

The implications of defining “minimum” amounts of water



The Supreme Court concluded that reserved water rights are limited to the minimum amount of water necessary to satisfy the primary purpose of the federal reservation. see United States v New Mexico (438 U.S. 696 (1978))

Implications

State courts tend to conclude that applying the criteria of a “minimum” means that the purpose of the federal reservation can be satisfied with less than the whole. The implication is that a surplus of water can exist in wilderness.

How much water does a wilderness really need? Courts addressing this question have relied on the needs of selected species or ecosystems processes. The question becomes: how much water can be removed and still maintain a given species or a described ecosystem process? Whatever is beyond that quantity of water is identified for diversion and use elsewhere.

The greater implication is that humans have identified the needs of all species and natural processes. It further implies that some reduction in population size of known affected species may be acceptable if the reduction won’t lead to species disappearance. There is some hubris in those implications, as knowledge of many species may be limited. Importantly, the position also conflicts with the untrammelled and natural qualities of wilderness character. Those qualities direct wilderness to be self-expressive and without the influence of modern civilization.

When the court makes allocations according to these practices, and a junior water right holder is given a portion of the water, it is not acting from the position that it is reallocating wilderness water to a different purpose. It is acting from the position that the federal reservation has been met, and there is surplus water available for further allocation.

Primary and Secondary Purposes

Courts define primary and secondary purposes in the following way:

Primary purpose: where water is necessary to fulfil the specific purposes for which a federal reservation was created.

Secondary purpose: where water is valuable for a secondary use of a federal reservation.

Congress intended to reserve the necessary water for the primary purpose of the federal reservation, and not subject itself to appropriation of water through the state. If there is a secondary need for water, Congress intends that the water be secured by appropriation through the state. The primary purpose of wilderness is to preserve wilderness character. As we discussed in the chapter on wilderness and water rights, water is necessary to fulfil most qualities of wilderness character.