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# Waters and Watercourses - Title to Waters and Water Rights in Lands of United States - United States Has Reserved Rights to Water in National Forest Only for Purposes of Timber and Watershed Management and Not for Purposes of Wildlife Preservation, Recreation, Aesthetics or Stock Watering

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# RECENT CASE

WATERS AND WATERCOURSES — TITLE TO WATERS AND WATER RIGHTS IN LANDS OF UNITED STATES — UNITED STATES HAS RESERVED RIGHTS TO WATER IN NATIONAL FOREST ONLY FOR PURPOSES OF TIMBER AND WATERSHED MANAGEMENT AND NOT FOR PURPOSES OF WILDLIFE PRESERVATION, RECREATION, AESTHETICS OR STOCK WATERING.

In 1899 the Gila National Forest was reserved from the public domain by executive order pursuant to statutory authority[1] which was silent on the subject of water rights.[2] This action was brought for a general adjudication of rights to the water of the Rio Mimbres.[3] The issue before the Court was what amount of water, if any, did Congress intend to reserve for use in the national forest.[4]

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1. The Creative Act of March 3, 1891, provides as follows:

> The President of the United States may, from time to time, set apart and reserve in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof. . . .

16 U.S.C. § 471 (1970) (repealed Pub. L. 94-579, 90 Stat. 2792 (1976)).

2. United States v. New Mexico, ____U.S.____, ____; 98 S. Ct. 3012, 3015 (1978). The Special Master, to whom the state district court referred portions of this case, found "that the United States was diverting 6.9 acre-feet per annum of water for domestic-residential use, 6.5 acre-feet for road water use, 3.23 acre-feet for domestic-recreational use, and .10 acre-feet for 'wildlife' purposes," in addition to using water for stock watering, and that "an 'instream flow' of six cubic-feet per second was being 'used' for the purposes of fish preservation." *Id.* at ____, 98 S. Ct. at 3016. The Special Master felt that the United States had "reserved" the right to water for these uses by creating the national forest. *Id.*

3. *Id.* at ____, 98 S. Ct. at 3013. The Rio Mimbres originates in the Gila National Forest and provides private downstream users with water for irrigation, mining, and residential purposes. In 1966 the Mimbres Valley Irrigation Company sued to enjoin allegedly illegal appropriations of water from the river. The State of New Mexico intervened, seeking a general adjudication of water rights in the Rio Mimbres and the United States was joined pursuant to 43 U.S.C. § 666 (a) (1978), which provides as follows:

> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

4. ____U.S. at ____, 98 S. Ct. at 3013. The state district court and the New Mexico Supreme Court ruled that the United States was not entitled to a minimum instream flow for aesthetic, recreational, and wildlife purposes, and any federal permitee within the national forest wanting an appropriation for stock watering must comply with procedures established by state law. Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, ____, 564 P.2d 615, 617-19 (1977). A minimum instream flow is considered to be that water which is retained solely for the purpose of preserving the stream and the ecological system which it supports. Comment, *Federal Protection of Instream Values,* 57 NEB. L. REV. 386 (1978). *See generally* Comment, *Minimum Stream Flow: The Legislative Alternative,* 57 NEB. L. REV. 704 (1978).

The United States Supreme Court *held* that under the reserved waters doctrine[5] and the Organic Act,[6] Congress impliedly reserved enough water necessary to provide for favorable water flows and a continuous supply of timber; however, no water was reserved for the purposes of wildlife preservation, stock watering, aesthetics or recreation.[7] United States v. New Mexico, ____U. S.____, 98 S. Ct. 3012 (1978).

The importance of water in the arid states for social and economic development has had a profound impact on the evolution of water law in the West.[8] The wisdom and perhaps necessity of allowing western states to develop their own law of water rights in accordance with local needs has been consistently recognized in legislation designed to promote the development of federally owned

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5. The reserved waters doctrine, also called the reserved rights doctrine and the implied-reservation-of-waters doctrine, provides that where Congress has reserved lands from the public domain for a specified purpose, it has also impliedly reserved the rights to the use of then unappropriated water in sufficient quantity to effectuate those purposes. Arizona v. California, 373 U.S. 546, 600-01 (1963). The right to such use is given priority as of the date of the land reservation and is not dependant upon the immediate beneficial use of the water. Cappaert v. United States, 426 U.S. 128, 139 (1976). Thus, private appropriators whose rights have become vested under state law may find their rights subordinated to a later federal claim if the establishment of the reservation predates the vesting of their rights. One effect of the application of the reserved waters doctrine is that state-created rights may be impaired in this manner without compensation. Kiechel & Green, *Riparian Rights Revisited: Legal Basis For Federal Instream Flow Rights*,[16] NAT. RESOURCES J. 969 (1976).

6.

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

16 U.S.C. § 475 (1970). Prior to the enactment of the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1974), *see infra* note 50 and accompanying text, the Organic Act was the only Congressional statement of intent concerning the purposes of establishing national forests.

7. __U.S. at __, 98 S. Ct. at 3023. Mr. Justice Powell dissenting and joined by Mr. Justices Brennan, Marshall, and White, argued that Congress reserved by implication water necessary for the preservation of the forest eco-system which includes wildlife and fish. *Id.*

8. California v. United States, __U.S. __, __, 98 S. Ct. 2985, 2990 (1978). Throughout the western states the common law doctrine of riparian rights was rapidly replaced by the law of prior appropriation, which was better suited to allocating the scarce resource to meet the needs of economic development. *Id.* The riparian rights doctrine conferred upon a riparian owner the right to the continuous natural flow of the stream or river, enforceable against upstream users. In contrast, appropriation of water and its application to a beneficial use pursuant to the law of prior appropriation will establish a priority over subsequent appropriators, upstream or downstream, for a quantity reasonably required for the beneficial use. Arizona v. California, 298 U.S. 558, 565-66 (1936). In United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1898), the Court noted the following:

> [A]lthough there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by state legislation, a different rule — a rule which permits, under certain circumstances, the appropriation of the water of a flowing stream for other than domestic purposes.

*Id.* at 704. *See* 3 THE REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW, 34-35 (1950) [hereinafter cited as 3 REPORT].

lands.[9] Thus, the state doctrine of prior appropriation[10] was recognized and given approval in the Mining Act of 1866,[11] the Desert Land Act of 1877,[12] and the Reclamation Act of 1902.[13]

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9. ____U.S. at ____, 98 S. Ct. at 3015. *See* California v. United States, ____U.S. ____, 98 S. Ct. 2985 (1978). "The history of the relationship between the Federal Government and the States in the reclamation of arid lands of the western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 2990.

10. Pursuant to New Mexico statutory provisions the requirements for rights to attach by prior appropriation include application to the state for a permit, followed by the application of a specified amount of diverted water to a recognized beneficial use. N.M. STAT. ANN. §§ 72-1-1 to 72-5-6 (1978). Once the right has vested, it is enforceable against all junior holders. *See* Comment, *New Mexico's National Forests and the Implied Reservation Doctrine,* 16 NAT. RESOURCES J. 975, 976 (1976). *See also* 3 REPORT, *supra* note 8 at 154-58.

Among the western states which have adopted the law of prior appropriation in whole or in part are Arizona, Brasher v. Gibson, 2 Ariz. App. 91, 406 P.2d 441 (1965); California, Pasedena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949), *cert. denied,* 339 U.S. 937 (1950); Colorado, Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963); Idaho, Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969); Montana, Richland County v. Anderson, 129 Mont. 559, 291 P.2d 267 (1955); Nebraska, Brummond v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969); Nevada, Walsh v. Wallace, 26 Nev. 299, 67 P. 914 (1902); New Mexico, Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952); Oregon, Fitzstephens v. Watson, 218 Ore. 185, 344 P.2d 221 (1959); Texas, State v. Hidalgo County Water Control & Improv. Dist., 443 S.W.2d 728, (Tex. Civ. App. 1969); and Utah, Stubbs v. Ercanbrack, 13 Utah 2d 45, 368 P.2d 461 (1962).

11.

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessers and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed. . . .

Act of July 26, 1866, 14 Stat. 253 (codified at 43 U.S.C. § 661 (1964) ).

In 1870 the following amendment was added: "All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section." Act of July 9, 1870, 16 Stat. 218 (codified at 43 U.S.C. § 661 (1965) ). In United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1868), the Court construed this act to be "a voluntary recognition of a preexisting right of possession, constituting a valid claim to its continued use," rather than as a grant of water rights under federal law. *Id.* at 705.

12.

> It shall be lawful for any citizen of the United States, . . . upon payment of twenty-five cents per acre — to file a declaration . . . that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon same, within the period of three years thereafter: *Provided however* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Desert Land Act of 1877, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1965) ).

Legislative history indicates clearly that this section was intended to ratify and confirm the regulation of water rights in accordance with state prior appropriation law. CONG. GLOBE, 39th Cong., 1st Sess. 3227 (1866). In addition, the Court has ruled that this section effected "a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 158 (1935). In Kansas v. Colorado, 206 U.S. 46, 94 (1907), the Court held that a state could not be compelled to adhere to either the riparian rights doctrine or the law of prior appropriation, and in *Rio Grande Dam / Irrigation Co.* the Court stated that, "[a]s to every stream within its dominion a State may change . . . [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise." 174 U.S. at 702-03.

13.

> [N]othing in this Act shall be construed as affecting or intending to affect or to in any

The emergence of the controversial reserved waters doctrine[14] has had an unsettling effect on private appropriators and bureaucrats in the western states.[15] The weighty consequences of the doctrine's development and application are clear in light of the extent of the federally owned lands,[16] and the fact that more than sixty percent of the average annual water yield in the eleven western states derives from federal reservations.[17] In North Dakota the federal government owns more than 2.3 million acres which comprises approximately five percent of the surface acreage in the state.[18] As the *New Mexico* Court noted, the application of the reserved waters doctrine will frequently require a gallon-for-gallon reduction in water already diverted to beneficial use.[19]

The reserved waters doctrine was first enunciated in *Winters v. United States.*[20] In *Winters,* settlers upstream of Fort Belknap Indian Reservation in Montana appropriated water from the Milk River in compliance with state law and without notice of federal, reserved water claims.[21] The Court pointed out that such action prevented the Indians from irrigating otherwise tillable acres. The Court held that the United States could not have intended to confine the tribes on a reservation suitable only for agriculture and then deny them

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way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Reclamation Act of June 17, 1902, Section 8, 32 Stat. 388 (codified as amended at 43 U.S.C. § 383 (1964)).

This section has been interpreted in California v. United States. __U.S. __. 98 S. Ct. 2985 (1978), to mean that in the absence of additional expression of Congressional intent, the Secretary of the Interior is not to proceed with any project where there is a divergence between state and federal law, and that in the absence of such expression, a state may legitimately impose conditions on irrigation permits issued to the federal government. *Id.* at __, 98 S. Ct. at 3001 (1978).

14. *See supra* note 5.

15. Trelease, *Water Resources on the Public Lands PLLRC's Solution to the Reservation Doctrine,* 6 LAND & WATER L. REV. 89 (1970). Trelease points out that recognizing rights to water when there has been no use of that right and thus no notice of a claim either to state officials or to other appropriators threatens to 1) disrupt the established water rights priority system; 2) destroy, without compensation, water rights considered to have vested under state law; and, 3) impede water resource development planning by state agencies. *Id.* at 90.

16. The federal government owns approximately 43% of the land in Arizona, 45% in California, 36% in Colorado, 63% in Idaho, 29% in Montana, 86% in Nevada, 34% in New Mexico, 52% in Oregon, 6% in South Dakota, 64% in Utah, 30% in Washington, and 48% in Wyoming. These percentages were compiled from figures found in GENERAL SERVICES ADMINISTRATION, INVENTORY REPORT ON REAL PROPERTY OWNED BY THE UNITED STATES THROUGHOUT THE WORLD AS OF JUNE 30, 1974, AT 57-58 [hereinafter cited as G.S.A. INVENTORY], and THE WORLD BOOK ENCYCLOPEDIA, vols. 1, 3, 4, 10, 13, 14, 18, 19, 20 & 21 (1974).

17. __U.S. at __, 98 S. Ct. at 3013-14 n.3.

18. G.S.A. INVENTORY, *supra* note 16, at 58.

19. __ U.S. at __, 98 S. Ct. at 3016.

20. 207 U.S. 564 (1908).

21. Winters v. United States, 207 U.S. 564, 568-69 (1908).

the water necessary to irrigate and cultivate the land.[22] The Court relied on language from *United States v. Rio Grande Dam & Irrigation Co.*, to support the conclusion that the United States had the power to exempt waters from appropriation under state law.[23] In so holding,[24] the Court rejected the argument that a reservation of water for future use on federal land is revoked by a subsequent admission of the state into the union.[25]

The reserved waters doctrine was expanded in *Arizona v. California*.[26] It was held that admission of a state into the union does not extinguish Congress' right to *subsequently* reserve unappropriated water which is appurtenant to federally-owned lands within the state.[27] More importantly, the Court ruled that the doctrine applied to all federal enclaves, including national parks and forests.[28] The *Arizona* Court also concluded that the right to the use of then unappropriated water in sufficient quantities to meet present and future needs vested as of the date of the land reservation, with no requirement of immediate appropriation for beneficial use.[29]

The scope of the reserved waters doctrine was further refined

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22. *Id.* at 576-77.

23. 207 U.S. at 577. In *Rio Grande Dam & Irrigation Co.*, the Court noted the following:

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial use of the governmental property.

174 U. S. at 703.

24. The decision of the *Winters* Court was also based in part on the rule that all ambiguities in agreements and treaties with Indian Nations and Tribes are to be resolved in favor of the Indians. 207 U. S. at 576. Following the essential logic of the *Winters* case, the Ninth Circuit Court of Appeals ruled that the intent of Congress to reserve water necessary to fulfill the purposes of the land reservation can be evidenced by statute or executive order, and need not be based on a treaty or other expressed covenant. United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939). This interpretation has been ratified by the Supreme Court. *See* Cappaert v. United States, 426 U. S. 128 (1976); Arizona v. California, 373 U. S. 546 (1963).

25. 207 U.S. at 577-78. The argument seems to be that the United States conferred upon Montana by admitting it into the Union "on an equal footing with the original states" all of the sovereign rights over real property which the United States previously enjoyed, and thereafter had simply a proprietary interest in federally owned land, subject to state law. In rejecting this argument, the *Winters* Court seems to have impliedly relied on the supremacy clause as the basis for the doctrine. *See generally* Corker, *Let There Be No Nagging Doubts: Nor Shall Private Property, Including Water Rights, Be Taken For Public Use Without Just Compensation*, 6 LAND & WATER L. REV. 109 (1970); Comment, *New Mexico's National Forests and the Implied Reservation Doctrine*, 16 NAT. RESOURCES J. 975 (1976).

26. 373 U.S. 546 (1963). The adjudication of water rights to the Colorado River involved federal claims on behalf of five Indian Reservations in addition to claims to the use of water in Lake Mead National Recreation Area, Havasu Lake National Wildlife Refuge, The Imperial National Wildlife Refuge, and the Gila National Forest. *Id.* at 600.

27. *Id.* at 597-98. The Court found authority in the commerce clause and the property clause of the United States Constitution. *Id.*

28. *Id.* at 601.

29. *Id.*

30. 426 U.S. 128 (1976). The United States sought to enjoin private pumping of ground waters which lowered the pool level in Devil's Hole, Death Valley National Monument and threatened the existence of a rare species of desert pupfish. The area has been reserved for its historical, educational and scientific value by presidential proclamation pursuant to the American Antiquities Preservation Act, 16 U.S.C. § 431 (1970), prior to the water appropriations by the Cappaerts. 426 U.S. at 131-37.

in *Cappaert v. United States.*[30] In *Cappaert,* the United States sought to enjoin groundwater pumping by a private appropriator whose own water rights were perfected pursuant to the Desert Land Act.[31] In enforcing the claimed federal reserve rights, the Court refused to interpret the Desert Land Act as applying to federal lands which are reserved from the public domain for specified purposes, and concluded that federal, reserved water rights are governed by federal law.[32] The Court also emphasized that in reserving water rights by implication, Congress reserved only enough water to meet the purposes of the reservation of land and no more.[33]

In order to determine what water rights were reserved, the Court in *New Mexico* had to determine the purposes of the reservation of Gila National Forest.[34] At the time of its withdrawal from the public domain, the purposes for which a national forest could be established were enumerated in an ambiguous statute.[35] The dissent argued that this statute provided three purposes for national forests, as follows: 1) to improve and protect the forest; 2) to secure favorable conditions of water flows; and, 3) to furnish a continuous supply of timber.[36] Hence, appropriating water to maintain wildlife and fish populations would be permissible in furtherance of the legitimate purpose of improving and protecting the forest.[37] The majority rejected this argument, concluding that watershed and timber management constituted "improving and protecting the forest" and hence there were actually only two purposes for the establishment of the forest.[38]

In support of its conclusion, the *New Mexico* Court utilized the legislative history of the Creative Act,[39] and the Organic Act.[40] Congress originally empowered the president to set aside forested areas for special regulation in order to halt the ravaging of the

31. 43 U.S.C. Ch. 9 (1965). *See supra* note 12.

32. 426 U.S. at 139-41.

33. *Id.* at 143. Thus, while the United States was entitled to a water level in the Devil's Hole pool sufficient to permit survival of the pupfish, the petitioners were allowed to reduce the natural level of the pool to the court-ordered minimum necessary to insure that survival.

34. __ U.S. at __, 98 S. Ct. at 3013.

35. 16 U.S.C. § 475 (1970). The statute provides that "[N]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States."

36. __ U.S. at __, 98 S. Ct. at 3024 (Powell J., dissenting). The New Mexico Supreme Court concurred in this interpretation, but found the facts unable to support a claim. Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977). *But see* Avondale Irrigation Dist. v. Northern Idaho Prop., 99 Idaho 30, 577 P.2d 9 (1978).

37. __ U.S. at __, 98 S. Ct. at 3023-26 (Powell J. dissenting).

38. __ U.S. at __, 98 S. Ct. at 3017-18 n.14. According to the majority, a correct rephrasing of Section 475 would be "to improve and protect the forest within the boundaries," or *in other words,* for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber. *Id.* (emphasis original).

39. 16 U.S.C. § 471 (1970). *See supra* note 1.

40. 16 U.S.C. §475 (1970). *See supra* note 6.

forests.[41] Congress' goals were to provide for proper timber and watershed management in order to maximize the benefits of the timber while minimizing the seasonal flooding and providing water flows conducive to irrigation.[42]

Based on this legislative record, the *New Mexico* Court found it unlikely that Congress, which intended to limit the President's power,[43] would grant him the broad mandate to reserve public lands for "improvement" and "protection."[44] Moreover, the Court argued, if Congress intended to protect wildlife and fish populations by creating national forests, enactment in 1934 of a statute[45] providing for game and fish sanctuaries would have been redundant.[46] The Court cited portions of the National Park Service Act,[47] and the Superior National Forest Act[48] as examples of

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41. __ U.S. at __, 98 S. Ct. at 3017.

42. *Id.* at __, 98 S. Ct. at 3017-19. The author of the Creative and Organic Act stated as follows:

> I believe that the floods that have been raging for the last two months in nearly all of our rivers from the Red River of the North to the great father of waters in the South, carrying death and destruction in their flow, is in the large measure due to the reckless destruction of our mountain forests. . . . I believe that with a rational forestry system, a sufficient number of carefully selected reservoirs, and a completion of our present levee system that we will protect the lowlands of the South from overflow, irrigate the desert lands of the West, and give the people of the North a continuous supply of timber.

30 CONG. REC. 966 (1897) (remarks of Cong. McRae).

43. Enactment of the Organic Act resulted from Congress' dissatisfaction with President Cleveland's unrestrained use of the powers granted him under the Creative Act. __ U.S. at __, 98 S. Ct. at 3017. The Congressional Record evidences the outrage of the representatives of the western states at what they considered the tyrannical and indiscriminate withdrawal of land from productive use. 30 CONG. REC. 985 (1877) (remarks of Rep. Bell).

44. __U.S. at __, 98 S. Ct. at 3017 n.14 Establishing forests for their "improvement" and "protection," independent of any watershed and timber value, was inconsistent with the economic interests of the West and was considered by the Court to be the evil at which the Organic Act was aimed. *Id.* The Court agreed with the statement of the author of the Organic Act, that national forests "are not parks. . .but have been established for economic reasons." *Id.* at __, 98 S. Ct. at 3018.

45.

> For the purpose of providing breeding places for game birds, game animals, and fish on lands and waters in the national forests not chiefly suitable for agriculture, the President of the United States is authorized, upon recommendation of the Secretary of the Interior and Secretary of Commerce and with the approval of the State Legislature of the respective states in which said national forests are situated, to establish by public proclamation certain specified and limited areas within said forests as fish and game sanctuaries or refuges which shall be devoted to the increase of game birds, game animals, and fish of all kinds naturally adapted thereto. . . .

16 U.S.C. § 694 (1974).

This section provides for preservation of fish and wildlife in designated areas within the national forest system. The dissent felt that preservation of wildlife was already contemplated by the Organic Act. __ U.S. at __, 98 S. Ct. at 3024-25 (Powell J., dissenting).

46. __ U.S. at __, 98 S. Ct. at 3019.

47.

> [T]he fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historical objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

16 U.S.C. § 1 (1970).

48.

> In order to preserve the shore lines, rapids, waterfalls, beaches, and other natural features of the region in an unmodified state of nature, no futher alteration of the natural water level of any lake or stream within or bordering upon the designated area

Congress' ability to express reservations of water rights for explicit environmental and aesthetic goals when that is their actual purpose.[49]

The Court rejected the Government's suggestion that passage of the Multiple-Use Sustained-Yield Act of 1960,[50] which provides that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," confirmed the view that Congress always intended a wide range of purposes for the national forests.[51] Stating that the purpose of the Multiple-Use Sustained-Yield Act was to "broaden the benefits accruing from all reserved forests,"[52] the Court concluded that by enacting this statute, no reservations of waters were thereby expanded.[53]

The most significant portion of the *New Mexico* decision is the construction of the Multiple-Use Sustained-Yield Act in conjunction with the Organic Act.[54] The Court concluded that timber management and watershed protection are the primary purposes of the national forest, but range, recreation, wildlife and fish purposes are secondary.[55] Thus, while appurtenant water is impliedly reserved for the primary purposes of the land reservation, water necessary to accomplish secondary purposes must be acquired pursuant to state water law.[56]

As in this case,[57] when environmental principles come into conflict with the economic interests of mining and agriculture, the application of the federal reserved waters doctrine is of critical importance.[58] The Supreme Court in *New Mexico* ruled that water

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shall be authorized by any permit, license, lease, or other authorization. . . .

16 U.S.C. § 577b (1970).

49. __ U.S. at __, 98 S. Ct. at 3019.

50.

The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title.

16 U.S.C. § 528 (1970).

51. __ U.S. at __, 98 S. Ct. at 3021 n.21.

52. *Id.* at __, 98 S. Ct. at 3021.

53. *Id.*

54. *Id.*

55. *Id.* at ____, 98 S. Ct. at 3021-22. The Court took the language "supplemental to, but not in derogation of" of 16 U.S.C. § 528 (1970) to reconfirm the conclusion that national forests have two primary purposes, rather than adopting the view that the additional purposes stated in Section 528 were intended to be of equal priority with the two purposes read into the Organic Act ____ U.S. at ____, 98 S. Ct. at 3021.

56. *Id.*

57. The Court did not decide the question of what reserved water rights might exist for the administration of national forests which were reserved after the passage of the Multiple-Use Sustained-Yield Act. Also, the dissent suggested the Court's view of the Multiple-Use Sustained-Yield Act as not reserving additional waters on existing national forests was dicta because the question was not briefed or presented to the Court for resolution. __ U.S. at __, 98 S. Ct. at 3023 n.1 (Powell J., dissenting).

58. *Id.* at __, 98 S. Ct. at 3016. The Court noted that "federal reserved water rights will

was reserved in Gila National Forest only to preserve timber and maximize water flows for the beneficial appropriation by users under state law.[59] In the future, when the Forest Service wants to use water in a national forest for purposes other than watershed and timber management, it will have to stand in line with state and private appropriators.[60]

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frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress. . . ." *Id.*

59. *Id.* at ____, 98 S. Ct. at 3023.

60. Kiechel and Green obviously failed to anticipate such a holding by the Court when they wrote the following in 1976:

> [H]ere, as in so many other areas, the law has the good sense to follow nature. Just as in nature a forest inevitably brings with it a network of rivulets, streams, and rivers, and an associated community of fish, birds, animals and insects, so does the law assume, *and establish,* that the national government, in creating forest reservations, necessarily also protects and preserves the forest streams which engender and nourish the flora and fauna inseparably linked with the forests we walked through in our youth, or in our dreams.

Kiechel & Green. *Riparian Rights Revisited: Legal Basis for Federal Instream Flow Rights,* 16 NAT. RESOURCES J. 969, 974 (1976) (emphasis original).

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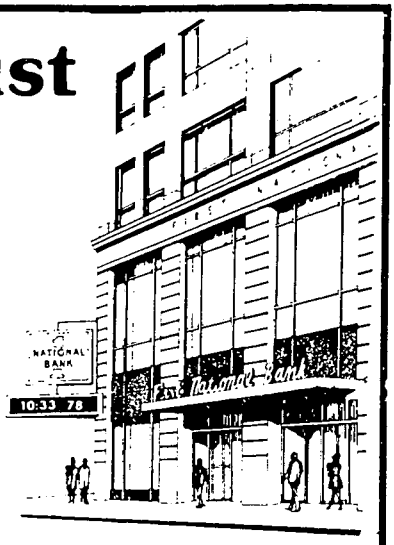


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