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WATER LAW—QUANTIFICATION OF WATER RIGHTS CLAIMED UNDER THE IMPLIED RESERVATION DOCTRINE FOR NATIONAL FORESTS—United States v. New Mexico, 438 U.S. 696 (1978)

In 1966, the Mimbres Valley Irrigation Company initiated a civil action<sup>1</sup> in a New Mexico state court to enjoin alleged illegal water diversions by upstream riparian owners on the Rio Mimbres River. Pursuant to statutory authority,<sup>2</sup> the State of New Mexico intervened in 1970 to seek a general adjudication of water rights claimed within the river system. The United States was joined as a defendant to the action because the Rio Mimbres watershed contains the Gila National Forest.<sup>3</sup> The report of the special master<sup>4</sup> assigned to the case supported the United States' claims to water for minimum instream flows and recreational purposes within the Gila National Forest under the implied reservation of waters doctrine.<sup>5</sup> The trial court, however, rejected the United States'

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1. *Mimbres Valley Irrigation Co. v. Salopeh*, Civil No. 6326 (6th N.M. Jud. Dist. Ct., filed March 21, 1966), reprinted in Appendix at 2, Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, *United States v. New Mexico*, 438 U.S. 696 (1978).

2. N.M. STAT. ANN. § 75-4-4 (1935).

3. A federal statute, the McCarran Water Rights Suits Act (Federal Liability), 43 U.S.C. § 666 (1976), allowed the United States to be joined in the state court action. The McCarran Amendment provides: "[C]onsent is given to join the United States as a defendant in any suit . . . for the adjudication of rights to the use of water of a river system or other source . . ." 43 U.S.C. § 666(a) (1976). This provision has been held to extend to claims under the implied reservation of waters doctrine. See *United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *United States v. District Court for Water Div. No. 5*, 401 U.S. 527 (1971); text accompanying note 37 *infra*; note 5 *infra* (statement of implied reservation doctrine).

4. Special Master's Report, Findings of Fact and Conclusions of Law (filed May 5, 1975), *Mimbres Valley Irrigation Co. v. Salopeh*, Civil No. 6326 (6th N.M. Jud. Dist. Ct., filed March 21, 1966) reprinted in Appendix at 190, Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, *United States v. New Mexico*, 438 U.S. 696 (1978).

5. The implied reservation doctrine is also known as the *Winters* doctrine. It stands for the following proposition:

Where the federal sovereign has expressly withdrawn or reserved lands from the public domain for purposes requiring the use of water, sufficient water is impliedly reserved to guarantee the present and future fulfillment of those purposes. Although junior to water rights vesting under state law prior to creation of the federal reservation or enclave, these federal reserved water rights are senior to all nonfederal rights vesting thereafter, even though the reserved waters remain unapplied to the purposes for which the water rights were reserved.

*Grow & Stewart, The Winters Doctrine as Federal Common Law*, 10 NAT. RESOURCES LAW. 457, 458 (1977). Cf. *Winters v. United States*, 207 U.S. 564 (1908) (first case to express the implied reservation doctrine, perfecting water rights on an Indian reservation over a private appropriation claim under state water law); *Arizona v. California*, 373 U.S. 546 (1963) (extended the doctrine to all federal reserves); *Cappaert v. United States*, 426 U.S. 128 (1976) (*Winters* doctrine applied to enjoin groundwater pumping by private appropriator threatening unique pupfish in a national monument).

For discussion of the implied reservation doctrine, see F. TRELEASE, FEDERAL-STATE RELATIONS IN

claims. The Supreme Court of New Mexico upheld the trial court's decision<sup>6</sup> on the ground that the reservation doctrine could be applied only to the purposes for which the Gila National Forest was established under the Organic Act of 1897.<sup>7</sup> The New Mexico Supreme Court found that the original purposes for which the Gila National Forest was created were to insure favorable conditions of water flow and to furnish a continuous supply of timber. The court concluded that neither of these purposes would support reserved rights for recreational purposes or minimum in-stream flows for wildlife preservation.<sup>8</sup>

The United States Supreme Court granted certiorari.<sup>9</sup> In a 5-4 decision,<sup>10</sup> the Court upheld the New Mexico court's conclusion that the reserved rights doctrine can be applied only for the limited purposes for which the national forests were created, thus affirming the denial of the United States' claims. *United States v. New Mexico*, 438 U.S. 696 (1978).

*United States v. New Mexico* is the first Supreme Court decision to quantify reserved water rights available for the national forests. The narrow scope accorded the implied reservation doctrine as applied to the United States' claims for water for recreational and wildlife purposes reflects recognition by the Court that the implied reservation doctrine will be limited in the face of competing claims based on state law.

The Court's decision limits federal interests under the reserved rights doctrine without providing adequate protection for the water needs of the national forests. The decision also deprives the implied reservation doctrine of the flexibility which rendered it useful in balancing state and federal interests in water adjudications.

This note examines the considerations that may have led the Court to limit the scope of the implied reservation doctrine and the effect the decision will have on federal water rights in national forests. The note

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WATER LAW (National Water Commission Legal Study No. 5, pt. v, 1971); Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639. For discussion of the application of the implied reservation doctrine to the national forests, see Comment, *New Mexico's National Forests and the Implied Reservation Doctrine*, 16 NAT. RESOURCES J. 975 (1976); Comment, *Water in the Woods: The Reserved Rights Doctrine and National Forest Lands*, 20 STAN. L. REV. 1187 (1968).

6. *Mimbres Valley Irrigation Co. v. Salopeh*, 90 N.M. 410, 564 P.2d 615 (1977).

7. Organic Administration Act of 1897, ch. 2, § 1, 30 Stat. 34 (codified at 16 U.S.C. § 475 (1976)).

8. *Mimbres Valley Irrigation Co. v. Salopeh*, 90 N.M. 410, 564 P.2d 615, 618 (1977).

9. *United States v. New Mexico*, 434 U.S. 1008 (1978).

10. Justice Rehnquist delivered the opinion of the Court; Justice Powell, with whom Justices Brennan, White and Marshall joined, dissented in part. *United States v. New Mexico*, 438 U.S. 696 (1978).

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concludes that as a result of *United States v. New Mexico*, congressional action is needed to insure that adequate supplies of water will be available to the national forests.

### I. THE COURT'S HOLDING

Both the majority and dissenting opinions in *United States v. New Mexico* acknowledged the validity of the implied reservation doctrine. The majority noted that prior Supreme Court decisions had firmly established (1) that Congress has power to reserve unappropriated water for use on land withdrawn from the public domain,<sup>11</sup> and (2) that the authority given the President by Congress to reserve land impliedly authorizes him to reserve unappropriated water to the extent needed to accomplish the purposes of the reservation.<sup>12</sup> As the implied reservation doctrine had previously been found to apply to the national forests,<sup>13</sup> the issue before the Court was which purposes of the Gila National Forest would support a claim to reserved waters.

The Court noted that even though Congress generally defers to state water law,<sup>14</sup> if "water is necessary to fulfill the very purposes for which a federal reservation was created," a congressional intent to reserve the necessary water may be inferred.<sup>15</sup> Where, on the other hand, the water serves only "secondary" uses of the reservation,<sup>16</sup> it is presumed that Congress intended that water rights should be acquired under state law,

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11. 438 U.S. at 698–99 (citing *Cappaert v. United States*, 426 U.S. 128, 143–46 (1976); *Arizona v. California*, 373 U.S. 546, 597–98 (1963); and *Winters v. United States*, 207 U.S. 564, 577 (1908)). Although there is little question as to the existence of the power to reserve water, the basis of federal power over western water is unsettled. The Public Land Law Review Commission, taking a pragmatic approach, concluded:

As successor to the sovereigns from which the United States obtained the vast areas of the western public domain, the Federal Government by the mid-19th Century possessed complete power over the land and water of that region. Because the courts have settled the issue, there is little to be gained in academic arguments as to whether that power derives from concepts of "ownership" as distinguished from "sovereignty": the power is plenary, whatever its conceptual basis.

PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 141 (1970).

12. 438 U.S. at 699–700.

13. *Arizona v. California*, 373 U.S. 546, 597–98 (1963). The *Arizona* decision also included a reference to the master's conclusion that the United States intended to reserve enough water to meet the future needs of the Gila National Forest and expressed agreement with that conclusion. *Id.* at 601.

14. 438 U.S. at 702.

15. *Id.*

16. *Id.* "Secondary" uses are the uses made of the national forest that are not explicitly referred to in the act allowing the President to reserve the land. These uses are allowed or encouraged as compatible with the land and not in derogation of the express purposes.

rather than under an implied federal right.<sup>17</sup> The dissenting opinion reiterated this distinction between primary purposes and secondary uses. Thus, there was no disagreement between the majority and dissent concerning the rejection of the United States' reserved water rights claims for recreation, aesthetic, and stockwatering purposes.<sup>18</sup> The Court found that the express provisions of the Organic Act of 1897<sup>19</sup> could not be read as evidencing an intent to reserve water for these "secondary" uses made of the national forests.<sup>20</sup>

The majority opinion found only two permissible purposes for the creation of a national forest under the Act of 1897: (1) to secure favorable water flows, and (2) to furnish a continuous supply of timber.<sup>21</sup> The Court found that neither could support a reserved water claim for wildlife preservation.<sup>22</sup> The dissent, while agreeing with the majority's rejection of claims for recreational, aesthetic, and stockwatering purposes, argued that an additional purpose of the Act of 1897 was to "improve and protect" the forest.<sup>23</sup> Utilizing the accepted notion that the forest is an inte-

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17. *Id.*

18. *Id.* at 698, 718. The majority's and dissent's attempt to distinguish between purposes and secondary uses by examining congressional intent creates a striking inconsistency: the silence of Congress concerning water appropriations for federal reserves evidenced an intent to reserve water, while the silence concerning secondary uses of the federal reserves evidenced an intent to appropriate water under state law. The Court cites no authority for the distinction between purposes and uses made of the national forests as a basis for an implied reservation claim. Creation of this dichotomy suggests a rather naked attempt to expand state power over water located on federal reserves.

19. Organic Administration Act of 1897, ch. 2, § 1, 30 Stat. 34 (codified at 16 U.S.C. § 475 (1976)).

20. 438 U.S. at 718 (Powell, J., dissenting in part). The United States argued that either the purposes or the secondary uses recognized by Congress would support a reserved water rights claim. Under this theory, recreation, aesthetics, and stockwatering would have a valid claim for reserved water, even though those purposes were admittedly "secondary objects" of the creation of a national forest. See Brief for Petitioner at 13, *United States v. New Mexico*, 438 U.S. 696 (1978).

21. 438 U.S. at 706-08.

22. *Id.* at 707.

23. The United States claimed a negligible amount of water for consumptive use in wildlife preservation (.10 acre feet per year). The real issue was its claim for 6.0 cubic feet per second for minimum instream flow maintenance. This claim was awarded by the special master for fish preservation purposes. See Appendix at 190, *Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico, United States v. New Mexico*, 438 U.S. 696 (1978). On appeal before the Supreme Court, the United States argued that the minimum instream flows were for the conservation of fish, game, and plant life, as well as for protection against fire and erosion. Brief for Petitioner at 24, *United States v. New Mexico*, 438 U.S. 696 (1978). The Court's decision never reached the question whether minimum instream flow generally would be proper as an implied reservation of water. The dissent pointed out that nothing in the Court's opinion would prevent such a claim for fire prevention and erosion control, purposes which would be consistent with those of the Organic Administration Act of 1897. 438 U.S. at 722-24 (Powell, J., dissenting in part). For a discussion of instream flow maintenance as a substantive water right, see Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 211.

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grated ecosystem that includes wildlife,<sup>24</sup> the application of the implied reservation doctrine to wildlife preservation claims was proper.

The majority seized upon an ambiguity in the Act of 1897 to limit its "improve and protect" provision to a statement of objectives rather than true purposes.<sup>25</sup> To support the limitation, the Court relied on the legislative history of the Act of 1897, specifically congressional debate on the Act and a predecessor bill,<sup>26</sup> which suggested that economic concerns

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24. 438 U.S. at 721-24. Cf. Gosz, Holmes, Likens & Bormann, *The Flow of Energy in a Forest Ecosystem*, SCIENTIFIC AMERICAN, Mar. 1978, at 93, 99-102 (illustrating the role of forest organisms in maintaining the forests' vegetative productivity).

25. The confusion centers around the following passage: "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. . . ." Organic Administration Act of 1897, 16 U.S.C. § 475 (1976) (emphasis added). The use of the disjunctive "or" suggests that improving and protecting the forest is a purpose permitted by the Act which is distinct from securing favorable conditions of water flows and securing a continuous supply of timber. The Supreme Court of New Mexico construed the Act as allowing for three purposes but then ignored the "improve and protect" provision. *Mimbres Valley Irrigation Co. v. Salopeh*, 90 N.M. 410, 564 P.2d 615, 617 (1977), *aff'd*, *United States v. New Mexico*, 438 U.S. 696 (1978). The United States Supreme Court construed the statute to permit only the latter two purposes: "Forests would be created only '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.'" 438 U.S. at 707 n.14 (emphasis in original).

26. The measure which became the Organic Administration Act of 1897 was proposed by Senator Pettigrew of South Dakota as an amendment to a general appropriation bill. 30 CONG. REC. 899-900 (1897). The debate on the measure does not give a clear indication of what purpose could validly be used for reserving land as a national forest. Compare remarks of Senator Pettigrew, 30 CONG. REC. 913 (1897) (the amendment would allow effective forest administration to protect the forests and "keep them in a condition as good as they are now") with remarks of Representative McRae, 30 CONG. REC. 966 (1897) (purpose of the bill is to maintain favorable forest conditions, not as "parks set aside for nonuse," but as reserves established for economic reasons).

The predecessor bill introduced at the previous session of Congress stated: "That the objects for which public forest reservations shall be established under the provisions of the act approved March 3, 1891, shall be to protect and improve the forests for the purpose of securing a continuous supply of timber for the people and insuring conditions favorable to water flow." H.R. 119, 54th Cong., 1st Sess., 28 CONG. REC. 6410 (1896) (emphasis added). However, as the dissent pointed out, reliance on the wording of the bill as a basis for the Court's construction of the Act is misplaced since an additional provision directed the Secretary of the Interior "to preserve the timber and other natural resources, and such natural wonders and curiosities and game as may be therein, from injury, waste, fire, spoliation, or other destruction . . ." *Id.* The dissent interpreted the "improve and protect" provision of the Organic Administration Act of 1897 as incorporating the explicit provisions of the earlier bill and evidencing the intent of Congress to provide for wildlife preservation. 438 U.S. at 722. This interpretation would explain the rather unusual wording of the Act and lead to the conclusion that the "improve and protect" provision should be viewed as an independent substantive purpose within the Act.

The Organic Administration Act of 1897 was the result of input by two opposing groups: conservationists and western settlers. The former were concerned with the lack of protection for existing national forests, and the latter opposed large scale reservation of western land for national forests, some of which had been settled by these frontiersmen. The Act can best be viewed as a compro-

rather than forest preservation prompted the legislation. Additional justification for the Court's narrow reading of the Act of 1897 was provided in the Court's comparison of the purposes expounded by other congressional acts creating federal enclaves which expressly provided for wildlife protection.<sup>27</sup>

The dissent found no justification for the limited reading of the 1897 law in light of its express provisions to "improve and protect the forests."<sup>28</sup> Subsequent appropriation acts dealing with wildlife study and preservation in the national forests<sup>29</sup> evidenced to the dissent that Congress had assumed that the purposes of the Act of 1897 included wildlife protection. Also, the dissent argued that a complete reading of the predecessor bill to the Act of 1897, upon which the Court relied, revealed an intent to include forest improvement and wildlife preservation as explicit purposes for the creation of national forests.<sup>30</sup>

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mise between the two groups; the conservationists received greater protection for existing and future reserved forest land, and the settlers received assurance that the President would not be allowed to reserve lands more valuable for mineral resources or agricultural purposes. In this context, the "improve and protect" provision of the Act would have a substantive import and become a purpose for which the application of the implied reservation doctrine would seem appropriate. *See generally*, Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCES LAW. 503 (1974).

27. 438 U.S. at 709. The Court used, as illustrations, the National Park Service Act of 1916, 16 U.S.C. § 1 (1976) (the "fundamental purpose of said parks . . . is to conserve the scenery and the natural and historic objects and the wild life therein . . . for the enjoyment of future generations") and the Act of March 10, 1934, 16 U.S.C. § 694 (1976) (authorizing the establishment of fish and game sanctuaries within the national forests with the consent of the state legislatures). 438 U.S. at 709-11. The Court concluded that Congress would not have needed to resort to the passage of the 1934 Act if the "improve and protect" provision of the Organic Administration Act of 1897 applied to wildlife. *Id.* at 711.

28. *Id.* at 720 (dissenting opinion). *See* note 25 *supra*.

29. Act of March 3, 1899, ch. 424, 30 Stat. 1095 (codified at 16 U.S.C. § 553 (1976)) (all forest agents required to aid in the enforcement of state laws to protect fish and game); Act of May 22, 1928, ch. 678, § 5, 45 Stat. 701 (codified at 16 U.S.C. § 581 (d) (1976)) (authorizing appropriations for investigations into histories and habits of forest wildlife); Act of March 29, 1944, ch. 146, § 1, 58 Stat. 132 (codified at 16 U.S.C. § 583 (1976)) (ordering Secretary to establish sustained yield units for purposes which include "preservation of wildlife").

30. *See* note 26 *supra*. In addition, the dissent took issue with the majority's opinion that the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (1976), could not create new reserved rights with a priority date of 1960. The Act provides that it "is the policy of the Congress that the national forests *are established* and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* at § 528 (emphasis added). The Court concluded that the purposes expressed in the 1960 Act were secondary to those of the Act of 1897 and therefore not a proper basis for an implied reservation claim. 438 U.S. at 713-15. The dissent labeled the Court's statement concerning the 1960 Act as dictum since no claim of a reserved right was based on the provisions of the 1960 Act; rather, the United States introduced the 1960 Act to illustrate congressional policy toward the scope of the purposes included within the Act of 1897. 438 U.S. at 718-19 n.1 (dissenting opinion). *See*, Brief for Petitioner, *supra* note 20, at 53-55.

## II. IMPLICATIONS FOR THE IMPLIED RESERVATION DOCTRINE

### A. *The Narrowed Scope of the Reservation Doctrine and the Shift to State Control*

The clear message of the Court's decision in *United States v. New Mexico* is that the implied reservation doctrine will continue to be a valid basis for federal claims to water only when the claims coincide with the narrowly defined purposes for which the reservation was created. The Court's rejection of claims for water based on current uses<sup>31</sup> and legislatively expressed administrative purposes<sup>32</sup> illustrates the narrow scope accorded the doctrine. The Court relied on the usual congressional deference to state water law to infer that no reservation of water was intended unless it is clear that without the water, the express purposes of the reservation would be frustrated.<sup>33</sup> When this inference is combined with the Court's restrictive reading of the express purposes of the act creating the federal reserve, the burden on the United States to establish an implied reservation becomes onerous.

Two interrelated considerations may have prompted the Court to limit the implied reservation doctrine. First, the 1963 decision in *Arizona v. California*<sup>34</sup> extended the doctrine's application to all federal reserves. The resulting uncertainty regarding the extent of federal water rights on reservations has caused concern and comment, and may have motivated the Court to seek an approach that would provide for greater predictability.<sup>35</sup>

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31. 438 U.S. at 719.

32. The Court drew a distinction between those purposes for which a national forest could be established, which gives rise to an implied reservation claim, and those for which the forest could be administered. Thus, while a national forest could be established only for a purpose provided in the Act of 1897, the forest could be administered for the secondary purposes found in the Act of 1960. 438 U.S. at 715. See note 30 *supra*.

33. 438 U.S. at 702. See note 43 *infra*.

34. 373 U.S. 546 (1963).

35. Dean Trelease observed:

Rights created by the 'reservation doctrine' . . . are wild cards that may be played at any time, blank checks that may be filled in for any amount, or that may never be cashed. They deter other uses, and cause losses of benefits, and they may encourage or permit federal uses that are financially possible with the money at hand but economically undesirable because more is lost than is gained.

F. TRELEASE, *supra* note 5, at 160. Professor Corker made a similar comment:

'Reservation doctrine' deserves the name neither of doctrine nor of law. Most reserved rights asserted rest on implication. There is no justification for a prudent government ever intentionally to rely on implications for the existence, quantity, priority, and nature of its right or rights enjoyed by its people. Due to its inherent uncertainty, the doctrine serves beneficiaries of the



Second, by the adoption of the McCarran Amendment,<sup>36</sup> the United States waived sovereign immunity and consented to be joined in state adjudications of water rights. The Supreme Court has held that this consent extends to water rights established under the implied reservation doctrine, even though questions of the volume and scope of the particular reserved rights are federal questions which can be appealed to the Supreme Court after final state adjudication.<sup>37</sup>

The Court, in *United States v. New Mexico*, did not discuss either the negative reaction to the extension of the implied reservation doctrine in *Arizona v. California* or the use of the McCarran Amendment to facilitate state water adjudication. Nevertheless, its decision seems to have been an attempt to facilitate more predictable quantification of water rights within the federal reserve, and at the same time recognize and reinforce the deference accorded state water law.

However, the Court's decision to narrow the scope of the reservation doctrine and to provide for greater state control over federal claims to water in the national forests unreasonably limits protection of federal interests. By using the McCarran Amendment to force federal claims into state courts, states and private appropriators likely will gain protection of their water rights over federal claims that have not been perfected under state law.

Congressional action is needed to resolve the conflict between state and federal interests. Legislation to provide for quantification of the reserved rights and for cooperative water development planning has been strongly recommended by both the Public Land Law Review Commission<sup>38</sup> and the National Water Commission.<sup>39</sup> Congress now may be

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implied right badly, just as it badly serves prudent water users who have no means of learning of either the existence or the nature of the senior but implied water right.

Corker, *A Real Live Problem or Two for the Waning Energies of Frank J. Trelease*, 54 DEN. L. J. 499, 503 (1977).

In its 1970 report to Congress and the President, the Public Land Law Review Commission evaluated the problem posed by the implied reservation doctrine as follows:

The result has been apprehension in the western public land states that the doctrine will have the effect of disrupting established water right priority systems and destroying, without compensation, water rights considered to have vested under State law. Moreover, the uncertainty generated by the doctrine is an impediment to sound coordinated planning for future water resources development.

PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 144 (1970).

36. 43 U.S.C. § 666(a) (1976). See note 3 *supra* (partial text of statute).

37. *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971).

38. "We recommend legislative action to dispel the uncertainty which the implied reservation doctrine has produced and to provide the basis for cooperative water resources development planning between the Federal Government and the public land states." PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 144 (1970) (emphasis in original).

39. NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 459-71 (1973) (recommendations for a proposed "National Water Rights Procedure Act").

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forced to act in order to protect federal water rights from state court decisions based on state water law.<sup>40</sup> However, after *United States v. New Mexico*, legislation aimed at clarifying the scope of the implied reservation doctrine may be precluded from fully protecting federal water rights. Since the Court limited the amount of water that was impliedly reserved when the reservation was created, any legislative action to increase federal rights would require compensation, under the fifth amendment's "taking" clause,<sup>41</sup> for private water rights that are diminished.

### B. Future Application of the Implied Reservation Doctrine

*United States v. New Mexico* reduces the flexibility of the implied reservation doctrine by requiring rigid adherence to the original purposes of the Organic Act of 1897 and thus insures expansion of the state's role in adjudication of water rights. Ideally, as a judicial creation,<sup>42</sup> the implied reservation doctrine possesses inherent flexibility allowing it to meet varying contingencies involved in federal-state conflicts over water rights. This flexibility permits the courts to obtain equitable results when competing claims are presented by recognizing the purposes of the federal reservation "as now perceived."<sup>43</sup> If the reservation of water necessary to accomplish the currently recognized purpose of the federal reservation can be said to have been within the realm of congressional contemplation at the time of the reservation, and no factors point to an intent to exclude such reserved water rights, the claim should be granted. The key to the analysis should not depend on a search of archaic legislative history. Rather, it should depend on an equitable balancing of the present needs

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40. Water law in the western states developed with an emphasis on private economic use of the water. For example, claims for recreation or fish preservation would receive low priority, and possibly no recognition, under New Mexico's water law. See Comment, *New Mexico's National Forests and the Implied Reservation Doctrine*, *supra* note 5, at 987-88.

41. U.S. CONST. amend. V.

42. See *Grow & Stewart*, *supra* note 5, at 457; *Ranquist*, *supra* note 5, at 652. "[I]t is important to keep in mind that there is no statute dealing directly with the subject—the doctrine is judicially created." *Id.*

43. Trelease, *Indian Water Rights for Mineral Development*, in P. MAXFIELD, *NATURAL RESOURCE LAW ON AMERICAN INDIAN LANDS* 219 (1977).

Prior to the Court's decision in *United States v. New Mexico*, Dean Trelease commented on the congressional intent and the presumption afforded by the implied reservation doctrine:

In all probability such searches for specific intentions will prove futile. Rather than a question of fact, the "intent of the government" appears to be a rule of law, an irrebuttable presumption that if water is needed to accomplish the purposes of the reservation *as now perceived*, then enough unappropriated water was reserved to fulfill those purposes.

*Id.* (emphasis in original). This "irrebuttable presumption" was not mentioned in *United States v. New Mexico*.

and benefits of the federal reservation with the state's desire for predictability and the expectations of private appropriators under state law.<sup>44</sup>

The Court's decision rejects such a balancing approach and might lead to unwarranted results in the application of the implied reservation doctrine. Without going beyond the express purposes for the creation of a federal reserve, claims for water rights could be asserted that have no realistic basis in the context of actual uses and needs. Also, claims to obtain water for purposes not covered by the restrictive scope of the doctrine could result. For example, a minimum instream flow for erosion and fire control purposes in a natural forest could be claimed as a reserved right and would be supported as such by the purposes expressed within the Organic Act of 1897.<sup>45</sup> Yet the unstated objective of the claim might be fish preservation, which would clearly fall outside the scope of the implied reservation doctrine as defined by the Court.<sup>46</sup> Such a juggling of the purposes behind claims of reserved water rights would increase the unpredictability of claims and cause the implied reservation doctrine to lose integrity as a tool of equity.

Given the severely restricted scope accorded the doctrine by the Court, the United States may be forced to seek condemnation to insure an adequate supply of water for the uses and administrative purposes<sup>47</sup> of federal reservations when claims cannot be perfected under state law. This alternative presents financial and procedural problems. Further, when the potential benefits to state and private water users from federal management of water resources within national forests are considered, the burden placed on the United States to perfect water rights by condemnation is unjustified.<sup>48</sup> Whenever the use of water by the forest service benefits the state and private appropriators in such a way as to increase the yield or protect the water resource, the federal government should not be required to pay for the use. As the subject of legislation<sup>49</sup> or adjudication,<sup>50</sup> the reserved rights in the national forests should be considered in

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44. See generally, Comment, *Implied Reservation Claims after Cappaert v. United States*, 1977 ARIZ. ST. L.J. 647.

45. 16 U.S.C. § 475 (1976). See note 25 *supra* (text of statute).

46. 438 U.S. at 702.

47. See notes 20 & 32 and accompanying text *supra*.

48. To illustrate, one of the recognized purposes of the national forests is to secure favorable water flows to prevent flooding and erosion downstream both inside and outside the national forest. This relieves the state of the burden of managing the watershed and benefits downstream appropriators by the increased water yield of a properly maintained watershed. To require the United States to undertake a wholesale "buy back" of water needed to facilitate secondary uses or administrative purposes of forest management when these uses indirectly aid watershed protection and maintenance would be inequitable.

49. See notes 38 & 39 and accompanying text *supra*.

50. See note 42 *supra*.

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light of their potential benefit to the state and private appropriators within the watershed.

### III. CONCLUSION

The Court's decision in *United States v. New Mexico* has severely narrowed the scope for claims based on the implied reservation doctrine. Although the Court's implicit objective of insuring predictability of state water adjudication and limiting confrontation between state and federal interpretations of the doctrine is a worthy goal, the opinion does not adequately protect valid federal interests, and thus creates a need for congressional action to protect claims of reserved rights on federal reservations.

*Michael Wrenn*