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UNITED STATES v. NEW MEXICO: THE BEGINNING OF A TREND TOWARD FAVORING STATE WATER RIGHTS OVER FEDERAL WATER RIGHTS

In *United States v. New Mexico*,¹ the United States Supreme Court ruled that the United States did not reserve water under the implied reservation doctrine for aesthetic, environmental, recreational, wildlife preservation or cattle grazing purposes in the Gila National Forest. In so ruling, the court limited the purposes for which the Gila National Forest was established to two, namely "to preserve the timber or to secure favorable water flows for private and public uses under state law."² The result of the decision will be to give additional strength to state water rights by narrowly construing the federal water right.

The controversy in *United States v. New Mexico* initially arose as a private action to enjoin the alleged illegal diversions of the Rio Mimbres River. In 1970, the State of New Mexico filed a complaint-in-intervention to seek a general adjudication of the water rights in the Rio Mimbres and its tributaries. The United States was joined as a party because it claimed reserved water rights for use in the Gila National Forest through which the Rio Mimbres runs. The state district court ruled that Congress, in segregating the Gila National Forest from other public lands, had reserved enough water to fulfill the purposes for which it was set aside. The district court, however, held that these purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing. On appeal, the New Mexico Supreme Court affirmed.³ Certiorari was granted by the United States Supreme Court.⁴

Writing for a majority of five,⁵ Justice Rehnquist maintained that the United States may reserve only the amount of water necessary to fulfill the purposes for which a federal reservation is created. The issue, then, was what amount of water, if any, did Congress intend to

1. 438 U.S. 696 (1978).

2. *Id.* at 718.

3. *Mimbres Valley Irrigation Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (1977). See Note, National Forests Do Not Have Reserved Water Rights for Recreational Purposes, 18 Nat. Res. J. 423 (1978).

4. 434 U.S. 1008 (1978).

5. Included in the majority are Justices Rehnquist, Stewart, Blackmun, Stevens, and Burger.

reserve for use in the national forests. To determine the purposes for which the national forests were established the Court construed the Organic Administration Act of June 4, 1897.⁶ The Act states:

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.⁷

From the language of the Act and its legislative history, the Court determined that the national forests were reserved for only two purposes: "to conserve the water flows and to furnish a continuous supply of timber for the people."⁸ The Court also concluded that "[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes."⁹

Justice Powell dissented and was joined by Justices Brennan, White, and Marshall. The dissenting Justices interpreted the Organic Act in a way differing from the majority's interpretation. They urged that a natural reading of the language in the Organic Act indicated that wildlife-preservation was one of the purposes for the national forests. The dissenters maintained that the effect of the majority opinion was to severely limit the amount of water available to the federal government by restricting the application of the federal law of implied reservation.

Historically, the states and the federal government have struggled over whose water law shall apply to federal lands. The struggle has taken place in the West where the predominant water law is antithetical to the federal law and where most of the large federal reservations are situated. In general, the Western states allocate water on the basis of prior appropriation—that is, the past use of a specific quantity of water entitles the user to the continued use of that amount. On the other hand, under the federal implied reservation doctrine, the federal government has reserved unspecified amounts of water for future use on its lands. The two systems ultimately collide in the arid West when the federal government attempts to appropriate, under the implied reservation doctrine, water for a new use from a stream which already is over-appropriated under the state system of prior appropriation. In cases prior to *United States v. New Mexico* the Supreme Court tended to give the federal right greater weight in

6. 30 Stat. 34, 36, 16 U.S.C. §§ 473 to 482, 551 (1976).

7. 30 Stat. 35, as amended 16 U.S.C. § 475.

8. 438 U.S. at 707.

9. *Id.* at 708.

resolving disputes.¹⁰ The decisions of the Supreme Court in *United States v. New Mexico* and its companion case, *California v. United States*,¹¹ indicate, however, that the Court is shifting to a position favoring the application of state water law even to federal reservations.

The implied reservation doctrine was first developed in *Winters v. United States*.¹² In that case, an action was brought by the United States to restrain appellants from building a dam in the Milk River in what is now the State of Montana. Construction of the dam would have inhibited the flow of the river to the Fort Belknap Indian Reservation. The Supreme Court held that the federal government could reserve water for the Indian reservation and exempt it from the appropriation requirement of state law. The Court also held that the priority date of the reservation was the date the Indian reservation was established, rather than the date the Indians first made beneficial use of the water. Thus, the Court recognized the federal power to reserve state water, at least for Indian reservations.

The implied reservation doctrine relied on in the *Winters* case was later applied in *Federal Power Commission v. Oregon*, the so-called Pelton Dam case.¹³ In that case the Federal Power Commission had issued a license for construction of a hydroelectric plant on federal lands bordering on the Deschutes River in Oregon. The power of the commission to issue such a license was challenged by the State of Oregon. The Court held that the commission could grant the license for "the use of the water [when it] does not conflict with the vested rights of others."¹⁴ The Court rejected the argument made by Oregon that the Desert Land Act of 1877¹⁵ and related acts constituted an express congressional delegation of authority to the state of the power to regulate the use of its own waters.¹⁶ The result of the case was that the federal government could sanction the building of a dam and the corresponding use of water without the state's consent.

The strongest indication of the Court's federal rights stance was evinced in *Arizona v. California*.¹⁷ The basic issue of the case concerned the amount of water from the Colorado River to which New Mexico, California, Arizona, Nevada, Utah and the United States

10. *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976).

11. 438 U.S. 645.

12. 207 U.S. 564 (1908).

13. 349 U.S. 435 (1955).

14. *Id.* at 445.

15. 19 Stat. 377, 43 U.S.C. § 321 (1976).

16. 349 U.S. at 447.

17. 373 U.S. 546 (1963).

were entitled. The United States asserted a reserved right for use of water on an Indian reservation, in the national forests, recreational and wildlife areas, and other government lands. With respect to the claims made by the United States on behalf of the Indian reservation, the Court relied on the *Winters* case to hold that, by the implied reservation doctrine, water rights were reserved at the time the Indian reservation was created. As to the claims concerning the national forests, the Court agreed with a Master's finding that the national forests had been established for five purposes:

- (1) the protection of watersheds and the maintenance of natural flow in streams below the sheds; (2) production of timber; (3) production of forage for domestic animals; (4) protection and propagation of wildlife; and (5) recreation for the general public.¹⁸

To arrive at its decision, the Court relied on the United States Constitution and stated: "We have no doubt about the power of the United States under these clauses [Property Clause and Commerce Clause] to reserve water rights for its reservations and its property."¹⁹

The Court again addressed the federal rights question in *Cappaert v. United States*.²⁰ The issue in the case was whether the implied reservation doctrine applied to a national monument at Devil's Hole. The Court held that when the federal government withdraws land from the public domain it reserves sufficient water then unappropriated to accomplish the purpose of the reservation.²¹ The Court decided that when the federal government reserved the land around Devil's Hole it also reserved enough unappropriated water "to maintain the level of the pool to preserve its scientific value. . . ."²² This decision was based on a finding that the preservation of conditions of scientific interest was one of the purposes for the establishment of Devil's Hole Monument.

Until *United States v. New Mexico*, the tendency of the United States Supreme Court had been to favor the federal claim of implied reservation over a claim based on state law. In *United States v. New*

18. S. Rifkind, Special Master Report 96 (1960).

19. 373 U.S. at 598.

20. 426 U.S. 128 (1976).

21. The Court in its decision gives a very succinct definition of implied reservation: when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

426 U.S. at 138.

22. 426 U.S. at 147.

Mexico the Court narrowly construed the purposes for which the Gila National Forest was established and hence for which water was impliedly reserved. In so doing, the Court implicitly overruled dicta in *Arizona v. California*²³ which had broadly construed the purposes of the national forests. If the Court had followed its previous trend, it would have broadly construed the purposes for which the Gila National Forest was established and concluded that aesthetics, wildlife and recreation were among those purposes. Because of the Court's decision, the federal government will need to perfect water rights under the state law of prior appropriation if it wishes to use water for aesthetic, wildlife and recreation purposes in the Gila National Forest.

A further indication of the Court's change in position is seen in the case of *California v. United States*,²⁴ which was decided the same day as *United States v. New Mexico*. The question presented to the Court was whether the Reclamation Act of 1902²⁵ allowed a state to require the reclamation projects authorized by Congress in that state conform to state law.²⁶ In construing section eight of the Act, the Court held that a state could impose conditions on the "control, appropriation, use or distribution of water"²⁷ which were not inconsistent with the congressional directive regarding the reclamation project. The state of California, therefore, has some control over the use of its water when that water is used in a federal program.

CONCLUSION

The change in the Supreme Court's position on the reservation of water rights has a potentially dramatic effect on existing federal reservations. Henceforth, the United States will need to perfect its water rights on federal reservations according to state law whenever a given water usage does not fall within one of the narrowly defined purposes of the reservation. The effect will be harsh in the West where the dominant water law is that of prior appropriation.²⁸ Most

23. 373 U.S. at 595.

24. 438 U.S. 645 (1978).

25. 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1976).

26. 348 U.S. at 647.

27. *Id.* at 675.

28. The law of prior appropriation provides that a right to water is created by putting the water to beneficial use. There are two views on the use of prior appropriation. In Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming the law of prior appropriation is the only water law. In California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington the law of prior appropriation is used in conjunction with a riparian water system. See Ellis, *Water Rights: What They Are and How They Are Created*, 13 Rocky Mtn. Min. L. Inst. 451 (1967).

streams in the West are already over-appropriated and so new claims on water can rarely be allowed.²⁹ The only technique for the acquisition of water rights when a stream is over-appropriated is through the purchase of an existing water right. Following *United States v. New Mexico*, if the Department of Interior wants water in the national forests for other than maintenance of timber or watersheds, it will have to purchase existing water rights. Those water users who have a legal right under the law of prior appropriation to a certain amount of water will not need to worry about losing that supply to the United States. This assurance of a water supply will lead to higher purchase prices for existing water rights.

Unanswered by *United States v. New Mexico* is what rights holders of valid grazing permits in the Gila National Forest possess since the Supreme Court has stated that water has not been reserved for this purpose under the implied reservation doctrine. Furthermore, one may inquire as to the significance of this decision as applied to the Gila National Forest since the Rio Mimbres originates in the forest. The fact that the Rio Mimbres originates there guarantees that the aesthetics and wildlife preservation purposes can be fulfilled without express reservation.

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29. *Id.* at 452.