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# NATIONAL FORESTS DO NOT HAVE RESERVED WATER RIGHTS FOR RECREATIONAL PURPOSES

WATER LAW—FEDERAL WATER RIGHTS: New Mexico court holds that the reasons for which National Forests were created and for which water rights may be reserved by the federal government do not include recreational or aesthetic purposes. *Mimbres Valley Irrigation Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (1977), *cert. granted sub nom. United States v. New Mexico*, 98 S. Ct. 716 (1978).

The New Mexico Supreme Court recently made the latest interpretation of the reserved rights doctrine as it applies to National Forests. The case originated as a private action to enjoin allegedly illegal diversions of waters from a stream in southwestern New Mexico, the Rio Mimbres. The district court ordered a hydrographic survey of the stream system pursuant to state statute.[1] After completion of the survey, the State of New Mexico filed a complaint-in-intervention[2] seeking a general adjudication of water rights in the Rio Mimbres and its tributaries. The court appointed a Special Master to adjudicate the rights of the more than 1,000 parties. One of these defendants was the United States. The Special Master found that the United States had reserved water rights for minimum instream flows and recreational purposes within the Gila National Forest. New Mexico disagreed. The district court reversed the findings of the Special Master, and the United States appealed to the New Mexico Supreme Court. The Court found that

> . . . the original purposes for which the Gila National Forest was created were to insure favorable conditions of waterflow and to furnish a continuous supply of timber. Recreational purposes and minimum instream flow were not contemplated.[3]

The reserved rights doctrine was first enunciated in *Winters v. United States.*[4] The U.S. Supreme Court applied it to the Gila

1. N.M. STAT. ANN. §75-4-6 (Repl. 1968).
2. N.M. STAT. ANN. §75-4-4 (Repl. 1968).
3. 90 N.M. 410, 564 P.2d 615, 618 (1977). *See generally* Note, *Minimum Streamflows—Federal Power To Secure*, 15 NAT. RES. J. 799 (1975); Note, *New Mexico's National Forests and the Implied Reservation Doctrine*, 16 NAT. RES. J. 975 (1976).
4. 207 U.S. 564 (1908).

National Forest in *Arizona v. California*[5] in 1963. In dicta of that decision the Court stated: "[t]he principle underlying the reservation of water rights for Indian Reservations [is] equally applicable to other federal establishments such as National Recreation Areas and National Forests . . . [T]he United States intended to reserve water sufficient for the future requirements of the . . . Gila National Forest."[6]

*Cappaert v. United States*[7] is the most recent U.S. Supreme Court case concerning reserved rights. In this decision, Mr. Justice Burger stated:

> This Court has long held that 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* . . . (emphasis added). In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water.[8]

In *Mimbres Valley,* the State successfully argued that the test explained by Mr. Justice Burger should be used to determine the quantity of water reserved for the enclave. The "purposes" of creating National Forests were established in the Organic Act of 1897.[9] The Act limits the purposes for which National Forests are authorized to: 1) improve and protect the forest; 2) secure favorable conditions of waterflows; and 3) furnish a continuous supply of timber. The U.S. Forest Service argued that included in the above purposes were aesthetic, environmental, recreational, and fish purposes, all of which required minimum instream flows.

Generally, National Forests encompass the headwaters of watersheds. Since all other water users are downstream from the forest, instream flows are assured in the forest. But this simple solution was not available in *Mimbres Valley.* When the Gila National Forest was established,[10] it encompassed approximately 92,622 acres of privately owned land. Many of the landowners were already appropria-

5. 373 U.S. 546 (1963).
6. *Id.* at 601.
7. 426 U.S. 128 (1976).
8. *Id.* at 138.
9. 16 U.S.C. §475 (1970).
10. The Gila National Forest was originally established by Presidential Proclamation of March 2, 1899, 34 Stat. 3126. Additional lands were placed in the Forest by later Presidential Proclamations, dated: July 21, 1905, 34 Stat. 3123; Feb. 6, 1907, 34 Stat. 3274; June 18, 1908, 35 Stat. 2191; and May 9, 1910, 36 Stat. 2694.

ting water from the Rio Mimbres pursuant to New Mexico water law. This law is based upon "prior appropriation"[11] for "beneficial use."[12] Thus, senior appropriators have a right to water before the Forest Service can enforce its right. If water in the Rio Mimbres is sufficiently low, these senior appropriators may use all of the waters of the river before it enters National Forest lands below their private lands. Thus, regardless of the water reserved for the Gila National Forest by the Organic Act, minimum instream waterflows could not be asserted in subrogation of the rights of senior appropriators.

Junior appropriators of Rio Mimbres water who appropriated waters on private lands encompassed by the Gila National Forest were the parties who stood to lose if the reservation doctrine included minimum instream flows. They would not be allowed to appropriate water for beneficial use if this caused water in the Forest to fall below minimum instream flows. On the other hand, the general public stood to lose if the reservation doctrine did not include minimum instream flows. The result of this could be no water for public use in the Gila National Forest along the Rio Mimbres.

The Forest Service relied principally upon the "implied intent" of the Organic Act, evidenced by legislative history of the Act, history of uses of the National Forests from their inception to the present, post-Organic Act legislation, and historic administration of the National Forests, all purporting to show that recreation (including aesthetic, environmental, and fish purposes), has been a purpose of the National Forests since their inception.

The New Mexico State Engineer, on the other hand, wished to protect State-created appropriative rights from infringement by the federal government. To this end, New Mexico argued that the test explained in *Cappaert* should be rigidly applied. In addition, the state asserted that there was no language to the effect that the federal government "intended to reserve" the National Forests for recreational purposes. Recreation might be an intended "use" of National Forests, but it is not an intended "purpose," as required in *Cappaert*. Since the government was relying on historic evidence *after* enactment of the Organic Act, all of this evidence explained "use;" only historic evidence *before* enactment could be used to explain "purpose." The State also argued that the reserved rights doctrine is too narrow to allow "implied" purposes. Again citing *Cappaert*, New Mexico claimed that the federal government "reserves

11. N.M. CONST. art. 16, §2; N.M. STAT. ANN. §75-11-4 (Repl. 1968).
12. N.M. CONST. art. 16, §3; N.M. STAT. ANN. §75-1-2 (Repl. 1968).

only that amount of water necessary to fulfill the purpose of the reservation, no more."[13]

Since the New Mexico Supreme Court agreed, the law concerning intended purposes is somewhat in limbo, requiring further delineation by the U.S. Supreme Court. The U.S. Attorney applied for certiori, which was granted on Jan. 10, 1978. In the meantime, the practical effects of the New Mexico decision in this case are to allow the Gila National Forest virtually no water at all.

As the law now stands, the public has been effectively denied much of the recreational use of the Gila National Forest. Without water for picnic facilities, fishing purposes, wildlife use, and general aesthetics, the forest may become nothing more than a storage area for insuring water and timber supplies: A virtual wasteland for large numbers of New Mexicans and tourists who would otherwise receive many benefits from the Forest's use.

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13. 426 U.S. 128, 141 (1970).