
NATURAL RESOURCES JOURNAL

Volume 16
Issue 4 *Symposium on Water Resources Management in a Changing World*

Fall 1976

New Mexico's National Forests and the Implied Reservation Doctrine

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NOTES AND COMMENTS

NEW MEXICO'S NATIONAL FORESTS AND THE IMPLIED RESERVATION DOCTRINE

Since *Arizona vs. California,*[1] countless pages have heralded a great Federal-State conflict over the waters in the West. The source of conflict is the implied reservation doctrine, which has merited specific analysis in at least three recent major studies,[2] and has been the catalyst for several unsuccessful Congressional bills.[3] The conflict, if one believes all that has been written, is between fervent state engineers who castigate this potential federal encroachment on private and state water rights, and federal bureaucrats who envision grandiose plans with their newfound source of power. Actually, the conflict thus far has been more imagined than real, but that is not to say that the conflict does not exist. One can sense federal and state agencies preparing for the ultimate confrontation.

The principal federal agency affecting New Mexico water rights is the Forest Service. This comment will focus on the implied reservation doctrine and Forest Service water uses vis-a-vis New Mexico water law. The New Mexico State Engineer steadily attacks the implied reservation rights that are claimed for New Mexico's National Forests. Both the State Engineer and the Forest Service claim a better right to the use of an increasingly scarce and valuable resource; proponents on both sides are prone to emotionalism and exaggeration. This comment, like so many others before it, attempts a rational analysis of the issue.

As early as 1911 one noted authority predicted, perhaps unwittingly, the conflict that currently envelops litigation over water rights in the Southwest:

1. Arizona v. California, 373 U.S. 546 (1963).

2. National Water Commission, Water Policies For The Future, Final Report to the President and to the Congress of the United States, ch. 13 (1973), [hereinafter cited as *NWC Final Report*]; F. Trelease, *Federal-State Relations In Water Law,* National Water Commission, Legal Study No. 5, pt. V (1971) [hereinafter cited as Trelease, *NWC Study*]; and, U.S. Public Land Law Review Commission, One Third of the Nation's Land, A Report to the President and to the Congress, ch. 8 (1970) [hereinafter cited as PLLRC, *One Third of the Nation's Land*].

3. *E.g.,* the *Moss Bill,* S. 28, 92nd Cong., 1st Sess. (1971); the *Hosmer Bill,* H.R. 2312, 92nd Cong., 1st Sess. (1971); and the *Kuchel Bill,* S. 1636, 89th Cong., 1st Sess. (1965). The first two are verbatim reiterations of the *Kuchel Bill,* which is a moderate version of the *Barret Bill,* S. 863, 84th Cong., 2d Sess. (1956). For an excellent discussion of legislation up to 1966, *see,* Morreale, *Federal-State Conflict over Western Waters–A Decade of Attempted "Clarifying Legislation,"* 20 Rutgers L. Rev. 423 (1966).

> The Federal system here considered is just developing. . . . In any event, it leaves room for much conflict between the Forest Service and the State Engineer and the general State water administrations. . . . In this matter, as throughout the policy of conservation, the conflict between State and Federal jurisdiction . . . is becoming marked; and the law is in an uncertain and formative stage.[4]

This statement accurately reflects the present state of the law in the area of Federal-State relations, sixty-five years later. Particularly in New Mexico, the issue of implied reservation rights is critical—the conflict *has* become marked, and the law *is* in an uncertain and formative stage.

THE DOCTRINE OF PRIOR APPROPRIATION

New Mexico, like most of the western states, has abandoned the riparian doctrine of the water-rich East, and has formally adopted the doctrine of prior appropriation of water rights—the Colorado Doctrine.[5] Prior appropriation grew of necessity in the arid West, where it is vital that owners have access to the scarce water supplies. The doctrine was accepted by the courts[6] prior to its formalization in the 1907 statutes[7] and the New Mexico Constitution.[8]

New Mexico shares the same basic elements of appropriative water law as the other appropriation states. The first is that beneficial use is the basis of the right to use water,[9] as opposed to the riparian basis of land ownership and reasonable use. Secondly, the appropriator must establish dominion over a definite quantity of water, which is measured by beneficial use. This dominion is generally established by diversion of water. In New Mexico, man-made works are required to divert water for irrigation purposes.[10] Thirdly, the potential water user must intend to appropriate and pursue the diversion of water with diligence. The next element is that notice must be given to other users or potential users.[11] The fifth element is that water rights are ranked in a system of priority in time, *i.e.*, senior rights are protected over junior rights.[12] Full protection is given the first use before the second use, and so on, in times of shortage. The date of

4. S. Wiel, Water Rights in the Western States, § 442 (3rd ed. 1911).
5. *See* Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).
6. United States v. Rio Grande Dam & Irrigation Co., 9 N.M. 292, 306-307, 51 P. 674 (1898), *rev'd. on other grounds*, 174 U.S. 690 (1899).
7. N.M. Stat. Ann. § 75-1-1 (1953).
8. N.M. Const. art. 16, § 1-3.
9. N.M. Stat. Ann. § 75-1-2 (1953).
10. State *ex. rel.* Reynolds v. Miranda, 83 N.M. 443, 493 P.2d 409 (1972).
11. N.M. Stat. Ann. § 75-1-2.1 (1953).
12. N.M. Stat. Ann. § 75-1-2 (1953).

the priority is the date when the first step is taken to appropriate water. Although the water may be put to beneficial use at a later date, the right is said to "relate back" to that first step. The sixth element is that the water right is transferable and forfeitable.[13] Finally, a system of administration is provided by the State.[14]

THE IMPLIED RESERVATION DOCTRINE

The Property Clause and Other Conceptual Bases

A brief explanation of the implied reservation doctrine is necessary. Federal power over Western water has been found in the commerce clause, the supremacy clause and the property clause of the United States Constitution, and sometimes in a combination thereof. The Public Land Law Review Commission has 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.[15]

Yet, no explanation is given by the Commission for those vested pre-19th century water rights existing at the time the United States became sovereign, a concern that has been discussed by a noted New Mexico proponent of State water rights.[16] Further, to make such a sweeping conclusion is to underestimate the proprietary role of the United States. Until the development of the implied reservation doctrine, the Western states were believed to have acquired any proprietary interests the Federal Government had.

The property clause of the United States Constitution states:

> The Congress shall have power to dispose of, and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.[17]

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13. First State Bank v. McNew, 33 N.M. 414, 269 P. 56 (1928); N.M. Stat. Ann. § 75-5-26 (1953).

14. *Compare* N.M. Stat. Ann. § 75-2-1 (Supp. 1975), *with* N.M. Stat. Ann. § 75-2-8 and 75-2-9 (1953).

15. PLLRC, *One Third of the Nation's Land*, at 141.

16. Bloom, *Indian "Paramount" Rights to Water Use*, 16 Rocky Mt. Ml. L. Inst. 669 (1971). *Contra*, Veeder, *Indian Prior and "Paramount" Rights To The Use of Water*, 16 Rocky Mt. Ml. L. Inst. 631 (1971).

17. U.S. Const. art. IV, § 3(2).

If, as the Public Land Law Review has so found, the Federal Government possessed complete ownership over the land and water of the western region, then it would have had to subsequently dispose of those lands in order to grant title to the western states. On the other hand, if pre-19th century rights existed at the time the Federal Government came into possession, or if the Federal Government subsequently granted away the right to use the water over much of the public domain, then valid claims exist which cannot be prejudiced by other Constitutional provisions such as the supremacy clause or the commerce clause. The problem is that since much of the public domain was subsequently disposed of through major congressional acts, it was assumed that the non-navigable water rights were also disposed of.

The Homestead Act of 1866[18] seemed to grant authority to the States to determine what water uses should become vested rights. The Act provided, among other things, that:

> 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 possessors and owners of such vested rights shall be maintained and protected in the same, and the rights of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; . . .[19]

The Act was amended in 1870 by adding the following:

> 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 the preceding section.[20]

Finally, the Desert Land Act of 1877[21] stated:

> . . . and all surplus water over and above such actual appropriation and use, together with the water of all, [sic] 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. . . .[22]

18. 43 U.S.C. § 661 (1965) (corresponds to Act of July 26, 1866, c. 262, § 9, 14 Stat. 253).
19. *Id.*
20. 43 U.S.C. § 661 (1965) (corresponds to Act of July 9, 1870, c. 235, § 17, 16 Stat. 218).
21. 43 U.S.C. § 321 (1965) (corresponds to Act of March 3, 1877, c. 107, § 1, 19 Stat. 377).
22. *Id.*

The Supreme Court, in 1935, had an opportunity to discuss the Desert Land Act and concluded: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states."[23] The Court further held that each state had the right to determine to what extent the law of appropriation or the law of riparianism applied.

Not until 1955 did the Supreme Court suggest to the Western appropriators that the above discussed Acts were "not applicable to the reserved lands,"[24] but only to public lands. Apparently the broad grant of water rights which seemed to have been given to the Western States did not include those for lands reserved from the public domain. Previously, in *Winters v. United States*,[25] the Court had established Indian reserved rights, but that was considered a unique water rights resolution not applicable to non-Indian federal land. The effect of excluding reserved lands from operation of the Acts is reflected in a recent study:

> Nearly 700 million acres of the original public domain, lands that were never transferred from Federal ownership, remain as part of our public lands. Over 179 million acres of public domain have been reserved as national parks and national forests. Some, approximately 53.5 million acres, have been set aside for specific uses by . . . other Federal agencies.[26]

Apparently, the proprietary powers of the Federal Government, long since considered relinquished to the Western States, were revived by the *Pelton Dam* decision.[27] However questions remain. Are water rights included within that "property" belonging to the United States and protected by the property clause? Has water on reserved land not been "severed from the land(?)"[28] Did the reservation doctrine truly grow out of the property clause?

Walter Kiechel, Jr., of the Department of Justice, seems to have resolved these questions affirmatively, in favor of Federal Government ownership:

> . . . The right to use that water was and is one of the whole bundle

23. California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935).

24. Federal Power Commission v. Oregon, 349 U.S. 435, 448 (1955), commonly referred to as the *Pelton Dam* decision.

25. Winters v. United States, 207 U.S. 564 (1908).

26. PLLRC, *One Third of the Nation's Land*, at 19-20.

27. 349 U.S. 435 (1955).

28. 295 U.S. at 158, wherein the Court interpreted the Desert Land Act as having "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself."

> of rights acquired by the United States when it acquired ownership of the lands. . . .
>
> Once the United States' ownership of the right to use the waters upon, within, and adjacent to the public domain which have not previously been appropriated by others under authority of an act of Congress is recognized, *there really is no mystery about the reserved rights doctrine.* It simply means that when public lands are withdrawn or reserved for authorized purposes requiring the use of water, the right to use a sufficient amount of the unappropriated waters pertaining thereto to accomplish those purposes is also reserved.[29] (Emphasis added.)

For some, the mystery remains.

Some Background Case History

At least one noted water law expert[30] has argued that the present-day reservation doctrine had its beginnings in *United States v. Rio Grande Dam and Irrigation Company.*[31] That case dealt with the problem created when an irrigation company, authorized by state law, diminished the navigability of the Rio Grande River. At the company's diversion location the river was non-navigable; its effect was downstream. The Court relied on the supremacy doctrine, in creating a "navigation servitude" to limit state action, and stated that absent Congressional authority, "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 uses of the government property."[32]

Professor Trelease argues that the supremacy clause is the basis for the reservation doctrine, and that *Rio Grande* is a restatement of that supremacy power. He has also concluded:

> It is thus very clear from a reading of the Supreme Court opinions that the reservation doctrine does not depend upon theories of federal ownership of water, faulty interpretations of statutes and false history. The results would have been the same if the Acts of 1866 and 1877 had never been enacted, and nothing would change if those acts were repealed today. Reserved water rights stem from the supremacy clause and the need for water to carry out federal functions. The power to make such reservations cannot be doubted, and

29. W. Kiechel Jr., *Inventory and Quantification of Federal Water Rights–A Common Denominator of Proposals for Change,* 8 Nat. Res. L. 255, 256 (1975). *See* United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960).

30. Trelease, *NWC Study,* at 147*k.*

31. 174 U.S. 690 (1899).

32. *Id.* 703.

> they can be created by any form of notice of intent to use unappropriated water for any contemplated federal purpose on any lands in any state of the union.[33]

The evolution of the reservation doctrine continued in the much discussed *Winters* case.[34] The Court again relied on the supremacy doctrine and held that through creation of an Indian reservation, the federal government impliedly reserved water enough to develop the reservation. Further, the priority date established was the same date as creation of the reservation (1888), regardless of the time when Indian uses actually began. The effect was that post-reservation, non-Indian state-created uses were now junior to these Indian uses which began later.[35]

The doctrine was slowly expanded to include non-Indian reserved lands as well. In the 1955 *Pelton Dam* case,[36] the Supreme Court upheld the Federal Power Commission's grant of a license to a private power company which sought to build a dam across the Deschutes River in Oregon, over state protests. Both sides of the river were bounded by federal lands—an Indian reservation on one side and a power site reservation on the other. Oregon unsuccessfully relied on the Desert Land Act of 1877[37] as authority for its position that non-navigable waters were severed from public lands and subjected to state control. As discussed above, the Court distinguished reservations from public lands, the latter being those lands open for disposition to the public. Relying on the property clause of the Constitution, the Court held that the Federal Government could issue the license without state approval. However, under the facts, the decision did not necessitate impairment of water rights created by state law.

The first actual allocation of water for federal reserved non-Indian lands occurred in *Arizona v. California*,[38] a 1963 decision. The United States intervened in a multi-state suit to claim water for Indian reservations as well as other reserved federal lands. The Court dealt with the Indian lands, relying on *Winters*, by reiterating the doctrine of implied reservation of water on Indian reservations and quantifying the water rights as the amount necessary for irrigation of their "practicably irrigable" lands. The Court extended the implied

33. Trelease, *NWC Study*, at 147*l*.

34. 207 U.S. 564 (1908).

35. Perhaps *Winters* should be viewed strictly as an Indian water rights case, considering United States reservation policy and the implications of a treaty situation. Also, as to appropriation dating, *see* authorities cited *supra* note 16.

36. 349 U.S. 435 (1955).

37. 43 U.S.C. § 321 (1965).

38. 373 U.S. 546 (1963).

reservation doctrine to include, "other federal establishments such as National Recreation Areas and National Forests,"[39] but they did not quantify these non-Indian uses. Among these other federal establishments was the Gila National Forest in New Mexico. Further, the Court states that, "We have no doubt about the power of the United States under these clauses [the commerce clause and the property clause] to reserve water rights for its reservations and its property."[40]

There have been recent footnotes to the implied reservation doctrine involving Supreme Court decisions. In *United States v. District Court in and for the County of Eagle,*[41] the Court held that the McCarran Amendment[42] allowed a state court to adjudicate federal water rights established under the implied reservation doctrine, though the case could be reviewed by the Supreme Court. The "or otherwise" clause of the McCarran Amendment was construed to include reserved water rights, and the United States no longer had to initiate the adjudication in order to litigate reserved water rights. The Court stated that the "federally reserved lands include any federal enclave. . . . The reservation of waters may be implied and their amount will reflect the *nature* of the federal enclave.[43] (Emphasis added.) In a companion case, *United States v. District Court in and for Water Division No. 5,*[44] the water rights involved were said to include those of four separate National Forests. Further, a new Colo-

39. *Id.* 601.

40. *Id.* 598.

41. United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971).

42. 43 U.S.C. § 666(a) (1970) (corresponds to Act of July 10, 1952, c. 651, Title II, § 208 (a)-(c), 66 Stat. 560):

> 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. The United States, when a party to such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided,* That no judgment for costs shall be entered against the United States in any such suit.

In *State ex. rel. Reynolds v. Lewis,* 88 N.M. 636, 545 P.2d 1014 (1976), the New Mexico Supreme Court held that the United States, as "owner" of reserved Indian water rights, could be joined as a defendant in general stream adjudications in State courts under the McCarran Amendment. The case involved reserved water rights of the Mescalero Apache Indian Reservation.

43. 401 U.S. at 523.

44. United States v. District Court in and for Water Div. No. 5, 401 U.S. 520 (1971).

rado procedure was determined sufficient service of process on the United States.

In another Colorado case, the United States as trustee for certain Indian tribes and as owner of various non-Indian government claims, brought an action in the United States District Court for the District of Colorado to adjudicate waters and tributaries in Water Division No. 7. One of the defendants in the federal action filed a state court action seeking an order directing service of process on the Government for the purpose of adjudicating all of the United States' claims; subsequently, several defendants and intervenors in the federal proceeding moved the District Court to dismiss on the ground that under the McCarran Amendment the court had no jurisdiction to determine federal water rights. The District Court granted the motion, ruling that the doctrine of abstention required deference to the state court proceedings and failing to resolve the jurisdictional issue. The Tenth Circuit Court of Appeals reversed, in *United States v. Akin*,[45] holding that abstention was inappropriate and that the action was within the Federal District Court's jurisdiction under 28 U.S.C. § 1345, which gives the federal district courts original jurisdiction of all civil actions commenced by the United States, "[e]xcept as otherwise provided by Act of Congress." The fear of a "race to the courthouse" was dismissed as groundless.[46]

The United States Supreme Court, on certiorari, reversed the Tenth Circuit judgment and affirmed the District Court's judgment dismissing the complaint.[47] The Court held that the McCarran Amendment was not an exception "provided by Act of Congress," for purposes of 28 U.S.C. § 1345. Thus the District Court had jurisdiction under § 1345 over the action brought by the United States. Further, although the abstention doctrine was held inapplicable, the court listed several factors that counseled against concurrent federal proceedings, the most important of which was the clear federal policy behind the McCarran Amendment against piecemeal adjudication of water rights in a river system.

Notably, the Supreme Court reiterated a safeguard mentioned in *Eagle County*. The Court, quoting from *Eagle County*, stated that, "questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are federal questions which, if preserved,

45. United States v. Akin, 504 F.2d 115 (10th Cir. 1974), rev'd. 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976).

46. 504 F.2d at 121.

47. Colorado River Water Conservation Dist. v. United States, 96 S.Ct. 1236, 47 L.Ed. 483 (1976).

can be reviewed [by the Supreme Court] after final judgment by the Colorado court."[48]

Finally, the Ninth Circuit recently held that the United States may also reserve underground water as well as surface water.[49]

The Doctrine Summarized and Problems Presented

One study found six variations of the implied reservation doctrine.[50] However, certain basic tenets of the doctrine which pervade the various interpretations can be established.

If a federal enclave has been established by treaty, act of Congress, or executive order for a federal purpose which will require water at some date, present or future, and if at the time of establishment the federal government intended to reserve unappropriated water for that purpose, then enough water to fulfill that purpose is reserved from appropriation by private users under state law, assuming that unappropriated water in sufficient amounts is available. Thus if and when water is put to use by a federal enclave, its right is senior to those private rights acquired after the date of the enclave establishment *even though those private rights have been put to beneficial use.* Private rights vesting after the reservation date and impaired or destroyed by Federal use need not be compensated for by the Federal Government, since no harm will be done under the concept that priority in time is priority in right.

It is speculative at this date whether the federal reservation water rights are limited to those uses contemplated at the time of the reservation. The language in *Eagle County* indicates that the amount of water reserved, "will reflect the nature of the federal enclave."[51] Some questions remain. Does "nature" mean "purpose"? What is the "nature" of a National Forest? And do water uses that weren't contemplated at the time of the reservation share the same date of appropriation as the time of the water's first use?

Further, in light of *Winters* and *Arizona,* the doctrine is not limited to the water arising on the enclave; uses involved in both cases were from rivers upstream from the reservation. Whether this is problematic, as it pertains to the Forest Service, is uncertain, since most National Forests are at the top of watersheds. Whether a claim to water arising outside of the watershed will be sustained is also not

48. *Id.* 1244.

49. United States v. Cappaert, 508 F.2d 313 (9th Cir. 1974), *cert. granted,* 422 U.S. 1041 (1975).

50. Wheatley & Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands,* Public Land Law Review Commission (1969).

51. 401 U.S. at 523.

definite. Resolution of that issue is guided only by vague language addressing appurtenantcy. As far as New Mexico National Forests are concerned, sufficient water can be obtained from watersheds within each Forest.[52]

Finally, after *Arizona* and the subsequent reservation cases, one wonders whether federal use is limited to use on those lands riparian to the waterflow. Can the water only be used on the lands appurtenant to the stream, or may it be diverted from reservation to reservation, or from reservation to private land? This problem has more effect on Indian reservations. Forest uses are limited to the lands close to the waterflow. Any diversion is to land within the Forest and riparian to the stream. Special use permits for private and State use are also similarly restricted.

NEW MEXICO AND FOREST SERVICE WATER RIGHTS

Vital Statistics

Federal lands provide 61% of the total natural runoff in the 11 coterminous western states.[53] Forest Service and National Park Service lands contribute about 96% of the runoff from public lands, and approximately 59% of the total yield from all lands in those states.[54] Approximately 18.2 million acres, or 23% of the total land area, in New Mexico are forested.[55] Of that acreage, approximately 9.0 million acres, or 11% of the total land area in New Mexico, is National Forest.[56] The National Forests in New Mexico are included in Region 3 of the National Forest system, with headquarters in Albuquerque, New Mexico.

National Forests in New Mexico contribute approximately 1.8 million acre-feet of the total New Mexico water yield. The present Forest use in New Mexico is 3215.41 acre feet per year.[57] The projected Forest use is expected to increase to an *additional* 3392.76 acre-feet per year, by the year 2000.[58]

The National Forests in New Mexico consist of the Apache, Carson, Cibola, Coronado, Gila, Lincoln and Santa Fe. The breakdown

52. Interview with Region 3 Hydrologists, United States Forest Service, Department of Agriculture, in Albuquerque, November 3, 1975.

53. PLLRC, *One Third of the Nation's Land,* at 141.

54. *Id.*

55. Choate, *New Mexico's Forest Resource,* U.S. Forest Service Resource Bull. INT-5, iii (1966).

56. Interview with Region 3 Hydrologists, *supra* note 52.

57. *Id.* 1975 compilations. Because the figures are based on millions of Region-wide individual uses they are subject to error and are not intended as absolutely reliable figures, particularly the projected use figures.

58. *Id.*

of approximate present water contribution, present water use, and projected additional use per forest is as follows:[59]

Forest	*Yield (acre-feet)*	*Present Use (acre-feet)*	*Projected Additional Use (acre-feet)*
Apache	400,000	230	235
Carson	425,000	350	365
Cibola	120,000	395	35
Coronado	90,000	90	30
Gila	310,000	1,160	1,695
Lincoln	120,000	690	585
Santa Fe	410,000	300	450
Totals	1,875,000	3,220	3,395

In short, the present Forest uses in New Mexico total approximately 0.21% of their yield, while the projected total use will be 0.44% of their yield. The Region 3 statistics also indicate that Forest uses are 1.00% of all State uses, while the projected uses will be approximately 1.50-2.00% of all State uses.

These statistics are not intended to suggest that because the Forest Service uses such a small proportion of its total water yield, and of the State total use, that its uses should go unquestioned. They serve merely to provide a reference by which the reader may attain some perspective of the actual scope of the reservation doctrine and its application in New Mexico.

The Conflict

The National Water Commission determined that a reserved federal water right has certain characteristics

> ...which are quite incompatible with state appropriation water law: (1) it may be created *without* diversion or beneficial use, (2) it is not lost by nonuse, (3) its priority dates from the time of the land withdrawal, and (4) the measure of the right is the amount of water reasonably necessary to satisfy the purposes for which the land has been withdrawn.[60]

Another characteristic can possibly be added at this point: (5) the Federal Government does not have to pay compensation for those private rights it divests which have a later appropriation date. With that addition we have the core of the controversy surrounding the implied reservation doctrine.

59. *Id.*
60. NWC, *Final Report*, at 464.

In most cases since 1963, federal agencies have continued to comply with state regulations, perhaps as a matter of comity. In some cases federal agencies have adopted positions in disregard of State law. The Forest Service Manual, reflecting a 1965 rewording, indicates that water, including instream flows and standing water for reserved lands, "will be obtained and used in accordance with the reservation principle."[61] For acquired lands, water rights have been obtained under state law, through appropriation or purchase.

A. Diversion and Beneficial Use

One interesting problem raised by Forest Service use in New Mexico is that of beneficial use, the basis of the right to use water in the State. A Forest use might not be considered as a beneficial use under New Mexico law, or if recognized, may be low in priority. How valuable, for example, do New Mexicans consider weekend ski trips or picnics? Perhaps a lease for a ski resort, a recreational water site, or a campground development will affect certain private water rights vested under New Mexico law.

For the most part, the presently projected uses are for: stock water for cattle on grazing permits; special use permits other than grazing; the irrigation of nurseries; domestic uses, at guard stations and maintenance sites; the maintenance of timber management roads; recreation uses, domestic and other; fire-fighting; and wildlife preservation. There are no innovative or theoretically possible uses such as the highly unlikely Region 6 plan for timber irrigating to increase yield.[62] However, as Frank Trelease has pointed out, "even the small uses contemplated . . . will not come off the top of a 363 million acre foot tank,"[63] stressing the point that in a particularized, localized situation the reservation use may indeed affect established rights. That is, a New Mexico rancher could be economically affected when his alfalfa crop needs water that is taken by the Forest Service from a low stream in late summer.

The only actual case involving an impaired private right by the use of an implied reservation right is that of *Glenn v. United States*,[64] an unreported 1963 decision. In *Glenn*, the plaintiff sought $25,000 in damages under the Federal Tort Claims Act when the Ashley National Forest in Utah supposedly took water from Bear Creek to supply a campground, which in turn impaired the plaintiff's domestic

61. Forest Service Manual, Title 2500–Watershed Management, c. 2540, § 2541.03 (1965).

62. Interview with Region 3 Hydrologists, *supra* note 52.

63. Trelease, *NWC Study* at 120.

64. Glenn v. United States, Civil No. C-153-61 (D. Utah 1963).

use. Actually, the spring from which the Forest Service took the water had no visible effect on the Bear Creek domestic use, and in fact Forest Service officials did not know that the campground was in the same drainage. At any rate, the reservation doctrine was relied upon to defeat the claim.[65]

Assuming diversion of water is also required for an appropriative right to vest,[66] some Forest Service uses may not require diversion. An example of such use, discussed later, is the maintenance of certain levels of instream flows to preserve fish life and stream quality. In such case the Forest Service is not physically impounding the water. The use is non-consumptive, and the determination of whether it is a beneficial use would seem to be the guiding principle.

In New Mexico, recreational uses and the preservation of fish for fishing purposes have been recognized as beneficial uses.[67] Such uses require no diversion and are non-consumptive. However uses such as this are generally low in preference and may not always be recognized as a beneficial use.

The implied reservation doctrine is at odds with the concepts of beneficial use and diversion of water, as is pointed out by the National Water Commission study cited above. To reserve an indeterminable amount of water that will fulfill future needs of a National Forest is to appropriate without use. Such reservation does not mean that the water flows down to the ocean are unused until the Forest Service decides otherwise; other users may put the water to use. But these appropriators would be junior appropriators, that is, appropriators with a lesser priority to the water when the Forest Service does decide to put the water to use. The junior appropriators have a lesser protected water right, with a later priority date.

B. Priority Dates

The United States, acting as sovereign, obtained most of the lands of what are now the New Mexico National Forests through the Mexican Cession. These forests were all reserved from the public domain

65. Corker, *Federal-State Relations in Water Rights Adjudication and Administration*, 17 Rocky Mtn. Ml. L. Inst. 579, n. 11 (1972).

66. *But see* Note, *Appropriation By The State of Minimum Flows In New Mexico Streams*, 15 Nat. Res. J. 809, 817-18 (1975), for an interesting and convincing argument that diversion is not an absolute requisite in appropriating water in New Mexico. The argument is three-fold: (1) diversion served as objective proof of intent to appropriate prior to 1907 statutory notice provisions; (2) diversion also served as a practical kind of notice no longer required because the State Engineer now approves or disapproves every appropriation; and, (3) the assumption that uses requiring diversion result in a better allocation of resources is no longer valid and is outdated.

67. State *ex. rel.* State Game Commission v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

with fairly early reservation dates. Other lands have been acquired through exchange or purchase and brought within the National Forest boundaries. Many of these acquisitions were of old Spanish land grants, e.g., the J. J. Lobato Land Grant on the Carson National Forest.

The fact that there is presently only one case of a reserved forest water right[68] affecting private rights is an argument repeatedly made by federal officials to minimize the uncertainties created by the doctrine. Yet one may wonder if the instances will increase as the amount of unappropriated water decreases. Very recently, a complaint has been filed in the United States District Court of Oregon by the United States,[69] seeking a declaratory judgment to determine water rights on the Williamson River, and seeking to enjoin those private uses that are impairing its use on federal lands. The lands involved are the Klamath Forest National Wildlife Refuge, formerly part of the Klamath Indian Reservation, which was transferred to the United States in 1958 for the creation of a migratory bird refuge; other parcels on the Williamson which were acquired from private owners and now are part of the Winema National Forest; and reserved lands now part of the Deschutes, the Fremont, and the Umpqua National Forests.

In the above complaint, the United States asserts that priority dates of previous owners are tacked-on for its acquired lands. Among other things, the Government also asserts that if a federal reservation is created from a preexisting federal reservation, the priority date of its water rights is the earlier reservation date.

New Mexico appropriation law allows a tacking-on of priority dates when the land and its water rights are sold.[70] Since water rights of *acquired* lands are subject to State law, it would seem a similar problem in New Mexico should be resolved in favor of the Government's position, when the water is put to the same use as it had been by the previous landowner. However, a new use by the Government might be limited if it was not a high-ranking beneficial use as recognized by the State.

The latter assertion of the Government concerning the tacking-on of *reservation* priority dates is not quite so clear. The *Eagle County* case indicates that water is reserved according to the original "nature" of the reserve.[71] The nature of an Indian reservation and that of a National Forest reservation are two different things. It

68. Glenn v. United States, *supra* note 64.
69. United States v. Adair, Civil Case No. 75-914 (D. Ore.).
70. N.M. Stat. Ann. § § 75-5-21 through 22 (1953).
71. 401 U.S. at 523.

would seem that a priority date of the latter reservation is more practical. The Indian reservation, by its nature, may have required more or less water than is necessary for the Forest reservation. If the Forest requires more water than the Indian reservation did, a priority date as of the date of the Indian reservation would perhaps serve to divest previously vested rights. If it requires less, then the "difference" serves to greater protect junior rights.

The question of tacking-on priority dates has arisen in one of the two current New Mexico adjudications concerning Forest Service uses.[72] In the *Mimbres Valley* adjudication, the court found that, "uses *necessary for military purposes* on the lands of the Ft. Bayard Military Reservation . . . when transferred to the Department of Agriculture on January 2, 1941, became forest purpose uses with the original priority date of April 16, 1869; and *all other uses* originated thereafter were for forest purposes with a priority date of January 2, 1941."[73] It should be noted that the United States Supreme Court has found against the Federal Government on this issue.[74]

As noted above, the reservation doctrine does not apply to acquired lands. But what happens when acquired land has a valuable water source that can be diverted to adjoining reserved land, all within the Forest boundary? The reserved priority date should not apply because the water does not arise on land that is reserved, therefore the priority date should be the date the water was put to use. Conversely, what if the water is diverted from the reserved land to acquired land? That is, suppose land is acquired for a potential campground site. Later the water source on the acquired land proves insufficient and additional water is diverted from reserved land within the same Forest to the acquired land. What priority date applies? *Arizona v. California* indicates that the water is to be used on the reservation in order to obtain a reservation date priority? a priority date as of its use should apply here also.

C. Instream Flows and the Purposes Argument

Closely related to the beneficial use and priority date issues is the issue of "instream flows," or "minimum flows." The Forest Service contends that it is environmentally beneficial to maintain instream flows of water in a water course—to preserve stream quality and life,

72. State of New Mexico *ex. rel.* Civil No. 9780 (N.M. D. Ct., filed Nov. 2, 1972) [hereinafter cited as *Red River*]; Mimbres Valley Irrigation Co. v. Salopek, Civil No. 6326 (6th N.M. J.D. Ct., filed Mar. 21, 1966) [hereinafter cited as *Mimbres Valley*].

73. Order Sustaining objections and Modifying Findings of Fact and Conclusions of Law of the Special Master, Conclusion of Law No. 5, *Mimbres Valley, supra* note 72.

74. Arizona v. California, 373 U.S. 546 (1963), where a military reservation had been transferred to the Ft. Mohave Indian reservation.

for fire protection, and for its aesthetic value. This raises several related questions: (1) is the maintenance of instream flows one of the original purposes for which National Forests were created; (2) does the maintenance of instream flows reflect the nature of a National Forest; and, (3) are instream flows included as a reserved water right? If not a reserved right, then instream flows are subject to the State law of appropriation. As it stands, the maintenance of instream flows is not recognized as a beneficial use by New Mexico law. However, closely related are the recognized recreational uses and a recognized beneficial use in the preservation of fish for fishing purposes.[75]

If recognized as a reserved right, the next question is how much water is required for instream flows? In quantifying its water rights, the Forest Service contends that while it is best to maintain a high level of instream flow, a certain minimal flow should be recognized and will be acceptable. In *Mimbres Valley*, for instance, the Forest Service suggested a minimum of 2.0 cubic feet per second, meanwhile maintaining that 7.0 to 9.0 cubic feet per second would probably be a reasonable instream flow.

Whether reserved rights include instream flows is an issue that should be resolved by the United States Supreme Court. At least one state's district court has resolved the issue in favor of the Forest Service.[76] But other state courts have not been so inclined, particularly New Mexico's.[77] It has been argued persuasively that the original purpose of the National Forest did not include instream flows, or at any rate, instream flows for the protection of fish and game.

The Organic Act[78] is perhaps the first actual statement of Forest purposes. Therein is found, "No national forest reservation shall be established, except *to improve and protect the forest* within the boundaries, or for the purpose of *securing favorable conditions of water flows.*" (Emphasis added.) The Act does not detail what favorable conditions are, or to whom they must be favorable. It is reasonable to assume, however, from the contemporary legislative intent as well as subsequent legislation that "favorable conditions of water flows" were those conditions favorable to both the Forest and to the public.

Further, it is reasonable to argue that to maintain instream flows is

75. State *ex. rel.* State Game Commission v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

76. Soderman v. Kackley, Civil Case No. 1829 (Dist. 6, Idaho 1975).

77. *Red River* and *Mimbres Valley, supra* note 72.

78. 16 U.S.C. § 475 (1970) (corresponds with Act of June 4, 1897, c. 2, § 1, 30 Stat. 35).

to improve and protect the forest. In the *Mimbres Valley* litigation, the Federal Government argued that the term "forest" includes "more than just the trees. It includes the entire ecosystem—the trees, the bushes and other plant life, the decaying leaves, needles, etc., the fish and wildlife, etc., that make up the forest community."[79]

The Government has also argued that early forest reservation acts and commentary on those acts suggest that instream flows is an original purpose for which reserved water rights ought to exist. It has been noted that the early geological surveys of areas that were to become National Forest pointed out that "pure crystal" quality of the streams and the "abundance of fine trout."[80] Further, in an act prior to the Creative Act of 1891,[81] Congress reserved forest lands in California and provided for the "preservation from injury . . . natural curiosities or wonders within said reservation, and their retention in their natural condition."[82]

New Mexico has argued that the Organic Act authorized only two purposes for which National Forests were created, citing the relevant portion of the Act:

> 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. . . .[83]

The two purposes recognized by the State are the protection of the watershed to ensure dependable water supplies for downstream appropriators, and protection of the forest in order to secure an adequate and continuous supply of timber.[84] Apparently the State ignores the first purpose elaborated in the Act and expounded by the Government, to improve and protect the forest within the boundaries. The purposes they do recognize are preceded by the conjunction "or" in the Act, which indicates that at least three general purposes were intended.

It was not until 1960 that "multiple use" became the official credo of the National Forests. The Multiple Use—Sustained Yield

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79. Memorandum of Points and Authorities in Support of Special Master's Report, p. 8, filed by United States in *Mimbres Valley, supra* note 72.

80. First, Second and Third Annual Reports of the United States Geological Survey of the Territories for the years 1867, 1868, and 1869, 182 (1873).

81. Act of Mar. 3, 1891, ch. 561, 24, 26, 26 Stat. 1103.

82. Act of Oct. 1, 1890, ch. 1263, 26 Stat. 651.

83. 16 U.S.C. § 475 (1970).

84. Memorandum of Law Submitted Pursuant to the Court's Pre-Trial Order of Nov. 12, 1975, in *Red River, supra* note 72.

Act[85] sets out the purposes of a Forest: outdoor recreation, range, timber, watershed, wildlife and fish purposes. Yet, the Forest Service had long administered the National Forests under a multiple use policy. Nothing new was added by the Act except a Congressional stamp of approval. As early as 1891, the Chief Forester stated that:

> Forest management such as contemplated, does not destroy natural beauty, does not decrease but gives opportunity to increase the game, and tends to promote the greatest development of the country, giving regular and steady employment, furnishing continuous supplies, and making each acre to its full duty in whatever direction it can produce most.[86]

And the following language appears as early as 1906 in the Forest Service Use Book:

> In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people, and not for the temporary benefit of individuals or companies . . . and where conflicting interests must be reconciled the question will always be decided from the standpoint of the greatest good of the greatest number in the long run.[87]

Finally, the Senate and House Reports on the Multiple Use Act make clear that the Act gave Congressional approval to a long continued practice:

> On the same day that the administration of the national forests was given to the Secretary of Agriculture by the act of February 1, 1905 (16 U.S.C. 472), Secretary of Agriculture Wilson directed that questions of policy in their management should be decided from the standpoint of "the greatest good of the greatest number in the long run." Enactment of the bill would continue this policy. The administration of the national forests *has long been under the policies of multiple use* and sustained yield.[88] (Emphasis added.)

It would appear that the original purposes for which the Forests were created were broad indeed. If that argument is sound, the decisions in the *Mimbres Valley* and *Red River* adjudications are clearly erroneous in their conclusions against the Government on instream

85. 16 U.S.C. §§ 528-31 (1970) (corresponds with Act of June 12, 1960, P.L. 86-517, § 1, 74 Stat. 215).

86. Report of the Chief of the Division of Forestry, 224-25 (1891).

87. Use Books for 1906, 15-17 (1907).

88. H.R. Rep. No. 1551, 86th Cong., 2d Sess. 2 (1960); S. Rep. No. 1407, 86th Cong., 2d Sess. 3 (1960).

flows.[89] Prior to the decision by the District Court in the Mimbres case, the Special Master had ruled in favor of the Federal Government's reserved rights to instream flows. But he had distinguished instream flows that are upstream from private appropriators. Finding that no private appropriators were upstream from the portions of the river where instream flows were sought, the Master found in favor of instream flows. However, the distinction made should make no difference; instream flows should or should not be valid reserved rights irrespective of their geographical location in respect to private appropriators.[90]

On the one hand, some observers refuse to believe that Congress originally intended Forest Service purposes to include instream flows. Some, even, find it incredible that Congress made an implicit reservation of any water for future uses. On the other hand, some find it hard to believe that Congress could foresee fully appropriated waters threatening the life of fish, game, and stream quality—not to mention the whole natural forest cycle. Perhaps the words of President Theodore Roosevelt, esteemed conservationist, will help soothe the frustration of the latter group: "The man who would so handle his forest as to cause erosion and to injure stream flow must be not only educated, but he must be controlled."[91]

The question of whether special use permits on National Forests are entitled to reserved rights turns on whether the use of water by permittees was an original purpose of the Forest reservation. Stockwater grazing uses are particularly at issue. The Special Master in the *Red River*[92] adjudication concluded that they were not. As a practical matter the only effect of this holding would appear to be that the Forest Service cannot increase its present permittee uses without the permittee appropriating the water under State law. The State Engineer Office has apparently conceded the futility of attempting to adjudicate present permittee water rights.[93]

89. Order Sustaining Objectives and Modifying Findings of Fact and Conclusions of Law of the Special Master's Report, Conclusion of Law, No. 11, *Mimbres Valley, supra* note 72.

90. *But see* Special Master's Report, Conclusion of Law No. 17, *Red River, supra* note 72. *See also* Conclusion of Law No. 16, where the Special Master concluded that the United States had no right to instream flows because that use, "is not a reasonable use within the meaning of the riparian principle of reasonable use." But the question should not turn on types of water law applied, riparian "reasonable" use or appropriative "beneficial" use. Once the court concedes that the federal government has the power to reserve water, the distinction of types of law is irrelevant because where there is a conflict between federal law and state law, federal law should supercede. Rather, the issue is whether the government reserved water rights for that particular use, and to resolve that question the court must determine what the original Forest purposes were, which it did in Conclusion of Law No. 4.

91. Report of the National Conservation Commission of 1909, at 7.

92. Special Master's Report, Conclusion of Law no. 12, *Red River.*

93. Proposed Order Modifying the Master's Report, sent to the District Court by the State Engineer, *Mimbres Valley.* The following appears at pp. 3-4:

Thus it appears that in New Mexico present water rights for grazing uses would be protected; but under State law, not under the implied reservation doctrine. Whether or not these cattle grazing water uses were part of the original purpose of the Forest reservations is a subject of great debate. The Forest Service had assumed that *Arizona v. California* had settled the issue; therein the Court approved the Special Master's finding of original purposes including grazing permittee use. Cattle grazing was an original use of the National Forests, but it would seem that the only water use contemplated was use by cattle directly out of the natural stream or ponds, reminiscent of more pastoral times. The Granger-Thye Act,[94] authorizing special use permits for cattle grazing, was not enacted until 1950. However, a strong argument can be made that grazing was an original purpose, given the Multiple Use–Sustained Yield Act[95] and the legislative reports on its enactment.[96] Given the State's concession that present grazing rights not be adjudicated, the only practical effect is that the Forest cannot reserve future uses for its grazing permittees. But even under appropriative law it would appear that one permittee may transfer the water rights to a subsequent permittee on the same grazing allotment.

The majority of the remaining water uses by special use permittees would undoubtedly be considered as within the original purposes of the National Forests, i.e., recreational, domestic, mineral, milling, etc. Again, the primary issue is "original purpose" of the reservation.

The question of purpose is crucial to the conflict between the reservation doctrine and the appropriative law of New Mexico. If one adheres to the proprietary basis of the reservation doctrine the question is whether the Federal Government actually reserved its proprietary interests for that particular use of the water, that particular purpose. If so, an implied notice was given the subsequent appro-

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> ... With regard to the various uses made by permittees New Mexico would be willing to have the rights arising therefrom adjudicated jointly and severally to the United States and the permittees. As the Court has held, it is our view that the rights are appropriative in nature, but at the same time New Mexico would not want to become involved in a dispute between the United States and its permittees over the ownership of improvements, including water rights, upon the termination of given permits. Accordingly, we would suggest that the rights be given a single appropriative priority. On this point we have no reason to doubt that all such stockwater uses are valid rights vested before 1907, so we would propose adjudicating January, 1907 priority dates to all of them, unless the United States can, within a reasonable time, establish an earlier date of initiation, by affidavit or otherwise.

94. 16 U.S.C. § 580(l) (1965) (corresponds with Act of April 24, 1950, c. 97, § 19, 64 Stat. 88).

95. 16 U.S.C. § 528 (1968).

96. H. Rep. No. 1551; S. Rep. No. 1407, *supra* note 88.

priators and their rights are junior to the Federal Government. If not, their rights are vested under New Mexico appropriative law. However, if one is a proponent of the supremacy basis of the reservation doctrine, then the question is whether the Federal law—such as the Creative Act, the Organic Act, and the Multiple Use Act—is in conflict with the State appropriative law. To resolve this requires an analysis of the purposes of the act. If there is a conflict, the conflict should be resolved in favor of the Federal Government.

In short, the issue is not whether the Government can reserve water for instream flows or special use permits, but whether it in fact did reserve water for instream flows or special use permits. And if so, when? Or in other words, the question of instream flows or any other use of water by the Forest Service should not hinge on whether the State has authorized such use, but on whether the Federal Government, and particularly Congress, has authorized such use. Once that determination is made in favor of the Government, the next issue is whether it is Constitutional under the property clause, supremacy clause, commerce clause, etc.

D. Compensation

Perhaps the foremost problem concerning the reservation doctrine is that of compensation. Professor Trelease has concluded that the reservation doctrine is a financial doctrine, and:

> . . . The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power is that in some cases where the water is taken from persons who have previously put it to use the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more.[97]

A reservation right means that the Government need not compensate for an impaired right junior to the reservation right.

The Forest Service position is a we'll cross that bridge when we get to it stance. The *Forest Service Manual* calls for an analysis of any private rights that might be impaired by proposed Forest plans,[98] and a consideration for the needs of other water users.[99] Some have suggested that the Forest Service is relying on the fact that only one impaired water right has surfaced thus far, that of the *Glenn* case. The underlying rational, however, is that a position which sanctions compensation will lead to a rash of "impaired rights"; a lot of appropriators who do not use their full measure of water presently, will begin to closely safeguard their quantities.

97. Trelease, *NWC Study* at 147*m*.
98. *Forest Service Manual*, at § 2541.14.
99. *Forest Service Manual*, at § 2541.02.

In light of the instream flows problem, suppose that a private appropriator attempts to transfer his point of diversion or location of use to a point which threatens instream flows; this would most likely be the transfer of a use location presently downstream from Forest instream flows, to a use location upstream from Forest instream flows. Under the reservation doctrine, assuming that the private appropriator has a priority date later than the reservation date, the appropriator's right to transfer his point of diversion is negated. Yet he need not be compensated for his loss under the implied reservation doctrine. However the *Forest Service Manual* makes clear that, "The effect of the proposed National Forest System water use on present non-National Forest users who are dependent upon water for their livelihood will be fully considered to ensure that any unnecessary depletion of their existing water use is avoided."[100] There has been no showing that this policy has not been followed in New Mexico.

Most of the recommended legislation at the national level is in support of some type of compensation for vested junior uses that are impaired.[101] One study by Tarlock and Tippy suggests that future large-scale uses will most likely be Congressionally approved and will provide compensation measures.[102] The Wild and Scenic Rivers Act[103] provisions are relied upon to substantiate such an outlook. Perhaps this is a valid assessment of large-scale uses, but what happens to those localized uses that don't "come off the top of a 363 million acre foot tank(?)"[104] The Forest Service regulations provide that each Forest Supervisor is responsible for projected projects on his particular forest, and consequently, projected water uses.[105] The Regional Forester may review or have to approve certain projects that may be controversial or have a substantial regional impact. Rarely does a decision go beyond the regional level to the Washington office. As such, the localized uses do not have the protection envisioned by Tarlock and Tippy.

Another argument that has been made is that the United States Government, "could and should be *estopped* from asserting its superior water rights without paying just compensation for the right taken."[106] (Emphasis added.) The author lists four elements of

100. *Forest Service Manual*, at § 2541.14.

101. Legislation listed at *supra* note 3.

102. Tarlock and Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 Cornell L. Rev. 707 (1970).

103. 16 U.S.C. § 1271-1278 (1970).

104. Trelease, *NWC Study*, at 120.

105. *Forest Service Manual*, at § 1251.04.

106. Note, *Limiting Federal Reserved Water Rights Through the State Courts*, 1972 Utah L. Rev. 48, 56 (1972). *But see* , *Can the Government be Estopped?*, 10 Land &

equitable estoppel and applies them to the implied reservation doctrine. The fourth element cited is that the injured private appropriator, *"must have relied to his detriment upon the actions of the party to be estopped."*[107] The author concludes that a taking of water rights without compensation would be detrimental to the private appropriator.[108] But a court might have to balance the detrimental reliance with the beneficial reliance. A court might well consider the National Forest contribution to watershed management and production, which has allowed more and more water users to construe new ways of putting water to beneficial use. Does the detriment outweigh the benefit? In equity, this writer thinks not. On the other hand, should one man pay for the good of all? Finally, it is seriously doubted whether the United States would be estopped in this type of situation.

Another farfetched possibility might be to utilize the Federal Tort Claims Act[109] in an attempt to recover for property damage. There are at least four problems with its utilization, however. One is that in order to recover under the Act negligence must be shown on the part of a federal employee. Second, the federal employee must have acted within the scope of his employment. Third, an exception is made for those employee actions that are "discretionary" in nature.[110] Fourth, there is a question whether any compensable property injury would exist.

If Forest Service officials fail to consider the needs of other water users, or to ensure that any "unnecessary depletion of their existing water use" is avoided, then these officials are acting at variance with their *Manual*[111] and perhaps negligently. Applicable state law controls as to the elements of actionable negligence. The presence of such Manual provisions may serve to show a duty owed to the non-Forest user; non-compliance is perhaps a breach of that duty. Assuming an injury to property, and that the employees were acting within the scope of their employment, then the requirements of the Act are met. The chances of succeeding on these arguments are practically nil, since the "discretionary actions" exception safeguards any administrative decisions concerning Forest Service water use.

Assuming that it can be shown that Forest Service officials acted within the scope of their employment, acted negligently toward the

Nat. Res. Div. J. (1972); and, United States v. E. W. Savage and Son, 343 F. Supp. 123 (S.D. D.C. 1972).

107. Note, *Limiting Federal Reserved Water Rights Through the State Courts*, at 59.

108. *Id.*

109. 28 U.S.C. § 2671-80 (1969).

110. 28 U.S.C. § 2680 (1969).

111. *Forest Service Manual*, at § 2541.14.

non-Forest user, and that their actions were not discretionary, the final hurdle would be a showing of a compensable property injury. Weil set forth a much-cited statement on property rights in water:

> . . . The substantial property right recognized by the law is the usufruct of the stream—the right to the flow and use of the natural resource, or "water right" in the natural supply, and this is real property, however obtained. A right of access to the natural resource is essential to the enjoyment of this usufruct.[112]

Apparently the New Mexico Supreme Court agrees that a water right is a property right.[113]

Federal rights proponents such as Kiechel[114] have argued that the Federal Government is the owner of the water on its reserved lands. Under appropriative law and the implied reservation doctrine, a non-Forest use has to commence prior to the creation of the reservation in order to be a fully protected right. But that is not to say that the latter right should go unprotected. Both rights should be compensated for; it is the water right that is the property interest. The issue of earlier or later priority should be applicable only in determining the amount of compensation, or damages under some waiver-of-sovereign-immunity act such as the Federal Tort Claims Act.

E. Quantification

The state of New Mexico, like the rest of the Western states, is a proponent of quantification of Federal Government reserved rights. This means that all contemplated uses for the federal reserved lands, such as National Forests, should be evaluated and recorded so that state planners and private parties contemplating investment in water use can rely on those figures.[115]

The Region 3 policy is the general policy outlined in the *Forest Service Manual* and reflective of a recent change made in light of the *Eagle County* decision. The Manual states that:

> . . . In cases where the reservation principle is applicable, the proper State water agency will be notified of current and foreseeable future National Forest system water requirements in a manner to be developed with each State, on a State-by-State basis.[116]

The Forest Service provided the State Engineer Office with the present and projected figures on June 11, 1975.[117]

112. S. Wiel, *Water Rights in the Western States*, § 442 (3rd ed. 1911).
113. Clodfelter v. Reynolds, 68 N.M. 61, 66, 358 P.2d 626, 629 (1961).
114. W. Kiechel, *supra* note 29.
115. PLLRC, *One Third of the Nation's Land*, Recommendation 56, at 156.
116. *Forest Service Manual*, at § 2541.03.
117. Interview with Region 3 Hydrologists, *supra* note 52.

The Region 3 figures tend to support the *de minimus* argument set forth by several federal agencies. Part of that argument is that present and projected Federal uses are so minimal in comparison to private uses that their effect is also minimal. But that argument begs the question. What happens to those private rights that are affected by reservation uses?

The decision in *Eagle County* upon cursory analysis, would seem to be a great boon to the State in allowing it to adjudicate Forest Service uses in accordance with State law under the McCarran Amendment, perhaps forcing the Forest Service to quantify its claims. However the Supreme Court specifically recognized the existence of federal reserved rights under *Arizona v. California,* and allowed for the review of any decision dealing with those rights. In reality then, "any state judicial theory concerning the reservation doctrine that is to survive the appellate process in the United States Supreme Court must at least recognize the existence of the federal government's reserved rights."[118]

At any rate, New Mexico and other states have argued that "by virtue of the McCarran Amendment the United States had waived its immunity, consented to suit in state water rights adjudications, and waived its defense that state law, especially the statutory requirements in adjudication suits, was inapplicable."[119] In the *Mimbres Valley* adjudication, the Special Master and the District Judge approved that argument. The Idaho Supreme Court had reached the same conclusion earlier.[120] That court held that the United States, when made a party to a general adjudication, must quantify all its rights from the source including those based upon the reservation doctrine and intended for future use. The decision was the first from a court of last resort to deal with quantification and to hold that the United States must quantify.

Even if the Forest Service's quantified uses are adjudicated on each State surface-water basin, it is hard to determine what real gain is made thereby. In the *Mimbres Valley* case, the figures provided by the Gila National Forest show a present use of 91.18 acre-feet per year, and a projected additional use of 855.40 acre-feet per year on

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118. Note, *Limiting Federal Reserved Water Rights Through the State Courts,* 1972 Utah L. Rev. 48, 55 (1972). *See also* United States District Court in and for the County of Eagle, 401 U.S. 520, 526 (1971).

119. Memorandum from the State Engineer Office to District Judge Hodges, Proposed Order Modifying the Master's Report, dated March 5, 1976, at p. 4, *Mimbres Valley, supra* note 72.

120. Avondale Irrigation District v. North Idaho Properties, Inc., 96 *Id.* 1, 523 P.2d 818 (1974).

the Mimbres River basin.[121] Even discounting plans for the Noonday Reservoir, stockwater use figures alone show an increase from 74.45 acre-feet to an additional 507.55 acre-feet.[122] Is this abnormal increase, compared to State-wide Forest figures, only coincidental to the fact that this was the first adjudication attempting to quantify Forest Service reserved rights in New Mexico? This writer thinks not. The same type of increase is reflected in the Red River basin figures provided in the *Red River* adjudication.

Perhaps inflated figures wil be resorted to by Forest officials as insurance that sufficient water is retained under the reservation doctrine. Does this promote the most economical and efficient use of water any more than non-quantification? One of the authors of the Public Land Law Review study observed:

> . . . Few persons, I think, could sustain the burden of showing that the Government's estimates of future requirements were unreasonable. If you wanted to start a run on the aspirin market, you would announce that everyone has six months to establish his next forty-year requirement for aspirin. And a federal agency whose activities depend on federal laws and money appropriations subject to change cannot estimate its forty-year requirements any better than you can estimate your forty-year aspirin requirements.[123]

The Department of Justice has proposed federal legislation aimed at quanitfying federal reserved uses.[124] The bill calls for an inventory of all reserved, appropriative, and other water rights, to be prepared by the head of each federal agency within five (5) years after passage of the act. Within six (6) years after passage, the Secretary of the Interior is to submit to each appropriate state authority a single inventory of all Federal water rights within that state, which inventory is to be published in the Federal Register. The inventory is to be updated annually. The bill also provides for judicial review, in the appropriate United States District Court, of the rights listed in the inventories without resorting to general adjudication proceeding. The state or a private appropriator may seek review. Even assuming that the bill would become law in 1976, the inventory of quantified rights would not have to be submitted to the New Mexico State Engineer Office until 1982. The District Judge in the *Mimbres Valley*

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121. Interview with Region 3 Hydrologists, *supra* note 52. The Mimbres River basin is a sub-basin of the Southwestern Closed Basin, a major basin in the extreme southwestern corner of the State.

122. *Id.*

123. Corker, *Federal-State Relations In Water Rights Adjudication and Administration*, 17 Rocky Mt. Mi. L. Inst. 579, 593 (1972).

124. *See* Kiechel, *supra* note 29.

adjudication has ordered that the United States quantify its future needs within one year.[125] It will be interesting to see which inventory is submitted first, if ever—the Department of Justice's Kiechel Bill inventory, or the Mimbres court ordered inventory.

CONCLUSION

The conflict created by the implied reservation doctrine has been heightened by stretching it to its fullest imagined ramifications. Much as the courts proceed on a case-by-case basis, so must the resolution of the reservation doctrine problems proceed. Too much analysis and conclusion has been made through a nationwide or West-wide approach. Perhaps more *ad hoc* analysis is needed for particular states and particular federal reservations.

Certainly a more objective view is required. Admittedly, this writer's view leans toward the federal position. But it started with no particular constituency or clientele to appease. Besides, one tires of reading page after page of pro-state analyses. Ultimately, that "objective view" will have to be provided by the United States Supreme Court. Resolution via Congressional action has been, and will continue to be, met by federal agency resistance, and present executive action is being hotly contested by state agencies.

New Mexico should recognize that Forest Service use is beneficial use, even where there is no diversion. Priority dates should be given as of the date of the reservation and successive but different-type reservation priority dates should be tacked on. The purposes for which the National Forests were created should include: instream flows, permittee use, and those uses included under the revamped "multiple use" concept. Water rights, and priority dates in particular, for acquired lands should be administered under State law. Further, the issue of compensation should be resolved in favor of the non-Forest user because he has a protectable property right in the use of the water. Finally, quantification would not serve to maximize economic water utility and most likely will not limit future reserved rights.

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125. Order Sustaining Objections and Modifying Findings of Fact and Conclusions of Law of the Special Master's Report, Conclusion of Law No. 12, *Mimbres Valley, supra* note 72.