Denver Law Review

Volume 61 | Issue 1 Article 6

February 2021

Water Rights for Expanded Uses on Federal Reservations

Kirk S. Samelson

WATER RIGHTS FOR EXPANDED USES ON FEDERAL RESERVATIONS

KIRK S. SAMELSON*

I. INTRODUCTION

In November of 1982 the Colorado Supreme Court decided *United States v. City and County of Denver*,[1] a leading case in the area of federal reserved water rights. The major issue addressed was the claim of the United States for reserved water rights for national forests and national parks. The Colorado Supreme Court, based on dictum from the United States Supreme Court case of *United States v. New Mexico*,[2] declared that when Congress enlarged the purposes for which national forests are administered through passage of the Multiple-Use Sustained-Yield Act of 1960[3] (MUSYA), it did not implicitly increase the amount of water reserved for national forests.[4] Despite this holding, the Colorado court allowed the United States to acquire additional reserved water rights when lands originally reserved for national forest purposes became part of Rocky Mountain National Park.[5]

The court ruled Rocky Mountain National Park acquired reserved water rights as of the date of creation of the national forest, but these reserved rights were limited to purposes that were common to both forest and park reservations, such as watershed and timber protection. Additional reserved rights were granted for the enlarged purposes of the national park as of the dates the land was reclassified.[6] The court never explained how it could deny increased rights for the enlarged purposes of the MUSYA, but grant them when a reservation is reclassified. This ruling raises a question concerning the treatment of reserved right claims for other reclassified federal reservations, and for reservations affected by a statutorily enlarged purpose. As will be discussed, the courts have two alternatives: deny additional reserved rights as was done when the purposes of the national forests were enlarged by the MUSYA[7] or grant new rights for the enlarged purposes resulting from reclassification as was done in Rocky Mountain National Park.[8] This paper will explore the alternatives from a legal and practical stand-

* B.S., 1973, United States Air Force Academy; J.D., 1977, University of Denver. Attorney at law, Hall & Evans, Denver, Colorado.

1. 656 P.2d 1 (Colo. 1982).

2. 438 U.S. 696 (1978).

3. Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528-531 (1976)) (statute applies to Forest Service lands and directs that the lands be managed so as to ensure multiple use and sustained yield).

4. 656 P.2d at 24-27.

5. *Id.* at 30.

6. *Id.*

7. United States v. New Mexico, 438 U.S. 696 (1978); United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

8. United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

point, and offer a framework for resolving the conflict.[9] Before proceeding, however, it is necessary to have an understanding of the doctrines of prior appropriation and federal reserved water rights.

II. BACKGROUND—FEDERAL RESERVED WATER RIGHTS AND PRIOR APPROPRIATION

In the arid western states, a system of laws developed for the regulation of water usage that was completely alien to the Eastern and English systems of riparian rights.[10] Called the doctrine of prior appropriation, this system provides that available water can be appropriated for a beneficial use by any person.[11] Unlike the riparian system, an appropriator need not own land bordering a stream, and the water right acquired is totally separate from the land. The right to water from a particular stream is determined by priority of appropriation. The holders of the senior, or oldest, water rights are entitled to satisfy their water needs before the holders of junior rights.[12]

A conflict that arose out of application of the prior appropriation doctrine concerned water rights for federal lands. One question concerned whether the United States was bound by state prior appropriation laws affecting federal lands, and if not, how was the United States to acquire water for its federal reservations. A second question raised by the prior appropriation doctrine concerned determination of the priority date for federal water rights. The first case addressing these issues, *Winters v. United States*,[13] involved a conflict over the use of water on Fort Belknap Indian Reservation in Montana. Congress in 1888 reserved the Fort Belknap area as an Indian reservation and simultaneously opened adjacent lands for homesteading.[14] In 1898, after creation of the reservation, the Indians developed an agricultural project requiring 5,000 inches of water per year from the adjacent Milk River.[15] Prior to 1898, but after 1888, the defendants homesteaded on land upstream from the reservation and appropriated 5,000 inches of water from the Milk River under the laws of Montana.[16] The United States, suing on behalf of the Indians, sought to enjoin the defendants from diverting water

9. *See infra* notes 46-57 and accompanying text. A third alternative of backdating priorities is also briefly discussed.

10. Riparian rights can generally be described as the right of a riparian landowner to a reasonable quantity of water from the adjacent stream to supply his needs. In general, this right is appurtenant and cannot be conveyed apart from the land. *See generally* S. CIRCIACY-WANTRUP, W. HUTCHINS, C. MARTZ, S. SATO, & A. STONE, 1 WATERS AND WATER RIGHTS § 16 (1967).

11. *See generally* R. BECK & E. CLYDE, 5 WATERS AND WATER RIGHTS §§ 405-14 (1972) (a discussion of the prior appropriation doctrine).

12. Nine states apply a pure appropriation system. They are Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. Other western states recognize both riparian and appropriation rights, although appropriative rights apply predominately. States that follow this mixed system are California, Nebraska, Kansas, North Dakota, South Dakota, Oklahoma, Oregon, Texas, and Washington. F. TRELEASE, WATER LAW RESOURCE USE AND ENVIRONMENTAL PROTECTION 11 (2d ed. 1974).

13. 207 U.S. 564 (1908).

14. Act of May 1, 1888, ch. 213, 25 Stat. 113.

15. 207 U.S. at 566.

16. *Id.* at 568-69.

from the river because it left the reservation with insufficient water for irrigation.

The United States Supreme Court affirmed the lower court's ruling in favor of the United States and announced the proposition that the Indians acquired the rights to adequate quantities of water for the reservation as of the date when the lands were reserved. Although the 1888 reservation agreement never specifically mentioned water, the Court found that Congress implicitly reserved the water for reservation purposes.[17] Consequently, the Indians' right to the water was held to be senior to any appropriation made pursuant to state law after the reservation was created.[18]

The *Pelton Dam*[19] case clarified the issue of federal reserved water rights for land reserved[20] from the public domain. The Supreme Court held that the United States is not required to follow state laws regarding water appropriation for reserved lands.[21] This holding refuted state claims that Congress had provided for total state control over the use of water.

Arizona v. California,[22] the first case extending the application of the reserved rights doctrine to federal reservations other than Indian reservations, involved reserved right claims for national recreation areas and national forests.[23] The Court extended the reasoning set forth in *Winters* and held that federal reserved rights apply to non-Indian reservations. Because it would have been meaningless for the United States to reserve land from the public domain unless it also reserved sufficient water to accomplish the purposes for which the land was reserved, the Court reasoned that the Government intended to reserve water sufficient for future requirements. Consequently, reserved rights were granted to the Government with priority dates as of the creation of the reservations.[24]

Congress, in 1952, passed the McCarren Amendment,[25] which granted jurisdiction to state courts to adjudicate and administer water rights claimed by the United States. Although arguably under the McCarren Amendment, the United States relinquished its authority to claim reserved water rights, the Supreme Court held the McCarren Amendment was a waiver of sovereign immunity only for purposes of state administration of federal reserved rights.[26] Once the United States claims reserved rights, state courts can administer and quantify those rights. The state courts have no authority, however, over the *creation* of federal reserved rights.

---

17. *Id.* at 575-77.
18. *Id.* at 577.
19. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).
20. Withdrawn land is land owned by the federal government that is withheld from private appropriation and disposal under the public land laws. A withdrawal is usually accomplished by an executive order of the Secretary of the Interior, or an act of Congress. A reservation is a withdrawal for a specific purpose such as an Indian reservation, national forest, or national park. PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 42 n.1 (1970).
21. 349 U.S. at 444-45.
22. 373 U.S. 546 (1963).
23. *Id.* at 601.
24. *Id.* at 595-601.
25. 43 U.S.C. § 666 (1976).
26. United States v. District Court, 401 U.S. 520 (1971).

III. *UNITED STATES V. NEW MEXICO*

United States v. New Mexico[27] halted the Court's trend of enlarging the scope of the federal reserved water rights doctrine. In *New Mexico*, the United States asserted reserved water rights in the Rio Mimbres River for the Gila National Forest. The forest was originally reserved in 1899 under the Organic Administration Act of 1897.[28] The MUSYA, which amended the Organic Administration Act, legislatively expanded the uses for which national forests are administered.[29] In its claim for reserved rights, the United States argued that the MUSYA merely codified the purposes for which national forests were already being administered. As a result, reserved rights for Gila National Forest should be granted for the MUSYA purposes with a priority date of 1899.[30] The Court rejected this argument based on the legislative history of the MUSYA.

The 1897 Organic Administration Act only authorized the creation of national forests for two purposes—timber preservation and enhanced water supply. The MUSYA expanded the purposes of national forests administration beyond these two,[31] therefore there were no reserved water rights with an 1899 priority for the MUSYA purposes. Furthermore, the Court stated that the MUSYA purposes were secondary to the purposes for which the national forests were created. Although the Court acknowledged that Congress intended the national forests to be administered for broader purposes after 1960, they could find no indication that Congress intended to reserve additional water for secondary MUSYA purposes.[32] The Court refused to grant reserved water rights with a 1960 priority date for these secondary purposes. The 1960 priority date was rejected even though the United States made no claims for the 1960 date.[33]

IV. PROGENY OF THE *NEW MEXICO* CASE

Four cases since *New Mexico* have cited it for the proposition that there are no federal reserved water rights for secondary purposes of federal reservations.[34] In three of these cases, however, the citation was dictum to the decision.[35] In *Colville Confederated Tribes v. Walton*,[36] the Ninth Circuit

27. 438 U.S. 696 (1978).

28. 16 U.S.C. §§ 473-482 (1976). 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." *Id.* at § 475.

29. 16 U.S.C. § 528 (1976). The MUSYA declared "[t]hat the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes . . . of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests are established." *Id.*

30. 438 U.S. at 713 n.21.

31. *Id.*

32. *Id.* at 715.

33. *Id.* at 713.

34. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 51 U.S.L.W. 5095 (1983); Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981); United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

35. San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 51 U.S.L.W.

determined the amount of reserved water available for the Colville Indian Reservation in Washington. The court quoted the *New Mexico* Court's denial of reserved rights for secondary purposes, but then proceeded to define broadly the primary purposes of the Colville Reservation. Because historically the Indian tribes relied heavily on fishing and farming for their subsistence, the Ninth Circuit found implicit in the reservation sufficient reserved water to satisfy these historical uses. Secondary purposes were not mentioned further.[37]

Sierra Club v. Watt[38] also cited the *New Mexico* prohibition against granting reserved water rights for secondary purposes on federal reservations. The issue was not, however, addressed fully. The land in question was in the public domain and not reserved or withdrawn land; therefore, there were no reserved water rights associated with those parcels.[39] Another reference to the secondary purpose prohibition occurred in *San Carlos Apache Tribe v. Arizona*.[40] The primary issue in *San Carlos* was whether state or federal courts had jurisdiction over Indian reserved water rights. Aside from stating the secondary purpose limitation, the doctrine was not mentioned.

V. *UNITED STATES V. CITY AND COUNTY OF DENVER*

The Colorado Supreme Court, in *United States v. City and County of Denver*,[41] addressed the issue of federal reserved water rights for many federal reservations within the state. One of the government's assertions in the case was a claim of federal reserved water rights for the purposes of recreation and wildlife conservation in seven national forests with a priority date of 1960 based on the MUSYA.[42] In rejecting the government's claim, the court abided by the Supreme Court's statement in *New Mexico* that the MUSYA was not a reservation of any additional water rights for national forests.[43] Although the statement may have been dictum,[44] the Colorado court indicated it was bound by the ruling.[45]

The *Denver* ruling indicates that when the purposes of a federal reservation are changed to allow for broader administration, for example, outdoor recreation, range, timber, watershed, wildlife and fish purposes, additional federal reserved water rights will not be granted to accommodate the expanded purposes. The difficulty with the *Denver* holding is that the opinion contradicts itself; after ruling that no additional water rights will be granted for national forests as a result of MUSYA, the court granted additional reserved water rights for Rocky Mountain National Park based on the park's

5095 (1983); Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

36. 647 F.2d 42 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).
37. *Id.* at 47-48.
38. 659 F.2d 203 (D.C. Cir. 1981).
39. *Id.* at 206.
40. 668 F.2d 1093 (9th Cir. 1982), *rev'd*, 51 U.S.L.W. 5095 (1983).
41. 656 P.2d 1 (Colo. 1982).
42. *Id.* at 24.
43. 438 U.S. 696, 715 (1978).
44. *Id.* at 718 n.1.
45. 656 P.2d at 24.

change in designation from a national forest to a national park.[46] The court reasoned that the simple reclassification of national forest lands to national park status did not rescind the national forest timber and watershed protection purposes for which the lands were originally reserved; therefore, the government was granted reserved water rights with a priority date of 1897 for national forest purposes. For national park purposes, however, the reserved rights were granted with a priority date as of the park's creation.[47] Thus, the court allowed expanded water rights when the classification of a reservation was changed from national forest to national park, but not when the purposes for administration of national forests was enlarged statutorily as under the MUSYA.

The question then is: where do other federal reservations, whose classification has been changed or purposes enlarged, stand with regard to reserved water rights? The courts have three alternatives: grant no additional reserved water rights using the *New Mexico* rationale, grant additional reserved rights for the enlarged purposes as of the date the purposes are expanded using the *Denver* logic, or grant additional water rights with a priority backdated to the creation of the original reservation as with the Lake Mead National Recreation Area.[48]

There are areas such as Zion National Park,[49] Capital Reef National Park,[50] and Arches National Park[51] that were changed in designation from national monuments to national parks where the issue of reserved rights is not settled. National monuments were created in accordance with the American Antiquities Preservation Act of 1906,[52] for the purpose of preserving areas of historic and scientific interest.[53] The National Park Service Act of 1916[54] brought national monuments into the national park system.[55] The purposes of national parks, which include recreation and conservation of scenery, natural objects and wildlife, are much broader than the purposes of monuments.[56] Arguably, the National Park Service Act modifies the Antiq-

46. *Id.* at 30.

47. *Id.*

48. Arizona v. California, 373 U.S. 546 (1963). The Court awarded reserved rights to the Lake Mead Recreation Area based on 1929 and 1930 general withdrawals, even though the express purposes of the area were not stated until 1964. Op. Solic. Dep't of Interior, 86 Interior Dec. 553, 600 (1979).

49. Act of Nov. 19, 1919, ch. 110, § 1, 41 Stat. 356 (codified at 16 U.S.C. § 344 (1976)).

50. Act of Dec. 18, 1971, Pub. L. No. 92-207, 85 Stat. 739 (codified at 16 U.S.C. § 273 (1976)).

51. Act of Nov. 12, 1971, Pub. L. No. 92-155, 85 Stat. 422 (codified at 16 U.S.C. § 272 (1976)).

52. Pub. L. No. 209, 34 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-458 (1976 & Supp. V 1981)).

53. The Antiquities Act states in part: "The President . . . is authorized . . . to declare . . . historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest . . . to be national monuments. . . ." *Id.* at § 431.

54. Pub. L. No. 64-235, 39 Stat. 535 (codified as amended in scattered sections of 16 U.S.C.)

55. *Id.* at § 2 (codified as amended at 16 U.S.C. § 1 (1976)).

56. The National Park Service Act directs that:

> the [s]ervice . . . shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for

uities Act to enlarge the purposes of national monuments to coincide with those of national parks. The United States made this assertion in *Denver* for Dinosaur National Monument, but it was rejected by the Colorado Supreme Court. The court held that the National Park Service Act of 1916 did not eliminate the distinction between parks and monuments, but simply included monuments in the National Park System to provide for administration and management by the National Park Service rather than the Forest Service.[57]

Accepting this interpretation of the National Park Service Act there are still three possible outcomes for reserved water rights in an area such as Zion National Park. Zion National Park was originally reserved in 1909 as a national monument.[58] The area was redesignated as a national park in 1919.[59] Following the rationale of *New Mexico*, no increased water rights should be granted with a 1919 priority date, and only that water necessary for a national monument would be reserved with a priority date of 1909. Using the *Arizona v. California* logic, Zion National Park would have enough reserved water appropriate for a national park with a priority backdated to 1909. If the *Denver*, Rocky Mountain National Park reasoning is applied, reserved rights would be granted for monument purposes with a 1909 priority and additional reserved rights for national park purposes would be granted with a 1919 priority. No court, since *Arizona v. California*, has backdated the priority for reserved water rights for federal reservations; therefore, this concept seems to carry little weight. It is necessary to explore the rationale of *New Mexico* and *Denver* to determine which of the two remaining alternatives is most consistent with congressional intent.

VI. REASONING BEHIND *NEW MEXICO* AND *DENVER*

The United States Supreme Court,[60] and subsequently, the Colorado Supreme Court,[61] based their rulings that MUSYA did not create new federal reserved water rights on an interpretation of one sentence in MUSYA: "The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title."[62] Because of this wording, the Court concluded the purposes established by the MUSYA were secondary to the purposes for which the national forests were created, and therefore, no additional water was reserved for those purposes. The Court in *New Mexico* quoted a MUSYA House Report as support for its conclusion that the MUSYA purposes were supplemental to the national

> the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Id.

57. 656 P.2d at 28.

58. Zion National Monument was reserved by Presidential Proclamation *reprinted in* 36 Stat. 2498 under the authority of the American Antiquities Act, Pub. L. No. 209, 343 Stat. 225 (1906) (codified as amended at 16 U.S.C. §§ 431-458 (1976 & Supp. V 1981)).

59. Act of Nov. 19, 1919, ch. 110, § 1, 41 Stat. 356 (codified at 16 U.S.C. § 344 (1976)).

60. United States v. New Mexico, 438 U.S. 696, 702, 713-15 (1978).

61. United States v. City and County of Denver, 656 P.2d at 26.

62. 16 U.S.C. § 528 (1976).

forest purposes of timber and watershed protection.[63] The Court failed, however, to include the next sentence of the House Report, "It is also clear that the Secretary of Agriculture shall administer the national forests for all of their renewable natural resources, and none of these resources is given a statutory priority over the others." This negates the interpretation that the MUSYA purposes are secondary to those enumerated in the Organic Act.[64] Whereas the Court implies the statute's wording that "the purposes . . . are supplemental to, but not in derogation of, the purposes for which the national forests were established. . . ."[65] gives the purposes of MUSYA secondary characteristics, an investigation into the definitions of "supplemental" and "derogation" gives a different result. Supplemental means an addition "to supply a deficiency or defect."[66] Derogation is defined as a "nullification, avoidance, or abrogation, in whole or in part, as a statute nullifying common law rights."[67] The plain meaning of the statute places the MUSYA purpose on equal footing with the purposes of the 1897 Act because the MUSYA was added to correct a defect, but not to nullify the purposes for which national forests were established.

The House Report further supports the conclusion that MUSYA purposes are not secondary in its statement of priority of resource use. Congress did not give the purposes of the 1897 Act priority over the MUSYA purposes.[68]

Another interpretation of the MUSYA given by both the United States and Colorado Supreme Courts is that the MUSYA expanded the purposes for which the national forests are administered but did not expand the reserved water rights of the national forests for the enlarged purposes.[69] The

63. United States v. New Mexico, 438 U.S. at 714. The House Report contains the following language:

> The addition of the sentence to follow the first sentence in section 1 is to make it clear that the declaration of congressional policy that the national forests are established and shall be administered for the purposes enumerated is supplemental to, but is not in derogation of, the purposes of improving and protecting the forest or for securing favorable conditions of water flow and to furnish a continuous supply of timber as set out in the cited provision of the act of June 4, 1897. Thus, in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in the bill. In other words, a national forest would not be established just for the purpose of outdoor recreation, range, or wildlife and fish purposes, but such purposes could be a reason for the establishment of the forest if there also were one or more of the purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.

H.R. REP. NO. 1551, 86th Cong., 2d Sess. 4, *reprinted in* 1960 U.S. CODE CONG. & AD. NEWS 2380 [hereinafter cited as H.R. REP. NO. 1551].

64. *Id.*

65. 16 U.S.C. § 528 (1976).

66. BALLENTINE'S LAW DICTIONARY 1241 (3d ed. 1969).

67. *Id.* at 340.

68. The House Report indicates that:

> In practice, the priority of resource use will vary locality by locality and case by case. In one locality timber use might dominate; in another locality use of the range by domestic livestock in another outdoor recreation or wildlife might dominate. . . . One of the basic concepts of multiple use is that all of the named resources in general are of equal priority. . . .

H.R. REP. NO. 1551 at 2379, 2382.

69. United States v. New Mexico, 438 U.S. 696, 713 (1978); United States v. City and County of Denver, 656 P.2d 1, 26 (Colo. 1982).

counter argument to this is a practical one. How can the national forests be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes if the water to sustain these uses is not made available? The courts have recognized the purposes, but have not given the Forest Service the tools to carry out these purposes.

The final rationale used by the courts to justify the denial of additional reserved water rights based on MUSYA is that increasing federal reserved rights reduces the amount of water available to satisfy long-held, adjudicated water rights, especially in fully-appropriated streams.[70] There are two answers to this contention: 1) long-held rights would not be affected if the additional reserved waters were given a priority date of 1960, and 2) in the past, the courts have not been reluctant to grant federal reserved water rights even when adjudicated water rights are affected adversely. If the national forests are granted reserved rights with a 1960 priority date for the purposes enunciated in MUSYA, it is doubtful that any owners of adjudicated water rights would be affected. All of the purposes stated in MUSYA contemplate in-stream use meaning that the water would be available for appropriation once it left the national forest. The only persons possibly affected would be owners of water rights with a priority date after 1960 who diverted their water from within the national forest. Thus, the most logical alternative, when a federal reservation changes designation to allow for increased purposes is to follow the Colorado Supreme Court's decision for Rocky Mountain National Park and allow additional reserved water rights with a priority date as of the change of designation.

VII. CONCLUSION

The dissent in *United States v. New Mexico* asserted that the ruling denying additional reserved water rights for national forests with a 1960 priority date was dictum.[71] The Colorado Supreme Court was of the opinion that that ruling was binding even if dictum. The issue concerning additional water for national forests based on MUSYA may never reach the Supreme Court again, however, there are other federal reservations such as Zion, Arches, and Capital Reef National Parks with analogous backgrounds concerning water rights that have yet to be heard in court. There are many legal and practical reasons to grant those areas additional water as of the date their designation of use changed. As the New Mexico Supreme Court said in *Mimbres Valley Irrigation Co. v. Salopek*,[72] the case that became *United States v. New Mexico*,

> We are aware of the advancing environmental and aesthetic concerns related to the use of our natural resources. Had the congressional enactments and their interpretations by the Supreme Court given us leeway so as to interpret more broadly the intent of the Creative and Organic Acts we may have been persuaded to decide

70. United States v. New Mexico, 438 U.S. at 705, 715; United States v. City and County of Denver, 656 P.2d at 26.

71. United States v. New Mexico, 438 U.S. at 718 n.1.

72. 90 N.M. 410, 564 P.2d 615, *aff'd sub. nom* United States v. New Mexico, 438 U.S. 696 (1977).

differently.[73]

Hopefully, the courts in the future will realize that the leeway to grant additional water for federal reservations with expanded purposes exists. The expansion of the purposes of federal reservations has a primary or secondary impact of protecting the environment. By granting additional water for these environmental purposes, the courts will help preserve our natural resources for future generations.

73. *Id.* at 414, 564 P.2d at 619.