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NO WATER FOR THE WOODS: A CRITICAL ANALYSIS OF UNITED STATES V. NEW MEXICO

SALLY K. FAIRFAX* and A. DAN TARLOCK**
I. INTRODUCTION

In the West, the availability of water determines the value of land. The law of prior appropriation was developed to encourage private and public entities to acquire and exercise rights to use water on riparian and non-riparian land. In return for this extensive privilege of capture, the holder of a water right is expected to act as a rational economic maximizer, as defined by the custom of the region. A vested water right depends on the continuous application of water to a beneficial use.1 If the use ceases or is excessively wasteful, the right is lost or reduced in quantity, and the water is thus made available to other, presumably more efficient, users.2 Those familiar with western water law are aware of substantial qualifications to each of these statements, but the qualifications do not diminish the power of these generalizations to establish the background for the problem with which this article is concerned. That problem is the tension between the states' power to determine how western waters and lands will be allocated among competing uses and the federal government's rights to preempt, at least partially, state allocations. The tension between state-based and potentially inconsistent federal allocations arises out of the federal government's reserved rights claims under the Property and Supremacy Clauses of the federal constitution. State water law is vitally concerned with changing land use patterns and the impact of

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1. “The right is a practical one. It is not a personal right or an incident of land ownership to be exercised at will; for if the water is not used, the right never comes into existence; and if it is once used, the right can be lost if the use is discontinued.” MAXIFIELD, DIETERICH & TRELSEE, NATURAL RESOURCES ON INDIAN LANDS 209 (1977).

these changes on the allocation of the state's waters.\textsuperscript{3} Despite the Supreme Court's recognition of federal rights for over three quarters of a century, western states have always been surprised when the largest land holder in the West, the federal government, acts rationally and seeks to apply water arising on public lands to enhance the use of lands it owns. The surprise and anger of the western states at the federal government's assertion of appurtenant water rights has found its way into the results and reasoning of two important 1978 Supreme Court decisions dealing with federal-state water conflicts, \textit{California v. United States}\textsuperscript{4} and \textit{United States v. New Mexico}.\textsuperscript{5}

\textit{United States v. New Mexico} is the first Supreme Court opinion to confront directly the question of when a federal land management agency may assert the implied intent of Congress to reserve appurtenant water rights when public land is withdrawn from entry. In a five to four decision, the Supreme Court held that the Forest Service could not claim reserved rights for the preservation of instream flows as well as for recreation and stockwatering. At issue was the implied intent of Congress in passing the 1891 Creative Act\textsuperscript{6} and the 1897 Organic Administration Act.\textsuperscript{7} Mr. Justice Rehnquist, writing for the majority, followed conventional historical wisdom in the assertion that both acts exclude aesthetic and environmental considerations from forest reserve management. Thus, the Court concluded that the reservation of water for instream flow preservation and recreation was not intended by Congress in 1891 and 1897 because such uses were inconsistent with the original purpose of the forest reserves. A similar analysis was made of the stockwatering claim.

This article examines the implications of \textit{United States v. New Mexico} and the likelihood of future federal-state water conflicts arising out of reserved right claims by federal land managers. We urge an alternative reading of the legislative history and a different approach to reserved rights problems. Our reading of the background of the two acts and other relevant legislation convinces us that the

\begin{itemize}
  \item \textsuperscript{3} See, e.g., United Plainsmen Ass'n v. North Dakota Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976) which holds that the "public trust" imposed on the state's waters requires the consideration of the impact of coal production-related appropriations on future water needs.
  \item \textsuperscript{4} \textit{--- U.S. ---}, 98 S.Ct. 2985 (1978).
  \item \textsuperscript{5} \textit{--- U.S. ---}, 98 S.Ct. 3012 (1978).
  \item \textsuperscript{6} 16 U.S.C. § 471 (1976) [hereinafter cited as the 1891 Act]. Although generally called the "Creative Act" in Forest Service usage, the provision was actually passed as the twenty fourth of twenty four sections in the General Land Law Revisions of 1891. 26 Stat. 1095, 1103 (1891).
  \item \textsuperscript{7} 16 U.S.C. §§ 473 et seq. (1976). The "Organic Act" was passed as an amendment to an appropriations bill. 30 Stat. 11 (1897).
\end{itemize}
1891 Act authorizing forest reservations was intended simply to preserve the forests. The early forest reserves were conceptually and administratively indistinguishable from early park reservations. The 1897 Act altered the 1891 concept only to the extent that it authorized the secretary to regulate permitted uses consistent with the primary purpose of the forest reservations. Seen in this light, the Court's construction of the two acts is arguably wrong because the reservation of water for instream uses is consistent with the original purpose of the reserves.

Part II of the article traces the evolution of state claims to exclusive control of western waters. Part III sketches the belated recognition of federal claims and their impact on state allocation systems. Part IV analyzes United States v. New Mexico, and Part V presents an alternative reading of the legislative history. Part VI concludes the article with an analysis of the impact of the decision for federal land managers and permittees.

II. THE "STATES RIGHTS" ARGUMENT

A. Historical Roots of the Expectation of State Control

Western states have always been acutely aware that the federal government's ownership of the public domain is the source of all land and water titles. The law of prior appropriation was developed on the assumption, which turned out to be wrong, that federal land ownership would be temporary and that in the interim, pending disposal, the federal government would claim no water rights as a riparian landowner. This was a reasonable assumption during the formative period of western water law, 1850-1890. The principal federal interests in the public domain were initially fiscal and, later, redistributive. The public domain was seen as an asset to be disposed of, first to retire the revolutionary war debt, and later to encourage settlement and "internal improvements" through land grants to states, corporations and homesteaders.

On the expectation that the federal government would eventually dispose of all the public domain, the states developed theories of state sovereignty over waters arising on the public domain. The states first tentatively asserted that the federal government had acquiesced in state-created water rights before the federal government or a federal patentee asserted any interest in waters arising on the public domain. Then, they boldly asserted that the federal government had ceded all power to allocate western waters to the states by severing the waters from the land it retained. Through this line of reasoning, the western states were able to argue that the United States had no interest, apart from navigation protection,

8. The leading historians are P. Gates, History of Public Land Law Development (1968); B. Hibbard, A History of the Public Land Policies (1924); R. Robbins, Our Landed Heritage (1942).
in western waters. Many state constitutions asserted "ownership" of the waters within their boundaries, but the states were never clear whether ownership meant proprietary ownership or whether the term was used merely as a shorthand way of asserting the state's police power over resources within its jurisdiction.

State theories of exclusive sovereignty based on a federal cession of interest were necessary in order to eliminate the possibility of the subsequent assertion of latent federal rights. The federal government owns the public domain both as a proprietor and as a sovereign. This dual ownership makes the federal government both an ordinary landowner and one with the power to assert superior property rights against those claiming under an inferior sovereign. As a landowner, the Property Clause of the federal constitution entitles the federal government to use a share of navigable and non-navigable waters arising on the public domain. As a superior sovereign, the Supremacy Clause entitles the federal government to have its needs satisfied before others can use the water. The exercise of both clauses is required to explain the doctrine in the West. The Property Clause explains why the federal government owns rights superior to some state rights, for unless the federal government owned something, the Supremacy Clause alone only allows the federal government to expropriate state-created rights after paying just compensation. The Supremacy Clause explains only why there is no balancing of federal and state interests in determining the scope of federal reserved rights. In short, reserved rights are riparian rights plus.

Because the federal government had the power to establish a federal law of water rights, the great western resource guardians,

9. One of the best summaries of the states' arguments is Note, Control of Western Waters, 60 COLUM. L. REV. 967 (1960).
12. Of course, the United States, with respect to the lands owned by it throughout the western territories, has a status at least equal to that of a riparian proprietor of private lands. In other words, the only pre-existing body of water rights from which the United States can carve out and reserve when it sets aside land for a specific use are the riparian rights created by the common law upon its extension to the western territories.
13. Dean Trelease argues that the Supremacy Clause not the Property Clause is the correct constitutional basis of the reserved rights doctrine. "Reserved rights stem from the supremacy clause and the need for water to carry out federal functions." F. Trelease, Federal-State Relations in Water Law, NATIONAL WATER COMMISSION STUDY NO. 5 at 147 (1971). Under the Trelease theory, reserved rights are not limited to Desert Land Act states because any reservation of land is a potential notice of intent to appropriate. Support for this theory can be found in Cappaert v. United States, 426 U.S. 128 (1976), which refused to apply a balance of convenience doctrine to
such as Mr. Justice Field and Samuel Weil, always recognized that state arguments, maintaining western waters were free from federal rights, were wrong. Mr. Justice Field realized that at some future time the federal government might assert its rights, and he sought to accommodate the law of state claims—built on custom alone—with federal claims by legitimating what had taken place in order to foreclose the retroactive assertion of federal claims. Not only did the federal government adopt this approach but it waited until long after the state-created law of prior appropriation had taken root to assert its interests. The expectation of non-retroactive assertion ripened into one of non-prospective assertion as well. Despite the familiar doctrine that the sovereign cannot be estopped to assert its powers, the federal government's prior inaction in asserting it claims makes it politically—and legally—painful to achieve a current accommodation, as President Carter discovered after the initial drafts of his 1977 water policy were released. Although the accommodation

the federal government once a congressional intent to reserve a sufficient quantity of water to carry out the purpose of the reservation was established. Professor E. Hanks strongly argues that Dean Trelease is wrong because the federal government's power to displace state created rights in Desert Land Act states depends on a theory of federal ownership of something. In brief, her argument is that (1) in the West the federal government does in fact "own" something in trust for the public, (2) this "ownership" is a source of power to displace subsequent state-created rights in Desert Land Acts states, and (3) of course the United States can acquire water in non-Desert Land Act states, but the Supremacy Clause analysis alone does not answer the hard question: must the federal government pay when state-created rights are displaced? E. HANKS, FEDERAL STATE RIGHTS AND RELATIONS, 2 WATERS AND WATER RIGHTS § 102.1 (R. Clark ed. Supp. 1978).


15. A recent and perceptive evaluation of Mr. Justice Field's contribution to the development of natural resources while sitting as a justice of the California Supreme Court is McCurdy, Stephen J. Field and Public Land Law Development in California, 1850-66: A Case Study of Judicial Resource Allocation in Nineteenth Century America, 10 L. & Soc'y REV. 235 (1975). McCurdy argues that Field aggressively and imaginatively applied local customs to potentially federal claims and "effectively brought federal land-use policy into the realm of private, and in some instances constitutional law." Id. at 264. Field's genius lay in his constant recognition that California decisions fashioning a law from the "de facto delegation of federal authority" would ultimately have to be validated by the federal government." History proved Mr. Justice Field correct for the Mining Act of 1866, discussed infra at notes 21 to 27 did this.

In Boggs v. Merced, 14 Cal. 374 (1861), Mr. Justice Field decided a conflict between a lessee of John C. Freemont, claiming under a federal patent confirming a Mexican land grant, and one who simply entered and began mining. For the price of $50,000.00, it is alleged [C. SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 86 (1969 ed.)] Field held for Biddle Boggs on the ground that the federal government owned the minerals and could dispose of them. To the Merced Mining Company's argument that federal forebearance amounted to a license to grab, he answered that "the supposed license from the federal government, then to work the mines on the public lands, consists in its simple forebearance. Any other license is a mere assertion, and is untrue in fact and unwarranted in law."
of federal and state interests must take place against the long history of federal deference to state water law and the expectations which have grown up around its desuetude, some accommodations must be made to allow the federal government to fulfill its trusteeship of the retained public lands. To determine the constraints which control any accommodation, it is necessary to consider the states' argument that they are free from federal rights.

B. A Faulty Constitutional Theory Seemingly Confirmed by Waiver

The argument that the federal government could have established a federal water law does not establish the superiority of federal claims, for the states have long maintained that any federal rights have been waived. The states make both a general and a specific waiver argument. They argue, for example, that they acquired exclusive sovereignty and proprietary ownership under the equal footing doctrine. This argument is faulty for two reasons. First, the original states did not own their waters in a proprietary sense, and second, the equal footing doctrine guarantees only political, not economic, equality. Nevertheless, although the equal footing doctrine as a basis for state sovereignty is now discredited, it continues to echo in modern opinions. In California v. United States, Mr. Justice Rehnquist quoted the Holmes dictum, "[t]he life of the law is not logic but experience," and began his discussion of the background of federal-state relations, observing with obvious approval "One school of legal commentators held the view that, under the equal footing doctrine, the western states, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams."

The stronger states rights argument is that three acts from 1866 to 1877 constitute a specific waiver of any federal claims. The strongest basis for this specific waiver is the Mining Act of 1866, which provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested or accrued, and the same acknowledged by local customs, laws, and the decision of local courts, the possessors

16. Equal footing doctrine provides that new states are admitted to the Union with the same political rights as existing states.
18. E. Morreale (now Hanks), Federal-State Rights and Relations § 102.6 WATERS AND WATER RIGHTS (R. Clark, ed. 1967).
19. ___ U.S. ___, 98 S.Ct. 2985, 2987 (quoting O. HOLMES, THE COMMON LAW 1 (1881)). Mr. Justice Rehnquist went on to observe "so it may be said that the life of law is not political philosophy but experience." Id.
20. Id. at 2990.
and owners of such vested rights shall be maintained and protected
in the same.\textsuperscript{22} The legislative history of the Act of 1866 is scant, but
its purpose seems limited to assuring protection to claims based on
the actual application of water to a beneficial use prior to 1866.\textsuperscript{23} Such an act was necessary because the federal government did not
assert its rights to the public domain during the Civil War, although
in theory all miners and other water users were simply trespassers
on the public domain.\textsuperscript{24} The Act of 1866 was probably designed to do
no more than carry forward the traditional public domain policy of
confirming squatters rights after the fact, and the leading Supreme
Court decisions interpreting the Act treat it as confirming rights
vested prior to 1866 rather than as renouncing all future federal
rights.\textsuperscript{25}

This legislation validated the accommodation between the
theoretical claims of the federal government as landowner and the
mounting expectations of miners, ranchers and the new states
whose economy was based on these expectations and worked out by
Mr. Justice Field while sitting on the California Supreme Court.
Subsequent legislation enacted in 1870\textsuperscript{26} and 1877\textsuperscript{27} did little
more than reaffirm the 1866 solution to those who had entered the
public domain to grab and prosper. The Desert Land Act of 1877\textsuperscript{28}
does contain broader language which has been interpreted by the

\textsuperscript{22} Id.

\textsuperscript{23} A recent article reviewing the legislative history of the Act of 1866 and two
subsequent acts concludes that what evidence is available indicates that Congress in-
tended no blanket severance of whatever rights the federal government owned, and
that the extent of state control over federal waters contemplated by the acts is
unclear because the issue was never addressed. Grow & Stewart, \textit{The Winters Doc-
trine as Federal Common Law}, 10 NAT. RESOURCES LAW. 457 (1977) [hereinafter cited
as Grow & Stewart].

\textsuperscript{24} The great Samuel Wiel stated that the Act of 1866 was “not a formal
grant” but rather “a declaration that the courts and the people had been correct in
spite of the fact . . .” that the federal government had a superior claim.

\textsuperscript{25} The Court first enforced the law of prior appropriation between conflicting
appropriators in Atchison v. Peterson, 87 U.S. 507 (1874); Basey v. Gallagher, 87 U.S.
670 (1874); Jennison v. Kirk, 98 U.S. 453 (1878). In 1879, the Court applied the Act to
uphold the claim of a prior appropriator, claiming under state law, against a subse-
quent federal patentee. Mr. Justice Miller explained: “We are of the opinion that the
section of the act . . . was rather a voluntary recognition of a pre-existing right of
possession, constituting a valid claim to its continued use, than the establishment of a
new one.” Broder v. Water Co., 101 U.S. 274, 276 (1879). These cases do no more than
adopt what has become known as the California theory of appropriation. The California
to recognize, however, the power of the federal government to assert rights against
future claimants.

\textsuperscript{26} Act of July 9, 1870, ch. 235, 16 Stat. 217 (1879).

\textsuperscript{27} Desert Land Act, ch. 197, 19 Stat. 377 (1877).

\textsuperscript{28} Id.
Supreme Court as a blanket severance. An analysis of the legislative history of the 1877 Act, which the court has never made, indicates, however, that the new language was intended only to reaffirm the 1866 legislation and to insure that early Desert Land Act patentees did not monopolize available supplies of water to the exclusion of future entrants. Thus, the severance theory rests on the strength of the Act of 1866 and fails because the federal government never relinquished all assertable rights over its water resources.

III. FEDERAL CLAIMS ARISE

A. The Origin of the Reserved Rights Doctrine

Not until after the states developed a complete system of water rights based on the assumption that no federal interest would ever be asserted in water allocation did the federal government begin to assert consumptive use claims in non-navigable waters. In the 1890's, the federal government changed its public domain policy from disposal with selective retention to widespread retention. The consequences for state water rights of this shift in public domain policy was not immediately appreciated by the states, because it was not immediately reflected in water law doctrines. The Supreme Court, however, hinted as early as 1899 that there was no blanket severance in U.S. v. Rio Grande Irrigation Company. In that case, the federal government sued to enjoin the construction of a dam on a non-navigable reach of the subsequently navigable Rio Grande River in New Mexico. The Supreme Court held that the United States had the power to protect the navigable capacity of rivers by prohibiting upstream impoundments which threatened downstream navigability. This holding was a significant, but not unexpected, extension of federal commerce power jurisdiction which had been steadily expanded inland from tidal waters. What was more significant for the Far West was the Court's suggestion that the Property Clause was an alternative ground for the federal government's...
power. Nevertheless, the federal power to allocate western waters to federal claimants under the property power was not clearly announced by the Supreme Court until United States v. Winters in 1908.

Federal reserved water rights were first recognized to benefit Indian tribes confined to reservations. Non-Indians claims were not confirmed until 1963. The sequence of recognition has made accommodation even more difficult because Indian claims are an arguably special and limited case of federal government trusteeship duties and treaty obligations and thus rest on grounds apart from ownership of the public domain. The broad impact of the Supreme Court’s opinion in Winters was thus not immediately appreciated with the result that the limitation on title claims of the states grew stronger.

In U.S. v. Winters, the Supreme Court held that the federal government had the power to reserve water for the benefit of an Indian tribe confined to a reservation by treaty. The issue was whether an Indian reservation created by an 1888 treaty could claim water rights which prevail over actual diversions perfected under Montana law prior to the time the Indians, through the United States, claimed the right to divert the stream. The state appropriators argued that no rights could be reserved to the Indians because federal rights would be inconsistent with Montana’s entry into the Union on an equal footing with the eastern states where the federal government held little land. The Court brushed aside the equal footing argument and merged the question of the power to reserve into the question of whether there had been an intent to reserve. Emphasizing that the purpose of the creation of the reservation was to civilize the nomadic people, the Court concluded that "it would be extreme to believe that within a year [Montana entered the Union in 1899] Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste . . . ."33

Given the history of United States Indian policy, it was not surprising that the states did not immediately appreciate the broader significance of Winters, although the assertion of a federal interest in the public domain continued in related areas. For example, between 1928 and 1935, the Court held that federal rather than state law governed title disputes between the states and the federal

32. 207 U.S. 564 (1908).
33. Id. at 577.
34. The Winters decision implemented the policy of the General Allotment Act of 1887, Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388 (codified in scattered sections of 25 U.S.C.), to civilize the Indians by acculturating them “in the white tradition, individualism was to supplant communal ways and farming was to be substitute for hunting.” Chambers & Rice, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan. L. Rev. 1061, 1071 (1974).
Still the states and their respective patentees seemed secure in their belief of state "ownership," for the severance theory received Supreme Court approval in 1935 in the unanimous opinion by Utah-bred Mr. Justice Sutherland. The full force of the severance theory announced in *California Oregon Power Co. v. Portland Beaver Cement Co.* lived for twenty years, and reserved rights were thought to be confined to Indian reservations until 1955 when the Court decided *FPC v. Oregon.* The issue in *FPC v. Oregon* was whether the Federal Power Commission could assert regulatory jurisdiction over a dam on a non-navigable river running through withdrawn land and an Indian reservation. Oregon tried to prevent construction of the dam to protect salmon runs on the ground that the state "owned" the water. The Court, however, held that the FPC had jurisdiction, in part, on the ground that the states did not "own" the water because the three acts said to constitute a severance did not apply to withdrawn lands. No federal property claims were involved, and some commentators have therefore tried to explain the holding as nothing more than an "allocation of power" case. The clear implication of the opinion was, however, that there was no blanket severance, the government owned something, and reserved rights therefore extended to non-Indian lands. This reading was confirmed in *Arizona v. California.* With negligible analysis, the Court adopted the special Master's recommendation and extended *Winters* to non-Indian public lands.

Two important United States Supreme Court cases in 1971 and one in 1976 interpreted the McCarren Amendment, holding that federal agency and Indian rights may be adjudicated in state court


37. *Id.*


proceedings provided the state has a general adjudication statute, but confirmed the federal government's power to reserve water without further amplifying the basis of the doctrine. Finally, in 1976, the Court attempted a synthesis of the doctrine which treated the existence of federal reserved rights on non-Indian lands as beyond dispute. In Cappaert v. United States, Mr. Chief Justice Burger explained the doctrine as follows:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.

Despite the certainty of Cappaert, the Court has never satisfactorily justified the application of the doctrine to non-Indian lands, and it has left two important technical problems unanswered. First, the Court has never clearly explained how reserved rights can be squared with the severance theory announced in California Oregon Power. Second, no opinion has ever explained why a reserved right has a priority date as of the date of the withdrawal. Arguably, the federal government's latent "riparian" rights could date from the time that the federal government acquired the land, which is to say that they are automatically superior to any state created rights.

Indian water rights can be justified on the Court's recognition of the federal government's special duties toward the Indians, but Winters does not automatically support the extension to withdrawn public lands. A better explanation of non-Indian reserved rights is that they stem from the federal government's trusteeship over the public lands. In Light v. United States, the Supreme Court upheld

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44. 426 U.S. 128 (1976).
45. 426 U.S. at 138.
46. 295 U.S. 142 (1935).
47. 220 U.S. 523 (1911).
the power of Congress to withdraw "large bodies of land from settlement" reasoning that "[a]ll the public lands of the nation are held in trust for the people of the whole country . . . and it is not for the courts to say how that trust shall be administered. That is for Congress to determine." If Congress' power to reserve the public domain is discretionary, on what basis can a court recognize reserved rights by implication? The answer must be that resort to congressional intent is a fiction, for what the Court has been doing is formulating its own trust standards. The underlying rationale of the non-Indian reserved rights cases seems to be two unstated assumptions. The first is that when Congress withdraws public land, it is reasonable to assume that Congress intended to exercise the full extent of its trust powers. Thus, if water is necessary to help maximize the purpose of the withdrawal, federal water rights will be implied even though Congress itself could have reserved sufficient appurtenant water when it made the withdrawal. The second, and equally crucial, assumption is that if the Court has misread Congress' intention, Congress can always abandon the reserved right and relinquish the water to the state.

Once this justification of the application of the doctrine to non-Indian lands is accepted, the two technical problems become easier. The trust theory helps explain the reasoning in FPC v. Oregon which limited the severance to lands open to entry as opposed to withdrawn lands. The justification for the priority date of a reserved right is harder but still possible once the federal common law basis of the doctrine is understood. The best explanation is that the doctrine that the right supercedes state-created rights subsequent to the date of the withdrawal is a sensible balancing of state and federal interests. The doctrine is not compelled by the Constitution but is an appropriate exercise of judicial restraint. State water rights were acquired on the belief that no federal interests would ever be asserted. To ease the shock of judicially created federal water rights, a withdrawal is treated as a federal appropriation. The withdrawal date, therefore, provides a crude form of notice, far short of that provided subsequent appropriators under state law, that future federal rights may arise. The doctrine is not the fairest in the world, but it is a creative judicial solution to a difficult problem.

B. The Potential Impact of Non-Indian Reserved Rights Doctrine on the States

For almost two decades, the threat of the belated recognition of large reserved rights has been a ghost in the state water law systems, but now the likelihood of substantial federal claims is imminent as federal agencies become more aggressive in their assertion
of their rights. The question, of course, is how shall they be integrated into state law systems, as federal law is supreme. The extent to which reserved rights will be integrated into state law depends largely on Congress, but courts can speak to the question of integration indirectly by answering questions such as the scope of the right and the conditions under which it can be exercised.

Federal reserved rights are theoretically troublesome to western water right holders and planners for two reasons. First, they are inchoate and thus may pre-empt state-created rights, and second, the right extends to uses which are potentially broader than those recognized under state law. Reserved rights are inchoate because there is no requirement that federal agencies disclose the claims until the agency chooses to exercise the claim. The right can be exercised long after the date of the reservation but the priority date relates back to the date of withdrawal of the land carrying the appurtenant right.\footnote{This characteristic of the reserved right makes it similar to a riparian right which can be “called” by the riparian as the need for the water arises. Matter of Long Valley Creek System, 84 Cal. App. 3d 140, 148 Cal. Rptr. 488 (1978) illustrates the force of the right to future use. The court held that a riparian has a right to have his “prospective, albeit unexercised use, recognized.” At issue was California’s 1928 constitutional amendment, article 10, section 2, prohibiting waste and unreasonable methods of use. The amendment was construed to recognize the right to future uses and consistent with this analysis a statute requiring quantification was held unconstitutional.} Only state created rights prior to the date of the withdrawal are vested.\footnote{Hunter v. United States, 388 F.2d 148 (9th Cir. 1967).} Thus, there is no procedure by which state agencies can accurately gauge the extent of federal claims short of a general adjudication. As the New Mexico decision illustrates, the Supreme Court has construed the McCarren Act to allow the states to join the federal government in general adjudication proceedings and thus force some disclosure of reserve rights. Problems still exist, however. These problems are aggravated because the federal government is not bound by state definitions of a perfected appropriation or a beneficial use, since the right is, with minor exceptions, a federal one.

State hostility is ultimately based on the quantity of water rights that the federal government might claim. It is hard to judge the validity of this apprehension. The quantities now claimed by the Indians are potentially greater than those which may be claimed for non-Indian uses, but because Indian rights must be quantified and can probably be sold for non-Indian uses off the reservation such rights can be integrated into state systems.\footnote{See E. CLYDE, INDIAN WATER RIGHTS. 2 WATERS & WATER RIGHTS § 143 (Supp. 1978).} Integration is harder for non-Indian reserved rights because the major claims will be for...
non-consumptive uses such as the preservation of instream flows. Such claims are often seen as inconsistent with state allocation priorities which encourage traditional consumptive uses.

Originally, state hostility to the preservation of stream flows was based on the argument that the recognition of these uses conflicted with state policies which are aimed at preventing the monopolization of water rights. Nevertheless, states are now recognizing instream uses and their "standing" to object to federal recognition is diminishing somewhat, although significant differences exist among the states over the procedures for and the extent of preservation flow protection.

Western water law has historically depended upon an out-of-stream application to a beneficial use since this policy furthered the mission of regional settlement and development. The idea that water left in a stream could be "used" was simply antithetical to making the desert bloom, and leaving water in place was a ghost of the discredited doctrine of riparian rights. There has always been a dissenting minority to this view, but until recently it was assumed that water could not be appropriated for instream uses. The technical reason was that an instream use lacked an actual diversion and was not beneficial. In addition to the judicially imposed requirement of reduction to possession, it has been argued in Colorado, Idaho and Nebraska that constitutional guarantees of a [Vol. 15

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54. Empire Water Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913).


56. COLO. CONST. art. 16, § 6. The Colorado Supreme Court has held that this section does not prohibit instream flow appropriations Colorado River Conservation Dist. v. Colorado Water Conservation Board, ___ Colo. ___ 594 P.2d 570 (1979).

57. IDAHO CONST. art. 15, § 3.

58. NEB. CONST. art 15, § 6.
perpetual right to divert prohibited the recognition of instream uses. Most states now recognize that the state's police power gives them the authority to withdraw certain waters from appropriation, reserve minimum flows for instream uses and deny appropriations to reserve water for higher uses.  

Legislatures in Colorado, Idaho and Montana have created procedures for state appropriation or reservation of rights for preservation flows. In upholding the right of the state to file appropriations on legislatively designated streams, the leading Idaho case of State Department of Parks v. Idaho Department of Water Administration holds that the legislature may eliminate the actual diversion requirement, that instream uses are presumptively beneficial, and that the constitutional guarantee of the right to appropriate does not prevent the state from deciding what water will be open to public and private appropriators. In 1978, Idaho passed legislation which allows the Water Resource Board to file for minimum stream flow appropriations on all of the state's waters. The recognition of instream uses is not consistent, however, throughout the West, and the amount of water which should be withdrawn remains bitterly controversial as the Yellowstone reservation hearings illustrate.

IV. THE OPINION IN UNITED STATES V. NEW MEXICO

A. The Issues and their Significance

United States v. New Mexico raises three important issues: (1) does the Creative Act of 1891 or the Organic Administration Act of 1897 include reserved rights for instream flows; (2) does other

59. "In 1978, Idaho amended its water code to allow the Director of the Department of Water Resources to deny an application for an appropriation application on three grounds including "that it will conflict with the local public interest, where local public interest is defined as the affairs of the people in the area directly affected by the proposed use." Idaho Code § 42-203 (Supp. 1978). These three grounds are in addition to the grounds of unavailability and interference with prior rights. The constitutionality of this section is discussed in Grant, The Idaho Water Plan: Two Threshold Constitutional Problems and Suggested Solutions, 15 Idaho L. Rev. 443 (1979).


conservation era withdrawal legislation, such as the National Park Service Act of 1916, form a sufficient basis for claiming reserved rights, and (3) can federal permittees claim reserved rights by virtue of a federal permit? This last issue is important not only for stock grazing permittees, but also for energy development where oil, oil shale and geothermal leases might be a basis for a reserved right. The Court’s opinion addressed all three issues, although only the first and third were raised by the case.

The narrow issue before the Court was whether the withdrawal of land for the Gila National Forest carried with it reserved rights for recreation, aesthetics, wildlife preservation and stock watering. As Mr. Justice Rehnquist stated, the resolution of the issue “is a question of implied intent, and not power.” United States v. New Mexico is the most difficult intent case to come before the court. The Indian cases, starting with Winters, can be seen as a belated recognition of the special obligations owing to the Indians under the trust. Arizona v. California and Cappaert v. United States dealt with small amounts of water for water related reservations such as wildlife refuges and national monuments or where it was justifiable to conclude that Congress had decided that the purpose of the reservation would have been impaired, if not frustrated, by the non-recognition of federal reserved rights. United States v. New Mexico, in contrast, involved a frank effort by the federal government to expand the reserved rights doctrine in order to take account of the ever-evolving mission of a federal land management agency. The relationship between implied intent and the agency’s mission was much less clear than it was in previous cases. The case thus required the Court to articulate clearly for the first time, the policies and standards for determining implied intent to withdraw and to confront the implications of the fact that the reserved rights doctrine is federal common law.

B. Facts and Lower Court Holdings

The facts were relatively simple, as water users in New Mexico were not particularly interested in the claims of the United States in this case. The users and the state were looking to other adjudications where the conflict between federal reserved right claims and subsequent state appropriations was much greater. The Court obliged western water users by taking the opportunity to restate and revise the law of non-Indian federal reserved rights in order to blunt its impact.

The Rio Mimbres River arises in southwestern New Mexico in the upper reaches of the Gila National Forest. The river, which is

66. ___ U.S. at ___, 98 S. Ct. at 3013.
fully appropriated, flows through "more than 50 miles" of privately owned lands before it disappears into a desert sink north of the Mexican border. In 1966, the Mimbres Valley Irrigation District began a private adjudication, and in 1970 the state of New Mexico intervened seeking a general adjudication of rights on the river and its tributaries. Because New Mexico has a general adjudication statute, it was able to join the United States as a defendant due to the Supreme Court's construction of the McCarren Act in United States v. District Court for Eagle County. A special state master found that the United States was diverting 6.5 acre feet for domestic and residential use and .1 acre feet for wildlife purposes. He further found that specified amounts of water were being used in the Gila National Forest for stock watering and that an instream flow of six cubic feet per second was being "used" for the purposes of fish preservation. The special master held that all these government uses fell within the scope of the reserved rights doctrine, but a New Mexico district court and the State Supreme Court refused to accept the recommendation holding that the United States could not, at least before the Multiple-Use Sustained Yield Act of 1960, claim reserved rights for either instream flows or stock-watering purposes.

C. The Arguments

The federal government based its claim that Congress had impliedly reserved water for all the claimed uses on three acts. The first, The Creative Act of 1891, authorized Presidential withdrawals of forest reserves. The second, the Organic Administration Act of 1897, was enacted as a response, in part, to the anguished pleas of westerners who claimed that Washington was making them a colony by withdrawing the public domain from productive use by defining with great care the purposes for which land could be withdrawn. The third, the Multiple-Use Sustained Yield Act of 1960, codified long-standing administrative practices and authorized forest management for a wide range of purposes. The United States' argument was that the two early acts were intended for purposes compatible with the reservation of water for instream flows and that the Multiple-Use Sustained Yield Act was only a legislative confirmation of the broad purposes for which forests were originally withdrawn. The United States wisely did not argue that the 1960 Act created new reserved rights with a retroactive priority date.

69. 401 U.S. 520 (1971).
D. The Holding and Reasoning

The Court in *U.S. v. New Mexico* held that the 1891 and 1897 Acts evidence an intent to limit the reservation of water rights "only where necessary to preserve the timber or to secure favorable water flows for private uses under state law."72 This is, as we will argue, an incomplete reading of the legislative history of the acts.

The majority's narrow reading of the statute flows from the explicit premise of the opinion: reserved rights must be limited in the west to protect the interests of existing and future appropriators. Apparently the majority opinion rests on a deep-seated hostility to reserved rights. How else could Mr. Justice Rehnquist conclude that the Forest Service's argument "that Congress intended to reserve water for recreation and wild-life preservation is not only inconsistent with Congress' failure to recognize these goals as purposes of the national forests, but would defeat the very purposes for which Congress did create the national forest system—to protect downstream flows needed for irrigation."73

Mr. Justice Rehnquist's hostility is illustrated by his resolution of an issue not before the Court. The federal government claimed no rights under the Multiple-Use Sustained Yield Act of 1960. Nonetheless, the Court decided to try and foreclose any such claims by developing out of whole cloth the unclear theory that even if the 1960 Act which expanded the statutory purposes for which forests could be managed and could logically serve as a basis for an implied reservation, were to be applied the expanded purposes are secondary to the primary purposes of the 1891 and 1897 legislation. From this premise, it was said to follow that Congress did not intend to reserve water for secondary uses with a 1960 priority under the Multiple-Use Sustained Yield Act. Unless one accepts the theory that the 1960 legislation created reserved rights with an 1897 or 1891 priority, a 1960 or later priority date would have done the government no good, and seldom will, as all state appropriations have priority dates long antedating 1960. Since, as Mr. Justice Powell noted, there was no reason to reach this issue, the proffered construction of the Multiple-Use Sustained Yield issue is dicta.

Mr. Justice Rehnquist, like his earlier western predecessor, Mr. Justice Sutherland, has decided to draw on his experience with western water law disputes to develop a law of federal water rights protective of state interests. Reserved rights are now said to be "a doctrine built on implication and an exception to Congress's explicit deference to state water law in other areas."74 The late assertion of

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72. ___ U.S. at ___, 98 S.Ct. at 3023.
73. *Id.* at ___, 98 S.Ct. at 3020.
74. *Id.* at ___, 98 S.Ct. at ___.
federal reserved rights clearly places a cloud on the title of all western water rights, and only the most blind adherents to the theory that the federal government's wisdom to make superior resource allocations follows from the Supremacy Clause would deny the need to accommodate federal and state interests by limiting the claims of the federal government. This accommodation, however, can best be accomplished by political processes. There is a need to require the systematic disclosure of federal claims to provide an inventory of claims and to provide strict standards for the exercise of reserved rights. After this is done, it would be an appropriate time for Congress to decide when federal rights should give way to state rights or to consider compensation mechanisms where the federal interest in allocating the water is paramount. Our basic objection to the majority's opinion is that it deprives the federal government of the discretion to work out an administrative and political accommodation in a situation where the result is not clearly dictated by the legislative history of the acts construed.

In order to limit the federal government's power to claim reserved rights, Mr. Justice Rehnquist first announced a frustration of purpose standard for determining whether Congress impliedly intended to withdraw appurtenant rights.

The Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." Each time this Court has applied the "implied-reservation-of water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where


Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other private or public appropriator.

Mr. Justice Rehnquist's analysis rests on three Supreme court cases—Winters v. United States, Arizona v. California, and Cappaert v. United States—each of which contains some support for his position. A close reading of the cases, however, suggests that the Court has never viewed frustration of purpose as the sole basis for implying intent to reserve.

As previously discussed, the issue in Winters was whether the government intended to reserve water for the Fort Bellknapp reservation, which was carved out of a larger tract of arid lands which the Indians had an established right to use. The smaller tract without irrigation would have been inadequate to allow the Indians to survive and prosper. In answer to an argument that the Indians deliberately gave up whatever rights they might have had, the Court in Winters said: "Did they give up all of this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate... By a rule of interpretation of agreement and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." The Court, by addressing the problem of the United States' trust responsibility to the Indians, did no more than articulate the government's duty of fair dealing. It did not state a general theory of frustration of purpose.

The Court in Arizona v. California held that the special master's award of reserved rights to an Indian reservation, a national recreational area, two wildlife refuges, and a national forest was proper. On the issue of reserved rights, Mr. Justice Black first rejected Arizona's argument that the United States did not intend to reserve water for the Indians by reaffirming the theory underlying Winters.

77. ___ U.S. at ___, 98 S.Ct. at 3014.
78. 207 U.S. 564 (1908).
81. 207 U.S. at 576.
that there is a presumption of reservation because of the government's duty of fair dealing with the Indians. Second, the special master's extension of the doctrine to non-Indian withdrawn lands was accepted without analysis. Therefore, Arizona v. California stands only for the proposition that the federal government can claim reserved rights for non-Indian lands. The opinion does not speak to the standard of implied intent.

_Cappaert_ involved the Devil's Hole pup fish's habitat, which according to the proclamation withdrawing the Death Valley National Monument, "evolved from the original ancestral stock that in Pleistocene times was common to the entire region" and lives in a pool which "is a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System." The pool was interconnected to a source of groundwater, and Nevada appropriators were causing a drawdown. Claiming reserved rights, the United States sued to enjoin pumping in order to protect the level of the pool. Mr. Chief Justice Burger, writing for a unanimous Court, made only two statements with respect to the standard of intent. He first summarized the prior cases: "This Court has long held that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." His second statement, almost a restatement of the first, was that "intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created." _Cappaert_ did not, however, apply these doctrines, because on the issue of intent, the court concluded that since the Reservation Proclamation mentioned the Devil's Hole pool in four of the five preambles, "the water right this reserved by the 1952 Proclamation was thus explicit, not implied."

This analysis of the three precedents relied upon by the Court suggests that the majority formulation of implied intent was not compelled by prior cases, as the Court seems to have recognized. In an effort to bolster his standard of implied intent, Mr. Justice Rehnquist next asserted that the reserved rights doctrine is "an exception to Congress' explicit deference to state water law in other areas" and thus his standard followed accordingly. _United States v. New Mexico_ was decided the same day as _California v. United

82. 373 U.S. at 599-601.
84. 426 U.S. at 138.
85. _id_.
86. _Id_. at 139.
87. _U.S. at ___, 98 S.Ct. at 3014.
which applied this principle to allow states a partial veto over federal operation of Reclamation Projects. There is a critical distinction between the two cases. Mr. Justice Rehnquist missed it, but Mr. Justice Powell—the only Justice to vote to uphold state claims in the California case but not in New Mexico—did not. Mr. Justice Powell's decision to switch sides in the above mentioned cases illuminates the weakness of the foundation of the majority's frustration of purpose standard. The distinction between the two cases is this: California v. United States construed a federal statute containing an express deference to state water law; United States v. New Mexico involved at best an implied deference, and less deference is due the states because the federal interest at stake involves the management of public lands and is stronger than the federal interest in reclamation spending which was the basis of the issue in California v. United States. Thus, there was no need to characterize the reserved rights doctrine as "an exception to Congress' explicit deference to state water law in other areas" as the Court did.

California v. United States clarifies the long-standing debate over the meaning of section 8 of the Reclamation Act of 1902, which provides "the Secretary of the Interior...shall proceed in conformity with..." state law "relating to the control, appropriation, use, or distribution of water used in irrigation." The Reclamation Act of 1902 authorizes the construction of federal projects for state beneficiaries, but the federal government often asserts an interest in the allocation of project waters because it furnishes the initial funds and picks up the non-reimbursable costs. Still, despite arguments to the contrary, the primary purpose of a Reclamation Project is to direct federal subsidies to state beneficiaries. For this reason, it has been assumed that section 8 requires the federal government to defer the state law of water allocation by acquiring rights through state procedures and distributing the waters in a manner consistent with state law. As Mr. Justice Douglas explained in Nebraska v. Wyoming: "Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the land owners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works."
Because the power to spend carries with it the power to condition the use of federal funds, the presumption that the federal government is a mere financier and carrier for state beneficiaries must give way when the federal government asserts an overriding interest in the reclamation project. The presumption was properly overcome in *Ivanhoe Irrigation District v. McCracken*, where the Court held that the state of California could not prevent the United States from acquiring water rights for a project and distributing it according to a federal mandate inconsistent with state law. At issue was section 5 of the Reclamation Act which prohibits the delivery of water to tracts in excess of 160 acres owned by a single individual.

If the federal government has the power to construct a reclamation project, it can condition access to subsidies to further important federal interests—in *Ivanhoe*, the deconcentration of agricultural land holdings. Few, if any, would quarrel with the holding in *Ivanhoe*, but the Court went on to suggest in dictum that section 8 meant only that state law controls the definition of vested rights when the federal government acquires project water rights. This reading, of course, strips state law of any role in the allocation of project waters and makes the unwarranted assumption that the application of state law will always frustrate an important interest. The dictum was repeated in two more cases before the Court decided *California v. United States*. This last case was a good one in which to re-examine the above mentioned dicta, because the state of California was asserting the right to condition the use of water for a project where there was no clear overriding federal interest. The irrigation district which would have been the contractee had not been organized, and the state was asserting only the right to condition the use of the water in the interim for environmental purposes, a policy which at least—after the National Environmental Policy Act of 1969—is not per se inconsistent with federal policy.

When, however, the federal government claims water rights as a landowner, the United States has a greater interest in the water than when it claims rights as a carrier; it asserts the right to control the distribution of Reclamation Project waters in the absence of an express congressional declaration of federal policy. As Mr. Justice Powell noted in his dissent in *New Mexico*, the recognition of the federal government's greater interest does not dispense with the need to apply the reserved rights doctrine "with sensitivity to its impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law."

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96. ___ U.S. at ___, 98 S.Ct. at 3023.
The greater federal interest, however, permits the Court to fashion a common law of reserved rights without explicit textual authority.

The Court's general philosophy of reserved rights formed the background for the holding that neither the Creative Act of 1891 nor the Organic Administration Act of 1897 could be read to support federal reserved rights for instream uses, recreation, or stockwatering. Mr. Justice Rehnquist relied primarily on the Organic Administration Act of 1897 which he gives a tight grammatical reading supplemented by an incomplete historical theory of its purpose. Both the grammar and history arguments are weak.

The 1897 Act provides: "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; but it is not the purpose or intent of these provisions, or of [the Creative Act of 1891], to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes."97 The Forest Service argued that the Act envisioned three purposes for the forests and that instream rights fell within the first purpose, "to improve and protect the forest. . ." , but the Court found only two purposes. To support his conclusion that Congress limited the forest reserves to only two purposes, Mr. Justice Rehnquist adopted the following definition of the word "or", "a coordinating conjunction introducing an alternative."98 He found this reading of the Act justified because it was "inconceivable that a Congress which was primarily concerned with limiting the President's power to reserve the forest lands of the West, would provide for the creation of forests merely to 'improve and protect.'"99 His theory adopts the common assumption that the broad authority of the 1891 Act aroused bitter western opposition to the reserves, and that Congress responded to this opposition by sharply curtailing the executive discretion delegated in 1891 by passing an act which was "a charter for forest management and economic uses within the forests."100 Our reading of the history of the 1891 and 1897 Acts suggests that Mr. Justice Rehnquist has misunderstood the purposes of the Acts and the relationship between the two, and lends support to the brief dissenting opinion of Mr. Justice Powell and suggests a rationale for the recognition of reserved rights for instream flows in the national forests created under the 1891 and 1897 Acts.

99. Id.
100. ___ Id. at ___, 98 S.Ct. at 3017.
Mr. Justice Powell, writing for himself and Mr. Justices Brennan, White and Marshall, adopted the "natural reading" of the 1897 Act which attributes three, not two, purposes to the legislation. The reservation of instream flows falls within the first purpose because "the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses. I therefore would hold that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests, as well as the plants." This view adopts the position urged by the National Wildlife Federation in an amicus brief that at common law the term "forest" included flora and fauna. The conclusion has support in the legislative history but not in the National Wildlife Federation position.

V. AN ALTERNATIVE READING OF THE LEGISLATIVE HISTORY

A. The Alternative Reading Summarized

This section presents an alternative reading of the background and legislative history of the 1891, 1897 and other relevant acts which would have permitted the Court to reach the opposite conclusion. The Court's construction of the Creative Act of 1891 and Organic Administration Act of 1897 is based on the assumption that the Acts were passed for only two limited purposes, and thus Congress did not intend to reserve minimum instream flows for fish and wildlife uses. To reach this conclusion, Mr. Justice Rehnquist drew a distinction between subsequent congressional legislation creating the two forest reserve acts, the National Park Service, and fish and wildlife sanctuaries within national forests, and the express recognition of instream values in the creation of a particular forest. He concluded that only in this limited second class of withdrawals was it arguable that Congress intended to reserve

101. Id. at ____ , 98 S.Ct. at 3023.
102. Both the National Wildlife Federation amicus brief and the dissenting opinion rely upon Lund, Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976). The study suggests, however, that the demands of the frontier were too robust to support such a static view of the forest as the dominant theme of early american wildlife law was the encouragement of what we now call sustained yield management.
105. 16 U.S.C. § 577b (1976). The Shipstead-Nolan Act established water levels in the area of Lake Superior National Forest, and Mr. Justice Rehnquist used the Act to show that when Congress wanted to recognize instream flows "it expressly so directed, as it did in the case of Lake Superior National Forest." ___ U.S. at ___. 98 S.Ct. at 3019. The example is not on point because the Shipstead-Nolan Act sought to prevent the further alteration of natural water levels in the area which might result from flooding. There is a difference between this objective and one which seeks to protect a minimum instream flow by leaving the water in place.
water for instream uses. Underpinning this construction of the legislation is a reliance on conventional historical wisdom which sees the 1891 Act as the inception of national forests, a victory for the scientific conservation movement won at the expense of intense western opposition. This opposition was said to have forced Congress to accommodate Western interests in 1897 by limiting the purposes for which forests could be withdrawn and opening the reserves to use and management.

Our reading of the debate over forest policy between 1865 and 1897 and the legislative background of the two Acts, as well as subsequent ones, suggests that Mr. Justice Rehnquist's construction of the Act does not comport with their history. The Court relied exclusively on a single and inadequate secondary source for its entire, and quite limited, analysis of the 1891 legislation. Failure to probe

106. The Court relied almost exclusively upon J. Ise, The United States Forest Policy (1920). Ise wrote with a clear disdain for Congress, which had, according to Ise, "shown an utter incapacity to deal intelligently with the public timber; and all hope for future conservation must center in the provision which would take some of the timber out of the hands of Congress—the provision enabling the President to set aside forest reserves" Id. at 119-20. Ise treated the 1891 bill predominately in the context of timber management and as proof of the incapacity of Congress to deal with that important issue. Thus biased, Ise was in a poor position to deal with the non-timber aspects of the 1891 and 1897 Acts and was, in addition, an especially questionable source upon which to rely regarding the intent of Congress. Ise, like many historians of his day and ours, presented the conservative movement as a fight between good and evil with the forces of light gathered in the East and the forces of darkness, like Milton's fallen angels, in the West. This led him to read the twentieth century debate on the management of the public lands into the legislative history of the 1891 Act. Specifically, Ise argued that in 1891 Congress was lulled into passing an act which allowed the reservation of public land forest reserves. His version has been unquestioned until recently in its general contours. Basically, Ise argued that Secretary of the Interior Noble was successful in having section 24, authorizing the creation of reserves, "tacked on" to the end of the 1891 General Land Law Revision while the bill was in Conference Committee. Id. at 130. Although such a procedure was contrary to congressional rules, the final item was barely noticed, and the bill passed without comment on section 24. The lack of discussion of the reserve concept led Ise to conclude that Congress did not understand the implications of the concept and would not have enacted the measure had its true importance been understood. Until the early 1970's virtually every subsequent scholarly account of forest history—and Mr. Justice Rehnquist—followed Ise. The degree to which Ise has been cited and/or adopted by major and minor writers in the area can be established by consulting A. Carhart, Timber in Your Life 60-61 (1955); M. Clawson & B. Held, The Federal Lands: Their Use and Management 27-28 (1957); S. Dana, Forest and Range Policy 100-02 (1956); M. Frome, The Forest Service 11 (1971); Gates, supra note 8 at 565; Hibbard, supra note 8 at 530; E. Peffer, The Closing of the Public Domain 15 (1951); G. Pinchot, Breaking New Ground 85-86 (1947); R. Nash, Wilderness and the American Mind 133 (1967); Robbins, supra note 8 at 303-07; P. Roberts, Hoofprints on Forest Ranges 18-19 (1963); G. Robinson, The Forest Service 6 (1975); A. Rogers III, Bernard Eduard Fernow 155 (1951); H. Steen, The Forest Service: A History 26-27 (1977); S. Udall, The Quiet Crisis 100-01 (1963).

Two recent doctoral dissertations have done much to correct Ise's errors and biases. See H. Kirkland, The American Forests, 1864-1898: A Trend Toward Conservation 140-87 (1971) (unpublished Ph.D. dissertation, Florida State University); J. Miller,
beyond that single, albeit much cited source, led it to make erroneous distinctions between forest and park reservations made during the same period. Having failed to understand the 1891 Act and its implementation, the Court was unable to assess the important but subtle distinctions between the 1891 and 1897 Acts. It thus failed to understand the important provisions of the 1897 Act and also failed to address an equally critical relationship between the 1897 Act and the Transfer Act. That 1905 legislation sent the forest reserves from the General Land Office in the Department of the Interior to the Department of Agriculture, and thus under the wing of Gifford Pinchot, soon to be first Chief of the Forest Service. Pinchot succeeded Bernhard Fernow as head of the Division of Forestry in 1898 and began agitating for the transfer. A principal theme in favor of the transfer was that forestry was "tree cultivation upon a large scale covering long periods of time." This was an entirely different concept of forestry from that which had dominated congressional discussions of the previous decades, and there was initial resistance to the idea. Only after much effort from Pinchot and Roosevelt was it eventually accepted by Congress. Although the drafters of the Transfer Act explicitly said that there was "no change whatsoever" in the purpose of the reserves, Congress recognized that the Act harbingered a radical shift in forest policy. Thus, the 1905 Transfer Act, not the Acts of 1891 and 1897, is the appropriate beginning of the scientific conservation era in forestry. Specifically, we argue that the legislative history leading up to the 1891 Creative Act suggests that the primary purpose was to create

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Congress and the Origins of Conservation 230-38 (1973) (unpublished Ph.D. dissertation, University of Minnesota). Kirkland and Miller have done much of the painstaking review of the Congressional Record and other relevant documents which are conspicuously absent from virtually all previous sources. See also, B. Fernow, REPORT UPON THE FORESTRY INVESTIGATIONS OF THE U.S. DEPT OF AGRICULTURE 1877-1898, H.R. Doc. No. 181, 55th Cong., 3rd Sess. 190-204 (1899), which is also ignored by most of the other authors. This oversight is inexplicable given Fernow's central position in all the events of the 1890's. The only writer who expressed an accurate understanding of the range of public and congressional concerns leading up to section 24 is Samuel P. Hays. S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1969). Unfortunately, citing no references, Hays concludes "The campaign to establish forest reserves had its origin . . . in the drive by wilderness groups to perpetuate untouched large areas of natural beauty, by Eastern arboriculturists and botanists to save trees for the future, and by Western water users, both large corporations and small owners, to preserve their water supply by controlling silting." Id. at 263-64.


108. Pinchot has told the story himself in his autobiography, BREAKING NEW GROUND, supra note 106 at 161-203. The Forest Service was not founded until 1905, and the forest reserves were not renamed national forests until 1907.

109. 35 CONG. REC. 6509 (1902) (Statement of Congressman Lacey). See also the exchange between Representatives Shafroth and Scott, id. at 6572-73.

110. For a detailed discussion of the development of the term "forestry," see H. Smith, 12 AGRICULTURAL HISTORY 326 (1935).

111. 35 CONG. REC. at 6515.
forest reserves, which are better understood in present-day terms as parks rather than forests; that Congress understood what it was doing in 1891; and that the pressures which led to the 1897 Act cannot be simply explained as anti-western reaction to the policy of "locking up" the forests; instead the 1897 Act is a modification but not a rejection of the purposes of the 1891 legislation. Moreover, the 1905 Act rather than the 1891 and 1897 Acts is the precursor of scientific forest management as presently understood. The transition from forest reserve to national forest is a phenomena appropriately associated with the Roosevelt-Pinchot era in American conservation, and has little at all to do with the 1890's statutes misconstrued by the courts.

We are, therefore, arguing that "protecting the forest" was a legitimate, in fact the overriding, purpose of the reserves in both the 1891 and 1897 Acts. It does not, however, automatically follow that the purposes of the reserves extend to protection of fish and wildlife. To so argue would make the unwarranted assumption that Congress understood the modern concept of "ecosystem management." The legislative record provides only scattered references to congressional recognition that the forest was a system which included flora and fauna, and these occurred some twenty years before the passage of the Creative Act. Our argument is the more modest claim that once it is understood that Congress and subsequent administrators accepted aesthetic preservation and protection of wildlife as primary purposes of the reserves, the Court has the discretion to allow reserved rights related to these objectives. In short, we are arguing that because the doctrine of reserved rights has always been based on federal common law a search for specific congressional intent to reserve is misdirected. The proper standard is whether the recognition of reserved rights is reasonably related to enhancement of the purposes of the withdrawal.

B. Background of the 1891 Act

The conventional wisdom about the Creativity Act is that it was, in former Secretary Udall's words, "a fluke." It passed undebated by a Congress which did not understand its implications, after it was added by Committee action as the final section of a lengthy and complex general land law revision. The conventional wisdom is, however, simply not true; Congress had been aware of timber depletion problems since the early 1800's. Initial programs protected material needed by the Navy, but after George Perkins

112. During a discussion of the pending Timber Culture Act, one representative suggested that destroying the trees leads to the disappearance of insectivorous birds, and "as the birds disappear, fruit-destroying insects increase." Cong. Rec. 2898 (1872).
114. See supra note 106.
Marsh’s epochal study, *Man and Nature*,\(^{115}\) was published in 1864, national concern focused on the long-term, unintended consequences of human intervention in natural process. Forest destruction became an early theme in growing cries of alarm.

In the 1870’s, the particular national concern with forest destruction had two basic components. The dominant and most durable focus of attention was water. As settlers entered the treeless plains and encountered harsh conditions of the arid West, the Congressional Record filled with discussions of the relationship between forest cover and water supply. Trees, it was widely believed, caused rain; prevented floods; held winter snows, snow melt and rainwater in the soil; prevented evaporation from rivers, springs and watersheds; and contributed incalculably to the quantity, distribution and quality of water supplies.\(^{116}\) Forest preservation was, therefore, essential to the settlement and prosperity of the West because water was essential. This general principle was at the heart of every post-Civil War discussion of forest problems, and was not seriously questioned until the twentieth century debates on the Weeks Act.\(^{117}\)

A secondary focus was on the role of the forests providing timber for building homes, fences, mine shafts, railroad crossties, and many other necessities of development and settlement. Even as the necessity for forest cover was being recognized, the logging industry was moving constantly westward seeking new supplies to replace the worked-over forests of the northeast, southeast and midwest, leaving fire, erosion, flood, and siltation in its wake. Fear of “timber famine” became an important antecedent of the conservation movement.\(^{118}\) The westward movement was surprisingly rapid. In 1865, New York still provided more timber than any other state. By 1868, the “Golden Age” of lumbering had arrived in the Great Lakes area.\(^{119}\) The completion of the transcontinental railroad simultaneously opened the West for full economic development, hence underscoring the need for water and bringing home the idea

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that the vast wilderness and inexhaustible supply of raw materials beyond the Appalachians (the Mississippi, the Missouri, and the Rockies) were gone.

The Timber Culture Act of 1873 was the first congressional attempt to deal with the causes of growing public alarm. The Timber Culture Act offered to donate 160 acres of public land to any person who would plant 40 acres of trees and keep them growing for 10 years. This Act occasioned flagrant land frauds, and it was amended numerous times amidst growing discussion of the forest problem. It was repealed by the 1891 General Land Law Revision. Nonetheless, tree planting was the first general response to the burgeoning recognition of the value of trees. It is not coincidental that the Arbor Day tradition was begun in 1872 in Nebraska.

Following the temporary preoccupation with planting trees, Congress began to entertain a variety of proposals for dealing more comprehensively with forest issues. Three general categories of proposals stand out. First, a miscellaneous set of proposals include such diverse and unconnected ideas as establishing a forestry school in the Dakota territories, establishing a forest experiment station, and establishing a commission or appointing a commissioner to investigate forestry matters. The latter was approved in 1876 as a rider on an appropriation funding the distribution of experimental seeds. The 1876 action gave rise to the Division of Forestry in the Department of Agriculture. The Division later developed into the Bureau of Forestry, which became Gifford Pinchot's first governmental affiliation in 1898.

The other two categories of proposals are more indicative of the general direction of congressional discussions in the 1870's and 1880's. The concern with watersheds and water was expressed in a variety of proposals for reservation and preservation of forests on the public domain, appurtenant to navigable rivers, or in particular watersheds. Timber supply and availability issues were associated with calls to classify timberlands and either establish a sales system or a sales reservation system.

Shortly after the Timber Culture Act passed, the first of many reservation proposals was introduced. In 1876, Representative Granberry Fort of Illinois introduced "a bill for the preservation of the forests of the national domain adjacent to the sources of the navigable rivers and other streams of the United States." The pro-

120. See Dana, supra note 106, at 383.
122. See Fernow, supra note 106, at 194-202 for a partial listing of legislative proposals.
123. See Dana, supra note 106, at 81-86; Pinchot, supra note 106, at 26, 130-45.
posal was not seriously considered; but from that time forward, one and sometimes several bills calling for the reservation and preservation of public forests were constantly before Congress.

Simultaneously, numerous measures were introduced regarding timber, the prevention of fraud, monopoly and theft in obtaining timber for domestic and commercial uses. Most of these proposals were directed at remedying chicanery encouraged by the fact that there was simply no legal way to obtain timber off the public domain. There were no provisions for selling timber without the land, but following cessation of the sales system in the 1840s, the only way to acquire the land was to pre-empt or homestead it. Forested lands were generally not suitable for agriculture and were entered fraudently only for purposes of stripping the timber. In an editorial comment on John Wesley Powell's "Report on the Lands of the Arid Region" of the United States, the editors of The Nation complained:

The present laws, however, absolutely prohibit the honest acquirement of any of these timber lands, because they are not agricultural. . . . An old system, contrived when all tracts were taken as farms and the forests cleared as hindrance to the main object, is wholly inapplicable where the timber constitutes their sole value, summer frosts rendering agriculture hopeless. 125

Timberlands were then, and continue to be through the debates, by definition, those forest lands not suited for agriculture. Until 1883, proposals to remedy the timberlands availability problem joined the reservation proposals in the congressional hopper. Early versions reflect the general belief that the best way to protect the standing timber was to have it pass as rapidly as possible into private hands. Later sales system proposals call for either selling public-domain timber off tillable lands prior to committing the land to agriculture entry, in order to return full value to the Treasury or reserving timberlands unfit for agriculture in order to establish a sales system in perpetuity or both. Several proposals, reminiscent of the naval reserves, called for the reservation of valuable timber species. 126 The reservation and sales in perpetuity system was frequently introduced at the behest of Bernard Fernow, forester in charge of the Division of Forestry, and were characteristic of the urgings of a small but significant segment of the forestry movement. 127 Still, the more typical approach to the forestry issue is expressed in an 1883 editorial in The Nation:

125. Our Unavailable Public Lands, supra note 116.
The Government of the United States has clearly no more concern in holding or managing forest property; than it has in working unoccupied wheatfields, except so far as forests, from their peculiar location, are essential to the preservation of the important rivers of the country. . . . The forests of Michigan or Louisiana may be exterminated, as have been those of New England, without seriously affecting the nation as a nation. Such forests will grow again if profit can be found in growing them; but if the forests which guard the flow of great rivers such as head among the Adirondacks or the Sierras of California, the Alleghanies, or the Rocky Mountains are destroyed, there is something more than a local destruction of property. The steady flow of rivers is endangered, and widespread disturbances, threatening the lives and property of persons living perhaps thousands of miles from the forests upon which their safety depends, is the result. It is clearly the duty of government, then, to preserve in every possible way the great rivers of the country; and forest preservation is thus, under certain conditions, a vital question: The prosperity of the nation, even, depends upon it. So far then, as the forests affect the rivers, they should be made the subject of national investigation and preservation; but for no other reason should the government, either General or State, become a forester. Individuals can grow timber, and take care of it when grown, better than the government, and the less the government mixes itself up with business of this nature, the better.

After the Timber and Stone Act and the Free Timber Act passed in 1878, Congress began to emphasize the need to establish reservations to protect watersheds, and Congress considered reservations which allowed for no use of timber at all. This agitation for land reservations from the public domain was expressed, in part, in a growing movement within and without Congress for the reservation of parks. Congress made numerous reservations for park purposes prior to the passage of section 24. The debate over park reservations indicates that the park concept was seen, in part, as a means of preserving forested watersheds.

128. 37 THE NATION 201 (1883).
130. See text accompanying note 138 infra. Early reservations include Hot Springs, Arkansas (1832, 1870); Yellowstone, Montana, Wyoming and Idaho (1872); and Yosemite, California (1864); and Mackinac Island, Michigan (an 1875 reservation ceded to the state in 1895. See R. LEE, FAMILY TREE OF THE NATIONAL PARK SERVICE (1972) for early park reserves discussion.
The numerous measures concerning timber depletion, forest reservations, park reservations and forest protection, and the similarities between early parks and forest reservations give substantial clues as to congressional intent regarding section 24. Moreover, the whole history of the forest protection issue in the nineteenth century is sufficient to indicate that Congress was not taken by surprise by section 24. The forest reservation authority was a familiar and much discussed proposal and its passage in 1891 cannot, conventional wisdom notwithstanding, be considered a "fluke."

C. Section 24 and Its Immediate Origins

Section 24 of the 1891 General Land Law Revisions provides:

The President of the United States may, from time to time, set apart and reserve, in any state or territory having public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.\(^{131}\)

The standard interpretation of the Act is that it was a great victory for scientific conservation,\(^{132}\) but the purposes are mixed and on the whole unrelated to scientific forest management. While it is true that the 1891 statute repealed the Timber Culture Act and the Preemption Act, two of the most abused public land statutes, it also liberalized the provision of the Free Timber Act by allowing a defendant to defend against a timber trespass action by showing that the "cut and removed timber" was for agricultural use.

The major referent in treating the 1891 Act as a scientific conservation landmark is section 24. Yet the familiar assumption that the forest reserves were intended for timber management appears, upon closer inspection, to be untrue. The construction of section 24 is made difficult not because it was not discussed in Congress; as we have demonstrated, the idea had a long history. The provision has been opened to misrepresentation because the text is grammatically awkward; the sentence quoted above contains no direct object, so it is not clear what is reserved.

An examination of proposed and enacted legislation which preceded the adoption of section 24, however, supports the argument that the purpose was not to authorize forest management, but that forest reservations were intended to be, literally, preserves withheld from use in order to protect the public interest. Although Congress did not speak in great detail about the purpose of section


\(^{132}\) See text accompanying note 106, supra.
24 forest reservations, the purpose of park reservations had been clear for twenty years. Neither Congress nor anyone else made distinctions between forest and park preserves between 1870-91. In short, the purpose was to preserve forests by withdrawing them from entry and preventing use and occupancy. Contemporaneous statements by those charged with administering the Act confirm that preservation was the purpose of Congress.

Two significant antecedents of section 24 are section 8 of the 1888 General Land Law Revision and 1890 legislation creating parks in California through the forest reservation procedure. Legislation considered in 1888 provided for timber classification and sale in sections 2-7. A system of forest reserves separate from the timber management areas was included in section 8 which provided:

The President of the United States may from time to time set apart and reserve in any State or Territory having public lands bearing forests, any part of the public lands designated as timber lands, or any lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, on which the tree and undergrowth shall be protected from waste or injury under the charge of the Secretary of the Interior; and the President shall by public proclamation, declare the establishment of such reservations and the limits thereof, and may employ such portion of the military forces as may be necessary or practicable in protecting such or any other reservations, or any other public timber land from waste or injury; and all the provisions of this Act, or of any law touching the public domain which relates to timber lands, shall be subordinate to this section.

133. An inconclusive debate on the section was resolved by assurances that presidential abuse of the withdrawal authority could be corrected by Congress.
135. See text accompanying note 138 infra.
136. See H.R. 7901, 50th Cong., 1st Sess. (1888). The 1888 legislation contained two parts of relevance to the forest reserves question. Sections 4-7 establish a comprehensive timber classification and sales program, and section 8 dealt with forest reserves entirely separately from the timber sale program. The 1888 proposals contemplated only limited use and management on the section 4-7 lands and none whatever on the section 8 lands. The Chairman of the Public Lands Committee rejected the intense and expensive management schemes long advocated by Fernow and his colleagues. These proposals were contained in the "Hale" bill see note 126 supra, which were bypassed in favor of the Committee's General Land Law Revision. The bill died in the Senate after it passed the House. See Miller, supra note 106, at 222-229; 19 Cong. Rec. 2456-63, 5553-73, 5585-5607, 5627-28 (1923) for key parts of the debate and Miller's useful commentary on the whole bill.
It is possible that section 24 was a hasty edit of this earlier section, as the elimination of the discussion of commercial timber would eliminate the direct object of "set apart and reserve." Less speculatively, it is significant to note that timber management and sales provisions were separate from section 8 forest reservations and were not a part of the land law revision which passed in 1891.

Subsequent indication of congressional intent regarding section 24 comes from legislative and administrative activities affecting California national parks. In 1890, Congress created Sequoia Park. One week later, a bill reserving what is now part of Yosemite National Park, "to set apart certain tracts of lands in the State of California as forest reservations," passed both houses of Congress without debate.137

Both acts are patterned explicitly after the Yellowstone legislation of 1872 and include language authorizing the Secretary to promulgate regulations which "shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonder." The Secretary must also "provide against the wanton destruction of fish and game within the reservation." Miller sums up the confusion concerning the California reservations:

Like Yellowstone, the California reservations remained in a kind of administrative twilight zone. Unlike Yellowstone, they were not all public parks. Two and five-sevenths of the three 'parks' were designated by Congress as 'reserved forest lands.' The Secretary of the Interior called them national parks in his 1890 annual report, and a recent history of the national parks declares 'That they were considered by Congress to be national parks is evident by the language of the two bills, identical to that of the Yellowstone Act of 1872.' The language was similar but not identical. If they were all supposed to be national parks, why did the House Public Lands Committee substitute H.R. 12187 [the bill that created the Yosemite forest reservation] for H.R. 8350, the bill that would have created a Yosemite National Park? . . . Yosemite Valley was owned by the State of California, though it was often called a national park; it was surrounded by a congressionally-designated area of reserved forest lands, called a national park by the Secretary of the Interior, which was patrolled by U.S. Army troops, sent there without proper authorization.138

Both the Secretary of the Interior, charged with administering both the forest and park reserves, and Bernard Fernow, the only

professional forester in government at the time, viewed section 24 as setting up reservations, not as management charters. Fernow's 1891 Report of the Division of Forestry described section 24 as having a primary economic objective—the provision of continuous forest cover and the equalization of downstream flows. The secondary objective, according to Fernow, was "to secure places of retreat for . . . health, recreation, and pleasure." Although he was a leading contemporary advocate of forest management, Fernow recognized where the Supreme Court did not, that aesthetic preservation and recreation were important purposes of the forest reservations. Fernow's partisan priorities, however, were rejected by the Interior Secretary and the President in designating and administering the reserves. Secretary Noble clearly viewed the purpose of the reserves as the reservation of park or quasi-park areas. The initial reserve proclaimed under the new authority was an expansion of Yellowstone National Park and many other early forest reserves were established at the behest of local park advocates. There is some evidence that he thought further congressional action would be necessary to give the forest reserves full national park status. In his 1891 annual report, the Secretary made quite clear that even absent further legislation the forest reserves were to be managed as parks: "It is to be considered also that these parks will preserve the fauna, fish and flora of our country, and become resorts for the people seeking instruction and recreation . . . "

Thus, although Congress did not speak directly of purposes of lands reserved under section 24 of the 1891 Act, it is possible to put together a coherent picture of congressional intent from a variety of data. In 1888, Congress specifically segregated timber sales and management from forest reservations. In 1890, Congress established forest reservations in California and raised no protest when they were administered by the Secretary as national parks. The basic theme of the Secretary's concept of a national park is, moreover, supported by over 20 years of congressional discussion of both forest and park policy: preserve the watersheds. Related themes, consistent with 20 years of congressional discussions of reservation policy and clear administrative policy include public recreation and preservation of the "fauna, fish and flora" and national and scenic wonders as objectives of both park and forest reservations. The park-forest distinction upon which the Court's decision in New Mexico relies so heavily simply did not exist in the 1890's.


140. See Rakestraw, infra note 143.


142. The uses which many proposed for the forest reserves do not, contrary to
D. The Background of the 1897 Legislation

The key assumption of the majority opinion that there are two and only two purposes of the 1897 legislation rests on the theory that Congress rejected federal control over forests except for limited purposes designed to benefit the West. This assumption adopts the overly simplistic theory that western opposition to the withdrawal of some 38.5 million acres by Presidents Harrison and Cleveland caused such an uproar in the West that Congress abandoned the broad discretion conferred in section 24 of the Creative Act. A complete reading of the historical record shows that, of course, westerners were concerned about the forest reservations. The controversy, however, focused on the issue of uses permitted on reservations rather than on opposition to the general idea of forest reservations. Western irrigation interests were, in fact, more oppo-

present-day conceptions, contradict the point regarding the similarity between forests and parks. Many of the uses urged for the forest reserves were permitted in parks as well, and the restrictions on use in the forest reservations (all use of any kind was prohibited) were much more stringent than park use standards. For example, in 1881, Secretary of the Interior S. J. Kirkwood approved rules for Yellowstone National Park which forbade cutting of timber and forbade removing mineral deposits without the supervisor's permission. The regulations, however, allowed hunting, trapping and fishing for purposes of securing food (as opposed to hunting for sport) but forbade the selling of intoxicating liquors: see Records of the Department of the Interior, NA, P&M, LS, 1872-1886 Cited in D. Hampton, How the U.S. Cavalry Saved Our National Parks 49-50 (1971); when the army took responsibility for park protection in 1886, the rules were amended to forbid mining altogether; the cutting of green timber; hunting, trapping and discharging of firearms; fishing with hook and line; and, except by hotel proprietors, the selling of intoxicating liquors. Livestock was allowed except that stock was not permitted to run loose in the vicinity of the various points of interest frequented by visitors; see S. Exec. Doc. 40, 49th Cong., 2d Sess., Appendix A at 7.

143. Between 1891 and 1893, Presidents Harrison and Cleveland withdrew seventeen reserves totalling over 17.5 million acres. The process by which these early reserves were studied and designated was extensive and elaborate. It compares favorably with the inadequately studied designs made later by Cleveland (1897) and Roosevelt (1907) which, unlike the early reserves, aroused extensive hostility. For a copy of the rules which the General Land Office followed in studying and evaluating the reserves, see 29 Cong. Rec. 2514-15 (1897). See B. Rakestraw, A. History of Forest Conservation in the Pacific Northwest: 1891-1913 at 42-46 (1955) (Ph.D. dissertation, University of Washington) for an extensive discussion of early reserve designations. In 1897, President Cleveland precipitously added 21 million acres to the reserved forest areas. Coming without warning or consultation, the "Cleveland Reserves" did indeed engender hostility.

144. In the Monongahela litigation, Izaak Walton League v. Butz, 497 F.2d 849 (8th Cir. 1974) courts accepted the plaintiff's argument that the 1897 Act was a restriction on the authority granted in the 1891 Act and, therefore, had to specifically be rescinded rather than altered by implication. Although the authorities granted in the 1897 Act are narrow, especially in the timber management area, they do not limit the 1891 grant. The simple truth is that in neither the West Virginia nor the New Mexico cases did the Court even inquire into the 1891 Act. Had it done so, a more accurate assessment of the 1891 and 1897 statutes might have been forthcoming.

145. The congressional discussion of the Cleveland reserves are instructive on this point. Despite legitimate outrage, bordering on hysteria in much of the western
ed to allowing any use of the reserves than were eastern forest management advocates such as Fernow.

Between 1892 and 1895, Congress methodically stepped back from the absolute prohibition on the use of reserves, but it did not abandon the concept of forest preservation. The conclusion which follows from congressional activity during this period is that Congress was nearly unanimous in the need to preserve forests in order to preserve the watersheds. There was also growing acceptance of the idea that withholding the forest reserves entirely from use was both unnecessary and unwise. By 1895, Congress had virtually decided to authorize the Secretary to permit those uses which could be regulated to the extent that they did not threaten the watershed protection purpose. The act which finally passed in 1897 does not revoke or limit the authority that seems to have been delegated in the 1891 legislation.

This conclusion is supported by legislative activity in Congress between 1892 and 1897 and the broad purpose of the Organic Act. Successive drafts of the 1897 legislation demonstrate that Congress was trying to strike a balance between preservation and use by carefully regulating use and occupancy. Regulated use, the majority came ultimately to believe, might occur without harming the forest cover. In the terms of the Court's decision in *New Mexico*, "preserving and protecting the forest" is the dominant theme of the reservation authority in 1897, as it was in 1891. It is separate from the two purposes, which Mr. Justice Rehnquist urges are synonymous, providing for favorable conditions of water flow and a continuous supply of timber. In 1892, Congress considered and rejected legislation which expressly limited the purposes of the reserves to the two urged by the majority. Through a series of proposals and modifications, Congress arrived at a carefully worded set of provisions which would insure the objects of such reservations, namely "to regulate their occupancy and use and to preserve the forests thereon from destruction."

press, congressional reaction was moderate and generally supportive of the resource concept. See 29 Cong. Rec. 2513, 2515, 2516, 2678, 2903, 2971-73 see also note 149 infra.

146. The Paddock Bill, S.3235, 52d Cong., 1st Sess. (1892) employed the same language as the proposals Mr. Justice Rhenquist used to support his two-purpose reading of the act, and the Paddock Bill was rejected.

147. See note 6, supra. The majority entirely overlooked this definition of reserve purposes found in section 24 of the act. In its straining to achieve a two-purpose rather than three-purpose interpretation of the statement of purpose in the section which it chose to interpret, the Court was, moreover, forced to adopt a meaning of the term "or" which is better achieved by eliminating the word altogether. Given the care and attention with which Congress phrased and rephrased the section, the Court should not have ignored so obviously critical a word.
The focus of much of the debate on the evolving "McRae Bill" concerned whether to allow harvest of reserve timber. Congressman McRae of Arkansas, sponsor of the bill and one of very few Congressional advocates of timber harvesting and management, was forced over a period of several years to severely restrict his initially expansive version of permitted harvests. In a series of modifications and amendments made during debate on the bill, Congress limited timber cutting to dead or mature trees. Moreover, it authorized the Secretary to designate, appraise and sell timber specifically "for the purpose of preserving the living and growing timber and promoting the younger growth of natural forests."

Only trees interfering with young growth could be removed, a provision which led to successful litigation in the mid-1970's challenging Forest Service harvesting practices. Although the basic issues involved in balancing forest use and protection had been resolved, the legislation did not pass in 1895. Congressman McRae was absent due to family illness when the Conference Committee Report was due to be presented in the House, and the bill died. Several events which intervened before the bill passed in 1897 have confused subsequent observers and the Supreme Court.

President Cleveland declined to establish any further forest reservations beyond the 13 million acres which had been designated by 1893. The General Land Office had neither the personnel nor the resources to enforce the strict prohibitions on use, and the declarations therefore had made no positive impact on the forests ostensibly protected. In 1896, after the McRae bill died in the Fifty-third Congress, the Secretary of the Interior requested the National Academy of Science to propose a rational policy for administration of the reserves. Further congressional action on the issue awaited NAS recommendations. Although the Secretary expected a report in two weeks, a Special Committee appointed by the Academy studied and debated for nearly two years. Sensing a need for dramatic Presidential action to brake the "stalemate" in Congress, the Committee made its recommendations in two parts. First, it recommended that thirteen new reserves be declared. Western opposition would, the Committee hoped, create an atmosphere in which Congress

148. Congressman McRae was forced by Congress to accept language which restricted timbercutting to dead or mature trees and the restrictive purpose limitations were removed. Mr. Justice Rhenquist relied on Congressman McRae's remarks to support his arguments concerning the distinction between forest and park purposes. This is a misleading reference because McRae, as the leading advocate of scientific forestry in the Congress and the only person knowledgeable about silviculture and the only one to see it as distinct from park management, was also forced to significantly modify his position during debate on the 1897 legislation. His views are not, therefore, to be taken as the sense of Congress on that point. See Miller, supra note 106, at 296; see also Smith, The Appalachian National Park Movement, 1885-1901, 37 N.C. Hist. Rev. 33, 64 (1960).
would act favorably upon the recommended forest policy, which was alleged to be forthcoming. On Washington's Birthday, 1897, President Cleveland added the thirteen new reserves, totalling approximately 21 million acres, and congressional response was so rapid that the Committee's recommendations arrived after the issue had been resolved.

President Cleveland's 1897 Washington's Birthday reserves aroused tremendous western hostility, in principle part because the boundaries were drawn with insufficient study and without consulting a single representative from the affected areas. Western outrage was, however, widely shared in the East. Congress considered various proposals to vacate the reservation order, but legislative action taken in the face of Cleveland's ill-advised move was restrained. Congress merely passed a bill authorizing the President to modify or revoke a reserve. Cleveland, however, refused to sign the measure. Because it was a rider on the appropriations bill, newly inaugurated President McKinley was obliged to call a special session of Congress to deal with fiscal and forestry matters.

149. The President's Washington's Birthday reserve created a wave of bitter outrage and hostility in Congress and in the Western press. Unlike the previous reserves, the boundaries were not carefully drawn but, rather, included whole towns, villages, farms, mines, mills, and thousands of inhabitants. The NAS committee which recommended the reserves had not even visited five of them, and there was no consultation with representatives from the affected areas and no opportunity for local citizens to become informed of or comment on the proposals. The entire Congress was aware that the reserves were unreasonable, but western representatives were particularly dissatisfied. Editorial reaction in western newspapers was dyspeptic. Some people feared that the outcry threatened both the reserve concept and the careful and promising compromises of the third session of the Fifty-third Congress.

There is, however, a striking difference between the fulminations which filled the popular press and the measured response which Congress enacted in the wake of President Cleveland's ill-advised action. The Senate considered and passed a measure to restore to entry the Cleveland Reserves less than a week after the reserves were proclaimed. See 29 Cong. Rec. 2512-17 (1897). The House rushed through a revised version of the McRae Bill which included authorization for the President "to modify or vacate" any order creating a reserve. There was considerable debate as to whether the President already had that authority, but in the end the House accepted Public Lands Committee Chairman Lacey's proposal. Id. at 2677-80. The Conference Committee on the appropriations bill agreed to an amendment bill which simply adopted the last phrases of the Lacey proposal which authorized the President to modify or revoke a reserve.

It is commonly assumed that Congress became so enraged at the Cleveland Reserves that they sought, by the 1897 Act, to limit his authority to set aside lands. See Ise, supra note 106. The record does not support that contention. Given the enormity of Cleveland's action, the response of Congress can only be viewed as a model of restraint and support for the reserves. President Cleveland, however, apparently considered the amendment to the appropriations bill unacceptable. With the new president literally arriving at the door of the inaugural ceremonies, Cleveland refused to sign the bill. See generally, Miller, supra note 106 at 228-246; Kirkland supra note 106, at 307-333.
The Organic Act passed again as a rider on an appropriations bill in June, 1897. The measure suspended the Cleveland reserves for a year but in other pertinent parts was essentially similar to the 1895 McRae bill. Surprisingly, the Act appears to rule out forestry, as presently conceived, since most harvesting was precluded. Following the 1895 compromise, only the cutting and selling of those trees which must be removed in order to protect the forest or promote the younger growth is clearly within the purposes of the Act. Manipulation of the forest cover in order to produce preferred species or preferred quality of trees, improved stocking, or growth rates is not allowed. The supply of timber that the forests were to produce was conceived to be continuous but not voluminous: the supply would be perpetual but limited in amount to those trees whose continued presence threatened the forest or the young growth. The only possibility for extensive logging in a forest reserve would occur when a stand of trees was, in some way, threatening to the forest. This might include trees which were vulnerable to fire, insect attacks, or other forms of disease or pest which threatened the young growth. It is not sufficient justification, according to the Act, to have a tree or stand of trees rotting or about to burn. They cannot be cut or sold unless the burning or rotting threatens younger growth. Hence, the 1897 Act authorizes not silviculture, or timber management, but only those uses of the forest which will not impair the watershed protection and future growth of the forest.

For the issue of reserved rights the message of the 1897 Act is that the reserves are established in order to regulate use of the forests therein. The Court's "two purpose" argument is clearly without merit because it ignores the important tension Congress perceived between use and preservation. Mr. Justice Rhenquist has argued that "to preserve and protect the forest" is synonymous with "securing favorable conditions of waterflow and to furnish a continuous supply of timber." The congressional concerns, however, reflected both in the debate and the plain language of the bill demonstrate that Congress believed that timber harvest was antithetical to, rather than synonymous with preserving the forest. Mr. Justice Rhenquist also ignored the clear statutory language which authorized the Secretary to regulate timber harvest and all other uses; literally, "to insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction."150

VI. IMPACT OF THE DECISION ON FUTURE RESERVED RIGHT CLAIMS ON PUBLIC LANDS

United States v. New Mexico construed two acts authorizing the establishment and use of forest reservations, but the opinion has im-

150. 30 Stat. 11 (1897).
plications for a variety of other non-Indian reserved rights claims. The final section of this article examines the narrow as well as the broad impact of the decision.

A. National Forests

To restate the holding, reserved rights may not be claimed for fish and wildlife protection and recreation under the 1891 and 1897 legislation. The only purpose for which reserved rights may be claimed under the majority opinion is timber preservation, and under our analysis this purpose does not extend to silviculture generally. The majority's short list is not, however, exhaustive. An Idaho Supreme Court opinion rendered just before the United States Supreme Court's decision suggests that a narrow reading of the two acts will encompass two other uses, although the practical significance of the Idaho reading is conjectural.

Two cases involving Forest Service claims to the entire natural flow of a stream, including seasonable variations, reached the Idaho Supreme Court shortly after *Mimbres Valley Irrigation Co. v. Salopek* was decided in New Mexico. In both Idaho cases, a district court allowed the government's claims, and in *Avondale Irrigation District v. North Idaho Properties* the district court required the claim to be quantified. The state supreme court reversed both district courts on the issue on federal instream flows, adopting the *Mimbres Valley* reasoning. *Avondale Irrigation District* did, however, reach two issues not considered in *Mimbres Valley* and broadened slightly the uses for which a federal claim may be valid. In one Idaho case, the district court had disallowed federal claims for fire prevention and erosion control, and the supreme court disagreed but did not reverse since there was no evidence of the need for these two uses. This dicta has strong support in the legislative history of the 1897 Act, but it seems unlikely that much water can in fact be claimed for these two purposes.

The more interesting issue addressed by the Idaho Supreme Court was whether a valid non-consumptive reserved right—for the limited purposes allowed by the Idaho and United States Supreme Courts—must be quantified where state law so requires. The McCarren Act, under which state courts acquire jurisdiction over federal claims, has been interpreted by the Supreme Court to require state courts to apply the federal substantive law of reserved rights. Under this rule, questions of volume and scope are matters of federal substantive law. The line between substance and pro-

152. 90 N.M. 410, 564 P.2d 615 (1977).
procedure is, of course, not self-defining, and the imposition of state law on the theory that the issue is merely procedural could become an effective means of diminishing the allowable scope of federal reserved rights. To avoid undue interference with federal claims, the majority, over a dissent, applied Idaho law in a manner which avoided a conflict with a possible federal common law rule that the government need not quantify its non-consumptive claims. Avondale Irrigation District stands for the proposition that a non-consumptive "claim to the entire flow, if it is proved to be necessary,"\(^\text{154}\) is a sufficient quantification of the reserved rights claimed in the two cases.

The majority opinion also seems to foreclose reserved rights claims under the Multiple-Use Sustained Yield Act, but this part of the opinion is dictum as the issue was not before the Court. Moreover, the majority opinion is bad dictum for it reflects a too restrictive approach to the standard of implied intent to reserve. Given the federal government's constitutional power to administer the public lands in light of changing conditions,\(^\text{155}\) it would be reasonable to presume that Congress has delegated the authority to reserve water when a federal statute with respect to withdrawn public lands contemplates a water-related use. Such a presumption would be rebuttable in light of a long history of congressional desire to accommodate state and federal claims. A presumption in favor of federal reserved rights is a logical extension of Supreme Court precedents recognizing the relationship between land and water use in the West. Moreover, a presumption is subject to two limitations which recognize state interests in certainty with regard to water allocation. First, the Court's opinion in *Cappaert* properly suggests that the federal government is entitled to only the minimum amount of water necessary to accomplish the purpose of the reservation. Second, state interests are not without representation in Congress, and there is little that a court might do to recognize federal interests that cannot be corrected by Congress should it disagree with a decision. The public trust does not compel any fixed allocation of land and water resources.

B. Other Withdrawn Lands

Other agencies, such as the Department of the Interior, often claim reserved rights for national parks, monuments and fish and wildlife refuges, and prior cases have recognized reserved rights for these lands. The majority opinion in *New Mexico*, however, casts some doubt on the success of such claims where Congress does not expressly indicate that water is necessary to support the land use.

\(^{154}\) *Id.* at 41, 577 P.2d at 20.

To support its denial of the Forest Service’s claim in *New Mexico*, the Court noted a distinction between the National Park Service enabling legislation and the two forest acts. The former was said to evidence a broader purpose as compared to forest withdrawals. As we have argued, the distinction between parks and forests only became clear after the 1905 legislation. Even granting the majority’s premise, it should follow that congressional intent to reserve water should be more readily inferred in the case of parks, monuments and wildlife refuges. In an apparent effort to foreclose an argument based on the park/forest distinction, the Court in a footnote indicated that the opinion expressed no views “as to what, if any, water”156 Congress intended to reserve under the enabling legislation creating the national parks. Parts of the opinion went further and suggested that all minimum flow claims must be based on express water-related withdrawals. The geographical position of most national parks makes the question of intent to reserve of limited interest because there will be few upstream appropriators to contest a reserved rights claim. The issue is important for national monuments and wildlife refuges. Because of the close connection between water and the purpose of the reservation, Mr. Justice Rehnquist’s offhand footnote ought not to be construed as a repudiation of the holdings in *Arizona v. California* and *Cappaert v. United States* recognizing reserved rights for these uses.

C. Stockwatering and Other Reserved Rights

Reserved rights were also claimed for stockwatering purposes, but the Court rejected these claims. If the Court had upheld the claim, the door would have been opened to the argument that all federal permits to use public lands carry with them reserved rights. *United States v. New Mexico* is the first Supreme Court opinion to consider this question so the Court’s analysis of the claim has implications beyond the narrow issue of stockwatering. The Court rejected the stockwatering claim on three grounds: (1) stockwatering was not a direct purpose of the reservation of forests; (2) there was no evidence in the legislative history of the need to allocate water for stockwatering purposes; and (3) the intent of Congress would not be defeated if stockwatering could not take place.157 An argument could be made that a major reason for the 1897 legislation was to protect forests from destructive grazing, and thus water should be reserved to allow the Forest Service to regulate grazing use of the forest.158 But, access can be controlled directly so there may be little need to imply federal water rights for this purpose.

156. ___ U.S. at ___, 98 S.Ct. at ___.
157. Id. at ___, 98 S.Ct. at 3022.
158. The legislative history shows that Congress clearly and explicitly recognized livestock use of the forests as a major threat to the forest cover. Controlling
The rationale for denying reserved rights for stockwatering permits does not necessarily apply to permits to develop natural resources such as geothermal and oil shale since the purpose of the reservation is energy development. Nonetheless, the result should be the same in both cases. In United States v. District Court for Water Division No. 5, the Supreme Court suggested that reserved rights could be claimed by the Department of the Navy for its oil and petroleum reserves. There is, however, an important distinction between reserved rights claimed by a federal agency and those claimed by a private party acting under federal permission. In the first situation, the federal agency's mission may require an allocation of water different from that allowed under state law. Thus, there is a need to construe water-related withdrawals as carrying appurtenant rights unless Congress expressly disclaims such an intention. Perhaps the same could be said of federal permittees on the theory that they are carrying out a federal function. Generally, however, federal permits are issued for uses compatible with state water law. The broad rationale of the Court's disposition of the stockwatering issue is that there is no need to place federal livestock is quite clearly one of the purposes for which the reserves were established. The record of the debates in Congress, the regulations adopted by administrators implementing congressional directives, and the popular press of the day all testify to this universally held understanding of the forest reserves. McRae wearily summed up the bill at the final debate before passage in the Fifty-third congress:

I have repeatedly discussed this bill, and I do not desire to take up time now. It is, however, intended to provide a sensible method for preventing forest fires, for keeping the cattle and sheep from destroying the young growth, and for much use of the ax as will help and not hurt the forest.

The need to protect the reserves from grazing was noted immediately and often by successive Secretaries of the Interior, Commissioners of the General Land Office, and Heads of the Division of Forestry. The very first regulations issued regarding the reserves following the 1891 Act "prohibited" the driving, feeding, grazing, pasturing, or herding of cattle, sheep, or other livestock "within any of the reserves." See Roberts, supra note 106, at 21. Moreover, the very first regulations issued pursuant to the 1897 Act prohibited the entrance of sheep or cattle into any of the reserves. The Report of the Commissioner of the General Land Office for 1898 noted that "next to fires, sheep grazing constitutes the most serious difficulty to be considered in administering the reserves." It was necessary, however, to prohibit pasturing of sheep in all the reserves except those in Washington and Oregon because sheep grazing "has been found injurious to the forest cover." He noted, however, that "special efforts have been directed toward ascertaining the particular regions in which the conditions are such as to demand the exclusion of sheep, and toward acquiring information necessary to a determination of the nature of restriction required to regulate sheep grazing in other regions." After studying the matter, the Commissioner had rescinded the prohibition on all livestock and permitted cattle generally "so long as it appears that injury is not being done to the forest growth." Report of the Commissioner of the General Land Office 53d 3d 87-88 (1898).

licences and permittees on a different footing from state appropriators unless Congress expressly so states. Even if Congress wants to further the federal purpose by overriding state law, the fairer method of accomplishing this objective is to invoke the Supremacy Clause. A federal permittee would not be bound by state law but would have to compensate any water right holders whose rights were taken by the exercise of the federal lease or permit.


The answer to this question is, of course, that reserved rights may be claimed under state law. A federal land management agency may claim instream flow rights for public lands by filing for a state appropriation permit. The federal government will be subject to the procedures and substantive law of the state. All federal rights—if granted—will have late priority dates. To many, this is a desirable result. In light of the government's trust over the public lands and the fragmented state law recognizing instream flow rights, we conclude that the federal government should not be left to state law to claim water rights for fish and wildlife preservation and other related purposes. Instead, the withdrawal of land for purposes which are arguably water-related should be construed to carry with them appurtenant water rights. Future federal-state adjustments should come through congressional legislation defining more precisely the scope of federal reserved rights.

A FINAL WORD

Throughout the West, United States v. New Mexico will be read, along with California v. United States, as a major victory for state control of western waters. On one level, this reading is right and the cases are a welcome relief from the Supreme Court's simplistic preference for federal control of water resources development. Nevertheless, advocates of state control can take little heart from New Mexico for the case is too flawed and hence unstable to have a long term influence. It is unlikely that the Supreme Court will reverse itself on the narrow issue of the effect of the 1891 and 1897 acts, but it is by no means certain that the broad dicta and attitudes which run through the opinion will prove a reliable guide to future reserved rights controversies.