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John E. Masters

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CASE NOTE

WATER AND WATER COURSES—Limiting the Reservation Doctrine. Mimbres Valley Irrigation Co. v. Salopek, 564 P. 2d 615 (N.M. 1977), cert. granted, 46 U.S.L.W. 3426 (No. 77-510).*

*Mimbres Valley Irrigation Co. v. Salopek*¹ originated in 1966 as a private action to enjoin an alleged illegal water diversion from the Rio Mimbres in southwestern New Mexico. In 1970 the State intervened seeking a general adjudication of the water rights.² Among the named defendants was the United States³ which claimed water for minimum instream flows and recreational purposes within the Gila National Forest.⁴ The case was assigned to a special master who filed findings of fact and conclusions of law to support the United States' claim to six cubic feet per second under the implied reservation of water doctrine.⁵ Following an objection by the State to the special master's report, the district court found that the United States had not reserved water for instream flows and recreational purposes when the land was withdrawn from the public domain.

The New Mexico Supreme Court considered the issue to be whether the purposes for which the forest lands were reserved encompassed recreation and instream flows. Finding these uses were not envisioned when the land was reserved, the court affirmed the district court's denial of a water right.

THE RESERVED WATER RIGHTS DOCTRINE

The implied reservation of water rights doctrine was first enunciated in 1908 in *Winters v. United States*.⁶ Winters led a group of investors and farmers in a scheme to dam and divert the Milk River in Montana for agricultural purposes. Following sizeable expenditures and strict compliance with state appropriation procedures, Winters created a successful farming community. Downstream, on the Fort Belknap Indian

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1. 564 P.2d 615 (N.M. 1977) cert. granted, 46 U.S.L.W. 3426 (No. 77-510).

2. N.M. STAT. ANN. § 75-4-4 (1953).

3. 43 U.S.C. § 666 (1970).

4. The forest was created by a series of Presidential Proclamations; the primary ones were announced on March 2, 1899, July 21, 1905, February 6, 1907, June 18, 1908 and May 9, 1910.

5. The implied reservation of waters doctrine is alternately referred to as the "reservation doctrine" and the "reserved water rights doctrine."

6. 207 U.S. 564 (1908).

Reservation which had been created prior to the Winters group settlement, the flow of the river was considerably reduced. Consequently, the United States, on behalf of the Indians, sought an injunction to prevent diversions of water by Winters. In the creation of the Indian reservation no mention was made of a concurrent reservation of water. The Supreme Court noted, however, that without the water the Indian lands would be practically worthless, so Congress must have intended to reserve water for use on the Reservation. The government was allowed to acquire an appropriation dating from the establishment of the Indian reservation. Winters and his party became junior appropriators and lost use of most of the River's waters.

Although couched in terms of resolving an ambiguity in favor of the disadvantaged Indian,⁷ the decision had the effect of saving the government the expense of buying rights from Winters. Appropriately, Dean Trelease has described the reservation doctrine as a "financial doctrine."⁸

Until 1963 the doctrine was thought to apply only to Indian lands.⁹ This limitation was rejected by the Supreme Court in the landmark case *Arizona v. California*.¹⁰ In that case several states drained by the Colorado River sought the Court's assistance in determining their respective legal rights to the River's water. The United States also claimed a portion of the water for uses on various federal enclaves. Writing for the majority, Justice Black determined federal rights did exist and the reservation doctrine was applicable to determine the extent of those rights. The court found that federal reserved water rights were not limited to Indian Reservations.¹¹ The future needs of the Gila National Forest, source of a major Colorado River tributary, were specifically mentioned.¹²

In its most recent statement on the doctrine, the *Cappaert* case,¹³ Chief Justice Burger, speaking for a unanimous court, said:

7. *Id.* at 576.

8. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 147m (1971).

9. Although the *Pelton Dam* case, *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955), and the *Hawthorne* case, *Shamberger v. United States*, 165 F. Supp. 600 (1958), *aff'd*, 279 F.2d. 699 (1960), gave some indication that this interpretation would soon be rejected.

10. 373 U.S. 546 (1963).

11. *Id.* at 601.

12. *Id.*

13. *Cappaert v. United States*, ___U.S.____, 96 S.Ct. 2062 (1976).

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. . . . The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.¹⁴

Cappaert marked the first time, the Court applied the doctrine to groundwater and found that by establishing, in 1952, the Devil's Hole National Monument for the purpose of preserving a unique specie of pupfish, the United States impliedly reserved water in the amount necessary to maintain the fishes' habitat, an underground pool. The pumping of groundwater on the Cappaert ranch was restricted so that a minimum level would be maintained in the pool which was supplied by the same aquifer.

ANALYSIS BY THE MIMBRES VALLEY DECISION

In an effort to ascertain the purposes for which the Gila National Forest was created, the New Mexico Supreme Court reviewed the statutory authorization for the creation of national forests. By the Creative Act of March 3, 1891¹⁵ power was granted to the President to withdraw forested land from the public domain. This Act was silent on limitations of the power as well as protection and administration of the newly created reserves. After attempting to enact such legislation for over four years,¹⁶ Congress and President McKinley finally agreed to the Organic Administration Act of 1897, commonly known as the Organic Act.¹⁷ This Act specified that national forests could be created for purposes of: 1) improving the forest, 2) protecting the watershed, and 3) providing a

14. *Id.* at 2069.

15. 16 U.S.C. § 471 (1970) provides that "[t]he President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as national forests, and the President shall, by public proclamation, declare the establishment of such forests and the limits thereof."

16. See generally Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCES LAW. 503 (1974).

17. 16 U.S.C. §§ 473 *et seq.* (1970).

supply of timber for the citizens.¹⁸ The Organic Act does not mention whether recreational uses or instream flows were anticipated. The United States sought to demonstrate in *Mimbres Valley* that such purposes were intended by the drafters of the Organic Act.

The government proposed two arguments. The first contention was that the Organic Act envisioned "aesthetic, environmental, recreational and 'fish' purposes."¹⁹ Pointing to another section of the Organic Act,²⁰ the United States claimed that the Secretary of Agriculture was instructed to regulate the forests for the objectives of the reservations. The statute specified that these objectives, "occupancy and use," now correspond to recreational uses and minimum instream flows. Accordingly, Congress envisioned these purposes when the Organic Act became law.

The court rejected this argument by distinguishing a "purpose" for creation from an allowable "use" of the land. The court refused an expansive reading of the Organic Act, stating "[w]e cannot take such liberty with the expressions of Congress."²¹ The explicit "purposes" announced in the Act could not be supplemented by "uses" later deemed appropriate by the Secretary. As an example, the court noted that if a secondary use such as grazing conflicted with a primary purpose such as watershed protection, the secondary use would not be permitted.²²

As its second contention the government argued that in enacting the Multiple-Use Sustained-Yield Act of 1960,²³ Congress was merely clarifying an intent which had existed since the forest was created in 1899. The 1960 Act states "[i]t is the policy of the Congress that national forests are established

18. 16 U.S.C. § 475 (1970) which provides in part: "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[.]"

19. *Mimbres Valley Irrigation Co. v. Salopek*, *supra* note 1, at 617.

20. 16 U.S.C. § 551 (1970) which provides "[t]he Secretary of Agriculture shall make . . . such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction[.]"

21. *Mimbres Valley Irrigation Co. v. Salopek*, *supra* note 1, at 617.

22. *Id.*

23. 16 U.S.C. § 528 (1970) which states: "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title."

for outdoor recreation, range, timber, watershed and wildlife and fish purposes."²⁴ In disposing of this argument, the court deferred to a Fourth Circuit opinion²⁵ which had granted an injunction against clear-cutting. That court noted "repeal of a statute by implication is not favored."²⁶ The Fourth Circuit found that the Multiple-Use Sustained-Yield Act of 1960 could not displace the Organic Act since the 1960 Act is "supplemental to, but not in derogation of, the purposes for which the national forests were established."²⁷ The *Mimbres Valley* court found that the 1960 Act was not intended to clarify purposes for which the national forests had been created.²⁸

The New Mexico court concluded that the purposes for which the Gila National Forest was created were limited to the three express provisions of the Organic Act of 1897.²⁹ Since recreational uses and instream flows were envisioned by neither the President nor the Congress when the land was withdrawn from the public domain, no implied reservation of waters arose. The United States' claim was accordingly denied.

EVALUATION OF THE MIMBRES VALLEY RATIONALE

Whether *Mimbres Valley* will survive as an effective limitation of the reservation doctrine depends, to a large extent, upon whether it is a valid interpretation of *Cappaert v. United States*.³⁰ In *Cappaert* the Supreme Court stated that the existence and scope of the reserved water right is determined by the purpose for which the land was withdrawn. *Mimbres Valley*, as stated above, limited application of the reservation doctrine to those purposes expressed in the Organic Act.

24. *Id.*

25. *Izaak Walton League v. Butz*, 522 F.2d. 945 (4th Cir. 1975).

26. *Id.* at 953.

27. *Supra* note 23.

28. "There are four basic reasons for the enactment of this bill: (1) There should be a statutory directive to administer the national forests under sustained yield; (2) there should be a similar directive to administer the national forests for multiple use; (3) all the renewable surface resources for which the national forests are established and shall be administered should be named in a single statute; and (4) enactment would help to implement the program for the national forests sent to the Congress in March 1959, and unanimously approved by this committee by a resolution adopted Aug. 4, 1959." H.R. REP. NO. 1551, 86th Cong., 2d Sess. (1960), reprinted in [1960] U.S. CODE CONG. & AD. NEWS 2377, 2378.

29. *Supra* note 18.

30. *Supra* note 13.

Both *Arizona v. California*³¹ and *Cappaert v. United States*³² seem to recognize that the government's intent is the controlling factor. If intent controls and the proposed use "would not normally be apparent to the parties and not within their reasonable contemplation at the time the land was withdrawn,"³³ it would seem no reservation of waters could be implied. But, as Dean Trelease observed:

In all probability such searches for specific intentions will prove futile. Rather than a question of fact, the "intent of the government" appears to be a rule of law, an irrebuttable presumption that if water is needed to accomplish the purposes of the reservation as *now perceived*, then enough unappropriated water was reserved to fulfill those purposes. The problem is much like other searches for "the intent of the parties"—to a contract or a deed—where in fact there was no intention at all; the parties simply never thought about the matter. The court is called upon to supply the missing term.³⁴

As with most early dealings in western lands, the Congress probably never considered uses of water within national forests other than those specifically provided for by the Organic Act. At least in its dealings with Indians, the Supreme Court apparently considers the question to not be of finding an express intent but, rather, what would the parties have done if the problem had been considered.³⁵ When this reasoning is applied to benefit the disadvantaged, few complain loudly,³⁶ but when the result benefits the government—one of the parties who negligently forgot to specify its intent—the result is more difficult to justify. In situations where Indian lands are not involved, resort to strict interpretation of federal intent may be justifiable.

A problem unanswered by the *Mimbres Valley* court is whether the Multiple-Use Sustained-Yield Act of 1960 created a water right as of 1960 for the new purposes. In rejecting the United States' claim under the 1960 Act to an 1899

31. *Supra* note 10, at 600.

32. *Supra* note 13.

33. Trelease, *Indian Water Rights for Mineral Development*, in MAXFIELD, *NATURAL RESOURCE LAW ON AMERICAN INDIAN LANDS* 219 (1977).

34. *Id.* (emphasis in the original).

35. *Winters v. United States*, *supra* note 6, is a classic example.

36. Except the party losing the water!

right,³⁷ the court concluded that “[t]he prior discussion in this opinion reveals that the United States does not have reserved water in the forest for these permitted uses.”³⁸ No mention is made of a 1960 right.

While such a right would be junior to almost all others on the river, the 1960 Act seems to meet the requirements of the reservation doctrine—including the need for an express intent required by the *Mimbres Valley* court. Under the property clause,³⁹ the government unquestionably has power to establish new uses or purposes for its land. Express reservations of water for the new purpose would be junior only to existing appropriations under state law.⁴⁰ Failure to make an express reservation forces the government to rely on the reservation doctrine. To deny the creation of an implied right as of 1960 is to infer that the reservation doctrine will apply only when there is a concurrent intent and withdrawal even though all other requirements for application have been met. There is neither a statutory provision nor caselaw to support such a limitation. To the contrary, in *Winters* the court stated, “[t]he power of the government to reserve the waters and exempt them from appropriation under state law is not denied, and could not be.”⁴¹ The Court makes no qualification of its statement. The *Mimbres Valley* court should have granted the government a 1960 appropriation date. The most likely explanation for the failure to do so is that the government did not request a 1960 right for instream flows and recreational uses. If this was the case, then the only real question under the 1960 Act is whether the newly created purposes relate back to the time of the original reservation.

This question, too, was inadequately resolved by the *Mimbres Valley* court. The court deferred to a Fourth Circuit case involving clear-cutting.⁴² In that case the government asserted that the 1960 Act directed modern forestry principals be used in the management of the forest. Since clear-cutting is the preferred method of harvesting timber, the government argued that clear-cutting is statutorily authorized, and the

37. The date of the first Presidential Proclamation, *see* note 4.

38. *Mimbres Valley Irrigation Co. v. Salopek*, *supra* note 1, at 619.

39. U.S. CONST. art. 4, § 3.

40. *Cappaert v. United States*, *supra* note 13.

41. *Supra* note 6, at 577.

42. *Izaak Walton League v. Butz*, *supra* note 25, at 953.

Organic Act's limitation to "dead, mature or large growth of trees"⁴³ would no longer be valid. The Fourth Circuit found the Multiple-Use Sustained-Yield Act could not, by implication, displace the Organic Act. In this case, the government was arguing for repeal by implication; this is not true in *Mimbres Valley*.

In *Mimbres Valley* the government contended that the 1960 Act was merely an expression of the intent which existed when Congress drafted the Organic Act. The two can be read together without contradiction. The purposes of the 1960 Act are "supplemental to, . . . not in derogation of,"⁴⁴ the Organic Act in this case.

It is still questionable whether the Multiple-Use Sustained-Yield Act of 1960 is a codification of prior intent. The issue was not resolved by the *Mimbres Valley* court. The court's result can be explained by an allocation of the burden of proof of the prior intent. When complicated by the fictional nature of the reservation doctrine, the burden of proving a prior intent may become impossible. This is apparently what was required of the government by the *Mimbres Valley* court. Since the burden was not met, the court denied the argument. While this was not the court's express reason for rejecting the United States' contention, it does justify the conclusion. Since before there had been almost an irrebuttable presumption⁴⁵ that the intent did exist when the land was withdrawn, this limitation on new purposes may be the most significant aspect of *Mimbres Valley*. Reallocation of the burden of proof could effectively limit the application of the reservation doctrine and is seemingly justified by the *Cappaert* requirement that an intent be demonstrated.

FUTURE EFFECTS OF THE MIMBRES VALLEY DECISION

To those water users with appropriations before the federal withdrawal was made, the reservation of water doctrine was never a threat. Application of the doctrine has been limited to unappropriated water existing at the date of the withdrawal.⁴⁶ Those users who acquired rights after the withdraw-

43. 16 U.S.C. § 476 (1970).

44. *Supra* note 23.

45. *E.g.*, Trelease's "irrebuttable presumption," *supra* note 34.

46. *Cappaert v. United States*, *supra* note 13.

al live with the uncertainty associated with the reservation doctrine. These are the parties who may gain from *Mimbres Valley*, because if the 1960 Act does not relate back to the withdrawal, the rights vesting after the reservation of land but before the new purpose was announced will have priority over the new purposes.

Prior to *Arizona v. California* in 1963, a western water user not located near Indian land probably would not have guessed that the reservation doctrine might restrict his water rights.⁴⁷ Now, with the application of the doctrine to all federal enclaves and with sixty-one percent of western natural runoff occurring on federal lands,⁴⁸ it is entirely possible that the United States has an unrecorded and unquantified right superior to the farmer's rights. These unrecorded rights have been called "wild cards"⁴⁹ and have a recognized deterrent effect on private projects requiring water.⁵⁰ Thus, any statutory action or judicial proceeding which eliminates some of the uncertainty will be essential, if not critical, to the development and growth of the western states.

In spite of the defects in its decree and opinion, the *Mimbres Valley* case may prove to remove some of the uncertainty caused by the reservation doctrine. By requiring the government to prove the unprovable fact, the unstated intent, there is an increased ability to forecast a successful defense to a reservation doctrine claim. No one can, however, predict when the doctrine will be invoked by the government and how much water will be granted by a successful application of the doctrine.

For holders of post-1963 water rights, *Mimbres Valley* will be of little help. This group of users acquired appropriations after the Multiple-Use Sustained-Yield Act of 1960 created new purposes and after *Arizona v. California* gave notice that the reservation doctrine would apply to all federal en-

47. Again, *Winters v. United States*, *supra* note 6, is the foremost example.

48. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND 141 (1970).

49. TRELEASE, *supra* note 8, at 160. "Rights created by the reservation doctrine . . . are wild cards that may be played at any time, blank checks that may be filled in for any amount, or that may never be cashed. They deter other uses, and cause losses of benefits, and they may encourage or permit federal uses that are financially possible with the money at hand but economically undesirable because more is lost than is gained.

50. PUBLIC LAND LAW REVIEW COMMISSION, *supra* note 48, at 144; NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 469 (1973).

claves. For the agriculturalist holding a 1964 appropriation it is academic whether the government's right is dated 1899 or 1960.

For all western water users the uncertainty remains. Will the upstream federal enclave seek a reserved water right? Does the federal creative purpose include this use? How much water will be granted to the government? Will downstream appropriators be compensated for lost rights? Are other sources of that precious liquid available? These vexing questions persist until each hydro-system's water is subjected to a general adjudication.

Such issues are particularly troublesome to western energy developers. Coal gasification, electric generation, and oil shale extraction⁵¹ are typical examples of where the uncertainty caused by the doctrine may cause costly delays. The nation's need for domestic energy increases, but before investing millions or billions of dollars to meet this need, the private sector requires a reduction in the uncertainty surrounding potential water supplies. Forewarned of the possible application of the doctrine, an energy developer would be foolish to make a large expenditure and then rely upon the government to not make a claim to the water used by the plant. Even the possibility that the doctrine may be applied to gain water for energy projects is uncertain where no valid federal purpose existed to create an implied reservation. Again, the "wild card" is too large a variable for most investment decisions.

The quickest and most satisfactory solution would be a Congressional enactment. The Public Land Law Review Commission⁵² and the National Water Commission⁵³ both recognized the economic disruption caused by the reservation doctrine and both presented plans to limit the doctrine. Basically, these plans called for an identification of the potential claims, a quantification of the need, and formal procedures to test the claims. Congressional action along these lines would remove most of the uncertainty in the finely tuned western

51. See, for example, Comment, *The Federal Reserved Water Doctrine—Application to the Problem of Water for Oil Shale Development* 3 LAND & WATER L. REV. 75 (1968).

52. *Supra* note 48, at 146, recommendation No. 56.

53. *Supra* note 50, at 461-68, recommendations No.'s 13-1 to 13-6.

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water systems. Availability of water for energy development could be determined, informed financial decisions could be made and domestic energy production could be increased.

CONCLUSION

In *Mimbres Valley* the court limited the application of the reservation doctrine to those instances where the government can clearly demonstrate that the federal purpose of the withdrawal requires a water right. This limitation may prevent liberal application of the reservation doctrine for newly created purposes such as grazing and recreation.

Given the unlikelihood that the reservation doctrine will be judicially overturned, until legislation is passed which requires the potential claims to be identified and quantified, economic disruption among western water users will continue. The need for legislation is real; the need can only increase. Further delay by Congress may cause irreparable damage to the country's social and economic goals.

JOHN E. MASTERS