Land & Water Law Review

Volume 19 | Issue 1 Article 5

1984

Water Law - The Limits of Federal Reserved Water Rights in National Forests - United States v. City and County of Denver

Stephenson D. Emery

WATER LAW—The Limits of Federal Reserved Water Rights in National Forests. *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983).

Water is a scarce resource in the West, particularly in the Rocky Mountains. Indeed, the West is considered semi-arid because most farming requires irrigation.[1] As a result, Western states are very solicitous about dividing the limited water supply among a large number of users. Threatening the states' careful water distribution systems, however, are the federal government's vast Western landholdings. In the upper Colorado region, 96% of the average annual water yield originates on, or flows through, federal land.[2] On November 2, 1967, the State of Colorado asked the federal government to quantify its claims for water on its land by joining it in a general adjudication of water rights within Colorado water divisions 4, 5, and 6.[3] After the United States' objections to joinder were resolved,[4] the water court for the three divisions appointed a master-referee, who conducted hearings and filed a lengthy report of his findings.[5] The water court reviewed the master-referee's report and in 1978 ruled that the United States had reserved water on its Colorado land by withdrawing it from the public domain, but that these federal reserved water rights were more limited in quantity and permissible application than the United States had sought.[6]

On appeal, the Colorado Supreme Court considered the extent to which the federal government possessed reserved water rights on its forest reservations. The United States claimed that its reserved water rights included instream flows, while Denver argued that federal reserved rights did not exist at all.[7] Culminating fifteen years of litigation, the Colorado Supreme Court held, *inter alia*, that instream flows were not authorized in national forests because federal reserved water rights were limited to the minimum amount of water necessary to fulfill the primary purposes of the forest reservation and these purposes did not sanction instream flows.[8] This Note

1. *See* Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967 (1960).
2. United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978).
3. Opening Brief for the United States at 4-5, United States v. City and County of Denver, 656 P.2d 1 (Colo. 1983). Seven water divisions were created by the Colorado Water Right Determination and Administration Act of 1969 to function as the judicial units in which water adjudications were to proceed. COLO. REV. STAT. §§ 37-92-101 to -602 (1973).
4. The United States challenged application of the statute that allowed it to be joined in state water adjudications, but the challenge failed. Colorado Water Conservation Dist. v. United States, 424 U.S. 800 (1976). *See also* United States v. Dist. Court for Eagle County, 401 U.S. 520 (1971).
5. Nineteen hearings over three years resulted in 10,000 pages of transcript from which the master-referee drew in making his 1,084 page report. Opening Brief for the United States, *supra* note 3, at 6.
6. 656 P.2d at 12-13. Lands owned by the United States are either: 1) public domain; or 2) reserved. Reserved lands are withdrawn from the public domain by statute, executive order, or treaty and are dedicated to a specific purpose. *Id.* at 5. Among the reservations affected by this adjudication were seven national forests: 1) Arapahoe; 2) White River; 3) Grand Mesa; 4) Gunnison; 5) Uncomphagre; 6) Manti-La Sal; and 7) Routt. National forests are created by the President under power given by the Creative Act of 1891 (16 U.S.C. § 471 (1976)), and administered by the Department of Agriculture under such acts as the Organic Act of 1897 (16 U.S.C. §§ 473-481 (1976)), and the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. §§ 528-531 (1976)). *See infra* text accompanying note 18 for a definition of federal reserved water rights.
7. Opening Brief for the United States, *supra* note 3, at 7, 14.
8. United States v. City and County of Denver, 656 P.2d 1, 35 (Colo. 1983). This litigation also concerned the existence of federal reserved water rights in national parks, national

will examine how and why the Colorado Supreme Court restricted the federal government's reserved water rights.

BACKGROUND: THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

A. Creation.

The first trace of the reserved rights doctrine is found in *United States v. Rio Grande Dam and Irrigation Company,*[9] a case which held that the property clause of the Constitution limited the right of states to control water. Nine years later the United States Supreme Court promulgated the doctrine in *Winters v. United States*[10] with its decision that the federal government possessed power to reserve water on its lands and exempt it from appropriation under state water law.[11] In *Winters,* the Court resolved a dispute between the federal government and the State of Montana over water rights on an Indian reservation by upholding an order that enjoined Montana from building any dams or reservoirs upstream of the reservation. The Court also ruled that Montana's entry into the Union on an 'equal footing' in no way affected the federal government's implied reservation of water.[12] By the early 1900's the United States Supreme Court had sketched the broad outlines of a doctrine that enabled the United States to obtain water rights outside of a state's water appropriation system.

B. Interpretation.

The reserved rights doctrine laid dormant for almost fifty years until *Federal Power Commission v. Oregon*[13] was decided. Though this case did not concern the doctrine directly, it limited the doctrine's application to federal reservations, as opposed to public lands.[14] In *Arizona v. California,*[15] the Court expanded the doctrine to include non-Indian federal reservations, as well as Indian reservations.[16] A precise definition of the doctrine was finally given by the Court in *Cappaert v. United States*:[17]

> 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

monuments, mineral hot springs, and public springs and water holes. A number of administrative aspects of federal reserved water rights were litigated, as well. These issues, however, are beyond the scope of this note.

9. 174 U.S. 690 (1899).
10. 207 U.S. 564 (1908).
11. *Id.* at 577. *See generally* Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water,* 1975 B.Y.U. L. REV. 639 (1975).
12. 207 U.S. at 577.
13. 349 U.S. 435 (1955).
14. *Id.* at 448. Oregon claimed that the United States had ceded ownership of water on reservations to the states in the Act of July 26, 1866 (43 U.S.C. § 661 (1976)) and the Desert Land Act of 1877 (43 U.S.C. §§ 321-339 (1976)) but the Court held that those statutes applied to public lands, not reservations.
15. 373 U.S. 546 (1963).
16. *Id.* at 601.
17. 426 U.S. 128 (1976).

> 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 nonnavigable streams.[18]

The majority in *Cappaert* declared that reserved water rights were to be determined in regard to the federal purpose of the reservation, not state law.[19] Moreover, where water was necessary to fulfill the purposes of the reservation, intent to reserve the water would be inferred;[20] but the quantity of the reserved right was limited to the minimum amount of water necessary to accomplish those purposes.[21]

Cappaert's broad interpretation of the reserved rights doctrine was narrowed significantly by *United States v. New Mexico*.[22] At issue in *New Mexico* was the United States' claim to various reserved rights in the Gila National Forest. Based on the Organic Act of 1897 (Organic Act)[23] and the Multiple-Use Sustained-Yield Act of 1960 (MUSYA),[24] the United States claimed reserved rights for aesthetic, recreational, wildlife-preservation, and stockwatering purposes.[25] Mr. Justice Rehnquist applied the reserved rights doctrine narrowly in his majority opinion because he felt that it was a judicial exception to Congress' deference to state water law.[26] Critical to the United States' claim was the contention that the Organic Act provided three purposes for which national forests had been established, namely: 1) to preserve and protect the forest; 2) to safeguard the forest watershed; and 3) to furnish a continuous supply of timber.[27] The Court's construction of the Organic Act allowed for only watershed and timber protection, however.[28]

Further, the Court reasoned that those two purposes did not support an instream flow claim for aesthetic, recreation, or fish-preservation purposes, insofar as these flows would be at odds with Congress' desire to maximize the amount of water available for development of the West.[29] MUSYA was viewed by the Court as having broadened the purposes of national forests without reserving additional water to accomplish those new purposes.[30] The Court called the new purposes of MUSYA secondary, and distinguished them from the primary purposes of the Organic Act by holding that the United States had not shown the secondary purposes to be so crucial as to require more water in contravention of Congress' wishes.[31]

18. *Id.* at 138.
19. *Id.* at 145.
20. *Id.* at 139.
21. *Id.* at 141.
22. 438 U.S. 696 (1978).
23. 16 U.S.C. §§ 473-481 (1976).
24. 16 U.S.C. §§ 528-531 (1976).
25. 438 U.S. at 698.
26. *Id.* at 715.
27. *See infra* text accompanying note 81 for the exact language of the Organic Act.
28. 438 U.S. at 707 n.14.
29. *Id.* at 713.
30. *Id.*
31. *Id.* at 715.

It was in the wake of *New Mexico* that *United States v. City and County of Denver* was decided.

THE PRINCIPAL CASE

A. The Arguments.

In its appeal, the United States was primarily concerned with the nature and scope of reserved water rights under federal law.[32] The Organic Act, it argued, had reserved water for instream uses within the confines of the two purposes delineated by *New Mexico.*[33] Such uses included fire fighting and protection, and flood, soil, and erosion control.[34] The United States next contended that MUSYA had reserved additional water, with a 1960 priority date, for recreational and wildlife purposes.[35] Seemingly, the United States Supreme Court had disposed of this argument in *New Mexico,*[36] but the United States insisted that the language was dictum, and in any event, erroneous.[37] The language was erroneous because the new purposes of MUSYA were supplemental only in that they could not stand alone as purposes for which a national forest could be established, not that they were secondary;[38] and dicta because, in *New Mexico,* the United States had argued that MUSYA demonstrated broad purposes for which national forests had *always* been established, not that MUSYA had reserved more water with a *1960 priority.*[39]

Denver did not respond directly to any of the United States' arguments. Instead, it claimed that the United States was relegated to the same laws as all other appropriators because federal reserved water rights simply did not exist.[40] Specifically, Denver asserted three arguments. First, that the United States had abandoned any interest in water on the public domain by virtue of the Act of July 26, 1866,[41] the Desert Land Act,[42] and entry of Colorado into the Union upon ratification of its constitution by Congress;[43] second, that the McCarran Amendment[44] required the federal government to submit to state water law;[45] and third, that the Supreme Court decisions creating and interpreting the reserved rights doctrine were either dicta or somehow inapposite, to wit: *Rio Grande* was irrelevant in that it only concerned navigability; *Winters* did not involve waters of the United States; *Arizona v. California* was not decided under

32. Opening Brief for the United States, *supra* note 3, at 1.
33. *Id.* at 28-32. *See generally,* Tarlock, *Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights,* 1978 UTAH L. REV. 211 (1978) for a discussion and analysis of instream flow rights.
34. Opening Brief for the United States, *supra* note 3, at 20.
35. *Id.* at 32.
36. *See supra* text accompanying notes 30-31.
37. Opening Brief for the United States, *supra* note 3, at 33.
38. *Id.* at 35.
39. *Id.* at 33.
40. Reply Brief for City and County of Denver at 3, United States v. City and County of Denver, 656 P.2d 1 (Colo. 1983).
41. 43 U.S.C. § 661 (1976).
42. 43 U.S.C. §§ 321-339 (1976).
43. Reply Brief for City and County of Denver, *supra* note 40, at 6-11. *But cf. supra* text accompanying notes 12-14.
44. 43 U.S.C. § 666 (1976).
45. Reply Brief for City and County of Denver, *supra* note 40, at 30.

the McCarran Amendment; *Cappaert's* reserved rights language was dictum; and *New Mexico* was based on a misunderstanding of *Winters* and rested on a series of false premises.[46]

B. The Colorado Supreme Court's Holding and Analysis

In *Denver,* the Colorado Supreme Court held that reserved water rights in national forests, implied from the primary purposes of the reservation, were not broad enough to allow instream flows.[47] The court reached this conclusion based largely upon the United States Supreme Court's finding in *New Mexico* that the Organic Act had limited the establishment of national forests to two purposes which were expanded by MUSYA without having reserved additional water.[48] To determine the scope of federal reserved water rights the Colorado court detailed its own framework: examine the legislation authorizing the reservation to ascertain the precise federal purpose to be served; decide whether water is essential to accomplish the primary purposes of the reservation; and establish the minimum amount of water necessary to fulfill such purposes.[49] In other words, the extent of reserved rights was to be controlled by the intent of Congress as expressed in the purposes of the reservation.

The United States grounded its first instream flow claim on the Organic Act.[50] In *New Mexico,* the United States Supreme Court found, and in *Denver* the Colorado Supreme Court agreed, that the congressional intent behind this act was to further economic development of the West by enhancing the quantity of water available to appropriators, not to enlarge the consumption of water by protecting instream flows.[51] Congress revealed this intent by limiting the national forests to the "essentially nonconsumptive" purposes of watershed and timber protection.[52] Because the United States failed to show that the purposes of the reservation would be defeated without the water, the Colorado court denied federal instream flow rights.[53] In any case, the United States Supreme Court, in *New Mexico,* had already denied federal instream flow rights (predicated upon the Organic Act) for recreational, wildlife, and scenic purposes.[54] The Colorado court's overriding concern, however, seemed to be that instream flow rights would defeat "long-held expectations" of public and private appropriators in favor of downstream junior appropriators.[55] Consequently, the United States could not reserve water for instream flows; rather it could reserve only enough water to fulfill the two primary purposes of the reservation.[56]

46. *Id.* at 17-40.
47. The court summarily rejected Denver's argument, and recognized federal reserved water rights, by resorting to the supremacy clause of the Constitution. The issue was one of federal law, according to the court, so it was bound to adhere to the principles of the reserved rights doctrine as specified in *New Mexico* and *Cappaert.* Therefore, the remainder of Denver's argument was ignored. 656 P.2d 1, 16 and n.5, 17 n.26 (1983).
48. *Id.* at 22-27.
49. *Id.* at 20.
50. *Id.* at 22-23.
51. *Id.* at 23.
52. *Id.*
53. *Id.* at 22-23.
54. *Id.* at 22. *But cf. supra* text accompanying notes 33-34.
55. *Id.* at 23.
56. *Id.*

The United States' second instream flow claim was based upon MUSYA. *New Mexico's* treatment of MUSYA, the United States argued, was dictum, but the Colorado Supreme Court concluded that it was bound, either way.[57] Although it conceded that MUSYA was intended to provide authority for the Forest Service to broaden its management practices, in accord with federal policy emphasizing recreational, as well as economic uses of public lands, the court held that MUSYA did not expand the original purposes of the Organic Act.[58] Applying its framework, the court decided that MUSYA did not reserve additional water because the water was not essential to the purposes of the reservation.[59] The new (secondary) purposes of MUSYA were not to "impair effectuation" of the original (primary) purposes of the Organic Act, and any instream flow rights would mean less water for irrigation and domestic use.[60] Absent clear contrary intent, the Colorado court, as did the United States Supreme Court in *New Mexico,* felt compelled to construe the statute narrowly.[61] Therefore, it directed the United States to acquire water rights for secondary reservation purposes according to the provisions of Colorado water law.[62]

ANALYSIS OF THE DECISION

A. Introduction.

Through blind deference to the United States Supreme Court's edict in *New Mexico,* the Colorado Supreme Court denied federal instream flow rights in *Denver.*[63] The Colorado court cheerfully bound itself to *New Mexico's* mandate in order to protect those public and private appropriators who had obtained their water rights under Colorado water law. Such deference by the court could be foreseen, however, because Mr. Justice Rehnquist, a states' rights advocate, had authored a majority opinion in *New Mexico* that protected state water law from excessive federal intrusion or circumvention.[64] In *New Mexico,* Rehnquist construed the Organic Act and MUSYA narrowly by asking whether the purposes set forth in those statutes would be frustrated without a particular reserved water right

57. *Id.* at 24.

58. *Id.* at 25. MUSYA specifies "outdoor recreation, range, timber, watershed, and wildlife and fish. . ." as purposes for which national forests are established, 16 U.S.C. §§ 528-531 (1976). *See generally* Coggins, *Of Succotash Syndromes & Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management,* 53 U. COLO. L. REV. 229, 252-57 (1982), for definition of these purposes.

59. 656 P.2d at 25. *Cf.* United States v. New Mexico, 438 U.S. 696, 715 (1978), which asked whether the water was crucial to accomplishment of MUSYA's new purposes, instead of whether it was essential.

60. 656 P.2d at 25. Note that the Colorado court accepted *New Mexico's* distinction between primary and secondary purposes of a reservation.

61. *Id.* at 26.

62. *Id.* at 27. In the alternative, the court suggested that the United States exercise its right of eminent domain if it desired to acquire water rights outside the State appropriation system. *Id.* at 26.

63. *Id.* at 16.

64. United States v. New Mexico was a 5-4 decision with Justices White, Marshall, and Brennan joining in a dissent written by Justice Powell. *See generally* Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico,* 15 IDAHO L. REV. 509, 526 (1979).

claim;[65] while in *Denver,* the court asked whether the water was necessary to accomplish the two statutory purposes.[66] Unfortunately, each court's standard failed to recognize the federal government's critical interest in managing its lands.[67] As could be expected, each court was more concerned with states' interests. Thus, the Colorado Supreme Court welcomed *New Mexico's* narrow treatment of the reserved rights doctrine without hesitation, indeed, almost without consideration, even though *New Mexico* had not foreclosed the United States' particular instream flow claims.[68]

B. The Organic Act of 1897.

For its analysis of the Organic Act, the Colorado court relied exclusively upon the statutory interpretation and construction given in *New Mexico.* In *New Mexico's* majority opinion, Mr. Justice Rehnquist studied the legislative history of the Organic Act to ascertain Congress' underlying intent. Remarkably, he depended upon one poor source for all of his information.[69] J. Ise, from whom Rehnquist drew his analysis, was

> an especially questionable source upon which to rely regarding the intent of Congress. . . . [Because] 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.[70]

Relying on Ise, Mr. Rehnquist cited President Cleveland's vast land withdrawal in 1897 as the reason for the Organic Act.[71] He said that Western Congressmen strongly protested the withdrawal because such protectionism threatened their states' economic future, insofar as it hindered the establishment of agriculture and mining operations.[72] Accordingly, Congress passed the act to limit the President's power to withdraw land by carefully defining the purposes for which a forest reservation could be established.[73] Yet, those purposes had been carefully defined at least five years before the protest. In 1892, a bill was introduced in the U.S.

65. 438 U.S. at 700. Mr. Rehnquist invoked this strict standard because he believed that the quantity of a particular reserved right was a question of intent, not power. *But see* Fairfax & Tarlock, *supra* note 64, at 529, who argue that Rehnquist was not compelled to formulate his narrow standard of implied intent and challenge his reading of *Winters, Arizona v. California* and *Cappaert. Winters,* they maintain, expressed the federal government's duty of fair dealing, not a theory of frustration of purpose; *Arizona v. California* allowed the federal government to acquire reserved rights on non-Indian land, but nowhere was mention made of a standard of implied intent; and *Cappaert* involved an explicit reservation of water.

66. 656 P.2d at 20. *See supra* text accompanying note 50 for the Colorado court's complete analytical framework.

67. Fairfax & Tarlock, *supra* note 64, at 532. To accommodate that interest, the authors contend that Rehnquist should have developed a federal common law of water based upon a standard that determined whether the reserved right was reasonably related to enhancement of the reservation's purposes.

68. *See supra* text accompanying notes 33-35 for the United States' specific claims.

69. Fairfax & Tarlock, *supra* note 64, at 534-36.

70. *Id.* at 534 n.106.

71. 438 U.S. 696, 706 (1978). Before 1897, two Presidents had reserved a total of 17.5 million acres. Then, in 1897, with one executive order President Cleveland abruptly reserved 21 million acres. *See* Fairfax & Tarlock, *supra* note 64, at 545 n.143.

72. 438 U.S. at 706 and n.13.

73. *Id.* at 706.

House of Representatives which contained purposes identical to those found in the Organic Act.[74] Furthermore, a bill with those same purposes was nearly enacted in 1895, two years before the protest.[75] While the President's land withdrawal may have given Congress the impetus to finally pass the Organic Act, it was not the reason why Congress defined the purposes of a forest reservation. In granting the Secretary of Interior the authority to halt the taking of free timber, Congress sought to prevent the stripping of forests.[76] Hence, Congress' motives were environmental, not economic, and Mr. Justice Powell's dissenting opinion in *New Mexico* directly supports this view.[77]

Because of its economic interpretation, the United States Supreme Court found, and the Colorado court agreed, that the Organic Act provided just two purposes for which a national forest could be established, namely, watershed protection and timber conservation.[78] This construction, according to Rehnquist, was confirmed by the distinction between the purposes of national parks and those of national forests.[79] Mr. Justice Powell's dissent in *New Mexico*, however, found that in addition to the above, the Organic Act supplied the third purpose of forest improvement and protection.[80] The two justices reached different conclusions based upon the same language because the wording of the Organic Act is confusing: "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. . . ."[81] A literal reading of the statute suggests three purposes for which national forests could be established, but Mr. Rehnquist construed 'or' as meaning 'in other words' to derive just two statutory purposes.[82] Yet, if Congress had meant this, surely it would have been easy enough to say it; in any event, Rehnquist's meaning would have been better accomplished simply by omitting 'or'. Further, Mr. Rehnquist ignored three vital facts in reaching his conclusion: first, Congress rejected a bill with only two purposes in 1892;[83] second, the park/forest distinction did not exist in the 1890's;[84] and third, Congress had itself proclaimed that the Organic Act provided three purposes.[85] In short,

74. *See* Bassman, *The 1897 Organic Act: A Historical Perspective*, 7 NAT. RESOURCES LAW 503, Appendix I (1974).
75. Fairfax & Tarlock, *supra* note 64, at 546-49.
76. Bassman, *supra* note 74, at 512-13. The Secretary of Interior was initially vested with the authority to administer the national forests' timber reserves, but in 1905 that authority was granted to the Secretary of Agriculture.
77. 438 U.S. at 719 (Powell, J., dissenting in part).
78. *Id.* at 707.
79. Rehnquist believed that the broad purposes of national parks removed any doubts as to the narrow purposes of national forests. *Id.* at 709.
80. *Id.* at 721 (Powell, J., dissenting in part).
81. 16 U.S.C. § 475 (1976).
82. Mr. Rehnquist urged this construction of the Organic Act:
> "Forests would be created only 'to improve and protect the forest within the boundaries,' or *in other words* 'for the purposes . . .' "

438 U.S. at 707 n.14. *But cf.* Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615, 617 (1977), the predecessor to *New Mexico* which found three purposes in the Organic Act.
83. Fairfax & Tarlock, *supra* note 64, at 546.
84. *Id.* at 544.
85. The legislative history of MUSYA reveals the following statement of Congressional intent:
> [A] national forest could not be established just for the purpose of outdoor recreation, range or wildlife and fish purposes, but such purposes could be a

Mr. Rehnquist donned blinders and abandoned the rules of syntax to achieve his construction of the Organic Act.

Based on his interpretation and construction of the Organic Act in *New Mexico,* Mr. Justice Rehnquist denied the United States instream flow rights for aesthetic, recreational, and fish-preservation purposes;[86] whereas in *Denver,* the Colorado Supreme Court denied *any* federal instream flow rights pursuant to the Organic Act.[87] Apparently, the two decisions rested on the assumption that instream flows were inconsistent with the Organic Act's purposes.[88] The two courts felt that recognition of instream flows would "require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators,"[89] which would definitely be at odds with the Organic Act's goal of enhancing the water available to settlors in the West. In truth, however, instream flows affect only those upstream appropriators with priority dates subsequent to the date of reservation.[90] As the forest reservations involved in *Denver* were high mountain watersheds, the federal government's water needs were already filled by the time anyone else could use the water.[91] What is more, if there were any appropriators upstream, their rights would most likely be senior to the United States' because the forests were reserved years after Colorado was initially settled.[92]

Given this context, the Colorado Supreme Court could have granted the instream flow rights requested by the United States without substantially affecting other water users. In other words, the court could have recognized the federal government's interest in managing its lands without undermining Colorado's interest in protecting appropriators under state water law. Yet, the Colorado court obediently adopted the reasoning of the United States Supreme Court that the two interests were mutually exclusive. Nevertheless, in *Denver* the United States asked only that the Colorado Supreme Court grant instream flow rights for the limited purposes of fire protection and flood, soil and erosion control.[93] The dissent in *New Mexico* observed that the majority opinion had not foreclosed those instream uses because it had denied instream flow rights merely for aesthetic, recreational, and fish-preservation purposes.[94] The Colorado court ignored any distinction, however, and treated all the instream flow claims as just one claim.[95] Fear of fire and soil erosion were significant motivating factors behind the Organic Act,[96] and at least one court has

> reason for the establishment of the forest if there also were one or more of the *purposes of improving and protecting the forest, securing favorable conditions of water flows, or to furnish a continuous supply of timber as set out in the 1897 act.*
>
> H.R. REP. No. 1551, 86th Cong., 2d Sess. 4.

86. 438 U.S. at 705.
87. 656 P.2d at 23.
88. United States v. New Mexico, 438 U.S. 696, 724-25.
89. 656 P.2d at 26 n.42 (quoting United States v. New Mexico, 438 U.S. 696, 705 (1978)).
90. United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 859 (9th Cir. 1983).
91. 656 P.2d at 23.
92. The Creative Act of 1891 (16 U.S.C. § 471 (1976)) first empowered the President to create national forests, while Colorado attained statehood in 1876.
93. Opening Brief for the United States, *supra* note 3, at 20.
94. 438 U.S. at 724 (Powell, J., dissenting in part).
95. *Cf.* 656 P.2d 1, 23 n.37, which questions the evidentiary basis for the United States' instream flow claims.
96. Bassman, *supra* note 74, at 511.

recognized this in distinguishing between instream flow claims.[97] The Colorado Supreme Court should have done the same in *Denver*, and it could have, because *New Mexico* did not resolve this particular instream flow issue.

C. The Multiple-Use Sustained-Yield Act of 1960.

The first question that the Colorado court faced in regard to MUSYA was whether *New Mexico's* treatment of the statute was dictum. The United States argued in *New Mexico* that MUSYA reserved water for recreational, aesthetic, and wildlife-preservation uses with a priority date of 1897;[98] while in *Denver*, the United States claimed that MUSYA reserved water for the very same purposes, but with a 1960 priority date.[99] Mr. Justice Powell's dissent declared the majority's treatment to be dictum,[100] on the strength of the majority's own admission that

> [T]he United States [did] not argue that [MUSYA] reserved additional water for use on the national forests. Instead, the Government argue[d] that the Act confirm[ed] that Congress *always* foresaw broad purposes for the national forests and authorized the Secretary of the Interior as early as 1897 to reserve water for recreational, aesthetic, and wildlife-preservation uses.[101]

Obviously, the Colorado court overlooked this footnote because in an unexplained bit of reasoning it said that the majority opinion in *New Mexico* had "directly addressed the issue" so that it was "bound by the pronouncement of the United States Supreme Court on this point."[102] The only MUYSA issue directly addressed by the Court in *New Mexico* was whether that 1960 statute had reserved additional water with an 1897 priority date. Once again the Colorado court failed to make an important distinction. By not considering whether MUSYA had reserved additional water with a 1960 priority date, the court evidenced a strong desire to be bound by Rehnquist's superfluous postulations in *New Mexico*, and thereby avoided a difficult question. Although MUSYA broadened the purposes for which national forests were established,[103] the United States Supreme Court held that Congress did not intend to reserve additional water because MUSYA's new purposes were secondary purposes.[104] In *Denver*, the Colorado Supreme Court agreed that MUSYA had broadened national forest purposes, and it concluded that the new purposes were not to "impair effectuation" of the Organic Act's original purposes.[105] As support for its conclusion, the Colorado court quoted language from MUSYA that said the new purposes were "supplemental to, but not in derogation of" the original purposes.[106] Evidently, both courts accorded MUSYA narrow construction in

97. Avondale Irrigation Dist. v. N. Idaho Properties, 99 Idaho 30, 577 P.2d 9, 18 (1978).
98. 438 U.S. at 713 n.21.
99. *See supra* text accompanying notes 35-39.
100. 438 U.S. at 718 n.1 (Powell, J., dissenting in part).
101. *Id.* at 713 n.21.
102. 656 P.2d at 24. *See also supra* text accompanying notes 57-60.
103. 16 U.S.C. § 528 (1976) provides in part:
> [T]hat national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.
104. 438 U.S. at 715. Justice Powell expressed no opinion as to MUSYA's effect on reserved water rights. *Id.* at 718 n.1 (Powell, J., dissenting in part).
105. 656 P.2d at 25.
106. *Id.* at n.40.

an effort to stop the expansion of the reserved rights doctrine through implication. Believing that more reserved water would mean less agricultural water, the two courts interpreted federal silence as requiring deference to state water law.[107] The statute does not support that conclusion, however. The House Report on MUSYA explained that the resources listed in the act were to be treated equally, no priority was to be given to any, and that Congress neither intended to upgrade nor downgrade any resource.[108] Furthermore, the report stated that the "supplemental to, but not in derogation of" language had been inserted to make it clear that "in any establishment of a national forest a purpose set out in the 1897 act must be present but there may also exist one or more of the additional purposes listed in [MUSYA]."[109] In other words, the Organic Act's purposes were the minimum requirements for establishing a national forest and MUSYA's purposes were supplemental only in that they could not justify a forest reservation by themselves.

The Colorado court should have considered the United States' particular MUSYA argument more carefully, as it had not been addressed in *New Mexico*. Upon closer examination it would have discovered that MUSYA did not compel a distinction between primary and secondary purposes. Under the proper standard of review it would have granted additional reserved rights so long as they were reasonably related to enhancement of a federal purpose. Regardless, the court should have implied reserved rights for *all* resource uses, if it was going to imply them for *any* uses, because MUSYA dictated that all resources be treated equally.

CONCLUSION

The Colorado Supreme Court denied the United States instream flows by limiting federal reserved rights to the minimum amount of water necessary to fulfill the primary purposes of national forests. The decision did not, however, sound the death knell for federal instream flow rights. The United States is likely to make the same arguments on appeal; namely, that the federal government had instream flow rights before 1960 for fire protection and erosion control, and after 1960 for wildlife, fish and recreation purposes. Further judicial analysis of these issues must appreciate the tension between economic and environmental interests in order to determine the optimum allocation of the West's scarcest resource, water.

It is unfortunate that the Colorado Supreme Court chose to follow a decision that might be the beginning of a trend toward narrow construction of the reserved rights doctrine. The potential impact of broad federal reserved water rights struck a legitimate fear in the court,[110] but the federal government's keen interest in the management of its reservations cannot be neglected. The national forests currently generate $120 million

106. *Id.* at n.40.
107. United States v. New Mexico, 438 U.S. 696, 715 (1978). United States v. City and County of Denver, 656 P.2d 1, 26 (Colo. 1983).
108. H.R. REP. No. 1551, 86th Cong., 2d Sess. 3. *See generally* Coggins, *supra* note 58, at 279.
109. H.R. REP. No. 1551, 86th Cong., 2d Sess. 4.
110. 1800 cities and over 600 dams depend on national forests for their water. *Id.* at 5.

of revenue, one-fourth of which is returned to the states.[111] With recreational use of the forests on the rise,[112] the tourist dollar will grow as a percentage of that figure. The Colorado court could have encouraged such growth by granting instream flow rights in national forests, but such encouragement will now most likely require explicit congressional action.

STEPHENSON D. EMERY

111. *Id.*
112. *Id.*