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# *1 SEEING THE FOREST FOR ITS TREES: THE CASE FOR INDIVIDUALIZED ANALYSIS OF IMPLIED FEDERALLY RESERVED WATER RIGHTS ON NATIONAL FORESTS

***Abstract***

*In* United States v. New Mexico, *the Supreme Court relied on the Organic Act to limit the federally reserved water rights attached to the Gila National Forest Reservation in New Mexico. The Supreme Court construed the Organic Act narrowly, holding that the Act reserved water for timber and watershed protection purposes only. Looking at the Organic Act alone set a detrimental precedent for future federally reserved water rights determinations; prompting future courts to use uniform timber and watershed purposes to determine the implied water rights attached to all national forest reservations*.

*This Article challenges the Court's reliance on the Organic Act and argues in favor of a place-specific analysis to determine implied federally reserved water rights that are attached to national forest reservations. Specifically, this Article argues that courts should look to the place-specific documentation and conditions surrounding each parcel of land in addition to acts of Congress with nationwide scope like the Organic Act. First, courts should look to the place and time specific dedicating instrument used to create the federal land reservation at issue. Second, because each parcel's dedicating instrument may not provide sufficient indicia of intent, where necessary, courts should look outside the instrument used to make the reservation to place-specific physical and historical circumstances surrounding the reservation. The value that each federal land reservation provides has much to do with the unique features provided by each unique location, and should be treated accordingly when determining federally reserved water rights*.

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***2 I. INTRODUCTION**

The federal reserved water rights doctrine presents courts with a daunting task: to determine what water rights the federal government intended to reserve from the public domain when, by implication, it reserved land for specified purposes.[1] Not surprisingly, these judicial attempts to determine implied purpose, sometimes up to 100 years after the reservation, have been the topic of extensive debate.[2] In western states, the combination of large federal land holdings and the prior appropriation doctrine creates the potential for large federal water reservations via the federal reserved rights doctrine.[3] The federal reserved water rights doctrine asks courts to determine what the federal government meant to imply when it reserved land from the public domain without explicitly reserving water.[4] Hotly contested water rights in the West depend on this determination.[5]

***3** After years of broadening the doctrine,[6] the Supreme Court responded to these Western pressures when it took a narrower approach to construing federally reserved water rights for national forests in *United States v. New Mexico*.[7] In what may have been an attempt to solidify this criticized and fluctuating doctrine, the Supreme Court for the first time denied reserved water rights to the federal government when it interpreted the Organic Act to limit the primary purposes of the Gila National Forest to timber and watershed protection only.[8] It deemed the United States' other claimed purposes and claimed water rights for recreation, aesthetics, and wildlife "secondary" and therefore not implicitly attached to the reservation, but only acquirable by other means.[9] By using that approach, applying an act with nationwide effect to determine the scope of a single reservation, the Supreme Court opened the door for future courts to follow suit and treat all national forest reservations uniformly.[10] In fact, the *New Mexico* Court's approach to the purposes determination has since been applied not only to national forests, but also to wilderness reservations. This has the effect of limiting federally reserved water rights attached to wilderness in Colorado according to another act with nationwide scope, the Wilderness Act.[11]

***4** The federal reserved water rights doctrine continues to play a major role in state water right determinations, especially in the West.[12] Many western states are still in the process of general stream adjudications on a state-wide level, and federally reserved water rights are often involved.[13] For example, within the last ten years the Department of Justice has, or currently is, negotiating or litigating federally reserved water rights in Colorado, Utah, Arizona, New Mexico, Oregon, Idaho, Wyoming, Montana, and Nevada.[14] Many of these states have or will have water compacts or stream adjudication decrees including federally reserved rights on their waters.[15] As a result, how courts treat federally reserved water rights in national forests has the potential to make a major impact on western landscapes.

This Article challenges the dangerous precedent created by the Supreme Court in *United States v. New Mexico* of uniform purposes for implied water rights determinations across all federal lands reserved under a particular act with nationwide scope. Without arguing in favor of more or less water attached to federal land reservations, this Article argues that courts should undertake a two-part place (or forest) specific inquiry to determine the purposes of federal land reservations and

attached water rights. First, courts should look to the specific instrument used to make the federal land reservation, not just the act with nationwide scope. Second, where that instrument does not provide place-specific detail, courts should broaden the scope of their inquiry and look outside the ***5** four corners of the dedicating instrument to physical characteristics and historical circumstances surrounding the reservation to most accurately determine its purposes.

Part II of this Article outlines the relevant background: the purpose inquiry and Supreme Court federally reserved water right determinations, specifically noting the information used by courts to determine the purposes of each reservation. Part III of this Article argues in favor of the above two-part place-specific inquiry to determine implied water rights for National Forests. Part III first describes how courts already have, and should, look to the specific instrument that made each reservation, not just the acts with nationwide scope. Next, Part III argues that if that instrument is not available or helpful in expressing implied intent, courts have and should continue to look to place-specific physical and historical circumstances to determine implied intent. Finally, this Article will use the Gila National Forest as an example to illustrate that recommended two-part inquiry. Because the Organic Act and other acts with nationwide scope are ill suited to make a proper determination of implied water rights, this Article outlines a new framework.

## II. BACKGROUND

### a. The Implied Purpose Determination

Under the doctrine of federal reserved water rights, when the federal government reserves land from the public domain it, in some instances, also impliedly reserves water rights with that land.[16] The implied reservation of water rights doctrine can be broken ***6** into two major categories: tribal reserved water rights and public land reservations.[17] Since the Supreme Court first recognized implied water rights for Indian Reservations in 1906, it has also recognized implied rights outside the tribal context for national park, national forest, national monument, national recreation, and national wildlife areas.[18]

Whether a particular federal land reservation impliedly reserves water rights depends on the government's intent to reserve unappropriated water, which courts infer based on their determination of the implied purposes of each reservation.[19] The amount of water reserved by the land reservation must not exceed the amount required for those purposes.[20] Only the amount of water "necessary to accomplish the purpose for which the reservation was created" is impliedly reserved by the land reservation.[21] Accordingly, when a federally reserved water right is at issue, courts must determine the original purpose of the land reservation and issue a decree limiting the amount of water impliedly reserved by the reservation based on that purpose determination.[22] The quantity of water reserved depends on the court's determination of that original purpose, or whether the land was actually withdrawn from the public domain.[23] Courts have limited that quantity-or negated it completely for certain purposes-in three ways: by finding the original purpose of the federal land reservation requires a limited amount of water, by limiting the original purposes, or by separating the purposes into primary and secondary purposes.[24]

### *7 b. The Supreme Court Cases

The following Part outlines the genesis of Supreme Court cases from tribal reserved water rights in 1907, the Court's recognition of federally reserved rights for other land reservations almost fifty years later, and the eventual narrowing of the doctrine with respect to national forests in *United States v. New Mexico*.[25] Specifically, the following Part focuses on what information the Supreme Court has used to determine the purposes of reservations in its federally reserved water rights cases, and the resulting effects on the implied water rights attached to those reservations.

In its seminal case on federally reserved water rights, the Supreme Court in *Winters v. United States* first recognized federally reserved water rights for Indian reservations.[26] The Court upheld a decree from the lower court enjoining later priority date users from utilizing river water intended for the Indian reservation.[27] In *Winters*, the Court noted that where the implications conflict, agreements and treaties with Indians have greater force.[28] Ambiguities should therefore be resolved from the standpoint of the Indians.[29] Thus, it held that the statute reserving the Fort Belknap Indian Reservation carried greater weight and was not affected by a subsequent Act of Congress admitting Montana to the Union.[30] As a result, the Court held that settlers on public lands claiming riparian rights on the river could not prejudice the implied reservation of a sufficient ***8** amount of water for the Indian Reservation.[31] The reservation implicitly reserved a sufficient amount of water for the Indians to irrigate their land.[32]

The Court considered the value of the land with and without water, the aridity of the land, the intended purposes of the reservation, and the Indian's "command [of the lands and waters] and of all their beneficial use, whether kept for hunting and grazing roving herds of stock, or turned to agriculture ..."[33] Ultimately, it found that because waters made the reservation "valuable and adequate," the Indians retained water rights reserved by the Federal Government.[34]

Almost fifty years after *Winters*, the Court first recognized the possibility that federally reserved water rights might extend to non-Indian federal land reservations.[35] In *Federal Power Commission v. State of Oregon*, the Court distinguished public lands from federally reserved lands, finding that there was not a federally reserved water right because land was removed from the public domain by a licensing scheme under the Federal Power Act.[36] However, it elaborated that other lands reserved from the public domain and not subject to private appropriation are reservations.[37] Thus, the Court implied that federal reservations *could* exist on non-Indian lands.[38]

Seven years later, the Supreme Court explicitly extended the *Winters* doctrine to non-Indian federal reservations in *Arizona v. California*.[39] In *Arizona,* the Court ***9** addressed state water rights on the Colorado River and its tributaries.[40] First, it looked at each of the Indian Reservations at issue separately, along with how they were created, specifically noting that some were made by Acts of Congress, while others were made or expanded by executive order.[41] The Court rejected Arizona's argument that an executive order was not a proper instrument to reserve water, noting the specific ecological characteristics of the land as a justification for its finding.[42] Specifically, it held that:

> [M]ost of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries .... It is impossible to believe that when Congress created the great Colorado Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind--hot, scorching sands--and that water from the river would be essential to life of the Indian people and to the animals they hunted and crops they raised.[43]

The Court also looked at the debate leading to the approval of the first congressional appropriation for irrigation of the Reservation, which noted the essential nature of water to Indian prosperity, life, agriculture, and general subsistence on the reservation.[44] Thus, despite the fact that the Court used similar reasoning to that used in *Winters*, it still noted information unique to the Colorado River Indian Reservation.[45]

Next, the Supreme Court upheld the Special Master's finding that "the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests."[46] In confirming reserved rights for non-Indian federal land units, the Court ***10** relied on a 433 page Special Master's Report that analyzed state water rights claims on the Colorado and its tributaries.[47] The scope of the Special Master's inquiry was expansive. The Special Master compiled his report by conducting "a trial ... during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filed."[48] In his report, the Special Master held that "the reservation theory" that applied to Indian Reservations "seem[ed] equally applicable to lands used by the United States for its other purposes. If the United States can set aside public land for Indian Reservation and, at the same time, reserve water for the future requirements of that land, I can see no reason why the United States cannot equally reserve water for public land which it sets aside as a National Recreation Area."[49] In order to determine whether the United States intended to reserve water for the future needs of Lake Mead National Recreation Area, the Special Master "followed the [same] course outlined in regard to Indian reservations."[50]

The Special Master specifically looked to each executive order used to reserve the national recreation area, but did not note what facts in the executive orders were determinative for his finding that the United States intended to reserve water for the purposes of the reservation.[51] The executive order issued by Herbert Hoover that the Special Master cited simply withdrew the lands for consideration as a national monument and gave only their physical location, without reference to details or characteristics of the ***11** lands themselves.[52] With respect to the Gila National Forest Reservation, the Special Master found that "the purposes of the Forest cannot be fulfilled without an adequate water supply" meaning, "the United States intended to reserve water from these sources in quantities reasonably necessary to fulfill the purpose of the [land] withdrawal."[53] However, the Special Master affirmed the principle he applied to the national recreation area that "it is unnecessary to put maximum limits on the reserved water rights created for [the Forest's] benefit" because "the future water requirements ... appear to be so modest."[54] In his findings of fact with respect to the Forest, the Special Master noted the presidential

proclamation that created the forest reservation, and the subsequent proclamations that enlarged or modified the reservation, but again failed to state facts determinative from those proclamations that lead to his findings.[55]

On the other hand, the Special Master's report analyzed in great detail the individual physical qualities of each river and tributary at issue in its generally applicable findings of fact.[56] For example, the report chronicled the history of the Colorado River, including dams, aqueducts, overall water supply, and canals in the basin.[57] Thus, the Special Master's consideration of physical and historical circumstances surrounding water use and ownership of the national forest, national monument, and surrounding areas was extensive.

Ultimately, the Special Master held that the parties presented insufficient evidence as to what quantity of water was necessary. The Special Master also found, and ***12** the court agreed, that the United States' claim to any waters that "would have been wasted but for salvage by the Government on its wildlife preserves," was without merit, reasoning that reservation without consumptive use "is inconsistent with the Act's command that consumptive use shall be measured by diversions less returns to the river."[58] Thus, the Court deferred to the Special Master's limited finding that the purposes of national forest and national monument reservations require water, but did not declare specific purposes or quantities of water for either type of reservation.[59]

The Supreme Court next had occasion to address federally reserved water rights, in *Cappaert v. United States* when the United States sought water rights appurtenant to Death Valley National Monument.[60] Specifically, the United States sought underground waters sufficient to maintain a pool and protect the endangered species living in a part of the monument known as Devil's Hole.[61] The Supreme Court affirmed the district court's order enjoining competing water users from interfering with the water levels in Devil's Hole.[62] The Court held that when the presidential proclamation established the national monument, it reserved water rights in unappropriated appurtenant water sufficient to preserve the scientific value of Devil's Hole.[63] This holding was predicated on its finding that the proclamation reserving the monument expressed explicit intent to reserve water.[64]

Devil's Hole was reserved as a national monument by a presidential proclamation issued under the American Antiquities Preservation Act, which authorizes the president ***13** to reserve objects of historic or scientific interest as national monuments on federal lands.[65] With respect to quantity, the Court enjoined pumping that would lower Devil's Hole's water levels below those necessary to preserve a unique species of desert fish that inhabited the pool.[66] The Court noted that the Death Valley Proclamation reserved "unusual features of scenic, scientific, and educational interest" and specifically noted the monument-to-be's "remarkable underground pool" in its preamble.[67] The Court even quoted long sections from the preamble of the Death Valley Proclamation:

> WHEREAS the said pool is a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly striated limestone, while also owing its formation in part to fault action; and
>
> WHEREAS the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region; and
>
> WHEREAS the said pool is of such outstanding scientific importance that it should be given special protection ....[68]

The Court also acknowledged that the National Park Service was the agency charged with managing the national monument, and that the agency had limited access to the hole by fencing it off.[69] In addition, the Court acknowledged the agency's purposes and the purposes in the National Park Service Act Furthermore, the Court looked to the specific ecological characteristics of the hole when it analyzed the situation, noting that water levels in the hole helped algae grow, which allowed the fish to live there.[70] The Court ***14** focused on the Proclamation's discussion and focus on the pool, holding that "since a pool is a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved

was ... thus explicit not implied."[71] The Court rejected the adjacent water user's argument that the Antiquities Act only allowed for protection of archeological sites because the Act allowed reservation of the pool in Devil's Hole and the pool's inhabitants as "objects of historic or scientific interest."[72] Thus, the presidential proclamation specific to Devil's Hole was determinative and critical in the Court's analysis, and the Antiquities Act was not.

**c. United States v. New Mexico**

Just a year after *Cappaert*, the Supreme Court for the first time addressed federally reserved water rights on national forests in *United States v. New Mexico*.[73] In *New Mexico*, the Court reaffirmed Congress' and the president's power to both reserve portions of the federal domain for specific federal purposes, and to reserve appurtenant, then-unappropriated water by implication.[74] However, it emphasized that the United States only reserved the amount of water necessary to fulfill the specific purposes of the reservation, and went on to narrowly construe the purposes of national forest reservations according to the Organic Administration Act of 1897.[75] The Court held that the Organic Act reserved national forests for two purposes: to conserve water flows, and to furnish ***15** timber supply.[76] National forests were not reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes.[77]

The Court justified this narrow reading by looking at historical circumstances surrounding the creation of the national forest system and other types of reservations, but eventually focused on the content of the Acts of Congress with nationwide scope. For historical reference, the Court looked at the Creative Act of 1891, which originally addressed the disappearing forests of the public domain but failed to regulate and protect the forests from fires and indiscriminate timber cutting, and failed to make deliberate reservations of *unsettled* forestlands.[78] Since the Organic Act was adopted as a response to these concerns, the court reasoned that its purposes were narrow.[79] It also looked to legislative history like Congressional debates and earlier bills to find these narrow timber-and-water-flow-only purposes, emphasizing that the forests were reserved not for economic purposes, not non-use.[80] Thus, the Court looked beyond the Organic Act to narrow its purposes and determine the meaning of the Act, but did not look outside the Organic Act for place-specific information concerning the Gila National Forest.

While national parks were reserved with broader purposes in mind, the Court reasoned that national forest reservations must expressly indicate if they intend to reserve for broader purposes like those attached to national parks.[81] The Court even considered Congress' change of jurisdiction over forests, from the Department of Interior to the Department of Agriculture, because this change pointed again to limited purposes of the ***16** national forests.[82] Considering its eventual holding, the Court surprisingly distinguished the forest at issue from the Lake Superior National Forest, which it said was more specifically dedicated with nature in mind.[83] Essentially, the Court looked to the specific dedicating document for a different national forest, yet relied on the Organic Act generally to determine the purposes of the Gila National Forest reservation.[84] The Court also noted that Congress' specific authorization of the establishment of fish and game sanctuaries within forests further evidenced Congress' intent *not* to authorize such purposes for national forests under the Organic Act generally.[85]

Ultimately, the Court did not analyze or even mention the specific presidential proclamations used to reserve the Gila National Forest, despite the fact that the U.S. cited the proclamations in its opening brief.[86] Furthermore, save the procedural history of the case itself, the Court did not undertake a place-specific analysis of the uses, management history, or ecological make-up of the Gila National Forest.[87] Rather, the Court focused on the general history of national forests and the West in general.[88]

Since the *New Mexico* decision, lower courts have applied the Supreme Court's narrow timber and watershed only purposes determination with little or no place-specific analysis to other implied water rights determinations on national forests. For example, the Supreme Court of California noted that, according to the Court in *New Mexico*, "wildlife preservation constituted a secondary purpose of the national forests, the primary ***17** purposes being limited to timber and water preservation. Therefore, the court held, water for wildlife preservation purposes was not available under the reserved rights doctrine."[89] The Colorado Supreme Court rejected the United States' claim for water rights to preserve in stream flows, and held that "the United States does not have reserved in stream flow rights to protect recreational, scenic, or wildlife values in the National Forests, and (2) that the United States did not claim or prove that in stream flow rights were necessary to achieve the National Forest purposes of timber and watershed protection."[90] Thus, whether it intended to or not, the Supreme Court created a blanket rule, the purposes of all national forests are limited to timber and watershed protection.

## III. Recommended Two-Part Analysis for Future Courts

The history of federal reserved rights cases show that determining the implied purpose of a federal land reservation in order to determine the water reserved with that land is not a straightforward task.[91] Now over 100 years old, the federal reserved water rights doctrine has been widely analyzed and criticized by legal scholars.[92] Scholars critique the Court's standard for implied reserved rights as too narrow,[93] too broad,[94] or ***18** incorrectly interpreting Congress' intent.[95] Especially in western states where water is scarce, the federal reserved rights doctrine has spurred extensive conflict.[96]

Likewise, the *New Mexico* court's narrowing of the federal reserved rights doctrine has been widely analyzed and criticized.[97] Specifically, the Court's reading of the Organic Act has been widely criticized by both scholars and the minority's dissent.[98] The most common criticism aligns with the dissent, which argued that the Court interpreted the Organic Act incorrectly when it found that the Act did not imply scenic and recreational primary purposes.[99] Additionally, legal scholars criticize the Court's refusal to extend the water rights to include the purposes of the Multiple-Use Sustained Yield Act or point out that the Court really looked to express, rather than implied purposes when it narrowly construed the Organic Act.[100]

Rather than critique the Court's interpretation of the Organic Act, this Article takes issue with the Court's reliance on the Organic Act. Whether the majority's reading of the Organic Act's purposes was accurate, courts should instead look outside the Organic Act to determine, on an individual basis, the purposes of each national forest. The *New Mexico* Court's approach failed to look for an implication based on the best available evidence, and instead only looked at explicit words in the Organic Act to find ***19** intent.[101] Without arguing in favor of broadened purposes, or more or less water, this Article argues that the *New Mexico* Court erred in its reliance on the Organic Act alone to create a blanket rule, in this case uniform purposes for all national forests under the federal reserved rights doctrine. In the future, courts should instead broaden the scope of their evidentiary inquiry and look first, at the place-specific reservation or dedication documents and second, at place-specific physical and historical indicia of intent to make the most accurate implied water rights determination possible.

### a. The Specific Instrument

This part outlines perhaps the most obvious way to distinguish the *New Mexico* Court's analysis from past federal reservation cases--its failure to address the specific proclamation used to reserve the Gila National Forest. This Article's first argument in favor of looking beyond the Organic Act concerns the instrument used to make each reservation. This part outlines the instruments used to make reservations, how the instruments were analyzed by the Supreme Court in implied water rights cases before *New Mexico*, and urges courts to undertake that more place-specific analysis where available.

The Supreme Court's review of federal water rights cases before and after *New Mexico* used the individual dedicating document in their analysis.[102] For example, *Cappaert* dealt with a specific national monument reservation, and the presidential proclamation used to dedicate that monument discussed at great length the physical and ***20** ecological characteristics of that particular monument.[103] The Court recognized the importance of the desert pupfish, and allowed federally reserved water rights for the fish based on the very detailed presidential proclamation that reserved Devil's Hole as a national monument.[104] While the *Cappaert* Court looked at the Antiquities Act for help in its water rights determination, the proclamation specific to Devil's Hole was determinative.[105]

Likewise, *Winters* and *Arizona's* Indian Reservation federal water rights determinations looked to documents specific to each reservation.[106] Those Courts used the specific instruments dedicating each individual reservation to determine what the federal government intended for Indians to do on each reservation, and declared the existence of federal water rights accordingly.[107] When the Court considered non-Indian federal land units in *Arizona*, it deferred to the Special Master's determination that the federal government intended to reserve water on national monument and national forest reservations.[108] The Special Master's factual inquiry for all of the water rights at issue was hundreds of pages long, and with respect to the non-Indian reservations, the Special Master cited the specific executive orders and presidential proclamations authorizing each individual federal land reservation to make his finding that implied water rights were attached.[109] Thus, in each of these cases and for each type of reservation at issue, the specific instrument played a role in the Court's determination.

***21** Additionally, failure to consider the specific proclamation is potentially less accurate because it fails to consider the

timing of the reservation. The timing of the reservation is important not only because it determines priority date, but because it could also lead to a more accurate purpose determination as reservation purposes have varied throughout the years. For example, as the Court in *New Mexico* noted, the purposes of the Forest Service have evolved considerably since it was founded so the purposes of a reservation under Forest Service management are also likely to differ depending on when the reservation was made.[110] As the priority date for federal water right reservations is the date that the specific unit was reserved, rather than the date of the general authority to establish a particular type of reservation, purposes should be contemporaneous with the priority date, not the Act with nationwide scope. Failure to account for the specific instrument that created the reservation at issue could result in failure to account for the specific timeframe noted by that instrument and as a result, a less accurate water rights determination.

On the other hand, problems arise when the specific dedicating instrument still does not give enough clues for a court to properly determine implied intent.

**b. Physical Characteristics and Historical Circumstances**

The *New Mexico* Court's use of the Organic Act alone narrowed the implied water rights inquiry relative to past cases not only by neglecting the specific instrument, but by also neglecting indicia of intent outside the Act's explicit words. This limited evidentiary inquiry is less likely to lead to an accurate determination of a reservation's ***22** purposes than the broader evidentiary inquiry undertaken by the Supreme Court before *New Mexico*. Confining the inquiry to the Organic Act's express purposes effectively asks what the *express* intent of Congress was, not the implied intent, which is the proper inquiry under the doctrine and was treated as such by the Supreme Court before *New Mexico*.[111] Despite the fact that the *New Mexico* court looked outside the Organic Act when it analyzed the overall structure of the Forest Service and the Department of Agriculture, it still failed to look at information unique to the Gila National Forest.[112] In contrast, earlier Supreme Court federal reservation cases took a broader view.

In *Arizona*, the Court accounted for the general aridity of the area around the Colorado River when it determined Congress' intent to reserve water, despite the executive order that created the Indian Reservation's failure to mention it.[113] Furthermore, the Special Master's report used by the Court in *Arizona* relied on physical and historical circumstances surrounding the national forest and national monument reservations to support its finding that the United States intended to reserve water.[114] While the Special Master's report cited the executive orders and proclamations used to make the reservations, it did not note determinative facts from those instruments; rather, the Special Master must have relied on his broader inquiry--the report in its entirety. As noted, that report discussed at length the physical conditions on each waterway at issue and the historical circumstances surrounding water rights claims in the area.[115]

***23** Even in cases where the specific instrument provided detailed, place-specific information, the Supreme Court before *New Mexico* undertook a broader inquiry in its attempts to determine implied intent. For example, the *Winters* Court considered physical circumstances when it looked at the aridity of the landscape on the Fort Belknap reservation.[116] The Court considered historical circumstances when it noted early settlement and Montana's admission to the Union, and even considered actual use by the Fort Belknap tribe in its federally reserved water rights determination.[117] Even in *Cappaert,* where the Devil's Hole Proclamation played a pivotal role in the Court's implied purpose determination, the Court undertook a detailed look at the physical characteristics of Devil's Hole in addition to the content of the Proclamation.[118]

Determining implied intent is not easy. As such, courts should use available information concerning the physical characteristics and historical circumstances of each individual reservation to determine what federally reserved water rights attach to a particular national forest reservation. For example, the Gila National Forest is a particular land reservation with unique physical characteristics and historical circumstances that affect the purposes of the reservation.

**c. Gila National Forest Case Study**

Unlike national monuments or Indian reservations, national forests can be created by a much wider variety of instruments, and those instruments tend to be much less specific. While the federal government made Indian reservations and national monuments by a detailed instrument leaving almost nothing for the court to infer, other land reservations, ***24** like national forests, are much less clear. In general, national forest reservations are made by presidential proclamation, executive order, or

by acts of Congress.[119] The authority to make these reservations comes from the Organic Act, which was replaced by the Forest Reserve Act (also called the Creative Act), the Pickett Act, and ultimately the Multiple Use Sustained Yield Act.[120] The National Forest System includes federally owned forest, range, or related lands in the United States managed by the Forest Service.[121] The National Forest System is vast, with over 225 million acres as of 2015.[122] Thus, national forests are extremely variable both in how they are created and the characteristics of the land reserved.

The first portion of the Gila National Forest was reserved by presidential proclamation in 1899.[123] The presidential proclamation from William McKinley specified only the following ecological characteristics for the land: that they be "covered in timber or undergrowth" and "the public good would be promoted by setting apart and reserving said lands ... whether commercial in nature *or not*."[124] Theodore Roosevelt's 1905 proclamations concerning the Payson Forest Reserve in Utah and the Pine Forest Reserve in South Dakota parroted the same language, but neglected to specify physical characteristics (other than boundary lines) that might differentiate the forest from others.[125] Later, when presidential proclamation increased the size of the Gila National ***25** Forest, it again echoed the very same language.[126] Thus, specific proclamations for forest reserves often shed little light on the purposes of the reserve.

However, if the Supreme Court made a specific inquiry into the physical characteristics or historical circumstances surrounding the Gila National Forest reservation and subsequent additions, it almost certainly would have reached a different result. For example, if the Court considered the aridity of the landscape as the *Winters* Court and *Arizona* Court had, it might have recognized that the Gila National Forest's ability to produce timber is unlike forests in the Pacific Northwest.[127] It might have also recognized that the Gila National Forest provides different values to the forest system than other areas based on its early wilderness designation-the first in the nation.[128] While it is impossible to say with absolute certainty what effect a broader inquiry would have had on the *New Mexico* court's analysis, considering information specific to the Gila National Forest almost certainly would have produced a more accurate result.

## IV. CONCLUSION

The value of each federal land reservation deserves individual attention. In the western United States, where federal land reservations are plentiful and water resources are limited, it is especially important to accurately determine implied water rights attached to federal land. It is imprecise and likely inaccurate to treat all federal land reservations of a certain type, national forest or otherwise, uniformly based on acts with nationwide scope. Additionally, determining the implied intent and original purposes of ***26** a reservation is not easy, warranting a broad evidentiary inquiry to increase accuracy. This Article's recommended two-part individualized analysis should be adopted to address this important and difficult task. Courts already determine each reservation's appurtenant water rights individually, on a case-by-case basis, but their evidentiary inquiry should also be individualized and tailored to each piece of land.

Footnotes

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1 *See* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 9:53 (2015).

2 *See generally* Todd A. Fisher, Note, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077 (1984) (outlining controversy surrounding federally reserved water rights).

3 *Id.* at 1078.

4 *Id.*

[5] *Id.*

[6] *See infra* Part II (b).

[7] United States v. New Mexico, 438 U.S. 696, 699 (1978).

[8] *Id.* at 702.

[9] *Id.* at 698.

[10] *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 328 (Cal. 1988) (noting that "[t]he Supreme Court held, however, that wildlife preservation constituted a 'secondary' purpose of the national forests, the primary purposes being limited to timber and water preservation."); Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1103 (D. Colo. 2004) (finding that, "to conserve the water flows, and to furnish a continuous supply of timber for the people." (citing United States v. New Mexico, 438 U.S. 696, 707 (1978)))

[11] Sierra Club v. Block, 622 F. Supp. 842, 854 (D. Colo. 1985).

[12] UNITED STATES DEPT. OF JUSTICE, FEDERAL RESERVED WATER RIGHTS AND STATE LAW CLAIMS (May 12, 2015), https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims (outlining various federally reserved rights claims); Fisher, *supra* note 2, at 1079 (highlighting the importance of the prior appropriation doctrine, which organizes water users by priority date, with respect to federally reserved rights in that most federal reservations carry an earlier priority date than individual users).

[13] McCarran Amendment, ch. 651, 66 Stat. 560 (1952) (waiving the United States' sovereign immunity and allowing for the joinder of the federal government as a defendant in general stream adjudications.); *See also* UNITED STATES DEPT. OF JUSTICE, *supra* note 12.

[14] *See* UNITED STATES DEPT. OF JUSTICE, *supra* note 12.

[15] *Id.*

[16] ROBERT W. ADLER ET. AL., MODERN WATER LAW: PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS 377, 385 (2013).

[17] *Id.*

[18] *See* UNITED STATES DEPT. OF JUSTICE, *supra* note 12.

[19] Cappaert v. United States, 426 U.S. 128, 139 (1976).

[20] *Id.*

[21] *Id.*

[22] TARLOCK, *supra* note 1.

[23] *Id.*

[24] *See infra* Part II (detailing Supreme Court federally reserved water rights cases).

[25] United States v. New Mexico, 438 U.S. 696 (1978).

[26] Winters v. United States, 207 U.S. 564 (1907).

[27] *Id.* at 578.

[28] *Id.*

[29] *Id.* at 576.

[30] *Id.*

[31] *Id.* at 570.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Fed. Power Comm'n v. Oregon, 349 U.S. 435 (1955).

[36] *Id.* at 449.

[37] *Id.*

[38] *Id.*

[39] Arizona v. California, 373 U.S. 546, 601 (1963).

[40] *Id.* at 549.

[41] *Id.* at 595-96.

[42] *Id.* at 598-99.

[43] *Id.*

[44] *Id.* at 599.

[45] *Id.*

[46] *Id.* at 601.

[47] *Id.* at 551.

[48] *Id.*

[49] SIMON A. RIFKIND, SPECIAL MASTER REPORT 292 (Dec. 5, 1960); Arizona v. California, 373 U.S. 546 (1963), https://dspace.library.colostate.edu/handle/10974/312 (hereinafter SPECIAL MASTER'S REPORT).

[50] *Id.* at 293.

[51] *Id.* at 292-95.

[52] *Id.* at 295 (citing Exec. Order No. 5105 (May 3, 1929)).

[53] SPECIAL MASTER'S REPORT, *supra* note 49, at 335.

[54] *Id.* at 335.

[55] *Id.* at 342.

[56] *See generally Id.* (outlining physical and historical characteristics of each major waterway at issue before addressing legal merits of the party's arguments).

[57] *Id.*

[58] Arizona v. California, 373 U.S. 546, 601 (1963) (noting also that tribal rights are measured by reasonably foreseeable needs).

[59] *Id.*

[60] Cappaert v. United States, 426 U.S. 128 (1976).

[61] *Id.* at 129.

[62] *Id.* at 140

[63] *Id.*

[64] *Id.*

[65] *Id.* at 128.

[66] *Id.* at 147.

[67] *Id.* at 132.

[68] *Id.*

[69] *Id.* at 132-33.

[70] *Id.* at 133.

[71] *Id.* at 139-40

[72] *Id.* at 142 (citation omitted).

[73] United States v. New Mexico, 438 U.S. 696 (1978).

[74] *Id.* at 698-99.

[75] *Id.* at 696.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 705-07

[79] *Id.*

[80] *Id.* at 708 (quoting 30 Cong. Rec. 966 (1897) (Cong. McRae)).

[81] *Id.* at 709-710.

[82] *Id.* at 709 n.18.

[83] *Id.* at 710 (quoting 16 U.S.C. § 557b (1976)).

[84] *Id.* at 713.

[85] *Id.* at 710.

[86] Brief for Petitioner at 8, United States v. New Mexico, 438 U.S. 696 (1978) (No. 77-510), 1978 WL 206869.

[87] *New Mexico*, 438 U.S. at 703-5.

[88] *Id.* at 705-9.

[89] In re Water of Hallet Creek Stream System, 749 P.2d 324, 328 (1998) (citations omitted).

[90] United States v. Jesse, 744 P.2d 491, 497 (Colo. 1987).

[91] *See* TARLOCK, *supra* note 1.

[92] *Id.*

[93] Susan Hoffman Adams, *Water Rights and National Forests -Narrowing the Implied Reservation Doctrine: United States v. New Mexico*, 40 OHIO ST. L. J. 729 (1979).

[94] George S. Young, *Reserved Water Rights on National Forests after United States v. New Mexico* 1979 UTAH L. REV. 609 (1979).

[95] Sally K. Fairfax & A. Dan Tarlock, *No Water For the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979).

[96] *See* Fisher, *supra* note 2 (noting that the federal reserved water rights doctrine conflicts with the prior appropriation doctrine because "federally reserved rights exist independently of beneficial use or quantification.").

[97] Fairfax & Tarlock, *supra* note 95, at 509.

[98] United States v. New Mexico, 438 U.S. 696, 719-25 (1978).

[99] *Id.*

[100] *See* Young, *supra* note 94, at 616. (pointing out that "the opinion stands for the proposition that the occurrence of express purposes in an act creating a withdrawal preempts the use of water under the doctrine for implied purposes.")

[101] New Mexico, 438 U.S. at 707.

[102] *See supra* Part II (b).

[103] Cappaert v. United States, 426 U.S. 128, 132 (1976).

[104] *Id.* at 133.

[105] *See supra* Part II (b).

[106] *Id.*

[107] *Id.*

[108] Arizona v. California, 373 U.S. 546, 601 (1963).

[109] *See* SPECIAL MASTER'S REPORT, *supra* note 49.

[110] United States v. New Mexico, 438 U.S. 696, 703 n.7 (1978).

[111] *See supra* Part II (b).

[112] *See supra* Part II (c).

[113] Exec. Order No. 5105 (May 3, 1929).

[114] SPECIAL MASTER'S REPORT, *supra* note 49.

[115] *Id.*

[116] Winters v. United States, 207 U.S. 564, 566 (1908).

[117] *Id.* at 565.

[118] Cappaert v. United States, 426 U.S. 128, 133 (1967).

[119] *See generally* GERALD W. WILLIAMS, U.S. DEPT. AGRIC., THE USDA FOREST SERVICE--THE FIRST CENTURY (2005).

[120] *Id.* at 8-10.

[121] 5 WEST'S FED. ADMIN. PRAC. § 5806 (2015).

[122] U.S. DEPT. AGRIC., FOREST SERV., NATIONAL AND REGIONAL AREA SUMMARY (2015).

[123] 34 Stat. 3126 (Mar. 2, 1899).

[124] *Id.* (emphasis in original).

[125] *Id.*

[126] *Id.*

[127] U.S.D.A. FOREST SERV., FOREST PRODUCTS PERMITS (2016).

[128] *1924: Gila Wilderness Designation*, THE FOREST HISTORY SOCIETY, http://www.foresthistory.org/ASPNET/policy/Wilderness/1924_Gila.aspx (last visited May 3, 2016).