NATIONAL WATER POLICY IN THE WAKE OF UNITED STATES v. NEW MEXICO

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The United States Supreme Court's decision in *United States v. New Mexico* was rendered on July 3, 1978.[1] To the surprise of some, the Court limited federal reserved right claims to the Rio Mimbres drainage of the Gila National Forest to an amount of water necessary to satisfy the purposes for which the forest lands were withdrawn from the public domain, as authorized by the Organic Administration Act of 1897.[2] Since the decision there have been numerous uncomplimentary remarks by commentators aligned or sympathetic with federal interests.[3] Some have recommended the assertion of federal rights without regard for state water law.[4] More importantly, however, the federal government has reacted by reassessing its posture in water rights litigation in the various western states and by defining a conceptually new basis upon which to assert its claims. This paper examines the legal basis of "non-reserved federal water rights" and discusses their incipient promulgation in the form of Solicitor Krulitz's Opinion of June 25, 1979,[5] and the "Report of the Federal Task Force on Non-Indian Reserved Rights," which is presently in the final stages of preparation as part of the implementation of President Carter's water policy message of June 6, 1978. This paper also discusses the assertion of federal reserved claims in the guise of executive policy.

In *Mimbres Valley Irrigation Co. v. Salopek*,[6] which was the caption of *United States v. New Mexico* before the New Mexico Supreme Court, the United States asserted reserved rights in the Gila National Forest for aesthetic, recreational, wildlife and stockwatering purposes. New Mexico maintained that the New Mexico Supreme

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1. 438 U.S. 696 (1978).

2. 30 Stat. 34 (1897) (codified in scattered sections of 2, 16 U.S.C.).

3. *See, e.g., Comments of Professor Robert Emmet Clark on United States v. New Mexico and California v. United States*, XI Rocky Mountain Mineral Law Foundation Water Law Newsletter 4 (No. 3, 1978).

4. *See, e.g.*, Note, *Federal Acquisition of Non-Reserved Water Rights After New Mexico*, 31 STAN. L. REV. 885 (1979).

5. 86 Interior Dec. ____, (1979) (hereinafter cited as Opinion).

6. 90 N.M. 410, 564 P.2d 615 (1977), *aff'd sub nom.* United States v. New Mexico, 438 U.S. 696 (1978).

Court should recognize water rights only where necessary to satisfy the statutorily prescribed purposes of: 1) improving and protecting the forest to secure favorable conditions of water flow for appropriators under state law, and 2) providing a continuous supply of timber. On writ of certiorari from the United States Supreme Court, the dispute was framed in terms of the history of legislation manifesting federal-state relations in water matters, and the case was argued in light of New Mexico's view that "the development of the reservation doctrine discloses an anamolous jurisprudence in western water law."[7] Philosophically, New Mexico urged, there was a fundamental antagonism between appropriative rights vested under state law and the doctrine of federal reserved rights.[8] To appreciate the change in the federal legal position revealed in Solicitor Krulitz's Opinion of June 25, 1979, this philosophical backdrop is important to keep in mind.

In its brief New Mexico explained that the reservation doctrine was an exception to the rule made by Congress long ago that all non-navigable western waters were subject to the plenary control of the individual states. After noting the significance of the Acts of 1866 and 1870,[9] the first two acts in which the federal government recognized state control over non-navigable western waters, New Mexico argued:

> Finally, Congress passed the Desert Land Act of March 3, 1877, ch. 107, §1, 19 Stat. 377, 43 U.S.C. 321 as amended, which, according to this Court, "effected a severance of all waters upon the public domain, not heretofore appropriated, from the land itself." *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 55 S.Ct. 725, 79 L.Ed. 1356 (1935). Concluding, the Court said:
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> > We hold that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, . . . with the rights in each (state) [*sic*] to determine for itself to what extent the rule of appropriation or the common-law rule in respect to riparian rights should obtain. For since "Congress cannot enforce either rule upon any state, *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state." (*Id.*, [*sic*] 295 U.S. at 164).
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> This passage is often cited for the proposition that the Acts of 1866, 1870, and 1877 effected a complete cession of the govern-

7. Brief for the State of New Mexico at 7-8, 438 U.S. 696 (1978) (hereinafter cited as New Mexico Brief).

8. *Id.* at 10-18.

9. 43 U.S.C. §661 (1976) and 30 U.S.C. §51 (1976).

> ment's control over all of the non-navigable waters arising on the public domain to the western states, thus, by implication, leaving no water for the government with which to operate its various enclaves which had been or might be carved out of the public domain.
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> In 1908, however, the Court decided *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340, where it was held that when the United States withdrew lands from the public domain in order to establish the Ft. Belknap Indian Reservation, it also impliedly withdrew from the then unappropriated waters of the Milk River sufficient waters to satisfy the purposes for which the lands were withdrawn. "The power of the Government to reserve the waters and exempt them from appropriation under the state laws," the Court concluded, "is not denied, and could not be." *Winters,* 207 U.S. at 557, citing *United States v. Rio Grande Ditch & Irrigation Co.,* 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899).[10]

In oral argument, as well, the limited nature of the reservation doctrine was discussed by New Mexico:

> There are two fundamental mistakes in the United States' approach to the reservation of waters in national forests. The United States views its powers over western waters as the rule instead of the exception and the U.S. either ignores or hides from the fact that Congress explicitly relinquished control of the flow and the use of the waters in our national forests to the respective states.[11]

No mention was made by the United States in *New Mexico* of a "non-reserved federal water right," although the United States utilized dictum in *United States v. Rio Grande Ditch & Irrigation Co.*[12] to suggest that its powers over its property compel a broad construction of the statutes authorizing withdrawals of land from the public domain. In response, New Mexico stated:

> They make reference to the *Rio Grande* case. In dicta in the *Rio Grande* case and subsequently in another case called *Gutierres v. Albuquerque Land & Irrigation Co.* [188 U.S. 545] this Court said: "Of course, as held in the *Rio Grande* case, even a state as respects streams within its borders in the absence of specific authority from Congress cannot by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow of its waters so far at least as may be necessary for the beneficial uses of the government property."
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> They seem to say that we really don't need the reservation doctrine, that just by virtue of that dicta the United States could by fiat

10. New Mexico Brief, *supra* note 7, at 12-13.

11. Transcript of Oral Argument at 20, 438 U.S. 696 (1978) (hereinafter cited as Transcript).

12. 174 U.S. 690 (1899).

> say that we now want water in the West, we are going to use water for this purpose, therefore it is ours. That is not true.
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> The waters in the West were severed. Plenary control was relinquished to the states. When Justice Sutherland used the adjective "plenary," he used it advisedly. It means complete. When the waters were severed, they were severed. In the United States' view, there is some illogical, incomplete severance. There is no such thing in logic.[13]

It is clear that in arguing *United States v. New Mexico,* the United States thought of its rights to water in the Gila National Forest in terms of traditional reserved right dogma:

> It is well settled 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." *Cappaert v. United States,* 426 U.S. 128, 138; accord, *Arizona v. California,* 373 U.S. 546, 597-602; *Winters v. United States,* 207 U.S. 564, 575-578. Because the federal right applies only to waters that are unappropriated at the time the public land is reserved, it is subordinate to rights perfected before the establishment of the federal enclave. But it is superior, in turn, to rights perfected after that date. "[T]he 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." *Cappaert v. United States, supra,* 426 U.S. at 138; *Arizona v. California, supra,* 373 U.S. at 600; see also Morreale, "Federal-State Rights and Relations," in 2 Clark, *Waters and Water Rights* 58-71 (1967).[14]

In its reply brief, the United States tacitly suggested that federal water rights arise without the overt act of withdrawing lands from the public domain, that is, without a basis upon which to *imply* a water right, but counsel stopped short of urging recognition of a non-reserved federal right:

> In *United States v. Rio Grande Irrigation Co.,* 174 U.S. 690, this Court made it clear that general statutes providing that state law should govern the allocation of water rights do not bar the federal government from asserting its interests, even when those interests are inconsistent with state law. The Court noted two principles that limit the applicability of state prior-appropriation claims against the federal government. First, the Court held that appropriation rights conferred by state law are limited by the federal government's interest in ensuring the navigability of the nation's rivers. Second, with respect both to navigable and non-navigable streams, the Court observed (174 U.S. at 703):

13. Transcript, *supra* note 11, at 25-26.
14. Brief for the United States at 15-16, 438 U.S. 696 (1978).

> [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.[15]

In a footnote the United States added:

> The State seeks to dismiss the *Rio Grande* case as applying only to navigable streams (Br. 64-65 n. 18). That reading ignores the passage quoted above (174 U.S. at 703), which applies both to navigable and to non-navigable streams. The federal government's rights, "as the owner of lands bordering on a stream" to the "continued flow of its water," apply to "every stream within [the State's] dominion" (174 U.S. at 702, 703).[16]

The logical result of such a position is that the reservation doctrine was an unnecessary development, i.e., the Court did not have to devise a legal fiction upon which to rationalize the exemption of water for the Ft. Belknap Reservation "from appropriation under the state laws. . . ."[17] If the United States had retained control over unappropriated, non-navigable waters, its right to water for a federal purpose need not be evidenced by anything other than a federal purpose. However, despite this view of *Rio Grande,* the United States chose not to explain the logical consequences of the case to the Court. Instead, it sought to exploit the *Rio Grande* dictum less boldly, suggesting that federal ownership of non-navigable water should warrant a broad construction of the reservation doctrine.[18]

The United States lost *United States v. New Mexico.*[19] Before *New Mexico,* the United States limited its claims to those assertable in the form of federal reserved rights, and was thus implicitly of the opinion that federal rights arose in no other way. After *New Mexico,* the United States decided to exploit the *Rio Grande* dictum to its fullest. With the reservation theory having been clearly defined as the exception to the rule of federal deference to state law in the acquisition of water rights, the United States needed some new theory upon which to asert its expansive claims in future cases.

15. Reply Brief for the United States at 6, 438 U.S. 696 (1978).

16. *Id.* at 7 n. 4.

17. Winters v. United States, 207 U.S. 564, 577 (1908).

18. In this light, note the significance of Mr. Justice Rehnquist's opening comment in United States v. New Mexico: "The question posed in this case–what quantity of water, if any, the United States reserved out of the Rio Mimbres when it set aside the Gila National Forest in 1899–is a question of implied intent and not power." 438 U.S. at 698.

19. It should be noted that with respect to its legal underpinnings, the decision of the Court was unanimous. The dissent goes only to Mr. Justice Powell's opinion "that the United States is entitled to so much water as is necessary to sustain the wildlife of the forests. . . ." *Id.* at 719.

The United States' new theory is expressed in Solicitor Krulitz's Opinion of June 25, 1979, the ostensible purpose of which was to discuss, as a part of the implementation of the national water policy, the nature and extent of the United States' rights to use water on the federal lands administered by various agencies of the Department of the Interior. The theory is simple. The Solicitor first posits that "(t)he plenary power that Congress has under the Property Clause by virtue of federal ownership of (public lands) includes the power to control the disposition and use of water on, under, flowing through or appurtenant to such lands."[20] Coupled with the plenary power that Congress is afforded by the property clause is the view that any claim by a state or private individuals to non-navigable western waters must derive from the United States' initial ownership of public lands.[21] Interests in the property of the United States may be acquired only by express grant. According to Solicitor Krulitz, "(i)t follows," therefore, "that to the extent Congress has not clearly granted authority to the states over waters which are in, on, under or appurtenant to federal lands, the Federal Government maintains its sovereign rights in such waters and may put them to use irrespective of state law."[22]

The question is whether Congress has clearly granted authority to the states over non-navigable waters arising on or flowing through federal lands. After reviewing the Acts of 1866, 1870, and 1877, Solicitor Krulitz points out that the Supreme Court has recently recognized only two exceptions to the western states' exclusive control over non-navigable waters: "reserved rights . . . and the navigation servitude."[23] However, urges the Solicitor:

> The Court cited only *United States v. Rio Grande Irrigation Co., supra,* 174 U.S. at 703, for the proposition that only *reserved rights,* rather than all federal water rights needed to carry out congressionally-mandated land management responsibilities, fall within this exception allowed by the Desert Land Act. In the passage cited by the Court in *California v. United States,* the Court had stated, in *dictum:*
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> > [I]n the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States,

20. Opinion, *supra* note 5, at 2. U.S. CONST. art. IV, § 3, cl. 2 reads:
The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

21. *See* United States v. Grand River Dam Auth., 363 U.S. 229, 235 (1960).

22. Opinion, *supra* note 5, at 2.

23. California v. United States, 438 U.S. 645, 662 (1978).

> as owner of lands bordering a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.
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> It therefore seems plain that the *Rio Grande* Court, in construing the Desert Land Act twenty-two years after its passage, did not limit the exception to the higher reserved rights standard–the right to use waters on lands reserved from the federal domain for *specific* purposes, "where without the water the purposes of the reservation would be entirely defeated,"–but instead allowed it under a lesser standard, for water necessary for the beneficial uses of the government property.[24]

In this statement lies the conceptual genesis of the new non-reserved federal water right. Ignoring the fact that the statement in *Rio Grande* related solely to the proposition that the government has always been able to exempt waters from appropriation under state law to protect navigability,[25] the Solicitor gleans from the Court's statement a continuing riparian right in the United States that transcends the actions of severing the water from the land and relinquishing *plenary* control to the states. What the Solicitor ignores is that the Court has specifically addressed the issue: "[I]n the absence of federal legislation, the state would be powerless to affect the riparian rights of the United States . . . , [but] the authority of Congress to vest such power in the state, *and that it has done so by the legislation to which we have referred* [i.e., the Acts of 1866, 1870 and 1877], cannot be doubted."[26]

The holdings of the Supreme Court plainly indicate that the reservation doctrine is an exception to the relinquishment of plenary control over non-navigable, western waters.[27] The Solicitor's Opin-

24. Opinion, *supra* note 5, at 8-9.

25. The Court recognized in United States v. Rio Grande Dam and Irrigation Co., that the Acts of 1866 and 1877:

> assented to the appropriation of water (under state law) in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country, and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. 174 U.S. at 706.

The holding, as well as the discussion in support of it, was limited to the protection of navigability. Nowhere did the Court intimate that a federal riparian right survives the actions of the states pursuant to Congress' 19th century legislation.

26. California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162 (1935) (emphasis added).

27. *See, e.g.*, Winters v. United States, 207 U.S. 564 (1908); Arizona v. California, 373 U.S. 546 (1963); United States v. Dist. Court for Eagle County, 401 U.S. 520 (1971); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Cappaert v. United States, 426 U.S. 128 (1976).

ion is based solely on the inapposite remarks of the Court in *Rio Grande* and other *"inconsistent dictum"* (sic) which are not inconsistent unless one presumes the Solicitor's conclusion. In his statement of his conclusion, however, one can also discern the flaw in the government's logic:

> I am of the opinion that by these relatively narrow Acts of 1866, 1870 and 1877, the United States did not divest itself of its authority, as sovereign, to use the *unappropriated* waters on the public lands for governmental purposes. Supreme Court decisions upholding federal reserved water rights created after the effective dates of these statutes affirm this conclusion (*United States v. New Mexico,* supra, at 698):
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> > The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional acts and admission to the Union, however, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes. *Winters v. United States,* 207 U.S. 564, 577 (1908); *Arizona v. California,* 373 U.S. 546, 579-98 (1963).[28]

The Solicitor fails to distinguish between the *power* of the United States under the property clause and the *acts* of the United States. It is true that the United States did not divest itself of its "authority" in the sense that it could tomorrow repeal the Acts of 1866, 1870, and 1877. It did divest itself of its authority, however, in the sense that it relinquished plenary control over all non-navigable waters in the West to the states, which action of Congress has been changed historically only by the exemption of water from appropriation under state law, through the mechanism of the implicit reservation of water to satisfy the purposes for which lands have been withdrawn from the public domain.[29] Also, the Solicitor concludes that the

28. Opinion, *supra* note 5, at 9.

29. The basis of Professor Clark's reaction to United States v. New Mexico is not dissimilar to the thinking which underlies the government's new theory:

> The oversimplified response from the western states to the implied reservation doctrine is that they "own" all water within the boundaries of individual states and, therefore, the United States has claim only to water rights expressly reserved, or to those related to the navigation servitude. Most water in the west originated in the high altitude water yielding areas of United States public domain. But this "ownership" concept underlies the attitude accepted by Justice Rehnquist and applied to national forest management in the *New Mexico* case.

Clark, *supra* note 3, at 4.

However, no such "ownership concept" was suggested to the Court. Instead, it was urged that the only exception to the historical fact that Congress relinquished complete control over all non-navigable water in the West to the states derives from Winters v. United States. Admittedly, Congress has the power to take back the control it gave away, but by its acts it hasn't done so, which, of course, is the reason for the fictional rationale of Winters.

United States did not divest itself of its authority *"to use* the unappropriated waters" on federal land. The Supreme Court, on the other hand, has been more specific, restricting its conclusion to the power of the United States *"to reserve"* unappropriated waters. The difference is the difference between non-reserved federal water rights, which do not exist, and reserved rights, which the Court has repeatedly recognized as the only exception to federal deference to state water law.

It is no secret that Solicitor Krulitz's Opinion of June 25, 1979, in reaction to *United States v. New Mexico,* asserts a new theory upon which to make federal claims. At a special press conference to reveal the opinion in Salt Lake City on June 23, 1979, at which Secretary Andrus, Solicitor Krulitz, other federal representatives, and the governors and representatives of the western states were present, Solicitor Krulitz stated that in the first draft of the opinion there was "no mention of *United States v. New Mexico."* In the second draft it was stated that the Court's decision was "inapplicable to other reservations." The third draft, according to the Solicitor, "overruled (the Court's) opinion." The final draft, however, "adhered to *United States v. New Mexico."*[30]

The fact of the matter is that the Solicitor finally overcame the Court's decision in *United States v. New Mexico* not by adhering to it, but by asserting a novel doctrine designed to circumvent it. To conclude that the United States has always retained a residual right to use non-navigable western waters for congressionally mandated purposes independently of the reservation doctrine is not to adhere to the Court's decision, but to be contemptuous of it.

Solicitor Krulitz's opinion is only one manifestation of federal water policy. While water policy seems to receive nearly regular attention,[31] the current surge in national interest surfaced in President Carter's Environmental Message of May 23, 1977, in which he directed the Office of Management and Budget, the Council on Environmental Quality, and the Water Resources Council under the chairmanship of Secretary Andrus, "to conduct, in consultation with the Congress and with the public, a review of the present federal water resource policy."[32]

After consultation with representatives of various water interests in the western states, a draft presidential document entitled "Water

30. The quotations were transcribed by the author at the Salt Lake City press conference.

31. During the past 60 years over 20 commissions or committees have looked into national water policy. UNITED STATES WATER RESOURCES COUNCIL, THE NATION'S WATER RESOURCES 2-2 (1968).

32. President Carter's Message to the Congress on the Environment, 13 WEEKLY COMP. OF PRES. DOC. 788 (May 23, 1977).

Resources Policy Reforms" was prepared and submitted to interested federal agencies for review and comment. The basic premise of the document, according to the Land and Natural Resources Division of the Department of Justice, was "that the States have 'the major water rights management role,' that the exercise by the federal government of its reserved rights is 'interference' with the States, and that the reservation by the federal government of the public domain . . . results in the 'preempting' of nonfederal rights. . . ."[33] The Department of Justice described the proposed presidential document as "inaccurate, incomplete, confused and biased . . . ," and pointed out that the "recommendations would result in jeopardizing the property rights of the United States, and would undermine our position in litigation concerning those property rights. . . ."[34]

Perhaps the most significant recommendation in the proposed document was "that the owners of state-sanctioned water rights established prior to 1963 be compensated for the diminution of their rights resulting from the exercise" of federal reserved rights.[35] The recommendation was based upon the fact that the reservation doctrine was not made applicable to non-Indian federal reservations until 1963.[36] The Department of Justice urged that the recommendations

33. Letter from James Moorman to Eliot R. Cutler, Associate Director, Natural Resources, Energy & Science, Office of Management and Budget, Guy R. Martin, Assistant Secretary, Land and Water Resources, Department of the Interior, and J. Gustave Speth, Council on Environmental Quality (March 8, 1978). The author of the letter argued for the United States in United States v. New Mexico seven weeks later.

34. *Id.* at 1.

35. *Id.* at 5.

36. In arguing that the development of the reservation doctrine discloses an anomalous jurisprudence in western water law in United States v. New Mexico, New Mexico reviewed the Acts of Congress which relinquished plenary control over non-navigable waters to the states and went on to say:

> With the so-called *Pelton Dam* decision, there was a definite suggestion that the once provincially Indian *Winters* doctrine was suddenly expanded to include any reservation of lands from the public domain, whether for Indians, power sites, national forests or some other reservation. The suggestion was clarified in 1963 when this Court held that the "principle underlying the reservation of water rights for Indian Reservations (is) [*sic*] equally applicable to other federal establishments such as National Recreation Areas and National Forests." Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).
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> The antagonism between state-created, appropriative rights and federal reserved rights goes beyond the obvious fact that the reservation doctrine takes away from what was thought to have been relegated to the plenary control of the states. With respect to national forest lands the antagonism derives from the fact that appropriators under state law had no notice—even by fiction—of competing federal interests until 1963, i.e., they believed that water was available to make their appropriations, and they could not have reasonably expected that a paramount interest in the same water might be claimed in the future. Secondly, the reservation doctrine provides enough water to satisfy

"not be submitted to the President . . . ," but instead should be "totally revised."[37]

In the early stages of the development of the water policy in 1977 and in his water policy message to the Congress on June 6, 1978, President Carter stated that "these water policy reforms will *not* preempt State or local water responsibilities."[38] Notwithstanding similar assurances by Secretary Andrus and Guy Martin, Assistant Secretary of the Department of the Interior for Water and Land, officials of the western states voiced continuing concern. As a result, President Carter met with several governors on October 22, 1977, and stated: "I want to make clear from the very beginning that there absolutely will be no preemption of state or private prerogatives in the use or management of water. This is not the purpose of the policy at all."[39] With respect to non-Indian federal reserved rights, the policy objective seemed reasonable, namely, "to facilitate the resolution of reserved rights controversies in a timely and fair manner."[40] Three directives were issued to federal agencies:

> 1) to increase the level and quality of their attention to the identification of Federal reserved rights, . . . focusing particularly on areas where . . . it is essential to reduce uncertainty over future Federal assertions of right . . . ;
> 2) to seek an expeditious . . . quantification of Federal reserved water rights . . . ;
> 3) to utilize a reasonable standard, when asserting Federal reserved rights, which reflects true Federal needs, rather than theoretical or hypothetical needs based on the full legal extension of all possible rights.[41]

The decision in *United States v. New Mexico* indicates that the Court viewed the federal claims for the Gila National Forest as unreasonable and exaggerated. Instead of recognizing a right to an in-

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future as well as present water requirements, thus, in a fully appropriated system such as the Mimbres, permitting the United States to make new appropriations with the priority of the original withdrawal, effectively taking without compensation all rights predicated upon intervening uses.

New Mexico Brief, *supra* note 7, at 15-16.

37. Letter of March 8, 1978, *supra* note 32, at 5 and 10.

38. Message to Congress on Federal Water Policy, 14 WEEKLY COMP. OF PRES. DOC. 1045 (June 6, 1978) (emphasis in original).

39. Remarks in a Panel Discussion and Question-and-Answer Session on Western Water Policy, 13 WEEKLY COMP. OF PRES. DOC. 1615 (October 22, 1977).

40. Message to Congress on Federal Water Policy, *supra* note 37, at 15.

41. President Carter's Memorandum for the Secretary of the Interior, The Secretary of Agriculture, The Secretary of Housing and Urban Development, The Secretary of the Army, The Attorney General, and The Chairman of the Tennessee Valley Authority 1, 2 (July 12, 1978).

stream flow for "fish" purposes and rights for aesthetic, recreational, wildlife and permittee stockwatering purposes, the Court limited the United States' rights to those rights the state had thought reasonable, viz., to rights necessary to prudently manage the watershed to maximize water yield to appropriators under state law and to insure a continuous supply of timber. Having seemingly profited from the Supreme Court's "sensitivity to [the reservation doctrine's] impact upon those who have obtained water rights under state law and to Congress' general policy of deference to state water law,"[42] Secretary Andrus introduced Solicitor Krulitz's Opinion to the Western governors by stating:

> To my mind, one of the most important elements of the President's message was his directive to use a "reasonable standard" in asserting federal reserved rights. That means asserting only those rights which reflect our true water needs, the *minimum* we must have to manage federal lands as the Congress has directed: It means we must *not*—I repeat, *not*—seek the broadest theoretical extension of all possible legal rights.[43]

While the Solicitor's Opinion reacted to *United States v. New Mexico* by positing a novel theory upon which to assert the same federal claims that the Court denied under the reservation doctrine, the Report of the Federal Task Force on Non-Indian Reserved Rights is equally imaginative. In its introductory pages the report apologizes for going beyond the President's directive of July 12, 1978:

> Because the Federal Government owns and manages substantial amounts of land in the Western States these states have manifested concern that the exercise of these largely unquantified reserved rights may adversely affect non-federal water users. Yet the reserved rights issue is only one part of the relationship between the states and the Federal Government over water rights.
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> There are substantial uncertainties and unresolved questions concerning non-reserved water rights as well, and it therefore became clear to the Task Force that we could not fully carry out our responsibilities without addressing generally the mechanisms by which the Federal Government secures water rights sufficient to carry out congressionally-mandated management programs on the federal lands, whether reserved rights are involved or not.[44]

42. United States v. New Mexico, 438 U.S. 696, 718 (1978) (Powell, J., dissenting in part).

43. Department of the Interior News Release (given at the June 23, 1979 press conference) (emphasis in original). It should be noted that the Solicitor of the Department of the Interior chairs the task force assigned to implement the President's policy on non-Indian reserved rights.

44. Report of the Federal Task Force on Non-Indian Reserved Rights, 10-11 (June 1979) (hereinafter cited as Report of the Task Force).

There was no concern, of course, over non-reserved federal water rights. The President and the western water-using community had never heard of them, and as late as April 1978, when *United States v. New Mexico* was argued orally, the Department of Justice was not asserting them.[45] In the area of water rights the "relationship between the states and the Federal Government" existed only in the form of the reserved rights issue; the attempt of the United States to assert reserved rights on acquired lands was short-lived. Consequently, the President's water policy in the area of federal reserved rights is being implemented in a way that flies in the face of the numerous assurances of federal officials that the purpose of the policy was not to assert federal claims in the guise of executive policy. Not only did the Department of Justice change the complexion of the national water policy envisaged in the February 13, 1978, Draft Presidential Document, but changed its substance rather dramatically by replacing policy recommendations based upon broad and representative consultation with the legal opinions and positions advocated by Justice. Compounding this interruption in the policy making process, the task force not only advocates the views of Justice, but broadens its policy-making effort by going beyond the executive directive in order to make room for the Solicitor's assertion of a non-reserved federal rights theory.

The report also covers up much of the antagonism between the assertion of federal reserved rights and appropriative rights vested under state law:

> [B]y no means is every assertion of a federal water right inimical to the states' interests. Much of the water secured by such rights may be, directly or indirectly, available to local citizens for uses benefitting local economies; e.g., fish and wildlife protection, grazing, or recreation. Others, such as instream flow rights, by definition involve no consumptive use and therefore preserve the water for appropriation under state systems at points outside the federal reservation, lower in the watershed. It is therefore often mistaken to characterize assertion of federal water rights as a federal "grab" of water that could otherwise be used to benefit states and local interests. On the contrary, federal agencies can often secure needed water rights fairly

45. There is one exception. The Solicitor's Opinion derives in large part from the original work of Charles Estes, an ex-employee of the Justice Department now employed as an Assistant U.S. Attorney in Albuquerque, New Mexico. To the author's knowledge, Mr. Estes was the first to articulate a non-reserved federal right concept in State of New Mexico ex rel., S. E. Reynolds, State Engineer, and Pecos Valley Artesian Conservancy District v. L. T. Lewis et al., Dist. Ct. No. 22600, a general water rights adjudication pending in state district court in New Mexico. The argument was not successful. If the theory warrants a name in future proceedings it should be called the Estes Doctrine.

> and adequately without jeopardizing, and sometimes even furthering, legitimate state interests.[46]

The fact of the matter is that there is no point in distinguishing between consumptive use and non-consumptive use in ascertaining whether the assertion of a reserved right would interfere with state rights. In *United States v. New Mexico,* for instance, Phelps Dodge Corporation appeared *amicus curiae* because the U.S. Forest Service had filed a notice of intent to claim a right to a minimum instream flow just below Phelps Dodge's point of diversion on the Gila River. Phelps earlier had spent approximately $2.5 million for the right to divert 11,756.281 acre-feet annually to provide water for an ore concentrator.

The concentrator, diversion dam, lake, and pipeline cost the company approximately $140 million. To complete its operation Phelps Dodge constructed a smelter at an additional cost of $315 million. The assertion of a non-consumptive federal reserved instream flow just below Phelps Dodge's point of diversion could have been 100 percent confiscatory.[47]

Despite the President's assurance that his water policy reforms would not be designed to undermine state prerogatives in water rights administration, one of the essential thrusts of the policy is the assertion by the federal government of rights to minimum instream flows, a concept inimical to the law of prior appropriation until just recently.[48] Instream flows were at issue in *United States v. New Mexico,* and the Court's decision is significant in terms of the task force's stubborn belief that the assertion of federal instream flow rights might further state interests.

At the district court level in *United States v. New Mexico,* the special master agreed with New Mexico that:

> [F]ederal rights to minimum instream flows could only be utilized in derogation of private appropriators, but in the limited circumstance where such rights could be utilized only in derogation of *transferred* appropriative rights (i.e., a change in place of use under New Mexico law to the upstream private lands, thus creating the situation where the Forest Service could theoretically call priority and shut down the transferred use), the Master reached the following conclusion of law:

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46. Report of the Task Force, *supra* note 43, at 14.

47. *See* Brief for Phelps Dodge Corp., Amicus Curiae, 438 U.S. 696 (1978). Also, the transmountain diversions of the Twin Lakes Reservoir and Canal Company and the Southeastern Colorado Water Conservancy District would have been cut by approximately 50 percent by the Forest Service's non-consumptive instream flow claims in the White River National Forest.

48. *See* FISH AND WILDLIFE SERVICE, DEP'T OF INTERIOR, STATE LAWS AND INSTREAM FLOWS (1977).

> In view of the fact that there are no appropriators upstream of the instream uses . . . , and . . . because said federal uses can be made without interfering with upstream junior appropriators or with the express purpose of the Gila National Forest of managing the watershed in such a way as to maximize the water yield to downstream appropriators, the United States has reserved rights to minimum instream flows in the aggregate amounts of 6.00 cfs . . . (Master's Conclusion No. 10, A. 198).[49]

On appeal to the New Mexico Supreme Court and on certiorari from the United States Supreme Court the issue was whether the incident of the property right which enables an appropriator to change his point of diversion warranted the same protection from the assertion of federal reserved rights to instream flows as the right to divert. In response to a question from Justice White in this regard, counsel for New Mexico responded by stating "that if the Court were to recognize the minimum instream flow, we would effectively prevent the transfer of any water rights under state law. That is just as much a part of the property right under state law as is the right to divert."[50]

With the encouraged assertion of federal instream flow rights as its cornerstone, the task force's report also encourages the federal quantification of a requisite "groundwater level for general ecosystem maintenance,"[51] which is yet another category of novel federal claims. A sustained groundwater level, like an instream flow, is not an ordinary usufructory interest in property, that is, water that is diverted from nature's design and utilized or made serviceable by man for his design. Quite the contrary, a "groundwater level" water right and an "instream flow" water right are not water rights at all, but simply names for that exercise of governmental dominion over water that *prevents* its usufructory enjoyment. In short, both concepts form the antithesis of an appropriative water right. To the extent that instream flow rights and groundwater levels are recognized and articulated in the vernacular of federal reserved rights, the United States will succeed in rolling back history, and in taking back from the relinquishment of plenary control to the states the governmental dominion over western waters that has not existed since the middle 1800s. In reality, "instream right" water is nothing more than water made unavailable for appropriation under state law—it is a

49. New Mexico Brief, *supra* note 7, at 4-5. It should be noted, however, that the only legal utility of non-consumptive instream flow rights is to shut down an upstream junior appropriator.

50. Transcript, *supra* note 11, at 21.

51. Report of the Task Force, *supra* note 43, at 36.

name for the national usurpation of "the control of the flow and use of waters" that legally reposes in the western states. Both concepts ignore the Court's decision in *United States v. New Mexico,* and notwithstanding the President's assurances, both concepts—if sanctioned either by the courts or Congress—will directly undermine state prerogatives in the use and management of water.[52]

The creation of a non-reserved federal water right doctrine appears to be the natural consequence of the Court having clarified the scope of reserved rights. The task force's report encourages assertion of water claims under state law only to the extent that the federal claims might be judicially cognizable under principles of prior appropriation. The report's authors state: "Once federal agencies have determined that water needed for a particular congressionally-authorized use is not necessary to carry out the purpose of a federal reservation, it should take all steps necessary under state procedures to perfect the right to use that water."[53] However, in states whose laws do not recognize appropriations of water for instream flows—or sustaining groundwater levels for general ecosystem maintenance—the government "either must ignore the congressional directive to manage the public land for fish, wildlife and recreation . . . , or assert a federal substantive water right (a non-reserved right) based on the congressionally-authorized use."[54] In other words, the executive and its agencies are recommending that they proceed to prevent water from being diverted and beneficially used despite the Congress. In the area of federal water rights, this is the real thrust of the national water policy.

The test of President Carter's national water policy will not come until Congress is afforded the opportunity to act upon the President's recommendations. While many of the issues involved are politically unmanageable, it is not likely that the Congress will ignore the views of western water officials as readily as did the legal representatives of the Department of the Interior and the Department of Justice in the preparation of the President's policy positions. Ostensibly the water policy is being promulgated in the national interest. In its present form, however, it is neither representative nor utilitarian. On the contrary, it is designed to undermine federal-state relations and provide a basis upon which to execute laws respecting non-navigable western waters which have never been passed.

52. It might be suggested that the real purpose of the assertion of federal rights to groundwater levels in the guise of executive policy is to provide some footing upon which to prevent groundwater mining, which the government abhors.

53. Report of the Task Force, *supra* note 43, at 43.

54. *Id.* at 44.