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G. EMLLEN HALL*

The Forest Service and Western Water Rights: An Intimate Portrait of *United States v. New Mexico*

ABSTRACT

Lawsuits offer an arcane and fundamental way of making basic water law and policy. The tortured course of litigation set the course of natural resource policy for years to come. Mimbres Irrigation District v. Salopek et al., which reached the U.S. Supreme Court in 1978 under the more glamorous moniker of United States v. New Mexico, dealt for the first time with the important issue of U.S. Forest Service water rights on Forest Service lands. The decision both resolved the history of Forest Reservations with respect to water and narrowed and shaped Forest Service options with respect to future management. This article provides the intimate details of the Forest Service litigation. The portrait reveals how the case struggled to define the Forest Service's past and unwittingly set the course for its future. The details—the incomplete understandings of history, the legal posturing in an adversary system, the quirks of personality in a complex process—combine in this story to show how time and chance influence our eternal rules about our most basic resources. The article weaves materials from personal interviews and various state and federal archives to develop the tale.

I. THEN AND NOW: THREE TALES IN SEARCH OF A COMMON HISTORY

At 2:47 P.M. on April 24, 1978, in the U.S. Supreme Court in Washington, D.C., New Mexico water lawyer Richard Simms proceeded to the podium and started to argue *United States v. New Mexico* on behalf of the State of New Mexico.¹ Supreme Court Justice Harry Blackmun,

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1. HARRY A. BLACKMUN, JUSTICE HARRY A. BLACKMUN PAPERS, at Box 680, Folder 5, No. 77-510 (Manuscript Div., Library of Congress, Washington, D.C. 2003). A register of Justice Blackmun's papers in the Library of Congress can be found at http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss/uploaded_pdf/ead_pdf_batch_01_November_2004/2003.2/wrps/ms003030.pdf.

who did not take much interest in western water rights, noted that Simms was "neat" and "slender."² (Blackmun noted that the lawyer for the United States was "chubby" and "bearded."³ The two other lawyers with him were bearded as well. One of them thought the outcome of the case turned on the fact that the New Mexico state lawyers had less facial hair.⁴) Simms was more awed than terrified on this, his first appearance before the Supreme Court on life or death western water matters.⁵

These days Simms sits in his living room north of Hailey, Idaho, and looks down at New Mexico, 900 miles south of him, and back at 30 years of legal practice there. He likes to remind listeners that he got his start as a fledgling attorney in the early 1970s battling with the United States over the nature and extent of Forest Service water rights in the West. The fight carried him to the U.S. Supreme Court for the first of seven times in a long and illustrious career. He remembers the first trip best of all. "In 1978, I saved the West," he says now, "from an attempted Forest Service takeover of the most important sources of state water, high in the mountains."⁶

In 1978 Stephen Glasser, now the Forest Service's water rights program manager, was just getting his start as a surface water hydrologist in the West.⁷ A native of the borough of Queens, New York, Glasser had just found his way into the Forest Service as one of the brand new "ologists" in the Service.⁸ In the 1950s, the Service had been manned almost exclusively by foresters, technically trained in a respected academic discipline. It was one of the measures of the tectonic changes that the agency went through in the 1970s that more and more employees from other disciplines—biologists, ecologists, and hydrologists like Glasser—joined the Forest Service corp.⁹ Glasser got his start hip deep in the freezing Gallatin River of Montana gauging stream flows, not supervising timber sales.

These days he sits in his office in the ancient brick Yates Building at the corner of Fourteenth and Constitution, Washington, D.C. From a cubicle, Glasser, 58, looks out to his present bailiwick, water in the West,

2. BLACKMUN, *supra* note 1.

3. *Id.*

4. Telephone Interview with Peter R. Steenland, Counsel, Sidley Austin Brown & Wood LLP, in Washington D.C. (Dec. 21, 2004).

5. Interview with Richard Simms, Attorney, in Hailey, Idaho (Jan. 4-5, 2004).

6. *Id.*

7. Interview with Stephen Glasser, Water Rights & Uses Program Manager, USDA Forest Serv., in Washington, D.C. (July 23, 2004).

8. Interview with Jim Koser, Retired Highway Eng'r, USDA Forest Serv. (Mar. 1, 1999).

9. HAROLD K. STEEN, *THE U.S. FOREST SERVICE: A HISTORY* 318 (1976).

and back to the case that Richard Simms won. Glasser currently heads the Forest Service efforts to secure the water needed for National Forests, primarily in the West. He speaks carefully, with the faint trace of Queens still in his voice, but he pulls no punches. "The Mimbres decision," he says, "that's what we in the Service call *United States v. New Mexico*, has caused us nothing but headaches ever since 1978. It made it very difficult for us to manage our resources. It created an impossible barrier to Forest Service water rights. Getting water rights for National Forests under the Mimbres standard is like asking a world class pole vaulter to jump 30 feet when the world record is 10 feet. That barrier has become more and more severe as the Forest Service has been called on more and more to protect the waters on its lands."¹⁰

In 1978, the U.S. Forest Service lay on the cusp of major changes in mission and function. In 1976, Congress had set out a new charge for the Forest Service for the first time in 75 years. The National Forest Management Act (NFMA) mandated forest-by-forest land use planning for the 154 Forest units,¹¹ most of which lay west of the 100th Meridian. The Service had planned for many years previous on its own initiative. By 1978, however, the planning choices became public and there was increasing pressure to shift from the timber management function of yesterday to what some saw as the recreational and ecological functions of the future.¹² Water on the National Forests would have to drive that change.

Now the Forest Service manages roughly the same acreage, configured in the same way, as it did in 1978. The change promised by NFMA has stalled. Congress has been paralyzed in its efforts to outline a new, or indeed any statutory path for the Forest Service. The courts, sometimes reluctantly, sometimes with glee, have managed the National Forests by injunction. Different administrations have entered the breach with contradictory rules. By regulation the Clinton Administration adopted ecological sustainability as a fundamental planning principle. The Bush administration countered with local adaptive management.¹³ The course of water for the different visions has become even more twisted as the result of *United States v. New Mexico*.

10. Interview with Stephen Glasser, *supra* note 7.

11. FOREST SERV., U.S. DEPT OF AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM AS OF SEPTEMBER 30, 1979, at 1 (1979).

12. See generally CHARLES S. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

13. George Hoberg, *Science, Politics, and U.S. Forest Service Law: The Battle Over the Forest Service Planning Rule*, 44 NAT. RESOURCES J. 1 (2004) (discussing President George W. Bush administration's forest policy as a response to previous policies).

Ironically, in the desert West, the Forest Service suffers from an abundance of water. For the most part the lands that the Service manages lie at the higher mountainous elevations where precipitation is proportionally greater. Specific locales and general numbers vary greatly, but the contrast between the water that falls on the forests above and the deserts below is stark. For example, Albuquerque, New Mexico, lying along the Rio Grande at 5,000 feet elevation, receives less than nine inches of annual average precipitation.¹⁴ Taos County's Wheeler Peak, which feeds the same Rio Grande, elevation more than 11,000 feet, enjoys annual average precipitation of almost 40 inches a year.¹⁵ They call the Albuquerque land outside of the narrow river corridor high desert because it is so parched. They call the water-rich Wheeler Peak lands a "giant sponge" because they collect and leak so much water. From a water point of view, the difference between the Albuquerque "high desert" and the Wheeler Peak sponge is the difference, say, between Death Valley and Connecticut. But in the West in general and New Mexico in particular, the two very different places are inextricably linked by their connection to a common water source. For better or worse, the water that the Forest Service has is also the water that downstream farmers and cities need. *United States v. New Mexico* represented the Supreme Court's first big effort to straighten out a relationship that was as inevitable as it was inextricable.

In the Mimbres case, Richard Simms was sure that he had saved for the States its share of water originating on the national forest and flowing down to the desert below. It was the same water that Stephen Glasser worried about preserving for the National Forests today. History plagued them both. Simms had won an old lawsuit that had set the course for state and federal claims to the Forest water ever since. Glasser had inherited a by now ancient doctrine that molded and constrained his choices for an altered Forest Service mission. From administration to administration, the Forest Service could not tell what the mission was. What are we to make of courts as arbiters of history and creators of inflexible natural resource rules?

In *United States v. New Mexico*, the courts twice set the Forest Service back in time. First, the decision caught the Forest Service in 1978

14. Western Regional Climate Center, *Period of Record Monthly Climate Summary for Albuquerque WSFO Airport, New Mexico* (290234), <http://www.wrcc.dri.edu/cgi-bin/cliRECtm.pl?nmalbu> (last visited Oct. 2, 2005).

15. U.S. Dep't Agric., Natural Resources Conservation Serv., Nat'l Water & Climate Center, Site Information and Reports for TOLBY, at <http://www.wcc.nrcs.usda.gov/snotel/snotel.pl?sitenum=934&state=num> (last visited Feb. 6, 2006) (listing precipitation measurements for the SNOTEL Site located in the proximity of Wheeler Peak).

at a time when it really did not know what water rights it needed. Second, the 1978 decision froze those basic rights in 1897 in a history it really did not understand.

The combination has left the Forest Service scrambling for alternatives to water rights altogether, indirectly trying to accomplish what *United States v. New Mexico* said the Forest Service could not do directly. As a result, the already tortured course of federal/state relations over water originating on the National Forest has been forced to take even more violent turns whose end is even more unsure than when the courts took the issue on in the 1970s. How these things come to pass tells us a lot about how we make critical natural resource decisions in the twenty-first century West.

II. "LETTING FEDERAL RESERVED WATER RIGHTS OUT OF THE BOTTLE"¹⁶

Until the Supreme Court decided the monumental *Arizona v. California*¹⁷ in 1963, Forest Service water rights did not pose much of a problem for either federal forest service managers or state water supervisors. Everyone knew that the high elevation federal forestlands produced a lot of the water¹⁸ that primarily was governed by the water law of downstream states for the benefit of farmers and cities. Without any question at all, most assumed that if the water-rich Forest Service needed a right to water, even on its own land, it would apply to the states to secure it. So, on the Gila National Forest where the big battle over federal water rights would unfold, the Forest Service as recently as 1955 had gone to the New Mexico State Engineer and applied for two permits to appropriate water,¹⁹ just like any other private appropriator.

16. Interview with Stuart Shelton, Assistant Gen. Counsel, U.S. Dep't of Agric., in Washington, D.C. (July 20, 2004).

17. *Arizona v. California*, 373 U.S. 546 (1963).

18. See, e.g., *id.* at 555 n.12 (noting how the Colorado River "serve[s] large areas"); Reply Brief of United States, *infra* note 216, at 1a-2a (indicating total yield of water from national forest lands at 200 million acre-feet per year). But compare *United States v. New Mexico*, 438 U.S. 696 n.3 (1978) (noting that "[m]ore than 60% of the average annual water yield in the 11 Western States is from federal reservations.... In the Rio Grande water-resource region, where the Rio Mimbres lies, 77% of the average runoff is from federal reservations....") with FOREST SERV., U.S. DEPT OF AGRIC., FS-600, WATER AND THE FOREST SERVICE fig. 5 (Jan. 2000) [hereinafter WATER AND THE FOREST SERVICE] (showing the yearly water yields from national forest lands in the Rio Grande as 29% of the total runoff).

19. Office of State Eng'r, State of N.M., Permit No. 2844, Certificate of Construction and License to Appropriate Water (May 31, 1955); Office of State Eng'r, State of N.M., Permit No. 2868, Certificate of Construction and License to Appropriate Water (Oct. 10, 1955).

That then universal understanding was grounded in three nineteenth-century congressional statutes and confirmed by the U.S. Supreme Court when in an off-hand 1935 remark the Court said that the three acts meant that "all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states...."²⁰ In 1908, however, the Court decided the *Winters* case, holding that, when the United States withdrew lands from the public domain to establish the Fort Belknap Indian reservation, it also impliedly withdrew sufficient waters to satisfy the purposes for which the lands were withdrawn.²¹

Historically, the so-called "federal reserved water rights" doctrine applied exclusively to Indian reservations as opposed to federal reservations of land from the public domain for other federal purposes, like national forests in general and the Gila National Forest in particular. In 1955, however, the Supreme Court strongly suggested that the doctrine might apply to other reservations, in that case a federal power reservation. In 1963 in *Arizona v. California*, a massive inter-state case that peripherally drew southwestern New Mexico into its maw, Special Master Simon Rifkind legally determined that there was no reason why "the principle underlying the reservation of water rights for Indian Reservations (is not) equally applicable to other federal establishments such as National Recreation Areas and National Forests."²² The Supreme Court agreed.

All of a sudden the reserved rights doctrine had attached to the Forest Service and come home to roost in the Gila National Forest at the very headwaters of a stream that originated high in the mountains of southwestern New Mexico and quickly tumbled out of the state and into Arizona on its 1,000 mile run to its juncture with the Colorado at Yuma, Arizona.²³ The same National Forest at the heart of the original 1963 extension of the doctrine to all federal lands held for a federal non-Indian purpose would also lie at the heart of the 1978 first formal, detailed

20. *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). See also *An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes*, ch. 262, 14 Stat. 251 (1866); amended by ch. 235, 16 Stat. 217 (1870); *An Act in relation to the Hot Springs Reservation in the State of Arkansas*; ch. 108, 19 Stat. 377 (1877).

21. *Winters v. United States*, 207 U.S. 564 (1908).

22. *Arizona*, 373 U.S. at 601. The Supreme Court affirmed Special Master Rifkind's Report of December 5, 1960, without mentioning Rifkind's elliptical determination with respect to reserved water rights for non-Indian federal withdrawals of land like the Gila National Forest. *Id.*

23. See generally GREGORY MCNAMEE, *GILA: THE LIFE AND DEATH OF AN AMERICAN RIVER* (1994).

definition of forest federal reserved water rights in *United States v. New Mexico*.

In *Arizona v. California* in 1963, the Supreme Court focused on the headwaters of the Gila-San Francisco watershed, which drained west to Arizona, rather than the Mimbres, which drained south to nowhere. At that, the *Arizona v. California* court hardly concerned itself with Forest Service claims to the Gila River system, almost none of which involved consumption of water.²⁴ Instead, the states of Arizona and California set out to limit as much as they could the right of New Mexicans under state law to deplete the flows of the headwaters on the theory that curtailing the lilliputian New Mexico rights could only expand those of their gargantuan neighbors to the south and west.

In the summer of 1956, the U.S. Supreme Court, acting through its Special Master,²⁵ came to rural, out-of-the-way southwestern New Mexico and took evidence on the nature and extent of New Mexicans' use of the Gila-San Francisco waters. First, in small Silver City, the heart of New Mexico mining country, and then in even smaller Reserve, the county seat of a ranching and farming community that would become the heart of the Sagebrush Rebellion in New Mexico, hostile Arizona and California lawyers from Phoenix and Los Angeles and the Special Master and his clerks and stenographers from San Francisco descended on relatively backwater southwestern New Mexico.²⁶ While gathering evidence, the out-of-state lawyers listened to, criticized, and mocked the New Mexicans and otherwise tried to minimize New Mexico's entitlement by use to the small part of the Gila stream system that quickly left the state. Two hundred thirty-four southwestern New Mexico irrigators and others testified about local water use. The testimony yielded almost 4,000 transcript pages.²⁷ The proceedings diminished what little respect local farmers had for outside interests. The Forest Service, which held lands in the Gila National Forest along both streams and their mountain tributaries, did not say much.

But the 1956 Gila-San Francisco proceedings in *Arizona v. California* did introduce a couple of key players to the Gila National Forest's second great appearance in national water battles 22 years later

24. See SAMUEL H. RIFKIND, REPORT OF THE SPECIAL MASTER, NO. 8, at 96 (Dec. 5, 1960). The Supreme Court affirmed the report without specifically mentioning the elliptical finding with respect to Forest Service water rights.

25. *Id.* at 2-3.

26. HELEN M. INGRAM, PATTERNS OF POLITICS IN WATER RESOURCE DEVELOPMENT: A CASE STUDY OF NEW MEXICO'S ROLE IN THE COLORADO RIVER BASIN BILL 57-58 (1969); HELEN INGRAM, WATER POLITICS: CONTINUITY AND CHANGE 84-85 (1990) [hereinafter WATER POLITICS].

27. RIFKIND, *supra* note 24, at 3.

in *United States v. New Mexico*. For one, a young Grant County lawyer, Norman Hodges, just elected district attorney, sat in the audience with his father and brother, both of whom were local lawyers, and watched the local farmers and the out-of-state hotshots have at it. Hodges had just returned from five years of legal practice in nearby Lordsburg under the aegis of H. Vearle Payne where he had learned some water law.²⁸ H. Vearle Payne would go on to a distinguished career as U.S. district judge for the district of New Mexico, in the course of a long career, himself making some landmark water rulings.²⁹ Vearle Payne's protégé, Norman Hodges, would go on to become, first, Grant County district attorney and then, beginning in 1963, state district judge with jurisdiction over the waters of the Gila-San Francisco and the Mimbres rivers. The intimate circle of a small state often thrown into the midst of much wider issues tightened when in 1976 New Mexico Supreme Court Justice H. Vern Payne, the son of H. Vearle, wrote the decision upholding state district judge Norman Hodges' restrictive ruling on the nature and extent of Forest Service water rights.³⁰

The litigation also marked the first appearance in a major interstate western water battle of legendary New Mexico State Engineer Stephen E. Reynolds. Appointed State Engineer in August, 1955, at the beginning of a 35 year career as New Mexico state water czar, Reynolds immediately launched an assault on all the major issues facing the State's water users.³¹ Special Master Simon Rifkind and *Arizona v. California* came within his ken. In characteristic fashion, Reynolds responded surely and quickly in two ways to the threat posed by the behemoths to the west.

First, Reynolds launched a campaign to show that New Mexico was equitably entitled to a share of the Gila-San Francisco headwaters beyond the small amount New Mexico residents were then using. Rifkind refused to recognize future uses for New Mexico. Eventually Reynolds found a political solution to this legal roadblock.³²

28. Interview with Honorable Norman Hodges, Retired Judge, Sixth Judicial Dist. Ct. of N.M., in Albuquerque, N.M. (May 11, 2004).

29. Robert J. Nordhaus et al., *Revisiting Merrion v. Jicarilla Apache Tribe: Robert Nordhaus and Sovereign Indian Control over Natural Resources on Reservations*, 43 NAT. RESOURCES J. 223, 224 (2003).

30. *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (1977).

31. G. EMLÉN HALL, HIGH AND DRY: THE TEXAS-NEW MEXICO STRUGGLE FOR THE PECOS RIVER 108-29 (2002).

32. WATER POLITICS, *supra* note 26, at 93; G. Emlen Hall, How the Gila Got Its Spots, paper delivered under the aegis of the N.M. Humanities Council in Silver City, N.M., (Mar. 24, 2002) (on file with Natural Resources Journal).

In the meantime, however, Reynolds set out to shore up the extent of New Mexico's then existing uses. No one knew exactly how much they were, even after the 1956 hearings in New Mexico and even after Reynolds prevailed on Rifkind to raise by 15% the existing uses that the Supreme Court would recognize.³³

To justify that increase, Reynolds promised to formally survey and determine once and for all the Gila-San Francisco water rights in New Mexico. This promise resulted in the quickest adjudication suit in New Mexico's experience, then or since. Between 1963 and 1965, State Engineer Reynolds and his army of surveyors and one lawyer investigated on the ground the exact extent and location of existing uses of water and then filed suit to confirm them. This suit introduced the State Engineer to the extremely independent farmers and ranchers of Catron County, some of whom were tractor-driving women,³⁴ to the surprise of many, and many of whom were extremely suspicious of nosy outsiders, especially after the 1956 debacle. The suspicions now extended to Reynolds and his employees who saw "Steve Reynolds: Wanted Dead or Alive" posters tacked to Catron County telephone poles and who found it wise to travel with a police escort through the county.³⁵

An unflappable local district judge helped to keep the adjudication proceedings under control and on track. That judge turned out to be none other than Norman Hodges, appointed to the bench in 1963. What Hodges had not learned about water law as an associate of H. Vearle Payne and as an observer of the local 1956 Supreme Court proceedings, he quickly learned as the judge deciding infrequent debates between the Office of the State Engineer and local ranchers and farmers over the extent of water rights to which each was entitled. The few cases that he had to decide involved whether a particular tract of land had ever been irrigated and how many acres it included if it had.³⁶

These grounded Norman Hodges in the hardcore state law of prior appropriation. That law emphasized the diversion of water from where it naturally occurred and its application to beneficial use where it never would have gotten but for the intervention of man. Ten years later, when he was asked to consider a water right claim by the Forest Service that involved leaving water in place, Hodges said that he had never

33. WATER POLITICS, *supra* note 26, at 93; HALL, *supra* note 31.

34. Mary Jo Lass Woodfin, *Found Women: Catron County, New Mexico*, 4 MS., No. 8, 1976, at 57-61.

35. Telephone Interview with Paul Bloom, Former Gen. Counsel to the State Eng'rs Office, in Washington, D.C. (Nov. 17, 2004).

36. Interview with Honorable Norman Hodges, *supra* note 28, at 9.

heard of such a thing.³⁷ Between 1963 and 1965, the use it or never get it or lose it principle of western water law settled into his soul. Long before the exact claims of the Forest Service came before him in what became *United States v. New Mexico*, Hodges had learned from the Gila-San Francisco that water rights came from water use.

The Gila National Forest, however, had always contained the seeds of another different approach to water and land. Famous conservationist Aldo Leopold, by some accounts the father of applied ecology, had known the Gila country from his earliest days as a Forest Service employee in nearby Arizona at the inception of the Forest Service in the first two decades of the twentieth century.³⁸ Leopold always viewed recreation as an important function of the Gila that he loved. Early in his life he viewed hunting as the form of recreation for which the new National Forests were ideally suited.³⁹ Finally, early on Leopold had convinced Forest Service Region 3, of which the Gila was a part, to administratively set aside a portion of the Forest as a primitive area, the first of its kind anywhere in the United States.⁴⁰

Over the next 50 years, Leopold's idea slowly worked its way up the Forest Service chain of administration, from the Gila National Forest to all of the southwestern Region 3, from the southwest region to all of the national forests, and, finally, from the Chief Forester's national office to Congress itself.⁴¹ The 1964 Wilderness Act⁴² owed its beginnings to Leopold's 1915 survey, with his friend and former Gila Forest supervisor Fred Winn, mapping America's first wilderness area.⁴³

The area encompassed in that pioneering work included the headwaters of the Mimbres stream system. Leopold's Forest Service plan for the area combined his concerns for recreation, wildlife, and water. The inter-relationship between these three factors in the Mimbres water rights of the Forest Service would lie at the heart of *United States v. New Mexico's* determination of all Forest Service water rights a half century later. Some wondered how the adjudication of such a fundamental issue could have arisen in such a backwater, but Aldo Leopold had planted the seeds of the dispute in precisely this place and with precisely these ideas.

37. *Id.*

38. ALDO LEOPOLD, ALDO LEOPOLD'S SOUTHWEST 6-11 (David E. Brown & Neil B. Carmony eds., 2003).

39. LOUIS S. WARREN, THE HUNTER'S GAME 71-125 (1997).

40. LEOPOLD, *supra* note 38, at 162.

41. *Id.*

42. 16 U.S.C. §§ 1131-36 (1964).

43. LEOPOLD, *supra* note 38, at 11.

It turned out that the Mimbres River provided the perfect physical backdrop for a clear view of the forest conflict. From the top down, the Mimbres watershed looked like most western watersheds. At its height, a relatively low 9,400 feet, almost 30 inches of precipitation fell a year and the terrain was high alpine meadows and mountains and valleys.⁴⁴ The elevation quickly dropped the farther south (and west) you went until 60 miles below you arrived in Deming, elevation 4,300 feet and annual precipitation a little more than nine inches per year.⁴⁵

Irrigated agriculture started in these lower desert elevations. Beginning in the 1860s and continuing by fits and starts through the turn of the century, private farmers had moved along the Mimbres River, as they had done along most New Mexico water courses, and developed irrigated farms. In a classic desert pattern, the farming had started as low on the Mimbres as possible, where the terrain was easiest, the growing season the longest, but the water supply was still adequate.⁴⁶

From those beginnings, Mimbres irrigation development had moved both upstream and downstream.⁴⁷ Up the river, the water supply improved but the terrain became steeper and steeper and the land harder and harder to farm. Eventually, by the turn of the century, the farms furthest upstream would find themselves surrounded by land reserved for the Gila National Forest in 1899. But with the Forest's creation what became classic inholdings never reached far up into the stream's real origins higher still in the Mimbres watershed.

From the initial development of private farms in the middle reaches of the Mimbres, subsequent irrigation development had spread downstream as well. South toward desert-dominated Deming, the flows of the Mimbres became more and more ephemeral, the product not so much of high mountain water, originating in the forest uplands, as of floods rushing into a poorly defined stream channel from tributary canyons and arroyos to the lower east and west. Even here, the use of

44. U.S. Dep't Agric., Natural Resources Conservation Serv., Nat'l Water & Climate Center, Site Information and Reports for SIGNAL PEAK, at <http://www.wcc.nrcs.usda.gov/snotel/snotel.pl?sitenum=755&state=nm> (last visited Feb. 6, 2006) (listing precipitation measurements for the SNOTEL Site located on Signal Peak).

45. Western Regional Climate Center, *Period of Record Monthly Climate Summary for Deming, N.M.*, <http://www.wrcc.dri.edu/cgi-bin/cliREctm.pl?nmdemi> (last visited Oct. 5, 2005).

46. SUSAN M. BERRY & DAVID B. BERRY, SETTLEMENT AND SURFACE WATER USE OF THE UPPER MIMBRES VALLEY 1860-1907, at 7 (June 1, 1984).

47. LEGAL DIV., OFFICE OF N.M. STATE ENG'R, MIMBRES RIVER SETUP (undated) (The setup shows a solid block of middle range irrigation ditches developing around 1870. Above the Shingle Canyon USGS gaging station, ditches date years later. Below the San Lorenzo community ditch development dates tend to be more and more junior as well).

Mimbres waters had begun before the United States set any high country land aside as a national forest.

But the battle over rights to the Mimbres River pitted the lower irrigated areas against the higher forest ones, the drier farm areas against the wetter wilderness ones, the state-based water rights below and what became, after the 1963 Supreme Court decision, the possible federal rights above. As the Department of Agriculture's Stuart Shelton sees it, *Arizona v. California* let the genie of federal water rights out of the state bottle. For the first time, there was a possibility across the west of a real conflict between the two as federal authorities in Washington started pushing the possibility of establishing federal control of western waters, the same waters that had been thought to have been under the plenary control of the states until 1963. Ironically, the issue galvanized first in Aldo Leopold's backyard on the Mimbres.

III. "A USE IS NOT A PURPOSE"

What became *United States v. New Mexico*, a grand national struggle between the relative rights of the federal and state governments for control of a common water source, started in the mid-1960s as a private late-night water grab by a couple of out-of-town desert water thieves looking to get a late foothold in the ephemeral flood flows of the lower Mimbres River.⁴⁸ Tony Salopek was an aggressive, high-rolling, politically active farmer and rancher from Las Cruces, a couple of drainages east of the Mimbres Basin in the much larger Rio Grande watershed. But, like acquaintance Henry Schlotauer, Salopek had huge 30,000 acre grazing leases on state lands⁴⁹ lying on both sides of the lower Mimbres River, west and north of Deming and 60 miles south of the upstream section of the river fed by the base flows, such as they were, originating in the National Forest.⁵⁰ In early spring 1966, Salopek built a rough dam across the Mimbres stream channel, hoping thereby to force what floodwater came his way out onto the adjoining lease lands where his cattle grazed. Schlotauer followed a slightly more moderate course, cutting down the banks of the river so that it would have less capacity to constrain high flows and dump more onto his bordering leased lands. In previous years, the two cattlemen had resisted the efforts

48. Interview with Honorable Norman Hodges, *supra* note 28, at 9.

49. Transcript of Record at vol. V, 42-44, *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (1977) (Civ. No. 6326) (Institutional Lease between the Comm'r of Pub. Lands, State of N.M. & Tony Salopek; lease total 32,452.44 acres, Oct. 1, 1965).

50. OFFICE OF N.M. STATE ENG'R, RIVER HYDROGRAPHIC SURVEY & MAP SHEETS (1971) (showing on page 48 the Salopek diversions and on page 53 the Schlotauer diversion).

of even further downstream irrigators to come on their lease lands to improve the stream channel so more water would pass downstream. Now, the more aggressive steps of Salopek and Schlotauer proved too much.

The Mimbres Valley Irrigation Company, a turn-of-the-century private corporation that had tried to establish irrigation even farther downstream, and with a sketchy subsequent history, sued the two on the grounds that Salopek and Schlotauer had illegally taken flood flows that should have run down to them.⁵¹ In the spring of 1966, State District Judge Norman Hodges, fresh in from the Gila-San Francisco adjudication just across the Continental Divide, issued a temporary injunction against the Salopek and Schlotauer diversions and got ready to decide what then looked like nothing more than a small, obscure, local water squabble.⁵²

Then, through the summer and fall of 1966, things got complicated along the Mimbres in Luna County. The suit started to spread to more parties along more of the river.⁵³ In reaction, Schlotauer and Salopek each hired southern New Mexico lawyers with strong statewide political and water connections to defend them. Schlotauer chose Deming's Ike Smalley, for years a leader in the New Mexico State Senate; Salopek picked Edwin L. Mechem, a once and future New Mexico governor with a real interest in water law.⁵⁴ Each defendant lawyer challenged the water rights of the plaintiff Irrigation Company just as the Irrigation Company challenged the water rights of the two ranchers.

And then the New Mexico State Land Office, the owners of the land onto which Schlotauer and Salopek poured the water, intervened to protect the State's rights to the improvements that their lessees were making by delivering water to the State's lands. All of a sudden, *Mimbres Valley Irrigation Co. v. Salopek* looked a lot broader and deeper to Judge Hodges than it initially had appeared. Rather than cut the lawsuit back to a manageable size, he agreed to expand it to include the whole Mimbres River.

First, after four days of confused and confusing trial in March and October 1966, Hodges, on January 24, 1967, directed the State Engineer's Office to inventory all of the surface water rights of the

51. Complaint, vol. V, 1-4, *Salopek*, 564 P.2d 615 (Civ. No. 6326).

52. Temporary Restraining Order & Order to Show Cause, vol. V, 5-7, *Salopek*, 564 P.2d 615 (Civ. No. 6326); Interview with Honorable Norman Hodges, *supra* note 28, at 9.

53. Complaint in Intervention & Order Allowing Intervention, vol. V, 25-26, *Salopek*, 564 P.2d 615 (Civ. No. 6326).

54. HALL, *supra* note 31, at 116.

Mimbres River stream system, from the Deming desert at the bottom to the administrative Forest Service wilderness at the top. "A decision," Hodges wrote, "cannot be made in this matter without a hydrographic survey being made."⁵⁵

Over the next three and a half years, State Engineer hydrographic surveyors went from Deming to the headwaters of the Mimbres, mapping water uses. In the meantime, the existing seven parties to the original suit waited. By July 1970, the State Engineer investigators had discovered over 900 additional claims to the Mimbres and had analyzed and mapped them. The claims included the State's version of the Forest Service rights.⁵⁶ At that point, State Engineer Reynolds moved to turn the original suit into a stream-system adjudication, turning all the claimants into defendants and fixing all of their water rights once and for all.⁵⁷ Now the original three party law suit had grown to 900 parties, including, still incidentally at this point, the rights of the Forest Service. Hodges agreed to the expansion on the same day.⁵⁸

Complex factors explain why Judge Hodges found the claims of just the railroad, the state land office, and the Mimbres irrigators so tangled that he thought it would be better if the State Engineer straightened them all out once and for all as he had already seen State Engineer Reynolds do on the neighboring Gila-San Francisco. The Mimbres Valley Irrigation Co. lawyer screamed bloody murder, alleging that his suit had nothing to do with any other water rights on the Mimbres and certainly not all of the other water rights.⁵⁹ The politically powerful lawyers for Salopek and Schlotauer stood by, recognizing that delay favored their position and that a full blown, stream system adjudication might buy a lot of time. Reynolds went along.

Finally, Reynolds told Hodges that the State Engineer had the money to do both the survey and the adjudication suit.⁶⁰ In the late 1960s and early 1970s, the State Engineer was filing adjudication suits willy

55. Transcript of Record, vol. V, 89-90, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (order requiring hydrographic survey of the surface water rights of the Mimbres River system located in the counties of Grant and Luna, N.M., Jan. 24, 1967).

56. *Id.* vol. V, supp. 102, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (list attached to complaint-in-intervention, July 31, 1971).

57. Motion to Intervene, vol. V, 91, *Salopek*, 564 P.2d 615 (Civ. No. 6326).

58. Order Granting Motion to Intervene, vol. V, 93, *Salopek*, 564 P.2d 615 (Civ. No. 6326).

59. Motion for an Order Setting Aside Intervention at vol. V, 105-06, *Salopek*, 564 P.2d 615 (Civ. No. 6326).

60. Interview with Honorable Norman Hodges, *supra* note 28, at 9.

nilly across the stream systems of the state;⁶¹ the Mimbres was just another one. The stream system adjudication would only cost the Luna County court time.

Reynolds even offered to help Hodges with the extra work by finding and paying for a special master.⁶² That master could attend to the nasty factual arguments that might arise in any of the 900 water rights to be adjudicated, including Forest Service claims. Hodges was still the only district judge in the large area covered by the Sixth Judicial District and he welcomed the State Engineer's suggestion. He was equally pleased when the State Engineer arranged for the services of Irwin S. Moise as special master. On December 4, 1970, Hodges appointed Moise his "special master and referee."⁶³

The choice of Moise made sense in many ways. A semi-retired Albuquerque lawyer at the time, associated with a prestigious firm, Moise had time for the job even at the \$12 an hour that it came with.⁶⁴ In the decade between 1960 and 1970, Moise had served as a justice on the New Mexico Supreme Court and had just retired as chief justice. On the court, he had decided many of the groundbreaking cases on the substance of state water rights and the procedures in state adjudication suits.⁶⁵ If Reynolds was the most litigious S.O.B. because his name

61. See, e.g., S.E. REYNOLDS, STATE ENGINEER, TWENTY-NINTH BIENNIAL REPORT OF THE STATE ENGINEER OF NEW MEXICO, JULY 1, 1968 TO JUNE 30, 1970, at 17-20.

62. Interview with Honorable Norman Hodges, *supra* note 28.

63. Transcript of Record at vol. V, 135, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (Order of Reference, Dec. 18, 1970).

64. *Id.*

65. See *Kaiser Steel Corp. v. W.S. Ranch*, 81 N.M. 414, 467 P.2d 986 (1970) (opinion by Chief Justice Moise holding that a private corporation had the public power of condemnation to secure access to public water); *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967) (opinion by Moise holding that due process required equal opportunities to apply the doctrine of relation back among surface and groundwater rights); *McBee v. Reynolds*, 74 N.M. 783, 399 P.2d 110 (1965) (opinion by Moise holding that the State Engineer had no jurisdiction over groundwater rights filed before a basin was declared); *Clements v. Carlsbad Irrigation Dist.*, 74 N.M. 373, 394 P.2d 139 (1964) (opinion by Moise holding that the State Engineer had correctly applied the law in denying a change in the point of diversion); *State ex rel. Reynolds v. McLean* 74 N.M. 178, 392 P.2d 12 (1964) (opinion by Moise holding that a district court's "decision" to confirm a special master's findings was not a final order that could be appealed); *Durand v. Carlsbad Irrigation Dist.*, 71 N.M. 479, 379 P.2d 773 (1963) (opinion by Moise holding that the State Engineer had correctly applied the law in denying a change in the point of diversion); *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961) (opinion by Moise holding that a well the development of which was begun prior to the declaration of an underground basin did not require a permit even though it was completed after the declaration of a basin); *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) (opinion by Moise holding that adjudication proceedings in district court were not reviewable if supported by substantial evidence); *State ex rel. Reynolds v. Massey*, 66 N.M. 199, 344 P.2d 947 (1959)

appeared so frequently in water litigation, then Moise was his greatest judicial fan so frequently did he review and approve the State Engineer's decisions. In the late 1940s, well before he became a judge, Moise had been deeply involved in the drafting and adoption of the inter-state Pecos River Compact, as bitter a negotiation and as complex a solution as ever seen in bitter, complex western water affairs.⁶⁶ On a more personal level, Moise had lived across the fence from Reynolds on Santa Fe's east side while serving on the state supreme court. The two men had become friends. Moise also belonged to the small New Mexico Jewish community in which Reynolds's chief lawyer, Paul Bloom, also actively participated.⁶⁷ When it came time to pick someone who could help Judge Hodges with particular claims to the Mimbres Stream system, Justice Moise fit on many scores.

It did not take long for the Forest Service issues to emerge from what had started as a three-party Deming battle and grown into a 900-party stream-wide adjudication involving all private, state, and federal claims to the entire Mimbres stream system.⁶⁸ Under established federal law, the Forest Service, as a federal agency, had to submit to the jurisdiction of the state court.⁶⁹ The United States responded August 2, 1971, with a 13-page answer. In it the U.S. Department of Justice Attorney Donald W. Redd, a trial lawyer in the Department's Land and Natural Resources Division in Washington, began to set out the nature and extent of Forest claims to the lands withdrawn and reserved.⁷⁰

In one paragraph deep in his complex answer, Redd set out the standard reserved rights theory, imported from *Winters* and adopted in *Arizona v. California*. The water rights of the Forest Service attached to the common source as of the date of the land reservations (1899-1910) in an

(opinion by Moise holding that adjudication proceedings in district court were not reviewable if supported by substantial evidence).

66. HALL, *supra* note 31; Record of Meeting of the Pecos River Compact Commission, in Santa Fe, N.M. at 109 (Dec. 4, 1948).

67. Telephone Interview with Paul Bloom, *supra* note 35.

68. Transcript of Record, vol. V, 111-29, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (Notice of Lis Pendens, Sept. 8, 1970 & associated Exhibit A, listing 902 parties defendant in adjudication); *id.* at 145 (Affidavit of Service to U.S. Attorney for Dist. of N.M. & U.S. Att'y Gen. John N. Mitchell).

69. McCarran Amendment, 43 U.S.C. § 666 (2000) (unchanged since enactment on July 10, 1952, waiving sovereign immunity of the United States so that it could be joined in state water adjudications); *United States v. Dist. Ct. for Eagle County*, 401 U.S. 520 (1971) (finding that the McCarran amendment was an "all-inclusive" statute that enabled adjudication of appropriated, riparian, and reserved water rights); U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL § 2541.7 (May 1974, amend. 14).

70. Transcript of Record, vol. IV, 1, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (Answer to Complaint in Intervention by the United States of America, filed Aug. 2, 1971).

amount necessary for "the requirements and purposes of said reservation."⁷¹ But what were those purposes at the time of the land reservation? And what happened if the purposes of the Forests changed because the values for which they were managed evolved, as had been the case with the Gila and most other National Forests, and their water needs changed? Had the Supreme Court adopted this open-ended view of the evolving purpose of Forest Service water rights, *United States v. New Mexico* would have looked very different in 1978 and the course of federal-state relations over water would have taken a very different course after then. As it was, none of this was seen in 1971.

Indeed, at the time, the Forest Service was just beginning to deal in any systematic way with establishing its rights in adjudication suits. For years, the Chief Forester had directed regional foresters and those below them to keep states informed about water needs.⁷² In the wake of *Arizona v. California* and a growing emphasis on land use planning, the pressure increased to define existing uses and outline future needs. The Washington office pushed Regional Foresters to assert formally enough water rights for modern forest purposes. The Regional Foresters pushed the Forest Supervisors up and down the chain of command. The Forest Supervisors did the best they could, recognizing that, the closer federal water claims got to the ground, the more controversial they became. The pace stepped up as the Forest Service got dragged into more and more state adjudication suits, demanding a formal adjudication of the local Forest Service claims.⁷³ The ambiguous answer filed by Redd in 1971 in the Mimbres adjudication tracked the instructions for Forest Claims in the Forest Service Manual.⁷⁴

It did not take long for Special Master Moise to ask for clarification. On August 4, 1971, only two days after the United States had answered, Moise called for a pre-trial conference to be held September 16 at the Luna County District Courthouse in Deming, New Mexico. Among a few other general concerns, Special Master Moise sought "clarification of the claims of the United States of America for the Gila National Forest...."⁷⁵ As it turned out, the Forest Service needed at least a year to document the more than 200 existing uses on the Gila National Forest, most of which involved stock and wildlife ponds, and to

71. *Id.* at 165.

72. Interview with Stuart Shelton, *supra* note 16; U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL § 2541.11 (1980, amend. 27).

73. Interview with Stuart Shelton, *supra* note 16.

74. U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL § 2541.03 (1980, amend. 27); U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL, § 2541.03 (May 1974, amend. 14).

75. Transcript of Record, vol. IV, 175, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (Notice of Hearing, Aug. 4, 1971).

assemble its other water needs. That was acceptable to the State, which had a lot of work to do of its own adding and changing defendants on the existing list of more than 900 claimants. It would be a year at least before either the State or the United States would be ready to specify real issues and try them.

Sure enough, almost a year to the day after the initial pre-trial conference, Special Master Moise convened a second pre-trial conference on September 26, 1972, this time in Silver City. Now the parties agreed for the first time that Moise would have to decide whether or not "the limits as to uses for which water could be reserved or withdrawn in national forests were fixed as of the time that the national forest was created,"⁷⁶ an issue that went to the heart of U.S. attorney Don Redd's initial, unclear claim. The State, the United States, and the Special Master also agreed that the special master would have to decide whether recreation use was within the purposes for which water could have been reserved between 1899 and 1910 when the Mimbres watershed lands within the Gila National Forest were withdrawn and reserved.⁷⁷ On these issues of clarification, Special Master Moise invited briefs by both parties by December 1.

In addition to the promise of the definition and resolution of some fundamental issues, the proceedings in the fall of 1972 introduced a new key player in the lawsuit, Richard Simms. Simms joined the State Engineer office that September after a year clerking for Chief Judge Oliver Seth of the Tenth Circuit Court of Appeals. Simms had spent most of his year as a clerk reading appellate briefs. When it came time to leave the clerkship and find another job, Simms had told Judge Seth that he was interested in specializing in an area that involved sustained, high level, important litigation. Judge Seth recommended water law as a specialty and State Engineer Reynolds, a long-time Santa Fe acquaintance for whom Seth had great respect.⁷⁸ Based on Seth's recommendation, Reynolds hired Simms, who joined a small legal staff now including three lawyers.

In the fall of 1972, State Engineer General Counsel Paul Bloom was swamped with work. Litigation over the water rights of Pueblo Indians was picking up speed.⁷⁹ Various inter-state deals were coming

76. Pre-Trial Order, Oct. 25, 1972, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510), app. at 38-39 (reciting that a pre-trial conference was held Sept. 26, 1972, in Silver City).

77. *Id.*

78. Interview with Richard A. Simms, *supra* note 5.

79. Memorandum Opinion and Order, *New Mexico v. Aamodt*, 618 F. Supp. 993 (D.N.M., Jan. 24, 1986) (No. 6639-M Civ.).

unraveled.⁸⁰ It looked like Forest Service issues were about to explode on the Mimbres. Simms took a look at the emerging federal reserved rights issues there, decided that these were the kinds of issues that most interested him, and offered to take the case off Bloom's hands. Bloom gladly agreed.⁸¹ On October 12, 1972, right between Moise's order for briefs on the forest issues and their deadline of December 1, Simms took over the Mimbres case.

The questions posed by Moise were just the kind that had brought Simms to the job. Without much direction from Bloom and despite the fact that he did not know much about it beforehand, Simms tore into the issue. On November 30, 1972, he filed his first Brief for the State of New Mexico in Judge Hodges' court.⁸² The brief made it clear that the State believed that the Forest Service could only claim federal reserved water rights for purposes that existed at the time of the reservation of Gila lands between 1899 and 1910. Simms went on to concede that recreation was a purpose of the reservations at that time. "An extremely technical argument," he wrote in a style reminiscent of the opinions he had drafted for Chief Judge Seth, "could be made in order to establish that recreation was not a valid purpose for the creation of a national forest.... We find the argument ill-advised and concede the point (that recreation is a forest purpose)."⁸³

In making the concession, Simms was treading on dangerous ground. Once he opened the door to reserved rights for recreation, then all the related claims would rush in: reserved rights for fish necessary to recreational fishing, for other wildlife, for boating, even for ski areas. In the Mimbres drainage of the Gila, Aldo Leopold early on had insisted on managing the area at least in part for its recreational values, but did insistence like that rise to the level of an original purpose?⁸⁴ Based on his own years hiking and camping in the National Forests of the Southwest, Simms initially just assumed so.

Eventually the issue of recreation as a basis for Forest Service reserved rights in the Gila National Forest would emerge as a key issue before the U.S. Supreme Court; the Court, in upholding the ultimate position adopted by the State of New Mexico, would unanimously reject the point that Simms initially had conceded.⁸⁵ But during the course of

80. HALL, *supra* note 31, at 127-29 (discussing the Pecos River Compact).

81. *Id.*

82. Transcript of Record, vol. III, 425, *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (1965) (Civ. No. 6326) (Brief for Plaintiff in Intervention).

83. *Id.* at 467.

84. LEOPOLD, *supra* note 38, at 8-9.

85. *United States v. New Mexico*, 438 U.S. 696, 705, 718 (1978).

the litigation, Simms paid dearly for what he originally wrote. The United States took constant glee in reminding Simms and the State that they originally had agreed that recreation was a purpose of the Forest from the start.⁸⁶

Simms also paid dearly for his early concession with his new boss, State Engineer Reynolds. Reynolds voraciously read everything that came out of all of the branches of his office. Eventually he got to the brief on recreational issues that Simms had submitted at the end of November 1972. As always, he could not stop himself from commenting on it. On the upper right hand corner of the brief Reynolds wrote in a firm hand, "A use is not a purpose" and sent the already filed brief back to Simms.⁸⁷

By this elliptical remark Reynolds meant that Forest "purposes" and Forest "uses" were not identical. Congress in the Organic Act and the courts interpreting it, Reynolds was suggesting, had authorized the Forest Service to permit and regulate all kinds of uses of National Forest lands. However, those permissible uses were not necessarily purposes for which the Forests had been withdrawn and reserved. Only the limited purposes, not the broader uses, would give rise to federal reserved water rights. Recreation (and its associated values), intimated Reynolds, might be a use, but it probably was not a purpose and could not be the basis for a federal reserved right.

It is not clear where State Engineer Reynolds got this lawyer-like distinction between "uses" and "purposes." Years later, when I had begun teaching federal public land law at the University of New Mexico law school, Reynolds allowed, in that self-deprecating way of his, that he should probably take the course since he did not know enough about Forest Service law. However, he knew enough in 1972 to settle for the first time in the case on a fundamental distinction between Forest "uses" and Forest "purposes" that would prove essential and fundamental from then on and in the Supreme Court's ultimate restriction of federal reserved water rights six years later.

Neither Simms nor Bloom immediately caught on to the fundamental issue referred to by Reynolds in 1972. By 1976, however, Simms had to formally reverse positions on the recreational issue, now saying that recreation was not an authorized purpose of the Forests, just a permitted use. He attributed the mistake to the fact that he had just

86. See, e.g., *infra* sources cited notes 130-131.

87. Interview with Richard A. Simms, *supra* note 5.

begun to practice law in 1972 and did not know any better.⁸⁸ The U.S. attorney would not buy Simms' "inexperience and subsequent education" as an excuse for the State's inconsistent stances on the recreational issue.⁸⁹ The fact of the matter was that neither Bloom nor Simms immediately snapped to State Engineer Reynolds' elliptical note. They were too busy getting ready for the only trial that would ever be held on the nature and extent of water rights in the Mimbres Basin by the Forest Service for the Gila National Forest. Special Master Moise set the Forest Service question for hearing October 9, 1973, in Deming, New Mexico.

It turned out to be a boiling fall day in southern New Mexico. The cooling system for the elegant Luna County Courthouse was on the blitz and it was hot inside. Court personnel had thrown open the courtroom windows to try to cool things down. Dark green U.S. Immigration Service buses, similar to Forest Service vehicles, kept pulling into the parking lot, loaded with Mexicans who had tried, unsuccessfully this time, to get across the nearby border.⁹⁰ It was sometimes hard to hear in the warming court room, but the only hearing on the big issue of federal reserved water rights for the National Forests took only the morning.

For the United States, Redd called only two witnesses, the national administrative coordinator of all water rights for the Forest Service, Wesley Carlson,⁹¹ and Norman Ritchey, an employee of the Gila National Forest who was in charge of the water management program for the Forest.⁹² Carlson opened by describing for Redd in general how the Forest Service identified its water uses and its water needs. The brief testimony fit the post *Arizona v. California* Forest Service efforts to inventory Forest Service water uses and needs and it dovetailed as well with the general inventory prescriptions in the most current Forest Service Manual.⁹³ But Carlson did not acknowledge any limitations that might be imposed by the reserved rights doctrine and said nothing about

88. Transcript of Record, vol. V+, at 39, *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (1965) (Civ. No. 6326) (letter from Richard A. Simms, Special Assistant Att'y Gen., N.M. State Eng'r Office, to Honorable Norman Hodges, Dist. J. (Feb. 4, 1976)).

89. Letter from Donald W. Redd, Assistant Att'y Gen., U.S. Dept. of Justice, to Honorable Norman Hodges, Dist. J. (Feb. 12, 1976) (on file with Natural Resources Journal).

90. Interview with Richard A. Simms, *supra* note 5; Letter from Richard A. Simms, Special Assistant Att'y Gen., N.M. State Eng'r Office, to author (June 3, 2003) (on file with Natural Resources Journal).

91. *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510), app. at 48-49 (Transcript of Hearing Before Special Master on October 9, 1973, filed in Luna County Dist. Ct., Dec. 17, 1973).

92. *Id.* at 83.

93. *Id.* at 83-84.

any historical distinction between forest uses, actual or proposed, and forest purposes at the time of the reservations.

Indeed, Carlson's view of forest water needs included recreation, included wildlife, included aesthetics. "If it's a legitimate National Forest use," testified Carlson, unwittingly referring to a term that would become increasingly loaded as the case moved on, "if it's located on the National Forest, and it's for a public recreation service, and the water is to be used on the National Forest, it comes from the National Forest, it could be claimed under reservation."⁹⁴ Carlson was not a lawyer. In 1972, the doctrine of federal reserved water rights was not as well-developed as it would be by 1976. However, his testimony did not show much understanding either for the threat that expansive Forest Service rights posed to states or for what would emerge as the sharp limitations on the federal claims. And, although Carlson did not know it, he had just walked into the purpose/use trap that State Engineer Steve Reynolds had tried to set.

In Deming that morning, State Engineer General Counsel Paul Bloom, not Richard Simms, cross-examined the government's two witnesses, beginning with Carlson. While Simms had taken over the primary responsibility for the case and was writing everything for it, Bloom was still the more experienced trial attorney and continued in that limited role. Bloom lit into Carlson on a variety of subjects related to the Forest Service inventory process, but his cross-examination never got down to the fundamentals of the reservation doctrine and Forest Service water rights.⁹⁵

The Forest Service's only other witness, Norman Ritchey, tried to connect Carlson's general water principles to actual water inventories that the Forest Service was carrying out in the Gila. He had only worked for the Gila for three years and he only had the help of a local Forest Service wild life biologist who had just been hired, but he had tried to round up all existing and future water uses in, as he said, "a preliminary sort of way." He had gathered them in an early computer printout that identified by number and location all of the Gila Forest claims in the Mimbres watershed. Ritchey brought the list with him to court and showed it to the State Engineer lawyers for the first time.⁹⁶

Ritchey's list included over two hundred items. Two were licenses from the State Engineer himself. Many of the others involved stock tanks and small arroyo dams that cattle grazers and the Forest Service traditionally built and managed together for joint cattle and

94. *Id.* at 56 (Carlson testimony).

95. *Id.* at 58-73.

96. *Id.* at 84-85 (Transcript of Norman Ritchey testimony).

wildlife distribution purposes. Others involved existing and proposed recreational facilities, ranging from primitive campgrounds to large lakes and boating, a few constructed, some the dream of a Bureau of Reclamation planner. It was all there in Ritchey's list and testimony, the minimal facilities on the ground, the much more ample dreams of the Forest Service projected way into the future. (There was no talk about Forest purposes in the past that finally would turn out to be the basis and the limit of Forest Service water rights.)⁹⁷

There was even a claim for what the Forest Service identified in its printouts as "instream flow rights" for fish purposes. The existing Forest Service Manual explicitly had directed Forest officials to list such claims in their inventories.⁹⁸ Ritchey and the wildlife biologist who had just joined the Gila National Forest staff had identified a place high in the Mimbres watershed, on a small tributary of the Mimbres main stem, well above any other right established under state law, where some rare trout required guaranteed flows for survival.⁹⁹ Ritchey could not say how much water would be required until later, when he guessed at a flow of 2 cubic feet per second for the claim.

Here was an idea way ahead of its time. In 1973 the state officials had never heard of such a thing as a minimum instream flow right, a protected right to leave water in place. They hardly heard it as Ritchey testified and only noticed it when their engineering aides later tore into the specifics of the Forest Service list of uses and found the reference.¹⁰⁰ Slowly, they realized that the claim for instream flows to support fish that once were and might again become the object of sportsmen combined into a recreational claim that might not be a purpose of the Forest reservation. Cross-examining Ritchey, the lawyer Paul Bloom could not quite put the pieces together.

But by noon on that sweltering October day, the evidentiary trial in what would become the groundbreaking reserved water rights case for all National Forests was done. It had taken all of a couple of hours. The State of New Mexico called no witnesses and introduced only one exhibit, a copy of the 1936 Forest Manual that directed the Forest Service to acquire all of its water rights from the States where the forests were located.¹⁰¹ By way of contrast, a simultaneous Colorado proceeding

97. *Id.* at 192-93.

98. U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL, § 2541.03 (1980, amend. 27).

99. United States v. New Mexico, 438 U.S. 696 (1978) (No. 77-510) app., at 87-90 (Transcript of Norman Ritchey's Testimony).

100. *Id.* at 137 (Letter from Richard A. Simms, Special Assistant Att'y Gen., State of N.M., to Honorable Irwin S. Moise, Special Master, Dist. Ct. of N.M. (Nov. 22, 1974)).

101. Interview with Richard A. Simms, *supra* note 5.

involving the same Forest Service issues took months.¹⁰² And when in 1990, twelve years after the U.S. Supreme Court resolved the issues coming before Special Master Moise in 1973, the Forest Service tried to rescue what they could and presented 28 days of expert testimony over the course of a year in a proceeding in which they invested over \$800,000 just for posters,¹⁰³ the Service found itself stuck with an incomplete decision based on two hours of testimony in a sweltering Deming courthouse.

Of course, the recreational issue had never been resolved at the October 1973 hearing and the related instream flow problem was still below everyone's radar. The later problem began to awkwardly surface as Moise began to assemble his decision. On January 17, 1974, he wrote a letter to the lawyers indicating that he intended to hold that the Forest Service was entitled to an instream flow right for fish purposes in the Mimbres headwater creeks because the right was so high in the system that no one could be hurt by it, a position that he stuck to over the next couple of months of controversy. With respect to federal reserved rights for recreational uses, Moise agreed with everyone at that point: recreation was a use that gave rise to a reserved right. But when it came time to actually produce what lawyers called Findings of Fact and Conclusions of Law that would encompass the Special Master's decision, there was trouble.

Some of the problems lay in what Moise described as "many delays and false starts" on his part.¹⁰⁴ Some involved the highly technical and detailed land descriptions that described both the land withdrawals and reservations that had given birth to the Gila National Forest and would date the implicit reservation of water that they spawned. But the most nettlesome involved the problem of instream flow rights, slowly rising to the surface of the litigation like a canker sore.

The Forest Service continued to update and amend its inventory of uses. Simms himself had missed the first single reference to the Forest's only instream flow claim. Now, in trying to reconcile the technical descriptions of Forest uses for Moise, he discovered that the

102. Brief for the State of New Mexico, app. Exhibit 1b et seq., *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510) (Partial Master Referee Report Covering All of the Claims of the United States of America); Richard A. Simms, Speech to the Colorado State Bar (Oct. 12, 1978) (in personal files of Judge Norman Hodges).

103. Interview with Stuart Shelton, *supra* note 16.

104. *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510) app., at 135 (Letter from Honorable Irwin S. Moise, Special Master, N.M. Dist. Ct., to Donald W. Redd, Assistant Att'y Gen., State of N.M. & Richard A. Simms, Special Assistant Att'y Gen., State of N.M. (Sept. 17, 1974)).

most recent Forest Service inventory included two new instream flow claims,¹⁰⁵ bringing the total to three. Simms protested.

There followed in late 1974 and early 1975 yet another round of briefs directed to the instream flow controversy. Simms' memorandum in particular showed both a growing appreciation of the late nineteenth-century history of Forest reservations and a rising outrage at the position of the United States.¹⁰⁶ Special Master Moise responded by offering the increasingly disputatious parties one last chance to argue orally the instream flow issue in his Albuquerque office.¹⁰⁷ There Moise explained once again that under the circumstances recognition of a reserved instream flow right could not harm anyone, so why not recognize it? Simms tried to tie Moise down to that, going so far as to suggest that the United States would not have an instream flow right if it did any harm to an appropriator under state law, essentially making the right disappear if it was ever exercised. The suggestion raised yet another round of debate. Moise stuck to his carefully trained guns, telling Simms and Redd that he was only deciding the case before him and that, in the case of the Mimbres, recognition of the three instream flow rights could not harm anyone.¹⁰⁸

Finally, after all the debates, all the wrangling, on May 5, 1975, almost two years after the two-hour trial, Special Master Moise issued his report. The report listed the three instream uses finally claimed by the United States and gave each a priority of March 2, 1899, the date of the Forest Reservation. As he had said all along, he now found that these instream flow rights could not interfere with upstream junior users because there were none.¹⁰⁹

In the meantime, however, the part of Moise's decision dealing with recreation as a basis for the federal reserved rights of the Forest Service simply slid by. Ever since late 1972, when Simms conceded the recreational issue, everyone assumed that in one form or another recreation would be one of the Forest Service purposes for which a water right would be implied. Every version, every draft of the Master's

105. *Id.* at 137-38 (Letter from Richard A. Simms, Special Assistant Att'y Gen., State of N.M., to Honorable Irwin S. Moise, Special Master, N.M. Dist. Ct. (Nov. 22, 1974)).

106. *Id.* at 153-69 (State's Memorandum Brief, Jan. 31, 1975).

107. *Id.* at 171 (Letter from Richard A. Simms, Special Assistant Att'y Gen., State of N.M., to Honorable Irwin S. Moise, Special Master, N.M. Dist. Ct. (Feb. 24, 1975) (confirming "the setting of March 6, 1975, for oral argument on the issue of minimum instream flows")).

108. *Id.* at 137-38 (Letter from Richard A. Simms, Special Assistant Att'y Gen., State of N.M., to Honorable Irwin S. Moise, Special Master, N.M. Dist. Ct. (Nov. 22, 1974)).

109. *Id.* at 190-99 (Special Master Irwin Moise Rep. dated May 2, 1975, filed May 5, 1975, Referencing Findings of Fact 3, 4).

decision proposed by the State or the United States, by Simms or Redd, would have so found. Towards the end, Simms tried to distinguish between "recreational uses incidental to hiking, fishing, camping and hunting," the Aldo Leopold "recreational uses," and the "substantial recreational reservoirs, winter sports facilities, and such other substantial works involving large consumptive uses," the Bureau of Reclamation dream-like uses about which Ranger Ritchey had testified at the hearing in October 1972. In his ultimate report, filed May 5, 1975, Special Master Moise bought the distinction but the State was still left with a modified version of recreation as the basis for a federal reserved water right.¹¹⁰

Initially, the State's lawyers were exclusively concerned with Moise's resolution of the instream flow issue, but court rules gave them only ten days to think about it. On May 15, 1975, they formally objected to Moise's report on the grounds that he had erred as a matter of fact and law when he recognized the limited instream flow rights that he had. They did not complain about his recognition of limited recreation. The objections brought the matter before District Judge Norman Hodges, who had appointed Moise Special Master.¹¹¹

All of a sudden the traditional relationship between Hodges and Moise was reversed. For years, Supreme Court Justice Moise had heard and decided appeals from New Mexico district judges like Norman Hodges. Now Hodges, the district judge, was sitting in review of retired Supreme Court Justice, now Special Master, Moise. The two men knew each other from professional activities. Hodges had learned of Moise's water decisions in the 1960s in the course of his own management of the Gila-San Francisco adjudication and had great respect for Moise's water wisdom. After the State had filed its objection and before he had decided the appeal, Hodges ran into Moise at a bar function and mentioned the State's appeal to him. Moise remarked that he could not understand what the State was upset about, since his decision had very little to do with water in the upper reaches of the Mimbres water shed.¹¹² But Norman Hodges, unflappable as ever, was not concerned with the role reversal and was not concerned with Moise's lack of concern. He knew what his job was in reviewing the report of his special master, whoever it might be, and he intended to do his job.

With respect to the instream flow issue, he had some new help. In early January, 1976, Silver City attorney Wayne Woodbury, representing the Phelps Dodge Corporation, asked the Court for

110. *Id.* at 198 (Special Master Irwin Moise Rep. dated May 2, 1975, filed May 5, 1975, Referencing Conclusions of Law 11-12).

111. *Id.* at 200 (State's Objections to Master's Report, May 15, 1975).

112. See Interview with Honorable Norman Hodges, *supra* note 28.

permission to write a friend-of-the-court (amicus) brief in support of the State's position that Special Master Moise had erred when he awarded the Forest Service the three minimum-instream flow rights. After a hearing, Hodges let Woodbury and Phelps Dodge into the case.¹¹³

Special Master Moise had asked who could be hurt by recognizing an instream right. In his brief, Woodbury showed that such a right in the Gila National Forest, albeit on the Gila/San Francisco side of the Continental divide and not on the Mimbres side, would be disastrous to the operation of its large copper processing mill at Tyrone. Phelps Dodge, then one of the largest employers in Grant County, had invested a lot in the mill and "many millions of dollars" for the purchase of more than 11,000 acre-feet per year of water rights with priorities ranging from 1882 to 1961. And guess what? Phelps Dodge diverted that Gila water above a large section of National Forest below. If the Forest Service had instream flow rights below the Phelps Dodge mill diversion and the priority of those rights was the 1899 reservation date of the Forest, then the Forest Service could force Phelps Dodge to shut down most of its diversion when the water got short in the Forest below in order to leave water in the Gila.¹¹⁴ Indeed, as recently as 1973, the Region III Supervisor in Albuquerque had reminded Phelps Dodge that it might require the mining company to shut down when Phelps Dodge had filed for a permit to move irrigation rights that it had bought from below some Forest land to above it. Now Woodbury attached the Forest Service warning to his brief.¹¹⁵

The Phelps Dodge problem demonstrated the practical effect of recognizing an instream flow right. It concretely answered Moise's almost rhetorical question about who instream flow rights could possibly hurt. The damaged party here was not in the Mimbres watershed, but it was in the next one west, the Gila-San Francisco watershed with which Judge Hodges was so familiar. And Phelps Dodge was no small player in southwestern New Mexico, as everyone knew

113. Letter from J. Wayne Woodbury, Attorney, representing Phelps Dodge, to Jerry L. Haggard, Attorney, Evans, Kitchel & Jenckes (Jan. 16, 1976) (in personal files of Judge Norman Hodges); Letter from J. Wayne Woodbury, Attorney, Representing Phelps Dodge, to Honorable Norman Hodges, Dist. J., State of N.M. (Jan. 27, 1976) (in personal files of Judge Norman Hodges).

114. Brief for Phelps Dodge Corp. as Amici Curiae Supporting Plaintiffs, Mimbres Valley Irrigation Co. v. Salopek, 564 P.2d 615 (1965) (No. 6326) (in personal files of Judge Norman Hodges).

115. Memorandum from Regional Forester William D. Hurst to the N.M. State Engineer et al. (June 18, 1973) (advising Phelps Dodge that its application to move water rights from the "Cliff Valley" below the national forest to the Bill Evans Reservoir above it could not interfere with the "instream flow requirements necessary for fisheries") (in personal files of Judge Norman Hodges).

who was familiar with the still ruling domination of mining in the economy of Luna County and New Mexico. Wayne Woodbury's amicus appearance for Phelps Dodge did not add much to the intellectual analysis of Forest Service reserved water rights, but it made up in practical heft for whatever it lacked in legal argument.

The hefty legal arguments before Judge Hodges were left to Simms and Redd. By now the two had gone around and around so many times before Special Master Moise that their respective arguments already had started to jell and emerge. Simms clearly was headed toward nineteenth century land law as a critical factor in determining the limited purposes of the National Forests; the 1897 Organic Act, authorizing the establishment of National Forests and defining their purposes, was emerging as the centerpiece of his argument.¹¹⁶ At the same time, Simms' objection had expanded from the recognition of instream flows to any recreational uses. Simms had conceded that point in 1972. He had helped draft the Moise conclusion that Forest recreation did deserve a reserved water right. He had not objected to that modest recreational conclusion when he had appealed Special Master Moise's instream flow findings to District Judge Hodges. Now he seemed to broaden the category of his objection while he narrowed his focus on the history. He ended the brief with what would become a constant refrain: expanding Forest Service reserved water rights threatened to confiscate state based water rights without compensation.

For his part, Redd started down the same historical road, a road that would end up in the heart of the U.S. Supreme Court's ultimate decision in the case. Now Redd suggested to Hodges that if the 1897 Act really defined Forest purposes, then there were three purposes, not just two as the state argued, and the first purpose, "to improve and protect the forest within the boundaries," was broad enough to include instream flows. "The word 'forest,'" wrote Redd to Hodges, "includes more than just the trees. It includes the entire ecosystem—the trees, the bushes and other plant life, the decaying needles, the wood, etc., that make up the forest community. See Webster's Unabridged Dictionary."¹¹⁷ In a refrain that would be repeated, word for word, in the Supreme Court's dissent,¹¹⁸ the issue raised here by Redd, the precise meaning of a couple of sentences in an 1897 statute, tried to ground the issue before Judge Hodges in legal history.

116. Memorandum of Law at 17, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (in personal files of Judge Norman Hodges).

117. Memorandum of Points and Authorities in Support of Special Master's Report at 8, *Salopek*, 564 P.2d 615 (Civ. No. 6326) (in personal files of Judge Norman Hodges).

118. *United States v. New Mexico*, 438 U.S. 696, 721 (1973) (Powell, J., dissenting).

Before the objections to the decision of Special Master Moise reached him, District Judge Hodges had not heard of any of this. He set oral arguments for February 2, 1976. He thought seriously about beginning the hearing by asking each of the parties for their definition of the instream flow rights at the center of the controversy.¹¹⁹ Hodges had never heard the term before in his experience with water law, thought from the little that he had learned from the briefs that it was probably anathema to the state law of prior appropriation that he knew so well as a lawyer and judge, and believed he needed to know more about the controversial idea. In the end, however, he decided to let the lawyers have their say. No one transcribed the arguments, but Hodges kept notes in a scraggly hand on long legal paper.¹²⁰

Three lawyers argued that day that Special Master Moise had been wrong in recognizing reserved instream flow rights for the Forest Service. As so often happened in western water rights proceedings, U.S. attorney Redd stood for the federal government alone.¹²¹ Judge Hodges was far too polite and dignified a judge to allow a hostile atmosphere that day, but there was no question that U.S. attorney Don Redd was outnumbered.

This time out, Simms as the lawyer for the party appealing went first. According to Hodges' handwritten notes, Simms eventually acknowledged that the United States had limited powers to reserve water but hammered away at the fact that recreation and aesthetics had not been among those purposes.

As he rose to respond for the United States, Redd must have realized that Simms had just attacked a purpose of the Forest, recreation, that Simms had accepted before. Redd challenged in two ways. He berated Simms for changing positions and he emphasized that a "proper perspective" would show that the Forest Service was only asking for a little bit of water for fish and recreation.¹²² In rebuttal, Simms pleaded initial inexperience and reminded Judge Hodges that his decision would

119. See Interview with Honorable Norman Hodges, *supra* note 28.

120. Handwritten notes of Honorable Norman Hodges, N.M. Dist. Ct. J. (Feb. 3, 1976) (in personal files of Judge Norman Hodges).

121. The distribution was typical in state water proceedings in those days. Federal attorneys would sit all alone on one side of rural western courtrooms packed by opposing state and private attorneys and their hostile clients crowded into the other side. The Forest Service attorneys loved to tell the story of two U.S. attorneys arriving for a water rights hearing at a western slope Colorado courthouse (Eagle County, Colo.) packed with local farmers and ranchers and attorneys. The water judge was supposed to have leaned over the bench as the two foreign attorneys entered in front of the assembled local crowd and welcomed each of them saying, "I see you brought a friend." Interview with Stuart Shelton, *supra* note 16.

122. Handwritten notes, Honorable Norman Hodges, *supra* note 120, at 3.

set an important precedent for years to come for all National Forests no matter how much water was involved.¹²³ The relationship between Simms and Redd was collapsing as the gulf between their positions widened.

In the end, however, Hodges recalls that it was as much the arguments of the local private attorneys at the hearing that day that swayed him. In particular, Phelps Dodge's Wayne Woodbury spoke only briefly, but he reminded Hodges that the United States had stood by and let Phelps Dodge buy millions of dollars worth of water rights only now to claim what Woodbury called "an absolute power" to shut Phelps Dodge down on the basis of a fishing and recreation right that no one had ever guessed existed before.¹²⁴

Over the rest of February, Simms and Redd skirmished some more about Simms' late change of position on the recreation issue.¹²⁵ In the meantime, Judge Hodges on three separate occasions sat down himself and tried to draft an opinion of his own, analyzing the reserved rights issues before him and explaining his resolution of them.¹²⁶ As a busy district judge, he was not obligated to go so far. His fellow district judges rarely went to the trouble of drafting their own decisions, preferring to adopt and alter, if necessary, the offerings of the lawyers who had tried the case. (Hodges' aborted efforts, especially the initial draft Memorandum Opinion, showed an incomplete understanding of the relationship between state and federal law and solicitude for the United States' dilemma in trying to protect fisheries even though it had no reserved instream rights. Had Hodges adopted his own initial view of events, the subsequent course of the litigation might have been quite different.¹²⁷) "But I knew that this was an important case," he later told me, "and I wanted to do it justice. In the end, I could never find the time to finish any of the opinions that I started."¹²⁸

So on March 1, 1976, Judge Hodges just wrote Simms and Redd a two-page letter. He told the two lawyers that he had considered their

123. *Id.* at 4.

124. *Id.* at 3.

125. Letter from Richard A. Sims, Special Assistant Att'y Gen., State of N.M., to Honorable Norman Hodges, Dist. J., State of N.M. (Feb. 4 1976) (in personal files of Judge Norman Hodges); See also Letter from Donald W. Redd to Honorable Norman Hodges, *supra* note 89.

126. Norman Hodges, Memorandum Opinion (undated) (unpublished typed rough drafts with additional handwritten notes. The last draft, with alterations and significant deletions became the March 1, 1976, letter) (in personal files of Judge Norman Hodges).

127. The initial memorandum would have restricted state control over the designated fisheries even as it denied the United States instream rights because they did not exist under state law. *Id.*

128. See generally Interview with Honorable Norman Hodges, *supra* note 28, at 10.

"excellent" briefs. He noted that he had read a couple of articles on his own. Most importantly, Hodges announced that he was ruling in favor of the State's objections to Special Master Moise's report. He asked for the opinions of the attorneys on the issues he had struggled with in his own incomplete opinions. And, as was customary, Judge Hodges invited the attorney for the prevailing side, Richard Simms, to draft the order sustaining Simms' objections and modifying Moise's decision.¹²⁹ Simms did so.

On March 26, 1976, Judge Hodges signed a new ten-page order sustaining Simms and the State on the reserved rights issues.¹³⁰ The signing was preceded and followed by months of squabbling between Simms and Redd over the language of the new ruling and Simms' naiveté or perfidy, depending on perspective, in changing positions on the different issues.¹³¹ Obviously, as Redd realized how narrow the ruling would be with respect to Forest Service reserved rights, he became more defensive and more desperate. It took all of April and all of May that year to hear out the two positions. Finally, on June 4, 1976, Judge Hodges washed his hands of the debate and filed the decision he had made on March 26.¹³²

The first eight pages, setting out the dates and the boundaries of the Forest reservation in the Mimbres watershed, were factual, detailed, technical, and not controversial except for what they did not say. It was the ninth, tenth, and eleventh conclusions of law at the very end of Hodges' order that caused trouble. In the ninth, Hodges held that, where grazing permittees made use of water on the national forests, the associated water rights belonged to the permittees, not the Forest Service. In the tenth, Hodges held that recreation of any kind was not a purpose

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129. Letter from Honorable Norman Hodges, Dist. J., State of N.M., to Richard A. Simms, Special Assistant Att'y Gen., State of N.M. & Donald W. Redd, Assistant Att'y Gen., State of N.M. (Mar. 1, 1976) (in personal files of Judge Norman Hodges).

130. Order Sustaining Objections and Modifying Findings of Fact and Conclusions of Law, Mimbres Valley Irrigation Co. v. Salopek, 564 P.2d 615 (1965) (No. 6326) (filed June 4, 1976, signed March 26, 1976) (in personal files of Judge Norman Hodges).

131. Letter from Richard A. Simms, Special Assistant Att'y Gen., State of N.M., to Honorable Norman Hodges, Dist. J., State of N.M. (Mar. 5, 1976) (in personal files of Judge Norman Hodges); Letter from Donald W. Redd, Assistant Att'y Gen., State of N.M., to Honorable Norman Hodges, Dist. J., State of N.M. (Mar. 23, 1976) (in personal files of Judge Norman Hodges); Letter from Richard A. Simms, Special Assistant Att'y Gen., State of N.M., to Honorable Norman Hodges, Dist. J., State of N.M. (Mar. 29, 1976) (in personal files of Judge Norman Hodges); Objections to Proposed Order, *Salopek*, 564 P.2d 615 (No. 6326) (submitted by state engineer sustaining objections and modifying findings of fact and conclusions of law) (on file with Natural Resources Journal).

132. Order Sustaining Objections and Modifying Findings of Fact and Conclusions of Law at 1, *Salopek*, 564 P.2d 615 (No. 6326) (on file with Natural Resources Journal).

of the Forest and the Forest Service had no reserved rights for that. Finally, in the eleventh conclusion of law Hodges flatly held that the Forest Service had no rights to any minimum instream flows for fish purposes or any purposes.¹³³ There was no mistaking the tenor of the Hodges' decision. 3

Just five days later, on June 7, 1976, the U.S. Supreme Court issued its first ruling on implied federal reserved water rights since the elliptical decision in *Arizona v. California*. In *Cappaert v. United States*,¹³⁴ a unanimous Supreme Court decided that the United States had reserved rights for a pool in the Devil's Hole National Monument and that reserved right was superior to subsequently established rights under Nevada state law. Chief Justice Burger's opinion sometimes demonstrated an unclear understanding of western water law,¹³⁵ but the outlines of his analysis solidified the doctrine that was at the heart of the Gila National Forest dispute. The quantities of the federal reserved water rights were to be minimal, but their priorities were real: the federal right was superior to all subsequently established rights, but inferior to those already established rights under state law. The purpose of the federal reservation would determine both the existence and the extent and the time of the federal right. Applied to the *Mimbres* case, *Cappaert* made it clear that the history of the 1897 Organic Act was going to be even more critical than anyone had yet guessed.

In any case, the Forest Service could not let Judge Hodges' decision stand. Redd was convinced the decision was dead wrong. The narrow view of Forest Service reserved rights would present real difficulties for the Forest Service and the principles on which the decision rested might have much wider effects, at least in New Mexico's four other national forests.¹³⁶ On July 2, on the last day allowed, the United States appealed to the state supreme court in Santa Fe.¹³⁷

Once again, the course of the litigation got confused and off course. As the appealing party, the United States was responsible for procuring the Sixth Judicial District Court record of proceeding for the

133. *Id.*

134. *Cappaert v. United States*, 426 U.S. 128 (1976).

135. For example, Burger dubbed the water in the cavern "surface water" to avoid the problem of whether the doctrine applied to ground water, called the reservation of water explicit even though the 1952 act establishing the Monument referred to water but said nothing about water rights, and said that it was impossible to specify a quantity for the reserved water right since it did not involve the consumption of water. In fact the pupfish sounded more like an endangered species, entitled to protection, not a water right. *Id.*

136. Letter from Donald W. Redd to Honorable Norman Hodges, *supra* note 131; Letter from Richard A. Simms to Honorable Norman Hodges, *supra* note 131.

137. Transcript of Record, vol. III, 406, *Salopek*, 564 P.2d 615 (No. 6326).

state supreme court. On the same day that the United States appealed, it requested that the clerk of the Luna County district court reproduce "the complete record" and send it to the supreme court.¹³⁸ In response, the Luna County district court clerk, Nadine Speir, asked if the United States really wanted the thousands of pages of documents in the 900 subfiles in the entire Mimbres adjudication. There was no way that she could segregate the Forest Service documents. The specification of less than all of the documents was up to the Forest Service. When the Forest Service tried to specify those local documents pertaining to its claim, it ran into more trouble.¹³⁹ In the end, the record sent to the state supreme court was a chaotic, huge hodge-podge of mundane documents¹⁴⁰ and important documents and irrelevant documents. The record filled five volumes¹⁴¹ and for the most part obscured what had begun with a very short trial and ended with a very clear ruling.

The problem with the record went on causing problems through the fall of 1976. The Luna County district clerk had trouble figuring out what the United States wanted her to send to Santa Fe. The United States had trouble complying with the timetable for the appeal. State Engineer lawyer Richard Simms, aggressive enough to exploit the Forest Service's problems, twice moved to have the appeal dismissed by the supreme court and twice forced the state supreme court to hold a hearing on his motions.¹⁴² In the end, the court was not willing to dispose of the appeal on such technical grounds and what was still called *Mimbres Valley Irrigation Co. v. Salopek* limped forward.

However, the procedural imbroglios did bring U.S. appellate attorney Peter Steenland to the battleground. Assigned to the task of writing the briefs and orally arguing the case that trial attorney Redd had litigated and Judge Hodges had decided, Steenland found himself first immersed in the procedural mess that the trial attorneys had created with the record. In the late fall of 1976, Steenland even had to make an emergency visit to Santa Fe from his home base in Washington to save the appeal from Simms' attacks.¹⁴³ The state supreme court heard him out about the difficulties with the record and let the case continue

138. *Id.* at 407.

139. *Id.* at 415.

140. For example, ten orders joining additional parties defendant as the stream system adjudication progressed and new claimants were added to the overall list. The transcript of the record proper included all the motions and orders to join additional defendants. *Id.* vol. V, 139-40, 143-44, 151-52, 157-58, 160-61.

141. *Id.* Table of Contents.

142. *Id.* vol. III, at 419; *id.* vol. I, at 25.

143. Telephone Interview with Peter R. Steenland, *supra* note 4.

despite Simms' objections.¹⁴⁴ It was the last thing that Steenland won in the supreme court.

In the meantime, Steenland and a couple of assistants in the appellate division of the attorney general's Land and Water Division went to work on their basic brief to the state supreme court. They brought a fresh eye to the issues that trial attorney Redd had struggled with and a lot more experience to the appellate process. Before he retired in 1992, Steenland would become one of the Land and Natural Resource Division's most experienced appellate lawyers, appearing for the United States by his own estimation in over 150 cases for the Department of Justice in federal courts.¹⁴⁵ (Only "a handful" would involve state appellate courts of the kind he faced in the Mimbres case.) The 28-page brief-in-chief that Steenland filed just before Christmas 1976¹⁴⁶ had a polish to it that Redd's many previous memoranda lacked.

Surprisingly, however, the brief took essentially the same tack that Redd always had: any lawful use of Forest Service land, including recreation, wildlife, and instream flows, was authorized by the all-important 1897 Organic Act and therefore brought with it reserved water rights with the dates of the Gila National Forest reservation shortly after 1897. To shore up the basic point, Steenland went into much greater depth than anyone previously had, showing that the Forest Service had from the beginning administered the Gila and the Mimbres watershed within it for recreational and wildlife purposes. (Aldo Leopold would have agreed to that.)

Steenland's history missed the purpose/use distinction emphasized by New Mexico and increasingly relied on the words of B.F. Fernow, the first head of forestry, who, in a long passage featured by Steenland, in 1891 distinguished between "primary purposes" and "secondary objects" of national forests. Of course, the "primary/secondary" dyad that Steenland unwittingly trumpeted sounded a lot like the "purpose/use" distinction on which Simms built his case. In the ultimate U.S. Supreme Court decision, Chief Justice Rehnquist made much of the distinction between the "primary" purposes of the National Forests, which did imply reserved water rights, and the "secondary purposes," which did not.¹⁴⁷ For the moment, in the first brief to the

144. Transcript of Record, vol. I, at 33, *Salopek*, 564 P.2d 615 (No. 6326).

145. Biography of Peter R. Steenland, at <http://www.sidley.com/lawyers/bio.asp?ID=S121074856> (last visited Sept. 23, 2005); Telephone Interview with Peter Steenland, *supra* note 4.

146. Transcript of Record, vol. I, at 35, *Salopek*, 564 P.2d 615 (No. 6326) (Appellants Brief in Chief filed Dec. 22, 1976).

147. *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

New Mexico Supreme Court, the United States just assumed that any lawful use was a purpose sufficient to draw reserved water rights to it.

The job of answering Steenland fell, as it had from the beginning of the case in 1972, to Richard Simms. He had written on the issue frequently over the previous five years and his thinking had slowly evolved. This time around he worked much harder on the brief. The fact that he had to write it over Christmas and New Years, he said, actually helped. State government was effectively shut down so there were many fewer distractions. And State Engineer Reynolds, as much a workaholic as Simms, was more available to help out.¹⁴⁸

The answer brief Simms wrote over the holidays and filed on January 10, 1977, focused on the history of the 1897 Forest Service Organic Act as a measure of the Forest's reserved water rights. Brief after brief, the history had grown incrementally. Still, working pretty much alone, Simms felt that neither he nor anyone else had mastered the history of what was a critical period in forest history between 1891 and 1897.¹⁴⁹

Whatever this brief lacked in detailed history, however, it gained in focus. Again and again in the brief, Simms returned to the distinction between Forest purposes and Forest uses, the fundamental distinction that State Engineer Reynolds had first pointed out to Simms in 1972. Now in their discussions in Reynolds' corner office in the Bataan Memorial Building in late 1976 and early 1977, Reynolds re-emphasized the distinction and Simms built it into his January 1977 brief as a fundamental building block in his basic argument that the 1897 Organic Act limited the purposes for the establishment of national forests while it authorized a very broad regulation of uses on them. Only the purposes, not the uses, would give rise to federal reserved water rights and those purposes did not include recreation, wildlife, or instream flows.

Way back in September, the United States had requested an oral argument before the state supreme court once the briefs were done.¹⁵⁰ The court set Monday, February 7, 1977, for the arguments and decided which of the five justices would sit on the three-judge panel hearing the case. When the lawyers arrived in the small, intimate supreme court courtroom and found Justice H. Vern Payne, Chief Justice LaFel Oman, and Justice Dan Sosa sitting at the judge's bench before them, Richard

148. Interview with Richard A. Simms, *supra* note 5.

149. *Id.*

150. Transcript of Record, vol. I, at 24, *Salopek*, 564 P.2d 615 (No. 6326) (Request for Oral Argument filed Sept. 2, 1976).

Simms took note even though the array would not mean much to out-of-towner Peter Steenland.¹⁵¹

H. Vern Payne was the son of H. Vearle Payne with whom Norman Hodges had begun the practice of law in Lordsburg in the late 1950s and from whom Hodges had learned his water law. Vern Payne brought his father's interests in water law and his predilection for state water law to which federal reserved rights were a narrow exception. Chief Justice LaFel Oman would show his cards immediately after the supreme court's decision in the *Mimbres* case when, as judge pro tem in the Pecos River adjudication, he took an extremely narrow view of both federal Indian and Forest Service reserved water rights.¹⁵² Only Justice Dan Sosa was an unknown quantity on the court, but he was from southern New Mexico and knew the *Mimbres* well.

Neither Simms nor Steenland remembers the details of the oral argument that Monday morning. Simms remembers that the panel did not ask that many questions but appeared sympathetic. He recalls Steenland, who came to Santa Fe from Washington on the Sunday before oral arguments and left on Tuesday, the day after, as being uncomfortable in the courtroom and anxious to leave. But Steenland felt no hostility to the federal claims from the state high court.¹⁵³

In any case, immediately after the oral arguments were concluded, the court formally announced that it would take the case under advisement. Informally, the three justices quickly agreed that they would affirm the decision of Judge Hodges, reject the appeal of the United States, and write an opinion that hewed to the extremely narrow view of federal reserved water rights for the Gila National Forest that Simms and Reynolds had come to espouse. The three justices agreed that Justice Payne would author the decision.

Everyone waited a long three months while Justice Payne and his clerks assembled the opinion whose result they knew. Payne was known as a conscientious supreme court justice and a fine writer. In his own words, he often agonized over different cases, wondering what the correct result should be. A couple of years before, Payne had decided another case about whose result he had been pretty sure and the U.S. Supreme Court had reversed him.¹⁵⁴ But the *Mimbres* decision never troubled him. The arguments of the United States, he later said, made no

151. Interview with Richard A. Simms, *supra* note 5.

152. *State ex rel. Martinez v. Lewis*, 861 P.2d 235 (N.M. Ct. App. 1993) (reviewing decision of Judge Pro Tem LaFel Oman).

153. Telephone Interview with Peter R. Steenland, *supra* note 4.

154. Telephone Interview with Vern Payne, retired N.M. Sup. Ct. J., in Albuquerque, N.M. (June 16, 2005).

sense to him. He knew what the result should be.¹⁵⁵ Between February and May he set out to justify the result as best he could.

The decision, issued May 23, 1977, was only seven pages long and was as clear as a bell. Supreme Court law, especially the recent *Cappaert* case, wrote Payne, previously had decided that the United States had reserved water rights "in quantities reasonably necessary to fulfill the purposes of the Gila National Forest."¹⁵⁶ Now the New Mexico court had to determine for what purposes the Gila National Forest was originally established and whether those purposes necessarily required an implied reservation of water. Payne was immediately back to the

① Creative Act of 1891 and the Organic Act of 1897 ②

There he found that Congress authorized the creation of Forests like the Gila for three purposes: improving and protecting the forest, securing favorable conditions of water flows, and furnishing a continuous supply of timber. The Forests, wrote Payne, could regulate the occupancy and use of the Forests for recreation and for minimum instream flows necessary for aesthetic, environment, recreation, and "fish" purposes, but these were authorized uses, not themselves purposes. As such, those uses could not be a basis upon which to imply the federal reservation of water. In so holding, Payne had bought the fundamental point that Reynolds had insisted on since 1972 and that Simms had finally latched onto so clearly in his 1977 brief.

True, there were ambiguities in Payne's opinion. He had held that "improving and protecting the forest" was an independent purpose of federal forest reservation, perhaps capable of requiring an implied reserved water right depending upon how "forest" was defined. If, for example, the forest included "fish," as U.S. attorney Don Redd had suggested to District Judge Norman Hodges,¹⁵⁷ well, then, maybe protecting the forest did include the minimum flows necessary for the Gila River trout. Simms had tried as hard as he could to keep Payne away from that gaping possibility and in the end he had failed.

But the decision represented a clear victory for New Mexico and a clear blow to a Forest Service looking for water rights to move it toward a more ecological stewardship of its resources and an increased focus on recreation as its mission. At the time, court decisions from across the west on forest service reserved water rights were drifting in

155. Interview with Don Klein, former Special Assistant Att'y Gen., in Socorro, N.M. (Feb. 2, 2004).

156. *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615, 616-17 (1977) (quoting *Arizona v. California*, 376 U.S. 340, 350 (1964)).

157. Handwritten notes of Honorable Norman Hodges, *supra* note 120.

X
Result

from different directions.¹⁵⁸ None was quite as final as Justice Payne's decision in what was still called *Mimbres Valley Irrigation Co. v. Salopek*. Most were no more favorable. Perhaps it was time to find out once and for all if Forest Service water rights in 1980 really depended on what Congress had implied between 1891 and 1897. With Payne's decision in hand, the United States now had to decide whether to go back into the future with respect to what Congress had intended.

IV. "THIS IS ONE OF THOSE RARE CASES EVOKING EPISODES IN THIS COUNTRY'S HISTORY THAT, IF NOT FORGOTTEN, ARE REMEMBERED AS DRY FACTS AND NOT AS ADVENTURE."¹⁵⁹

Richard Simms fully expected the United States to try to appeal the New Mexico Supreme Court's May 1976 *Mimbres* decision to the U.S. Supreme Court. He hoped that it would, so sure had he become that he was right on an issue that he had worked on for more than four years and on which he already had beaten the United States twice. But it took the various federal officers awhile to decide whether they wanted to take on the case. A new president, Jimmy Carter, had taken office, and it took time to appoint new lieutenants. First, Judge Griffin Bell, like Carter a southerner, became the new Attorney General. Then, President Carter and Attorney General Bell had to pick a new Assistant Attorney General for Land and Natural Resources. The decision whether to appeal what was still called *Mimbres Irrigation District v. Salopek et al.* would fall to them and to the new Solicitor General, Wade McCree.¹⁶⁰

The deadline for petitioning for a writ of certiorari from the U.S. Supreme Court to the New Mexico Supreme Court fell due late in the summer of 1977. Rather than hurry, the new administration asked for an extension until that fall. On August 11, 1977, U.S. Supreme Court Justice William Rehnquist, in the first of many critical decisions he would make in the *Mimbres* case, extended the deadline until October 3.¹⁶¹

By then the new administration had found its new Assistant Attorney General for Land and Water, James Moorman. From the point of view of New Mexicans, Moorman was a nightmare come true.

158. Brief of Petitioner at 30, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510) (listing pending adjudications suits in federal and state courts where Forest Service water rights were at issue).

159. *Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) (Justice Rehnquist's opening sentence).

160. Interview with James Moorman, Former Assistant Att'y Gen. for Land & Water, in Washington, D.C. (July 21, 2004).

161. Petition for Writ of Certiorari at 2, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

President Carter and Attorney General Bell picked Moorman because he was a southern environmental lawyer with connections to both the Sierra Club Legal Defense Fund and the Environmental Defense Fund. Carter, Bell, and Moorman shared close personal and political connections to the Georgia Nature Conservancy.¹⁶² Moorman fit Carter's bill. But what were virtues to Carter were vices to Reynolds and Simms: Moorman was not from the West; he had not been schooled in the state-based, federally approved doctrine of prior appropriation that Westerners found so threatened by expansive reserved water rights for the National Forests.¹⁶³

Moorman had begun his legal career as an opponent of the Forest Service's perceived devotion to resource extraction in the 1960s and 1970s, becoming one of the first lawyers to use the Forest Service's own regulations to halt some of the worst timber sales in the Pacific Northwest.¹⁶⁴ Moorman had attracted attention when, between 1972 and 1974, he had spearheaded the first successful and controversial effort to shut down Forest Service clear cutting in the National Forests.

Using the same 1897 statute at the heart of *United States v. New Mexico*, Moorman and his Sierra Club Legal Defense cohort had successfully stopped Forest Service clear cutting in the Monongahela National Forest near his home state of North Carolina.¹⁶⁵ Moorman had convinced the district court and the Fourth Circuit Court of Appeals that the specific narrow provisions of the 1897 Organic Act still controlled logging 75 years later. Now, as newly appointed Assistant Attorney General for Land and Water, Moorman had switched sides and positions. He was defending the Forest Service and arguing for a broad definition of reserved water rights under the 1897 statute, a reading that served instream flows, not clear cutting. Moorman wanted to appeal the New Mexico Supreme Court's decision.

The Forest Service itself agreed. Department of Agriculture lawyers and water rights specialists had been itching to get some final (and better, they hoped) resolution of the Forest Service reserved rights issue that had been roiling around the federal and state courts of the West. *United States v. New Mexico* looked to them like the first and best shot.¹⁶⁶ With both the Department of Justice and the Department of Agriculture agreed on the appeal, the new Solicitor General, Wade

162. Interview with James Moorman, *supra* note 160.

163. Moorman, who was based in San Francisco, participated in the Eagle County case. He had been around western water rights. *Id.*

164. WILKINSON, *supra* note 12, at 183 (illustrating the "Big Build Up").

165. *W. Va. Div. of the Izaak Walton League of Am., Inc. v. Butz*, 367 F. Supp. 422 (D.C. W. Va. 1973), *affirmed* by 552 F.2d. 945 (4th Cir. 1975).

166. Interview with Stuart Shelton, *supra* note 16.

McCree, who had the ultimate say, went along. On October 3, 1977, Moorman, with the help of two new attorneys, filed the request by the United States that the Supreme Court review the decision of the New Mexico Supreme Court.

Moorman's October 3 Petition for a Writ of Certiorari was meant to get the Supreme Court to accept the United States' appeal of the New Mexico decision, not necessarily win it. But Moorman did do his best to convince the Supreme Court to take the case on the basis of its specific importance and its general application. "(T)he New Mexico Supreme Court," wrote Moorman, "has cut off water to 7,793,195 acres of national forest land within that state for any purpose other than 'to insure favorable conditions of water flow and to furnish a continuous supply of timber.'"¹⁶⁷ He pointed out that the same issue was plaguing eight other proceedings involving 17 other national forests across the west. "The mischief," he concluded, of the New Mexico Supreme Court's decision, "once done, cannot easily be undone."¹⁶⁸

In addition, argued Moorman, the New Mexico Supreme Court had been dead wrong in distinguishing "purposes" and "uses." The court in *Cappaert v. United States* had not intended, he continued, "to limit the federal government's reserved water rights to the primary purposes (sic) of a reservation of public lands, thereby foreclosing for lack of water all secondary purposes that were within the original contemplation of Congress."¹⁶⁹ Of course, statements like this just emphasized again the kind of hierarchy of purposes and uses that led to the argument's demise.¹⁷⁰

For the moment, Simms, still working on his own and near another holiday (this time Thanksgiving), would have none of it. He accused Moorman of misrepresenting the facts presented before Special Master Moise. He wrote that "the United States distorts and hyperbolizes the significance of the New Mexico Supreme Court's decision...."¹⁷¹ And, he said, the State and the state supreme court had been right about the legislative history of the 1897 Organic Act, a history that the United States just disregarded rather than refuted. Formally, Simms opposed the United States' petition; he argued against the Supreme Court's taking the

167. Petition for Writ of Certiorari at 7, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

168. *Id.* at 8.

169. *Id.* at 16 n.12.

170. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (Rehnquist, J., discussing primary and secondary purposes).

171. Brief of Respondent at 5, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

case. But he was just itching for a good fight and if it was in the Supreme Court, well, so much the better.¹⁷²

The U.S. Supreme Court met in conference in early January¹⁷³ to decide whether to allow the United States' appeal and give Simms his chance. There were many petitions to consider, the great majority of which would be rejected.¹⁷⁴ In the developing Supreme Court practice of the day, most of the justices agreed to share their clerks and jointly assign the job of writing one memorandum assessing the importance of the case to one clerk.¹⁷⁵ In early December 1977, after the petitions by the United States and the responses by Simms had all come in, the job of summarizing fell to Tom Campbell, one of four clerks to Justice William Brennan.

On December 8, 1977, he circulated his "preliminary memorandum" to the chambers of the other justices.¹⁷⁶ The memorandum tried to describe the course of the litigation in New Mexico and the issues raised there. But the memorandum hopelessly confused federal reserved rights, state based rights under the doctrine of prior appropriation, and the possible and real conflicts between the two.¹⁷⁷ Campbell did acknowledge that "water rights in the Western States particularly are matters of critical concern" as evidenced by other pending Supreme Court cases involving western water. However, on balance, Campbell recommended that the court not take *United States v. New Mexico* until the pending cases all over the West had developed the issue more fully.¹⁷⁸ On receiving the pooled memorandum, at least one clerk to another Supreme Court justice added some handwritten notes.¹⁷⁹ But basically, when the Supreme Court members met on January 6, 1978, they had only Campbell's memorandum to go on.

172. Interview with Richard A. Simms, *supra* note 5.

173. BLACKMUN, *supra* note 1.

174. Thurgood Marshall, Personal Papers, Library of Congress (Jan. 9, 1978) (Order List indicates that 6 petitions for certiorari were granted and 191 denied).

175. BLACKMUN, *supra* note 1, Introduction, at 7 (discussing certiorari memoranda, 1968-1993). The certiorari pool practice was established in 1972. A single clerk's memorandum summarizing the cases was circulated to all judges who participated in the "cert. pool." Justice Blackmun participated in the pool. *Id.*

176. BLACKMUN, *supra* note 1, Box 274, Folder 3 (Preliminary Memorandum, Conference of January 6, 1978).

177. *Id.* Box 274, Folder 3, at 6-8 (the memorandum refers to U.S. claims as based on prior appropriations when in fact they are fundamentally based on implied reservations of water).

178. *Id.* Box 274, Folder 3, at 8-9.

179. *Id.* Box 274, Folder 3, app. (Preliminary Memorandum, Dec. 8, 1977; Notes by Keith Ellison, clerk to Justice Blackmun).

At that meeting, the justices considered the petition for certiorari to the New Mexico Supreme Court. There was a short discussion and a vote followed. Despite the doubts raised by the clerks, seven justices unequivocally voted to grant the petition and hear the case. Justice Powell, who, as it turned out, had the greatest concern with the wildlife issues raised by the New Mexico decision,¹⁸⁰ abstained. Most surprisingly of all, Justice Rehnquist, who as a westerner familiar with water and as one of the courts most avid backers of state-based rights, especially in resource conflicts with the federal government, was the only justice of nine to vote against hearing the case.¹⁸¹ Justices Powell and Rehnquist lost, and on January 9, 1978,¹⁸² the U.S. Supreme Court formally granted the United States' petition and agreed to review the New Mexico Supreme Court's decision in the Court's 1978 October Term.

It promised to be a busy and controversial Term. Big cases involving fundamental social issues like affirmative action in higher education were before the court.¹⁸³ A claim that water was a discoverable mineral under the 1872 Mining Act involved basic water resource issues under federal law.¹⁸⁴ Another case from the central valley of California raised essential issues about the relationship of the state and federal governments' control of reclamation projects.¹⁸⁵ When *United States v. New Mexico* joined *California v. United States* on the October 1978 Supreme Court docket, it looked as if that Term would yield some crucial decisions with respect to state and federal power over western water.

In *United States v. New Mexico*, Assistant Attorney General Moorman and the Solicitor General's office, as the appealing party, had to file the opening brief. Moorman began by familiarizing himself with the issues in detail and by assembling a team of researchers and writers. Members included lawyers from his own Department of Justice Land and Water Division, from the Solicitor General's office, and from the solicitor's office of the Department of Agriculture and its Forest

180. *United States v. New Mexico*, 438 U.S. 696, 719 (1978) (Powell, J. dissenting).

181. BLACKMUN, *supra* note 1, in Dockets, *United States v. New Mexico*, 438 U.S. 696 (1978) (op. cit. chart showing votes on certiorari).

182. *Id.*

183. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

184. *Andrus v. Charlestone Products Co.*, 436 U.S. 604 (1978).

185. *California v. United States*, 438 U.S. 645 (1978). This case was granted certiorari during the October 1977 Term but was not placed on the docket until the October 1978 Term. *United States v. New Mexico* and *California v. United States* started on separate tracks but were later paralleled and the decisions were written together and issued simultaneously.

Service.¹⁸⁶ At the meetings, the lawyers discussed the issues, many for the first time, and divvied up the work. They recognized that a lot of it would involve the early history of the Forest Service and they tried to parcel that out too. Stuart Shelton, a then young lawyer in the Department of Agriculture, remembers drawing the task of looking at the grazing leases from the early Aldo Leopold days on the Gila National Forest, trying to determine what exactly they said about federal and state rights to water.¹⁸⁷

Meanwhile, back in New Mexico, Richard Simms made a choice that some said changed the course of the litigation in the Supreme Court.¹⁸⁸ Up until then, Simms had done himself almost all the historical and legal investigation in the entire *Mimbres* case. Now he realized that the case really would turn on the history of forest reserves between 1891 and 1897. Like the lawyers for the United States, Simms had toyed with what he had come to realize was an incredibly complex series of events in the last decade of the nineteenth century about which no one knew enough. He decided to assign the task of investigating the history in depth to a new lawyer in the State Engineer's office, Don Klein.¹⁸⁹

Klein was an extremely bright, slightly eccentric attorney who had come to the State Engineer Office, like Simms, on the recommendation of a New Mexico appellate judge for whom Klein had clerked. Klein had grown up in Albuquerque's North Valley, gone to a public high school there known even then for the incredible diversity of its student body, and by chance headed off to the University of Chicago for his undergraduate training. He had returned to New Mexico, started law school, dropped out to work for a while on the Navajo Reservation, and finally finished. By the time he went to work for Simms, his unconventional life had slipped a couple of notches. He was living in Los Alamos with his first wife and her two kids, commuting the 40 dangerous mountain miles to Santa Fe to work, and struggling, as he did much of his adult life, with alcohol. Klein appreciated Simms' assignment to him because he loved research and it fit his flexible lifestyle and the long, irregular working hours he put in.¹⁹⁰

In the late fall and early winter of 1977-1978, Klein began to explore the history of the origins of the Forest Service. He quickly found that not much academic work had been published on it. In the 1920s,

186. Interview with Stuart Shelton, *supra* note 16.

187. *Id.*

188. Telephone Interview with Peter Thomas White, Retired Chief Counsel, N.M. State Eng'r (Sept. 9, 2003).

189. Interview with Richard A. Simms, *supra* note 5.

190. Interview with Don Klein, *supra* note 155.

John Ise had written *The United States Forest Policy*, a book based on the Congressional Record but focused as a Progressive-period history on timber thievery, not water policy.¹⁹¹ In 1967, Roderick Nash had devoted a chapter to Aldo Leopold in his monumental *Wilderness and the American Mind*, focusing on Leopold's early work in the Gila with recreation and wilderness, which, as Nash told it, involved opposite sides of the same vision.¹⁹² Finally, in 1976, a year before Klein went to work in earnest, the University of Washington Press, in conjunction with the Forest History Society,¹⁹³ published Harold Steen's *The U.S. Forest Service: A History*. However, by Steen's own account, his *U.S. Forest Service* hardly dealt in detail with the actions in Congress between 1890 and 1897, a subject that Steen would return to in 1990,¹⁹⁴ 1991,¹⁹⁵ 1992,¹⁹⁶ and 2005,¹⁹⁷ too late to help the Supreme Court or Klein in 1978. Don Klein was pretty much on his own.

Harold Steen later wrote that the legislative history of the National Forests and what Congress intended in reserving them under the purposes of the 1897 Act at the heart of *United States v. New Mexico* "is both voluminous and complex, and tracing a particular thread requires great patience and more than a little detective skill."¹⁹⁸ At the start, Klein did not know it, but between 1871 and 1897, Congress would consider nearly 200 bills concerned in some way with forests on western public lands.¹⁹⁹ Each had its own usually incomplete history. It was very difficult to discern an overall picture. With no guidelines at all and nothing more than a quick intellect, a tireless passion for research, and a quirky schedule, Klein dove into the task, starting with the Congressional Record for the decade and letting it lead him where its

191. JOHN ISE, *THE UNITED STATES FOREST POLICY* (1920).

192. Roderick Nash, *Aldo Leopold: Prophet, in WILDERNESS AND THE AMERICAN MIND* 182, 189-91 (3d ed. 1982).

193. "The Forest History Society is a non-profit, educational institution dedicated to the advancement of historical understanding of human interaction with the forest environment." See STEEN, *supra* note 9, at iv. This organization is partially funded by the Forest Service, but independent of it.

194. Transcript of Dr. Harold Steen Testimony, 131-39, Concerning the Application for Water Rights of: The United States of America for Reserved Water Rights in the Platte River in Boulder, Clear Creek, Douglas, El Paso, Gilpin, Jefferson, Larimer, Park and Teller Counties. (Arapahoe, Pike, Roosevelt and San Isabel National Forests) (1990) (Case No. W-8439-76 etc.).

195. HAROLD K. STEEN, U.S. DEP'T. OF AGRIC., FOREST SERV. *THE BEGINNING OF THE NATIONAL FOREST SYSTEM*, at FS-499 (1991).

196. ORIGINS OF THE NATIONAL FORESTS: A CENTENNIAL SYMPOSIUM (Harold K. Steen ed., 1992).

197. Harold K. Steen, *The Forest Service Organic Act*, 103 J. FORESTRY 234, 234-36 (2005).

198. See Transcript of Testimony of Dr. Steen, *supra* note 194, at 4.

199. *Id.* at 3.

debates and its references to bills and committee reports and other administrative documents might take him.

Luckily, Klein found just the place to do his work, at the New Mexico Supreme Court library in Santa Fe, across the street from his State Engineer Office in the Bataan Memorial Building and down the hall from the courtroom where Justice H. Vern Payne had listened to Peter Steenland and Richard Simms argue the *Mimbres* case. The supreme court law library was a federal repository,²⁰⁰ so it had all the documents that the complete set of the Congressional Record might refer to. The law library was open long hours so it could accommodate Klein, who often arrived at work at 11 in the morning and sometimes did not leave until dawn the next day, much to the chagrin of State Engineer Steve Reynolds and, by proxy, Richard Simms. The law library was open stack and so Klein could wander the well polished third floor alcoves late at night, seeing what was there, pulling down obscure documents from high metal shelves as they struck his fancy. The supreme court law library had a quirky collection, supplementing its comprehensive federal collection with a random sample of hard-to-find federal land documents, usually contributed to the library by a New Mexico bar deeply entangled in all of the New Mexico land imbroglios that had gone on for a long time.²⁰¹

In his research Klein used all of these resources. He kept elaborate Congressional Record indexes, written by hand on long yellow legal pads, cross-referenced to all of the other federal documents to which they referred. Late one winter night, he was wandering down an alcove, reached up to the top shelf of a row of Interior Board of Land Appeals Decisions, and pulled down a thin volume bound in ancient green leather. He opened it and found himself in a 1903 "Compilation of Laws, and Regulations and Decisions Thereunder, Relating to the Establishment of Federal Forest Reserves Under Section 24 of the Act of March 3, 1891 (26 Stat., 1095), and the Administration Thereof."²⁰²

The volume had been published by the Department of the Interior's General Land Office in 1903. It pulled together documents from every federal source, from statutes to amendments, to rules and regulations governing forest reserves, to Interior Circulars, to

200. Telephone Interview with Jack Blum, Retired N.M. Sup. Ct. Law Librarian (Mar. 8, 2004).

201. *Id.*

202. DEP'T OF INTERIOR, GEN. LAND OFFICE, *COMPILATION OF LAWS, AND REGULATIONS AND DECISIONS THEREUNDER, RELATING TO THE ESTABLISHMENT OF FEDERAL FOREST RESERVES, UNDER SECTION 24 OF THE ACT OF MARCH 3, 1891 (26 STAT., 1095), AND THE ADMINISTRATION THEREOF* 14-15 (1903).

administration letters. It happened to be in the New Mexico Supreme Court library because Santa Fe lawyer Richard H. Hanna, a veteran of many a land war in New Mexico and in the late 1910s the especially controversial U.S. attorney for struggling New Mexico Pueblos,²⁰³ had donated the volume to the library in the 1920s. (A computer search would have shown copies of it in the bowels of the Library of Congress and the Department of the Interior,²⁰⁴ but computer data bases were not available in 1978.) Weeks of work in the National Archives might eventually have led to the different sources gathered in the volume, but Klein literally had stumbled on it in the New Mexico Supreme Court Law Library.

When he opened it up and started reading, he stumbled again on a printed copy of the "Regulations Governing Forest Reserves under the Act of June 4, 1897 (30 Stat., 34-36). Issued by the General Land Office of the Department of the Interior on April 4, 1900, the regulations began:

Object of Forest Reservation.

2. "Public forest reservations are established to protect and improve the forests *for the purpose* of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow."²⁰⁵

Here was exactly the point that Simms and New Mexico Supreme Court Justice Payne had tried to make: improving and protecting the forest was not an independent purpose for creating national forests from which a court could imply a federally reserved water right. Instead, protection and improvement served two other fundamental purposes—timber and water supply—and it was only these independent purposes that would yield the reserved water rights at issue in the case. And it was the Department of the Interior officially making the point in 1900, only a couple of years after the statute setting forth the purposes for which forest lands could be reserved had been passed. Klein seized on the language as he had seized on the volume and passed it on to Simms. (Simms, of course, passed it on to the U.S. Supreme Court and it became one of the foundations in Justice Rehnquist's opinion.)

203. G. EMLIN HALL, *FOUR LEAGUES OF PECOS: A LEGAL HISTORY OF THE PECOS GRANT, 1800-1933*, at 219 (1984).

204. Library of Congress Online Catalog, <http://catalog.loc.gov>, (go to Library of Congress Online Catalogue, lc control no. 08035600, call no. SD426.A5 1903) (last visited Oct. 27, 2005); Dep't of Interior Library Catalog, <http://library.doi.gov/catalog.html> (go to the Dep't of Interior Library catalogue call no. KF5631.A3 1903) (last visited Oct. 27, 2005).

205. See DEP'T OF INTERIOR, GEN. LAND OFFICE, *supra* note 202, at 15 (emphasis added).

The discovery of the 1900 regulations was only one of many serendipitous finds that Klein made in his investigation. As he worked, he cast a wider and wider net. He researched late nineteenth century law on national parks to see how parks and forests differed. Klein found by chance a statute establishing a Midwestern national forest that explicitly referred to protection of water resources on the forest. He researched the many battles over the reservation of reservoir sites. He looked at statutes granting rights-of-way across the forests for holders of state-based water rights who wanted to locate their diversions high on streams in the national forests. Then Klein extended that to the late nineteenth century departmental decisions interpreting the right-of-way statutes.²⁰⁶

In the process Klein made some amazing discoveries. For example, he unearthed an early 1894 Interior Department decision holding that the 1891 Act "would seem to relegate the matter of appropriation and control of all natural sources of water supply in the state of California to the authority of that state."²⁰⁷ As soon as he read it, he realized what he had discovered and raced from the Supreme Court library across the street to the Bataan Memorial Building where he found Reynolds and Simms. "Look what I found," he yelled, waving the ancient document in his hand, startling the two. "Rehnquist is going to love this."²⁰⁸

So it went with Klein and his historical research. The documents deepened. The related subjects expanded. The analytic memos lengthened. Klein's conviction that Hodges and Payne and Simms and Reynolds had been correct about the history became firmer and firmer the deeper into the history he went. But that conviction became more and more rooted in the overriding concern of the New Mexico defenders with state and federal power over water. In the 1920s, good progressive John Ise had filtered the legislative processes through the lens of private resource exploitation of public forests. Now Klein viewed it through the late 1970s western state pre-occupation with state prerogatives over water originating on federal lands. Ise clearly had missed something. Klein may have too, but it was not for lack of hard research in the original Forest Service documents.

In the spring of 2004, I went to see Don Klein in Socorro, New Mexico, where he now lives and practices law, to find out what he remembered about that time and that work. Klein lives alone in an old building on the main drag through bedraggled Socorro. An old wooden sign hangs from the front door heralding the "Law Office and

206. Interview with Don Klein, *supra* note 155.

207. *Right of Way—Canals—State Control*, 18 PUB. LANDS DECISIONS 573, 574 (1894).

208. Interview with Don Klein, *supra* note 155.

Administrative Headquarters of Don Klein Jr." His house doubles as his law office these days and there are literally books everywhere, in the bathroom, in the kitchen, so many in the bedroom that it is hard to see how he can make his way to his bed at night. He has had a hard life in the 26 years since he worked on the legislative history for Simms. But even today he remembers the particulars of that work, still can recite chapter and verse from the 1891-1897 history he assembled in 1977-1978. And he is as convinced today as he became then that New Mexico's take on the history was correct. "I gained," he recalls, "the greatest respect for the understanding of those western congressmen. They knew what was at stake in the battle over water on the national forests, even in advance of those court decisions that created the doctrine of implied federal reserved water rights, and they protected those interests magnificently."²⁰⁹

Because the United States had appealed the decision of the New Mexico Supreme Court, it went first in its brief to the U.S. Supreme Court. Everybody in New Mexico—Simms, Klein, Reynolds, and the rest of the State Engineer crew—waited to see what the United States would know about Klein's history. It turned out very little.

The opening Supreme Court brief for the United States²¹⁰ had the hard analytic surface of glass. There were, of course, three, not just two, "purposes" in creating National Forests like the Gila and all express purposes implied the need for water. The independent purpose of improving and protecting the forest "subtended" the other two purposes, argued the Assistant Attorney General Moorman, and gave rise to the reserved rights for recreation, for minimum instream flows, and for grazing rights the New Mexico Supreme Court had refused to recognize.

In making that argument, Moorman concentrated on the language of the 1897 Organic Act itself. He included very little of the surrounding history that Klein had so immersed himself in. In fact, the brief mentioned almost nothing about what had happened between the 1891 Creative Act and the 1897 Organic Act. It mentioned almost nothing about the federal-state conflict over water control that Klein said had dominated the debate during the period. Instead, Mormon and his cohort went the way of syntax, arguing that Congress had authorized many lawful purposes when it passed the 1897 Act. Those "secondary purposes," they wrote, implied the reservation of water as surely as watershed and timber protection.

209. *Id.*

210. Brief of Petitioner, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510).

New Mexico, in its Answer Brief, March 31, 1978,²¹¹ filled the gap with Klein. By then his research had filled several loose-leaf notebooks with memoranda on different topics; extensive, esoteric citations to obscure material; and cross references to an ever-wider range of related topics. Simms had to assign a law clerk then in his employ just to cull and organize the material.²¹² Ultimately, the New Mexico brief ended up citing 38 federal and state statutes dating from 1817 to 1973; 24 House documents and bills, mostly dating from between 1890 and 1897; 13 Senate documents from the same period; and 41 separate references to the Congressional Record.²¹³ Klein was convinced that the history buffs on the court would love the detail and that the weight of that labyrinthine evidence showed that indeed Congress had very clearly meant to restrict federal Forest Service water claims to the restrictive two purposes finally named by Judge Payne in the New Mexico court decision.

Simms was convinced that Klein's research simply weighed too much. "We needed that detail," he later recalled, "but nobody, surely not the Supreme Court, but not even their clerks, would wade through that stuff. So I had to find another way. And I did it by writing a sort of introductory section that was short and to the central point."²¹⁴ "As a practical matter," wrote Simms, "to the extent that reserved rights are recognized, rights created and vested under state law may be diminished." It was not just that the federal reserved rights doctrine took away what states thought that Congress had relegated to the states' plenary control. Worse, appropriators under state law had no notice of a competing federal claim to water until 1963. Thus, they believed, prior to then, that water was available to make their appropriations and "they could not have reasonably expected that a paramount (Forest Service) interest in the same water might be claimed in the future." A new Forest Service appropriation, for example for recreation purposes would take the priority of the original creation of the Gila (1899), "effectively taking without compensation all (state law) rights predicated upon intervening uses."²¹⁵ Klein's endless history, cast as a nineteenth century state/federal conflict, came home to roost in a threatened federal twentieth century taking of state-based property rights. No wonder that

211. Brief for the State of New Mexico, app. Exhibit 1b et seq., *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510).

212. Interview with Richard A. Simms, *supra* note 5.

213. Brief for the State of New Mexico, at iii-xii, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

214. Interview with Richard A. Simms, *supra* note 5.

215. Brief for the State of New Mexico, pt. 1, 10-18, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

1st mention of paying rights

Congress had sharply limited the purposes of Forests, as Klein's history showed. And no wonder that, according to New Mexico, the Supreme Court had to confirm that limitation in 1978.

In its final short reply brief,²¹⁶ the United States did not quarrel with any of Klein's long history at all. It only argued again that the 1897 Organic Act indeed authorized improvement and protection of the forest as an independent federal purpose for their creation, essentially emphasizing the fact that the federal government had never abandoned its conservation interest in the reserved forests even as it was setting them aside to protect timber and irrigation flows. The reply brief did not say so in so many words, but the United States was suggesting that both Klein and Simms had gone overboard in their view of this history as exclusively about relative state and federal control of forest water resources. As for Simms's opening suggesting that expanding federal reserved water rights would reach back and take existing state created rights, the United States called the claim "alarmist." To prove it, they attached a letter to their brief from Chief Forester John R. McGuire, claiming that the Forest Service reserved rights were "modest" by any measure and almost certainly at their most expansive less than one percent of the water produced by the forests.²¹⁷

That gratuitous assertion satisfied no one, least of all the two New Mexico mining companies and one Colorado reservoir company who were so concerned about Forest Service claims that they each went to the trouble of filing briefs of their own²¹⁸ in support of New Mexico in a case in which they were not even parties. The Molybdenum Corporation of America (Molycorp) from the Red River, north of Taos, New Mexico, and Phelps Dodge from the Gila River in New Mexico, both large and powerful southwestern mining companies, held land and water rights upstream from reserved forest land. Here were two entities who could prove that Simms was right, that recognizing new Forest Service instream rights in stretches of the river below the mines would take essential waters from their operations.

The Colorado reservoir company, Twin Lakes Reservoir and Canal, brought a similar position to the Supreme Court litigation and a superb new lawyer, John U. Carlson, as well. A Rhodes Scholar from

216. Reply Brief for the Petitioners, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

217. *Id.* app. 1a (Letter from John R. McGuire, Chief, USDA Forest Serv., to James W. Moorman, Assistant Att'y Gen. (Apr. 19, 1978)).

218. Brief for Respondent, *Amicus Curiae Brief on Behalf of Molycorp, Inc., United States v. New Mexico*, 438 U.S. 696 (No. 77-510); Brief for Respondent, *Brief Amicus Curiae of Phelps Dodge Corp., United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

Montana, Carlson had established himself as a pre-eminent water lawyer in Colorado.²¹⁹ As an amicus on the side of New Mexico in *United States v. New Mexico*, he brought to the Supreme Court litigation another real client who would be damaged by an expansive federal reserved water right for the Forest Service and an intellectual patina of his own. The brief²²⁰ that Carlson filed on April 3, 1978, in support of New Mexico sparkled with elegant phrases and imaginative slants on the basic arguments. (Carlson almost went too far when he first suggested that the Forest Service did not need water rights to accomplish its goals. It already had enough uncontested land use controls to better accomplish those goals. This argument, as we shall see, was first picked up again in 1990 and then finally in 2004, with final ironic results.²²¹)

Finally, New Mexico was also joined in an amicus brief filed by every other state west of the One Hundredth Meridian.²²² Simms, as one of the New Mexico representatives to the Western States Water Council, had lobbied hard there for participation by other member states. It was not easy, he later reported, to get all of the states to agree on anything, but on this one they were unanimous and in favor of New Mexico. That final amicus brief, signed by ten western states, made up in breadth for whatever it lacked in depth. Like the other amici briefs filed in support of the New Mexico position, the brief of the western states could not match the Klein history, but it counted for as much by virtue of unanimity that it demonstrated.

Only one amicus brief arrived on the side of the United States and it came, not surprisingly, from the National and local Wildlife Federation.²²³ Writing for the two organizations, attorney Patrick Parenteau insisted that the 1897 Organic Act's reference to improving

219. John U. Carlson was a water law legend in his own time. He grew up on a sheep ranch in eastern Montana, graduated in 1962 from the University of Montana, and won a two-year Rhodes Scholarship in that year. On his return from England, he matriculated at the Yale Law School from which he graduated in 1967. Over the next 25 years he practiced water law out of Denver, Colorado, representing a variety of water users including irrigators from the San Luis Valley. In the process of his work he won a reputation as knowing more about Colorado's role in the Rio Grande Compact than any man alive. A rare blood disease tragically ended his life prematurely in 1992.

220. Brief for Respondent, *Brief of Amici Curiae, The Twin Lakes Reservoir and Canal Company and the Southeastern Colorado Water Conservancy District, United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

221. *Id.* at 34-35.

222. Brief for Respondent, *Amici Curiae Supporting Respondents, United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

223. Motion for Leave to File Brief as Amici Curiae, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510); *Brief Amicus Curiae of Nat'l Wildlife Fed'n & N.M. Wildlife Fed'n, United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

and protecting the forest stood as an independent purpose of the National Forests, capable of generating an implied reservation of water. Then Parenteau went one step further and said that the "forest" to be improved and protected included all of its flora and fauna, its plants and its animals, its trees, and its Gila trout.²²⁴ U.S. attorney Don Redd had suggested the same thing before District Judge Hodges, using the dictionary as his authority, and had gotten nowhere.²²⁵ In the U.S. Supreme Court in 1978, Parenteau's argument had a post-modern ring, but he grounded his definition in texts from 1615, 1815, and 1884.²²⁶ His conclusion followed the broad definition as clearly as night followed day: As used in the 1897 statute, protecting the forests meant protecting its aquatic wildlife. Protecting fish meant guaranteeing water for them. Guaranteeing water for them meant legally protecting stream flows. Therefore, Congress had implicitly reserved water in 1897 for instream flows necessary for the protection of the fish that were a part of the "forest." QED.

To all except the New Mexicans. Back in Santa Fe, Simms bridled at the importation of modern ecological ideas into the 1890-1897 debates so clearly outlined differently by Klein. His colleagues mocked the National Wildlife Federation brief, dubbing it the "Evangeline defense" after Henry Wadsworth Longfellow's epic poem that began with "(t)his is the forest primeval."²²⁷ Their scorn was both a measure of the state of war into which they had worked themselves and of how worried they were that contemporary values would insert themselves into a late nineteenth century debate whose federal/state contours they thought they (and Klein) so clearly understood.

Then, as far as they were concerned, the Supreme Court itself laid their worries to rest. In a surprise move, the Court decided that the Wildlife Federation brief had arrived too late and declined to accept it in the proceedings.²²⁸ New Mexico lawyers breathed a sigh of relief: at least they did not have to deal with that. Ironically, the Wildlife Federation

224. Brief Amicus Curiae of Nat'l Wildlife Fed'n & N.M. Wildlife Fed'n at 8-9, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

225. Handwritten notes of Honorable Norman Hodges, *supra* note 120.

226. Brief Amicus Curiae of Nat'l Wildlife Fed'n & N.M. Wildlife Fed'n, at 9, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510) (citing John Manwood, *TREATISE OF THE LAWS OF THE FOREST* 18-19 (London 1615)); *LES TERMES DE LA LEY* (J. Johnson, Portland 1812); William Blackstone, *BLACKSTONE'S COMMENTARIES* (Boston, MA 1884).

227. Interview with Richard A. Simms, *supra* note 5.

228. U.S. Supreme Court, Order List for January 9, 1978, at 5 (showing the Motion of the Wildlife Federation et al. to file brief was granted at the same time writ of certiorari was granted); U.S. Supreme Court, Order List for Monday, March 27, 1978, at 2 (showing that motion of Wildlife Federation was denied for untimely filing).

brief already had arrived in the Court and copies had been distributed to the chambers of the various justices. The "Evangeline defense," which they thought had died, was miraculously resurrected months later as the basis for the formal dissent in the *United States v. New Mexico* decision.²²⁹

In the meantime, Richard Simms began the arduous task of preparing for oral arguments, set by the court for April 18 in Washington, D.C. By then he had invited Denver lawyer John Carlson to share the argument with him on the grounds that Carlson spoke for a client with a concrete interest in limiting the Forest Service claims and spoke with the kind of eloquence befitting the Supreme Court. Still Simms had to prepare for his part. He began methodically by outlining the basic points of New Mexico's position and listing the questions he might be asked and his answers to them. He tried them out before his colleagues, who tried to poke holes in what he had to say. Then he went back to the beginning and followed the same process, again and again and again. The meticulous preparation was characteristic of Simms in any case, but he was particularly careful this time since it would be his first appearance before the nation's highest court, a place most lawyers never reach in their entire careers.²³⁰

Simms left for Washington a week before the arguments. There, in a conference room in the Watergate Hotel, he went through the arguments again, answering the questions of a new panel of volunteer interrogators. He even went over to the Supreme Court itself and inspected the awe-inspiring courtroom for the first time. By the appointed hour, Monday afternoon, April 24, 1978, he felt in perfect control of the case and the argument that he wanted to make.

In the meantime, the United States had been going through the same process. Under normal circumstances, the Solicitor General or one of his assistants would have argued the case before the Supreme Court. But in an informal practice that had emerged over the years, newly appointed assistant attorney generals could select one case to argue before the Court²³¹ and James Moorman picked *United States v. New Mexico*.

"I took that case extremely seriously," he remembers today, sitting in his unpretentious office at Tax Payers Against Fraud, which he helped found and where he now works with the same gusto and southern charm he must have shown as assistant attorney general for land and natural resources almost 30 years ago. "I took over two weeks

229. *United States v. New Mexico*, 438 U.S. 696, 719 (Powell, J., dissenting) (citing same references used by Parenteau in Amici Curiae brief, *supra* note 226).

230. Interview with Richard A. Simms, *supra* note 5.

231. Telephone Interview with Peter R. Steenland, *supra* note 4.

preparing for the thing. The Supreme Court justices analyze your argument and go into it in depth. You have to know your cases when you're there. As an old hand told me, make sure that you have a list of your three most important points in mind, because when they start asking questions, you can be driven right out of your case and the time can be up and you realize that you didn't make those three points."²³²

Sure enough, when at 2:22 P.M. on that Monday, Chief Justice Warren Burger called the case of *United States v. New Mexico* and invited Moorman to proceed, Justice Byron White, a westerner from Colorado, interrupted almost immediately. "What," White asked Moorman, "does the record show as to why the instream flow issue was even in the case? Are there any upstream users for the water?"²³³ White wanted to know who could be hurt by the Forest Service claims. Simms and Carlson were there in person to testify about the potential dangers that extensive Forest Service claims might pose and Phelps Dodge, MolyCorp, and Carlson's Twin Lake's Reservoir and Canal Company already had shown in their briefs how the claim might affect their concrete investments. But it was not their turn and Moorman struggled to answer White's question by minimizing the impact of the Forest Service claims.

From there, Moorman seemed to struggle to make his three points. If they surfaced in the remaining portion of his argument, amidst the slew of questions and queries and jokes that followed from the bench, it was hard to spot them. "Mr. Moorman," one justice asked, "where did we get all of these fancy names of the acts [involved here] like the [1891] Creative Act and the [1897] Organic Act and the [1960] Multiple-Use Sustained Yield Act? Is someone down in the department charged with the responsibility for figuring fancy names?"²³⁴ Moorman answered, "They are getting worse as I read what is coming out of Congress, Your honor." At the end of his allotted time, Moorman had managed to say that protecting the forest and recreation were independent purposes for which the 1897 Congress had authorized national forests and that recreation was an additional one. He did not have time for the third point and had not much illuminated the other two.

When Richard Simms rose in response for the State of New Mexico, he felt like he should have been more unsure than he was. "It was my first time in the Supreme Court," he remembers, "and even though I'd looked at the courtroom before, you can't imagine how

imposing the place is and how close the podium is to the justices. Still, I wasn't nervous. I knew what I had to say."²³⁵

He started with the two fundamental points that he had begun with in the short opening section of the brief that preceded Klein's exhaustive history. This time he stated them even more succinctly. "There are two fundamental mistakes in the United States approach to the reservation of water in the national forests," he boldly began. "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....The national forests were designed with respect to water to maximize water yield to appropriators under state law."²³⁶ In a way that Moorman had never quite been able to do, in one fell swoop, Simms had made New Mexico's essential points while countering the United States' central claims. **

He went one step further and, in a classic gambit of the oral advocate, answered the question Justice White had asked of Moorman. There are upstream users, Simms told the Court, on the Mimbres and more important elsewhere, who had a direct interest in the extent of Forest Service claims. Justice White fell for it, asking, almost rhetorically, "So the in-stream flow is really a live issue?"²³⁷ Simms answered by going back to Phelps Dodge and the company's \$425 million investment in a smelting plant upstream from a part of the Gila National Forest. White and Simms continued their friendly colloquy, outlining together New Mexico's case. Then, toward the end of his time, Simms rolled on, uninterrupted.

"Your honors," he concluded, "I think that what this case boils down to is an attempt by the United States to protect commendable environmental values through a scheme of legislation that was designed to do something else. We have laid out the history of the applicable legislation. If that history is understood, there is no way in my opinion that Your Honors could believe the United States and reverse the decision of the New Mexico Supreme Court. It is simply impossible. If this case is decided on the basis of historical reality, instead of on the basis of the regrets of certain Justice Department lawyers now, we are confident that the decision of the New Mexico Supreme Court will be

232. Interview with James Moorman, *supra* note 160.

233. Transcript of Oral Argument at 3, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510).

234. *Id.* at 15.

235. Interview with Richard A. Simms, *supra* note 5.

236. Transcript of Oral Argument at 20, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

237. *Id.* at 21.

upheld."²³⁸ The closing was typical Richard Simms: certain, aggressive, with an underlying moral bite that could offend.

Simms finished at three o'clock on the dot. At that moment, court closed. The justices disappeared behind a curtain. There was no way to tell the justices' reactions until the next morning at ten o'clock when John Carlson would take the remaining 15 minutes of New Mexico's half-hour of allotted time and Jim Moorman would have his five minutes of rebuttal.

When John Carlson resumed the next morning, it quickly became clear that some justices were nervous about the absolutist position taken by Simms. Carlson began by pointing out the strong dependence of western states on water generated on high-elevation national forests. Ninety-five percent of the water in his Colorado, he told the court, arises on Colorado's national forests.²³⁹ It was not hard to convince the Court of the importance of the issue. What had troubled justices overnight was the thought that state appropriators could simply take all the water on the national forests and leave none there. They wanted to know whether the purpose of "securing favorable conditions of water flows," a purpose that New Mexico grudgingly admitted did not guarantee the Forest some minimum flows since no flows could not be "favorable."²⁴⁰ A long series of confusing exchanges ensued where neither Carlson nor the justices could come to common terms. The discussion ended in a whimper, not Simms' bang.

Jim Moorman got in the last word in a five-minute rebuttal that Tuesday morning. Twenty-five years later, thinking back on his opening argument the day before, Moorman has some misgivings about the technical three-point approach he had taken at the start. "I should have taken the high-road," he laments. "I should have emphasized the whole, not the parts, the ecological integrity of the forests. In retrospect, I could have won more justices that way."²⁴¹ Even so, it was not the route he took in rebuttal.

Instead, he merely said that the states had "an inordinate fear of the size of the future needs of the national forests."²⁴² To show how small those future needs were, Moorman referred to the letter of Chief Forester Maguire, attached to his last, short brief, saying that the Forest Service intended to use less than one percent of the water originating on the

238. *Id.* at 27.

239. *Id.* at 30.

240. *Id.* at 33, 40.

241. Interview with James Moorman, *supra* note 160.

242. Transcript of Oral Argument at 46, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510).

forests. To further prove there was nothing for the western states to worry about, there was Chief Forester Maguire himself sitting in the front row of spectators in the Supreme Court. Some justices did not like the tactic. "What happens," asked one, "if the Forest needs jump from .5% to 20% by 1990?" "Can this Chief," asked another, "bind a future Chief?"²⁴³ Moorman tried to answer, but if this was the high road, it did not look as if it led anywhere.

Somehow Moorman later recollected his rebuttal as "electric." When Chief Justice Berger closed the court that morning, Moorman was sure that he had won. "I saw Simms and Carlson standing there, glowering, and I knew that they knew that we had won, too."²⁴⁴

"That's ridiculous," says Simms, glowering today.²⁴⁵

Luckily, it was up to the Supreme Court to decide. On Thursday, April 28, three days later, the justices met to stake out their basic positions. Chief Justice Berger opened the conference with what Justice Blackmun described as a "long review."²⁴⁶ At that point, Berger was tending toward affirming the New Mexico Supreme Court on all scores.

The two westerners on the court, Justices White and Rehnquist, then weighed in. Colorado's White noted that the case involved little water law and a lot of ancient statutory construction. The briefs, he said, were good. It was clear to him that the United States had no basis for 1897 reserved rights for grazing or recreation. A reserved right for fish and wildlife was "[a] close [question]." Still, at this point, White voted to affirm on all points.²⁴⁷

Justice Rehnquist agreed. He noted that it was an important case to Arizona and the rest of the West. To his mind, the issues involved "[p]urely statutory construction" and a lot of "legislative history," not "water law" *per se*. (Here Rehnquist was falling into Klein's bailiwick.) In context, Rehnquist argued that the 1897 purposes should be "[c]onstrue[d] narrowly," thus bringing himself into line with Simms' basic trajectory. The Court should recognize no reserved rights for recreation or grazing, as Justice White agreed, but, in addition, Justice Rehnquist also felt strongly that there should be no reserved rights for fish or wildlife either.²⁴⁸

That morning four other justices—Stewart, Marshall, Stevens, and Blackmun—sided with the Chief Justice and the two westerners

243. *Id.* at 49.

244. Interview with James Moorman, *supra* note 160, at 10.

245. Interview with Richard A. Simms, *supra* note 5, at 38.

246. BLACKMUN, *supra* note 1.

247. *Id.*

248. *Id.*

without adding much, giving seven votes for affirming the New Mexico Supreme Court. Justices Brennan and Powell alone disagreed. Their disagreement was primarily directed at reserved water for fish and wildlife. Speaking first at the conference, Brennan said that "[s]urely...[the Forest Service] must maintain a flow for fish." Powell went further. He said that he could not "conceive of a forest sans game & fish." The United States had to have enough water to maintain the Forest in its "primeval" condition, thus unwittingly invoking the dreaded Evangeline defense.²⁴⁹

At the conference's end that morning, the Chief Justice designated Justice Rehnquist, a natural choice for many reasons, to draft the court's opinion in the case. Rehnquist was in the majority. As one of the two westerners on the court, he was more intimate with western water matters than the others. Personally he was drawn to western legal history. *United States v. New Mexico* had its share of that. In the days before the appointment of Justice Anton Scalia, who adamantly opposed the use of legislative history to construe statutes, justices like Rehnquist felt free to roam around in just the kind of late nineteenth century documents that Don Klein had assembled.²⁵⁰ Ideologically, he favored state control over federal control generally and local control over natural resources in particular. The result the court had just voted on fell squarely within the parameters of those beliefs. Finally, for all the same reasons, Justice Rehnquist already had recently drawn the job of writing the court's decision in another pending western water case in which the court had also voted to support an expanded state control over (and diminished federal interest in) federal water projects.

On March 28, 1978, less than a month before oral arguments in the *Mimbres* case, the Supreme Court had heard arguments in *California v. United States*.²⁵¹ In that case, the State of California had tried to attach 20 substantive requirements to a huge federal Bureau of Reclamation project. A California federal district court said that the state could not control a federal project in that way and the Ninth Circuit Court of Appeals had agreed. California appealed to the U.S. Supreme Court on the grounds that section 8 of the 1902 Reclamation Act in fact authorized just such state control.²⁵² Klein and Simms and the California lawyers

249. *Id.*

250. Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 647 (1994); see also Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

251. BLACKMUN, *supra* note 1 (Conference Notes on *California v. United States*, 438 U.S. 645 (1978) (Mar. 28, 1978)).

252. *California v. United States*, 438 U.S. 645 (1978).

knew about the parallel courses of their contemporaneous cases. They recognized that the two cases squeezed on federal interests in water from opposite directions, the New Mexico one by cutting down on federal rights to water, the California one by boosting state control over it. But so sure was each that the other would lose that the New Mexico and California lawyers had not talked about their respective briefs.²⁵³ Now the two cases merged in the Supreme Court.

At an April third conference, the Supreme Court Justices had voted in *California v. United States* and decided to reverse the Ninth Circuit and uphold the power of western states to control federal projects. Chief Justice Burger assigned this majority opinion to Justice Rehnquist too. By April 24, when the Court held oral arguments in *United States v. New Mexico*, Rehnquist still had not circulated a draft of a proposed opinion in the California case.²⁵⁴ On May 3, he was assigned the majority opinion in *United States v. New Mexico* as well.

From then until the simultaneous release of both opinions on July third, the cases were joined as fraternal twins under the care and tutelage of Justice Rehnquist and his clerks. The two cases shared a common ideological lineage and a common source in relatively old federal statutes; in the case of California, section 8 of the 1902 Reclamation Act; in the case of New Mexico, the 1897 Organic Act.

Justice Rehnquist and his clerks must have had a busy two months of it in May and June, assembling the two opinions simultaneously. We will never know exactly how they did it because his clerks have pledged among themselves not to discuss the writing of any of the Rehnquist opinions as long as the "Chief," as they call him, is still on the bench.²⁵⁵ But there are some tell-tale signs indicating that the two opinions were done together and that material from one cross-fertilized the other.

Remember Don Klein in 1977 steaming into State Engineer Steve Reynolds' office in Santa Fe, 1894 Interior Board of Land Appeal's decision in the HH Sinclair case in hand, announcing that "Rehnquist would love this"?²⁵⁶ Klein was right, but Justice Rehnquist used Klein's

253. Interview with Don Klein, *supra* note 155, § 2, at 10-11.

254. Memorandum from Keith Ellison, Supreme Court clerk, to J. Harry A. Blackmun, at 17-18 (Apr. 22, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

255. E-mail from Barton H. Thompson, Jr., Professor of Natural Resources Law & Director of the Stanford Institute for the Environment, Stanford Law School, to G. Emlen Hall, Professor of Law & Editor-in-Chief of the Natural Resources Journal, The University of New Mexico School of Law (Feb. 18, 2005, 14:37 MST) (on file with Natural Resources Journal).

256. Interview with Don Klein, *supra* note 155, § 2, at 4.

discovery in *California v. United States*.²⁵⁷ Remarkably none of the attorneys in the California case had referred to Klein's 1894 one. Apparently Justice Rehnquist and his clerks borrowed freely from Don Klein's research in late nineteenth century state-federal water relations, applying the New Mexico material to the California case.

In the *Mimbres* case itself, Justice Rehnquist also borrowed freely from the various written briefs submitted. From the amicus brief of the Salt River Project in his own Arizona, he took the reference to the "gallon-for-gallon" reduction that would occur if the Court recognized the expansive Forest Service reserved rights for the forests.²⁵⁸ From John Carlson's oral argument, Rehnquist borrowed the high numbers for state water originating on National Forests.²⁵⁹ From the United States' own briefs he took the primary/secondary distinction of Forests with which the United States had tried to escape Reynolds' purpose/use distinction.²⁶⁰ From Richard Simms, Rehnquist borrowed the grammatical parsing of the 1897 Organic Act's tortured language and, more importantly, the basic tilt in favor of state control.²⁶¹

Finally, from Don Klein, Rehnquist, having borrowed from him literally in *California v. United States*, took almost everything historical in the history-heavy *United States v. New Mexico*. Klein, who counted these things, found a reference in the final Rehnquist opinion to every piece of legislative history New Mexico had referred to in its lengthy brief. Only one document was missing, the revealing 1903 Compilation that Klein had stumbled on in an obscure corner of the New Mexico Supreme Court library. "Rehnquist must have missed it," Klein now says, smiling, "because I didn't tell him how to find it."²⁶²

Out of this mélange of material, Rehnquist and his clerks melded a seamless opinion, more severely limiting Forest Service reserved water

257. *California v. United States*, 438 U.S. at 660 n.15.

258. Compare Brief for Salt River Project Agric. Improvement & Power District as Amicus Curiae Supporting Respondents at 3, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510) ("Application of the Government's claims to the national forests on the Salt and Verde River watersheds would work a gallon-for-gallon expropriation of downstream users...."), with *United States v. New Mexico*, 438 U.S. at 705 ("When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.").

259. Compare Transcript of Oral Argument at 30-31, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510), with *United States v. New Mexico*, 438 U.S. at 699 n.3.

260. Compare Brief of Petitioner at 33, 40, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510), with *United States v. New Mexico*, 438 U.S. at 702.

261. Compare Brief of Respondent at 7-8, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510), with *United States v. New Mexico*, 438 U.S. at 707 n.14.

262. Interview with Don Klein, *supra* note 155.

rights than any of the parties to the suit had dared to suggest. Now the Forest Service could claim reserved water rights for forests like the Gila only for the essential purposes for which the Forests were established and, even then, only if without water those essential purposes would be completely impossible to achieve. Recreation, fish and wildlife, and stock grazing did not come close to getting over that bar.

As the May 31 first draft of the Rehnquist opinion circulated among the chambers of the other justices, informal positions solidified. For example, one of Justice Blackmun's clerks reported to his boss that Rehnquist had done a "solid job" and suggested only minor changes.²⁶³

However, the opposition also solidified. On June 5, a day after he received Rehnquist's draft, Justice Powell replied, saying that he and Justice Brennan would file a partial dissent. The two agreed with Rehnquist on rejecting recreation and stockgrazing as the basis for reserved water rights but they disagreed on his rejection of wildlife. "[O]ne of us," Powell told Brennan, "will write."²⁶⁴

It turned out to be Powell and his clerks and Brennan's clerk who hammered out the dissent over the next ten days. Just as Justice Rehnquist had found help in many places, so too did the Powell crew. The only amicus brief filed in support of the position of the United States and now Justices Powell and Brennan had been the brief of the National and New Mexico Wildlife Federations. When it arrived weeks after the formal filing deadline, the Court ordered that it not be further considered. Now many of the sources and even the language of the Powell dissent came straight out of the banned brief.²⁶⁵ The point of the Powell partial dissent was the same too: protecting the forest was an independent purpose of the 1897 Organic Act and the "forest" included its flora and fauna.

As the Supreme Court term drew to a close, slightly modified drafts of the Rehnquist majority opinion and the Powell partial dissent sped between chambers. On June 15, Justice Brennan formally joined Powell's dissent.²⁶⁶ On June 16, the dissent was circulated. On the nineteenth, Rehnquist added a couple of paragraphs and more footnotes

263. Memorandum from Keith Ellison, Supreme Court clerk, to J. Harry A. Blackmun (June 4, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

264. Memorandum from J. Lewis F. Powell, Jr. to J. William H. Rehnquist (June 5, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

265. Compare Brief Amicus Curiae of Nat'l Wildlife Fed'n & N.M. Wildlife Fed'n at 9, *United States v. New Mexico*, 438 U.S. 696 (No. 77-510), with *United States v. New Mexico*, 438 U.S. at 721.

266. Memorandum from J. William J. Brennan, Jr., to J. Lewis F. Powell, Jr. (June 15, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

to refute some of the points that Powell had made.²⁶⁷ On the twenty-third, a third draft of the majority opinion made the rounds. On the same day, a wavering Justice White added his name to the partial dissent. "You have sold me on the birds and bees," he wrote to Powell, thus making the final vote 9-0 on the recreation and grazing issues and a closer 5-4 on the wildlife one.²⁶⁸ At that point it looked like *United States v. New Mexico* and its companion California case might emerge on time before the end of the term on the last day of June.

Then the Supreme Court printing office got backed up, as the Chief Justice warned that it might,²⁶⁹ and the decisions were not released until July third. Richard Simms knew that the Court's term ended on June 30. He arranged to begin his first vacation since he had started working on the case in November of 1972, after the Court's term ended. He had gone with his wife and friends on a remote boat trip—without phones—to Mexico's Sea of Cortes. As soon as he landed in Guaymas on July 13, he called Reynolds at home in the evening. Reynolds, a diabetic and a workaholic, was in mild insulin shock when Simms reached him. "Richard," the usually articulate Reynolds managed to say in a garbled voice, "you won the *whole enchilada*" and hung up.²⁷⁰ It was a clear victory for state-over-federal control of water. The New Mexicans celebrated in their own ways. Simms went back to work and recommended Klein for a merit pay increase for the extraordinary work that he had done on the history of the case.²⁷¹ (Reynolds rejected the recommendation on the grounds of Klein's irregular work hours.²⁷²) Klein immediately wrote Judge Hodges in Silver City and told him that the Supreme Court of the United States had affirmed his ruling.²⁷³ The local Deming paper gave the ruling front page play.

But for the Forest Service it was not a good time. The decision in *United States v. New Mexico* limited the agency to the narrowest of claims under the reserved rights doctrine, those water rights absolutely essential to the very limited purposes the Court had recognized for the Forests under the 1897 statute. The decision hung the Forest Service out

267. Memorandum from J. William H. Rehnquist to J. Lewis F. Powell, Jr. (June 19, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

268. Memorandum from J. Byron R. White to J. Lewis F. Powell, Jr. (June 23, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

269. Memorandum from C.J. Warren E. Burger to Conference (June 22, 1978) (on file with the Collections of the Manuscript Division, Library of Congress).

270. Interview with Richard A. Simms, *supra* note 5, at 14.

271. *Id.* at 13.

272. Interview with Don Klein, *supra* note 155, § 1, at 9.

273. Letter from Don Klein, N.M. Special Assistant Atty Gen., to Honorable Norman Hodges, Dist. Ct. J. (July 6, 1978) (on file with Natural Resources Journal).

to dry all across the west at just the time that the Forest Service's new directions—recreation and fishing—required more and more water. As the Forest Service looked to the future, history and a court decision embodying it ran it down from behind. Unable to change the history or the case, the Forest Service spent the next 25 years trying to work its way out of it.

V. IN THE WAKE OF THE FOREST WEEPS

The various institutions affected by *United States v. New Mexico* began to react to the Supreme Court decision almost immediately. The academics weighed in, pro and con.²⁷⁴ In New Mexico, the Forest Service quickly flooded the State Engineer's office with applications for state appropriative rights for stock watering uses on Forest lands because the Supreme Court had said that the Forests had no federal reserved rights for the purpose. The State Engineer's Water Rights Division was almost overwhelmed by the large number of applications for small quantities of water.²⁷⁵ In Washington, the Forest Service slowly realized that the 1978 decision would require the agency to amend its May 1974 Forest Service Manual, which directed the agency to claim a reserved right for the instream flows that the Supreme Court had rejected in 1978. In amendment 27 to chapter 2540 on water uses and development, adopted in July 1980, the Forest Service grudgingly acknowledged the changes that the Supreme Court had wrought in its future.²⁷⁶

However, the real reaction of the federal land holders over the next 25 years was to try every decade or so to fundamentally shunt *United States v. New Mexico* off to the side so that they could be free to manage the resources on the Forest lands, including the critical water resources, as best they saw fit.

The first move in that direction came when, on June 23, 1979, the Department of the Interior invited attendees at the Western States Water Council, all of which had explicitly joined on the side of New Mexico in *United States v. New Mexico*, in Salt Lake City to a filet mignon dinner and an announcement.²⁷⁷ After dinner, Secretary of the Interior Andrus

274. 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); see also Alan E. Boles, Jr. & Charles M. Elliot, *United States v. New Mexico and the Course of Federal Reserved Water Rights*, 51 U. COLO. L. REV. 209 (1980).

275. Telephone Interview with Bob Rogers, Dist. III Supervisor, Office of the State Eng'r, Deming, N.M., Mar. 2, 2002; Telephone Interview with Paul Saavedra, Director, Office of the State Eng'r Water Rights Div., Santa Fe, N.M., Apr. 16, 2002.

276. FOREST SERV., U.S. DEP'T AGRIC., FOREST SERVICE MANUAL § 2540 (1980).

277. Interview with Richard A. Simms, *supra* note 5.

introduced Interior Solicitor Leo Krulitz. In turn, Krulitz introduced an incredulous audience of state water administrators and lawyers to a brand new doctrine: non-reserved water rights, a third category of federal claims to water on federal lands. There had been federal water rights acquired under state law and federal reserved water rights under the doctrine just limited for the Forests in *United States v. New Mexico*. Now, to those two, the United States proposed to add a third category, federal water rights necessary to any federal purpose on federal public lands.

The audience was stunned. Richard Simms scribbled as Krulitz talked, writing down what the Solicitor said about the new doctrine and the recent Supreme Court case. Simms noted that the Solicitor said that, in various drafts of the opinion announced that evening, "there was no mention of *United States v. New Mexico*, that the decision applied only to the Forest Service, that his opinion overruled the Supreme Court's opinion, and that his opinion "adhered to *United States v. New Mexico*."²⁷⁸ Steve Reynolds listened for a while and then, low on blood sugar, began to slide again into insulin shock. Simms rushed him again to the hospital, this time in Salt Lake City.²⁷⁹

Two days later, on June 25, 1979, the Department of the Interior formally issued the opinion to which Solicitor Krulitz had referred.²⁸⁰ It was long. It was scholarly. And it found federal rights to federal water, unconstrained by either the reservation doctrine or state water law, in the original federal ownership of land and water, back in time before there was a forest service, forest lands, states, territories or, indeed, anything except the United States. Early on the United States had allowed states and territories to create state rights in water originating on federal public land. The Supreme Court had then found that Congress had reserved some more from that state process when it set parts of the public domain, like the forests, aside for limited federal purposes. But Solicitor Krulitz' non-reserved water rights went back to a time before all of that, a time when it owned all the land and the water. If there was any left, said Krulitz, the United States could now just take it. Federal officials must have seen these non-reserved rights as primordial.

The western states saw them as predatory, and they screamed. Over the next three years, opinion after opinion issued from federal land

278. Richard A. Simms, *National Water Policy in the Wake of United States v. New Mexico*, 20 NAT. RESOURCES J. 1, 9 (1980).

279. Interview with Richard A. Simms, *supra* note 5.

280. *Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management*, 86 DECISIONS OF THE U.S. DEP'T OF THE INTERIOR 553 (1979).

agency after federal land agency. Each successive one cut farther and farther back on the boundless residual rights that Krulitz had found. The opinions were all scholarly. Like all pieces of advocacy, each was convincing in its own analytical way.²⁸¹ Naturally, the last, by Theodore Olsen, now the Solicitor General of the United States, really was the best. It sharply limited the expansive federal power that Krulitz had found to the point where it almost disappeared. Now, in Olsen's hands, what was left of non-reserved water rights fell into the category of not general executive power where Krulitz had found it but specific congressional pre-emption, where western senators could control what was left of it.²⁸² This attack on *United States v. New Mexico* from below was over by 1982. In early 1986, federal district judge Edwin Mechem, who as a private attorney had represented one of the original parties in the suit from which *United States v. New Mexico* had emerged, drove the only official judicial nail through the heart of the federal non-reserved water rights claim, rejecting federal appropriative rights to the extent that they included rights under the Krulitz theory.²⁸³

Enter Stage II of the Forest Service response to *United States v. New Mexico*: securing favorable conditions of water flows.

In the next decade, the Forest Service itself came after reserved water rights head on when the Service attempted to expand one of the two categories of reserved rights that the Supreme Court had recognized in the Mimbres case, "favorable conditions of water flows." After the Colorado Supreme Court in 1987 cleared the way for the Service to do so,²⁸⁴ the Service put on a case in Colorado's Water Division I beginning in April 1990 that stretched over a year, involved scores of expert witnesses from a variety of disciplines, and cost \$800,000 for demonstrative exhibits—"posters"—alone.²⁸⁵

Strangely enough, some of the witnesses in the 1990 proceedings were related to central characters in the Mimbres debate that had started 20 years before. For example, Roderick Nash, the dean of wilderness historians who had first written about Aldo Leopold's early days on the Gila, now himself came to testify on behalf of the Forest Service's claim for an expansive reading of the recognized reserved right purpose of

281. See, e.g., Opinion of William H. Coldiron, *Nonreserved Water Rights—United States Law Compliance*, 88 DECISIONS OF THE U.S. DEP'T OF THE INTERIOR 1055 (1981).

282. *Federal "Non-reserved" Water Rights*, 6 OP. OFF. LEGAL COUNSEL 328 (1982).

283. Memorandum Opinion and Order, *New Mexico v. Aamodt*, 618 F. Supp. 993 (D.N.M., Jan. 24, 1986) (No. 6639-M Civil).

284. *United States v. Jesse*, 744 P.2d 491 (Colo. 1987).

285. See generally NANCY GORDON, USDA FOREST SERV., GENERAL TECH. REP. RM-GTR-270, SUMMARY OF TECHNICAL TESTIMONY IN THE COLORADO WATER DIVISION I TRIAL (1995); Interview with Stuart Shelton, *supra* note 16; Interview with Stephen Glasser, *supra* note 7.

"favorable conditions of water flow."²⁸⁶ Other real historians replaced Klein, although they could not agree on the meaning of the 1897 Organic Act and felt artificially constrained by the 1978 decision.²⁸⁷ And Leopold's own son, Dr. Luna Leopold, a pre-eminent ecologist at the University of California at Berkeley, led a team of fluvial geomorphologists testifying on the needs of high mountain streams for just the kind of instream flows in the name of "favorable conditions" that the U.S. Supreme Court had denied in the name of fish and wildlife.

Given the cast of characters, it was hard not to see the 1990 testimony as the kind of case that the Forest Service should have put on in Deming in the fall of 1972 when it offered two witnesses for two hours on the subject of all Forest Service reserved water rights. Now, in 1990, when the Service offered dozens of experts in 28 days of testimony spreading over a year, it was too late. The Supreme Court in 1978 already had narrowed the scope of federal reserved water rights to the point where there was very little room to maneuver and the Service had to drive its real case through the eye of that remaining legal needle.

In the end, it did not work. Division I water judge Robert Behrman ruled in early 1993 that the Forest Service did not need the kind of expansive instream flow rights it claimed to maintain "favorable conditions of water flows."²⁸⁸ The Forest Service already possessed, ruled Behrman, all the authority that it needed to control human access to its streams through its uncontested power to regulate use and occupancy of forest lands. If, said Behrman, a state-based faucet threatened to take too much water from a federal stream, the Forest Service could shut the faucet off. It did not need a water right to do that. It only needed power over its own land, which it had.²⁸⁹ Colorado lawyer John Carlson had suggested precisely the same thing at the end of his 1978 brief in *United States v. New Mexico* and no one had noticed.²⁹⁰ Now water judge Berhman picked up on the idea and based his decision on it.

The Forest Service, anxious to acquire water rights directly, wanted to appeal Behrman's ruling, but the Department of Justice, which

286. Transcript of Jan. 10, 1990, In re Application for Water Rights (Colo. Water Ct., Div. 1, 1990) (Case No. W-8439-76) (Testimony of Roderick Nash).

287. *Id.* (Testimony of Dr. Harold K. Steen, executive director of the Forest History Society).

288. See GORDON, *supra* note 285, at 4 (Final Decision, Feb. 12, 1993, in Water Division I).

289. Interview with Stephen Glasser, *supra* note 7.

290. Brief for Respondents at 34, *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510).

controlled such things, refused.²⁹¹ Once burned by *United States v. New Mexico*, the Department of Justice was reluctant to risk another big loss. Behrman's ruling stood, but in the defeat of an expansive definition of federal reserved rights for "favorable conditions of water flows" there lurked yet another possibility for the expansion of federal control over forest water: Forest Service control over land.

Recall that the 1897 Organic Act at the heart of *United States v. New Mexico* always had authorized federal control of the "use and occupancy" of lands reserved for National Forests. Early in the litigation, before they had learned how strong the resistance of state lawyers would be, Department of Justice lawyers had argued that any control of the "use and occupancy" of Forest lands would imply the reservation of necessary water to that use and occupancy.²⁹² The Supreme Court had taught them how wrong they were in that approach. But the power to control use and occupancy remained even if it implied no reserved water rights. A state-based water right to withdraw water from a forest stream had to cross federal land to get to that water. State-based rights, driven by the doctrine of prior appropriation and its emphasis on taking water from where it naturally occurred and putting it to use where it did not, had to cross federal lands to do their job. Klein's emphasis on the nineteenth century right-of-way statutes had proved, if nothing else, that the ability to cross federal lands was essential to making forest waters available for state uses. Now, a century later, if the Forest Service wanted the water left in its streams and could not directly secure the water rights to do it, then it could indirectly accomplish the same end by limiting access across its lands to that water.

Enter Stage III of the federal response to *United States v. New Mexico*: the Colorado bypass flow controversy.

It all got started when non-federal water developers downstream from creeks originating on the National Forest highlands of Colorado's front range secured permits in the 1920s under existing federal law allowing them to build dams on forest lands to store winter flows for summer irrigation and municipal use below the forests. Projects like this, Don Klein had shown, were exactly what Congress had in mind when it enacted the late nineteenth century right-of-way statutes. Cities and farmers from Colorado Springs on the south to Fort Collins on the north (to say nothing of the sprawling Denver in between) had long depended on these stored supplies, often storing all winter

291. Interview with Stuart Shelton, *supra* note 16; Interview with Stephen Glasser, *supra* note 7.

292. Transcript of Hearing Before Special Master, app., *United States v. New Mexico*, 438 U.S. 696 (1978) (No. 77-510).

flows behind the dams and leaving none for the forest streams below. Now, in the late 1980s, the Forest Service, "responding to changing public values and a more sophisticated knowledge of environmental health,"²⁹³ announced that it would renew the dam permits only if some flows were restored to the streams below the dams.

The announcement set off battles on a variety of well-publicized and familiar fronts. The Ninth and Tenth Circuits seemed to uphold federal authority to "consider" water flows in making land use decisions, although neither case involved denying access across federal land to reach water on Forest Service lands.²⁹⁴ The Forest Service's Steve Glasser, hoping to head off a collision, had Congress appoint a seven-member commission, hopefully to straighten out the Colorado mess.²⁹⁵ Despite early optimism, the commission could not agree and in the end issued majority and minority reports, each almost as long, as convincing, as scholarly, and as incompatible²⁹⁶ as had been the almost contradictory agency opinions on federal non-reserved water rights in the late 1970s and early 1980s.

New Mexico v. United States haunted the different perspectives. Proponents of federal power to employ land use controls to achieve instream flows by limiting state-based access to water on federal land could point to John Carlson's final point in his 1978 brief to the Supreme Court. Colorado water judge Robert Behrman had stated the same idea even more emphatically in 1993 when he denied the Forest Service instream flow rights to guarantee "favorable conditions of water flow." The Forest Service," said Behrman on more than one occasion, "controls the faucet" (through land use controls) so it did not need to worry about rights to the flow. Now again, advocates for Forest Service power to require bypass flows in Colorado simply said that *United States v. New Mexico* may have limited Forest Service water rights, but bypass flows involved wholly separate land use controls.

To opponents of Forest Service power to require bypass flows, this categorization seemed ironic. Hadn't the Forest Service lawyers claimed in the *Mimbres* case that all Forest Service "uses" implied a reservation of water? The Forest Service lawyers had lost that point.

293. GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 550 (5th ed. 2002).

294. *Wyo. Wildlife Fed'n v. U.S. Forest Serv.*, 792 F.2d 981 (10th Cir. 1986); *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713 (9th Cir. 1993).

295. Interview with Stephen Glasser, *supra* note 7.

296. See Federal Agricultural Improvement and Reform Act, Pub. L. No. 104-127, § 389(d)(3), 110 Stat. 888, 1021-22 (1996) (creating a Federal Water Rights Task Force).

How could they now claim that Forest Service control over uses existed entirely outside any concern for water?

Besides, the whole debate smacked again of the importation of modern values into a debate that had been settled a century before and in favor of the power of private citizens acting under state law to establish water rights in non-navigable streams. If nothing else, Klein's history and Rehnquist's opinion had returned the late nineteenth century debate to the late nineteenth century. At the time that the rights were established and for a long time thereafter, state water rights required a diversion from where the water naturally occurred, transportation of the diverted water to a non-riparian place of use, and application of the diverted and transported water to beneficial use at the new place of use. New Mexico even allowed those seeking an appropriation of water a private right of eminent domain across the lands of unwilling riparian owners to get access to public water.²⁹⁷ In that context, how could Forest Service riparian land use controls deny state water holders established access to appropriative rights?

The Forest Service tried its best to finesse the impasse. In 2000 it issued a report on Forest Service water policies that restated the importance of instream flows to its lands but suggested many alternative methods for securing those flows, some of which paid full respect to the states.²⁹⁸ When testifying in 2001 before Congress about the ongoing Colorado bypass flow controversy, Deputy Forest Service Chief Randy Phillips allowed as how the Forest Service had no intention of cutting off the more than 8,000 private diversions on Forest Service lands.²⁹⁹ As if to prove it, the Service successfully helped to negotiate a series of voluntary agreements with respect to the controversial Front Range storage dams and minimum flows below them. For a moment it looked as if the Forest Service effort to neutralize *United States v. New Mexico* by employing its land use controls would not be necessary.

Then, in late 2003, Trout Unlimited hoisted the Forest Service on its own petard. The Forest Service had negotiated an acceptable voluntary bypass flow agreement with dam owners on La Poudre Pass Creek in the mountains west of Fort Collins and Greeley. The Forest

297. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986 (1970).

298. *WATER AND THE FOREST SERVICE*, *supra* note 18, at 12; see also FOREST SERV., U.S. DEPT' AGRIC., *WATER FOR THE NATIONAL FORESTS AND GRASSLANDS: INSTREAM FLOW PROTECTION STRATEGIES FOR THE 21ST CENTURY* (2000) (on file with Natural Resources Journal).

299. "Bypass Flows" on National Forest Lands: Joint Oversight Hearing Before the Subcomm. on Forests and Forest Health and the Subcomm. on Water and Power of the H. Comm. on Resources, 107th Cong. 19 (2001) (statement of Randy Phillips, Deputy Chief, Programs and Legislation, USDA Forest Service).

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