In the

Supreme Court of the United States

UNITED STATES,

Petitioner,

V.

NEW MEXICO,

Respondent.

No. 77-510

April 24, 1978

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Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	
v.	No. 77-510
NEW MEXICO, Respondent.	

Washington, D. C.

Monday, April 24, 1978

The above-entitled matter came on for argument at 2:22 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES W. MOORMAN, ESQ., Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Washington, D. C.; on behalf of the Petitioner

RICHARD A. SIMMS, ESQ., Special Assistant Attorney General of New Mexico, Santa Fe, New Mexico; on behalf of the Respondent

JOHN U. CARLSON, ESQ., P. O. Box 8749, Denver, Colorado; on behalf of Lakes Reservoir & Canal Co., et al., as amicus curiae, supporting Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-510, United States v. New Mexico.

Mr. Moorman, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES W. MOORMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MOORMAN: Mr. Chief Justice, and may it please the Court:

The Gila National Forest was created by a series of Presidential proclamations issued between 1899 and 1910 which reserved certain public lands in New Mexico from entry. The in this case is whether under the doctrine of reserve water rights those reservation proclamations also reserved waters of the Rio Mimbres for the needs of the Gila National Forest for in-stream flows for fish and wildlife, for stock watering and for recreation.

The case began before a Special Master appointed by the State District Court in New Mexico who concluded that the United States did indeed have such water rights for those purposes. The State District Court disagreed with the Special Master at the objection of the State of New Mexico and held first that the United States did not have a reserve water right for recreation purposes within the forest; secondly, the State District Court held that the United States did not have reserved water rights for stock watering purposes within the national

forest and thereby leaving grazing permittees to obtain whatever rights they could under state law; thirdly, the State District Court held that the United States could not have a reserved water right for in-stream flow in Rio Mimbres for those or any other purposes; and, fourthly, the District Court without comment deleted from the Master's proposed decree a water right for wildlife.

QUESTION: What does the record show as to why the in-stream flow issue was even in the case? Are there any upstream usersfor the water?

MR. MOORMAN: There are no upstream appropriators, Mr. Justice White.

QUESTION: Well, how would the issue as a practical matter ever arise? It says there might be, someone might want to --

MR. MOORMAN: There are some in-holdings upstream which might at some point become a point --

QUESTION: Someone might want to develop water above the forest?

MR. MOORMAN: The forst, of course, goes up to the crest.

QUESTION: Well, how can the in-flow issue ever be as a practical matter in the case? Because if it just doesn't rain, there is not going to be a -- or if it doesn't snow, there isn't going to be much of a flow, and if it does there is.

MR. MOORMAN: Well, we think --

QUESTION: So how come that issue is in the case?

MR. MOORMAN: Well, we have wondered in this case why it was challenged by New Mexico, but we do believe that --

QUESTION: Challenged, the only reason it would be challenged is that you claimed it.

MR. MOORMAN: That's correct.

QUESTION: Well, why would you claim it in this case?

MR. MOORMAN: Becuase we are required, we believe, to claim all of the water rights which we claim for the national forest in this proceeding. So if we did not claim the water right now, we would be forever foreclosed from claiming it later.

QUESTION: Well, that is a tough question, but why would it ever arise here? Who could ever possibly interfere with your in-stream flow?

MR. MOORMAN: A later appropriator upstream in an in-holding might.

QUESTION: So that is what you are really worried about?

MR. MOORMAN: Yes, Your Honor.

QUESTION: But you own way to the crest.

MR. MOORMAN: Well, but of course we are interested in in-stream flow below the crest. There are in-holdings in the forest above the points in the --

QUESTION: Do you mean fee title land?

MR. MOORMAN: Yes, Your Honor.

QUESTION: But I thought you said there weren't any upstream users.

MR. MOORMAN: They are not users but there are private lands upstream which could be points of diversion. In addition to that, someone --

QUESTION: They could transfer the water elsewhere?

MR. MOORMAN: That is correct.

QUESTION: Except you would never let them do it across your property, across the national forest. They would have to get your permission.

MR. MOORMAN: Well, but of course if we didn't have a water right, we would have no basis for denying them a right-of-way, Your Honor.

QUESTION: Well, your in-stream flow claim goes against down-stream appropriators who are prior in time to the national forest proclamation.

MR. MOORMAN: I believe that the in-stream flow, Your Honor, would be a great benefit to all the down-stream appropriators, junior or senior, because it is a non-consumptive use of water.

QUESTION: But some of them probably don't think so.

MR. MOORMAN: I doubt that, Your Honor, because I am sure they want in-stream flows to reach them.

QUESTION: Well, this goes against upstreamers.

MR. MOORMAN: The people who would complain about in-stream flows generally would be upstream junior appropriators.

QUESTION: Yes.

MR. MOORMAN: Yes.

QUESTION: Straighten me out in my geography. Does the Mimbres flow into the Rio Grande?

MR. MOORMAN: It does not. It flows down into the desert and it ends somewhere north of the Mexican border. It is not really tributary to any other stream.

QUESTION: But the Gila flows into the Colorado?

MR. MOORMAN: The Gila does, yes, Your Honor.

QUESTION: That is on the other side of the divide then?

MR. MOORMAN: So I understand.

The Supreme Court of New Mexico affirmed the District Court, holding specifically that the United States does not have any rights to maintain an in-stream flow in the Rio Mimbres and in addition specifying that the United States does not have reserved rights for the purpose of stock watering and recreation.

The New Mexico Supreme Court reached this holding because it concluded that the purposes for which the United States claimed reserve rights from the Rio Mimbres for the Gila National Forest were not within the purposes for which a forest

could be established under the Organic Administration Act of 1897. Under that Act, in the New Mexico Court's view, a national forest can only be established for the two purposes of supplying timber or supplying water for down-stream appropriators. The New Mexico Court reasoned that the reservation of land for the Gila National Forest could not have reserved water rights for stock watering or recreation, as those were not the purposes of the reservation.

The New Mexico Court also held that the United States could not reserve an in-stream flow for any purpose. The specific present rights which the United States seeks in the Mimbres are set forth at pages 192 and 193 of the appendix. There is set forth 91.18 acre-feet of consumptive use mostly for stock watering. There are also listed a few rights there on page 192 and 193 for domestic recreation, which is another word for camp ground. There is one small right listed for a tenth of an acre-foot for wildlife. In addition, there are some rights listed for matters not in contention here for stock watering and residential, and that would be the ranger's home or a fire tower. Also listed are the three non-consumptive in-flow stream rights of three cubic-feet -- of two cubic-feet per second each.

The Special Master's report also provided that the United States could have a year to present additional claims for the future needs of the forest if the United States chose

to do so. Because the District Court, however, ruled as a matter of law that the United States could not have most of the rights it sought here, and because the United States appealed that ruling, the time never arrived for the United States to submit any evidence of future needs. However, if we prevail here today, Your Honors, we will submit evidence of some additional consumptive use but no additional in-stream flow use.

QUESTION: Your in-stream flow claim is bounded on the downward side of the river by the boundary of the national forest?

MR. MOORMAN: Yes, Your Honor. It would be measured at three locations.

QUESTION: But would any of them be below the lower boundary of the national forest?

MR. MOORMAN: No, Your Honor. The governing law of this case, the doctrine of reserved water rights is not in dispute. It rests on a long line of decisions of this Court. Reserved water rights are often referred to as Winters rights, after the leading decision of this Court in 1908 in the United States v. Winters, which first fully enunciated the doctrine.

QUESTION: Was it a long line of opinions?

[Laughter]

MR. MOORMAN: Well, I believe there are at least -- it depends, I guess, on what you think is long, but we have at

least 80 years of decisions now, and there are six or seven Supreme Court opinions on the subject.

QUESTION: On the subject of water rights reserved by implication?

MR. MOORMAN: Yes, Your Honor. I think the doctrine was foreshadowed in the 1899 decision of United States v. Rio Grande Dam & Irrigation Company, which discussed a number of the authorities cited by New Mexico here. In that case, the Court stated with regard to the water rights of the United States that in the absence of specific authority from Congress, a state cannot by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow of its waters so far at least as may be necessary for the beneficial uses of government property. And I am citing 174 U.S., at 703.

Most recently, in 1976, this Court enunciated the doctrine in the case of Cappaert v. United States as follows: When the federal government withdraws its land from the public domain and reserves it for a public purpose, the government by implication reserves the pertinent water then unappropriated to the extent needed to accomplish the purposes of the reservation.

QUESTION: Well, you are not equating the pupfish in Cappaert with the Gila trout here, are you?

MR. MOORMAN: I'm sorry, Your Honor, I didn't

understand the question.

QUESTION: You are not equating the concern for the pupfish in Cappaert with the Gila trout here, are you?

MR. MOORMAN: Oh. In that case, the United States reserved water for the purpose of preserving the pupfish, a somewhat limited purpose. Here the question is what are the purposes of the Gila National Forest and whether the water rights which the United States claims falls within those purposes. It is the position of the United States that the reserved water rights it seeks for wildlife, for stock grazing, for recreation and for in-stream flows for those and other purposes such as fire protection or to provide a continuous flow of water, do indeed fall within the purposes for which the Gila National Forest was reserved.

And since there have been some questions on it, I would like to take up first, if I could, the --

QUESTION: Of course, failing that, you can always resort to eminent domain, can't you?

MR. MOORMAN: Well, only if Congress authorizes it and, of course, we have no way of knowing what the ramifications of that would be, Your Honor. It would be hugely expensive at this late date.

QUESTION: And very controversial, wouldn't it? It has always been controversial as to what would be done with western land reservations, and the western state Senators and

Representatives have always kept the heat on the Department of the Interior and other executive agencies to make sure that there was proper consideration for the interests of private proprietors on those western lands.

MR. MOORMAN: I think, Mr. Justice, you understand the politics very well.

QUESTION: Well, is that wholly divorced from the law?

MR. MOORMAN: Well, I think Congress has never taken upon itself to give up the reserved water rights, so I think we must take the law as it stands in that way. They certainly have been aware of them for many, many years and it --

QUESTION: There was also considerable debate, it is reflected in the briefs and opinions, as to what the purpose of the national forests were going to be and how restricted or how wide open those purposes were going to be, wasn't there not?

MR. MOORMAN: That's correct, Your Honor.

The New Mexico courts held that the United States could not have an in-stream flow in the Rio Mimbres for any purpose whatsoever. We consider this both an absurd and a harsh result because it means that junior appropriators could take all of the water from the streams and de-water the national forests so there would be no water available for any purpose, legitimate or not.

Now, as I read the brief of the State of New Mexico, they have conceded that this holding goes too far and that the United States can have an in-stream flow in the national forest for the appropriate purposes of the national forest. I further read their position to be that they simply differ with us as to what are the appropriate purposes of the national forest. They take a much narrower view than the United States does, and we believe that this concession of the State of New Mexico alone requires reversal in this case, and I refer the Court to Footnotes 11 and 15 of the state's brief.

The state's concession is well grounded, because it is clear that the cases have not distinguished between flow and diversion rights. I have referred and quoted earlier the first case touching on the reserve rights doctrine, the 1899 decision in the Rio Grande Dam & Irrigation Company case, where the water rights of the United States are referred to as the continued flow of waters.

Special Master Rifkin in his opinion in Arizona v. California stated that one of the purposes of the national forest was to maintain natural flows, and the Organic Act itself states as the second purpose for which national forests may be established as for the purpose of securing favorable conditions of water flows.

QUESTION: What did this Court do with Judge Rifkin's finding or recommendation -- I've forgotten how you described it.

MR. MOORMAN: This Court issued a decree, Your Honor, in which it stated, it decreed that the United States had the right to divert water from the Gila and San Francisco Rivers in the Gila National Forest -- and I am quoting now from the decree -- "in quantities reasonably necessary to fulfill the purposes of the Gila National Forest, with priority dates of the date of withdrawal for the forest purposes of each area of the forest within which the water is used." And that is 376 U.S. 350. Now, that tracks almost exactly the language of the proposed decree of Special Master Rifkin which he attached to his report.

In his report, Judge Rifkin stated more specifically what the purposes of the forest were.

QUESTION: And that was not adopted by this Court, was it, in its degree, it was not incorporated?

MR. MOORMAN: It was not incorporated, but it is our view that it had to be the predicate for the decree or the decree did not decree any rights. It only then stated a rule of law, if that was not the predicate for the decree.

We have argued in our brief, of course, that that collateral estops New Mexico, which was a party to that case here.

With respect to all the water rights we claim, Your Honor, whether they are in-stream flow rights or consumptive rights, we argue that the United States is entitled to such

rights as they are all within the purposes of a national forest under the Organic Act. The Organic Act, Your Honor, reads in relevant part as follows, if I may: "No public forest reservation shall be established except to improve and protect the forest within the reservation or for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States."

In the following paragraph of the Organic Act, in relevant part, the Congress instructed the Secretary of the Interior "shall make provisions for the protection against destruction by fire and depradations upon the public forest and forest reservations." And a little bit further he was instructed that to make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction.

QUESTION: Mr. Moorman, where did we get all of these fancy names of the acts like the Creative Act and the Organic Act and Multiple-Use Sustained Yield Act? Is somebody down in the department charged with responsibility for figuring up fancy names?

MR. MOORMAN: They are getting worse, as I read what is coming out of Congress, Your Honor.

QUESTION: So you blame the law-makers, do you?

MR. MOORMAN: Well, I wouldn't blame this Court for that.

Our first argument under the Organic Act, Your Honor, is that those provisions of the Organic Act which call for the protection and preservation of the national forests must by implication have reserved water for the national forests. First, the Congress stated as its first reason for the establishment of national forests that they be improved and protected; and, secondly, Your Honors, the Congress twice gave clear instructions to the Secretary that he should take actnons to protect and preserve the forests, at one point referring to preservation of the forests as one of the objects of the reservation. Thus we argue, Your Honors, to the extent that the Secretary needs water so as to protect the forests, it must be reserved or Congress' plan would be thwarted.

For example, the development and placement of stock water holes is often the only way or the best way to insure an even distribution of the stock over the forests. A failure to achieve an even distribution of stock can quickly lead to overgrazing, ruined land and erosion. Thus when the forest ranger locates a water source for stock, he is not thinking simply of providing water for a use but he is also thinking of protecting the very soil of the forests from erosion.

QUESTION: Was any of the land reserved in the Gila National Forest reserved before the passage of the Organic Act?

MR. MOORMAN: No, the first proclamation was on March 2, 1899, Mr. Justice Rehnquist.

QUESTION: And the Organic Act was what, 1897?

MR. MOORMAN: 1897, June 6, 1897. Now, this principle of preservation applies equally to something such as a camp ground, although you might not think so at first. When a ranger locates his camp ground with a water diversion, he thinks not only of servicing campers but he also thinks of minimizing the risk of fire from the careless camper. By locating his diversion at a specific place, he not only attracts the camper to a safe location, he provides a source of water to put out the fire. And clearly if protection of the forest and its resources requires an in-stream flow as opposed to a diversion, there is nothing special about that.

QUESTION: Are you justifying the water for campers under the terms of the Organic Act?

MR. MOORMAN: Yes, indeed. We believe that the forests are open for campers, that the use of water is one of the tools which the forest ranger must use to protect the forest from campers, among other things. He uses it as an incentive to guide their camping in certain spots where it is safe from fire and as a resource to help put out camp fires.

I should point out that the use of the forests by campers and other recreationists is quite large. In 1976 alone, there were 822 million recreation days of use on the

national forests.

QUESTION: What was it in 1897, the year the Organic Act was passed?

MR. MOORMAN: In 1907, I think we -- I don't know what the figure was in 1897, but we do know that the area of the Gila National Forest -- I can speak for the Mimbres -- was visited. There were the Gila Hot Springs, which were later taken out of the forest and made into --

QUESTION: Well, do you think Congress really reserved the Gila National Forest as opposed to the various national parks for the purpose of use by campers?

MR. MOORMAN: No doubt about it. But I would like to draw the distinction between the two.

QUESTION: No doubt about what?

MR. MOORMAN: The fact that I think that Congress reserved the national forests for campers, Your Honor.

QUESTION: You are speaking now as of 1897?

MR. MOORMAN: Yes, I am. Congress clearly did not wish the national forests to be treated the way national parks were, which is to say areas which would not be -- where the resources would not be used in an economic way, such as cutting timber, range or hunting of deer. However, it is very clear, it seems to us, that Congress did intend for the forests to be used, it made a big thing -- there were a lot of references in the legislative history to the effect that the forests were to

be places of use, not places of non-use, and camping by all sorts of people was something that was done quite regularly in those days, not only for the kind of camper we think of today but campers in connection with grazing and other uses.

Recreational use of the forest was known at that time. And furthermore, I should say that the Forest Service assumed from the very beginning that this was one of the purposes of the national forests and Congress in fact in 1899, two days before the first proclamation was issued for this forest, passed a law authorizing the Chief of the Forest Service to lease land in the national forests adjacent to Hot Springs for the purposes of recreation.

I wish to make one other argument under the Organic Act, and that concerns the provision of the Act which refers to occupancy and use. The statute directs the Secretary to issue rules and regulations to regulate the occupancy and use of the forests. And we would argue that to the extent that he needs water for that purpose, water is also reserved and it would work this way, for example, a ranger would oftentimes go out and examine the range and determine that it is under-utilized. Now, he may prevent over-use by fencing, but oftentimes the only way he can prevent under-utilization of the range is by providing a water source, in our view, the extent of which the Forest Service needs water for use and occupancy to preserve and protect and to promote all of the uses which

Congress contemplated, water is reserved under the reserved rights doctrine.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Simms.

ORAL ARGUMENT OF RICHARD A. SIMMS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. SIMMS: Mr. Chief Justice, and may it please the Court:

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

Compounding that fundamental legal and historical misapprehension of the matter, the United States also ignores the fact that unlike any other federal enclave, unlike any other federal reservation of lands from the public domain, the national forests were designed with respect to water to maximize water yield to appropriators under state law.

I would like to make reference to your question, Mr. Justice White, about whether or not there were any private users upstream. In the forest there are -- in the Rio Mimbres drainage of the forest, there are 17,000 acres of patented fee

land. There are a number of diversions on some of these lands. Some of the diversions are being made by other parties to this adjudication against whom at this point in the litigation the rights of the United States have not vested.

QUESTION: So the in-stream flow is really a live issue?

MR. SIMMS: It is a live issue.

QUESTION: In this case, as a practical matter?

MR. SIMMS: I believe it is, and it is also live in the sense that if the Court were to recognize the minimum in-stream flow, we would effectively prevent the transfer of any water rights under state law. That is just as much a part of the property right under state law as is the right to divert.

If we jump over to the Gila side in the same forest, you can see its effect on Phelps Dodge Corporation. Phelps Dodge spent $125 million buying up water rights, transferring them to a point above certain forest lands; in total spent about $425 million creating a smelting plant. Subsequent to all of that, the United States, by filing a paper in the Office of the State Engineer in New Mexico, informs Phelps Dodge that they would now like to claim a minimum in-stream flow below that point of diversion.

QUESTION: I had the feeling from your brief and from some of the things you have already said that in a way you challenge the whole theory of reserved rights.

MR. SIMMS: No, we do not challenge the whole theory of reserved rights.

QUESTION: You are saying that is just the extent of it you are arguing about here?

MR. SIMMS: That's true. And unlike the assertion of the United States that there is no difference between us, there is a difference. There is a difference as to the way in which we apply the doctrine.

QUESTION: You take the position I think in your brief, don't you, that since the doctrine of reserved rights is an exception and is contrary to the general law, that appropriation of water in the western states is governed by state law since it is an exception, the implied reservation should be minimally and narrowly understood?

MR. SIMMS: For that reason and other reasons, Your Honor, that we discuss in the brief.

QUESTION: You do take that basic position?

MR. SIMMS: Right.

QUESTION: Do you fit in the reserved rights doctrine in the sense that when the United States has reserved or has created a national forest, that this is sort of an appropriation of water for beneficial use? Is that the way it fits in or not?

MR. SIMMS: I don't know if I understand your question, Mr. Justice White.

QUESTION: Well, I just want to know, is the reserve rights doctrine -- does it fit in with what you feel is the way the United States wanted to handle its water or to dispose of the water -- or is it an exception to the general rule?

MR. SIMMS: No, no, we think it does fit in. We aren't denying the existence of the reservation doctrine. What we are asking the Court to do is precisely what it did in Cappaert, to look at the authorizing legislation under which lands might be withdrawn from the public domain and then apply the principle of the reservation doctrine.

In this situation, forests were created in large part to protect the watersheds in order to maximize water yield to appropriators under state law. The national legislature, the Secretary of the Interior repeatedly in his rules and regulations -- his rules and regulations right out the door 26 days after the act was passed, noted that control of the flow and use of water was left to the individual states. By its assertion of claims to minimum in-stream flows, it seems that the United States is going quite beyond what was intended before.

At the same time, the decision of the New Mexico Supreme Court does not preclude the assertion of a claim to minimum in-stream flows provided that claim comes within the ambit of the purposes of the Organic Administration Act. No such evidence was put on in this case. The only evidence that was put on in this case related to the protection of fish, and

we submit that it is patently clear that the legislation and its history do not permit a reading that would say that fish purposes were among the purposes for which the lands of the forests could have been withdrawn.

Your Honors, the United States reply brief, while in my view says virtually nothing, I think is probably the most telling brief in this case. In response to the legislative history of the Creative Act of 1891, that piece of legislation that authorizes the President to withdraw the lands for national forests, in response to some forty pages of history relating to the Organic Administration Act of 1897, the Act which limits the purposes for which lands could be withdrawn under the 1891 Act, in response to the legislative history of all of the applicable rights-of-way statutes on into this century, in response to the history relating to the decisions of the Secretary of the Interior, in response to the decisions and opinions of the General Land Office, indeed the United States Attorney General, in its reply brief the United States offers no rebuttal, it offers no legal history, it offers no law.

Instead, what the United States tries to do in our view is to muddy the waters, is to make it a little bit more difficult to see this case clearly. The United States explains that we have somehow ameliorated the effect of the New Mexico Supreme Court's decision in our brief, that we have made a

concession. That is not true.

Indeed, subsequent to the decision in the case, the United States went before one of our state district courts and put on evidence in support of what it says we just now say they can do in our brief. I don't think their understanding of the decision was any different than ours. The decision was rendered the way it was because there was no evidence in the record for any of these other matters.

In the United States brief, it also refers to a number of appropriations statutes. This Court has never before held that reserved water rights arise out of appropriations of money. Reserved water rights arise out of withdrawals of land from the public domain.

The United States most importantly also argues that the U.S. never relinquished its rights, that somehow there is a broad power in the United States that makes these claims acceptable now, and because of that broad power this Court should not strictly construe the statutes authorizing the withdrawal of land from the public domain. I think their interpretation of the law is most definitely wrong.

They make reference to the Rio Grande case. In dicta in the Rio Grande case and subsequently in another case called Guterias v. Albuquerque Land & Irrigation Company, this Court said this: "Of course, as held in the Rio Grande case, even a state as respects streams within its borders in the absence

of specific authority from Congress cannot by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow of its waters so far at least as may be necessary for the beneficial uses of the government property."

They seem to say that we really don't need the reservation doctrine, that just by virtue of that dicta the United States could by fiat say that we now want water in the west, we are going to use water for this purpose, therefore it is ours. That is not true.

The waters in the west were severed. Plenary contorl was relinquished to the states. When Justice Sutherlund used the adjective "plenary," he used it advisedly. It means complete. When the waters were severed, they were severed. In the United States view, there is some illogical incomplete severance. There is no such thing in logic.

It is also clear from a reading of Rio Grande that that case is a case that says the United States may protect its right to navigability. That case got back to the Supreme Court three years later, in 1903. If the Court takes a look at that opinion, it is clear also that that case related only to navigability and not to non-navigable waters.

The important language with respect to non-navigable waters is in Justice Sutherlund's opinion in 1935, in California-Oregon Power Company v. Beaver Portland Cement. He

said, "In the absence of federal legislation, the states would be powerless to affect the riparian rights of the United States, but the authority of Congress to vest such power in the states and that it has done so by the legislation to which we have referred cannot be doubted." There is no question that the severance of water affects the riths of the United States, no question whatsoever. You can't use Rio Grande as a broad brush to somehow broaden the reservation doctrine. It just doesn't work.

Your Honors, I think 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 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 upheld.

Thank you.

[Whereupon, at 3:00 o'clock p.m., the argument in the above-entitled matter was adjourned, to reconvene on Tuesday, April 25, 1978, at 10:00 o'clock a.m.]

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