New Mexico Court of Appeals Says No To
Federal Reserved Water Rights for State School Lands

On September 24, 2008, the New Mexico Court of Appeals ruled unanimously that lands granted to the State of New Mexico in 1912, on the occasion of New Mexico becoming a state, do not enjoy the benefit of federal reserved water rights. The New Mexico Commissioner of Public Lands, who administers the so-called "school lands" and other lands granted to the State of New Mexico in 1912, sought a judicial determination in a general stream adjudication for the San Juan River in northwestern New Mexico that the federal doctrine of reserved water rights first described and applied in *Winters v. United States*, 207 U.S. 564 (1907), applied to state school lands in New Mexico. The New Mexico state district court rejected the Commissioner's claim, and the New Mexico Court of Appeals has affirmed that decision.

In *Winters* and its progeny, including *Arizona v. California*, 373 U.S. 546 (1963), and *Cappaert v. United States*, 426 U.S. 128 (1976), the United States Supreme Court established the federal reserved water rights doctrine and defined its parameters. Generally, the Court recognized "the power of the federal government, under certain circumstances, to impliedly reserve water [in conjunction with the reservation of federal lands for specific federal purposes] and exempt it from appropriation under state law." Slip Op. at 12, *citing Winters,* 207 U.S. at 577. In *Winters*, the Court concluded that when Congress established an Indian Reservation in Montana, Congress also impliedly reserved to the Indians "the right to the amount of water necessary to achieve the reservation's purpose." Slip Op. at 12, *citing Winters,* 207 U.S. at 565, 577.

According to the Court of Appeals, "the doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders." Slip Op. at 13, *citing United States v. New Mexico*, 438 U.S. 696, 702 (1978). Two fundamental elements are required in order to establish "the existence of a federal reserved water right: (1) that the federal government withdrew the land from the public domain and reserved it for a federal purpose and (2) that a certain amount of water is necessary to accomplish the purpose for reserving the land." *Id., citing Cappaert,* 426 U.S. at 138.

After stating that the federal reserved water rights doctrine is to be narrowly construed, Slip Op. at 17, the Court of Appeals set out to apply the two-part test to the claim of the New Mexico Commissioner of Public Lands.[1] " . . . '[T]he threshold question necessarily is whether the government has in fact withdrawn the land from the public domain and reserved it for a public purpose.'" Slip Op. at 17, *quoting Sierra Club v. Block*, 622 F.Supp. 842, 853 (D.Colo. 1985). From a public land law perspective, "withdrawal" and "reservation" have different and distinct meanings:

> "A withdrawal makes land unavailable for certain kinds of private appropriate . . . . It temporarily suspends the operation of some or all

[1] The Court noted that there were other elements that must be proved before a federal reserved right can be fully recognized and defined, but the Court focused on these two initial elements in its opinion.

> of the public land laws, preserving the status quo while Congress or the executive decides on the ultimate disposition of the subject lands.
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> "A reservation, on the other hand, goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use."

Slip Op. at 18, *quoting Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005).

The Court of Appeals noted that the Commissioner seemed to gloss over whether there was in fact both a withdrawal and a reservation. And, the Court noted that the previous Supreme Court precedent did not address in any detail whether there were federal reservations of land; "in each of those cases, it was undisputed that the federal government" had indeed established federal reservations of various types. Slip Op. at 19, *citing New Mexico,* 438 U.S. at 707 (National Forests); *Cappaert*, 426 U.S. at 140-41 (National Monuments); *Arizona,* 373 U.S. 601 (National Recreation Areas, National Wildlife Refuges, etc.); and *Winters,* 207 U.S. at 577 (Indian Reservations). Therefore, the question presented then is whether the federal legislation on which the Commissioner's claim depends "actually created a federal reservation of the school trust lands . . . by withdrawing and reserving them for a particular public use to further a federal purpose." Slip Op. at 20.

The Court of Appeals then considered the three statutes on which the Commissioner relied, the Organic Act of 1850, which established the boundaries of the Territory of New Mexico, the Ferguson Act of 1898, a precursor to legislation making New Mexico a state, and the Enabling Act of 1910, which "ushered" the Territory of New Mexico into statehood. While the Organic Act of 1850 "reserved" two sections (roughly 640 acres each) of land per township, the court indicated that use of the term "reserve" does not necessarily constitute a withdrawal and reservation of that land. Slip Op. at 20. In the case of the 1850 Organic Act, its operative or substantive provisions did not segregate those two sections from each township from operation of federal public land laws, including homesteading and other laws. The segregation was to occur only after certain surveying activities were completed. Under the 1850 Act, the Court of Appeals observed: "Until completion of the survey, the [school] trust lands remained in the public domain and were subject to disposal by the federal government. Thus, the Organic Act did not contemplate a withdrawal or reservation of the lands that it identified for purposes of now asserting a federal reserved water rights claim." Slip Op. at 20-21.

The Court then turned to the 1898 Ferguson Act. In the Ferguson Act, Congress acknowledged that some of the lands described in the 1850 Organic Act had in fact been reserved by the federal government for other purposes. Therefore, Congress provided for in lieu or indemnity lands to compensate for, or replace, the lands so reserved. Substantively, the Ferguson Act was little different than the Organic Act, and the court found that the Ferguson Act's in lieu or indemnity provisions belied any

intent that Congress sought to withdraw and reserve school lands for the State of New Mexico. Slip Op. at 22-23.

Finally, the court considered the 1910 Enabling Act. In the Enabling Act, Congress provided for the grant of four sections per township, and also provided for indemnity lands in the event those four sections were unavailable for a range of reasons. Slip Op. at 23-24. Not surprisingly, the Court concluded that the Enabling Act did not provide for a withdrawal or reservation of lands, but rather "simply conveyed lands out of federal ownership to the State of New Mexico. Similar to the Ferguson Act, by providing for indemnity lands that were meant to replace lands in the orginal grant that were, in fact, disposed of or reserved for a federal purpose, the Enabling Act displays Congress's cognizance of the difference between a reservation and a grant." *Id.* at 24. Consequently, the Court of Appeals concluded that the Commissioner "failed to prove the threshold requirements of demonstrating the existence of implied federal reserved water rights.

While the Court's conclusion described above is sufficient to defeat the Commissioner's claim, the Court then turned to whether the claimed "reservation" would have been for a federal purpose. Recognizing that the "support of common schools is a matter of national interest," the Court concluded that it was not a "federal purpose" which met the standard of the federal reserved water rights doctrine. *Id.* at 25. According to the Court, continuing federal ownership of the reserved land "appears to be a prerequisite to a determination that such [implied water] rights exist." *Id.* And, the oversight powers that the United States retained to ensure that the State of New Mexico administered its trust responsibilities over the state school lands was not sufficient to convert the administration of those state school lands into a federal purpose, particularly in light of the fact that the federal reserved water rights doctrine must be narrowly construed. *Id.*

Finally, the Court rejected the Commissioner's contention that Congress intended to convey water rights. The Commissioner argued that Congress was aware of the arid nature of New Mexico's lands and must have intended that water be reserved with the grant of lands "in order to make the lands more valuable." *Id.* at 27. The Court rejected the argument, acknowledging that Congress' response to concerns about the aridity in New Mexico was to increase the numbers of sections of land per township to grant to the newly admitted State. In effect, while there is no doubt that water makes land more valuable, the Court concluded that water was not necessary to effectuate the purpose of the grants of land to the State of New Mexico.

While the Court's decision forecloses application of the federal reserved water rights doctrine to state school and other state trust lands, this does not mean that state lands do not have the benefit of water rights for their development. To the contrary, as has been the case since statehood and even before, the Commissioner and those using state lands are free to develop water rights on those lands according to state law of prior appropriation.

If you have questions concerning this article or the subjects of federal reserved water rights and water rights development on state lands, please feel free to contact Maria O'Brien, mobrien@modrall.com or Walter Stern, western@modrall.com

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