UNITED STATES V. NEW MEXICO: PURPOSES THAT HOLD NO WATER

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In Western States, the scarcity of water and the substantial amount of land reserved by the federal government[1] present difficult problems of water allocation in the context of federalism. Much of the acrimony that now exists between the states and the federal government over water allocation has been generated by the implied-reservation-of-water doctrine. Under this doctrine, Congress impliedly authorizes the reservation of appurtenant, unappropriated water to the extent needed to accomplish the purpose for the land's reservation.[2] At least theoretically,[3] the reserved federal water right bears four characteristics that are incompatible with the Western States' appropriation water law:[4]

1. *See* United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978); E. DOLGIN, FEDERAL ENVIRONMENTAL LAW 501-03 (1974).

2. As defined in *United States v. New Mexico*, the "implied-reservation-of-water doctrine" empowers Congress to delegate authority to the President to reserve portions of the federal domain for specific federal purposes, impliedly authorizing him to reserve "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." 438 U.S. at 700 (quoting Cappaert v. United States, 426 U.S. 128, 138, (1976)). *See, e.g.*, Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 805 (1976); United States v. District Court, 401 U.S. 520, 522-23 (1971); Arizona v. California, 373 U.S. 546, 595-601 (1963); Winters v. United States, 207 U.S. 564, 597-98 (1908).

3. Since the Supreme Court first expressly recognized the reserved rights doctrine, it has had few occasions to apply it. See note 2 *supra*. Some commentators have suggested that because the non-Indian federal rights involved are often relatively small, the perceived theoretical incompatibility between state water law and the reserved rights doctrine is largely overplayed. Trelease, *Federal Reserved Water Rights Since the PLLRC*, 54 DEN. L.J. 473, 491-92 (1977). Since most federal reservations are located high on the Western watersheds, United States v. New Mexico, 438 U.S. at 699 n.3, reserved water rights do not typically impair upstream users. TASK FORCE ON FEDERAL NON-INDIAN RESERVED WATER RIGHTS, REPORT OF FEDERAL TASK FORCE ON NON-INDIAN RESERVED RIGHTS 16 (1979) [hereinafter cited as TASK FORCE]. Furthermore, nonconsumptive federal uses primarily involve instream flows which preserve water for appropriation under state law at points downstream from federal reservations. *Id.* Even when consumptive uses are involved, those uses are often minimal. *Id.*

4. Most Western States, including New Mexico, follow the prior-appropriation doctrine. *See, e.g.*, Clough v. Wing, 2 Ariz. 371, 381-82, 17 P. 453, 456-57 (1888); City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 909, 207 P.2d 17, 28 (1957), *cert. denied*, 339 U.S. 937 (1958); State *ex*

(1) Its creation is not contingent upon diversion or beneficial use,[5] (2) it is not dissipated by non-use,[6] (3) its priority is set from the date the land is withdrawn,[7] and (4) quantification of the right is contingent upon the amount of water necessary to fulfill the purposes for which the land was withdrawn.[8]

Consistent with this theoretical incompatibility and a history of congressional deference to state water law,[9] the United States Supreme Court, in *United States v. New Mexico*,[10] held that under the reserved rights doctrine, federal forest officials are empowered to secure enough water to advance what the Court found to be the two purposes of the Organic Administration Act of 1897.[11] In construing the Organic Act of 1897, the Court concluded that Congress did not intend to reserve water for such activities as recreation, wildlife maintenance, and stock watering.[12] To support this finding the Court relied heavily on an inspection of the Act's legislative history which was found to manifest an intent to ensure favorable conditions of water flows and continuous supplies of timber and nothing else.[13] In so holding, the Court appears

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rel. Reynolds v. Miranda, 83 N.M. 443, 448, 493 P.2d 409, 411 (1972). *See generally* F. TRELEASE, WATER LAW 30 (2d ed. 1974).

Under this doctrine, one who first diverts and applies the waters of a stream to a beneficial use has a prior right to the extent of this appropriation. Arizona v. California, 373 U.S. 546, 555-56 (1963). The right of a prior appropriator to the use of the water of a stream, absent statutory or constitutional provisions existing at the time of its acquisition qualifying it, is a property right that cannot be deprived without compensation. *Id.* The appropriator's interest is infused with the typical incidents of property rights in general, including the right of sale and transfer. Wyoming v. Colorado, 298 U.S. 573, 584 (1941). Although a prior appropriator secures a property right, he does not acquire title to the running water, at least not prior to actual diversion, unless he is entitled to take and use all of the water of the stream. Saint v. Guerrerio, 17 Colo. 448, 453-54, 30 P. 335, 337 (1892). In addition, it is generally held that to constitute a valid appropriation of water there must be a bona fide intent to apply the water to some beneficial use existing at the time or contemplated in the future. State *ex rel.* Reynolds v. Miranda, 83 N.M. 443, 448, 493 P.2d 409, 411 (1972). This, in turn, must be followed by a diversion from the natural channel by means of a ditch, canal, or other structure. Washington v. Oregon, 297 U.S. 517, 527-28 (1936). Finally, the appropriator must make an active application of the water, within a reasonable time, to a beneficial use. *Id.* The water right is limited and can be lost by abandonment when there is non-use coupled with an intention to abandon, CF & I Steel Corp. v. Puragatoire River Water Cons. Dist., 183 Colo. 135, 137-38, 515 P.2d 456, 457-58 (1973), or by involuntary statutory forfeiture. State *ex rel.* Reynolds v. South Springs Co., 80 N.M. 144, 147-49, 452 P.2d 478, 481-82 (1969).

5. COMPTROLLER GENERAL, GENERAL ACCOUNTING OFFICE, RESERVED WATER RIGHTS FOR FEDERAL AND INDIAN RESERVATIONS: A GROWING CONTROVERSY IN NEED OF RESOLUTION 59 (1978). *See* United States v. New Mexico, 438 U.S. 696, 700 (1978).

6. COMPTROLLER GENERAL, *supra* note 5, at 59.

7. *Id. See* Cappaert v. United States, 426 U.S. 128, 138 (1976); Winters v. United States, 207 U.S. 564, 577 (1908).

8. COMPTROLLER GENERAL, *supra* note 5, at 59. *See* United States v. New Mexico, 438 U.S. 696, 700 (1978).

9. Although the entire Court acknowledged this history of congressional deference to state water law, United States v. New Mexico, 438 U.S. at 701-02, 718, it recently split on the issue of congressional deference to state law in federal reclamation projects. *Compare* United States v. California, 438 U.S. 645, 668-69 (1978) *with id.* at 680 (White, J., dissenting).

10. 438 U.S. 696 (1978).

11. *Id.* at 706-07, 718.

12. *Id.* at 716-17.

13. *Id.* at 705-18.

to have rendered inoperative one of the statute's purpose clauses—"to improve and protect the forest."[14] By largely eliminating this clause's independent significance, the Court has narrowed the scope of purposes by which water can be reserved for federal forests. As a result of the Court's decision in *United States v. Mexico*, the continued preservation of wildlife in national forests is uncertain.[15]

This Comment will first present an outline of the Court's past treatment of the reserved rights doctrine and recount the majority and dissenting opinions in *United States v. New Mexico*. Because the interpretation of the Organic Act constitutes the major issue in this case, attention will then be focused on the different modes of statutory construction employed by the majority and dissent. Finally, an independent analysis that supports the dissent's construction of the Act will be offered.

BACKGROUND TO *UNITED STATES V. NEW MEXICO*

The implied-reservation-of-water doctrine operates when United States' public lands, such as Indian Reservations,[16] national parks,[17] or national forests,[18]are reserved or withdrawn. Under this doctrine, sufficient water resources are impliedly reserved to accommodate the purposes for which the lands were withdrawn.[19] Subsequent public or private water users, by virtue of the doctrine, have notice of these public acts and take water subject to the prior implied reservation of the United States.[20]

The doctrine's first underpinnings were established in the late nineteenth century in *United States v. Rio Grande Irrigation Co.*[21] In that case, a state-federal conflict arose over the uses of the water of the Rio Grande River.[22] The Court, while not expressly acknowledging

14. *Id.* at 707-10 & n.14.

15. *Id.* at 724 n.5 (Powell, J., dissenting).

16. Arizona v. California, 373 U.S. 546, 597-98 (1963); Winters v. United States, 207 U.S. 564, 577 (1908).

17. Cappaert v. United States, 426 U.S. 128, 143-46 (1976).

18. United States v. New Mexico, 438 U.S. 696, 698-99 (1978).

19. *Id.* at 698-700; Cappaert v. United States, 426 U.S. 128, 143-46 (1976); Arizona v. California, 373 U.S. 546, 597-98 (1963); Winters v. United States, 207 U.S. 564, 577 (1908). *Cf.* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 670, 703 (1899) (absent specific congressional authorizations, state cannot destroy federal government's right to continued flow of water within and bordering on its lands, so far as that water is necessary for beneficial uses of government property).

20. *See* Cappaert v. United States, 426 U.S. 128, 138 (1976).

21. 174 U.S. 690, 703-04 (1899).

22. *Id.* at 703. In *Rio Grande*, an irrigation company had attempted to construct a dam across the Rio Grande, claiming that the states (and territories) had the power to change the common law riparian rights doctrine and adopt prior appropriation law, under which diversions of the natural flow of a watercourse, including dams, were permissible. *Id.* at 702-03. Although agreeing that the states had the power to abrogate the common law and adopt prior appropriation law, *id.* at 703, the Court held that the state's power was limited by the federal government's right,

the doctrine, asserted that a state's right to appropriate water is constrained by the federal government's power to secure water to advance the uses of government property.[23]

The Court in *Winters v. United States*[24] transformed the *Rio Grande Irrigation* implication into an express judicial recognition of the existence of the implied-reservation-of-water doctrine.[25] In *Winters*, the Court confronted and resolved the issue of whether Congress impliedly reserved to the Indians a reasonable amount of water when it withdrew the Fort Bilknap Indian Reservation by treaty.[26] It responded to the question by finding that Congress withdrew the Indian reservation from the public domain in an attempt to make the Indian's historically nomadic life style more pastoral and sedentary.[27] That purpose, the Court stated, would remain unfulfilled if water sufficient to allow irrigation was not allocated to the Indians.[28] Beyond establishing the validity of Fort Belknap Indian Reservation's claim to water, the Court held that the date on which water was impliedly reserved was coterminous with the date of the Indian reservation's creation.[29] Thus, the priority of the federal interests was secured over subsequent state-created water uses.[30]

The Court first intimated that the doctrine might be lifted from the Indian reservation context[31] and applied to federally reserved lands

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as the owner of lands bordering on a stream, to the continued flow of the stream's waters and the federal government's power to secure uninterrupted navigability. *Id.*

23. *Id.* at 703. Although one commentator argues that the non-Indian reserved rights doctrine developed independent of the language in *Rio Grande*, Trelease, *supra* note 3, at 475, another commentator suggests that the doctrine can be inferred from the case. Clark, *Comments on United States v. New Mexico and California v. United States*, WATER LAW NEWSLETTER, No. 3, 1978, at 4. *See generally* Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 B.Y.U. L. REV. 639; *see also* Grow & Stewart, *The Winters Doctrine as Federal Common Law*, 10 NAT. RESOURCES LAW. 457 (1978).

24. 207 U.S. 564 (1908).

25. *Id.* at 577. *Contra*, Trelease, *supra* note 3, at 475 (arguing that non-Indian reserved rights were not recognized in *Winters*).

26. 207 U.S. at 577.

27. *Id.*

28. *Id.*

29. *Id.* at 577-78.

30. *Id.*

31. Indian rights under the reserved rights doctrine are probably accorded a much stronger emphasis than non-Indian reserved rights. *See* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 602 (1979) [hereinafter cited as D. GETCHES]; Clark, *supra* note 23, at 4. *See generally* Pelcyger, *The Winters Doctrine and the Reservations*, 4 J. CONTEMP. LAW. 19 (1977).

Indian reserved rights involve more urgent difficulties than non-Indian reserve rights because the former, unlike the latter, typically entail large consumptive demands. COMPTROLLER GENERAL, *supra* note 5, at 18. *See generally* Note, *A Proposal for the Quantification of Reserved Indian Water Rights*, 74 COLUM. L. REV. 1299 (1974).

Consistent with the federal government's trust responsibility over Indians, the Court has tended to resolve "competing inferences concerning congressional purpose to imply a prior right in favor of the Indians," often with the aid of sympathetic canons of construction. D. GETCHES, *supra*, at 602. *See* United States v. Ahtanum Irrigation Dist., 236 F.2d 321, 337 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957). In United States v. Walker River Irrigation Dist., 104 F.2d 334 (9th Cir. 1939), the court clarified the Indian-reserved-rights doctrine by stating that there was "no

generally in the *Pelton Dam* case.[32] In that case, the state of Oregon attempted to defeat the grant of a federal license to a private power company to build a dam across an in-state river, claiming that state consent to the project was required.[33] Oregon relied on the Desert Land Act of 1877[34] in asserting its authority over in-state nonnavigable waters.[35] In denying Oregon's contention, the Court cited the property clause[36] of the United States Constitution as authority for the federal government's power to issue a license to a private power company without Oregon's consent.[37] Underlying that general federal power, the Court noted, was the distinction between public lands and federal reservations.[38] Although the Desert Land Act of 1877 was clearly adequate to ensure state water law supremacy as to public lands,[39] its authority ceased when applied to federally reserved land.[40]

The *Pelton Dam* assertion that the reserved rights doctrine applied not only to Indian reservations but to any reservation of land from the public domain was confirmed in *Arizona v. California*.[41] The Court, while not specifying amounts of allocation, firmly established the doctrine's applicability to non-Indian federal reservations: The "principle underlying the reservation of water rights for Indian Reservations [is] equally applicable to other federal establishments such as National Recreation Areas and National Forests."[42]

Although the Court again recognized the doctrine in *United States v. District Court*[43] and *Colorado River Water Conservation District v.*

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reason to believe that the intention to reserve needs be evidenced by treaty or agreement," *id.* at 336, and found that departmental action was sufficient to reserve water. *Id.* In light of *United States v. New Mexico*, however, it is extremely doubtful that non-Indian reserved rights can be activated by departmental action, absent express congressional or executive authorization.

32. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

33. *Id.* at 440.

34. 43 U.S.C. § 321 (1976).

35. 349 U.S. at 446.

36. U.S. CONST. art. IV, § 3.

37. 349 U.S. at 442-46.

38. *Id.* at 443-44. "Public land" refers to land owned by the United States that is subject to private appropriation and disposal under state law. *Id.*

39. *Id.*

40. *Id.* at 446-48. In California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the Court held that following the Desert Land Act of 1877, 43 U.S.C. §§ 321-339 (1976), all nonnavigable water, then part of the public domain, became subject to the plenary control of the states. 295 U.S. at 163-64. Consequently, the ruling in the *Pelton Dam* case came as a great shock to the Western States. Subsequent Supreme Court decisions, particularly Arizona v. California, 373 U.S. 46 (1963), have precipitated a series of congressional bills that sought to either modify or abolish the reserved-rights doctrine. *See* Morreale, *Federal-State Conflicts Over Western Waters—A Decade of Attempted "Clarifying Legislation,"* 20 RUTGERS L. REV. 423, 423 n.1 (1966).

41. 373 U.S. 546 (1963).

42. *Id.* at 601. *See generally* Wilmer, *Arizona v. California, A Statutory Construction Case*, 6 ARIZ. L. REV. 40 (1964).

43. 401 U.S. 520, 522-23 (1971).

United States,[44] it also interpreted the McCarran Amendment[45] to authorize states and private parties to bring state court suits against the United States in general stream adjudication actions.[46] By creating concurrent state-federal jurisdiction, and expressing a tacit preference for adjudication in state courts,[47] these cases signaled the Court's increasing sensitivity to interests protected under state law.[48]

While the doctrine was held applicable to any federal reservation of land, the amount of non-Indian water allotments was not decided in the *Pelton Dam* or *Arizona v. California* decisions.[49] The doctrine of non-Indian implied-reservation-of-water rights was quantitatively applied for the first time in *Cappaert v. United States*.[50] In that case, the Court specifically acknowledged the doctrine's function as a water reservation power with regard to groundwater and wildlife. Yet also, consistent with the spirit of its interpretation of the McCarran Amendment, the Court confirmed the importance of contrary state interests.[51] Prior to the Court's review of *Cappaert*, Congress, through the American Antiquities Preservation Act,[52] had delegated to the President the power to reserve "objects of historic and scientific interest that are situated upon the lands owned or controlled by the Government."[53] In exercising this authority, the President had reserved Devil's Hole as a national monument.[54] The Presidential Proclamation cited the mon-

44. 424 U.S. 800, 805 (1976). The Court held that Indian reserved rights could be adjudicated in state court. *Id.* at 809.

45. 43 U.S.C. § 666 (1976). Prior to this amendment, there was no method to adjudicate these water rights. *See* Note, *Expansion of the Reservation of Water Rights Doctrine*, 56 NEB. L. REV. 410, 413 (1977).

46. Colorado River Water Conservation Dist. v. United States, 424 U.S. at 806-09; United States v. District Court, 401 U.S. at 522-23. *See generally* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111 (1978); Comment, *Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudication in Wyoming*, 12 LAND AND WATER L. REV. 457 (1977); Note, *Colorado River Water Conservation District v. United States: An Increased Role for State Courts in the Adjudication of Federal Reserved Water Rights*, 1977 UTAH L. REV. 315 (1977). The Court's interpretation of the McCarran Amendment resulted in the United States' joinder as the defendant in state court in United States v. New Mexico, 438 U.S. at 697 n.1.

47. In *Colorado River Water Conservation Dist. v. United States*, the Court ruled that the McCarran Amendment gave concurrent, not exclusive, jurisdiction over adjudication of federal reserved rights. 424 U.S. at 809. Nevertheless, the Court held that to avoid duplication and to prevent piecemeal adjudication of water rights from the same source in separate courts, state court adjudication was proper. *Id.* at 817-21. Federal authorities feared that state adjudication would result in unsympathetic determinations of reserved rights.

48. One writer has suggested that the holdings in these cases constituted an "indirect attack" on federal reserved rights. Clark, *supra* note 23, at 4.

49. *See* Arizona v. California, 373 U.S. 546, 601-02 (1963); Federal Power Comm'n v. Oregon, 349 U.S. 435, 446-48 (1955). Neither case involved quantification of non-Indian water allotments.

50. 426 U.S. 128, 141 (1976).

51. *Id.* at 139-41.

52. 16 U.S.C. §§ 431-450qq-4 (1976).

53. *Id.* § 431.

54. Presidential Proclamation No. 2961, 3 C.F.R. 147, 148 (1949-1953 comp.); 426 U.S. at 141-43.

ument's great archeological significance and the existence of the rare pupfish as motivating factors for the creation of the reservation.[55] The Court noted those presidential findings and concluded that existence of those two purposes of the monument's reservation was adequate to imply a congressional intent to reserve water sufficient to fulfill them.[56] The Court stated, however, that the doctrine was not without limitations and suggested the nature of those limitations: "The implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."[57]

Although the Court, in the past two decades, has found the doctrine to be a proper vehicle for the reservation of water to advance the purposes of non-Indian federal reservations, it has also suggested that an exacting inspection of these purposes is necessary to determine whether the doctrine's imposition is consonant with manifest congressional intent.[58] Hence, the recent language in *Cappaert*[59] reflects a tension to which the Court has, of late, been keenly aware: How broadly must the Court construe congressional dictates which, without the implied-reservation-of-water-rights doctrine, would otherwise be silent as against water user's claims arising from state prior appropriation water law?

UNITED STATES V. NEW MEXICO

The water at issue in *United States v. New Mexico* was the Rio Mimbres River, which originates in the Gila National Forest in New Mexico but runs through more than fifty miles of private land and provides substantial water for irrigation and mining.[60] In 1966, the State of New Mexico intervened in litigation initiated by private appropriators of the river's waters, seeking a state-wide resolution of water rights in the river.[61] Upon joining the action, New Mexico named the United States as a defendant.[62] The state district court appointed a Special Master who found that in reserving the Gila National Forest under the authority of the Organic Administration Act of 1897,[63] the federal gov-

55. See note 54 *supra*.
56. 426 U.S. at 141.
57. *Id.* The Court continued, finding that "[t]he District Court thus tailored its injunction, very appropriately, to *minimal need*." *Id.* (emphasis in original). *See generally* Note, *Cappaert v. United States: A Dehydration of Private Groundwater Use?*, 14 CAL. W. L. REV. 382 (1978); Note, *Expansion of the Reservation of Water Rights Doctrine*, 56 NEB. L. REV. 410 (1977); Note, *Determining Priority of Federal Reserved Rights*, 48 U. COLO. L. REV. 547 (1977); Note, *Federally Reserved Rights to Underground Water—A Rising Question in the Arid West*, 1973 UTAH L. REV. 43.
58. Cappaert v. United States, 426 U.S. 128, 141 (1976).
59. *Id.*
60. 438 U.S. at 697.
61. *Id.* at 697 n.1.
62. *Id.*
63. 16 U.S.C. §§ 473-475 (1976).

ernment had impliedly reserved water for several purposes, which included wildlife maintenance, aesthetics, stock grazing, and recreation.[64] The trial court rejected these findings and refused to recognize the United States' claim to water for those purposes.[65] The New Mexico Supreme Court affirmed the trial court's determination, holding that although recreation, aesthetics, cattle grazing, and wildlife preservation were uses for which the forest could be employed, no water could be appropriated from the Rio Mimbres for these purposes under the implied reservation doctrine.[66]

The United States Supreme Court affirmed, concluding that the state court had correctly applied the principles of federal law in determining the reserved rights involved.[67] Justice Rehnquist, writing for a bare majority, set the tenor of the Court's opinion by stating that "the question posed in this case . . . is a question of implied intent and not power."[68] By marshalling the legislative history surrounding its enactment, Justice Rehnquist found that the Organic Act authorized implicit water reservation for only two purposes: to secure favorable water flows and to furnish a continuous supply of timber.[69] The Court then drew comparisons between the Organic Act and subsequent congressional legislation.[70]

First, the distinction between national forests and national parks was offered to demonstate the disparity between the purposes activating their creation.[71] The opinion stated that since the National Parks Service Act of 1916[72] specifically adverted to aesthetic, wildlife, and recreational purposes, the absence of similar language in the Organic Act of 1897 indicated that those purposes were not contemplated in the creation of national forests.[73] Next, the Court noted that in the Act of March 10, 1934,[74] "Congress authorized the establishment within individual national forests of fish and game sanctuaries, *but only with the consent of the state* legislatures."[75] If the Organic Act authorized the

64. Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 411, 564 P.2d 615, 616 (1977), *aff'd sub nom.*, United States v. New Mexico, 438 U.S. 696 (1978).

65. *Id.*

66. *Id.* at 412-13, 564 P.2d at 615-17. To buttress its construction, the New Mexico court compared the Organic Administration Act of 1897, with the Multiple-Use Sustained-Yield Act of 1960. *Id.* at 413, 564 P.2d at 618. The court reasoned that while the Multiple-Use Act specifically singled out wildlife preservation and recreational use as purposes of national forests, those purposes were supplemental to the objectives of the Organic Act of 1897. *Id.*

67. 438 U.S. at 718.

68. *Id.* at 698.

69. *Id.* at 707-09 n.14.

70. *Id.* at 708-15.

71. *Id.* at 709.

72. 16 U.S.C. §§ 1-460kk (1976).

73. 438 U.S. at 709.

74. 16 U.S.C. § 694 (1976).

75. 438 U.S. at 710 (emphasis in original).

reservation of forest land to improve and protect fish and wildlife, the Court reasoned that the 1934 Act would have been unnecessary.[76] It also found that the reservation of instream flows would be inconsistent with the purpose for which Congress created the national forest system.[77] Finally, the Court cited the Multiple-Use Sustained-Yield Act of 1960.[78] Although wildlife and recreational purposes are mentioned in that Act, the Court labeled those purposes as secondary, having no retroactive or broadening effect on the purposes of the Organic Act of 1897.[79] In addition, the Court concluded that Congress did not intend the purposes of the Multiple-Use Sustained-Yield Act to require additional reservation of water.[80]

Stock watering was also discounted as an activating purpose of the doctrine under the Organic Act.[81] Although the Court admitted that stockwatering was a purpose of the Act, it was relegated to the status of an indirect purpose, insufficient to authorize the reservation of water under the implied reservation doctrine.[82] As such, water necessary to graze stock could only be appropriated under state law.[83]

In response to the majority's opinion, four Justices joined in a partial dissent written by Justice Powell.[84] While expressing no opinion on the ultimate effect of the Multiple-Use Sustained-Yield Act,[85] the dissent agreed with the majority that the Organic Act "cannot fairly be read as evidencing an intent to reserve water for recreational or stockwatering purposes."[86] The dissent found, however, that Congress did intend to reserve water for wildlife in national forests.[87]

Justice Powell presented a two-fold attack on the majority opinion. First, he noted that both the New Mexico court and Congress had found that there were three purposes in the Organic Act, not two as the majority had held.[88] Those purposes were identified as: (1) Improving and protecting the forest; (2) securing favorable conditions of water

76. *Id.*
77. *Id.* at 711-12. *But see id.* at 723 n.4 (Powell, J., dissenting) (wildlife is necessary to secure watershed and timber purposes of Organic Act).
78. 16 U.S.C. §§ 528-531 (1976).
79. 438 U.S. at 713-15.
80. *Id.* See note 85 *infra*.
81. 438 U.S. at 716.
82. *Id.*
83. *Id.*
84. *Id.* at 718-725.
85. *Id.* at 718-19 n.1. Justice Powell stated that "[a]lthough the Court purports to hold that passage of the 1960 Act did not have the effect of reserving any additional water in then-existing forests, . . . this portion of its opinion appears to be dicta." *Id.* (citations omitted). Reservation of additional water under the Multiple-Use Sustained-Yield Act of 1960 was never at issue in the case. *Id.* See text & notes 139-42 *infra*.
86. 438 U.S. at 718.
87. *Id.* at 719.
88. *Id.* at 720.

flows; and (3) furnishing a continuous supply of timber.[89] Justice Powell further contended that these prior delineations of purposes were consistent with a facial examination of the Act.[90] Second, the dissent asserted that even assuming a need to explore the legislative history of the Act, such an inspection revealed a sensitivity for the wildlife of the national forests.[91] The dissent concluded by noting that since reservation of instream flows is not a consumptive use, it conflicts neither with the needs of downstream appropriators nor with the underlying purposes of the Organic Act.[92]

STATUTORY CONSTRUCTION

Actual Subjective Intent and Manifest Intent

The primary distinction between the majority and dissenting opinions in *United States v. New Mexico* rests on their differing interpretation of the Organic Act which, in pertinent part, provides: "No national forests shall be established, except to improve and protect the forest within the boundaries, 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 citizens of the United States. . . ."[93]

While the majority discerned only two purposes in the act—securing favorable conditions of water flows and furnishing a continuous supply of timber—[94] the dissent found a third purpose—to improve and protect the forest wildlife.[95] Although possibly reflecting substantive differences with regard to the problems of federalism generally,[96] this conflict in interpretation is an apparent outgrowth of the disparate methods of statutory construction employed in *United States v. New Mexico*.

The majority opinion eschewed an initial analysis of the Organic Act's text and instead, immediately focused on the Act's legislative history.[97] This history was also inspected by the dissent but not before it had first examined, to its satisfaction, the text of the Organic Act.[98] The distinction is more than a matter of emphasis.

In heavily relying on legislative history, the majority's approach

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 724.
93. 16 U.S.C. § 475 (1976).
94. 438 U.S. at 707 n.14.
95. *Id.* at 719.
96. *See* Clark, *supra* note 23, at 4 (suggesting that recent water law decisions might encourage a new provincialism).
97. 438 U.S. at 707 n.14.
98. *Id.* at 720-21.

can be characterized as a search for what Congress itself subjectively meant in enacting the Organic Act.[99] By first analyzing the Act's text, the dissent displayed more interest in what the statute means to the congressional audience.[100] This difference in approach is captured in two terms: actual subjective intent and manifest intent.[101]

Actual subjective intent can be defined as the collective understanding that a legislative body attaches to the words of a particular statute.[102] An inspection of actual intent focuses on what the legislature meant when it enacted the statute.[103] Consequently, the legislative history of the statute—floor debates, committee reports, and committee hearings—is freely consulted in order to ascertain the act's meaning.[104] Manifest intent, on the other hand, refers to the meaning that a reasonable person could glean from the statute's text without immediate resort to legislative history.[105] The disagreement within the Court as to the number of purposes in the Organic Act can be directly traced to these divergent modes of statutory construction.

Immediately after quoting the Organic Act, the majority diverted its attention from the Act's text: "The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes. . . ."[106] In a footnote, the majority explained that these predecessor bills and their attendant debates required a rewording of the Act: "[F]orests would be created only 'to improve and protect the forest within the boundaries,' or, *in other words*, 'for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.' "[107]

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99. "Our problem is not what do ordinary English words mean, but what did Congress *mean* them to mean." Commissioner v. Acker, 361 U.S. 87, 95 (1958) (Frankfurter, J.) (emphasis in original). *But see* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) (scope of judicial interpretive duty excludes consideration of subjective legislative intent); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930) (legislative subjective intent is undiscoverable and irrelevant).

100. "[W]e do not inquire what the legislature meant; we ask only what the statute means." Holmes, *Collected Legal Papers* 207 (1920) *reprinted in* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.07, at 20 (4th ed. D. Sands). *See* McBoyle v. United States, 283 U.S. 25, 26 (1931) (Holmes, J.). The term "congressional audience" refers to those subject to Congress' mandates.

101. Professor Dickerson's term, actual intent, is modified to emphasize the focus on the legislature's subjective perceptions of the statute's meaning. *See* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 79 (1975).

102. *Id.* at 69-70.

103. "It seems evident that 'intent of the legislature' [actual subjective intent] concentrates attention upon the 'sending' end of the communication relationship whereas the 'meaning of the statute' concentrates attention on the 'receiving' end." 2A J. SUTHERLAND, *supra* note 100, § 45.07, at 21.

104. *See* R. DICKERSON, *supra* note 101, at 82.

105. *See id.* at 69-70, 80-81; Coffman, *Essay on Statutory Interpretation*, 9 MEM. ST. L. REV. 57, 59 (1978); Radin, *supra* note 99, at 867.

106. 438 U.S. at 707.

107. *Id.* at 707 n.14 (emphasis in original).

Although the practice of inserting new words into a statute in order to ascertain its meaning has been criticized,[108] the chief difficulty posed by the majority's technique emanates from the nature of the authority the Court offers in support of its textual alterations. The Court's rewording was not required because of a textual inconsistency or absurdity inhering in the bare statutory test;[109]rather, the alteration was offered in order to achieve a harmonious comparison between the Organic Act and a predecessor bill[110] which seemed to provide only two purposes.[111] Even though the comparison advanced by the majority might profitably be criticized on substantive grounds,[112] the technique's most salient deficiency lies in its avoidance of any initial interpretation of the Organic Act's text apart from its legislative history.[113]

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108. Courts generally decline to substitute or insert new words into a statute unless an unresolvable repugnancy or inconsistency would result, or unless the words substituted can be discerned from context or other extrinsic evidence. 2A J. SUTHERLAND, *supra* note 100, § 47.36, at 163-64. *But see* note 159 *infra*. The power to substitute is denied where the word substituted affects the essence of the act, where the statute is unambiguous, and where two legislative purposes are suggested and both render the act effective. *Id. See* Harris v. Commissioner, 178 F.2d 861, 863-64 (2d Cir. 1949) (Hand, J.) (error or omission must be plain before substitution allowed); Davies v. Citizen's Trust Co., 242 N.Y. 196, 197-98, 151 N.E. 205, 206 (1926) (words that would defeat statutory purpose will not be inserted into act); note 178 *infra*.

109. *See* 2A J. SUTHERLAND, *supra* note 100, § 47.36, at 163-64.

110. *See* 438 U.S. at 707, n.14. *Compare* Organic Administrative Act of 1897, 16 U.S.C. § 475 (1976) *with* H.R. 119, 54th Cong., 1st Sess., 28 CONG. REC. 6410 (1896).

111. 438 U.S. at 707 n.14.

112. The predecessor bill, in pertinent part, read: "That the object for which public forest reservation shall be established . . . shall be to protect and improve the forests *for the purpose of* securing a continuous supply of timber for the people and securing conditions favorable to water flow." H.R. 119, 54th Cong., 1st Sess., 28 CONG. REC. 6410 (1896) (emphasis added). Justice Rehnquist concluded that this prior bill, which quite expressly specified only two purposes, indicates that the Organic Act itself has only two purposes. 438 U.S. at 707 n.14. It is difficult to accept Justice Rehnquist's reasoning. First, since Congress never enacted this predecessor bill, it must be assumed that the prior bill did not comport with congressional desire. Congress' dissatisfaction with the predecessor bill seems evident in light of its subsequent insertion of the word "or" in place of the prior bills "for the purpose of." *See* T.V.A. v. Hill, 437 U.S. 153, 182 (1978); Arizona v. California, 373 U.S. 546, 580 (1963); Coffman, *supra* note 105, at 75-76; Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930). The insertion of the word "or" in the Organic Act implies that the statute, as enacted, had three purposes, strongly suggesting that Congress intended to expand the Act's purposes. *See* Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 199-201 (1974); Hardin v. Kentucky Utils. Co., 390 U.S. 1, 11-12 (1968). Second, if, as Justice Rehnquist admitted, other predecessor bills "could be read as setting forth either two or three purposes," 431 U.S. at 707-08 n.14, Congress' ultimate enactment of a bill that plainly establishes three purposes—the Organic Act—should be dispositive. This notion of congressional competency led Justice Jackson to remark:

> The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act . . . before final enactment. That is intended . . . to make sure that each House knows that it is passing and passes what it wants. . . . It is the business of Congress to sum up its own debates in its legislation. . . .

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951). *Cf.* R. DICKERSON, *supra* note 101, at 160 (nonadoption or rejection of a proposed amendment to a pending bill is normally inadequate as basis for inferring legislative intent) (citing Pine Hill Coal Co. v. United States, 259 U.S. 191, 196 (1922) (Holmes J.)) and Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737, 756 (1940)); Radin, *supra* note 99, at 873 (though successive drafts of bills are not successive stages in a statute's development, negative conclusions may accurately be drawn).

113. "[N]ot even the most reliable document of legislative history . . . may have the force of law. Certainly it may not be given weight equal to that of the statute to which it relates." R.

Generally, the first step in construing a statute must be an analysis of the statute's words, not its legislative history.[114] Despite wide acceptance of the primacy of textual meaning, the search for actual intent through legislative history encourages a court to either ignore or distort the facial import of a statute.[115]

DICKERSON, *supra* note 101, at 10. *See* Piper v. Chris-Craft Indus. Inc., 430 U.S. 1, 26 (1977) (legislative history must be used with caution). The primacy of the statute over its legislative history finds its most prominent expression in the "plain meaning" rule which, in its most extreme manifestation, precludes any resort to legislative history:

> If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right *to add to it or* take from it.

Lake County v. Rollins, 130 U.S. 662, 670 (1889) (emphasis added). *See* United States v. Missouri Pac. Ry., 278 U.S. 269, 278 (1929); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L. Q. 2, 5-6 (1939). Although the rule has been modified, Hutton v. Phillips, 45 Del. 156, 160, 70 A.2d 15, 17 (1949), and perhaps even abandoned, United States v. American Trucking Ass'n, Inc., 310 U.S. 534, 544 (1940) it does serve to reaffirm "the preeminence of the statute over materials extrinsic to it." R. DICKERSON, *supra* note 101, at 229. *See* T.V.A. v. Hill, 437 U.S. 153, 184 n.29 (1978) (when confronted with an unambiguous statute, legislative history is not normally inspected to ascertain meaning); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 472 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976); E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 164, at 256 (1940) (before the court can resort to any other source, it must first seek to find legislative intention from the words of the statute). *See generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1302-03 (1975).

114. *See* Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2330 (1979) (in every case of statutory construction, the starting point must be the language of the statute). Although the Court has expanded the role of legislative history in statutory construction by modifying established impediments to its invocation, principally the plain meaning rule, *see* cases cited in note 113 *supra*, it has also recently confirmed legislative history's subsidiary role and recanted earlier assertions that it would always consult such materials when ascertaining statutory meaning. T.V.A. v. Hill, 437 U.S. 153, 184-85, 184 n.29 (1978) (when statute is unambiguous it is not necessary to consult legislative history). The Court's oscillation on the issue reflects a continuing academic debate between advocates and opponents of legislative history. *See* R. DICKERSON, *supra* note 101, at 138. *Compare* Radin, *supra* note 99, at 873 (legislative history does not substantially aid in the interpretation of statutes) *with* Landis, *supra* note 112, at 888 (legislative history affords a compelling guide to intent).

The chief infirmities of the use of legislative history center on its unreliability and its unavailability. *See* R. DICKERSON, *supra* note 101, at 147, 154. Since legislative materials are typically unavailable to the legislative audience, those subject to the statute are denied notice of the statute's effect when a court relies upon legislative history in interpreting the act. *Id.* at 147-49. This criticism is of little significance in *United States v. New Mexico* because reserved rights, as a doctrine of judicial implication of legislative intent, were created without notice to western water users who had relied upon priorities established under state law. *See* text & note 4 *supra*. Since the Court in *United States v. New Mexico* employed legislative history as a means to limit the purposes for which water could be reserved under the doctrine, 438 U.S. at 707 n.14, its use can be viewed as ameliorating, rather than creating, notice problems.

The potential unreliability of legislative history, however, should have activated judicial caution in the case. The majority opinion substantially supported its holding that only timber and waterflow purposes were adequate to reserve water by citing congressional statements in floor debates. *See* 437 U.S. 707-11, 707-08 n.14, 708 n.15, 708-09 n.16. Such materials are the least reliable of all legislative sources. R. DICKERSON, *supra* note 101 at 156. Even more unsettling is the purpose for which these materials were used: cognition or ascertainment of statutory meaning. *See id.* This technique is indefensible. *Id.* at 157. Further, the majority's resort to legislative materials, arguably, creates, rather than resolves, the ambiguity in the Organic Act. *See* 438 U.S. at 720 (Powell, J., dissenting) (the natural reading yields three purposes). Legislative history should never be used to create ambiguity. R. DICKERSON, *supra* note 101, at 139. Similar criticism must also be directed at the majority's inspection of legislative materials prior to, and to the exclusion of, any analysis of the Organic Act's text. *See* text & notes 105-06 *supra*.

115. This reversal of priorities received implicit judicial sanction in a recent case when the

The search for an actual subjective intent by scanning legislative history is often motivated by a reluctance to infer legislative intent from the words of the statute.[116] There is an inherent epistemological futility in such recalcitrance. Since legislative history, like the statute itself, is invariably embodied in objective writings, the interpreter will always be confronted with the problem of inferring intent from the written word.[117]

Beyond this difficulty, the search for actual subjective intent tends to encroach upon the manifest intent of the statute.[118] A legislature can be fully aware of the broad purposes of a statute without ever mentioning them.[119] The legislative history might only reveal a legislature's concern for specific, discrete elements of the problem the statute is meant to correct.[120] Consequently, with regard to the broader concerns of a statute, the absence of an actual subjective intent evidenced by legislative history is quite predictable. Nevertheless, a legislative pronouncement in a statute is no less a reflection of legislative intent merely because a concomitant actual subjective intent is absent.[121] The thoughts of the legislators cannot exhaust the manifest intent as expressed in a statute's text:[122] A statute's idea, as manifest in its written text, has a life of its own.[123]

This follows naturally because a legislature typically attempts to subsume the unforeseen within the statute's provisions.[124] Since statutes are applied prospectively, unanticipated events are expected to be

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Court found that "[t]he legislative history . . . is ambiguous. . . . Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n.29 (1971). *See* Frankfurter, *supra* note 99, at 543. The practical effect of the Court's approach in *Volpe* is to stand the "plain meaning" rule on its head. *See* Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 636 (1954). The Court entertained similar priorities in Arizona v. California, 373 U.S. 546 (1963) when it announced that "*[t]he legislative history, the language of the Act*, and the scheme established by the Act . . . convince us . . . that Congress intended to provide its own method for . . . apportionment," *id.* at 575, and proceeded to analyze legislative history extensively before discussing the text of the statute at issue. *Id.* Even an advocate for the use of legislative history would probably not countenance such a reordering. *See* Landis, *supra* note 112, at 891 (legislative history affords a guide to intent).

116. "[T]he lazy judge is likely to take the legislative history as an excuse for foregoing the difficult problems of statutory analysis which it is his responsibility to meet." Bishin, *The Law Finders: An Essay in Statutory Interpretation*, 38 S. CAL. L. REV. 1, 17 (1965).

117. R. DICKERSON, *supra* note 101, at 82.

118. *See id.* at 80.

119. *Id.*

120. *Id.*

121. *See* Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2330-31 (1979).

122. "I cannot believe that any of us would say that the 'meaning' of an utterance is exhausted by the specific content of the utterer's mind at the moment." L. HAND, THE BILL OF RIGHTS 18-19 (1958). *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975), *rehearing denied*, 423 U.S. 884 (1976) (Rehnquist, J.); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 395 n.16 (1968), *rehearing denied*, 393 U.S. 902 (1969); R. DICKERSON, *supra* note 101, at 80.

123. J. Kohler, *Judicial Interpretation of Enacted Law*, in SCIENCE OF LEGAL METHOD 187, 195 (1921).

124. 2A J. SUTHERLAND, *supra* note 100, at 228; Frankfurter, *supra* note 99, at 539.

resolved by its provisions.[125] Consequently, by giving effect only to those parts of the statute that are mirrored in legislative history, the interpreter risks both inaccuracy and usurpation of the legislative function.[126]

These criticisms of actual subjective intent are cynically implicit early in Justice Powell's dissenting opinion: "My analysis begins with the language of the statute."[127] Thus, the dissent notified the reader that its priorities were markedly dissimilar to the majority's. Though admitting that the Act was unartfully drafted,[128] the dissent apparently found no inherent conflict within the statute[129] and proceeded to announce its "natural reading."[130] This reading yielded a purpose not discerned by the majority in its analysis of legislative history—to improve and protect the forest.[131] After noting that both the New Mexico Supreme Court[132] and Congress[133] had attributed three purposes to the Act, the dissent implicitly accentuated the distinction between actual intent and manifest intent, and its preference for the latter. As Justice Powell stated: "The Court then concludes that *Congress did not mean* to 'improve and protect' any part of the forest except the usable timber and whatever other flora is necessary to maintain the watershed. This, however, *is not what Congress said*."[134]

The dissent, of course, resorted to legislative and postenactment history to support its interpretation of the Organic Act. Contrary to the majority's technique, however, recourse to these interpretative aids was postponed until after the Act's text had been examined.[135] Like the majority, the dissent examined "actual intent," but by initially concerning itself with the issue of manifest intent as revealed in the Organic Act's text, it clearly relegated that investigation to a secondary status. Without first inspecting manifest intent as embodied in the Organic Act's text, resort to an actual subjective intent analysis invited a restrictive interpretation never intended by Congress.[136] The dissent, by first examining the Organic Act's text without regard to legislative history, presented a more balanced approach to construction. By observing the

125. *Id.*
126. *See* R. DICKERSON, *supra* note 101, at 9-10.
127. 438 U.S. at 720.
128. *Id.*
129. *See id.*
130. *Id.*
131. *Id.*
132. Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 412, 564 P.2d 615, 617 (1977), *aff'd sub nom.*, United States v. New Mexico, 438 U.S. 696 (1978).
133. H.R. REP. NO. 1551, 86th Cong., 2d Sess., 4, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2380.
134. 438 U.S. at 721 (emphasis added).
135. *See id.* at 721-25.
136. See text & notes 118-26 *supra*.

primacy of the statute's text, it refused to constrict the statute's manifest intent by the limits of actual subjective intent revealed in the Act's legislative history.

The Dichotomy of Purpose: Immediate and Ulterior Purpose in United States v. New Mexico

Both the majority[137] and the dissent[138] in *United States v. New Mexico* focused on the purposes of the Organic Act in determining the application of the implied-reservation-of-water doctrine. Neither, however, adequately explored the concept of purpose. The majority, in construing the Multiple-Use Sustained-Yield Act of 1960,[139] differentiated between primary and secondary purposes,[140] but this distinction was predicated on the questionable assumption that Congress established a hierarchy of purposes within the Act.[141] Purpose as a term of statutory construction remained unaddressed.[142] The Court's failure to

137. 438 U.S. at 707.

138. *Id.* at 718-721.

139. The Multiple-Use Sustained-Yield Act of 1960 provides:

> It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528 to 531 of this title are declared to be supplemental to, but not in derrogation of, the purposes for which the national forests were established as set forth in [the Organic Act].

16 U.S.C. § 528 (1976). The Court found that this Act expressly broadened the purposes for which national forests had previously been administered by including outdoor recreation, range, wildlife and fish purposes, *see* United States v. New Mexico, 438 U.S. at 714, but also indicated that the Act did not expand federal reserved rights. *Id.* at 715. The dissent labeled as dictum the majority's denial of expanded reserved rights, *id.* at 718-19, noting the majority's recognition that petitioner's had asserted only that the Act *confirmed* the existence of wildlife, range and recreation purposes in the Organic Act. *Id.* As to reservations after the 1960 effective date of the Multiple-Use Sustained-Yield Act, neither opinion expressed whether a broader reserved-rights doctrine might apply. 438 U.S. at 715 n.22.

140. 438 U.S. at 713-14.

141. In analyzing the House Report of the Multiple-Use Sustained-Yield Act, the majority concluded that outdoor recreation, wildlife and stock-grazing purposes were secondary to the water flow and timber purposes of the Act. *Id.* at 715. The same House Report, however, expressly denied the existence of any priority in the purposes of the Act: "The order in which the resources are listed in the bill is not to be construed as indicating any priority of one of the resources over another. . . . [N]o resource would be given a statutory priority over the others. The bill would neither upgrade nor downgrade any resource." H.R. REP. No. 1551, 85th Cong., 2d Sess. 4 *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2379. The Report also announced that "[t]here was some opposition to the suggestion that timber and watershed do not and should not have priorities in the establishment and administration of the national forests," and that the Act, as passed, pacified that opposition. *Id.* at 1-2, *reprinted in* [1960] U.S. CODE CONG. & AD NEWS 2378. Indeed, the committee amendments that were partially quoted by the majority, *see* 438 U.S. at 715, expressly refute the majority's contention that a primary-secondary purpose distinction was sanctioned by Congress: "It is also clear that . . . none of these resources is given statutory priority over the others." H.R. REP. No. 1551, 85th Cong., 2d Sess. 4, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2380. Since the majority's analysis of the Multiple-Use Sustained-Yield Act is dictum, *see* 438 U.S. at 713-14 n.21; *id.* at 718-19 n.1 (Powell, J., dissenting); text & note 130 *supra*, the question whether the Act reserved additional water for reservations established prior to or after 1960 is undecided. As the Court's 5-4 split in *United States v. New Mexico* indicates, subsequent interpretations of the Act and its legislative history might require a different result, especially in light of the apparently contrary language in the House Report.

142. The Court achieved the primary-secondary purpose distinction through a comparison of

examine purpose as a term of art in statutory construction is unfortunate because the concept might have clarified the issues involved in construing the Organic Act.

In statutory interpretation, a major dichotomy exists in the concept of legislative purpose: "Immediate purpose" refers to a particular purpose "that the statute is intended to directly express and immediately accomplish"[143] while "ulterior purpose" refers to a purpose "that the legislature intends the statute to accomplish or help to accomplish."[144] When a legislature enacts a statute, it advances immediate purposes directed as ameliorating specific problems and broader ulterior purposes encompassing notions of general welfare which are usually compatible with, but more wide-ranging than the immediate purposes of the statute.[145]

The primary subject of interpretation in *United States v. New Mexico*, appears to contain two immediate purposes and one ulterior purpose.[146] The Organic Act's provisions for securing favorable water flows and furnishing continuous timber supplies seem to be immediate purposes.[147] Both clauses direct action over specific concerns.[148] The provision "to improve and protect the forest,"[149] on the other hand, resembles the language of an ulterior purpose: it connotes an image of a broader, more remote concern. The assumption that such a dichotomy of purposes exists in the Organic Act is supported by Justice

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the Multiple-Use Sustained-Yield Act and its legislative history with the Organic Act. 438 U.S. at 715 (quoting 16 U.S.C. § 528 (1976) and H.R. REP. NO. 1551, 86th Cong., 2d Sess. 4, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2380). Since the House Report conditioned future reservations on the existence of one or more of the original purposes of the Organic Act, the majority reasoned that wildlife, recreation, and range purposes were not merely "supplemental," but also secondary to the purpose of the Organic Act and inadequate alone to reserve water. *Id.* The primary-secondary purpose distinction suggests that certain purposes have been deemed by Congress to be relatively more important than others. An ulterior-immediate purpose analysis, however, inspects the nature of purposes without necessarily attempting a hierarchical ordering. See text & note 145 *infra*.

For a discussion of the distinctions between purpose and motive see Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970); Heyman, *The Chief Justice, Racial Segregation and the Friendly Cities*, 49 CALIF. L. REV. 104, 115-16 (1961); Howell, *Legislative Motive and Legislative Purpose in the Invalidation of a Civil Rights Statute*, 47 VA. L. REV. 439, 440-44 (1961); MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 757 (1966); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 HARV. L. REV. 1807, 1887 n.1 (1970).

143. R. DICKERSON, *supra* note 101, at 88 (citing Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 371 (1947) and Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930)); Radin, *supra* note 99, at 875-77.

144. R. DICKENSON, *supra* note 101, at 88.

145. *Id.* This compatibility can be understood in terms of means-ends relationships. Practically any purpose, either immediate or ulterior, functions as a means to accomplish other purposes. Consequently, both immediate and ulterior purposes serve not only as discrete statutory ends, but also as means to the achievement of each other. Radin, *supra* note 99, at 876.

146. *See* 16 U.S.C. § 475 (1976).

147. *See id.*

148. *Id.*

149. *Id.*

Rehnquist's characterization of the implied-reservation-of-water doctrine: "Each time this Court has applied the 'implied-reservation-of-water-doctrine, it has carefully examined both the asserted water right and the *specific purposes* for which the land was reserved. . . .' "[150] Since the majority found that only timber and water flow purposes were "specific purposes" adequate to activate the reservation doctrine,[151] this language suggests that timber and water flow purposes were the immediate purposes of the Organic Act. If this assumption is correct, then the majority apparently asserted that only immediate legislative purposes have been sufficient to reserve water. This assertion is debatable, however, because in previous cases the Court had never modified the word "purpose" with the adjective "specific."[152]

Even if the majority of the Court in *United States v. New Mexico* were inclined to view ulterior purposes as sufficient to reserve water, its approach in construing the Organic Act—a reliance on legislative history and concomitant exclusion of textual analysis—was ill-suited to discern such broad purposes.[153] An examination of legislative history usually bares only immediate purposes.[154] Since the legislative process centers more on achieving agreement on the legislation's immediate purposes than on its ulterior purposes, legislative materials might contain only scant reference to the latter, even though these broader purposes are recorded in the statute's text.[155] Although legislative history might accurately reflect the immediate purposes of a statute, the same materials will generally fail to illuminate ulterior purposes.[156] Therefore, assuming that the clause "to improve and protect the forest" constitutes an ulterior purpose, the majority's failure to discover evidence of it in the Organic Act's legislative history is not surprising. The ab-

150. 438 U.S. at 700 (emphasis added).

151. *Id.* at 707-08.

152. *E.g.*, Cappaert v. United States, 426 U.S. 128, 138 (1976); United States v. District Court, 401 U.S. 520, 522-23 (1971); Arizona v. California, 373 U.S. 546, 595-601 (1963); Winters v. United States, 207 U.S. 564, 577 (1908). The assertion in *Cappaert* that Congress only reserved water sufficient to fulfill "minimal need," 426 U.S. at 141, is not implicit precedent for the requirement of "specific" purposes. *Cappaert* merely decided that once a purpose was viewed as sufficient to activate the reserved rights doctrine, the *amount* of water reserved would be tailored to "minimum need." It did not suggest that only "minimum" or "specific" purposes were required to activate the reserved rights doctrine.

The *Cappaert* Court, however, did have the opportunity to demand specific purposes but declined to do so. In President Truman's Proclamation creating the reservation in *Cappaert*, Presidential Proclamation No. 2961, 3 C.F.R. 147 (1949-1953 Comp.), a broad purpose (scientific interest) and a more specific interest (preservation of the pupfish) were announced, yet the Court did not state that only the specific pupfish purpose was adequate to reserve water: "The fish are one of the features of scientific interest." 426 U.S. at 141. Since the only water at issue in *Cappaert* was water for the pupfish, the Court tailored water requirements for that purpose to minimal need, but did not find that the specific pupfish purpose was exclusive. *See id.*

153. *See* text & notes 93-136 *supra*.

154. R. DICKERSON, *supra* note 101, at 90-91.

155. *Id.*

156. *Id.*

sence of persistent reference to an ulterior purpose in a statute's legislative history is hardly dispositive, however, especially when the Act's text specifically enumerates the broad purpose.[157] Consequently, the inability of legislative history to reveal ulterior purpose, at least in the context of the Organic Act, exemplifies actual subjective intent's failure to circumscribe manifest intent.[158]

Even if the existence of a broad, ulterior purpose in the Organic Act is not foreclosed by the absence of a parallel legislative history, a difficult issue remains: Which purposes should control the interpretation of the Act—the immediate or the ulterior? The authority against giving effect to the broader provisions rests on the proposition that where immediate purposes are contained in the statute's working provisions, and the ulterior purpose is set apart in the general purpose section of the statute, the immediate purposes should control.[159] This position should not dictate the construction of the Organic Act, however, because the assumed ulterior purpose—to improve and protect the forest—is contained in the same section as the immediate purposes,[160] suggesting that both the immediate and ulterior purposes are contained in the Act's working provisions. Furthermore, since there is a general compatibility between the three purposes in the Organic Act,[161] the assumption that the ulterior purpose must be excluded is unwarranted.[162]

Determining congressional purpose in the Organic Act is a delicate matter: the reserved rights doctrines as a creation of judicial implication, directly competes with Western States prior appropriation law.

157. See text & notes 93-136 *supra; cf.* Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2330-31 (1979) (even though legislative history did not reflect expansive purpose of statute, statutory language controlled).

It is arguable that wildlife purposes *were* reflected in the Organic Act's legislative history. *See* 438 U.S. at 721-25 (Powell, J. dissenting). Nevertheless, the absence of pervasive evidence in the Act's legislative history hardly precludes wildlife preservation as a purpose of the Act. Preservation of natural resources was a dominant theme in the 1890's, *id.* at 706 & n.13, which ultimately led to the indiscriminate creation of federal reservations. *Id.* The congressional response to the problem of imprudent reservation was the Organic Act of 1897 which defined the purposes for which reservations could be made in the future. *Id.* Although the Act's legislative history fully recounts the narrow, economically motivated purposes of watershed and timber preservation, the focus on these interests might only reflect the fears of some Western congressmen that reservations would be made in areas that would more profitably be devoted to agriculture or mining. *See id.* at 706, n.13. Such fears however, do not necessarily imply a desire to exclude from the Act an interest in protecting wildlife. As Justice Powell noted: "One may agree with the Court that Congress did not . . . intend to authorize the creation of national forests *simply to serve as wildlife preserves*. But it does not follow . . . that Congress did not consider wildlife to be part of the forest that it wished to improve and protect. . . ." *Id.* at 723 (Powell, J., dissenting) (emphasis added).

158. See text & notes 115-26 *supra*.

159. R. DICKERSON, *supra* note 101, at 99.

160. 16 U.S.C. § 475 (1976).

161. *See* text & notes 217-24 *infra*.

162. *See In re* Trans Alaska Pipeline, 436 U.S. 631, 643-45 (1978); R. DICKERSON, *supra* note 101, at 98-100; Radin, *supra* note 99, at 876-77.

Since the dissent agreed with the majority that the doctrine must be applied with sensitivity and deference,[163] it seems that the entire Court found the non-Indian reserved rights doctrine analogous to statutes that are in derrogation of the common law.[164] As such, it could be expected that the doctrine's activation would only be predicated on clear expressions of purpose.[165] The dissent's application of the implied-reservation-of-water doctrine, however, was animated by what it found to be a plain statement of legislative purpose—to improve and protect the forest.[166] To test the validity of the dissent's conclusion that this purpose was plainly articulated by Congress and applicable to wildlife, the following analysis will examine the Organic Act's text.

INTRINSIC AIDS AND INTERPRETATION OF THE ORGANIC ACT

The main problem of construction in *United States v. New Mexico* revolves around the meaning of the clause "to improve and protect the forest" in the Organic Act.[167] In order to refute the majority's contention that this clause was not a purpose of the Act and support the dissent's contrary view that the clause was a purpose sufficient to reserve water for forest wildlife, two propositions must be established: (1) That the clause was a separate purpose of the act; and (2) that the clause was applicable to wildlife. By employing intrinsic aids—presumptions and canons of statutory construction[168]—both propositions can be reasonably supported.

One of the most basic canons of construction states that each word, clause, and sentence of a statute is to be given effect: "[N]o part of a statute should be inoperative or surplus, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."[169] The majority opinion engages in

163. 438 U.S. at 723 (Powell, J., dissenting).

164. Although the riparian-rights doctrine was the common law of the Eastern States, F. TRELEASE, *supra* note 4, at 30, prior appropriation developed as the common law in the West. *Id.* Consequently, the relationship between prior appropriation law and the reserved-rights doctrine might be viewed as analogous to the interaction between common law and subsequent, modifying statutory law. As with statutes in derogation of the common law, 3 J. SUTHERLAND, *supra* note 100, § 61.01, at 41-42, the non-Indian reserved-rights doctrine has been applied restrictively. *See* United States v. New Mexico, 438 U.S. 698, 700-02 (1978); Cappaert v. United States, 426 U.S. 128, 143-46 (1976). *But cf.* Winters v. United States, 207 U.S. 564, 576-77 (1908) (doctrine of negative implication inapplicable to determination of Indian reserved water rights); United States v. Winans, 198 U.S. 371, 380-81 (1905) (treaty must be construed as Indians understood it).

165. *See* Shaw v. North Pa. R.R., 101 U.S. 557, 565 (1879).

166. 438 U.S. at 720-21.

167. *See* text & note 93 *supra*.

168. Presumptions of construction differ from canons of interpretation in that the latter have been more rigidly applied so that at one time it was thought that they approached the status of "rules." *See* R. DICKERSON, *supra* note 101, at 228. This distinction has apparently lost much of its value, however, because every rule or presumption of interpretation merely suggests probability, not certainty. *Id.* at 236.

169. Colautti v. Franklin, 439 U.S. 379, 392 (1979). *See* Reiter v. Sonotone Corp., 99 S. Ct.

interpretation methodology that runs precisely opposite this canon when it construes the Organic Act to mean: "Forests would be created only 'to improve and protect the forest within the boundaries,' " or, *in other words*, "for the purpose of securing favorable water flows and to furnish a continuous supply of timber."[170] Apparently the majority felt compelled to reword the statute in order to preserve the harmony between the Act's text and its history. This technique cannot be justified by an "obvious error" in the drafting. Instead, it represents a substantial departure from normal methods of interpretation.[171]

The dissenting opinion does not follow the majority's lead. Instead, it assumes that the first clause maintains a significance independent from and, of necessity, broader than the subsequent two clauses.[172] Although the underlying rationale is not expressly advanced, this is certainly the position of the dissent, because it suggests that the majority's interpretation renders the first clause of the statute wholly superfluous.[173] Analysis consistent with the dissent's intrinsic approach supports their conclusion.

A strict application of the plain meaning doctrine could have no compelling function under the linguistic circumstances presented by the Organic Act.[174] The degree of ambiguity present in the Act could, arguably, justify a tempered resort to reliable, relevant legislative history.[175] When conjoined with the canon that each element of a statute be given effect, however, the doctrine does tend to accentuate the literal[176] significance of the disjunctive "or" that connects the first clause of the Organic Act to the second and third clauses.[177] The majority's addition of the words "in other words" clearly distorts the plain meaning of the word "or." Indeed, "the word 'or' . . . is used in the inclusive sense of 'A or B, or both,' unless the context affirmatively shows

2326, 2331 (1979); F.A.A. v. Robertson, 422 U.S. 255, 261 (1975); United States v. Menasche, 348 U.S. 528, 538-39 (1955); 2A J. SUTHERLAND, *supra* note 100, § 46.06, at 63.

170. 438 U.S. at 707 n.14.

171. *See* text & note 108 *supra*.

172. *See* 438 U.S. at 720.

173. *See id.*

174. For a discussion of the plain meaning doctrine, see note 113 *supra*.

175. *See* R. DICKERSON, *supra* note 101, at 229-32.

176. The word "literal" is not used to suggest that the "rule of literalness" should be applied to the Organic Act. This "rule of literalness," which requires that "[s]tatutory words must be given effect according to their relevant dictionary senses," R. DICKERSON, *supra* note 101 at 230, has been criticized as excluding consideration of context and enforcing only the interpreter's subjective perceptions. *Id.*; 2A J. SUTHERLAND, *supra* note 100, § 46.02, at 52. *See* Lynch v. Overholser, 369 U.S. 705, 710-11 (1962). The rule of literalness is distinct from the approach in the text, which is more closely related to the Delaware Supreme Court's conclusion that "[i]mplicit in the finding of a plain, clear meaning of an expression *in its context*, is a finding that such meaning is rational and makes sense in that context." Hutton v. Phillips, 45 Del. 256, 260, 70 A.2d 15, 17 (1949) (emphasis in original). *See* Flora v. United States, 357 U.S. 63, 65 (1958) (Court must first apply literal meaning); 2A J. SUTHERLAND, *supra* note 100, § 46.04, at 55-56 (statute's meaning derived from internal context creates prima facie determination as to whether act is clear or ambiguous).

177. *See* text & note 93 *supra*.

that it is used in the exclusive sense of 'A or B, but not both.' "[178] Since the first clause of the Organic Act is connected to the second and third clauses by the disjunctive "or,"[179] convention indicates that the first clause is an independent element of the act.

Beyond analysis of the relationship of the clauses in the Organic Act, an application of intrinsic aids to the word "forest" suggests not only that the term contemplates wildlife, but also that the clause "to improve and protect the forest" is an independent purpose of the statute. One of these intrinsic aids is the presumption of common usage. Under this presumption, it is assumed that the drafter of a statute has reflected the basic presuppositions of communication.[180] Since communication depends on usage, it is assumed that an author adhered to the liguistic conventions of his society.[181] The presumption admonishes the drafter of a statute that deviation from common usage risks propagation of unintended meaning.[182] The majority opinion did not address itself to an examination of past or present common usage of the word "forest," while the dissent construed the term broadly to include wildlife.[183] Although the dissent examined the word "forest," it did not specifically invoke the presumption of common usage.[184] In ascertaining the meaning of "forest," the dissent did demonstate that the word "forest" has been used to include both vegetation and animal life,[185]

178. R. DICKERSON, *supra* note 101, at 233. *See* E. CRAWFORD, *supra* note 113, § 188, at 322-23. In Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979), the Court employed similar reasoning in construing the clause "business or property" in § 4 of the Clayton Act, 16 U.S.C. § 15 (1976). 99 S. Ct. at 2330-31. The respondents had contended that the word "business" restricted the meaning of property to the exclusion of noncommercial, consumer interests, an approach roughly analogous to the majority's construction of the Organic Act. *See* 438 U.S. at 707 n.14. The *Reiter* Court concluded, however, that such a

> strained construction would have us ignore the disjunctive 'or' and rob the term 'property' of its independent and ordinary significance; moreover, it would convert the noun 'business' into an adjective. In construing a statute we are obliged to give effect, if possible, to every word Congress used. . . . Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not. . . .

99 S. Ct. 2331. *See* F.C.C. v. Pacifica Foundation, 438 U.S. 726, 739-40 (1978). In *Reiter*, the court of appeals had asserted that legislative history indicated that "business or property" meant only commercial property because the word "business" restricted the effect of the word "property." 99 S. Ct. at 2329. This argument paralleled the majority's conclusion in *United States v. New Mexico* that legislative history confirmed that the "waterflows" and "timber" clauses were the only effective purposes of the Organic Act. *See* 438 U.S. at 707 n.14. Contrary to the majority's conclusion in *United States v. New Mexico*, however, the Court in *Reiter* found the statutory language controlling and disregarded the more restrictive implications of the legislative history. 99 S. Ct. at 2330-31. Ironically, Justice Rehnquist concurred in the Court's opinion in *Reiter*, "fully agree[ing] with the Court's construction of the phrase 'business or property.' " *Id.* at 2334.

179. 16 U.S.C. § 475 (1976).

180. R. DICKERSON, *supra* note 101, at 223. The presumption is rebuttable and "[a]lthough [it] does not bear with overwhelming force at each specific point in the text, it generally does so for the text taken as a whole." *Id.*

181. *Id.*

182. *Id.*

183. 438 U.S. at 720-22.

184. *Id.*

185. *Id.* at 721-23 (Powell, J., dissenting).

but most of its authority was confined to congressional pronouncements and technical treatises.[186] Although the latter would not normally yield indicia of common usage, resort to scientific or technical usage is unnecessary to support the dissent's viewpoint.

Reference to a good dictionary confirms the contention that "forest" means both vegetation and wildlife: the word is several hundred years old and was originally used to refer to a wooded tract of land in which the English and Scottish nobility housed their game.[187] From this etymological underpinning, it would strain reason to assert that the word "forest" ever elicited an image apart from wildlife in the British consciousness or suggest that the comprehensive meaning of the word was not accepted in the United States as a tacit linquistic assumption.[188] As the dissent noted,[189] more technical references confirm these conclusions and explain the long established and recognized interdependency between plantlife and wildlife in the forest.[190] Most convincing, however, is the dissent's well-supported contention that Congress had consistently understood and applied the term in its inclusive sense,[191] because it implied a congressional presumption that statutory and common usage were roughly coterminous.[192] Consequently, the dissent appears correct in asserting that few would naturally enter-

186. *Id.*

187. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 890 (1968). Ironically, the early British understanding of the word manifested indifference toward the timber component of forests by only requiring that the land be "more or less wooded." *Id.*

188. Although the early British understanding of the word would not, at least as a matter of primary image, ordinarily parallel the American usage of "forest," the common acceptance of wildlife as a component of forests is reflected in dictionary definitions. Even meanings that do not expressly refer to wildlife, encompass it by implication: "an extensive plant community of shrubs and trees in all stages of growth and decay with a closed canopy having the quality of self-perpetuation or of development into an *ecological climax*." *Id.* (emphasis added). If dictionary meaning is any indicator of popular meaning the common American understanding of "forest" would probably, at a minimum, incorporate wildlife into the term as an unstated, working assumption. Since the general dictionary definition fails to advert to the ecological element, however, more restrictive meanings are available. *Id. But see* note 192 *infra*.

189. 438 U.S. at 723 n.4.

190. J. MANVILLE, A TREATISE AND DISCOURSE OF THE LAWS OF THE FOREST 6 (1598); S. SPUR, FOREST ECOLOGY 155 (1964).

191. 438 U.S. at 721-22.

192. Although the dissent did not specifically reach this conclusion, it can be implied from the technique employed. By focusing on congressional perceptions of the meaning of "forest," *id.* at 720-22, the dissent engaged in an actual subjective intent analysis. See text & notes 115-127 *supra*. A possible supposition under such an approach is that the legislature enacted words as the legislators understood them "and presumed that this understanding matched that of the legislative audience." R. DICKERSON, *supra* note 101, at 70. Although the congressional presumption is typically unwarranted, *see id.*, the equivalence between the repeated congressional meaning, as recounted by the dissent, 438 U.S. at 721-23, and common usage, see note 188-90 *supra*, indicates that the assumption is appropriate in this case. Both the congressional and common usage emphasize broad, ecological meaning. *See* 438 U.S. at 720-25 (Powell, J., dissenting); note 188-90 *supra*. Further, legislative materials also indicate that the wildlife component in national forests is neither secondary nor derivative. *See* H.R. REP. No. 1551, 86th Cong., 2d Sess. 5, *reprinted in* [1960] U.S. CONG. & ADMIN. NEWS 2379. Consequently, external contextual evidence dissolves the more restrictive implications of dictionary meanings, *see* note 188, and points to an inclusive common usage.

tain the image of a still, lifeless tree farm in response to the term "forest."[193]

Another presumption of construction bolsters the dissent's broader definition of "forest." It is usually presumed that an author has not altered terminology unless he has intended to change meaning, and that he has not changed meaning unless he has varied terminology.[194] This presumption of formal consistency has particular applicability in the Organic Act. The first clause directs that "[n]o national forest shall be established, except to improve or protect the *forest*"; the third clause establishes that a purpose of the Act is "to furnish a continuous supply of timber."[195] The presumption that variation in terminology implies change in meaning is clearly implicated, yet the ultimate question remains: Whether, given the alteration, the word "forest" is broader than first assumed, or merely different from, but coextensive with, the term "timber." A resolution consistent with the majority position is not difficult to proffer. "Timber," it could be argued, simply means wood in its processed, utilitarian form and "forest" means timber still in its natural state. Construed in such a manner, there is no variation in meaning broad enough to suggest that "forest" includes wildlife.

An interpretation favorable to the dissent, however, is probably more reasonable. Had the drafters of the Act intended to exclude wildlife from consideration, the substitution of the word "timber" for "forest" in the first clause would have unmistakably achieved that effect and preserved a meaning consistent with that ascertained by the majority opinion. Since the drafters did not use the word "timber" in the first clause, it can reasonably be argued that the word "forest," rather than being an artistic variation without substantial change in meaning, is a broad term indicating something more than trees.

In light of the second clause in the Act, another issue is presented that entails the presumption of formal consistency: whether "forest" means trees and other vegetation, or trees, vegetation, and animals. A resolution favorable to the majority viewpoint might be that the former construction, trees, and vegetation, is more compatible with the second clause of the Act, to "[secure] favorable conditions of water flows."[196] Both vegetation and trees are essential to secure that function and wild-

193. 438 U.S. at 723.

194. R. DICKERSON, *supra* note 101, at 224. This rebuttable presumption of formal consistency can be weak or strong, depending upon whether the statute was carefully drafted and is consistent in punctuation, arrangement, and language. *Id.* at 225. Although the dissent suggested that the Organic Act was unartfully drafted, 438 U.S. at 720, commas follow each purpose clause, the purposes are sequentially presented, and no inconsistencies in the language used are evident. *See* 16 U.S.C. § 475 (1976).

195. 16 U.S.C. § 475 (1976).

196. *Id.*

life might not be important to achieve that purpose.[197] To support that interpretation, the majority could argue that the maxim "the specific controls the general" or *ejusdem generis*,[198] limits the word "forest" to mean trees and vegetation. The specific timber and waterflow purposes could be viewed as creating a class—trees and vegetation—too narrow to include wildlife.[199]

Such a construction, however, ignores ecological interrelationships which indicate that wildlife is a necessary constituent of a forest that provides timber and favorable waterflows.[200] Even if timber and waterflow purposes define a narrow category, wildlife preservation implicit in the broader purpose clause falls within that class.[201]

The only real issue under *ejusdem generis* is whether the "to improve and protect" clause should be given a restrictive construction at all.[202] Indeed, the Court was confronted with an interpretation problem in *Cappaert v. United States*,[203] similar to that in *United States v. New Mexico*,[204] yet it declined to restrictively define purposes.

In *Cappaert*, the Presidential Proclamation creating the Devil's Hole National Monument contained a broad purpose—scientific inter-

197. *But see* 438 U.S. at 723 n.4 (Powell, J., dissenting).

198. Where general words precede or follow specific words, the general words are construed to include only those items similar in nature to those objects specifically enumerated. J. SUTHERLAND, *supra* note 100, § 47.17 at 103-04.

199. *See* R. DICKERSON, *supra* note 101, at 234.

200. 438 U.S. at 723 n.4 (Powell, J., dissenting). The majority's failure to recognize this ecological relationship is conceptually inconsistent with its previous recognition of the hydrological interrelationship between groundwater and surface water. *See* Cappaert v. United States, 426 U.S. 128, 142 (1976).

201. *Ejusdem generis* should not be employed to "limit the operation of the statute to the specific objects set forth," 2A J. SUTHERLAND, *supra* note 100, § 47.18 at 109-11. The issue is not whether more than that specifically enumerated falls within the statute's ambit, but how much more. *Id.*

202. *See* United States v. Powell, 423 U.S. 87, 91-92 (1977) (*ejusdem generis* may not be used to defeat the purpose of the statute). Several exceptions to the doctrine suggest that the "improve and protect" clause might create a class distinct from that created by the timber and waterflow purposes. Since both the timber and waterflow clauses could be construed to be general or at least, diverse, the inference that Congress intended to restrict the general "improve and protect" clause with specifically enumerated purposes might not arise. *See* 2A J. SUTHERLAND, *supra* note 100 § 47.20, at 114. Furthermore, if the timber and waterflow clauses embrace all the objects within the class designated by the enumeration, the general "improve and protect" clause would assume content independent of the specific words. *See id.* § 47.21, at 116. A similar result would obtain if the statute were not construed as attempting an enumeration. *Id.* § 47.20, at 114. All these exceptions are arguably applicable to the Organic Act and suggest that the "improve and protect" clause created a class, distinct from the timber or waterflow purposes, that is broad enough to include stockwatering and recreation purposes. Since *ejusdem generis* is an outgrowth of the bias toward strict construction of statutes in derogation of the common law, *id.* § 47.18, at 111, it is not surprising that the exceptions to the rule were not invoked. The implied reservation-of-water-rights doctrine is analogous to a statute in derogation of the common law. *See* text & note 164 *supra*. Accordingly, the Court's reluctance to construe the "improve and protect" clause as creating a class broad enough to include recreation and stockwatering activities implies that its bias for a restrictive interpretation and the perceived congressional deference to state law, outweighed the exceptions to *ejusdem generis*. 438 U.S. at 718; *id.* at 718 (Powell, J., dissenting).

203. 426 U.S. 128 (1976).

204. 438 U.S. at 707; *id.* at 720 (Powell, J., dissenting).

est—and a narrow purpose—preservation of the pupfish.[205] The Court did not, however, find that the pupfish purpose, by virtue of its specific enumeration, was primary, and therefore, the only purpose adequate to reserve water.[206] Nor did it hold that the pupfish purpose was the exclusive purpose under the proclamation.[207] The *Cappaert* decision, consequently, is implicitly conflicting with the majority's assertion in *United States v. New Mexico* that the timber and waterflow purposes in the Organic Act are exhaustive,[208] and that the "improve and protect" clause is redundant.[209]

An application of intrinsic aids to the Organic Act demonstrates that the dissent was justified in concluding that the statute contained three purposes[210] and that the word "forest" includes a wildlife component.[211] The majority's contrary view[212] is unsupportable under such an analysis. Although the dissent did not apply intrinsic aids to the Act,[213] its assertion that the starting point of its examination was the statute itself is consistent with the approach employed here.

COMPATIBILITY OF STATUTORY PURPOSES AND DEFERENCE TO STATE LAW

Although an intrinsic aids analysis supports the dissent's contention that the first clause of the Organic Act—"to improve and protect the forest"—was a purpose of the Act, two issues still remain: (1) Whether the dissent's application of the implied-reservation-of-water doctrine to the first clause of the Act was sensitive to the history of congressional deference to state water law; and (2) whether recognition of wildlife purposes in the Act would defeat the watershed and timber purposes.

With regard to the first issue, by excluding recreational and stockwatering purposes from the Act's ambit, the dissent offered a fairly restrictive interpretation of the clause.[214] Only the reservation of water for wildlife was viewed as compatible with the manifest purpose

205. Presidential Proclamation No. 2961, 3 C.F.R. 147 (1949-1953 Comp.); 426 U.S. at 131, 140-41.

206. 426 U.S. at 141.

207. *Id.* Justice Burger, writing for a unanimous Court in *Cappaert*, recognized the breadth of the scientific interest purpose: "The fish are *one* of the features of scientific interest." *Id.* (emphasis added). The opinion does contain ambiguous language that can be read as implying that the pupfish purpose exhausts the class, *see id.*, but this language more plausibly indicates that once a purpose is recognized, water necessary to fulfill the purpose is reserved according to minimal need.

208. 438 U.S. at 707 n.14.

209. *Id.*

210. *Id.* at 720.

211. *Id.* at 721-23.

212. *Id.* at 718.

213. *Id.* at 720.

214. *Id.* at 718.

in the clause.[215] In addition, the dissent noted that the reservation of water for wildlife required by the Act's first clause would not drastically impair state interests because the instream flows necessary to sustain this purpose were essentially nonconsumptive.[216] Although it declined to adopt the majority's more restrictive application of the reserved rights doctrine, the dissent was still able to observe the Court's tradition of sensitively applying the implied-reservation-of-water doctrine, while also giving effect to the Organic Act in its entirety.

Nevertheless, a majority of the Court found that recognition of a wildlife purpose in the Organic Act was impossible because it would defeat the timber and watershed purposes of the Act.[217] The dissent not only concluded that wildlife preservation is ecologically consistent with the other purposes of the Act,[218] but also argued that, as an interdependent element of the forest, wildlife preservation was a necessary predicate to the achievement of favorable waterflows and timber.[219] Thus, even if timber and waterflow purposes defined and limited the possible categories of purposes under the Organic Act, in the dissent's view, wildlife preservation would fall within the class of purposes recognized by the majority.[220] Beyond this, however, it is clear that the dissent viewed the "improve and protect" clause as consistent with, but independent from, the classes created by the timber and waterflow purposes.[221] Although the class created by the "improve and protect" clause was construed narrowly by the dissent, wildlife, as an obvious intrinsic resource of the forest, was deemed adequate to reserve water.[222]

In light of the dissent's observations, the majority's assertion that a wildlife purpose would be inconsistent with waterflow and timber purposes seems unenlightened.[223] Nevertheless, the majority's analysis of

215. *Id.* at 719.
216. *Id.* at 724.
217. *Id.* at 707.
218. *Id.* at 724.
219. *Id.* at 723 n.4 (citing J. MANVILLE, *supra* note 190, at 6); S. SPUR, *supra* note 190, at 155.
220. 438 U.S. at 720-25, 723 n.4.
221. *Id.* at 724 n.5.
222. The dissent was concerned that if wildlife became endangered in a National Forest, under the majority holding, the federal government would be powerless to act. *Id.* Beyond the express provision in the Organic Act evincing concern over protection of the forest, 16 U.S.C. § 475 (1976), the Multiple-Use Sustained-Yield Act, *id.* §§ 528-531, and its legislative record indicate that Congress has, at least subsequently, displayed an intent to *preserve* wildlife. The express congressional rejection of resource priorities in the Act, *id.* § 528; H.R. REP. NO. 1551, 86th Cong., 2d Sess. 2-4, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2378-79, and the assertion that consideration given to the relative values of resources in any particular forest would not necessarily be contingent on pure economic return, 16 U.S.C. § 531(a) (1976), supports the dissent's view.
223. Perhaps the majority would have acknowledged the compatibility between wildlife, timber, and waterflow purposes had it not narrowly defined the waterflow purpose as principally expressing an intent to increase water quantities for irrigation and mining activities by private individuals under state law. *See* 438 U.S. at 711-12. Increasing water quantities for private users was clearly only one of the benefits anticipated in the waterflow clause of the Organic Act: Con-

the role of purpose in the reserved-rights doctrine implicitly presents a limiting principle, applicable to both non-Indian and Indian reserved water rights.[224]

CONCLUSION

The conflict between the majority and dissenting opinions in *United States v. New Mexico* illustrates the importance of method in statutory construction. By elevating the interpretive status of legislative history and minimizing the effect of ulterior purpose in statutory construction, the majority determined that only two purposes, timber and watershed, were sufficiently mirrored in the Organic Act's legislative history. The method of interpretation employed by the Court—analy-

temporaneous and subsequent legislative history indicate that the waterflow clause in the Act sought to encourage a broad *watershed* management under which flooding would be eliminated and waterflows regulated. S. DOC. No. 105, 55th Cong., 1st Sess., 10 (1897); H.R. REP. No. 1551, 86th Cong., 2d Sess. 2-3, *reprinted in* [1960] U.S. CODE CONG. & AD. NEWS 2378. Under the majority's construction of the waterflows clause, any reservation of additional water for wildlife purposes would, at least conceptually, defeat the perceived congressional intent to increase water quantity for private users. This conflict disappears when the clause is construed to mean overall watershed development, because wildlife preservation is an important component of watershed management. *See* 438 U.S. at 723 n.4 (Powell, J., dissenting). Even assuming that the waterflows clause principally referred to increasing water quantity, the reservation of water for wildlife purposes, as distinct from stock watering or recreational uses, involves only minimal consumptive use. *Id.* at 724 (Powell, J., dissenting).

224. The assertion that only "specific" purposes are sufficient to reserve water, 438 U.S. at 698, 700; *see* text & notes 150-52, could radically alter the scope of Indian reserved water rights. Traditionally Indian reserved rights, in contrast to non-Indian reserved rights, have been expansively defined, often with the aid of sympathetic cannons of construction. *See* Winters v. United States, 207 U.S. 564, 576-77 (1908) (doctrine of negative implication inapplicable to determination of existence of water right); United States v. Winans, 198 U.S. 371, 380-81 (1905) (treaty must be construed as Indians understood it); D. GETCHES, *supra* note 31, at 602. If "specific" statutory purposes are necessary to reserve water for Indian reservations, however, the breadth of future judicial implications of Indian water rights could be drastically constrained. Indeed, the court in Colville Confederated Tribes v. Walton, 460 F. Supp. 1320 (E.D. Wash. 1978) adopted such an approach. *Id.* at 1328, 1331. In denying the tribe's claim for water sufficient to support spawning grounds for a traditional food source, the *Walton* court specifically relied on *United States v. New Mexico. Id.* at 1330. The court found that the *New Mexico* opinion "articulated a more restricted view of the concept of reserved rights in general," *id.* at 1328, and held that, under the *New Mexico* standard, the purpose of the Indian reservation would not be defeated if the reservation of water for fish purposes were not implied. *Id.* at 1331. Since a nearby federal hatchery was providing trout to the Indian tribe, the strict necessity test of *Cappaert* and *New Mexico* had not been met. *Id.* at 1330.

The result in *Walton* seems particularly onerous because the tribe's natural food source, salmon and trout runs on the Columbia River, had been eliminated by the construction of federal reclamation and power dams. *Id.* Since the Indian interest asserted—autonomous and aesthetic control over a traditional food source—could be characterized as remote or ulterior, the *Walton* court's refusal to imply water is consistent with the spirit of *New Mexico. See* text & notes 143-52 *supra*. The court failed, however, to adequately justify its reliance on non-Indian water rights decisions in an Indian water rights case. Instead, the court suggested that *Cappaert* and *New Mexico* had announced restrictive principles applicable to the reserved rights doctrine generally. 460 F. Supp. at 1328. Neither *Cappaert* nor *New Mexico* purported to resolve Indian water rights issues. *But cf.* United States v. New Mexico 438 U.S. at 700 & n.4 (dictum) (suggesting that the Court inspected "specific purposes" in *Winters* and *Arizona v. California*). Consequently, the *Walton* court's assumptions that Indians no longer retain the benefit of liberal construction aids, *see* 460 F. Supp. at 1328, and that the *New Mexico* analysis of purpose is transferrable to the Indian water law context, *see id.* at 1330, are premature.

sis of legislative history, prior to any examination of the statute's text—can typically only reveal specific, "immediate purposes" because only those purposes are predominantly reflected in legislative history. By requiring that "specific purposes" activate the reserved rights doctrine, the Court intimated that in the future it will continue to narrow the doctrine's applicability and recognize only those purposes that are firmly grounded in legislative materials, even where a statute expressly contains broader, ulterior purposes.

Although the exclusion of ulterior purposes might be appropriate where they conflict with immediate purposes, the dissent was correct in asserting the essential compatibility between the ulterior purpose and the immediate purposes in the Organic Act. Moreover, the dissent's statutory construction priorities—analysis of the statute's text before resort to legislative history—not only comported with conventional interpretation rules but also preserved the dignity of an express statement of congressional purpose despite the absence of a concomitant legislative record. An intrinsic aids analysis confirms the dissent's conclusion by demonstrating the independent significance of the "to improve and protect" clause and the proper scope of the word "forest." The lack of any ecological or economic inconsistency between a wildlife purpose and timber and watershed purposes suggests that the dissent was correct in adhering to convention and eschewing the majority's extraordinary technique.