No. 08-_____ 081066 FEB 18 2009

In The

Supreme Court of the United States

COMMISSIONER OF PUBLIC LANDS
FOR THE STATE OF NEW MEXICO,

Petitioner,

v.

STATE OF NEW MEXICO *ex rel.*
STATE ENGINEER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals
Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New Mexico Commissioner of Public Lands may claim federal reserved water rights with respect to lands Congress reserved from the federal public domain, and granted to the State of New Mexico subject to a strict, federally enforceable trust, to support public education and for other related purposes specified by Congress.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals of the State of New Mexico were:

State of New Mexico *ex rel.* State Engineer (Plaintiff-Appellee);

Commissioner of Public Lands for the State of New Mexico (Defendant-Appellant); and

United States of America; Jicarilla Apache Nation; Navajo Nation; Ute Mountain Ute Tribe; San Juan Water Commission; and BHP Navajo Coal Company (Defendants-Intervenors-Appellees).

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PETITION FOR A WRIT OF CERTIORARI

The Commissioner of Public Lands for the State of New Mexico (hereinafter, the "Commissioner") petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of the State of New Mexico.

OPINION BELOW

The decision of the Court of Appeals of the State of New Mexico (App. 1a-32a) has not yet been published in the New Mexico Reports or the Pacific 3d Reports. The vendor neutral citation for the Opinion is 2009-NMCA-004.

JURISDICTION

The New Mexico Court of Appeals issued its Opinion on September 24, 2008. App. 1a. On November 20, 2008, the Supreme Court of the State of New Mexico entered an Order denying the Commissioner's Petition for Writ of Certiorari to the New Mexico Court of Appeals. App. 47a-48a. This Court has jurisdiction to review the decision of the New Mexico Court of Appeals under 28 U.S.C. § 1257, which authorizes review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any title, right, privilege, or immunity is specially set up or claimed

under the Constitution or the treaties or statutes of . . . the United States."

This case involves the Commissioner's claim to certain federal law water rights on the lands withdrawn from the federal public domain and granted in trust by the United States to the State of New Mexico to support public schools and for other related purposes (sometimes referred to herein as the "trust lands"). The Commissioner raised this claim as part of a state court adjudication of all water rights in the San Juan-Animas-La Plata River basin in northwestern New Mexico. The State Engineer of the State of New Mexico commenced the general water rights adjudication by filing a complaint in the Eleventh Judicial District Court, San Juan County, and later opened a subfile proceeding seeking a determination that the Commissioner may not claim any water rights arising under federal law. In response to a District Court order directing the parties to file briefs regarding the merits of Commissioner's federal law claims, the Commissioner filed a motion for general declaratory relief, and the State Engineer filed a motion for summary judgment against the Commissioner. The District Court entered an Order and Final Judgment in favor of the State Engineer against the Commissioner. App. 42a-46a.

The New Mexico Court of Appeals decision affirming the District Court judgment constitutes a final judgment or decree by the highest court of the State of New Mexico in which a decision could be had. In its Order and Final Judgment, the District Court

stated that the judgment was an appealable judgment pursuant to Rule 1-054(B)(1) of the New Mexico Rules of Civil Procedure. App. 45a. *See also State ex rel. State Engineer v. Parker Townsend Ranch Co.*, 118 N.M. 780, 781, 887 P.2d 1247, 1248 (1994) (holding that general adjudication subfile order adjudicating water rights as between the State and water rights claimant is a final and appealable judgment). Upon denial of certiorari by the New Mexico Supreme Court, the state court judgment became final for purposes of this Court's jurisdiction. *See United States v. New Mexico*, 438 U.S. 696 (1978) (reviewing New Mexico Supreme Court decision affirming a general stream adjudication judgment denying federal reserved rights claim asserted by the United States).

At issue is the Commissioner's assertion of water rights arising under federal law, specifically the "implied-reservation-of-water doctrine," *United States v. New Mexico*, 438 U.S. at 700, more commonly referred to as the "federal reserved water rights doctrine." *See generally Cappaert v. United States*, 426 U.S. 128 (1976); *Arizona v. California*, 373 U.S. 546 (1963); *Winters v. United States*, 207 U.S. 564 (1908). The federal reserved water rights doctrine derives from two sources of authority in the United States Constitution: the Commerce Clause of Article I, § 8, which permits federal regulation of navigable streams, and the Property Clause of Article IV, § 3, which permits federal regulation of federal lands. *Cappaert v. United States*, 426 U.S. at 138. Further,

the Commissioner's claim is based on federal statutes reserving the trust lands, and granting them to the State of New Mexico, as trustee, in a federally created and enforceable trust. As set forth in the Congressional acts reserving the lands and granting them to the State, the trust's express purpose is to provide a perpetual resource (lands and their revenues) to support civil infrastructure, primarily public education. The Commissioner claims that these Congressional actions implicitly included a reservation of an appurtenant right to use water needed to achieve Congress' purpose.

The New Mexico Court of Appeals based its decision on its interpretation of the federal reserved water rights doctrine as applied to the trust lands. App. 15a-31a. The Court acknowledged that the federal reserved rights doctrine represents an exception to the general rule that state law governs water rights. App. 16a (citing *United States v. New Mexico*, 438 U.S. at 702). The Court of Appeals said that the federal reserved water rights doctrine should be narrowly construed because of its potential effect on the administration of water rights arising under state law and the state law doctrine of prior appropriation.[1]

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[1] *See* N.M. Const., art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.") and § 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water.").

App. 16a-19a. Nonetheless it is clear that the Commissioner's claimed title, right, or privilege arises under and is governed by federal law, and that the Court of Appeals decision does not rest on any adequate and independent state law grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (adequacy and independence of any possible state law ground must be clear from the face of the opinion).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the appendix to this petition:

(i) New Mexico Organic Act of 1850, ch. 49, § 15, 9 Stat. 446 (1850);

(ii) Ferguson Act of 1898, ch. 489, §§ 1-4, 6-7, and 10, 30 Stat. 484 (1898);

(iii) New Mexico-Arizona Enabling Act of 1910, ch. 310, §§ 6, 7, 10 and 12, 36 Stat. 557 (1910);

(iv) School Lands Act of 1927 (Jones Act), ch. 57, 44 Stat. 1026 (1927), 43 U.S.C. §§ 870-871 (as amended).

STATEMENT

This case arises in the context of the long-standing federal policy of reserving lands from the

public domain to support public education. Following the American Revolution, Congress established a system for the orderly settlement of the new western lands obtained under the Treaty of Paris. *See* General Land Ordinance of 1785, reprinted in 2 *The Territorial Papers of the United States: Territory Northwest of the River Ohio, 1787-1803* at 12-18 (1934); Northwest Ordinance of 1787, reprinted in 1 Stat. 50 (1787). To ensure orderly development, the General Land Ordinance of 1785 required that the new lands be surveyed prior to settlement; and to promote good government, it required that section 16 in each township be reserved to support public education, thus providing for the educated electorate deemed essential to democracy. Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 803-06 (1992). A similar principle was incorporated into the Northwest Ordinance of 1787, which, in charting the settlement of the Western territories and their admission as states, declared that "Religion, Morality, and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall be forever encouraged." *Id.* at Article 3.

Increasing requirements for the establishment of civil and political institutions was intended to guarantee the passage from territorial status to admission into the Union on an "equal footing" with the more settled and developed Eastern states. Sally K. Fairfax & John A. Souder, *State Trust Lands* 19-26 (1996);

Sean O'Day, *School Trust Lands: The Land Manager's Dilemma Between Educational Funding And Environmental Conservation, A Hobson's Choice?* 8 N.Y.U. Envt. L. J. 163, 176 (1999) (land grant plan "was fueled by both a desire to place all states on an equal footing and a vision that those states would be settled by an enlightened people"). Over the course of the next 125 years, Congress generally followed the framework established in the Northwest Ordinance, which included consistently reserving and dedicating land from the public domain for the support of public education in 31 of the 35 states that entered the Union. *United States v. Wyoming*, 331 U.S. 440, 443 (1947); *Papasan v. Allain*, 478 U.S. 265, 268-70 (1986). The need to set aside resources for support of civil infrastructure became increasingly important as Manifest Destiny impelled a westward expansion into the arid and unpopulated western lands. Accordingly, more lands were set aside over time to ensure that sufficient resources would be made available to the citizens of newly admitted states. *See Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 460-63 (1967). This case presents the next chapter in enforcement of the federal policy to ensure that sparsely populated areas of the Western United States, as a condition of being admitted into the Union, would conserve and use the natural resources made available to them for the purposes intended by Congress – development of school systems and public infrastructure that would make them self-sustaining and not dependent upon the federal treasury.

The material facts concerning the Commissioner's reserved rights claim largely consist of the Congressional acts reserving the trust lands from the federal public domain and granting them in a federally enforceable trust, as well as the historical context in which each of those acts occurred. Although the grant in trust to the state necessarily conceded the sovereignty of the new state, the federally created trust imprinted upon those lands the historic federal purpose through the imposition of fiduciary duties, strict standards of management, and federal enforcement. The express trust permitted sufficient ongoing federal control over the granted lands to guarantee that they would serve, in perpetuity, Congress' purpose. In addition, the state court record includes extensive historical evidence of Congressional awareness that the arid lands of New Mexico required irrigation in order to provide value as a resource.

1. *New Mexico Organic Act of 1850 (Act of Congress dated Sept. 9, 1850), ch. 49, 9 Stat. 446 (1850).* In Section 15 of the New Mexico Organic Act, Congress provided that:

> When the lands in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory *shall be, and the same are hereby, reserved for the purpose of being applied to schools* in said territory, and

> in the states and territories hereafter to be erected out of the same.

(Emphasis added.) *See also* Revised Statutes of 1873 § 1946 (reaffirming school lands reservation in New Mexico, Arizona[2] and six other territories).

The Act clearly expressed a present intention to reserve the lands which "shall be and the same are hereby, reserved . . . " Since the General Land Ordinance had required that lands be surveyed before settlement, such a reservation was sufficient to assure the dedication of the lands to the stated purpose without interference. But soon after the New Mexico Organic Act, the government embarked on a new federal land disposal policy, first fully articulated in the Homestead Act of 1862, which encouraged more rapid settlement by permitting "homesteading" prior to survey. Although the overall federal purpose of promoting the orderly settlement, governance, and equal footing of Western states remained the same, the development of the lands and the education of the populace now appeared to conflict: lands reserved for education might be settled before they were identified by survey. Congress moved to harmonize these two policies by confirming the reservation of school lands, and by providing for lands equivalent to those which might be lost to early settlement.

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[2] The Territory of Arizona was carved out of the New Mexico Territory in 1863. Act of Feb. 24, 1863, ch. 56, 12 Stat. 664 (1863).

Under the Act of February 26, 1859, ch. 58, 11 Stat. 385 (1859) (Rev. Stats. § 2275), the reservation for school purposes did not apply where the school land had been settled for purposes of preemption prior to the survey. Otherwise, as the public land survey of each township was completed, title remained in the United States, but the reserved sections 16 and 36 were withdrawn from the federal public domain and were no longer subject to public entry. *Dugan v. Montoya*, 24 N.M. 102, 173 P. 118 (1918); *United States v. Elliot*, 41 P. 720, 722 (Utah Terr. 1895) (stating that reserved school lands are "public lands" in the sense of being owned by the federal government, but "they are not public lands in that they are open to entry."); *United States v. Bisel*, 19 P. 251, 253 (Mont. Terr. 1888) ("It is true that section 1945 reserves sections 16 and 36 in each township in the territory for public school purposes, and, while such reservation continues, such lands are *sub modo* segregated from the public domain; they are not open to settlement under the statutes regulating this subject; they would not pass under any granting act of congress that did not mention them; nor would they be embraced under the definition of "public lands," as given by Mr. Justice DAVIS in the case of *Newhall v. Sanger*, [92 U.S. 761 (1875)].").[3]

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[3] The New Mexico Court of Appeals incorrectly characterized the Organic Act reservation as merely a "promise" to grant a certain quantity of school lands in the future. App. 6a. In fact, the Organic Act had the immediate practical effect of precluding public entry of the reserved school sections for purposes of

(Continued on following page)

Thus, the Organic Act provided for the reservation of the lands for a specific federal purpose, and for their subsequent withdrawal once they were identified as available. Subsequent federal legislation preserved this intent in the context of new land disposal policies.

2. *Ferguson Act of 1898 (Act of Congress dated June 21, 1898), ch. 489, 30 Stat. 484 (1898).* New Mexico had been organized as a territory for an unprecedented 62 years before it was admitted as a state in 1912. Proclamation of Jan. 6, 1912, 37 Stat. 1723.[4] During that long wait, the state, not having title to the reserved lands, lacked the resources to support development of the civil infrastructure necessary to admission as a state on an equal footing. The Ferguson Act was enacted in anticipation of New Mexico's statehood and in recognition of the costs of delay in getting to that point. The Ferguson Act provided for a grant in trust of the school lands reserved by the Organic Act and additional quantities of land to support public institutions and infrastructure. *See* Ferguson Act §§ 1-3 and 6-7. Significantly, the Act provided for "indemnity" selection of lands to be granted in lieu of certain school sections which were excluded from the grant because they had been

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settlement when they were identified by the public land survey of a township.

[4] Similarly, Arizona was not admitted as a state until 1912. Joint Res. No. 8, August 21, 1911, 37 Stat. 39; Proclamation of Feb. 14, 1912, 37 Stat. 39.

classified as "mineral lands," had been reserved for other federal purposes, or had been homesteaded prior to completion of the public land survey. *Id.* at § 1. Congress thus assured that a certain quantity of lands would be dedicated to the purpose first expressed in the Organic Act reservation. *See United States v. Morrison*, 240 U.S. 192, 202 (1916) (discussing similar provision in Oregon Enabling Act).

However, the preservation of the federal purpose required further measures. Earlier grants of school lands had been dissipated through graft and mismanagement, thus frustrating the federal purpose. *Lassen*, 385 U.S. at 463-64. Thus, to assure that the land was used well and for the purpose for which it had been reserved, Congress imposed strict limitations on use and disposition, and required that the United States Secretary of the Interior approve any lease or sale as well as all investments made or securities purchased with the proceeds. Ferguson Act § 10. Further, all money received on account of the sale or leasing of such lands, after deducting expenses, was to be placed in separate funds to be used only for the purpose set forth in the Act. *Id.*

3. *New Mexico-Arizona Enabling Act of 1910 (Act of Congress dated June 29, 1910), Pub. L. 61-219, ch. 310, 36 Stat. 557 (1910).* In the New Mexico-Arizona Enabling Act, Congress confirmed and further extended the grant of school lands and expressly imposed strict fiduciary duties on the State with respect to management and disposition of these lands. In addition to section 16 and 36 in each township

reserved under the Organic Act and granted under the Ferguson Act, the Enabling Act granted sections 2 and 32 as school lands and provided for indemnity selections where those sections were unavailable. Enabling Act § 6; 43 U.S.C. §§ 851-852 (providing for the selection of "lieu" or "indemnity" lands); 43 U.S.C. § 854 (stating that §§ 851-852 supersede the Ferguson Act lieu land provisions). In keeping with the purpose of providing support for institutions and infrastructure needed to assure that New Mexico was entering the Union on an equal footing with other states, Congress provided for additional quantity grants in trust to support higher education, hospitals, and other civil institutions. Enabling Act § 7. Because these grants were made, in the first instance, as a quantity, no "lieu land" provisions were necessary.

In Section 10 of the Enabling Act, New Mexico was required to hold and manage the lands in a trust characterized by uniquely detailed limitations and requirements, enforceable by the Attorney General of the United States. These strict and federally enforceable trust requirements "marked a complete and absolute departure from the enabling acts under which other states were admitted to the Union." *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947). By means of this trust arrangement, the purpose of the original Organic Act reservation was preserved in the retention of federal control imposed through the State's fiduciary duties and federal enforcement rights.

The New Mexico Constitution confirmed the State's acceptance of the grants and the conditions placed upon them. N.M. Const. art. XXII, § 12, art. XIV, §§ 1-2 and art. XXI, § 9.

4. *School Lands Act of 1927 (Jones Act) (Act of Congress dated Jan. 25, 1927), ch. 57, 44 Stat. 1026 (1850), 43 U.S.C. §§ 870-871 (as amended).* While the Enabling Act had excluded "mineral" lands from the grant of numbered school sections, the School Lands Act of 1927 (also known as the Jones Act) removed that exclusion, with the proviso that the State reserve the minerals during land sales and place all proceeds of mineral leases into the Enabling Act trust. Any attempted disposition contrary to the School Lands Act would result in forfeiture of the mineral estate to the United States "by appropriate proceedings instituted by the Attorney General." 43 U.S.C. § 870(b). Thus, the United States retained a reversionary interest in these lands, to be exercised in the event that there was an effort to dispose of the minerals in violation of the School Lands Act.

5. Because the Enabling Act and School Lands Act imposed extraordinary conditions on the use and disposition of trust lands, the State cannot use or dispose of those lands or their revenues for general state purposes. *Ervien v. United States*, 251 U.S. 41 (1919). The Commissioner manages the Enabling Act trust only to generate revenue for the support of 21 institutions and programs, primarily the state's public schools. Enabling Act §§ 6-7; N.M. Const. art. XII, § 12 and art. XIV, §§ 1-2; NMSA 1978 § 19-1-17

(2005) (permanent, income and current funds). At present, the land trust holds approximately 9 million acres of surface estate and approximately 13 million acres of mineral estate statewide.[5] Revenue is derived from grazing and agricultural leases, mineral and oil and gas royalties, and general business development. *See generally* NMSA 1978 Chapter 19, Articles 7-11 and 13. In addition, limited amounts of the trust's surface estate are sold subject to the required mineral reservation. *See* NMSA 1978 § 19-7-9 (1989). In accordance with the Enabling Act, the New Mexico Constitution and state statutes, all trust revenues are placed in permanent funds and current funds designated for the benefit of the supported institutions. *See* Enabling Act, § 10; N.M. Const. art. XII, § 2, 7 and 12; NMSA 1978 § 19-1-17 (2005) (establishing permanent funds) and § 19-1-18 (1996) (providing for distribution of revenues into permanent and current funds).

As of December 31, 2008, the New Mexico Enabling Act trust had generated a permanent fund valued at $7.9 billion,[6] and in Fiscal Year 2008 the trust provided roughly $546 million in support to its

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[5] Because sale of the mineral estate is prohibited under the School Lands Act and state law, NMSA 1978 §§ 19-7-25 (1912) and 19-7-27 (1925), the mineral estate acreage is substantially greater that the surface estate acreage.

[6] In the last year and a half, the value of the fund has plunged by approximately $2.8 billion due to market conditions and other factors.

designated institutions. As impressive as this may seem, the trust cannot be said to have succeeded in fulfilling its federal purpose. New Mexico's consistent ranking among the lowest states in the provision of public education suggests that the roughly 40% of the school budget provided by the trust is inadequate. Were it not for the discovery of oil and gas reserves, unknown at the time of the Enabling Act or earlier, the trust's arid lands would have generated only negligible income. Yet Congress, at that time aware that ranching and agriculture were the only viable uses for Western arid lands, sought to accomplish the settlement and education of New Mexico through the reservation and dedication of land as the resource to sustain that purpose.

When Congress established the Territory of New Mexico and reserved land for common schools, and later when Congress provided for the admission of New Mexico as a state, it had long been recognized that much of the land was arid and was valueless without irrigation. Neither the Organic Act, the Ferguson Act, nor the Enabling Act specified how water rights would be established with respect to the trust lands. Nonetheless, it was evident that much of the land would require irrigation in order for it to provide the support Congress intended. As shown in extensive data and analysis which the Commissioner submitted to the District Court, (i) the trust needs additional funds to support public education, (ii) the use of groundwater underlying the trust lands would substantially enhance the support the trust provides

to public education; and (iii) federal reserved water rights can be administered in a manner that protects the interests of current users.

Due to the strictness of the trust terms, the Commissioner can only use trust revenues for the support of denominated state institutions and programs. No trust income can be diverted toward improvement of the trust lands. *Lake Arthur Drainage District v. Field*, 27 N.M. 183, 199 P. 112 (1921). The development of water rights and water resources on state trust lands is thus not an option for the Commissioner. The Commissioner must rely on trust land lessees to improve the lands by appropriating water for beneficial use on those lands; but those lessees would prefer, whenever possible, to develop such valuable resources on their adjacent lands. Because the acquisition water rights under the state law of prior appropriation is thus an uncertain source of creating the needed value in the trust lands, and because oil and gas revenues are expected to diminish as reserves become more scarce, the Commissioner is seeking to confirm the trust's reserved water rights in an effort to generate the support that Congress envisioned.

6. The general stream adjudication regarding the San Juan River Basin was commenced on March 13, 1975, when the State Engineer filed a complaint pursuant to NMSA 1978 §§ 72-4-15 through 19

(1907)[7] and 43 U.S.C. § 666(a). The subfile proceeding[8] from which this Petition arises concerned a Declaration of State of New Mexico Trust Reserved Water Rights, which described the general premises upon which the Commissioner anticipated claiming federal reserved water rights as part of the adjudication. In the subfile proceeding, the court compelled the Commissioner to file a Motion for Declaratory Relief seeking to establish a general right to claim federal reserved water rights appurtenant to the trust lands, and the State Engineer simultaneously filed a motion seeking a summary judgment "adjudicating that [the Commissioner] has no water rights arising under federal law." The District Court subsequently entered an order allowing intervention in the subfile proceeding by the United States, the Jicarilla Apache Nation, the Navajo Nation, the Ute Mountain Ute Tribe, the San Juan Water Commission, the Bloomfield Irrigation District, Gary Hoerner, Public

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[7] The State Engineer is authorized to perform a hydrographic survey of a stream system and then direct the Attorney General to enter suit on behalf of the State to determine all rights to use water in the stream system.

[8] In general, a "subfile" proceeding is one in which issues specific to a particular water rights claimant are determined as between the plaintiff (usually the State Engineer) and the claimant. The determination of the claimant's water right, if any, then becomes subject to an "*inter se*" proceeding in which other parties who did not participate in the subfile proceeding may contest the determination of the claimant's water right. *See generally Parker Townsend Ranch*, *supra*; Rule 1-072.2 of the New Mexico Rules of Civil Procedure.

Service Company of New Mexico and BHP Navajo Coal Company.[9]

On February 20, 2007, the District Court issued a Decision denying the Commissioner's Motion for Declaratory Relief and granting the State Engineer's Motion for Summary Judgment. App. 33a-41a. On March 15, 2007, the District Court entered an Order and Final Judgment, which included a determination that it constituted an immediately appealable final judgment. App. 42a-46a.

7. In affirming the District Court judgment, the New Mexico Court of Appeals said that federal reserved water rights are "very problematic" in the context of New Mexico's prior appropriation doctrine and arid conditions, under which certain streams are fully appropriated and a federal reserved right may require a reduction in the water available to private appropriators. As a result, the Court of Appeals concluded that the federal reserved rights doctrine should be narrowly construed. App. 19a. The court's conclusion, however, was premised on its assertion that "as demonstrated by this case, claims to federal

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[9] The Arizona State Land Department, which is raising a similar reserved water rights issue in two Arizona state court water rights adjudications, sought leave to file an *amicus curiae* brief with the District Court in this case, and leave was initially granted and then denied. On appeal, the New Mexico Court of Appeals granted the Arizona State Land Department leave to file an *amicus curiae* brief in support of the Commissioner's reserved water rights claim.

reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights under existing state law." *Id.* Because the factually intense issues of quantification and priority were specifically precluded from consideration by the District Court, this premise of the Court of Appeals was unfounded and improper.

Examining the first element of the reserved rights doctrine, the Court of Appeals found that neither the New Mexico Organic Act, nor the Ferguson Act, nor the New Mexico Enabling Act had effected a withdrawal of the land from the public domain and a reservation for a public purpose sufficient to qualify for a reserved water right. Casting aside any "plain language" rule of construction, and without reference to the 125-year history of this particular usage by Congress, the Court of Appeals declared, "[T]he mere use of the term 'reserved' in a congressional act does not necessarily create a federal withdrawal and reservation of land." App. 23a (citing *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 785 (10th Cir. 2005)). However, in every instance of this particular usage by Congress, the result was that designated lands, or their equivalent in value, were dedicated to a federal purpose and withdrawn from the public domain. This is what is required under the logic and principles of

the reserved rights doctrine,[10] not a rigid and formulaic mechanism for "withdrawal and reservation" such as the state court employed. *Cf. Winters*, *supra* (seminal reserved water rights case recognizing reserved rights for the Fort Belknap Reservation, which consisted simply of the lands remaining after ceding to the United States "a very much larger tract"); *Arizona v. California*, *supra* (finding reserved rights attached to the Colorado River Reservation which was created by Act of Congress, increased by executive order, and further increased by amendment to executive order).

The Court of Appeals further found that the grant of lands in a federally enforceable trust did not constitute a "withdrawal and reservation" for purposes of the reserved rights doctrine (a) because the exact location of the trust lands was to be determined by the public land survey, which had not been completed in all parts of the state, (b) because some of the lands identified by survey were nonetheless excluded from the grant and subject to "lieu" land selection by the state, and (c) because the land remained subject to alternative federal reservation or disposal before its identification by survey and vesting of title in the state. App. 24a-26a.

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[10] *See Cappaert*, 426 U.S. at 145 ("determination of reserved water rights . . . derives from the federal purpose of the reservation").

Examining the second element of the reserved rights doctrine, the Court of Appeals found that the congressionally mandated purpose for the land trust (support of common schools) was not a sufficient "federal purpose" to establish a reserved water right. According to the Court of Appeals, "As the term 'federal purpose' has been construed in non-Indian federal reserved water rights cases, continuing federal ownership of the reserved lands appears to be a prerequisite to a determination that such rights exist." App. 27a. The Court then conceded that federal reserved rights were conveyed when certain Indian reservation lands were conveyed to individual Indian allottees, and thus "federal reserved water rights are not dependent on continuing federal ownership." App. 28a-29a (citing *United States v. Powers*, 305 U.S. 527, 532 (1939)). It sought to distinguish this from the trust lands by pointing out that "the federal government, by treaty, withdrew the land at issue from the public domain and reserved it for a federal purpose *before* it was allotted and conveyed to individual tribal members." *Id.* (emphasis in original). However, this is exactly how the federal government disposed of the trust lands at issue here: the Organic Act reservation dedicated the lands to a federal purpose (public education) and provided for withdrawal from public entry upon survey. Only later, under the Ferguson and Enabling Acts, did the government part with ownership.

The Court of Appeals further rejected the Commissioner's contention that the imposition of federal

trust terms on the granted lands and ongoing federal power to enforce the trust terms demonstrates a federal purpose for the trust. App. 27a-28a. The Opinion does not explain why federal title ownership, rather than federal control, is relevant to the reserved rights doctrine. In either case, the federal purpose is sustained by the federal control over the use of the land.

In addition, the Court of Appeals found that Congress took measures to ensure that New Mexico schools would derive adequate support from the trust lands despite the arid conditions that prevail in much of the state, rendering much of the trust land valueless without a supply of water. First, the Court of Appeals noted that New Mexico and Arizona were granted four sections in each township, as opposed to the one or two sections granted to other states, in recognition of the arid conditions in the two states. App. 30a (citing *Lassen,* 385 U.S. at 463 n.7). However, doubling the amount of land that is valueless for lack of water would not provide the resource needed for support of the federal purpose; and there is no indication this was intended as full compensation. Second, the Court of Appeals noted that the Ferguson Act grants included a grant of 500,000 acres of land for the purpose of establishing permanent water reservoirs for irrigation. App. 30a-31a (citing Ferguson Act § 6). However, these reservoirs were to serve the entire state, and thus were not intended to add the needed value to trust lands.

REASONS FOR GRANTING THE PETITION

I. THE NEW MEXICO COURT OF APPEALS OPINION PRESENTS A SIGNIFICANT QUESTION OF FIRST IMPRESSION REGARDING APPLICATION OF THE FEDERAL RESERVED WATER RIGHTS DOCTRINE TO MILLIONS OF ACRES OF SCHOOL LANDS IN ARID WESTERN STATES.

The New Mexico Court of Appeals decision is the first reported decision determining whether reserved water rights may be asserted with respect to lands reserved for school purposes and granted to a state in trust. In two Arizona state court water rights adjudications, the Arizona State Land Department has asserted a similar reserved water rights claim as to Arizona's trust lands. In a Special Master report and recommended decision entered jointly in the two cases, the Special Master found that federal reserved water rights may not be claimed with respect to the trust lands in Arizona. Objections were filed, and the Superior Court has yet to rule on those objections. Thus, there is at least a potential for a conflicting decision with respect to Arizona's trust lands.

In *United States v. New Mexico*, *supra*, the most recent of the Court's reserved rights decisions, the Court said that "many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified." *Id.*, 438 U.S. at 700. The reserved water rights issue is one of "implied intent" based on what the federal government has

done in setting aside land from the public domain. *Id.* at 698. Thus, a reserved water rights claim requires that the courts "carefully examine[] both the asserted water right and the specific purposes for which the land was reserved." *Id.* at 700.

Here, the state court decision is the first decision in an area of federal law that potentially affects other Western states with similarly reserved and granted school lands. Because extending the doctrine to school lands in arid states such as New Mexico and Arizona presents an important federal law issue which has not yet been addressed by this Court, the Court should grant review of the state court's judgment.

II. THE NEW MEXICO COURT OF APPEALS OPINION DECIDES AN IMPORTANT FEDERAL LAW QUESTION IN A WAY THAT HAS PROFOUND IMPLICATIONS FOR FEDERAL LAND TRUSTS IN SEVERAL STATES AND FOR NUMEROUS WATER RIGHTS ADJUDICATIONS.

This Court has previously granted review in various cases pertaining to administration of the Enabling Act trusts to ensure that the trusts are administered in accordance with federal law. *See ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989); *Alamo Land & Cattle Co., Inc. v. Arizona*, 424 U.S. 295 (1976); *Lassen, supra*; *Payne v. New Mexico*, 255 U.S. 367 (1921); *Ervien v. United States, supra*. Issues related to Mississippi trust lands and their proceeds were reviewed in *Papasan, supra*, and the Court is

currently hearing a case regarding trust lands in Hawaii. *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 30 (2008). Thus, the Court previously has recognized that administration of the federally created land trusts involve important federal law issues. *See Lassen*, 385 U.S. at 461 (recognizing "the importance of the issues presented both to the United States and to the States which have received such lands").

Contrary to established federal law, the state court based its decision on a narrow interpretation of the federal reserved rights doctrine. Conversely, this Court has "recognized that the legislation of Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively," *Wyoming v. United States*, 255 U.S. 489, 508 (1921), and lower federal courts have recognized implied rights that are needed to ensure that the lands serve the purpose Congress intended. *See, e.g., In re Schugg (Lyon v. Gila River Indian Community)*, 384 B.R. 263, 279 (D. Ariz. 2008) (citing *Utah v. Andrus*, 486 F.Supp. 995, 1001-02 (D. Utah 1979)). In holding that the federal Department of the Interior could not prohibit access to Utah trust lands or otherwise restrict their use in such as way as to make economic development competitively unprofitable, the *Andrus* court said:

> Recognition of the special nature of the school land grants is important both in determining the Congressional intent behind the grant and in understanding judicial

> treatment of similar grants. Generally, land grants by the federal government are construed strictly, and nothing is held to pass to the grantee except that which is specifically delineated in the instrument of conveyance. [Citation omitted.] *But the legislation dealing with school trust land has always been liberally construed.* [Citations omitted.] Further, it is clear that one of Congress' primary purposes in enacting the legislation was to place the new states on an "equal footing" with the original thirteen colonies and to enable the state to "produce a fund, accumulated by sale and use of the trust lands, with which the State could support the (common schools)." *Lassen v. Arizona Highway Dept.*, 385 U.S. 458, 463, 87 S.Ct. 584, 587, 17 L.Ed.2d 515 (1967).
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> *Given the rule of liberal construction and the Congressional intent of enabling the state to use the school lands as a means of generating revenue*, the court must conclude that Congress intended that Utah (or its lessees) have access to the school lands. Unless a right of access is inferred, *the very purpose of the school trust lands would fail.* Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.

Id., 486 F.Supp. at 1001-02 (emphasis added).

This clear emphasis on liberal construction when inferring rights necessary to the functioning of

"school lands" was ignored by the state court. If that decision is left to stand, it could form the basis for denying federal reserved water rights to other state trust lands and other federal entities seeking reserved rights in the multiple water rights adjudications ongoing in the Western states.

Of equal import is the state court's assertion that federal reserved water rights should not interfere with "predominant" state law water rights. App. 19a. As this Court said in *United States v. New Mexico*, *supra*, "[W]hatever powers the states acquired over their waters as a result of congressional Acts and admission into the Union, . . . Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes." *Id.* at 698. Thus, while the Desert Land Act of 1877, 43 U.S.C. § 321 (1994), generally requires that water rights for federal lands be acquired in accordance with state law, federal law continues to prevail as to lands set aside from the public domain for specific federal purposes. *Id.*

In each of the seminal federal reserved rights cases, the federal government set aside land from the public domain for a specific purpose, and the courts examined the circumstances and purposes of the federal action to determine whether a federal interest in the appropriation of water to achieve the federal purpose superseded state regulation. *Winters*, *supra*, pitted the State of Montana's interest in allocating

water to local residents against the need for water to achieve the purpose of the treaty in which the federal government and an Indian tribe established the tribe's reservation. *See also Arizona v. California*, 373 U.S. at 598-601 (applying *Winter*s doctrine to find federal reserved right for Indian reservations, national recreation area, national wildlife refuges, and national forest). In *Cappaert*, *supra*, the need for water to serve the federal interest in protecting the national monument habitat of a rare species prevailed over state regulation. Finally, in *New Mexico*, the Court held that state water law could not interfere with the appropriation of water needed to achieve the primary purpose for which a national forest was established.

When presented with a claim that there are federal reserved water rights, the courts generally make two distinct sets of determinations. First, applying the standards set out in *Winters* and *Cappaert*, courts make an initial determination of whether a right to use water was implicitly reserved at the time that the land was reserved. The courts have taken a liberal approach in determining whether a reserved water right exists, giving due regard to the paramount federal interests that were at stake in exempting the reserved land from the application of laws pertaining to the public domain. Second, in determining the quantity of water needed to serve the federal purpose of reserving the land, the courts have taken a more circumscribed view of the extent of the water right. *Cf. United States v. New*

Mexico, 438 U.S. at 698-701. The state court decision seeks to reverse this established pattern of federal law, or to carve out a novel exception. In either case the decision warrants review by this Court.

In finding that federal reserved water rights do not attach to the trust lands under any circumstances, the New Mexico Court of Appeals applied the reserved rights doctrine in a manner that misconstrues the Congressional acts reserving and granting the lands in trust and misconstrues the underlying federal purpose of those acts. That federal reserved water rights accompany the lands reserved and granted in trust by Congress follows from the analysis outlined in *Cappaert*, 426 U.S. at 138, and *United States v. New Mexico*: (1) determining whether lands were reserved; (2) determining what purpose the federal government sought to achieve by reserving the lands; and, (3) determining whether unappropriated water was impliedly reserved because it is necessary to the purpose for which the lands were reserved. Rather than applying these factors with an eye toward what Congress intended to achieve, the state court focused on the mechanics of the reservation and withdrawal process involved, and in the process subordinated federal interests to state law.

The state court's cramped view of the reserved water rights doctrine highlights the fact that this is a case of first impression. Lacking precedent recognizing reserved water rights for school lands, the court distinguished school lands from lands with recognized

reserved water rights in ways that simply do not negate the existence of an implied congressional intent to reserve a water right.

Further, in rejecting the Commissioner's federal reserved water rights claim, the New Mexico Court of Appeals leaves a situation where ongoing appropriation of water and establishment of water rights priorities under state prior appropriation doctrine will leave no unappropriated water available for use on the trust lands as other products of the land are depleted and as increasing population and development make possible other productive uses of the land that depend upon the right to use appurtenant water. In setting aside a resource to support vital civic institutions such as public schools, Congress clearly did not intend that the appropriation of water prior to development on the trust lands would render certain trust lands permanently undevelopable when a water right of sufficient priority would provide the means of achieving the purpose for which the trust lands were reserved.

The equal footing doctrine balances the right of sovereign states to provide for the health, education and welfare of their residents, and the federal interest in assuring that all citizens of the United States have equal opportunities. New Mexico's Enabling Act trust represents one of the more fully articulated outgrowths of this balance. It acknowledged the sovereignty of the state by making the state, rather than the federal government, the trustee, and it preserved the integrity of the federal purpose by

reserving a perpetual resource to support schools and other infrastructure needed for good government.

The federal reserved water rights doctrine provides a companion balancing. The state law of prior appropriation encourages the pursuit of private interests in a market economy, while the federal reservation of land and related resources in a perpetual trust seeks to ensure a public benefit which conflicts with the consumption of those resources for private benefit. By recognizing a reserved right to use water appurtenant to the trust lands, the courts would balance state sovereignty and state law against broader federal purposes. State law and sovereignty are subordinated only to the extent necessary to assure the accomplishment of the federal purpose underlying the reservation. At this point in the proceedings, the Commissioner is seeking recognition of the federal portion of that balancing equation. The balancing itself will come at a later phase when the courts determine the amount of water that is reserved for the trust lands.

In similar arid land circumstances, the Court has inferred that the reservation of land for Native American tribal homelands, national forests, and protection of endangered species implicitly included a reservation of the right to use water to achieve the federal purpose inherent in reserving the land. Congress' reservation of a resource for present and future generations of New Mexicans is equally worthy of recognition.

It is an inescapable fact that under state prior appropriation water law doctrine only those with the current financial resources to buy water rights or put water to beneficial use will have water to use in the future. Future generations of New Mexicans who will pass through its schools cannot compete in today's auction. The record demonstrates there will be no unappropriated water available for use on trust lands. That resource is being rapidly appropriated by burgeoning populations overlying aquifers on private lands and private industrial development. As it stands now, the Commissioner can only stand by and watch as the resources intended by Congress for his beneficiaries are depleted by others. This case will determine whether Congress intended this unfortunate result.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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