Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight

Introduction

The federal reserved water rights doctrine has been denounced as "a wild card that may be played at any time,"[1] "a blank check that may be filled in for any amount,"[2] and "a federal intrusion of unquantified rights."[3] Perhaps most colorfully, the doctrine has been described as "a first mortgage of undetermined and undeterminable magnitude which hangs like a Sword of Damocles over every title to water rights on every stream which touches a federal reservation."[4]

The judicially created federal reserved water rights doctrine allows the federal government to claim water rights for land it withdraws from the public domain and reserves for a specific purpose.[5] The doctrine is based on the federal government's powers under the Property Clause[6] and the Supremacy Clause[7] of the United States Constitution. Several

1. F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 160 (1971).

2. *Id.*

3. *Additions to the National Wilderness Preservation System: Hearings on H.R. 42 and H.R. 4233 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. 159 (1986) [hereinafter *Hearings on H.R. 4233*] (statement of David H. Getches, Executive Director, Colorado Department of Natural Resources) (not yet published at the time of this writing; copy on file with *The Hastings Constitutional Law Quarterly*).

4. F. TRELEASE, *supra* note 1, at 117 n.34 (quoting address by Northcutt Ely to National Water Commission (Nov. 6, 1969)). Damocles was a legendary courtier of ancient Syracuse. To give him a lesson in the perils of a ruler's life, a king seated Damocles at a feast beneath a sword hung by a single hair. WEBSTER'S NEW COLLEGIATE DICTIONARY 323 (9th ed. 1986).

5. *See generally* Arizona v. California, 373 U.S. 546, 596-600 (1963); Cappaert v. United States, 426 U.S. 128, 138-42 (1976); United States v. New Mexico, 438 U.S. 696 (1978).

A "withdrawal" of land refers to a statute, an executive order, or an administrative order that changes the designation of a parcel of federally-owned land from "available" to "unavailable" for homesteading or resource exploitation. A "reservation" denotes a dedication of withdrawn land to a specified purpose. G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND & RESOURCES LAW 239 (2d ed. 1986).

6. U.S. CONST. art. IV, § 3, cl. 2. Under the Property Clause, Congress is given the power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

7. U.S CONST. art. VI, cl. 2. Under the Supremacy Clause, the Constitution and laws of the United States are "the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

states and private water users[8] have criticized the doctrine because federal claims to water supplies mean less water is available for them. Water users in the semiarid West express the most vehement criticisms because competition for the West's limited water is especially keen.[9]

Because their water supplies are limited, western states have struggled for decades among themselves for rights to interstate waters[10] and with the federal government for rights to intrastate waters.[11] To complicate matters, western states also must contend with the federal government's ownership of vast areas of land at high elevations, where substantial amounts of water originate.[12]

This struggle for water between western states and the federal government escalated in 1985 when a federal district court held for the first time that the federal government could claim reserved water rights for twenty-four wilderness areas located in Colorado.[13] The Secretary of Agriculture and other federal defendants appealed the decision;[14] however, the Tenth Circuit Court of Appeals held that it lacked jurisdiction and remanded the case to the district court.[15] On June 3, 1987, the dis-

8. *See infra* note 111 and accompanying text.

9. *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 699 (1978) ("In the arid parts of the West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.").

10. *See, e.g.*, Texas v. New Mexico, 462 U.S. 554 (1983) (apportionment of the Pecos River between Texas and New Mexico); Colorado v. New Mexico, 459 U.S. 176 (1982) (compact between Colorado and New Mexico regarding the Vermejo River); Arizona v. California, 373 U.S. 546 (1963) (struggle between Arizona, California, Nevada, New Mexico, and Utah for use of the Colorado River).

11. *See, e.g.*, United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).

12. The United States now owns approximately 732 million acres—about one-third of the nation's total land. Although federal public lands are located in all states, they comprise especially large portions of the eleven "western states": Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. G. COGGINS & C. WILKINSON, *supra* note 5, at 11. Roughly 80 million acres constitute the National Wilderness Preservation System. Shepard, *The Scope of Congress' Constitutional Power Under the Property Clause*, 11 B.C. ENVTL. AFF. L. REV. 479, 483 n.22 (1984). More than 60% of the average annual water yield in the eleven western states derives from federal reservations. United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978).

13. Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985) (*Sierra Club I*). Plaintiff Sierra Club brought this action against John Block, the Secretary of Agriculture, Max Peterson, Chief of the Forest Service, William Clark, Secretary of the Interior, and Russell Dickenson, Director of the National Park Service. Several parties intervened as defendants: Mountain States Legal Foundation, the Colorado Cattlemen's Association, the Colorado Farm Bureau, the National Cattlemen's Association, the city of Denver, the Colorado Water Conservation Board, and the Colorado Water Congress.

14. Sierra Club v. Lyng, Nos. 86-1153, 86-1154, 86-1155, slip op. (10th Cir. Oct. 8, 1986). By the time the original action was filed and an appeal was taken, Richard Lyng had replaced Block as the Secretary of Agriculture.

15. *Id.* The Tenth Circuit stated that an appellate court has jurisdiction only over final decisions of district courts pursuant to federal statute. In determining whether an order is appealable, "appellate courts look at whether the [district court's] order ends the litigation and

trict court again upheld federal reserved water rights in wilderness areas.[16]

The district court's decisions raise important constitutional issues regarding the scope of the federal government's power to claim water rights for federal reservations such as wilderness areas, while virtually ignoring state water law. The reserved water rights doctrine is a matter of federal law and therefore is not subject to state water law limitations.[17] Federal claims to water in wilderness areas thus could usurp state claims to the same water under the constitutional doctrine of preemption.

In Part I, this Note examines the constitutional preemption doctrine as it applies to federal reserved water rights. Part II surveys the judicial history and development of the reserved water rights doctrine. Part III examines the conflict between the federal reserved water rights doctrine and the water law of the western states. Part IV explores the practical implications of applying the doctrine to federal wilderness areas. Part V considers the federal legislative response to applying the federal reserved water rights doctrine in wilderness areas. Finally, in Part VI, this Note proposes a legislative solution to the problems inherent in extending the doctrine to wilderness areas.

I. Federal Preemption of State Water Law

The federal government's power to preempt state law derives from the Supremacy Clause of the Constitution, which declares that the laws and Constitution of the United States are "the Supreme Law of the Land."[18] Under this clause, the federal government may preempt state law by federal legislation that expresses a preemptive intent[19] or fairly implies such an intent.[20]

In general, the Supreme Court has found an implied preemptive intent when (1) the legislative history of the federal regulation or regulatory scheme indicates a preemptive intent;[21] (2) the federal regulatory scheme is so pervasive that it is reasonable to infer that Congress left no

leaves nothing to be done except execute the judgment." *Id.*, slip op. at 3. The court concluded that the Colorado district court's order was not final under this standard, because the district court could still render a final judgment after it reviewed the plan it had ordered the federal defendants to submit. *See infra* notes 104-106 and accompanying text.

16. Sierra Club v. Lyng, 661 F. Supp. 1490 (D. Colo. 1987) (*Sierra Club II*).

17. *See infra* note 129 and accompanying text.

18. U.S. CONST. art. VI, cl. 2. *See supra* note 7.

19. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (holding that it is well-established that, within constitutional limits, Congress may preempt state authority by using express terms).

20. *See infra* notes 21-24 and accompanying text.

21. *See, e.g.*, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146-50 (1963).

room to supplement it;[22] (3) the nature of the regulation or the subject matter requires nationwide uniformity;[23] or (4) the state law impedes Congress' ability to fully attain the objectives of the federal law.[24]

Although the Constitution enables the federal government to preempt state law under these limited circumstances, states have reacted with particular hostility to the federal government's assertion of water rights under its protection power. This is especially true in the semiarid West, where water rights have long been recognized as property rights often more valuable than the land on which the water is used.[25]

The central inquiry in the preemption analysis is whether the federal government intended to supersede state law, either explicitly or implicitly, in the particular area of regulation.[26] Under the federal reserved water rights doctrine, courts consider two factors in determining whether the federal government intended to preempt state water law. First, because the federal government rarely expresses an intent to claim the water appurtenant to federal land when it reserves the land, courts must determine whether the federal government impliedly intended to reserve the water.[27] Second, courts must consider the federal government's traditional deference to state water law.[28] Courts considering these two

22. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 633 (1973); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

23. *Florida Lime*, 373 U.S. at 143.

24. *See, e.g.*, Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982); Hines v. Davidowitz, 312 U.S. 52, 66-67 (1941).

In Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824), Chief Justice Marshall recognized the hierarchy of the federal system, stating that as to

> "such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the law of Congress, made in the pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 376-94 (1978).

25. City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952). As one writer has noted:

> In the West, lack of water is the central fact of existence, and a whole culture and set of values have grown up around it. In the East, to "waste" water is to consume it needlessly or excessively. In the West, to waste water is not to consume it—to let it flow by unimpeded and undiverted down rivers.

M. REISNER, CADILLAC DESERT 12 (1986).

26. *See supra* notes 13-24 and accompanying text.

27. *See* United States v. New Mexico, 438 U.S. 696, 699 (1978) ("Congress has seldom expressly reserved water for use on . . . withdrawn lands."). For examples of federal legislation that withdraw land without any declaration as to federal water rights, see the American Antiquities Preservation Act, 16 U.S.C. § 431 (1933) (establishing national monuments) and the National Park Service Act, 16 U.S.C. § 1 (1946) (establishing national parks).

28. The leading statement by the Supreme Court on congressional deference to state water law is California v. United States, 438 U.S. 645 (1978), which affirmed the power of the California State Water Resources Control Board to impose conditions on a federal water project before the federal government could impound water for a dam. *See also* California Or. Power

factors have examined the purposes of the federal legislation that reserved the land to determine whether the federal government also intended to reserve water rights.[29]

To understand how the preemption doctrine applies to water conflicts in the West, it is necessary first to define the federal reserved water rights doctrine, and then to compare it to the water laws of the western states.

II. The Federal Reserved Water Rights Doctrine

Under the United States Constitution, the federal government has the power to control interstate commerce, provide for the common defense, make war, enter into treaties, control interstate compacts, manage federal property, levy taxes, and spend money for the general welfare of the country.[30] The federal government has used each of these powers at one time or another to justify its involvement in developing and regulating water resources.[31]

Courts have held that both the Commerce Clause[32] and the Property Clause[33] authorize the federal government to reserve water for federal lands.[34] The more commonly accepted constitutional basis for the doctrine, however, is the Property Clause coupled with the Supremacy Clause.[35] This combination is based on the federal government's ownership of the public domain as both an ordinary proprietor and as a superior sovereign.[36] The Property Clause permits the federal government,

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Co. v. Beaver Portland Cement Co., 295 U.S. 142, 164 n.2 (1934) ("Congress . . . has repeatedly recognized the supremacy of state law in respect of the acquisition of water for the reclamation of public lands of the United States and lands of its Indian wards."); *In re* Green River Drainage Area, 147 F. Supp. 127, 148 (D. Utah 1956) ("[T]here is a long-standing federal legislative policy of conformity by the federal government with state laws concerning the acquisition, ownership and administration of its water rights.").

29. *See* United States v. New Mexico, 438 U.S. 696, 698 (1978); Cappaert v. United States, 426 U.S. 128, 143-46 (1976); Arizona v. California, 373 U.S. 546, 587-98 (1963); Winters v. United States, 207 U.S. 564, 577 (1908).

30. U.S. CONST. art. I, § 8.

31. *See generally* Morreale, *Federal-State Conflicts over Western Waters—A Decade of "Clarifying Legislation"*, 20 RUTGERS L. REV. 423, 445 (1966).

32. U.S. CONST. art. I, § 8, cl. 3. Under the Commerce Clause, Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

33. U.S. CONST. art. IV, § 3, cl. 2. *See supra* note 6.

34. *See generally* Cappaert v. United States, 426 U.S. 128, 138 (1976) ("Reservation of water rights is empowered by the Commerce Clause . . . which permits federal regulation of navigable streams, and the Property Clause . . . which permits federal regulation of federal lands."); Arizona v. California, 373 U.S. 546, 598 (1963) ("We have no doubt about the power of the United States under [the Commerce and Property Clauses] to reserve water rights for its reservations and its property.").

35. U.S. CONST. art. VI, cl. 2. *See supra* note 7.

36. *See* Kleppe v. New Mexico, 426 U.S. 529, 540 (1976).

acting as an ordinary landowner,[37] to use a share of the navigable and nonnavigable waters on the public lands.[38] Acting as a superior sovereign, the federal government has authority under the Supremacy Clause to assert water rights that take precedence over the rights of other water users.[39]

A. The Development of the Federal Reserved Water Rights Doctrine

The Supreme Court first alluded to the reserved water rights doctrine in dictum in *United States v. Rio Grande Dam and Irrigation Company*.[40] In *Rio Grande*, decided in 1899, the Court considered whether an irrigation company, acting pursuant to state authority, could be enjoined from diverting water at a rate which severely diminished the navigability of a river. The Court held that the relevant state law was limited by the federal government's superior power over navigable waters.[41] In dictum, the Court noted:

> [I]n the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property.[42]

It was not until 1908 that the Supreme Court clarified the reserved water rights doctrine. In *Winters v. United States*,[43] the Court held that when Congress created the Fort Belknap Indian Reservation in 1888, it not only set aside the land for the Indians, but also impliedly reserved enough water to satisfy their needs.[44] The Court reasoned that Congress must have intended to reserve the water simultaneously with the land because without the water, the arid land would be practically useless to the Indians.[45] Justice McKenna, writing for the Court, stated that "[t]he power of the Government to reserve the waters and exempt them from

37. See *supra* note 12 for a discussion of the amount of land the federal government owns.

38. *See* Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of* United States v. New Mexico, 15 IDAHO L. REV. 509, 512 (1979).

39. Commentators differ over which constitutional powers allow the federal government to reserve water. Dean Trelease argues that the Supremacy Clause alone, without the Property Clause, is the proper constitutional basis for the reserved rights doctrine. F. TRELEASE, *supra* note 1, at 147 ("Reserved rights stem from the supremacy clause and the need for water to carry out federal functions."). *But cf.* E. HANKS, FEDERAL STATE RIGHTS AND RELATIONS, 2 WATER AND WATER RIGHTS § 102.1 (R. Clark ed. Supp. 1978) (criticizing Trelease's view and opining that the federal government's power to usurp state-created rights must depend on a preexisting ownership of interest.

40. 174 U.S. 690 (1899).

41. *Id.* at 703.

42. *Id.*

43. 207 U.S. 564 (1908).

44. *Id.* at 576.

45. *Id.*

appropriation under the state laws is not denied, and could not be."[46]

The "*Winters* Doctrine", as the reserved water rights doctrine came to be known, originally was thought to apply only to Indian reservations.[47] It was not until 1955 that the Court held the federal reserved water rights doctrine applied to federal lands other than Indian reservations.[48] In 1963, the Supreme Court in *Arizona v. California*[49] unequivocally extended the doctrine beyond Indian lands to include national recreation areas, wildlife refuges, and national forests.[50] Courts have since applied the doctrine to military facilities,[51] national monuments,[52] national parks,[53] public waterholes, and mineral hot springs.[54]

B. The Scope of the Doctrine

Courts have determined that the federal government has the power to reserve water for federal lands. Recognizing Congress' power does not, however, resolve the questions of how much water the federal government may reserve or when the federal right vests.

1. Amount of Water Reserved

In *Cappaert v. United States*,[55] the Supreme Court held that federal intent is the decisive factor in determining whether a federal reservation of public land impliedly includes a reserved water right.[56] The Court stated that it would infer federal intent to reserve water if the previously unclaimed waters were "necessary to accomplish the purposes for which

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46. *Id.* at 577.

47. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DEN. U. L. REV. 473, 475 (1977) (reserved rights were considered a "special quirk of Indian water law").

48. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955) (also known as the "*Pelton Dam*" decision) (holding that the federal government had impliedly reserved water rights for hydropower at Pelton Dam).

49. 373 U.S. 546 (1963).

50. The Court stated:

> The [Water] Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

Id. at 601.

51. Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *rev'd on other grounds*, 279 F.2d 699 (9th Cir. 1960) (Hawthorne Naval Ammunition Depot, Mineral County, Nev.).

52. Cappaert v. United States, 426 U.S. 128 (1976) (Death Valley National Monument).

53. United States v. Denver, 656 P.2d 1 (Colo. 1982) (Rocky Mountain National Park).

54. *Id.*

55. 426 U.S. 128 (1976).

56. *Id.* at 139.

the reservation was created."[57] In *Cappaert*, the Court examined a 1952 presidential proclamation which established Devil's Hole Cavern in Nevada as part of the Death Valley National Monument. Based on language in the proclamation suggesting that special protection be given to a pool in the cavern,[58] the Court concluded that the proclamation was also intended to reserve sufficient water to maintain the level of the pool.[59]

Two years later, in *United States v. New Mexico*,[60] the Supreme Court considered whether water rights are impliedly reserved when public land is designated as national forest. The Court ruled that when the United States established the Gila National Forest in New Mexico, it intended to reserve only that portion of the river flow through the forest that was necessary to fulfill the primary purposes of the national forest.[61] The Court noted that each time it had previously applied the federal reserved water rights doctrine, it had "carefully examined both the asserted water right and the specific purposes for which the land was reserved, and [had] concluded that without the water the purposes of the reservation would be entirely defeated."[62]

To determine the primary purposes of the designation at issue in *New Mexico*, the Court examined the Organic Administration Act of 1897,[63] which authorized the creation of national forests. After reviewing the congressional debates on the Organic Administration Act, Justice Rehnquist ruled for the majority that Congress had intended to reserve national forests for two primary purposes—"[t]o conserve the water flows [for downstream use], and to furnish a continuous supply of timber."[64] The Court then held that Congress had intended to reserve only the amount of water necessary to fulfill these two purposes.[65]

The Court rejected the federal government's argument that Congress had also intended to reserve water for aesthetic, recreational, and fish-preservation purposes.[66] The legislative history of the Organic Ad-

57. *Id.*

58. *Id.* at 140 ("The Proclamation discussed the pool in Devil's Hole in four of the five preambles and recited that the 'pool . . . should be given special protection.' ").

59. *Cappaert*, 426 U.S. at 139-40.

60. 438 U.S. 696 (1978).

61. *Id.* at 716-18.

62. *Id.* at 700.

63. Ch. 2, 30 Stat. 34 (1897) (codified as amended at 16 U.S.C. §§ 471a-543h (1985). The Act provides: "No national forest 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 . . . ." *Id.* § 475.

64. *New Mexico*, 438 U.S. at 707.

65. *Id.* at 702 ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

66. *Id.* at 705.

ministration Act indicated that Congress created national forests only for the two very narrow purposes;[67] reserving water for aesthetic, environmental, recreational, or wildlife-preservation concerns would exceed and indeed conflict with the primary purposes of the Act.[68]

The Court buttressed its holding by comparing the language of the Organic Administration Act to the broader language Congress had used to authorize the establishment of national parks and fish and game sanctuaries.[69] In these latter instances, Congress had expressly indicated its intent to preserve fish and wildlife.[70] By comparison, the Court noted that Congress had not expressed similar preservation concerns in the Organic Administration Act itself or during the debates over its adoption. Further, when Congress intended to maintain minimum water flows in a particular national forest, it expressed its intent directly, as in the case of the Lake Superior National Forest.[71] Based on these comparisons, the Court concluded that Congress intended to reserve water for the Gila National Forest solely to maintain downstream water flows and timber supplies, and not for any secondary purposes such as recreation.[72]

The Court emphasized in *New Mexico* that the *original* purposes of the land reservation determined the scope of the reserved water right. In 1960, Congress enacted the Multiple Use Sustained Yield Act ("MUSYA")[73] which broadened the purposes of national forests. This legislation expressly provides that national forests are to be administered for, among other things, recreation and wildlife and fish preservation.[74] Nonetheless, the Court concluded in *New Mexico* that Congress had not intended to expand the reserved water rights doctrine to include these new purposes.[75] A House of Representatives Report accompanying MUSYA stated that the new purposes were to be "supplemental to, but

67. *Id.* at 708.

68. *Id.* at 711-12.

69. *Id* at 710-11.

70. Under the National Park Service Act of 1916, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1-460ee (1976)), Congress provided that the "fundamental purposes of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations." 16 U.S.C. § 1, *quoted in New Mexico*, 438 U.S. at 709. In 1934, Congress authorized the establishment of fish and game sanctuaries within national forests. 16 U.S.C. § 694 (1976). The Court in *New Mexico* reasoned that if the Organic Administration Act was intended to " 'improve and protect' fish and wildlife, the 1934 Act would have been unnecessary." *New Mexico,* 438 U.S. at 711.

71. 438 U.S. at 710.

72. *Id.* at 708.

73. Pub. L. No. 86-517, 74 Stat. 215 (1960) (codified as amended at 16 U.S.C. §§ 528-531 (1985)).

74. MUSYA provides in part: "It is the policy of Congress that the national forests are to be established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528.

75. 438 U.S. at 713.

not in derogation of" the original purposes set forth in the Organic Administration Act.[76] According to the Court, this language indicated that these later purposes were secondary to those specified in the Organic Administration Act, and thus no additional federal water rights were impliedly reserved by MUSYA.[77] The Court reasoned that reserving more water could substantially lessen the amount of water available for irrigation and domestic use, "thereby defeating Congress' principal purpose of securing favorable conditions of water flow."[78]

2. *When Federal Reserved Water Rights Vest*

In *Winters v. United States*,[79] the Court held that the Indians' rights to the water flowing through their reservation related back to the time of the reservation's creation. The rule that federal reserved water rights vest on the date the land was reserved was confirmed in *Cappaert v. United States*.[80] Accordingly, a federal water right acquires a priority date[81] at the time of the land reservation, making the federal reserved water right superior to the rights of water appropriaters who acquire their water after the date of the federal reservation.[82]

C. Extending the Federal Reserved Water Rights Doctrine to Wilderness Areas

Following *New Mexico*, commentators debated whether the reserved water rights doctrine should be extended to wilderness areas.[83] Congress has authority to reclassify an area of a national forest as part of the National Wilderness Preservation System under the Wilderness Act.[84] This

76. H.R. Rep. No. 1551, 86th Cong., 2d Sess., 4 (1960).

77. 438 U.S. at 713. This holding by the Court has been criticized by several commentators. *See, e.g.*, Abrams, *Reserved Water Rights, Indian Rights, and the Narrowing Scope of Federal Jurisdiction*, 30 STAN. L. REV. 1111, 1138 (1978) ("The court's holding reflects a serious misunderstanding of how federal reserved rights may vest."); Fairfax & Tarlock, *supra* note 38, at 536 (proposing an alternative reading of the relevant federal laws which would have permitted the Court to reach the opposite conclusion, namely that Congress accepted aesthetics, preservation, and protection of wildlife as primary purposes of the forest reserves); Note, *Water Law—Quantification of Water Rights Claimed Under the Implied Reservation Doctrine for National Forests*—United States v. New Mexico, *438 U.S. 696 (1978)*, 54 WASH. L. REV. 873 (1979) (asserting that the decision does not provide adequate protection for the national forests).

78. *New Mexico*, 438 U.S. at 715.

79. 207 U.S. 564 (1908). *See supra* text accompanying notes 43-46.

80. 426 U.S. 128 (1986). *See supra* text accompanying notes 55-59.

81. *See infra* text accompanying notes 114-115.

82. "[T]he United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." 426 U.S. at 138.

83. *See supra* note 77.

84. Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended at 16 U.S.C. §§ 1131-1136 (1982)).

reclassification effectively prohibits all commercial development in the designated area.[85]

In 1979, the Solicitor for the Interior Department studied whether a reclassification of national forest lands as a wilderness area impliedly reserved water rights in the area for wilderness purposes.[86] The Solicitor concluded that federal reserved water rights did exist to fulfill the primary purposes of wilderness areas.[87] However, at least two commentators disputed the Solicitor's conclusion, maintaining that it was unsupported by case law.[88]

The issue did not come before a court until 1985 when a federal district court ruled in *Sierra Club v. Block* ("*Sierra Club I*")[89] that the federal reserved water rights doctrine applied to wilderness areas. The district court ruled that the United States held unperfected reserved water rights claims in the twenty-four wilderness areas located in Colorado.[90]

In *Sierra Club I*, plaintiff Sierra Club brought an action against the Secretary of Agriculture and other federal officials. The complaint charged that the federal government had failed to claim reserved water rights in Colorado wilderness areas. Accordingly, the Sierra Club sought a judicial determination that the federal government holds reserved water rights in wilderness areas. It also requested an order requiring the federal government to take whatever action is necessary to protect these water rights.[91]

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85. Once land is designated as a wilderness area, it is withdrawn from all commercial development such as logging, mining, oil and gas leasing, and road-building. 16 U.S.C. §§ 1133(c), (d) (1982). For a more detailed discussion of the Wilderness Act, see Comment, *Federal Reserved Water Rights in National Forest Wilderness Areas*, 21 LAND & WATER L. REV. 381, 382-84 (1986).

86. Solicitor's Opinion M-36914, 86 Interior Decisions 553 (1979).

87. The Solicitor concluded that federal reserved water rights exist to fulfill the conservation, recreational, and scientific purposes of congressionally designated wilderness areas. *Id.* at 609-10. While subsequent Solicitors have modified this 1979 opinion, the section on wilderness areas remains intact. *See* G. COGGINS & C. WILKINSON, *supra* note 5, at 90.

88. Waring & Samelson, *Non-Indian Federal Reserved Water Rights*, 58 DEN. U. L. REV. 783, 791-92 (1981). Waring and Samelson note that the Wilderness Act expressly makes the purposes of wilderness areas supplemental to the purposes for which national forests and parks originally were established. Thus, they assert that applying the Court's "primary purpose" test in *New Mexico*, the Wilderness Act can be construed as establishing secondary purposes for which no water was reserved. *But see Sierra Club I*, 622 F. Supp. 842 (D. Colo. 1985), and the discussion *infra* notes 92-100 and accompanying text.

89. 622 F. Supp. 842 (D. Colo. 1985). The Secretary of Agriculture was named as a defendant because in 1906, Congress transferred jurisdiction of the national forests to the Department of Agriculture under the Transfer Act of 1905, ch. 288, 33 Stat. 628.

90. 622 F. Supp. at 862.

91. *Id.* at 846. For a thorough discussion of the role and duty of the Secretary of Agriculture to assert federal water rights in wilderness areas, see Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. REV. 387.

The government responded by arguing that since the Wilderness Act creates wilderness areas out of lands previously designated as national forests,[92] reclassification cannot exceed the purposes of the initial reservation as a national forest. Thus, the government contended that because wilderness purposes are secondary to national forest purposes, Congress did not intend federal water rights to attach to them.[93]

The court in *Sierra Club I* rejected the government's arguments and distinguished the Supreme Court's treatment of MUSYA in *New Mexico*.[94] The Wilderness Act, the court held, does not "constitute an attempt to *add* to the primary purposes of existing reservations," but is instead "*initial legislation* creating an *entirely new reservation* of federal lands."[95] The court also examined the issue of congressional intent, employing the standard developed by the Supreme Court in *Cappaert*[96] and *New Mexico*.[97] Under this standard, a court will infer an intent to reserve water if previously unappropriated waters are necessary to accomplish the primary, but not secondary, purposes for which the reservation was created.[98]

In order to ascertain the primary purposes for which wilderness areas are created, the court examined the Wilderness Act and the several statements of congressional purpose it contains. The court noted that Congress mandated that "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."[99] It observed that, unlike the Organic Administration Act at issue in *New Mexico*, both the Wilderness Act and its legislative history are replete with statements indicating that Congress viewed *all* of these purposes as primary and crucial. Therefore, the court concluded that Congress impliedly reserved enough water to accomplish all of the

92. *See supra* note 85 and accompanying text.

93. *Sierra Club I*, 622 F. Supp. at 860. The government also argued that "because the lands had already been withdrawn from the public domain and reserved for national forest purposes, subsequent wilderness designation did not constitute a 'withdrawal from the public domain.' " The court held that a wilderness designation does constitute a withdrawal because the areas are "withdrawn" from use-related laws. *Id.* at 855.

94. *See supra* notes 73-78 and accompanying text.

95. *Sierra Club I*, 622 F. Supp. at 860 (emphasis in original).

96. *See supra* text accompanying notes 55-57.

97. *See supra* text accompanying note 61.

98. *Sierra Club I*, 622 F. Supp. at 853.

99. *Id.* at 858 (citing 16 U.S.C. § 1133(b) (1982)). The court also reviewed the remarks of various members of Congress during legislative debates on the Wilderness Act, in order to determine the purposes of wilderness areas. For example, Rep. Riehlman, R-N.Y., stated that "[t]he reason Congress wished to protect the wilderness areas was to 'preserve for the present and future generations, land in its original state to be used and enjoyed by all who are interested in outdoor life and conservation.' " *Sierra Club I*, 622 F. Supp. at 850 (quoting 110 CONG. REC. 17,437 (1964)); Rep. Cleveland, R-N.H., stated that "the primary motivation of Congress in establishing the wilderness preservation system was to 'guarantee that these lands will be kept in their original untouched natural state.' " *Id.*

purposes of a wilderness area.[100] The court emphasized that "water is the lifeblood of the wilderness areas. Without water, the wilderness would become deserted wastelands . . . [and] the very purposes for which the Wilderness Act was established would be entirely defeated. Clearly, this result was not intended by Congress."[101]

Holding that federal water rights vested on the date the individual wilderness designations were made,[102] the court ordered the government to prepare a plan for protecting these rights.[103] The government appealed; however, the Tenth Circuit Court of Appeals held that it did not have jurisdiction over the matter because the defendants had not yet prepared their plan and, hence, the district court's order was not yet final and reviewable.[104]

The case was remanded, and in November 1986, the government filed its report. Two months later, the Sierra Club filed a second action, *Sierra Club v. Lyng ("Sierra Club II")*[105] challenging the sufficiency of the plan. The district court called the defendant's three page plan a "document which reflects a completely inadequate evaluation of the factors . . . to be considered in determining how best to protect wilderness water resources," and ordered the government to submit a more comprehensive plan by September 1, 1987.[106] While conceding that reserved water rights may not be the only means of assuring adequate water supplies in wilderness areas, the court concluded that the defendants had failed to address fully any acceptable alternatives.[107]

During the second trial, the Colorado Water Congress and other private parties who had intervened as defendants attempted to demonstrate that the doctrine of federal reserved water rights does not apply to wilderness areas. The intervenors cited a portion of the Wilderness Act not previously considered by the district court which states that "[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."[108] The intervenors argued that under this section, Congress intended to "forbid new federal water rights which could interfere with

100. *Sierra Club I*, 622 F. Supp. at 862. The court again quoted legislators: "The purpose of this measure is to afford protection for our priceless wilderness heritage, a heritage that once destroyed can never be replaced. It is impossible to restore wilderness once it is gone." *Id.* at 861 (quoting 110 CONG. REC. 17,438 (1964) (statement of Rep. Bennett, D-Fla.)).

101. *Sierra Club I*, 622 F. Supp. at 862.

102. *Id.*

103. *Id.* at 867.

104. Sierra Club v. Lyng, Nos. 86-1153, 86-1154, 86-1155, slip op. at 3 (10th Cir. Oct. 8, 1986).

105. 661 F. Supp. 1490 (D. Colo. 1987).

106. *Id.* at 1501.

107. *Id.*

108. 16 U.S.C. § 1133(d)(6) (1982), *cited in Sierra Club II*, 661 F. Supp. at 1492.

[state-controlled] water projects."[109] The court disagreed, holding that a "plain reading" of the cited provision indicated that it was "simply a disclaimer . . . [under which] Congress meant to do nothing more than to maintain the *status quo* of basic water law."[110] The government obtained an extension for filing its plan from September 1, 1987, to September 30, 1987. The plan was filed with the district court on September 30, and as of this writing, the case had not yet been appealed.

The district court's decisions in *Sierra Club I* and *Sierra Club II* provoked strong reactions from state and private water users in Colorado.[111] Although the rulings relate only to Colorado wilderness areas, they are likely to influence similar cases in other western states, including Nevada, Montana, and Utah.[112] To appreciate the intensity of the dispute provoked by these decisions, it is necessary to examine the prevailing system of water law in the western states.

III. Western Water Law

A. The Priority System

Generally, water rights in western states are determined by a system known as "prior appropriation." Under this doctrine, the rights of the first water user in time are senior to those of subsequent users.[113] Under this "first in time, first in right" principle, each water user's "priority date" is fixed on the date his or her use of the water began.[114] The priority system becomes particularly significant in times of shortage when a junior appropriator may not be entitled to any water at all.[115]

This basic tenet of western water law presents a major point of conflict between western states and the federal government. As previously discussed, federal courts have ruled that federal reserved water rights vest on the date the underlying land was reserved, regardless of when

109. 661 F. Supp. at 1492.

110. *Id.* at 1493.

111. *See, e.g.*, Reid, *Wilderness Areas Ruled to Have Water Rights*, Wash. Post, Nov. 28, 1985, at A3, col. 1 (district court ruling sent "shock waves through the water industry in the West"); N.Y. Times, Dec. 1, 1985, at 27, col. 5 (Rep. Strang, R-Colo., stated that the ruling "creates a layer of water rights that is not quantified. It throws the process of the validity of our [state's] water rights into chaos.").

112. Reid, *supra* note 111, at A3, col. 3.

113. The doctrine of prior appropriation in the West was apparently derived from Irwin v. Phillips, 5 Cal. 140 (1855), in which the court judicially enshrined the customs of the miners who developed the "first in time" concept for their system of water rights in the 19th century. The doctrine of prior appropriation differs from the system of "riparianism" prevalent in the East. Riparianism accords an owner of land bordering a watercourse certain rights and privileges in the water. *See generally* Note, *Federal-State Conflicts over the Control of Western Waters*, 60 COLUM. L. REV. 967, 969-70 (1960).

114. *See generally* Comment, *Determining Priority of Federal Reserved Rights*, 48 U. COLO. L. REV. 547, 551-52 (1977).

115. *Id.*

actual water use begins.[116] Thus, the federal government holds water rights senior in time to the rights of states or private parties that appropriate water after the date of the federal reservation. Western states and private users thus must compete with the federal government for scarce water supplies.

The problem is exacerbated when the federal government does not exercise its rights to claim water resources until years after the reservation is created. In this situation, the federal government may preempt appropriators who had acquired water rights under state law between the time the reservation was created and the government's actual assertion of its rights to the same water.[117]

Moreover, when the federal government displaces state water users in this way, the state appropriators are not entitled to compensation.[118] The federal government has no duty to compensate the displaced water user because its senior claim to the water assures that it did not "take" anything rightfully belonging to the state appropriators. A subsequent appropriator is not entitled to compensation because his or her use of the water was subject to the preexisisting, though unexercised, federal claim. In short, the federal government has no duty to pay for what it already owns.[119]

B. The Primary Purpose Limitation and State Uncertainty

Although the court in *Sierra Club I* and *II* established that water rights are impliedly reserved upon designation of wilderness areas, the question of how much water is reserved remains. Because the federal reserved water right remains unquantified,[120] and because the water

116. *See supra* notes 79-80 and accompanying text.

117. *See* Trelease, *Uneasy Federalism—State Water Laws and National Water Uses*, 55 WASH. L. REV. 751, 756 (1980) ("[The] appropriator downstream from federal reserved land who finds water available and puts it to use pursuant to state law may not get the top prority [sic] although he is the first taker.").

118. Boles & Elliot, United States v. New Mexico *and the Course of Federal Reserved Water Rights*, 51 U. COLO. L. REV. 209, 230 (1980) ("Perhaps the most disturbing aspect of federal reserved water rights claims has been that they provide the government with a license to divest water users of their property with no compensation whatsoever."); Comment, *supra* note 114, at 552 ("Even though the priority of a water right is usually viewed as an interest in property for the purpose of due process, the government does not have to compensate these state appropriators for their 'losses.' ").

119. *See generally* F. TRELEASE, *supra* note 1, at 147; *see also* Comment, *supra* note 114, at 552:

> [U]nder the basic theory of reserved rights, when the United States reserves a portion of land . . . it also reserves water from appropriation . . . . A subsequent appropriator takes what is left, and though he may use the reserved water until the government exercises its right, he is not entitled to compensation since his use of the water was always subject to an overriding federal claim.

120. *See* Comment, *supra* note 85, at 393 ("[T]he precise magnitude of [wilderness reserved rights] will not be determined until adjudication and quantification.").

needs of a wilderness area are potentially large,[121] states like Colorado fear that vesting reserved rights in the federal government will "lock up" an undetermined amount of water in wilderness areas. As a result, the states' future water rights are left uncertain.[122]

Although it is not clear that any water actually would be "locked up", the states also fear that the unquantified nature of the right will adversely affect the orderly development of water resources. The Supreme Court acknowledged this concern in *Arizona v. California*[123] when it noted that the financing of the Boulder Canyon Project would have been impossible had it not "clearly appear[ed] that, at or prior to the time of constructing such works, vested rights to the permanent use of the water [would] be acquired."[124] Moreover, the Bureau of Reclamation[125] has in the past postponed construction of certain projects until the water was allocated to the state in which the projects were being built.[126]

The doctrine of federal reserved water rights also has discouraged decisions to invest in water projects. A consulting engineer stated during congressional testimony:

> [With] respect to water rights, there are sufficient clouds over the validity of state-created water rights caused by the [federal reserved water rights doctrine], that in my opinion, a local agency in many cases can no longer depend upon those as sufficient assurance of an adequate water supply for a proposed project.[127]

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121. "[I]n order to fulfill the enumerated purposes and to retain the 'primeval character' of wilderness areas, it would seem that all waters in wilderness areas should be left in their natural state." *Id.* at 392.

122. *See, e.g.*, Comment, *supra* note 114, at 550 n.19 (1977) ("[S]upporters of state water rights have argued that reserved rights greatly interfere with state administration of water resources, a function traditionally relegated to state control. Because it is now unclear how much water the federal government will claim under its reserved rights, state supporters maintain that long-range state planning is upset and that future private development is deterred."); *see also* Boles & Elliott, *supra* note 118, at 213 ("This uncertainty is also a source of frustration to new water appropriators and state administrators trying to determine what, if any, water remains available for appropriation."); United States v. Denver, 656 P.2d 1, 7 (Colo. 1982), *reh'g denied*, 656 P.2d 1 (Colo. 1983) ("A complex society and economy have since flourished here in reliance on a comprehensive legal system for the allocation of water rights; and municipalities, agriculture and industry throughout Colorado all depend upon the continued existence and availability of water from the rivers of the State.").

123. 282 U.S. 423 (1931).

124. *Id.* at 459. *See also* F. TRELEASE, *supra* note 1, at 128-30.

125. The Bureau of Reclamation was formed under the Reclamation Act of 1902, ch. 4, 32 Stat. 388 (codified as amended in 43 U.S.C. §§ 371-600e). The early principle of the Act was that the United States would build irrrigation works from the proceeds of public land sales in the 16 arid western states in order to encourage settlement in this area. Since then, the purposes of the Act have grown to include the construction of water facilities for hydropower, municipal, commercial, and industrial uses. 1 WATER AND WATER RIGHTS § 110.2 (R. Clark ed. 1967).

126. F. TRELEASE, *supra* note 1, at 128-30.

127. *Id.* at 129 (quoting consulting engineer Harvey O. Banks).

One commentator has maintained that the 500 million dollar Los Angeles aqueduct would not have been constructed if substantial quantities of water had been claimed by the federal government for allocation to the Indians before the project was commenced.[128]

C. Federal Reserved Water Rights and State Law

Since federal reserved water rights are created by federal law and are not subject to state water law, federal claims to water need not be quantified according to state procedures.[129] Consequently, it is difficult for a state to maintain a unified and consistent "catalogue" of all water uses within its borders.[130] In addition, because the federal water right is potentially broader than a typical right under state law, as discussed below, the federal right can conflict with rights recognized under state law.[131]

Under the state doctrine of prior appropriation, a water appropriator is required to apply his or her water to a "beneficial use" in order to perfect a water right.[132] Traditionally, beneficial uses were limited to consumptive or commercial water uses, such as agriculture, mining, and stockwatering uses, and residential and industrial consumption.[133] In contrast, federal reserved water rights are generally allocated to nonconsumptive uses such as preserving instream flows, providing recreational and aesthetic resources, and wildlife conservation. Thus, if the federal government were required to assert its water rights under state law, the state might not recognize the claim because the federal purposes would not come within the state's definition of "beneficial use."

However, several western states have recently revised their water codes to include water preservation in the definition of "beneficial uses."[134] Thus, the extent of any actual conflict between a state's beneficial use requirement and the doctrine must be assessed on a state-by-state basis.

In addition to requiring that water be put to beneficial uses, several western states also require that an appropriator physically divert the water from its source in order to perfect a water right. In these states,

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128. *Id.*

129. Cappaert v. United States, 426 U.S. 128, 145 (1976) (holding that "[f]ederal water rights are not dependent upon state law or state procedures").

130. *See supra* note 122.

131. *See* Fairfax & Tarlock, *supra* note 38, at 521.

132. *See supra* note 113 and accompanying text.

133. *See generally* Wilkinson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 210 (1985).

134. *See, e.g.*, CAL. WATER CODE § 1243 (Deering 1977) ("The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."); *see also* COLO. REV. STAT. §§ 37-92-103(3), (4) (1973); IDAHO CODE ANN. §§ 67-4307 to 67-4312 (Supp. 1986); NEV. REV. STAT. ANN. § 533.030 (Supp. 1986); ORE. REV. STAT. § 536.300 (1975); UTAH CODE ANN. § 73-3-29 (1971).

"in-stream appropriations" which merely leave the water in its natural state are not recognized.[135] Thus, federal uses such as fish and wildlife preservation, which require that water remain in its natural state, would be precluded by this requirement. Because of a lack of uniformity among the states, the practical impact of this requirement on federal reserved water rights would vary from state to state.[136]

In sum, three characteristics of federal reserved water rights are incompatible with the state doctrine of prior appropriation: (1) the federal priority date is determined by the date of the land reservation, not the date the water is actually used; (2) the federal right is unquantified which casts uncertainty over state created water rights; and (3) the federal right is not subject to some western states' requirements of beneficial use and physical diversion.

IV. The Practical Implications of Wilderness Reserved Water Rights

Despite state misgivings about the doctrine, it is not clear that applying federal reserved water rights in wilderness areas will significantly affect state and private water users. The impact of application of the doctrine to wilderness areas depends on its practical effects as well as its legal basis. Four practical considerations are of particular importance.

First, because federal reserved water rights vest on the date the land is reserved,[137] federal water rights in wilderness areas would have little effect on appropriations made prior to the wilderness designation, since these prior rights would be senior to the federal rights. The United States would hold rights senior only to those water appropriators whose claims were perfected *after* the designation of a wilderness area. Since the earliest possible priority date for a wilderness area located anywhere in the United States is 1964, the effective date of the Wilderness Act, state water rights perfected before that time would not be affected by the doctrine.[138] Many state wilderness areas were designated in 1980, and

135. *See, e.g.*, California Trout, Inc. v. Water Resources Control Bd., 90 Cal. App. 3d 816, 820, 153 Cal. Rptr. 672, 674 (1979) ("The statutory pattern makes it plain that possession of some sort must be taken of the water."). However, other western states now allow in-stream appropriations by the state. *See, e.g.*, Department of Parks v. Idaho Dept. of Water Admin., 96 Idaho 440, 444, 530 P.2d 924, 928 (1974) (holding that the Idaho constitution "does not require actual physical diversion"); COLO. REV. STAT. § 37-92-103(3) (1973) (authorizing the state to make an instream appropriation).

136. It has been suggested that this variance among the states is itself a sufficient basis for the federal government to refuse to comply with state law. F. TRELEASE, *supra* note 1, at 137 (such variations would create "material and undesirable variations in the local application of federal laws, policies and programs").

137. *See supra* notes 79-82 and accompanying text; *see also Sierra Club I*, 622 F. Supp. 842, 862 (D. Colo. 1985).

138. *See* Comment, *supra* note 85, at 395.

thus have relatively late priority dates.[139] The federal reserved water rights accompanying future wildernesss designations would have priority dates that would be junior to all then-existing claims.[140]

Second, the location of many wilderness areas makes it unlikely that federal reserved water rights in these areas would actually impair the rights of other users. In Colorado, for example, wilderness areas are located high in the mountains where many of the streams which supply the state with water originate.[141] In the rare instances when a user needs to appropriate water above a wilderness area,[142] the diversion would be prohibited only if it interfered with the primary purposes of the wilderness area.[143] On the other hand, in other states where wilderness areas are located at lower elevations, the doctrine could have a greater impact on upstream diverters.

Third, state concerns that the federal reserved water rights would "lock up" large and unquantified amounts of water in wilderness areas may be of little practical importance. Because the use of water for wilderness purposes is "nonconsumptive", the water likely would remain in its free-flowing state, passing through the wilderness areas to downstream users.[144] In short, because of their late priority date, location,

139. For a discussion of wilderness priority dates, see *Colorado Wilderness Act: Hearings on S. 2916 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 130 (1984) (statement of Maggie Fox, Southwest Director, The Sierra Club).

140. *Id.*

141. *See* Kosloff, *Water for Wilderness: Colorado Court Expands Federal Reserved Water Rights*, 16 Envtl. L. Rep. (Envtl. L. Inst.) 10002, 10006 (1986); Comment, *supra* note 85, at 395.

142. As commentators have noted, few users need to divert water above a wilderness area since there are few practical uses for water in such remote locations. Kosloff, *supra* note 141, at 10006; Comment, *supra* note 85, at 395.

143. This conclusion has been contested by at least one Coloradan. Ralph Curtis, President of the Colorado Water Congress, testified in June, 1986, before the House Public Lands Subcommittee:

> Our State's history has shown that it is sometimes necessary to divert water from above or within a wilderness area so that it can be used where it is needed. Moreover, water storage is best accomplished at higher elevations for use even in the same basin, so that the water can be released and allowed to flow down the stream channels for diversion by the greatest number of uses, including farms, cities, and businesses, when the water is needed. Existing wilderness areas in Colorado are primarily located at the higher elevations where future storage may be needed. The problem of locating diversion and storage points will only be magnified as wilderness designations are extended or proceed downstream on Forest Service and [Bureau of Land Management] lands.

Hearings on H.R. 4233, supra note 3, at 221.

144. As one commentator stated: "Reserved rights in wilderness do not consume water. They merely assure that what flows today will flow tomorrow." *Id.* at 332 (statement of Christopher H. Meyer, Counsel for the National Wildlife Federation). *See also* Abrams, *supra* note 91, at 389. As Abrams states, "[m]ost designated wilderness areas are relatively remote and near the headwaters of streams; most state law appropriators, by contrast, are located down-

and nonconsumptive use of water in wilderness areas, federal reserved water rights in wilderness areas will have less effect on existing water users than is popularly believed.[145]

Perhaps the most convincing argument against applying the reserved water rights doctrine to wilderness areas is the federal government's ability to assert the "no injury rule"[146] against state water appropriators. This rule, followed in virtually all of the western jurisdictions, requires water users seeking to change their water uses to demonstrate that the change will not harm junior water users.[147] In three decisions, the Supreme Court has used language similar to the "no injury rule" implying that the federal government could invoke this concept.[148] As a result, the federal government may assert this rule to prevent a junior user from changing his or her use in a way which would adversely affect the water flow through a wilderness area.[149]

V. Legislative Reaction to the Doctrine

A. Historical Background

From the time the Supreme Court first extended federal reserved water rights to lands other than Indian reservations in *Pelton Dam*,[150] federal legislators from western states have lobbied for a congressional reversal of the doctrine. The matter has been before Congress almost continuously since 1956, and legislative interest in this issue remains strong.[151]

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stream. Thus, a federal reserved [water] right that maintained water in the stream until the water flowed through the wilderness area would not affect these downstream uses."

145. The court in *Sierra Club I* stated: "[I]t is important to note that these reserved rights will probably have little effect on prior appropriators." *Sierra Club I,* 622 F. Supp. 842, 862 (D. Colo. 1985).

146. *See infra* notes 147-149 and accompanying text.

147. *See, e.g.*, Cache La Poudre Water Users Ass'n v. Glacier View Meadows, 191 Colo. 53, 61, 550 P.2d 288, 294 (1976) ("[W]here senior users can show no injury by the diversion of water, they cannot preclude the beneficial use of water by another."); Green v. Chaffee Ditch Co., 150 Colo. 91, 106, 371 P.2d 775, 783 (1962) ("Equally well established, . . . is the principle that junior approriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfuly resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights." (quoting Farmers Highline Canal & Reservoir Co. v. Golden, 129 Colo. 575, 579, 272 P.2d 629, 631-32 (1954)).

148. *See* Cappaert v. United States, 426 U.S. 128, 141 (1976); Arizona v. California, 373 U.S. 546, 599-601 (1963); Winters v. United States, 207 U.S. 564, 577 (1908).

149. In other words, a user whose right vested prior to the time the federal land was reserved would be prevented from changing the point of his diversion if it were deemed to diminish the flow of water necessary to fulfill the primary purposes of a wilderness area. *See* Comment, *supra* note 85, at 395-96.

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

151. *See infra* notes 152-176 and accompanying text.

The first bill introduced in Congress regarding reserved water rights—the "Barrett Bill"[152]—would have subjected the federal government to state law in almost every water-related activity. Not surprisingly, several federal departments opposed the proposal as overly broad.[153]

In 1958, the Interior Department submitted the "Agency Bill"[154] for committee consideration, which provided that the reservation of federal lands would not affect any water rights acquired under state law. Several federal agencies, including the Departments of Justice and Defense, initially supported this bill, but when it was later modified to deny federal reserved water rights altogether, the federal agencies withdrew their support. One commentator described this modification as a "bald attempt to enact into law an untenable theory of state supremacy."[155]

B. The Legislative Reaction of the Colorado Congressional Delegation

Sierra Club I provoked renewed opposition to the federal reserved water rights doctrine in Colorado and in Congress. When a preliminary ruling was issued in the case in 1984, United States Senator William L. Armstrong[156] attached a rider to the then-pending Colorado Wilderness Bill.[157] Armstrong's amendment would have abolished all federal claims to reserved rights in Colorado's existing and future wilderness areas.[158] When environmentalists opposed the amendment, Armstrong withdrew his support for the entire wilderness bill, and it was never passed.[159]

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152. Water Rights Settlement Act of 1956, S. 863, 84th Cong., 2d Sess. *See 1956 Senate Hearings* 244. The full text of this bill is set forth in Morreale, *supra* note 31, at 512-15. *See also* F. TRELEASE, *supra* note 1, at 131.

153. F. TRELEASE, *supra* note 1, at 131.

154. *Hearings Before the Subcommittee on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs,* 86th Cong., 1st Sess., series 9 at 131 (1959). The Agency Bill was submitted on March 28, 1958. It was intended as a substitute for the Barrett Bill and provided that the withdrawal or reservation of lands would not affect any preexisting or subsequently acquired water right under state law. One commentator suggests that the bill was never passed because it raised more questions than it answered, such as when the United States was deemed to have initiated its water rights. Morreale, *supra* note 31, at 478-80.

155. F. TRELEASE, *supra* note 1, at 132.

156. R-Colo.

157. S. 2916, 98th Cong., 2d Sess., 130 CONG. REC. S10,018 (daily ed. Aug. 8, 1984).

158. Section 7 of S. 2916 stated:

> No provisions of this Act nor any other Act of Congress designating areas in Colorado as part of the National Wilderness Preservation System, nor any guidelines, rules, or regulations issued thereunder, shall constitute the establishment of a right to the use or flow of water in the Federal Government because of the designation . . . .

Colorado Wilderness Act: Hearings on S. 2916 Before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources, 98th Cong., 2d Sess. 22 (1984) [hereinafter *Hearings on S. 2916*].

159. *See* J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 546 (1986).

Senator Armstrong argued that Congress had not intended to reserve any water rights when it created the wilderness system. Such a step, he believed, would "clearly do serious violence to the West's long-standing system of state water law and would throw into serious jeopardy the water rights of thousands of Coloradans."[160] The reaction to Armstrong's amendment was mixed. Private and state water users praised the proposal, while many environmentalists opposed it.[161]

Following the demise of the Armstrong proposal, attempts were made to resurrect the Colorado Wilderness Bill. Congressman Timothy Wirth[162] proposed a bill which would have designated 773,675 acres of new wilderness in Colorado, but the bill did not refer to federal reserved water rights.[163] This bill died without passage.

In February 1986, Congressman Michael Strang[164] introduced a bill dealing exclusively with reserved water rights in Colorado wilderness areas.[165] Congressman Strang's proposal would have reversed *Sierra Club I* and established alternative procedures by which federal land managers could seek only minimum instream flows in Colorado wilderness areas. In effect, this proposal directed federal land managers to defer to Colorado's law on instream flows.[166]

Supporters of Congressman Strang's bill applauded the idea of requiring the federal government to defer to state law, rather than displace Colorado's well-established system.[167] However, the bill failed to assuage the concerns of environmentalists who feared that Colorado's state water law would not adequately protect streamflows in Colorado wilderness

160. 130 CONG REC. S10,021 (daily ed. Aug. 8, 1984) (statements of Sen. Armstrong).

161. *Compare Hearings on S. 2916, supra* note 158, at 414 (statements of John Porter, farmer) ("[T]erms like 'natural state,' and 'pristine environment,' are nice terms, but they make me very nervous as an upstream diverter. We think section 7 [of Armstrong's bill] needs to be in there . . . .") *with id.* at 132 (statement of Maggie Fox, Southwest Representative of the Sierra Club) ("[Section 7] is both unnecessary and potentially very destructive to the integrity of the wilderness system in Colorado and nationwide.") *and id.* at 138 (statement of Michael Scott, Regional Director of The Wilderness Society) ("[The] language [of section 7] is categorically unacceptable to us.")

162. D-Colo.

163. H.R. 34, 99th Cong., 1st Sess., 131 CONG. REC. H66 (1986).

164. R-Colo.

165. H.R. 4233, 99th Cong., 2d Sess., 132 CONG. REC. H570 (1986).

166. For a more detailed examination of the Strang proposal, see *infra* notes 169-174 and accompanying text.

167. "Rather than displacing an established State program, [Strang's bill] directs U.S. agencies to utilize Colorado's program, unless it is shown to be plainly inadequate. . . . [T]he doctrine of implied reserved water rights is a slender peg on which to rest the policy of the United States in water matters." *Hearings on H.R. 4233, supra* note 3, at 205 (statement of Larry Simpson, Manager of the Colorado Water Conservancy District). Another Colorado state water official expressed concern "about the disruptive effect of a federal intrusion of unquantified rights that do not respect our well-established state water rights system, a system that is understood and observed by all other water users in the state." *Id.* at 159 (statement of David H. Getches, Executive Director of the Colorado Department of Natural Resources).

areas.[168] Thus, this bill also died without passage.

Congressman Strang's bill was the first to deal exclusively with federal reserved water rights in wilderness areas, and thus merits closer examination. The bill would have authorized the Secretary of the Interior to claim minimum instream flows for wilderness areas in accordance with Colorado law, which permits instream appropriations to "preserve the natural environment to a reasonable degree."[169] However, these instream appropriations historically have been limited to the minimal amount of water needed to keep fish alive.[170] Congressman Strang's bill did not use the language of the Colorado instream statute, but instead would have limited the federal water appropriations to the minimum amount necessary to preserve "aquatic life to a reasonable degree."[171] Congressman Strang did not specify whether this provision would have allowed the federal government to appropriate water to serve recreational, scenic, or educational purposes, or to preserve plants and wildlife other than fish. In other words, the bill may have authorized the Secretary to do what cannot be done under Colorado law.

The bill also prohibited federal water appropriations "during drought events," a caveat which would have left the federal government without water rights during times of critical need in wilderness areas.[172] In addition, the bill provided that "nothing in this section shall be construed . . . to deprive the people of the State of Colorado of the beneficial use of those waters available by law and by interstate and international compacts."[173] As one commentator has noted, "[r]ead literally, this language completely eliminates whatever minimal water rights would otherwise be allowed [to the federal government] under the bill."[174]

There is no Colorado wilderness legislation currently pending before Congress. The members of the Colorado delegation report that they are

168. "[T]he solution proposed in H.R. 4233 is no solution at all, but an abdication of federal responsibility in the guise of comity." *Id.* at 337 (statement of Christopher Meyer, counsel for the National Wildlife Federation).

169. COLO. REV. STAT. § 37-92-103(4) (1973).

170. See Colorado River Water Conservation Dist. v. Water Conservation Bd., 197 Colo. 469, 480, 594 P.2d 570, 578 (1979), in which the Colorado Supreme Court upheld the Colorado Water Board's determination that the appropriation of minimum flows necessary to preserve certain fish species also would suffice to maintain the rest of the natural environment.

171. H.R. 4233, 99th Cong., 2d Sess., § 2, 132 CONG. REC. E451 (1986). Section 2 provides:

> The Secretary is authorized . . . to claim where necessary in a manner consistent with . . . [the] laws governing water appropriation in the State of Colorado, such minimum instream flows of the waters of natural streams and lakes within designated wilderness areas as may be required to preserve and protect, except during drought events, minimum instream flows to maintain aquatic life to a reasonable degree.

172. *Id.* § 2.

173. *Id.* § 2(b).

174. *Hearings on H.R. 4233, supra* note 3, at 337 (statement of Christopher Meyer, counsel for the National Wildlife Federation).

committed to determining whether federal reserved water rights will apply to wilderness areas before drafting any new wilderness legislation.[175] Thus, the political debate over the reserved water rights doctrine in wilderness areas has effectively blocked the passage of any new wilderness designation at this time, creating an additional concern for environmentalists.

Colorado's representatives are not alone in their concern that extending the doctrine of federal reserved water rights to wilderness areas may adversely affect the state's available water supply. In 1985, for example, legislation was introduced which would have expressly denied federal reserved water rights in 939,400 acres of wilderness in Nevada.[176]

C. The Effect of the Federal Reserved Water Rights Doctrine on Wilderness Legislation

While the practical effects of federal reserved water rights in wilderness areas may not be as significant as the current debate suggests,[177] current case law and statutes are inadequate to resolve the important legal issues presented. Federal legislators are hesitant to enact new wilderness legislation, thereby stalling the expansion of the nation's existing wilderness system.[178] A legislative compromise is necessary to protect state and federal water interests and to move wilderness legislation through the political process.

VI. A Proposed Legislative Solution

While the laws of western states are beginning to reflect environ-

175. Telephone conversations with legislative aides to Congressman Campbell (who replaced Strang in January of 1987) and to Senator Armstrong, Feb. 10, 1987 and Sept. 17, 1987. During the conversations on Sept. 17, 1987, the aides to Senator Armstrong stated that he has proposed a meeting with all parties involved in the *Sierra Club v. Lyng* litigation to discuss the reserved rights issue. While the parties were expected to meet and reach a compromise in the fall of 1987, they have not yet done so.

176. *Additions to the National Wilderness Preservation System: Hearing on H.R. 1686 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. 18 (1985). Section 402(b) of this bill provided: "Nothing in this Act shall be construed to limit the exercise of valid water rights as provided under Nevada State Law, nor shall it constitute an express or implied reservation of water rights in favor of the Federal Government."

177. *See supra* notes 137-149 and accompanying text.

178. Opponents to the doctrine have remarked: "If [appropriating all the water in wilderness areas] is the aim of wilderness legislation, our District is not interested in seeing any more wilderness areas designated in Colorado." *Hearings on H.R. 4233, supra* note 3, at 205 (statement of Larry Simpson, Manager of the Colorado Water Conservancy District); ". . . [W]e oppose the passage of any additional wilderness designation in Colorado, unless the legislation contains a Congressional declaration that implied federal reserved water rights are not created as a result of wilderness designation." *Id.* at 225 (statement of Ralph Curtis, President of the Colorado Water Congress).

mental concerns,[179] many legislators continue to resist the idea of allowing the federal government to claim reserved water rights for wilderness areas. A wilderness bill for a western state must address several issues in order to provide an acceptable compromise between the *Sierra Club I* approach and total refusal to apply the doctrine to wilderness areas. While the states prefer Congressman Strang's proposal, environmentalists fear that the Strang bill would severely handicap the federal government's ability adequately to protect valuable water flows within wilderness areas.[180]

The first step towards a more satisfactory compromise is to determine whether federal reserved water rights should apply to wilderness areas. Under the Supreme Court's analysis in prior reserved water rights cases,[181] reserved water rights should indeed accompany a wilderness designation. The secondary nature of the withdrawal of land for wilderness designation does not negate a federal claim for the water flowing on the land. In *Arizona v. California*,[182] the Supreme Court held that reserved water rights attached to a national recreation area and a national wildlife refuge, both of which were secondary withdrawals.[183] Moreover, by its very provisions, the Wilderness Act created new reservations with new purposes,[184] unlike MUSYA in *New Mexico* which merely broadened the purposes of national forests.[185] Since it appears that Congress intended all of these new wilderness purposes to be "primary",[186] reserved water rights should attach to wilderness areas under the *New Mexico* primary purpose test.[187]

While Congress does not have an affirmative obligation to adopt the judicially implied doctrine of federal reserved water rights,[188] it could *choose* to follow the lead of the courts in this matter by issuing a legislative pronouncement that reserved water rights accompany wilderness designations. The Wilderness Act, created by Congress, furthers the worthy national policy of ensuring that certain federal lands, valuable for their pristine beauty and wealth of natural resources, will remain in their natural state. In order to design legislation that would truly be a compromise, however, Congress should declare that reserved water rights in wilderness areas are subject to legislative restraints designed to protect the state interests involved. In this way, a compromise would not be

179. *See supra* note 134 and accompanying text.
180. *See supra* notes 161-168 and accompanying text.
181. *See supra* notes 40-82 and accompanying text.
182. 373 U.S. 546 (1963).
183. *Id.* at 601.
184. *See supra* note 95 and accompanying text.
185. *See supra* notes 73-74 and accompanying text.
186. *See supra* notes 95-101 and accompanying text.
187. *See supra* notes 61-62 and accompanying text.
188. Under the concept of separation of powers as laid out by Articles I, II, and III of the Constitution, Congress is given the responsibility for initially creating and enacting laws.

"loaded" toward those who favor unrestricted federal wilderness water rights by allowing Supreme Court precedent to control legislative policy-making.

The most effective means of accommodating legitimate state water concerns would be for the federal legislation to state expressly the amount of water the federal government is claiming when it designates a wilderness area. Thus, Congressional intent to reserve water for wilderness areas would not have to be implied as in the past, but would be expressed in any new legislation. This approach is superior to measures such as the Strang proposal which would require that federal water rights be determined by state law. While Congress typically has deferred to state law on water use issues, federal deference in the context of reserved water rights for wilderness areas is undesirable. The very reason that the Constitution contains a Supremacy Clause is to provide Congress with control over the effects of its laws, by precluding state subordination of federal goals to local interests.[189] This clearly is an area in which the federal law should be allowed to preempt relevant state laws[190] because, as discussed in Part II, state law requirements would impede the full attainment of federal objectives. A uniform, national water policy for protecting wilderness areas is more desirable than a piecemeal, state-by-state determination of wilderness water rights. Thus, Congress could declare, using its powers under the Property and Supremacy Clauses,[191] that as a matter of federal law, reserved water rights exist in federal wilderness areas to fulfill the primary purposes of these areas.

The next issue is how much water the federal government *should* claim by the terms of its legislation. In order to achieve the preservation-oriented purposes underlying creation of wilderness areas, the federal government should reserve more water than the amount needed to preserve aquatic life. As its provisions and legislative history suggest, the Wilderness Act was designed to protect a much wider range of environmental values including aesthetics, scenery, education, history, and conservation.[192] Thus, Congress should establish parameters for wilderness reserved water rights that parallel the language of the Wilderness Act

189. Professor Tribe states in his treatise: "Thus, state action must be invalidated if its effect is to discourage conduct that federal action seeks to encourage." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 378 (1978). Another commentator notes: "When federal action is inspired by a desire to avoid multiple and conflicting state regulation, or to circumvent the parochial attitude of local authorities, the context strongly suggests that the states should not be allowed to continue to govern matters . . . ." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 STAN. L. REV. 208, 216 (1959). These concepts are particularly important in the reserved water rights context since the federal goal of keeping water in its natural state for wilderness purposes is at least perceived by states as a threat to their use of the water for consumptive purposes.

190. *See supra* note 24 and accompanying text.

191. *See supra* notes 35-39 and accompanying text.

192. *See supra* notes 99-100 and accompanying text.

itself, rather than the language of a state law that severely restricts instream appropriations. The legislation should expressly permit the federal government to claim sufficient instream flows to preserve the recreational, scenic, scientific, educational, conservation, and historical purposes of the wilderness area designated.[193] The federal government then could claim the instream flows necessary to preserve the natural character and habitats of the wilderness area. By expressly defining federal reserved water rights, Congress could protect the environmental value of each wilderness area. This concept would be particularly helpful in those states that do not recognize environmental concerns as a beneficial use, or do not permit instream appropriations.

A chief complaint by western states is that the current federal reserved water rights doctrine allows the federal government to claim an unquantified, "blank check" amount of water. To protect state interests, therefore, Congress should precisely quantify the amount of water it is claiming for wilderness areas. The legislation should state precisely how much water the federal government will claim during each of the various seasons, and during drought periods should they occur.[194] An automatic

193. The language adopted should parallel that of the Wilderness Act, 16 U.S.C. § 1133(b) (1982).

194. To resolve the problem of quantifying federal reserved water rights, some commentators have suggested that general adjudicatory proceedings should be held to quantify the rights of all claimants to a water supply, including the federal government. *See, e.g.*, Elliott & Balcomb, *Deference to State Courts in the Adjudication of Reserved Water Rights*, 53 DEN. U. L. REV. 643, 661 (1976); Note, *Adjudication of Indian and Federal Water Rights in the Federal Courts*, 46 U. COLO. L. REV. 555, 557-63 (1975); Note, *Adjudication of Federal Reserved Water Rights*, 42 U. COLO. L. REV. 161, 167-68 (1970). A general adjudication is in effect a statutory class action in which, after proving their rights, claimants obtain a decree setting forth each claimant's rights, specifying the date of appropriation, amount of water due, season, type of use, and so forth. *See* J. SAX & R. ABRAMS, *supra* note 159, at 574.

The federal government could be joined in this state proceeding pursuant to the 1952 McCarran Amendment, 43 U.S.C. § 666 (1982), which allows the United States to be joined as a party in state water proceedings. The McCarran Amendment provides:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

Id.

Courts have applied this provision to the federal reserved water right. Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976); United States v. District Court *ex rel.* Water Div. Number 5, 401 U.S. 527 (1971); United States v. District Court *ex rel.* Eagle County, 401 U.S. 520 (1971); United States v. Bell, 724 P.2d 631 (Colo. 1986).

While using proceedings under the McCarran Amendment to quantify federal reserved water rights sounds appealing in theory, such adjudications sometimes involve thousands of claimants and, as a result, can take years to resolve. One commentator has characterized the problems with the procedure as follows: "The most frequently voiced criticisms of general adjudications in which the United States has been joined as a party pursuant to the McCarran Amendment are [that it is] too expensive, too time-consuming, promote[s] overreaching, exac-

denial of the reserved right during times of water shortage, as suggested by Congressman Strang, would severely threaten the plant, wildlife, and fish populations in a wilderness area.

To assist the states further in their water planning, the legislation should direct the Secretary of the Interior to prepare a "catalogue" of water rights, estimating the current and future water needs of wilderness areas on an area-by-area basis. In addition, the Secretary should indicate the amount of water needed by private appropriators.

The legislation should prescribe controls on future exercise of federal reserved water rights by requiring the federal government to give notice of its intended appropriation to all water users who may be affected by the federal claims. Federal appropriations effected without proper notice would obligate the federal government to compensate displaced users.[195]

To increase the protection given to federal water rights, the "no injury" rule[196] should be included in the legislation. With the "no injury" rule, the federal government could ensure that any changes in use, even changes by senior water users, would not lessen the flow of water available to any wilderness area.

Finally, the legislation should allow for state administration of the federal reserved water right. In this respect, the states in which federal wilderness areas lie could ensure that the amount of water the federal government claimed is indeed being used for wilderness purposes. While the law on state administration of federal water rights is not entirely clear, at least one court has held that states have this power under the McCarran Amendment.[197]

The Congessional delegation from New Mexico recently proposed a bill containing federal reserved water rights language for the El Malpais Wilderness in New Mexico.[198] Such a proposal may be a step in the right

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erbate[s] differences and promote[s] distrust, and reach[es] uneven results." White, *McCarran Amendment Adjudication—Problems, Solutions, Alternatives*, 22 LAND & WATER L. REV. 619, 626 (1987). Thus, by having the federal government quantify its reserved rights outright pursuant to federal legislation, resolution of the reserved water rights problem would occur much sooner.

195. *See* Note, *Adjudication of Federal Reserved Water Rights*, 42 U. COLO. L. REV. 161, 171 (1970).

196. *See supra* notes 146-149 and accompanying text.

197. 43 U.S.C. § 666 (1982). *See* Federal Youth Center v. District Court, 195 Colo. 55, 575 P.2d 395 (1978); *see also supra* note 194.

198. H.R. 403, 100th Cong., 1st Sess. (1987). Section 509(a) of the proposed bill states: "Congress expressly reserves to the United States the minimum amount of water required to carry out the purposes for which the national monument, the conservation area, and the wilderness areas are designated under this Act." According to a legislative aide to Senator Armstrong (R-Colo.), despite the controversy over wilderness water, the New Mexico Senators are proceeding with the bill as introduced because the Senators and state leaders feel that any potential problems are moot since the El Malpais Wilderness governed by the bill has little

direction, and may help to encourage legislative resolution of the reserved water rights problem.

No one piece of legislation will completely satisfy state governments, federal interests, environmentalists, and private water users. The legislative scheme suggested above represents balanced concessions, making possible continued development towards preserving and expanding the nation's wilderness lands. The problem might best be approached by examining basic principles of constitutional law. The above solution attempts to preserve the federal governments's priority in policy-making pursuant to the Supremacy Clause, while granting the states more certainty in planning for their water needs.

Conclusion

Under the federal reserved water rights doctrine, the federal government is deemed impliedly to have reserved enough water to fulfill the primary purposes for which it has withdrawn federal land from the public domain and reserved it for a specific national purpose. The doctrine historically has been applied to Indian reservations, military facilities, national monuments, national parks, and national forests. It was not until 1985 that the doctrine was extended to wilderness areas.[199]

The federal reserved water rights doctrine conflicts with the western states' system of prior appropriation and has fueled a growing controversy in the semiarid West.[200] Federal legislators from Colorado have sought to overturn *Sierra Club I* by introducing amendments to the Colorado Wilderness Act which would expressly preclude federal reserved water rights in Colorado's existing and future wilderness areas. None of these amendments has been adopted and the legislators are currently attempting to reach a compromise before proceeding with new legislation.[201] Thus, the issue of federal reserved water rights in wilderness areas remains unresolved and has impeded the enactment of new wilderness legislation in many states.

A legislative solution is best approached with a constitutional view. Under the Supremacy and Property Clauses, the federal government can upset state-created water rights when it withdraws federal land. Without adequate restraints, this exercise of federal power adversely affects state water planning and policy-making. Through carefully crafted legislation, however, Congress can use its authority under these two clauses to protect federal wilderness areas while accommodating state water needs.

water in it anyway. Telephone interview with legislative aide to Senator Armstrong (Sept. 17, 1987).

199. *See supra* notes 89-104 and accompanying text.

200. *See supra* notes 116-136 and accompanying text.

201. *See supra* notes 156-158 and accompanying text.

This Note proposes elements of a legislative compromise which would use the supremacy of federal law to address local as well as national water needs. The legislation would define the federal right as a matter of federal law, and would provide for explicit quantification of the right in federal legislation so as to facilitate state water planning. While complex problems remain, a compromise could be better encouraged if the reserved water rights doctrine were perceived not as a federal wild card, blank check, or intrusion of Damoclean magnitude, but as a device by which states can incorporate environmental concerns into their water planning philosophy.

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