The Morality of Wilderness: Federal Reserved Water Rights in Western Wilderness Areas

Elinor Colbourn

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylpr

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.yale.edu/ylpr/vol6/iss1/9

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law & Policy Review by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
The Morality of Wilderness: Federal Reserved Water Rights in Western Wilderness Areas

Elinor Colbourn

Wilderness—allow the idea to inhabit your mind's eye for a moment. Typically, an image of trees and perhaps mountain peaks, alpine flowers, or wildlife will emerge. If you have ever been to a true wilderness, you will also recall a profound stillness, due not to any actual silence, but to the absence of the normal sounds of our everyday lives.

This image, however, is far from an accurate description of many of the areas that Congress and the U.S. Forest Service proudly label Wilderness Areas under the 1964 Wilderness Act. The integrity of these wilderness areas has been eroded by economic pressures for development and the contradictory management objectives of the government agencies that administer the areas. To envision a modern wilderness accurately, then, you must add to your mental picture, among other things, trails, shelters, hardened campsites, portable toilets, and corrals for commercial outfitters. The image now comes closer to the bureaucratic reality. To envision the issue at stake in the recent decisions in Sierra Club v. Block and Sierra Club v. Lyng, you must compromise your original image of wilderness even further and remove or reduce the flow of water in the rivers, lakes, and streams. It is the realization of this final image, however, that these two recent Colorado district court rulings attempt to prevent by establishing the existence of federal reserved water rights in wilderness areas.

1. 16 U.S.C. §§ 1131-1136 (1982). It should be noted that the vast majority of wilderness areas designated under the Wilderness Act of 1964 are located in the western states. This paper addresses only these western areas.

It seems obvious that Congress could not have intended to allow the water in land reserved as wilderness to be diverted for other uses, ultimately turning these areas into barren wastelands. Apart from the beauty of free-flowing rivers, wilderness is valued for scientific research, for which the natural water cycles are invaluable. Some of the leading research on ecosystem patterns and functioning are based on watershed nutrient cycling data. Any alteration of the natural watershed functioning would adversely impact and perhaps invalidate research of this type. Groundwater is equally important in the functioning of natural processes such as soil formation and patterns of vegetation. A decrease in saturation levels or in the water table could affect nutrient concentrations, as well as cycling and leaching processes in the soil. All of these factors in turn influence the rest of the wilderness ecosystem. Thus, the unique value of wilderness as a reservoir of genetic materials and a control against which to measure human impact in other ecosystems would be adversely affected by any change in the watershed.

Scientific and economic concerns, however, should not be viewed as the only, or even the most important, reason for a complete reservation of water in wilderness areas. Economic and scientific arguments may be countered in a degenerating battle of statistics, but the Wilderness Act is not about statistics; it is about moral values—the recognition that wilderness has value as wilderness. Fundamentally, these values were espoused by Congress in 1964. No economic gain was foreseen by that Congress, nor were tangible scientific benefits weighed. Primary consideration was given to the preservation of lands untrammeled by man, and opportunities for solitude or primitive recreation. Unless Congress expressly alters this value judgment, it should not be permitted to be whittled away. As legal commentator Michael McCloskey observed, the Act:

has blended many political, religious and cultural meanings into deeply felt personal convictions. . . . Those who administer that law must look to these convictions to understand why the law exists. The

---

3. The best known example of this type of research is the long-running study of the Hubbard Brook Experimental Forest in New Hampshire conducted by Yale, Cornell, and Dartmouth Universities in conjunction with the U.S. Forest Service.
4. Researchers at Hubbard Brook do not permit visitors even to enter the controlled watershed areas; this prohibition is established in order to prevent any inadvertant impact on the data being collected.
5. The concept of the preservationist as moralist is explored in J. Sax, Mountains Without Handrails (1980).
Wilderness Reserved Water Rights

convictions cannot be easily manipulated or refashioned to suit the administrators.\footnote{McCloskey, The Wilderness Act of 1964: Its Background and Meaning, 45 Or. L. Rev. 288, 295 (1966).}

Indeed, after considering the legislative history of the Wilderness Act, Judge Kane's opinions in Block and Lyng enforced the original intent of the Wilderness Act in finding that wilderness areas carry appurtenant water reservations. These decisions effectively gave the rights to potentially all water in wilderness areas to the federal government as of the date of designation of the area as wilderness.

The holdings evoked sharp and critical reactions from western water interests.\footnote{One politician stated, "We woke up one morning to find that Judge Kane had decided we intended to do something we never even considered." Drabelle, The Lifeblood of Wilderness, Wilderness, Fall 1987, at 36, 37 [hereinafter Drabelle]; \textit{See also} Reid, Wilderness Areas Ruled to Have Water Rights, Wash. Post, Nov. 28, 1985, at A4, col. 1; Wilderness Ruling Raises Questions on Water Use, N.Y. Times, Dec. 1, 1985, at 27.} Ten senators\footnote{The signatories were: Chic Hecht, Jake Garn, Paul Laxalt, Alan Simpson, Barry Goldwater, Malcolm Wallop, Bill Armstrong, Steve Symms, Orrin Hatch, and Mark Andrews. Letter to Senator James McClure (Oct. 20, 1986).} sent a letter to James McClure, Chairman of the Committee on Energy and Natural Resources, insisting that:

The federal government has no implied right to water as a result of wilderness designation, but must establish any right to use water for wilderness purposes within the framework of State water law. . . . We believe further that no additional wilderness legislation should be passed unless these principles are clearly reaffirmed in federal law.\footnote{The Senators also expressed concern that "[a] right to preserve historic flows would be in direct conflict with future development of water, particularly the storage of water which, by its very nature, is designed to alter stream flows." \textit{Id.}}

Another senator charged that "(a) lawyer for the Sierra Club has been out having an adventure, and Congress may end up designating nothing but mountaintops as wilderness."\footnote{Sen. Jim Beirne, Minority Counsel to the Senate Comm. on Energy and Natural Resources, \textit{quoted in} Drabelle, \textit{supra} note 8, at 37.} This statement is particularly ironic since almost all the western wilderness is, in fact, comprised of mountaintops.

Concern that the district court would rule precisely as it did had actually created the threatened block on wilderness designations as early as 1984. Water is the only issue stalling passage of a Colorado wilderness bill.\footnote{Drabelle, \textit{supra} note 8, at 38.} An amendment to the Nevada wilderness bill was proposed in anticipation of the pending decision, an amendment that would have denied the existence of reserved water rights in the
designed areas. Despite this opposition, those who support Judge Kane's decision believe that without reserved water rights, the philosophy embodied in the Wilderness Act would be compromised to the point of irrelevance.

Legislation is needed to respond to this impasse, legislation that would uphold, and even expand, the rulings in Block and Lyng. Wilderness water rights should be quantified statutorily as that amount of streamflow and groundwater that existed at the time of the original reservation under the Wilderness Act. While such a broad gauge would not be suitable in most federal enclaves, the economic considerations and compromises acceptable, even desirable, in the context of other federal reservations are not appropriate in relation to the philosophy of wilderness preservation that underlies the Wilderness Act of 1964. Unlike other federal reservations, wilderness areas are highly restricted use areas and, once degraded, are irreplaceable. The intuitive character of wilderness has already been substantially compromised, but somewhere a line must be drawn. There must come a point at which the original moral judgment underlying the Wilderness Act, rather than the motivations of the special compromise provisions, guides management directives. The rights to wilderness waters is that point.

I. Genesis and Evolution of the Judicial Doctrine of Federal Reserved Water Rights

The judicially created doctrine of federal reserved water rights evolved from the 1908 Supreme Court decision in Winters v. United States. In Winters, the United States brought suit to restrain the defendants from diverting waters of the Milk River and its tributaries that would otherwise flow through the Fort Belknap Indian Reservation. The United States had not expressly reserved water rights in the 1888 treaty establishing the reservation. Nevertheless, the Court determined that both common sense and the rules of treaty

14. 207 U.S. 564 (1908). See also United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899) (“in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States ... to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property”).

160
Wilderness Reserved Water Rights

construction\(^{15}\) mandated a reservation as of 1888 of the water necessary for irrigation.\(^{16}\)

The courts long regarded *Winters* as a legal aberration relevant only to cases involving Native American rights.\(^{17}\) In 1955, however, the Supreme Court expanded its holding in *Winters* with the decision in *Federal Power Commission v. Oregon*.\(^{18}\) While the Court did not make explicit a reserved water rights doctrine for non-Native American lands, it did indicate for the first time that federal reserved lands are not subject to state water laws.\(^{19}\)

Western water users were quick to realize the import of this decision. The federal government not only controlled unappropriated waters on federal reserved lands, but also controlled appropriated water if the federal reservation was made prior to appropriation under state laws.\(^{20}\) Because federal reserved water rights may lie dormant and unquantified without being lost, junior appropriators remained uncertain of their rights.\(^{21}\) Consequently, calls arose for comprehensive legislation addressing the scope of federal water rights. The first of a number of "Western Water Rights Settlement Acts" was introduced that same year.\(^{22}\)

---

15. "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Winters*, 207 U.S. at 576.

16. In the western states, water rights are determined on a "first in time, first in right" principle. In Colorado, "the first person to divert unappropriated water and to apply it to a beneficial use has a water right superior to subsequent appropriators from the same water source." Navajo Dev. Co., Inc. v. Sanderson, 655 P.2d 1374, 1377 (Colo. 1982). Priority rights are used to apportion limited water resources. For example, if two people were each using 10 gallons of water per day, and the available water decreased seasonally to 15 gallons per day, the individual who first began using the water, the senior appropriator, would still be entitled to 10 gallons per day. The junior appropriator would receive only five gallons per day. In *Winters*, Native American rights were held to be superior to defendants' appropriations even though actual use by the Native Americans occurred after that of defendants.


18. 349 U.S. 435 (1955) (holding that the Desert Land Act of 1877 applies only to public lands open to settlement, not reserved lands; and authorization to build a hydroelectric plant on federal reserved lands does not require the consent of the state in which those lands lie).

19. This holding was later made more explicit in Nevada *v.* United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

20. This is true even if the junior appropriator did not, and prior to the ruling in *FPC v. Oregon* could not, know that the federal reservation carried water rights.


The fear of western water interests—that waters they believed they had legitimately appropriated were actually subject to federal reserved water rights—was borne out eight years later. In Arizona v. California, the Supreme Court expressly found that federal reserved water rights exist in non-Native American reservations, including National Forests, Wildlife Refuges, and National Recreation Areas. The extent of the reservation was held to be that amount of water sufficient for the requirements of the federal purposes of the lands.

The Supreme Court continued in the tradition of an expansive reserved rights doctrine in Cappaert v. United States. The Cappaerts had pumped water from their wells to such an extent that the water level was lowered in a subterranean pool located on federal land. The pool contained the only population of Devil's Hole pupfish. The United States successfully enjoined the Cappaerts from pumping this groundwater. For the first time, the Court held that reserved water rights affect groundwater as well as surface water. Yet the Court did not explicitly apply reserved rights to groundwater as such, only to that groundwater necessary to maintain the reserved surface water. Citing Arizona v. California, the Court simultaneously limited the reserved quantity to that amount necessary to maintain the underground pool and preserve its scientific value as set forth by the Presidential Proclamation.

The slight narrowing trend of Cappaert was continued in United States v. New Mexico. In this case, the United States claimed reserved water rights for the Gila National Forest, arguing that Congress intended to reserve water for aesthetic, recreational, and fish

---

24. 373 U.S. at 601.

Responding to the decision in Arizona v. California, the Public Land Law Review Commission (PLLRC), created by Congress to review use of United States public lands, called for quantification of prospective government water requirements, elimination of implied reserved water rights for future reservations, and compensation for water taken from a state appropriator whose interest had vested prior to the decision in Arizona v. California. See Trelease, supra note 17, at 479.

Again, in 1971 a National Water Commission Legal Study recommended that the federal government abandon the reserved rights doctrine and rely instead on eminent domain. The Commission further recommended that the government comply with the procedures set forth in state water laws. The recommendations of both the PLLRC and the Commission were generally ignored. See F. Trelease, Federal-State Relations in Water Law, (Nat'l Water Comm. Legal Study No. 5) (1971) [hereinafter Trelease, Legal Study No. 5].

27. Cappaert, 426 U.S. at 141.
Wilderness Reserved Water Rights

preservation purposes. The Court, relying heavily on legislative analysis, held against the government, finding that "Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows." These, the Court stated, were the only purposes set forth under the Organic Act of 1897, which established the National Forests. The additional purposes enumerated in the Multiple-Use and Sustained-Yield Act of 1960 (MUSYA) were held to be secondary purposes for which no additional water was reserved.

A further functional limitation of federal reserved water rights occurred in Sierra Club v. Andrus. The Sierra Club sought an order requiring the Department of the Interior to define and protect established federal reserved water rights in four specific water courses in southern Utah and northern Arizona: (1) the Escalante River; (2) the Paria River; (3) Kanab Creek; and (4) Johnson Wash. Each of these water courses was the subject of ongoing general adjudication in Utah state courts, adjudications in which the United States had not been joined and did not intend to intervene.

The Court found that the Department had not abused its discretion by failing to intervene because: (1) federal reserved water rights could not have been lost or harmed by nonassertion at that time, and (2) the relief sought was currently being attained through administrative means. The practical result of this decision was to

29. 438 U.S. at 718.
30. 438 U.S. at 718. The Organic Act of 1897 defined the purposes for which national forests can be reserved, and established a charter for forest management. 16 U.S.C.A. §§ 473-475 (West 1985). The Organic Act provides in pertinent part:
   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.

31. Justice Lewis Powell's strong dissent noted that this portion of the opinion appeared to be dicta, since the United States was not claiming that the MUSYA affected a reservation of additional water. United States v. New Mexico, 438 U.S. 696, 719 (1978) (Powell, J., dissenting). Nevertheless, this dicta has been given precedential weight in later decisions. See, e.g., Block, 622 F.Supp. 842.
33. These adjudications were undertaken pursuant to the filing of water rights applications for several energy projects.
34. Under the McCarran Act, 43 U.S.C. § 666 (1976), the United States may be joined as a party in any state adjudication of water rights. See United States v. District Court, 401 U.S. 520 (1971) (holding that the McCarran Act subjects all water rights of the United States within a particular state's jurisdiction to general adjudication in state proceedings).
35. 487 F.Supp. at 452.

In August 1978 the Interagency Task Force on Federal Non-Indian Reserved Water Rights was formed pursuant to President Jimmy Carter's water policy announcement of
prevent the orderly protection of federal reserved water rights. The federal government may choose to act after the state has reached a decision in the initial state proceedings and/or a state appropriator, by initiating use, has made a significant investment.

The application, scope, and enforcement of the principles of federal reserved water rights remain to be defined with respect to the National Wilderness Preservation System. However, the doctrine itself is now clear. When the United States removes land from the public domain and reserves the land for a specific purpose, it may simultaneously reserve the rights to the amount of water necessary to fulfill the purposes of the reservation. If the government does not make an express reservation, the courts will infer a reservation if the waters are vital to fulfill the primary purpose of the reservation.36

II. Moral Intent of the Wilderness Act of 1964

The well-documented ideological and political history of the Wilderness Act from inception to final passage provides an illuminating background against which to assess the value of reserved water rights in wilderness areas.37 Wilderness areas were first set aside, and thereby recognized as having value as wilderness, under the Forest Service Organic Act of 1897.38 The first official designation of wilderness within national forest lands occurred in 1924 in the Gila National Forest of New Mexico.39 In 1939, the Forest Service adopted a new set of regulations for the administration of wilderness areas. These so-called “U-regulations” shaped Forest Service policy until the passage of the Wilderness Act in 1964.

The U-regulations gave new administrative strength to wilderness designation, prohibiting commercial timbering, roads, building construction, grazing, the use of motorboats, and the landing of airplanes in these areas. However, the areas protected under the U-regulations were still threatened by the economic upswing that came

June 6, 1978. The task force issued its report on June 15, 1979, recommending systematic quantification of all federal reserved water rights. At the time Andrus was handed down, federal agencies had begun to act on those recommendations. This process has never been completed.

36. See Trelease, Legal Study No. 5, supra note 24.
37. It took nine years and 18 hearings before the Wilderness Act was passed. The initial five-year Senate battle alone generated over 2,000 pages of hearing transcripts.
38. McCluskey, supra note 7, at 296.
Wilderness Reserved Water Rights

with World War II. The Forest Service, despite internal regulations, remained legally powerless to prevent mining, dam construction, and water projects within wilderness areas.

The post-war period also saw the growth of private conservation organizations. A. Starker Leopold, a prominent preservationist, saw this conservation movement as a sign of "respect for nature as it existed in the first place. It is the emergence of this element of respect that deserves special attention, for it marks a turning point in man's view of the earth." As the frontier disappeared and open spaces became scarce, the frontier mentality, which held natural resources to be unlimited, began to change. Among other considerations, it became necessary to weigh aesthetic and spiritual values against questions of economics and pragmatism. Environmental protection became a moral issue.

It was in this atmosphere that, on June 7, 1956, Senator Hubert Humphrey introduced a bill that appeared to be relatively uncontroversial; it neither required the establishment of a new agency, nor altered any jurisdiction of existing agencies, nor required funding of any significance. The bill changed only one of the many sets of regulations governing public lands—those governing less than 2% of all the land in the United States.

The first hearings on the Wilderness Act set the pattern for the debates that would follow. The opposition of the mining and lumber interests was anticipated by the preservationists, but attacks from water interests were not; of 19 groups testifying, five were concerned with water rights.

The most important of the concerns raised were those of the California Department of Water Resources. The Department feared that some of their planned water projects, vital to the economy of California, would be banned by the proposed legislation. Perhaps concerned about adverse public reaction, the testimony given by the Department regarding the nature and location of these proposed

40. The economic pressures were graphically illustrated in a doctoral dissertation by James P. Gilligan. Gilligan criticized management practices of the period and cited numerous exceptions to the regulations. In 28 of the largest areas of designated wilderness, areas of over 100,000 acres in size, he documented 200 miles of roads, 145,000 acres in inholdings, between 400-500 mining claims, 60 active mines, 24 airstrips, pasture for 140,000 sheep and 25,000 cattle, and 90 dams. J. P. Gilligan, The Contradiction of Wilderness Preservation in a Democracy, reprinted in 102 Cong. Rec. 12313 (1956).

41. U-1 and U-2, 36 C.F.R. §§ 251.20, 251.21 (now superseded).


43. Id.


water projects was diplomatically vague and quite moderate in tone.\textsuperscript{46} However, a California newspaper, which supported the bill, substantially discredited the testimony of the Department of Water Resources when it reported that the Department’s projects included a number of radical infringements on wilderness areas: infringements already prohibited by management agency regulations. The projects were reported to include a dam in Yosemite National Park, possible tunnels under the Marble Mountain Wilderness, reservoirs for hydroelectric plants, and canals through the Lava Beds National Monuments and the Joshua Tree National Monument.\textsuperscript{47}

One frustrated preservationist commented at the hearings, “It has been my own theory that California is going to run out of fresh air before it runs out of water.”\textsuperscript{48} In fact, water collections could just as easily be made downhill where the water would inevitably end up.

The Department eventually was appeased by the addition of a provision granting the President power to authorize the construction of reservoirs and water facilities within wilderness areas if he deemed this use to be more beneficial to the American people than its denial. In addition, sponsors of the bill added a clause stating that nothing in the bill was intended to affect established federal-state relationships regarding water laws. Defendant intervenors in \textit{Sierra Club v. Lyng}\textsuperscript{49} unsuccessfully pointed to these compromises to support their contention that there are no federal reserved water rights attached to wilderness reservations.

The legislative battles over the Wilderness Act reflected the new post-war relationship between people and the land. In an early speech advocating passage of the bill, Howard Zahniser, then executive secretary of the Wilderness Society, editor of \textit{The Living Wilderness}, and honorary vice-president of the Sierra Club, captured the preservation philosophy that informs the Wilderness Act. He cited “our compulsion to save from destruction whatever is best,”\textsuperscript{50} and went on to address the growing popularity of recreation which was degrading many back-country areas:

\textsuperscript{47} J. McClatchy, Water Developers Fight Wilderness Area Proposal, Sacramento Bee, Feb. 19, 1957, at 8, col. B.
\textsuperscript{48} Hearings on S. 1176, supra note 46, at 348 (statement of David Brower).
\textsuperscript{49} 661 F. Supp. 1490 (D. Colo. 1985).
\textsuperscript{50} Zahniser, The Need for Wilderness Areas, 21:59 The Living Wilderness 37, 37 (1956-57).

166
Wilderness Reserved Water Rights

It is, of course, not surprising that recreational values are generally understood as representing the dominant importance of wilderness in our modern society. Only in a society that produces the erosion of human beings, the wearing away of soul and body and spirit that is so familiar in our modern circumstances, does the concept of recreation appear.\(^5^1\)

Zahniser was clearly addressing a friendly audience with whom he could afford to wax poetic. He even went so far as to claim that in wilderness lay the basis for our humanity. Yet in the end, it was just such lofty philosophy that ensured passage of the bill, for it appealed to the general public and inspired environmental organization memberships. It is, therefore, this philosophy that must be looked to in implementing the Wilderness Act.

The definition of wilderness that finally emerged from the political and philosophical battles reads:

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. . . . [It is] an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.\(^5^2\)

This definition has been, and continues to be, the subject of bitter debate. Contradictions between this definition and many of the special use and compromise provisions (e.g., the clause preserving federal-state relationships regarding water laws, added to appease water concerns) are inherent in the Wilderness Act. These contradictions are now echoed in incoherent management objectives and practices. For example, special provisions permit prospecting, the use of motorboats and aircraft where the use was already established, and the grazing of livestock subject to regulation by the Secretary of Agriculture.\(^5^3\)

\(^5^1\) Id. at 38.
The original management objectives mandated by the Act are:
[to administer wilderness areas] for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character and for the gathering and dissemination of information regarding their use and enjoyment as wilderness. . . .54

A current Forest Service brochure seems to indicate that the Forest Service is holding true to these objectives.55 It lists the following management goals for wilderness areas: (1) to perpetuate a system of high quality wilderness; (2) to provide opportunities for public use, enjoyment, and understanding of a wilderness experience; (3) to maintain plants and animals native to the area; (4) to maintain healthy watersheds; (5) to protect threatened or endangered species; and (6) to maintain the primitive character of wilderness as a benchmark for comparison with lands that have been developed. Yet this same brochure embodies the contradictory character of the Act by approving the following uses "as long as they do not adversely affect the area": trails, bridges, hunting, fishing, prospecting for minerals, shelters, pit or vault toilets, hitching racks and corrals for commercial outfitters, aerial fish stocking programs, weather stations, improvements for grazing, and structures to protect soil, water, or vegetation. Furthermore, the Forest Service adds: "don't be surprised to see some other activities that don't seem to fit the wilderness concept we've described!" It is difficult to reconcile a mandate to maintain the primitive character of wilderness with the approval of shelters, toilets, and bridges.

In some situations where secondary provisions of a statute contradict the basic purpose of the statute, courts have refused to enforce the incompatible provisions rather than impair the expressed intent of the statute. A federal district court, for example, held that despite the provision of the Wilderness Act permitting surface mineral exploration, such activity was prohibited by the plain purpose of the Wilderness Act.56

If the premise is accepted that mining activities and wilderness are opposing values and are anathema each to the other, then it would

Wilderness Reserved Water Rights

seem that in enacting the Wilderness Act Congress engaged in an exercise of futility if the court is to adopt the view that mineral rights prevail over wilderness objectives. . . . To create wilderness and in the same breath to allow for its destruction could not have been the real Congressional intent and a court should not construe or presume an Act of Congress to be meaningless if an alternative analysis is available.57

Wilderness preservation and compromise are by nature contradictory terms.

Some believe that the Wilderness Act only adds legality to abuses of the wilderness designation, and removes the moral foundation from which future battles could be waged. Certainly, the preservationists did not succeed completely in promoting the legislation of a "moral issue" in a democracy. Their failure has resulted in numerous legal battles over the intent of the bill, the latest of which is that over the existence and scope of federal reserved water rights in wilderness areas.

III. Sierra Club v. Block: Reserved Water Rights in Wilderness Areas

It seemed as if the controversy over the existence of federal reserved water rights in wilderness areas was settled when Judge Kane ruled in Block that "[f]ederal reserved water rights do exist in . . . each of the Colorado wilderness areas designated as such pursuant to the Wilderness Act. . . ."58 Rather than settling the issue, however, this ruling only seemed to create greater controversy. In Block, the Sierra Club raised three claims against John Block, then Secretary of Agriculture, and other government officials:59 (1) that federal reserved water rights exist in wilderness areas under the Wilderness Act; (2) that the federal defendants violated their duties in not claiming these rights; (3) that this failure to claim the water rights was arbitrary and capricious and therefore constituted unlawfully withheld agency action.60

58. 622 F. Supp. at 862.
59. A number of organizations representing western water interests were permitted to intervene as defendants, including: Mountain States Legal Foundation, Colorado Cattlemen's Association, Colorado Farm Bureau, National Cattlemen's Association, the City and County of Denver, the Colorado Water Conservation Board, and the Colorado Water Congress.
60. 622 F. Supp. at 846.
Defendants contended that federal reserved water rights did not exist in wilderness areas because designation of an area as wilderness does not constitute an original withdrawal from the public domain. Such a withdrawal, they argued, is required to establish federal reserved water rights. Defendants claimed that wilderness designation failed to affect a withdrawal both because designation is merely a management directive and because only the original withdrawal of lands from the public domain could establish implied reserved water rights. The lands involved in Colorado had been originally withdrawn from the public domain as National Forest lands.

Judge Kane ruled against the defendants on both issues. He held that the Wilderness Act is not a management directive on the ground that, under the Act, wilderness areas were withdrawn from use-related laws, and specific federal purposes were designated for the lands. Further, he reasoned that a secondary rather than the original withdrawal is sufficient to establish reserved water rights.

Judge Kane also examined the intent of Congress in passing the Wilderness Act. Defendants argued that under the New Mexico ruling, the Wilderness Act must be equated with the Multiple-Use and Sustained-Yield Act (MUSYA). That is, the purposes set forth in the Wilderness Act, as those set forth in the MUSYA, conflict with the original purposes of the National Forests and create only secondary purposes with no appurtenant water rights. In Judge Kane's view, however, the Wilderness Act is distinguishable from the MUSYA in that: (1) It is not a land management act; and (2) it created an entirely new reservation of land. Moreover, he wrote, the purposes of the Wilderness Act do not conflict with the purposes set forth in the Organic Act of 1897.

Judge Kane admonished the defendants for not being sufficiently dutiful in asserting federal reserved water rights in wilderness areas, but he did not find an arbitrary or capricious neglect of duty. Conceding that he was "without power to order the Attorney General to instigate litigation to claim these rights," Judge Kane or-

---
62. See supra note 27 and accompanying text.
63. 622 F. Supp. at 859-62. See also Lyng, 661 F. Supp. at 1492-95 (includes a further discussion of the existence of federal reserved water rights in wilderness areas).
Wilderness Reserved Water Rights

dered defendants to submit a report explaining how they intended to protect the character of the wilderness areas.

After an appeal from this order failed, the Forest Service submitted a brief report on November 26, 1986.\textsuperscript{66} Meanwhile, the defendant intervenors\textsuperscript{67} sought reconsideration of the original ruling establishing the existence of reserved water rights in wilderness areas. They argued that the provision of the Wilderness Act that reads, "[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,"\textsuperscript{68} expressly prohibits the establishment of federal reserved water rights. This is the clause originally added to appease the California Department of Water Resources.\textsuperscript{69}

On June 3, 1987, Judge Kane handed down a second decision,\textit{sub nom} Sierra Club v. Lyng.\textsuperscript{70} He ruled against defendant intervenors, holding that the clause at issue was meant solely to maintain the status quo. Judge Kane also held that the Forest Service plan as submitted constituted an abuse of discretion by the agency. Clearly infuriated by the inadequacy of the \textit{Forest Service Report}, he referred to the report "in its portentous three page entirety," stating that "[t]he plan submitted . . . is woefully inadequate and constitutes an insouciant disregard of the government's statutory responsibility. . . ."\textsuperscript{71}

It is important to note that both rulings requiring the Forest Service to compile a coherent plan stemmed largely from the operation of the postponement doctrine in Colorado.\textsuperscript{72} This doctrine provides that if a senior appropriator does not adjudicate his water rights in the same or a previous calendar year as a junior appropriator, the senior appropriator's rights are subordinated to those of the junior appropriator.\textsuperscript{73} Thus, inaction by the federal government could result in a subordination of federal water rights to a junior

\textsuperscript{66.} Report by Forest Service on Methods for Protecting Wilderness Water Resources on Lands in Colorado Submitted to Judge Kane (Sept. 22, 1987) [hereinafter Forest Service Rep.].
\textsuperscript{67.} \textit{See supra} note 59.
\textsuperscript{68.} 16 U.S.C. § 1133(d)(6).
\textsuperscript{69.} \textit{See supra} text at 166.
\textsuperscript{70.} 661 F. Supp. 1490.
\textsuperscript{71.} 661 F. Supp. at 1501.
\textsuperscript{73.} This doctrine has been held to apply to federal reserved water rights. \textit{See United States v. Bell}, 724 P.2d 631 (Colo. 1986).
appropriator. The postponement doctrine, unique to Colorado, makes it necessary for the Forest Service to have a rational plan for protecting water rights. This doctrine, in turn, allowed Judge Kane to avoid the finding of Andrus that, in fact, no harm resulted from nonassertion.\footnote{487 F. Supp. 443 (D.D.C. 1980).}

The Forest Service plan acknowledged the role of the postponement doctrine. On the one hand, the plan stated that “wilderness reserved rights could possibly be subject to the Colorado postponement doctrine . . . making them junior to virtually all presently adjudicated rights.” On the other hand, it asserted that “there are a number of conditional water rights within the designated wilderness areas . . . [but] most of these rights are of doubtful validity for failure of their owners to satisfy the diligence requirements of Colorado law.”\footnote{Lyng, 661 F. Supp. at 1499.} In short, the longer the federal government remains inactive, the more conditional rights may become perfected and therefore superior to those of the government. In fact, prompt action by the government to adjudicate its rights could move the government’s priority above that of senior appropriators who fail to similarly adjudicate within the same calendar year.

Still, Judge Kane reiterated that he was powerless to order the Attorney General to initiate such action. He ordered the Forest Service to submit a more complete plan and concluded with a clear call for legislative action:

[T]he issues in this case are permeated with conflicting philosophical views and economic interests which properly should be resolved by the political branches of government. While a court can resolve ambiguities and conform executive implementation to legislative intent, it is not the court’s business to create policy. Until enlightened by a more precise articulation of legislative policy, it is my intent to enforce with vigor the intent of Congress as I perceive it to be.\footnote{661 F. Supp. at 1502.}

Judge Kane’s frustration is evident, as is the need for a Congressional resolution of this debate. The opinions in both Block and Lyng struggle with fine legal distinctions in an attempt to fit the parameters of earlier decisions relating to non-wilderness areas. The decisions rest on tenuous foundations in the light of New Mexico. These foundations are further undermined by ever-increasing development pressures, the increase in wilderness recreation itself, and the contradictory provisions that have already diverted the im-
Wilderness Reserved Water Rights

The true debate over the existence and scope of federal reserved water rights in wilderness areas has already taken place in Congress. The intent of Congress is evident, and further legislation should therefore be unnecessary. Nevertheless, due to the current Administration’s lack of enthusiasm for even moderate enforcement, the special provision language of the Wilderness Act has facilitated degradation of this intent. This degradation must not extend to the denial of federal reserved water rights in wilderness areas. To prevent such an extension, the legislature now must articulate more specifically its original intent to preserve the wilderness areas and remove them from the general debate over the validity of federal reserved water rights.

Since the doctrine of federal reserved water rights was first expanded in 1955 there have been numerous attempts to legislate a resolution of the ensuing controversy. No consensus has yet been achieved. However, the National Wilderness Preservation System represents a highly specialized and limited area of reserved water rights, a fact that perhaps would facilitate the formation of a consensus for such a limited bill. The bill would necessarily restrict future projects of western water interests. Nevertheless, legislative quantification would also benefit western water interests by diminishing the uncertainty that currently inhibits water rights appropriators from investing in water-dependent development projects. If the bill is carefully drafted, stressing that federal reserved water rights pertain for reasons unique to wilderness areas, perhaps a consensus could be achieved.

In order to accomplish these ends, a wilderness water rights bill should include the following provisions:

77. Some wilderness areas near urban areas in Colorado are so popular that one sees dozens of people when hiking in the area. As early as 1983, environmental organizations and the Forest Service debated the benefits of installing hardened campsites and portable toilets to minimize the physical degradation in these areas. In some areas the Forest Service has stopped marking the wilderness areas on its public maps because the designation alone tends to attract even more visitors. (Observations made by author while working with the Colorado Open Space Council in Denver, Colo., 1983).

78. See supra note 22.
The legislature must espouse expressly the ruling in Block\textsuperscript{79} that federal reserved water rights exist in wilderness areas.

Judge Kane's determination that wilderness areas are endowed with reserved water rights as of the date of their reservation is dependent on two problematic threshold findings: first, a determination that wilderness areas were both reserved and withdrawn under the Wilderness Act; second, a finding that Congress intended to reserve this water—i.e., the purposes expressed in the Act are, under the categories set forth in \textit{New Mexico},\textsuperscript{80} primary rather than secondary.

The language of the Wilderness Act expressly provides that designated areas are to be retained and administered by the agency responsible for the land at the time of passage. Arguably, this indicates congressional intent to create a strong land management directive, rather than a de novo reservation and withdrawal of the lands required for the establishment of reserved water rights. Furthermore, one of the factors that persuaded the \textit{New Mexico} court that the MUSYA was intended as merely a secondary purpose was that MUSYA conflicted with the original purposes set forth in the Organic Act of 1897. The Wilderness Act does provide that the purposes of wilderness areas are not to "be deemed to be in interference with the purpose for which national forests are established."\textsuperscript{81} However, the provision banning timber-cutting in wilderness areas flagrantly conflicts with that very purpose of the national forests. Judge Kane dismissed the conflict in an unconvincing footnote:

Although Congress mandated that nothing in the Wilderness Act shall be deemed to be in interference with the purpose for which national forests are established, it is clear that Congress was not referring to the purpose of providing a continuous supply of timber. \ldots Congress' mandate that the wilderness purposes are 'within and supplemental to' the national forest purposes, including timber-cutting, is a \textit{non-sequitur}.

If the \textit{Block} decision is not reinforced by congressional action, it could well be overturned on these bases.

\begin{itemize}
  \item 79. 622 F. Supp. 842, 853.
  \item 80. 438 U.S. 696 (1978).
\end{itemize}
Wilderness Reserved Water Rights

Further, the legislation must espouse the holding in *Block*, rather than establish a current intent to reserve water rights. A current intent bill would fail to create a federal reserved water right because the right would not be created in conjunction with the original reservation and withdrawal of land from the public domain. Under a current intent statute, federal water rights would have to be established by eminent domain or in a piecemeal fashion according to individual state laws. Protecting wilderness water rights through these means would be problematic. Instream uses, such as maintaining wilderness streamflows, are of dubious value in establishing appropriative rights in a number of states. Traditionally, an appropriation exists when a person actively diverts water and puts it to a beneficial use. Although some states have now modified this policy to protect minimum instream flows, others do not recognize instream use as a valid appropriation.83

Establishing current intent would also fail to preserve the priority dates of the original reservations. Under the appropriation system of water rights prevailing in the western states, any water right is dependent on actual beneficial use and is subject to water rights established earlier in time.84 If legislation simply expressed a present intent to reserve wilderness water rights, the priority dates of these rights would fall some 24 years after the date of the original reservations, thereby potentially subrogating federal claims to those of otherwise junior appropriators.

(2) Federal reserved water rights in wilderness areas must be defined as that amount of streamflow and groundwater that existed at the time of the original reservation into wilderness.

This is an unabashedly broad but eminently reasonable scope for reserved water rights. The language of the Act itself supports a broad interpretation: The National Wilderness Preservation System was created "[i]n order to assure that an increasing population . . . does not occupy and modify all areas within the United States . . .

---

83. Instream uses are problematic even in the context of a strong federal reserved water right. See Waring and Samelson, Non-Indian Federal Reserved Water Rights, 58 Den. L.J. 783, 792 (1981);

In addition, Justice Rehnquist's observation that the maintenance of instream flows within the confines of a national forest is a valid purpose only when Congress "expressly so directed" casts doubt upon the [Solicitor General's] conclusion that minimum stream and lake levels are reserved by the designation of wilderness areas. There is no express direction in the Wilderness Act regarding the reservation of instream flows.

84. The eastern states follow the riparian system of water rights. Under this system, ownership of land bordering a body of water determines water rights. See Note, supra note 22, at 479.
leaving no lands designated for preservation and protection in their natural condition. . . .”

In addition, western wilderness lands are almost exclusively mountaintop areas originally set aside in part because commercial interests saw no possible profit in developing them. There are, consequently, few existing upstream water interests that would be affected by a total reservation such as this one. In Colorado, for example, 14 of the 24 wilderness areas have no private lands above them, and nine of the areas contain the headwaters of their watershed. The concerns of western water interests do not appear to be with the loss of existing rights, but rather with the loss of possible future storage projects upstream from the wilderness areas. The upstream sites, one commentator argues, are attractive for several reasons, including the low costs of dam construction in the narrow valleys, and of transporting the water that can flow by gravity from these high elevations. However, the report submitted to Judge Kane by the Forest Service on September 22, 1987, belies these concerns. The report analyzes the potential for future water developments on both federal and non-federal lands that might affect wilderness water resources. It concludes that all but one of these areas are undesirable for development due to their topography, their location in upper watersheds with limited storage capacity, the cost of construction, and general engineering feasibility. The reservation of groundwater as well as surface water is vital to the maintenance of the natural ecosystem, particularly for scientific study. Although the Supreme Court has never expressly held reserved water rights to extend to groundwater, several lower courts have made this finding.

86. See, Gilligan, supra note 40, 102 Cong. Rec. at 12315.
87. See Forest Service Rep., supra note 66, at 1. See also, Abrams, supra note 64, at 389-90. Those appropriators with rights senior to the federal reservation would remain unaffected by this legislation. In addition, junior appropriators required to give up water rights ordinarily would not be charged with undertaking any restorative program. In most cases the water table gradually will recharge itself, and diverted waters could simply be allowed to return to their natural course. Attempting to repair any damage already incurred would inevitably involve additional interference with the natural state of the area.
88. Abrams, supra note 64, at 390.
89. The one site determined to be plausible for future water development that might affect a wilderness area is located above Colorado’s Cache La Poudre wilderness. See Forest Service Rep., supra note 66.
90. See supra notes 3-4 and accompanying text.
Wilderness Reserved Water Rights

A broad quantification, while limiting future water developments, also would benefit the western water interests. State appropriators would gain certainty as to their rights and the possibilities for future development. As many industries are discovering, compliance counseling is vastly less expensive than are legal battles to allocate guilt or innocence, and it also reduces the adverse publicity that can accompany such lawsuits. Furthermore, such quantification would conserve judicial resources by obviating the need for case-by-case quantification.

(3) Government agencies that manage wilderness lands must be assigned a duty to assert appurtenant federal reserved water rights.

The Wilderness Act provides federal agencies with discretion to ascertain a means of preserving the wilderness character of designated areas. The decisions in both Block and Andrus explicitly defer to this agency discretion, refusing to order the government to assert federal reserved water rights so long as the integrity of the wilderness is protected by some other means. "'[T]here is simply no specific legal duty on the part of federal defendants to claim reserved water rights in the wilderness areas in state adjudications.' Creation of any such duty lies with the Congress," Judge Kane observed. So long as this broad discretion operates, the existence of reserved water rights will not assure the protection of these rights. Congress must create an affirmative duty on the part of federal agencies to protect these rights on behalf of the American people. Any other means of protecting the water needs of these areas would prove inadequate.

(4) The President's power to authorize exceptions from the provisions of the Wilderness Act should be transferred to an appeals committee.

Despite the appeal of absolute prohibitions when dealing with moral issues such as wilderness resources, experience has shown that economics and immediate human needs will at times trump moral and philosophic values. Should a case arise presenting a conflicting value of overriding importance, proponents could take their case before an appeals committee with authority to determine if the public interest in this case would be better served by granting the exception. Such an appeals board, referred to as the "God Commit-

93. For a full discussion of the duty of the federal official to assert federal reserved water rights in wilderness areas, see Abrams, supra note 64, at 387.
"tee," is already in place and functioning for exceptions to Endangered Species Act protections.

The committee structure offers several advantages over traditional judicial review. This type of committee is comprised usually of experts in the field who represent all major viewpoints. Such technical expertise can be vitally important in these decisions. Furthermore, by removing exceptional cases from the ordinary water rights adjudication procedure, the power of the absolutely prohibitive language of the statute is maintained. The committee process perhaps would force a more in-depth examination of the issues before a variance is awarded. Finally, the committee would relieve the courts from having to balance policy concerns, an activity more appropriate for a quasi-legislative body.

Legislation such as that described above would accomplish a variety of purposes. It would: (1) ensure that the effects of Block would stand despite probable challenges based upon the New Mexico ruling; (2) provide the quantification of rights needed by western water interests for future planning and investment purposes; (3) revitalize the prohibitive policy that underlies the Wilderness Act; and, (4) save judicial and administrative resources by avoiding painstaking case-by-case adjudications of the scope of these water rights.

Conclusion

The doctrine of federal reserved water rights is vital to the protection and preservation of the integrity of the National Wilderness Preservation System. The basis for its application in these areas is found in the language and legislative history of the Wilderness Act. Already, significant inroads have been made on the traditional concept of wilderness envisioned by proponents of the Wilderness Act and described at the outset of this Current Topic. There is little enough of our land remaining that legitimately could be called wilderness. That which does remain should not be destroyed piecemeal by lackadaisical protection, especially of natural water flows. As former National Park Service Director Newton Drury observed, "Surely, we are not so poor that we need destroy them, or so rich that we can afford to lose them." 94