§ 37.03. Federal Reserved Water Rights.*

(a.01) Generally.

The most commonly accepted view of the nature of reserved rights is that when reserving lands from the public domain for specific purposes, the federal government revoked the authority granted states under the Desert Lands Act[361] to create property rights in water and implicitly reserved an amount of water to itself, sufficient to fulfill the purposes of the reservation.[362] This federal power to reserve lands, grounded on the property clause of the Constitution,[363] was not limited to Indian reservations, and therefore the reserved rights doctrine should not be either. However, western water lawyers assumed that the doctrine was a special quirk of Indian law, a narrow exception to the "severance" of water from federal lands effected by the Desert Lands Act.[364] They were thus taken by surprise when the Supreme Court announced, in the 1955 *Pelton Dam* case, that the severance did not operate with respect to federal lands reserved for specific purposes, such as a power site withdrawal.[365] Eight years later, the Court approved reserved rights for a national recreation area, a national forest, and two wildlife refuges in *Arizona v. California*.[366]

Federal reservations that were established long ago possess senior priority dates. Because the amount of water reserved is uncertain until quantified, but potentially quite large, western states have resisted claims to federal rights that appear to destabilize long-held uses. Thus, the five decades since *Arizona v. California* have witnessed considerable litigation over the nature and scope of the federal right and the proper forum in which to determine these issues. While the states have not succeeded in overturning the reserved rights concept as applied to

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361 43 U.S.C. § 321; *see supra* Treatise § 37.01(a), at notes 12–17 and accompanying text.

362 In California Oregon Power Co. v. Portland Beaver Cement Co., 295 U.S. 142 (1935), the Supreme Court ruled, a half century after enactment of the Desert Lands Act, that that statute had worked a severance of all unappropriated waters on the public domain, meaning that federal patentees would obtain no water rights other than those recognized by state law. However, the Court in *California Oregon Power Co.* recognized that this deference to state law was subject to two exceptions: 1) to protect federal beneficial use of government lands, and 2) to protect navigation. 295 U.S. at 158–59, construing United States v. Rio Grande Irrigation Co., 174 U.S. 690 (1899).

Note that this general concept relates to the federal government reserving lands (and, therefore necessary waters) to serve *its* purposes regarding the lands. Thus, it is no surprise that in In re General Adjudication of All Rights to Use Water in the Gila River System and Source, 231 Ariz. 8, 289 P.3d 936 (2012), the court rejected a claim by the State of Arizona for reserved water rights for the land grants that had been conferred upon the State by the United States at statehood. The court found that educational land grants were in the "public interest," but that they served no "federal purpose," the lands were no longer federal, and there was no indication in the record of any congressional intent to reserve water for the lands. *See* Jenna Anderson, *Gila River IX and State Trust Lands: Setting Boundaries for the Federal Reserved Water Rights Program*, 16 U. Denv. Water L. Rev. 419 (2013); Amy K. Kelley, Federal Report, XLV Rocky Mt. Min. L. Fdn. Water L. Newsletter no. 3, at 6 (2012).

363 U.S. Const. Art. IV, § 3, cl. 2.

364 *See* Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 Denv. L.J. 473, 475 (1977) ("At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law").

365 FPC v. Oregon, 349 U.S. 435, 448 (1955); *see* Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 Denv. L.J. 473, 477 (1977) (describing the case as "a real bombshell").

366 Arizona v. California (*Arizona I*), 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340 (1964). The federal lands received some 79,000 acre-feet of water. 373 U.S. at 346.

non-Indian federal reservations, they have won important victories by successfully asserting the jurisdiction of state courts over reserved rights—where recognition of their existence and magnitude has been predictably grudging—and by convincing a narrow majority of the Supreme Court to significantly reduce the potential water reserved for national forests, the largest federal reservation system.[367] Since most states refuse to provide protection for reserved rights until they are quantified,[368] there is little incentive on the part of the states to quantify decreed reserved rights.

For all of these reasons, nearly fifty years after *Arizona v. California* federal reserved water rights for non-Indian reservations have not produced widespread destabilization of state water rights systems, and one might fairly doubt that they ever will. Nevertheless, the states have not been uniformly successful in court[369] and face new questions with respect to water reserved for wilderness areas.[370] These uncertainties, coupled with the fact that quantifying reserved rights through litigation is a long, laborious, and expensive process,[371] prompted the federal government to shift its strategy for ensuring instream flows on many federal lands by turning to its authority to

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[367] *See infra* Treatise § 37.03(a)(1) and United States v. New Mexico, 438 U.S. 696 (1978) (no water reserved for fish and wildlife or aesthetic purposes), discussed *infra* Treatise §§ 37.03(a), 37.03(a)(1), at notes 384–391 and accompanying text.

[368] *See, e.g.*, Reed D. Benson, *Can't Get No Satisfaction: Securing Water for Federal and Tribal Lands in the West,* 30 Envtl. L. Rep. 11056, 11057 (2000); Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Instream Water Rights in the Northwest,* 27 Envtl. L. 203, 205 (1997).

[369] *See, e.g.*, Cappaert v. United States, 426 U.S. 128 (1976) (upholding reserved rights for a national monument). Another example of the federal government prevailing in a reserved rights dispute concerns federal regulations governing subsistence fishing harvests in Alaska. The Ninth Circuit originally ruled that federal reserved water rights for land reservations in Alaska constitute sufficient federal interest in navigable waters to bring those waters within the definition of "public lands" in the Alaska National Interest Lands Conservation Act (ANILCA), thus requiring federal regulation of subsistence fishing, according to the Ninth Circuit. Alaska v. Babbitt, 54 F.3d 549 (9th Cir. 1995). *See also* Native Village of Quinhagak v. United States, 35 F.3d 388 (9th Cir. 1994) (questioning the reasonableness of the Secretary of the Interior's exclusion of navigable waters from the definition of "public lands").

The Alaska Supreme Court refused to follow *Alaska v. Babbitt* in Totemoff v. State, 905 P.2d 954 (Alaska 1995). The state court ruled that the state had jurisdiction over harvests of game on navigable waters by virtue of the Submerged Lands Act. 905 P.2d at 964–65. The court concluded that even if reserved rights gave the federal government a property interest in navigable waters, the federal interest was limited to the purposes of the reservations which did not include regulation of hunting and fishing. 905 P.2d at 966–67. The court also determined that use of the reserved rights doctrine to define the scope of federal regulation under ANILCA was "highly impractical, perhaps even impossible," since it would require federal agencies to ascertain the amount of water needed to fulfill the primary purpose of a reservation and convert that amount of water into a surface area of water constituting "public lands" under ANILCA. 905 P.2d at 967. Subsequent to the *Totemoff* decision, the Ninth Circuit, in a majority opinion, reaffirmed its ruling in *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995), a decision noted by Frona M. Powell, *Recent Application of the Reserved Rights' Doctrine:* State of Alaska v. Babbitt, 25 Real Est. L.J. 308 (1997).

An *en banc* Ninth Circuit reaffirmed the panel decision in *Alaska v. Babbitt (Katie John I)* in May 2001. John v. United States, 247 F.3d 1032 (9th Cir. 2001). The vote was 8-3, but three judges thought the district court was correct in holding that Congress intended federal protection of subsistence to extend to all navigable waters, not just waters in which the federal government has a reserved water right. 247 F.3d at 1054. The 3-member dissent thought that Congress was not sufficiently clear in ANILCA that it intended to diminish the state's right to regulate fishing on navigable waters, an area "uniquely implicating sovereign interests." 247 F.3d at 1044, *citing* Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987). The federal subsistence regulations are codified at 36 C.F.R. Part 242 (Forest Service); and 50 C.F.R. Part 100 (Fish and Wildlife Service).

The Ninth Circuit Court of Appeals revisited this matter yet again in *Katie John v. United States of America*, 720 F.3d 1214 (9th Cir. 2013), and reaffirmed the earlier ruling, despite finding *Katie John I* to be "a problematic solution to a complex problem" and an "imperfect tool."

[370] *See infra* Treatise § 37.03(a)(6).

[371] For example, the legal fees and expert witness fees incurred in the twelve-year litigation in the Big Horn case ran in the tens of millions of dollars, and it took Colorado fifteen years and four trips to the Supreme Court to finally establish state jurisdiction over reserved rights. David H. Getches, Water Law in a Nutshell 521 (4th ed. 2009). By 1995, only two tribal

condition land management authorizations.[372] This, too, has proved to be controversial, and thus far has yet to produce any meaningful streamflows. Consequently, there is widespread interest in settling of reserved rights claims through negotiated settlements, an issue explored in a later section.[373]

Given the uncertainties and delays in litigation over the existence, scope, and nature of reserved rights, Congress and the President have become increasingly explicit about whether new public land reserves contain reserved rights. In fact, the Clinton Administration's Interior Solicitor claimed that over the course of the past quarter-century, explicitness has become the rule, rather than the exception.[374] For example, all of the seventeen national monuments President Carter designated in Alaska expressly reserved water, and nearly all of the almost two-dozen monuments declared by President Clinton addressed the issue, although some expressly reserved water, and some expressly disclaimed any intent to do so.[375] The new era of explicitness is also evident in legislation over the past twenty years as, for example, Congress has expressly reserved water in legislation establishing wilderness and other conservation units in Arizona, California, New Mexico, and Washington while expressly disclaiming reserved water rights in Colorado and Idaho.[376] Similarly, Congress has expressly disclaimed federal reserved rights for new wilderness designations in Nevada.[376.1] Thus, like the dominance of state court interpretations under McCarran Amendment adjudications,[377] the new era of explicitness seems likely to contribute to a further fracturing of reserved water rights law. Unless courts conclude that explicitness is now required to reserve federal water rights, however, the new era should not have a profound effect on reserved rights doctrine, although it now seems obvious that proponents of any new public land conservation measure must confront the reserved rights issue, at least in arid areas.

(a) Scope and Nature.

Like Indian reserved water rights, the scope and nature of federal reserved water rights are functions of the purpose of the individual land reservation. Unlike Indian reserved rights, many of which were the products of bilateral negotiations, the purpose of a federal reserved right depends on the intent of the federal government alone. This requires scrutiny of the legislation, executive order, or public land order establishing the reservation.

Another distinction between Indian and federal reserved rights is that the latter do not benefit from the favorable rules of construction used in interpreting Indian reservations.[378] In fact, in *United States v. New Mexico*, the Supreme Court stated that claims of federal reserved water rights must be "carefully examined" for their "primary purposes," and that reserved rights should not be implied unless "without the water the purposes of the reservation

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reserved rights claims had been determined through state court litigation. *See* Scott B. McElroy & Jeff J. Davis, *Revisiting* Colorado River Water Conservation District v. United States—*There Must Be A Better Way*, 27 Ariz. St. L.J. 597, 648 (1995).

372 *See infra* Treatise § 37.06(c).

373 *See infra* Treatise § 37.04(c).

374 John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation,* 4 U. Denv. Water L. Rev. 271 (2001).

375 Leshy, 4 U. Denv. Water L. Rev. at 278 (citing 13 of the Clinton national monument proclamations).

376 Leshy, 4 U. Denv. Water L. Rev. at 277 (*citing* statutes).

376.1 *E.g.*, Clark County Conservation of Public Land and Natural Resources Act of 2002, ***Pub. L. 107-282***, § 203(d)(2)(A)***116 Stat. 1994*** (Nov. 6, 2002); Lincoln County Conservation, Recreation and Development Act of 2004, ***Pub. L. 108-424***, § 204(d)(2)(A), ***118 Stat. 2403***, 2410 (Nov. 30, 2004); White Pine County Conservation, Recreation, and Development Act of 2006. ***Pub. L. 109-432***, § 324(d)(3)(A), ***120 Stat. 2922***, 3034. Each of the Nevada wilderness bills contained a Congressional finding that the unique nature of the wilderness lands protected made it possible to protect the wilderness and other values without a federal reserved water right.

377 *See infra* Treatise § 37.04(a).

378 *See supra* Treatise § 37.02(a).

would be entirely defeated."[379] This appears to be a "frustration of the purpose" test, similar to that which the court announced the same day in the context of the permissible scope of state conditions on the operation of federal reclamation projects.[380] Water for secondary reservation purposes must be secured pursuant to state law.[381] Nevertheless, federal reserved rights are a consequence of (mostly implied) intent; their existence is not a function of present-day equities.[382]

These standards impose the burden of proving the existence of reserved rights on the federal government, which in some cases may prove to be a considerable burden before skeptical state courts. The federal government's prospects will vary considerably depending on the type of reservation.[383]

(1) National Forests.

United States v. New Mexico is the leading case concerning reserved water rights in national forests (and indeed the leading non-Indian reserved rights case). In *New Mexico,* a sharply divided Supreme Court gave an extremely narrow interpretation of the National Forest Organic Act, determining, 5-4, that the primary purpose of national forests did not include fish, wildlife, or aesthetic purposes, but only timber production and watershed protection.[384] Neither did those purposes include stockwatering, so graziers on the forests must obtain water from the state.[385] The Court also suggested that passage of the Multiple Use and Sustained Yield Act in 1960—which expressly called for national forest management for fish and wildlife purposes[386]—did not change the primary purpose of national forest reservations.[387] Two state supreme courts subsequently picked up on the Court's suggestion, ruling the Multiple Use Act produced no new federal reserved water rights.[388]

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379 438 U.S. 696, 700 (1978).

380 *See* California v. United States, 438 U.S. 645, 674 (1978) (state conditions cannot frustrate the purpose of federal reclamation projects) discussed *infra* Treatise § 41.04; *see also* Charles J. Meyers, *The Colorado River*, 19 Stan. L. Rev. 1, 68, 73 (1966).

381 United States v. New Mexico, 438 U.S. at 700.

382 Cappaert v. United States, 426 U.S. 128, 138–39 (1976).

383 Some types of reservations generally have no reserved water rights. For example, national heritage areas, of which the 2009 Omnibus Public Land Management Act established ten, contained an express disclaimer of reserved water rights. *See, e.g.*, ***Pub. L. No. 111-11, 123 Stat. 991***, § 8001(f) (concerning Sangre de Cristo National Heritage Area, one of 10 such provisions in the Omnibus Act). Similarly, three national heritage areas were established by Congress in the 2008 Consolidated Natural Resources Act. Pub. L. No. 110-229, 122 Stat. 75u, title IV (designating the three areas), § 408(4) (example of a disclaimer). The 2009 Omnibus Act also forbade acquisition any federal water right on the Gunnison river to fulfill the purposes of the Dominquez-Escalante National Conservation Area. ***Pub. L. No. 111-11, 123 Stat. 991***, § 2405(h).

384 New Mexico, 438 U.S. at 707 (construing 16 U.S.C. § 475). This interpretation was subject to critical attack by most of the academic commentary. *See, e.g.*, Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of* United States v. New Mexico, 15 Idaho L. Rev. 509 (1979) (arguing that the original purposes for reserving national forests were preservationist in nature; management of the forests for consumptive uses did not begin until Gifford Pinchot became head of the Forest Service in 1905). For a detailed history of *U.S. v. New Mexico,* including the personalities and the quirks of legal posturing within the adversarial system, see G. Emlen Hall, *The Forest Service and Western Water Rights: An Intimate Portrait of* United States v. New Mexico, 46 Nat. Resources J. 979 (2005).

385 *New Mexico*, 438 U.S. at 715–17.

386 16 U.S.C. § 528.

387 *New Mexico*, 438 U.S. at 714–15.

388 The Colorado Supreme Court rejected the federal government's argument that national forests should obtain a 1960 priority date for uses authorized by the Multiple Use Act. United States v. City and County of Denver, 656 P.2d 1, 26–28 (Colo. 1982). The Idaho Supreme Court agreed. United States v. Challis, 988 P.2d 1199, 1203 (Idaho 1998) (reserved rights doctrine applies only to "reservations" of land; MUYSA was a land management statute making no land reservations). Both of these

The decision in *New Mexico* was a substantial victory for opponents of reserved water rights, for national forests contain 135 million acres in the arid West, by far the largest federal land reservation system,[389] and on which more than half of the western water either originates or flows.[390] Interestingly, the western states' *amicus* argument to the Court in support of the state of New Mexico emphasized that there were other, better alternative mechanisms to protect instream flows for fish and wildlife on national forest lands.[391] In the years since the Court's decision, those same states have, in large measure, undermined those alternatives.[392]

In the wake of the *New Mexico* decision, the federal government attempted to assert instream flow claims for timber and watershed protection in Colorado litigation, but the Colorado Supreme Court ruled that the Forest Service had not proved that instream flows were necessary for these purposes.[393] In another Colorado case from the Arkansas River Basin, however, the federal government, citing recent advances in the science of "fluvial geomorphology," asserted that "strong, recurring instream water flows are necessary to maintain efficient stream channels and to secure favorable conditions of water flows … ."[394] The Colorado Supreme Court responded that the government should be given the opportunity to prove its allegations that instream flows were necessary to prevent the Organic Act's primary purpose of "securing favorable conditions of water flow" from being "entirely defeated."[395]

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cases are analyzed in Justin Huber & Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 16 U. Denv. Water L. Rev. 261 (2013) (addressing a number of "poorly reasoned and result-oriented state court decisions").

389 *See* John D. Leshy, *Water and Wilderness/Law and Politics*, 23 Land & Water L. Rev. 389, 397 (1988).

390 *New Mexico*, 438 U.S. at 703.

391 *See* Lois G. Witte, *Still No Water for the Woods,* SG039 ALI-ABA 239, 244 (Federal Lands Law Conf., Oct. 18–19, 2001), available at http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf (quoting from the amicus brief of the western states: "[T]he New Mexico Supreme Court decision does not preclude or inhibit federal and state initiative to secure minimum flows to protect recreation, wildlife, and other values of the national forests … ."). *See also* SG039 ALI-ABA 239 at 247 (quoting the state of Colorado's brief in the Platte River case (also known as Water Division No. 1): "Special use permits and other federal regulatory controls are just as capable of protecting the forest purposes as the claims made in this case … . In light of the broad federal regulatory power, there is simply no need here for a reserved right to accomplish what can be accomplished through permits." The state's argument apparently convinced the court, which noted: "The Forest Service has broad powers to regulate the construction of irrigation structures within national forests, and as a practical matter, to control the ability of others to make diversions within the forests. Permits are required to establish such structure and these permits must be renewed from time to time." In the matter of Reserved Water Rights in the Platte River, Nos. W-8439-76 *et al.* (Colo. Water Div. No. 1, 1993).

392 Lois G. Witte, *Still No Water for the Woods*, SG039 ALI-ABA 239, 248–55 (Federal Lands Law Conf., Oct. 18–19, 2001), available at http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf (discussing the inadequate protection for instream flows on public lands under state laws and state opposition to federal land conditions aimed at providing instream flows). For a discussion of state opposition to the Forest Service's authority to condition land use permit renewals on maintaining streamflows (so-called "bypass flows"), *see* Janet C. Neuman & Michael C. Blumm, *Water for National Forests: The Bypass Flow Report and the Great Divide in Western Water Law*, 18 Stan. Envtl. L.J. 3 (1999).

393 United States v. City and County of Denver, 656 P.2d 1, 22 (Colo. 1982). *See also* United States v. Alpine Land & Reservoir, 697 F.2d 851, 859 (9th Cir. 1983) (federal government produced insignificant evidence to show that instream flows were necessary for watershed protection or timber production); Avondale Irrig. Dist. v. North Idaho Props., 577 P.2d 9, 18 (Idaho 1978) (control and prevention of forest fires may require instream flows, but federal government had not shown the necessity).

394 United States v. Jesse, 744 P.2d 491, 498 (Colo. 1987) (arguing that appropriators with diversions on national forest land were injuring the primary purposes of the national forests by reducing streamflows and threatening the equilibrium necessary for preserving natural stream channels).

395 *Jesse*, 744 P.2d at 503. *Accord In re* SRBA Case No. 39576, Organic Act Claims, Subcase No. 63-25243 (Idaho Dist. Ct. Sept. 30, 1998) (allowing the federal government to proceed to trial on the necessity of a federal reserved water right for channel maintenance under the Forest Service Organic Act; *but see infra* text accompanying notes 404 & 405).

The latter case returned to the water court, where the federal government claimed that up to half of the annual flows of most headwater streams were necessary to prevent destabilization of stream channels which can lead to erosion, sediment deposition, channel movement, encroachment of riparian vegetation, and flooding.[396] A Colorado Deputy Attorney General acknowledged that these claims would not deprive any downstream appropriators of any rights, but claimed they could curtail the state's ability to develop new storage within national forest boundaries.[397]

In 1993, the Colorado water court denied the federal government's claims for reserved rights for instream flows for stream channel maintenance in the Platte River Basin, thus rejecting the government's "fluvial geomorphology"-based claims.[398] The water court relied on the Supreme Court's language in *United States v. New Mexico* in ruling that the language in the Forest Service's Creative and Organic Acts concerning "favorable water flows" was aimed principally at providing water for irrigation and domestic uses. The water court noted that recognizing the federal claims would increase spring flows, which is "the exact opposite of what is desired by people whose thoughts on the subject were influential at the time of the Creative and Organic Acts," and which would conflict with efficient use of water for irrigation and domestic purposes. Surprisingly, the court agreed with the government that channel maintenance was necessary to the purposes of establishing national forests, but it ruled that "such maintenance is required only to a reasonable degree" and concluded that the evidence showed that changes due to diversions "did not seriously impair the integrity of stream channels … [and] are well within the bounds which a reasonably informed person must have contemplated when the diversions in the national forests were allowed … ."[399] The court held that the scientific methodology supporting the federal claims failed to prove that specific minimum flows were necessary for channel maintenance. The court ruled that the Forest Service's experts on fluvial geomorphology merely "gave a scientific tone to what was essentially speculation," and suggested that federal attempts to secure the instream flows for channel maintenance would succeed only if they were "to a reasonable degree consistent with both the requirements of stream flows and the necessities of efficient irrigation and domestic use." The water court did uphold the federal claims for firefighting and administrative sites.[400]

Although the Snake River Basin Adjudication court in Idaho allowed the federal government to prove that instream flows were necessary to secure favorable watershed conditions under the Organic Act, the case was ultimately settled when the federal government withdrew the claims and the state agreed to a joint cooperative watershed evaluation project.[401] In fact, no court has ever granted an Organic Act-based claim for stream channel maintenance.[402] And, as noted above, Multiple Use Act-based claims have also failed,[403] even though that statute clearly states that national forests "are established and shall be administered" for, among other

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396 *See* Wendy Weiss, *The Federal Government's Pursuit of Instream Flow Water Rights*, 1 U. Denv. Water L. Rev. 151, 157–60 (1998); Lois G. Witte, *Recent Federal Instream Flow Claims: Circumvention of New Mexico?*, at 10–11 (paper presented to American Bar Ass'n at Annual Water Law Conference, Jan. 19, 1990).

397 Lois G. Witte, *Recent Federal Instream Flow Claims: Circumvention of New Mexico?*, at 12 (paper presented to American Bar Ass'n at Annual Water Law Conference, Jan. 19, 1990) (quoting the Colorado Deputy Attorney General).

398 In the matter of Reserved Water Rights in the Platte River, Nos. W-8439-76 (Colo. Water Div. 1, Feb. 12, 1993). On April 1, 1994, the federal government without comment dismissed its appeal of this case in the Colorado Supreme Court (Case No. 93 3A 227). Similarly, a Nevada trial court upheld the state engineer's rejection of channel maintenance flow claims for the Toiyabe National Forest. *In re* Waters of Monitor Valley, No. 14906 (5th Jud. Dist., Nev., Apr. 28, 2000).

399 *See* Western States Water No. 981 (Mar. 5, 1993).

400 *See* Western States Water No. 981 (Mar. 5, 1993). *See also* Diane E. McConkey, *Federal Reserved Rights to Instream Flows in National Forests*, 13 Va. Envtl. L.J. 305 (1994); Teresa Rice, Colorado Water Court Denies Reserved Rights Claim for Channel Maintenance, 4 Rivers 146 (1993).

401 *In re* SRBA, Case No. 39576, Organic Act Claims, Sublease No. 62-25243 (Idaho Dist. Ct. Sept 20, 1998).

402 *See* Lois G. Witte, *Still No Water for the Woods*, SG039 ALI-ABA 247 (Federal Lands Law Conf., Oct. 18–19, 2001), available at http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf. However, a Colorado water

purposes, fish, wildlife, and recreation,[404] and even though over one-third of national forest lands are important to maintaining aquatic diversity.[405] Thus, the Forest Service must obtain water for these "secondary" purposes from the states, and the results thus far have been largely discouraging.

The Forest Service did succeed in having its riparian rights recognized by the California Supreme Court,[406] which enabled the Forest Service to claim instream flows for fish and wildlife, recreational, and aesthetic purposes in that state.[407] But most western states do not recognize riparian rights, let alone new riparian uses, so that precedent will have limited use outside of California. In both Colorado and Idaho the states have resisted the Forest Service's attempt to secure instream flows under state law, maintaining that only the state can hold an instream flow water right, a view ratified by the Idaho Supreme Court.[408] A Forest Service attorney summarized the unavailing efforts of the Forest Service in the following terms:

> … the track record of the Forest Service in acquiring instream flow rights under state law in the federal name has been equal to its record in acquiring instream rights under the implied reserved rights doctrine. With the exception of permits issued by the State of Arizona, the Forest Service does not yet have [in 2001] a single instream flow right for fish, recreation, or wildlife, although it has filed hundreds of state-based instream flow claims in numerous state adjudications or administrative proceedings. In several states where the claims have been filed, the filings have aggressively been resisted as inconsistent with state law.[409]

The Forest Service and the Montana Reserved Water Rights Compact Commission culminated fifteen years of negotiations in September 2006 by reaching a draft settlement that would define the water rights the Forest Service holds in western and central Montana.[410] The agreement recognized reserved rights for fire-fighting and administrative needs and an instream flow right for the South Fork Flathead River, a federal wild and scenic river. The settlement also calls for the state to establish instream flows on 77 streams and one wetland area. The

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court did uphold a stream channel maintenance claim for Rocky Mountain National Park. *See infra* Treatise § 37.03(a)(2), notes 436–38 and accompanying text.

403 *See supra* note 388 and accompanying text.

404 16 U.S.C. § 528.

405 *See* U.S. Dept. of Agriculture, Forest Service, Water and the Forest Service 22 (FS-660, Jan. 2000).

406 *In re* Hallett Creek Stream Sys., 749 P.2d 324 (Cal. 1988); *see also infra* Treatise § 37.06(b).

407 *See* 749 P.2d at 337 (state water board can evaluate proposed new riparian uses and decide whether they "should be permitted in light of state's interest in promoting the most efficient and beneficial use of the state's waters"). The California court limited its ruling to reserved lands, based on its interpretation of the Desert Lands Act. 749 P.2d at 334–35. This interpretation was criticized in Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan. L. Rev. 1529, 1533–34 n.33 (1989).

408 Idaho v. United States, 996 P2d 806, 811 (Idaho 2000) ("Idaho law generally requires an actual diversion and beneficial use for the existence of a valid water right … . Only two exceptions to the diversion requirement exist. No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water for stockwatering … . In addition State entities acting pursuant to statute may make a nondiversionary appropriation for the beneficial use of Idaho citizens … ."). In Colorado, the Forest Service's attempt to secure an instream flow right in the Rio Grande Basin resulted in a settlement in which the Forest Service agreed not to file any more applications for instream flows in that basin. *See* Lois G. Witte, *Still No Water for the Woods*, SG039 ALI-ABA 248 (Federal Lands Law Conf., Oct. 18–19, 2001), available at http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf.

409 Lois G. Witte, *Still No Water for the Woods*, SG039 ALI-ABA 12 (Federal Lands Law Conf., Oct. 18–19, 2001), available at http://www.stream.fs.fed.us/publications/PDFs/Still_no_water_for_the_woods.pdf (noting that claims under state law (using MUSYA authority) have been filed in Colorado, Idaho, New Mexico, and Nevada; they were denied in Nevada and protested in Idaho and Colorado).

410 Montana Reserved Water Rights Comm'n, USDA Forest Service/Montana RWRCC Agreement, available at: http://dnrc.mt.gov/rwrcc/Compacts/usdacompact/default.asp.

state legislature approved the agreement in 2007, including changing state law to allow the Forest Service to object in the state's water court to water right claims that could adversely affect its rights and to streamline federal and state permitting.[411]

In a decision in the long-running battle between the estate of Wayne and Jean Hage and the Forest Service, Senior Judge Loren Smith for the Court of Federal Claims concluded that Forest Service actions that precluded the Hages from accessing and using their state water rights—notably, constructing fences on national forest lands and preventing the Hages from performing routine maintenance of irrigation ditches to which they had a vested federal right–amounted to a taking of their property for which the government owed some $4.22 million, plus interest, attorney fees, and costs.[412] Much of this decision was reversed on appeal.[412.1]

(2) National Parks and Monuments.

Both parks and many national monuments are part of the national park system, which expressly includes the term "water" in its definition.[413] Moreover, the purpose of the National Park System Organic Act is "to conserve the scenery and the natural and historic objects and the wild life therein … [to] leave them unimpaired for the enjoyment of future generations."[414] The monuments that are part of the park system are authorized by the Antiquities Act, which enables the President to reserve "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest … ."[415]

In *United States v. New Mexico,* the Supreme Court distinguished what it viewed as the narrow purposes of national forests from the broad purposes of national parks. The Court contrasted the lack of congressional concern for recreation and wildlife in establishing the national forest system with the express mention of both in the National Park System Organic Act.[416] The Interior Solicitor subsequently construed the Organic Act to include "a variety of consumptive and non-consumptive reserved water rights necessary to conserve scenic, natural, historic, and biotic [resources] and to provide for sustained public enjoyment thereof."[417] This would include reserved water for ecosystem maintenance, watershed protection, wildlife conservation, and maintenance of aesthetic conditions and natural features, among other uses.[418]

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411 Mont. Code Ann. § 85-20-1401. *See U.S. Forest Service and Montana Officials Research Water Rights Agreement,* Water Strategist, Oct. 2006; Perry Backus, *Forest Service, State Agree on Water Compact*, Missoulian.com (2007); Patrick A. Byorth, *Conflict to Compact: Federal Reserved Water Rights, Instream Flows, and Native Fish Conservation on National Forests in Montana*, 30 Pub. Land & Resources L. Rev. 35 (2009).

412 Hage v. United States, 82 Fed. Cl. 202 (2008), *aff'd in part, rev'd in part*, 687 F.3d 1281 (Fed. Cir. 2012). This was Judge Smith's fifth decision in the case. *See* 82 Fed. Cl. at 205 n.1 (citing the earlier cases).

412.1 Estate of Hage v. United States, 687 F.3d 1281 (Fed. Cir. 2012). *See generally supra* Treatise § 36.05.

413 16 U.S.C. § 1c(a).

414 16 U.S.C. § 1. *See* Eric T. Freyfogle, *Repairing the Waters of the National Parks: Notes on a Long-term Strategy*, 74 Denv. U. L.J. 815 (1997); Ryan Rowberry, *Drinking from the Same Cup: Federal Reserved Water Rights and National Parks in the Eastern United States*, 29 Ga. St. U. L. Rev. 987 (2013); A. Dan Tarlock, *Protection of Water Flows for National Parks*, 22 Land & Water L. Rev. 29 (1987); Charles F. Wilkinson, *Water Rights and the Duties of the National Park Service: A Call for Action at a Critical Juncture*, in Our Common Lands: Defending the National Parks 261 (D. Simon ed. 1988).

415 16 U.S.C. § 431.

416 United States v. New Mexico, 438 U.S. 696, 709 (1978) (*citing* 16 U.S.C. § 1).

417 86 Interior Decisions 553, 595 (1979).

418 86 Interior Decisions at 595–96.

In *Cappaert v. United States*, the Supreme Court ruled that the Devil's Hole National Monument reserved water to protect a rare fish.[419] In so doing, the Court closely scrutinized the presidential proclamation establishing the monument and concluded that it reserved sufficient water to protect the fish that the proclamation indicated was of scientific interest.[420] Consequently, the Court enjoined off-reservation groundwater pumping that was depleting water levels in the monument.[421]

The seventeen national monuments proclaimed by President Carter in Alaska in 1978 all expressly reserved water rights.[422] Some of the national monuments proclaimed by President Clinton expressly reserved water, some expressly disclaimed water rights.[423] A prominent example of the latter was the Grand Staircase-Escalante National Monument, the largest national monument in the Lower 48 states. The proclamation states that it "does not reserve water as a matter of Federal law," but then directed the Secretary of the Interior to address water rights in the monument management plan, including "the extent to which water is necessary for the proper care and management of … this monument and the extent to which further action may be necessary pursuant to Federal or State law to assure the availability of water."[424]

According to his Interior Solicitor, President Clinton accepted Secretary Babbitt's recommendations concerning whether federal water rights were necessary to protect the monuments he proclaimed, which recommendations were the product of detailed study of the water needs of the monument and water availability.[425] For example, the Missouri Breaks National Monument reserved water in only two tributaries,[426] while the Hanford National Monument reserved water only in the mainstem Columbia River but not in its tributaries.[427]

Congress has also taken a case-by-case approach to reserved water in the national monuments and related reserves it creates. For example, Congress expressly reserved water for El Malpais National Monument and the

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419 426 U.S. 128 (1976).

420 *Cappaert*, 426 U.S. at 141.

421 *Cappaert*, 426 U.S. at 141. In a 2008 ruling that reflected the continued relevance of the *Cappaert* decision, the Nevada State Engineer denied an application to change the point of groundwater pumping closer to Devil's Hole and ruled that any future applications within a 25-mile radius of the monument would be denied with few exceptions. *See Nevada State Engineer Curtails Pumping Near Devil's Hole National Monument*, 13 Western Water Law & Policy Reporter no. 2, at 40 (Dec. 2008).

Off-reservation water use poses a particular problem for Yellowstone National Park, where geothermal drilling outside the park threatens Yellowstone's geysers. For an argument that Congress should take action to restrict geothermal development affecting the park's resources, *see* Robert B. Keiter, *The Old Faithful Protection Act: Congress, National Park Ecosystems, and Private Property Rights,* 14 Pub. Land L. Rev. 5 (1993).

422 *See* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. Denv. Water L. Rev. 271, 278 (2001).

423 *See* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. Denv. Water L. Rev. 271, 278–79 (2001) (*citing* proclamations).

424 Proc. No. 6920, 61 Fed. Reg. 50,223 (1996).

425 *See* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. Denv. Water L. Rev. 271, 279 (2001) ("As one deeply involved in [the monument designation] process, I can attest that we looked at what the monument's needs for water were; whether the necessary water resources were already protected by other, previous federal reservations; and whether any additional protection that might be advisable could be afforded [in] other ways (such as through land use controls")). For an inside look at the monument designation process, *see also* John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View,* 31 Envtl. L. 199, 216–19 (2001).

426 Proc. No. 7398, 66 Fed. Reg. 7359, 7361 (2001).

427 Proc. No. 7319, 65 Fed. Reg. 37,253, 37,255 (2000).

El Malpais National Conservation Area in New Mexico in 1987[428] but expressly disclaimed reserved rights for the Hagerman Fossil Beds National Monument the next year.[429] However, in the San Pedro Riparian National Conservation Area, Congress not only expressly reserved water but also directed the Secretary of the Interior to file a claim for quantification in an appropriate stream adjudication.[430] This individualized approach to explicit congressional consideration of reserved water for newly designated monuments mirrors that of new wilderness designations,[431] and is certain to contribute to the fracturing of reserved rights doctrine.

In 1979, the Interior Solicitor opined that early proclamations establishing national monuments prior to the enactment of the National Park System Organic Act in 1916 would have a pre-1916 priority date and would include reserved water for "unstated" monument objectives, such as preservation of biological resources, because "the promotion of the public good is a primary purpose of the monument reservation and … it includes public enjoyment of both stated and unstated monument objectives."[432] However, state courts have not interpreted the scope of reserved monument water that broadly. For example, the Colorado Supreme Court narrowly interpreted the purposes of the Dinosaur National Monument. After scrutinizing the purposes of both the presidential proclamation creating the monument and the Antiquities Act, the court concluded that water was reserved only for scientific and historical purposes, not for whitewater rafting or fish and wildlife.[433] The court concluded that Congress intended national monuments to have a more limited scope and purpose than national parks, noting that because Dinosaur National Monument was located in the lower reaches of the Yampa River in Colorado, reserved water rights for recreational boating would have an "enormous potential economic impact" on existing water rights holders.[434] However, the court also ruled that Rocky Mountain National Park's purposes were broader than those of the Dinosaur National Monument, including conserving scenery, historic and scientific objects, and wildlife, as well as recreational boating.[435]

In late 1993, the same Colorado water court that earlier rejected the federal government's claims for channel maintenance flows in national forests[436] upheld claims for channel maintenance reserved rights in Rocky Mountain National Park.[437] The court ruled that the congressional purpose in establishing the park was to leave it unimpaired, preserving natural conditions. As a result, the water court concluded that the statute which created the park reserved all the unappropriated water for ecosystem maintenance, based in part on judicial notice of what the court referred to as the "arcane" science of fluvial geomorphology.[438]

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[428] 101 Stat. 1539 (1987) (also reserving water for the Cebolla Wilderness, approximately 60,000 acres, and the West Malpais Wilderness, approximately 38,210 acres).

[429] 102 Stat. 4575, 4576 (§ 304) (1988).

[430] ***102 Stat. 4571*** (1988).

[431] *See infra* Treatise § 37.03(a)(6).

[432] 86 Interior Decisions 553, 599–601 (1979).

[433] United States v. City and County of Denver, 656 P.2d 1, 27 (Colo. 1982); *see* Wendy Weiss, *The Federal Government's Pursuit of Instream Flow Water Rights*, 1 U. Denv. Water L. Rev. 151, 160–61 (1998).

[434] *Denver*, 656 P.2d at 29. On remand, the water court concluded that "neither the Presidential Proclamation nor the relevant underlying documents contemporaneous with its issuance suggest that fishes or other wildlife were thought by the President to be of scientific, biological, or historic importance at the time the reservation was made." In the matter of Dinosaur National Monument, Case No. W.18 (Colo. Water Div. No. 6, March 14, 1985).

[435] *Denver*, 656 P.2d at 28, 30.

[436] *See supra* Treatise § 37.03(a)(1), at notes 398–400 and accompanying text.

[437] Concerning the Application for Water Rights of the United States of America for Reserved Rights in Rocky Mountain National Park, No. W-8439-76 (Colo. Water Div. 1, Dec. 29, 1993).

[438] *See* John R. Hill, Jr., *Colorado Court Recognizes Federal Reserved Rights to Instream Flows in Rocky Mountain National Park*, 4 Rivers 243 (1993). *See also* Eric T. Freyfogle, *Repairing the Waters of the National Parks: Notes on a Long-term*

The Black Canyon of the Gunnison River in west-central Colorado was long the scene of a complex struggle over federal reserved rights. The Black Canyon was made a national monument in 1933 by President Hoover and upgraded to national park status by Congress in 1999. The park legislation disclaimed any effect on any existing water rights and promised that any new water right needed by the park would be established under Colorado law.[439] However, in 1978, the state water court granted the United States a "conditional and absolute" right, with priority dates of 1933, 1938, and 1939 to a quantity of water necessary to conserve and maintain unimpaired the scenic, aesthetic, natural, and historic objects of the monument and its wildlife, including fish flows.[440] Although the water court directed the federal government to file a quantification of the amount of water necessary to carry out its decree, the government did not do so until twenty-three years later, in January 2001, when it claimed year-round base flows of 300 cubic feet per second (cfs) and higher peak and shoulder flows during the spring runoff.[441] Over 380 statements of opposition ensued, and the federal government entered into settlement negotiations that culminated in a 2003 settlement in which the government agreed to relinquish its claims to peak and shoulder flows, settle for base flows of 300 cfs or natural flows, whichever is less, and to seek an additional instream flow under state law with a 2003 priority date.[442]

A coalition of environmentalists appealed the settlement and, after the Colorado Supreme Court affirmed a stay of the agreement issued by the water court (see discussion *infra* at notes 627–630 and accompanying text) a federal district court ruled that the settlement's lack of environmental impact analysis violated the National Environmental Policy Act.[443] The court also held that 1) the delegation to the state board of the appropriate instream flow above 300 cfs was an improper delegation of federal responsibility; 2) the settlement improperly disposed of federal property without congressional authorization; and 3) the settlement violated the National Park Service's affirmative duties to protect the canyon's resources imposed by the National Park Service Organic Act, the Black Canyon Act, and the Wilderness Act.[444] Water users, conservation groups, and the federal government subsequently reached a settlement that provided for peak and shoulder flows as part of the federal reserved right.[445] A Colorado water court approved the settlement in a 2009 decree that established a complex formula peak and shoulder flows, based on annual forecasted inflow into Blue Mesa Reservoir in April through July, and subordinated those flows to upstream water rights established prior to the construction of the reservoirs on the Gunnison River in 1957.[446]

Strategy, 74 Denv. U. L.J. 815, 833 (1997), urging the Park Service "to tie its water rights directly into its charter language [in the Organic Act], and make little use of the individual statutes that gave rise to particular park units."

[439] 16 U.S.C. § 410fff-8(b).

[440] *See* High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235, 1240 (D. Colo. 2006) (discussing the water court decision of March 6, 1978).

[441] *See In re* The Application for Water Rights of the United States, 101 P.3d 1072, 1076 (Colo. 2004). The delay was due in part due to the difficulties in reconciling apparently conflicting congressional policies. *See High Country Citizens' Alliance*, 448 F. Supp. 2d at 1240–41.

[442] *See High Country Citizens' Alliance*, 448 F. Supp. 2d at 1241–42.

[443] *High Country*, 448 F. Supp. 2d at 1243–46.

[444] *High Country*, 448 F. Supp. 2d at 1246–53.

[445] *See* Paul Noto, *Colorado Water Court Finalizes Reserved Water Right Decree for the Black Canyon of the Gunnison National Park*, 13 Western Water Law & Policy Reporter no. 4, 97 (Feb. 2009). *See also* Reed D. Benson, *A Bright Idea from the Black Canyon: Federal Judicial Review of Reserved Water Rights Settlements*, 13 U. Denv. Water L. Rev. 229 (2010) (concluding that federal judicial review is the only real check on federal agencies' ability to give up reserved rights through settlement but also suggesting that settlements be open to the full range of stakeholders—which did not occur in the Black Canyon settlement).

[446] *See* 13 Western Water Law & Policy Reporter no. 4 at 98–99 (noting that conservation groups agreed to subordinating the reserved right because studies showed that the upstream water rights would not interfere with the peak and shoulder flows).

President George W. Bush designated six national monuments during his eight-year presidency.[447] Five were in the ocean and the other in New York City, so none would have any reserved rights' effects on irrigation diversions. The Omnibus Public Land Management Act of 2009 established the Prehistoric Trackways National Monument in southern New Mexico, disclaiming any "express or implied reservation" of water rights.[448] The same statute established three new additions to the national park system without mentioning water rights.[449]

(3) National Wildlife Refuges.

The National Wildlife Refuge System consists of "all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas."[450] The specified purposes of a refuge depend on the executive order or statute creating the area. In *Arizona v. California*, the Supreme Court awarded reserved water rights to the Havasu Lake National Wildlife Refuge without focusing closely on the reservation's purposes.[451] The Ninth Circuit subsequently ruled that the Kenai National Moose Range possessed reserved water.[452]

The Interior Department may claim reserved rights for both "consumptive and non-consumptive water uses necessary for the conservation of migratory birds and other wildlife (e.g., watering needs, habitat protection, ecosystem food supply, fire protection, soil and erosion control) and attendant personnel needs (e.g., refuge staff domestic needs)."[453] Assertion of reserved rights for refuges could produce significant conflicts with state water rights holders because unlike many forests and parks, most refuges are located at low elevations, downstream from diversions.

The leading state court case on reserved rights for national wildlife refuges reflects considerable judicial hostility to implying reserved rights for refuges. In *Idaho v. United States*,[454] the Idaho Supreme Court affirmed the Snake River Basin Adjudication court's conclusion that the Deer Flat National Wildlife Refuge, which consisted

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[447] The six monuments were: 1) the African Burial Ground (New York City), 71 Fed. Reg. 10,793 (Feb. 27, 2006); 2) the Papahanaumokukuakea Marine, 71 Fed. Reg. 36,443 (June 15, 2006) (renamed, 72 Fed. Reg. 10,031 (Feb. 28, 2007); 3) the World War II Valor in the Pacific, 73 Fed. Reg. 75,293 (Dec. 5, 2008); 4) the Marianas Trench Marine, 74 Fed. Reg. 1557 (Jan. 6, 2009); 5) the Pacific Remote Island Marine, 74 Fed. Reg. 1565 (Jan. 6, 2009); and 6) the Rose Atoll Marine, 74 Fed. Reg. 1577 (Jan. 6, 2009).

[448] Pub. L. No. 111-11, §§ 2103, 2104(i), ***123 Stat. 991***.

[449] Pub. L. No. 111-11, §§ 7001–03 (establishing the Paterson Great Falls National Historical Park (New Jersey), the William Jefferson Clinton Birthplace Home National Historical Park (Arkansas), and the River Basin National Battlefield Park (Michigan)).

[450] 16 U.S.C. § 668dd.

[451] Arizona v. California (*Arizona I*), 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340, 346 (1964).

[452] United States v. Alaska, 423 F.2d 764, 767 (9th Cir. 1970).

[453] 86 Interior Decisions 553, 604 (1979). Recreational uses on refuges have no reserved rights, because they are secondary purposes. 86 Interior Decisions at 606–07.

[454] 23 P.3d 117, 125 (Idaho 2001). The court was convinced that the primary purpose of the refuge was to provide protection for migratory birds from hunters and trappers, not to provide habitat protection. *See* 23 P.3d at 126 ("The United States has not shown that the principal objects of the reservations will be defeated without a reserved right. Hunting is still prohibited and migratory birds still have a sanctuary without a federal reserved right. Without water there would be no island, but there would be a sanctuary as defined by the Migratory Bird Conservation Act. Even if it were shown that the purpose of the island reservations has evolved over the years to include maintaining the riparian habitat provided by the islands or foster isolation from predators, those purposes were not present at the time of the reservations.") In S. Bryce Farris, Comment, *Reserved Water Rights—Protecting Migratory Waterfowl in the Snake River Basin Adjudication*, ***33 Idaho L. Rev. 659 (1997)***, the author argued that the refuge had no reserved water rights.

of numerous islands in the Snake River, had no reserved rights because in reserving "islands" as a "sanctuary for migratory birds" the executive orders establishing the refuge failed to provide a "standard for quantification" of the amount of water necessary to preserve an island. Use of this rather wooden, formalistic test enabled the court to reject reserved water for the refuge, even though the test would seem to relate to the issue of how much water was reserved, not whether there was any reserved water. The Idaho court acknowledged that "[o]ne can assume that there was an expectation that the 'islands' would remain surrounded by water," but maintained (without citation of authority) "that does not equate to an intent to reserve a federal right to accomplish that purpose. The two concepts are not equivalent."[455]

The Idaho court sought to distinguish the Deer Flat refuge from the Lake Havasu and Imperial Refuges—which the Supreme Court in *Arizona v. California* held were entitled to reserved water rights—by declaring that the Arizona refuges were not reserved pursuant to the Migratory Bird Conservation Act (as Deer Flat was), although the court was unclear how or why the Havasu and Imperial executive orders provided the "standard of quantification" that the Bird Act lacked. The court also asserted that after the Supreme Court's *United States v. New Mexico* decision courts may recognize federal reserved rights only where a lack of federal water would defeat the primary purpose of the reservation. It then opined that the primary purposes of the Deer Flat Refuge—to prevent the extinction of migratory birds, to create sanctuaries where the birds could be safe from hunters, and to promote increased bird populations to assist farmers with insect control—would "not be defeated without a federal reserved water right."[456] Providing the birds "isolation from predators, proximity to open water, and riparian habitat" were, according to the court, mere secondary purposes, for which no reserved rights could be awarded.[457]

The Ninth Circuit upheld the Nevada State Engineer's approval of a transfer of irrigation rights for wetlands restoration in the Stillwater National Wildlife Refuge. The court rejected assertions that the transfers would conflict with existing claims and were not in the public interest.[458]

In February 2005, the Oregon Water Resources Commission approved a water right, after a settlement in a contested case, for the Malheur National Wildlife Refuge in eastern Oregon, allowing refuge managers to divert water for irrigation for crops, native grass areas, and wetlands. Among the conditions the Commission attached included a limit on the total volume and maximum diversion rates, development of a water quality monitoring plan, and bypass flows at diversion points.[459]

In April of 2013, the State of Montana entered into a compact "in settlement of the reserved water rights claims of the United States" for the Charles M. Russell National Wildlife Refuge.[459.1] The reserved rights have a priority date of December 11, 1936.

(4) Wild and Scenic Rivers.

The Wild and Scenic Rivers Act expressly reserves water rights when rivers are designated but only "in quantities … necessary to accomplish [the river's] purposes."[460] Those purposes include protection of "scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values … preserved in free-flowing

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455 *Idaho,* 23 P.3d at 126.

456 *Idaho*, 23 P.3d at 127.

457 *Idaho*, 23 P.3d at 127.

458 United States v. Alpine Land & Reservoir Co., 341 F.3d 1172, 1180–83 (9th Cir. 2003) (also rejecting a requirement for cumulative studies under Nevada law).

459 *See* Western Water Law & Policy Reporter, April 2005, at 157–58.

459.1 Mont. Code Ann. § 85-20-1701.

460 16 U.S.C. § 1284(c).

condition."[461] The Act also contains a classic *non sequitur* concerning water rights: "Nothing 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."[462] The Interior Solicitor concluded that "no consistent reading of this provision appears possible."[463]

Designated rivers may be classified "wild," "scenic," or "recreational,"[464] by either the land management agency or by Congress, and designation may affect only segments of certain rivers. While the Interior Department has concluded that "river designation does not automatically preserve the entire flow of the river," the agency does intend to claim reserved water necessary to protect the particular aesthetic, recreational, scientific, biotic, or historic features that led to the river's inclusion in the system.[465]

The leading decision on reserved rights for wild and scenic rivers is the Idaho Supreme Court's unanimous affirmation of the Snake River Basin Adjudication court's ruling that the Wild and Scenic Rivers Act expressly reserved water in section 13(c) of the Act.[466] That provision states that designation of wild and scenic rivers "shall not be construed as a reservation of the waters of such streams for purposes other than those specified in the Act, or in quantities greater than necessary to accomplish these purposes."[467] The court also affirmed the SRBA court's rejection of the argument that the scope of the reserved right for wild and scenic rivers was all the unappropriated flows in the designated rivers; instead, the scope of the reserved water was that which the federal government could prove was the minimum necessary to preserve the rivers in their free-flowing condition and to protect and preserve the characteristics for which the rivers were designated.[468]

The federal government and the state of Idaho, and several other parties reached a court-approved settlement that quantified instream flow rights to wild and scenic rivers in the state by subordinating each right to all existing rights.[469] Moreover, depending on the river,[470] the instream river rights are also subordinated to certain types and amounts of future diversions.[471]

In 1992, the Bureau of Land Management reported recognition of the first instream flow water right in New Mexico to protect a stretch of the Red River, a federal wild and scenic river. An agreement with the state allows for average monthly flows for certain river stretches to be set by court order.[472]

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461 16 U.S.C. § 1271. *See* Brian E. Gray, *No Holier Temples: Protecting National Parks Through Wild and Scenic River Designation*, 58 U. Colo. L. Rev. 551 (1988).

462 16 U.S.C. § 1284(b).

463 86 Interior Decisions 553, 608 n.99 (1979).

464 16 U.S.C. § 1273(b). A wild river is for the most part totally pristine; a scenic river is free of impoundments and major shoreline development, but is accessible by road; a recreational river is readily accessible with some impoundment and shoreline development.

465 86 Interior Decisions 553, 608–09 (1979).

466 Potlatch Corp. v. United States (In re SRBA Case No. 39576), 12 P.3d 1256, 1258–59 (Idaho 2000).

467 16 U.S.C. § 1284(c).

468 Potlatch Corp., 12 P.3d at 1260.

469 *In re* SRBA, Case No. 39576, Wild & Scenic Rivers Act Claims, IDWR Subcase No. 75-13316 (SRBA Dist. Ct. 2004). *See* www.idahorivers.org/pdf/WildScenicSettlement04.pdf.

470 The six designated wild and scenic rivers in Idaho are: the Salmon, the Middle Fork Salmon, the Rapid, the Selway, the Lochsa, and the Middle Fork Clearwater.

471 *See* 37 Water Law Newsletter no. 3, at 8 (2004).

472 *See* Western States Water No. 963 (Oct. 30, 1992). For an argument that the Wild and Scenic Rivers Act protects designated rivers by withdrawing from states the power to authorize water rights inconsistent with the Act, effectively

In 1997, the federal District Court of Oregon ruled that a wild and scenic river plan that did not call for removal of grazing in the river corridor, despite the unanimous recommendation of five BLM-hired botanists, violated the Wild and Scenic Rivers Act.[473] The court noted that grazing was the primary cause of high water temperatures which violated water quality standards under the Clean Water Act.[474]

The Omnibus Public Land Management Act of 2009 added nine segments of Oregon rivers near Mount Hood and several river segments of four northern California rivers to the wild and scenic river system.[475] The Act specified only that the designations would not "affect valid existing water rights" of the Oregon rivers and one of the California rivers.[476] The Omnibus Act also added Fossil Creek in Arizona and Taunton River in Massachusetts to the national river system, without mentioning water rights.[477] However, the statute's addition of the Snake River Headwaters on northwestern Wyoming to the system came with a directive that the federal government quantify the water rights reserved by each river segment under the laws of the state of Wyoming with a priority date of the date of the Omnibus Act.[478] And the designation of some thirty streams in Zion National Park in Utah as wild and scenic rivers disclaimed any intent to affect a 1996 water settlement between the federal, state, and county governments.[479]

(5) National Recreation Areas.

National recreation areas generally are devoted to intensive recreation.[480] In *Arizona v. California*, the Supreme Court awarded reserved water for the Lake Mead National Recreation Area without discussing quantification standards.[481] In the Snake River Basin Adjudication, the Idaho Supreme Court affirmed the SRBA court's conclusion that the Hells Canyon National Recreation Act constituted an express reservation of water rights in Snake River tributaries within the boundaries of the Recreation Area because the Hells Canyon Act set aside

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preempting inconsistent state water law, *see* Peter M.K. Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 Idaho L. Rev. 313 (1992–93).

473 Oregon Natural Desert Assoc. v. Green, 953 F. Supp. 1133, 1145–46 (D. Or. 1997).

474 *ONDA*, 953 F. Supp. at 1145. The court also ruled that, given scientific data indicating that grazing in the river corridor might significantly degrade protected river values, the preparation of a wild and scenic river plan required preparation of an environmental impact statement. 953 F. Supp. at 1146–48. In a subsequent decision involving another designated river, the Oregon district court determined that the management agency's assumption that Congress intended continued grazing after wild and scenic designation was erroneous; the agency had to make a finding that grazing was compatible with the "outstandingly remarkable values" for which the river was designated. Oregon Natural Desert Ass'n v. Singleton, 75 F. Supp. 2d 1139 (D. Or. 1999). *See generally supra* Treatise § 39.02(e).

475 The Oregon river segments added were (1) the South Fork of the Clackamas, (2) Eagle Creek, (3) the Middle Fork of the Hood, (4) the South Fork of the Roaring, (5) the Zig Zag, (6) Fifteenmile Creek, (7) the East Fork of the Hood, (8) the Collawash, and (9) Fish Creek. Omnibus Pub. Lands Mgmt. Act of 2009, Pub. L. No. 111-11, § 1203(a) (1), ***123 Stat. 991***. The California rivers were (1) the Amargosa, (2) the Owens Headwaters, (3) Cottonwood Creek, and (4) Piru Creek. Pub. L. No. 111-11, § 1805(a).

476 Pub. L. No. 111-11, § 1203(a)(2). A tenth Oregon river, the Elk River, was added to the Wild and Scenic River system in a separate section of the 2009 statute with no mention of its effect on water rights. Pub. L. No. 111-11, § 1302. Of the California designations, only Piru Creek's addition is to have no affect on "valid existing rights in existence" on the date of enactment of the 2009 statute. Pub. L. No. 111-11, § 1805(b).

477 Omnibus Pub. Lands Mgmt. Act of 2009, Pub. L. No. 111-11, § 5001, ***123 Stat. 991*** (Fossil Creek, Arizona), § 5003 (Taunton River, Massachusetts).

478 Omnibus Pub. Lands Mgmt. Act of 2009, Pub. L. No. 111-11, § 5002(e)(3), ***123 Stat. 991***.

479 Omnibus Pub. Lands Mgmt. Act of 2009, Pub. L. No. 111-11, § 1876(c), ***123 Stat. 991***.

480 16 U.S.C. §§ 460n–460qq.

481 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340, 346 (1964).

"lands and waters" in the reserve.[482] However, the court reversed the SRBA court's ruling that the amount of water was all the water in the national recreation area, but instead was that amount which the federal government could prove was necessary for the purpose of the reservation.[483]

In a companion case, the Idaho Supreme Court rejected reserved water rights for the non-wilderness portion of the Sawtooth National Recreation Area because the purpose of the NRA was to "preserve and protect the natural scenic, historic, pastoral and fish and wildlife values of the area only through regulating land development and mining."[484] Fulfilling this purpose apparently required no water rights.[485]

(6) Wilderness Areas.

There has been a good deal of litigation and considerable controversy over whether wilderness designations reserve water for the Wilderness Act's purposes of preserving areas in their natural condition for "recreational, scenic, scientific, educational, conservation, and historic uses."[486] The statute was hardly clear about what wilderness designation meant for water rights, however, stating: "Nothing in this [Act] shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws."[487] The Interior Solicitor first claimed water was reserved for wilderness areas, then recanted, a decision that itself was subsequently revoked.[488]

A federal district court ruled in 1985 that water is reserved for wilderness purposes upon "the date of the individual reservations or designations as wilderness,"[489] but the Tenth Circuit subsequently reversed and refused to require the Forest Service to submit a plan to protect wilderness water uses because the issue was

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482 Potlatch Corp. v. United States, 12 P.3d 1260, 1268–69 (Idaho 2000).

483 *Potlatch Corp.*, 12 P.3d at 1270.

484 Idaho v. United States, 12 P.3d 1284, 1288–89 (Idaho 2000).

485 *Idaho*, 12 P.3d at 1280 ("The purpose of the Act was not simply to protect fish habitat, but rather to protect that habitat as well as other values associated with the recreation areas, from the damages associated with watershed mining operations … we all agree fish require water, [but] we do not agree judicial notice of this fact establishes that without such water the purposes of the non-wilderness portion of the Sawtooth NRA will be entirely defeated.").

486 16 U.S.C. §§ 1131(a), 1133(b).

487 16 U.S.C. § 1133(d)(6).

488 The succession of Solicitor Opinions reflects the politically charged nature of the debate over wilderness water rights. The initial decision, handed down in the wake of the Supreme Court's *New Mexico* decision, was the product of the Carter Administration. 86 Interior Decisions. 553, 609–10 (1979) ("designation as wilderness does more than merely authorize secondary uses entailing no reserved water rights"; wilderness reserved water rights include sufficient water to carry out the preservation purposes of the Wilderness Act, including science, education, inspiration, and recreation). This opinion was reversed during the Reagan Administration. 96 Interior Decisions 211 (1988) (concluding that Congress in the Wilderness Act did not intend to create reserved water rights). The 1988 opinion was then revoked by the Clinton Administration in 1993. ***58 Fed. Reg. 68,629 (Dec. 28, 1993)*** (overruling part of 86 Interior Decisions 553 (June 25, 1979) and a concurrence of the Attorney General concluding that federal agencies would not claim reserved water rights in wilderness areas). *See* John D. Leshy, *Water and Wilderness/Law and Politics*, 23 Land & Water L. Rev. 389 (1988); Karin P. Sheldon, *Water for Wilderness,* 76 Denv. U. L. Rev. 555 (1999).

489 Sierra Club v. Block, 622 F. Supp. 842, 859–60, 862 (D. Colo. 1985) (Wilderness Act is not a mere land management statute like the Multiple Use-Sustained Yield Act, but created entirely new reservations with new primary purposes); later decision at 661 F. Supp. 1490 (D. Colo. 1987) (determining that a two-page Forest Service plan to protect wilderness water rights inadequate). On the alleged duty of the federal government to assert wilderness water rights, *see* Robert H. Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights,* 1986 U. Ill. L. Rev. 387; Elinor Colbourn, *The Morality of Wilderness: Federal Reserved Water Rights in Western Wilderness Areas*, 6 Law & Policy Rev. 157 (1988); Jason Marks, *The Duty of Agencies to Assert Reserved Water Rights in Wilderness Areas,* 14 Ecology L.Q. 639 (1987); Janice L.

not ripe.[490] The court could find no "irreconcilable threat" to the Wilderness Act's preservationist mandate.[491] Thus, an unwilling Forest Service was not compelled to assert a reserved wilderness water right, which could result in an effective relinquishment of the priority date of the right by not asserting it in ongoing adjudication.[492] Even if it does not result in a loss of priority date, failure to assert wilderness water rights will allow states to continue to issue water rights to private parties, creating expectations that will not be easily unsettled.

The lack of apparent conflict between wilderness water and existing uses the Tenth Circuit found was not especially surprising, given the fact that most (but not all) existing wilderness areas are located high in national forest watersheds, above existing diversions.[493] As Congress designates wilderness areas on lands managed by the Bureau of Land Management,[494] however, conflicts are likely to increase, although existing rights holders will not be defeased, because new wilderness designations will have junior priority dates.[495] Opposition to BLM wilderness water is not therefore from existing rights holders, but from states wishing to protect their ability to allocate unappropriated water supplies.[496] Nevertheless, the first statewide act designating BLM lands as wilderness, the Arizona Desert Wilderness Act of 1990, expressly reserved "a quantity of water sufficient to fulfill the purposes of this title" and directed the Secretary of the Interior to file a claim to quantify these rights in an appropriate stream adjudication.[497]

Congress also expressly reserved water rights in the Washington Park Wilderness Act of 1988, in the following language:

> Subject to valid existing rights, within the areas designated as wilderness by this Act, Congress hereby expressly reserves such water rights as necessary for the purposes for which such areas are so designated. The priority date of such rights shall be the date of enactment of this Act.[498]

A statute designating wilderness in New Mexico used different language to reserve water: "Congress expressly reserves to the United States the minimum amount of water required to carry out the purposes [of the wilderness

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Weiss, Note, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight*, 15 Hastings Const. L.Q. 125 (1987).

490 Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990).

491 *Yeutter*, 911 F.2d at 1414. This decision provided an impetus for Congress to pass a long-stalled Colorado Wilderness Act because it reduced opposition based on fears of wilderness reserved rights. Colorado Wilderness Act of 1993, ***107 Stat. 756***, 762–63 (1993) (disclaiming any intent to reserve wilderness water rights, but providing an alternative to protect wilderness water through land management mechanisms, such as those discussed *infra* Treatise § 37.06(c)).

492 *See* United States v. Bell, 724 P.2d 631, 643 (Colo. 1986) (federal government's failure to originally assert the full scope of a reserved water right cost it six decades of seniority, due to failure to comply with state notice laws). *But see* the Colorado Supreme Court's subsequent limiting of the *Bell* case, discussed *infra* Treatise § 37.03(a) (7), at note 519.

493 *See* John D. Leshy, *Water and Wilderness/Law and Politics*, 23 Land & Water L. Rev. 389 (1988), 395–98. However, in Idaho two of the wilderness areas at issue in the Snake River Basin Adjudication, *infra* notes 502–506, are not at the headwaters of their watersheds, prompting conflict with upper basin water diversions.

494 Under § 603 of the Federal Land Policy and Management Act, BLM was to study roadless areas and make wilderness recommendations to Congress by 1991. 43 U.S.C. § 1762.

495 *See supra* Treatise § 37.03(b).

496 John D. Leshy, *Water and Wilderness/Law and Politics*, 23 Land & Water L. Rev. 389, 407–12 (1988) (noting potential conflicts over water right transfers, interstate water allocations, and new water projects).

497 Act of Nov. 28, 1990, ***Pub. L. No. 101-628, 104 Stat. 4469***, 4473 (1990) discussed at 23 Water Law Newsletter No. 3, at 3 (Mar. 1991)

498 ***102 Stat. 3961***, 3968 (§ 502) (1988).

reserves]."[499] The California Desert Protection Act of 1994, designating BLM lands as wilderness, also expressly reserved water rights necessary to fulfill the purposes of the wilderness, subject to valid existing rights.[500] On the other hand, the Colorado Wilderness Act of 1993 expressly disclaimed any intent to establish wilderness water rights, instead opting for use of land management controls to protect water flows in wilderness areas.[501]

The most prominent state court wilderness water rights case thus far was the Idaho Supreme Court's decision in the Snake River Basin Adjudication (SRBA), where the court reversed itself, 3-2, and overruled the SRBA court's conclusion that the federal government had a reserved right for all unappropriated water flows in the Frank Church River of No Return, the Selway, and the Gospel-Hump Wilderness Areas as of the date of their respective designations.[502] In reversing, the Idaho Supreme Court gave an extremely narrow interpretation of the purpose of the Wilderness Act, interpreting it merely to "set[] aside land and prohibit[] its development, nothing more."[503] According to the court, the land restrictions imposed on wilderness areas would supply only incidental protection against diversions within the designated areas; therefore, there was no need for a federal water right which would protect against upstream diversions (of which there were several hundred, which would have been shut off under the lower court's ruling).

Moreover, the court ruled that unlike the case of the national monument in *Cappaert v. United States*, there was no "standard of quantification" by which to measure the amount of water reserved, although the court did not attempt to explain why there was such a standard in *Cappaert.*[504] Nor did the court attempt to explain why the national monument in *Cappaert* could restrain water rights beyond its borders, but wilderness areas may not. The court emphasized the economic consequences of recognizing reserved rights, in apparent contradiction to the United States Supreme Court's ruling in *Cappaert*, where the Court stated that present-day equities are irrelevant to the existence of reserved rights.[505] The Idaho court also chose to ignore the specific legislation creating two of the wilderness areas in question, which specifically mentioned watershed preservation, fish and wildlife protection, and downstream water quality benefits.[506]

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[499] 101 Stat. 1539, 1542 (§ 401), 1549 (§ 509) (1987) (also reserving water for a national monument and a national conservation area). The statute also disclaimed any intent to "establish[] a precedent with to future designations, nor shall it affect the interpretation of any other Act or any designation made pursuant thereto." 101 Stat. 1539 at 1549 (§ 509(c)).

[500] ***108 Stat. 4471***, 4498 (1994).

[501] *See* Colorado Wilderness Act of 1993, ***107 Stat. 756***, 762–63 (1993) (disclaiming any intent to reserve wilderness water rights, but providing an alternative to protect wilderness water through land management mechanisms, such as those discussed *infra* Treatise § 37.06(c)).

[502] Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000), *rev'g* No. 24546, 1999 Ida. LEXIS 119 (Oct. 1, 1999). The case is criticized in Michael C. Blumm, *Reversing the* Winters *Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and its Implications*, 73 U. Colo. L. Rev. 173 (2002). The reversal was due to an apparent change of heart by Chief Justice Trout after the author of the initial opinion, Justice Silak drew partisan opposition, based largely on her wilderness water rights opinion, in her bid for reelection and was defeated convincingly. *See* 73 U. Colo. L. Rev. at 188; Gregory J. Hobbs, *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. Denv. Water L. Rev. 122, 136–146 (2001); Justin Huber & Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 16 U. Denv. Water L. Rev. 261 (2013) (addressing a number of "poorly reasoned and result-oriented state court decisions").

[503] *Potlatch*, 12 P.3d at 1266.

[504] *Potlatch*, 12 P.3d at 1267.

[505] *Potlatch*, 12 P.3d at 1267 ("wilderness was not intended to strangle the economic life from areas outside the wilderness"); 12 P.3d at 1268 (Act not intended to "cripple the economic growth of portions of Idaho outside the wilderness"); *Cf. Cappaert*, 438 U.S. at 139 (existence of reserved rights not a function of "competing" equities).

[506] *See Potlatch*, 12 P.3d at 1279–80 (Silak J., dissenting). Two concurring opinions gave different reasons for refusing wilderness water rights: one concurrence relied on a disclaimer provision in the Wilderness Act, 12 P.3d at 1271–72 (Kidwell,

The Idaho Supreme Court also reversed the SRBA court and concluded that the wilderness portion of the Sawtooth National Recreation Area had no reserved water rights because of a disclaimer clause similar to that in the Wilderness Act, and also because of the court's conclusion that the purpose of the statute was to prevent mining development, even though the purpose of the wilderness expressly included preserving and protecting fish and wildlife.[507]

A Nevada district court upheld the state engineer's determination that the federal government was entitled to all the unappropriated water in the Alta Toquima and Table Mountain Wilderness Areas, due to the language of the 1989 Nevada Wilderness Protection Act.[508]

The Omnibus Public Lands Management Act of 2009 established numerous wilderness areas over some 2.2 million acres, with varying degrees of attention to water rights. For example, the Rocky Mountain National Park Wilderness in Colorado contained an express disclaimer of any intent "to reserve or appropriate any additional water rights to fulfill the purpose of the Wilderness, declaring that "existing water rights are sufficient for the purposes of the Wilderness."[509] Similarly, fourteen wilderness areas designated in Utah came with a similar disclaimer,[510] as did the Owyhee Wilderness in Idaho.[511] But the Dominguez Canyon Wilderness in Colorado authorizes a kind of hybrid water right, a federal right to maintain surface water flows in the wilderness; the right must be secured under state law.[512] On the other hand, neither the Mount Hood Wilderness, nor the Copper Salmon Wilderness, nor the Eastern Sierra and Northern San Gabriel Wilderness contained any mention of water rights.[513] The Spring Basin and Badlands Wilderness designations in Oregon did not mention water rights but included disclaimers concerning Indian treaty rights, including off-reservation rights.[514]

(7) Bureau of Land Management Lands.

With some exceptions, Bureau of Land Management (BLM) lands do not possess reserved water rights because, according to the Interior Department, they generally are not reserved lands, dedicated to particular purposes.[515] The D.C. Circuit later expressed "substantial agreement" with this view that most BLM lands were unreserved lands without reserved water rights, and that the Federal Land Policy and Management Act did not

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J., concurring), the other on a congressional "awareness" of potential conflicts between federal reserved rights and state water law which apparently would make implied reserved rights impossible at the time of the passage of the Wilderness Act in 1964. 12 P.3d at 1270–71 (Trout, C.J., concurring).

507 Idaho v. United States, 12 P.3d 1284, 1288–91 (Idaho 2000).

508 *In re* Waters of Monitor Valley, No. 14906 (5th Jud. Dist. Nev., Apr. 28, 2000), *case dismissed*, ***131 P.3d 612 (Nev. 2004)*** (table).

509 Omnibus Public Lands Management Act of 2009, Pub. L. No. 111-11, § 1952(f), ***123 Stat. 991***.

510 The areas were designated by § 1972(a) (1), ***123 Stat. 991***; the water rights disclaimer appears at § 1972(b)(9), ***123 Stat. 991***.

511 § 1502(b)(12), ***123 Stat. 991***.

512 § 2406(h), ***123 Stat. 991***. *See* John D. Leshy, *Water Rights For New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. Denver Water L. Rev. 271 (2001) (advocating such hybrid water rights). *See also infra* § 37.06(c)(1) (describing federal non-reserved water rights).

513 Pub. L. No. 111-11, §§ 1201–1207, ***123 Stat. 991*** (Mount Hood); §§ 1301–03 (Copper Salmon) §§ 1891–1804 (Eastern Sierra and Northern San Gabriel). Nor did the Wild Sky Wilderness, designated by the Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 101, ***122 Stat. 754***, contain any mention of water rights. The Copper Salmon designation disclaimer any intent to affect "any right of any Indian tribe." § 1303(a), ***122 Stat. 754***.

514 Pub. L. No. 111-11, § 1755, ***123 Stat. 991*** (Spring Basin), § 1705 (Badlands) ("Nothing in this subtitle alters, modifies, enlarges, or abrogates the treaty rights of any Indian tribe, including the off-reservation reserved rights secured by the Treaty with the Tribes and Bands of Middle Oregon …").

515 86 Interior Decisions 553, 588 (1979).

effectuate a reservation of lands.[516] There are, however, some BLM lands that have been reserved for specific purposes, such as public springs and water holes, oil shale withdrawals, and (lately) national conservation areas. These lands do have reserved rights, and so do BLM lands that have been designated as wilderness areas or wild and scenic rivers. For example, a 1926 executive order, known as Public Water Reserve 107, withdrew public springs and water holes to prevent monopolization of water sources in arid regions and to preserve water for domestic uses and stockwatering.[517] The Colorado Supreme Court rejected an Interior Department claim that the total yield of these springs and water holes was reserved for a variety of purposes, holding that water was reserved only in amounts sufficient to prevent monopolization.[518] The same court later ruled, however, that the public water holes originally leased for oil and gas development and subsequently withdrawn under Public Water Reserve 107 may have their entire yield withdrawn.[519]

The Idaho Supreme Court concurred that Public Water Reserve (PWR) No. 107 created reserved water rights for the limited purpose of stock watering by federal grazing permittees.[520] The SRBA court subsequently ruled that PWR 107 reserved rights 1) included water for more than just single-family use, 2) included water that is tributary to a perennial flowing stream, 3) must be used on-reservation, 4) did not include water once it flows off the reservation, and 5) did not include stream segments that do not meet the definition of a "spring" or a "water hole "[521] But a Nevada district court upheld the state engineer's rejection of three claims under PWR 107.[522] Lands withdrawn for oil shale purposes under 1916 and 1930 executive orders may have reserved rights, but only for the "purposes of instigation, examination, and classification," not for oil shale development.[523] The Taylor Grazing Act creates no stockwatering rights, even in Idaho, where ranchers can gain water rights for stockwatering without a diversion; ranchers with Taylor Act permits to graze on federal land get their own water rights because, unlike the federal government, they put the water to beneficial use.[524]

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[516] Sierra Club v. Watt, 659 F.2d 203, 206 (D.C. Cir. 1981). The court interpreted the savings clause in the statute, section 701(g), 90 Stat. 2786 (1976), which states that nothing in it is to be interpreted as "expanding or diminishing" federal or state jurisdiction or water rights, to mean that no water rights were reserved by the statute.

[517] Public Water Reserve No. 107, Exec. Order of Apr. 17, 1926, 30 C.F.R. § 758 n.1.

[518] United States v. City and County of Denver, 656 P.2d 1, 32 (Colo. 1982), rejecting the position advanced in 86 Interior Decisions 553, 581–88 (1979). The Interior position was criticized sharply in Frank J. Trelease, *Uneasy Federalism-State Water Laws and National Water Uses*, 55 Wash. L. Rev. 751, 761–63 (1980). The *Denver* court did, however, hold that the federal government could claim reserved rights in tributary springs and waterholes, *Denver*, 656 P.2d at 33, a result contrary to Hyrup v. Kleppe, 406 F. Supp. 214 (D. Colo. 1976). Subsequently, the Interior Department dropped its expansive claims. 90 Interior Decisions 81 (1983). *See generally* Angela A. Liston, Note, *Reevaluating the Applicability of the Reservation Doctrine to Public Water Reserve* No. 107, 26 Ariz. L. Rev. 127 (1984).

[519] Park Center Water Dist. v. United States, 781 P.2d 90 (Colo. 1989) (relying on language in the Oil and Gas Conversion Act of 1934, 30 U.S.C. § 229a). The *Park Center* court assumed that groundwater could be the subject of reserved rights, 781 P.2d. at 95 n.13, in contrast to the Wyoming Supreme Court, *see supra* Treatise § 37.02(d), at notes 290–95 and accompanying text. The Colorado Supreme Court also distinguished its earlier decision in the *Bell* case, *supra* Treatise § 37.03(a)(6), note 493, by allowing amendments to the federal claim to relate back to the government's original filing. 781 P.2d at 97–98 (finding sufficient notice to other claimants under the "unique facts" of the case).

[520] United States v. State, 959 P.2d 449 (Idaho 1998), *cert. denied sub nom*. Idaho v. United States and ***Hoagland v. United States, 526 U.S. 1012 (1999)***.

[521] *In re* SRBA, Subcase Nos. 23-10872 *et seq.* (Scope of PWR 107 Reserved Rights) (Dec. 28, 2001).

[522] *In re* Waters of Monitor Valley, No. 14906 (5th Jud. Dist. Nev., Apr. 28, 2000), *case dismissed*, 131P.3d 612 (Nev. 2004) (table).

[523] 86 Interior Decisions 553, 591–92 (1979). *See* Jan G. Laitos, *The Effect of Water Law on the Development of Oil Shale*, 58 Denv. L.J. 751, 774 (1981); William E. Holland, *Mixing Oil and Water: The Effect of Prevailing Water Law Doctrines on Oil Shale Development*, 52 Denv. L.J. 657 (1975). *See also infra* Treatise § 37.03(b), at notes 545–547 and accompanying text.

[524] Joyce Livestock Co. v. United States, 156 P.3d 502, 518–21 (Idaho 2008).

According to the Interior Department, power site withdrawals, lands classified for grazing, wild horse ranges, and Oregon and California timber lands have no reserved rights.[525] Nor does the Federal Land Policy and Management Act reserve water for BLM lands,[526] although land management plans under that statute might lead to federal regulatory water rights.[527]

The 2009 Omnibus Public Land Management Act established a new overarching land management system—the National Landscape Conservation System—managed by BLM to conserve, protect, and restore landscapes with outstanding cultural, ecological, and scientific values.[528] The system is comprised of BLM-managed national monuments, national conservation areas, wilderness study areas and wilderness area, national trails, wild and scenic rivers, and other areas designated by Congress for conservation purposes.[529] New components of this system include two conservation areas established by the 2009 Omnibus Act: the Fort Stanton-Snowy River Cave (New Mexico) and the Dominguez-Escalante (Colorado) National Conservation Areas.[530] Both reservations included disclaimers concerning establishing any new reserved water rights.[531]

(8) Military Reservations.

There has been little interpretation of the nature and scope of reserved water rights for the approximately 23 million acres of federal military reservations. A district court decision in 1958 held that state law did not govern federal groundwater pumping on a naval ammunitions depot.[532] In 1971, the Supreme Court seemed to assume that naval petroleum and shale oil reserves had reserved rights,[533] but the Colorado Supreme Court subsequently ruled that most of the claimed reserved rights had junior priority dates because the federal government failed to assert the full scope of the claims in a timely manner.[534]

In 1995, the Deputy Assistant Secretary of the Army issued policy guidance for maintaining water rights at Army installations.[535] The guidance states that "the Army will comply with applicable laws of the States pertaining to the use of water" when they are consistent with federal law and military requirements.[536]

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525 86 Interior Decisions 553, 590–94 (1979). *See also* United States v. City and County of Denver, 656 P.2d 1, 33–34 (Colo. 1982) (rejecting a claim for reserved water for geothermal power production).

526 86 Interior Decisions 553, 594 (1979); Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

527 *See infra* Treatise § 37.06(c).

528 Omnibus Public Lands Management Act, Pub. L. No. 111-11, § 2002(a), ***123 Stat. 991***.

529 Pub. L. No. 111-11, § 2002(b), ***123 Stat. 991***.

530 Pub. L. No. 111-11, § 2202, ***123 Stat. 991*** (Fort Stanton-Snowy River); § 2402 (Dominguez-Escalante).

531 Pub. L. No.111-11, §§ 2203(e), 2405(h), ***123 Stat. 991***.

532 Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

533 United States v. District Ct. In & For Water Dist. No. 5, 401 U.S. 527, 530 (1971).

534 United States v. Bell, 724 P.2d 631, 643 (Colo. 1986) (rejecting a federal argument that its entire reserved right should relate back to the date of its original claim, on the grounds that the amended claim did not satisfy the state's notice requirement).

535 Memorandum from Paul Johnson and Earl Stockdale, Policy Guidance on Water Rights at Army Installations in the United States (Nov. 26, 1995).

536 Memorandum from Paul Johnson and Earl Stockdale, Policy Guidance on Water Rights at Army Installations in the United States (Nov. 26, 1995) at B-1 to B-2. *See* William A. Wilcox, Jr., and Captain David Stanton, *Maintaining Federal Water Rights in the Western United States*, Army Lawyer 3, 10 (Oct. 1996). *See also* Michael Cianci, Jr., *The New National Defense Water Right—An Alternative to Federal Reserved Water Rights for Military Reservations,* 48 Air Force L. Rev. 159 (2000) (discussing Nevada's recognition of a water right for Nellis Air Force base that incorporated both seniority and some flexibility while giving the state the ability to permit the use and manage it).

The Snake River Basin Adjudication court rejected the federal government's claims for the Mountain Home Air Force base, even though no one objected to those claims.[537] The court ruled that lands acquired by condemnation (slightly over one-third of the base) could not have reserved water rights because they were not part of a federal land reservation, and that the primary purpose of the remaining lands would not be defeated without a federal reserved water right because the federal government must have intended that some of the water for the air base would come from state lands and had deferred to state law in the past. The federal government and the state of Idaho subsequently settled the case before it reached the Idaho Supreme Court.[538]

In the Gila River Adjudication, the special master upheld the reserved rights claims of Fort Huachuca, with priority dates of 1861 and 1863, but denied claims for an adjacent artillery range that was added to the reservation during the twentieth century.[539]

(b) Priority Date.

The priority date for a federal reserved water right is the date of the statute, executive order, or public land order establishing the reservation.[540] Unlike Indian reserved rights, federal rights cannot have a "time immemorial" priority date.[541]

In *Arizona v. California,* the 1963 Supreme Court appeared to adopt a "relation back" theory of priority dates. The Court awarded the Lake Mead National Recreation Area priority dates of 1929 and 1930, when executive orders withdrew lands "pending determination as to the advisability of including such lands in a national monument," even though the monument was not created and its purposes not established until 1946.[542] This "relation-back" theory has also been employed to fix an earlier priority for Indian reserved rights.[543] The priority date for wilderness areas and wild and scenic rivers would also seem to relate back to the date in which areas were designated for study, where the areas are later added to the system.[544]

Reservations that are subsequently reserved for additional purposes may have more than one priority date. For example, the Rocky Mountain National Park, which originally was a national forest, has priority dates of 1897 for watershed protection and timber production but 1915 and 1930 priority dates for park purposes because on those dates the forest lands were transferred to park status.[545]

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537 *In re* SRBA, Case No. 39576, Subcases 61-11783 *et al*. (Idaho Dist. Ct., Apr. 6, 2001).

538 *In re* SRBA, Case No. 39576 at 14–22, 26–28.

539 *In re* Gila River, Contested Case No. W1-11-605, Report of the Special Master (2008), *available at* http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/gila.asp.

540 *See, e.g.*, Cappaert v. United States, 426 U.S. 128, 138 (1976) (reserved water rights vest on the date of reservation and are superior to the rights of future appropriators).

541 *See supra* Treatise § 37.01(c)(1), at notes 103–104 and accompanying text, and Treatise § 37.02(b), at notes 191–98 and accompanying text.

542 Arizona v. California, 373 U.S. 546, 601 (1963), *decree entered*, 376 U.S. 340, 345–46 (1964).

543 *See supra* Treatise § 37.02(b), at note 186 and accompanying text.

544 *See, e.g.*, Solicitor's Opinion on "Reservations" and Public Lands Under the Federal Power Act, BLM-ER-0528 (Aug. 16, 1985) (concluding that wilderness study areas are reservations because such areas are not subject to appropriation under the public land laws).

545 United States v. City and County of Denver, 656 P.2d 1, 30 (Colo. 1982).

The Colorado Supreme Court has ruled that the primary virtue of reserved rights—their early priority dates—may be lost by failure to assert the rights in a timely fashion in state adjudications.[546] Although the government may amend its claims, the court refused to allow amendments to relate back to the original filing.[547] Thus, the federal government may effectively lose its reservation priority date by failing to assert the full extent of its claims when joined in state proceedings.[548]

(c) Quantification.

As with Indian reserved rights, the measure of federal reserved water rights is a function of their purpose. The Supreme Court has cautioned that the quantity of water reserved is "that amount necessary to fulfill the purpose of the reservation, no more."[549] The Court subsequently ruled that water is reserved only for a reservation's primary purposes.[550] Although the existence of reserved water rights is not affected by present day equities,[551] the Court has suggested that sensitivity to existing rights holders influences the quantity of water reserved.[552] As a result, the Colorado Supreme Court is convinced that the scope of reserved rights must be narrowly construed.[553]

The controversial "practicably irrigable acreage" measure of the scope of waters reserved for Indian reservations[554] does not affect federal reserved rights because there are no federal reserved rights for irrigation.[555] In the only Supreme Court case that quantified reserved rights, the Court approved over 79,000 acre-feet of water for the Havasu Lake and Imperial National Wildlife Refuges and the Lake Mead National Recreation Area.[556]

Congress has sometimes directed the Executive to file claims in appropriate quantification proceedings, in an apparent effort to overcome the judicial deference accorded to the federal government's failure to assert its reserved rights.[557] For example, in both the Arizona Desert Wilderness Act of 1990 and in the legislation that established the San Pedro Riparian National Conservation Area, Congress directed the Secretary of the Interior

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546 United States v. Bell, 724 P.2d 631 (Colo. 1986) (disallowing a sixfold increase in oil shale claims twelve years after the government filed its original claims).

547 *Bell*, 724 P.2d at 643 (government "ignored the equivalent of a filing deadline").

548 Amended claims would have a priority date as of the filing, not as of the creation of the reservation. *See* John U. Carlson & Paula C. Phillips, *Accommodating Interests in a Shared Resource Between States and the Federal Government*, in Water and the American West: Essays in Honor of Raphael J. Moses 109, 117–18 (D. Getches ed. 1988) (discussing the *Bell* case). *But see* Park Center Water Dist. v. United States, 781 P.2d 90, 97–98 (Colo. 1989) (distinguishing *Bell* under the "unique facts" of the case).

549 Cappaert v. United States, 426 U.S. 128, 141 (1976).

550 United States v. New Mexico, 438 U.S. 696, 712–15 (1978).

551 *Cappaert*, 426 U.S. at 138–39.

552 *New Mexico*, 438 U.S. at 705 (Powell, J., dissenting).

553 United States v. City and County of Denver, 656 P.2d 1, 26 (Colo. 1982). *See* Justin Huber & Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 16 U. Denv. Water L. Rev. 261 (2013) (addressing a number of "poorly reasoned and result-oriented state court decisions").

554 *See supra* Treatise §§ 37.02(c)(2), 37.02(c)(3).

555 Federal reclamation projects have no reserved water for agriculture because Congress clearly subjected water from reclamation projects to state control in § 8 of the Reclamation Act. 43 U.S.C. § 383. *See* California v. United States, 438 U.S. 645, 675 (1978), discussed *infra* Treatise § 41.04; *see also* 86 Interior Decisions 553, 611 (1979) (no reserved water rights for federal reclamation projects). Public Water Reserve 107 did reserve water, but only for domestic uses and stockwatering, not irrigation. *See supra* Treatise § 37.03(a)(7), at notes 517–522 and accompanying text.

556 Arizona v. California, 376 U.S. 340, 345–46 (1964).

557 Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990), discussed *supra* Treatise § 37.03(a)(6).

to file quantification claims.[558] Absent such a directive, it appears at this point that the failure to file is largely beyond judicial review.

In a leading state court federal reserved rights case, the Colorado Supreme Court disallowed reserved rights for recreational boating in a national monument but approved rights for recreational purposes in a national park.[559] The same decision rejected reserved rights for Multiple Use Act purposes in national forests, restricted reserved rights for public springs and water holes, and found no reserved rights for geothermal purposes on reserved hot springs.[560] The reserved rights awarded in the Colorado litigation included absolute decrees for existing diversions, conditional decrees for certain future diversions and impoundments, and unquantified conditional decrees, with timetables for quantification, for instream flows.[561] The total will, in the words of the Colorado Supreme Court, "fix the maximum extent of federal reserved rights for all time."[562]

(d) Waters Reserved.

Waters reserved for federal reservations are those necessary to accomplish the primary purpose for which the reservation was established.[563] There has been no definitive answer to whether reserved rights may be claimed for waters off reservation lands. However, the Supreme Court in the *Cappaert* case gave sanction to the extraterritorial notion of reserved water rights by enjoining off-reservation groundwater pumping.[564]

In *United States v. City and County of Denver*, the federal government argued against a Colorado water court decision restricting reserved waters to those "on, under, or touching reserved lands."[565] The Colorado Supreme Court declined to resolve the issue, however, considering it to be a hypothetical one.

Despite the water court's finding that reserved waters could include those "under" a reservation, whether reserved rights extend to groundwater remains unsettled. The Wyoming Supreme Court has ruled that Indian reserved rights do not extend to groundwater,[566] but that result appears inconsistent with a number of other decisions, including the Arizona Supreme Court[567] and a federal district court's exemption of a military reservation's

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[558] ***104 Stat. 4469***, 4473 (1990) (Arizona Desert Wilderness Act); ***102 Stat. 4571*** (1992) (San Pedro Riparian National Conservation Area). In *Silver v. Pueblo Del Sol Water Co.*, the Maricopa County (AZ) Superior Court held that the Arizona Department of Water Resources must consider the impact on the federal reserved water right of the San Pedro Riparian National Conservation area in making determinations whether there exists an adequate water supply for groundwater pumping that could affect that right. Slip op., Case No. LC2013-000264-001 DT (June 6, 2014).

[559] *See supra* Treatise § 37.03(a)(2), at notes 433–435 and accompanying text.

[560] United States v. City and County of Denver, 656 P.2d 1, 24–27, 31–34 (Colo. 1982). *See* Justin Huber & Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 16 U. Denv. Water L. Rev. 261 (2013) (addressing a number of "poorly reasoned and result-oriented state court decisions").

[561] *Denver*, 656 P.2d at 13–15. *See* John U. Carlson & Paula C. Phillips, *Accommodating Interests in a Shared Resource Between States and the Federal Government*, in Water and the American West: Essays in Honor of Raphael J. Moses 109, 117 (D. Getches ed. 1988).

[562] *Denver*, 656 P.2d at 13.

[563] United States v. New Mexico, 438 U.S. 696, 700 (1978).

[564] Cappaert v. United States, 426 U.S. 128, 147 (1976).

[565] *Denver*, 656 P.2d 1, 31–33 (Colo. 1982).

[566] *In re* General Adjudication of the Big Horn Sys., 753 P.2d 76, 99–100 (Wyo. 1988); *see supra* Treatise § 37.02(d), at note 290 and accompanying text.

[567] *In re* General Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 989 P.2d 739, 797 (Ariz 1999); *see supra* Treatise § 37.02(d), at notes 297–301.

groundwater pumping from state permit requirements.[568] The groundwater issue looms large in the context of plans to tap geothermal resources adjacent to Yellowstone National Park which could adversely affect the Mammoth Geyser Basin within the park.[569]

(e) Change in Use On-Reservation.

Few issues concerning changes in use have reached the courts. Presumably, no changes in use are permissible unless they are necessary to fulfill a primary reservation purpose. In this respect, federal reserved rights more closely resemble *Winans* fishing rights than *Winters* irrigation rights.[570]

It seems clear that, once quantified under state law, any change in use or point of diversion is subject to administration by the state.[571] The federal government has argued that states must approve such changes if they effectuate a valid reservation purpose. The Colorado Supreme Court declined to decide the issue, however, until the federal government actually filed a change-in-use application with the state engineer.[572]

(f) Transferability.

In *United States v. City and County of Denver*, the Colorado Supreme Court reversed a water court decision that denied the use of a federal reserved right by government permittees, licensees, or concessionaires.[573] The court ruled that, so long as used for reservation purposes, national park contractors may use the government's reserved rights. To rule otherwise, the court noted, would force the hiring of government employees to perform functions now efficiently supplied by others.

The state of Montana has argued that, as trustee of school lands granted to the state by the federal government, it should succeed to reserved water rights. The Montana Supreme Court avoided deciding the issue, while granting the state the water on other grounds.[574] But the New Mexico Court of Appeals concluded that the state's school lands have no reserved rights because they were not reserved for a federal purpose, but instead conveyed to the state.[575] Similarly, the court in the Gila River Adjudication rejected the state of Arizona's claim for reserved rights for its state school lands, reasoning that the lands were grants from the federal government to the state, not federal reservations.[576]

The Idaho Supreme Court rejected the city of Pocatello's argument that it acquired a federal reserved water right in the Fort Hall Indian Reservation Cession Agreement of 1888, which promised the citizens of Pocatello "free and

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568 Nevada *ex rel.* Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960). *See also supra* Treatise § 37.02(d), at note 295 and accompanying text, and Treatise § 37.03(a)(8), at note 532 and accompanying text.

569 *See* Robert B. Keiter, *The Old Faithful Protection Act: Congress, National Park Ecosystems, and Private Property Rights*, 14 Public Land L. Rev. 5 (1993); David Ness, *Protection of the Geothermal Resource of Yellowstone National Park— A Case Study*, 9 Public Land L. Rev. 145 (1988). *See generally* John D. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 14 Hastings West-Northwest J. Envtl. L. & Policy 1323 (2008).

570 *See supra* Treatise § 37.02(e) (noting limitations on changing uses of *Winans* rights).

571 United States v. City and County of Denver, 656 P.2d 1, 35 (Colo. 1982).

572 *Denver*, 656 P.2d at 35.

573 *Denver*, 656 P.2d at 34.

574 Department of State Lands v. Pettibone, 702 P.2d 948 (Mont. 1985).

575 State *ex rel.* State Engineer v. Comm'r of Public Lands, 200 P.3d 86, 95–99 (N.M. Ct. App. 2008).

576 *In re* General Adjudication of All Rights to Use Water in the Gila River System and Source, 231 Ariz. 8, 289 P.3d 936 (2012). The court found that educational land grants were in the "public interest," but that they served no "federal purpose," the lands were no longer federal, and there was no indication in the record of any congressional intent to reserve water for the lands. *See* Amy K. Kelley, Federal Report, XLV Rocky Mt. Min. L. Fdn. Water L. Newsletter no. 3, at 6 (2012).

undisturbed use in common with said Indians of the waters of any river, creek, stream, or spring flowing through the Fort Hall Reservation … ."[577] The court ruled that the language made no reference to a water right, no clear congressional intent to abrogate the tribe's water rights, and no agreement by a majority of the adult males of the tribe to cede water rights.[578]

577 25 Stat. 452 (1888).

578 City of Pocatello v. State, 180 P.3d 1048 (Idaho 2008).