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Wilderness Water Rights: The Status of Reserved Rights after the Tarr Opinion

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Wilderness Water Rights: The Status of Reserved Rights After the Tarr Opinion[1]

I. INTRODUCTION

In 1988, two major conflicting opinions affecting federal reserved water rights for wilderness areas were released. The opinions may significantly alter federal water policy for statutory wilderness lands.

On July 26, 1988, Ralph Tarr, Solicitor of the Interior Department released Opinion M-36914 (Supp. III).[2] It was followed within a few weeks by the final judgment in the federal court decision that prompted the Tarr Opinion, *Sierra Club v. Lyng*.[3] The original *Sierra Club* decision was rendered in November of 1985, and conflicts directly with the Tarr Opinion.[4] *Sierra Club* was the first case to hold that the reservation doctrine[5] applied to wilderness areas and caused great concern among western water users. The Sierra Club sued for declaratory relief, seeking a finding that certain wilderness areas in Colorado were entitled to federal reserved water rights, and asking that the court compel federal officials to assert these rights.[6] The court found that the wilderness areas in question were reservations of land, and that new water rights vested with these reservations.[7] The water rights "wild card" had been played.[8]

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1. This paper was awarded the first place in the American Bar Association Natural Resources Section 1989 Writing Competition.

2. ___ Interior Dec. _____ (July 26, 1988). [hereinafter Tarr Opinion]. On the same date, the U.S. Attorney General issued an opinion letter affirming the Tarr Opinion.

3. Sierra Club v. Lyng, No. 84-M-2, (D. Colo. Sept. 30, 1988) (Order for Entry of Final Judgment).

4. This case was originally decided by Judge John L. Kane, *sub nom* Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985) [hereinafter *Sierra Club*]. In the interim period an appeal was filed, and subsequently dismissed for lack of a final order, Sierra Club v. Lyng, No. 86-1153, slip op. at 4-5 (10th Cir. Oct. 8, 1986). On June 3, 1987, the District Court entered an order reaffirming the order that the Forest Service submit a plan for protecting wilderness water resources, rejecting a three-page plan that had been submitted in response to the prior order. Sierra Club v. Lyng 661 F. Supp 1490, 1501 (D. Colo. 1987) [hereinafter *Sierra Club II*]. On September 27, 1987, a new plan was submitted. This plan was affirmed on September 30, 1988 and Judge Richard P. Matsch entered an order making Judge Kane's decision of November 25, 1985, a final order.

5. For an explanation of the reservation doctrine, *see infra* notes 24-35 and accompanying text.

6. 622 F. Supp. at 845-46.

7. *See infra* notes 81-86 and accompanying text.

8. F. TRELEASE, FEDERAL-STATE RELATIONS IN WATER LAW 160 (1971). Dean Trelease foresaw a Sierra Club-type action and described wilderness reserved water rights as a "wild card

This comment considers the history of the reservation doctrine and the judicial standards developed for its application. It analyzes the reasoning of *Sierra Club,* its potential impact, and the opinion's flaws. The comment explores the logic of the Tarr Opinion and suggests it as a foundation for appellate review of *Sierra Club.* Further, this comment considers the reservation doctrine as applied to wilderness areas. Finally, a legislative solution is proposed that would resolve further controversy concerning federal reserved rights for all prospective wilderness areas.

A. Western Water Allocation

All western states employ some form of the appropriation system for perfection of water rights. The principal rule is "first in time, first in right."[9] The water right is severed from the land and independently administered. Generally, a diversion from the water flow is required, although some statutes recognize instream flow rights. The water appropriated must be put to beneficial use. Traditionally, legally recognized beneficial uses included farming, mining, domestic, or stockwatering. Many states have adopted laws reflecting an expanded view of beneficial uses.[10]

Federal reserved rights may interfere with a well-ordered state water allocation system because they are not perfected and quantified under the state system. When a withdrawal and reservation of public land is made, there is an implied water right sufficient to accomplish the primary purposes of the reservation.[11] This dormant reserved water right imposes uncertainty upon economic development as the state plans for its future water needs. Because the federal right is guaranteed as a reserved right, the federal government need not participate in state court adjudications of water flows. Effective adjudication is impossible when all interested parties are not compelled to join the proceeding.[12]

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that can be played at any time," and a "blank check" waiting to be written. Trelease used other colorful language in his writing, also terming the wilderness reserved right as a Damoclean sword. However, in later years, he began a quiet retreat, abandoning the view that the reserved rights threaten water rights stability. *See, e.g.,* Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 DEN. L. J. 473, 492 (1977).

9. 1 W. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES, 14, 366 (1971).

10. *See, e.g.,* UTAH CODE ANN. § 73-3-29 (Supp. 1988) (public recreational use, preservation of aquatic wildlife, conservation of water); CAL. WATER CODE § 1243 (West 1988) (recreation, preservation and enhancement of fish and wildlife).

11. *See* Winters v. United States, 207 U.S. 564 (1908) and notes 53 through 62 and accompanying text, *infra.*

12. An adjudication is a declaratory class action brought under state law in which all claimants of water rights present their claims. A book is generally published with the judgment which quantifies and qualifies each claimant's right in the subject water source.

Many view *Sierra Club* as an unwarranted federal incursion because it further expands the reservation doctrine. In direct conflict with the holding in *Sierra Club,* the Tarr Opinion concludes that wilderness designation under the Wilderness Act does not reserve lands.[13]

B. The Beaver Dam Mountains Wilderness: The Next Battleground?

The Beaver Dam Mountains Wilderness area, located on the Arizona strip of Utah and Arizona, is one of very few designated wilderness areas currently undergoing water rights resolution.[14] This area is part of a larger wilderness area known as the Paiute-Beaver Dam Mountain Wilderness Area, adjacent to the Virgin River Gorge.[15] The water rights adjudication involving the Beaver Dam Wilderness Area has been underway in the Utah District Court in St. George for the past seven years.[16] The Tarr Opinion has effectively stopped all action in the general determination, as the Justice Department considers its next move. The Justice Department finds itself directed by the Solicitor of the Interior Department not to assert reserved water rights, while ordered by *Sierra Club* to advance reserved right claims.[17]

The Beaver Dam adjudication is the first water adjudication where the Justice Department must claim some rights, and yet is obligated to refrain from asserting reserved rights under the Tarr Opinion. Several extensions for the claims deadline have been granted to the United States.[18] All rights of the parties are in limbo. The claims record has been printed and prepared for distribution, but it has been ordered withheld from distribution by the Utah Attorney General, pending action by the Justice Department.[19] As of this writing, no claim has been filed by the United States for water rights within the

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13. Tarr Opinion at 2-3.

14. In the Matter of General Determination of Rights to the Use of Water, Both Surface and Underground, Within the Drainage Area of the Virgin River, No. 7596-Civ (5th Dist. Ct., Wash. Co., Utah 1988) [hereinafter *General Determination*].

15. The area was designated as a wilderness area by the Arizona Wilderness Act of 1984, Pub. L. No. 98-406, 98 Stat. 1493 (1984), codified at 16 U.S.C. § 1132 (Supp. II 1984). The Beaver Dam Mountains are drained by the Virgin River, located in the southwest corner of the state. The Virgin River, along with the Santa Clara River and La Verkin Creek, drains the Pine Valley mountains and Zion National Park.

16. *See supra* note 14, *General Determination.*

17. While the district court in Sierra Club recognized a federal reserved water right under the Wilderness Act, the court also found that it was powerless to *compel* the federal defendants to pursue these claims. *See* Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985).

18. *See supra* note 14, *General Determination,* Motion for Enlargement of Time Within Which to File Water Rights Claims for the Beaver Dam Mountains Wilderness Area (Div. No. 3.), filed Sept. 9, 1988.

19. Telephone interview with Gerald Stoker, Superintendent, Southern Utah Office, Utah Div. of Water Rights (Cedar City, Utah), Oct. 3, 1988.

wilderness area.[20] The Secretary of the Interior has suggested that the Justice Department file an application for future water rights under Utah state law.[21]

II. History of Reserved Rights

A. *The* Winters *Decision*

The genesis of federal reservation of water doctrine is *United States v. Winters,*[22] a case involving an Indian reservation.[23] The reserved rights doctrine is a policy determination that lands set aside as reservations should have the water needed to fulfill the purpose of the reservation. Because many of the lands reserved by the government predate various water appropriations, a conflict of priority arises when the government exercises the doctrine.[24]

In *Winters,* the Indians had ceded large tracts of land to the federal government, which then opened the land to homesteading. The homesteaders perfected water rights by appropriations from the Milk River under Montana law. After some years, the reservation Indians began an agricultural project and diverted large amounts of water for irrigation. The homesteaders, believing that their rights were superior, made new diversions to obtain their water. The new diversions were upstream from the Indian project, severely decreasing their water supply. The Supreme Court granted a senior right to the Indians. The Court observed the "first in time, first in right" rule, allowing the Indians to relate the priority of their right back to the time of the reservation of the land, which was prior to any homesteader claim.

B. Winters *Expanded: Water Rights for All Reservations*

For many years, everyone assumed that the *Winters* doctrine applied only to Indian reservations.[25] This view was strongly reinforced

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20. Water rights have been claimed for the federal government under state law procedure for other Bureau of Land Management lands. *See supra* note 14, *General Determination.*

21. Letter from Donald P. Hodel, Secretary of the Interior, to Edwin Meese III, Attorney General (July 26, 1988). A copy is on file at the office of the Journal of Public Law.

22. 207 U.S. 564 (1908).

23. The reservation doctrine first appeared in dicta in United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899). The Court stated that the individual states may not destroy, through legislation, the riparian rights of the United States, at least so far as may be necessary for the beneficial uses of the governmental property. The reservation doctrine is commonly referred to as the *Winters* doctrine.

24. *See generally* Comment, *Federal Reserved Water Rights in National Forest Wilderness Areas,* XXI Land & Water L. Rev. 380, 386 (1987).

25. *See, e.g.,* Trelease, *Federal Reserved Water Rights Since the PLLRC,* 54 Den. U.L. Rev. 473, 475 (1977).

in *California Oregon Power Co. v. Beaver Portland Cement Co.*[26] However, in *Federal Power Commission v. Oregon,*[27] (the *Pelton Dam* decision), the Supreme Court held that a designation of land for particular purposes severed the water on that land from appropriation under state control.[28] The Court limited its holding to reservations for a particular purpose, thus not applying the holding to all public lands in general. This distinction was short-lived; eight years later the *Winters* doctrine was extended to fish and game refuges, national forests and recreation areas.[29]

In recent years, the Supreme Court has emphasized the narrow nature of the reserved rights doctrine. In 1976, the Court held in *Cappaert v. United States*[30] that reserved rights extend only to the minimum amount of the unappropriated water that is necessary to accomplish the purpose of the reservation. The Court stated:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators . . . [O]nly that amount of water necessary to fulfill the purpose of the reservation, no more, [shall be reserved].[31]

Cappaert extended the *Winters* doctrine specifically to ground water, giving protection to the water level of a pool in Devil's Hole Cavern, part of the Death Valley National Monument.[32]

Following *Cappaert,* in *United States v. New Mexico,*[33] the Supreme Court examined the reserved rights for instream flows, recreation, and stockwatering in national forests.[34] The Court held that the

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26. 295 U.S. 142, 159 (1935). The Supreme Court held that the Desert Land Act of 1877, 43 U.S.C. §§ 321-29 (1982), applied the appropriation doctrine to all non-navigable water sources in the public domain. This was viewed as a confirmation of the federal policy of recognizing only appropriative claims perfected under state law.

27. 349 U.S. 435 (1955).

28. *Id.* at 444.

29. Arizona v. California, 373 U.S. 546, 601 (1963).

30. 426 U.S. 128 (1976).

31. *Id.* at 138, 141.

32. *Id.* at 139-40.

33. 438 U.S. 696 (1978).

34. The government argued that the extent of the purposes of the federal reservation, whatever they may be, should govern the extent of the reserved water rights. The government also claimed that subsidiary purposes, such as minimum stream flow for fire and erosion protection, which support the primary purposes (improving and protecting the forests) should also be subjects of reserved rights. Brief for the United States at 22, United States v. New Mexico, 438 U.S. 696 (1978).

intent of Congress in passing the legislation authorizing a reservation would be controlling. Justice Rehnquist's majority opinion reiterated the general rule of deference to state law.[35] The presumption in favor of state water policy would be overcome only after meticulous study of "both the asserted water right and the purposes for which the land was reserved".[36]

III. WILDERNESS WATER: A RESERVED RIGHT?

A. *The History of Wilderness Lands*

In 1891, Congress authorized the President to establish national forests.[37] The primary purposes of the national forest reserves were to "improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States."[38] The Supreme Court has interpreted this provision to establish two primary purposes for national forests: conservation of water flows and protection of timber.[39]

Congress did not mandate any particular means of forest management. The concept of wilderness areas first appeared in 1928, when the Secretary of Agriculture authorized the Forest Service to designate certain areas of forests where no construction or occupancy would be permitted, except as specifically authorized by the Secretary or the Chief of the Forest Service.[40] No real direction was provided to the Forest Service in designating and administering newly-created wilderness areas. Water rights were not even mentioned in the enabling regulations. The regulations merely instructed that primitive conditions of the environment be maintained within the zone designated as a "primitive area."[41] Being administrative orders, the wilderness designations under

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35. United States v. New Mexico, 438 U.S. 696, 715 (1978).

36. *Id.* at 700.

37. Act of March 3, 1891, ch. 561, 26 Stat. 1103 (subsequently repealed).

38. Organic Administration Act, ch. 2, 30 Stat. 35 (1897).

39. United States v. New Mexico, 438 U.S. 696, 707 (1978).

40. Regulation L-20 of the Department of Agriculture, *quoted in* H.R. REP. No. 2521, 87th Cong., 2d Sess. 11 (1962). This House Report contains a succinct history of the development of the wilderness concept in the 20th century.

41. For an excellent history of early Forest Service action on wilderness concerns, as well as a background for the introduction of the numerous wilderness bills which preceded the Wilderness Act of 1962, *see* J. HENDEE, WILDERNESS MANAGEMENT (1978). Regulation L-20 survived only ten years, when it was replaced by Regulations U-1 and U-2. These regulations provided for the establishment of "wild" and "wilderness" areas. Logging and road construction were prohibited, and the areas were distinguished on the basis of size. Regulations U-1 and U-2 of the Department of Agriculture, *quoted in* H.R. REP. 2521, 87th Cong., 2d Sess. 11 (1962). It was these regulations that were employed in establishing wilderness areas until the passage of the Wilderness Act

these regulations were subject to reversal or modification by subsequent administrations. Seeking permanent protection, congressional efforts were directed toward enacting wilderness legislation, culminating in the introduction of over sixty bills during the 1950s.[42]

The Wilderness Act of 1964[43] stated that its purposes were recreational, scenic, scientific, educational, conservation and historical. The Act contains restrictions on the building of permanent roads, use of motor vehicles, and construction of permanent structures. Water projects are allowed upon authorization of the President, but only after study and a determination that approval of such projects would better serve the interests of the United States than would the denial.[44]

B. Wilderness Lands: A Withdrawal and Reservation?

A finding that a designation of land for a specific purpose constitutes a withdrawal from disposal and reservation for the specific purpose is the threshold issue for application of the reservation doctrine.[45] Public domain lands are available for sale if they have not been "withdrawn."[46] However, a withdrawal from disposal availability may not accomplish a reservation. A reservation must be expressed in legislative or executive action which establishes the purpose for which the land is to be dedicated.[47] Some examples include national parks, monuments and forests.[48]

A review of the literature criticizing implied reserved rights under the Wilderness Act of 1964 shows that no commentator or scholar has contended that the Act did not withdraw and establish a reservation of lands.[49] Nonetheless, recognizing reservation as the threshold issue, Judge Kane took great pains in *Sierra Club* to establish that the Act

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in 1964. Pub. L. 88-577, 78 Stat. 890 (1964), codified at 16 U.S.C. §§ 1131-36 (1982). These regulations were also silent on the nature of water rights for the designated wilderness areas. The presumption seems to have been that the water rights appurtenant to the national forest lands, from which the wilderness area was created, would remain in force, simply preserving the status quo.

42. J. HENDEE, *supra* note 41 at 64.

43. 16 U.S.C. § 1133(b) (1982).

44. *Id.* at § (d)(4).

45. *See, e.g.,* Arizona v. California, 373 U.S. 546, 597-60 (1963); Cappaert v. United States, 426 U.S. 128, 138 (1976).

46. Federal Power Commission v. Oregon, 349 U.S. 435, 444 (1955).

47. United States v. City & County of Denver, 656 P.2d 1, 5 (Colo. 1982) ("Reserved lands are those . . . withdrawn from the public domain by statute, executive order, or treaty, and are dedicated to a specific federal purpose").

48. *Id.*

49. *See, e.g.,* Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 DEN. L. J. 473 (1977); Robinson, *Wilderness: The Last Frontier,* 59 MINN. L. REV. 1 (1975).

accomplished a valid reservation of land for a public purpose.[50] The language of the Wilderness Act of 1964 emphatically lists the public purposes for which the lands are to be used.[51] The terms of the Act lead to the logical conclusion that Congress intended a reservation.[52] Further, *Sierra Club* cites numerous excerpts from legislative debates where the term "reservation" is employed.[53] The finding of a reservation is well supported, while there is no authority for a contrary finding.

C. *The Purposes Test of* United States v. New Mexico

An express reservation for a public purpose is a prerequisite for a reserved water right.[54] *United States v. New Mexico*[55] established a test centered on congressional purposes for establishing the subject reservation.[56] Absent language of an express reservation of water rights, the examining court must find a primary purpose requiring a water right.

The Supreme Court construed the Organic Act of 1897 to institute two primary purposes for national forest lands. These purposes are to promote growth of a steady supply of timber and to conserve water flows.[57] The Court determined that the MUSYA[58] established only secondary purposes.[59] Writing for the majority, Justice Rehnquist stated: "where water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other

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50. 622 F. Supp. 842, 854-55 (D. Colo. 1985). His was the first court to consider the issue.

51. 16 U.S.C. § 1133(b) (1982).

52. 622 F. Supp. at 856 ([W]ilderness areas shall be devoted to the *public purposes* of recreation, scenic, scientific, educational, conservation and historic use (emphasis added)).

53. *Id.* at 856-57, (citing 110 CONG. REC. 5885, 17,443, 17,448, 17,437, 17,435 (all quoting various Congressmen calling for a reservation of lands for wilderness uses)).

54. 622 F. Supp. at 855.

55. 438 U.S. 696 (1978).

56. *Id.* at 707-08. The *New Mexico* decision involved a dispute over water rights for the Gila National Forest in New Mexico. The controversy began with a state court water rights adjudication for the waters of the Rio Mimbres River. The federal government asserted reserved rights for recreational uses, stockwatering, and wildlife preservation. These claims were based on the original Forest Service enabling act, The Organic Act of 1897, 16 U.S.C. § 473, and the Multiple-Use Sustained Yield Act of 1960 [hereinafter MUSYA], 16 U.S.C. § 528 (1982). The government argued that these two acts provided express evidence of congressional intent to reserve water for these purposes. On appeal from the Supreme Court of New Mexico, the Supreme Court affirmed a decision denying reserved water rights for secondary purposes. 438 U.S. at 714. The Court found that wildlife propagation, recreation, aesthetics and stockwatering were all secondary purposes.

57. 438 U.S. at 707.

58. *See supra* note 56.

59. 438 U.S. at 714.

public or private appropriator."[60] Thus congressional intent to reserve water rights will not be implied when the purposes are secondary in nature.[61]

The *New Mexico* Court considered a claim for instream flow preservation.[62] Similar concerns arise in the wilderness context. Should one conclude that Congress intended to reserve a wilderness water right, the question of quantification arises. Following the purposes test of *New Mexico,* one must consider the primary purpose of the wilderness reservation. The purposes of the Wilderness Act of 1964 are directed at preserving the wilderness character of the land

> [W]here the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain . . . retaining its primeval character and influence, without permanent improvements or human habitation . . . protected and managed so as to preserve its natural conditions . . . with the imprint of man's work substantially unnoticeable.[63]

Terms such as those listed in the Wilderness Act would lead a court to conclude that "untrammeled by man" means just that. This would in turn prevent any alteration of the full natural stream flow, whether that alteration be the storage of flood waters or appropriation of water for a beneficial use. The terms of the Act make no provisions for a lesser quantity, notwithstanding the likelihood that the wilderness flora and wildlife might well be maintained with a reduced instream flow. Indeed, while not likely, strict application of the purposes test would prevent even temporary diversion of water for forest fire suppression.

D. From The Wilderness Fuller Purpose: Impairment of Existing Rights

Assuming both that a reserved wilderness water right exists, and that the purposes of the Wilderness Act are literally interpreted, many perfected water rights are at risk of reduction, or perhaps elimination. While most wilderness areas are located in high country, generally the home of stream headwaters, some wilderness areas are subject to inholdings.[64] Future expansion of the national wilderness system is likely

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60. *Id.* at 702.

61. *Id.* at 715.

62. *Id.* at 713-15.

63. 16 U.S.C. § 1131(c) (1982).

64. *See, e.g.,* Forest Service Report on Protecting Wilderness Water Resources, filed with the U. S. District Court for Colorado in Sierra Club v. Lyng, 84-K-2 (D. Colo. Sept. 22, 1987). Twenty of the twenty-four wilderness areas within Colorado contain inholdings (privately-owned

to include roadless areas located downstream from senior appropriators.[65] The Beaver Dam Mountain Wilderness Area is one such area. In these cases, the wilderness reserved right may have a degree of control over the upstream appropriators, even those senior in right.

Hydro-electric projects and reservoirs are found on nearly every stream of appreciable size in the West. A reserved right to the full natural flow of a stream holds the potential of impairing upstream water development projects. As water demand increases, planners will undoubtedly look to the high mountain canyons. These narrow, deep canyons often are suitable for low-cost dam construction, resulting in lower cost water storage.[66] Moreover, these lands are usually still in the public domain, reducing the cost of purchase or easement for the developing agency. If the wilderness is located near or at the headwaters, development is blocked by virtue of the Wilderness Act.[67] On the other hand, if the wilderness area is downstream the right to a full natural flow may heavily restrict the ability to manage flows, and render ineffectual any development plans.

A wilderness area may even carry a priority date earlier than 1964, the year of passage of the Wilderness Act. Many wilderness areas were created from land previously administratively designated as "primitive."[68] For example, Aldo Leopold, while a district forester, classified areas within the Gila National Forest as "wilderness."[69] Those areas are now designated as wilderness under the Wilderness Act.[70] A court may view a contemporary wilderness designation as congressional ratification of the administrative classification. The result might well be that the court would then grant a priority date related back to the first administrative classification of the land as wilderness

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tracts within the borders of a wilderness area). Brief in Support of Sierra Club's Motion for Summary Judgment at 20 n.12, Sierra Club v. Block, No. 84-K-2, filed June 10, 1985.

65. Congress has charged the Bureau of Land Management [BLM] to conduct the Roadless Area Review and Evaluation [RARE] studies to identify areas under that agency's control which might be candidates for wilderness designation. This order came under the Federal Land Policy and Management Act [FLPMA], and carries a target date of 1991. 43 U.S.C. § 1782 (1982). The BLM was created in 1946, much later than the National Park Service and Forest Service. 43 U.S.C. § 1731 (1982). Being a relatively young agency, the BLM administers the lands not already assigned to other federal agencies, such as the Park Service or Forest Service. Many of these lands are located away from the high forest areas, and certainly will have upstream prior appropriations.

66. *See* Abrams, *Water In The Western Wilderness: The Duty To Assert Reserved Water Rights,* 1986 U. ILL. L. REV. 387, 390.

67. 16 U.S.C. § 1133(d)(4) (1982). The Act requires Presidential approval for water development projects located within wilderness areas. To date, it appears that this approval has never been granted.

68. *See supra,* note 41 and accompanying text.

69. Robinson, *Wilderness: The Last Frontier,* 59 MINN. L. REV. 1, 6-7 (1975).

70. 16 U.S.C. § 1132 (1982).

or primitive. In *Arizona v. California* the Court determined that a reserved right may be implied from administrative action.[71] The end result is that during times of drought, a junior appropriator may be left without any water.

Aside from an early priority date, the imposition of a wilderness reserved right onto a well-ordered appropriation system would wreak havoc. Western water rights are relatively settled. To introduce a blank check "not on record, [and] not fixed in size . . ."[72] into water rights already determined under state law requires a reallocation of all previously adjudicated rights.

A common feature of a prior appropriation system is the "no-harm" rule.[73] A senior appropriator may not change his point of diversion, or transfer his water right, if other appropriators will be harmed. Should an upstream water development project alter the flow through the wilderness area, by moving the point of diversion from downstream to upstream, the wilderness right would hold a veto power over the water development project.[74] This is true even if the party changing the point of diversion holds a senior right, and even if less than a full natural instream flow is needed for the propagation of fish, animal and plant life.

In its report to the district court in *Sierra Club,* the Forest Service raised the next factor related to a reserved water right. It questioned whether the cost of quantification would be proportionate to any threat to the wilderness area water supply.[75] The agency administering the wilderness area would have the burden of establishing quantification of the water right in any state water proceeding. The Forest Service report points to the hard costs of hydrological study, as well as the time required for such studies and then their agency's evaluation.[76]

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71. 373 U.S. 546, 598-601 (1963). *See also* Cappaert v. United States, 426 U.S. 128, 139-40 (1976).

72. Trelease, *Federal Reserved Water Rights Since the PLLRC,* 54 DEN. L.J. 473, 474 (1977).

73. *See, e.g.,* UTAH CODE ANN. § 73-3-3 (Supp. 1988); W. HUTCHINS, *supra* note 9 at 625.

74. These consequences would not necessarily, and likely not at all, be the result if no wilderness reserved right exists. If, as in the majority of cases, the wilderness area had been carved from forest reservation, all that would be required is a quantity of water sufficient to fulfill the primary purposes of the forest reservation. The no-harm rule would then be satisfied, barring other complications.

75. Report on Methods for Protecting Wilderness Water Resources on Lands in Colorado, Sierra Club v. Block, No. 84-K-D, filed Sept. 22, 1987.

76. *Id.* at 4.

IV. *Sierra Club v. Block*: The Torturous Journey to a Reserved Right

A. *Summary of the Case*

Sierra Club has been the center of much controversy. The district court divided the issues into three main questions. First, whether the Wilderness Act of 1964 effectively withdrew lands from the public domain and created a federal land reservation. All of the twenty-four Colorado wilderness areas at issue had been part of the national forest system, and thus had been validly reserved for forest purposes. Therefore, the court had to decide whether the Wilderness Act of 1964 effected a second act of reservation for these lands. Second, assuming that the court found a reservation for wilderness purposes, did Congress intend to reserve the unappropriated water. The court had to determine the purpose of the second reservation to shape the extent of the reserved right, in accordance with *United States v. New Mexico.* The third issue, not discussed here, was whether the federal administrative agencies had an affirmative duty to assert reserved water rights in state water courts.[77]

The court held that there was a second reservation of land under the Wilderness Act of 1964, and accordingly there was a reserved water right for the purposes of the Act. The court listed these purposes as conservation, recreation and aesthetic preservation.[78] The plaintiffs achieved summary judgment on the first two issues.[79] However, since the Wilderness Act did not contain a Congressional directive to the Forest Service, Park Service, or any other agency, the court found no duty to pursue the water rights in the state courts. This issue was critical to the opinion. The court found a duty to protect the water rights, although it recognized that the state court might not be the only forum or method through which the rights might be protected.[80] The court offered no alternative courses of action.

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77. Sierra Club v. Block, 622 F. Supp. 842, 846 (D. Colo. 1985). For an excellent and comprehensive discussion of the duty to claim federal reserved water rights, *see* Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights,* 1986 U. Ill. L. Rev. 387, 389 (1986); Marks, *The Duty of Agencies to Assert Reserved Rights in Wilderness Areas,* 14 Ecology L.Q. 639 (1987).

78. 622 F. Supp. at 851.

79. *Id.* at 866.

80. *Id.* at 864-65.

B. Reservations Accepted—The District Court's Logic

A critical question facing Judge Kane was whether a second reservation had been effected under the Wilderness Act.[81] A second reservation would potentially give rise to new water rights; rights implied in accordance with the *New Mexico* purposes test. The court concluded that the Wilderess Act developed a new class of lands. The Act prohibits any form of mineral rights, any commercial undertaking, or the construction of permanent roads. No grazing is allowed, unless grazing rights were granted prior to wilderness designation.[82] The court found that this language pointed to an intent to withdraw the lands from the public domain.[83] Other language, drawn from the Act and the legislative history convinced the court that Congress intended a reservation.[84]

The defendants argued that the Wilderness Act was a land management scheme, similar to the Multiple-Use Sustained Yield Act (MUSYA), Federal Land Policy Management Act (FLPMA), Taylor Grazing Act, and the Wild Free-Roaming Horses and Burros Act.[85] The court, however, distinguished these various land management acts stating that none of them withdrew and reserved lands, as had the Wilderness Act.[86] In effect, since the court had construed a reservation, it could distinguish these other acts solely by virtue of it's construction of the Wilderness Act.

Having concluded that a reservation was made, the court turned its attention to the intent of Congress to reserve water rights. Here the critical nature of the reservation construction is evident. If the Wilderness Act did not create a new reservation, the water rights would have been dependent on the primary purposes of the earlier withdrawal and reservation as national forests, in accordance with the purposes test of *United States v. New Mexico.*[87] The district court eased around the

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81. Lands that are owned by the federal government, and were obtained from another sovereign body politic, are known as lands in the public domain. These lands become "reserved" when withdrawn by executive order or statute for a particular purpose. The act of withdrawal is a necessary prerequisite to reservation. Withdrawal removes the land from homesteading, mining and availability for sale. The wilderness areas in question in this case had been withdrawn and reserved as national forest lands.

82. 16 U.S.C. § 1133(d)(4) (1982).

83. 622 F. Supp. at 855.

84. *Id.* at 856-57.

85. *Id.* at 858 (citations omitted).

86. *Id.*.

87. 438 U.S. 696, 707-08 (1978). In this case the Supreme Court considered whether reserved water rights were created for instream flows, recreation and stockwatering in national forests under the Multiple-Use Sustained-Yield Act [MUSYA] of 1960, 16 U.S.C. § 528 (1982). The government brief argued that the United States was entitled to a reserved water right for whatever purpose there may be in the land. Brief for the United States at 20, United States v. New Mexico. *See supra* text accompanying notes 54-63.

New Mexico decision by distinguishing the Wilderness Act from the MUSYA, noting that the MUSYA did not withdraw and reserve lands. Additionally, the court said that the MUSYA added to the primary purposes of national forests, while the Wilderness Act did not.[88] In *New Mexico,* the Supreme Court said that the MUSYA might well conflict with the primary purposes of national forests, to protect the watershed and insure a supply of timber.[89] The district court found that, unlike the MUSYA, the purposes of the Wilderness Act were harmonious with the primary purposes of national forests.[90] Because of these factors the district court felt that *Sierra Club* was distinguishable from the *New Mexico* doctrine of prohibiting reserved rights for supplemental purposes.

The question remains whether the wilderness reservation supercedes the forest reservation, or must be consistent with it. One might accept that the Wilderness Act does not conflict with the policy of preserving the waterflows. It is easy to conclude that wilderness status protection of an area will lead to improved water quality for downstream users. The court cited a Congressional finding to this effect.[91]

It is difficult, if not impossible, to reconcile the other primary purpose of national forests, a supply of timber, with the stated purposes of the Wilderness Act. The district court attempted to perform this task in a footnote.[92] Judge Kane stated that clearly Congress was not referring to the purpose of providing a steady supply of timber, when it stated that nothing in the Wilderness Act shall be deemed to interfere with the primary purposes of national forests. He reaches this seemingly irreconcilable conclusion by noting a Senate report which states that the particular wilderness lands in question had long been withdrawn from timber leasing.[93] The court apparently recognizes its failure since several pages of the opinion deal with reconciling the purpose of maintaining water flows with the Wilderness Act, while the timber purpose was disposed of in the fine print. This leads to the conclusion that the court was unable to successfully confront this issue.

Most importantly, by determining that the purposes of the Wilderness Act were consistent with the purposes of the Organic Act the court left unanswered whether dedication to wilderness purposes through the Wilderness Act of 1964 must be compatible with the purposes of the original forest reservation. The court reasoned that since

88. *Sierra Club,* 622 F. Supp. at 860.
89. 438 U.S. at 714-15.
90. 622 F. Supp. at 859.
91. *Id.,* (citing S. REP. No. 109, 88th Cong. 1st Sess. at 15 (1963)).
92. 622 F. Supp. at 860 n.13.
93. *Id.,* (citing S. REP. No. 109, 88th Cong. 1st Sess. at 4 (1963)).

the purposes of the Wilderness Act did not conflict with the Organic Act, they could not be secondary.[94] The Supreme Court in *New Mexico* held that the purposes of the MUSYA were secondary because they were not consistent with the Organic Act.[95] It does not follow, however, that all inconsistent purposes will be secondary in nature.

C. Sierra Club *Presented No Justiciable Issue*

While this comment skirts the procedural issue of the duty to assert reserved water rights,[96] another procedural issue cannot be so lightly dismissed. There must be a case or controversy before a court can entertain litigation.[97] If at some point during the litigation, the case is mooted by resolution of the case or controversy, it must be dismissed without further proceedings.[98] *Sierra Club* is a case where no real case or controversy, in the strict legal sense, was presented to the court.

Those desiring to invoke the power of the federal courts must allege some tangible threatened or actual injury.[99] However, the case was not brought as an action for declaratory judgment, and no allegations were made in the complaint of any potential harm to forest lands or wilderness lands. Since no allegations of injury were made which might be attributable to the primary defendants in the case, there was no controversy to be decided.[100]

The court must hold some power to cure the alleged injury in order to establish a case or controversy as envisioned in Article III of the United States Constitution.[101] *Sierra Club* recognized that it had no power to compel the federal defendants to take any action to claim reserved water rights.[102] The court also held that failure to assert these rights was not an arbitrary or capricious abuse of administrative power,[103] and thereby reviewable under the Administrative Procedures Act.[104] In *City of Los Angeles v. Lyons,* Justice Marshall wrote that adjudication of rights which a court is powerless to enforce is tanta-

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94. 622 F. Supp. at 859.

95. 438 U.S. 696, 702 (1978).

96. *See supra* note 77.

97. Allen v. Wright, 468 U.S. 737, 750 (1984).

98. Preiser v. Newkirk, 422 U.S. 395, 401-02 (1975).

99. *See, e.g.,* O'Shea v. Littleton, 414 U.S. 488, 493-94 (1974)(citations omitted).

100. Presumably the Sierra Club wished to establish the existence of federal reserved water rights for wilderness areas so that the rights might be sought in other adjudications involving wilderness areas.

101. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 242 (1937) *reh'g. denied* 300 U.S. 687.

102. 622 F. Supp. at 864.

103. *Id.*

104. 5 U.S.C. §§ 701-02 (1982). This act allows judicial review of agency actions.

mount to an advisory opinion.[105] *Sierra Club* unequivocally amounts to nothing more than an advisory opinion, since the court fully acknowledged that it was impotent to fashion any relief. For that reason, the case should have never been considered.

V. The Interior Solicitor's Response to *Sierra Club*

A. *The Krulitz Opinion*

Under the Carter Administration, the Solicitor of the Interior Department considered the reservation doctrine and wilderness areas in a formal opinion.[106] This opinion received criticism from several quarters.[107] The analysis supporting the conclusion that the reservation doctrine may be applied to the Wilderness Act consumed a scant three paragraphs.[108]

While Judge Kane did not cite the Krulitz Opinion in *Sierra Club,* he did cite it in a subsequent supplemental decision.[109] It is the only other authority supporting the view in the *Sierra Club* decision. It does not contain any history of the reservation rights, other than desultory references to major cases. It is not surprising, then, that it has been superceded and overturned by the present solicitor.

B. *The Tarr Opinion*

Sierra Club gives the legislative history great weight in determining congressional intent. It is apparent to a reader of the Tarr Opinion[110] that the district court's study of the legislative history of the Wilderness Act was sketchy, at best. The Tarr Opinion tracks the development of the reservation doctrine and federal water rights in general. Particular detail is found in the discussion of the Wilderness Act's legislative history and related acts. Some have suggested that the opin-

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105. 461 U.S. 95, 129 n.20 (1983)(Marshall, J., dissenting).

106. 86 I.D. 553, 609 (1979)[Krulitz Opinion].

107. *See, e.g.,* Waring & Samelson, *Non-Indian Federal Reserved Water Rights,* 58 Den. L.J. 783, 792 (1981); Tarlock, *Protection of Water Flows for National Parks,* 22 Land & Water L. Rev. 29, 44 (1987).

108. The Krulitz Opinion was subsequently modified on January 16, 1981, 88 I.D. 253 (1981)[Martz Opinion] (former Solicitor Martz later became lead counsel for the defendants in *Sierra Club*), September 11, 1981, 88 I.D. 1055 (1981)[Coldiron Opinion I], and February 16, 1983, 90 I.D. 81 (1983)[Coldiron Opinion II]. The Martz Opinion concluded that neither the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-82 (1982), nor the Taylor Grazing Act, 43 U.S.C. §§ 315, 315o-1 (1982), authorized water appropriation except under normal state law procedures. The Coldiron Opinions arrived at substantially the same conclusion, applied to non-reserved rights. None of the subsequent modifications significantly deal with federal reserved rights in the wilderness context.

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

110. *See supra* note 2 and accompanying text.

ion was crafted around a particular political philosophy, reflecting the views of the Reagan Administration.[111] The text of the opinion, however, does not impart the impression of a document drafted with a conclusion penned in advance of the research.

1. Did Congress intend to create a federal reserved water right in the Wilderness Act?

A major portion of the Tarr Opinion discusses § 4(d)(7) of the Wilderness Act, which provides: "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."[112] This section was not mentioned in the *Sierra Club* decision. However, the government relied on this section in a motion to reconsider summary judgment. In *Sierra Club v. Lyng (Sierra Club II)*,[113] the court considered the language of this section and concluded that it did not act to preclude a reserved water right.[114] Despite the government's urging, and the previously demonstrated willingness to rely on selected legislative comments, the court failed to consider the vast and circuitous legislative history behind this short and seemingly innocuous section.

Interestingly, in the entire Wilderness Act, water is mentioned only twice. First, Congress gives the President the discretion to implement water projects when truly needed.[115] The other reference is in § 4(d)(7). Subsequent acts designating particular wilderness areas generally refer back to § 4(d)(7).[116] In the absence of a specific reservation of water rights in the legislation designating the wilderness area, and in light of the reference back to § 4(d)(7), the language of § 4(d)(7) should be seen as controlling. Therefore, undertaking a meticulous and painstaking search for the legislative intent is vital in this section, an element wholly absent from the reasoning of *Sierra Club.*

While an advocate of the death of legalese might look at § 4(d)(7) and be repulsed, there appears also to be a plain English meaning of this section. Congress neither created nor disclaimed any federal water rights for wilderness areas, purposefully adopting ambiguous language in § 4(d)(7). Study of the early history of the Wilderness Act bears out this conclusion.

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111. *See, e.g.*, Leshy, *Water and Wilderness/Law and Politics*, 23 LAND & WATER L. REV. 389, 398 (1988).

112. 16 U.S.C. § 1133(d)(6) (1982).

113. *Id.* 1490 (D. Colo. 1987).

114. 661 F. Supp. at 1502.

115. 16 U.S.C. § 1133(d)(4) (1982).

116. *See, e.g.*, Arizona Wilderness Act of 1984, 98 Stat. 1485 § 101(b), (e); California Wilderness Act of 1984, 98 Stat. 1619 § 101(a).

As the bill was introduced, the congressional delegations from the western states were understandably concerned over the potential impact on existing water rights. This is illustrated by the following remarks offered by Senator Hubert Humphrey:

> Paragraph 5, the last in this section, contains language that is *vital to our colleagues from the West.* When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change existing water laws and would deprive local communities of water, both domestic and irrigation. Although this *certainly was not the intention of the sponsors,* it has seemed necessary to insert a short sentence to remove any doubts.[117] [cites § 4(d)(7)]

While one might hastily conclude that the western legislators of the day were overreacting, one need simply consider the history of water scarcity in the West. It is also helpful to remember that the Wilderness Act was introduced shortly after the Supreme Court decided *Pelton Dam.*[118] *Pelton Dam* expanded the *Winters* reservation doctrine and was viewed as infringing on states' water allocation systems. There had been extensive hearings on legislation introduced to overrule *Pelton Dam.*[119] Indeed, the same Senate committee proposing the bill to overrule *Pelton Dam* considered the Wilderness Act. All this points to a Congress well-versed in current water issues and able to tackle the job of wilderness water rights in whatever manner it deemed appropriate.

The original language of § 4(d)(7), proposed by the California Department of Water Resources, was more precise than the final language.[120] The history of the interchange of the California administrators and the Senate committee is recorded in the hearings on the Wilderness Act, and cited extensively by the Tarr Opinion in support of the proposition that § 4(d)(7) precludes a federal reserved water right.[121] The first amendment proposed would have placed all unappropriated water within the wilderness area under the exclusive control of the appropriate state agency.[122] There was a danger, however, that a provision this broad might be interpreted to repudiate existing federal

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117. 104 CONG. REC. 11,555 (1958)(emphasis altered from original).

118. *See* Federal Power Comm. v. Oregon, 349 U.S. 435 (1955).

119. Tarr Opinion, (citing *Hearings on S. 863 before the Subcomm. on Irrigation and Reclamation of the Sen. Comm. on the Interior and Insular Affairs, in consideration of S. 863,* 2. The Subcommittee there stated that the purpose of the bill was to overturn the *Pelton Dam* ruling).

120. Representatives of the California Departments of Water Resources, Game and Fish, and Natural Resources testified before the Committee, all in support of some form of guarantee of the integrity of the state water rights system.

121. *See* Tarr Opinion at 11, 12 (citing *Hearings on S. 1176 before the Senate Committee on the Interior and Insular Affairs,* 85th Cong., 1st Sess., 5-6, 281-89, 329-32 (1957)).

122. *Id.*

water rights. As some of the proposed wilderness areas encroached on Indian reservations, this might also have opened the door to claims of treaty abrogation.[123]

The Tarr Opinion concludes that the language of § 4(d)(7) was included in direct response to the concerns of the western congressional delegations, already smarting at the bite of the *Pelton Dam* decision.[124] The author characterized the section as a "disclaimer of interference with State or Federal water rights."[125]

Senator Church, while serving on the Senate Committee on the Interior, also interpreted § 4(d)(7) as not creating a reserved right. In the bill which set aside land for a wilderness area in Idaho, he noted that the bill repeated the language of the Wilderness Act of 1964, and stated "moreover, we desired to reiterate and underscore the jurisdiction of the State of Idaho over the water resources and fish and game within the wilderness areas and accomplished that by repeating the provisions of the 1964 act which relate to these issues."[126]

The Wild and Scenic Rivers Act, containing similar language, followed four years after the Wilderness Act.[127] This act also specified that the principles of water administration would not be altered by the act. Nonetheless, the act seems to create federal water rights. Notwithstanding, the Senate Committee on the Interior and Insular Affairs, in reporting out the bill, said

> [The § 4(d)(7) parallel language] is intended by the Committee to preserve the status quo with respect to the law of water rights. No change is intended. The first sentence states that established principles of law will determine the Federal and State jurisdiction over the waters of a stream that is included in a wild river area. Those estab-

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123. Tarr Opinion at 12 n.13.

124. *Id.* at 13.

125. *Id.* (citing *Hearings on S. 174 Before the Sen. Comm. on the Interior and Insular Affairs,* 87th Cong., 1st Sess. at 5 (1961)). Several other public figures and organizations were quoted in statements that indicate a clear understanding that the Wilderness Act did not create a reserved water right. A representative of the National Wildlife Federation stated that this section offered assurance that "no claim is made to exemption from State Water laws" in the wilderness areas. *Hearings on S. 4028 before the Sen. Comm. on Interior and Insular Affairs,* 85th Cong., 2d Sess., pt. 2 at 257 (1958). The Citizen's Committee on Natural Resources stated that "a special provision of the bill safeguards State water laws." *Hearings on S. 174 at 275.* The New York Conservation Council stated that "all existing rights . . . will continue to be recognized, as will State water laws." *Id.* Such statements show that the Wilderness Act was to be construed in derogation of State water law. A view of reserved rights would simply be inconsistent with such construction.

126. H. REP. NO. 838, 2d Sess. 20 (1980). *See also* S. REP. NO. 414, 96th Cong., 1st Sess. at 22 (1980), *cited in* Tarr Opinion at 15. This report stated that Section 7, which contained the duplicate language from § 4(d)(7), "further reiterates and underscores the jurisdiction of the State of Idaho over the water resources within the wilderness area."

127. Act of October 2, 1968, Pub. L. No. 90-542, 82 Stat. 906.

> lished principles of law are not modified. The third sentence states that with respect to possible exemption of the Federal Government from the State water laws the act is neither a claim or denial of exemption. Any issue relating to exemption will be determined by established principles of law as provided in the first sentence.[128]

2. *Did Congress intend to abandon existing federal water rights under the Wilderness Act?*

In light of the statements made in support of passage of the Wilderness Act, as well as subsequent statements, it seems reasonable to conclude that the Act was not intended to create a federal reserved water right. The converse must also be considered. Did Congress intend to abandon any established federal water rights? *Sierra Club* contains no analysis on this point. It again seems logical to rely on a plain English rendition of the section's meaning as to this question.

The discussion in the foregoing section hints at the influence of California state officials in the drafting of § 4(d)(7). Senator Humphrey, sponsor of the Wilderness Act, stated that he gave "carte blanche" to Senator Kuchel of California to mold the bill to the satisfaction of the California officials.[129] Despite this generous offer, it is clear that the final language was the product of compromise. Such a process indicates that elements of Congress were concerned with preserving the extant federal water rights.

The California version of § 4(d)(7) stated, "nothing in this act shall constitute an express or implied claim on the part of the United States for exemption from State water laws." The Department of Justice objected, concerned that this language

> exposed to loss, through appropriation by others under State law, all presently vested rights of the United States to the use of water on the Government's military establishments, national forests, Indian reservations, national parks and monuments, and other reserved lands, except in the fulfillment of treaty obligations in connection therewith is involved, should be noted.[130]

Thus, to satisfy Justice Department concerns, the words "or denial" were added and constituted the final language of the section.[131] A rep-

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128. S. REP. 491, 90th Cong., 1st Sess. at 5 (1967).

129. Letter from Senator Kuchel to Senator James Murry, April 4, 1958, *cited in* Tarr Opinion at 15.

130. *Hearings on S. 863* at 55, *supra* note 119 (remarks of the Assistant Attorney General for the Office of Legal Counsel).

131. 104 CONG. REC. 6343 (1958) (for reasons not entirely clear, a portion of the Committee report was read into the Congressional Record by Senator Richard Neuberger.)

resentative of the Trustees for Conservation who was present during the relevant debates confirmed this conclusion.[132]

VI. *New Mexico v. Molybdenum Corporation of America*: A Case In Conflict With *Sierra Club*

While the Tarr Opinion presents a comprehensive recitation of the legislative history of the Wilderness Act of 1964, and reaches logical conclusions, its impact is limited by the controlling weight granted to an opinion of the United States Attorney General.[133] A case is currently under consideration in federal district court for New Mexico which directly contradicts the *Sierra Club* opinion, *New Mexico v. Molybdenum Corp. of America.*[134] While a final, appealable order has not yet been entered, preliminary rulings indicate that the final judgment will hold that there are no federal reserved water rights under the Wilderness Act of 1964.

In *Molybdenum Corp.*, the federal government asserted reserved water rights under the Wild and Scenic Rivers Act, Wilderness Act of 1964, Organic Act of 1897, MUSYA, and for properly perfected appropriations under New Mexico state law.[135] This case is similar to the adjudication for the Beaver Dam Mountains Wilderness Area in that all claims have been considered and decided, except those of the federal government, and once again it is the federal government that is delaying an adjudication that has been ongoing for several years (10 years in the New Mexico case). The court referred these claims to a Special Master for evaluation.[136]

The claims in this case present a true drama, as the United States'

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132. Tarr Opinion at 19 (quoting Howard Zahniser, Washington Representative, Trustees for Conservation, in a report issued by Zahniser to his organization, an abstract of which is found at 104 CONG. REC. 6343 (1958). In the report, Zahniser states:

> The [California] Department also recommended the insertion of an added Special section which would provide that "nothing in this Act shall constitute an express or implied claim on the part of the United States for exemption from State Water laws." In line with suggestions received in the course of the consultation regarding the proposed new section, the *words "or denial" were also added to avoid an [sic] possible misinterpretation on the other hand and specifically to anticipate and avoid objection on the part of the Department of Justice* (emphasis in original)).

133. Although the Tarr Opinion was authored by the Solicitor of the Interior Department, it was approved by, and in effect adopted as the opinion of the U.S. Attorney General by his letter dated July 26, 1988.

134. New Mexico v. Molybdenum Corp. of America, No. 9780C (D. N.M. 1988). This case involves an adjudication of water rights to the flow of the Red River.

135. New Mexico v. Molybdenum Corp. of America, No. 9780C (D. N.M. 1988), Report of the Special Master (filed March 27, 1987) at 4-6, Report of the Special Master affirmed by the Court, February 2, 1988, Motion for Reconsideration denied June 2, 1988.

136. *Id.*

claims are contested by, among others, several farm groups representing poor farmers. The farmers testified that their wells often become dry. The government's representative testified of increased need for snow-making at a ski resort located on federal lands.[137] All of the farmers' ditch systems have appropriative claims perfected under state law which predate perfected federal appropriative rights.

The Special Master allowed federal claims properly perfected under applicable state law and claims advanced under a theory of reservation by the Organic Act of 1897.[138] However, after consideration and rejection of *Sierra Club,* the Special Master denied claims under reservation of wilderness lands, wild rivers and MUSYA.[139] Section 4(d)(7) of the Wilderness Act and the identical language contained in the Wild and Scenic Rivers Act[140] were cited as evidence of a lack of congressional intent to reserve water rights.[141] The report was adopted by the district court without modification.

Perhaps by the time that *Molybdenum Corp.* is final the appeal of *Sierra Club* will have been decided by the Tenth Circuit Court of Appeals. In any circumstance, the Justice Department will not likely appeal the almost-certain verdict in *Molybdenum Corp.* in light of the Tarr Opinion and confirmation by the Attorney General. In this respect, the Tarr Opinion directly impacts on important water rights litigation.

VII. Ex Post Facto Divination of Congressional Will

A. *A Reconsideration of Wilderness Purposes*

As discussed above, it is critical to a reserved water right that there be a withdrawal and reservation, and a congressional intent to reserve a water right to meet a primary purpose for the designated reservation.[142] *Sierra Club* found both in the case of wilderness lands, a finding now seriously questioned by the more complete legislative historical analysis of the Tarr Opinion. This lapse of *Sierra Club* prescribes an examination of the purposes implicated in a wilderness reservation.

Judge Kane viewed the intent of the Wilderness Act of 1964 in its entire context to arrive at the conclusion that the purposes of the Act were not supplementary or in derogation of the purposes of the Organic

137. *Id.* at 7-8.

138. *Id.* at 5.

139. *Id.* at 10.

140. 16 U.S.C. § 1284 (1982).

141. Report of Special Master, *supra* note 135 at 10.

142. United States v. New Mexico, 438 U.S. 696, 702 (1978). *See supra* notes 54-63 and accompanying text.

Act of 1897.[143] He failed, nonetheless, to cite and distinguish the plain language of § 4(d)(6) of the Act, which states "the purposes of this chapter are hereby declared to be *within and supplemental* to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered . . . ."[144] While criticism of the court's construction of the Act may be unfair, in light of stated objectives such as "preservation and protection of . . . wilderness"[145] and "retaining [the] primeval character and influence . . . for solitude or a primitive and unconfined type of recreation,"[146] the court's omission of the section cited above indicates an analytical weakness in ignoring the germane legislative history.

The Tarr Opinion cites several other provisions of the Wilderness Act which seem to indicate that the Act was nothing more than a complex system of management to be imposed on wilderness lands. No conflict exists here between this goal and the original concerns of conservationists troubled by the administrative, and therefore reversible, nature of wilderness lands established under early regulations.[147] The opinion concludes that wilderness land designated under the Wilderness Act of 1964 are designated for purposes *secondary* to the uses of the land previously reserved for other purposes.[148]

Significant statements of prominent senators during consideration of the Act bolster this conclusion. Senator McGovern stated that the proposed act merely "establishes the criteria under which our wilderness areas will be *managed.*"[149] Committee hearings on the bill also show that the proposed act was not intended to create new and distinctive purposes for the land designated as wilderness areas.[150]

B. Toward Direction and Purpose

Possibly the most apparent question is "Why did Congress not simply create a reserved right?" Certainly, the power exists. The United States Constitution gives Congress the power to regulate property owned by the United States.[151] The threshold inquiries center on congressional intent. The route to ascertaining intent is that most di-

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143. 622 F. Supp. 842, 855-56 (1985).

144. 16 U.S.C. § 1133(a) (1982) (emphasis added).

145. 16 U.S.C. § 1131(a) (1982).

146. *Id.* at (c).

147. *See supra* note 41 and accompanying text.

148. Tarr Opinion at 33.

149. 109 CONG. REC. 5942-43 (1963) (emphasis added).

150. *See, e.g.*, 104 CONG. REC. 11,555 (1958) (The wilderness bill is in harmony with a multiple use policy for national forests).

151. U.S. CONST. art. IV, § 3.

rect: speaking the mind of Congress.

Two answers immediately respond to the inquiry. The obvious, one would suppose for a body that faces election biannually, is politics. President Jimmy Carter lost his reelection bid to Ronald Reagan, garnering no electoral votes west of the Mississippi. Some observers attribute this result to the "hit list," a list of projects to be cut that included western water conservation projects. The defendant-intervenors of *Sierra Club* reads like a "Who's Who" of powerful western lobbying groups.[152] No elected representative relishes an imbroglio with the heavy campaign contributors and influential groups.

The second answer may be that no one thought about water rights. While this is possible for eastern congressional representatives, it seems very unlikely for western representatives who are politically inculcated with water rights disputes. Some might even be so steeped in federal supremacy as to believe that no state could successfully challenge the assertion of a federal water right. As for all others, the prior answer seems appropriate.

At least one wilderness-designating statute contains an express reservation of a federal water right for the wilderness area. In the bill designating the El Malpais Wilderness in New Mexico,[153] the authors include a provision reserving the minimum amount necessary to accomplish the purposes of the El Malpais National Monument and Wilderness Area.[154] The bill was introduced by members of the New Mexico Congressional delegation. To date, no wilderness bills have been passed without full support of the congressional delegation of the state in which the subject area is located. Thus, it is significant that this language originated with the bill's sponsors.

The author proposes the following language to abate further wilderness reserved water rights controversy, insofar as any debate concerning the existence of these rights.

> By passage of this act, Congress expressly reserves the rights to unappropriated waters appurtenant to the designated wilderness area. The amount reserved shall be limited to that necessary to the propagation and preservation of wildlife and aquatic wildlife within the area. No intent of exemption from existing or future water allocation compacts is intended or contained in this act. Adjudication of quantification shall be completed through the courts of the state in which the water flow or drainage area or groundwater source is contained, and the

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152. The intervenors included, among others, the Colorado Farm Bureau, Colorado Water Congress, Mountain States Legal Foundation, National Cattlemen's Association, Colorado Water Conservation Board, and the Colorado Cattlemen's Association.

153. 16 U.S.C. § 460uu-49(a)(b) (1988).

154. *Id.*

McCarran Amendment[155] shall apply.

Such language would be consonant with the *New Mexico* purposes test and eliminate doubt concerning the purpose upon which the water right is based. Further, traditional deference to state water proceedings is maintained through state jurisdiction over quantification.

VII. Conclusion

Sierra Club v. Block demonstrates the inadequacy of selective application of legislative history. The Tarr Opinion reflects that the authors and supporters of the Wilderness Act of 1964 envisioned no expansion of the *Winters* doctrine into wilderness lands. The Tarr Opinion also establishes that the purposes of the Wilderness Act of 1964 did not supersede the primary purposes of the Organic Act of 1897, to preserve stream flows and ensure a supply of timber.

The Beaver Dam Mountains Wilderness Area may be the site of the next reserved rights battle.[156] It appears that the proponents of wilderness reserved rights are now faced with the Tarr Opinion as a potentially mortal wound, if the Justice Department heeds its instruction. The adjudication in the Virgin River Drainage, now halted by the wilderness reserved right question, may be quickly concluded. Perhaps then the Beaver Dam Wilderness Area will be remembered as the groundbreaking of cooperation between the environmental advocates, the government and the opponents of wilderness reserved rights.

The controversy over federal reserved water rights may be intelligently resolved through legislative language that would preserve state administration over water while promoting wilderness preservation. The reservation doctrine should not be applied to wilderness area water rights, even though the lands may have been previously reserved for other purposes. The administration in the vast tracts of wilderness areas is best left to the individual states, where time-proven water administration may effectively allocate the precious resource of water. The Sierra Club and similar advocacy groups should best serve their constituency by promoting remedial legislative language, and letting the *Sierra Club* controversy die a natural death.

Kenneth R. Wallentine

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155. 43 U.S.C. § 666 (1982). This amendment waives immunity from suit for water adjudications.

156. Not only does the Beaver Dam Mountains Wilderness present a fertile battleground, but an Interior Department offical (declining to be named) informed the author that the attorneys for the Sierra Club have discussed such an action.