

# WHAT IS THE FEDERAL RESERVED WATER RIGHTS DOCTRINE, REALLY? ANSWERING THIS QUESTION IN IDAHO'S SNAKE RIVER BASIN ADJUDICATION

JEFFREY C. FEREDAY AND CHRISTOPHER H. MEYER

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# WHAT IS THE FEDERAL RESERVED WATER RIGHTS DOCTRINE, REALLY? ANSWERING THIS QUESTION IN IDAHO’S SNAKE RIVER BASIN ADJUDICATION

JEFFREY C. FEREDAY AND CHRISTOPHER H. MEYER\*

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## I. INTRODUCTION

One of the achievements of Idaho's Snake River Basin Adjudication ("SRBA") was the determination of federal reserved water rights claims for Indian reservations and for non-Indian federal land designations such as wilderness, wild and scenic rivers, wildlife refuges, and national recreation areas.<sup>1</sup> Such water rights arise under the "federal implied reserved water rights doctrine"<sup>2</sup> articulated by the United States Supreme Court in a line of decisions between 1908 and 1978.<sup>3</sup> This essay points out that, particularly in its decision that federal reserved water rights were not created by implication in a statute establishing wilderness areas, the Idaho Supreme Court provided needed clarification as to what the Doctrine is, and, more importantly, what it is not. This, too, is a signal achievement of the SRBA in Idaho.

Over the past forty years or so, hundreds of pages of scholarly discussion have explored the Reserved Rights Doctrine.<sup>4</sup> These analyses typically focus on the same set of questions: the now-familiar inquiry into whether a land designation is a "reservation" of land and, if so, what constitutes the "primary purposes" for which a water right is necessary and how the right should be quantified. This essay takes a different approach, and focuses on a more fundamental question. Ultimately, so did the Idaho Supreme Court.

This article's central point is seemingly obvious but rarely acknowledged in the literature: Despite the lore surrounding it (and the Doctrine's lofty name), the Reserved Rights Doctrine is not a substantive rule of law mandating that a federal land reservation automatically creates a federal water right. Rather, it is a canon of construction created

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1. In 2006, SRBA Judge Melanson rejected a novel argument by the City of Pocatello that it was entitled to a federal reserved water right based on the Pocatello Townsite Act. *Pocatello v. State*, 180 P.3d 1048, 145 Idaho 497 (2008). We do not discuss this opinion here.

2. In this article, we refer to it variously as the "Reserved Rights Doctrine" or simply the "Doctrine." The Doctrine also goes by the name "*Winters* Doctrine" in reference to the seminal Reserved Rights Doctrine case, *Winters v. United States*, 207 U.S. 564 (1908). Portions of this article were adapted from the Federal Reserved Water Rights chapter in FEREDAY, MEYER & CREAMER, *WATER LAW HANDBOOK* 376 (2015), on file with the authors.

3. See cases cited *infra* note 8.

4. E.g., THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS (Barbara Cosens & Judith V. Royster eds., 2012); Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203 (2006); Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173 (2002); Sally K. Fairfax & Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979); Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122 (2001); Debbie Leonard, *Doctrinal Uncertainty in the Law of Federal Reserved Water Rights: The Potential Impact on Renewable Energy Development*, 50 NAT. RESOURCES J. 611 (2010); Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639 (1975); Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENV. L. J. 473 (1977); William H. Veeder, *Winters Doctrine Rights Keystone of National Programs for Western Land and Water Conservation and Utilization*, 26 MONT. L. REV. 149 (1965); Star L. Waring & Kirk S. Samelson, *Non-Indian Federal Reserved Water Rights*, 58 DENV. L. J. 783 (1980); Janet L. Weis, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight*, 15 HASTINGS CONST. L. Q. 125 (1987).

by the United States Supreme Court for the situation where the federal government reserves land—whether by statute, treaty, or executive order<sup>5</sup>—yet fails to address whether it also intends to reserve or otherwise create water rights necessary to achieve the reservation's purposes. The Doctrine has been employed to fill this seemingly inadvertent gap in legislative drafting by implying the reservation of sufficient water rights to ensure that the primary purposes of the reservation are not defeated. It is a simple, common sense tool for divining the government's intent when it is silent on the subject. And it is nothing more. The Doctrine does not invoke a rote, "if reservation, then water right" syllogism as many of the commentators seem to believe. Rather, it requires a court to analyze legislative or executive intent in the order, treaty or statute establishing the land designation. Like any rule of construction, it must be applied in context.

The context of the seminal reserved rights cases was federal silence, which the Court interpreted as inadvertent oversight. The government was focused on the big issue (the land reservation); it did not think to mention the need for water—or, more particularly, the need for a water right. Where that need is inescapably apparent, the Court held that the reservation of water rights may be implied.<sup>6</sup>

The first reserved rights case, *Winters v. United States*, 207 U.S. 564 (1908), involved water rights implied by an Indian treaty. For many years, the *Winters* Doctrine was thought to be unique to Indian law. Since the Supreme Court's 1955 decision in the *Pelton Dam* case, however, Congress and the Executive have been on notice and fully aware that a reserved water right may be recognized in connection with any kind of federal land reservation, not just those reserving Indian lands.<sup>7</sup>

To date, each of the Supreme Court's reserved water rights decisions has involved a land reservation pre-dating 1955.<sup>8</sup> Each was analyzed in the context of federal silence on the subject of water rights. However, most post-1955 statutes—such as the 1964 Wilderness Act (together with subsequent site-specific statutes adding lands to the Wilderness System), the 1968 Wild and Scenic Rivers Act, and a handful of National Recreation Area statutes—were enacted in the context of robust debate as to whether federal water

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5. For the sake of convenience, this article often will refer to the reserving instrument as the "statute." But the use of this term should be understood, unless the context dictates otherwise, to mean "statute," "executive order," or "treaty," as the case may be.

6. *Winters v. United States*, 207 U.S. 564 (1908).

7. *Fed. Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435, 444–45 (1955).

8. *United States v. New Mexico*, 438 U.S. 696 (1978) (interpreting the 1899 federal land withdrawal for the Gila National Forest); *Cappaert v. United States*, 426 U.S. 128 (1976) (interpreting the 1952 Proclamation by President Truman that created the Devil's Hole National Monument); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (holding that the 1952 McCarran Amendment provided consent to determine in state courts federal reserved water rights held on behalf of Indian tribes); *United States v. Dist. Ct. in and for Eagle Cty.*, 401 U.S. 520 (1971) (interpreting a 1905 withdrawal of land to create the White River National Forest); *Arizona v. California*, 373 U.S. 546 (1963) (interpreting several treaties that created Indian reservations in Arizona, California, and Nevada, all of which predated 1929, along with several federal land withdrawals for National Recreation Areas, National Wildlife Refuges and National Forests, all of which predated 1955); *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955) (holding that the 1877 Desert Land Act provision making water on public land subject to private appropriation under state law was inapplicable to federal lands reserved for hydroelectric projects); *United States v. Powers*, 305 U.S. 527 (1939) (interpreting an 1868 treaty setting aside a tract of land for the Crow Indians in what is now Montana); *Winters*, 207 U.S. 564 (1908) (interpreting the 1888 treaty creating the Fort Belknap Indian Reservation).

rights would or should be reserved. Accordingly, they generally include language addressing the subject of water rights in one way or another.<sup>9</sup> In some instances, reserved rights were expressly created. In others, they were expressly denied. In a third category, Congress expressly punted. In any event, the era of federal silence about reservation of water rights is over.<sup>10</sup> The question is how the Reserved Rights Doctrine should apply in this new context.

Where the crafting of land reservation language is attended by debate and testimony on the water rights issue, the omission of express language creating a water right no longer can be deemed inadvertent; it must be interpreted as intentional. Under such circumstances, we contend that reserved water rights cannot fairly be implied. It is one thing to employ a canon of construction to resolve a side issue that the legislative drafters inadvertently failed to consider. That is statutory interpretation. That is a court's job. It is quite another for a court to create a property right that the legislative drafters considered creating but ultimately omitted from the legislation. Consequently, we posit that, as a practical matter, for federal statutes adopted after 1955, there can be either expressly-created water rights or none at all.

The Idaho Supreme Court decision at the center of this discussion is *Potlatch Corp. v. United States* (“*Potlatch II*”), in which the Idaho Supreme Court reversed course on rehearing and held that the laws adding federal lands in Idaho to the Nation's Wilderness System create no implied federal water rights.<sup>11</sup> This decision is correct because, in enacting these wilderness statutes, Congress debated the water right issue, chose not to expressly reserve a water right, and even inserted language identical to that in the original, 1964 Wilderness Act declaring legislative neutrality on the subject.<sup>12</sup> Congress's refusal to act after being fully informed does not get the job done. This is the essence of Justice Linda Cople Trout's special concurrence in *Potlatch II*.<sup>13</sup>

Of course, a statute containing express language reserving a water right will do the trick. This is just what the Idaho court concluded, in the companion case of *Potlatch Corp. v. United States* (“*Potlatch III*”), with regard to the strikingly different water right language in the Wild and Scenic Rivers Act (“WSRA”).<sup>14</sup> While the SRBA litigants debated the meaning of the WSRA's text on the subject, one plausible reading is that it

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9. An exception is the Multiple Use Sustained Yield Act of 1960 (“MUSYA”), 74 Stat. 215, 16 U.S.C. 528 *et seq.* This act, which did not reserve new lands, does not contain language addressing reserved water rights, and its legislative history indicates that Congress did not consider or debate the issue. *See* S. Rep. No. 1407, 86th Cong. 2d Sess. (May 23, 1960) and H. Rep. No. 1551, 86th Cong., 2d Sess. (April 25, 1960).

10. Wilderness Act of 1968, Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. § 1131 *et seq.* (2012) (Selway-Bitterroot Wilderness)); Wild and Scenic Rivers Act of 1968, Pub. L. No. 90-542, 82 Stat. 906; *see also* Act of July 23, 1980, Pub. L. No. 96-312, 94 Stat. 948 (segment of Salmon River); Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 40 (1978) (Gospel-Hump Wilderness); Boundary Waters Canoe Area Wilderness Act of 1978, Pub. L. No. 95-495, 92 Stat. 1649; Eastern Wilderness Act of 1975, Pub. L. No. 93-622, 88 Stat. 2096; Act of Aug. 22, 1972, Pub. L. No. 92-400, 86 Stat. 612.

11. *Potlatch Corp. v. United States* (*Potlatch II*), 12 P.3d 1260, 1272, 134 Idaho 916, 926 (2000). The authors represented Potlatch Corporation and other private entities in the *Potlatch* litigation, where we made essentially the same argument presented here. *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990). That case dealt with the wilderness water rights issue, but the point made in this article about the nature of the Reserved Rights Doctrine was not made by any of the litigants.

12. *See infra* notes 57–58 and accompanying text.

13. *Potlatch II*, 12 P.3d at 1270–71, 134 Idaho at 926–27.

14. *Potlatch Corp. v. United States* (*Potlatch III*), 12 P.3d 1256, 1260, 134 Idaho 912, 916 (2000); *see also* 16 U.S.C. §§ 1271–1287 (2012).

expressly creates a reserved instream water right for a wild and scenic river designation, and that is what the Idaho court found.<sup>15</sup> But such an express reservation of federal water rights would not invoke the Reserved Rights Doctrine, which applies only where the intent to reserve a water right must be found by implication.

We also make the case as to why Congress cannot be seen as having intended, in a particular post-1955 land reservation, to establish federal reserved water rights through “acquiescence” based on previous Supreme Court decisions finding reserved water rights arising from other statutes or proclamations.

Finally, this article briefly surveys the five additional non-Indian federal reserved water rights cases the Idaho court decided in the course of the SRBA, noting in each how the court has employed and analyzed the Doctrine.

## II. THE RESERVED WATER RIGHT DOCTRINE IS A RULE OF STATUTORY CONSTRUCTION APPLICABLE ONLY WHERE CONGRESS OR THE EXECUTIVE WAS SILENT ON THE QUESTION OF WATER RIGHTS.

### A. Origins of the reserved rights doctrine

Federal power to establish enforceable water rights was first articulated in *Winters v. United States*, a once-obscure Indian law decision handed down by the U.S. Supreme Court over a century ago.<sup>16</sup> In 1888 the United States entered into a treaty with the Gros Ventre and Assiniboine bands or tribes of Indians creating the Fort Belknap Indian Reservation along the Milk River in Montana.<sup>17</sup> In the Court’s words, the treaty’s purpose was to convert “a nomadic and uncivilized people” into a “pastoral and civilized people.”<sup>18</sup> The Court found the Indians’ former means of subsistence was made impossible by their forfeiture of lands under treaty, and that their only opportunity for survival, and for a “pastoral” life, was irrigated agriculture.<sup>19</sup> The Court then concluded that while the treaty did not explicitly reserve a water right for the Indians, such a reservation must have been intended for the Indians to sustain themselves, and is therefore implied in the treaty.<sup>20</sup> Noting the rule of interpretation that any ambiguities in a treaty with Indian tribes should be resolved in favor of the Indians, the Court construed the treaty to mean that an entitlement to water was intended.<sup>21</sup>

For many decades, Westerners viewed *Winters* as an anomaly of Indian law and nothing more. The bulletin that this might not be so arrived in 1955 in the Court’s *Pelton Dam* decision, which indicated that this implied reserved rights doctrine might extend to other federal land reservations.<sup>22</sup> There, the Court held that the Desert Land Act provision

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15. See *infra* Section IV.

16. *Winters*, 207 U.S. 564 (1908).

17. Act of May 1, 1888, 25 Stat. 113 (ratifying agreements made with the Gros Ventre and Assiniboine in 1886 and 1887).

18. *Winters*, 207 U.S. at 576.

19. *Id.*

20. *Id.* at 576–78.

21. *Id.* at 576.

22. *Pelton Dam*, 349 U.S. 435 (1955).

making water on public land subject to private appropriation under state law was inapplicable to federal lands reserved for hydroelectric projects.<sup>23</sup> While *Pelton Dam* was not decided under the rubric of the reserved water rights doctrine, it implied that, as a function of the power site reservation, the government's private licensee was exercising a federal water right that had been created by implication and that was not subject to state control.<sup>24</sup>

What *Pelton Dam* presaged was confirmed, in spades, by the Supreme Court's 1963 holding in *Arizona v. California*.<sup>25</sup> The so-called *Winters Doctrine*, said the Court, could be applied to all federal land "reservations" where a water entitlement was necessary.<sup>26</sup> Suddenly national parks, forests, wildlife refuges, and monuments—any federal land area that had been withdrawn from settlement, sale, or entry under the mining and homestead laws and reserved for a specific purpose—was henceforth understood as potentially carrying federal reserved water rights just like the Fort Belknap Tribes won in 1908. The stage was set for further litigation.

The federal reserved water rights doctrine now has been applied by the U.S. Supreme Court eight times, each involving a pre-1955 statute or land order.<sup>27</sup> As every American water law professor doubtless has explained, the Doctrine emerging from these cases may be condensed to this statement from the Court's 1976 opinion in *Cappaert v. United States*: "This Court has long held that when 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."<sup>28</sup>

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23. *Id.* at 446–48; see also Desert Land Act of Mar. 3, 1877, 43 U.S.C. § 321. The Act expressed congressional deference to state water laws and water administration systems, a principle also articulated in other federal public land statutes addressing the question of water arising on or flowing through federal lands, including the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372, 373, 381, 383, 391, 392, 411, 414, 419, 421, 431, 432, 434, 439, 461, 491, 498, 1457), "the Placer Law," Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (codified at 43 U.S.C. § 661), and "the Lode Law," Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253 (codified at 43 U.S.C. § 661). Congress's generally hands-off approach to water resources in these and similar statutes, despite its plenary power over federal lands generally, has been noted by the Court in several decisions. *California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

24. *Pelton Dam*, 349 U.S. at 443–45.

25. *Arizona v. California*, 373 U.S. 546 (1963).

26. *Id.* at 599–601.

27. See cases set out in note 8.

28. *Cappaert*, 426 U.S. at 138. Once established, these implied federal reserved water rights share many of the attributes of private appropriative rights under state law. They fit into the state's priority system with a priority as of the reservation date. They may be quantified to a specific flow at a particular place. In these respects, federal reserved rights operate exactly like ordinary appropriative rights. However, federal reserved water rights arise either expressly or by implication from a federal statute or order, not through notice of intent to appropriate water, filing an application, or other compliance with state procedures. They also need not conform to state substantive law. For instance, tribal irrigation rights are quantified based on "practicably irrigable acres," not actual beneficial use. Jennele Morris O'Hair, *The Federal Reserved Rights Doctrine and Practicably Irrigable Acreage: Past, Present, and Future*, 10 BYU J. Pub. L. 263 (1996). Likewise, a federal reserved right may be obtained for instream flow rights even in a state which does not recognize instream rights or which recognizes them only when held by a state agency. It may lie dormant and unexercised indefinitely but cannot be lost by non-use; when it is diverted—or when its instream flow is enforced—it can disrupt water rights established after the date of reservation. A federal reserved water right thus intrudes on the authority of states to grant, deny, and condition water rights.

In *Cappaert*, the Court considered whether a federal water right was created when President Truman established Devil's Hole National Monument, a land reservation expressly intended to preserve, among other things, a certain water level in a natural pool containing a rare fish.<sup>29</sup> Interestingly, because *Cappaert* can be read as an express reservation of a water entitlement—that necessary to maintain a specific water level in a natural pool—the opinion is better understood as an express, not an implied, reserved water rights case. Indeed, the Court even commented that President Truman's proclamation created a federal water right that is “explicit, not implied.”<sup>30</sup>

In any event, the above statement from *Cappaert*, probably the most-quoted language describing the Doctrine, may lead some to see it as a substantive rule of law, with the effect that whenever federal land is reserved, a federal reserved water right is created automatically. But a substantive rule of law it is not. Rather, the implied reservation of water rights doctrine is a rule of construction applicable where Congress or the Executive, in creating a reservation, inadvertently fails to address the question of water where a federally-held water right is necessary to carry out the primary purposes of the reservation—where the failure to hold a water right for a particular purpose in a particular place would “entirely defeat” a purpose of the land reservation.<sup>31</sup>

Indeed, the court in *Cappaert* forthrightly stated that the Doctrine is a rule mandating a determination of legislative intent: “In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water.”<sup>32</sup> This statement surely is beyond questioning: courts cannot reserve or create federal property rights; only Congress, or the Executive acting under statutory authority, can do that.<sup>33</sup>

Over the years, it seems the *Cappaert* statement has become talismanic, recited and applied without reference to its context or the function of statutory construction. The result has been that when the Federal Government withdraws land and reserves it for specific purposes, many simply take it as a given that “the Government, by implication, reserves appurtenant water then unappropriated . . . .”<sup>34</sup> Thus, much of the debate about whether a statute implicitly creates a federal water right has revolved around the question whether an actual land reservation has occurred. For example, in *Sierra Club v. Watt*, the Court of Appeals for the District of Columbia ruled that the Federal Land Policy and Management Act of 1976 (“FLPMA”),<sup>35</sup> which establishes policies and planning requirements for public lands administered by the Bureau of Land Management (“BLM”), did not create federal reserved water rights in part because there had been no “reservation.”<sup>36</sup>

29. *Id.* at 141.

30. *Id.* at 140.

31. *United States v. New Mexico*, 438 U.S. 696, 700 (1978) (noting that “[e]ach time this Court has applied the ‘implied-reservation-of-water doctrine,’ it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.”).

32. *Cappaert*, 426 U.S. at 139.

33. U.S. CONST. art. IV, § 3.

34. *E.g.*, *Sierra Club v. Watt*, 659 F.2d 203, 205 (D.C. Cir. 1981) (quoting *Cappaert*, 426 U.S. at 138).

35. 43 U.S.C. §1701.

36. In *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.C. Cir. 1980), *aff'd*, *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981), the Sierra Club sued the federal government for its failure to assert federal reserved



Similarly, in *Sierra Club v. Block*, the litigants wrangled over whether a wilderness designation was a proper “reservation” and over the primary purposes.<sup>37</sup> The Colorado Federal District court in *Block*, evidently swayed by the argument that a wilderness would not function without water, applied the Doctrine as if it were a binding rule of law to find a federal reserved water right for wilderness.<sup>38</sup> In the next round of the same litigation, the court reiterated this view.<sup>39</sup> On appeal, however, the Tenth Circuit dismissed the case and vacated the *Lyng* opinion on the ground that the matter was not ripe for review.<sup>40</sup> In any event, the point urged in this article was not presented in that litigation or considered by the *Block/Lyng* courts.<sup>41</sup>

On yet another front, Democratic and Republican administrations issued predictable “pro” and “con” opinions on the subject. The latest in this line of party-tracking flip-flops was issued in 1988 by then-Attorney General Edwin Meese who joined with then-Secretary of the Interior, Donald Hodel, in issuing a non-binding advisory opinion on the subject of wilderness water rights.<sup>42</sup> Mr. Meese, issuing his opinion during his final week

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water rights on various public lands. Various energy projects were seeking water rights in a Utah general adjudication. The United States had not been joined under the McCarran Amendment and was taking no action to assert senior federal water rights. The district court granted summary judgment and motions to dismiss against *Sierra Club*, holding that alleged “trust duties” are subsumed by the various organic statutes and that the Department of Interior had discretion as to most effective way of protecting public resources. The court spoke in terms of “trust obligations” and “trust duties.” There is no mention in the opinion of the public trust doctrine as such. The circuit court’s basic point was that federal reserved water rights, if they exist, would be senior to any new water rights being sought, and that they would be unaffected by the state court proceeding to which the United States was not a party. Accordingly, the district court concluded that it was not unreasonable for Interior to sit out the state proceedings. The district court, however, held that in the event of a “real and immediate” threat, Interior must take appropriate action. The *Sierra Club* took a narrow appeal, limited to the question of whether FLPMA created federal reserved water rights. Just prior to oral argument, the United States was made a party to the Utah general adjudication. Accordingly, the Court of Appeals reached the merits of this claim. The appeals court found no federal reserved water rights because (1) there was no “reservation” of public lands and (2) the savings clause in FLPMA precluded creation of new federal water rights by the Executive. The appeals court recited the holdings of the district court regarding trust duties, but it did not address them because they had not been appealed.

37. *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985). It was followed by *Sierra Club v. Lyng*, 661 F. Supp. 1490 (D. Colo. 1987), which reiterated that the Wilderness Act implicitly created federal reserved water rights. On appeal, however, the Tenth Circuit dismissed the case and vacated the opinion on ripeness grounds because the *Sierra Club* had identified no imminent harm. *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

38. See *Block*, 622 F. Supp. at 857.

39. *Lyng*, 661 F. Supp. 1490.

40. *Yeutter*, 911 F.2d 1405. Meanwhile, a federal court in New Mexico reached the opposite conclusion with respect to both wilderness areas and wild and scenic rivers. *New Mexico v. Molybdenum Corp. of America (“Red River Adjudication”)*, CV No. 9780 (D.N.M. 1988) (Order Approving and Affirming Report of Special Master).

41. In the SRBA litigation over wilderness water rights, not even the federal government cited the vacated *Block/Lyng* opinions as precedent for what the Idaho courts should do.

42. Memorandum from Ralph W. Tarr, Solicitor of Dep’t of the Interior, to Secretary on Federal Reserved Water Rights in Wilderness Areas (July 26, 1988)([http://www.azwater.gov/AzDWR/Surface-Water/Adjudications/documents/Aravaipa\\_Initial\\_Disclosures/USAV-00004433.PDF](http://www.azwater.gov/AzDWR/Surface-Water/Adjudications/documents/Aravaipa_Initial_Disclosures/USAV-00004433.PDF)).

This opinion followed a series of opinions on the subject of federal water rights issued by the Interior Department. Much of the discussion in these opinions focused on the theory of “nonreserved water rights”—a theory conceived in the Carter Administration that has never gotten off the ground. The nonreserved rights theory argues that the federal government may appropriate water by implication under the reserved rights doctrine not only to achieve the primary purposes of a federal reservation, but also for secondary purposes and for management purposes on nonreserved lands.

The first and the broadest articulation of the administrative authority to appropriate was that found in the Krulitz Opinion in 1979. Federal Water Rights of the National Park Service, Fish and Wildlife Service,

in office under the Reagan Administration, concluded that in enacting the Wilderness Act, the Congress intended to defer to Western water law and create no implied water rights.<sup>43</sup>

The most recent United States Supreme Court opinion applying the Doctrine is *United States v. New Mexico*,<sup>44</sup> in which the Court announced some limitations on the Doctrine by ruling that early twentieth century executive orders establishing National Forest Reserves implicitly created federal water rights only for the “primary purposes” of securing favorable conditions of water flow and for preservation of timber—the two purposes set out in the 1897 statute under which the forest reserves were established.<sup>45</sup>

In *New Mexico*, the Court rejected reserved water rights based on the Multiple Use Sustained Yield Act of 1960 (“MUSYA”), 16 U.S.C. §§ 528 et. seq. This appears to be the only instance in which the U.S. Supreme Court has addressed whether federal reserved water rights attach to a post-1955 federal land statute. In enacting MUUSA, Congress did not address the subject of reserved water rights. (See discussion in note 9 above.) This is not surprising, because the statute did not reserve any new federal lands, but only addressed how existing reservations should be managed.<sup>46</sup> The Court ruled that MUSYA “broaden[ed] the purposes for which forests previously had been administered,” but “Congress did not thereby intend to expand the reserved rights of the United States.” *United States v. New Mexico*, 438 U.S. at 713. The Court found that, under the 1897 Organic Administration Act, 80 Stat. 36, codified at 16 U.S.C. § 481, national forests have reserved water rights for “the principal purpose of securing favorable conditions of water flow,” but that the “secondary” purposes articulated

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Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (IBLA 1979) (“Krulitz Opinion”). Solicitor Leo Krulitz determined that the federal government is empowered to preempt state law as necessary when four conditions are met: (1) Congress assigns a land management function to a federal agency, (2) Congress does not expressly prohibit the preemption, (3) unappropriated water is available, and (4) the water is put to use. *Id.*

This was followed, in the same year, by the Martz Opinion, which embraced the general reasoning of the Krulitz Opinion, but concluded that as applied to the Taylor Grazing Act and FLPMA, no authority to preempt state law was intended. Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 88 Interior Dec. 253 (IBLA 1981).

Solicitor William Coldiron did an about-face with his 1981 opinion which flatly announced, “[t]here is neither a congressional nor judicial basis for the exercise of a federal non-reserved water right.” Non-reserved Water Rights—United States Compliance with State Law, 88 Interior Dec. 1055, 1062 (IBLA 1981). Solicitor Coldiron did not question Congress’s power to preempt, but he concluded that Congress has not exercised it beyond the scope of reserved rights and the navigation servitude.

The next to be released—with great fanfare by the Department of Justice—was the opinion by Assistant Attorney General Theodore B. Olson. Fed. “Non-Reserved” Water Rights, 6 U.S. Op. O.L.C. 328, 330 (June 16, 1982) (“Olson Opinion”). The agency’s press releases announced, “The nightmare is over.” The Olson Opinion, however, was a far cry from what the public posturing on both sides would have suggested. In fact, the Olson Opinion is a thoughtfully reasoned rejection of the Coldiron Opinion; it articulates a theoretical basis for asserting preemptive federal appropriative water rights. After eighty pages of analysis, however, the Olson Opinion stopped short of applying its reasoning to particular statutes, settling instead for the observation that “such rights probably cannot be asserted under the current statutory schemes.”

See also Purposes of Executive Order of Apr. 17, 1926, Establishing Pub. Water Reserve No. 107, 90 Interior Dec. 81, 82 (Feb. 16, 1983) (a subsequent opinion by Solicitor Coldiron).

43. A thoughtful rebuttal to the Meese and Hodel opinion was issued by the Congressional Research Service: PAMELA BALDWIN, CONG. RESEARCH SERV., 89-11 A, WILDERNESS AREAS AND FEDERAL WATER RIGHTS (1989).

44. *United States v. New Mexico*, 438 U.S. 696 (1978).

45. 1897 Organic Administration Act, codified as part of 16 U.S.C. §§ 473-82, 551 (2012).

46. *New Mexico*, 438 U.S. at 696.

in the MUSYA in 1960 do not establish reserved water rights under the 1897 Act or the forest reservations stemming from it. *United States v. New Mexico*, 438 U.S. at 715.

Interestingly, the Supreme Court reserved judgment on the question whether “Congress, in the 1960 Act, authorized the subsequent reservation of national forests out of public lands to which a broader doctrine of reserved water rights might apply.” *Id.* n. 22. In any event, the Court did not rule on that question, and neither the Court nor the parties to *New Mexico* addressed the point we make in this article. The authors suggest that for post-1955 legislation, the Doctrine—based on silence resulting from apparent oversight—should not apply at all, and most certainly should not be broadened. If new federal water rights are to be reserved, that must be done by Congress with statutory language saying as much, not with knowing silence or language attempting to lateral hard legislative choices back to the courts.

### III. THE RESERVED RIGHTS DOCTRINE HAS NO APPLICATION WHERE THE STATUTE OR EXECUTIVE ORDER ADDRESSES THE WATER RIGHT QUESTION.

Each of the cases in which the court has applied the Doctrine involved a reservation pre-dating *Pelton Dam*, and in which there is no legislative history or other extrinsic evidence of debate about the water rights question. We do not criticize these decisions; pre-1955 reservations are properly evaluated to determine whether they establish federal reserved water rights by implication. Many of them do. However, after *Pelton Dam*, Congress consistently has debated the federal water right issue as it considered reservations of federal land. Most of the statutes at issue in the SRBA were in this category.

Front and center in the congressional debates over the Wilderness Act were the 1955 and 1963 Supreme Court decisions finding implied water rights arising from reservations under other statutes, executive orders, or treaties. Both sides urged Congress to adopt explicit water right language in the wilderness bill—one urged that the law forthrightly establish a right and the other sought an express disclaimer.<sup>47</sup> As explained by Professor Janice Weis:

From the time the Supreme Court first extended federal reserved water rights to lands other than Indian reservations in *Pelton Dam*, federal legislators from western states have lobbied for a congressional reversal of the doctrine. The matter has been before Congress almost continuously since 1956, and legislative interest in this issue remains strong.<sup>48</sup>

This seems to be exactly the point. From 1955 on, statutory silence (or indecision) was the result of gridlock on a tough issue.

In the Wilderness Act that emerged from this intense debate, Congress sided with neither camp. Instead, it punted on the issue and inserted this language: “Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal

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47. 104 CONG. REC. 6344 (1958) (“CONG. REC.”).

48. Janice L. Weis, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight*, 15 HASTINGS CONST. L.Q. 125, 144 (1987). Professor Weis points out that, in Congress’s effort to craft what became the Wilderness Act, two bills were introduced to limit or disclaim reserved water rights and that both died when federal land management agencies opposed them.

Government as to exemption from State water laws.”<sup>49</sup> This amounts to Congress saying, “We’re not declaring one way or the other whether we intend to create a federal reserved water right for the purposes in this Act.” The federal government has argued that this odd language is simply a statement that Congress elected not to change the status quo.<sup>50</sup> It certainly is plausible that federal land agency representatives providing testimony to Congress believed the status quo would include established jurisprudence based on *Winters*, and that they could rely on the courts to interpret the new statute as implicitly including federal water rights.<sup>51</sup>

By adding “or denial” to the provision, Congress acceded to the Justice Department’s request that section 4(d)(6) not be read as disavowing any reserved water rights that might already exist on lands that would be designated as wilderness.<sup>52</sup> The result is that Congress, squarely facing the issue in the Wilderness Act, could not muster the votes either to establish any new federal property interest in water use or to limit any existing interest. Congress considered the matter and affirmatively declined to create federal reserved water rights. The 1980 Central Idaho Wilderness Act at issue in *Potlatch II* contains the identical section 4(d)(6) “neither yes nor no” language.<sup>53</sup>

It is our position that, where Congress debates the reserved water right question for a land designation and then declines to establish an associated water right by express language, there can be no implication that Congress intended to create the right. In fact, without an express reservation, the opposite implication arises. Put another way, where Congress debates the water right question and inserts language on the subject, the question can be only whether the language expressly creates a water right for the federal purpose. The question cannot be, “Does this implicitly create such a right?”

As a practical matter, all new federal land designations will deal with the question whether federal water rights are intended. Recent wilderness and similar land conservation designations bear this out.<sup>54</sup> Some expressly reserve water rights. Others expressly do not.

For example, in the Gila Box Riparian National Conservation Area legislation, Congress stated: “Congress hereby reserves a quantity of water sufficient to fulfill the purposes, as specified in subsection (a) of this section, for which the conservation area is established. The priority date of this reserved right shall be November 28, 1990.”<sup>55</sup>

49. Wilderness Act of 1968 § 4(d)(6), 16 U.S.C. § 1133(d)(6) (2012) (originally enacted as section 4(d)(7)). See also Act of October 21, 1978, Pub. L. No. 95-495, 92 Stat. 1650 (1978) (repealing former item (5) of section 4(d) and renumbering the remaining items).

50. Brief for Respondent at 28, In re SRBA Case No. 39576, Consolidated Subcase No. 79-13597, *Potlatch Corp. v. United States* 1998 WL 34301394, at \* 22 (Idaho 1998).

51. But see *infra* Part V. Any such belief would be misplaced because the so-called “acquiescence” concept would not apply to a new reservation.

52. See CONG. REC., *supra* note 47.

53. Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, § 7(a)(3), 94 Stat. 948-51.

54. See, e.g., An Act to establish the El Malpais National Monument and the El Malpais National Conservation Area in the State of New Mexico, to authorize the Masau Trail, and for other purposes, Pub. L. No. 100-225, 101 Stat. 1539 (1987); Washington Park Wilderness Act of 1988, Pub. L. No. 100-668, 102 Stat. 3961 (1988); Nevada Wilderness Protection Act of 1989, Pub. L. No. 101-195, 103 Stat. 1784 (1989); Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628, 104 Stat. 4469 (1990); Colorado Wilderness Act of 1993, Pub. L. No. 103-77, 107 Stat. 756 (1993); California Desert Protection Act of 1994, Pub. L. No. 103-433, 108 Stat. 4471 (1994).

55. 16 U.S.C. § 460ddd(f)(1) (2012).

In 1988 Congress established the City of Rocks National Reserve in Idaho, expressly disavowing federal water rights:

Nothing in this title, nor any action taken pursuant thereto, shall constitute either an express or implied reservation of water or water right for any purpose: Provided, That the United States shall retain that reserved water right which is associated with the initial establishment and withdrawal of the national forest lands which will be transferred to the Reserve under this chapter.

Obviously, Congress can explicitly set aside the water rights it deems necessary for any federal land designation, regardless of whether it is deemed a “reservation.” The express and forthright provisions in land designation statutes of the last thirty years or so appropriately dispense with the legislative dodge that is section 4(d)(6) of the Wilderness Act.<sup>56</sup> With regard to post-1955 designations, there is scant basis for a hope that the courts will come to the rescue and deliver up federal water rights in the face of informed silence. There would appear to be little question that the Doctrine’s practical scope now is reduced to those pre-1955 land reservation statutes that have yet to be evaluated by the courts.

#### IV. THE IDAHO SUPREME COURT CORRECTLY RULED THAT THE WILDERNESS ACT CREATED NO IMPLIED FEDERAL RESERVED WATER RIGHTS.

The centerpiece, or at least the most controversial, of the Idaho Supreme Court’s reserved water rights rulings is its decision on whether the Central Idaho Wilderness Act and previous Idaho wilderness designations had created federal reserved water rights. When the issue reached the Idaho Supreme Court, it initially upheld the federal government’s reserved right claims in a three-to-two decision.<sup>57</sup> A year later, following the grant of a motion for reconsideration and further briefing and argument, the court reversed itself and rejected the federal claims, again by a three-to-two vote.<sup>58</sup>

Justice Trout, referencing her further examination of the various reserved water rights cases before the court, observed that “we are faced with a situation far different from any other case in which the United States Supreme Court has applied the federal reserved rights doctrine.”<sup>59</sup> Justice Trout therefore changed her vote, writing a special concurrence adopting the position we urged in that litigation:

Because [at the time of *Winters*] Congress was not yet aware of the potential conflict between state and federal water rights, it was understandable that Congress could have remained silent about the existence of a water right, and yet still intended to reserve water for purposes of the reservation. Thus, through the holding in *Winters* and its progeny, the United States Supreme Court recognized

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56. This provision has been codified as section 4(d)(7), and is referred to by that designation in the Idaho Wilderness Areas whose rights were adjudicated in *Potlatch II*, including the Frank Church-River of No Return Wilderness, the Gospel-Hump Wilderness, the Selway-Bitterroot Wilderness, and the Sawtooth Wilderness. It also adjudicated the reserved water right question for the Idaho portion of the Hells Canyon National Recreation Area. Wilderness Act of 1964 § 4(d)(6), 16 U.S.C. § 1133(d)(6) (2012) (originally enacted as section 4(d)(7)).

57. *In re* SRBA Case No. 39576, Subcase No. 24546, *Potlatch Corp. v. United States (Potlatch I)*, 1999 WL 778325 (Idaho Oct. 1, 1999).

58. *In re* SRBA Case No. 39576, Consolidated Subcase No. 75-13605, *Potlatch Corp. v. United States (Potlatch II)*, 12 P. 3d 1260, 134 Idaho 916 (2000).

59. *Id.* at 1271, 134 Idaho at 927 (Trout, J., concurring).

a federal reserved water right where, had Congress thought about it, it would have believed water was necessary to accomplish the purposes of the reservation.

... Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a water right is necessary to fulfill the purposes of the reservation.<sup>60</sup>

Justice Kidwell, also specially concurring with the majority, stated that “application of the federal reserved water rights doctrine is not appropriate where Congress has expressly discussed, and then refused to reserve, water rights.”<sup>61</sup> He went even further, contending that the Act contains an express rejection of reserved rights:

It is well settled law that the canon of legal construction known as the implied reservation of water rights doctrine is not applicable where the legislation expressly provides for federal exemption from state water law, as is the case here . . . . Rather, the history, the record, and the words of the Act, amply demonstrate that the intention of the drafters was to expressly disclaim a reservation of water for the named Wilderness Areas.<sup>62</sup>

Justice Schroeder’s opinion for the majority is harder to pin down. Unlike Justice Trout, who expressed doubt in the continued vitality of the Reserved Rights Doctrine with respect to these modern statutes, the majority opinion apparently embraces the Doctrine even as to modern legislation but concludes that the Doctrine as applied does not call for an inferred right here. For instance, he distinguishes cases like *Cappaert* not because they dealt with pre-1955 legislation but because the need for a federal water entitlement was more compelling and obvious there than in these wilderness areas.<sup>63</sup> Tracking the words of the Doctrine, he concludes at one point: “There is no indication ‘that without the water the purposes of the reservation would be entirely defeated.’”<sup>64</sup> This conclusion is driven largely by the court’s recognition of the limited practical effects of reserving or not reserving water rights.<sup>65</sup> In essence, the majority found that, regardless of whether water would serve a primary purpose of this wilderness, the statute did not reserve a water right.

Yet other parts of the majority opinion stray from the wooden application doctrine. The opinion contains a detailed and practical evaluation of the legislative history leading to the conclusion that “a reservation of water flowing into the wilderness [area] was not

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60. *Id.* at 1270–71, 134 Idaho at 926–27.

61. *Id.* at 1272, 134 Idaho at 928 (Kidwell, J., concurring).

62. *Id.* at 1271, 134 Idaho at 927 (Kidwell, J., concurring). Justice Kidwell’s conclusion that the drafters expressly disclaimed a reservation of water was premised on section 4(d)(6) (a/k/a section 4(d)(7)). His reasoning was that by using the term “claim” in the provision, “Congress provided that federal agencies were not exempt from state water laws,” and that by including “denial,” it was specifying only that “no existing federal water rights would be changed or denied by the Act.” *Id.* at 1272, 134 Idaho at 928. This certainly is a plausible reading of the provision, and it adds up to a conclusion that no new water rights were being created under federal law.

63. See *Potlatch II*, 12 P.3d 1260, 1265, 134 Idaho 916, 921.

64. *Id.* at 1266, 134 Idaho at 922 (quoting *United States v. New Mexico*, 438 U.S. 696, 700 (1978)).

65. CONG. REC., *supra* note 47, at 6344.

in the contemplation of Congress.”<sup>66</sup> This focus on determining congressional intent (as opposed to evaluating whether primary purposes will be frustrated) is in keeping with the authors’ view that the Doctrine is an aid to statutory construction, not a rule of law. Yet the majority opinion seems to see it as both.

The wilderness reserved water right portion of *Potlatch II* has attracted criticism in the law journals.<sup>67</sup> The argument is that, in reversing itself on rehearing, the Idaho court ignored *Winters* and its progeny and repudiated the implicit intent of the Wilderness Act.<sup>68</sup> Some of the commentators say that the decision “deprived water to” this Idaho wilderness.<sup>69</sup> These commentators also decry the evident role of politics in the decision after the court granted rehearing at the request of the State and its allied private water right holders.<sup>70</sup>

It is unfortunate that political overtones likely will be affixed permanently to the decision. It happened that Idaho Supreme Court Justice Cathy Silak, the author of *Potlatch I*, faced a retention election a few months after the opinion was issued.<sup>71</sup> This gave rise to a drama that, in our view, should not be visited on any judiciary. While the State of Idaho and private parties sought rehearing on the matter, a challenger announced his candidacy for Justice Silak’s seat on the bench and identified her wilderness reserved water rights opinion as a reason he believed she should be replaced.<sup>72</sup> Justice Silak then was defeated in the election, but served out her term, participated in the *Potlatch II* decision, and authored the dissenting opinion in the case.<sup>73</sup> (Justice Walters concurred in Justice Silak’s dissent and wrote a separate dissent.)<sup>74</sup> It is not surprising that, given this backdrop, some commentators would conclude that the decision on rehearing, and Justice Trout’s change of position, resulted not from legal reasoning but from political pressure.<sup>75</sup>

We think that is wrong and unfair. We contend that the court erred in its first opinion on the wilderness reserved water rights question, that rehearing was appropriate, and that Justice Trout, in changing her vote, correctly analyzed the Doctrine in the context of the 1964 and 1980 wilderness statutes. The original opinion essentially applied a rote syllogism, as had the *Block/Lyng* court, without grappling with the argument—which had been presented to it (but not to the *Block/Lyng* court)—that a refusal to act on a debated point does not establish the property interest by implication. Justice Trout recognized and addressed this argument despite the political background noise.

In examining congressional intent, the Idaho Supreme Court recognized the practical reality of congressional politics. It is not reasonable to conclude that Idaho’s former Senators Frank Church and Jim McClure would have promoted legislation containing a preemptive federal water right whose very existence would require shutting down all new

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66. See *Potlatch II*, 12 P.3d 1260, 1267, 134 Idaho 916, 923 (2000).

67. See generally, Blumm, *supra* note 4; Hobbs, *supra* note 4.

68. Blumm, *supra* note 4, at 201.

69. *Federal Reserved Water Rights & America’s Rivers*, Columbia Inst. for Water Policy (Nov. 2006), <http://www.columbia-institute.org/pdf/FedReservedWaterRights.pdf>.

70. *Id.*

71. Blumm, *supra* note 4, at 188.

72. John D. Echeverria, Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections, 9 N.Y.U. ENVTL. L.J. 217, 247–48 (2001).

73. *Potlatch Corp. v. United States*, 12 P.3d 1260, 1273, 134 Idaho 916, 929 (2000) (Silak, J., dissenting).

74. *Id.* at 1283, 134 Idaho at 939.

75. Blumm, *supra* note 4, at 207.

water-dependent activity in the communities upstream of the wilderness areas being created.<sup>76</sup> On rehearing, the Idaho Supreme Court recognized as much:

Congress could not and would not have passed a bill that implied a water right that would prevent the appropriation of water under state law beyond the boundaries of the wilderness areas. There was no more important person than Frank Church in the development of wilderness legislation. A review of the Frank Church papers brings home the reality that Senator Church would not have advocated or voted for the Wilderness Act but for his understanding that the Act would not cripple the economic growth of portions of Idaho outside the wilderness.<sup>77</sup>

This “focus on Congress’s intent” analysis contrasts sharply with the mechanical application of a law-review-based doctrine that has dominated the debate for the last forty years or more. As Justice Schroeder said, “Little about the background and principles of *Winters* is applicable in this case.”<sup>78</sup> Justice Trout’s concurrence was even more direct: “I have come to question the continued vitality of the doctrine.”<sup>79</sup>

The United States—whose briefing and argument to the Idaho Supreme Court had studiously avoided debating the points that we, as Potlatch Corporation’s attorneys, raised about legislative intent in light of Congress’s post-*Pelton Dam* attention to the water question—determined not to seek U.S. Supreme Court review of this decision.

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76. It is possible that many in Congress never understood this, thinking that somehow reserved rights have effects only within the reservation itself. To be sure, most wilderness reserved water right situations will require little or no analysis of the curtailment issue because most of these areas are in upstream, headwaters locations. Because wilderness instream flow rights are non-consumptive, they have no adverse effect on downstream water uses. Likewise, reserved rights for such areas are largely redundant with the land use restrictions provided by the Wilderness Act. For instance, the reserved rights fight in the *Sierra Club v. Block* line of cases was an academic debate over headwater wilderness driven primarily by concerns over political and legal precedent. The situation in Idaho is far different. Three wilderness areas were at issue: the Frank Church-River of No Return, the Gospel-Hump, and the Selway-Bitterroot. The first two of these are anything but headwater areas. Resorts, industries, agricultural properties, and even whole towns are located upstream of these areas. Indeed, a significant part of the debate over the boundaries of the Frank Church Wilderness was aimed at making sure that certain upstream mining properties were excluded through the time-honored “cherrystem” technique of gerrymandering. Thus, federal reserved rights with priority dates reaching back to 1964 (Selway-Bitterroot), 1978 (Gospel-Hump), and 1980 (Frank Church) would have the power to curtail uses upstream that have come on line since that date, and potentially to block all future development in these upstream valleys and inholdings—despite the fact that these areas had been excluded from the wilderness specifically so that they could continue to grow. Indeed, the claims reached not only upstream surface users, but up-gradient ground water users.

On the other hand, even the federal government did not suggest that such development upstream of wilderness areas threatened to dewater stream segments in the wilderness; the potential for upstream development is modest in the Idaho situation. This was borne out by the settlement of instream flow quantities in the companion WSRA reserved water right case, which concerned several river segments, including two (the Salmon River and its Middle Fork) passing from these same private lands upstream into wilderness downstream.

Indeed, Justice Schroeder, writing for the majority, premised the Court’s conclusion that there was no implied reserved right on these practical observations. *Potlatch II*, 12 P.3d at 1266–67, 134 Idaho at 922–23.

77. *Potlatch II*, 12 P.3d at 1268, 134 Idaho at 924.

78. *Id.* at 1264, 134 Idaho at 920.

79. *Id.* at 1270, 134 Idaho at 926 (Trout, C.J., specially concurring). We take Chief Justice Trout’s comment to mean that she doubts the continued vitality of the Doctrine as applied to post-1955 statutes in which Congress was plainly aware of the reserved water rights issue but chose not to expressly reserve rights.



*Potlatch II* is not a paragon of clarity, and the outcry over the targeting and then electoral defeat of Justice Silak may overshadow the opinion's substance in the minds of many. However, the point remains that, in Idaho's SRBA, the Idaho Supreme Court (or at least the special concurrences of Chief Justice Trout and Justice Kidwell) did what no other court or commentator had done in evaluating the implied federal reserved water rights doctrine: really address what the Doctrine is all about. And the court got it right. Where Congress considers and debates the water rights question in a land reservation statute, and then fails to establish a water right expressly, no federal water right can be implied.

#### V. THE IDAHO COURT'S RULING ON RESERVED WATER RIGHTS IN THE WILD AND SCENIC RIVERS ACT.

In contrast, the Idaho court found that section 13(c) of the 1968 Wild and Scenic Rivers Act<sup>80</sup> expressly reserves a federal water right, leaving only the question of the quantity to be sorted out through litigation.<sup>81</sup> Because two branches of Idaho's Salmon River—both carrying WSRA protection—pass through, or border, the Central Idaho Wilderness, this went a long way toward achieving what the Wilderness Act did not in terms of a water right. The state, private parties, and the federal government settled the quantity issue, negotiating specific amounts in various river reaches with subordinations accommodating certain amounts of future upstream development.<sup>82</sup>

Still, the water rights language in the WSRA deserves comment, and is a further illustration of the point of this article. The WSRA actually contains two sections dealing with the subject.<sup>83</sup> Section 13(b) essentially repeats the language used in the Wilderness Act: "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."<sup>84</sup>

Then, and despite the "nothing in this chapter" admonition in Section 13(b), Congress inserted into the chapter the following language constituting Section 13(c): "Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes."<sup>85</sup>

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80. 16 U.S.C. § 1284(c).

81. *Potlatch III*, 12 P.3d 1256, 1260, 134 Idaho 912, 916 (2000). With the possible exception of *Cappaert*, which involved a specific water level in a natural pool, federal reservations of water rights have not been accompanied by any statement of quantity, either in rate of flow, volume, or lake level. The question of quantity is left to further adjudication by the courts or administrative processes. This article does not address the quantification process other than to note that, as was the case in Idaho, it is most likely to be resolved by negotiation.

82. This and other reserved water rights settlements really constitute the most significant achievements pertaining to federal reserved water rights in the Idaho's Snake River Basin Adjudication, and should serve as models for settlements of similar claims in other states. The WSRA negotiators, which included Mr. Fereday, recognized that there is sufficient water to accommodate these wild areas and river reaches—which surely need water—and a reasonable amount of future water diversions for communities and businesses upstream. The settlement document can be found on the Idaho Department of Water Resources' website.

83. *See generally* 16 U.S.C. §§ 1271–1287 (2015).

84. 16 U.S.C. § 1284(b).

85. 16 U.S.C. § 1284(c).

These provisions together have been described as “a non sequitur”;<sup>86</sup> “confusing,” “elliptical,” “back-handed,” and “obliquely”;<sup>87</sup> “a classic non-sequitur”;<sup>88</sup> and “negatively stated.”<sup>89</sup> As Professor Gray summed it up, “Making sense of these seemingly contradictory provisions is no easy task.”<sup>90</sup> Nonetheless, he and other scholars have concluded that, despite their obscurity, they amount to an express reservation of a federal water right.<sup>91</sup> The authors, who (as noted in footnote 11, above) were Potlatch Corporation’s counsel in the litigation, had argued that the provision is not enough to accomplish this because it takes no position but rather anticipates, and defers to, a future judicial construction of the language. The argument was that such legislative avoidance and an attempted hand-off to another branch of government could not combine to create an entitlement only Congress can create. While the Idaho Supreme Court disagreed, this argument likely would be credible in other courts, including the U.S. Supreme Court, should a WSRA case ever find its way there.

VI. POST-1955 RESERVATIONS INVOLVE NO CONGRESSIONAL  
“ACQUIESCENCE” IN THE SUPREME COURT’S RESERVED RIGHTS  
RULINGS.

The courts have held that in certain circumstances Congress, by deliberately declining to amend a statute to override a court’s interpretation of it, may be deemed to have acceded to that judicial interpretation. Professor Blumm, in his critique of *Potlatch II*, argues that section 4(d)(6) of the Wilderness Act demonstrates that Congress had acquiesced in the concept that the Act was intended to reserve federal water rights by implication.<sup>92</sup> We respectfully disagree.

Professor Blumm stoutly criticizes the decision in *Potlatch II*. After making the standard argument that wilderness enactments, such as those at issue in Idaho’s Snake River Basin Adjudication, are reservations whose primary purposes require water,<sup>93</sup> Professor Blumm then turns to the argument we made to the court in that case: For post-1955 statutes that were adopted after debate about the reserved rights issue, the courts no longer have any basis to find implied congressional intent to create water rights. Professor Blumm dismisses this rationale with the argument that Congress was entitled to rely on

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86. Fed. Water Rights of the Nat’l. Park Serv., Fish & Wildlife Serv., Bureau of Reclamation, and Bureau of Land Mgmt., 86 Interior Dec. 553, 607 n.99 (1979).

87. Brian E. Gray, *No Holier Temples: Protecting the National Parks Through Wild and Scenic River Designations*, 58 U. COLO. L. REV. 551, 555, 568, 576 (1988).

88. MICHAEL C. BLUMM, 4 WATERS AND WATER RIGHTS § 37.03(a)(4) at 37–67 n.427 (Mathew Bender & Co. 1991).

89. PAMELA BALDWIN, CONG. RESEARCH SERV., RL30809, WATER RIGHTS AND THE WILD AND SCENIC RIVERS ACT 4 (2001), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL30809.pdf>.

90. Gray, *supra* note 87, at 556.

91. THEODORE B. OLSON, U.S. DEP’T OF JUSTICE, FEDERAL “NON-RESERVED” WATER RIGHTS 328, 356–60 (1982), <http://www.justice.gov/sites/default/files/olc/opinions/1982/06/31/op-olc-v006-p0328.pdf>.

92. See Blumm, *supra* note 4, at 199.

93. As indicated, even conceding that a particular primary purpose “needs water” to function does not mean that a “water right” is necessary. And in any event, and regardless of perceived need, the question still is whether Congress intended to establish a federal water right.

the courts to find that, in the Wilderness Act, Congress implicitly intended to create a federal water right:

[I]t is not clear why Congress cannot simply indicate that it intends to acquiesce to existing judicial interpretations of congressional intent. The doctrine of congressional acquiescence is quite well established, allowing the United States Supreme Court to conclude, for example, that major league baseball did not involve interstate commerce in 1972, and that state hydroelectric licensing laws were preempted by the Federal Power Act in 1990. Why congressional acquiescence should not apply to water rights is hardly clear. A conscientious legislator certainly could have voted for the 1964 Wilderness Act on the basis of the belief that section 4(d)(6) preserved existing law instead of changing it, especially considering Congress's rejection of a provision [after hearings on the Act] that would have expressly made state law govern federal water rights.<sup>94</sup>

Professor Blumm supports his theory without analyzing the acquiescence principle or considering how it might apply in the context of implied reservation of water rights. Instead, he simply cites two cases where the principle was in play, *Flood v. Kuhn* and *California v. Fed. Energy Regulatory Comm'n*, both of which found that a court or agency interpretation of a statutory provision is ratified when Congress amends that very statute without changing the provision.<sup>95</sup> None of the land management or designation statutes at issue in the SRBA, including the Wilderness Act, present such circumstances.

In addition, Congress has not, as Professor Blumm argues, "simply indicate[d] that it intends to acquiesce to existing judicial interpretations of congressional intent."<sup>96</sup> Indeed, this suggestion misses the point. Congress's Wilderness Act language ("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") is hardly an endorsement of any particular judicial interpretation, much less a statement as to whether and how prior judicial interpretations of other statutes should apply to the Wilderness Act.<sup>97</sup> The "no claim or denial" provision takes no position as to whether the statute pushes aside state water law. Some members of Congress hoped it would; others trusted it would not. The legislative language is emblematic of the deep divide on this subject, a divide that dominated the legislative debate. What we know is that Congress was fully aware and was moved to include language expressly declining to decide the matter. This is not a situation where it is appropriate to apply any type of congressional acquiescence.

The two cases Professor Blumm cites in support of an acquiescence argument in the Wilderness Act context actually demonstrate why that argument fails in the context of the Idaho wilderness water right litigation.

In *California*, the question was whether section 27 of the Federal Power Act required the Federal Energy Regulatory Commission ("FERC") to defer to the state's proposed minimum stream flow through a federally-licensed hydropower project.<sup>98</sup> The Court ruled that the dispute would present a "close question" if this were a case of first

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94. Blumm, *supra* note 4, at 199.

95. See *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490 (1990); *Flood v. Kuhn*, 407 U.S. 258 (1972).

96. Blumm, *supra* note 4, at 199.

97. Indeed, there still is no binding federal court ruling on whether the Wilderness Act established any water right.

98. See *California v. Fed. Energy Regulatory Comm'n*, 495 U.S. at 493.

impression.<sup>99</sup> This is because that provision expressly prohibits FERC from imposing license conditions that would “affect or in any way . . . interfere with” certain aspects of state water law.<sup>100</sup> However, the Court found that section 27 had been interpreted forty-four years earlier in *First Iowa*<sup>101</sup> to limit this prohibition in ways that leave FERC free to impose its own minimum flow obligation, and that Congress had amended that same Act without contradicting that interpretation.<sup>102</sup> The Court found “no sufficient intervening change in the law” to repudiate the *First Iowa* finding of federal supremacy even where it thwarts certain state-based water management goals.<sup>103</sup>

In other words, where the meaning of a particular statutory provision has been settled by the courts, and Congress then has had the opportunity, but has declined, to reject the judicial interpretation by amending the provision as part of other amendments to the same statute, then the argument arises that Congress has acquiesced in that judicial interpretation of that statute. With regard to reserved water rights, this was not the case with the Wilderness Act and other post-1955 land statutes. These are new, stand-alone statutes, not add-ons to pre-1955 land reservations.

The second case, *Flood*, is to the same effect. It involved a ballplayer’s attempt to enforce the Sherman Anti-Trust Act to overturn major league baseball’s “reserve clause.”<sup>104</sup> While the Act seemingly would apply, longstanding judicial precedent interpreting it had held that the Act did not apply to this subject matter. As the Court noted, quoting *Toolson v. New York Yankee*:

Congress has had the ruling [i.e., the longstanding *Toolson* interpretation] under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing anti-trust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.<sup>105</sup>

Again, the courts had interpreted the very statute in which major leaguer Curt Flood was seeking to find an entitlement, and on the very same point, and had found that the statute does not contain the protection he sought. Congress also had amended this very statute without upsetting that judicial interpretation.

Other decisions finding Congressional acquiescence likewise must be distinguished from the Wilderness Act water rights question. For example, in *Cannon v. Univ. of Chicago*,<sup>106</sup> the Court found an implied private right of action to enforce Title IX of the Civil Rights Act due to longstanding court interpretations of a nearly identical portion of the

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99. *Id.* at 497.

100. *Id.*

101. *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm’n*, 328 U.S. 152 (1946).

102. *California v. Fed. Energy Regulatory Comm’n*, 495 U.S. at 498–99.

103. *Id.* at 491.

104. *Kuhn*, 407 U.S. at 268.

105. *Id.* at 273 (quoting *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356, 357 (1953)) (bracketed material supplied).

106. *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

Act that Congress had left intact in the amendment process and for which the Court had long recognized a private right of action.<sup>107</sup>

The acquiescence principle might apply if, for instance, Congress amended the acts creating the Frank Church wilderness or the wild and scenic river designations in Idaho after the decisions in *Potlatch II* and *Potlatch III*. That would support an argument that Congress endorsed the rejection of reserved rights in the wilderness and embraced it for the wild and scenic rivers. In other words, legislative silence in amendatory acts subsequent to judicial interpretation of those acts properly implies congressional acquiescence. But that is not the situation here.

When the 1980 Central Idaho Wilderness Act was passed, there was no existing interpretation of the Wilderness Act on this subject. Congress simply was never presented with an opportunity to acquiesce in anything on the subject with regard to any of these statutes. We believe the acquiescence principle is not in play with regard to federal reserved water rights under the Wilderness Act or any other post-1955 land statute.

To illustrate, we offer this hypothetical. Suppose the Supreme Court interpreted a statute that conferred certain powers on states as implicitly conferring similar powers on territories. The acquiescence cases say that if Congress later amended that statute and did not take away those powers, it is fair to presume that Congress acquiesced in the prior interpretation. That makes sense, as do other applications of *stare decisis*.

It would be another thing altogether if Congress enacted a new, separate statute granting some other rights or powers to states, but said nothing about territories. Because the new law is not amending the same statute that received the judicial interpretation, contending that Congress acquiesced in the prior interpretation and intended the same new rights or powers for territories would not be a fair application of the acquiescence principle. The status quo is that territories do not have whatever new powers were extended to states by the new legislation. If acquiescence is to the status quo, the presumption works against including territories, if it applies at all.

This is all the more evident when Congress is not silent on the subject, but engages in a vigorous debate over whether to extend the new powers to territories as well as to states. Suppose the pro-territory and anti-territory factions deadlock. As a result, Congress passes legislation conferring the new powers only on states, perhaps with some “neither claim nor deny” gobbledygook thrown in as a sop to the pro-territory faction. There would be no basis to say that Congress acquiesced in an action it considered taking, but ultimately did not take. Indeed, the only thing the courts may fairly conclude is that only a minority in Congress “acquiesced” in the creation of the new powers. If there had been a majority, the legislation would have expressly extended the powers to territories.

Moreover, courts have declined to recognize acquiescence even in circumstances where Congress has amended the very statute in question and has chosen to leave well-known interpretations undisturbed. For example, in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the petitioner argued that section 10(b) of the Securities Exchange Act of 1934 imposes liability on aiders and abettors because “Congress ha[d] amended the securities laws on various occasions since 1966, when courts first began to interpret § 10(b) to cover aiding and abetting, but ha[d] done so without providing that

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107. *Id.* at 728.

aiding and abetting liability is not available under § 10(b).<sup>108</sup> One party asked the Court to “infer that these Congresses, by silence, ha[d] acquiesced in the judicial interpretation of § 10(b).”<sup>109</sup> The Court rejected that argument, reasoning:

Furthermore, our observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. “It does not follow . . . that Congress’ failure to overturn a statutory precedent is reason for this Court to adhere to it. It is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the [courts’] statutory interpretation . . .”<sup>110</sup>

Along these lines, it has long been recognized that basing decisions on congressional acquiescence is not favored.<sup>111</sup> In *Northwest Environmental Advocates v. EPA*, the Ninth Circuit stated that “the standard for a judicial finding of congressional acquiescence is extremely high.”<sup>112</sup> In *SWANCC*, the Court ruled that, “Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.”<sup>113</sup> The *SWANCC* Court referenced language in *Bob Jones Univ. v. United States*, in which the Court had found that “[a]bsent . . . overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.”<sup>114</sup> Furthermore, these cases involved agency interpretations of a statute that Congress later amended, a legislative sequence not found in any of the statutes said to create implied reserved water rights in the SRBA. This context is fundamentally different from that applicable to reserved water rights, where each land statute or presidential proclamation is unique and has been evaluated on its own without agency interpretation or prior court analysis in which to acquiesce.

In summary, where Congress is silent on an issue, and the silence is completely uninformed or seemingly inadvertent, a question may arise as to whether Congress intended to include a particular entitlement or mandate. Finding such intent by implication in these circumstances is possible where the statute would not make sense, or could not be carried into effect, without it. This is what *Winters* and its progeny were about. Likewise, finding such an intent by congressional acquiescence is possible where Congress

108. 511 U.S. 164, 186 (1994).

109. *Id.*

110. *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) and *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987)) (brackets and ellipses original).

111. *See, e.g., Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (“Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”); *Pension Benefits Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (noting that “Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction . . .”).

112. 537 F.3d 1006, 1022 (9th Cir. 2008) (citing *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 162 (2001)).

113. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng’rs (SWANCC)*, 531 U.S. 159, 169 (2001).

114. *Id.* at 169 n.5 (referencing 461 U.S. 574, 595, 600–01 (1983)).

truly has considered and can be said to have acquiesced in a judicial (or agency) interpretation of the statute in question, and has declined to amend the statute to overrule the interpretation. On the other hand, where Congress is fully informed about a subject, is asked by one side to create the interest and by the other not to, and then refuses to act, there can be no inference of an intent to create the interest, regardless of its alleged importance. Such are the circumstances of the Wilderness Act.

VII. OUT OF HABIT, OR THE PERSISTENCE OF MYTH, FEDERAL AGENCIES AND THE MAJORITY OF COMMENTATORS CONTINUE TO SUGGEST THAT IMPLIED WATER RIGHTS CAN AUTOMATICALLY ARISE FROM ANY NEW FEDERAL RESERVATION.

The Reserved Water Rights Doctrine has received substantial commentary, almost none of which grapples with the question we take up here. Generally, these commentators see the Doctrine as an immutable rule of law—"if X (a reservation for which water is seen as necessary), then Y (a reserved water right was created)"—rather than as a tool of statutory construction in which legislative intent must be deduced in the face of silence.

The extensive scholarship about the Doctrine typically focuses on whether a particular land designation was a "reservation," or whether water-implicating purposes are "primary" or "supplemental" to some other purpose.<sup>115</sup> These analyses would be appropriate for any pre-1955 reservation that might yet be evaluated, but they miss the point we make here. None of these authors grapples with the essential purpose of the Doctrine, which is to determine legislative intent.

Likewise, the federal land management agencies continue to avoid the question of the Doctrine's limitations, and do not mention the implications of *Potlatch II*. For example, the BLM's statement on reserved water rights suggests that the Doctrine is a rule of law that can apply to any public land reservation: "When the United States reserves public land for uses such as Indian reservations, military reservations, national parks, forest, or monuments, it also implicitly reserves sufficient water to satisfy the purposes for which the reservation was created."<sup>116</sup>

The BLM's website further states that "[t]he Wilderness Act reserves the amount of water within the wilderness area necessary to preserve and protect the specific values" involved.<sup>117</sup> Obviously, we disagree.

At least some conservation groups continue to misunderstand this rule. For example, the Columbia Institute's website states:

In 2000, contrary to 90 years of federal legal precedent, the Idaho State Supreme Court ruled that implied reserved rights do not exist in that state. According to the Idaho state court, Congress must include explicit language to reserve water rights for federal lands. This ruling deprived water to several Congressionally

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115. See, e.g., Star L. Waring & Kirk S. Samelson, *Non-Indian Federal Reserved Water Rights*, 58 DENV. L. J. 783, 791–92 (1981) (arguing that the Wilderness Act established no reserved water rights because wilderness was "supplemental" to national forest purposes).

116. *Federal Reserve Water Rights*, BLM.GOV, [http://www.blm.gov/pgdata/etc/medialib/blm/co/field\\_offices/denca/DENCA\\_Advisory\\_Council/extra\\_materials\\_for.Par.33214.File.dat/FedResWaterRights.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/co/field_offices/denca/DENCA_Advisory_Council/extra_materials_for.Par.33214.File.dat/FedResWaterRights.pdf) (last visited Nov. 27, 2015).

117. *Id.*

protected areas in Idaho, including the Frank Church-River of No Return Wilderness and the Sawtooth National Recreation Area.<sup>118</sup>

This misstates the Idaho court's ruling, and misses the point. The Idaho court found that implied reserved water rights do exist in Idaho, through Public Water Reserve 107, for example, and in the Hells Canyon NRA.<sup>119</sup> Also note the statement that the ruling "deprived water to several Congressionally-protected areas in Idaho." While it deprived the area of a federal water right for that reservation's purposes, it did not result, and no evidence suggests it is likely ever to result, in any dewatering or impairment of wilderness values.

California's Department of Water Resources also continues to describe the Doctrine as a simple, immutable rule of law, with no attention to the issue we raise here (and no mention of the Idaho cases): "The rationale used in the *Winters* decision on behalf of Native Americans also applies to public lands held by the federal government for national parks, wildlife refuges, national forests, military bases, wilderness areas, or other Public purposes."<sup>120</sup>

The Supreme Court has yet to take up a post-1955 reservation, and this issue will remain unsettled until it does. However, we predict the Court will see such reservations, each addressing the water right question, as either creating a federal water right by express language (which might be the outcome for any future WSRA review) or as creating no federal water right at all.

#### VIII. A BRIEF REVIEW OF THE IDAHO SUPREME COURT'S OTHER FEDERAL RESERVED WATER RIGHTS RULINGS—SOME STRAIGHTFORWARD, OTHERS CONFUSING IN LIGHT OF *POTLATCH II*.

This final section briefly reviews the Idaho Supreme Court's decisions, all arising from litigation in the SRBA, on other non-Indian federal reserved water right claims. None of these decisions was appealed to the United States Supreme Court.

##### A. Sawtooth National Recreation Area (2000).

In *State v. United States (Sawtooth NRA)*,<sup>121</sup> the Idaho Supreme Court found no reserved water rights were created for the Sawtooth National Recreation Area ("SNRA").<sup>122</sup> No party asserted an express reserved right.<sup>123</sup> The case turned on whether the establishment of these wilderness and recreation areas in 1972 carried with it an implied reservation of water rights.

118. Briefing Paper, Columbia Inst. for Water Policy, No. 11-06, Federal Reserved Water Rights & America's Rivers, (Nov. 2006), <http://www.columbia-institute.org/pdf/FedReservedWaterRights.pdf>.

119. See *supra* notes 100–101 and accompanying text.

120. *The Doctrine of Reserved Water Rights*, 4 (Cal. Water Plan Update, Reference Guide 2009), [http://www.waterplan.water.ca.gov/docs/cwpu2009/0310final/v4c19a06\\_cwp2009.pdf](http://www.waterplan.water.ca.gov/docs/cwpu2009/0310final/v4c19a06_cwp2009.pdf).

121. *State v. United States ("Sawtooth NRA")*, 12 P.3d 1284, 1290, 134 Idaho 940, 946 (2000).

122. Sawtooth National Recreation Area, Idaho, establishment, Pub. L. No. 92-400, §§ 1-15, 86 Stat. 612 (1972) (codified at 16 U.S.C. §§ 460aa (1992)).

123. *Sawtooth NRA*, 12 P.3d at 1288, 134 Idaho at 944. The State and Hecla Mining Company urged that the "no claim or denial" language contained in virtually all recent federal reservations constitutes an express denial of water rights. The Court rejected this claim, essentially saying that the boilerplate (which commentators have debated for years) means nothing at all.



The court's conclusion was consistent with its analysis in the companion case, *Potlatch II*. In reaching its decision on the SNRA, however, the court reverted to a more traditional analysis under the reserved rights doctrine.

The court began with a recitation of the traditional reserved rights analysis (primary versus secondary purpose; entire defeat of primary purpose). It then divided the SNRA into its wilderness and non-wilderness components. In each case, the court identified a relatively limited primary purpose (e.g., "protect that area from the dangers of unregulated mining") and then concluded that the purpose could be accomplished without a reserved water right.

While this "primary-secondary/entirely defeat" analysis seems logical, in practice it provides minimal structure to guide a court's analysis of the reserved water right question. For instance, the district court had seized on references in the SNRA statute to fish and wildlife, took judicial notice of the fact that "fish need water," and then concluded that a reserved right was essential to prevent the entire defeat of a primary purpose. The Idaho Supreme Court rejected this analysis, stating "[w]hile we agree that fish require water, 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."<sup>124</sup> The Idaho court's simultaneous ruling in *Potlatch II* appears to present a more predictable and appropriate analysis: instead of attempting to divine what purposes are "primary" or which would be "entirely defeated," the court indicated that the real question is whether Congress intended to establish a federal purposes water right where it actively debated the point and then declined to insert statutory language clearly doing so. With regard to post-Pelton legislation such as the 1972 Sawtooth National Recreation Area Act, and given the Idaho Supreme Court's decision in *Potlatch II*, it is not clear why this same court used a traditional "purposes" analysis in Sawtooth.

This may be explained in part by the fact that Potlatch Corporation, whose briefing was reflected in the court's decision in *Potlatch II*, was not a party to the Sawtooth litigation; the parties there argued the case on the more traditional theories adopted by the court.<sup>125</sup> Nevertheless, it is odd that decisions in such high visibility litigation would not be more thoughtfully integrated. In any event, the court in Sawtooth stepped through a traditional analysis, beginning with a ritual separation of primary and secondary purposes, before reaching the ultimate question: Did Congress intend to create reserved water rights?<sup>126</sup>

In Sawtooth, Justice Schroeder did not repeat his observation that the Doctrine has little to do with these modern, post-*Pelton Dam* statutes.<sup>127</sup> Nor did Justice Trout question the continued vitality of the Doctrine as it applies to this post-*Pelton Dam* statute.<sup>128</sup> One is left with the question why, if the implied reservation of water rights doctrine has no vitality in these modern land statutes, did the court resort to it at all in the very next case, on the very next page in the reporter?

Perhaps the answer is that the implied reserved rights Doctrine is deeply ingrained in the thinking of water lawyers; its status as a "doctrine" is difficult to criticize when it comes to pre-*Pelton Dam* land reservations. It likewise is difficult to shake the Doctrine's inherent elegance, or perhaps its talismanic appeal. Like the recitation of Latin phrases,

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124. *Id.* at 1290, 134 Idaho at 946.

125. *Potlatch II*, 12 P.3d 1260, 134 Idaho 916 (2000).

126. *Id.*

127. *See id.*

128. *See id.*

the Doctrine has a certain constancy, and provides some intellectual comfort. With respect to modern statutes, however, it is time to recognize that the Doctrine must be treated for what it really is: a canon of statutory construction. In each of these, Congress could not reasonably be seen as having implied a federal reserved water right by statutory silence (or dissembling) when the matter was front-and-center in the lawmakers' debates and in the national debate carried out in legislative committees by various congresspeople and interest groups.

#### B. Public Water Reserve 107

In 1998, the Idaho Supreme Court ruled on Public Water Reserve No. 107 ("PRW 107") in *United States v. State* (a/k/a Basin-Wide Issue #9, PWR 107).<sup>129</sup> In that case, the United States asserted claims in the SRBA to federal reserved water rights under PRW 107, an executive order issued by President Calvin Coolidge in 1926.<sup>130</sup> The order withdrew and reserved to the United States all springs and watering holes on unreserved federal land.<sup>131</sup>

The SRBA District Court denied the government's claims, but the Idaho Supreme Court reversed the holding, finding the 1926 executive order created federal reserved water rights.<sup>132</sup> Whether the court viewed this as an express or an implied entitlement is unclear. The court recited the law of implied reserved rights as the basis for the decision, but then declared, "[a]fter considering the plain and ordinary words of the enabling statutes and executive order underlying PRW 107, we conclude that PRW 107 evidences an express intention by Congress that reserves a water right in the United States."<sup>133</sup>

The court's statement suggests an oxymoron: If it is merely an intention (something unstated), then it is not express. If it is an express reservation, then there would be no point in reciting the law of implied federal reserved rights. Presumably the court meant that there was an "express intention by Congress to protect the water resource which gives rise to an implied reserved right." In any event, the Doctrine certainly can be considered in evaluating this reservation, because it predated *Pelton Dam*.

#### C. Multiple Use Sustained Yield Act

Following the Court's discussion of MUSYA in *New Mexico*, the Idaho Supreme Court rejected any notion of federal reserved rights under MUSYA in *United States v. Challis*.<sup>134</sup> The Idaho court ruled that the reserved rights doctrine applies only to "reservations" of land and that whatever MUSYA did, it did not reserve (or "re-reserve") land.<sup>135</sup> Hence, no implication of reserved rights could follow.

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129. *United States v. Idaho*, 959 P.2d 449, 131 Idaho 468 (1998).

130. *Id.* at 452, 131 Idaho at 471 (discussing executive order PRW 107, which was issued by President Calvin Coolidge).

131. *Id.* at 451, 131 Idaho at 470.

132. *Id.* at 453, 131 Idaho at 472.

133. *Id.* at 452, 131 Idaho at 471.

134. *United States v. City of Challis*, 988 P.2d 1199, 1207, 133 Idaho 525, 533 (1999).

135. *Id.* at 1207–08, 133 Idaho at 533–34.

#### D. Hells Canyon National Recreation Area

As another part of its decision in *Potlatch II*, the Idaho Supreme Court ruled that in establishing the Hells Canyon National Recreation Area in 1975, Congress expressly reserved sufficient water to satisfy the purposes of the reservation.<sup>136</sup> The court noted that the reservation was of both “land and water” and contained language exempting claims of water rights on certain rivers and tributaries.<sup>137</sup>

The court remanded for a determination of quantity, the minimum necessary to fulfill the purpose of the reservation.<sup>138</sup> Here the court cited *Cappaert*. The federal reserved rights doctrine, it seems, is being converted from a theory for implying new water rights into a mechanism for filling in the details of inartfully articulated but nonetheless express water rights. This is consistent with how the Idaho court handled the PWR 107 claims, discussed above.

The United States, the State of Idaho, and various water users ultimately settled the federal government’s claims to various amounts and locations of instream flows and lake levels under this reserved right.<sup>139</sup> Adopting the stipulation, the SRBA Court decreed some twenty-five separate reserved water rights, all for streams and lakes within the Hells Canyon NRA that are tributary to the Snake River in this reach; the rights do not include any flows in the Snake River itself.<sup>140</sup> The decree subordinates the reserved rights to all water rights and permits existing when the SRBA began in 1987, and also to future domestic and stock water rights.<sup>141</sup> Due to the scant private land ownership in the area, there likely is only limited opportunity for conflict between such future uses and the reserved water rights decreed by the SRBA Court.

#### E. Deer Flat National Wildlife Refuge

In *United States v. Idaho (Deer Flat NWR)*, the Idaho Supreme Court rejected a claim for federal reserved water rights associated with the Deer Flat National Wildlife Refuge on the Snake River, which was established by executive order in 1937.<sup>142</sup> The federal government asserted that the establishment of the refuge—and particularly the inclusion of certain river islands—carried with it implied reserved water rights.<sup>143</sup> The argument was that islands need water to remain islands.

In ruling against the United States, the Idaho court stepped through a traditional analysis of the Doctrine, identifying the primary purposes and then determining whether

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136. *Potlatch II*, 12 P.3d 1260, 1269, 134 Idaho 916, 925 (2000) (referencing Hells Canyon National Recreation Act of 1975, Pub. L. No. 94-199, 89 Stat. 1117 (1975) (codified at 16 U.S.C. §§ 460gg(1)-(13))).

137. *Id.* (referencing 16 U.S.C. § 460gg(a)-(b)).

138. *Id.* at 1270, 134 Idaho at 926.

139. *Order Approving Stipulation and Entry of Basin 79 Partial Decrees*, Subcase No. 79-13597, Hells Canyon National Recreation Area Act Claims, *In re* SRBA, District Court for the Fifth Judicial District of Idaho (May 2, 2005), [http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/Reports\\_Presentations/PDF/Basins/basin\\_78.pdf](http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/Reports_Presentations/PDF/Basins/basin_78.pdf).

140. *Id.*

141. *Partial Decree for Federal Reserved Water Right 78-12200, Hells Canyon National Recreation Area*, *In re* SRBA Case No. 39576, 2 (May 2, 2005), [http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/Reports\\_Presentations/PDF/Basins/basin\\_78.pdf](http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/Reports_Presentations/PDF/Basins/basin_78.pdf).

142. *United States v. Idaho* (“Deer Flat NWR”), 23 P.3d 117, 135 Idaho 655 (2001).

143. *Id.* at 122, 135 Idaho at 660.

water was essential to their achievement. In clinging to this rigid outline, the court appears, at first glance, to be more concerned with the rituals of the Doctrine than with the ultimate goal of divining legislative (or executive) intent. But when we turn to the merits of what the court did, we find it focusing once again on what the Executive intended.

Here is an example:

It is inconceivable that President Roosevelt in 1937, in the context of the dust bowl years, intended to give preference to waterfowl, or any other migratory bird, over people. The reclamation projects themselves assure that water in the Snake River will be controlled for the benefit of agriculture. . . . The presidents and other executives promulgating policy had the ability, and most likely the knowledge, that they could reserve a federal water right if that were essential. They did not do so expressly. And they did not do so by implication, considering the historical context in which they acted.<sup>144</sup>

This strongly suggests that the Idaho court's adherence to the rigid analysis of the implied reservation of water rights doctrine is more cosmetic than substantive. The court may continue to step through the minuet learned long ago from cases that considered pre-1955 reservations. At the end of the dance, however, the court plainly is more interested in the political reality of the congressional grant: what did Congress intend, and what was the context? While the oft-repeated sentence from *Cappaert* may continue to attract the most attention on this subject, the Idaho court's approach reminds us that the Supreme Court in *Cappaert* and other decisions has stressed that the point of the exercise is to determine legislative intent.

Thus, in Idaho both "old" and "new" land reservations have been subjected to an increasingly vigorous inquiry when it comes to the question whether federal reserved water rights can be found by implication. Simply reciting that "this reservation needs water" no longer appears to be sufficient.

## IX. CONCLUSION

The U.S. Supreme Court has never applied the Federal Reserved Water Right Doctrine where the statute in question was enacted after debate on the reserved water right question. The Court certainly has never applied the Doctrine where, as in the Wilderness Act example, the statute's text explicitly spells out a non-decision and the legislative history further enforces the conclusion that Congress, though fully informed, chose to avoid the issue. We predict the Court never will find an implied federal water right in such circumstances.

On the other hand, when legislation is silent on the subject and where the debates reveal no discussion about water rights, the traditional reserved water rights analysis presumably would still be in play. However, those statutes enacted after *Pelton Dam*, as a practical matter, cannot be of this type. The Idaho Supreme Court in *Potlatch II* correctly ruled that the Wilderness Act establishes no reserved water right for Wilderness, and in that decision at least partially set forth the rationale argued here. The hope is that other courts and commentators also now will recognize the Doctrine for what it is: a guide to statutory construction where there is radio silence on the question of water rights.

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144. *Id.* at 128–29, 135 Idaho at 666–67.

By the way, this debate has nothing to do with being for or against wilderness. It relates instead to issues of judicial restraint and common sense.