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# Federal Reserved Water Rights in National Forest Wilderness Areas

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# COMMENT

## Federal Reserved Water Rights in National Forest Wilderness Areas

In *Sierra Club v. Block*,[1] a federal district court for the first time declared that federal reserved water rights exist in wilderness areas. The court also held that the Wilderness Act[2] imposed upon the Forest Service a statutory duty to protect wilderness water resources.[3] The court ordered the Secretary of Agriculture and the Chief of the Forest Service to submit a memorandum describing their plans to comply with that statutory duty.[4]

One means of protecting wilderness water resources is the assertion of the reserved rights that the *Block* court found to exist. Although the Forest Service has not asserted wilderness reserved rights in the past, it may choose to do so now that a court has removed the uncertainty surrounding their existence. This comment will examine the new federal water right created by the *Block* decision. First, it will trace the history of the Wilderness Act and the federal reserved rights doctrine. Then the *Block* opinion will be discussed and analyzed. Finally, the nature of wilderness water rights and the likely effects of those rights will be explored.

### Wilderness Preservation

*Administrative Wilderness Classification*

The movement toward wilderness preservation dates back to the enactment of the Forest Reserve Act of 1891,[5] which authorized the creation of forest reserves. Even though the Act was not preservation-oriented,[6] wilderness advocates nevertheless viewed the national forest system as a possible vehicle for wilderness protection.[7] Their optimism, however, was seemingly misplaced. Gifford Pinchot, the first Chief of the Forest Service, made it clear that wilderness preservation was not one of his priorities when he wrote that "[t]he object of our forest policy is not to preserve the forests because they are beautiful . . . or because they are refuges for the wild creatures of the wilderness . . . but . . . the making of prosperous homes . . . . Every other consideration comes as secondary."[8]

Despite the strong anti-preservation attitude reflected in its early policy, the Forest Service eventually came to perceive the forests as a source of recreational as well as economic value, and local officers were given limited authority to manage the forests for recreational use.[9] Among

1. Sierra Club v. Block, No. 84-K-2 (D. Colo. November 25, 1985).
2. Wilderness Act, P.L. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C.S. §§ 1131-36 (Law. Co-op. 1984)).
3. Sierra Club v. Block, No. 84-K-2, slip. op. at 27 (D. Colo. November 25, 1985).
4. *Id.* at 31.
5. Forest Reserve Act, ch. 561 § 24, 26 Stat. 1095, 1103 (1891).
6. Robinson, *Wilderness: The Last Frontier*, 59 Minn. L. Rev. 1, 4 (1975).
7. *See id.*
8. S. Hays, Conservation and the Gospel of Efficiency 42 (1959) (quoting letter from Gifford Pinchot to Robert V. Johnson (Mar. 27, 1904)).
9. Robinson, *supra* note 6, at 6-7.

these local officers was Aldo Leopold, then an assistant district forester, who in 1924 prompted the classification of an area within Gila National Forest as wilderness.[10] Other local officers followed suit, and five more designations were made within a year.[11]

Soon the Forest Service developed a nationwide wilderness policy and in 1928 promulgated Regulation L-20, the "first systematic program to reserve tracts of land for wilderness purposes."[12] L-20 provided for classification of "primitive areas" in which primitive conditions of "environment, transportation, habitation, and subsistence" would be maintained.[13] L-20 gave the local officers a great deal of discretion, however, and was loosely enforced.[14] It was replaced in 1939 with the "U-Regulations," which were designed to achieve greater protection and permanence for wilderness areas.[15] Classification under the U-Regulations proceeded slowly and was further delayed by the Second World War.[16] Apart from the slow rate of progress, wilderness advocates were bothered by the lack of permanence that accompanied administrative classification even under the U-regulations.[17] The preservationists feared that the Forest Service, under the existing administrative classification system, might declassify wilderness areas and put them to other uses.[18] Consequently, they sought legislative protection for the wilderness.[19]

*The Wilderness Act*

In the mid-50's, wilderness bills were introduced in both the Senate and the House.[20] Nine years and sixty-four bills later, the Wilderness Act[21] was enacted. A Senate committee observed that "[f]ew proposals in American legislative history have had more thorough study."[22]

After a short statement of policy, the Wilderness Act provides:

> [T]here is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas," and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness. . . . [23]

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10. *Id.* at 7.
11. *Id.*
12. J. HENDEE, G. STANKEY & R. LUCAS, WILDERNESS MANAGEMENT 61 (1978) [hereinafter cited as J. HENDEE].
13. *Id.* (quoting OUTDOOR RECREATION RESOURCES REVIEW COMM'N, WILDERNESS AND RECREATION: A REPORT ON RESOURCES, VALUES AND PROBLEMS (1962)).
14. Robinson, *supra* note 6, at 8; J. HENDEE, *supra* note 12, at 61-62.
15. Robinson, *supra* note 6, at 9.
16. *See* J. HENDEE, *supra* note 12, at 63.
17. *See* Robinson, *supra* note 6, at 10-11.
18. J. HENDEE, *supra* note 12, at 63.
19. *Id.* at 63-64.
20. *Id.* at 64.
21. Wilderness Act, 16 U.S.C.S. § 1131-36 (Law. Co-op. 1984).
22. S. REP. No. 109, 88th Cong., 1st Sess. 7 (1963).
23. Wilderness Act, § 2(a), 16 U.S.C.S. § 1131(a) (Law. Co-op. 1984).

In "inspired and poetic prose rarely found in public law,"[24] Congress defined wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[25] The Act further defines wilderness as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions."[26] Section 3(a) expressly designates as wilderness all areas within the National Forests that had been classified by the Secretary of Agriculture or the Chief of the Forest Service as "wilderness," "wild" or "canoe."[27]

Sections 3(b) and 3(c) outline the procedures by which additional areas may be designated, while section 4 describes the permitted and prohibited uses of wilderness areas.[28] Purposes to which the wilderness areas are devoted are "the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."[29] Prohibited uses include roads, motor vehicles, motorized equipment and motorboats, landing of aircraft, other forms of mechanical transport, and any structure or installation.[30] Section 4(d) makes "special provisions" regarding certain uses of wilderness. Permitted special uses include fire control, limited existing use of aircraft and motorboats, insect and disease control,[31] presidentially authorized water works,[32] limited commercial services,[33] and existing livestock grazing.[34] The Act further provides that the mining and mineral leasing laws continue to apply to National Forest wilderness areas until December 31, 1983; only those valid mining claims located before that date may be developed.[35]

After the passage of the Wilderness Act, wilderness advocates were secure in the knowledge that the Forest Service no longer possessed discretionary authority to declassify wilderness areas or modify the purposes for which wilderness areas were to be used. Except for the limited management directives found in the Act itself, however, the wilderness legislation did not significantly affect existing Forest Service policy. But the Act did impose upon the Forest Service a statutory responsibility to achieve the purposes that Congress established for wilderness areas.

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24. Cutler, *Statutory Designation and Administrative Planning: Complementary Approaches to Achieving Wilderness Objectives*, 16 IDAHO L. REV. 469, 470 (1980).
25. Wilderness Act, § 2(c), 16 U.S.C.S. § 1131(c) (Law. Co-op. 1984).
26. *Id.*
27. Wilderness Act, § 3(a), 16 U.S.C.S. § 1132(a) (Law. Co-op. 1984). This section also provided for future designation of wilderness areas within national parks, national monuments, national wildlife refuges and game ranges. *Id.* § 3(c), 16 U.S.C.S. § 1132(c).
28. Wilderness Act, § 3(b), (c), 16 U.S.C.S. § 1132(b), (c) (Law. Co-op. 1984).
29. *Id.* § 4(b), 16 U.S.C.S. § 1133(b).
30. *Id.* § 4(c), 16 U.S.C.S. § 1133(c).
31. *Id.* § 4(d)(1), 16 U.S.C.S. § 1133(d)(1).
32. *Id.* § 4(d)(4), 16 U.S.C.S. § 1133(d)(4).
33. *Id.* § 4(d)(5), 16 U.S.C.S. § 1133(d)(6).
34. *Id.* § 4(d)(4), 16 U.S.C.S. § 1133(d)(4).
35. *Id.* § 4(d)(3), 16 U.S.C.S. § 1133(d)(3).

WILDERNESS WATER RESOURCES

The idea that water is a necessary component of a wilderness area cannot be seriously questioned. Congress, however, did not prescribe the means by which wilderness water resources should be protected. In fact, Congress conspicuously declined to address the delicate issue of water rights for wilderness areas. Section 4(d)(7) of the Wilderness Act provides that "[n]othing 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."[36] This neutral statement was apparently intended to "continue the status quo"[37] concerning the acquisition of federal water rights. A determination of what constitutes the status quo requires an examination of the federal reserved water rights doctrine.

*The Federal Reserved Water Rights Doctrine*

The federal reserved water rights doctrine is a peculiar product of the common law. It permits the judiciary (who created the doctrine) to infer that Congress (who often ignores the doctrine) intended to reserve water rights for public lands that have been withdrawn from the public domain and reserved for a particular purpose. The Supreme Court has described the doctrine in the following terms: "[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[38]

The doctrine was foreshadowed by dictum in *United States v. Rio Grande Dam and Irrigation Company,*[39] decided in 1899. Nine years later, in *Winters v. United States,*[40] the Supreme Court held that Congress, in creating an Indian reservation, reserved water rights to fulfill the purpose of the reservation, thereby exempting the reserved water from appropriation under state law.[41]

For some time after *Winters,* reserved rights were considered to be nothing but "a special quirk of Indian water law."[42] But in 1963 the Supreme Court expanded the doctrine to include other federal reserva-

36. *Id.* § 4(d)(7), 16 U.S.C.S. § 1133(d)(6).
37. 86 Interior Dec. 553, 610 n.106 (1979).
38. Cappaert v. United States, 426 U.S. 128, 138 (1976).
39. 174 U.S. 690 (1899). In *Rio Grande Dam,* the defendant sought to build a private dam on the Rio Grande River in New Mexico. The federal government sued to enjoin the project on the ground that it would interfere with navigation. The Supreme Court held that the trial court erred by taking judicial notice that the river was non-navigable, and went on to say that "a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property." *Id.* at 703.
40. 207 U.S. 564 (1908).
41. *Id.* Citing *Rio Grande Dam,* the Court proclaimed that "[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." Winters v. United States, 207 U.S. 564, 577 (1908).
42. Trelease, *Federal Reserved Water Rights Since PLLRC,* 54 DEN. L.J. 473, 475 (1977).

tions. In *Arizona v. California*,[43] an interstate allocation case, the United States claimed reserved rights not only for Indian reservations, but also for "National Forests, Recreation and Wildlife Areas, and other government lands and works."[44] The Court, without analysis, concluded that "the principle underlying the reservation of water rights for Indian Reservations [is] equally applicable to other federal establishments. . . ."[45] More specifically, the Court ruled that "the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."[46]

The Supreme Court restated and further explained the reserved rights doctrine in *Cappaert v. United States*.[47] The Cappaerts were ranchers who sought permits for a change in use of water from their wells, over the protest of the federal government.[48] The government was concerned that the pumping of the wells might lower the water level of a pool in Devil's Hole Cavern, a national monument located near the Cappaert's ranch.[49] A reduction in water level would threaten the existence of a rare species of fish inhabiting the pool.[50] The Court had little trouble in concluding that since the national monument was established before the Cappaerts obtained their well permit, the government possessed a reserved water right senior to the Cappaert's well.[51] As a result, the Court held that the government was entitled to an injunction preserving the minimum amount of water necessary to protect the rare fish.[52]

The *Cappaert* decision represented the pinnacle of the federal reserved water rights doctrine. In the Court's next substantive reserved rights decision, it denied the government an asserted federal water right.

*Western Resistance and U.S. v. New Mexico*

The western states have forcefully resisted the reserved rights doctrine since its inception. The doctrine is understandably perceived as a serious threat to orderly state administration as well as a threat to existing private rights in scarce and valuable western water. The doctrine, at least in theory, does great violence to the well-established prior appropriation system, the dominant method of water allocation in the West. Prior appropriation is based on the "first in time, first in right" principle and the requirement of beneficial use.[53] When an appropriator satisfies the pertinent requirements under state law, his water right is perfected.

43. 373 U.S. 546 (1963).
44. *Id.* at 595.
45. *Id.* at 601.
46. *Id.*
47. 426 U.S. 128 (1976).
48. *Id.* at 133-34.
49. *Id.*
50. *Id.*
51. *Id.* at 138-147.
52. *Id.*
53. 1 W. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES, 14, 366 (1971).

An earlier perfected water right takes priority over a later one; in times of shortage, the junior (later) right may be cut off by senior (earlier) appropriators.[54]

In contrast, a reserved right is "not on record, not fixed in size, [and] not dependent on beneficial use."[55] The priority of the federal right corresponds to the date of the establishment of the federal reservation, not the date when the right is asserted.[56] The federal right may lie dormant between the date that the federal land is reserved and the date that the right is asserted and quantified.[57] Consequently, a determination that a reserved right exists may prejudice a water user who perfected his water right between the date of the establishment of the federal reservation and the subsequent quantification of the federal reserved right. During this intervening period, the extent of the federal water right is unknown. This element of mystery causes apprehension among private appropriators, state and private water developers, and the state officials who must allocate water resources.

From *Winters* through *Cappaert,* the states found little comfort in the Supreme Court's reserved rights decisions. But in 1977, the Court expressed a new-found hostility toward federal reserved rights. In *United States v. New Mexico,*[58] the Court for the first time rejected a federal reserved water rights claim. The *New Mexico* controversy began in 1970, when the State of New Mexico undertook an adjudication of water rights on the Rio Mimbres River. In that adjudication, the United States asserted reserved instream flow[59] rights for recreational, aesthetic, wildlife, and stock grazing purposes in Gila National Forest.[60] The government based its claim on the Organic Act of 1897[61] and the Multiple-Use Sustained-Yield Act (MUSYA),[62] enacted in 1960. These two acts, the government argued, showed that the original purposes of the National Forests included recreation, aesthetics, wildlife protection, and stock grazing, and that Congress intended to reserve water for those purposes.[63] The state district court and the New Mexico Supreme Court rejected this argument, and the government turned to the U.S. Supreme Court.

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54. *See id.* at 488-89.
55. Trelease, *supra* note 42, at 474.
56. *Id.*
57. *Id.*
58. 438 U.S. 696 (1978).
59. "Instream flow" refers to " 'use' in-place for fish and wildlife maintenance, recreation or aesthetic enhancement of a stream and associated shorelands." Tarlock, *The Recognition of Instream Flow Rights: "New" Public Western Water Rights,* 25 ROCKY MTN. MIN. L. INST. 24-1 (1979).
60. United States v. New Mexico, 438 U.S. 696, 698 (1978).
61. 16 U.S.C.S. §§ 473-482 (Law. Co-op. 1978).
62. *Id.* §§ 528-538.
63. The Organic Act of 1897 provides that "[n]o national forest shall be established, except to improve and protect the forest within the national forest or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States." 16 U.S.C.S. § 475 (Law. Co-op. 1978). The Multiple-Use Sustained-Yield Act of 1960 provides "[i]t is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. [These purposes] are declared to

The Supreme Court affirmed, holding that Congress did not intend to reserve water rights for the purposes asserted by the government. The Court, in interpreting the Organic Act of 1897, determined that the National Forests were created for only two purposes: to preserve timber and to secure favorable water flows.[64] The Court found that the additional purposes reflected in MUSYA were merely secondary uses of the national forests.[65] The Court held that where secondary uses were at issue, congressional intent to reserve water would not be inferred.[66] In fact, according to the Court, the opposite inference arose.[67] The majority concluded that this opposite inference was supported by the legislative history of the Organic Act.[68] Therefore, the court held, no water rights were reserved for the purposes asserted by the government.[69]

The cases discussed above represent situations in which the federal government chose to assert claims under the reserved rights doctrine. The government, however, is not the only beneficiary of federal reserved water rights. Federal water rights also benefit private organizations and individuals who use federal lands for recreation and other purposes. On occasion, a private party may feel that the federal government is not adequately pursuing potential reserved rights claims. This situation existed in *Sierra Club v. Block.*

## SIERRA CLUB V. BLOCK

Following *New Mexico,* there was apparently some disagreement over whether reserved water rights existed in wilderness areas. The Solicitor of the Department of Interior maintained that they did exist.[70] One commentator, applying *New Mexico's* "primary purpose" test, questioned the Solicitor's conclusion.[71]

In any event, no court had addressed the matter, and the Forest Service did not press the issue. In 1984, having grown impatient with the Forest Service, and fearing that the government would lose its wilderness reserved rights unless they were asserted, the Sierra Club sued the Secretary of Agriculture and the Chief of the Forest Service (hereinafter referred to as defendants) in federal district court for the district of Colorado.[72]

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be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897]. 16 U.S.C.S. § 528 (Law. Co-op. 1978). In *New Mexico,* the government argued that in MUSYA, Congress was merely explaining the original purposes of the forests. Thus, the government sought a reserved right with an 1897 priority for these purposes.

64. *New Mexico,* 438 U.S. at 707, n.14 (1978).
65. *Id.* at 714.
66. *Id.*
67. *Id.*
68. *Id.* at 705-13.
69. *Id.* at 718.
70. 86 Interior Dec. 553, 609-610 (1979).
71. Waring and Samelson, *Non-Indian Federal Reserved Water Rights,* 58 DEN. L.J. 783, 791-92 (1981).
72. Sierra Club v. Block, No. 84-K-2, slip. op. (D. Colo. Nov. 25, 1985).

Sierra Club sought a declaration that reserved rights existed in wilderness areas in Colorado's national forests, a declaration that the failure of the defendants to assert these reserved rights was arbitrary, capricious, unlawful and a violation of the public trust, and an order requiring the defendants to take such action as the court deemed necessary to protect the water rights.[73] In response, the defendants contended that the matter was not judicially reviewable and, alternatively, that "the existence of federal reserved water rights is uncertain and therefore, [they] could not have acted arbitrarily and unlawfully in not claiming those rights."[74] Several organizations (hereinafter referred to as intervenors) intervened as defendants to dispute the existence of the water rights.[75] They advanced three principal arguments. First, they argued that wilderness designations did not constitute withdrawals and reservations of federal lands. Second, they contended that the Wilderness Act established only secondary purposes of the national forests for which no reserved rights could be implied. Finally, they argued that even if there was a reservation of federal land, Congress did not intend to reserve water rights for wilderness areas.[76]

The court first addressed the threshold question of whether wilderness designation constitutes a withdrawal and reservation of federal land. The court defined "withdrawal" as "the act of removing certain lands from the operation of federal mining, homestead or other disposal and use-related laws."[77] "Reservation" was defined as "the dedication of federal lands to a specific federal purpose."[78] Although the question was one of the first impression, the court had no trouble finding that the Wilderness Act satisfied these definitions.[79]

Once the court determined that a withdrawal and reservation had been made, the intervenors' second argument was doomed. Since the Wilderness Act, in the court's view, effected an "entirely new reservation"[80] of federal lands, the relationship between its purposes and the original purposes of the national forests became unimportant. The Wilderness Act contained its own purposes; unlike the MUSYA discussed in *New Mexico,* it did not purport to add to those of the national forests. Moreover, all of the purposes of the Wilderness Act were found to be "primary" and "crucial."[81] In addition, the court reasoned, the wilderness was a nonconsumptive user of water and therefore wilderness reserved rights could not conflict with the original national forest purposes.[82] Thus, *New Mexico* was inapposite.

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73. *Id.* at 1-2.
74. Sierra Club v. Block, 615 F.Supp. 44, 45 (D. Colo. 1985).
75. *Block,* No. 84-K-2, slip. op. at 1.
76. Defendant-Intervenors Brief in Support of Their Motion for Summary Judgment, Sierra Club v. Block, No. 84-K-2 (D. Colo. filed Aug. 19, 1985).
77. *Block,* No. 84-K-2, slip. op. at 13.
78. *Id.*
79. *Id.* at 12-18.
80. *Id.* at 22.
81. *Id.*
82. *Id.*

Finally, the court addressed the issue of congressional intent. Under the *Cappaert* test, intent to reserve water would be inferred if "the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."[83] The court examined the purposes of the Act and determined that water was necessary to fulfill those purposes:

> It is beyond cavil that water is the lifeblood of the wilderness areas. Without water, the wilderness would become deserted wastelands. In other words, without access to the requisite water, the very purposes for which the Wilderness Act was established would be entirely defeated. Clearly, this result was not intended by Congress.[84]

The court declared that reserved water rights existed in the Colorado wilderness areas.[85]

The court then addressed Sierra Club's other requests for relief. It chastised the federal defendants for their failure to determine whether reserved rights existed, but found that because of the controversy and uncertainty surrounding the wilderness reserved rights issue, their conduct was not arbitrary, capricious, or otherwise unlawful.[86] The court determined, however, that the defendants must meet their "general statutory duty to protect wilderness water resources."[87] Accordingly, they were ordered to submit a memorandum to the court describing their plan to protect wilderness water resources.[88]

## ANALYSIS OF SIERRA CLUB V. BLOCK

### *The Existence of Wilderness Reserved Rights*

Applying the *Cappaert* analysis, it seems clear that reserved water rights exist in wilderness areas. When Congress designates an area within a national forest as wilderness, it effects a "secondary withdrawal" of federal land.[89] There is no Supreme Court precedent dictating that under the reserved rights doctrine a secondary withdrawal should be treated differently than an original withdrawal from the public domain. In fact, *Arizona v. California* supports the opposite conclusion. In that case, the

83. Cappaert v. United States, 426 U.S. 128, 139 (1976).
84. *Block*, No. 84-K-2, slip. op. at 24.
85. *Id.* at 8-9.
86. *Id.* at 28-29.
87. *Id.* at 29.
88. *Id.*
89. The secondary withdrawal doctrine is discussed in WHEATLEY, STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS (1969). Wheatley explains that with respect to national forests, "withdrawals within a reservation are referred to as 'secondary withdrawals' and present an important phase of the withdrawal process as it relates to forest reserves" *Id.* at 285. Wheatley also speaks to the concept of "reservation" as it relates to wilderness areas: "Clearly the national parks and wilderness exemplify situations where Congress has deemed that the contemplated use of the area warrants the permanent dedication of the lands for the specified purpose." *Id.* at 41, 499. Thus, under Wheatley's analysis, wilderness areas were both withdrawn and reserved by Congress.

Supreme Court granted reserved rights for Lake Mead National Recreation Area and Havasu Lake National Wildlife Refuge, both of which were secondary withdrawals.[90]

In addition, *Block* does not run afoul of *United States v. New Mexico*.[91] In *New Mexico*, the Supreme Court indicated that congressional intent to reserve water for secondary *uses* would not be inferred.[92] The Wilderness Act does not express secondary uses of national forests, but rather creates new federal reservations with their own primary purposes. In the wilderness situation, two possible events could trigger *New Mexico's* primary purpose test. First, a court could find that a particular water right was being asserted for a "secondary purpose" of the Wilderness Act. Second, Congress, at some future date, could attempt to expand the purposes of the Wilderness Act. Otherwise, *New Mexico* should not apply to wilderness reserved rights. Despite its hostile tone and its finding of congressional deference to state water law, *New Mexico* appears to be quite limited in scope. Unless the Supreme Court decides to broaden the *New Mexico* analysis to encompass secondary *withdrawals*, the *Block* ruling should stand.

*The Block Remedy*

The *Block* controversy is not yet over. The defendants were ordered to "submit a memorandum . . . describing their actions on remand and their plan to comply with their statutory duty to protect wilderness water resources."[93] The court noted that while the defendants' duty to meet their statutory obligations was "no longer subject to dispute," their method of fulfilling that duty was "a matter left to their discretion."[94]

Throughout the course of the *Block* proceedings, the Forest Service resisted the notion of asserting reserved rights. The agency contended that it possessed other means of protecting wilderness water resources.[95] The same argument was successfully used by the government several years earlier in *Sierra Club v. Andrus*.[96] In *Andrus*, the Sierra Club sought a declaration that federal reserved water rights existed in certain lands managed by the Park Service and the Bureau of Land Management.[97] It also sought an order requiring that federal officials define, assert, and protect the purported reserved rights.[98] The court rejected the claims, reason-

90. Arizona v. California, 373 U.S. 546, 601 (1963). While it is true that *Cappaert* refers to withdrawals "from the public domain," nothing in that case suggests that the reserved rights doctrine is limited to original withdrawals. Cappaert v. United States, 426 U.S. 128, 138 (1976).

91. 438 U.S. 696 (1978).

92. *Id.* at 702.

93. *Block*, No. 84-K-2, slip. op. at 31.

94. *Id.* at 29.

95. Sierra Club's Brief in Support of its Motion for Summary Judgment at 15, Sierra Club v. Block, No. 84-K-2 (D. Colo. filed June 10, 1985) [hereinafter referred to as Brief for Plaintiff].

96. 487 F. Supp. 443 (D.D.C. 1980).

97. *Id.* at 445.

98. *Id.*

ing that the federal officials possessed broad discretion in discharging their responsibilities to protect water resources on federal lands.[99] The reserved rights doctrine was just one method of achieving such protection.[100] The court suggested that other means might be more desirable, as those alternative means did not require litigation.[101] Finally, the court concluded that since there was no immediate threat to any of the federal lands at issue, the government's decision to refrain from asserting reserved rights was not improper.[102]

In *Block*, the Sierra Club argued that the reserved water right was clearly superior to the proposed alternatives.[103] Whether or not this is true, in light of *Andrus* it seems unlikely that the *Block* court will, or indeed can, force federal officials to assert reserved rights. Given the broad discretion that the *Block* defendants possess, any plan that they submit to the court will probably survive judicial review.[104]

This, however, does not mean that the *Block* decision is meaningless. *Block* is important because it removed any uncertainty that previously surrounded the existence of wilderness reserved rights. Armed with *Block*, the government can use the reserved right as a bargaining tool in negotiations with the states. If the government must resort to litigation, or if it is joined as a party to an adjudication, it can use the *Block* decision as authority for an assertion of wilderness reserved rights. In anticipation that such an event might occur, the remainder of this comment will explore the "new" federal water right.

## WILDERNESS RESERVED WATER RIGHTS

### *Extent of the Right*

According to *Cappaert*, a reserved water right encompasses "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[105] In defining the purposes of a federal reservation of land, courts look to the legislation which established the reservation.[106] The Wilderness Act designates areas "for preservation and protection in their natural condition. . . ."[107] Furthermore, Congress declared that "[e]xcept as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, educational,

99. *Id.* at 448.
100. *Id.* at 452.
101. *Id.* at 452.
102. *Id.* at 451.
103. Brief for Plaintiff, *supra* note 95, at 16.
104. The *Block* court, while finding that the Wilderness Act imposed a "general statutory duty to protect wilderness resources," concluded that the Wilderness Act did not impose a specific statutory duty to *assert reserved rights*. *See Block*, No. 84-K-2, slip. op. at 27, 29. The court noted Sierra Club's "attempts to prove that assertion of reserved water rights is the *only* means by which to protect the water resources," but found that "the briefs and the administrative record are simply inadequate to fully evaluate this issue." *Id.* at 29 (emphasis in original).
105. *Cappaert*, 426 U.S. at 138.
106. *See* United States v. New Mexico, 438 U.S. 696 (1978).
107. Wilderness Act, § 2(a), 16 U.S.C.S. § 1131(a) (Law. Co-op. 1984).

conservation, and historical use."[108] Congress defined a wilderness area as "an area of undeveloped Federal land retaining its primeval character and influence."[109] Taking these statements together, in order to fulfill the enumerated purposes and to retain the "primeval character" of wilderness areas, it would seem that all waters in wilderness areas should be left in their natural state. Thus, the federal government conceivably could claim the natural flow[110] of surface waters and groundwater aquifers, because if streamflow is allowed to be diminished the purposes of the Wilderness Act are arguably not achieved. Even though *Cappaert* limits the extent of a reserved right to the minimum amount of water necessary to fulfill the purposes of the reservation, it seems that in the case of wilderness areas, the minimum is natural flow.

Groundwater presents another interesting question. As the Supreme Court noted in *Cappaert,* "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater."[111] Although some commentators have interpreted *Cappaert* as an extension of the reserved rights doctrine to groundwater,[112] the case merely held that the federal government could "protect its water from subsequent diversion, whether the *diversion* is of surface or groundwater."[113] Several lower courts, however, have extended the reserved rights doctrine to groundwater.[114] In the context of wilderness areas, the government would have a very strong argument that Congress intended to reserve groundwater as well as surface water. A depletion of groundwater, if it posed a threat to the native vegetation of a wilderness area, could destroy the primitive nature of the area. This would interfere with the asserted purposes of the Wilderness Act.[115]

Apart from the purposes described above, the Wilderness Act contains "special provisions" which describe other uses for wilderness areas. Section 4(d)(6) provides that "[c]ommercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas."[116] This section raises the question of whether Congress intended to reserve water for commercial use in the wilderness areas. The Colorado Supreme Court, in *United States v. City and County of Denver,*[117] suggested that federal reserved rights could be used by permittees, licensees, and concessionaires who entered agreements

108. *Id.* § 4(b), 16 U.S.C.S. § 1133(b).
109. *Id.* § 2(c), 16 U.S.C.S. § 1131(c).
110. "Natural flow," as used in this comment, refers to the entire flow of the stream.
111. *Cappaert,* 426 U.S. at 142.
112. *See* Little, *Administration of Federal Non-Indian Water Rights,* 27B ROCKY MTN. MIN. L. INST. 1709,1738 (1982); Meyers, *Federal Groundwater Rights: A Note on Cappaert v. United States,* 13 LAND & WATER L. REV. 377, 378 (1978).
113. *Cappaert,* 426 U.S. at 143 (emphasis added).
114. *See* Comment, *The Application of Federal Reserved Water Rights to Groundwater in the Western States,* 16 CREIGHTON L. REV. 781, 803-808 (1983).
115. *See supra* text accompanying notes 25-35.
116. Wilderness Act, § 4(d)(6), 16 U.S.C.S. § 1133(d)(5) (Law. Co-op. 1984).
117. 656 P.2d 1 (Colo. 1982).

to "augment the usage and accessibility" of the National Parks.[118] From this reasoning, one might conclude that wilderness reserved rights would include water for "commercial services" authorized by the Act. If these uses were determined to be "secondary," however, the *New Mexico* "primary purpose" test would have to be satisfied. It seems unlikely that reserved rights for these uses would pass muster under *New Mexico.*

While an examination of the Wilderness Act provides some insight into the possible extent of wilderness reserved rights, the precise magnitude of those rights will not be determined until adjudication and quantification. Perhaps it could be demonstrated that a reservation of something less than the natural flow of wilderness waters will sufficiently protect the natural conditions of wilderness areas. This assessment, a difficult one, can only be made on the basis of complex scientific and technical research. A determination of the ultimate reach of wilderness reserved rights, therefore, awaits further action in the scientific and judicial arenas.

*Priority*

The value of a water right under the prior appropriation system is directly related to the priority of the right. As a general proposition, the holder of a junior water right is entitled to his share of water only after all senior users have been satisfied.[119] Accordingly, the priority of a water right is perhaps its most significant attribute.

Under the federal reserved rights doctrine, the priority of a reserved right corresponds to the date of withdrawal and reservation of the federal land. Before the enactment of the Wilderness Act, many areas within national forests were classified as "canoe," "wild" or "wilderness" by the Chief of the Forest Service and the Secretary of Agriculture.[120] At first blush, it might appear that these areas, designated as early as 1930, obtained a reserved water right with a priority based on the original administrative designation. After all, as applied by the Supreme Court, the reserved water rights doctrine recognizes executive withdrawals as well as congressional withdrawals.[121]

Upon closer inspection, however, it becomes clear that the administrative wilderness designations did not rise to the level of a withdrawal and reservation of federal land. The administrative designations were achieved under the Secretary's broad authority to issue rules and regulations and not under the executive withdrawal power.[122] While such designations may have had the "practical effect of withdrawing these lands so classified from any inconsistent or incompatible uses,"[123] a leading study on the withdrawal and reservation doctrine concludes that the adminis-

118. *Id.* at 34.
119. *See* 5 WATERS AND WATER RIGHTS § 410.1, at 410 (R. Clark ed. 1972).
120. J. HENDEE, *supra* note 8, at 69.
121. *See, e.g.,* Cappaert v. United States, 426 U.S. 128 (1976).
122. WHEATLEY, *supra* note 89, at 20.
123. *Id.* at 21.

trative wilderness designations "were not 'withdrawals' which legally segregated them from the underlying forest or park reservations."[124]

Legal segregation does occur, though, when Congress designates a wilderness area. The Wilderness Act itself designated fifty-four wilderness areas in 1964.[125] Consequently, reserved water rights for these areas have a 1964 priority. Wilderness areas designated after the enactment of Wilderness Act would have reserved water rights with a priority based on the date of congressional designation. To the extent that water use is regulated on the basis of priority, no wilderness reserved right will interfere with water rights perfected prior to 1964. Priority, however, is not the only attribute of a water right.

*Other Significant Attributes*

A federal reserved water right, once established through adjudication and quantification, should be afforded the same protections as a conventional appropriative right.[126] Apart from the rule of priority, other rules have developed which protect a water user against certain actions by even senior appropriators. For example, an appropriator can change his point of diversion only if the change will not injure other users on the stream, regardless of the respective priorities involved.[127] Likewise, a change in the use of appropriated water, or the place of use, can only be accomplished if it is not detrimental to other users, even those with junior priorities.[128] In addition, any transfer of a water right that is conveyed separately from its appurtenant land can be enjoined if it will cause harm to other users on the stream.[129] These different rules may be collectively referred to as the "no-harm" rule.[130]

The no-harm rule may become important in the area of wilderness reserved rights. One of the principal concerns of wilderness advocates is that wilderness water resources are threatened by water development projects. If a particular project requires the acquisition of water rights senior to the wilderness reserved right, the no-harm rule may be invoked to prevent injury to wilderness water resources.

*Loss of Reserved Rights*

With respect to the possibility of loss, a reserved right is treated much differently than a conventional appropriative right. A conventional appropriative right is subject to the requirement of beneficial use.[131] If a

124. *Id.* at 26.
125. J. HENDEE, *supra* note 12, at 69.
126. This follows from the proposition that a federal reserved water right, once quantified, is subject to state administration. This point was conceded by the government in United States v. City and County of Denver, 656 P.2d 1, 35 (Colo. 1982). It would seem that the government would enjoy both the benefits and the burdens of state administration.
127. W. HUTCHINS, *supra* note 53, at 625.
128. *Id.* at 633-41.
129. *See id.* at 476.
130. *See* D. GETCHES, WATER LAW IN A NUTSHELL 165 (1984).
131. *See* WATER AND WATER RIGHTS, *supra* note 119, § 413.1.

perfected water right is not applied to beneficial use for a period of time it may be lost through abandonment or forfeiture proceedings.[132] A federal reserved right, however, is not subject to the beneficial use requirement. As the Colorado Supreme Court noted in *United States v. Denver*,[133] "[f]ederal reserved water rights are immune from Colorado's non-use requirement to the extent necessary to fulfill the purposes of the reservation. Once the federal right has been quantified, that amount is then outside the state appropriation system."[134] Thus, after quantification, a wilderness reserved water right cannot be lost through failure to apply the water to beneficial use.

There is, however, at least one way that a federal reserved right can be lost. Prior to quantification, a federal reserved right may lie dormant. The right exists, even if unasserted, by virtue of the reservation of federal land. This principle was articulated in *Sierra Club v. Andrus* when the court explained that "even where there has been substantial appropriation by 'junior' appropriators, the rights of the United States remain senior and unimpaired. Further, it is immaterial whether or not private appropriators have knowledge of the federal reserved water rights."[135] But once a state court undertakes a stream adjudication, if the federal government intervenes or is joined as a party and fails to assert a reserved rights claim, it may be barred from asserting that right in future litigation.[136] This was the primary concern that prompted the Sierra Club to initiate the *Block* litigation. If the Forest Service decides to protect wilderness water resources by some means other than the assertion of reserved rights, wilderness reserved water rights may be lost through nonassertion.

*The Practical Effect of Wilderness Reserved Rights*

Because of the late priorities attached to wilderness reserved rights, the remote locations of wilderness areas and the fact that most wilderness areas are found at high elevations, it appears that wilderness reserved rights will have little effect on existing water users.[137] In terms of priority, wilderness instream flow rights would affect only those existing uses that are upstream of the wilderness area and have a later priority date than the date of the wilderness designation. At the present stage of water development and appropriation in the western states, a water right with a 1964 priority is not a serious threat.

A more significant effect of wilderness reserved rights is the government's ability to assert the no-harm rule to prevent transfers and changes in use, place of use, and point of diversion by *senior* appropriators. Some

132. *Id.*
133. 656 P.2d 1 (Colo. 1982).
134. *Id.* at 34-35 (citations ommitted).
135. Sierra Club v. Andrus, 487 F. Supp. 443, 450 (D.D.C. 1980).
136. *See id.* at 451. The court determined that the federal government was not bound by state court decrees establishing priorities because it was not a party to the proceedings.
137. The *Block* court noted that wilderness reserved rights "will probably have little effect on prior appropriators." *Block*, No. 84-K-2, slip. op. at 24.

wilderness areas contain private inholdings of land. For example, twenty of Colorado's twenty-four wilderness areas contain private inholdings with "appurtenant water sources."[138] If the owners of these parcels possessed water rights senior to the wilderness reserved rights, the government could invoke the no-harm rule to protect wilderness water. The no-harm rule could also protect the wilderness areas from injurious water development occurring upstream of wilderness areas.[139]

## CONCLUSION

Even though a court has now declared that wilderness reserved rights exist, the controversy is not yet over. The *Block* decision could be overturned on appeal,[140] or the Forest Service might put together a plan to protect wilderness water resources that does not depend on the assertion of reserved rights. If such a plan survives judicial review, and the Forest Service continues to ignore the reserved rights alternative, wilderness reserved rights could be lost through nonassertion. Conceivably, Congress could impose upon the Forest Service an express statutory duty to assert wilderness reserved rights. Congressional action, however, is unlikely. The Wilderness Act itself was the product of years of debate and compromise, and any further substantive wilderness legislation would probably meet resistance from western legislators. The *Block* case itself generated a good deal of controversy in the western states.[141]

Consequently, the future of wilderness water resources will depend on the attitude and actions of the Forest Service. The *Block* decision is valuable to the federal government because it provides leverage in negotiations with the states over the extent of federal water rights. In addition, if the federal government becomes a party to litigation, *Block* can be used to support a wilderness reserved rights claim.

The extent of wilderness reserved rights is at this point uncertain, but the language of the Wilderness Act suggests that the government could assert very broad claims for the wilderness. Whether the Forest Service will do so is another question. Even if such broad claims were successfully asserted, the practical effects of wilderness reserved rights appear to be minimal. Until the Forest Service or a court provides some guidance concerning the extent of the rights, however, uncertainty and apprehension will remain.

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138. *See* Brief for Plaintiff, *supra* note 95, at 20 n.12.

139. *Id.* at 25. Although most wilderness areas are located at high elevations, there is at least the possibility, in some cases, of upstream water projects. *Id.*

140. Both the defendants and intervenors have appealed the *Block* decision.

141. While the *Block* decision was pending, Colorado politicians apparently threatened to halt wilderness designations in the state until the case was resolved in their favor. At the same time, other environmental groups questioned the timing of Sierra Club's suit, as it caused political backlash during a critical period in the Colorado wilderness designation process. *Battle Lines Drawn on Water Rights,* Rocky Mountain News, Sept. 15, 1985 at 24, col. 1.