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## Protection of Water Flows for National Parks

*A. Dan Tarlock\**

### I. INTRODUCTION

In both the popular and scholarly literature on national parks, water flow management is given comparatively little attention compared to external threats, land acquisition,<sup>1</sup> human-wildlife conflicts and visitor management.<sup>2</sup> This is paradoxical because water flow values were at the heart of John Muir's original vision of the park idea and remain central to many units of the system. The falls of Yosemite, the Colorado through the Grand Canyon, Yellowstone Lake and the Everglades, are water bodies that are central to the purpose for which a national park was created. A recent meditation on John Muir's Yosemite experience describes his theologically unsound but otherwise valid "ecological" vision of a park that was subsequently lost with the development of the National Park Service:

Hetch Hetchy was a part of the flow of Nature. It was filled with waterfalls, and was the path of the Tuolumne River. It was the path of ancient glaciers, and a path new life had taken as it entered the mountains. And damming it was an act by men which bespoke their arrogance. Men who built dams believed that they could control and harness the flow of Nature. Hetch Hetchy was also a consummation, as all the inseparable sections of the flow were. It was not an 'exceptional' creation, since none of God's gardens were. It was part of a larger whole, and edenic valley. Yet

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\* Professor of Law, IIT Chicago Kent College of Law, A.B. 1962, LL.B. 1965, Stanford University. This article is a substantially revised version of a talk prepared for the University of Colorado School of Law, Natural Resources Law Center Conference on External Developments Affecting the National Parks: Preserving "The Best Idea We Ever Had" held at Aspen Lodge, Estes Park, Colorado, September 14-16, 1986. The author expresses his gratitude to the Center Director, Mr. Larry MacDonnell, for organizing this first major legal conference on national park management issues and for bringing together such a stimulating group of participants to help focus the diffuse legal issues involved in park protection policy.

1. E.g., J. LASH, K. GILLAM & D. SHERIDAN, *A SEASON OF SPOILS* 279-88 (1984).

2. R. FORESTA, *AMERICA'S NATIONAL PARKS AND THEIR KEEPERS* 223-59 (1984).

when men chose to stop its flowing life, and did so not for the farmers of the Central Valley but for the businessmen of the City of San Francisco, Muir saw in this action civilization's willingness to kill Nature for its own convenience. In theory—for the young Muir certainly—all dams in all valleys were arrogant gestures by men. When he insisted that damming Hetch Hetchy was damming Hetch Hetchy, he was seriously pointing to the arrogance of men who pretended that they were gods. It was a wild place, and civilized men preferred to have it tame and dead.

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The entire idea behind Yosemite Park, an idea so long in taking shape, was to hold inviolate the whole watersheds of the Merced and Tuolumne rivers. To violate that precedent was to damage the concept of a national park as more than a collection of scenic features. So it was that the principle of a national park as an ecological whole was also at stake. Worse, Yosemite had already been 'improved.' Hetch Hetchy should not suffer the same fate. Perhaps the most important contribution Muir had made to public policy was the idea that national parks contain both wild and pastoral ecological systems.<sup>3</sup>

Water-related values remain central to many national parks and other units of the system, but water management policies have historically been, for the most part, low visibility Park Service decisions. Most water issues were initially defined as internal Park Service or intradepartmental management problems. Early issues included debates over whether lakes and streams should be stocked with fish and the restriction of power boating on Yellowstone Lake.<sup>4</sup> More recent issues include the use of rivers for commercial rafting.<sup>5</sup> The Secretary of the Interior would seem to have adequate statutory authority to administratively set flow levels for rivers running through units of the system.<sup>6</sup> These flow levels would not, of course, preempt prior up or downstream water rights.

The general neglect of water flow management is even more paradoxical because conflicts between park preservation and water development have played a major role in defining the national park system and the role of the Park Service. John Muir's final split with Gifford Pinchot came

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3. M. COHEN, *THE PATHLESS WAY: JOHN MUIR AND AMERICAN WILDERNESS* 330-31 (1984).

4. See L. GARRISON, *THE MAKING OF A RANGER: FORTY YEARS WITH THE NATIONAL PARKS* (1983), for an account of a dedicated career manager's growing awareness of the lessons of ecology. The political battle over the restriction of power boating on Yellowstone Lake is recounted in *id.* at 287-89.

5. The Secretary's discretion to limit the number of raft trips on the Colorado through the Grand Canyon was upheld in *Wilderness Pub. Rights Fund v. Kleppe*, 608 F.2d 1250 (9th Cir. 1979), *cert. denied*, 446 U.S. 982 (1980). See also *Free Enterprise Canoe Renters Ass'n v. Watt*, 711 F.2d 852 (8th Cir. 1983). For a discussion of the relationship between Park Service enabling legislation and park management policies, see Tarlock, *For Whom the National Parks?* 34 *STAN. L. REV.* 255 (1981).

6. 16 U.S.C. §§ 1a-1, 3 (1985).

over the construction of Hetch Hetchy reservoir in Yosemite, and divided the conservation movement into the "wise use" and preservation wings. In fact, Hetch Hetchy led to the preservation movement's first great success—the 1916 creation of a separate National Park Service to protect existing parks from the Forest Service and the rest of the Department of the Interior.<sup>7</sup> Stephen Mather's early success in blocking irrigation and power developments on Yellowstone and Jenny Lakes in Wyoming<sup>8</sup> established the Park Service's policy of opposing encroachments on park units and laid the foundation for the great political battles over dams in Dinosaur National Monument and the Grand Canyon in the 1950s and 1960s. The national campaign to delete a dam at Echo Park in the Dinosaur National Monument, proposed as part of the Colorado River Storage Act, helped to revive natural area preservation as a popular political issue,<sup>9</sup> although ironically the Park Service "lost mastery of its own house" as park issues were increasingly defined in legislative and media arenas rather than within the Service.<sup>10</sup> Finally, the successful fight to prevent two "cash register" dams at either end of the Grand Canyon<sup>11</sup> confirmed the nationwide appeal of resource preservation and mobilized a great deal of academic and popular criticism of water development that was channeled into the environmental movement in the 1970s.<sup>12</sup>

There appear to be two primary reasons for the relative neglect of water flow issues. First, most national park water uses are non-consumptive, instream uses. The fortunate geographic location of many parks and units makes it possible to share without conflict rivers and streams that arise in the park with the major consumptive claimants, downstream users. Second, when water issues have arisen, they have

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7. See R. NASH, *WILDERNESS AND THE AMERICAN MIND* 161-81 (3d ed. 1983). For an excellent account of the campaign to establish the National Park Service that emphasizes the role of the Western railroads in promoting the national park idea, see A. RUNTE, *NATIONAL PARKS: THE AMERICAN EXPERIENCE* 82-105 (1979).

8. The story is told in H. ALBRIGHT, *THE BIRTH OF THE NATIONAL PARK SERVICE, 1913-1933*, at 103-15 (1985) (as told to R. Cahn). A 1919-20 drought in Idaho and Montana promoted Secretary of the Interior Lane to allow a Yellowstone survey by an Idaho irrigation district, and Montana districts soon demanded equal access. State congressmen introduced legislation to allow Yellowstone Lake to be dammed, but the fortuitous resignation of Secretary Lane produced a new Secretary who told Assistant Director Horace Albright, "we'll kill those bills." *Id.* at 107. In his 1919 annual report to the Secretary of the Interior, Mather announced that Park Service policy would be "no utilization of lakes within the Parks." *Id.* The issue arose again in 1920 after the passage of the Federal Water Power Act of 1920, but President Wilson signed the act only after Senator Jones of Washington promised to introduce legislation to protect the parks from Federal Power Commission jurisdiction. *Id.* at 114. The FPC did receive some applications for dams in parks but deferred them pending passage of the Jones-Esch amendment to the Federal Power Act, 16 U.S.C. § 797a (1982), which prohibits dams in parks which were in existence in 1921. Legislation authorizing the creation of new units sometimes specifically limits Federal Energy Regulatory Commission jurisdiction. See *infra* note 19.

9. See O. STRATTON & P. SIROTKIN, *THE ECHO PARK CONTROVERSY* (1959); R. NASH, *WILDERNESS AND THE AMERICAN MIND* 209-19 (3d ed. 1982).

10. R. FORESTA, *supra* note 2, at 51.

11. See R. NASH, *supra* note 7, at 227-37.

12. The role of cost-benefit analysis in the controversy is analyzed in Carlin, *The Grand Canyon Controversy: Lessons For Federal Cost-Benefit Practices*, 44 *LAND ECON.* 219 (1968).

arisen in the context of broader resource use conflicts and have been addressed through assessment mechanisms such as the National Environmental Policy Act of 1969,<sup>13</sup> the Endangered Species Act of 1973<sup>14</sup> and section 522 of the Surface Mine Coal Reclamation Act of 1977 (SMCRA), which allows the Department of the Interior to designate lands unsuitable for surface mining.<sup>15</sup>

There are four basic types of water use conflicts and each can raise separate legal issues. There are (1) public and private efforts to construct reservoirs that encroach on a national park system unit; (2) public and private activities that divert needed waters from the unit; (3) Park Service proprietary claims to waters that arise in the park or border it; (4) land use management problems along river corridors. River corridor management raises a number of complex land use control issues and will not be discussed in this article.<sup>16</sup> Water use conflicts between park system units and other water users do, however, occur and may increase in the future as pressures for the exploitation of resources near park boundaries increase, as more and more parks and system units are located in more populated areas, and as the management of all units is intensified.

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13. A major recent upstream threat was the proposed Alton-Warner Valley energy project in southern Utah. The project included a coal slurry pipeline, and it was alleged the ground-water pumping could impair the flow of the Virgin River through Zion National Park. See ENVIRONMENTAL DEFENSE FUND, ALTERNATIVE TO THE ALLEN-WARNER VALLEY ENERGY SYSTEM: A TECHNICAL AND ECONOMIC ANALYSIS (June 1980), reprinted in NATURAL RESOURCES L. CENTER, U. OF COLO. SCHOOL OF LAW, EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS: PRESERVING "THE BEST IDEA WE EVER HAD," (Sept. 14-16, 1986) [hereinafter EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS]. The project was blocked when the California Public Utilities Commission refused to allow the participation of two California utilities because there were less environmentally destructive energy alternatives to the proposed project. Mastbaum, *No Park is An Island: A Simple Solution for the Thorny Problem of Park Protection*, RESOURCE L. NOTES 7-9, No. 9 (U. of Colo. Nat. Resources L. Center Aug. 1986). For a comprehensive review of the relationship between federal land management and environmental quality statutes and national park protection, see Keiter, *On Protecting the National Parks From the External Threats Dilemma*, XX LAND & WATER L. REV. 355 (1985). For a review of recent congressional efforts to develop a new park protection policy, see Comment, *Protecting National Parks From Developments Beyond Their Borders*, 132 U. PA. L. REV. 1189 (1984).

14. 16 U.S.C. §§ 1531-1543 (1982 & Supp. III 1985). See generally Coggins & Russell, *Beyond Shooting Snail Darters in Pork Barrels: Endangered Species and Land Use in America*, 70 GEO. L.J. 1433 (1982); Smith, *Endangered Species Act and Biological Conservation*, 57 S. CAL. L. REV. 361 (1982).

15. SMCRA prohibits coal mining within the boundaries, including inholdings, of any national park or any adjacent mining that will adversely affect a park. 30 U.S.C. § 1272(e) (1982). The Act allows the Secretary to designate lands as unsuitable for coal mining, in part, to protect national park values from adverse effects such as altered drainage patterns. *Id.* § 1272. See *Utah Int'l. Inc. v. Department of the Interior*, 553 F. Supp. 872 (D. Utah 1982).

16. The Park Service is often given the authority to manage river corridors by a combination of federal acquisition of fee and scenic easement interests and cooperation with local land use authorities. *E.g.*, Cuyahoga Valley National Recreation Area, 16 U.S.C.A. § 460ff-4 (West Supp. 1986); Chattahoochee River National Recreation Area, 16 U.S.C.A. § 460ii-5 (West Supp. 1986). See generally Professor Sax's pioneering studies, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239 (1976); *Buying Scenery: Land Acquisition For the National Park Service*, 1980 DUKE L.J. 709; *Do Communities Have Rights? The National Parks As A Laboratory for New Ideas*, 45 U. PITT. L. REV. 499 (1984).

This paper examines the types of water use conflicts that involve the Park Service from both an historical and legal perspective. Its thesis is that in the past the resolution of important water flow controversies has been on an ad hoc political basis or by Park Service reaction to larger events. Now, however, there is a need to explore affirmative methods by which water-related park values can be protected.

## II. BACKGROUND

### A. *Park Incursions*

As a late addition to the Department of the Interior, the Park Service has historically had trouble protecting its turf from the politically stronger development agencies within the department. The Bureau of Reclamation, organized in 1902, got to some prime reservoir sites before the Park Service. Bureau of Reclamation reservoirs proved difficult to dislodge, and some parks had to incorporate irrigation and other reservoirs or be gerrymandered to exclude them.<sup>17</sup> Legislation was passed in 1921 to amend the Federal Water Power Act to prohibit Federal Power Commission (now Federal Energy Regulatory Commission (FERC)) licenses in existing national parks.<sup>18</sup> Post-1921 units are also often protected by specific limitations on FERC jurisdiction in the enabling legislation.<sup>19</sup> As the popularity of the national park idea and the Park Service grew, park proponents were able to mount national, single-issue political campaigns to block the construction of dams that would flood parts of units. The first great success came in the 1956 when a reservoir was deleted from the Colorado River Water Storage Act because it would flood part of the Dinosaur National Monument.

Despite the demonstrated clout of the anti-dam constituency and the end of the construction of large federal multiple-purpose reservoirs, parks remain threatened by encroachments from dams. Park Service policy remains that dams are not a permissible park use, but the use of some of the Grand Canyon National Park for reservoirs is still authorized in the enabling legislation "whenever consistent with the primary purposes of said park. . . ."<sup>20</sup> San Francisco has again cast its eyes on other possible

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17. The damming of Jackson Lake, now part of the Grand Teton National Park, in 1911 has been described as "an act of environmental desecration second only to the inundation of Yosemite's Hetch Hetchy Valley." R. RIGHTER, *THE CREATION OF GRAND TETON NATIONAL PARK* 9 (1982). See *id.* at 91-92, for an account of the debate over the inclusion of the artificial lake in the proposed park. The demand for irrigation water from the Cache la Poudre River on the northern edge of the Rocky Mountain National Park was accommodated by transferring 354 acres to the Forest Service, which authorized the dam. J. ISE, *OUR NATIONAL PARK POLICY* 215 (1961). Ironically, 75 miles of the Cache la Poudre are now designated a wild and scenic river. 16 U.S.C. § 1276(31) (1982).

18. 41 Stat. 1353 (1921) (codified at 16 U.S.C. § 797a (1982)).

19. *E.g.*, Big South Fork National River and Recreation Area, 16 U.S.C.A. § 460ee(f) (West Supp. 1986); Hells Canyon National Recreation Area, 16 U.S.C.A. § 460gg-2 (Cum. Ann. Pocket Part 1986); Chattahoochee River National Recreation Area, 16 U.S.C.A. § 460ii-3 (West Supp. 1986).

20. 40 Stat. 1178 (1919) (codified as amended at 16 U.S.C. § 227 (1982)). The section was amended in 1975 to substitute the utilization of lands formerly within the Lake Mead National Recreation Area. 88 Stat. 2091 (1975). The successful fight to keep two "cash-

dam sites in Yosemite. To avoid future political controversies, legislation has been introduced to prohibit all impoundments within national parks or monuments as well as new dams that would encroach on park values by flooding portions of a unit of the National Park System.<sup>21</sup>

*B. Protection of Park from Upstream Impoundments and Diversions*

Despite the possibility of future protection of water supplies in the parks, at least two national parks, one in the East and one in the West, are threatened by upstream water management activities. The Grand Canyon is downstream from Glen Canyon Dam and Lake Powell, and new reservoir release patterns may impair park values. In Florida, the ecological integrity of the Everglades National Park is threatened by a long history of altered upstream water flows.

The Colorado River is fully allocated between the upper and lower basin states by interstate compact, acts of Congress and Supreme Court decision.<sup>22</sup> In 1922 the basin states agreed to divide the waters between the Upper and Lower Basin states.<sup>23</sup> The Upper Basin states must deliver 75 million acre feet to the Lower Basin states over a ten year average. Congress authorized the construction of Glen Canyon Dam as part of the Colorado River Storage Project Act<sup>24</sup> to allow Arizona, Colorado, New Mexico, Utah, and Wyoming to meet their delivery obligation. The dam is upstream from the Grand Canyon and has materially altered the flow of the Colorado. Power generation is what in fact controls the operation of the dams on the river. When the Bureau of Reclamation announced its intention to expand the power generating capacity of the dam an important issue was raised: Whether the Colorado River in Grand Canyon National Park is only a conduit from the Upper to the Lower Basin or is also an integral part of the values for which the park was set aside.

A proposal to construct more generators was withdrawn after environmental opposition. A more modest one to upgrade the existing generators was substituted in its place. Environmentalists, the Park Service and commercial river runners expressed concern that the altered flows from "rewinding" the generators would have an adverse impact on the river in the canyon. The Bureau of Reclamation concluded that the "uprating" would have no significant environmental impact and prepared a proposed FONSI (Finding of No Significant Environmental Impact) to support this conclusion. To forestall possible NEPA litigation, the Bureau agreed to restrict operations to the present maximum releases of 31,500

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register" dams from either end of the Grand Canyon was sealed by an amendment to the Colorado Basin Project Act that subjects the application of the Federal Power Act to the Colorado River between Glen Canyon and Hoover Dams "until and unless otherwise provided by Congress." 82 Stat. 901 (1968) (codified at 43 U.S.C. § 1555 (1982)).

21. H.R. 4089, 99th Cong., 2d Sess. (1986).

22. *Arizona v. California*, 373 U.S. 546 (1963). See generally Meyers, *The Colorado River*, 16 STAN. L. REV. 1 (1966).

23. Boulder Canyon Project Act (Colorado River Compact), 43 U.S.C. §§ 617-617t (1982 & Supp. III 1985) (originally enacted as 45 Stat. 1057 (1928)).

24. 70 Stat. 105 (1956) (codified at 43 U.S.C. § 620 (1982)).

c.f.s. until long term operating criteria for the powerplant are prepared.<sup>25</sup> It also agreed to divert power revenues to commission a cooperative study with the Park Service "to see how the present flow patterns impact on the total riverine environment in the Grand Canyon and how various low-flow periods effect [sic] rafting and the fisheries resources of the river."<sup>26</sup> The studies are now nearing completion and are under review by a National Academy of Sciences Committee.

A major federal-state effort is now underway in Florida to protect the Everglades National Park from a century of upstream efforts to promote urbanization and agriculture in Southern Florida. The Park is at the bottom of a shallow, slow-moving river that is 40 to 70 miles wide.<sup>27</sup> The watershed begins in a series of lakes south of Orlando, continues in the floodplain of the Kissimmee River and flows into Lake Okeechobee north of the Park. A sheet of slow-moving water entered the area that is now the Park and nourished the flora and fauna. Hurricane floods in the 1920s led to the installation of 38-foot dike around Lake Okeechobee to protect the sugarcane industry from floods. In response to pressure from farmers and ranchers along the river, the U.S. Army Corps of Engineers began to turn the Kissimmee into a ditch to allow cattle farming in the floodplain. By 1962, 29 million dollars had been spent to straighten the river.<sup>28</sup> To promote further agriculture through flood protection and land drainage, in 1948 the Corps began work on the Southern Florida Flood Control Project that eventually resulted in 1,400 miles of levees and canals that discharged much of the Everglades historic flows West into the Atlantic Ocean<sup>29</sup> and the construction of three large, water impoundment areas south of Lake Okeechobee.<sup>30</sup> The completion of levee L-29 and drainage canal C-111 between 1963-66 along the eastern boundary of the Park completely blocked sheet-flow water into the Park and began to dry up the Park to the detriment of the flora and fauna.

Efforts to save the park by restoring needed water flows began in the 1960s; however, it is harder to restore the balance of nature than to alter it. Congress responded to pressures from park advocates in 1970 and established a minimum water delivery duty of 315,000 acre feet for the park.<sup>31</sup> However, the Park's problems are more complex. Upstream drainage alteration, especially the ditching of the Kissimmee in the 1960s, com-

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25. Operation of the reservoir must be consistent with "the law of the river." 43 U.S.C. § 1552 (1985). In the early 1970s, commercial river runners sought to force the Bureau of Reclamation to prepare an EIS to evaluate the consequences of different flow releases. The court incorrectly refused to decide whether the continuous operation of a project triggers NEPA because the issue was ripe for review. *Grand Canyon Dorries, Inc. v. Walker*, 500 F.2d 588, 590-91 (10th Cir. 1974).

26. Memorandum from Commissioner, Bureau of Reclamation, to Regional Director, Salt Lake City, Utah (Dec. 6, 1982).

27. See generally M. DOUGLAS, *RIVER OF GRASS* (1947).

28. Flowers, *Starting Over in the Everglades*, NAT'L WILDLIFE 55, 56 (Apr.-May 1985).

29. G. Hendrix, *Water Management in the Everglades and Estuarine Productivity* (paper presented at the Nat'l Estuarine Symposium Mar. 13-15, 1984).

30. Hansen, *South Florida's Water: A Trickle of Hope*, 26 ENV'T 14 (June 1984).

31. River Basin Monetary Authorization and Miscellaneous Civil Works Amendments Act of 1970, Pub. L. No. 91-282, 84 Stat. 310 (1970).



pletely altered the natural flows which entered the Park. The natural flow pattern allowed the ecosystem to absorb flows safely. The upstream alterations substituted yo-yo flows that often gave the Park too much or too little water at the wrong times. Minimum delivery schedules continued the environmental decline of the Park because they set no limits on the amount of water that could be dumped in the park.

After the high rainfall years of 1981-83, the Park Service asked the Corps of Engineers and the South Florida Water Management District to modify the pattern of deliveries to the Park to base both the amount and timing of deliveries on actual rainfall amounts in the normal drainage areas and to use all existing wetland buffers to hold water when it would threaten wildlife in the Park. In 1985 the District proposed a two-year trial plan to give the Park surplus water in normal rainfall years, to use two existing water conservation areas as part of the delivery system, to time deliveries based on rainfall and the amount of water stored in the conservation areas, provide for more gradual deliveries and to use stored water for aquifer recharge and urban and agricultural use during dry years.<sup>32</sup>

The National Park Service is one of many players in the management of water in South Florida. There are substantial, potential competing demands for the region's fresh water resources, therefore, the Service must match its claims against those of more powerful state and federal agencies. Upstream water management is controlled by the state of Florida, and much of this power has been delegated to the South Florida Water Management District.<sup>33</sup> Since 1972 Florida has undertaken an ambitious effort to integrate land and water planning and management to protect the state's delicate environment from immense development pressures.<sup>34</sup>

In 1984, the state developed an ambitious program to save the Everglades. The objectives include the restoration of the Kissimmee River to its natural condition.<sup>35</sup> The state has asked for federal funding, but the idea that the historic federal flood protection policy of structural alteration should actually be reversed proved too radical for the Corps. In October of 1985, the Jacksonville District of the Corps recommended to the Board of Engineers for Rivers and Harbors that no federal monies be authorized to restore the Kissimmee. However, the South Florida Water Management District has spent 1.3 million dollars on the demonstration project to restore the previous flow of the river through a twelve-mile

32. National Park Serv., *Water Delivery to Everglades National Park* (Memorandum Jan. 2, 1986) (copy on file in Land & Water Law Review office).

33. FLA. STAT. ANN. § 373.069(e) (West Supp. 1986). The District has extensive powers to regulate water use including the power to set minimum for all surface watercourses in the district. *Id.* § 373.042 (West 1974).

34. See Hutchinson, *Running on Empty*, THE NEW FLORIDA (Oct. 1981) (special reprint on file in Land & Water Law Review office). Because large amounts of water exist and competing claims have not hardened into firm rights, the District has great discretion to use its powers to allocate upstream supplies among the various interests and thus to provide the necessary flows into the Park.

35. FLA. STAT. ANN. § 373.1965 (West Supp. 1986).

stretch of oxbows and to reflood a flood plain.<sup>36</sup> Such river restoration exposes the state and the District to inverse condemnation actions. The Supreme Court has said that the destruction of legitimate investment-backed expectations should presumptively be compensated<sup>37</sup> so these costs should be built into all future restoration projects.

### C. Current Protection Strategies

Current strategies to protect the parks from outside encroachments reveal fundamental flaws in national park policy that political action can only partially correct. These flaws reflect the lack of a coherent general Park Service or legislative policy to protect parks from outside threats because of the historic tendency to view the parks as isolated but commercially worthless scenic wonders. This attitude is the legacy of Park history in its formative years. Parks were originally reserved by Congress because they were widely perceived as commercially worthless. Because Congress resisted early Park Service arguments that parks be organized as complete ecological units the Park Service was forced to look inward rather than outward.<sup>38</sup> From the Mather-Albright eras to the present, National Parks were conceived as self-contained units "reserved" from surrounding multiple use lands.

This isolation of the parks was furthered by the Park Service's need to develop a constituency among those who could help it survive in Congress. The Park Service did so by promoting the park idea as democratic and not inconsistent with commercial development. For example, as Alfred Runte's important history has shown, the railroads supported the park idea to promote rail travel to remote areas of the West.<sup>39</sup> In addition, the Park Service promoted the parks by stressing quiet compromise and behind the scenes political support to block incursions.

Park Service responses to external threats were also a product of the historic agency split between pure preservation and open access. This split was manageable when parks were primarily confined to isolated areas of the West, but the idea of a park system unit has evolved far beyond the "Crown Jewel" concept. It has concentrated its efforts on issues such as visitor access, concession management, wildlife management and land ac-

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36. STATE OF FLORIDA, SAVE OUR EVERGLADES: THIRD ANNIVERSARY REPORT CARD 4 (Aug. 22, 1986).

37. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, *reh'g denied*, 439 U.S. 883 (1978). The investment-backed expectation idea has been misused by some courts to hold that any reliance on government permission to use land is speculative and not entitled to compensation, e.g., *Furey v. City of Sacramento*, 592 F. Supp. 463 (N.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986), but properly understood the theory awards compensation to landowner's who have a legitimate expectation that their property will be damaged by government regulation. Flooding cases are easy, especially where the government created the expectation that lands would be free from most flooding, because inverse condemnation has always been available to compensate damaged landowners, *United States v. Lynah*, 188 U.S. 445 (1903); cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Congress has recognized this principle. Pub. L. 98-181 (1983) (authorizing the Corps to modify water releases into the park and to acquire damaged agricultural lands).

38. H.R. 4089, 99th Cong., 2d Sess. (1986).

39. A. RUNTE, *supra* note 7, at 138-54.

quisition. Consequently, the Park Service now lacks a consistent park management philosophy. Buffeted by strong constituencies, comparatively little attention has been given to less visible problems such as water flow protection. It is only recently, for example, that water has emerged as the central issue in the most water-dependent unit—the Everglades National Park. In order to protect waterflows many units of the system, the Park Service may need to obtain proprietary water rights. The next section of this article examines the legal basis for Park Service appropriation of water rights.

### III. ANALYSIS

#### A. Basis of Federal Reserved Rights

Where potential upstream or adjacent consumptive use claimants exist, it will be desirable for the Park Service to hold proprietary water rights. These can either be appropriative, riparian, or reserved. In the West, federal reserved rights be the most advantageous for the Service because they will often provide protection against detrimental upstream impoundments, diversions or changes of use. Federal reserved water rights arise by the withdrawal of public land for water-related purposes. The issue of whether they attach to acquired lands is as yet unresolved.<sup>40</sup> Their priority dates from the date of the reservation for the water-related use, not the initiation of the use, and are not confined by state definitions of beneficial use. Because the western states established water allocation regimes before a substantial federal interest in public lands—beyond disposition—was established, it was long thought that federal proprietary water rights were an impossibility. The Supreme Court in 1908 recognized federal proprietary rights to benefit Indian tribes superior to subsequently vested state water rights and suggested the existence of general federal proprietary rights as early as 1899.<sup>41</sup> However, Justice Sutherland felt confident enough that Indian water rights were an aberration to declare in 1935 that the federal government had severed waters from the public lands and left the states free to devise whatever system of water allocation they choose.<sup>42</sup> This conclusion is now widely recognized as too sweeping because it failed to consider the federal government's proprietary interest in waters arising on the public domain<sup>43</sup> and failed to appreciate the limited purposes of the three nineteenth-century disposition acts that were said to constitute the severance.<sup>44</sup>

Despite the longstanding weakness of the severance theory, until 1955 federal reserved rights could exist simultaneously with the severance theory because the limitation to Indian tribes did not substantially

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40. The only discussion of the issue is Robb, *Applying the Reserved Rights Doctrine in Riparian States*, 14 N.C. CENT. L.J. 98 (1983).

41. *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690 (1899).

42. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

43. See Grow & Stewart, *The Winters Doctrine As Federal Common Law*, 10 NAT. RESOURCES LAW. 457 (1977); Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights To Use Water*, 3 B.Y.U. L. REV. 639 (1975).

44. See Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1 (1964-65).

threaten exclusive state control. The states were slow to see the vulnerability of their exclusive claims to Western waters because they assumed that reserved rights applied only to Indian reservations. In *Winters v. United States*,<sup>45</sup> the Court was called upon to determine whether an injunction should be upheld which prohibited an upstream appropriator, who claimed a Montana water appropriation subsequent to Congress' creation of an Indian reservation, from constructing a dam which would interfere with the Indians' water supply. Justice McKenna held that the government could claim the necessary waters under either the property or treaty powers of the Constitution, citing one case supporting each theory:

Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676, "upon an equal footing with the original States." The language of counsel is that "any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject of appropriation by the citizens and inhabitants of said State, was repealed by the act of admission." But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States v. Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371.<sup>46</sup>

*Winters* extends beyond Indian tribes only if the treaty granted something that the federal government owned, but there was little basis in precedent, history or federal public domain policy to suggest that the doctrine applied to future federal claims to support public land reservations. The Supreme Court consistently rejected expansive federal claims to Western waters in equitable apportionment actions,<sup>47</sup> and it was not until 1955 that the possibility of non-Indian reserved rights was suggested. In *Federal Power Commission v. Oregon*<sup>48</sup> the issue was the exclusive authority of the Federal Power Commission to approve a dam on a river that was non-navigable under *United States v. Appalachian Electric Power Co.*<sup>49</sup> and to override the dam was to connect two federal land holdings, an Indian reservation and a 1909 power site withdrawal, located across from each other on the Deschutes River. Oregon argued that the Commission was without jurisdiction because, under *California Oregon Power*, the state "owned" the waters to be dammed. Writing for the majority, Justice Burton rejected Oregon's argument, but the basis for the deci-

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45. 207 U.S. 564 (1908).

46. *Id.* at 577.

47. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Kansas v. Colorado*, 206 U.S. 46 (1907).

48. 349 U.S. 435 (1955).

49. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

sion is at best unclear. The Court's decision can best be explained as having located the federal government's licensing jurisdiction in federal ownership of the waters, which resulted from the act of withdrawing two land areas from entry.<sup>50</sup>

Although *Federal Power Commission* suggested federal non-Indian reserved rights could be claimed, it was not until the 1963 decision *Arizona v. California*<sup>51</sup> that the Supreme Court expressly held that the federal government has reserved water rights for non-Indian purposes. These inchoate federal rights were not sought by the federal government pursuant to a comprehensive scheme of federal water administration. Rather, in an ad hoc fashion the rights were thrust upon a somewhat surprised federal government, which had been forced to participate in the litigation by the Supreme Court.

*Arizona v. California* triggered concern over the possibility of substantial federal displacement of state rights. The concern over the impact of federal reserved rights claims became more intense in the 1970s for both legal and political reasons. The legal reason was a 1971 Supreme Court decision holding that federal reserved rights could be adjudicated in state proceedings<sup>52</sup> which met the McCarran Amendment<sup>53</sup> qualifications for a general proceeding. The decision forced many federal agencies to display the cards they claimed to hold in order to protect federal interest. Two recent organic acts for federal land management agencies, the National Forest Management Act of 1976<sup>54</sup> and the Federal Land Policy and Management Act of 1976,<sup>55</sup> impose affirmative management and planning obligations on federal agencies, which have potential water allocation consequences. These decisions and legislation triggered exaggerated fear of the substantial displacement of vested state water rights.

### B. Standards For Recognition

Reserved rights are said to exist only if Congress intended to claim them, but they are in fact federal common law so intent is at best a presumed intent. Because Congress has deferred to state water allocation laws because of the intense political interest of the western states in water allocation primacy, reserved rights are seldom claimed for water-related

50. *California Oregon Power* was distinguished on the ground that it applied only to "public lands"—lands open to entry and disposition—and not to reservations. Mr. Justice Douglas, the lone dissenter, found *California Oregon Power* controlling and concluded that the Pickett Act, 36 Stat. 847 (1910) (codified at 16 U.S.C. § 471 and 43 U.S.C. §§ 141-143 (1982)), left "water rights . . . undisturbed." *Federal Power Comm'n*, 349 U.S. at 456 (Douglas, J., dissenting).

51. 373 U.S. 546 (1963).

52. *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971); see also *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, *reh'g denied*, 426 U.S. 912 (1976).

53. 43 U.S.C. § 666 (1982).

54. Pub. L. No. 94-588, 90 Stat. 2949 (codified at 16 §§ 1600-1614 (1982) and other scattered sections of 16 U.S.C.). See Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 201-41 (1985), for an excellent account of the potential role of flow protection on national forest lands.

55. 43 U.S.C. §§ 1701-1782 (1982).

withdrawals. The major exception is the Wild and Scenic Rivers Act. Federal reserved rights are claimed in a back-handed manner; the designation of a river in the system "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>56</sup>

Initially, the Supreme Court's resort to congressional intent has been so pro forma as to amount to a fiction. The doctrine of implied intent originated in *Winters* and was justified on the principle that Indian treaties are construed in favor of the Indians and against the government. An implied intent to reserve water rights arose without great difficulty from this standard. In *Arizona v. California*,<sup>57</sup> the Special Master's finding of implied intent was accepted without analysis, and the *Winters* theory was extended from Indian to non-Indian reserved rights, with no consideration of whether it was warranted in non-Indian cases.

The Court's formulation of the "express or implied intent" standard was soon stated as settled law by Chief Justice Burger in *Cappaert v. United States*.<sup>58</sup> In *Cappaert*, the federal government sued a group of Nevada ranchers because their groundwater withdrawals interfered with maintenance of a subterranean pool which supported the Desert Pupfish in the Devil's Hole National Monument. The Court unanimously affirmed an injunction limiting their withdrawals to a rate that would maintain the pool at the minimum level necessary to support the pupfish. The Court found that the necessary water was expressly reserved in the creation of the Monument.<sup>59</sup> Thus, the Court did not have to justify or set a standard for determining when water rights would be implied when land was reserved for a water-related purpose. Some commentators argue that the Court adopted a frustration-of-original-purpose standard to limit the occasions in *Winters* and *Arizona* when water could be claimed. Others argue that the Court adopted a more flexible criterion, which looked to the general purpose of the reservation to determine Congress' implied intent, thus allowing courts to construe legislation liberally in favor of the government.<sup>60</sup>

The need to define the standard for implied intent was not recognized until the question was squarely presented to the Court in the 1978 decision of *United States v. New Mexico*.<sup>61</sup> *New Mexico* erected formidable barriers to claimed reserved rights arising by implied intent. The case poses problems for all federal land management agencies. However, the decision poses the least problems for many possible Park Service claims.

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56. 16 U.S.C. § 1284(c) (1982). See Keiter, *supra* note 13, at 385-86, for a discussion of the role that the Flathead River's designation plays in the management of Glacier National Park.

57. 373 U.S. 546 (1963).

58. 426 U.S. 128 (1976).

59. *Id.* at 139.

60. Compare Meyers, *supra* note 22, at 69 with Tarlock, *Appropriation For Instream Flow Maintenance: A Progress Report on "New" Public Western Water Rights*, 1978 UTAH L. REV. 221, 229.

61. 438 U.S. 696 (1978).

*United States v. New Mexico* grew out of a McCarran Amendment adjudication in southwestern New Mexico.<sup>62</sup> The Forest Service claimed reserved rights to instream flow in the Gila National Forest (ironically the first national forest in which a wilderness area was set aside), for aesthetic enhancement, fish and wildlife protection, and recreation and stock-watering purposes. The forest was withdrawn under two early conservation era statutes, the Creative Act of 1891<sup>63</sup> and the Organic Administration Act of 1897,<sup>64</sup> which marked the major shift toward federal retention and management of the public domain. The Court denied the claimed reserved rights by reading the two acts as narrowly utilitarian<sup>65</sup> in their goals. This reading excluded water claimed for environmental purposes as being unrelated to the theory that forests were exclusively established to facilitate timber management. Recent scholarship has underscored the broad initial purposes of the forest reserves, including aesthetic enhancement, and dates the birth of modern scientific forest management to the subsequent time when the forest reserves were transformed from the Department of the Interior's custodial jurisdiction to the Department of Agriculture and Gifford Pinchot.<sup>66</sup> But Justice Rehnquist, stepping belatedly into the shoes of the late Justice Sutherland as the guardian of Western resource interests, not only denied the federal government's claimed rights but established three formidable barriers to the implication of any future federal reserved water rights, especially those for energy development. First, the right must relate to the original purpose of the withdrawal of the reservation. Second, the implication must be necessary to prevent the frustration of the original purpose of the reservation. Third, the Court introduced into the law of reserved rights the distinction between the primary and secondary purposes of reservations, stating that the Court will find a reserved right to effect the former but will draw the contrary inference when the latter is found.

Justice Rehnquist based his strict standard of implied intent on the historic policy of federal deference to state water law, which he had applied in *California v. United States*, to hold that Section 8 of the Reclamation Act of 1902 creates a presumption that federal reclamation projects must comply with state law.<sup>67</sup> However, there are major differences between the federal statutes involved in the two cases. The *California v. United States* presumption of state control was applied to reserved rights in his analysis of the 1891 and 1897 Acts. Section 24 of the General Land Revision Act of 1891 authorizes the President to "set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth,

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62. See Note, *New Mexico's National Forests and the Implied Reservation Doctrine*, 16 NAT. RESOURCES J. 975 (1976).

63. Act approved Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103 (1891) (repealed 1976).

64. 16 U.S.C. §§ 473-82 (1982).

65. See generally S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1959).

66. See S. DANA & S. FAIRFAX, FOREST AND RANGE MANAGEMENT (2d ed. 1980).

67. The fullest articulation of this presumption is Olson, *Federal Non-Reserved Water Rights* (Legal Memorandum, U.S. Dep't of Justice, Office of Legal Counsel June 16, 1982).

whether of commercial value or not, as public reservations."<sup>68</sup> It is clear that in authorizing the creation of forest reserves, Congress responded to three major public concerns: the protection of watersheds, the preservation of natural beauty and the prevention of the threat of a pending timber famine. The aesthetic value of the forests was fully appreciated by Congress and influential supporters of the Act during this period.<sup>69</sup> For example, national park reserves and all of the lands set aside by Presidents Harrison and Cleveland were withheld from use for essentially aesthetic and recreational purposes. In 1897, Congress enacted legislation to clarify the withdrawal power in response to dissatisfaction with President Cleveland's withdrawals:

No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of [the Creative Act of 1891], to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.<sup>70</sup>

Justice Rehnquist read this section to limit the water-related purposes for which forests could be reserved to only "those necessary to preserve the timber or to secure favorable water flows for private uses under state law."<sup>71</sup> His interpretation of the 1891 Act was bolstered by his reading of the 1897 Organic Administration Act, which he understood, following conventional wisdom, to be a simple congressional response to Western protests against the size of purposes underlying President Cleveland's forest withdrawals. The majority reading of the history of the two Acts is not the only accurate reading.<sup>72</sup> There is an alternative, less cramped, reading based on the history of forest policy in Congress between 1871 and 1907. The reservation of water for fish and wildlife preservation and for recreation is consistent both with the purpose for which Congress created the reserves and with early interpretation and administration of the Acts.

The Court should frankly recognize that the reserved water rights doctrine is federal common law and erect a presumption of congressional intent to claim for park and wilderness reservations. Some have argued that water rights are not an appropriate doctrine for federal common law because "[the] incomplete nature of the *Winters* doctrine creates an uncertainty that in itself inhibits or is disruptive of the orderly, ongoing use

68. Act approved Mar 3, 1891, ch. 561, § 24, 26 Stat. 1103 (1891) (repealed 1976).

69. See Fairfax & Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509, 536 (1979).

70. Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1103, repealed by 90 Stat. 2792 (1976).

71. *United States v. New Mexico*, 438 U.S. 696, 718 (1978).

72. Fairfax & Tarlock, *supra* note 69; see also Note, *Water Rights and National Forests—Narrowing the Implied Reservation Doctrine*: *United States v. New Mexico*, 40 OHIO ST. L.J. 729 (1979).



of water in the West."<sup>73</sup> However, this interpretation is patently wrong. Properly understood the Court's development of the reserved doctrine is justified as a necessary incident to the recent changes in federal land management policy. In *Light v. United States*, the Supreme Court held that the property clause empowers Congress to manage the public lands in trust for the "people of the whole country."<sup>74</sup> In the absence of further legislative guidance, the Court has correctly refused to use the trust concept to impose judicial restraints on the allocation and management decisions of Congress and its delegates. However, the Court has applied the trust concept in situations traditionally appropriate for judicial intervention. The Court's reserved rights cases prior to *New Mexico* can be explained on the assumption that it was reasonable to imply reserved rights because they are consistent with congressional purposes and have, in fact, been ratified by Congress.

*New Mexico* was announced just as the Carter Administration began a major initiative to quantify both Indian and non-Indian reserved rights as part of its effort to develop a water policy based upon conservation and environmental considerations. In 1979 the Solicitor attempted an end-run around the case by issuing an opinion that made extensive federal reserved and non-reserved rights claims. With respect to Park Service rights, the opinion noted that *New Mexico* itself suggested that withdrawals for aesthetic and ecological reasons carried with them reserved rights and such rights were claimed for scenic, natural and historic conservation uses, for sustained public enjoyment at visitor accommodations and for Park Service personnel.<sup>75</sup> Other parts of the opinion, especially the assertion of federal non-reserved rights, created great controversy and were repudiated by a subsequent Solicitor,<sup>76</sup> but case law on parks and related reservations seems to be developing consistent with the 1979 opinion.

A federal district court in Colorado recently held that that the protection of instream flows in wilderness areas, as opposed to multiple use forest lands, is a primary purpose of the Wilderness Act of 1964, and the analysis applies equally to Park Service claims.<sup>77</sup> *New Mexico* was distinguished for several reasons. Most basic is that preservation is the primary purpose of the Act, and it is logical to conclude that Congress intended to reserve sufficient water to fulfill the purpose of the Act:

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73. Grow & Stewart, *supra* note 43, at 476.

74. 220 U.S. 523, 537 (1911). The constitutional issue now is how this authority will be shared between the Executive and Congress. For a review of the constitutional and statutory issues, see Peck, "And Then There Were None"—*Evolving Federal Restraints on the Availability of Public Lands for Mineral Development*, 25 ROCKY MTN. MIN. L. INST. 3-1 (1979) and Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982).

75. *Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation, Bureau of Land Management*, 86 Interior Dec. 553, 594-602 (1979) (Solicitor Opinion No. M.-36914 June 25, 1979).

76. 88 Interior Dec. 1055 (1981).

77. *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985). See Comment, *Federal Reserved Rights in National Forest Wilderness Areas*, XXI LAND & WATER L. REV. 381 (1986), for a discussion of the possible implementation of *Block*.

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. Accordingly, under the implied-reservation-of-water doctrine, it is implied from the Wilderness Act that Congress reserved water rights in the wilderness areas to the extent necessary to accomplish the purposes specified in the Act. Thus, I now hold that federal reserved water rights do exist in previously unappropriated water in each of the Colorado wilderness areas designated as such pursuant to the Wilderness Act and managed by federal defendants.<sup>78</sup>

In addition, the court reasoned that the Wilderness Act does not "constitute an attempt to *add* to the primary purposes of existing reservations, as the MUSYA [Multiple Use-Sustained Yield Act] did in *New Mexico*".<sup>79</sup> Further, the conservation and recreation purposes of wilderness preservation do not conflict with the purposes of conserving water flow.

*New Mexico* poses substantial problems for the Forest Service and the Bureau of Land Management, but it supports National Park Service reserved rights under certain conditions. The preservation of water-related values for environmental reasons can often be demonstrated as a primary, not secondary, purpose of a park reservation, although the primary-secondary distinction does limit some potential Park Service claims. A major reserved adjudication in Colorado has produced the most important Park Service precedent to date. The Colorado Supreme Court, not known for its sympathy to federal claims, recognized reserved rights for the benefit of the Rocky Mountain National Park for the protection of watershed and timber resources and the conservation of scenery, historic and scientific objects and wildlife.<sup>80</sup> The court, however, applied the primary-secondary distinction to refuse to recognize instream flows to support recreational boating in Dinosaur National Monument.

### C. Duty to Claim Reserved Rights

The major issue for the Park Service is not whether they can successfully claim federal reserved rights, but how such rights can be claimed and whether the Park Service has a mandatory duty to claim such rights. Reserved rights can be claimed in both federal and state proceedings, and after *Eagle County*<sup>81</sup> they are more likely to be claimed in state proceedings. One state, Montana, has a statutory procedure to establish state

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78. 622 F. Supp. at 862.

79. *Id.* at 860.

80. *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981); *United States v. City & County of Denver*, 656 P.2d 1 (Colo. 1982); see Coggins, Evans & Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 ENVTL. L. 536, 577-88 (1982). See generally Meshorer, *Federal Reserved Water Rights*, 28 ROCKY MTN. MIN. L. INST. 1283 (1982).

81. 401 U.S. 520 (1971).

and federal reserved rights.<sup>82</sup> The Park Service has filed numerous claims for flows in streams in and around Glacier National Park.<sup>83</sup> No rights have been granted to the Park Service, and some concern has been expressed by the Montana Reserved Water Rights Compact Commission about the future consequences of potential Park Service rights.

The situations in which the Park Service's mandatory duty to claim reserved rights can arise is illustrated by southern Utah where possible energy developments north of Zion National Park threaten the flow of the Sevier River. Two suits have unsuccessfully sought to impose a duty on the Park Service to claim water rights in this river. The issue is not completely resolved, and courts may be inching to the imposition of some duty to protect necessary water flows. The question of the Service's duty takes on new urgency in light of the Park Service's current policy of minimizing external threats. The duty was first urged for the Grand Canyon National Park and the Glen Canyon Recreation Area. This duty arose during the drive to make the United States energy self-sufficient. The Sierra Club sued to compel the Department of the Interior to intervene in state adjudications to claim reserved rights for park system units and BLM lands on public trust and statutory theories.

Earlier litigation involving logging that threatened the Redwoods National Park suggested that the Park Service might have a public trust duty to claim reserved rights.<sup>84</sup> After the case, environmentalists sought to impose a legislative public trust duty on the Park Service. Instead, in 1980 Congress amended Section 101 of the National Park Organic Act to require that Park Service activities "shall be conducted in light of the high public value and integrity of the National Park System, and shall not be exercised in derogation of the values and purposes for which these

82. MONT. CODE ANN. § 85-2-703 (1985).

83. *In re Claim of the United States of America for Reserved Water Rights Within the Boundaries of Glacier National Park, Montana*, Claim Nos. 76I-U-162226 to -162228, 41L-W-162229, 40T-W-162230 to -162237, 41L-W-162238 to -162239, 40T-W-162240 to -162249, 41M-W-162250 to -162262, 76I-U-162263 to -162276, 76LJ-W-162277 to -162304 (Mont. Reserved Water Rights Compact Comm'n filed Apr. 29, 1982) (claiming federal reserved rights with a priority date of May 11, 1910, the date on which Congress created Glacier National Park). The "U" in some of the claim numbers indicates both that these claims have become subject to a Temporary Preliminary Decree of the Montana Water Court and that the claimed rights are reserved rights. Letter from Susan Cottingham, Research Specialist for the Mont. Reserved Water Rights Compact Comm'n (Feb. 5, 1987) (copy on file at Land & Water Law Review office). The first number and letter in the claim number indicate the hydrological basin geographic area in which the claimed right exists. *See id.* A complete list of all claims filed by the Park Service can be found at MONT. DEP'T OF NAT. RESOURCES & CONSERVATION, WATER RIGHT SYSTEM: WATER RIGHT OWNER LISTING 2520-23 (June 17, 1986) (copy of printout of relevant pages on file in Land & Water Law Review office).

84. *Sierra Club v. Department of the Interior*, 376 F. Supp. 90 (N.D. Cal. 1974); 398 F. Supp. 284 (N.D. Cal. 1975), *modified*, 424 F. Supp. 172 (N.D. Cal. 1976). The district finally held that the Park Service abused its discretion by failing to acquire adequate buffer areas, but the suit was dismissed because the court could not finance the acquisition of the buffer areas. 424 F. Supp. 172 (N.D. Cal. 1976). Congress ultimately expanded the Park. 16 U.S.C. § 79b(a) (1980) (originally enacted as Act of Oct. 2, 1968, 82 Stat. 931 (1968)); *see Hudson, Sierra Club v. Department of the Interior, The Fight To Preserve the Redwood National Park*, 7 *ECOLOGY* L.Q. 781 (1979). The case against imposing a public trust duty on public land management agencies is set out in Tarlock, *supra* note 5, at 267-74.

areas have been established . . . .”<sup>85</sup> The district court in *Sierra Club v. Andrus*<sup>86</sup> held that this statute represented the Service’s entire duty because Congress rejected the application of the public trust doctrine as a separate Park Service duty but held that the Secretary of the Interior’s discretion to manage the system was “not unlimited.” On the merits, the court concluded that the issue was not ripe for review because the effect of the proposed energy developments on possible senior federal reserved rights did not pose an immediate threat to federal interests and because the plaintiffs had an adequate remedy in the ongoing Department of the Interior’s Task Force on Non-Indian Water Rights.<sup>87</sup>

Deference to agency discretion made some sense during the Carter administration when the Department of the Interior had an active policy to assert federal reserved rights for land management agencies. The question arises whether the case for substantial deference holds when Interior Department policy is both hostile to reserved rights and to taking actions to minimize external park threats. *Sierra Club v. Block*<sup>88</sup> is the only case after *Andrus* to consider the duty of federal land management agencies to claim reserved rights. That case suggests that this duty may arise out of agency indifference inconsistent with an unusually strict preservation mandate. The court initially held judicial review is neither precluded nor is the matter committed to agency discretion by law<sup>89</sup> under the APA<sup>90</sup> and subsequently expressed a greater willingness to find a breach of the duty. The court first concluded that federal inaction was not arbitrary and capricious on the facts because, in part, of the “considerable controversy on the issue of whether reserved rights exist in wilderness areas.”<sup>91</sup> However, the court went on to observe:

I can say, however, that if federal defendants had carefully analyzed the legislative history of the Wilderness Act, Congress’ intent to reserve water for the wilderness areas would have been apparent. I am dismayed by federal defendants’ benign neglect of this issue of federal reserved water rights in the wilderness areas as well as their failure to take any kind of action to determine whether they existed. To the extent that this benign neglect may have fostered an improper understanding of the law, federal defendants have not acted with the degree of responsibility rightfully to be expected of them. Just as clearly as judges should not in-

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85. 16 U.S.C. § 1a-1 (1982).

86. 487 F. Supp. 443, 448 (D.D.C. 1980), *aff’d sub. nom. Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981).

87. *Id.* at 452. As part of President Carter’s 1977-78 water policy initiatives, the Department of the Interior was directed to identify systematically and quantify all reserved rights necessary for management functions. See TASK FORCE 5A—PRESIDENT’S WATER POLICY IMPLEMENTATION, REPORT OF THE FEDERAL TASK FORCE ON NON-INDIAN RESERVED RIGHTS (June 1980).

88. 615 F. Supp. 44 (D. Colo. 1985).

89. *Id.* at 45.

90. 5 U.S.C. § 701(a) (1985).

91. *Sierra Club v. Block*, 622 F. Supp. 842, 864 (D. Colo. 1985).

ject themselves into prerogatives of the Executive, that same Executive should not ignore or disregard the intent and policy established by Congress.<sup>92</sup>

The federal government's motion to dismiss on this issue was granted, but the judge remanded the case to allow the Forest Service "the opportunity to consider further the usefulness of these rights in complying with their statutory duty to protect wilderness water resources."<sup>93</sup> The Forest Service must now prepare a plan to comply with its duty to protect water resources in wilderness areas.

#### IV. CONCLUSION

This brief survey of existing legislation, water law and National Park Service policy initiatives is designed to place water flow protection in the broader context of the protection of national parks from external threats. Congress has begun to debate the issue of external park protection. Legislation has been introduced to impose greater planning and reporting duties on the Secretary and to allow the Secretary a veto over federal expenditures or financial assistance for projects on federally managed lands contiguous to park boundaries that threaten to degrade the park.<sup>94</sup> This is a small beginning to a much larger problem. The Park Service's de facto internal policy of relative neglect of this problem must be changed;<sup>95</sup> the Department of the Interior and other federal land management commodity programs must be made consistent with park protection, and the Service must become an even more active participant in state and local regulatory programs that can be used to prevent degradation of the national parks.

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92. *Id.* at 865.

93. *Id.*

94. S. 2092, 99th Cong., 2d Sess. (1986).

95. CONSERVATION FOUND., NATIONAL PARKS FOR A NEW GENERATION—VISIONS, REALITIES, PROSPECTS 143 (1985).