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Water and Wilderness / Law and Politics

John D. Leshy*

I. INTRODUCTION

Frank Trelease offered many sagacious observations on water law and policy in the course of his long and productive career. One is found in the conclusion to a pithy piece on federal reserved water rights he published more than a decade ago. The "fears" that federal water rights for non-Indian federal land designations would destroy valuable water rights perfected under state law, Trelease said, have shown themselves to be "groundless," mere "bogies we have been conjuring up."¹

At first blush, Trelease's conclusion was surprising. As he himself (among many others) had observed, the theoretical basis for the federal reserved water right's wholesale destruction of existing uses of water protected by state law had a firm grounding in the leading case of *Winters v. United States*² and its progeny.³ Two features of the *Winters* doctrine are principally responsible for the concern: First, the federal water right comes into being when particular tracts of federal land are designated to serve particular uses. Most of these designations were made in the latter part of the nineteenth century and the early part of the twentieth. This means, in practical terms, that many federal water rights predate the establishment of rights to the same water sources under state law. Second, the federal water right is inchoate; it is not dependent upon actual use of water like state appropriative water rights. Thus the quantity of water embraced within the water right is not always obvious and might be opened. Moreover, other water users from the same source often have, at best, only limited notice of its existence.

*Professor of Law, Arizona State University. I appreciate the comments of Andy Wiessner, Robert Abrams, Bill Swan, Lori Potter, David Getches, and Debbie Sease on a draft of this paper. Any errors are, of course, my own.

1. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENVER L. J. 473, 492 (1977).

2. 207 U.S. 564 (1908).

3. See, e.g., *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

For holders of water rights under the law in the western states, then, the nightmare is this: Federal parks, forests, wildlife refuges or the like have often been created in watersheds where water was later appropriated under state law. The holders of these state law water rights could, many decades later, find them effectively rendered useless by the assertion of federal water rights for the same water they had been using all these years. And because the federal right is legally superior, having come into existence earlier, state water right holders would not be compensated for their loss. Outside the Indian context, this possibility of federal preemption was generally recognized as a result of the so-called Pelton Dam decision in 1955,⁴ although it was not finally cemented into law until the Supreme Court's decision in *Arizona v. California* in 1963.⁵

Yet when Trelease wrote in 1977, he could confidently say that no single case of actual harm to a state law water right had been shown to exist from the assertion of a federal reserved water right, at least outside the Indian context. He identified several reasons for this puzzling result.⁶ First, non-Indian federal rights involve precious little diversion and consumptive use (at least beyond the natural phenomena of evaporation and seepage to groundwater). They are for the most part rights to in-stream, non-consumptive uses, which means that they actually preserve flows for diversion and consumptive use below the federal reservation.

Second, and closely related to the first, the federal lands designated for particular uses are, as Trelease put it, "located for the most part where they can do the least harm,"⁷ principally at the tops or upper reaches of the western watersheds. Third, equitable and political factors restrain the federal agencies from pressing the kind of large consumptive claims that could pose large-scale problems for existing state water rights holders. Fourth, the same concern with equity counsels the courts to apply the *Winters* doctrine to try to avoid a "rollback of longstanding uses that have done no harm."⁸

Trelease's conclusion, expressed with perhaps a tinge of regret because he enjoyed sparring over water law as much as anyone, was that the western water users were mostly crying wolf about the *Winters* doctrine. The sensible thing to do, he suggested, was simply to wait to see if cases

4. Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955).

5. 373 U.S. at 601. See also *United States v. Rio Grande Dam and Irr. Co.*, 174 U.S. 690, 703 (1899) (strongly intimating this result in the non-Indian context nearly a decade before *Winters*).

6. See Trelease, *supra* note 1, at 487-92.

7. Trelease, *supra* note 1, at 492.

8. *Id.* Trelease was writing the year before the United States Supreme Court decided *United States v. New Mexico*, 438 U.S. 696 (1978), which was widely regarded as a modest reversal of field, limiting rather than expanding *Winters*' scope. In *New Mexico*, the Court cautioned that recognition of federal water rights may often mean a gallon-for-gallon reduction of water rights under state law. *Id.* at 705. But lest the uninitiated take that as a portent of the eventual abolition of the *Winters* doctrine, the Court reaffirmed the doctrine in unequivocal terms. *Id.* at 698-700. Indeed, no Justice since Brewer, who dissented without opinion in *Winters* itself, has ever expressed disagreement with the fundamental idea behind *Winters*.

of actual conflict occurred, where the *Winters* doctrine inflicted "real and substantial harm"⁹ on holders of water rights under state law. If such real conflicts surfaced, they could be dealt with on an ad hoc basis, in special relief legislation. If they became numerous enough, some form of general legislation, such as that recommended by the Public Land Law Review Commission in 1970¹⁰ or the National Water Commission in 1973,¹¹ might be appropriate. But until the theoretical conflict became a concrete one, Trelease preferred to devote his "energies to real problems," and implicitly suggested that others do the same.¹²

In almost all matters involving water law, Frank Trelease possessed the kind of authority that was merely claimed by a prominent Wall Street brokerage house in its advertising — when he talked, people listened. But, alas, not in this case, for the cries of wolf and the war of words about the federal reserved water right have not abated. Indeed, in the past two years they have reached a new level of intensity in one particular kind of federal land designation, of units of the National Wilderness Preservation System. This paper takes another look at Trelease's observations and recommendations, considered in the specific context of *Winters* rights for wilderness areas. It concludes that here, as elsewhere, Trelease made eminent sense, and his advice ought to be followed.

II. WATER AND WILDERNESS — CULTURAL STRANDS

It was probably inevitable that the wilderness protection movement, seeking legal protection for substantial areas of federal land in their natural condition, would someday join the long-running theatre of struggles over western water rights. Legal protection for water uses and for wilderness each illustrate core features of the special subculture that is peculiarly Western — the importance of water in a generally arid zone, and the continuing conflict between development and preservation of natural resources in a region historically dependent upon resource extraction.

Wilderness preservation advocates have achieved some signal victories in their decades-old struggle to convince the nation that significant tracts of federal land and its associated resources ought to be set aside and preserved in their natural condition. However one chooses to justify it — as having economic value in tourism (and the production of gorgeous coffee table books); as providing a hedge against an uncertain future or a gene-pool bank account; or as embodying an ethical expression by our culture about itself and its relationship to our natural heritage — the wisdom of protection has become rather firmly embedded in the national psyche, finding adherents across the political spectrum.

In contrast to the wilderness ideal of preservation of nature, the most prominent and widespread man-made feature on the western landscape is the network of water projects — dams, reservoirs and canals — and

9. Trelease, *supra* note 1, at 492.

10. ONE THIRD OF THE NATION'S LAND 141-49 (1970).

11. WATER POLICIES FOR THE FUTURE 459-71 (1973).

12. Trelease, *supra* note 1, at 492.

the irrigated lands, factories and cities it supports. These projects testify to the ability of the human race to alter its natural environment for its own ends.

Today, the competing impulses of preservation and manipulation are coming into conflict as never before.¹³ The federal government is moving to complete decisions on how much unroaded federal land to include in the National Wilderness Preservation System. Some areas Congress has already put into that System face threats to their continued preservation, including depletion of the water resources found within them. And so now the wilderness crusade has at last come face to face with what may be the last significant bastion of resistance to it — one cloaked in the extremely high esteem the West has traditionally accorded water.

III. WATER AND WILDERNESS: THE LEGAL ISSUES

The current controversy began modestly enough, when the federal government faced a deadline to file its water rights claims in a Colorado state court engaged in a general adjudication of all water rights in several streams. A series of bruising battles over the extent to which the state courts could adjudicate federal *Winters* rights had been won by the states.¹⁴ Now Colorado, along with numerous other state courts around the West, finally had the opportunity to quantify the federal water right (albeit in accordance with federal, not state, substantive law), fold it into the state water rights system, and administer it along with all other water rights.

But the United States Forest Service, acting through the Department of Justice, refused to claim a *Winters* right for wilderness areas. The federal government decided, in other words, effectively to relinquish its claim to a valuable property right by not asserting it in the adjudication.¹⁵ The Sierra Club sued, and the fun began. In a series of decisions, Federal District Judge Kane in Denver sided with the Sierra Club, finding that a federal reserved water right for wilderness purposes was created when particular tracts of land were designated as wilderness by Congress, and ordering the federal government to explain its refusal to assert such rights.¹⁶ The government's first attempt to justify its unwillingness to rely on the *Winters* right was roundly excoriated by the court.¹⁷ The Forest

13. For a recent treatment of how water has influenced development and culture in the western states, see Stegner, *The Function of Aridity*, and Worster, *An End to Ecstasy*, in WILDERNESS 14-21 (Fall 1987). See generally W. STEGNER, BEYOND THE HUNDREDTH MERIDIAN (1954).

14. See, e.g., Colorado River Water Conserv'n Dist. v. United States, 424 U.S. 800 (1976).

15. See United States v. Bell, 724 P.2d 631 (Colo. 1986), allowing the federal government to amend its original water rights application to assert a new water right, but denying its relation back to the original application. This had the effect of costing the government some six decades of priority for the claim, rendering its value dubious. But see United States v. Jesse, 744 P.2d 491 (Colo. 1987) (U.S. not estopped from asserting a new reserved rights claim to protect instream flows for national forests despite court's rejection of similar but not identical claim in earlier proceeding).

16. See Sierra Club v. Block, 615 F. Supp. 44 (D. Colo. 1985); 622 F. Supp. 842 (D. Colo. 1985).

17. Sierra Club v. Lyng, 661 F. Supp. 1490 (D. Colo. 1987).

Service has filed a new report with the court,¹⁸ the lawsuit drags on, and no end is yet in sight. In the meantime, Senator William Armstrong of Colorado picked up on the issue and began legislative efforts to undo Judge Kane's decision.¹⁹

I will not spend much time discussing the merits of the controversy, because Judge Kane and a growing number of commentators have thoroughly ploughed that ground.²⁰ In my view, Judge Kane reached the correct result.²¹ His conclusion that Congress implicitly reserves sufficient water to protect wilderness qualities when it acts to designate federal land as wilderness seems fully and comfortably within the letter and spirit of the Supreme Court's teachings about the *Winters* doctrine.²² Indeed, it seems obvious that when Congress acts to protect wild areas from activities that would destroy their natural character, the protection extends to their water as well as their flora, fauna, geological and other features.

The same concept has been applied to numerous other categories of federal land designations — national parks, monuments, forests, waterhole withdrawals and the like. And it has been applied when the purposes for which federal lands were set aside are altered, as when national forests become national parks. That alteration may itself create new *Winters*

18. Report on Methods for Protecting Wilderness Water Resources on Lands in Colorado (Sept. 22, 1987) [hereinafter Forest Service Report] (copy on file with Land and Water Law Review).

19. See, e.g., Public Lands News, Mar. 6, 1986, at 3. See also note 52 *infra* and accompanying text.

20. See, e.g., Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. REV. 387; Note, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight*, 15 HASTINGS CON. L. Q. 125 (1987); Marks, *The Duty of Agencies to Assert Reserved Water Rights in Wilderness Areas*, 14 ECOLOGY L. Q. 639 (1987); Comment, *Federal Reserved Water Rights in National Forest Wilderness Areas*, XXI LAND & WATER L. REV. 381 (1986); Note, *Wilderness Water Rights Protected Where Not in Conflict with Purposes of National Forest in Colorado*, 27 NAT. RES. J. 441 (1988). Pro and con articles on the subject comprise the March 1987 issue of ELS Dialogue (Environmental Law Society, U. of Colo. School of Law), authored by Lori Potter (attorney for the plaintiff in the Sierra Club litigation, pro) and Timothy J. Beaton (con). See also Wilkinson & Anderson, *Land and Resource Planning in the National Forests*, 64 ORE. L. REV. 1, 201-41 (1985); Tarlock, *Protection of Water Flows for National Parks*, XXII LAND & WATER L. REV. 29, 31-32, 38-48 (1986).

21. In a pending general adjudication in federal district court in New Mexico, involving the Red River, the special master recommended that water rights should not be recognized for federal wilderness areas, citing, with almost no elaboration, the disclaimer clause in the Wilderness Act, 16 U.S.C. 1133(d)(6) (1982) discussed in the text accompanying note 25, *infra*. Report of Special Master 9-10, *New Mexico v. Molybdenum Corp.*, No. CV 9780-C (Red River) (March 27, 1987). The district court recently adopted the master's report without opinion. Order Affirming and Adopting Report of the Special Master, *New Mexico v. Molybdenum Corp.*, No. CV 9780-C (Red River) (Feb. 2, 1988).

22. I helped draft the 1979 Solicitor's Opinion on federal water rights that determined, *inter alia*, that *Winters* rights were created in the designation of wilderness areas; see 86 Interior Dec. 553, 609-10 (1979), and a 1985 memorandum to the Colorado Congressional delegation, co-signed by several other law professors, that took the same position. See *Additions to the National Wilderness Preservation System, Part IV, Comm. Serial No. 99-19, Part IV, Hearings before the Subcomm. on Pub. Lands, House Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. 357-77 (1986).

rights, with a priority date as of the date of alteration.²³ Like these adjustments in land management, wilderness alters the statutory purposes for which federal lands are to be managed.²⁴

The arguments offered against the existence of a *Winters* right for wilderness areas are for the most part narrowly technical. They turn on such things as whether wilderness designation by statute constitutes a "reservation" of federal land sufficient to "reserve" water, and the meaning of one of the wonderfully opaque (and therefore routinely used) disclaimer clauses that Congress employs when it wants, as someone once said, to leave the status quo right where it is.²⁵ In this case the status quo in 1964, when the Wilderness Act was adopted, acknowledged that, absent an express renunciation of a claim of a *Winters* right, enough water was reserved to carry out the federal purpose in designating new management objectives for the land.

At its core, the argument about whether wilderness area designation creates a *Winters* water right raises the same issue as the seminal case of *Winters* itself; namely, how is the federal government's lack of specificity on water to be construed? Should the presumption be that water necessary to the designation is reserved, or the opposite? Historically, the Supreme Court has been firm in presuming a reservation of water, if hard evidence of a specific intent one way or another is lacking.²⁶ But some opponents of wilderness water rights argue that, in the modern era of increased consciousness of the *Winters* doctrine, that presumption ought to be reversed. It no longer makes sense, they say, to infer a reservation of water from the mere fact that a land designation will require water. Once the Supreme Court made clear that the federal government did have the power to reserve water for non-Indian federal land designations, they argue, the burden shifted to proponents of *Winters* rights to make their creation explicit.²⁷

It seems peculiar, even paradoxical, to say that, because the modern Supreme Court has been willing to infer the creation of a water right in

23. See, e.g., *United States v. Denver*, 656 P.2d 1, 30 (Colo. 1982); see also *United States v. New Mexico*, 438 U.S. 696, 713 n.21, 718 n.1 (1978) (Powell, J., dissenting).

24. This casts doubt on the claim of Senators McClure and Wallop that Judge Kane's decision subjects the *Winters* doctrine to "contortions," by "bootstrapping" secondary purposes to "create new preemptions." See *El Malpais National Monument*, S. REP. NO. 100-100 24 (1987) (Additional Views of Senators McClure and Wallop). Senator Wallop had earlier signed a letter authored by Senator William Armstrong of Colorado that found "strong legal precedent indicating that new reserved water rights would accrue to the Federal government to serve the purposes" of wilderness designation. See Letter signed by ten Republican western Senators to Senator James McClure, then Chair of the Senate Committee on Energy and Natural Resources (September 25, 1986) (copy on file with the Land and Water Law Review) [hereinafter Senators' letter].

25. See 16 U.S.C. § 1133(d)(6) (1982) ("Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws").

26. See e.g. *Arizona v. California*, 373 U.S. 546, 598-99 (1963) ("It is impossible to believe that . . . Congress [did not intend] to reserve waters necessary to make the reservation livable" for the Indians, in response to Arizona's argument that evidence was lacking of Congress' intent).

27. See, e.g., Beaton, *supra* note 20, at 4, 7.

land designations made long ago without hard evidence of specific intent, land designations made in modern times must explicitly create water rights. A far more sensible assumption is that the Congress enacting the Wilderness Act was entitled to rely on the unbroken line of reserved rights cases teaching that Congress need not be explicit in order to reserve water. Otherwise, the same approach — lack of express reservation of water — would have radically different consequences, based on nothing more than a presumed higher consciousness growing out of court decisions that such rights need not be created explicitly. Surely the long existence and application of *Winters* stands for the opposite result.

IV. A TEMPEST IN A TEAPOT?

A. Not to Worry — *The Limited Threat of the Wilderness Water Right*

Rather than plumbing the intricacies of imaginative legal arguments about why the *Winters* doctrine should not apply to wilderness areas,²⁸ I propose to explore why there is so much concern about whether a *Winters* right for wilderness exists. At first blush, water rights for wilderness areas are unlikely candidates for controversy. Trelease reminded us more than a decade ago that non-Indian federal *Winters* rights of any stripe will rarely actually interfere in any substantial way with existing water uses. The likelihood that the wilderness subspecies of *Winters* would seriously threaten existing water uses ought, in turn, to approach the vanishing point.

Several features of the wilderness water right tend to separate it from, and make it generally less troublesome than, the general run of non-Indian *Winters* rights. First, by definition the wilderness water right consumes no more water than natural systems allow, by evaporation or seepage. It is, in water rights parlance, a non-consumptive, instream, preservation-oriented water right that does no more than add a layer of legal protection to the naturally occurring hydrologic conditions in the wilderness area.

The Wilderness Act itself implies that the quantity of water embraced within the wilderness water right ought to be all or nearly all of the water found in the wilderness area.²⁹ On the other hand, its definition of wilder-

28. Although he was writing before attention had focused on the application of *Winters* to wilderness designations, Frank Trelease dropped enough hints on the question to satisfy me, at least, that he thought the doctrine applied. See Trelease, *supra* note 1, at 486-91.

29. See 16 U.S.C. §§ 1131(a), (c) (1982), referring, *inter alia*, to "an enduring resource of wilderness," defined as including "the earth and its community of life," of "primeval character and influence," to be "protected and managed so as to preserve its natural conditions." *Id.* The Senators' letter finds it "reasonable" to assume that the wilderness water right would protect "historic flows" in the area in order to "preserve wilderness characteristics." Senators' letter, *supra* note 24, at 1. Although the Supreme Court has in recent years emphasized that the *Winters* doctrine embraces the minimum amount of water necessary to carry out the purposes of the reservation, without which the purposes would be "entirely defeated," see *United States v. New Mexico*, 438 U.S. 696, 700 (1978), the wilderness water right seems uncompromising in its demand for something like full natural flow. Bottomed generally on the idea of ecosystem protection, it reaches beyond those minimum flows necessary to preserve fish life or some primitive recreational use to include general ecosystem protection. See also text accompanying note 83 *infra*.

ness contains qualifiers like "generally," "primarily," and "substantially," in describing to what extent areas need to be free from man's influence in order to qualify for legal protection as wilderness.³⁰ This suggests the existence of some room for depletion of natural flows in wilderness areas consistent with the wilderness water right.³¹

But the Act is firm on how an area is to be managed once it is designated as wilderness; namely, "to preserve its wilderness character."³² Given the Act's emphasis on preservation as the overriding management goal, the general presumption ought to be that all existing flows are embraced within the right, and proposed depletions subjected to a heavy burden of showing no interference with the character of the wilderness area.³³ Even assuming that all the natural flows are reserved, however, the threat to other uses is minimized by the fact that the right involves no artificial diversion or consumption of water.

Second, the priority date for the wilderness water right tends to be much later than the other *Winters* rights. Nearly all national forests, parks, monuments, and wildlife refuges were created around the turn, or at least within the first few decades, of this century. The wilderness water right probably came into existence only in 1964 or later, when specific areas were designated by Congress.³⁴ This is long after the priority date of most surface water appropriations under state laws.

Third, even more than most areas of federal land attended by federal water rights, federal wilderness areas tend to cluster around the very tops of watersheds and in other isolated corners of the western landscape. They also tend to contain, within their borders, relatively few parcels of non-federal land that might support significant water uses.³⁵ That is, with few

30. See, e.g., 16 U.S.C. § 1131(c) (1982); and text accompanying note 36 *infra*.

31. Cf. California Wilderness Coalition (IBLA No. 87-364), 98 IBLA (GFS) 314, 316 (July 30, 1987) (depletion of flows in BLM wilderness study area by upstream hydroelectric development did not impair the area's suitability for preservation as wilderness because the depletion would be "substantially unnoticeable," and would not violate a minimum flow regime previously established by the California Department of Fish and Game).

32. 16 U.S.C. § 1133(b) (1982).

33. The Forest Service Report, *supra* note 18, at 4, seems to take this position. It states that the quantity of the right is the "flow regime or level of water [existing] as of the date of establishment as wilderness, unless it is determined, based upon . . . specific facts . . . that a different quantity of water will achieve the purposes for which the wilderness was established." *Id.* Therefore, the agency said, the test was whether diversion of water would be "noticeable." *Id.*

34. Because a number of these areas were administratively designated for protection under various rationales prior to congressional designation, an argument exists that the priority date for wilderness might extend back to the earliest protective administrative designation. It is well-settled that *Winters* rights may be created by administrative as well as legislative action. See, e.g., *Arizona v. California*, 373 U.S. 546, 598-601 (1963). Even so, this would make the priority date for the earliest administratively designated wilderness areas reach back only to the early 1920's, which was after a large proportion of western surface water had been appropriated under state law. State law rights perfected earlier would still be senior to the wilderness water right. For an argument against the earlier priority date, see Comment, XXI LAND & WATER L. REV. 381, 393-94 (1986).

35. Such inholdings, often the result of patents issued under the General Mining Law of 1872 (codified at 30 U.S.C. §§ 22-39 (1982)), are usually small and located where water resource development is infeasible. See Forest Service Report, *supra* note 18, at 2, 8-10.

exceptions, they are not located in areas that pose substantial interference with existing water uses. To elaborate by taking the simplest case, the water right for a wilderness area that straddles the Continental Divide merely legally ensures that the water found in the area will make its way downstream for use where the farms, factories and people tend to be. While it does prevent the water from being artificially diverted from or above the wilderness, it does not prevent that water from being appropriated and used under state law once it leaves the wilderness.

Moreover, federal land generally cannot become part of the National Wilderness Preservation System if it already contains water resource projects of any size, or has already been stripped of its water by man-made developments. To qualify for wilderness designation, it must be "untrammelled by man, . . . undeveloped . . . retaining its primeval character and influence, without permanent improvements or human habitation, . . . generally appear[ing] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."³⁶ If existing appropriations of water under state law have robbed an area of its "primeval character and influence," it is not a realistic candidate for wilderness protection nor, therefore, for creation of a wilderness water right under federal law.

Finally, the total quantity of federal land that might give rise to a wilderness water right is substantially less than the amount of federal land giving rise to other subspecies of *Winters* rights. Although nearly 90 million acres of federal land have been officially designated as wilderness, nearly two-thirds of this acreage is in Alaska, certainly a special case as far as potential water conflicts are concerned.³⁷ The same could be said for the nearly one million acres designated in the more humid eastern and midwestern states. The 30-odd million acres of designated wilderness in the eleven western states (excluding Alaska and Hawaii) are not de minimus, and somewhat more than twice that many acres of roadless, de facto wilderness remain for possible congressional designation in the West. Still, the total number of acres of federal land in the eleven western states to which is attached some other subspecies of *Winters* water right is considerably greater. This latter, broader category includes the 135 million acres of national forests; the 13 million acres of national park system lands; the 4.5 million acres of national wildlife refuges; and most important (in terms of water rights involving consumptive use) the 42 million acres of land in Indian reservations.

In short, the wilderness water right would seem to be the paradigm illustration of what Frank Trelease was talking about—a theoretical poten-

36. 16 U.S.C. § 1131(c) (1982). This version of that Code subsection says that to qualify for wilderness designation the land must be "underdeveloped." This is an error in codifying the law. The Act actually states that the land must be "undeveloped" to qualify. Wilderness Act, Pub. L. No. 88-577 § 2(c), 78 Stat. 890, 891 (1964).

37. These and the statistics that follow in the paragraph were drawn from G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCE LAW 994, 1001 (2d ed. 1987); DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 1986 48-50; and telephone conversation with Michael Anderson, The Wilderness Society, Washington, D.C. (March 31, 1988).

tial for major interference with existing water uses that, upon closer examination, proves to be practically no threat at all. Indeed, that conclusion is borne out by the only actual studies done on the issue, in Colorado.³⁸

But if that is the case, why the ruckus? Why has the Reagan administration dragged its feet on asserting the wilderness water right?³⁹ Why have some of the western states, and the traditional water users like irrigation districts and municipalities, worked themselves into a lather on the issue?⁴⁰ Why have a number of western Senators and Congressmen, mostly conservative Republicans, vowed to hold up new wilderness legislation until the issue is clarified?⁴¹

B. The Reasons for Continued Opposition to Wilderness Water Rights

There seems little doubt that Frank Trelease would have regarded the outcry as a simple case of the traditional water users in the West, and their allies in the current administration, continuing to cry wolf. Part of the problem may be, in other words, that wilderness water rights are simply the latest concrete manifestation of the *Winters* doctrine. The doctrine itself has never sat well with traditional water interests in the West, not only because of the potential threat it poses to existing uses, but also because it challenges state primacy in water matters. The knee-jerk response in many parts of the West to assertion of any kind of federal

38. After Judge Kane's initial decision, members of the Colorado congressional delegation asked the Colorado Department of Natural Resources to examine and report on the conflicts between wilderness water rights and other uses. The Department's conclusion: "[T]here is little actual or potential conflict between existing or conditional water rights and any federal reserved rights that may be established in existing or proposed wilderness areas on Colorado National Forests." Letter from David Getches and Jeris Danielson to Gary Hart, Hank Brown, and Ken Kramer 3 (February 24, 1986) (copy on file with Land and Water Law Review). See also Forest Service Report, *supra* note 18, at 10.

39. For nearly a year rumors (the accuracy of which I have generally confirmed in confidential telephone conversations with several individuals in the federal establishment) have circulated that the Reagan administration is preparing an opinion rejecting the whole concept of a wilderness water right. This position would fly in the face of Judge Kane's decisions as well as reverse the 1979 Interior Solicitor's Opinion, see 86 Interior Dec. 553 (1979). The Department of the Interior has conceded that it is, as its Solicitor put it in a recent letter, "researching the scope of . . . water rights for areas designated as wilderness." Letter from Ralph W. Tarr to Cong. George Miller (Oct. 30, 1987) (copy on file in Land and Water Law Review). In the meantime, the federal government has been faced with deadlines to file claims in a number of general stream adjudications. The Department has, in these proceedings, avoided claiming wilderness water rights under the *Winters* doctrine without saying why, and instead expressed an intention to seek protection for wilderness water under state law. See note 72 *infra*.

40. Not all states have joined Colorado in the fray. The Director of Arizona's Department of Water Resources, for example, has said that an Arizona Farm Bureau proposal to include language renouncing federal water rights in forthcoming Arizona wilderness legislation is misguided because the Director "is not seriously concerned" that new wilderness designation will "jeopardize existing water rights in Arizona." The Director emphasized the late priority date and non-consumptive character of the wilderness water rights, and concluded that the "limited circumstances" under which they could impact water rights perfected under state law were not sufficient to warrant across-the-board abolition of wilderness water rights. See Letter from Alan P. Kleinman, Director, Arizona Department of Water Resources, to Andy Kurtz, Arizona Farm Bureau (March 30, 1988) (copy on file with Land and Water Law Review).

41. See Senators' letter, *supra* note 24, at 2.

water right has been hostility, and it was perhaps unreasonable to expect that the wilderness water right, despite the fact that it is considerably less threatening than other subspecies of *Winters* rights, would escape criticism.

But a more dispassionate view of state-federal relations in water rights, with particular focus on actual experience with the *Winters* doctrine, ought to give the traditional water interests some solace. The western states are winning on the issue of state primacy. Their courts have been handed an open invitation by the U.S. Supreme Court to adjudicate federal water rights, along with ones created under state law, in their own courts.⁴² Many such adjudications are now ongoing, covering many of the most important watersheds in the West. And once adjudicated, these federal rights will, for the most part, be administered through the state systems. This, coupled with the fact that no major instance of outright conflict between federal and state rights has yet surfaced, undercuts the hostility that has been visited upon the wilderness water right.

It may be too cynical to suggest that, now that the West at long last has the opportunity of adjudicating the federal water rights and finally laying to rest the specter of *Winters* that has occupied so much attention in last three decades, it cannot resist beating the drums of state primacy one more time. The contours of the doctrine are still shrouded in some uncertainty, especially as it relates to Indian water rights and to groundwater. Uncertainties about Indian *Winters*' rights, however, do not implicate wilderness water rights. As for groundwater, although groundwater pumping adjacent to wilderness areas might theoretically pose some problems, as suggested by the famous "pupfish" case,⁴³ the odds that significant groundwater pumping will be possible adjacent to wilderness areas would, given their isolation and generally rugged topography, seem to be quite remote.

A second strand of opposition to the wilderness water right is simply displeasure with the whole idea of legal protection for wilderness areas. This attitude is not a majority one, even in the western states, but it does command substantial support in some places. Although James Watt's tenure as the Reagan administration's federal lands czar has receded into the mists of memory, his efforts to open wilderness areas to mineral development, and his opposition to new designations, remind us of that support.⁴⁴

Opposing wilderness water rights may, for the Reagan administration, be a convenient way to placate die-hard Watt supporters and other wilderness opponents. And it may prove difficult for the courts to do much about it. The U.S. Supreme Court has recently held that judgments by

42. For the latest confirmation of this invitation, see *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

43. *Cappaert v. United States*, 426 U.S. 128 (1976).

44. See Leshy, *Natural Resources Policy*, in *NATURAL RESOURCES AND THE ENVIRONMENT: THE REAGAN APPROACH* 39-45 (Portney ed. 1984).

federal agencies not to take action are protected by the same kind of discretion accorded prosecutors' decisions not to seek indictments for crimes.⁴⁵ Whether this decision, rendered in the context of an agency's refusal to regulate, would be extended to cover an agency's refusal to protect a property right (to water in wilderness areas) is not clear.⁴⁶ But it at least raises the possibility that a determinedly hostile administration might be able to relinquish federal water rights for already designated wilderness without judicial interference.

This would allow the creation, in the future, of wilderness-impairing water rights, either by new appropriations or changes in existing water rights. Functionally, the net effect is similar to allowing the creation, within the wilderness area, of a non-federal inholding that may be used in ways inconsistent with the protection of the wilderness itself. Inholdings exist in some wilderness areas,⁴⁷ but they are troublesome because they threaten the very values the designation seeks to protect. They can lead to awkward management problems, controversy and, in the end, substantial expense if the federal government has to buy them out in order to secure needed protection. Federal land managers generally regard inholdings the same way they do migraine headaches, and so it is remarkable that the current administration seems bent on creating their functional equivalent here, by refusing to claim water rights for wilderness areas. It may perceive a short-term political gain by doing so, but in the long run the costs, measured by dollars and otherwise, may be high.

But if James Watt's crusade reminds us of the existence of anti-wilderness sentiment, his failure also teaches the tactical wisdom of not opposing wilderness for its own sake, for such opposition now seems to touch too tender a nerve in the national body politic. Opponents of designating new wilderness areas may think that basing their opposition on water rights implications will meet with a better response, and so far, they may be right.⁴⁸

Another explanation for the furor about wilderness water rights is simply ignorance and misunderstanding. Many water appropriators do not pause to reflect about the usufructuary character of water rights and the interdependence of water uses that are prominent features of all western state water appropriation systems. They do not understand how, even though the water of a particular stream may be wholly appropriated downstream, it can nevertheless later be made subject to another, *non-consumptive* appropriation upstream.

45. Heckler v. Chaney, 470 U.S. 821 (1985).

46. See Abrams, *supra* note 20, at 395-404; see also Sierra Club v. Block, 615 F. Supp. 44, 47-48 (D. Colo. 1985).

47. See, e.g., GENERAL ACCOUNTING OFFICE, NONFEDERAL LAND AND MINERAL RIGHTS COULD IMPACT FUTURE WILDERNESS AREAS (GAO/RCED-87-131) (June 1987).

48. The Senators' letter, *supra* note 24, at 1, expresses it this way: "We support the reasonable use of water to protect wilderness values. However, it is critical that wilderness designation should not force the West into a legal straight jacket as far as future water development is concerned." *Id.*

The existence of two or more valid appropriations to the same water is common in all western states. An appropriation for generating hydroelectric power may be granted even though the water to be run through the turbines is already subject to a senior downstream appropriation for agricultural use, because the two rights can co-exist without conflict. Nevertheless, at least in the wilderness context, the senior downstream appropriator may tend to think she in effect "owns" the stream. Thus, when she learns that the federal government may be claiming a new upstream water right she fears the worst: interference with or even theft of her water right.

Even otherwise knowledgeable lawyers may be susceptible to this error. In recent years applications to appropriate water to preserve instream flows, effectively a non-consumptive use, have sometimes been protested by downstream water users simply because of a genuine misunderstanding about the implications of granting the application. Happily, in some of these cases explanations and discussions have allayed fears, and led to the withdrawal of the protest.⁴⁹ But in other situations opposition continues.⁵⁰

1. Linkage Between New and Previous Designations

Blanket opposition to the designation of new wilderness areas points up another way wilderness water rights tend to differ from many other subspecies of *Winters* rights; namely, wilderness water rights are still being created in substantial numbers. Outside of Alaska, few parks, wildlife refuges, forests and other reservations of federal land and attendant water have been created in the last half century, but each year for the past decade or more Congress has spent substantial amounts of time deliberating over wilderness legislation — holding hearings, visiting areas, drawing boundaries, negotiating out conflicts, and passing bills designating dozens of new wilderness areas. And, as noted above, many millions of acres of federal land that meet the threshold qualifications for wilderness protection remain outside the National Wilderness Preservation System.⁵¹

The desire of wilderness advocates for new designations gives opponents legislative leverage they generally lack with respect to *Winters*

49. See, e.g., *Ariz. Dept of Water Resources, Decision and Order on the Nature Conservancy's Applications Nos. 33-78419 and 33-78421 to Appropriate Water in Ramsey and O'Donnell Creeks, Arizona* 2, 8 (April 29, 1983); and *on rehearing*, (July 29, 1983) (copies on file with Land and Water Law Review).

50. See, for example, the opposition expressed by several irrigation associations to the federal assertion of a wilderness water right in the Red River adjudication in New Mexico. Irrigation Associations' Brief on Objections by the United States to the Special Master's Report at 8, *New Mexico v. Molybdenum Corp.*, No. CV 9780—C (D. N.M. July 9, 1987) (copy on file with Land and Water Law Review) (arguing that there was no unappropriated water available when the wilderness area was created, because it had all been appropriated for agricultural and other uses downstream).

51. The only other category of *Winters* right being created in any substantial numbers is for rivers designated under the Wild and Scenic Rivers Act, which by its own fairly explicit terms creates a water right, and which is itself directly concerned with preserving streams in their natural state. See 16 U.S.C. §§ 1271-87 (1982).

rights that came into being decades ago. Politically, in other words, proposals to establish new wilderness areas provide a linkage that makes efforts to limit the assertion of water rights in already designated wilderness areas more credible. This has contributed to moving the battle from the courts to the Congress. Thus, Colorado Senator Armstrong's first response to the Sierra Club litigation was to introduce an amendment to a wilderness bill for Colorado that would have expressly renounced any *Winters* water right claim, not only for the wilderness areas that bill would designate, but also for areas designated by previous acts, dating back to 1964.⁵² Judicial relief is unavailable in this context; the courts can do nothing about the opposition of the administration and its allies in Congress to congressional designation of new wilderness areas, whether it is based on water rights or something else.

2. Keeping Water Projects Out of Wilderness Areas

Some opponents of new wilderness areas may object simply to the fact that designation of an area as wilderness tends to make it off limits to water projects, because man-made structures like dams, diversion tunnels, canals, and pumping stations are inconsistent with the idea of preserving the area in its natural condition. Somewhat strangely, however, the Wilderness Act does not erect an absolute bar to such new water resource developments. One of the numerous compromises made by wilderness advocates to secure passage of the original Wilderness Act in 1964 was a provision allowing the President to authorize, inside wilderness areas, "[the] prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest."⁵³

While this provision has never been used,⁵⁴ it does tend to blunt somewhat the argument that wilderness designation locks up large areas from water projects. But opponents of wilderness water rights can argue that

52. See S. 2916, 98th Cong. 2d Sess. (1984). Section seven of this proposal would have prevented any act designating lands in Colorado as wilderness from establishing a "right to the use or flow of water in the Federal Government because of the designation. . . ." *Id.* at 22. See *Colorado Wilderness Act: Hearings on S. 2916 before the Subcomm. on Public Lands and Reserved Water of the Senate Comm. on Energy and Natural Resources*, 98th Cong., 2d Sess. 22 (1984). See also H.R. 4233, 99th Cong., 2d Sess., 132 CONG. REC. H570 (daily ed. Feb. 25, 1986); S.2097, 99th Cong., 2d Sess. § 8 (1986), 132 CONG. REC. S1567-76 (daily ed. Feb. 25, 1986).

53. 16 U.S.C. § 1133(d)(4) (1982). The legislative history of this section suggests that this was intended to allow "minor water resource conservation measures [and] small watershed developments." 109 CONG. REC. 5892 (1963) (statement of Senator Frank Church of Idaho, a principal sponsor of the Wilderness Act). See *id.* at 5893 ("[I]f we are to have any new public water project on a wilderness area, it would require positive action of the Congress . . ." *Id.*) (Statement of Sen. Church, the context indicating a concern with new federal reclamation projects as opposed to the minor intrusions he thought could be authorized by the President under the Wilderness Act).

54. The most serious effort to invoke it was made by the Denver Water Board, which has long wanted to build a trans-basin diversion originating in the Eagle's Nest Wilderness above Vail, Colorado. The lobbying effort to persuade President Reagan not to exercise this authority eventually involved former President Gerald Ford, on behalf of his fellow residents of Vail, and Mrs. Joseph Coors. See Morgenthaler, *Water Dispute Between Denver and Vail Gets Nasty, Boils Over into White House*, Wall St. J., Aug. 21, 1981, at 21, col. 4.

Presidential authorization is, practically speaking, much more difficult to obtain than the kind of lower-level agency approval of rights-of-way and other permissions to use that would be required to build water projects on federal land that is not designated wilderness.⁵⁵ Thus, from their standpoint, wilderness designation at the least chills opportunities for building water projects in wilderness areas.

This opposition to wilderness designation is not based on concern about its implications for existing water rights, or even the concept of the *Winters* right. Rather, the concern is about getting access to land that might support future water development. Thus, defeating the assertion of a *Winters* right for wilderness areas does not open the gates of wilderness areas to new water projects. Instead, opponents of wilderness must employ additional strategies. One is to try to make new designations as palatable as possible, by carving out areas that could be the sites of water resource development projects. This converts the fight about water implications of new wilderness designations into one about boundaries, a question that tends to dominate consideration of every proposal to designate new wilderness. From the very beginning, the Forest Service, in its administrative wilderness designations, and later the Congress, in its legislative designations, have carved out and excluded from protection areas they thought more valuable for other uses, like mining.⁵⁶

Another is to try to write into any statute designating new wilderness an exception or grandfather clause for specific water projects. Here again there are ample precedents, not only in the Wilderness Act itself⁵⁷ but also in subsequent statutes designating specific areas as wilderness. At least one of these left room for a proposed water project, in the Holy Cross wilderness in Colorado.⁵⁸

55. Of course, that is presumably why the wilderness advocates insisted that the waiver come from the President rather than a lower-level official. See 109 CONG. REC. 5897-98 (1963). Senator Allott of Colorado proposed giving the appropriate Cabinet member (rather than the President) the power to make exemptions for water projects, but his proposal failed by a vote of 26 to 56. See *id.* at 5928.

56. See, e.g., J. LESHY, *THE MINING LAW* 230-42 (1987). See also Act of August 16, 1962, Pub. L. No. 87-590, 76 Stat. 389, as amended by Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, 92 Stat. 42, 43 U.S.C. § 616 (1982) (special authority for aspects of the Fryingpan-Arkansas water project as it related to the Hunter-Fryingpan wilderness area).

57. Besides the water project exception, Congress wrote into the Wilderness Act limited grandfather clauses for mining, grazing, and the operation of aircraft and motorboats in certain circumstances. See generally 16 U.S.C. §§ 1133(c), (d)(3)-(5) (1982).

58. See Act of Dec. 22, 1980, Pub. L. No. 96-560 § 102(a)(5), 94 Stat. 3265, 3266, providing that "[n]othing in this Act shall be construed to expand, abate, impair, impede, or interfere with the construction, maintenance or repair" of the Homestake Water Development Project. *Id.* For a somewhat analogous provision, see 16 U.S.C. § 1274 (51) (Supp. IV 1986) enacted as part of the Arizona Wilderness Act of 1984. This designated a stretch of the Verde River as wild and scenic, but provided that the designation "shall not prevent water users receiving Central Arizona Project water allocations from diverting that water through an exchange agreement with downstream water users in accordance with Arizona water law." *Id.* See also 100 Stat. 5368-69 (1986) (partially codified at 16 U.S.C. § 1274 (56) (Supp. IV 1986)), designating portions of the Cache La Poudre River as wild and scenic, and creating a federal water right to protect such purposes, but also disclaiming any attempt to interfere with the proposed Grey Mountain Dam water project. See S. REP. NO. 99-354, 99th Cong., 2d Sess. 3-6 (1986). And see note 56 *supra*.

Conversely, for wilderness advocates, wilderness areas can be protected from water projects inside their boundaries by persuading the President not to authorize water projects pursuant to the exception in the Wilderness Act. So long as that line of defense holds, a wilderness water right need not be asserted. But because the defense is good only so long as an incumbent President is unwilling to exercise this authority, it is not foolproof. Outright repeal of the President's statutory authority would provide firmer protection. For headwaters wilderness areas (those at the tops of watersheds), then, a viable strategy for wilderness advocates is to persuade Congress to put such areas beyond the President's power to invoke the water project exception in the Wilderness Act. If that were done, assertion of a wilderness water right for these areas would seem unnecessary.⁵⁹

If the water project exception to the Wilderness Act were repealed, and water projects entirely shut out of wilderness areas, the water found in these headwaters areas would be protected by forbidding land access, rather than by claiming a water right for natural flows. The degree of protection would be about the same (or even greater, if one assumes that the minimum amount contained in an implied wilderness water right⁶⁰ is something less than natural flows). The advantage is that the state would not have to trouble itself to quantify the wilderness water right and fold it into its state system of water rights.⁶¹ While such a proposal has been informally floated as a possible solution to the Colorado imbroglio, which involves mostly headwaters wilderness, the traditional water interests have apparently been unwilling to relinquish the possibility, however remote, of convincing a President that a new water project in an existing wilderness would be "needed in the public interest."⁶²

The question posed at the beginning of this section can be turned around: If wilderness water rights are not threatened by existing uses, what need exists for federal agencies to claim them? At one level, the answer is simple: as security against the possibility that new appropriations or changes in use of senior water rights could be made that would injure the wilderness. This is recognized in the Forest Service Report which, while it concluded that there are "no immediate threats,"⁶³

59. The same would hold true for downstream wilderness areas, as far as tributary streams originating within the boundaries of the wilderness were concerned.

60. See *United States v. New Mexico*, 438 U.S. 696, 700 (1978), and notes 29-31 *supra* and accompanying text.

61. But if this strategy were followed, care must be taken to make the prohibition of water projects in wilderness areas complete and explicit. The Wilderness Act allows some other non-conforming uses, such as mineral development, see 16 U.S.C. § 1133(d)(3) (1982), and it ought to be made clear that these do not carry any rights to build water projects, such as for mineral processing, by implication.

62. The diversion of water from the western slope to cities along the front range in Colorado might be the most likely place in the entire West where wilderness will conflict with feasible water development. The confluence of a number of factors tends to make this situation unique: fast-growing cities, nearby plentiful supplies originating in designated wilderness, the supplies readily obtainable largely by gravity flows through diversion tunnels (and possibly producing hydroelectric benefits), and a state concern about loss of compact entitlements to downstream states. Cf. text accompanying notes 78-87 *infra*.

63. Forest Service Report, *supra* note 18, at 5.

acknowledged that the agency's objective was to "protect the water resources of the wilderness area . . . so as to preserve and protect the wilderness characteristics for which each wilderness was designated."⁶⁴ To this end, the Report set out a number of management actions that could be taken to prevent water projects with negative effects on wilderness.⁶⁵ Among these was an intention to seek to purchase water rights that would threaten the wilderness.⁶⁶ Yet the agency was unwilling, in the end, to perfect the absolute ability to prevent those rights from being established because it would not claim a federal water right for the wilderness. Further, it acknowledged that it "cannot predict" whether it would obtain funds (nor, it might have added, whether it would have the will to ask Congress for them) to purchase such rights if that became necessary to protect the wilderness.⁶⁷ The Forest Service also argued that it would, at some future time, consider claiming a wilderness water right if "needed for protection of the wilderness resources."⁶⁸ This ignores the loss of priority future claims of wilderness water rights could entail, a stance previously criticized in harsh terms by Judge Kane in his rejection of the agency's first report.⁶⁹

The Forest Service Report nevertheless argues that, given the difficulty of quantifying the water rights, the real issue is a cost-benefit one — whether the potential threat to the wilderness from failing to claim the right is sufficient to justify the expense of quantification.⁷⁰ There are many reasons to doubt the sincerity of this claim, offered as it was relatively late in the Sierra Club's litigation, several years after the Forest Service decision to forego assertion of the right. In other areas of the West, by contrast, the Forest Service (and other federal agencies) had previously claimed wilderness water rights without apparent difficulty associated with quantification.⁷¹ And the Forest Service and other federal agencies have numerous times claimed instream flows under state law, or pursuant to other kinds of non-wilderness *Winters* rights, again without complaining about quantification. Indeed, in recent filings in Arizona, the Forest Service and the Park Service have claimed preservation flows for wilderness areas under state law, apparently foregoing the federal right, even

64. *Id.* at 4. And see the testimony of Douglas MacCleery, Deputy Assistant Secretary of Agriculture, on Colorado wilderness bills in June 1986, where he acknowledged that the Forest Service "has a responsibility to maintain and protect wilderness water values which include streams and other water dependent sources." *Additions to the National Wilderness Preservation System, Comm. Serial No. 99-19, Part IV, Hearings before the Subcomm. on Public Lands, House Comm. on Interior and Insular Affairs, 99th Cong., 2d Sess. 148 (1986).*

65. Forest Service Report, *supra* note 18, at 10-14.

66. *Id.* at 7, 17-18.

67. *Id.* at 18.

68. *Id.* at 14.

69. See *Sierra Club v. Lyng*, 661 F. Supp. 1490, 1499 (D. Colo. 1987). See also text accompanying notes 81-82 *infra*.

70. See Forest Service Report, *supra* note 18, at 5, 15. The agency does note, as an additional reason, that it does not want to "unduly disrupt . . . the water resource allocation programs of the . . . State of Colorado." *Id.*

71. See, e.g., federal claims for surface water under the Wilderness Act made in the Red River adjudication in New Mexico, discussed in the Report of Special Master 10-11, *New Mexico v. Molybdenum Corp.*, No. CV 9780-C (Red River) (March 27, 1987).

though the same quantification standard would apply.⁷² It would seem, on this last point, that elementary principles of fairness, as well as law, prevent a state from demanding more in the way of quantification for a federal wilderness water right than it does for other kinds of water rights. For all these reasons, the "head-in-the-sand" approach to wilderness water protection offered by the Forest Service in its latest Report is not persuasive.

C. Potential Water Rights Conflicts in Downstream Wilderness

1. Wilderness and Existing Upstream⁷³ Water Uses

It is no accident that concern about the water rights implications of designating new wilderness has emerged at a time when the wilderness review and designation process is, to some extent, entering a new phase. To date most of the areas designated as wilderness have been headwaters, "rock and ice" tracts, located primarily on national forest land. But now Congress is beginning to take a closer look at downstream areas, such as land managed by the Bureau of Land Management (BLM), the National Park Service, and the Forest Service in canyon country.⁷⁴ While the fight in Colorado has been over high altitude wilderness, where diversions of water upstream or on inholdings are practically impossible for the most part, the next generation of wilderness areas are more likely to have such existing diversions upstream. The Senators' letter made much of this: "A large number of long established water users are upstream from BLM areas now being considered for wilderness."⁷⁵

This is not to suggest that the designation of wilderness in these downstream areas is inevitably a serious threat. For one thing, no significant water uses may exist above wilderness areas. Upstream areas might themselves be mostly federal lands that are in some protected category such as wilderness. Or they may be so remote, arid, or otherwise undevelop-

72. See claims filed for the Saguaro National Monument Wilderness and the Organ Pipe Cactus National Monument Wilderness in the Upper Santa Cruz River and Lower Gila River, respectively, in Gila River System and Source General Stream Adjudication, Civ. Nos. W-1 through W-4, Superior Court of Maricopa County (November 2, 1987) (copies on file with Land and Water Law Review). The claims made are not crystal clear as to whether the federal reserved water right for wilderness has been waived. On the one hand, the claims are made "under state law for whatever purposes might have been added by the designation of portions of [these areas] as wilderness . . ." *Id.* On the other hand, the claims also rely on federal reserved rights under the legislation designating these areas as National Monuments, and the section of the claims describing the purpose of the designation refers specifically to the purpose of "securing the benefits . . . of wilderness," *id.*, and the claimed priority dates refer to the statutes designating portions of these areas as wilderness. See Act of Oct. 20, 1976, Pub. L. No. 94-567 § 1(j), 90 Stat. 2692, 2693 (Saguaro National Monument); National Parks and Recreation Act of 1976, Pub. L. No. 95-625 § 401(7), 92 Stat. 3467, 3490 (Organ Pipe Cactus National Monument).

73. The discussion that follows applies to existing water uses on inholdings within wilderness areas as well as upstream of such areas.

74. Much of this attention flows from Congress' mandate, in section 603 of the Federal Land Policy and Management Act, 43 U.S.C. § 1782 (1982), that BLM study the roadless areas under its management and make recommendations to Congress by 1991 on their suitability for preservation as wilderness.

75. Senators' letter, *supra* note 24, at 1.

able that significant water uses have never been made.⁷⁶ And even if significant water uses have been made upstream prior to designation of the wilderness, new downstream wilderness water rights would not legally threaten them, because the new rights would be junior in priority to the existing upstream uses perfected under state law.

2. Wilderness Water Rights and Changes in Existing Upstream Water Rights

But if the concern about the effect of wilderness water rights on existing uses is almost wholly misplaced, there remains their potential effect on future water arrangements. Transfers of water rights from one place or type of use to another have frequently been made in the West, despite numerous technical legal restrictions that impede them.⁷⁷ But they are clearly becoming something of a rage today, as farming and ranching become ever more economically marginal in many parts of the West, rapidly growing cities reach out for new supplies of water, and the federal water project construction program winds down because of the unavailability of new sites for projects, costs, lack of support for further subsidies, and environmental opposition. More water rights are being moved around the landscape today, and the trend is likely to continue.⁷⁸

A standard feature of prior appropriation systems prevents a transfer of water rights if it causes any injury to any other appropriator on the stream, whether senior or junior to the appropriation being transferred.⁷⁹ In the *Winters* context, this means that a wilderness water right, although junior to existing appropriators, is nevertheless in a position to veto any transfer of any other appropriation on the stream if it would be injured. Thus, such rights could impair new schemes for dams and water diversions, especially if they involve the transfer of water from existing uses downstream from wilderness areas to new points of diversion upstream from wilderness areas. The Senators' letter emphasizes this point, characterizing the right as a "legal [] bar [to] any change in the use or management of water by . . . upstream users."⁸⁰

76. See, e.g., Forest Service Report, *supra* note 18, at 9 (describing a tract of non-federal land above the Raggeds Wilderness in Colorado with a low risk of future water development).

77. These include such things as the appurtenancy doctrine (now rarely enforced), requirements that irrigation districts approve transfers within their borders, area of origin laws, and the like. See generally Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 21-29 (1966); D. GETCHES, *WATER LAW IN A NUTSHELL* 159-79 (1984).

78. See generally *Water Market Update*, a monthly report on water marketing activities begun in January 1987, published by Western Network in Santa Fe, New Mexico.

79. See D. GETCHES, *supra* note 77, at 165-66.

80. Senators' letter, *supra* note 24, at 2. At the same time, the rule protecting existing appropriations against injurious changes in other water rights protects state water rights against any attempt to convert the wilderness water right into one that involves diversion or consumption of water. Thus, a water user who perfects a state law water right downstream from an already established wilderness area is protected against any subsequent federal attempt to convert the senior priority wilderness in-stream flow right into one that would divert the water for some consumptive use. See, e.g., *Cache La Poudre Reservoir Co. v. Water Supply and Storage Co.*, 25 Colo. 161, 53 P. 331, 333 (1898); 27 Colo. 532, 62 P. 420 (1900) (a senior non-consumptive appropriator cannot transfer its right to another for a consumptive use to the detriment of a downstream appropriator).

This feature of the wilderness water right underscores the need for federal agencies to assert and defend it, if the water conditions in wilderness areas are to be protected. It is, for example, not always clear whether a proposed transfer or change in use of a water right can be protested by someone who does not hold an existing water right that may be affected. Similarly, it is not always clear whether the administering water rights agency can reject a proposed transfer or change on general, public interest grounds as opposed to the more narrow ground of interference with existing water rights.⁸¹ This means that the wilderness water right may be necessary to give the wilderness manager legal standing to object to such changes in upstream water rights in order to protect the wilderness.⁸²

In a broader sense, the availability of a right to interpose an objection to an alteration in upstream water conditions implicates the very basis for the water right for wilderness areas. The history of the movement to provide legal protection for wilderness shows clearly that the concept of wilderness is more than a tool for landform preservation, to exclude roads and structures. Instead, it has a much broader, more abstract purpose, related to ecosystem preservation, inspiration, and scientific study, among other things.⁸³ A wilderness area must have the legal means of protecting itself from upstream water diversions that would impair these broader purposes.

Generally, cost-effective opportunities to build new water projects in the West are scarce indeed. The best reservoir sites have long been built upon, and the waters in practically every western watershed have been brought fully under man's control before they reach their terminus. But cities along Colorado's front range, for example, continue to cast longing looks at the relatively few undammed streams left high in the Rockies. A wilderness water right could interfere with their dreams of tapping these streams, for if any part of the wilderness area is downstream from the point at which they want to divert, the wilderness water right would have a veto over any new appropriation or any transfer of any existing water right to that new point of diversion. Similarly, in the Colorado Plateau and other more arid regions, designation of lower altitude lands as wilderness could thwart attempts to make new consumptive uses of water upstream, such as to cool coal-fired power plants.

It might be said that, because of this veto power, the controversy about wilderness water rights is really about how much flexibility

81. See generally Grant, *Public Interest Review of Water Right Allocation and Transfer in the West: Recognition of Public Values*, 19 ARIZ. ST. L. J. 681 (1987).

82. The Forest Service has inferentially recognized this problem. It states that it would, if someone sought to change an existing water right in a way detrimental to wilderness, "consider asserting the reserved right and objecting to the proposed change." Forest Service Report, *supra* note 18, at 16-17. What the Forest Service fails to acknowledge, of course, is that it may be foreclosed from later asserting the federal reserved right by state rules of procedure. Cf. *United States v. Bell*, 724 P.2d 631 (Colo. 1986); see text accompanying note 15 *supra*.

83. See, e.g., 16 U.S.C. § 1131 (1982); R. NASH, *WILDERNESS AND THE AMERICAN MIND* (3d ed. 1982).

Westerners will have in the future. And it cannot be denied that wilderness designation may place some limits on the opportunities available to water planners, especially in the cities and utilities, as they look for new supplies of water. Upstream users (and potential purchasers of their water rights) resist being permanently locked into their existing modes of operation by the establishment of wilderness areas downstream from them. And so here, finally, we arrive at what is perhaps the heart of the opposition to assertion of water rights for wilderness areas.

The constraints placed on upstream water rights by the establishment of downstream wilderness are not peculiar to the wilderness water right nor, indeed, to the *Winters* doctrine. Indeed, they are a natural and familiar consequence of the appropriation doctrine itself, with its rule protecting even junior appropriators against changes or transfers of senior appropriations that injure them. All appropriative water rights are subject to this kind of restraint on alienation whenever valid water rights of any kind — wilderness or ordinary state law water rights — are established downstream from them. Senior water right holders have historically not been free to make alterations in their point of diversion or type of use when others would be adversely affected. In this sense, the loss of flexibility is more a consequence of state rather than federal law.

3. The Special Problem of Interstate Allocations.

One specific aspect of this concern about future water development involves the effect of wilderness water rights on interstate water allocations, especially interstate compacts. A specific example is in Colorado's compact entitlement to a substantial share of water from the Colorado River Basin. It now seems likely that Colorado will have substantial difficulty in making full use of its compact entitlement, a fact that is a godsend to Arizona because more water has been divided up among the basin states than exists in the basin, and the Central Arizona Project is, by congressional decree, the lowest priority among lower basin states.⁸⁴ If Colorado is prevented from diverting water above wilderness areas by the operation of a wilderness water right, it may have to let part of its compact entitlement flow unused to downstream states. The same may be true elsewhere.⁸⁵

There is no easy answer to this concern. It remains to be seen, however, whether it is a real one. By themselves, wilderness water rights may not significantly interfere with a state's ability to put the water it has been allocated by interstate arrangement to use, for reasons discussed in the

84. See 43 U.S.C. § 1521 (1982).

85. For example, New Mexico's entitlement to a share of water in the Gila River watershed may be affected because a substantial part of the upper reaches of the Gila in New Mexico is in that wilderness area first established administratively by the Forest Service at the urging of Aldo Leopold in the early 1920's. This implication of the *Winters* doctrine on compacts has not entirely escaped attention, see Muys, *Comments on "Federal Reserved Water Rights,"* 54 DENVER L. J. 493, 496 (1977), and indeed it may be at least partially responsible for the heated reaction to the Sierra Club's litigation in Colorado, even though it has not been expressed in those terms.

next section. Furthermore, some specific interstate problems might be dealt with in specific wilderness legislation by reasonable compromise.⁸⁶

Generally, interstate allocations are a problem of a wholly different dimension from wilderness water rights, involving large-scale issues of regional equity among the sovereign states. In this more rarified atmosphere, the only feasible course might be to include in wilderness legislation a standard disclaimer that nothing in the legislation ought to change any existing interstate allocation of water.⁸⁷

It should be noted, however, that the interests of the different western states' congressional delegations will diverge sharply on this issue. If it is true, for example, that establishment of water rights for Colorado wilderness would benefit Arizona, then the Arizona congressional delegation logically ought to be in the forefront of the struggle to establish water rights for Colorado wilderness. But such a stance cuts against the historic grain of western states' unity on water issues in dealing with the federal government, and no state will easily decide on a course of action that might undercut an interstate arrangement previously arrived at, no matter how outdated or wrongheaded it seems today. In the end, if no state is in the mood to compromise, compacts and other interstate allocation arrangements might have to be put aside — their adjustment may prove too complex to be solved within the context of wilderness water rights, at least absent a showing of real as opposed to theoretical impairment of an individual state's allocation.

V. WILDERNESS WATER RIGHTS AND FUTURE WATER DEVELOPMENT

Even accounting for possible interstate implications, it would be a mistake to make too much of the argument that wilderness water rights will heavily influence the future of water development in the West. It seems much more plausible to conclude that the wilderness water rights issue will not have a great deal to say about the future of western water development simply because designated wilderness will, under any conceivable scenario, occupy a relatively small fraction (no more than 10% if all roadless federal land were so designated) of the available land in the eleven

86. Congress has the power to alter compacts by legislation. *Cf. Arizona v. California*, 373 U.S. 546 (1963). For a hopeful development in a somewhat analogous context, see the Cooperative Agreement for Recovery Implementation Program for Endangered Species in the Upper Colorado River Basin signed by federal officials and the Governors of Colorado, Utah, and Wyoming in January 1988. This agreement establishes a framework for coordination among various federal and state agencies to protect endangered fish in the Upper Colorado Basin. It calls for, among other things, the maintenance of minimum stream flows via state law water rights, possible alterations in the operation of federal reservoirs, and the payment of a \$10 per acre-foot fee for any water diverted from the system by new projects, the proceeds used to finance purchases of water rights and hatcheries and other facilities to protect the fish. DEPARTMENT OF THE INTERIOR, FISH AND WILDLIFE SERVICE, FINAL RECOVERY IMPLEMENTATION PROGRAM FOR ENDANGERED FISH SPECIES IN THE UPPER COLORADO RIVER BASIN 1-7, 1-8 (1987).

87. *See*, for example, the Federal Land Policy and Management Act, § 701 (g) (5), 43 U.S.C. § 1701 note (1982) ("Nothing in this Act shall be construed . . . as modifying the terms of any interstate compact." *Id.*)

western states. And the land that qualifies for wilderness designation is, it must be recalled, remote and rugged almost by definition. The cost of building new water projects in or upstream of many of these areas will be prohibitive.⁸⁸

Firm evidence for this comes from the simple fact that the federal Bureau of Reclamation, in its historic role of building water projects with scant regard for the ability of the beneficiaries to pay for them,⁸⁹ has never found it possible to build projects in these areas already. That being the case, it would be amazing if many such areas were regarded as prime candidates for projects where the beneficiaries must, given the withdrawal of the Bureau from its historic role, shoulder a much larger proportion of the cost.

Moreover, leaving wilderness areas and areas upstream from them legally available for the construction of new water projects (by failing to perfect wilderness water rights) sends exactly the wrong signal to water planners throughout the West. These planners, like their counterparts in highway construction agencies, have displayed an almost instinctive tendency to try to build projects in open space and other areas valued for their natural amenities.⁹⁰

But now the West is undergoing a major transition in how it thinks about water resources. The new emphasis is on transferring water from lower to higher value uses rather than building more traditional water projects, the most economically sensible of which were completed a long time ago. Even though the West's relatively few areas of potential and already designated wilderness would not drastically interfere with building new projects, a decision not to protect the water resources of wilderness areas would in effect invite water planners to resume their traditional ways by promoting projects that could strip wildernesses of water, rather than looking at other, more readily available sources of supply. To put the matter more bluntly, the West has a good deal more water, and more choice about how it can be used, than the popular image of the thirsty West suggests. Preserving water in wilderness areas will not, in the end, constitute a serious threat to progress.

In the last analysis, this generic question remains: Are the modest limits wilderness water rights might place on future water developments too high a price to pay for designation of new areas as wilderness, and protection of existing ones through the assertion of wilderness water rights claims in ongoing adjudications? Happily, however, that generic question does not demand an answer, for Frank Trelease's approach is still the only sensible one. The political rhetoric that surrounds the issue ought to be penetrated, and those who believe they are threatened by the assertion of water rights for wilderness areas need to show how they are threatened.

88. See, e.g., Forest Service Report, *supra* note 18, at 9-10.

89. See M. REISNER, *CADILLAC DESERT passim* (1986).

90. Congress eventually made the invasion of parklands by highways much more difficult, see 23 U.S.C. § 138 (1982), and the courts cooperated with vigorous enforcement. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

Solutions can be negotiated to any real problems that might exist, in the context of bills designating specific areas as wilderness. But the process of designating new wilderness areas ought not to be derailed by concerns about water that are more fanciful than real.

It should also be noted that wilderness designation is, as a formal legal matter, no more permanent than any other statute. A water project promising great benefits that is hamstrung by a wilderness water right may proceed if Congress can be persuaded to make the necessary statutory alterations. While wilderness designations are generally regarded as permanent by all concerned, the availability of congressional relief counsels against holding new wilderness designations hostage merely because of the speculative possibility that they may interfere with a sensible water project at some future time.

VI. SOME CONCLUDING RECOMMENDATIONS

New wilderness designations, and even the assertion of *Winters* rights for already designated wilderness, cannot threaten many, if any, existing uses. The only even remotely credible concern involves future water projects that require either new appropriations or changes in existing appropriations. If a reasonable case can be made that a wilderness water right threatens such a project, the potential for conflict ought to be identified, discussed, and dealt with through the established political process that routinely deals with wilderness issues. Abstract, emotion-laden objections to the general principle of wilderness water rights retard rather than advance resolution of the wilderness issue.

It might be argued that opponents of wilderness and wilderness water rights would derive no benefit from this approach. Although they have lost round one in the courts, they may have considerably more leverage in the Congress, because of the substantial backlog of new wilderness proposals that will flood that body over the next decade or so. In the Congress, in other words, the burden of inertia is apparently on the wilderness advocates — the opponents merely have to stop the enactment of new proposed wilderness legislation, a task that is, in our system, far easier to perform than getting it enacted. And the opponents have so far been effective in slowing the pace of new designations considerably since the issue first came to the fore. The subject of water rights is so arcane and peculiarly regional that congressional representatives from other parts of the country are almost instinctively deferential to Westerners any time water rights issues are raised. So far the opponents of wilderness water rights are, in short, controlling the debate.

But in the longer run, a lowering of the rhetoric and a willingness to identify and negotiate about real as opposed to imagined problems would pay dividends for all sides. For one thing, *de facto* wilderness areas are, for the most part, already protected from development. It will be very

difficult to gain approval from a federal agency or the Congress to carry out a water project that threatens the water resources of an area under consideration for designation as wilderness, until the wilderness issue is resolved. Wilderness is, in other words, the driving engine in federal land management policy just about every place roadless areas exist. And it will likely remain so, given the tangled web of legal and political constraints that enmesh candidate areas for the National Wilderness Preservation System.⁹¹ In this sense, the burden of inertia is on opponents rather than advocates of wilderness protection. This means that, although opponents of wilderness water rights cite increased uncertainty about water rights as a reason to oppose new designations, their own preferred strategy of delaying decisions on de facto wilderness is, paradoxically, more likely to perpetuate uncertainty, because most roadless areas will not in the meantime drop off the candidate list for statutory protection.⁹²

Furthermore, the widespread popularity of the wilderness idea suggests a danger for opponents of wilderness water rights willing to play brinksmanship on the issue. The opponents are in effect taking a political gamble that the traditional water establishment will ultimately prove stronger politically than the supporters of wilderness. As more and more people come to understand just how much (or how little) is at stake underneath the rhetoric, however, opponents may lose enough credibility to make even well-grounded objections to wilderness water rights in specific areas politically suspect. And while congressional opponents now have a substantial ally in the current administration, which has shown less support for wilderness than any in the last three decades, President Reagan will leave office within a year, and his successor will almost certainly be less stridently hostile on wilderness issues. Finally, while wilderness advocates have been caught somewhat off guard by the suddenness with which this issue has come to the fore, they may yet organize themselves and their pro-wilderness constituents to regain control of the debate.

The opponents of wilderness water rights have succeeded in putting the issue on the table in a forceful way.⁹³ Indeed, the political controversy has already moved well beyond the confines of wilderness, to embrace

91. For example, Congress recently, and without debate, legislated a permanent ban on mineral leasing in areas being studied for possible preservation as wilderness. Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 5112, 101 Stat. 1330-262.

92. One could conceive of water projects that would deplete flows inside a de facto wilderness being built outside the wilderness with private funds, and without the need for federal legislation or other federal approval. In such circumstances, there is a risk that Congress could not muster enough concern to intervene and protect the flows. In that situation, the burden of inertia remains on the wilderness advocates. See, e.g., SOUTHERN UTAH WILDERNESS ALLIANCE NEWSLETTER 9 (Spring 1988), describing a proposal by the Wayne County, Utah, Water Conservancy District to dam the Fremont River above a proposed BLM wilderness.

93. To date the results in congressional deliberations over particular wilderness bills have been varied. For example, the House Interior Committee rejected an amendment offered by Montana Congressman Ron Marlenee to prohibit new wilderness designation in Montana from conferring any federal water right. See H.R. REP. NO. 100-369, 100th Cong., 1st Sess., pt. 1, at 25 (1987) (dissenting views). See also notes 94-97 *infra*.

proposals as varied as ones to designate a national conservation area on Bureau of Land Management land in southeastern Arizona,⁹⁴ a new national park in Nevada,⁹⁵ a national monument in New Mexico,⁹⁶ and a national reserve in Idaho.⁹⁷ This expansion of the battleground will, however, also expand the constituency that might be mobilized to support protection of water rights for these areas.

If the water rights implications are, in the wilderness context, relatively minor, the proper course for the Congress is to continue its past practice — to rely on *Winters* and its progeny and establish reserved water rights for wilderness areas by implication, and to negotiate compromises for those specific areas where real interference with future water developments might exist. Such compromises could involve redrawing wilderness boundaries, or including grandfather or other protective clauses for specific water projects.⁹⁸ Congress might also, in appropriate cases, limit the amount of water reserved in wilderness at some level below natural flows, where that might be a reasonable compromise between protecting the area's natural character and allowing depletion of some water for high-value uses elsewhere.

Alternatively, the wilderness advocates in Congress could bow to the demands of the wilderness opponents and make express reservations of water for new wilderness areas. Proponents of more wilderness might themselves be more comfortable with an express reservation, to the extent they have doubts about whether the courts will ultimately confirm Judge Kane's decision in the Sierra Club litigation. And an express reservation allows wilderness advocates to escape the Supreme Court's limitation,

94. See San Pedro Riparian National Conservation Area, H.R. 568, 100th Cong., 1st Sess. (1987). This bill has passed the House, see 133 Cong. Rec. H1522-25 (daily ed. March 24, 1987) but is being held up in the Senate by opposition from Senator Wallop on water rights grounds. Conversation with Patty Lynch, office of Sen. DeConcini, March 30, 1988. On the House floor, Cong. Kyl of Arizona noted that the House bill was silent on water rights, allowing the courts to "infer a Federal reserve water right for the conservation area." 133 Cong. Rec. H1525 (daily ed. March 24, 1987). Kyl preferred to have Congress address the issue "up front," but acquiesced in the bill's silence because "thorough investigation" revealed that no one's water rights would be "jeopardized by [a] reserved right that might be created" by the legislation. *Id.*

95. See Great Basin National Park, 16 U.S.C. § 410 mm-1(h) (Supp. IV 1986) (providing that nothing in the act "shall be construed to establish a new express or implied reservation to the United States of any water or water-related right . . . [except] that express or implied reserved water right which may have been associated with the initial establishment [of the National Forest and National Monument that eventually was included in the National Park]").

96. See El Malpais National Monument, Pub. L. No. 100-225, § 509, 101 Stat. 1539, 1549 (1987).

97. See City of Rocks National Reserve, S. 1335, 100th Cong., 1st Sess. (1987), passed by the Senate, 133 Cong. Rec. S17,969 (daily ed. Dec. 11, 1987); see also Hagerman National Monument, S. 1675, 100th Cong., 1st Sess. (1987), passed by the Senate, 133 Cong. Rec. S17,970 (daily ed. Dec. 11, 1987). See also Act of Nov. 6, 1986, Pub. L. No. 99-606, 100 Stat. 3457. This act withdrew several million acres of federal lands in Alaska, Arizona, New Mexico and Nevada for military purposes. Section 10 of the act cautioned that it should not "be construed to establish a reservation to the United States with respect to any water or water right on the [withdrawn] lands," although water rights acquired by the United States prior to the act would be unaffected. *Id.* at 3466.

98. See note 58 *supra*.

expressed in more recent *Winters* doctrine cases, of implying only the minimum amount necessary to carry out the purposes of the reservation.⁹⁹

One problem with an express reservation, however, is deciding how specific it ought to be. The spectrum ranges between simply expressly reserving enough water to protect the wilderness character, on the one hand, and legislating specific numerical values of flow levels on the other. The latter could require considerable hydrologic study, substantial time and money, and might itself delay wilderness designation indefinitely.¹⁰⁰ Trying to reach agreement on numbers would, moreover, give members of Congress and their staffs the unhappy task of micro-managing federal land. And the benefits of such detailed reservations will not always be apparent, especially if, as should usually be the case, the wilderness water right will simply embrace all natural flows, subject to prior perfected water rights. Many states have survived for decades without judicially quantifying and correlating water rights with each other in many of their watersheds. It is not obvious why water rights based on federal law — at least those as innocuous as wilderness water rights — ought to be held to a different standard. In any event, if quantification is deemed desirable in any particular situation, states have a readily available mechanism to do so in their own courts, under the McCarran Amendment's waiver of federal sovereign immunity, allowing the federal agencies to be joined in state general stream adjudications.¹⁰¹ For these reasons, if an express reservation is deemed desirable, the most sensible course would be for Congress simply to reserve all natural flows in wilderness areas, subject to valid water rights already perfected under state law.

A second problem with express reservations, especially if they are made in some cases but not others, is that they may be construed to negate the usual inference that Congress intends to reserve water when it is silent or uses the standard disclaimer.¹⁰² A raft of express designations could give a court eager to diminish the scope of the *Winters* doctrine an opportunity to reverse the traditional presumption in favor of implying water rights in federal land designations, at least where new land designations are involved. Looking down the road, then, express reservations may lead the courts to alter the rule of interpretation found in *Winters*, and to construe the silence of Congress where express reservations are lacking to mean that federal water rights are not created.

For wilderness advocates, the challenge is to avoid the implication that express reservations of water for some federal land designations undercut implied reservations of water in others. "No-precedent" language such as was included in the recent El Malpais legislation¹⁰³ helps on this

99. See, e.g., *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

100. The Forest Service report, *supra* note 18, at 4, emphasizes this difficulty. But the Forest Service offered it as a justification for not claiming the rights at all, rather than as a reason to delay designating new wilderness. *Id.*

101. See 43 U.S.C. § 666 (1982).

102. See text accompanying notes 25-27 *supra*.

103. See El Malpais National Monument, Pub. L. No. 100-225, § 509(c), 101 Stat. 1539, 1549 (1987) ("Nothing in this section shall be construed as establishing a precedent with regard to any future designations, nor shall it affect the interpretation of any other Act or

score, but may not provide ironclad protection in the courts.¹⁰⁴ In the end, both wilderness advocates and their opponents might have to live with some uncertainty until the courts make the call.

It is tempting to wish for a generic solution to this problem, along the lines of the impasse over "release" of de facto wilderness for multiple use management that was broken in 1984 with a compromise that was subsequently incorporated into nearly all new bills designating national forest wilderness areas.¹⁰⁵ But release involved a generic question — how the Forest Service should manage roadless lands that were not designated wilderness once Congress had designated other forest lands in the same area or state as wilderness. The policy implications did not vary much from area to area, and thus the problem lent itself to a generic solution. By contrast, water rights impacts might more substantially depend upon the character and location of the particular area in question. This makes ad hoc solutions more likely.¹⁰⁶

The El Malpais legislation that recently emerged from Congress¹⁰⁷ has been hailed as establishing a model for resolving the wilderness water rights issue,¹⁰⁸ even though the legislation itself cautioned that it should not "be construed as establishing a precedent with regard to any future designations, nor [should] it affect the interpretation of any other Act or [administrative] designation made pursuant thereto,"¹⁰⁹ and even though,

any designation made pursuant thereto"). See also S.2916, 98th Cong., 2d Sess. (1984), section 7 of which renounced federal water rights in all legislation designating wilderness areas in Colorado, but went on to provide, in language echoing the disclaimer in the Wilderness Act itself (see note 25 *supra*), that this renunciation "does not constitute an express or implied claim or denial" of a federal wilderness water right in legislation designating wilderness areas outside of Colorado. (emphasis added)

104. The floor debates on the El Malpais legislation did, however, reveal a clear understanding by most participants that the express character of that reservation of water did not alter the traditional rule of implying reservations of water from congressional silence. See, e.g., 133 CONG. REC. S18,249 (daily ed. Dec. 17, 1987) (remarks of Sen. Bingaman) ("while Congress may approach the water right issue [expressly or by silence] the key is whether water is needed to fulfill the purposes of an area"), *id.* at H11,767 (daily ed. Dec. 18, 1987) (remarks of Cong. Udall) (the water rights section "is not really necessary, but . . . not objectionable"); *id.* at H11,768 (remarks of Cong. Rhodes) ("if Congress believes there is no need for a Federal water right, Congress will so state explicitly"); *id.* at H11,769 (remarks of Cong. Miller) (the explicit reservation of water "does not undercut the rights associated with previous reservations nor the long line of judicial decisions protecting these rights").

105. See, e.g., Oregon Wilderness Act of 1984, Pub. L. No. 98-328, 98 Stat. 272.

106. One could imagine a generic solution that bans water project development in wilderness areas (repealing the Presidential exemption, see note 53 *supra*), expressly reserves water necessary to protect wilderness, and allows no more than a specified percentage of depletion of flows in wilderness from projects located outside the wilderness boundaries. But depletion of a percentage of existing flows, however the percentage is pegged, might still have substantially varying impacts from area to area, depending upon the area's natural conditions. And seasonal variations in flows are likely to be of great importance, further complicating things.

107. See El Malpais National Monument, Pub. L. No. 100-225, 101 Stat. 1539 (1987).

108. See Public Lands News, Jan. 7, 1988, at 5.

109. See El Malpais National Monument, Pub. L. No. 100-225, § 509(c), 101 Stat. 1539, 1549 (1987).

ironically, the area contains little water.¹¹⁰ For wilderness advocates, the El Malpais compromise is not a terrible result, although it is far from ideal. On the plus side, it expressly reserves, under federal law, the water required to carry out the purposes of the wilderness designation. On the down side, only the "minimum amount . . . required" is reserved, although nothing in the act or its history suggests that this may be less than natural flows.¹¹¹ Also on the down side, the priority date for the right is fixed as the date of the Act. In El Malpais itself, which was formerly unreserved land, no argument for an earlier priority date as a result of a previous administrative designation seemed available, but in other areas such an argument might exist.¹¹²

Also on the down side, the El Malpais compromise protects not only "valid or vested" water rights, but also mere applications for water rights pending as of the date of enactment and subsequently granted.¹¹³ If this became general congressional policy, it would create a large incentive to file such applications on potential wilderness lands all over the West.¹¹⁴ This would create new threats to wilderness water resources as well as substantial administrative headaches for state agencies as they try to sort out the spurious from the genuine. Finally, the El Malpais legislation is silent on the managing federal agency's duty to assert and defend wilderness water rights when required to do so in water adjudications. Given the current administration's reluctance to do so, Congress might make that duty express, so as to avoid repetition of the scenario that led to Judge Kane's decision in Colorado.¹¹⁵

Wilderness designation being a political process, negotiation and compromise is, in the end, inevitable, on water rights along with everything else. The furor about wilderness water rights probably means that they will remain on the bargaining table along with other conflicts raised by wilderness designation.¹¹⁶ But wilderness proponents ought to insist that the conflicts involving water be real and not merely imagined. Frank Trelease's advice is still sound.

110. See Fleming and Morrison, *Water Availability and Use in the Proposed El Malpais National Monument and Grants Conservation Area, Hearings on El Malpais National Monument and Big Cypress National Preserve, Subcomm. on Public Lands, National Parks and Forests, Senate Energy and Natural Resources Comm.*, 100th Cong., 1st Sess. 101-16 (1987).

111. See, e.g., 133 CONG. REC. S18,249 (daily ed. Dec. 17, 1987) (remarks of Sen. Bingaman) ("It is not the intent . . . to determine or quantify the amount of water reserved").

112. See Forest Service Report, *supra* note 18, at 4, and note 34, *supra*.

113. See El Malpais National Monument, Pub. L. No. 100-225, § 509(b), 101 Stat. 1539, 1549 (1987).

114. On the other hand, the El Malpais compromise does not grandfather pending applications for changes in diversion points or types of use for existing water rights. See *id.*

115. See notes 15-18 *supra*.

116. See 133 CONG. REC. H11,767-68 (daily ed. Dec. 18, 1987) (remarks of Cong. Craig) ("And so we begin down the road of reviewing on a case-by-case basis whether each particular land designation requires a Federal water right. Although review will be tedious, it will be no more tedious than drawing boundary lines, reviewing individual timber sales and making other detailed land use decisions [that wilderness designation sometimes requires].")