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FEDERAL RESERVED WATER RIGHTS APPLIED TO SCHOOL TRUST LANDS?

*Elizabeth Sodaström, Jennifer Sokolove, and Sally K. Fairfax**

I. INTRODUCTION

The purpose of this article is to assess whether federal reserved water rights attach to school trust lands. School trust lands were reserved from the public domain by Congress and granted at the time of statehood to support common schools and other public institutions in the new states. These lands have never commanded much attention in the discussion of western lands or public resources. Federal reserved water rights, by contrast, enjoyed a brief period of intense scholarly and political attention in the 1980s.¹ The intersection of these two relatively obscure topics is of more than marginal interest.

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1. The doctrine was first applied to public lands in 1963 with *Arizona v. California*, 373 U.S. 546 (1963). Following a liberal interpretation of the implied standard in *Cappaert v. United States*, 426 U.S. 128 (1976), the amount of litigation skyrocketed. A crude effort to enumerate cases reported on several computerized databases suggests that reserved rights litigation peaked in the 1980s. There were roughly two reserved rights cases pre-1950s, four in the 1950s, two in the 1960s, four in the 1970s, thirty-one in the 1980s, and a clear pattern returning to the pre-1980s norm in the 1990s, when only eighteen have been reported.

First, if reserved rights exist on state trust lands, the potential impact on water appropriation in the western United States is important. The school lands were “place grants,” generally made section by section in each township and are, therefore, spread out across the state.² Hence, potentially-affected parcels are not concentrated high in the watershed where they do relatively little damage to downstream juniors, as is the case regarding most Forest Service holdings. If trust land rights were recognized, the effect could be more destabilizing than our awareness of state trust lands suggests. Potentiating that possibility, priority dates for most school land claims are likely to be similarly disruptive, given the extremely early reservations in many instances. Including school trust lands would expand the federal reserved water rights doctrine at a time when courts confront claims proffered by federal agencies with an apparent intention of putting the genie back in the bottle.³

As a lens into the political nature of the claiming process, the discussion is interesting quite apart from the potential impact of the claims on established users. State trust claims provide fertile ground for exploring the links and divides between legal theory and political action. This article examines the role of reserved water rights claims in the efforts of Montana’s trustees to claim water for use on trust lands.

One initial question regarding the application of reserved water rights doctrine to state trust lands is why, if the doctrine is clearly applicable, did the question not arise earlier? While state claims do not precisely involve an issue of the dog that did not bark, since state land commissioners are intensely interested in enhancing their claims to trust water resources,⁴ it is important to explore why the dog barked so long after *Caepfert* effectively sounded the starting gun.⁵ The nature of the doctrine is a big part of the answer. Although long regarded as theoretically possible,⁶ the doctrine was not clearly applied to non-Indian lands until the mid-1970s. Since then, the focus has been to explore the extent of the right on the vast federal land hold-

2. Section 16 in every township was granted in 1803 to Ohio and to all states joining the union before 1850. After 1850 and until 1896, two sections—16 and 36—were granted. In 1896, as the joining states were increasingly arid, four sections—2, 16, 32, and 36—were granted. See JON A. SOUDER & SALLY K. FAIRFAX, *STATE TRUST LANDS: HISTORY, MANAGEMENT & SUSTAINABLE USE* 27-29 (1996).

3. The Supreme Court has been hostile to federal agency efforts to make claims under the doctrine. See *Cappert*, 426 U.S. at 128 (narrowing the standard for quantifying federal rights). In *United States v. New Mexico*, 438 U.S. 696 (1978), the Court signaled that it would read reservation purposes narrowly. It is not clear how the Court would react to a state claimant seeking to expand the doctrine.

4. See SOUDER & FAIRFAX, *supra* note 2, at 245-53.

5. PETER W. SLY, *RESERVED WATER RIGHTS SETTLEMENT MANUAL* 45 (1988). See also Department of State Lands v. Pettibone, 702 P.2d 948 (Mont. 1985).

6. See Sally K. Fairfax & A. Dan Tarlock, *No Water For the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979); See also *infra* notes 13, 14, 23-26 and accompanying text.

ings. State trust lands, if they are seen at all by analysts, are not the first order of business in clarifying the parameters of this peculiar water law doctrine.⁷

It is also important to suggest why the dog is barking now. Again, two factors seem important. First, as the culture of the trust becomes more important in managing the trust lands,⁸ the trustees are becoming aggressive in the management of trust resources, pressed both by increasing attention from beneficiaries and shrinking state funds. Water is only the most obvious of numerous “new” resources that state trust managers are exploring to generate income for the trust.⁹ Second, and more familiar to most water and public lands mavens, most western states are in the process of extensive and costly water rights adjudications.¹⁰ Reserved water rights, and the uncertainty they create, are a major component of the current emphasis on adjudication. Adjudication has long been an integral part of water policy in many western states. Nevertheless, the scale and geographic scope of current adjudications has recently increased, as has the visibility and import of the process.¹¹ State trustees are alert to the possibility that, if they do not get into the “deal making” at this pivotal point, their future chances for securing water resources for trust land management programs may be seriously undercut.

The Straight Face Test

Reserved water rights for state school and trust lands present a peculiar situation. One branch of state government relies upon an obscure federal doctrine to trump state water law in order to allocate water to a state purpose which was not regarded as having a meritorious water claim under the state system. Two points seem to be in order. First, supporting common schools was, at the time of the reservations, explicitly and undeniably a federal purpose, one that the Confederated Congress initially pursued with land grants precisely because it feared state hostility to education in the absence of such assistance. The commitment to supporting public schools by granting federal lands grew out of the Land Ordinances of 1785 and 1787.¹² The

7. See SLY, *supra* note 5, at 45-46.

8. See Sally K. Fairfax, *Grazing Leases on State Trust Lands: Four Current Conflicts*, Speech Prepared for PERC forum, *Environmentalism in the West* (June, 1996).

9. See SOUDER & FAIRFAX, *supra* note 2, at 245-53.

10. Adjudication generally refers to a comprehensive statutory procedure for the determination of all relative rights on a stream system or in a watershed. WELLS A. HUTCHINS, *WATER RIGHTS LAW IN NINETEEN WESTERN STATES* 444-48, 461-63 (1974).

11. For example, Idaho is in the process of a basin-wide adjudication of the Snake River involving 185,000 water rights in 38 of the state's 44 counties. Montana is in the midst of a statewide adjudication ordered by the legislature. Adjudications of large watersheds are in progress in California, Arizona, Washington, and Wyoming.

12. See SOUDER & FAIRFAX, *supra* note 2, at 8, 17-18. The tradition of grants for education had

land was to provide revenues for schools which, the Confederated Congress feared, would be available only to those who could afford private schools if states and townships were dependent on tax revenues to get local schools started. The utter centrality of education for democracy made developing general public education a major purpose of the new central government.¹³

Second, the Confederated and subsequent Congress's initial positions were essentially correct: The early school trusts are, as clearly as the Indian reservations, victims of unsupportive state systems. Lamentations about state malfeasance in handling the granted resources are the principle feature of the extensive literature on the school land grants.¹⁴ The Supreme Court held, in *Lassen v. Arizona*, that "the restrictions placed upon land grants to the states become steadily more rigid and specific . . . as Congress sought to require prudent management and therefore to preserve the usefulness of the grants for their intended purposes."¹⁵

Viewed from the perspective of claimants to water with perfected state water rights, the idea of federal reserved water rights for state trust lands is little short of nuts. Viewed from almost any other perspective, however, it is reasonable. To prove that point, our discussion of reserved rights claims will be both abstract and specific, discussing the reserved right in theory and then focusing on the role of state school land reserved water rights claims in Montana.

roots which went far deeper than these laws, however. The idea that land should be granted to support common schools has been traced by certain scholars back to ancient times. See HOWARD TAYLOR, *THE EDUCATIONAL SIGNIFICANCE OF THE EARLY FEDERAL LAND ORDINANCES*, 12-22 (Teachers College, Columbia University Contributions to Education, No. 118 1922); JOSEPH SCHAFER, *THE ORIGIN OF THE SYSTEM OF LAND GRANTS FOR EDUCATION*, (Bulletin of the University of Wisconsin, Madison).

13. See generally Sally K. Fairfax, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 ENVTL. L. 796, 804-07. See also David Tyack & Thomas James, *State Government and American Public Education: Exploring the 'Primeval Forest,'* HIST. EDUC. Q., Spring 1986, at 39. For a less analytical and more celebratory approach, see ELWOOD CUBBERLY, *PUBLIC EDUCATION IN THE UNITED STATES: A STUDY AND INTERPRETATION OF AMERICAN EDUCATIONAL HISTORY* (1934).

14. See COMMISSIONER OF EDUC., *REPORT OF THE COMMISSIONER OF EDUCATION FOR THE YEAR 1895-96: THE AMERICAN COMMON SCHOOL IN THE SOUTHERN STATES DURING THE FIRST HALF CENTURY OF THE REPUBLIC, 1790-1840* (1897); HENRY A. DIXON, *THE ADMINISTRATION OF STATE PERMANENT SCHOOL FUNDS: AS ILLUSTRATED BY A STUDY OF THE MANAGEMENT OF THE UTAH ENDOWMENT*, 9 (S. Cal. Educ. Monographs 1936); GEORGE KNIGHT, *HISTORY AND MANAGEMENT OF LAND GRANTS FOR EDUCATION IN THE NORTHWEST TERRITORY (OHIO, INDIANA, ILLINOIS, MICHIGAN, WISCONSIN)* (1885); FLETCHER SWIFT, *HISTORY OF PUBLIC PERMANENT COMMON SCHOOL FUNDS IN THE UNITED STATES 1795-1905* (1911); FLETCHER SWIFT, *STUDIES IN PUBLIC SCHOOL FINANCE: THE WEST—CALIFORNIA AND COLORADO* (Educ. Series 1, Res. Publications U. Minn. 1922); FLETCHER SWIFT, *FEDERAL AND STATE POLICIES IN PUBLIC SCHOOL FINANCE IN THE UNITED STATES* (1931).

15. 385 U.S. 458, 468 (1967). Although this point is frequently made, it is partially incorrect. Congress did relatively little to protect the school grants until the Arizona-New Mexico accession. Most of the increasing restrictions on state management of state lands came at the behest of state level advocates of education and they appear in state constitutions and statutes, not federal statutes. See SOUDER & FAIRFAX, *supra* note 2, at 33-36.

The article will begin with an abbreviated introduction to four basic questions which arise in any federal reserved rights claim, and it will then apply those questions to the peculiar case of the school lands reservations. The article asks: (1) is there a reservation? (2) what is its date? (3) what is the purpose of the reservation? and (4) how much water is reserved to achieve that purpose? Because the school lands involve a trust, with a trustee obligated to maximize the returns to the beneficiary, we will address a fifth issue which has been less central in the evolution of the doctrine: whether the manager is obliged to claim a federal reserved water right? We will see that determining the priority date for school land reservations is uncommonly difficult. Beyond that, most of the peculiarities in applying the reserved rights doctrine to state lands emerge from the peculiarities of the trust doctrine.

The second part of the discussion addresses the Montana example. Montana has been dealing with the issue of federal reserved rights on school lands for almost fifteen years, and various agencies and individuals have defined their positions on the subject with particular clarity. We will apply those theoretical questions to the current efforts of the Department of State Lands in Montana to claim federal reserved water rights and to get some preliminary indication of how reserved rights might be debated in the state lands context. More importantly, the Montana experience provides an opportunity to explore one example of a political context in which the reserved rights claims are pursued.

The discussion concludes that the reserved water rights doctrine clearly applies to state trust lands. However, the practical significance of our observation is less obvious, and our support for the theoretical right is neither an embrace of, nor a prediction regarding, reserved water rights claims for school trust lands in the twenty-two western states which still hold reserved lands. We do predict, however, that the barriers will arise, not at the stage of procuring wet water, but earlier, in the context of asserting the claim. The timing and the complexity of the claims, and the resources required to assert and to make use of them, suggest that the trustee may not be prudent to pursue them.

Further, as the Montana case study suggests, the political context in which the trustee operates appears to shape every aspect of the water claiming process and to encourage the trustee to minimize their reserved rights claims. For reasons that we can only surmise, even the beneficiaries are not enthusiastic about the trust's water claims. Hence, the possibility of reserved water rights may be more important than any additional water flowing to state lands. Asserting federal reserved water rights may be a useful strategy in attempting to bolster the trustees' position in water adjudica-

tions generally—within the state government’s water fights, or against the lessees’ claims to water applied on state parcels, or to repair a particularly egregious situation in a specific parcel of land. We conclude that the claiming process is more a matter of politics than legal doctrine, and the practical role of federal reserved water rights on state trust lands is likely to be more political than legal in nature.¹⁶ The rest of this introduction will first examine the state school lands and, then, the Montana case study that will be the focus of our discussion.

1. The State School Lands—A Brief Introduction

State school lands were reserved by Congress from the public domain for the support of common schools and similar state institutions.¹⁷ The school land policy was first described in the General Land Ordinance of 1785, which reserved section 16 in every township in the old Northwest for the support of common schools. Beginning in 1803, “school sections” were reserved and granted to states to be used and managed to benefit common schools. Congress reserved the lands when territories were formed or along the road toward statehood, then granted them to the states at or near the time of statehood. Where land in the designated section had already been taken up, Congress provided that the state could select an alternate section “in lieu” of the one granted. States actually took title to the lands either when they were surveyed or upon application for a particular parcel.

These grants began with Ohio in 1803 and, for present purposes, ended with Arizona and New Mexico in 1912.¹⁸ Peculiar and unheralded as these publicly held resources may be, they are not insignificant: nearly 135 million acres of surface rights and 152 million acres of mineral rights are held as trust lands by twenty-two western states.¹⁹ The lands and funds resulting from their management are managed as a trust with each state’s land commissioners acting as trustees and the public schools (K-12) as beneficiaries.

In this context, “trust” means that the trustee is required to make the trust corpus productive for the beneficiary. A long line of cases confirms that the state’s flexibility in managing the land is limited, that managers are judged against a tight definition of “undivided loyalty” to the beneficiary.²⁰ Unlike lands affected by the apparently similar “public trust doctrine,” state

16. See Sally K. Fairfax & A. Dan Tarlock, *Federal Proprietary Rights for Western Energy Development: An Analysis of a Red Herring?*, 3 J. ENERGY L. & POL’Y 1 (1982).

17. See generally SOUDER & FAIRFAX, *supra* note 2, ch. 1.

18. *Id.* at 29-30. Technically, until 1848, the township rather than the state was the recipient. *Id.* For a brief recital on why Hawaii and Alaska are not really relevant to this discussion, see *id.* at 23-24.

19. Basic data on the trust land holdings is found in SOUDER & FAIRFAX, *supra* note 2, at 5.

20. See *Lassen v. Arizona ex. rel. Arizona Highway Dep’t*, 385 U.S. 458 (1967); *County of Skamania v. State*, 685 P.2d 576 (1984); *State v. Nigh*, 642 P.2d 230 (Okla. 1982).

trust lands are to be managed for maximum economic return.²¹ The trustee is required to exercise “prudence,” balancing risk and benefit, to assure a maximum return to the beneficiary without eroding the long term productivity of the trust corpus. This mandate differs significantly from the more familiar multiple use requirements affecting federal public lands and plays into the reserved rights doctrine, most importantly in answering the questions about the amount of the water right and the obligation to claim it.

2. Montana Water Law and Reserved Water Rights Claims

Montana provides an excellent opportunity to explore these issues. Montana joined the union in 1889, under the same enabling act as North Dakota, South Dakota, and Washington. Montana currently holds and manages about 5.1 million acres of trust land, 4.59 million acres of which were granted for school purposes.²² Montana’s trust earned \$27.1 million in rents, royalties, and bonuses in 1990 and has one of the more productive management programs. The relatively few acres of irrigated agricultural lands are among the most productive of its resources. In 1990, oil and gas leasing produced \$5.9 million for the trust, and agricultural leasing produced \$7.3 million, with timber, coal, and grazing producing the bulk of the rest.²³

Montana is interesting as a focus because the whole reserved water rights issue began in Montana.²⁴ In 1889, the same year the state joined the union, the now-famous Fort Belknap Reservation was established by Congressional enactment. Unfortunately, the enactment did not specifically mention water.²⁵ In 1905, the reservation experienced its first water shortage after newly arrived ranchers and farmers built diversions on the Milk River upstream from the reservation.²⁶ The reservation superintendent solicited the aid of the United States Attorney General’s office, which petitioned the federal courts for an injunction against further non-Indian diversions from the Milk River.

The federal trial court ruled in favor of the reservation and granted a

21. See SOUDER & FAIRFAX, *supra* note 2.

22. That constitutes approximately 86% of the original area granted. The lands not associated with the common schools were granted for colleges and universities, public buildings, hospitals, prisons, and miscellaneous charities. See SOUDER & FAIRFAX, *supra* note 2, at 50.

23. See SOUDER & FAIRFAX, *supra* note 2, at 60-61.

24. A detailed account of events leading to the *Winters* decision can be found in Norris L. Hundley, *The Winters Decision and Indian Water Rights: A Mystery Reexamined*, 13 W. HIST. Q. 17 (1982).

25. 25 Stat. 113 (1889). Congress had decided in 1871 that tribes were no longer to be treated as sovereign entities. This decision allowed Congress to stop making treaties with the tribes and to dictate Indian policy via legislation. See FRANCIS PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 527-33 (1984).

26. For a complex and unusually interesting reflection on the myriad forces that led to and then crushed white settlement in the area, see JONATHAN RABAN, *BAD LAND: AN AMERICAN ROMANCE* (1996).

permanent injunction against pumping by newcomers. In this ruling, the court relied on its interpretation of the federal government's responsibility to the Indians, as expressed in the Fort Belknap agreement.²⁷ The Ninth Circuit Court of Appeals concurred, citing treaty obligations of the United States government to the Indians as the supreme law. The appellate court also determined that for the purposes of state water-rights administration, the Indians were to be assigned as an appropriation date the day Congress enacted the reservation legislation. The Supreme Court voted eight to one to uphold both the reasoning and findings of the lower courts.²⁸

In spite of its role as an early cenosure in water rights adjudication, water law in Montana has been exceptionally disorderly. Both groundwater and surface water rights are governed by the prior appropriation doctrine in Montana.²⁹ Water rights in Montana are nearly always considered appurtenant to the land and pass with the conveyance of the land.³⁰ This created a problem because, prior to 1973, all Montana water rights were either "use rights," for which there were no records at all, or rights represented merely by a posting or a filing before actual appropriation of the water. With no provision for filing a notice of completion, there was no way of knowing how much water was actually diverted and no way of assessing the total amounts of water that had been claimed. In response to this chaos,³¹ the 1972 Montana Constitution institutionalized a system of centralized water rights,³² and the state legislature adopted the Water Use Act in 1973.³³ The Act established a permit system as the exclusive means of acquiring a right to divert surface water or groundwater. All water rights acquired prior to 1973 were preserved and became the subject of a statewide stream adjudication initiated by the legislature in 1973. This adjudication is intended to provide a record of and some certainty to statewide understandings of pre-

27. *United States v. Anderson*, (9th Cir. 1906) (memorandum order) *sub nom.* *Winters v. United States*, 207 U.S. 564 (1908).

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

29. MONT. CODE ANN. § 85-2-501 (1961). Prior to 1973, surface water rights could be acquired on adjudicated streams simply by putting the water to a beneficial use or by posting an intent to divert the water. On adjudicated streams, one had to file a petition in court and be officially added to a prior decree, although there was no formal definition of what constituted an "adjudicated" stream, and such adjudications were partial and seldom final. In addition, before 1961 there was no statutory law and no definitive case law on the legal status of appropriating groundwater. The state legislature passed a law in 1961 that introduced a permit system for groundwater and controls on groundwater use in areas of over-draft.

30. Water rights may also be severed from the land and used elsewhere. *See* 6 WATER AND WATER RIGHTS 255 (Robert Beck ed., 1991).

31. *See* Albert Stone, *The Long Count on Dempsey: No Final Decision in Water Rights adjudication*, 31 MONT. L. REV. 1 (1969); Albert Stone, *Are There Any Adjudicated Streams in Montana?*, 19 MONT. L. REV. 19 (1957).

32. MONT. CONST. of 1972, art. IX, § 3.

33. MONT. CODE ANN. §§ 85-2-1 to -5 (1973). This law repealed all laws pertaining to surface water rights, but maintained the provisions of the groundwater law of 1961.

1973 records and rights.³⁴

To organize the adjudication process of pre-1973 water rights the Montana legislature established the State water court³⁵ and set a deadline of April 30, 1982, by which all water claimants had to file all rights claiming priority dates prior to July 1, 1973.³⁶ Failure to file water rights prior to this deadline constituted abandonment of those rights.³⁷ The Powder River Basin was chosen as a test area for the process, due to tremendous interest by energy companies and out of state interests in capturing its unclaimed water resources for minerals development and coal gasification plants.³⁸ The same bill established a Reserved Water Rights Compact Commission.³⁹ The Commission is responsible for negotiating agreements dividing state water between the Indian tribes and the federal agencies claiming reserved water. As an administrative tool for addressing reserved rights, the Commission is unique among the western states.⁴⁰

Reserved water rights on state trust lands have been one small element of the state's complex stream adjudication program, an issue in Montana for almost two decades. The goal of Montana's adjudication is to alleviate uncertainty in the area of water claims throughout the state. Yet, even the suggestion of reserved water rights in state trust lands introduces a significant

34. It is not entirely clear that this adjudication will actually provide any more legal certainty than any other previous adjudication procedures. See A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudication*, 25 IDAHO L. REV. 271 (1989). In *MacDonald v. Montana*, 722 P.2d 598 (1986), the Montana Supreme Court determined that historic water use signifies a water right. Some argue that this assertion will permit additional contestation of any final decree set down by the water court. Interview with Tim Hall, Montana Department of Natural Resources and Conservation, in Helena, Mont. (June 4, 1997).

35. Senate Bill 76, Ch. 697 L. 1979, MONT. CODE ANN. § 85-2-211 *et seq.* (1995). The statute divided the state into four water divisions: Yellowstone River, Lower Missouri, Upper Missouri and West of the Continental Divide. Each division was given a water judge and a water master with the chief water judge controlling the entire adjudication process from Bozeman.

36. MONT. CODE ANN. § 85-2-221 (1979).

37. A private individual can divert, impound or withdraw water for recreational purposes but cannot appropriate water for instream uses. MONT. CODE ANN. § 85-2-102(1) (1993).

38. Interview with Bruce Loble, Chief Water Judge, in Bozeman, Mont. (June 4, 1997).

39. MONT. CODE ANN. § 85-2-701 (1993).

40. Compacts have already been completed with three of seven tribal claimants and two of four federal agencies with water interests in Montana. Interview with Susan Cottingham, Program Director, Montana Reserved Water Rights Compact Commission (RWRCC), in Helena, Mont. (June 2, 1997). Once completed, compacts are evaluated by the water court. The court has final authority to affirm or deny a compact, but may not request or suggest any changes. If a compact is affirmed, it is then included in the decree for its water basin. Thus far, one compact, with the Northern Cheyenne Tribe (MONT. CODE ANN. § 85-20-301 (1993)), has been successfully approved by the Montana Water Court. The Northern Cheyenne Compact was approved as part of the adjudication of the Yellowstone River Basin. The claims to reserved water rights will also be adjudicated in state water court in situations in which the Commission fails to reach a compact; however, the Commission anticipates negotiating compacts with almost every group claiming federal reserved rights within the state. Interview with Susan Cottingham, Program Director of RWRCC, in Helena, Mont. (June 2, 1997).

component of uncertainty into the adjudication process. Nevertheless, the Department of State Lands has used federal reserved water rights claims as one element of its efforts to protect the water resources of the trust.

II. THE RESERVED RIGHTS DOCTRINE

The intent of this section is to identify the standard criteria for assessing reserved water rights and to address them in the context of school lands. The theory of reserved rights is that water necessary to fulfill the purpose of a federal reservation was reserved even without any specific mention of water in the reservation itself. A reserved water right arises implicitly from a federal reservation of public domain land, without necessary reference to water or compliance with the state allocation system. Judicial answers to four principle questions continue to form the core of the reserved water right: 1) is there a land reservation? 2) what is the date of the reservation, hence the priority date of the water right? 3) what is the purpose of reservation? and 4) what amount of water is reserved to achieve that purpose? The question of purpose and amount are inextricably linked and will be discussed as one. A fifth issue has arisen more recently—whether the manager or managing agency is obligated to claim a reserved water right? Because of the peculiar nature of the trust mandate and the obligations of the trustee, we will treat this arguably minor issue in detail.

Is there a reservation?

Near the end of the nineteenth century, large tracts of western public land were reserved to achieve stated federal purposes. The most familiar of these are Indian reservations, national parks, and national forests. Among the most extensive reservations, it is important to note, were the school lands. Confusion regarding the nature of the reservation arises from the *Winters* case,⁴¹ because the decision left unclear exactly what constituted the legal basis for the reserved rights doctrine.⁴² Diverse interpretations suggest that reserved rights are based on treaty powers, federal common law, the supremacy clause, the property clause or some combination thereof.⁴³ Because of this imprecision, it was not unreasonable over the next half century to view the doctrine as a reflection of the government's special obligation to the tribes. It was not until 1963, in *Arizona v. California*,⁴⁴ that the Supreme Court clearly suggested that reservations for parks, forests, and similar pur-

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

42. The Court refrained from referring to a treaty. Further, it was not altogether clear whether it was the Indians themselves who had reserved the water or the federal government acting on their behalf. See Hundley, *supra* note 24, at 30-31, for a discussion of this distinction.

43. See JOSEPH L. SAX & ROBERT ABRAMS, *LEGAL CONTROL OF WATER RESOURCES* 516-17 (1986).

44. 373 U.S. 546 (1963).

poses also carried with them an implied reservation of water.⁴⁵ Thirteen more years passed before the Supreme Court first applied the reserved rights doctrine to federal holdings other than Indian reservations.⁴⁶

Further complicating the issue, a precise definition of a reservation, particularly as distinct from a withdrawal, has never been adhered to in public lands discourse.⁴⁷ Litigation in the mid-1980s suggested that wilderness designations created reserved water rights.⁴⁸ To reach this point, the court in *Sierra Club v. Block* characterized wilderness designations as a reservation, circumventing the fact that the lands at issue had been previously reserved, frequently in the previous century.⁴⁹ However, the outer margins of what constitutes a reservation are not at issue here.⁵⁰ Having established that there is in fact a specific reservation of land, the courts are concerned with tying a purpose and a date to that reservation.

In the context of school lands, this is a simple issue. There is no question that the school trust lands were reserved by Congress for a specific purpose. Under the Articles of Confederation and continuing in myriad enabling acts over the next century and a half, Congress repeatedly and specifically reserved lands for schools. Both the Land Ordinance of 1785 and the Northwest Ordinance of 1787 acknowledged the importance of public schools, but it was the 1785 law that defined a specific process to support schools. It simply states that “[t]here shall be reserved the lot No. 16, of

45. In *Federal Power Comm'n v. Oregon*, 349 U.S. 435 (1955), the Court suggested the federal government's authority in licensing was located in federal ownership of the water resulting from the act of withdrawing land from entry.

46. *Cappaert v. United States*, 426 U.S. 128 (1976). The exact language reads: “when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.” *Id.* at 138. From *Cappaert* there followed significant efforts to identify and quantify reserved rights on national forests, national parks, and other reserved federal land.

47. A classic pre-FLPMA discussion is found in CHARLES WHEATLEY, *STUDY OF LAND ACQUISITIONS AND EXCHANGES RELATED TO RETENTION AND MANAGEMENT OR DISPOSITION OF FEDERAL PUBLIC LANDS* (1970), a study done for the Public Lands Law Review Commission. See also Frederick Anderson, *Public Land Exchanges, Sales, and Purchases Under the Federal Land Policy and Management Act of 1976*, 1979 UTAH L. REV. 657.

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

49. *Id.* This muddying of the matter has led one commentator to abandon the notion of a prerequisite reservation altogether and speak simply in terms of “dedicating federal lands to a specific use.” See Robert Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. R. 387, 389. Abrams asserts that the reservation is not, in fact, necessary to create the right. A simple declaration of purpose apparently reserves water sufficient to accomplish it. “Instream flows are part and parcel of the natural environment which wilderness areas are designed to preserve; those flows are therefore reserved by wilderness designation.” *Id.* at 392-93.

50. See *John v. United States*, WL 487830 (D. Alaska 1994). In *John*, plaintiffs argued that reserved water rights create a federal interest in navigable waters of the state of Alaska, and therefore that “public lands” in Alaska should be judged to include those navigable waters. The court declined to use reserved water rights to determine the geographic scope over which Title VIII of ANILCA should be applied. See also *Totemoff v. Alaska*, 905 P.2d 954 (1995).

every township for the maintenance of public schools.”⁵¹

What is the date of a reservation?

The priority date is the second essential ingredient of a reserved water right. Courts have made efforts to fit the right into the extant pattern of state appropriative rights. In upholding the circuit court decision in the *Winters* case, the Supreme Court agreed that reserved water rights have a priority date simultaneous with the date on which the lands involved were reserved. Only appropriators with priority senior to the date of creation of the federal reservation are safe from potential subordination to the federal reserved water rights.

Reference to the General Land Ordinance makes amply clear that the date on which land for school trusts was reserved from the public domain frequently antedates statehood by many decades. Section 16 in each township of the old Northwest was reserved in 1785. Ohio, the first recipient of a school lands grant, did not become a state until 1803. For Ohio, which operates under a riparian doctrine and no longer holds any school lands, the question of priority dates is avoidable. For other states, the issue is much more daunting.

Three historical patterns intertwine here. First, the amount of land reserved changed twice. Prior to 1848, states received only section 16 for schools. After that, and until 1894, states received sections 16 and 36. After 1894, the last joining continental states received sections 2 and 32, in addition to sections 16 and 36. Congress reserved section 16 in many territories well before it established the policy of reserving some or all of the other sections. Hence, different sections within a state may have different priority dates.

Second, many states had long and tortuous passages into the Union. Utah had five enabling acts over a 50 year period before joining in 1896. New Mexico wrote three separate constitutions and made eleven bids for statehood starting in 1850, before it was finally admitted in 1912. Montana's history is particularly interesting because it was a part of several different territories during its passage to statehood. Until Idaho Territory was created, the area's history was bifurcated by the Rocky Mountains. The western portion was associated with the Oregon country, and the eastern

51. 1 LAWS OF THE UNITED STATES, 565 (1815). The General Land Ordinance (GLO) applies technically only in the old Northwest. Therefore it is not clear that the 1785 priority date ought to carry forward for all section 16s, but it is arguable. The GLO was applied west-wide in many particulars. See PETER ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987).

part was associated with the Louisiana Purchase.⁵² Different sets of parcels in different sections of the state were reserved at different times by congressional statutes affecting different territories, and therefore could have different priority dates.

Finally, a reservation of land for school purposes was not a grant of land, and title remained in the United States, subject to the full control of and disposition by Congress, until the grant was effected.⁵³ Even after reservation, a private entry which occurred while the section was still unsurveyed would take precedence over the reservation. Congress was aware that many of the reserved school lands would be taken up by settlers, miners, or overriding federal reservations, like national forests or Indian reservations, before the states were established and could claim their grants. Accordingly, Congress provided in the Ohio accession, and every one thereafter, that states could select "in lieu" lands for granted lands already occupied.⁵⁴ In the Montana accession, the reservation, survey, and grant of trust lands became uncommonly admixed. The authorizing statute for the territorial government states:

That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-sixth each township shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected after the same.⁵⁵

The more typical question is whether there are reserved rights attached to "in lieu" lands? Some guidance may be available from decisions regarding Indian claims attached to lands added to a reservation. In those cases, the approach most often taken is to transfer the water rights with the title of the land. If those rights are inadequate to fulfill the purposes of the reservation, then a *Winters* right is implied from the date of reacquisition.⁵⁶ Another approach applied in the reacquisition of Pueblo Indian lands is to interpret the reacquired lands as replacement lands and attach to them the same water

52. For administrative purposes, the eastern section became a part of Indiana, Louisiana, and Missouri territories, then hung in limbo as part of unorganized Indian country, and then was added at one time or another to Kansas, Dakota, and Idaho territories. Mark Spence, TERRITORIAL POLITICS IN MONTANA, 5; J.U. Sanders, *Hundred Governors Rule Montana in Two Centuries*, Contributions to the Historical Society of Montana, with its Transactions, Officers, and Members, Vol. 9, 355-57 (1923).

53. *United States v. Morrison*, 240 U.S. 192 (1916).

54. Conversely, a private claim coming after the survey was not valid. See Jane Hudgert, 1 Interior Dec. 632 (1880).

55. Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, § 14.

56. *United States v. Anderson*, 736 F.2d 1358, 1363 (4th Cir. 1984).

rights as the lands they were intended to replace.⁵⁷ Either method could be applied to “in lieu” selections for state trust lands, but with potentially quite different results.

We may safely conclude that determining the priority date of school trust lands is a challenge probably requiring a parcel by parcel analysis, unless the state or the courts adopt a uniform rule to spare litigants the expense of producing rival theories and data to support them.

What is the purpose of reservation and the amount of water that has been reserved to achieve it?

The Court’s next challenge in assessing a reserved right is to identify the purpose of the land reservation. From the purpose, the amount of water reserved may be determined. The *Winters* decision, and most of the reserved right cases following it for the first half of the twentieth century, held that the Indians’ water right should not be quantified. This permitted the entitlement to expand with tribal needs. A more recent trend, one exacerbated by the spate of state water adjudications, has been toward placing an outside limit on the quantity of water reserved under the *Winters* doctrine. Hence, the purpose of the reservation defines the extent of the claim.

The Practicably Irrigable Acres Test

Those seeking to curb expansive Indian reserved rights claims assert that the intent of nineteenth-century treaties was to encourage the tribes (particularly in the Plains area) to convert from hunting and gathering to farming. Hence, they argue that agricultural production should be the only use to which a reserved water right can be devoted.⁵⁸ A more expansive view of the purpose of the reservation, for example to enable the tribes to participate fully in the economic, social, and political life of the United States, would likely justify a larger water claim. Even if the more limited notion regarding purpose were generally accepted as the basis for quantification, it does not translate simply into a specific amount of reserved water. How much water is needed to support agricultural production on a reservation? It depends on the technology employed, the number of acres to be farmed, the degree to which the application of water must be regarded as efficient, and a host of similar questions.⁵⁹

57. New Mexico, *ex rel.* Reynolds v. Aamodt, 618 F. Supp. 993 (D. N.M. 1985) (water right remains despite non-use).

58. Alvin H. Shrago, *Emerging Indian Water Rights: An Analysis of Recent Judicial and Legislative Developments* 26 ROCKY MTN. MIN. L. INST. 1105, 1106 (1980).

59. In *Skeem v. United States*, 273 F. 93, 93 (9th Cir. 1921), the United States Circuit Court for the Ninth Circuit held that the *Winters* right was not limited to use on those lands under cultivation on an

The most frequently discussed quantification criterion is currently the practicably irrigable acreage (PIA)⁶⁰ test proposed by the Special Master and adopted by the Supreme Court in *Arizona v. California*⁶¹ in 1963. *Arizona v. California* was the first case to use water required for agriculture as a standard to quantify federal reserved water rights for Indian reservations.⁶² This standard had the advantage of a fixed calculation of future water needs based on the physical capacity of the land.

In 1979, in a supplemental decree in *Arizona v. California*, the Court stated that even though practicably irrigable acreage was the criterion for quantifying the Indian right, and agricultural development was among the primary purposes for the reservations concerned, the tribes were not required to use their water for irrigation or other agricultural applications.⁶³ That is, once a reserved right is quantified under a PIA test, the water may be used for other purposes on the reservation.⁶⁴ The PIA standard was further refined in 1988. The Wyoming Supreme Court used a two-part test for defining PIA: 1) the land had to be shown to be physically capable of sustained agriculture, and 2) it had to be irrigable at a reasonable cost.⁶⁵ Nevertheless, many questions about PIA remain: Can a tribe go to a distant stream to seek water to irrigate its lands? If there are several sources of water available to the Indian reservation, which source was implicitly reserved? Is PIA a quantification standard applicable to nontributary ground water?⁶⁶

Beyond Practicably Irrigable Acreage?

Nor is irrigation the sole criterion for an Indian reserved water right. In *United States v. Adair*, the court declined to find a single, essential purpose

Indian reservation, either at the time of the reservation or at the time of the litigation, but could be expanded to include the entire land holding of a tribe. *Id.* This decision also supported a tribe's ability to lease its *Winters* rights in conjunction with the lease of tribal lands. *Id.*

60. The PIA quantification standard is applied by determining how many acres on the reservation can be irrigated taking into consideration such matters as slope and soil type. Next, a per acre water duty for irrigation of crops in that region is established by reference to data on climate and the practices of other irrigators. The product of these two figures is the quantified amount of the reserved right.

61. 373 U.S. 546 (1963).

62. *Id.* at 600. The Court stated:

We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations.

Id.

63. 439 U.S. 419, 422 (1979).

64. SLY, *supra* note 5, at 102.

65. *In re Big Horn River System*, 753 P.2d 76, 103-05 (Wyo. 1988).

66. See FRANK TRELEASE, *FEDERAL-STATE RELATIONS IN WATER LAW* 2 (1973).

for the reservation.⁶⁷ Instead, the court found a reserved right for hunting, fishing, and gathering in addition to irrigated agriculture on the reservation. A number of tribes were awarded rights to instream flow where it was shown that their reservation was intended to rely on fishing as a mainstay of the tribe's survival, or where instream flows were needed to preserve hunting and gathering rights.⁶⁸ Tribes have also been awarded rights for power generation.⁶⁹

Indians' ability to lease federal reserved water rights to non-Indians outside their reservations' borders has also been a heated topic. Advocates for water marketing off of Indian reservations argue the tribes should be allowed to do so, just as large urban water providers like the Denver Water Department market excess supply.⁷⁰ Critics point out that marketing water supplies is not mentioned in any of the treaties, acts, or executive orders creating the Indian reservations as a purpose for their establishment. Thus the tribes should not be allowed to market their water acquired through a federal reserved water right.⁷¹

Some commentators would allow the tribes the same marketing rights as other water-holding governmental entities but without significantly infringing on existing non-Indian claims.⁷² In 1988, the Shoshone and Arapahoe tribes and the federal government suffered a defeat in this arena before the Wyoming Supreme Court. The court ruled that the tribes were prohibited from selling their water for use outside the reservation.⁷³

67. 723 F.2d 1394, 1410 (9th Cir. 1983). "Neither *Cappaert* nor *New Mexico* requires us to choose between these activities or to identify a single essential purpose . . ." *Id.* at 1414-15. The instream reserved right was limited to that water necessary to support hunting and fishing rights currently exercised by tribal members, not those exercised at the creation of the reservation in 1864. *Id.*

68. See Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639, 656-58.

69. *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 340 (9th Cir. 1939). In this case, the Pahute Tribe of Nevada received water for the purposes of irrigation during half of the year, and water for domestic purposes, stock watering, and power generation during the non-irrigating half of the year. The rate of the continuous flow the reservation was to receive was determined by an estimate of "practically irrigable acreage," but other uses for the water were recognized in the initial quantification of water right. The court stated that "doubts about whether the reservation of lands for the Indians included rights to hidden or latent resources, such as minerals, petroleum, or water power, have, as a practical matter, uniformly been resolved in favor of the Indians" *Id.* at 337.

70. See Christine Lichtenfele, *Indian Reserved Water Rights: An Argument for the Right to Export and Sell*, 24 LAND & WATER L. REV. 131 (1989).

71. See Shrago, *supra* note 58, at 1106.

72. See David H. Getches, *Management and Marketing of Indian Water: From Conflict to Pragmatism*, 58 U. COLO. L. REV. 518 (1988).

73. *In re Big Horn River System*, 753 P.2d 76 (Wyo. 1988). The court also ruled that: 1) practically irrigable acreage was the sole measure of the tribal right; 2) tribal water could be put to use only for agricultural and domestic/municipal use; and 3) ground water underlying the reservation belonged to the state and was therefore subject to exclusive state regulation. *Id.* The U.S. Supreme Court heard on appeal some of the aspects of the decision, but became deadlocked over the question of whether to reverse the

Purpose and Quantification Standards for Non-Indian Reservations

To define reserved water rights on non-Indian federal reservations, the courts go through essentially the same process as on Indian lands. In two major reserved water rights cases, the Court indicated that it will take a narrow view of both the purposes of non-Indian reservations and the amount of water needed to accomplish those purposes.⁷⁴ In *Cappaert v. United States*, the Supreme Court held that reserved water rights in a national monument could be established to protect a rare fish and would consist of the minimum amount needed to accomplish that purpose.⁷⁵ This decision, limiting the amount of water to the amount needed to accomplish the stated purpose of the reservation has been called the “frustration-of-purpose standard.” If the water was not made available to the lands reserved in this way, it would be entirely impossible to fulfill the purpose for which they were originally reserved.

In a subsequent case involving Forest Service reserved rights in New Mexico’s Rio Membres, the Supreme Court further constrained the right by narrowing the purposes for which water could be claimed. The Court added the adjective “primary” as a modifier relevant to national forest purposes.⁷⁶ Justice Rehnquist relied upon an acrobatic reading of the agency’s basic 1891 and 1897 statutes to identify two primary purposes: watershed management and timber production.⁷⁷ The Supreme Court rejected claims that forests were reserved for aesthetic, recreational, and fish preservation purposes. Rehnquist argued that these broader purposes of forest reservations were defined only in subsequent legislation and generated no reserved water rights.⁷⁸

decisions and thus let stand as binding the Wyoming court decision. *Wyoming v. United States*, 492 U.S. 406 (1989).

74. See *supra* note 3.

75. 426 U.S. 128, 139 (1976). The Court stated:

In determining whether there is a federally reserved right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.

Id.

76. *United States v. New Mexico*, 438 U.S. 696, 705-11 (1978).

77. The Court held that “the Organic Administration Act and its legislative history demonstrate that Congress intended national forests to be reserved for only two purpose—to conserve the water flows, and to furnish a continuous supply of timber for the people.” *Id.* at 707. But see an alternative discussion of the legislative history of the 1891 and 1897 acts in *Fairfax & Tarlock*, *supra* note 6.

78. *Id.* at 713-15. The Chief Justice specifically mentioned the Multiple Use Sustained Yield Act of 1960, 16 U.S.C.A. § 528. Two further cases, *United States v. Denver*, 656 P.2d 1 (Colo. 1983) and *United States v. Jesse*, 744 P.2d 491 (Colo. 1987), reopened the door on the possibility of a Forest Service claim for instream flow, focusing on the amount of evidence needed to support an assertion that such

Regarding school lands, at least the purpose of the reservations is comparatively clear. It is less easy, perhaps, to resolve the issue of the amount of water reserved. The unchanging purpose of the land reservations is to support common schools.⁷⁹ The school trust lands are a rather surprising study in consistency: from the General Land Ordinance to the admission of Arizona and New Mexico almost 125 years later, congressional language describing the purpose of the reservation varied only slightly.

For example, typical enabling act language from Ohio forward grants the lands "for the use of schools." That normal phrase changed during the 1860s to read "for the support of common schools"⁸⁰ and shifted again in 1907 when Oklahoma was granted land "for the use and benefit of common schools." The 1864 Organic Act of the Territory of Montana reserved sections 16 and 36 "for the purpose of being applied to schools" in the territory. Subsequently the Montana enabling act granted lands "for the support of common schools."⁸¹

This consistency is amplified in the clarity of trust principles which govern management of the state school lands. The trustee is obligated to make the trust productive, and to act with undivided loyalty to the beneficiary in seeking to maximize long term returns to the trust. The trustee must exercise prudence, but is authorized to take reasonable risks in order to assure a high annual return to the beneficiary.⁸² Simultaneously, the obligation to maximize returns to the trust is balanced by the obligation to preserve the long term productive capacity of the trust.⁸³

Understandably, these often conflicting obligations do not translate easily into a specific amount of water. A threshold issue is determining whether making money to support the schools implies or requires *maximiz-*

flows were related to the primary purposes approved by the Court.

79. Although we have taken great pains in a different setting to introduce confusion into the slightly different issue of "who is the beneficiary of the trust established," that effort has no relevance here. See Fairfax, *supra* note 14, at 883-87.

80. This phrase first appeared in West Virginia's 1863 Enabling Act. 7 FRANCIS NEWTON THORPE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, & OTHER ORGANIC LAW OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, 4030 (1909).

81. Montana Enabling Act of 1889 (25 Stat. 676, § 11).

82. See SOUDER & FAIRFAX, *supra* note 2, at 2-4. For a discussion of prudence and the obligation to maximize, see also Jon A. Souder, et al., *Is State Trust Land Management 'Better' Than Federal Timber Management? A Best Case Analysis*, W., N.W. J. ENVTL. L. & POL'Y, (forthcoming 1998).

83. See Jon A. Souder, et al., *State School Lands and Sustainable Resources Management: The Quest for Guiding Principles*, 34 NAT. RESOURCES J. 271 (Spring, 1994). One additional possibility to entertain in terms of the long-term productive capacity of the trust is that the long-term success of the trust is as dependent on prudent political investments as it is on prudent economic investments. That is, that the trustees must consider maintaining cordial relations with all constituencies and colleagues who might be in positions to affect the success of future projects on state trust lands. See SOUDER & FAIRFAX, *supra* note 2.

ing returns. Case law surrounding the trusts in general and the school trusts specifically provides some guidance in this context. It is clear that the trustee is obligated to maximize returns to the trust consistent with maintaining the long term productive capacity of the trust.⁸⁴

In harmony with the general evolution of reserved rights litigation, one could adopt the PIA standard used in Indian water claims, arguing from two reasonable starting points. First, agriculture was the anticipated use at the time of the reservation. Second, for most of the parcels even today, leasing for agricultural or grazing continues to be the primary use of the land.⁸⁵ In adopting the PIA standard, one might extend to the school land trustees the same option to lease or sell water that they have to lease or sell lands. What would happen, if the trust attempted to claim water not arising on state parcels in order to irrigate them? What would happen if a state involved in urban development of school lands were to claim water to support condominiums and a golf course? Unknown at the time of the reservation, such urban developments are presently a major component of contemporary efforts to maximize returns to the school trust.⁸⁶ Quantification of the right is reflective as much of trust principles as of the reservation doctrine itself.

Obligation to Claim

Once the existence of reserved water rights on non-Indian lands was established, it was a relatively short time before the question arose as to whether agency officials were obligated to claim them.⁸⁷ Federal agencies have been reluctant to enter this political minefield, and environmentalists have been the major architects of expanding the doctrine on non-Indian lands. A Carter-era Department of the Interior Solicitor's Opinion attempted to justify reserved rights claims for "as much water for environmental land management purposes as appeared to be politically possible."⁸⁸ Two subsequent cases hinted at the obligation of agencies to assert reserved rights claims in litigation. The first case, *Sierra Club v. Andrus*, involved Bureau of Reclamation Lands in which the district court found the issue regarding

84. See Souder, et al., *supra* note 83.

85. See SOUDER & FAIRFAX, *supra* note 2, at 101, for a discussion of agricultural and grazing lease programs on state trust lands.

86. See SOUDER & FAIRFAX, *supra* note 2, at 253-65.

87. See Heather B. Lee, *Forcing the Federal Hand: Reserved Water Rights v. States' Rights for Instream Protection*, 41 HASTINGS L. J. 1271 (1990) (discussing *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985)).

88. Solicitor's Opinion No. M-36914, 86 Interior Dec. 553 (1979) (discussed in Fairfax, *supra* note 6, at 2-3). Less trusting commentators argued for a narrow construction of the reserved rights doctrine. Noting the possibility that holders of leases on reserved federal minerals could easily claim a reserved water right sufficient to develop the mineral, they argued both for a narrow construction of the doctrine and against any opportunity for third parties to force the government to claim reserved rights. FAIRFAX & TARLOCK, *supra* note 16, at 1-3.

non-protection of potential rights to be unripe.⁸⁹ However, the court indicated in dicta that it felt the Department of Interior had a trust responsibility to take "appropriate action."⁹⁰ Five years later, in *Sierra Club v. Block*,⁹¹ the district court found the United States obliged to assert reserved rights in wilderness lands in Colorado.⁹²

A Reagan-era policy statement riposted, taking the side of beneficiaries of state allocation systems, who are the most frequent advocates of limited reserved rights.⁹³ The Attorney General stated, in a letter to the Secretary of the Interior, that the government would not seek reserved water rights for wilderness, unless compelled to do so by specific statutory language, but rather would seek water for wilderness purposes where appropriate under state law.⁹⁴ The Reagan roll-back on what looked like a major environmentalist victory in *Block* led to a flowering of commentator's arguments on behalf of an obligation to claim,⁹⁵ but no further judicial imprimatur for the assertion has been forthcoming. Although the obligation to claim issue is quiescent on reserved federal public lands, given the trustee's obligations in managing state school lands, it is one of the more intriguing issues discussed in the next section.

At first blush it appears that trustees are even more clearly obliged to claim reserved rights than are federal land managers. Even if the trustee is not forced by the contours of the reservation doctrine to make a claim, there is certainly a basis in trust law, holding that the trustee has no authority to abandon a trust resource.⁹⁶ If a trustee appears to be ignoring rights to valuable resources or is politically thwarted in her effort to claim them by state officials with other priorities, a beneficiary could sue to force the claim. It is

89. 487 F. Supp. 443, 448-49 (D. D.C. 1980).

90. *Sierra Club v. Watt* 659 F.2d 203 (D.C. Cir. 1981). On appeal the issue had become ripe due to the joining of the United States in a general adjudication. The appellate court avoided a ruling on the duty issue by finding that no reserved rights to water existed for lands that arose out of the public domain (not reserved lands) and that were managed under FLPMA.

91. 622 F. Supp. 842 (D. Colo. 1985).

92. *Id.* The case was the subject of several opinions issued by the district court and by the Tenth Circuit Court of Appeals, resulting in a 1990 ruling dismissing the case as unripe. The final opinion in the series is *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

93. See generally Frank Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 DENVER L.J. 473 (1977); FRANK TRELEASE, *WATER LAW, POLICIES, AND POLITICS: INSTITUTIONS FOR DECISION MAKING* (1980).

94. Letter from Attorney General Edwin Meese to Secretary of the Interior Donald Hodel (July 28, 1988) (cited in Lee, *supra* note 87, at 1289).

95. Generally, these assertions begin with "the simple fact that Congress . . . creates and vests reserved water rights on the date the federal land is set aside. . . . [T]he views of the current federal land managers are clearly irrelevant in determining the existence of reserved rights." Robert H. Abrams, *Water in the Western Wilderness: The Duty to Assert Reserved Water Rights*, 1986 U. ILL. L. REV. 387. See also Jason Marks, *The Duty of Agencies to Assert Reserved Water Rights in Wilderness Areas*, 14 ECOLOGY L.Q. 639 (1987); Lee, *supra* note 88.

96. Abrams, *supra* note 95, at 403.

not difficult to imagine that state trust land managers would, in many circumstances, be forced to make claims that they would otherwise be too politically weak to bring.

It is not clear, however, that a reluctant trustee could be forced to claim water rights in order to maximize returns if the trustee were to present her position in terms of prudence or protecting the trust corpus. As discussed below, these claims are difficult to make and speculative in terms of positive outcomes. If the trustee argued that the risks of failing to win a claim were too high to justify the investment of trust resources, a beneficiary or other litigant could have a difficult time forcing the issue.

III. FEDERAL RESERVED RIGHTS ON STATE TRUST LANDS IN MONTANA

The familiar legal template of federal reserved water rights is altered in the trust land context in a couple of ways. First, state trust lands present several possible priority dates from which the right may be claimed; thus, they present a potentially open-ended claim. Further, state trust lands may be subject to a more stringent obligation to claim any reserved rights that do exist than are federal public lands or tribal reservations. In theory, trust principles appear to produce a more virulent strain of non-Indian reserved water rights. On the ground, however, these niceties appear to matter less than politics. The discussion of federal reserved rights on school lands in Montana will emphasize the political context surrounding such a claim.

The school lands trustees⁹⁷ entered the crowded and contentious arena of Montana water law belatedly, to protect water rights that appeared to be slipping away. Water was, perhaps incredibly, essentially ignored as a trust resource until recently. Lacking political clout within the western states, trustees have embraced a notion expressed in some, but not all, western state constitutions, that the water of the state belongs to the citizens of the state and is to be appropriated by private individuals for beneficial uses. In Montana, trustees were historically required by statute and regulation to allow lessees to divert waters on the leasehold, to develop them, and to put the water to use on or off trust lands.⁹⁸ The Trust began to take a more aggressive posture in the field of state-held water rights after the initiation of

97. The trustees of the school lands, until 1995, were located in the Montana Department of State Lands; however, in that year, the Department of State Lands was merged into the Department of Natural Resources and Conservation as the Division of State Lands. We will speak either of the trustees themselves or of the Trust when we refer to those who are engaged in actively managing these lands.

98. See SOUDER & FAIRFAX, *supra* note 2, at 245-46. The state lands trustees, by statute and regulation, allow lessees to divert waters on the leasehold, to develop them, and to put them to use on or off of the leased land. See MONT. CODE ANN. §§ 77-6-115, -302, -310 (1927); MONT. ADMIN. R. § 26-3-123 (1927).

the statewide water rights adjudication.

One of the trustees' first actions was litigation in which the Trust asserted a right to own water on state trust lands. From their first appearance in that case, to their more recent role as a possible disruption to the orderliness of the Montana adjudication process, federal reserved water rights have provided the Trust with a tool for increasing the weight of its opinions in state decision-making. The Trust's actions in raising the possibility that reserved rights might attach to trust lands, and the additional prospect of the Trust asserting those reserved rights claims in a public forum, have not given rise to any "wet water." But as a political tool, the claims appear to have increased the weight of the Trust's perspectives in state debates over water rights administration.

The Trust as a Legitimate Holder of Water Rights

The Trust began protecting its water rights in the name of the state as part of the statewide adjudication, filing approximately 8,500 claims by the 1982 deadline. This sortie immediately ran aground on the assertion that water on trust lands could not be claimed by the state, but only by lessees of state lands.⁹⁹ Within the Powder River Basin, twenty-three water rights on state lands were claimed by both the lessee and the state. In the 1978 preliminary decree for this pilot basin, the chief water judge held that the lessee, not the state, owned water rights perfected on state trust lands. When the water court issued its initial Powder River Final Decree in 1983, it again held that the title to the waters diverted on state school trust lands vested in the lessee, not in the state.

The Trust appealed the final Powder River decree to the Montana Supreme Court. In *Department of State Lands v. Pettibone*, the Trust argued for a federal reserved water right as originally recognized in *Winters v. United States*. This was the first assertion that a federal reserved water right attached to Montana state trust lands. The court refused to comment on this argument, preferring to confine reserved rights doctrine to accommodations between federal and state interests. Nevertheless, in *Pettibone* the court ruled that the state is the owner of a water right diverted or developed on state school trust land and that the lessee, in making appropriations on and for school trust sections, is acting on behalf of the state.¹⁰⁰ Embracing fundamental trust principles, the court concluded that "[t]he State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant

99. See *supra* note 97 and accompanying text.

100. *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985).

water right, without receiving full compensation therefor.”¹⁰¹

The introduction of federal reserved rights into the debates surrounding this case does not appear to have affected its outcome. The court drew on several other legal arguments for state ownership of water used on state lands; however, the court did agree that the state was a valid holder of water rights. This was an important first step towards the effective assertion of federal reserved rights on school lands.

In defending the trust’s ability to hold water rights, the court made two basic points:

First, an interest in school lands cannot be alienated unless the trust receives adequate compensation for that interest. Water that is appurtenant to the school lands is an interest for which the trust must receive compensation. Second, any law or policy that infringes on the state’s managerial prerogatives over the school lands cannot be tolerated if it reduces the value of the land.¹⁰²

The ruling cites several United States Supreme Court cases involving school trust lands and argues that the courts have traditionally been very protective of the trust concept and emphatic about the need to preserve the value of the school lands.¹⁰³ The cited cases set out principles governing school trust lands: 1) the enabling acts created trusts similar to private charitable trusts, which the state could not abridge; 2) the enabling acts were to be construed according to fiduciary principles, and; 3) the enabling acts preempt state laws or constitutions. An additional flourish confuses the state trust with the public trust. The court linked a state’s responsibility in safeguarding the public trust to the state’s responsibility to the school trust by citing *Illinois Central Railroad v. Illinois*: “a state may not abdicate its trust in public property.”¹⁰⁴ These conclusions were not applied to the reserved rights claim but would figure prominently in any future discussion.

The Specter of Trust Land Reserved Water Rights

Recognition of the state as a valid holder of water rights perfected on

101. *Id.* at 952.

102. *Id.* at 954.

103. *Id.* (citing *Andrus v. Utah* 446 U.S. 500 (1980); *Springfield Township v. Quick*, 63 U.S. 56 (1859); *Trustees for Vincennes University v. Indiana*, 55 U.S. 268 (1852)). In another case, the federal district court concluded that the lessees had an implied right of access to their leasehold across adjacent federal lands. The court felt that if it held otherwise, “the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.” *Utah v. Andrus*, 486 F. Supp. 995 (D. Utah 1979).

104. *Pettibone*, 702 P.2d at 957 (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892)).

state trust lands came relatively late in the adjudication process.¹⁰⁵ This caused significant difficulties for the Trust, and the trustees were forced to take extraordinary steps to alter the calendar to permit their claims. Again, the reserved water rights issue surfaced but did not come into play in the resolution of the issue

The Trust filed water claims in the adjudication process well before the *Pettibone* case was settled. The school lands trust managers decided to focus only on those claims that had the same criteria as the claims involved in the *Pettibone* case, claims that had both the point of diversion and the place of use on state trust lands.¹⁰⁶ Significantly, this decision rested on the belief that if the Trust won its *Pettibone* appeal, then the claims filed in the general adjudication would be secure. This decision was also influenced by a lack of resources; it would not be prudent for a trust with limited time and money to file all possible claims for water diverted from and/or used on state trust lands with an uncertain hope that the right to hold title to water would be recognized.

The point of diversion for irrigation rights is often upstream from the place of use. Therefore, due to *Pettibone* constraints, the Trust did not file for many of the irrigation rights used on state trust lands. The trustees estimate that 20,000 to 40,000 acres of irrigated lands could be lost due to this failure to claim.¹⁰⁷ School lands managers estimate that more than 1,000 claims for water which divert water from state trust lands for elsewhere were not filed by the state by the 1982 deadline. The Trust also reports that approximately 2,000 water rights for stockwater use were not filed by the deadline. Consultants hired to research the historical and existing water use on state trust lands and to file for the water rights did not inspect information from aerial photographs and relied solely upon information surveyed from lessees, thus overlooking a substantial water use.

The Trust pursued multiple methods to reclaim these lost water rights. The Trust filed an amicus curiae brief to an appeal to the Montana Supreme Court to determine whether water rights claimed after the 1982 deadline were still valid or were unequivocally abandoned. The court ruled that the

105. The state was recognized as a valid holder of water rights in the *Pettibone* decision in 1985, but the water court was established in 1979.

106. Water with a point of diversion on state lands, but a place of use off state lands, or water with a point of diversion off state lands, but a place of use on state lands, was not claimed by the Trust. As per *Pettibone*, the state lands trustees chose to claim only water that had both diversion and use on trust lands.

107. This potential loss represents approximately \$250,000 year in revenues. Approximately 500,000 acres of the school lands are used for agriculture, representing 3000 agricultural leases. The leases do not differentiate between irrigated and dryland crops, but the trust managers note that irrigated sugar beet and potato lands bring in a significant revenue for the trust. Interview with Tom Butler, State Trust Lands Attorney, in Helena, Mont. (July 29, 1997).

late filed claims were conclusively forfeited due to owner negligence, holding that court action had neither been excessive nor unreasonable.¹⁰⁸

In its brief to the court, the Trust argued that the nonfiling of state trust lands' water claims was due to factors beyond the Trust's immediate control. Such factors included

shortage of staff and funds for the SB #76 adjudication; the logistical problems of thoroughly evaluating water rights on the thousands of parcels that comprise more than 5,000,000 acres of trust lands sprinkled across the state, and completing accurate claims thereon within the allowed filing period; and the coolness (at times, hostility) of the Water Court toward the State as a water rights claimant during the early years of the adjudication program, a situation that was not rectified until 1985 (more than three years after the close of the filing period)¹⁰⁹

The brief also raised the idea that a conclusive abandonment of a valuable property right of water is in conflict with the peculiar trust principles governing the administration of the school lands.¹¹⁰ The brief suggested that trust managers might claim water rights for school trust lands under the doctrine of reserved rights.

By raising the possibility of reserved water rights in state trust lands, the Trust did manage to pressure the state legislature into allowing a second filing date for pre-1973 water claims. In 1993, the legislature created an additional filing date of July 1, 1996.¹¹¹ This filing date permitted two types of late claims. The first, called "postmark" claims, referred to late claimants who believed that the first filing deadline was a postmark date, not a received by date. Claimants who could prove that they had misunderstood the initial date received the priority date which they had initially claimed, but subordinate to all federal reserved rights water claims. The Trust, and others who had missed the deadline more egregiously, received priority dates subordinate to all on-time claimants and to any additional permits granted before the 1996 deadline. Essentially, late claimants without an excuse were permitted to file their claims, but they received no more rights to water than they would have received had they applied for new permits. The Trust did file additional claims by this second filing date, but the water rights that the

108. In re Yellowstone River, No. 91-140 (Mont. 1998). The court ruled that the late claims are abandoned under MONT. CODE ANN. § 85-2-226 (1993).

109. Brief of Amicus Curiae by Lon J. Maxwell, Mont. Dep't of State Lands at 3, *In re Yellowstone River*, No. 91-140 (Mont. 1998).

110. *Id.* The brief argued that abandonment of water rights collides with the public trust clause of Article X, § 3 of the Montana Constitution.

111. MONT. CODE ANN. § 85-2-221 (1973).

school lands might receive when those claims are adjudicated would be minimal in terms of both wet water and potential income to the trust. Following *Pettibone*, pending trust land claims filed by the 1996 deadline are slowly being resolved on a drainage-by-drainage basis and the Trust has been awarded a substantial proportion of its claims to date.¹¹²

Physical federal reserved water rights are important to state trust lands for two reasons: 1) they represent a possible strategy for recovering water rights appurtenant to state trust lands and retaining control over a valuable trust resource that has often been lost to lessees; and 2) they offer the possibility of substantially increasing the revenue obtained from the lease of school lands. Increased access to, and control over, water resources would allow the Trust to change the type of land use on some of its less profitable parcels to more profitable irrigated agriculture.

Potential federal reserved water rights appear to have utility of a somewhat different nature. They significantly increase the political bargaining power held by the school lands trustees. In both *Pettibone* and the adjudication process, merely raising the specter of federal reserved water rights might have affected the strength of the Trust's position in the political struggles surrounding water rights in Montana.

The Actual Reserved Water Rights Claims

By the late 1990s, reserved rights claims matured beyond political threats and were discussed directly as a trust strategy. Several years ago, Montana filed one claim for federal reserved water rights on school trust lands, and the watermaster refused to hear this claim due to insufficient factual support for the claim.¹¹³ Nevertheless, as basins in which it feels that it can make a strong case for reserved rights come up for review in the general stream adjudication, the Trust does anticipate filing for reserved rights on at least one more tract of land.¹¹⁴

This does not, however, take the reserved rights doctrine out of the political realm and return the process to a judicial assessment of the standard questions. The Trust approach to those familiar issues underscores the role of political considerations framing federal reserved water rights claims. While we see the potential for successful federal reserved rights claims on school lands, the Trust has chosen to make minimal reserved water rights claims rather than adopting the more familiar pattern associated with Indian and some earlier federal agency claims of seeking the maximum possible

112. Interview with Tom Butler, State Trust Lands Attorney, in Helena, Mont. (June 2, 1997).

113. *Id.*

114. *Id.*

amount. These reduced claims allow the Trust to maintain the possibility of the existence of reserved rights without galvanizing other state agencies with a maximum claim.

1. Is There a Reservation?

The Montana Attorney General's opening position is to deny that there has been a reservation of land which would give rise to a water right. The Trust contends that state trust lands were reserved in the State of Montana, specifically to support common schools.¹¹⁵ Reviewing the history of school lands in Montana, trust managers find several reservations. The first which they point to is in the 1864 Organic Act of the Territory of Montana:

That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township shall be, and the same are hereby reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected after the same.¹¹⁶

The Trust argues that the lands were re-reserved with the Enabling Act of the State of Montana in 1889:

That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such section, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent to . . . are hereby granted to the states for the support of common schools.¹¹⁷

The Montana Attorney General's office points to additional language in the Enabling Act, which describes the school trust lands as "the sixteenth and thirty-sixth sections embraced in *permanent reservations for national purposes*."¹¹⁸ The Attorney General's office asserts that a reservation requires that specific lands be withdrawn from the operation of the general land laws with the express intent that they be applied to a particular federal purpose.¹¹⁹ The Enabling Act's loose description of sections 16 and 36 does not constitute a rigorous description of a specific tract or tracts of land. More im-

115. *Id.*

116. Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, § 14.

117. Montana Enabling Act of 1889, 25 Stat. 676, § 10.

118. *Id.* at § 11 (emphasis added).

119. Interview with Harley Harris, Assistant Attorney General, State of Montana, in Helena, Mont. (Aug. 15, 1997).

portantly, they point out that, prior to survey, reserved school trust lands remained open to homesteading.¹²⁰ If the lands were still open to settlement, they were still administered under the general land laws of the United States and, hence, were still part of the public domain, and not truly reserved.¹²¹

Although the Montana Enabling Act states that the lands set aside for the common schools “shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only,”¹²² the Supreme Court held in *United States v. Wyoming*¹²³ that similar language in the Wyoming Enabling Act¹²⁴ did not actually forbid the federal government from allowing homesteading on those lands. The court held that a state enabling act could not limit the ability of the federal government to change or alter the ways in which it used the lands it had set aside for the school trust.¹²⁵ The attorney general’s office used this case to support its argument that “reserved” state trust lands remained open to sale and settlement.¹²⁶ This argument appears to be part of a largely successful effort to push the Trust claims back onto more readily contested grounds and to force the Trust to make a weaker claim regarding priority dates.

2. What is the Priority Date of the Reservation?

Chastened by the opposition on the reservation issue, the Trust is lowballing its position on priority dates. While it supports the idea that the date of reservation for reserved rights in school trust lands should be the date when the lands were reserved in the territory of Montana,¹²⁷ it seems most likely that any claims filed in water court will emphasize the survey date as the priority date. By taking this position, the Trust embraces the latest of all possible dates and dodges the brunt of the Montana Attorney General’s “no

120. *Id.*

121. However, the position of the Attorney General’s office is not entirely inflexible. They do allow that it is possible that the lands might have been reserved, but then contend that any reservation could not possibly have occurred prior to survey. *Id.*

122. Montana Enabling Act of 1889, 25 Stat. 676, § 11.

123. 331 U.S. 440 (1946).

124. Wyoming Enabling Act, § 5. The Wyoming language is as follows: “such [school lands] shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed.” *Id.*

125. Our interpretation of *United States v. Wyoming*, 331 U.S. 440 (1946), is that the court sought to support federal ability to re-reserve land, to move it from one federal purpose to another, not to demonstrate that the lands were never truly reserved.

126. The Attorney General’s office also points to a congressional act of 1891, 26 Stat. 796, that permitted homesteaders on school trust lands to perfect their claims if the lands on which they had settled had not yet been surveyed. Interview with Harley Harris, Assistant Attorney General, State of Montana, in Helena, Mont. (Aug. 15, 1997).

127. Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, § 14.

reservation" position.¹²⁸

If the Trust chose to argue for the maximum federal reserved water rights possible, the priority date for the reserved water rights of the school lands in Montana would be from reservations that ante-date its 1864 Organic Act.¹²⁹ The choice by the current managers of the trust has been to argue for the earliest reservation when Montana had attained its present form, not to stretch back to the first time each parcel was individually reserved. While any future claims for reserved water rights will be made on a tract by tract basis, each claim would be made with the same, statewide priority date.

Alternatively, the Trust has proposed, to strengthen any case it might make for federal reserved rights in any particular tract of land, that it might claim reserved rights from the date when each individual tract was surveyed. Once lands had been surveyed, they were officially a part of the territory of Montana, and Montana's reserved rights (as a territory, if not yet as an official state) could be asserted from that moment forward. Montana's Organic Act contains language which states that sections 16 and 36 will be reserved "when the lands in said territories shall be surveyed."¹³⁰

Using the survey date as the date of reservation would provide additional security that the specific lands set aside for the support of the public schools had been formally reserved. Montana's Attorney General agrees that, if a reservation exists at all, the survey date is a much more plausible date of reservation than the date that sections 16 and 36 were first discussed in association with support of Montana's public schools. The attorney general's office claims that the trust lands remained part of the public domain, subject to homesteading and all other entry and disposition, until the date of official survey.¹³¹ Once the lands had been surveyed, they belonged formally to Montana as a school trust. The attorney general's office contends that until the survey, the lands were still open to settlement and thus had not been formally withdrawn, nor reserved.¹³² The Supreme Court provides support for their opinion in its decision in *United States v. Wyoming*.¹³³ The Court states, in a discussion of school lands, that, "[p]rior to survey, those sections are a part of the public lands of the United States and may be dis-

128. Interview with Tom Butler, State Trust Lands Attorney, in Helena, Mont. (June 2, 1997).

129. See *supra* note 117, §14.

130. Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, § 14.

131. Interview with Harley Harris, Assistant Attorney General, State of Montana, in Helena, Mont. (Aug. 15, 1997).

132. *Id.* Support for the claim that the date of survey, and not the date of the Organic Act should be used as the date of reservation can be found in *United States v. Wyoming*, 331 U.S. 440 (1946); *United States v. Minnesota*, 270 U.S. 181 (1925); *Minnesota v. Batchelder*, 58 U.S. (1 Wall.) 109 (1863).

133. 331 U.S. 440 (1946).

posed of by the Government in any manner and for any purpose consistent with the applicable federal statutes.”¹³⁴

Other agencies involved in Montana’s debate over reserved rights in school trust lands offer conflicting views of the appropriate date of reservation. It is difficult to demonstrate convincingly that the priority date for the reserved rights should be the reservation of the lands rather than the date when the state gained title to the lands. This dilemma led to the rise of another popular date for when reserved rights might first have been established: 1889, the year that title to the lands was granted to the state of Montana in its Enabling Act.¹³⁵ According to this argument, reserved rights originated when the state was actually granted the school lands, not from the moment in which the intent to reserve those particular sections from the public domain was first discussed.

As to “in-lieu” selections or exchanged lands, the Trust has abandoned any possibility of a claim. They do not believe that reserved rights would accrue to those lands not originally reserved. They also argue that the reservation would not apply to lands bought or sold by the Trust and that the mechanics of an exchange are so similar to those of a sale that the rights could not be found on exchanged lands.

Although the ostensible purpose of the federal reservation of state trust lands is to maximize economic return to the trust, the Trust is not attempting to claim the earliest possible priority date and the maximum amount of reserved water for the trust. On the contrary, the claims that they appear most comfortable making minimize the potential scope of the reserved rights claim. While downplaying a federal right is not surprising in the context of the Western states’ power struggles with the federal government, it is surprising in light of the principles of managing a school trust.

3. What is the Purpose and the Amount of Water Reserved?

The purpose of Montana’s trust lands, like all state trust lands, is to provide financial support for the state’s public schools. In Montana’s Organic Act, the school lands are reserved for “the purpose of being applied to schools,”¹³⁶ and in the Enabling Act they are reserved for the “support of common schools.”¹³⁷ As discussed in previous sections, this purpose does not translate easily into a quantity of water that must have been implicitly reserved in order to carry out the purpose of the reservation. As has been

134. *Id.* at 445 (emphasis added).

135. Montana Enabling Act of 1889, 25 Stat. 676.

136. Organic Act of the Territory of Montana, Act of May 26, 1864, 13 Stat. 85, § 14.

137. Montana Enabling Act of 1889, 25 Stat. 676, § 10.

suggested, the difficulties inherent in assigning a water right to current and potential uses that fulfill the purpose of state trust lands are enormous.¹³⁸ What standard can translate maximization of financial productivity into a quantity of water? A reservation of water large enough to cover all potentially profitable uses of the state lands could disrupt all other water users in a basin.

The Trust has chosen to minimize its claims, arguing that the amount of water reserved in the state trust lands should be quantified by the standard often used to quantify reserved rights on Indian reservations—Practically Irrigable Acreage (PIA). This decision is a pragmatic choice for several reasons. First, employing a recognizable standard to quantify a real, but less than maximum, claim could make the claims more politically acceptable within the state as a whole. Second, it is possible to argue, given the current money-making capabilities of the trust lands, that agriculture is the highest and best use of those lands. The half million acres of trust lands that are currently in irrigated agriculture make as much money for the Trust as all of the other 4.7 million acres managed by the school lands trustees. Converting as much of the appropriately-suited trust lands from their current uses to irrigated agriculture would clearly be a necessary move for a manager entrusted with the task of maximizing the lands' economic productivity.¹³⁹ Third, the Trust argues that at the time of the reservation it was assumed that the lands would be used for agriculture. If the implied intent of the reservation was to support agricultural leases, the PIA standard is not only a relatively convenient method to determine the amount of reserved water, but it also fulfills the initial purpose of the reservation.

The question also arises, as on Indian lands, whether water claimed under the PIA standard can be sold or leased off of the lands on which it was quantified. If the state trust lands do have federal reserved water rights, is the water merely a necessary component of making the lands profitable, or is the water a trust resource in and of itself? If reserved water rights are granted to Montana's state lands under the PIA standard, it could increase the amount of water on trust lands. If the water could be managed as a sepa-

138. Initial attempts to translate the purpose of Indian reservations into a quantifiable water right were no less complex.

139. The trust land managers have made other efforts to obtain increased amounts of land for irrigated agriculture. In recent years they have made multiple exchanges of scrubland open space for irrigated sugarbeet or hay agricultural lands. Individuals (often in-migrants to Montana from more urban areas) are interested in maintaining a border of green space around their homes. When the Trust is the owner of a relatively unprofitable open space area around this type of home, and informs the homeowners that they are not permitted to buy school trust lands but that they may exchange other properties in return for title to the trust lands, the homeowners often purchase exchange lands specifically chosen by the trust managers. Most often, the exchanged lands chosen by the Trust are irrigated agricultural lands. Interview with Tom Butler, State Trust Lands Attorney, in Helena, Mont. (June 2, 1997).

rate trust resource, it could become an important asset for the school trust.

As in the case of the priority date, in devising a method of quantifying reserved rights on state trust lands, the Trust has shied away from claiming the maximum amount of water. While PIA is a useful and convenient standard, and would probably supply significant water to some trust lands, it is a distinct departure from the purpose of maximum productivity.

4. Obligation to Claim

The state lands managers in Montana argue that they are not under any formal obligation to claim federal reserved rights for the state trust lands. It is clear, however, that the issue of federal reserved rights continues to remain active in a difficult political environment precisely because the Trust believes that the responsibility of managing the trust lands involves taking advantage of any opportunity to increase the productivity of the school lands. Even the threat of asserting federal reserved rights appears to have improved the potential for trust managers to both protect and expand trust resources. The Trust is, however, quite limited in the number and scope of the claims it can practically expect to make. It currently employs one hydrologist, and funds for any large scale investigation into reserved water rights simply do not exist.

The peculiar structure of the school trust does, however, create grounds for concluding the contrary. The trust managers do not have absolute discretion in their management of the school lands. They are required to demonstrate undivided loyalty to the beneficiaries of the trust, and they are not permitted to abandon trust resources without receiving full compensation for those resources.

The trustees could assert an obligation to claim, but given their reticence on every other point, their failure to do so is not surprising. Perhaps it is unexpected that the beneficiaries are similarly disinterested. Montanans for the Responsible Use of the School Trust (MonTRUST) was formed in 1996 to provide interested Montana citizens with an organized opportunity to play an active role in the management of the trust lands. MonTRUST is interested in promoting strategies that will maximize and maintain the income generated through the trust for the purposes of public education. The organization argues that while Montana's state constitution requires the trust lands to be managed for the "sole benefit of public education,"¹⁴⁰ the lands are more often treated as the "domain of the users, rather than a trust (for schools)."¹⁴¹ Nevertheless, MonTRUST has expressed no interest in the

140. MonTRUST informational pamphlet [on file with *Land and Water Law Review*].

141. Mike Dennison, *Freebies May Be Costing State Pots of Money*, Great Falls Tribune, June 13,

Trust's effort to claim federal reserved rights. They are unlikely to push for action on such a controversial issue, believing that in their first few years as an organization, they might have a greater positive impact on the trust income by beginning with pressure on the Land Board over trust principles somewhat better-established.¹⁴²

It is possible that MonTRUST's position reflects a careful balancing of the likelihood of success against the costs of providing adequate data to defend the claims, and the final conclusion that the effort is not a prudent investment of trust resources. It seems reasonable to suggest, however, that the beneficiaries' reservations are rooted in the same potential constraints that have led the trustees to minimize their claims.¹⁴³

V. CONCLUSIONS: IMPLICATIONS OF ASSERTION OF THE RIGHT

Asserting federal reserved water rights, we conclude, is both a legal and a political issue. The final shape that any claim of reserved rights will take is partially determined by the outlines of the legal doctrine of federal reserved rights, but is completed by the contextual parameters of feasible political action.

In Montana, the battle over reserved water rights in state trust lands is not primarily a legal issue. While all parties involved in any discussion of reserved rights can couch their arguments in terms of the presence or absence of the legal authority to claim reserved rights, the debate is framed by the political issues associated with filing state claims for a federal right. We have argued that this right exists. However, attempts to decide whether to claim this particular right raise larger questions about the limits of federal control over state resources and of governmental interference with the private property rights of individual water users. In Montana, these larger issues are manifest in the differences of opinion between the state agencies that will be affected by any reserved rights claims made by the Trust.¹⁴⁴

1997 at M1 (quoting Roy H. Andes).

142. Telephone Interview with Roy H. Andes, MonTRUST vice president, (July 2, 1997).

143. Then again, it is not clear what states might do with these legal entitlements if confirmed. If a trust cannot justify investing trust resources to build water distribution systems, it would be unable to use any water claimed. This possibility might, in fact, defeat the claim itself.

144. It is not clear exactly which agencies would be winners and which would be losers should reserved rights be judged to exist in state trust lands. It is difficult to discern the boundaries of the constituencies of the Trust, the DNRC, the Attorney General's Office, and the RWRCC, and even harder to determine the balance of actual income change and political popularity as it would be measured by each agency. Other Montanans will clearly also have an interest in these claims to reserved water rights, but it is somewhat difficult to discern how even those who might be winners if the state trust lands should receive reserved rights might react to this issue. Potential irrigators on state trust lands would seem to have an interest in increasing the water available to their lands, and thereby the revenues they receive from those lands, but we anticipate that even they might be against the idea due to the implications of

The situation is made more difficult because it is not just whether or not the school lands will receive reserved rights that causes problems for other state agencies. Any claims filed in water court and made known to the public could have great impacts on the perception of the role of state agencies and of the parts that each agency plays in the stream adjudication process. The Department of Natural Resources and Conservation (DNRC), the Attorney General's office, the Reserved Water Rights Compact Commission (RWRCC), and the Trust are all significant actors in the debate over federal reserved water rights in Montana's state lands. They all also overlap in many areas of their constituent bases. In addition, they all face a public that is unsure whether resource agencies, and any branches of state government involved in resource law, are acting in or against the interests of individual property owners and resource users.

The complexity of this situation is heightened by the 1995 merger of the State Lands Department with the state's Department of Natural Resources. The resulting Department of Natural Resources and Conservation houses the RWRCC. The DNRC is responsible for granting water permits, and for researching water claims for the Water Court. The RWRCC is responsible for negotiating federal reserved water rights compacts, and the Trust is interested in filing for federal reserved rights in state lands. It is difficult to see how conflicts of interest could be avoided in any circumstance that involved the Trust and federal reserved rights: the department must negotiate with itself.¹⁴⁵

These issues are further compounded by the particular history of Montana's water claims. If the Trust should file now for federal reserved water rights, it would be the last entity in the state adjudication, governmental or private, to file for water rights. Reserved rights cannot be abandoned. By definition, and by virtue of their senior priority date and many downstream locations, any reserved rights on state trust lands would trump many of the established water rights of other individual and reserved right (tribal and federal agency) users in the Montana basins. Montana began a comprehensive state-wide water adjudication in 1979. The adjudication evaluates all water rights established prior to 1973 and all federal reserved water rights in federal and tribal lands. The deadline for filing water claims was April 30, 1982. The Trust filed approximately 8500 claims by the 1982 deadline. This

increased state power (particularly that of a state resource agency), especially if the state gains that power by wielding a federal right. State use of a federal right potentially threatens not only the balance between public and private interests within the state, but also that between state and federal government.

145. This is not necessarily the way in which state trust lands reserved rights would be negotiated. The RWRCC argues that Trust water rights would be entirely out of their purview because their legislative mandate only includes negotiation with federal agencies and tribal organizations. Telephone interview with Barbara Cousins, RWRCC (Apr. 13, 1998).

represents a relatively small percentage of the total water claims that could have been filed for current uses on the state lands. Reserved rights would allow the state to attain title that the Trust forfeited during the initial filing process and could permit the school lands to obtain new rights to water that has no history of use on those lands.

The Trust wants actual water to flow to the state trust lands, as do most groups involved in reserved rights negotiations in Montana.¹⁴⁶ Their potential claims are a threat to other water users. In basins where water is completely or almost completely appropriated through use or diversion, reserved rights would be the only way to provide sufficient wet water to institute irrigated agriculture on state trust lands.

In the *Pettibone* decision, the Montana courts ruled that the state held the rights to water developed on state lands. Any claims that were filed by the 1982 deadline either by the lessees of state lands or by the state lands office resulted in title to water vesting in the state with a priority date from first beneficial use. After *Pettibone*, the Trust managed to convince the state legislature, at least partly through the threat of asserting federal reserved rights, to open a second filing period for claims not filed by the 1982 deadline. Any claims filed by the July 1, 1996 deadline by either party resulted in the state gaining water rights, but with the priority dates subordinate to all water users who filed claims by the 1982 deadline and all holders of permits issued prior to 1996.¹⁴⁷ These claims are therefore almost useless. Federal reserved water rights represent a lucrative opportunity¹⁴⁸ for the school trust to increase its number of irrigated acres because they allow the Trust to obtain water that it could never receive through the state adjudication system.

The threat of state assertion of federal reserved water rights raises some frustration in the other parties involved in the statewide adjudication process. The credibility of the stream adjudication process has been difficult to create and maintain. Opponents of reserved rights on the school lands argue that the Trust missed all of the conventional opportunities offered in Montana's adjudication to gain water rights. It failed to reserve significant amounts of water for a state purpose in 1973, and it is now trying to exploit

146. The Trust is confident that they have the available money to develop any paper water rights granted in the adjudication process into wet water. This money would be most likely to come from the 2.5% of the state trust lands budget that is slated to go towards resource development. Interview with Tom Butler, State Trust Lands Attorney, in Helena, Mont. (June 2, 1997).

147. MONT. CODE ANN. § 85-2-221 (1997).

148. The 500,000 acres of school lands that are farmed brought in \$9,486,000 in 1996. Although the revenue from irrigated agriculture is not formally differentiated from that of dryland agriculture, the state lands trustees believe that a large portion of the 1996 agricultural revenue was derived from irrigated sugar beet and potato farming. Interview with Tom Butler, State Trust Lands Attorney, in Helena, Mont. (June 2, 1997).

a relatively obscure judicial doctrine to escape from the fact that it failed to defend its water interests at every opportunity given by state law. Western water law, and large-scale stream adjudication in particular, is fundamentally a search for security and certainty about who is entitled to how much water, and where. If the Trust applies for and/or receives reserved rights at this point in Montana's adjudication, many involved feel that it will betray the efforts that have already been expended in attempts to codify the shape of the state's water rights. It also undermines negotiations over how to balance federal and Indian reserved rights with those of historical users.

In addition to these political concerns, practical concerns are also likely to impact the range of possibilities open to the Trust in its attempts to obtain water for the school trust lands. The Trust employs one hydrologist. Its budget is small. The time involved to research reserved rights claims on multiple individual parcels of lands, and the money required to support these efforts, will require major commitments. Public education needs reliable funding year after year. It is unlikely that the trust will be able to afford a large scale effort to procure federal reserved rights.

We reviewed in detail one of the most complex and controversial options open to state trust land managers, the possibility that federal reserved water rights attach to state school lands. The discussion centered on four basic questions that run through all contemporary discussions of reserved water rights: Is there a reservation? What is the priority date of the right? What is the purpose of the reservation and the amount of water needed to achieve that purpose? Is the manager obligated to claim reserved water rights? The lengthy discussion concludes that it is reasonable to suppose that there is a reserved water right. However, the unavoidable conclusion is that even if the courts eventually vindicate the theory of reserved rights attached to school trust lands, there is not apt to be a West-wide march to the courthouse to claim them. The process is costly, the outcome uncertain, and the likely applicability narrow.

What makes the possibility interesting is the combination of the likelihood of a very senior priority date and the availability of a beneficiary to oblige a trustee otherwise unable to muster the political strength to make a claim. Even if reserved water rights are found to exist for some parcels of school lands and in some states, asserting a reserved water right would likely be a tremendously complex matter of research. This is true even if some simplifying doctrines emerge from the court's assessment. This is not trivial in the context of state school lands. In general, the state lands commissioners are not powerful actors on the state stage, nor do they have a staff of research scientists who could make filing such claims a routine matter.

Unlike the Forest Service, which is high in the watershed and deals primarily with instream flow claims, the trust could be required to demonstrate that the use of water would be efficient. It is not clear that this standard could be met given the limited resources most state commissioners have to invest in development of state lands and the trust requirement that any investment be prudent. Thus, a major solace to existing rights holders is that it may not be economically or politically feasible for state land commissioners to claim federal reserved rights. Given the complexity and uncertainty of the process, it might be prudent for trustees simply to condemn the water needed on state school lands and to pay fair market value for what is needed.

We conclude, regarding federal reserved water rights, that the practical significance of having found a basis for a claim is not clear, even though the state's priority date would be extremely senior and the water claims likely disruptive due to the location of the land. Although theoretically fascinating, the timing and complexity of the claims, and the resources required to make them, suggest that the threat is likely more important than the actual water that will flow to state lands. An initial defense of the theory by an aggressive attorney general's office might not be prohibitive. But it is not clear that there are many instances in which state trustees can muster the economic and political resources to claim and utilize reserved water rights. This does not mean that there is no point in raising the issue. It appears reasonable to suppose that the threat of making a reserved rights claim had some impact on the salubrious outcome (from the Trust's perspective) in the *Pettibone* case. If the possibility of a claim is seen to have any merit, it could give the Trust some leverage in a crowded and highly contentious political arena where they have previously been ineffective.