

2000

## Water Law - Wilderness Areas and Federal Reserved Water Rights: Unlimited Appropriation of Unallocated Water Endorsed by Idaho Court - Potlatch Corp. v. United States (In re SRBA)

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### Recommended Citation

Miller, R. Clark (2000) "Water Law - Wilderness Areas and Federal Reserved Water Rights: Unlimited Appropriation of Unallocated Water Endorsed by Idaho Court - Potlatch Corp. v. United States (In re SRBA)," *Land & Water Law Review*. Vol. 35 : Iss. 2 , pp. 375 - 394.

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## Case Note

### **WATER LAW—Wilderness Areas and Federal Reserved Water Rights: Unlimited Appropriation of Unallocated Water Endorsed by Idaho Court. *Potlatch Corp. v. United States (In re SRBA)* No. 39576, 1999 WL 778325 (Idaho 1999).**

#### INTRODUCTION

In 1987 the state of Idaho initiated a general adjudication of water rights within its Snake River Basin, a vast complex of streams and tributaries draining eighty-seven percent of the state's surface area.<sup>1</sup> The Snake River Basin Adjudication (SRBA) District Court of the Fifth District of Idaho was created to preside over the adjudication proceedings.<sup>2</sup>

In 1996, the federal government filed claims in the state SRBA court for reserved water rights for three wilderness areas within the Snake River Basin drainage.<sup>3</sup> Potlatch Corporation, an Idaho timber company, along with the state of Idaho, several irrigation districts and mining corporations, and two municipalities, moved to oppose the federal reserved water rights for the wilderness areas.<sup>4</sup> The parties filed cross-motions for summary judgment on the issue of whether the Wilderness Act of 1964 provided a basis for implying a federal reserved water right for the wilderness areas.<sup>5</sup> On December 19, 1997, the SRBA court issued an order granting federal reserved water rights to more than one million acres covered by the Frank Church River of No Return, the Selway-Bitterroot, and the Gospel-Hump wilderness areas within Idaho's central mountains, prompting an appeal to

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1. Snake River Basin Adjudication Court Homepage, *Informational Brochure*, (visited March 30, 2000) <<http://www.srba.id.us/DOC/BROCH1.HTLM#SEC1>>. "The SRBA is a statutorily-created lawsuit to inventory all surface and ground water rights in the stream system. . . . Parties to the SRBA, known as claimants or objectors, include: individuals, corporations, the state of Idaho, cities and counties, the federal government, Native American tribes and other entities. Parties filed claims for all uses of water (agricultural, industrial, hydropower, aquaculture, municipal and federal reserved rights). Because the SRBA is a general adjudication of an entire stream system, the United States has appeared in state court and filed its claims under a congressional waiver of sovereign immunity (the McCarran Amendment, 43 U.S.C. § 666). The U. S. has filed approximately 50,000 claims for ten federal departments or agencies and four Native American tribes. The U.S. claims are for consumptive and non-consumptive and federal reserved and state law based water rights. The Presiding Judge has devised a special court system to manage this large and complex case. The court uses Special Masters to conduct hearings and make recommendations on contested rights. Partial and final decrees will be entered by the Presiding Judge." *Id.*

2. *Id.*

3. *Potlatch Corp. v. U.S. (In re SRBA)*, No. 39576, 1999 WL 778325, at \*1 (Idaho 1999). This opinion has not been released for publication in the permanent law reports. Until released, it is subject to revision or withdrawal.

4. *Id.*

5. *Id.*

the Idaho Supreme Court by Potlatch and the other objectors.<sup>6</sup> On October 1, 1999, the Idaho Supreme Court in *Potlatch Corp. v. United States* affirmed the SRBA court's order.<sup>7</sup> In the process, the Idaho court rekindled a long-simmering legal debate over water and wilderness in the arid West.<sup>8</sup>

Not only did *Potlatch Corp. v. United States* announce that wilderness areas were entitled to federal reserved water rights dating to the time of their creation, the Idaho court held that the wilderness areas were entitled to *all* unappropriated stream flows within their boundaries.<sup>9</sup> The decision extends the federal reserved water rights doctrine to include wilderness areas, and arguably departs from the doctrine's tenet that no more than the minimum amount of water necessary to fulfill the purposes of a reservation can be reserved.<sup>10</sup>

This case note traces the history and application of the federal reserved water right doctrine from its origins as recognition of water rights for Indian reservations through the *Potlatch* decision. Three fundamental conclusions are reached. First, the majority correctly held that wilderness areas are federal reservations of land<sup>11</sup> qualifying for federal reserved water rights; second, the majority in *Potlatch* properly concluded that the minimum amount of water necessary to fulfill the purposes of wilderness areas necessarily requires allocation of all available water supplies; and, finally, most policy concerns raised by recognition of water rights for wilderness areas do not represent the dangers to western water users that some suggest.

## BACKGROUND

Congress has long deferred to local law and custom of western states in the arena of water allocation because of the scarcity of the resource and its potential as a tool for economic development. As the United States Supreme Court noted in *California v. United States* in 1978, "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continuous defer-

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6. *Id.* at \*1. The court also reviewed federal reserved claims for water within the Hells Canyon National Recreation Area that were combined with the federal reserved claims for the three wilderness areas. That portion of the case is beyond the scope of this case note and addressed issues of statutory interpretation specific to the act creating the recreation area. *Id.* at \*10-13.

7. *Id.* at \*8.

8. See generally, John D. Leshy, *Water and Wilderness/Law and Politics*, 23 LAND & WATER L. REV. 389 (1988).

9. *Potlatch Corp.*, 1999 WL 778325, at \*10.

10. See, e.g., *Cappaert v. U.S.*, 426 U.S. 128, 138 (1976).

11. See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 285 (3rd ed. 1993). "A 'withdrawal' of land is a generic term referring to a statute, an executive order, or an administrative order that changes the designation of a described parcel from 'available' to 'unavailable' for homesteading or resource exploitation. . . . A 'reservation' means a dedication of withdrawn land to a specified purpose, more or less permanently." *Id.*

ence to state water law by Congress.”<sup>12</sup> The primary concern of western lawmakers and water users has been that assertions of federal authority over water rights on federal lands could disrupt settled expectations within the western states relying on a “first-come, first-served” system of water appropriation.<sup>13</sup>

The federal reserved water rights doctrine is one of the exceptions to state water law deference and is at the core of the Idaho court’s holding in *Potlatch*. Understanding the origins and evolution of the federal reserved water rights doctrine is essential to understanding the *Potlatch* decision. In addition, an overview of the purposes of the Wilderness Act of 1964<sup>14</sup> as well as previous attempts to apply federal reserved water rights to wilderness areas will help explain the issues confronted by the *Potlatch* court.

### *Evolution of the federal reserved water rights doctrine*

The United States Supreme Court first adopted the federal reserved water rights doctrine in *Winters v. United States* in 1908, as a means to provide irrigation water to the Fort Belknap Indian Reservation from the Milk River, which bordered the reservation to its north.<sup>15</sup> Congress established the reservation in 1888 as an agricultural reserve for members of the Gros Ventre and Assiniboine tribes on the northeastern plains of Montana.<sup>16</sup> Subsequent to the creation of the reservation, non-Indian homesteaders upriver claimed state water rights on the Milk River and diverted water for irrigation to the extent that not enough was available for agricultural operations on the reservation.<sup>17</sup> Although water rights were not expressly reserved in the language of the treaty creating the reservation nor appropriated from the state of Montana as required by state law, the United States argued that the purposes of the agricultural reserve could not be fulfilled without irrigation water.<sup>18</sup> Therefore, the United States argued, the government had implicitly reserved water rights in 1888 when the treaty with the tribes was completed.<sup>19</sup> The Supreme Court agreed, holding that the Fort Belknap Indian Reservation was entitled to water rights to fulfill the agricultural mandate of the reservation, with a priority reverting to the date Congress established the reservation in 1888, thereby predating most upstream non-Indian users with valid state water rights.<sup>20</sup>

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12. 438 U.S. 645, 653 (1978).

13. *Id.*

14. 16 U.S.C. §§ 1131-1136 (1999).

15. 207 U.S. 564, 565 (1908).

16. *Id.*

17. *Id.* at 567.

18. *Id.* at 573.

19. *Id.*

20. *Id.* at 577.

*Winters* was a benchmark case because it departed from the tradition of deference to western states' water law. However, for nearly forty years *Winters* water rights were assumed to apply only to Indian reservations.<sup>21</sup> This assumption was challenged in 1955 in a Supreme Court case involving the licensing of a dam on federal reserved lands.<sup>22</sup> Although federal reserved water rights were not at issue, the Court in *Federal Power Commission v. Oregon* suggested that water rights were attached to federally reserved lands and could not be severed by state law.<sup>23</sup> The Court held that Oregon could not prevent the construction of a dam by a federal licensee on federal land reserved under the Federal Power Act for construction and operation of a hydroelectric facility.<sup>24</sup>

The suggestion in *Federal Power Commission v. Oregon* ripened to a holding in 1963 when the Supreme Court officially extended the federal reserved water rights doctrine in *Arizona v. California*, deciding that the federal government could reserve water rights not only for Indian reservations, but for national forests, national recreation areas, and national wildlife refuges as well.<sup>25</sup> The case involved a dispute between Arizona and California over their respective rights to Colorado River water.<sup>26</sup> The United States joined as an intervenor, asserting federal reserved rights for Indian lands as well as the Gila National Forest, Lake Mead National Recreation Area, and the Imperial and Havasu Lake National Wildlife Refuges.<sup>27</sup> Citing the Property and Commerce clauses of the United States Constitution,<sup>28</sup> the Court held there was "no doubt about the powers of the United States . . . to reserve water rights for its reservations and its property."<sup>29</sup>

Extending federal reserved rights to national monuments in *Cappaert v. United States*<sup>30</sup> in 1976, Chief Justice Burger articulated the reach of the doctrine:

[The Court] has long held that when the Federal Government withdraws its lands 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. In so doing the United States acquires a re-

21. Frank Trelease, *Reserved Water Rights Since PLLRC*, 54 DEN. L. J. 473, 474-75 (1977).

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

23. *Id.* at 444-45.

24. *Id.*

25. 373 U.S. 546 (1963).

26. *Id.* at 550-51.

27. *Id.* at 595, 597-98, 601.

28. U.S. CONST. art. IV § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *Id.* at art. I § 8, cl. 3 (stating that Congress shall have the power to "regulate Commerce . . . among the several States and with the Indian Tribes").

29. *Arizona v. California*, 373 U.S. 546, 598 (1963).

30. 426 U.S. 128 (1976).

served right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.<sup>31</sup>

In *Cappaert*, a landowner challenged the federal government's claim to a federal reserved water right for the protection of a species of fish that existed only in a pool inside a deep limestone cavern in Nevada reserved as Devil's Hole National Monument.<sup>32</sup> The uniqueness of the species was one express reason for the monument's creation.<sup>33</sup> The Court held for the federal government, finding that the national monument was a federal reservation entitled to federal reserved water rights for the protection of the rare species of fish.<sup>34</sup>

### *Federal reservations and their purposes*

Chief Justice Burger's definition in *Cappaert* reveals the elements of the federal reserved water rights doctrine. First, there must be a reservation of federal land, defined by Chief Justice Burger as a withdrawal of land from the public domain, such as Indian reserves and national forests.<sup>35</sup> Second, the withdrawal must be reserved for a specific federal purpose, such as transforming Indian reservations into agricultural lands, or protecting timber supplies in national forests.<sup>36</sup> Third, the federally-created reserve is entitled to an implied water right "to the extent needed to accomplish the purposes of the reservation."<sup>37</sup>

The Supreme Court in *United States v. New Mexico* illustrated how important interpretation of "reservation" and "purpose" can be when determining federal reserved water rights.<sup>38</sup> The federal government argued that the purposes of the Gila National Forest incorporated both the Organic Administration Act of 1897,<sup>39</sup> which allowed the creation of national forests, as well as the Multiple-Use, Sustained-Yield Act (MUSYA) of 1960,<sup>40</sup> which significantly broadened the scope of the National Forest System.<sup>41</sup> While the court found that the Organic Administration Act merely reserved rights for the purposes of conserving water flows and furnishing a continuous supply of timber,<sup>42</sup> MUSYA would have reserved additional water for aesthetic,

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31. *Id.* at 138.

32. *Id.* at 131.

33. *Id.* at 131-32.

34. *Id.* at 141.

35. *Id.* at 138.

36. *Id.*

37. *Id.*

38. 438 U.S. 696 (1978).

39. 16 U.S.C. §§ 471-82 (1999).

40. 16 U.S.C. §§ 528-31 (1999).

41. *United States v. New Mexico*, 438 U.S. 696, 698 (1978).

42. *Id.* (citing Organic Administration Act, 16 U.S.C. § 475, that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purposes of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and neces-

environmental, recreational, and wildlife purposes.<sup>43</sup> MUSYA did not create a new category of federal lands, but was intended by Congress to serve as supplemental policy for all national forests.<sup>44</sup> The Act expressly declared itself “supplemental to, but not in derogation of, the purposes for which the national forests were established.”<sup>45</sup>

In a five-to-four decision, the Court rejected MUSYA as a source for reserving federal water rights.<sup>46</sup> Writing for the majority, then Justice Rehnquist concluded that since MUSYA created supplemental purposes for the national forests that could not *derogate* from the purposes of the Organic Administration Act, there was no evidence that Congress intended that the federal reserved water rights doctrine be applied for MUSYA purposes.<sup>47</sup> The *United States v. New Mexico* majority was clearly concerned with the impact of recognizing far-reaching applications of the federal reserved water rights doctrine.<sup>48</sup> When determining purposes of a reservation, Justice Rehnquist wrote, a “careful examination” is necessary to ensure that an implied water right for a federal reservation actually exists.<sup>49</sup> The Court also reiterated the firmly settled rule that the federal reserved water rights doctrine reserves no more water than the minimum amount necessary to fulfill the recognized purposes of the reservation.<sup>50</sup>

The result of *United States v. New Mexico* was that the Gila National Forest was entitled the minimum water necessary to fulfill the purposes of continuous water flows and timber supplies, as stated in the Organic Administration Act.<sup>51</sup> It was not entitled to any water for the “supplemental” or “secondary” recreation, aesthetic, environmental, and fish and wildlife purposes created by MUSYA.<sup>52</sup>

### *Wilderness Act of 1964*

The Wilderness Act of 1964 expressed Congress’ intent to preserve certain public lands in their “natural condition” in response to increasing

sities of citizens of the United States. . .”).

43. 16 U.S.C. § 528 (1999).

44. *Id.* MUSYA states congressional policy is to administer National Forests for “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” *Id.*

45. *Id.*

46. *United States v. New Mexico*, 438 U.S. at 715.

47. *Id.* at 714.

48. *Id.* at 699. Justice Rehnquist wrote for the majority that “if water were abundant, Congress’ silence would pose no problem. In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States.” *Id.*

49. *Id.* at 700.

50. *Id.*

51. *Id.* at 718.

52. *Id.* at 714.

population growth and loss of wilderness areas.<sup>53</sup> The Wilderness Act established that federal lands previously classified by the Secretary of Agriculture or the Chief of the Forest Service as “wild” or “wilderness” became congressionally designated wilderness areas.<sup>54</sup> The Act also set forth procedures for future designation of wilderness areas.<sup>55</sup> Generally, the Act prohibited commercial enterprises, roads, motorized vehicles, and structures within designated wilderness areas, with limited exceptions.<sup>56</sup> While the Wilderness Act contained no express reservation of water, the legislation provided that “[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.”<sup>57</sup> The few courts that have considered the issue of federal reserved water for wilderness areas have struggled over the precise meaning of these words.

### *Wilderness areas and federal reserved water rights*

In 1985, a federal district court in *Sierra Club v. Block* held that a wilderness area was a “withdrawal and reservation” of federal lands and therefore eligible for federal reserved water rights.<sup>58</sup> The issue arose when the Sierra Club sued the Forest Service for failing to pursue federal reserved water rights for wilderness areas in Colorado.<sup>59</sup> At the time, the Forest Service did not recognize the Wilderness Act as creating a reservation of federal lands, and therefore did not seek federal reserved water rights for wilderness areas.<sup>60</sup>

On appeal, the Tenth Circuit Court of Appeals determined that the issue of whether the Forest Service should have acted to reserve water rights for wilderness areas was not ripe for adjudication and vacated the district court’s judgment.<sup>61</sup> The appellate court determined that although the Forest Service failed to pursue federal reserved water rights, it nonetheless fulfilled

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53. Wilderness Act of 1964, 16 U.S.C. § 1131(a) (1999). Congress stated that wilderness areas “shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas. . . .” *Id.*

54. *Id.* § 1132(a)(1).

55. *Id.* § 1132(b).

56. *Id.* § 1133(c). The Act allows exceptions “as necessary to meet minimum requirements for the administration of the area for the purposes of this chapter” including “emergencies involving the health and safety of persons with the areas.” *Id.* The Act also allows special provisions for motor vehicle use for control of “fire, insects, and diseases” subject to approval of the Secretary of Interior. *Id.* § 1133(d)(1). The statute also permits prospecting for minerals within wilderness areas, “if such activity is carried on in a manner compatible with the preservation of the wilderness environment.” *Id.* § 1133(d)(2).

57. *Id.* § 1133(d)(6).

58. 622 F. Supp. 842, 851 (D. Colo. 1985).

59. *Id.* at 846.

60. *Id.*

61. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1421 (10th Cir. 1990).



its mandate to protect wilderness areas via other means.<sup>62</sup> The issue has remained largely dormant in the state and federal courts until the litigation surrounding the Snake River Basin Adjudication began.

The Department of Justice visited the issue of federal reserved water rights in a 1982 memorandum setting out the federal government's legal position on the issue.<sup>63</sup> While silent on the question of wilderness areas and federal reserved water rights, the memorandum emphasized the limiting language in *United States v. New Mexico* that a "careful examination of congressional intent" is necessary to determine the existence of a federal reserved right.<sup>64</sup> It also noted the Court's language that a federal reserved right would only be found if the "purposes of the reservation would be entirely defeated" without the implied water right.<sup>65</sup>

In addition to the Department of Justice, the Solicitor's Office for the Department of Interior has addressed the issue of federal reserved water rights for wilderness areas within its jurisdiction, such as national parks, national monuments, and Bureau of Land Management lands. In 1979, the Solicitor's Office issued an opinion that federal reserved water rights were necessary to accomplish wilderness purposes.<sup>66</sup> Nine years later, during a subsequent administration, the Solicitor's Office issued a reversal of the wilderness area opinion.<sup>67</sup> The new opinion held that, like MUSYA, the Wilderness Act created purposes secondary to the reservations within which the wilderness areas were created.<sup>68</sup> For example, if the wilderness area was created within the boundaries of a national park, the purposes of the national park governed in terms of the federal reserved water rights.<sup>69</sup> The 1988 opinion, which has not been revisited, also determined that section 1133(d)(6) of the Wilderness Act was a congressional renouncement of any federal reserved water claims for wilderness areas.<sup>70</sup>

#### PRINCIPAL CASE

In *Potlatch Corp. v. United States*, the Idaho Supreme Court in a three-to-two decision held that the federal reserved water rights doctrine applied to the Gospel-Hump, Selway-Bitterroot, and Frank Church River of No Return Wilderness Areas.<sup>71</sup> The court further held that the wilderness areas

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62. *Id.*

63. 6 U.S. Op. Off. Legal Counsel 328 (1982).

64. *Id.* at 351 (citing *United States v. New Mexico*, 438 U.S. 696 at 700 (1978)).

65. 6 U.S. Op. Off. Legal Counsel 328 (citing *United States v. New Mexico*, 438 U.S. at 700).

66. 86 Interior Dec. 553, 609 (1979).

67. 96 Interior Dec. 211, 219-23 (1988).

68. *Id.* at 213.

69. *Id.*

70. *Id.*

71. *Potlatch Corp. v. U.S.*, No. 39576, 1999 WL 778325, at \*13 (Idaho 1999).

were entitled to all unallocated stream flows available at the date of each area's designation by Congress.<sup>72</sup>

The majority relied primarily on the plain language of the Wilderness Act itself.<sup>73</sup> The majority agreed with the federal government that the Act reflected intent by Congress to "elevate wilderness purposes above all other purposes," based upon the Act's mandate to preserve rapidly disappearing natural areas.<sup>74</sup> The majority found further evidence of these preservation purposes in the Act's definition of "wilderness" as an area retaining its "primeval character and influence."<sup>75</sup>

In order for the federal reserved water rights doctrine to apply, however, there must be a "reservation" of land.<sup>76</sup> Looking at the language of the Wilderness Act, the majority found that the designation of specified areas for the specific purposes of wilderness preservation amounted to a reservation of land for purposes qualifying for federal reserved water rights.<sup>77</sup> The majority distinguished the Wilderness Act from MUSYA, which the Supreme Court in *United States v. New Mexico* determined fell outside the federal reserved water rights doctrine.<sup>78</sup> The majority found that, unlike MUSYA, the Wilderness Act could not be subordinate to the purposes of the Organic Administration Act because of differences in statutory language and mandates at cross-purposes to one another.<sup>79</sup>

After determining the Wilderness Act constituted a reservation of land, the majority next held that section 1133(d)(6) of the Act was not an express waiver of federal reserved water rights.<sup>80</sup> The section's language that "[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws" merely maintained the *status quo* of water rights at the time of wilderness reservation, the majority held.<sup>81</sup> In other words, the federal government could seek federal reserved rights dating to the time of a wilderness area's designation, but the government would be unable to claim any new or additional rights.<sup>82</sup> After deciding the Wilderness Act was a reservation of federal land with no waiver of federal reserved water rights, the majority

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72. *Id.* at \*10.

73. *Id.* at \*4.

74. *Id.*

75. *Id.* (citing 16 U.S.C. § 1131(c)).

76. See COGGINS, *supra* note 11.

77. *Poilatch Corp.*, 1999 WL 778325, at \*5.

78. *Id.* at \*5-6.

79. *Id.* at \*5. The majority's primary argument was that the Wilderness Act's mandate to preserve wilderness was at cross-purposes with the Organic Administration Act's mandate to manage national forests for timber production. Therefore, Congress could not have intended that the Wilderness Act be secondary to the purposes of the Organic Act. *Id.*

80. *Id.* at \*7.

81. *Id.*

82. *Id.*

next held that the Act's wilderness preservation purposes carried an implied reservation of water.<sup>83</sup> The majority derived the implied reservation of water from the fact that without water, the Act's purpose of preserving the natural character of wilderness areas would be defeated.<sup>84</sup>

The dissent argued that the Wilderness Act was like MUSYA in that it created a supplemental purpose that was "secondary" to the purposes of the Organic Administration Act.<sup>85</sup> Just as the Court in *United States v. New Mexico* held that MUYSYA merely broadened the purposes of national forests, the *Potlatch* dissent stated that the Wilderness Act created supplemental purposes for forest management that did not create the need for additional water rights.<sup>86</sup> The dissent, relying on the plain language of section 1133(d)(6) as well as legislative history, argued that the section was meant to protect private western water users by preventing the federal government from claiming any additional water rights in wilderness areas, including federal reserved rights.<sup>87</sup> Because the dissent found an express waiver of federal reserved water rights within the Act, it found no need to consider whether an implied reservation existed.<sup>88</sup>

The final issue considered by the Idaho Supreme Court was how much water should be allocated for the wilderness areas. The majority held that because the Wilderness Act called for preserving wilderness in its "pristine natural condition," removing any water necessarily defeated such a purpose.<sup>89</sup> The majority further relied on an earlier Idaho Supreme Court decision involving federal reserved rights for a national forest that held "a claim to the entire natural stream flow is permissible where it is proven that the entire natural flow is necessary to accomplish the purposes of the reservation."<sup>90</sup> Therefore, the majority held that the "the United States is entitled to the entire amount of unappropriated waters" within the wilderness areas, with a priority date of the time the wilderness areas were created.<sup>91</sup>

The dissent countered that even if the federal reserved water rights doctrine could be applied to wilderness areas, the United States Supreme Court has consistently held that reservations are limited to no more than the minimum amount of water necessary to fulfill their purposes.<sup>92</sup> It further noted that section 42-1409 of the Idaho Code requires that the federal gov-

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83. *Id.* at \*8.

84. *Id.* at \*9.

85. *Id.* at \*15.

86. *Id.* at \*16.

87. *Id.* at \*14-16.

88. *Id.* at \*17.

89. *Id.*

90. *Id.* at \*10 (citing *Avondale Irrigation Dist. v. North Idaho Properties*, 577 P.2d 9, 19-20 (Idaho 1978)).

91. *Potlatch Corp.*, 1999 WL 778325, at \*10.

92. *Id.* at \*24 (citing *Cappaert v. U.S.*, 426 U.S. 128, 143 (1976)).

ernment must quantify the amount of any water claimed under the doctrine.<sup>93</sup> The majority's finding, the dissent argued, was an open-ended allocation of water that violated both Idaho law and United States Supreme Court precedent.<sup>94</sup>

#### ANALYSIS

*Potlatch Corp. v. United States* put other western states and western water users on notice that in at least one jurisdiction, the federal reserved water rights doctrine now extends to wilderness areas within national forests. It also announced that at least in Idaho, the federal reserved water rights doctrine can be stretched to its maximum in order to provide water for wilderness purposes.<sup>95</sup> The outcome was vigorously contested, as the court split three-to-two on each interpretation of statutory language and congressional intent. The division was the result of the majority's willingness to grant value to the Wilderness Act's preservation purposes on one side and the dissent's overly cautious and narrow application of the federal reserved water rights doctrine on the other.

#### *Reservation of federal land*

The first step to establishing federal reserved rights is the reservation of public lands.<sup>96</sup> The Wilderness Act of 1964 designated portions of national forests as wilderness areas and adopted procedures for future designations of federal lands as wilderness areas.<sup>97</sup> Such "designations," the majority said, amounted to a withdrawal of federal lands for specific federal purposes.<sup>98</sup> Thus, the majority held, the plain language of the Wilderness Act satisfied the reservation requirement.<sup>99</sup>

The dissent rejected the majority's holding largely by finding that the Wilderness Act could not be distinguished from MUSYA.<sup>100</sup> Since the United States Supreme Court in *United States v. New Mexico* found that MUSYA did not create federal reserved water rights, the dissent argued that neither did the Wilderness Act.<sup>101</sup> However, the dissent ignored important differences between MUSYA and the Wilderness Act.

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93. *Potlatch Corp.*, 1999 WL 778325 at \*25.

94. *Id.*

95. *Id.* at \*8-9.

96. See *supra* note 31 and accompanying text.

97. 16 U.S.C. § 1132 (1999). The Act states that all "areas within the national forests classified before September 3, 1964, by the Secretary of Agriculture or the Chief of the Forest Service as 'wilderness', or 'wild', or 'canoe' are hereby designated as wilderness areas, *id.* at § 1132(a), and that each future "recommendation of the President for designation as 'wilderness' shall become effective only if so provided by an Act of Congress." *Id.* at § 1132(b).

98. *Potlatch Corp.*, 1999 WL 778325, at \*5.

99. *Id.* at \*2 (quoting *Arizona v. California*, 373 U.S. 546, 597-98 (1963)).

100. *Potlatch Corp.*, 1999 WL 778325 at \*16.

101. *Id.*

The United States Supreme Court found MUSYA did not create federal reserved water rights largely because MUSYA's purposes were "declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established."<sup>102</sup> Similarly, the Wilderness Act states that its purposes "are hereby declared to be within and supplemental to the purposes for which national forests . . . are established and administered. . . ."<sup>103</sup> The Wilderness Act also states that "[n]othing in this chapter shall be deemed to be in interference with the purposes for which national forests are established as set forth in" the Organic Administration Act and MUSYA.<sup>104</sup>

Neither MUSYA, the Wilderness Act, nor the *Potlatch* court define "derogation" and "supplemental," terms central to the dissent's argument that the Wilderness Act creates no federal reserved water rights. *Black's Law Dictionary* defines "derogation" as the "partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force."<sup>105</sup> A "supplemental act" is that which "supplies a deficiency, adds to or completes, or extends that which is already in existence without changing or modifying the original. Act designed to improve an existing statute by adding something thereto without changing the original text."<sup>106</sup>

While MUSYA must be both "supplemental to" and not "in derogation of" the Organic Administrative Act, the "derogation" language of MUSYA is absent from the Wilderness Act.<sup>107</sup> This is significant because, relying on the above definitions, the plain language of the Wilderness Act does not support the dissent's adoption of the MUSYA analysis in *United States v. New Mexico* as directly applicable to the Wilderness Act.<sup>108</sup> While MUSYA must not derogate from—"partially repeal or abolish" as defined by *Black's Law Dictionary*—the Organic Administration Act, Congress mandated no such limits in the Wilderness Act.

102. *United States v. New Mexico*, 438 U.S. 696, 713 (1978) (citing MUSYA, 16 U.S.C. § 528 (1999)).

103. 16 U.S.C. § 1133(a) (1999).

104. *Id.*

105. BLACKS LAW DICTIONARY 444 (6<sup>th</sup> ed. 1990).

106. *Id.* at 1438.

107. MUSYA, 16 U.S.C. § 528 (1999). MUSYA states that the "purposes of sections 528 to 531 of this title are declared to be *supplemental to, but not in derogation of*, the purposes for which the national forests were established as set forth in section 475 of this title." *Id.* (emphasis added). The Organic Administration Act states that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. . . ." 16 U.S.C. § 475. The Wilderness Act states that "[t]he purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests . . . are established and administered and—(1) Nothing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the [Organic Administration Act] and [MUSYA]." 16 U.S.C. § 1133(a) (1999).

108. *Potlatch Corp. v. U.S.*, No. 39576, 1999 WL 778325, at \*16 (Idaho 1999).

To the contrary, the Wilderness Act's wilderness preservation mandate is at cross-purposes with the Organic Administration Act's economically driven timber-production purposes.<sup>109</sup> As the majority noted, the Organic Administration Act "cannot be reconciled with the clear language of the Wilderness Act," which bars new roads and commercial activities in wilderness areas.<sup>110</sup> Barring new roads and commercial activities within wilderness areas clearly conflicts with the promotion of logging activities mandated by the Organic Administration Act. Congress therefore necessarily intended that the Wilderness Act would, in important ways, derogate from the Organic Administration Act.

The dissent in *Potlatch* argued that the "supplemental" language of the Wilderness Act standing alone would disqualify the extension of federal reserved water rights to wilderness areas.<sup>111</sup> The dissent in effect argued that securing federal reserved water rights via the Wilderness Act would "change or modify" the Organic Administration Act, therefore violating congressional intent that the Wilderness Act remain supplemental to the Organic Administration Act. Such an interpretation of the "supplemental" nature of the Wilderness Act, however, is not consistent with the strong and clear congressional mandate that the Wilderness Act must preserve the natural character of wilderness lands for future enjoyment.<sup>112</sup>

### *Claim or denial of federal water rights*

Even if it accepted that the Wilderness Act was a federal reservation, the dissent argued that federal reserved water rights still would not apply because Congress expressly disclaimed any and all water rights for wilderness areas. Considering the language of the Wilderness Act and the absence of persuasive legislative history to the contrary, the dissent's conclusion needlessly limited the applicability of the doctrine.

The Wilderness Act states that "[n]othing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water law."<sup>113</sup> The section's meaning has been debated since at least 1979, when the Interior Department Solicitor concluded it was not a waiver of federal reserved water rights.<sup>114</sup> Both the majority and dissent in *Potlatch* agreed that the ambiguity of section 1133(d)(6) made proper an analysis of its legislative history.<sup>115</sup> Unfortu-

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109. 16 U.S.C. § 475 (1999).

110. *Potlatch Corp.*, 1999 WL 778325, at \*5 (citing 16 U.S.C. 1133(c) (1999), stating that: "Except as specifically provided for in this chapter. . .there shall be no commercial enterprise and no permanent road within any wilderness areas designated by this chapter. . .").

111. *Potlatch Corp.*, 1999 WL 778325 at \*16-17.

112. Wilderness Act of 1964, 16 U.S.C. § 1131 (1999).

113. 16 U.S.C. 1133(d)(6) (1999).

114. 86 Int. Dec. 553, 609 (1979).

115. *Potlatch Corp.*, 1999 WL 778325, at \*7, \*14-15, \*22-24.

nately, the legislative history was no less ambiguous in terms of resolving the question of federal reserved water rights.<sup>116</sup> Both the majority and dissent agreed that concerns over state water rights were raised during the debate over the Wilderness Act and that section 1133(d)(6) was added in response to those concerns.<sup>117</sup> Specific mention of federal reserved rights, however, was absent from the record.<sup>118</sup>

The 1988 Interior Department Solicitor's opinion reversing the 1979 ruling of a previous Solicitor offered a more in-depth examination of the issue than was included in the *Potlatch* court's decision.<sup>119</sup> The Solicitor was unable to discover any authority conclusively supporting the view that 1133(d)(6) disclaimed federal reserved water rights for wilderness areas, noting that "[o]ne of the major problems here is the lack of legislative history to document the consultations" regarding the incorporation of the "denial" language into the section.<sup>120</sup> Nonetheless, the 1988 opinion relied primarily upon the inconclusive legislative history to support the Solicitor's view that the Wilderness Act expressly disclaimed federal reserved water rights.<sup>121</sup>

In the absence of clear authority to the contrary, the *Potlatch* majority found that section 1133(d)(6) was nothing more than a declaration of the *status quo*.<sup>122</sup> In other words, Congress intended: (1) that the federal government would not *claim* an exemption from state water law in addition to the federal reserved water rights doctrine; and (2) that the section would not *deny* exemptions from state water law already existing, including federal reserved rights. The result was that Congress took no action on federal re-

116. See, 104 CONG. REC. 11,555 (1958). Both majority and dissent examined comments by Sen. Hubert Humphrey stating that section 1133(d)(6) "contains language vital to colleagues from the West. When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change *existing water laws* and would deprive local communities of water, both domestic and irrigation. Although this was certainly not the intention of the sponsors, it has seemed necessary to insert a short sentence to remove any doubts. The sentence added says: 'Nothing in this act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.'" *Id.* (emphasis added). Additional statements by Sen. Humphrey: "During the 8 years in which the proposed legislation has been before Congress, many important modifications have been effected in the specific procedures for identifying and protecting certain areas of wilderness. For example, the proposal to establish a permanent national wilderness preservation council has been eliminated. The original definition of wilderness has been modified considerably. The regulations for the protection of wilderness areas have been revised and liberalized. Each of these changes was made because the proponents of the legislation were determined to seek a bill that recognized the need for wilderness preservation but which did not unduly hamper present land use programs or legitimate economic, commercial, or commodity uses." 109 CONG. REC. 5901 (1963).

117. *Potlatch Corp.*, 1999 WL 778325, at \*7, \*14-15, \*22.

118. *Id.*

119. 96 Interior Dec. 211, 212 (1988). Although the *Potlatch* decision involved wilderness areas within national forest lands administered by the Department of Agriculture, the Interior Department administers several wilderness areas within Bureau of Land Management and National Park Service lands. *Id.*

120. *Id.* at 220, 224.

121. *Id.* at 224.

122. *Potlatch Corp.*, 1999 WL 778325, at \*7.

served water rights when enacting the Wilderness Act, instead leaving it to agencies and the courts to sort through.

The *Potlatch* majority's interpretation of section 1133(d)(6) as a *status quo* provision takes into account concerns that water rights for wilderness areas might interfere with western water use. By acting as a "place-holder" of water rights, the section protects all state-issued water rights existing at the time of Wilderness Act passage, while not denying future findings of federal reserved water rights. Like the 1988 Solicitor's opinion, the dissent offered no convincing explanation as to the meaning of the "denial" language, either by examining the language of the section or its legislative history.<sup>123</sup>

#### *Minimum amount necessary*

In order to quantify federal reserved water rights, the United States Supreme Court has consistently held the reserved water doctrine reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>124</sup> The Court in *United States v. New Mexico* provided further guidance:

Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated. This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water.<sup>125</sup>

In addition, under Idaho law, the federal government is required to quantify, in acre-feet or cubic feet per second, all water rights established by federal law.<sup>126</sup>

Despite these restrictions, the *Potlatch* majority affirmed the SRBA court's holding that the three wilderness areas were entitled to all unappropriated waters within their boundaries for instream flow with a priority dating to the time of reservation's creation.<sup>127</sup> Turning to the plain language of the Wilderness Act, the majority determined that Congress clearly intended that wilderness areas "be administered . . . in such manner as will leave

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123. *Id.* at \*14-15, \*22.

124. *Cappaert v. U.S.*, 426 U.S. 128, 141 (1976).

125. *United States v. New Mexico*, 438 U.S. 696, 699 (1978).

126. IDAHO CODE § 42-1409(1)(c)(ii) (1999).

127. *Potlatch Corp.*, 1999 WL 778325, at \*8.



them unimpaired for future use and enjoyment as wilderness, and so as to provide for . . . the preservation of their wilderness character."<sup>128</sup>

The majority noted that Congress defined wilderness as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions."<sup>129</sup> The majority's conclusion was simple: If Congress intended that Wilderness Areas must be managed to retain their natural conditions, that purpose would fail without reserving all available natural flows within wilderness boundaries.<sup>130</sup>

Although Idaho law requires that federal water rights be quantified, the majority noted that the Idaho Supreme Court in *Avondale Irrigation District v. North Idaho Properties, Inc.* established an exception to the rule.<sup>131</sup> In *Avondale*, the court said that if the Forest Service could show that all available instream flows were necessary to fulfill the purposes of the Caribou National Forest, then it need not quantify that amount.<sup>132</sup> The *Avondale* court justified its decision on grounds that:

[T]he reason for requiring the United States to join in a general adjudication of water rights and to quantify its claims pursuant to state law is to insure certainty as to the validity and quantity of the water rights of the water users in the state. A claim to the entire natural flow, if it is necessary, cannot be faulted for uncertainty. Therefore, we conclude that since the nature and scope of reserved rights are determined by federal law . . . and because the fundamental requirement of certainty is adequately satisfied, a claim to the entire flow, if it is proved to be necessary, is a sufficient quantification of the reserved rights claimed."<sup>133</sup>

While acknowledging the exception in *Avondale*, the dissent argued that the United States made no effort to demonstrate that the entire stream-flow within the wilderness areas would be necessary in order to fulfill the purposes of the Wilderness Act.<sup>134</sup> The dissent failed to account for the plain language of the Wilderness Act in arriving at its conclusion. Through the Wilderness Act, Congress ordered the preservation of wilderness areas in

128. *Id.* at \*9 (citing Wilderness Act, 16 U.S.C. § 1131(a) (1999)).

129. *Potlatch Corp.*, 1999 WL 778325, at \*9 (citing Wilderness Act, 16 U.S.C. § 1133(c) (1999)).

130. *Potlatch Corp.*, 1999 WL 778325, at \*9.

131. *Id.* at \*10.

132. *Avondale Irrigation Dist. v. North Idaho Properties*, 577 P.2d 9, 19-20 (Idaho 1978). The Idaho Supreme Court in *Avondale* remanded the case to the district court in order to determine if the Forest Service could demonstrate that it would need the entire stream flow within the Caribou National Forest in order to fulfill the purposes of protecting timber supplies by providing water for timber growth and fire protection. *Id.*

133. *Id.* (citations omitted).

134. *Potlatch Corp.*, 1999 WL 778325, at \*17.

their natural condition.<sup>135</sup> Reserving anything less than all available water would be counter to the congressional mandate of the Wilderness Act.

### *Policy concerns*

Concern that extending the federal reserved water rights doctrine to wilderness areas threatened harm to Idaho interests was a recurrent theme for the *Potlatch* dissent. In separate dissenting opinions, Justice Kidwell and Justice Schroeder each noted the importance of water to Idaho and the potential limitations on the use of water created by the majority's holding.<sup>136</sup>

The Supreme Court in *United States v. New Mexico* articulated many of the same concerns when it held that the environmental, aesthetic, recreational, and wildlife protection purposes for national forests created in MUSYA were beyond the realm of the federal reserved water rights doctrine.<sup>137</sup> Then Justice Rehnquist, writing for the majority, cautioned that a "careful examination" of the purposes of a federal reservation was necessary to ensure that no more water than necessary was granted to the federal government.<sup>138</sup> Within the national forests of the eleven western states alone, there are one hundred and twenty-seven wilderness areas spanning more than twenty-seven million acres.<sup>139</sup> If adopted by other western states, *Potlatch* would reserve substantial water rights to the federal government. Four mitigating factors, however, temper the threat of wilderness area water rights to development in the arid West.<sup>140</sup>

First, wilderness areas are relatively new federal reservations, and thus have a priority date junior to most existing water users.<sup>141</sup> National forest

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135. See *supra* note 56 and accompanying text.

136. *Potlatch Corp.*, 1999 WL 778325, at \*13. In his dissenting opinion, Justice Kidwell stated that a "judicial determination of additional federal water rights in Idaho is a far-reaching and historically significant decision. . . . I believe the majority fails to appreciate the breadth of its holding and the unequivocal language of the disclaimers contained in the Wilderness Act. . . ." *Id.* In his dissenting opinion, Justice Schroeder stated that "I . . . write separately to emphasize the effect of the Court's ruling which precludes the appropriation of water upstream, outside the wilderness, and invalidates any appropriation that has taken place since 1964 and the dates of subsequent wilderness designations. Any water appropriation that has taken place upstream from the wilderness in the last thirty-five years is invalid. No appropriation of such water in the future may take place, despite the fact that there is no factual basis establishing that the Court's holding is necessary to fulfill the purposes of the wilderness reservation." *Id.* at \*21.

137. 438 U.S. 696, 714 (1978).

138. *Id.* at 700, 702.

139. UNITED STATES FOREST SERVICE, LAND AREAS REPORT AS OF SEPTEMBER 30, 1998, TABLE 7 - NATIONAL WILDERNESS AREAS BY STATE (1988). Figures include Washington, Oregon, California, Arizona, New Mexico, Nevada, Utah, Colorado, Wyoming, Montana, and Idaho. *Id.* These states comprise slightly over forty percent of the entire National Wilderness Preservation System, and nearly ninety-one percent of the NWPS in the lower forty-eight states. PETER LANDRES & SHANNON MEYER, NATIONAL WILDERNESS PRESERVATION SYSTEM DATABASE: KEY ATTRIBUTES AND TRENDS, 1964-1998, (visited Jan. 14, 2000) <[http://www.wilderness.net/nwps/db/section\\_3.cfm](http://www.wilderness.net/nwps/db/section_3.cfm)>.

140. See *generally*, Leshy, *supra* note 8; Trelease, *supra* note 21.

141. Leshy, *supra* note 8, at 396.

reserved water rights can date to the Organic Administration Act of 1897,<sup>142</sup> while the priority date of federal reserved rights for Indian reservations date back even further.<sup>143</sup> No wilderness areas can have rights existing prior to the passage by Congress of the Wilderness Act in 1964. In the three wilderness areas considered by the *Potlatch* court, the Selway-Bitterroot Wilderness Areas was designated in 1964, the Gospel-Hump Wilderness Area in 1978, and the Frank Church River of No Return Wilderness Area in 1980.<sup>144</sup> The only danger presented by these wilderness areas would be to upstream users with water rights more recent than the respective dates of wilderness designation.

A second mitigating factor is that conflicts between wilderness water rights and other water users are likely to be minimal. While *Potlatch* was silent on the number of upstream users in the affected areas, in general, few water users exist upstream of wilderness areas because wilderness areas “tend to cluster around the very tops of watersheds and in other isolated corners of the western landscape.”<sup>145</sup> In order to become wilderness areas, the Wilderness Act requires that lands must be “untrammeled by man” and “undeveloped Federal land retaining its primeval character and influence, without permanent improvements.”<sup>146</sup> The three wilderness areas at issue in *Potlatch* are no exceptions, situated in largely undeveloped reaches of Idaho’s central and northern mountains.<sup>147</sup>

The third factor is that water is reserved in wilderness areas only for “non-consumptive” purposes, since the Wilderness Act allows for no others.<sup>148</sup> In other words, the water is reserved only for natural, instream flows, where any losses are limited to natural evaporation or seepage as water flows through natural waterways within wilderness areas.<sup>149</sup> Once these natural flows leave wilderness areas, they become available for use by downstream appropriators with rights dating from either before or after the

142. 16 U.S.C. § 475 (1999).

143. See, e.g., *Arizona v. California*, 373 U.S. 546, 596 (1963) (reserving tribal water rights with priority dates as recent as 1865); *Winters v. U.S.*, 207 U.S. 564, 565 (1908) (reserving tribal rights with priority date of 1888).

144. *Potlatch Corp. v. U.S.*, No. 39576, 1999 WL 778325, at \*1 (Idaho 1999).

145. Leshy, *supra* note 8, at 396-97.

146. Wilderness Act, 16 U.S.C. § 1131(c) (1999).

147. It should be noted that wilderness areas can also be created on Bureau of Land Management lands, typically located on arid lands on lower elevations and thus more susceptible to interference with upstream water rights issued after creation of such wilderness areas. Federal Land Policy and Management Act (FLPMA) of 1976, 43 U.S.C. § 1782 (stating that “the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964. . .”). While wilderness lands designated under the authority of FLPMA are more likely to conflict with other water uses that remote wilderness areas within national parks or national forests, Congress has the ability to expressly limit or define federal water claims in such circumstances. See, e.g., *infra* note 153.

148. Wilderness Act, 16 U.S.C. § 1133(c) (1999).

149. Leshy, *supra* note 8, at 395.

priority date of the reservation.<sup>150</sup> Therefore, federal reserved water rights for wilderness areas have little impact on future downstream development of water resources.

A final mitigating element against the threat of wilderness area water rights is Congress' authority to disclaim or limit federal reserved water rights for any current or future wilderness designation. Under the Wilderness Act, any new designation of a wilderness area by the President "shall become effective only if so provided by an Act of Congress."<sup>151</sup> Since the federal reserved water rights doctrine applies only if Congress has not expressly stated an adverse intent,<sup>152</sup> lawmakers concerned about a new designation's impact could expressly limit its claim on water. Since the Wilderness Act of 1964, Congress has created a number wilderness areas expressly reserving federal water rights.<sup>153</sup>

#### CONCLUSION

At first glance, the majority's holding in *Potlatch* seems quite generous. Not only did the majority find that wilderness areas were federal reservations qualifying for federal reserved water rights, it ruled that the wilderness areas were entitled to all water unclaimed under state law at the time of their designation. In deciding both issues, the *Potlatch* majority expanded the existing understanding of the federal reserved water rights doctrine. The language of the Wilderness Act of 1964 persuaded the majority that Congress intended to protect the nation's remaining wilderness areas by preserving their natural character for future generations. To accomplish that purpose, an expansive interpretation of the federal reserved water rights doctrine was necessary and proper.

The majority holding in *Potlatch* survived a vigorous dissent concerned with potential harm to existing and future water users resulting from the decision. Despite fears of the dissent, *Potlatch* poses little or no threat to economic interests in western states where federal lands are plentiful and water generally scarce. The relative recent creation of wilderness area reservations, their remote locations, their non-consumptive use of water, and

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150. *Id.* at 397.

151. 16 U.S.C. § 1132(b) (1999).

152. *Potlatch Corp. v. U.S.*, No. 39576, 1999 WL 778325, at \*14 (Idaho 1999). "[The federal reserved water rights doctrine] is employed only when the intent of Congress cannot be discerned from the clear language of the statute." *Id.*

153. *See, e.g.*, Washington Park Wilderness Act of 1988, Pub. L. 100-668, 102 Stat. 3961 (1988) (stating that Congress, for wilderness areas within national parks in the state of Washington, "expressly reserves such water rights as necessary, for the purposes for which such areas are so designated. The priority date of such rights shall be the date of enactment of this Act."); Act of Dec. 31, 1987, Pub. L. 100-225, 101 Stat. 1539 (1987) (stating that for wilderness areas within federal lands in New Mexico, "Congress expressly reserves to the United States the minimum amount of water required to carry out the purposes" of the Act.).

the legislative power of Congress to limit federal reserved rights, all serve to limit the threat of wilderness areas to western water users.

*Potlatch* establishes a new chapter in the history of the federal reserved water rights doctrine. The decision deserves consideration by both federal and state courts asked in the future to consider the reach of the federal reserve doctrine and the purposes of the Wilderness Act.

R. CLARK MILLER