



THE SECRETARY OF THE INTERIOR  
WASHINGTON

July 26, 1988

Honorable Edwin Meese III  
Attorney General  
Department of Justice  
Washington, D.C. 20530

Dear Mr. Attorney General:

This transmits for your concurrence a Solicitor's Opinion on the subject of federal reserved water rights in wilderness areas.

The issue of whether federal water rights for wilderness purposes were reserved when Congress created the National Wilderness Preservation System has been a particularly difficult one. Unlike many other acts, the Wilderness Act of 1964 specifically addresses water rights in a section which provides that the Act neither claims nor denies an exemption from state water laws. 16 U.S.C. 1133(d)(6). However, this section is extremely unclear on its face in stating Congress' intent. Furthermore, the 1964 Act provides for the designation of wilderness areas on federal lands already reserved for specific purposes which clearly carry with them federal reserved water rights.

To determine the correct interpretation of Congressional intent as to reservations of water for wilderness purposes, this Department has undertaken a massive research effort which has spanned the past year. In addition, the issue of federal reserved water rights for wilderness purposes has been the subject of extensive discussions among the Departments of Justice, Agriculture and Interior during that time. These discussions culminated in a meeting with you last week in which all of the Departments had an opportunity to present their views.

The results of the year of research and the discussions with the other departments are contained in the enclosed Solicitor's Opinion. In that Opinion, the Solicitor concludes that Congress did not intend to reserve federal water rights for wilderness purposes when it created the National Wilderness Preservation System. Rather, the legislative history of the 1964 Act demonstrates that Congress sought and achieved a delicate

balance in the Act. It established a major new management plan for certain federal lands without reserving water additional to that already reserved for the underlying parks, refuges and forests. The Act, though, specifically disclaimed any intent to interfere with whatever reserved water rights those underlying Federal reservations already possessed. Therefore, the Opinion concludes that wilderness areas may enjoy the benefit of water reserved for underlying reservations. In addition, as secondary purposes for those reservations, any additional water needed for wilderness purposes may be acquired for them under state water law. United States v New Mexico, 438 U.S. 696, 702 (1978). Also, Congress may provide water through express reservation in statutes designating specific wilderness areas. Ideally, Congress will provide through express reservations appropriate guidance to the Executive Branch in this otherwise difficult area of judicially-implied rights.

We request your concurrence in the Solicitor's Opinion. It is especially important that the issue of reserved water rights in wilderness areas be resolved, as the issue has arisen in a number of contexts within the past year. The federal district court in New Mexico recently affirmed a report by a special master finding that no federal reserved water rights were created under the Wilderness Act of 1964, 16 U.S.C. 1131. New Mexico v. Molybdenum Corp. of America, CV 9780C (D.N. Mex.), Report of Special Master (filed March 27, 1987), affirmed by the Court (February 2, 1988), Motion for Reconsideration denied (June 2, 1988). With your concurrence that such rights are not reserved for wilderness purposes, it would be appropriate for the Department of Justice not to take an appeal of that finding. The district court in Colorado came to a conclusion as to reserved water rights for wilderness purposes opposite the finding of the court in New Mexico. Sierra Club v. Lyng, No. 86-1153 (D. Col. Memorandum Opinion and Order issued June 3, 1987). While no appealable order has been entered in that case, based upon your concurrence in the Solicitor's Opinion, it would be appropriate for the Department of Justice to advise the court in Colorado of the position of the United States with regard to reserved water rights for wilderness purposes. Further, this Department and the Department of Agriculture are parties to a number of state general stream adjudications in which the issue of federal reserved water rights has been or will be raised shortly. For example, a response in an adjudication involving the Beaver Dam Mountains Wilderness Area on the Virgin River in Utah is due by September 10, 1988. With your concurrence, it would be appropriate for the Department of Justice to make future application for water for wilderness purposes under state law.

We very much appreciate your consideration of this issue of such importance to this Department.

Sincerely,

*Ronald Paul Hodel*

cc: Secretary, USDA



# United States Department of the Interior



OFFICE OF THE SOLICITOR  
WASHINGTON, D.C. 20240

July 26, 1988

M-36914 (Supp. III)

Memorandum

To: Secretary

From: Solicitor

Subject: Federal Reserved Water Rights in Wilderness Areas

## I. INTRODUCTION

The Solicitor's Office has recently been asked to advise the Department on the issue of whether to file claims for federal reserved water rights for wilderness areas administered by the Bureau of Land Management ("BLM") and the National Park Service ("NPS").<sup>1/</sup> Although briefly examined in a prior Solicitor's Opinion, the question of whether the Wilderness Act of 1964, 78 Stat. 890, 16 U.S.C. § 1131, et seq. ("Wilderness Act"), provides an adequate legal basis for claiming federal reserved water rights has been raised again in discussions within the Department. As a result of those discussions, we have been asked to examine in greater detail the issue of whether federal reserved water rights are created when wilderness areas are designated.

Solicitor's Opinion No. M-36914 of June 25, 1979, 86 I.D. 553-618 (1979) (hereinafter "Prior Opinion"), analyzed the nature and extent of non-Indian federal water rights for the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management. Among other matters, the Prior Opinion defined and characterized the reserved water rights those agencies may assert under various statutes, executive orders, and Secretarial orders. One of the statutes discussed was the Wilderness Act. Specifically, the Prior Opinion, after a summary, three-paragraph analysis, held that lands designated by

<sup>1/</sup> Presently ongoing are adjudications regarding the Beaver Dam Mountains Wilderness Area on the Virgin River, Utah, the Organ Pipe and Casa Grande National Monuments on the Gila River, Arizona, and the Saguaro and Taumacacori National Monuments on the Santa Cruz River, Arizona. Claims for water rights were recently filed in the adjudications involving the latter two river systems. The National Park Service did not include a claim for wilderness rights in those filings.

Congress as wilderness areas under that Act receive federal reserved water rights necessary to accomplish wilderness purposes.<sup>2/</sup> These wilderness purposes are described in the Prior Opinion as preserving and protecting wilderness in its natural condition without permanent improvements or human habitation and as fulfilling the public purposes of recreational, scenic, scientific, educational, conservation and historic use. Prior Opinion at 86 I.D. 553, 609.<sup>3/</sup>

On the basis of a detailed examination of the Wilderness Act and its legislative history, we conclude that the better legal view is that Congress did not intend to create federal reserved water rights when it provided for the designation of wilderness areas. Rather, Congress intended wilderness purposes to be secondary to the purposes for which the reservation on which wilderness areas are designated were originally created. As such, wilderness areas enjoy the benefits of water reserved for underlying parks, forests, or refuges but are not entitled to a separate and

<sup>2/</sup> The conclusions of that Opinion, and their consistency with applicable rulings of the Supreme Court, have previously been drawn into question. See Waring & Samelson, Non-Indian Federal Reserved Water Rights, 58 Den. L.J. 783, 792 (1981) ("The Solicitor's conclusions concerning reserved water rights for wilderness areas are not supported by the Supreme Court's analysis. . . ."); Tarlock, Protection of Water Flows for National Parks, 22 Land and Water L. Rev. 29, 44 (1986).

<sup>3/</sup> In addition, the question of wilderness area reserved water rights is being litigated in several cases. In Sierra Club v. Block, 622 F.Supp. 842 (D. Colo. 1985), appeal dismissed, sub nom Sierra Club v. Lyng, No. 86-1153 (10th Cir., Oct. 8, 1986) memorandum opinion and order issued June 3, 1987, this Department was originally one of the defendants but was deleted from an amended complaint after the Department submitted evidence that it had claimed reserved rights for "wilderness preservation" purposes in several national parks in Colorado. Id., Motion to Dismiss (filed March 26, 1984). In the case remaining against the Department of Agriculture, the District Court has found that federal reserved water rights are created when wilderness areas are designated. See Sierra Club v. Lyng, No. 86-1153, Slip Op. at 4-5. To date no appealable order has yet been entered by the District Court, therefore, the United States has not been permitted to challenge this finding on appeal. To the extent that we would reach the opposite conclusion and withdraw wilderness claims currently pending in Colorado state adjudications, it may be appropriate to simultaneously advise the federal court of our actions. A conclusion opposite that in Sierra Club v. Block was reached by the Special Master in State of New Mexico v. Molybdenum Corp. of America, CV 9780C (D. N.Mex.), Report of Special Master (filed March 27, 1987), at 10-11, Report of the Special Master affirmed by the Court, February 2, 1988, Motion for Reconsideration denied June 2, 1988.

additional reservation of water. To the extent that the Prior Opinion is inconsistent with this opinion, the Prior Opinion is modified and superseded.

## II. FEDERAL RESERVED WATER RIGHTS IN GENERAL

The courts created the doctrine of federal reserved water rights at the turn of this century.<sup>5/</sup> In 1899, the Supreme Court in United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899), recognized the federal government's superior authority under the Commerce Clause to preserve the navigability of navigable waters and to receive a flow of water necessary for the beneficial uses of federal property. Specifically, the Court noted two limitations on the power of the states to alter the distribution of water within its boundaries:

First, that, in the absence of specific authority from Congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States.

Id. at 703.

Relying on its opinion in Rio Grande, the Supreme Court shortly thereafter recognized an implied federal reservation of water in situations in which the Government had set aside land for Indians. In Winters v. United States, 207 U.S. 565 (1908), the Court addressed a statute that had set aside lands for an Indian reservation but had not expressly provided for water to irrigate those lands. Despite the absence of express language, the Court found an implicit reservation of sufficient water to meet the needs of the Indians. The Court based this finding on the clear intent of Congress that the Indians should become a pastoral and

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<sup>4/</sup> The Prior Opinion was modified in certain non-relevant respects by supplemental Solicitor's Opinions dated January 16, 1981, 88 I.D. 253-258, dated September 11, 1981, 88 I.D. 1055-1065, and dated February 16, 1983, 90 I.D. 81-84. In neither of these three later opinions did the Solicitor address the issue revisited in this memorandum.

<sup>5/</sup> For a complete description and history of the federal reserved water rights doctrine, see the Office of Legal Counsel's June 16, 1982, memorandum, "Federal Non-Reserved Water Rights." (6 Op. Off. Legal Counsel 329 (1982).)

civilized people and the fact that this intent would be frustrated if those Indians lacked sufficient water to irrigate their land.

For many years, Winters was seen as establishing a special rule applicable only to Indian water law.<sup>6/</sup> This understanding was reinforced by California Oregon Power Co. v. Beaver Portland Cement, 295 U.S. 142 (1935), in which a unanimous Court praised the western states' appropriative water rights doctrine as essential to "the future growth and well being of the entire region" and held that the Desert Land Act of 1877 "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself." Id. at 157, 158. Thus, the Court concluded, "following the act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states. . . ." Id. at 163-64. Following California Oregon Power Co., federal and state agencies and private appropriators all generally assumed that the Winters reserved water rights doctrine applied only to Indian lands, and that the federal government would obtain water rights for non-Indian lands only by complying with the substantive provisions of state water law.

This assumption essentially came to an end with Federal Power Commission v. Oregon, 349 U.S. 435 (1955) (also referred to as the Pelton Dam decision), in which the Court ruled that a state agency could not deny permission to a federal licensee under the Federal Power Act to construct a dam on lands reserved by the United States for that purpose.<sup>7/</sup> The implication of this decision was that the licensee was exercising a right of the federal government to use water reserved at the time the dam site was reserved. The Court limited California Oregon Power to

<sup>6/</sup> See Trelease, Reserved Water Rights since PLLRC, 54 Den. L.J. 473, 475 (1977); Tarlock, supra, at 39.

<sup>7/</sup> The Court in Pelton Dam examined two issues: (1) the jurisdiction of the Federal Power Commission under the Federal Power Act, 16 U.S.C. §§ 791a-825r, to issue licenses for dams on federal reserved lands; and (2) the power of the states to regulate the use of waters under the Desert Land Act of 1877, 43 U.S.C. § 321, and other statutes relating to water use. It was only in the first examination that the Court referred to a section in the Federal Power Act providing that the Act would not interfere with state laws and water rights. 16 U.S.C. § 821, cited in 435 U.S. at 445, n.15. The courts have interpreted this section as an answer to questions regarding preemption of state law otherwise applying to federal power projects. See, for example, First Iowa Hydro-Electric Co-operative v. Federal Power Commission, 151 F.2d 20 (D.C. Cir. 1945), rev'd on other grounds 328 U.S. 152, reh'g denied 328 U.S. 879. The Court in Pelton Dam did not cite this section as relevant to the question of reserved water rights.

"public lands," which were defined to exclude lands reserved for a specific purpose. Id. at 448. FPC v. Oregon was followed in Arizona v. California, 373 U.S. 546 (1963), in which the Court upheld a Master's conclusion that the United States intended to reserve water sufficient for the future requirements of certain refuges, National Forests, and a recreation area. 373 U.S. at 601.

In recent cases, the Supreme Court has further defined the scope of the reserved water rights doctrine and clarified that it is a narrow doctrine, applicable only when failure to obtain water would defeat congressional purpose and intent in reserving land. In a 1976 case, the Court indicated that federal reserved water rights may be implied when the federal government withdraws land from the public domain and reserves it for a particular purpose, but only to the extent that the water is the minimum amount of unappropriated water necessary to accomplish the primary purpose of the reservation. Cappaert v. United States, 426 U.S. 128 (1976). These criteria are set out in general in Cappaert, in which the Court found that reservation of Devil's Hole as a national monument under the Antiquities Act, 16 U.S.C. § 431, also reserved sufficient unappropriated water to maintain the scientific value of the reservation:

[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water, then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so, the United States acquires a reserved right in unappropriated water which vests in the United States on the date of the reservation and is superior to the rights of future appropriators.

426 U.S. at 138.

In a case decided two years later, United States v. New Mexico, 438 U.S. 696 (1978), the Supreme Court considered the issue of whether reserved water rights were created for the maintenance of instream flows, recreation and stockwatering in national forests under the Organic Administration Act of 1897, 16 U.S.C. § 473, et seq., and the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. § 528, et seq. In briefs filed in the Supreme Court, the United States had argued that it was "entitled to reserved water rights to the extent of the purposes of the federal enclave, whatever those purposes may be." Brief for the United States, United States v. New Mexico, No. 77-510, filed March 1978 ("Brief") at 20. Following this reasoning, the Government argued that water was necessary for such purposes as assuring minimum stream flow for protection against fire and erosion and desecration of the watershed, for conservation of living things and for recreation and stockwatering and that these subsidiary purposes met the ultimate purpose of improving and protecting the

forests. Brief at 20, 30, 50 and 61. Water being necessary, the argument went, it must be deemed to have been reserved by Congress when the National Forest system was established. Brief at 36.

However, the Court declined to take such an expansive view of the reserved water rights doctrine. Rather, in an opinion written by then Associate Justice Rehnquist, the Court sought to limit that doctrine by tying it to the intent of Congress as expressed in the legislation creating the federal reservation at issue. Specifically, the Court emphasized the general rule of deference to state law and the narrow exception that the reserved rights doctrine made to that rule. 436 U.S. at 715. The decision made clear that the presumption of the application of state law is overcome by an implied reserved water right only after a careful examination of "both the asserted water right and the specific purposes for which the land was reserved" and only if the Court could conclude that "without the water the purposes of the reservation would be entirely defeated." Id. at 700.<sup>8/</sup> Implicit in this language is the conclusion that a reservation of land alone, without any other evidence of congressional intent, is insufficient to trigger an implication that water rights are reserved. Accordingly, the Court undertook a complete examination of the relevant statutes and their legislative histories in order to determine whether an inference could be drawn that Congress intended to create reserved water rights for the specified purposes in National Forests.<sup>9/</sup>

<sup>8/</sup> The New Mexico Court gave several reasons for a cautious approach to a finding of implied reserved rights. First, any such reservation must be based upon implication in a situation in which Congress was in fact silent. Second, in those cases in which Congress has not remained silent, it has "almost invariably" accepted state water law, that is, Congress has acted against the presumption asserted. Third, because the reserved right is unrecorded and has a priority backdated to the withdrawal which created it, it may upset existing water allocations, often by a "gallon for gallon reduction". 436 U.S. at 701-03, 705.

<sup>9/</sup> It has been argued that the intent to create reserved water rights can be implied on the basis of a reservation of land and a showing that water is needed to meet the central purpose of the reservation. We do not disagree that these two elements are essential to a finding of reserved water rights. However, we do disagree that these are the only elements relevant to such a finding in light of the Supreme Court's direction in New Mexico to consider carefully all facets of the statute at issue. Further, a reservation and need for water cannot overcome legislative history that evidences an intent to disclaim the creation of new reserved water rights.

After its examination, the Court in New Mexico denied federal reserved rights for the purposes of maintenance of instream flows, recreation and stockwatering in National Forests, finding that these were not among the primary purposes included in the Forest Service's Organic Administration Act and that these were not included as primary purposes under the MUSYA. Building on this finding, the Court held that it could not find an implication of congressional intent to reserve water rights for these secondary purposes. The Court explained:

[W]here water is only valuable for a secondary use of the reservation . . . there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator. In this regard, [w]here Congress has expressly addressed the question of whether Federal entities must abide by State water law, it has almost invariably deferred to the State law.

438 U.S. at 702. Therefore, implied federal reserved water rights will be found by the Court only if necessary to accomplish the specific purposes for which Congress authorized reservation of the land and not for "secondary" or incidental uses.

With these legal standards in mind, we turn to the provisions of the Wilderness Act and the specific issue of whether federal water rights are reserved when wilderness areas are designated.

### III. SCOPE AND NATURE OF THE WILDERNESS ACT

Enacted in 1964 after eight years of consideration, the Wilderness Act established a federal policy of preserving congressionally designated "wilderness areas" on existing public lands. These areas remain within the jurisdiction of the agency originally responsible for them, but are to 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. . . ." Section 2; 16 U.S.C. § 1131(a). The land managing agency is responsible for preserving the wilderness character of a wilderness area while continuing to administer the area for such other purposes for which it may have been established originally. Section 4(b); 16 U.S.C. § 1133(b). With certain exceptions, the Act prohibits commercial enterprises, roads, motorized vehicles, and structures within areas designated as wilderness. Section 4(c); 16 U.S.C. § 1133(c). The Act authorizes construction of reservoirs and water conservation works within National Forest wilderness, upon authorization of the President. Section 4(d)(4); 16 U.S.C. § 1133(d)(4).

To date, Congress has designated about 456 segments of federal land for administration under the Wilderness Act. Approximately half of these are within lands administered by this Department.

As Departmental holdings in relatively arid regions lie predominantly high in their respective watersheds where legal ownership<sup>10</sup> of a right to in-stream flows has little practical impact,<sup>10</sup> the issue of our ability to assert such rights has rarely arisen. Reports from regional offices indicate, for instance, that the Fish and Wildlife Service has filed no reserved water rights claims for wilderness areas, and the National Park Service has filed but four such claims.<sup>11</sup>

#### IV. APPLICATION OF THE FEDERAL RESERVED WATER RIGHT DOCTRINE TO WILDERNESS AREAS

The Wilderness Act of 1964 contains no express reservation of federal water rights. Historically, subsequent statutes designating specific wilderness areas have not mentioned water rights. Rather, they merely effected the designation and directed that the area be managed in accordance with the 1964 Act. Therefore, to find a federal reserved water right for wilderness areas, we must find that Congress by implication intended in the 1964 Act to reserve water necessary to meet wilderness purposes and that those purposes are specific and primary. A judicial finding of an intent to reserve a water right represents a determination that it was the actual, albeit unexpressed, intent of Congress, to so reserve water. See United States v. New Mexico, 438 U.S. at 701-702. In addressing the question of congressional intent, we must bear in mind the Supreme Court's admonition that a careful and searching examination of the legislative history is required. Id. at 700.

Two portions of the Wilderness Act and their legislative history merit special attention in attempting to discern congressional intent as to water rights: section 4(d)(7), which directly addresses water rights, and section 4(a), which delineates the status of wilderness uses. A careful review of those sections and the legislative history thereof leads us to conclude that Congress expressed an intent not to create new federal reserved water rights when it enacted the 1964 Wilderness Act. This

<sup>10</sup> See United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 859 (9th Cir. 1983), citing the unlikelihood of upstream diversion as one reason for denying a Forest Service claim for an instream flow right.

<sup>11</sup> All of these claims are in Colorado, and are the same ones reported to the court in Sierra Club v. Block as follows: Mesa Verda National Park, Case No. W-1633-76, Water Division No. 7, Application filed December, 1976, Amended Application filed February, 1977; Black Canyon of the Gunnison National Monument, Case No. W-437, Water Division No. 4, Application filed December, 1971; Great Sand Dunes National Monument, Case No. 81CW164, Water Division No. 3., Application filed November 24, 1981; Rocky Mountain National Park, Case No. W-1768, Water District No. 5, Application filed December 29, 1971, and Case No. W-8788, Water District No. 1, Amended Application filed December 29, 1977.

conclusion is based upon our view of section 4(d)(7) as specifically disclaiming the creation of new reserved water rights and of section 4(a) as assigning wilderness a secondary purpose on federal reserved lands.

A. The Wilderness Act's Provision on State Water Law

The Wilderness Act establishes the National Wilderness Preservation System by providing for congressional designation of wilderness area on forests, parks and refuges. 16 U.S.C. § 1131. The Act specifies that those areas suitable for designation are to be identified by the Secretaries of Agriculture and Interior. 16 U.S.C. § 1132. The Act requires that the areas are then to be managed by the Secretary having jurisdiction over the underlying reservation so as to preserve the wilderness character of the lands while still using them for the other purposes for which they had originally been established. 16 U.S.C. § 1133. In the section of the Act on use of wilderness areas, Congress specifies certain activities which are prohibited in wilderness areas. Id.

Congress did not expressly reserve federal water rights to accomplish these purposes of the Act. In fact, water resources were mentioned only twice in the Act. In paragraph (d)(5) of section 4, Congress authorized the President to allow prospecting for water resources and the establishment and maintenance of reservoirs and water-conservation works. 16 U.S.C. § 1133(d)(4). In section 4(d)(7), 16 U.S.C. § 1133(d)(6), Congress addressed the issue of whether the Act was intended to provide an exemption from state water law with the following:

Nothing in this Chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

Subsequent to the 1964 Act, Congress enacted a number of statutes which designated individual wilderness areas. Rather than clarifying the issue of reserved water rights, the vast majority of those acts merely refer back to the 1964 Act for guidance as to the federal management of the areas designated, and in some cases, repeat the language of section 4(d)(7). See, for example, Arizona Wilderness Act of 1984, 98 Stat. 1485, §§ 101(b) and (e).<sup>12/</sup>

<sup>12/</sup> See, also The California Wilderness Act of 1984, 98 Stat. 1619, § 101(a); An Act to Designate Certain Areas within Units of the National Park System as Wilderness, 90 Stat. 2692, § 1; An Act to Designate Certain Lands as Wilderness, 84 Stat. 1104, § 1; An Act to Designate the Ventana Wilderness, 83 Stat. 101, § 1.

To the extent that the individual designating statutes refer back to the 1964 Act, then, the language of that Act would be determinant of the question of a reserved water right. Of course, if the specific designating statute were to expressly reserve a federal water right, then that expression would control in the specific wilderness area designated.

Although section 4(d)(7) is far from clear on its face, the legislative history of the Wilderness Act gives meaning to it. That legislative history demonstrates that the section was intended to disclaim any new or additional reserved water rights while not relinquishing any existing water rights.

1. Section 4(d)(7) Specifically Disclaims New Reserved Water Rights

The legislative history of section 4(d)(7) indicates that it was intended to achieve a particular congressional objective, i.e., to alleviate the concerns of western states that the Wilderness Act would form the basis for the assertion of additional federal reserved water rights. In this regard, Senator Hubert Humphrey stated as follows with respect to what was to become section 4(d)(7):

Paragraph 5, the last in this section, 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."

104 Cong. Rec. 11,555 (1958) (emphasis added).

That these concerns surfaced is not surprising. When the Wilderness Act was first introduced, the impacts of implied water rights reservations were the subject of significant legislative controversy. The Winters doctrine had originally been seen as limited to Indian water law, a belief reinforced by the statement in California Oregon Power that federal water rights on public lands had long ago been severed from the land and subjected to State allocation. 295 U.S. at 158. Then, only two years before the wilderness bills were introduced, the Supreme Court decided the Pelton Dam case, which contained language implicitly extending the reserved rights doctrine to non-Indian lands. This development was seen as upsetting state water allocations and

even federal agency practices.<sup>13/</sup> Legislation seeking to overrule that controversial decision, and to revoke all existing federal water rights reservations, had been referred to the Senate Committee on Interior and Insular Affairs, which held extensive hearings throughout 1956.<sup>14/</sup> When S. 1176, the predecessor of the Wilderness Act, was referred to that Committee in 1957, it came before a body already conversant with the effects both of implicit reservations and also of waiver of existing federal water rights. Therefore, the legislative history of the Wilderness Act is replete with references to water rights issues. These issues repeatedly surfaced during consideration of the Act, with legislators and witnesses repeatedly expressing concern that the Act might cut off vitally needed water.<sup>15/</sup>

However, S. 1176, as introduced and referred to the Interior and Insular Affairs Committee, contained no express provisions relating to water rights claims. During hearings, the bill was criticized by William Berry, testifying for California's Departments of Water Resources, Game and Fish, and Natural Resources:<sup>16/</sup>

The committee is very familiar with the serious problems concerning the validity of State water law that have been brought about by court decisions in

<sup>13/</sup> The Supreme Court noted that, prior to the Pelton Dam decision, Federal Power Commission v. Oregon, and Arizona v. California the Forest Service "apparently believed that all of its water had to be obtained under state law." United States v. New Mexico, 438 U.S. at 703, n.7.

<sup>14/</sup> See Hearings on S. 863 before the Subcomm. on Irrigation and Reclamation of the Sen. Comm. on Interior and Insular Affairs, 84th Cong., 2d Sess. (1956) [hereinafter "Hearings on S. 863"]. See also Memorandum of the Chairman to the Members of the Senate Comm. on Interior and Insular Affairs, in connection with the consideration of S. 863, at 2 (Comm. Print 1956) (Describing S. 863 as seeking "to overcome the ruling in the Pelton Dam case."); United States v. New Mexico, 438 U.S. at 702, n.5.

<sup>15/</sup> See, e.g., Hearings on S. 1176 before the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. 329-32 (1957) [hereinafter "Hearings on S. 1176"] (testimony of National Reclamation Association); id. at 417 (statement of Upper Colorado River Commission) ("This legislation is hostile . . . to the 17 western states where water development practices would be prevented.")

<sup>16/</sup> Id. at 281. Senator Neuberger accordingly referred to "the California agencies represented by you" which sought amendments, and Berry cited "those agencies that I represent." Id. 288-89 (emphasis added).

recent years, and especially by the Pelton Dam decision--Federal Power Commission versus Oregon, 349 U.S. 435, 1955.

As I understand it, however, the Pelton Dam case may be a precedent for holding that State water law has no validity on reserved or withdrawn federal land. . . .

The bills now before you would include large areas of national forests and wildlife management land in the national wilderness preservation system. . . . The Federal courts might well hold that land within such a system is reserved in the same sense as the land involved in the Pelton Dam case, that the Desert Land Act did not apply, and that State water law need not be followed.<sup>17/</sup>

To remedy this concern, the California agencies proposed an amendment to S. 1176 to subject all unappropriated water in wilderness areas to "appropriation and use of the public pursuant to State law."<sup>18/</sup> This broad amendment would not only have precluded water reservations based on a wilderness designation, but also could have repudiated federal water claims that antedated the designation. In addition to affecting claims for park and refuge use, this repudiation could also have destroyed the long-established water claims for Indian reservations, because S. 1176<sup>19/</sup> provided for establishment of wilderness areas on Indian lands.

In response to those hearings, the concerns of the three California Departments were addressed in two revised drafts of wilderness legislation. See 104 Cong. Rec. 11,551 (1958). Draft No. 2 contained the provision that was to become section 4(d)(7). Its origin was explained as follows in a report prepared by Howard Zahniser for, and submitted for the record in Senate floor debate by, Senator Neuberger:

<sup>17/</sup> Hearings on S. 1176, supra, at 286 (emphasis added).

<sup>18/</sup> Id. at 286-87.

<sup>19/</sup> S. 1176 would have legislatively designated fifteen wilderness areas on Indian reservations, plus such other roadless and wild areas as the Secretary might designate with tribal approval. S. 1176, § 2(d), Hearings on S. 1176, supra, at 5-6. The initial proposal would thus have repudiated Winters v. United States, as to these areas. Because many of the rights at issue in Winters and its pre-1955 progeny arose out of Indian treaties, the denial of existing federal claims might well have raised the issue of treaty abrogation.

Certain changes now incorporated in committee print No. 2, have been made to meet suggestions by the Department of Water Resources of the State of California. A statement by this department at the hearing added to the considerations in connection with making the changes suggested at the hearings by the Forest Service as regards reservoirs. After this change was made in the posthearings draft and incorporated in committee print no. 1, further consultations with representatives of the California Department led to the following further changes:

1. . . .

2. The California Department also recommended the insertion of an added special section which would provide that "nothing in this act shall constitute an express or implied claim on the part of the United States for exemption from State water laws." Following consultations with various others, including those within Government Departments as well as legislators and specially interested citizens, this has been added as a clarification that would protect the California Department of Water Resources and any other State or other agency from any misuse of the wilderness bill in connection with water programs. This is in keeping with the purposes of the wilderness bill to provide for wilderness preservation as part of an overall program that also includes economic and other enterprise. The added section reads as follows: "(5) 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."<sup>20/</sup>

It is our conclusion that this passage, reported simultaneously with the reporting of Committee Draft No. 2, proves that section 4(d)(7) was enacted to meet the concerns of western states regarding water rights, i.e., to specifically avoid the creation of new or additional reserved water rights in the wilderness areas to be created in the future. This conclusion is supported by other provisions of the legislative history of the Wilderness Act and the legislative history of a later specific wilderness bill.

Section 4(d)(7) was described by the Committee's chairman as a "disclaimer of any interference with State or Federal water rights" through enactment of the wilderness legislation.<sup>21/</sup>

<sup>20/</sup> 104 Cong. Rec. 6344 (1958) (emphasis added).

<sup>21/</sup> Hearings on S. 174 Before the Senate Comm. on Interior and Insular Affairs, 87th Cong., 1st Sess., at 5 (1961) (emphasis (footnote continued)

Senator Humphrey's assurances on the floor that his language was vital to western Senators and would "remove any doubts" that Congress did not intend to "change local water laws" has been mentioned previously.

Further, legislators and the public were repeatedly assured that, in light of this section, the wilderness bills if enacted would not interfere with state water rights. For example, Charles Collison of the National Wildlife Federation interpreted the language to guarantee that "no claim is made to exemption from State Water laws on wilderness areas." Hearings on S. 4028 before the Senate Committee on Interior and Insular Affairs, 85th Cong., 2d Sess., pt. 2 at 257 (1958) [Hereinafter "Hearings on S. 4028"]. The Citizen's Committee on Natural Resources argued that claims made by commercial interests were "completely without justification" because, inter alia, "A special provision in the bill safeguards State water laws." Hearings on S. 174 at 275. The New York Conservation Council stated that "all existing rights . . . will continue to be recognized, as will State water laws." Id. at 341. These statements simply cannot be reconciled with, and are completely opposite to, a conclusion that the Wilderness Act was intended to embody an implicit exemption from state water laws.

In addition, subsequent legislation confirms the view that section 4(d)(7) disclaimed the creation of new federal reserved water rights. A bill to designate certain lands in Idaho as wilderness areas was considered and finally passed in the 96th Congress. That bill, S. 2009, and parallel House bills, contained a provision referring back to section 4(d)(7) of the Wilderness Act to address the application of state water laws to the designated wilderness area. See section 7(b) of S. 2009; H.R. Rep. No. 838, 96th Cong., 2d Sess. at 20 (1980). That provision reads as follows:

As provided in paragraph 4(d)(7) of the Wilderness Act, 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.

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added). [Hereinafter "Hearings on S. 174"]. Others shared this view. See id. at 61 (testimony of Forest Service spokeswoman: "There is nothing [in the wilderness bill] that changes the situation with respect to water rights. It is very clear and specific in the bill."); id. at 65; 104 Cong. Rec. 11,557 (1958) ("It has been made clear that nothing in this legislation may be construed to modify existing water law"); Hearings on S. 4028 before the Senate Comm. on Interior and Insular Affairs, 85th Cong., 2d Sess., pt. 2 at 257 (1959) ("No claim is made to exemption from State water laws on wilderness areas.").

Senator Church explained that this provision applied State water law to the wilderness area as, he stated, the Wilderness Act had done in section 4(d)(7):

Moreover, we desired to reiterate and underscore the jurisdiction of the State of Idaho over the water resources and fish and game within the wilderness areas and accomplished that by repeating the provisions of the 1964 act which relate to these issues.

See, also 125 Cong. Rec. 17,180 (1980). The same explanation of section 7(b) of S. 2009 was contained in the Senate Report on the bill which stated that "Section 7 further reiterates and underscores the jurisdiction of the State of Idaho over the water resources within the wilderness area. . . ." S. Rep. No. 414, 96th Cong., 1st Sess. at 22 (1980).

In light of these explicit statements as to the intentions of Congress in enacting section 4(d)(7), it is clear that Congress disclaimed any intent to create new or additional reserved water rights for wilderness areas. Any other conclusion would entirely ignore the political balance Congress sought to achieve to address the concerns of western states. That the balance was achieved and that the disclaimer was effective is evidenced by California Senator Thomas Kuchel's support of the wilderness bill. The bill's sponsor, Senator Humphrey, had given California Senator Thomas Kuchel carte blanche to solve his State's problems with the bill ("I said to Senator Kuchel, for example, about mining rights and water rights; I said 'there is nothing in this bill that will prevent us from making whatever changes are required so that California can have its water.'" <sup>22/</sup> and Senator Kuchel found Committee Print No. 2 satisfactory ("I am particularly pleased to note two changes, which have eliminated the objections of certain officials in California"), adding "[t]hat [the section 4(d)(7) language seems to me to be sufficient." <sup>23/</sup>)

2. Section 4(d)(7) Specifically Retains Existing Water Rights

While section 4(d)(7) disclaimed the creation of any new or additional reserved water rights, we believe that it specifically retained existing federal water rights, such as those existing on Indian reservations. In other words, it is our conclusion that

<sup>22/</sup> "Senator Hubert Humphrey's informal Hearing on S. 1176, known as the Wilderness Bill," transcript dated December 10, 1957, at 12 (National Archives, files of the Senate Interior and Insular Affairs committee, box 27 [hereinafter "Committee Files"]).

<sup>23/</sup> Correspondence from Senator Thomas Kuchel to Senator James Murray, dated April 4, 1958 (Committee Files).

the "no denial" language was added to California's suggested "no claim" language (and to section 4(d)(7)) to safeguard federal reserved water rights then existing for park, forest and Indian purposes. As discussed above, the Wilderness Act merely imposed certain wilderness management restrictions on existing federal reservations, which had recently been deemed by the courts to have implied water rights. The legislative history of the Act indicates that while Congress did not wish to reserve new rights, it did not intend to reopen the issue in relation to those rights already recognized.

The legislative history of the Wilderness Act shows that section 4(d)(7) was intended to serve two purposes: first, the provision was inserted to protect the states, but, second, it was also "in keeping with the purpose of the wilderness bill to provide for wilderness preservation as part of an overall program that includes also economic and other enterprise." 104 Cong. Rec. 6344. We suggest that the "no denial" clause accomplished the second purpose, being intended to preserve water rights already recognized at the time of the bill, especially reserved water rights on Indian reservations (which were included as sites for wilderness areas in early bills, see section 2(d) of S. 3619, 104 Cong. Rec. 6341 (1958)). In other words, the "no denial" language recognized that wilderness preservation is simply one part of larger programs, i.e., systems of National Parks, National Forests and Indian reservations, on which reserved rights already existed and it was those rights that had to be preserved through the "no denial" language.<sup>24/</sup> The agreement arrived at by Congress which became the Wilderness Act was prospective only; it did not go so far as to eliminate existing rights.

The history of the Wilderness Act confirms this conclusion. California had originally suggested the addition of language to the wilderness bill that would disclaim all federal exemptions from state law. See Hearings on S. 1176, at 286-87; 104 Cong. Rec. 6344. Senator Neuberger explained that after consultation with government officials, legislators and interested citizens, the California language was included in the wilderness bill, but with the addition of the "no denial" language. 104 Cong. Rec. 6344. One of the major problems here is the lack of legislative history to document the consultations referred to above and, thus, the reasons why California's suggested language was changed to the "no claim or denial" language presently in the law. However, we believe that the answer can be found in parallel legislative history concerning the same language as used in another bill.

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<sup>24/</sup> Hearings on bills to overturn Pelton Dam evidence great uncertainty as to the effect of the case, but it was clearly recognized that certain federal reserved water rights existed, e.g., on National Forests and Indian reservations. Hearings on S. 863, at 11, 13, 20-22.

Within the year prior to its considering the wilderness bills, the Senate Committee on Interior and Insular Affairs had considered several bills seeking to overturn FPC v. Oregon (Pelton Dam). The wilderness bill language suggested by California was taken from these bills. For example, section 6 of S. 863, the Water Rights Settlement Act, 84th Cong., 2nd Sess., stated as follows:

Sec. 6. Subject to existing rights under State law, all navigable and nonnavigable waters are hereby reserved for appropriation and use of the public pursuant to State law, and rights to the use of such waters for beneficial purposes shall be acquired under State laws relating to the appropriation, control, use and distribution of such waters.

The parallel with California's first proposal is apparent: indeed, Mr. Berry described that proposal as taken directly from H.R. 5871, S. 863's successor on the House side of the 85th Congress. Hearings on S. 1176 at 286. However, this original S. 863 language incurred considerable criticism due to its overbroad reach. During hearings, the Assistant Attorney General for the Office of Legal Counsel argued that section 6:

expose[d] to loss, through appropriation by others under State law, all presently vested rights of the United States to the use of water on the Government's military establishments, national forests, Indian reservations, national parks and monuments, and other reserved lands, except as the fulfillment of treaty obligations in connection therewith is involved, should be noted.

Hearings on S. 863 at 55 (emphasis added).<sup>25/</sup> The primary

<sup>25/</sup> The Assistant Attorney General, while pointing out the problem of safeguarding existing Indian rights, also pointed out the problems with utilizing the specific language "subject to existing rights" in the bill. Hearings on S. 863, at 275. In testimony, he stated his conclusion that utilizing such language would be equally broad in the other direction by applying the concept of reserved rights to all future federal reservations:

Senator BARRETT. That matter [Indian reservations] was brought to our attention the other day. In order to protect the rights of the Indians on any of those we decided the other day that line 22 would be changed by striking out the words "under State law," and that has been agreed to. So that language reads:

Subject to existing rights, all navigable and  
(footnote continued)

example, given repeatedly of rights potentially lost were rights of Indians and Indian tribes to the use of water on their reservations. Id.<sup>26/</sup>

We believe that fear of losing existing federal reserved water rights was the reason why the same committee a year later in section 4(d)(7) substituted the "no claim or denial" language for California's "subject to existing rights" limitation, rather than any desire to extend the reserved rights doctrine to create new water rights. Only if this interpretation of section 4(d)(7) is accepted, i.e., that it preserved preexisting federal rights while still safeguarding the primacy of state law, do subsequent descriptions of 4(d)(7) as a "disclaimer of any interference with State or Federal water rights" make sense. Hearings on S. 174 at 5.

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nonnavigable waters are hereby reserved for  
appropriation, use--

and so forth. We think that would protect any rights that the Indians might have.

Mr. RANKIN. I think it would, Senator, but I think it might destroy the effect of your bill.

Senator BARRETT. Why do you say that?

Mr. RANKIN. Because I think, under the concept of the Pelton case, that would mean that the United States had all of the rights it has in reserve lands and the right to the use of the water and you put yourself right back where you don't accomplish what you appear to be trying to accomplish otherwise.

Hearings on S. 863, at 274-276.

26/ It could be argued, with regard to Indian Reservations, that the wilderness bill already contained a non-abrogation clause. See S. 1176, § 2(d). However, this does not detract from the argument that the "no denial" language was added to section 4(d)(7) to safeguard existing rights as: (1) not all Indian water rights derive directly from treaties; and (2) the committee had thought it appropriate to add a double protection to S. 863: "Congress is fully cognizant of the problem of Indian water rights. . . . In fact, this legislation not only protects all 'existing water rights' generally, it also specifically provides in section 7 that nothing in the Act shall be construed to affect . . . Such rights belonging to Indian tribes. . . ." S. Rep. No. 2587, 84th Cong., 2nd Sess. at 11 (1956).

This reading of committee action on the future section 4(d)(7) in light of Justice objections to parallel language in S. 863 is reinforced by the only contemporaneous committee explanation of the addition of the words "or denial." Immediately following the drafting of Committee Print No. 2, the Committee was furnished a report prepared by Howard Zahniser, Washington Representative for Trustees for Conservation. An abstract of this report was inserted in the Congressional Record by Senator Neuberger as an explanation of the changes. 104 Cong. Rec. 6343 (1958). In that report, Mr. Zahniser stated that the "no denial" language had been inserted to anticipate and avoid objection on the part of the Department of Justice:

The [California] Department also recommended the insertion of an added Special section which would provide that "nothing in this Act shall constitute an express or implied claim on the part of the United States for exemption from State Water laws." Following consultations with various others including those within Government departments as well as legislators and specially interested citizens this has been added as a clarification that would protect the California Department of Water Resources and any other State or other agency from any misuse of the Wilderness Bill in connection with water programs. This is in keeping with the purpose of the Wilderness Bill to provide for Wilderness preservation as part of an overall program that includes also economic and other enterprise. In line with suggestions received in the course of the consultations regarding the proposed new section, the words "or denial" were also added to avoid an possible misinterpretation on the other hand and specifically to anticipate and avoid objection on the part of the Department of Justice. The added section reads as follows:

"(5) Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption in State water laws."<sup>27/</sup>

This language supports the view that Committee print No. 2 was seen as resolving the California agencies' problems while avoiding interference with pre-wilderness-designation federal water rights.

<sup>27/</sup> Howard Zahniser, "Improvements in the Wilderness Bill," February 15, 1958, at 6. (Committee Files). (Emphasis added).

3. Arguments Against the Conclusion that Section 4(d)(7) Disclaims Federal Reserved Water Rights

The conclusion that section 4(d)(7) disclaimed any new federal reserved water rights is opposite that reached in the Prior Opinion and by some commenters. That Opinion and those commentators support their conclusion that reserved water rights are created when wilderness areas are designated with one of several theories: (1) that section 4(d)(7) is neutral, merely preserving the status quo which applies federal reserved water rights to wilderness areas; (2) that section 4(d)(7) was a compromise whereby the states retained some right to construct water projects in wilderness areas but lost the right to have water rights adjudicated under state law; and (3) that the subsequent use of the same language in the Wild and Scenic Rivers Act compels a conclusion that federal water rights are reserved for wilderness areas. For the reasons that follow, we find each of these theories to be unpersuasive.

a. Congressional Neutrality

The first theory advanced to support the existence of wilderness reserved water rights is that Congress, in enacting section 4(d)(7), sought to maintain "neutrality" with regard to the emerging doctrine of reserved water rights, doing nothing more than maintaining the status quo. This position essentially maintains that the use of "or denial" language in section 4(d)(7) either strips all meaning from its command that the Act not be read to assert any "claim" to exemption from State water laws, thus rendering the section completely meaningless,<sup>28/</sup> or that Congress intentionally chose, not to be silent, but to be neutral on the issue of water rights. The argument then proceeds from the conclusion that section 4(d)(7) maintains the status quo to a further conclusion that water rights are thereby created because

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<sup>28/</sup> Specifically, the Prior Opinion found that : "Giving literal effect to the "no implied claim . . . as to exemption from State water laws" phrase, denies the literal effect of the "no express or implied . . . denial . . . as to exemption from State water laws" phrase, and vica-versa. (Emphasis added.)" Prior Opinion at 86 I.D. 553, 607-608, n.99, dealing with an identical provision in the Wild and Scenic Rivers Act, 16 U.S.C. § 1271 et seq. With regard to that provision, the Prior Opinion also noted:

There is no clarifying legislative history. I therefore must conclude that the provision is a non sequitur roughly designed to preserve the status quo of federal-state relations in water law under "established principles of law," including the reserved water rights doctrine. 16 U.S.C. § 1284(b).

the status quo includes the federal reserved water rights doctrine.<sup>29/</sup> We find these arguments unpersuasive for several reasons.<sup>30/</sup>

A finding that section 4(d)(7) is essentially without meaning is an egregious violation of the cardinal principle of statutory construction that congressional enactments are not be relegated

<sup>29/</sup> The Prior Opinion states as follows in regard to section 4(d)(7):

[I] do not view the provision of 16 U.S.C. § 1133(d)(7) (1976) as undercutting the implied reserved water rights doctrine. Rather, the provision is intended to continue the application of then-existing principles of federal-state relations in water law, which includes the reserved water rights doctrine. 86 I.D. 553, 610.

.....

[R]ather, by not constituting either a new claim or a new denial or exemption from state water law, I am of the opinion that Congress intended to continue the status quo which allows for the creation and assertion of reserved water rights on lands withdrawn and reserved under the Wilderness Act. 86 I.D. 553, 610 n.106.

<sup>30/</sup> The District Court, in Sierra Club v. Lyng, found these arguments to be convincing, holding that section 4(d)(7) merely maintained the status quo. However, as discussed infra, this interpretation renders that section surplusage, a result the rules of statutory construct would caution against. Taking the second step, the District Court found that Congress "disclaimed any decisional responsibility" for the issue of water rights in wilderness areas. Given that assumption, the court reasoned that it should step in and create such rights under the general federal reserved water rights doctrine. However, this step seems to seriously misinterpret the role of the court in carrying out the federal reserved water rights doctrine. That doctrine calls on the courts to interpret the intent of Congress in making reservations of federal land. Cappaert v. United States, 426 U.S. at 138. It does not, nor does the separation of powers design of the Constitution, allow the courts to create reserved water rights when Congress declines to do so, even under the guise of "harmonizing" newly created congressional programs and pre-existing state law. The District Court seems to suggest that section 4(d)(7) gives a nod of approval to a judicial "legislative" process that creates federal reserved water rights absent affirmative congressional intent. Yet the constitutional bases of the implied reservation of water doctrine are found in the Commerce and Property Clauses, art. I § 8 and art. IV § 3, see Cappaert v. United States, 426 U.S. at 138, both of which delegate powers to Congress and Congress alone.

to surplusage if there is a way of giving meaning to them. See, e.g., National Insulation Transp. Committee v. I.C.C., 683 F.2d 533 (D.C. Cir. 1982); Zigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976); Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir. 1973), cert denied, 411 U.S. 917 (1973). Further, there is a complete lack of any evidence, or even plausible speculation, of a legislative motive for enacting a meaningless command.<sup>31/</sup>

As noted previously, what became section 4(d)(7) was first drafted as a repudiation of any "claim" to exemption. Prior to release of Committee Print No. 2, the "or denial" language was added. The argument that the "no denial" language strips the "no claim" language of meaning requires us to assume that Congress consciously added the "no denial" language to negate what it had already drafted. Yet the only contemporaneous explanation to be found in the Committee files mentions no such intent. Instead, it states that "The words 'or denial' were also added to prevent any possible misinterpretation on the other hand and specifically to anticipate, and avoid objection on the part of the Department of Justice."<sup>32/</sup> This expression of a positive intent is in accord with Senator Humphrey's later description of section 4(d)(7) as "language vital to our colleagues from the West" and as removing "any doubt" that the bill was not intended to "change existing water laws and . . . deprive local communities of water."<sup>33/</sup> The negation of a guarantee against extension of reserved federal water claims would hardly be "vital to our colleagues from the West" nor remove doubt as to impact on local water needs.

Also, there seems little merit to the Prior Opinion's basic premise that the "status quo" that the Prior Opinion maintains was safeguarded by section 4(d)(7) was, in 1964 at the time of the Wilderness Act, understood to include the recently extended doctrine of implicitly reserved water rights. Throughout this period, Congress was considering legislation to overturn or modify FPC v. Oregon (Pelton Dam), and in the Senate Interior and

<sup>31/</sup> It could be speculated that Committee staff might have held such a motive and, personally, attempted to thwart the Committee's desires. Apart from being a most questionable premise of legislative construction, there is no evidence to support this speculation. Moreover, this was an issue of great personal interest to the Committee in question. As the Committee and all its subcommittees held only 22 hearings during the first session of the 85th Congress, there would have been little necessity for members to give blind dependence upon staff. It is noteworthy that the 1957 hearings mention only one staff member in attendance--the clerk.

<sup>32/</sup> Zahniser, "Improvements in the Wilderness Bill," supra, at 6.

<sup>33/</sup> 104 Cong. Rec. 11,555 (1958).

Insular Affairs Committee, such legislation was seen as restoring the legal status quo which mandated the primacy of state law.<sup>34/</sup>

In advancing this "status quo" theory, proponents cite to several events in the Wilderness Act's five-year history. Following careful examination, we must conclude that these events lend more support to the conclusion that reserved water rights were not created for wilderness areas than to the opposite view.

The first such event consists of a two-paragraph telegram from Harvey Banks of the California Department of Water Resources to the chairman of the committee considering the wilderness bill objecting to the use of the "or denial language in section 4(d)(7)." He urged that the insertion would "leave room for further expansion of the Pelton Dam case, FPN [sic] v. Oregon. . . ." Hearings on S. 4028 at 198. The hearing record shows no response by the Committee. Such silence might be advanced as support for a view that Congress intended to apply Pelton Dam to wilderness areas. However, a careful review of Mr. Banks' hastily written two-paragraph letter and subsequent legislative history shows that this support is illusory. First, as noted earlier, when William Berry initially proposed the amendment to protect state water laws, he made clear that he represented three California officials--not only Mr. Banks, but also the directors of the Department of Fish and Game and of the Department of the Natural Resources. Hearings on S. 1176 at 289, 288-89. However, only Mr. Banks objected to the "no denial" language in his capacity as Director of the Department of Natural Resources; the latter two agencies, as well as the Governor,<sup>35/</sup> later endorsed the wilderness bill without reservation.

Second, even prior to receiving Mr. Banks' telegram, Senator Kuchel of California had notified the Committee Chairman that he had reviewed Committee Print No. 2 and that he "was

<sup>34/</sup> See, e.g., Hearings on S. 863 at 7 (1956) (Senator Barrett: "For nearly a century it has been settled law that western water rights are dependent on and determined by State law."); id. at 328-29; Hearings on S. 1275 Before the Subcomm. on Irrigation and Reclamation of the Senate Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. at 24-25 (1964) (Senator Kuchel: "it has generally been assumed that the mere fact that nonnavigable water arises upon any United States retained lands would not affect the rights . . . acquired by persons or by State or local governments. . .") See generally Morreale, Federal-State Conflicts over Western Waters, 20 Rutgers L. Rev. 423, 446 (1966).

<sup>35/</sup> See Hearings on S. 4028, pt. 2 at 653 (Department of Fish and Game); Hearings on S. 174, before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, 87th Cong., 1st Sess., pt. III at 839 (1961) (California Resources Agency, Successor to Department of Natural Resources).

particularly pleased to note two changes, which have eliminated the objections of certain officials in California." (Emphasis added.) Quoting what became section 4(d)(7), he concluded "this language seems to me adequate" and endorsed the proposals: "it is my hope that the Committee can give favorable consideration at an early date to the proposed changes."<sup>36/</sup> Upon receipt of Mr. Banks' telegram some three months later, Senator Kuchel indicated no alteration in his views, but merely transmitted the telegram to the Committee chairman with a two-sentence note requesting its inclusion to the record.<sup>37/</sup> This sequence is consistent with the view that the Committee deemed no reply necessary because Mr. Banks' views involved a misreading of the Committee's intent--the objections of the California officials had in fact been "eliminated," and all save Mr. Banks understood this and supported the amended bill.

Proponents of a "status quo" or "neutrality" argument also point to a statement made by Senator Kuchel during hearings on S. 174 in which he quotes several sections of the wilderness bill, including section 4(d)(7) and language concerning jurisdiction over fish and wildlife. Senator Kuchel then indicates that the bill does not resolve jurisdictional questions. Hearings on S. 174 at 65. However, Senator Carroll clarifies this issue by stating that the jurisdictional questions they are discussing relate to powersites and Federal Power Commission jurisdiction. Id.

Even assuming that Congress meant to draft section 4(d)(7) to explicitly state its neutrality on water rights, it does not follow that reserved water rights are created. Reserved water rights, where they exist, are a creature of legislative intent. "The reserved rights doctrine" is a doctrine built on implication...." United States v. New Mexico, 438 U.S. at 696. When such rights are considered, "The issue is whether the Government intended to reserve . . . water." Cappaert v. United States, 426 U.S. at 139. If Congress genuinely had no collective intent either to claim water or to leave it unclaimed, the water remains unclaimed, as the Courts have no basis to assert such a claim without at least the ability to infer an implied congressional intention to do so.<sup>38/</sup>

<sup>36/</sup> Correspondence from Sen. Thomas Kuchel to Sen. James Murray, dated April 4, 1958. (Committee Files). (Emphasis supplied).

<sup>37/</sup> Correspondence from Sen. Thomas Kuchel to Sen. James Murray, dated July 25, 1958. (Committee Files).

<sup>38/</sup> The view that reserved water rights are created by congressional neutrality implicitly treats water as claimed unless Congress expressly denies the claim. This disregards the counsel of the Supreme Court that implicit reservation of water is an "exception" to the rule of congressional deference to state  
(footnote continued)

b. Congressional Compromise

A second theory advanced to support wilderness water rights is that Congress sought a compromise on two water issues -- the reserved rights doctrine and the question of water improvement construction within wilderness areas. This view hypothecates a Committee agreement to accept negation of the proposed guarantee of state water rights in exchange for protection of access for water improvements. This explanation must be rejected for two reasons.

First, neither the published record nor the Committee's files suggest that any such quid pro quo was intended. So important a compromise on two controversial issues would likely have been reflected in the record, not to mention cited in explanation of Members' positions. Nor is there any ready explanation of who would have been parties to the hypothecated compromise. The entire Committee was composed of Senators representing states with reserved water rights concerns. The same Committee had reported out, without recorded dissent, a bill to essentially overrule Pelton Dam. Senator Neuberger, first sponsor of the wilderness bill, had even sought to amend that bill to suspend the licenses issued to the Pelton Dam under the authority of that case. The Committee, in short, does not appear to have considered protection of Pelton Dam a high priority, and an explanation which requires us to assume that Senator Neuberger would have protected that case law, let alone at the price of incurring further opposition to his bill, simply runs contrary to all known fact.

Second, this explanation is inconsistent with the subsequent course of the wilderness bills. If such a compromise had been reached, the proponents of water rights who were parties to it should have ceased opposition, and those not parties to it would have opposed the sacrifice of their desired water rights guarantees. In fact, the opposite appears to have occurred. Criticism of the bill's impact on water rights became all but nonexistent after publication of Committee Print No. 2, while Senators still in opposition to the bill roundly criticized its impact upon water improvements. This is consistent with the belief that problems with water rights had been eliminated while those with water projects remained, exactly the opposite of what the explanation offered by reserved water rights proponents requires. The minority views in the Committee reports in both the 87th and 88th Congresses, for example, devote an entire

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water allocation. United States v. New Mexico, 438 U.S. at 715. In addition, this view would violate the principle of separation of powers because it would implicitly authorize the courts to act as legislators and to create water rights when Congress had evidenced no intent to create them. We do not believe that section 4(d)(7) can be read as having this effect.

section to "The Impact on Western States," yet reflect no complaint that the bill had sacrificed protection of western water rights. In short, even if a compromise is assumed, it would appear to have involved a satisfaction of water rights concerns in exchange for only a partial satisfaction of water project difficulties -- precisely the opposite of what this "compromise" theory requires.

Proponents of the "compromise" theory seek support in a dialogue between Senator Goldwater, who had opposed the Wilderness Act from the beginning, and certain Forest Service officials, who were testifying in its support. Yet a careful reading of the dialogue demonstrates that: (1) a distinction was drawn between water-rights guarantees and the power to construct water improvements in wilderness areas and (2) both parties to the dialogue conceded that water rights had been protected, while the power to construct improvements was curtailed--which contradicts the hypothesis of a "compromise" in favor of the latter. Senator Goldwater began by asking whether the wilderness bill "would give you control over the water in these areas?" Forest Service Chief Richard McArdle replied "No, sir" and proceeded to quote the future section 4(d)(7). Senator Goldwater then introduced the requirement of Presidential authorization for water projects in wilderness areas, to which the Director of the Division of Legislative Reporting and Liaison replied:

Senator Goldwater, the application of State water rights and the question of the right to construct waterworks on [sic] water improvements on Federal lands are two distinct questions. The application of State water laws does not necessarily give to the holder of a water right the privilege of constructing dams.

Senator Goldwater replied, concretely, "Yes, but what good are water rights without water?" and another Forest Service witness concluded: "you have the right, but if the President refused, it would not implement the right." After some discussion of water rights in Colorado, the chairman ended with "there is nothing in the bill that changes the situation in these water rights is there?" and was assured by these witnesses: "There is nothing that changes the situations with respect to water rights. It is very clear and specific in the bill." Hearings on S. 174 at 58-61 (emphasis added).

In brief, we find that the Goldwater - Forest Service dialogue reinforces rather than contradicts the conclusions reached in this opinion. A distinction was clearly drawn between State water rights, which the bill would not affect, and the construction of improvements in wilderness areas, which it would.

c. Wild and Scenic Rivers Act

The third theory upon which wilderness area reserved water rights have been based is the usage of language duplicative to that found in section 4(d)(7) in another act which appears to reserve water rights, the Wild and Scenic Rivers Act, 16 U.S.C. § 1271, et seq. The Wild and Scenic Rivers Act does contain the same language that is used in section 4(d)(7) of the Wilderness Act. This similarity, however, furnishes little assistance to the task of construing the Wilderness Act. First, section 4(d)(7) of the Wilderness Act was drafted in 1958 and enacted in 1964. The Wild and Scenic Rivers Act was passed in 1968. References to congressional actions in 1968 to explain a clause drafted a decade before necessarily run afoul of the Supreme Court's admonition that "The views of a subsequent Congress of course afford no controlling basis from which to infer the purposes of an earlier Congress." Haynes v. United States, 390 U.S. 85, 87 n.4 (1968). See also United States v. Price, 361 U.S. 304, 313 (1960); United States v. United Mine Workers, 330 U.S. 258, 282 (1947).<sup>39/</sup> This is particularly so when the subsequent explanations come from legislators who did not serve in the earlier Congress or were not members of the committee which reported out the earlier bill. United States v. United Mine Workers, *supra*. It is noteworthy that only five of the seventeen members of the Senate Committee that considered the Wild and Scenic Rivers Act had served on the committee when it drafted what became section 4(d)(7) of the Wilderness Act. Compare Hearings on S. 1176, *supra*, at II, with Hearings on S. 119 and S. 1092 before the Senate Committee on Interior and Insular Affairs, 90th Cong., 1st Sess., at II (1967).

Second, although the wording employed in the Wild and Scenic Rivers Act and the Wilderness Act is the same, the statutory context and stated legislative purpose are in sharp contrast. The language at issue appears in the Wild and Scenic Rivers Act in a subsection entitled "Compensation for Water Rights," the primary focus of which was to ensure that vested water rights are not taken without just compensation. 16 U.S.C. § 1284(b). The first sentence of the subsection provides that federal-state jurisdictional questions will be settled by "established principles of law;" the second guarantees just compensation for any taking of water rights; the third contains the language at issue. The Senate Report treats the last sentence as having no separate significance, referring back to the first

<sup>39/</sup> The same admonition would apply to an attempt to use the National Wildlife Refuge System Act, 16 U.S.C. §§ 668dd-668ee, as a guide to interpreting the Wilderness Act. The Refuge System Act also contains language identical to that included in section 4(d)(7) of the Wilderness Act. 16 U.S.C. § 668dd(i). The Supreme Court, in Arizona v. California, let stand a master's conclusion that water had been reserved for one wildlife refuge. 373 U.S. at 601. However, neither the Supreme Court nor the master's decision referred to, much less analyzed or interpreted, section 668dd(i) of the Refuge System Act.

sentence as the operative language: "Any issues relating to exemption will be determined by established principles of law as provided in the first section." S. Rep. No. 491, 90th Cong., 1st Sess. 5 (1967). The better legal view of the "claim or denial" language in the Wild and Scenic Rivers Act, then, is that it was inserted not in response to the federal reserved water right doctrine--the reservation of waters was made, with limitations, in the next section of the Act--but rather to prevent the reserved water rights created in the Act from eliminating existing rights under state laws that were being taken and which formed the basis for compensation.<sup>40/</sup>

In fact, the emphasis on compensation in the Wild and Scenic Rivers Act is evident even in the reservation language, which reserves no more water than is necessary to meet the purposes specified in the Act, as follows:

\* \* \* \*

(b) Compensation for water rights

The jurisdiction of the States and the United States over waters of any stream included in a national wild, scenic or recreational river area shall be determined by established principles of law. Under the provisions of this chapter, any taking by the United States of a water right which is vested under either State or Federal law at the time such river is included in the national wild and scenic rivers system shall entitle the owner thereof to just

<sup>40/</sup> The District Court in Sierra Club v. Lyng also relied on the use of the section 4(d)(7) language in the Wild and Scenic Rivers Act to support wilderness area reserved water rights, noting that Congress used this language in conjunction with language recognizing a possible federal taking of privately-held water rights. Memorandum Opinion and Order (issued June 3, 1987) at 3. (The court relied here in part on the Department of Justice argument in response to Intervenor's Motion for Summary Judgment that the use of the same language in the Wild and Scenic Rivers Act as was used in section 4(d)(7) appeared to show an intent by Congress to reserve water for wilderness areas). However, rather than disputing it, the court's notation strengthens our argument that the "claim or denial" language is used in a different context in the Wild and Scenic Rivers Act than it is used in the Wilderness Act. Having affirmatively recognized that a taking was occurring when waters were reserved, Congress made clear with the "claim or denial" language what rights were being taken, i.e., state appropriated water rights. Otherwise, a court might find that the state rights were defeated by a reservation of federal rights and hold that no taking had occurred.

compensation. Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

**(c) Reservation of waters for other purposes or in unnecessary quantities prohibited**

Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.

**(d) State jurisdiction over included streams**

The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this chapter to the extent that such jurisdiction may be exercised without impairing the purposes of this chapter or its administration.

**(e) Interstate compacts**

Nothing contained in this chapter shall be construed to alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by any States which contain any portion of the national wild and scenic rivers system.

**(f) Rights of access to streams**

Nothing in this chapter shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area.

\* \* \* \*

16 U.S.C. § 1284. Taken as a whole, these provisions evidence a congressional intent to minimize the impact of the Act on state water laws and rights created thereunder. Recognizing that water was being reserved under the Wild and Scenic Rivers Act, Congress made clear its intent to go no further than necessary in exempting the areas impacted from state law.

The contrasting uses of the provisions of the two statutes are more understandable when viewed against a historical background. As noted above, when the relevant section of the Wilderness Act was drafted, reserved water rights for non-Indian lands were very much a new issue, recently suggested (and never actually applied) by the Court. By the passage of the Wild and Scenic Rivers Act, the doctrine had become established law. The two statutes were debated and enacted against two separate and different legal and historical backgrounds.

Moreover, the Wilderness Act focused upon preserving land, which might or might not affect water rights. The Wild and Scenic Rivers Act focused upon the water, expressly allowed taking of water rights upon compensation, 16 U.S.C. § 1284(b), expressly provided that the beds of designated streams and surrounding lands were "withdrawn", 16 U.S.C. § 1279, and contained no "within and supplemental" purposes clause. In contemplating the Wilderness Act, there was dispute over whether water rights should be acquired; in the Wild and Scenic Rivers Act debates, the issue was how they should be obtained.

Therefore, the arguments made in support of wilderness water rights are not persuasive on the issue, and as such, do not vary our conclusion that such rights are not reserved by the Wilderness Act of 1964.

#### B. Primary Purposes of Wilderness Areas

In analyzing the existence of reserved water rights for wilderness areas, we must next review the purposes for which wilderness areas are designated. That review demonstrates that Congress did not specify wilderness purposes as primary purposes for the federal lands in which they are designated.

In United States v. New Mexico, 438 U.S. at 702, the Supreme Court for the first time distinguished between the primary and secondary purposes of a federal reservation of land in determining congressional intent as to the creation of federal reserved water rights. In New Mexico, the Court concluded:

Where water is only valuable for a secondary purpose of the reservation, however, there arises the contrary inference that Congress intended,

consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

In applying this distinction to purposes of National Forests, the Supreme Court held that in the Multiple-Use-Sustained-Yield Act, Congress did not add additional primary purposes to existing National Forests and thus did not intend to create additional federal reserved water rights.

Section 1 of MUSYA, 16 U.S.C. § 528, states as follows in pertinent part:

That it is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of [this Act] are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the [Organic Administration Act of 1897, 16 U.S.C. 473 et seq.]. (Emphasis added.)

The Supreme Court relied in part on the "supplemental to, but not in derogation of" language set forth above in determining that MUSYA's purposes were secondary, not primary. 438 U.S. at 714. The Court then stated as follows:

As discussed earlier, the "reserved rights doctrine" is a doctrine built on implication and is an exception to Congress' explicit deference to State water law in other areas. Without legislative history to the contrary, we are led to conclude that Congress did not intend in enacting the Multiple-Use-Sustained-Yield Act of 1960 to reserve water for the secondary purposes there established. . . . Congress intended the national forests to be administered for broader purposes after 1960 but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water. . . .

Id. at 715. See also United States v. City & County of Denver, 656 P.2d 1, 25 (Colo. 1983).<sup>41/</sup>

<sup>41/</sup> Having found that the MUSYA directs the Forest Service "to expand the purposes for which the national forests are administered", the Colorado Supreme Court in United States v. City & County of Denver, concluded that the MUSYA did not effect an additional reservation with supplemental reserved water rights, but, rather, was merely a mandate to expand the purposes for which the original forest reservations are to be administered. 656 P.2d at 25 (Colo. 1983)

Like the language of section 1 of the MUSYA, paragraph (a) of section 4 of the Wilderness Act assigns wilderness purposes a secondary role to other purposes for which the lands are administered:

The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered. . . . (Emphasis added)<sup>42/</sup>

In addition, the Act specifies that it should not be deemed to interfere with the purposes for which national forests are established and that it should not lower the standards evolved for the "use and preservation" of park system units. Sections 4(a)(1) and (3); 16 U.S.C. §§ 1133(a)(1) and (3). Section 4(a)(3) provides: "Nothing in this chapter shall modify the statutory authority under which units of the national park system are created." This point is emphasized in paragraph (b) of section 4 as follows:

Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use. (Emphasis added.)<sup>43/</sup>

<sup>42/</sup> Section 4(d)(6), 16 U.S.C. § 1133(d)(6) (emphasis added). This and similar language throughout the Wilderness Act and its legislative history raises the additional issue of whether Congress in the Act intended to "reserve" lands for wilderness purposes. While we do not address the question of whether wilderness designations are in fact "reservations" of land, we note that a negative finding would preclude any argument that reserved water rights are created in wilderness areas as a reservation of land is a prerequisite to finding a congressional intent to create such rights. See Cappaert, 426 U.S. at 138.

<sup>43/</sup> The legislative history of the Wilderness Act also makes this point. Congress made clear that the Act established only additional criteria under which wilderness areas would be managed, not new primary purposes for the land:

The proposed legislation simply establishes the criteria under which our wilderness areas will be  
(footnote continued)

The plain language of these sections indicates an intent on the part of Congress in the Wilderness Act to make wilderness purposes secondary uses of the land already reserved for other purposes, rather than adding them as primary purposes. As such, and in accordance with the Supreme Court's decision in New Mexico, there is no implication that water has been reserved for these secondary uses.

The Prior Opinion interpreted section 4(a) in a contrary manner when it focused upon the word "within" in that section as indicating that wilderness purposes are to be considered primary purposes for the relevant reserved lands.<sup>44/</sup> Despite the Wilderness Act's use of language markedly similar to that at issue in New Mexico, the Prior Opinion interpreted the word "within" in Section 4(a) to mean that wilderness purposes are

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managed so that we can assure their preservation for the cultural, inspirational, recreational, and scientific values that these areas can offer to ourselves and future generations. (Emphasis added.)

Remarks of Senator McGovern, 109 Cong. Rec. 5942-43 (1963).

A like comment was expressed by Senator Humphrey on a section in a predecessor bill that substantially became section 1133(b):

Section 3 on the "use of wilderness" is important, for it makes clear that the preservation of wilderness is not inconsistent with the purposes for which national parks, national forests, and other units have been established. These units will be administered for such other purposes as also to preserve their wilderness character.

104 Cong. Rec. 11,555 (1958).

<sup>44/</sup> The Prior Opinion addresses this issue as follows:

[F]irst, as far as NPS and FWS areas are concerned, it is clear that wilderness designations establish purposes for the creation of the reservation; i.e., designation as wilderness does more than merely authorize secondary uses entailing no reserved water rights. 86 I.D. 553, 610.

. . . .

[B]y stating that Wilderness Act purposes are "within" existing area purposes, this forecloses any argument that wilderness area designation is subsidiary to other management objectives. Cf. United States v. New Mexico, supra, 438 U.S. at 713-15. 86 I.D. 553, 610 n.105.

primary. However, this conclusion ignores the "and supplemental" language of Section 4(a), which clearly suggests secondary purposes.<sup>45/</sup>

Moreover, there is no indication in the legislative history of the Wilderness Act that the phrase "within and supplemental" as used in section 4(a) intended additional primary, as opposed to additional supplemental, purposes for areas already reserved for federal purposes.<sup>46/</sup> For example, the sponsors of the Wilderness Act explained that its provisions make "plain that the wilderness bill is in keeping with multiple-use policy, that wilderness preservation is to be one of the multiple-use purposes of the National Forests, and that the forests as a whole are to be administered with the general objectives of multiple use and sustained yield."<sup>47/</sup>

<sup>45/</sup> The District Court, in Sierra Club v. Lyng, basically ignored both the "within" and "supplemental to" language. Citing a number of references in the Wilderness Act's legislative history to the effect that the preservation purposes of the Act are "crucial", the court reasoned that they were thus "primary" for reserved water rights purposes. Sierra Club v. Block, Memorandum Opinion and Order (Issued November 25, 1987). We do not believe that this omission is consistent with the careful analysis mandated by United States v. New Mexico. Particularly, we note that the court's decision is contrary to the principle that the federal reserved water right doctrine is to be construed narrowly. United States v. City and County of Denver. The states, as Congress explicitly recognized in enacting the McCarran Amendment, 43 U.S.C. § 666, have a strong interest in regulating the water within their boundaries, including water appurtenant to federal lands. As the Supreme Court has noted, "if the appropriation and use were not under the provisions of State law the utmost confusion would prevail. . . . Different water rights in the same state would be governed by different laws and would frequently conflict." California v. United States, 438 U.S. 645, 667 (1978). The courts, although acknowledging the federal reserved water rights doctrine, have continued to maintain strict requirements for its application and clearly regard it as an exception, not the rule, to a general deference to state law regarding appropriation and use of water. United States v. New Mexico, 438 U.S. at 703.

<sup>46/</sup> H.R. Rep. No. 1538, 88th Cong., 2d Sess. (1964), suggests that the purpose of section 4(a) was to "preserve the integrity of several statutes governing national forests and national parks." Accordingly, section 4(a) would have the same general intention as Section 1 of MUSYA, interpreted by the Supreme Court in United States v. New Mexico.

<sup>47/</sup> 104 Cong. Rec. 11,557 (1958). See also id. at 6343; Hearings on S. 174, supra, at 3 (Section 4(a) declares Wilderness Act  
(footnote continued)

Like those applicable to National Refuges, Parks and Forests, BLM wilderness designations also serve a purpose additional to the other purposes for which BLM lands are administered. The Wilderness Act does not authorize designation of lands as wilderness areas except within National Refuges, Parks and Forests. See section 3; 16 U.S.C. § 1132. Other federal public domain lands were not designated as wilderness areas until 1976 when Congress enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, et seq. Within that general land management statute, Congress directed the Secretary of the Interior to review and recommend areas for wilderness designation. 43 U.S.C. § 1782. Once designated as wilderness areas, those public lands would be used and administered in accordance with provisions of the Wilderness Act which apply to National Forest wilderness areas. Id.

In general, FLPMA sets out the goals and management objectives for public lands. In FLPMA, Congress makes it clear that the public lands will be managed for multiple use and sustained yield. See 43 U.S.C. § 1732(a). In the beginning of the Act, Congress included wilderness preservation as but one of these multiple purposes, when it declared that it was the policy of the United States that:

the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. . . . (Emphasis added.)

43 U.S.C. § 1701(a)(8).

The District of Columbia Circuit rejected an argument by the Sierra Club that this language in FLPMA effected a reservation of land that conferred by implication federal reserved water rights in waters appurtenant to the BLM lands reserved. Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981). Specifically, the Circuit Court found that FLPMA, while setting forth the "purposes, goals and authority for the use" of the public domain, did not establish a reservation from the public domain that brought with it reserved water rights. Id. at 206.

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purposes "supplement but do not interfere with the purposes of the National Forest Act of 1897 or the Multiple Use-Sustained Yield Act.") (Statement of the Chairman.)

The specific provisions in FLPMA providing that other public domain land would be designated as wilderness areas must be reviewed in light of the court's interpretation of these general provisions of the Act setting out its scope and affect. This review inevitably concludes that the preservation of wilderness on BLM lands is not the primary purpose for those lands.

Even if those specific sections in FLPMA relating to wilderness designations are viewed in isolation, i.e., without recourse to the Act's policy statements described above, the conclusion with regard to purposes is the same. The wilderness sections of FLPMA refer back to the Wilderness Act, specifying that BLM wilderness areas are to be used and administered according to provisions applicable to National Forests. 43 U.S.C. § 1782(c). As discussed above, the provisions applicable to National Forests mandate multiple use, with wilderness purposes being but one management goal. The same multiple use mandate likewise must apply to BLM wilderness areas, and, likewise, must preclude a finding that wilderness purposes are primary on BLM lands.

It has been argued that the prohibition of certain activities in areas designated as wilderness evidences congressional intent to make the preservation of wilderness the primary purpose for the lands upon which the areas are designated. For example, the Wilderness Act prohibits commercial enterprise, motorized and mechanical vehicles, equipment and transport, and structures and installations within wilderness areas. Section 4(c); 16 U.S.C. § 1133(c). This argument fails to persuade, however, in that it ignores the multitude of other uses that are not prohibited, and thus are allowed, in those areas. The Act makes clear that the other purposes for which the lands on which wilderness areas are designated, e.g., park and forest purposes, are to be continued. Section 4(b), 16 U.S.C. § 1131(b).<sup>48/</sup> Furthermore, a prohibition on certain activities is insufficient to overcome the clear intent of Congress to make wilderness purposes secondary when it used the "within and supplemental" language in section 4(a) of the Wilderness Act.

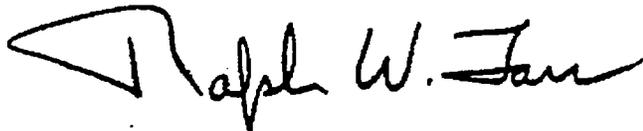
Here, then, as in New Mexico, Congress intended that wilderness areas "be administered for broader purposes [after the enactment] but there is no indication that it believed the new purposes to be so crucial as to require a reservation of additional water." 438 U.S. at 715. Therefore, our conclusion must be the same as that reached in New Mexico--Congress did not intend to create reserved water rights for wilderness areas under the Wilderness Act of 1964.

<sup>48/</sup> Another flaw in this "primary purposes" argument is that it looks mistakenly at the primary purposes for wilderness areas, not at the primary purposes for the lands on which a wilderness area may be designated. A broader view brings into perspective the true relationship between wilderness and other purposes.

V. CONCLUSION

We believe that the better legal view with regard to the creation of federal reserved water rights in wilderness areas is that Congress intended not to reserve water for those areas. Section 4(d)(7) clearly evidences a desire to avoid creating a reservation of water additional to that already created for the underlying parks, forests, and refuges. Further, section 4(a) plainly assigns wilderness purposes to a secondary position. To the extent that wilderness areas are in need of water to achieve their purposes, such water may be acquired by purchase or by appropriation for wilderness or related purposes (e.g., instream flows for fish and wildlife purposes) under applicable state law. In addition, Congress can expressly reserve water for any wilderness area.

To the extent that the Prior Opinion is inconsistent with these conclusions, it is modified and superseded.

A handwritten signature in cursive script that reads "Ralph W. Tarr". The signature is written in dark ink and is positioned above the printed name.

Ralph W. Tarr