

# CRS Report for Congress

## WILDERNESS AREAS AND FEDERAL WATER RIGHTS

Pamela Baldwin  
Legislative Attorney  
American Law Division

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### SUMMARY

Whether designation of an area for inclusion in the National Wilderness Preservation System gives rise to federal water rights for wilderness purposes will be an important and controversial issue as Congress considers the designation of new wilderness areas. The issue is of practical as well as academic importance because some of the areas now being studied and proposed for wilderness designation either have no other federal reserved water rights, or are on the middle of the relevant water source, and hence the federal water rights for the areas will affect other water right holders along the same water source.

The Supreme Court has said that when Congress reserves federal lands by withdrawing them and dedicating them to particular purposes, water necessary to carry out those purposes also is impliedly reserved. Whether designation of an area as wilderness is a reservation of land for which water rights impliedly are reserved, or whether Congress may have waived federal water rights by certain language in the Wilderness Act are questions that have been the subject of recent litigation and an Opinion rendered by the Solicitor of the Department of the Interior and concurred in by the Attorney General. The District Court for Colorado has concluded that wilderness designation does give rise to federal water rights; the Solicitor has concluded that such designation does not result in federal water rights.

The principal focus of controversy is section 4(d)(6) (originally 4(d)(7)) of the Wilderness Act which states that nothing in the Act "shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."

This report analyzes this and other provisions of the Wilderness Act and its legislative history, the reasoning of the federal District Court and the Solicitor, and concludes that it is more likely than not that wilderness designation will be held to give rise to federal water rights.

However, because of the factual circumstances that characterize the wilderness areas currently under study, it is possible that Congress will consider expressly addressing water issues in future wilderness legislation, regardless of judicial interpretation of the Wilderness Act itself. Some of the problems of wilderness areas that are located midcourse on water sources and possible mechanisms to address these problems also are discussed.

## TABLE OF CONTENTS

<b>WILDERNESS AREAS AND FEDERAL WATER RIGHTS</b> . . . . .	<b>1</b>
Introduction . . . . .	1
Background . . . . .	1
Federal Water Rights . . . . .	3
The National Wilderness Preservation System . . . . .	7
Analysis of Wilderness Water Rights . . . . .	11
Use of Legislative History . . . . .	13
Summary of Arguments . . . . .	16
Does Designation of a Wilderness Constitute a Reservation of Land? . . . . .	18
Section 4(d)(6) . . . . .	26
Section 4(d)(6) - Legislative History . . . . .	27
Section 4(d)(6) - Later Enactments Using the Same Language . . . . .	37
Section 4(d)(6) - Conclusion . . . . .	44
Possible Features of a Federal Wilderness Water Right . . . . .	44
Prospective Problems . . . . .	48
Summary and Conclusion . . . . .	50

## **WILDERNESS AREAS AND FEDERAL WATER RIGHTS**

### **Introduction**

Attention has been focused recently on whether the designation of an area for inclusion in the National Wilderness Preservation System gives rise to federal water rights. A federal district court has ruled that federal water rights do exist for wilderness areas. However, the Solicitor of the Department of the Interior recently concluded that designation does not give rise to federal water rights, and former Attorney General Edwin Meese approved this Opinion shortly before leaving office.

The issue is of practical as well as academic importance as Congress considers the possible designation of new wilderness areas. Some of the lands now being considered for wilderness designation either have no other federal reserved water rights, or are in the middle of the relevant water source, and hence the federal water rights for the areas will affect other water right holders along the same water source. Whether the wilderness areas do or do not have federal reserved water rights, and what the attributes of those rights might be affects the policy and drafting choices facing Congress as new wilderness legislation is considered.

This report discusses federal water rights in general, the development of the National Wilderness Preservation System, and whether the courts are likely to find federal water rights to exist as a result of the wilderness designation of an area. It also discusses the possible characteristics of federal wilderness water rights, how such rights might relate to the use of water under state law systems, and possible alternatives for addressing the issue expressly in future wilderness bills.

### **Background**

The federal government today administers approximately 730 million acres of land in the United States.<sup>1</sup> Many of these federal lands are located in the western part of the country where water is in short supply. Many

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<sup>1</sup> Public Land Statistics 1983, General Services Administration.

water sources either arise on federal lands or flow through them, and both the federal and nonfederal lands have various water needs.

The acquisition of the western lands by the United States greatly expanded the territory, wealth, and strength of the new nation. The manner in which lands were obtained by the federal government gave rise to differences in the terminology used in federal land laws. The lands that the federal government obtained from another sovereign are called "public domain" lands or "public lands". Those lands that the government obtained from a state or private individual are referred to as "acquired" lands. Although the terms are not always used consistently, different laws may apply to each type of lands, and the distinction may also be relevant to an analysis of water rights.

Early federal land laws alternately disposed of the public domain lands in order to raise money and encourage transportation, development, and settlement, or "withdrew" the lands from the operation of the disposal laws. Some lands that were withdrawn were set aside or "reserved" for a particular purpose or purposes. Examples of reservations are national forests, national parks, and national monuments. As the West became increasingly populated, the emphasis of the land laws shifted from disposal, albeit with significant areas reserved for conservation purposes, to retention of lands in federal ownership, with various private uses permitted. This policy of retention was expressly stated in the Federal Land Policy and Management Act (FLPMA) in 1976.<sup>2</sup>

FLPMA also established a comprehensive system of management for the remaining western public lands by the Bureau of Land Management (BLM) in the Department of the Interior. The national forests are managed by the Forest Service (FS), which is in the Department of Agriculture. As will be discussed, lands managed by either the FS or BLM may become wilderness areas, as may lands within national parks, wildlife refuges, and game ranges, all of which are managed by agencies within the Department of the Interior.

Congress has the power to create federal water rights, either expressly or by implication. The courts have implied "federal reserved water rights" for federal lands that are withdrawn from the operation of the general sale and disposal laws and dedicated to a particular purpose for which water is necessary. These federal rights are independent of state law, may have

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<sup>2</sup> Act of October 21, 1976, Pub. L. 94-579, 90 Stat. 2743, codified at 43 U.S.C. 1701 *et seq.*

features that differ from water rights obtained under state law, and make certain quantities of water unavailable for state or private use. The federal government also may obtain water rights under state law, in the same way that any other property owner in a state can. However, there may be instances when features of water rights under state law may not adequately serve federal purposes. For example, instream flow rights for wildlife or scenic purposes may not be a recognized use for which a right may be obtained under state law.

In 1964, Congress passed The Wilderness Act<sup>3</sup> to create a National Wilderness Preservation System to protect certain undeveloped federal lands in their natural state. Originally, only national forest lands were designated and these lands have underlying federal reserved water rights for forest purposes. Initially too, the areas designated for protection under the Act were at the headwaters of the water courses. Therefore, until recently attention was not focused on whether the areas might have additional water rights resulting from the wilderness designation. The issue has become of increased importance as areas managed by the Bureau of Land Management (BLM) that may not have other federal reserved water rights, and areas in the middle of water courses (whether BLM or national forest lands) are now being considered for possible wilderness designation. The questions of what rights wilderness areas may already have and of how to address water issues in state-by-state wilderness bills to be considered by Congress have become of pressing concern.

### Federal Water Rights

Federal authority over water may derive from several constitutional powers. From the earliest cases, Congress has been held to have extensive power to regulate navigation and water commerce under the "Commerce Clause", Art. I, Section 8, Clause 3 of the Constitution.<sup>4</sup> More recently, the Supreme Court has held that water itself is an article of commerce and hence *per se* subject to federal regulation.<sup>5</sup>

Nor is the commerce power the sole source of Congress' power to regulate water. Art. I, Section 8, Clause 1 authorizes Congress to levy taxes "to pay

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<sup>3</sup> Act of September 3, 1964, Pub. L. 88-577, 78 Stat. 890, codified at 16 U.S.C. 1131 *et seq.*

<sup>4</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1924).

<sup>5</sup> *Sporhase v. Nebraska*, 458 U.S. 941, 953 (1982).

the Debts and provide for the common Defence and general Welfare of the United States." The full scope of the power to spend for the general welfare has not been extensively explored, but has been held to be an adequate basis for a massive federal reclamation project.<sup>6</sup> The war powers also may play a role in federal water allocation and regulation.<sup>7</sup>

Congress also has considerable authority over water under the "property power" of Art. IV, section 3 of the Constitution. The Supreme Court has said: "We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."<sup>8</sup> To the extent the federal government did not dispose of all of its property rights, it retains them, and the power of Congress over federal property is plenary.

Although Congress in a series of terse statutes pregnant with meaning, severed water rights from title to land obtained from the federal government so that state law governs the water rights obtained by federal patentees, the federal government did not so restrict itself.<sup>9</sup> Yet the federal government has repeatedly demonstrated a sensitivity to the need for stability in the states' regulation of their water supplies by frequently deferring to state law.<sup>10</sup>

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<sup>6</sup> United States v. Gerlach Live Stock Company, 339 U.S. 725 (1950).

<sup>7</sup> Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

<sup>8</sup> Arizona v. California, 373 U.S. 546, 560 (1963).

<sup>9</sup> "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; ..." Act of July 26, 1866, ch. 262, § 9, 14 Stat. 253, Rev. Stat., § 2339, 43 U.S.C. 661. "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section." Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218, Rev. Stat. § 2340, 43 U.S.C. 661. Act of March 3, 1877, ch. 107, 19 Stat. 377, as amended, 43 U.S.C. 321 *et seq.*, permitting appropriation of water for arid lands. See California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 155 (1935).

<sup>10</sup> See United States v. New Mexico, 438 U.S. 696 (1978), n. 5 at 702 where the Court cites the Hearings on S. 1275 before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess., 302-310 (1964) listing 37 statutes "in which Congress recognized the importance of deferring to state water law...."

Nevertheless, when the federal government legislates, state law to the contrary must yield to federal law under the "supremacy clause", Art. VI, Clause 2 of the Constitution. Whether state law is contrary to federal law and hence preempted, may not be a simple question. If Congress addresses the issue expressly, preemption analysis is facilitated. If Congress is silent, a reviewing court must analyze whether preemption is implied by the structure, purposes, policies, subject matter, and provisions of the act in question. State law must yield if the state policy produces a result inconsistent with the objective of the federal statute, conflicts with the federal statute, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>11</sup>

The U.S. Supreme Court has held that federal water rights exist when such rights are necessary to carry out a federal purpose relating to federal property. However, federal water rights cases are relatively few and the precise nature of the analytical underpinnings is less than clear. For this reason, and because of the value of water as a critical resource, the specific applications of the holdings to date always generate controversy, and certainty is elusive.

Beginning with the statement in *United States v. Rio Grand Dam & Irrigation Company*,<sup>12</sup> the Court said that the United States had a right "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." This language was cited and interpreted broadly in the *Winters* case: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be."<sup>13</sup>

In *Winters*, the Court held that water sufficient to carry out the purpose of an Indian reservation was reserved when that reservation was created. It was not clear at the time of the *Winters* case, whether a more general rule as to water rights associated with other federal land reservations was intended. The "Pelton Dam" case added to the implications of the *Winters* case by holding that the federal land laws that had severed water rights from the land

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<sup>11</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) and see generally *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947) and additional cases cited there.

<sup>12</sup> 174 U.S. 690, 703 (1899).

<sup>13</sup> *Winters v. United States*, 207 U.S. 564, 577 (1908).

conveyed to federal patentees did not apply to reserved lands.<sup>14</sup> This meant that state law did not control the disposition of water on federal reservations. Later cases put these pieces together into the following rule:

This Court has long held that *when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.* In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams. *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 805 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520, 522-523 (1971); *Arizona v. California*, 373 U.S. 546, 601 (1963); *FPC v. Oregon*, 349 U.S. 435 (1955); *United States v. Powers*, 305 U.S. 527 (1939); *Winters v. United States*, 207 U.S. 564 (1908). (Emphasis added.)<sup>15</sup>

The cases cited inferred a federal reserved water right if water was necessary to carry out the purpose of the federal reservation. The cases also indicate various features of a federal water right: that it is for water that is *unappropriated* at the time of the federal reservation; the federal right generally has a priority as of the date of the federal reservation; the right is for a quantity sufficient to carry out the federal purposes; and the right is not lost if it is not put to immediate use. As to the last two features listed, and in other aspects as well, the federal water right may differ from a right acquired under state law.<sup>16</sup>

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<sup>14</sup> *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955).

<sup>15</sup> *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

<sup>16</sup> Federal water rights may differ from water rights under the laws of any particular state, which may emphasize either "riparian" or "appropriation" features. A discussion of the differences between appropriation and riparian systems of law is not necessary for the purposes of this paper. It can be noted, however, that under the riparian system, the right to use water usually is a right incident to the ownership of land that abuts the water source. The right is usually said to be to make "reasonable use" of the waters, although recognized uses may vary under state law. Each riparian owner has the same

The federal government may, of course, apply for water rights under state law just as any other property owner in a state may. However, there may be instances when a right acquired under state law may not serve the federal purposes as well as a federal right. For example, some state laws require a diversion of water or other water improvement as a precondition to obtaining a recognized right and such facilities might not be desirable for the federal purposes, as in a federal wildlife area intended to be maintained in natural condition. Even states that do recognize an "instream" right (a right to a certain amount of water that is simply allowed to remain in the stream course), may rank fish and wildlife purposes very low, behind many other preferred uses, with the result that the federal fish and game use would never receive a water right.

### **The National Wilderness Preservation System**

As has been discussed, historically Congress seldom expressly addressed the creation of water rights in the major land management statutes, and therefore, the courts relied on the implied rather than express intent of Congress as to their creation. The Supreme Court has emphasized an examination of the purposes for which federal land reservations were created, and whether water appears to be necessary to carry out those purposes. Therefore, this factor will be explored in considerable detail in the following overview of the evolution of the National Wilderness Preservation System.

In 1891, Congress granted the President the authority to establish forest reserves.<sup>17</sup> In the Organic Administration Act of 1897, Congress stated that the purposes of the forest reserves are:

... to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States.<sup>18</sup>

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right, the right is not lost through disuse, and all right holders share in times of shortage. In contrast, in an appropriation state the right to use water is not dependent on ownership of adjacent land, the right is for a particular quantity and use, and may be lost through disuse. Holders of water rights are ranked as to their entitlement, with earliest users having "priority" over later users, such that the later users may not receive water in times of drought.

<sup>17</sup> Act of March 3, 1891, ch. 561, 26 Stat. 1103, since repealed.

<sup>18</sup> Act of June 4, 1897, ch. 2, 30 Stat. 35.

Although the primary purposes of the national forests, as stated above, were the improvement and protection of the forests, the production of timber, and the securing of favorable conditions of water flows,<sup>19</sup> the forest reserves also were used for various other purposes such as wildlife conservation, recreation, and grazing. Other areas within the larger forests remained in a natural, wilderness condition and were administratively classified as such in the planning processes of the FS.

The Organic Act did not specify details as to the management of particular areas within the forests. In 1929 the Secretary of Agriculture by regulation L-20 authorized the Chief of the Forest Service to set aside primitive areas within the national forests where no permanent construction or occupancy under special use permits would be allowed except as specifically authorized by the Chief or the Secretary.<sup>20</sup>

In 1939, regulation L-20 was revoked and new regulations U-1 and U-2 providing for the establishment of "wilderness" and "wild" areas were promulgated. These classifications distinguished the types of areas by size, but imposed strict use limitations on both, including the prohibition of commercial timbering and the building of roads. These administrative wilderness classifications gave rise to legislative proposals to recognize wilderness areas, in part to protect them from future administrative reclassification, and in part to control the process of designation.

In 1960, Congress recognized the multiplicity of uses occurring in the national forests by enacting the Multiple Use-Sustained Yield Act (MUSYA).<sup>21</sup> This Act states that it is the "policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."<sup>22</sup> These purposes were declared to be supplemental to, but not in derogation of, the purposes for

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<sup>19</sup> The Supreme Court has interpreted the 1897 Act as stating that there are only two purposes of national forests: the improvement and protection of the forests "or *in other words*, for the purpose of securing favorable conditions of water flows or to furnish a continuous supply of timber." *United States v. New Mexico*, 438 U.S. 696, 707 (1978).

<sup>20</sup> For a history of the development of the wilderness concept, see H.R. Rep. 2521, 87th Cong., 2d Sess. 11 (1962).

<sup>21</sup> Act of June 12, 1960, Pub. L. 86-517, 74 Stat. 215, codified at 16 U.S.C. 528-531.

<sup>22</sup> 16 U.S.C. 528.

which the national forests were established. The renewable surface resources of the national forests are to be managed for multiple use and sustained yield of the several products and services obtained therefrom, giving due consideration to the relative values of the various resources in particular areas. The definition of "multiple use" states that "some land will be used for less than all of the resources" and that the uses that may be made of some land is "not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output."<sup>23</sup>

Furthermore, MUSYA expressly recognizes *administrative* wilderness as a legitimate use of some national forest lands: "The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of this Act."<sup>24</sup>

Nevertheless, in 1964 Congress enacted the Wilderness Act<sup>25</sup> to create a National Wilderness Preservation System and give legislated protection to certain wilderness areas. Under the terms of the Act, national forest areas classified as "wilderness", "wild", or "canoe" areas at the time of enactment became units of the new Wilderness System. In addition, the FS was to conduct a study of "primitive" forest areas and submit recommendations for wilderness designations to the President, who in turn was to submit to Congress recommendations for the inclusion of additional areas. Similarly, the Secretary of the Interior was to review roadless areas of five thousand contiguous acres or more in the national parks, national monuments, other units of the national park system, national wildlife refuges, and game ranges and submit recommendations to the President. After the enactment in 1976 of section 603 of FLPMA, certain of the public lands managed by BLM also were to be reviewed for suitability for wilderness designation.

Designated wilderness areas continue to be managed by the department and agency having jurisdiction before designation. The Act states that the purposes of the Act are "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."<sup>26</sup> Nothing in the Act "shall be deemed to be in interference with the purpose for which national forests are

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<sup>23</sup> 16 U.S.C. 531.

<sup>24</sup> 16 U.S.C. 529.

<sup>25</sup> Act of September 3, 1964, Pub. L. 88-577, 78 Stat. 890, codified at 16 U.S.C. 1131 *et seq.*

<sup>26</sup> *Id.* Section 4(a).

established as set forth in the Act of June 4, 1897... and the ...[MUSYA].<sup>27</sup> Nor shall anything in the Act "modify the statutory authority under which units of the national park system are created...." Designation "shall in no manner lower the standards evolved for the use and preservation of such park..."<sup>28</sup>

The Act states that it is the policy of Congress to secure the benefits of an enduring resource of wilderness areas, which are those areas:

...where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain... undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable.<sup>29</sup>

As to the management of wilderness areas the Act states:

Except as otherwise provided in this Act, 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.<sup>30</sup>

Other provisions of the Act specifically restrict the extent to which roads may be built, motor vehicles or motorized equipment may be used, or structures may be built within a designated area. Mineral development was allowed for a specified length of time, then terminated except for valid existing rights. Water resource related projects and other public projects are allowed, but must be authorized by the President after a determination that

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, section 2.

<sup>30</sup> *Id.*, section 4(b).

the proposed use in a specific area "will better serve the interests of the United States and the people thereof than will its denial."<sup>81</sup>

### **Analysis of Wilderness Water Rights**

In analyzing whether a statute gives rise to federal water rights, courts historically have looked to the express provisions of the act, whether lands are reserved for federal purposes, what the purposes of the reservation are, whether water is essential to carry out those purposes, and, if the relevant provisions are ambiguous, to the legislative history.

Whether designation of an area for inclusion in the National Wilderness Preservation System is a "reservation" of land and, if so, for what purposes, and whether Congress effectively waived any associated federal water rights are critical questions that will be discussed in this report.

The Solicitor of the Department of the Interior has recently issued an opinion<sup>82</sup> that was approved by Attorney General Edwin Meese shortly before he left office. The opinion concludes that designation of an area for inclusion in the National Wilderness Preservation System does not give rise to federal reserved water rights. Because the Solicitor's Opinion has generated discussion recently, because it undoubtedly will carry weight in future analyses of the issues, and because it provides a framework within which to discuss the questions set out above, the Opinion will be reviewed in considerable detail.

The Opinion focuses especially on section 4(d)(6)<sup>83</sup> of the Wilderness Act, which states:

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. (Emphasis added).

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<sup>81</sup> *Id.*, section 4(d).

<sup>82</sup> M-36914 (Supp.III), *Federal Reserved Water Rights in Wilderness Areas*, July 26, 1988, referred to herein as the "Solicitor's Opinion" or the "Opinion".

<sup>83</sup> This section originally was enacted as section 4(d)(7). The Act of October 21, 1978, Pub. L. 95-495, 92 Stat. 1650 repealed former item (5) of section 4(d) (relating to the Boundary Waters Canoe Area) and renumbered the remaining items. Therefore, the correct reference is to section 4(d)(6), but some of the quotations in this report may refer to the provision as section 4(d)(7).

This language is the only express language in the Wilderness Act relating to water law. The Opinion concludes that the provision is properly interpreted as preserving preexisting federal water rights, but waiving creation of any new federal water rights for wilderness areas. Section 4(d)(6) and the arguments as to its interpretation will be discussed fully later in this report.

The legislative history of the Wilderness Act figures heavily in the analysis and reasoning of the Opinion, but some of the ways in which the Opinion uses the legislative history of the Act may be questioned.

For example, the Opinion states that "[I]n 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."<sup>34</sup> For this statement the Opinion cites page 700 of *United States v. New Mexico*, but no such admonition appears at that page of that opinion. Rather, the Supreme Court stated in that case and in other cases involving possible federal reserved water rights, that inquiry should be addressed to the purposes of the reservation *vis a vis* the extent and nature of the water right asserted:

Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.<sup>35</sup>

Although the inquiry into the purposes of the reservation may entail a review of the legislative history, this is an important difference in emphasis. The analysis that the Court has done in past cases appears to be a variety of preemption analysis--to ascertain if implementation of the federal purposes in establishing the reservation in question necessitates the implication of a federal water right to carry out those purposes, thereby preempting state water law that otherwise would apply to whatever amount of water is necessary for the federal reservation. The intent to create water rights has been ascertained by an examination of the federal purposes, which examination may include a review of the relevant legislative history. In past cases the courts have not searched the legislative history seeking only comments indicating an intent to create water rights, and it has not been true that an absence of verbalized intent to create water rights expressed in the

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<sup>34</sup> Solicitor's Opinion, at 8 (emphasis added).

<sup>35</sup> *United States v. New Mexico*, 438 U.S. at 700.

legislative history is conclusive proof that an intent of Congress to reserve water may not otherwise be implied. Rather, the intent as to water rights has been deduced from the overall purposes of the land reservation itself.

The Solicitor's Opinion also states that:

Further, a reservation and need for water cannot overcome legislative history that evidences an intent to disclaim the creation of new reserved water rights.<sup>36</sup>

This is a very broad statement for which no cases are cited. How a court would regard clear expressions of an intent to waive water rights that appeared only in the legislative history of a measure that otherwise created a reservation for which water appeared essential is an open question. It is true that the Supreme Court recently has emphasized the historical deference Congress has shown to state control of water allocation.<sup>37</sup> However, an interpretation that overrides statutory language and purposes in favor of contrary evidence expressed only in legislative history appears to be a reversal of the usual rules of statutory construction.<sup>38</sup> This seems especially true if the evidence in the legislative history is ambiguous and could be interpreted in more than one way.

Whether one agrees with the extent and manner in which the Solicitor's Opinion relies on the use of legislative history, it is necessary to review that use in detail in order to discuss the Opinion. Also, certain preliminary comments on the use of legislative history by courts are in order.

#### *Use of Legislative History*

Some courts are reluctant to consider legislative history at all, regarding the final language of the statute as the best evidence of the collective will of the enacting Congress. If the meaning of a statutory provision is clear on its face, a court generally is said to have no recourse to the legislative history of the provision. If a court finds a provision to be ambiguous, or subject to more than one interpretation, it may examine the legislative history in order

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<sup>36</sup> Solicitor's Opinion, n. 9 at 6.

<sup>37</sup> See e.g. *United States v. New Mexico*, *supra*; *California v. United States*, 438 U.S. 645 (1978); *Utah v. United States*, 482 U.S. \_\_\_, 107A S.Ct. 2318 (1987).

<sup>38</sup> See, e.g. 2A Sutherland Statutory Construction § 46.01 (Sands, 4th ed.).

to attempt to ascertain the meaning intended by Congress. In actual practice, however, it seems likely that courts do consider legislative history before deciding whether a statute is clear on its face.

When recourse is made to the legislative history, courts normally accord different weight to different elements of the legislative history.<sup>39</sup> These differences reflect an effort to give greatest weight to those elements considered to be most probative of the collective intent of the enacting Congress and least weight to the opinions of outsiders or of single Members of Congress, since these are less likely to shed light on the collective intent of Congress. For this reason, greatest weight is given to the reports of the committees with jurisdiction over a measure and to the explanations of provisions by Members who served on the committee considering the bill, especially the Chairman. Comments by the Member managing the bill on the floor or by a sponsor of a bill also are given greater weight than are the comments of other Members.

As noted, committee report explanations are considered more persuasive and reliable than statements that are made during floor debates.<sup>40</sup> The reports have been said to represent "the considered and collective understanding of those Congressmen involved in drafting and studying the proposed legislation."<sup>41</sup> Committee reports are "presumably well considered and carefully prepared."<sup>42</sup> Committee reports are given greatest weight when they speak directly to the statutory language in question, and less weight when they digress into general commentary and associated exhortations and directives.<sup>43</sup> The report of a conference committee is "especially persuasive

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<sup>39</sup> See the Congressional Research Service report to Congress: *Sources of Legislative History as Aids to Statutory Construction*, by George A. Costello, August 7, 1986. CRS Report to Congress No. 86-842A.

<sup>40</sup> In re Evans, 452 F. 2d 1239 (D.C. Cir. 1971, cert. denied United States v. Evans, 408 U.S. 930; American Airlines, Inc. v. C.A.B., 365 F. 2d 939 (D.C.Cir. 1966); Federal Trade Commission v. Manager, Retail Credit Co., 515 F. 2d 988 (D.C.Cir. 1975).

<sup>41</sup> Zuber v. Allen, 396 U.S. 168, 186 (1969), quoted with approval in Garcia v. United States, 469 U.S. 479, 483 (1984).

<sup>42</sup> Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 396 (1951)(concurring).

<sup>43</sup> Secretary of the Interior v. California, 464 U.S. 312, 322 n.9 (1984).

evidence of congressional intent [because it] represents the final word on the final version of a statute."<sup>44</sup>

Statements made by Members during general debate on a bill are considered less persuasive than the committee reports, especially if the committee report and a floor statement conflict. Floor comments generally are considered to "reflect at best the understanding of individual Congressmen."<sup>45</sup> As the Supreme Court has explained, "[i]n construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of proposed laws."<sup>46</sup> Within the category of floor debate, the statements of sponsors and floor managers are given the most weight. Statements by Members not associated with formulation or committee consideration of the bill are entitled to little weight, and statements by bill opponents are not usually taken at face value. "Fears and doubts of the opposition are no authoritative guide....It is the sponsors that we look to when the meaning of statutory words is in doubt."<sup>47</sup> Nonetheless, if opponents are in general agreement with sponsors as to the purpose or effect (if not the desirability) of statutory language then this general consensus can be significant.<sup>48</sup>

Hearings records are often voluminous and this fact diminishes "the probative force of particular entries."<sup>49</sup> However, if the views presented at a hearing may be characterized as the opinions of drafters of provisions, this gives the statements greater weight, especially if other sources of the legislative history do not indicate congressional intent on a particular issue. This situation could arise if interested parties urge changes in a law or proposal and the changes are adopted. If so, the views of interested parties may be taken into account, especially if the committee reports or floor debates

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<sup>44</sup> *Planned Parenthood Fed. v. Heckler*, 712 F. 2d 650, 657 (D.C. Cir. 1983).

<sup>45</sup> *Zuber v. Allen*, 396 U.S. 168, 186 (1969).

<sup>46</sup> *S & E Contractors v. U.S.*, 406 U.S. 1, 13 n.9 (1972).

<sup>47</sup> *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951).

<sup>48</sup> *Arizona v. California*, 373 U.S. 546, 583 n. 85 (1963).

<sup>49</sup> Sutherland, *Statutes and Statutory Construction*, § 48.10 (Sands 4th ed., 1984 revision).

are silent on the issue.<sup>60</sup> On the other hand, views of lobbyists in opposition to a bill are, just as are the views of opposing Members, "entitled to little weight," since opponents "in their zeal to defeat a bill...tend to overstate its reach."<sup>61</sup>

The language and structure of the Wilderness Act as a whole and as it relates to water, together with relevant legislative history will now be reviewed, and conflicting interpretations discussed.

### *Summary of Arguments*

Those who conclude that designation of an area for inclusion in the National Wilderness Preservation System does give rise to federal reserved water rights for the area point to the fact the designation under the Wilderness Act is a reservation of the lands for wilderness purposes, just as lands are reserved for park, forest, national monument or other specific purposes. Furthermore (this side of the argument continues), although Congress did not expressly reserve water in the Wilderness Act, the reservation of lands for wilderness purposes necessarily includes the reservation of water in order to preserve the natural wilderness character and ecology of the protected lands, because otherwise the purposes of designating wilderness areas would be totally frustrated. Proponents of this argument assert that the "claim or denial" language of section 4(d)(6) of the Act preserves the status quo as to the legal principles -- the *law* of water rights -- by which the issue of possible federal water rights is to be analyzed. Under these principles of law, federal water rights to unappropriated water may be implied if such rights are necessary to carry out the purposes of the federal reservation, and state law applies to whatever quantity of water may be available beyond the amount necessary to carry out the purposes of the areas reserved by Congress.<sup>62</sup> This interpretation of section 4(d)(6) is borne out by the legislative history of the Wilderness Act and by the use of identical language in the Wild and Scenic Rivers Act.

Those who conclude that designation of an area for inclusion in the National Wilderness Preservation System does *not* give rise to federal water

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<sup>60</sup> See, Dawson Chemical Co. v. Rohm & Haas, 448 U.S. 176 (1980).

<sup>61</sup> Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n. 24 (1976).

<sup>62</sup> That this was the view of the Supreme Court on the principles to apply was clarified before passage of the Wilderness Act in Arizona v. California, 373 U.S. 546 (1963).

rights have made several arguments. One is that designation of an area as wilderness is not a reservation of lands and hence cannot give rise to reserved water rights. Rather, the Wilderness Act is seen as a land management statute only. Proponents of the view that designation does not give rise to water rights also conclude from some of the legislative history of the "neither claim nor denial" language of section 4(d)(6) of the Wilderness Act that Congress intended that state law apply to water in wilderness areas and that no federal water rights for wilderness purposes be created. This interpretation is seen as bolstered by the absence of express intent *in the legislative history* to create water rights, and by evidence in the legislative history that state law was to apply. This point of view has been represented most recently in the Solicitor's Opinion referred to above.

Most of the arguments for and against the existence of wilderness water rights were aired in *Sierra Club v. Block (Sierra Club I)*,<sup>53</sup> most recently styled *Sierra Club v. Lyng (Sierra Club II)*,<sup>54</sup> to date the only case in which there is a written opinion analyzing the various arguments proffered on the water rights issue.<sup>55</sup> In this case, the Sierra Club challenged the failure of the National Forest Service to file for reserved water rights for a wilderness area. The Federal District Court for Colorado decided that the failure of the Forest Service to assert federal reserved rights was reviewable,<sup>56</sup> and then addressed whether any such rights existed, a question it answered in the affirmative, after analyzing the arguments set out above.<sup>57</sup>

These interpretations will now be examined more fully, a process that, as noted, will require a rather more detailed examination of the legislative history of the Wilderness Act than is usual.

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<sup>53</sup> 622 F. Supp. 842 (D.Co. 1985).

<sup>54</sup> 661 F. Supp. 1490 (D.Co. 1987).

<sup>55</sup> The Federal District Court in New Mexico has affirmed a report by a special master finding that no federal reserved water rights are created under the Wilderness Act in *New Mexico v. Molybdenum Corporation of America*, CV 9780C (D.N.Mex. February 2, 1988), but no written opinion of the court has been issued to date.

<sup>56</sup> *Sierra Club v. Block*, 615 F. Supp. 44, 45-48 (D. Co. 1985).

<sup>57</sup> *Sierra Club v. Block*, 622 F. Supp 842 (D. Co. 1985).

*Does Designation of a Wilderness Constitute a Reservation of Land?*

Various intervenors in *Sierra Club I* argued that designation of an area for inclusion into the National Wilderness Preservation System is not a reservation of land, and that the Wilderness Act is a mere land management statute that establishes secondary purposes for the lands, as the Multiple Use Sustained Yield Act (MUSYA) does for forest lands.<sup>68</sup> In support of this position, proponents point to section 2(b) of the Act (16 U.S.C. 1131(b)), which provides that the agency having jurisdiction over a wilderness area before designation would continue to administer it after designation unless Congress provided otherwise, and to section 4(a) of the Act (16 U.S.C. 1133(a)), which states that the purposes of the Act are "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...."

In response, one can argue as did the Sierra Club in *Sierra Club I*, that the Wilderness Act is distinguishable from the MUSYA and other management statutes because none of the acts generally regarded as management statutes involve the withdrawal and reservation of lands in furtherance of a particular federal purpose as the Wilderness Act does, and that the whole thrust of the Wilderness Act is to statutorily elevate wilderness to being a primary purpose of the lands involved. Materials relevant to these arguments will now be examined.

A "withdrawal" is the withdrawal of federal public domain lands from the operation of some or all of the federal land disposal laws. The "reservation" of federal lands is the dedication of withdrawn lands to a particular federal purpose. The court in *Sierra Club I* noted that the Wilderness Act was both a withdrawal and reservation of then unwithdrawn lands for wilderness purposes, and was a second layer of reservation of already reserved lands. The court did not see any conceptual problem with a secondary level of

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<sup>68</sup> One of the points consistently put forward on this issue is that the Supreme Court in *U.S. v. New Mexico*, *supra*, held that the purposes of MUSYA were secondary national forest purposes. In fact, the Supreme Court held them to be such only in the context of considering the 1897 Act, and did not offer a conclusion as to whether the purposes set out in MUSYA might properly be viewed as primary purposes of the national forests after 1960. See *U.S. v. New Mexico* at 713-714.

reservation.<sup>59</sup> The court found in the Wilderness Act both restrictions over the uses and disposals that can be made of designated lands, and exposition of specific new federal purposes to which designated lands would be dedicated. For example, the Wilderness Act restricts mining and mineral leasing activities on wilderness areas after a phase out period, restricts commercial enterprises and permanent roads within wilderness areas, restricts expansion of livestock grazing in wilderness areas, and allows diversion or impoundment of water only where the President determines that use of water resources is necessary in the public interest and specifically authorizes such use.<sup>60</sup>

In contrast, mining and mineral leasing generally may be permitted in national forests, as may grazing and water diversions. Furthermore, the Organic Act of 1897 that established the national forests expressly allows water in national forests to be appropriated under state or federal law.<sup>61</sup> Yet the fact that lands within national forests are not generally available for the acquisition of private title, together with the affirmative statement of the specific statutory purposes of the national forests, which are to provide timber supplies and secure favorable conditions of water flows, has always been sufficient for the Supreme Court to find that creation of a national forest constitutes a reservation that implies necessary accompanying federal water rights.

In addition to finding sufficient evidence in the Wilderness Act itself that Congress intended to reserve lands designated for inclusion in the National Wilderness Preservation System, the court in *Sierra Club I* also found numerous references in the legislative history that expressly phrased the effects of designation under the Act as the "reservation" of lands: for example, the references by Members to the study documents that gave impetus to the enactment of the Wilderness Act, which documents themselves referred to the reservation of suitable areas as wilderness.<sup>62</sup> At various times, other Members

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<sup>59</sup> *Sierra Club I*, at 855.

<sup>60</sup> *Sierra Club I*, *supra*, at 854-856.

<sup>61</sup> The Act of June 4, 1897, ch. 2, 30 Stat. 36 states: "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of United States and the rules and regulations established thereunder."

<sup>62</sup> *Sierra Club I*, at 856, citing the report by the Outdoor Recreation Resources Review Commission discussed by Rep. Reid at 110 Cong. Rec. 17446 (1964); and 110 Cong. Rec. 5885-5886 (1964)(statement of Sen. Anderson); and 110 Cong. Rec. 5899 (1964)(statement of Sen. Metcalf).

also referred to their actions as reserving lands.<sup>63</sup> The historical reasons for these references also lend credence to the argument that the Wilderness Act is more than a mere management statute.

As mentioned previously, areas within national forests, national parks, and national wildlife refuges already were being administratively managed as wilderness, but there was concern that these areas could either be reduced by administrative fiat, or possibly unduly expanded as well. Therefore, many Members sought the statutory creation of a new land category to assert Congressional control over the protection of lands as wilderness. In order to refute those critics who characterized wilderness as a new and total "locking up" of lands,<sup>64</sup> various Members repeatedly pointed out that wilderness in fact served several purposes such as wildlife protection, habitat protection, watershed preservation, and scenic, scientific, and recreation purposes. Furthermore, these are all purposes that were recognized and authorized uses under other statutes; hence wilderness was "within" the purposes of the other conservation area designations. However, it was felt that separate Congressionally designated stature for the wilderness use was now necessary in order to "reserve" the lands specifically for that use and elevate the wilderness purpose and protection so that it could not be undone administratively; the Wilderness Act would be "supplemental" to the other underlying management statutes in this way. In other words, the wilderness use was legitimate in that it already was administratively "within" the broader park, forest, and refuge purposes, but now would be elevated to being the primary purpose of the reservations designated for inclusion in the new System, and hence "supplemental" to the previous purposes.

For example, the House Committee on Interior and Insular Affairs report states:

Since 1930 the Secretary of Agriculture and the Chief of the Forest Service have, by administrative action, set aside within

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<sup>63</sup> 110 Cong. Rec. 17448 (1964)(statement of Rep. Springer); 110 Cong. Rec. 17443 (1964)(statement of Rep. Boland); 110 Cong. Rec.17437 (1964)(statement of Rep. Baldwin); 110 Cong. Rec. 17435 (1964)(statement of Rep. Barry).

<sup>64</sup> See *e.g.*, the remarks of Sen. Dominick at 109 Cong. Rec. 5934 (1963): "S. 4 would permanently set aside for exclusive and extremely limited wilderness use some 3 million acres of public lands in Idaho. Much of this acreage has never been objectively evaluated for multiple-use potential. Its mineral potential is virtually unknown. Some of it has not even been surveyed."

the national forests 88 wilderness-type areas, i.e., wilderness, wild, primitive, and canoe.

Having been established by administrative action of the executive branch, any of the wilderness, wild and primitive areas could be similarly declassified and abolished by administrative action. In the alternative the administrators could, if they so desired, change the rules governing the uses allowed or prohibited within such areas.

A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited.

This committee accordingly endorses the concept of a legislatively authorized wilderness preservation system. Furthermore, by establishing explicit legislative authority for wilderness preservation, Congress is fulfilling its responsibility under the U.S. Constitution to exercise jurisdiction over the public lands.<sup>65</sup>

The road to enactment of the Wilderness Act spanned the time from before enactment of the Multiple Use-Sustained Yield Act in 1960 to after it. Before MUSYA, "wilderness" management was created out of whole administrative cloth, based totally on the broad language establishing the various types of conservation areas. MUSYA authorized and expressly recognized wilderness as a legitimate use of national forest lands, a fact that was acknowledged in the 1960 debates on the early Wilderness Act proposals. These discussions clearly recognized that the separate Wilderness Act that also was being considered was therefore clearly "within" the purposes of the other conservation area statutes, but was still needed in order to elevate the wilderness use to a secure and primary purpose of designated areas. In discussing the recognition of *administrative* wilderness management in the newly enacted MUSYA, one Member stated that "wilderness is a multiple use with stature equal to the commercial uses. I do not believe that action on this bill [MUSYA] should or will preclude action on other legislation - the so-called wilderness bill."<sup>66</sup>

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<sup>65</sup> H.R. Rep. 1538, 88th Cong. 2d Sess. (1964) at 7-8; see also S. Rep. 109, 88th Cong., 1st Sess. (1963).

<sup>66</sup> 106 Cong. Rec. 15564 (1960) (statement of Rep. Murray quoting Rep. Miller's comments on MUSYA).

A 1960 version of the Wilderness Act included the following language requiring management of statutory wilderness under MUSYA, language that was described as putting the "wilderness bill in complete accord with the Multiple-Use Act":<sup>67</sup>

In establishing thus a National Wilderness Preservation System to include units within the national forests it is further declared to be the policy of Congress to administer such units in accordance with the Multiple-Use Act of 1960, Public Law 517 of the 86th Congress.<sup>68</sup>

This language was changed in the next Congress to the current "within and supplemental to" language, perhaps because while wilderness management is "within" the MUSYA (and other management statutes), the telescope cannot be turned the other way around--i.e. the more narrow statutory wilderness areas designated under the Wilderness Act cannot be managed for all the other purposes permitted under the MUSYA. This interpretation is borne out by the Committee report from the 87th Congress which states:

[S. 174] leaves all lands under the administration of the agency now in charge and provides no interference with the basic purposes which the areas are now serving....In a large measure, S. 174 gives Statutory sanction and protection to maintenance of the status quo of the Federal wilderness lands involved and provides that the wilderness character of each area finally included in the National Wilderness Preservation System shall not be changed except on authorization at the highest levels of Government-by the President and/or Congress.<sup>69</sup>

The final language on management states that the purposes of the Wilderness Act are within and supplemental to the underlying purposes of the areas (16 U.S.C.1133(a); the Act is not an interference with those purposes (16 U.S.C.1133(a)(1), (2), and (3)); and each agency administering a designated area is "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*" (16 U.S.C. 1133(b), emphasis added).

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<sup>67</sup> 106 Cong. Rec. 15565 (1960).

<sup>68</sup> *Id.*

<sup>69</sup> S. Rep. 635, 87th Cong., 1st Sess. 9-10 (1961). Early versions of the wilderness bills varied as to whether Congress or the President would designate wilderness areas.

Some Members of the House of Representatives in the 87th Congress were concerned precisely because statutory wilderness under S. 174 was a restrictive reservation. The House bill sought to bring all executive withdrawals and reservations of sizable tracts of lands under Congressional control -- a result that was not achieved until the passage of FLPMA in 1976. The House report contrasted the creation of wilderness areas under S. 174 with multiple use as follows:

The Senate-passed bill, S. 174, seeks to treat wilderness preservation as a separate use and would grant to it alone the added strength of legislative stature. This would have the effect of placing the preservation of wilderness areas on higher plane than any other general use.<sup>70</sup>

This language illustrates that while administrative wilderness was one use under the multiple use concept, statutory wilderness designation was an elevation of wilderness use to a position of primacy.

Several Members pointed out that the Wilderness System would not have great and adverse economic impacts on the surrounding communities because the areas to be designated were already withdrawn and were already being managed administratively as wilderness. Therefore, no realistically imminent timber sales or other major economic activities would be affected. Furthermore, existing mining rights and grazing activities were protected, and provision was made in section 4(d)(4) for the President to permit water development projects in wilderness areas.

This balance between the effects of the new protective statutory designation and the minimizing of economic impacts was referred to many times, and was discussed at length in the Senate Report at pp. 12-18.

In contrast to the known effects on areas designated as part of the original Act, at least one Member commented on the uncertainty as to possible effects of designating areas in the future, if then unreserved lands might be designated. The report of the Outdoor Recreation Resources Review Commission had recommended that wilderness areas also be created from public domain lands, many of which are unreserved. This course ultimately was rejected in the original Wilderness Act, but was authorized later when FLPMA was enacted in 1976, which act provided for the wilderness designation of previously unreserved lands managed by the Bureau of Land Management. At the time of considering the Wilderness Act, Sen. Anderson stated:

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<sup>70</sup> H.R.Rep. 2521, 87th Cong., 2d Sess. 22 (1962).

Mr. President, the ORRRC went beyond S. 4, the wilderness bill which is now the pending business of the Senate. After enumerating the types of lands covered by this bill, it reported that:

Congress should take action to assure the permanent reservation of these and similar suitable areas.

It also went beyond S. 4 by suggesting that, in addition to the forest, park, wildlife and game lands covered by S. 4, there should be some areas of the unreserved public domain set aside.

There are no such reserved areas in the unreserved public domain.

We cannot be certain, as we are about areas actually covered by S. 4, that if a wilderness area is designated in the unreserved public domain it will not disturb some economic activity or arrangement.

Where designation of unreserved unrestricted areas are involved, the sponsors of this bill have felt that the same procedure as is followed in establishing a national park - an act of Congress - is the proper procedure. This bill so provides. No unreserved lands, no areas not already restricted as to economic activity, are involved in S. 4. If there is effort to add the additional lands to our wilderness holdings as recommended by the Outdoor Recreation Commission, it will hereafter have to be by an act of this Congress apart from S. 4.

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ORRRC found that the wild, wilderness, primitive, canoe, park, and wildlife areas covered in this bill should be reserved and protected as wilderness through prompt and effective action.<sup>71</sup>

To summarize the reservation issue, considering the Wilderness Act itself -- that only Congress can create a wilderness, that the Act creates a land designation that some might characterize as even more protective overall than that of many national parks, that the Act establishes preservation of the lands and watersheds in their natural state without permanent evidence of man's presence, that the Act elevates the wilderness use from an authorized

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<sup>71</sup> 109 Cong. Rec. 5885 (1963) (remarks of Sen. Anderson). Sen. Anderson was a member of the Senate Interior and Insular Affairs Committee in the 88th Congress, and had chaired the Committee in the 87th.

management option to the primary purpose of the designated lands, and that the Act precludes disposal of designated lands and restricts their uses -- together with the repeated references in the legislative history to the "reservation" of areas of wilderness, it seems more likely than not that other courts considering the question will hold that a wilderness designation is a reservation of land.

The Solicitor's Opinion states that "[W]hile 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."<sup>72</sup>

Although the Solicitor's Opinion disclaims any conclusion as to whether designation of an area as wilderness is a reservation, the Solicitor seems to have concluded that wilderness areas in fact are not reservations, by reasoning backwards from the conclusion that there are no wilderness water rights to the fact that the Wilderness Act therefore must be merely a land management statute and hence not a reservation.

It need not follow, of course, that simply because an area has no federal reserved water rights, it must not be a reservation. The better argument in support of the conclusion the Solicitor sought to achieve would seem to be that even when Congress creates a reservation, Congress can disclaim a reservation of water rights, and has done so on occasion.<sup>73</sup> This point is mentioned in a footnote in the Solicitor's Opinion:

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

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<sup>72</sup> Solicitor's Opinion, n. 42 at 32 (Emphasis added). We note that a reservation of land may not be necessary to the creation of some federal water rights. See the discussion of this point later in this report under the heading "Possible Features of a Federal Wilderness Water Right."

<sup>73</sup> See, e.g., Pub. L. 100-550, 102 Stat. 2749 in which Congress expressly created certain water rights, relinquished others and stated forthrightly: "Nothing in this Act shall create an implied reservation of water."

history that evidences an intent to disclaim the creation of new reserved water rights.<sup>74</sup>

The Opinion considers section 4(d)(6) of the Wilderness Act and its legislative history as persuasive evidence that Congress waived federal water rights for areas designated as wilderness. Although section 4(d)(6) is not a clear waiver such as Congress has included in later enacted statutes, this argument will now be reviewed in depth.

*Section 4(d)(6)*

To reiterate, section 4(d)(6) of the Wilderness Act states:

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. (Emphasis added).

On its face, this provision appears to be a preservation of the status quo as to the law on issues of federal and state water rights. If so, Congress may have meant that no new principles of law were being established; that whatever analysis usually applied to determine water rights would apply in this instance also. This interpretation is supported by the purpose and structure of the Act, some of the legislative history, and by the use of identical language in the Wild and Scenic Rivers Act and the National Wildlife Refuge Management Act, and is the interpretation given the provision in *Sierra Club II* and in a prior Solicitor's Opinion which did not, however, probe the section 4(d)(6) issues very deeply.<sup>75</sup>

However, the Solicitor's Opinion disputes this interpretation. The Opinion concludes that Congress intended the "no claim" language to waive creation of any new federal water rights for lands designated as wilderness, and the "no denial" language to protect existing federal rights for the underlying reservations, such as the national forests and the Indian reservations that were included in the early wilderness proposals. The Opinion also reasons that preserving the status quo -- allowing some scope for both state and federal law -- makes the section 4(d)(6) provision "essentially without meaning",<sup>76</sup> as though if there is any province within which federal rights operate, this fact vitiates all applicability of state law.

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<sup>74</sup> Solicitor's Opinion, n. 9 at 6.

<sup>75</sup> Solicitor's Opinion No. M-36914 of June 25, 1979, 86 I.D. 553 (1979).

<sup>76</sup> Solicitor's Opinion, *supra*, at 21.

This point as to whether the applicability of state law must be an all or nothing proposition in order to have any meaning is of central importance to the analysis. We note that if in a conservation statute Congress intended to preserve the status quo as to the relationship between federal and state water law (and hence allow some applicability of both federal and state law, since that appeared to be the status quo under then existing Supreme Court rulings), and even if some federal water rights were reserved for the purposes of a federal reservation, state law still would serve important functions. For example, state law would remain effective to define and protect all nonfederal existing rights and therefore provide continuity for existing uses and state water projects. State law also would provide the basis for determining property rights for which just compensation might be owed in the event these rights were condemned for federal purposes. State law also would apply to the appropriation, allocation, and use of all waters above and beyond the amount necessary to carry out the federal purposes. This can be a very significant fact because there are some instances where the quantity of the federal right is not the full flow of the water source.

Therefore, in reviewing the record of the Wilderness Act, one should keep in mind that Congress could have intended that the no claim or denial language would protect preexisting federal rights but not give rise to new ones for wilderness areas -- the interpretation proffered by the Solicitor; or Congress could have intended to maintain the status quo as to federal and state water law -- a possibility that, as discussed above, is not "essentially without meaning."

#### *Section 4(d)(6) - Legislative History*

The Solicitor's Opinion relies on part of the legislative history of the Wilderness Act to bolster its interpretation. The Opinion states that "it is clear that Congress disclaimed any intent to create new or additional reserved water rights for wilderness areas."<sup>77</sup>

Although the interpretation put forward in the Solicitor's Opinion is certainly a possible interpretation, that it is the one intended by Congress is not necessarily clear. Because of the importance given the provision in the Solicitor's analysis, an extended review of the legislative history and an analysis of both sides of the issue will now be set out. Members who are quoted will be identified as to the roles they played in the progress of the

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<sup>77</sup> Solicitor's Opinion, *supra*, at 15.

legislation, and the reader should keep in mind the weight a court usually would give to various aspects of the legislative history. The discussion in this report will begin with the enacting Congress and work backwards in time to materials more distant from enactment.

The water language in question was in both the House and Senate bills in the 88th (the enacting) Congress, but was not directly explained in either committee report<sup>78</sup> or in the floor discussions. In one floor discussion, Sen. Dominick, a member of the Senate Interior and Insular Affairs Committee, expressed concern about whether the Act would frustrate water development of the West. To minimize those concerns, he recommended that lands classified by the Forest Service as "primitive areas" (undeveloped areas that were in addition to those already classified by the Forest Service as "wilderness" or "canoe" by the Forest Service) be excluded from immediate designation in the bill, and that Congress retain control over future additions to the Wilderness System.<sup>79</sup> Both of these features ultimately were enacted. Sen. Mansfield responded by acknowledging that water development was indeed important to the West, but that two portions of the bill "adequately assure the West continued water development, and I submit that even within the wilderness system the bill does not constitute any impediment whatever." Sen. Mansfield then discussed the provision preserving the jurisdiction of FERC to license hydropower facilities, and the provision by which the President could open a wilderness area to water projects.<sup>80</sup> He did not mention the "claim or denial" provision.

The same "claim or denial" language was in the wilderness proposals in the previous (87th) Congress. The report of the House Interior and Insular Affairs Committee in that Congress sets out the language as part of a discussion of special provisions that were "made for exceptions or reiterations of existing law". The report stated that: "Federal-State *relationships*

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<sup>78</sup> H.R. Rep. 1538, 88th Cong., 2d Sess. (1964), and S. Rep. 109, 88th Cong., 1st Sess. (1963).

<sup>79</sup> 109 Cong. Rec. 5890-5891 (1963).

<sup>80</sup> 109 Cong. Rec. 5892 (1963). The Senator characterized the power of the President as opening a wilderness area to "minor water resource conservation measures, small watershed developments, so that once we would place areas into wilderness, they would not forever be removed from such activity." In contrast, he asserted that Congress always retained authority with respect to major public water projects. Whether this is a correct characterization of the President's authority under the Act is an undecided question since the Presidential authority has never been exercised.

concerning water laws and wildlife are maintained without change."<sup>81</sup> Quite arguably, this committee language is evidence that supports the interpretation that the provision was intended to preserve the status quo as to existing law on the federal/state relationship *vis a vis* water. This language is not mentioned in the Solicitor's Opinion.

The report of the Senate Committee on Interior and Insular Affairs for the 87th Congress contains a section "Effects on Water Resources" that discusses only the provisions for allowing the construction of water development projects in wilderness areas, and does not refer to the claim or denial language. It can be argued that this fact indicates that section 4(d)(6) was not seen as affecting water resources, and arguably contradicts the assertion in the Solicitor's Opinion that the language represents a collective understanding as to the very specific and far-reaching import of the language. The executive comment from the Secretary of Agriculture on S. 174 states that: "The bill would not affect the *present situation* as to the application of State water laws, nor the jurisdiction or responsibilities of the States with respect to wildlife and fish."(Emphasis added.)<sup>82</sup> Preserving the "situation" with respect to the application of state water laws is ambiguous at best, but again quite arguably appears to be more a reference to existing general principles than to an intent to make a specific distribution of rights.

During consideration of the wilderness proposals in the 87th Congress, most of the references to water during the debates centered on the language permitting the authorization of water development projects. However, Sen. Church, a member of the Senate Interior and Insular Affairs Committee also said:

The committee has been careful to *preserve States rights* within the proposed wilderness system. No change is made in regard to the *application* of State water laws.<sup>83</sup> (Emphasis added.)

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<sup>81</sup> H.R. Rep. 2521, 87th Cong., 2d Sess. 27 (1962) (emphasis added).

<sup>82</sup> S. Rep. 635, 87th Cong., 1st Sess. (1961) at 30. The analogizing of the claim or denial provision with that retaining state jurisdiction over wildlife occurs more than once in the history of the Wilderness Act and is interesting in that state law as to wildlife applies unless and until federal provisions or purposes as to the management of fish and wildlife preempt; as e.g. is especially true in National Wildlife Refuge areas that might be designated wilderness.

<sup>83</sup> 107 Cong. Rec. 18046 (1961).

This statement as to the preservation of states' rights and the application of state water laws could mean, as the Solicitor's Opinion concludes, that no new federal rights are created and state law applies to all unappropriated water in the area, or it could mean that state water laws apply except to the extent they are preempted by federal law and purposes. This critical point as to what might be meant by preserving unchanged the 'status quo', the 'situation', or the 'application' of state water laws is a pivotal issue and will be discussed further after completion of the review of legislative history.

The Opinion relies heavily on the testimony of certain witnesses at hearings of the 85th Congress in 1958. Although the testimony is certainly valuable and relevant, one of the hazards of using hearing testimony, noted in the discussion on the use legislative history above, is that it is highly selective and can give a misleading impression because so much material that also was heard is not noted at all.<sup>64</sup> Even the full context and remainder of the testimony from which extracts in the Opinion are taken is not presented or indicated in the Opinion. Furthermore, it is perilous to venture definitive conclusions as to how testimony presented to a few Members at hearings by witnesses who represent a particular viewpoint and whose views may or may not be correct relates to the understanding or intent of Members when they vote on a measure. On the other hand, courts have at times given some weight to hearings statements if they appear to relate to the drafting of a provision, especially if other evidence is sparse. The hearings testimony in question appears relevant for this reason.

With these considerations in mind, we return to the Opinion. The Solicitor notes that during the 85th Congress, the western states in particular were concerned with the then recent "Pelton Dam" case discussed in an earlier part of this report. Although the applicability and details about the reserved rights doctrine were still unclear in 1958, there had been a great deal of concern about the fact that the Supreme Court seemed to be indicating that the federal government could create federal water rights separate and distinct from those arising under state law. There was a flurry of bills discussed in Congress attempting legislatively to defer completely to state water law as the general rule. These bills did not pass. It is important to note, however, that there was concern at this time over protecting state water rights, and that there was considerable uncertainty as to how the Supreme Court would interpret the relationship of federal to state water rights in the future. This uncertainty was clarified before enactment of the Wilderness Act when the

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<sup>64</sup> For example, the Opinion quotes a few sentences from over 1,500 pages of testimony taken in 85th Congress. (1958 and 1959).

Supreme Court in 1963 found federal reserved rights for non-Indian lands, and made various interstate water allocations based on a federal statute.<sup>85</sup>

The Opinion quotes the hearing testimony of Mr. Berry, Chief of the Division of Resources Planning, Department of Water Resources for the State of California, on an early wilderness bill. Mr. Berry pointed out that "the Pelton Dam case may be a precedent for holding that State water law has no validity on reserved or withdrawn Federal land", and that "[T]he Federal courts might well hold that land within such a system was 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>86</sup>

In the balance of Mr. Berry's testimony, he presented several proposed modifications to the wilderness bill under discussion, one of which was language that, in contrast to that in section 4(d)(6), would seem to have more efficiently waived the creation of new federal reserved rights for wilderness areas, while preserving existing rights. This language read as follows (the emphasized phrases will be discussed more fully presently):

Notwithstanding any other provisions of this act and *subject to existing rights*, all *unappropriated* navigable and nonnavigable grounds (sic) and surface waters within the area of the national wilderness preservation systems are 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: Provided, that nothing in this act shall be construed to permit any person or entity to acquire the rights to store or divert waters in any national park or monument unless otherwise authorized by act of Congress.<sup>87</sup>  
(Emphasis added.)

In additional testimony not discussed in the Solicitor's Opinion, Mr. Berry also objected to the fact that the then current House bill prohibited water impoundments in wilderness areas, and that the bill also allowed the managing agency administratively to designate new wilderness areas, a fact that was perceived as facilitating the removal of still more lands from future water development.

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<sup>85</sup> Arizona v. California, 373 U.S. 546 (1963).

<sup>86</sup> Hearings before the Senate Committee on Interior and Insular Affairs on S. 1176, 85th Cong., 1st Sess. (1957) at 286.

<sup>87</sup> *Ibid.*, at 287.

Therefore, in addition to the proposed modification quoted above, Mr. Berry also suggested allowing water development projects in wilderness areas, and requiring Congressional action to add new areas to the System. It is important to keep in mind that these last two changes were made and did much to alleviate the objections of California and the other Western states on the water issues. Therefore, when it later was indicated that the California critics' concerns were satisfied, it was not because of the claim or denial language alone.

Also, Sen. Neuberger (a sponsor of the early bills, a member of the Senate Interior and Insular Affairs Committee during the earlier relevant Congresses who was replaced by Mrs. Neuberger in the later Congresses, and who was the committee Member who chaired the hearings when Mr. Berry testified) added at the conclusion of Mr. Berry's testimony: "Mr. Berry, thank you very much. I want you to know that *while we may not wholly agree on this*, I certainly have a great sympathy with the State of California and its water resource problems."<sup>88</sup>

In earlier remarks, Sen. Neuberger had reminded Sen. Kuchel of California (a member of the Senate Interior and Insular Affairs Committee in the relevant Congresses and a sponsor of the final bill) who earlier had spoken about the concerns of that state that wilderness designations might interfere with state water projects:

There are certain circumstances, I think, Senator, concerning the preservation particularly of mountain uplands, which are mainly involved in this bill, where that actually will enhance the production and maintenance of a steady supply of water, far more, for example, than permitting the commercial use of those areas where the waters rise.<sup>89</sup>

As noted, the next versions of the committee proposal were revised to address all three of the points raised by Mr. Berry: to eliminate the simple administrative designation of new wilderness areas; to establish a means of authorizing water development projects in wilderness areas; and to include a new provision on water law.

This new language in a committee draft evidently stated that nothing in the Act constituted "an express or implied claim on the part of the United States for exemption from State water laws." However, the proposed language

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<sup>88</sup> *Ibid.*, at 289 (emphasis added).

<sup>89</sup> *Ibid.*, at 85-86.

was changed from the suggested "no claim" to the final "no claim or denial" language. This obviously was quite a significant modification from Mr. Berry's original proposal. Unfortunately, little direct and contemporaneous evidence exists as to the intended meaning of the new language or the exact reasons for the modification.

A report prepared by Howard Zahniser, who was not a member of Congress, but who was a much respected proponent of wilderness, was submitted for the record by Sen. Neuberger. This report explains the new language as follows:

...further consultations with representatives of the California department led to the following further changes:

1. In addition to the reservoir provisions it appeared necessary to make sure that the provision applied also to related installations and accordingly, as recommended by the department's spokesmen, the words "and water-conservation works" were added. This addition is new in committee print No. 2.

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 purpose of the wilderness bill to provide for wilderness preservation as part of an overall program that includes also 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>90</sup>  
(Emphasis added.)

According to the Solicitor's Opinion, the full report of Mr. Zahniser available in the Committee files also included an additional sentence of explanation which stated: "In line with suggestions received in the course of the consultations regarding the proposed new section, the words 'or denial'

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<sup>90</sup> 104 Cong. Rec. 6344 (1958).

were also added to avoid possible misinterpretation on the other hand and specifically to anticipate and avoid objection on the part of the Department of Justice."<sup>91</sup>

The Solicitor's Opinion asserts that this report supports the view that the "or denial" wording was added solely to avoid interference with pre-wilderness-designation federal water rights. There is no direct evidence, however, whether the potential objection of the Department of Justice was directed at this point, or only to this point. It is true enough, as the Solicitor's Opinion notes, that a representative of the Justice Department had expressed concern about the destruction of preexisting federal rights by the very broad language proffered in the sweeping pro-states' water rights bill, but it also is true that that bill (S. 863, 84th Cong., 2d Sess.) was much broader than the language offered by Mr. Berry on behalf of California. As noted above, the latter language both expressly recognized existing rights, and spoke only to allocation of then unappropriated water. Therefore, there isn't any evidence on point as to exactly what the concerns of the Justice Department were (or those of the "Government departments" and "legislators") that resulted in the final language. Undoubtedly, taking care to preserve existing federal rights was one concern. It is also possible that Congress might have intended the provision to mean that existing principles of law should apply to resolve issues as to respective federal and state rights. These principles would have protected existing rights, but also might have recognized new federal rights.

The Opinion also cites the interpretations of various outside witnesses, though usually those opinions, as opposed to opinions of Members, are not generally entitled to much weight in interpreting statutory language. Furthermore, the comments cited in the Opinion vary in their characterizations, and some even support the interpretation that the provision meant that water *law* was preserved.<sup>92</sup>

Of greater importance is the comment of Sen. Humphrey, a sponsor of the wilderness legislation, who said of the new language:

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

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<sup>91</sup> Solicitor's Opinion, *supra*, at 19, quoting from: Howard Zahniser, "Improvements in the Wilderness Bill," February 15, 1958, at 6. (Committee Files).

<sup>92</sup> See, Solicitor's Opinion, n. 21 at 13-14.

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.<sup>93</sup>

By this statement, the Senator might have meant that all federal water rights were waived and state water laws would apply exclusively, or he might have meant, as seems to comport more easily with his statement, that the Act would not change existing laws, including those that related to water projects. This latter possible interpretation is borne out by an earlier dialogue Sen. Humphrey had with Sen. Kuchel of California<sup>94</sup> in which Sen. Kuchel expressed concern that wilderness designations would both preclude water development projects in designated areas, and might interfere overall with state plans for water development. Sen. Kuchel based his concerns on the broadness of the stated wilderness purposes; namely that wilderness areas were dedicated to "the public purposes of recreational, educational, scenic, scientific, conservation, and historical uses." Sen. Kuchel was especially concerned that the word "conservation" was so broad, perhaps because he anticipated that this breadth of federal purpose might preclude any water being available for state development projects. Sen. Humphrey responded by indicating that he thought there could be some kind of accommodation with the state's concerns about dovetailing "existing land patterns into a water plan or a water-use system", though he added that he "would want to look over the language very carefully so that we knew exactly what we were doing." It was at this part of the hearings too that Sen. Neuberger reminded Sen. Kuchel that preservation of natural watersheds enhanced the production and maintenance of a steady supply of water. Therefore, it is possible that Sen. Humphrey's later comment on the final language reflects a balancing of the federal interests in creating statutory wilderness and the states' interest in preserving without disruption existing state water projects and laws, leaving uncertainties and details on these issues to resolution by the judicial branch.

On another point, in its discussion and analysis of the 'no denial' language, the Opinion mischaracterizes some critical language in the early wilderness proposal and the effects of a federal reserved right on other valid

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<sup>93</sup> 104 Cong. Rec. 11,555 (1958).

<sup>94</sup> Hearings before the Senate Committee on Interior and Insular Affairs, 85th Cong., 1st Sess. 83-85 (1957). Sen. Kuchel was a member of the Senate Interior and Insular Affairs Committee in the 85th Congress, as well as in subsequent Congresses.

water rights already in existence. These facts affect certain conclusions reached in the Opinion.

When a federal reserved right is created, the Supreme Court has said it is a right to that amount of water that is both otherwise *unappropriated* at the time of the creation of the federal right, and necessary to the carrying out of the federal purposes.<sup>95</sup> Valid existing rights are not eliminated, condemned, or taken by the creation of a federal right.

On page 12, the Opinion states that the California proposal presented by Mr. Berry subjected all unappropriated water in wilderness areas to appropriation and use by the public pursuant to State law, and that this language "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 provided for establishment of wilderness areas on Indian lands."<sup>96</sup> A footnote to the above quote notes that S. 1176 would have designated fifteen wilderness areas on Indian reservations, and adds that: "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."<sup>97</sup>

This premise as to the effects of the original California proposal on preexisting federal rights does not appear to be correct. The complete language proposed as an amendment to S. 1176, as set out above in this report, included the phrase "subject to existing rights", and expressly subjected *unappropriated* water to appropriation under state law. Therefore, it does not appear that preexisting federal rights for parks, and refuges would have been repudiated and treaty rights abrogated.

Building on this interpretation of the original California proposal and its effects, the Solicitor's Opinion concludes that the "no denial" language therefore was added to the next California proposal (i.e. that nothing in the Act was a claim of exemption from state laws) in order to protect preexisting

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<sup>95</sup> *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *U.S. v. New Mexico*, 438 U.S. 696 (1978).

<sup>96</sup> Solicitor's Opinion, at 12 (emphasis added).

<sup>97</sup> *Id.*, n. 19.

federal water rights, thereby arriving at the very specific interpretation of the provision as waiving any claim of new federal rights on the one hand, and any denial of preexisting rights on the other.

In view of the fact that the "no denial" language appears not to have been essential to preserve existing federal rights as to the original California proposal, one again must ask what meaning might have been intended for the final provision as a whole. Again, one is referred back to the comments in the legislative history that the provision was intended to accommodate both state concerns about impacts on state water use, and federal concerns about implementing the purposes of the Act, and to the comments in the legislative history through several Congresses that the provision preserved the principles of law or the situation as to the relationship of federal and state water rights. That this interpretation might be correct is supported by a large part of the legislative history, especially by those parts to which a court normally gives greatest weight, and by the historical circumstances in which inclusion of the provision occurred. It is entirely possible that Congress spoke its will as to its purposes in creating the wilderness designation, and left to the courts to articulate the details of resulting federal water rights and how they related to state water rights.

*Section 4(d)(6) - Later Enactments Using the Same Language*

Language exactly the same as the section 4(d)(6) provision appears in the National Wildlife Refuge System Administration Act of 1966<sup>98</sup> (enacted two years after the Wilderness Act), and the Wild and Scenic Rivers Act<sup>99</sup> (enacted in 1968, four years after the Wilderness Act).

While it is true that Congress may use the same language to mean different things in different statutes, and the meaning of a provision is best drawn from the purposes, structure, and text of the act of which it is a part, the repeated use of the same provision in two other conservation statutes passed soon after the Wilderness Act is definitely relevant, especially if the explained meaning of the provision in the later acts comports with the explanations offered as to the Wilderness Act.

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<sup>98</sup> Act of October 15, 1966, 80 Stat. 927, codified at 16 U.S.C. 668dd.

<sup>99</sup> Act of October 2, 1968, Pub. L. 90-542, 82 Stat. 906, codified at 16 U.S.C. 1271 *et seq.*

We found no elaboration on the provision as it appears in the Refuge Administration Act<sup>100</sup>, but there is considerable elaboration on the provision as it appears in the Wild and Scenic Rivers Act.

The Solicitor's Opinion minimizes the relevance of the explanations of the same section 4(d)(6) language in the history of the Wild and Scenic Rivers Act on the grounds that it was enacted a decade after the drafting of the section in the Wilderness Act and hence was so remote as to make tenuous its relevance to the earlier language.<sup>101</sup> However, the principal elaboration on the same language in the Wild and Scenic Rivers Act appears in the 1966 debates on that Act, only two years after final consideration and enactment of the Wilderness Act, and therefore its reuse is hardly remote in time from its first enactment.

The Solicitor's Opinion goes on to state that the fact that the views of a subsequent Congress should be given little weight is particularly true "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."<sup>102</sup> Yet the principal speakers explaining the use of language identical to section 4(d)(6) in the Wild and Scenic Rivers Act, were Sen. Humphrey, who was a sponsor of the Wilderness Act; Sen. Kuchel of California, who was a member of the Senate Interior and Insular Affairs Committee in all the relevant Congresses, a sponsor of the final legislation, and was especially concerned with developing the language in question; and Sen. Allott, who was a member of the Senate Interior and Insular Affairs Committee in all the relevant Congresses, was directly involved in the development of the language in question in both acts, and was an opponent of the Wilderness Act. Therefore, it is quite possible that the explanations by these pivotal Members of the same language used in a statute enacted only a few years later are both relevant and probative; they at least should be considered.

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<sup>100</sup> The Supreme Court in *Arizona v. California*, 373 U.S. 546, 601 (1963) found that reserved rights existed for two National Wildlife Refuges, but did not elaborate as to its reasoning except to say: "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the ...Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge...."

<sup>101</sup> Solicitor's Opinion, at 27.

<sup>102</sup> *Id.*

The Wild and Scenic Rivers Act contains several provisions relating directly to water. It expressly states that existing principles of water law were not intended to be changed, and it contains the same language on neither claim or denial as to exemption from state water law as does the Wilderness Act. Yet the Wild and Scenic Rivers Act also appears quite clearly, through express language and through the stated purposes of the Act, to create federal water rights to whatever amount of water was necessary to carry out the act. It also authorizes condemnation if necessary to adequately protect a designated river or river segment.

However, the creation of a federal water right does not automatically work a condemnation of preexisting rights, a premise the Solicitor's Opinion indicates is the basis of the Wild and Scenic Rivers Act, and a distinguishing feature that obviates all comparisons between the 4(d)(6) language of the Wilderness Act to the same language when used in the Wild and Scenic Rivers Act. Again, we note that the federal reserved water right created by a river designation under that act is to that amount of water then unappropriated that is necessary to carry out the purposes of the act. Although the Wild and Scenic Rivers Act authorizes the condemnation of valid existing rights if necessary to implement the protection of a water course, we are advised by representatives of the Forest Service and the Department of the Interior that no designation of a river to date has involved condemnation of previously existing rights.

If the claim or denial language was intended in the Wilderness Act to maintain the status quo as to water law, then that provision as it appears in the Wild and Scenic Rivers Act is complementary to the provision in that act that explains that principles of water law are to apply, and to the statement that the jurisdiction of states over waters of any stream included in the protected system is unaffected by the act to the extent that such jurisdiction may be exercised without impairing the purposes of the act or its administration. This interpretation is borne out in the legislative history of the Wild and Scenic Rivers Act.

An earlier version of the act contained only brief language on water rights that was very similar to section 4(d)(6): "Nothing in the Act shall constitute an express or implied claim or denial on the part of the United States with respect to the applicability to it of, or to its exemption from State water laws..." Rep. Aspinall, a member of the House Interior and Insular Affairs Committee in the relevant Congresses and Chairman in the 87th, 88th, and 89th Congresses, in explaining the effects of the language quoted from comments from the Department of the Interior that indicate that both federal and state water rights would be operative:

Enactment of the bill would not in any way affect or impair any valid or existing water rights perfected under State law. In addition, further appropriations could be made and water rights perfected under State law so long as the subsequent appropriations would not adversely affect the designated rivers.<sup>103</sup>

As to the reservation of water under the Act, Rep. Aspinall continued to quote the Department:

Enactment of the bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation. Specifically, only that amount of water will be reserved which is reasonably necessary for the preservation and protection of those features for which a particular river is designated in accordance with the bill. It follows that all unappropriated and unreserved waters would be available for appropriation and use under State law for future development of the area.<sup>104</sup>

The Senate version of the Wild and Scenic Rivers Act contained more extensive provisions elaborating on water issues. These provisions were adopted in conference.

The Senate committee report expressly states that the water language was intended to preserve the status quo with respect to the law of water rights:

The language contained in subsection 6(f) is intended by the committee to preserve the status quo with respect to the law of water rights. No change is intended. The first sentence states that established principles of law will determine the Federal and State jurisdiction over the waters of a stream that is included in a wild river area. Those established principles of law are not modified. The third sentence states that with respect to possible exemption of the Federal Government from State water laws the act is neither a claim nor a denial of exemption. *Any issue*

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<sup>103</sup> 114 Cong. Rec. 26594 (1968)

<sup>104</sup> *Id.* The Departmental bill to which the Department's comments related contained additional express language on the reservation of water and possible taking of state recognized rights, so Rep. Aspinall's use of the Department's comments on its proposal in response to questions on H.R. 18260 was not entirely on point.

*relating to exemption will be determined by established principles of law as provided in the first sentence.*<sup>105</sup>

This language was repeated by Sen. Church on the floor as he commended the legislation to the Senate. Senator Church and Senator Allott, who it will be recalled were members of the Senate Interior and Insular Affairs Committee and played significant roles in favor of the position of the western states in the passage of the Wilderness Act, engaged in a dialogue on the Wild and Scenic Rivers Act. As to the effects of the proposed legislation on appropriation of water under state law, Sen. Church stated:

I would say to the Senator that whatever present law decrees with respect to the priority of rights, among appropriators, that law is left intact by this bill. It is true that the Federal Government can acquire rights by reservation, just as private citizens can acquire rights by appropriation. We sought not to interfere with water law, one way or another. We took great care in committee, as the Senator knows, to work out language that would make it clear that present water law is not altered by the provisions of this bill.<sup>106</sup>

Sen. Church further stated that:

Precaution has been taken to fully protect established water rights, and to make certain that State water laws are not infringed in any way. The Senate Interior Committee hammered out amendments to the original language to make doubly sure that the status quo with respect to water law remains unchanged.<sup>107</sup>

In responding to a question from Sen. Kuchel as to whether it was now "the understanding of the Senator that there has been no substantive change in the presently established principles of Federal and State water rights law", Sen. Church stated:

The Senator is correct. The whole purpose of the language in the sections to which the Senator has referred—sections, incidentally, which include the amendment the Senator proposes as subsection (i) under section 5 of the bill—was to maintain the

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<sup>105</sup> S. Rep. 491, 90th Cong., 1st Sess. 5 (1967)(Emphasis added).

<sup>106</sup> 113 Cong. Rec. 21747 (1967). The entire dialogue continues to p. 21748.

<sup>107</sup> 112 Cong. Rec. 419 (1966).

status quo with respect to the whole complicated structure of water law.

We have tried diligently to write language which would not embark us upon any new departure in the field of water law.

We seek to leave the law as it stands, to establish a wild rivers system which will not impair or alter or in any way change existing State or Federal laws concerning water rights.<sup>108</sup>

Sen. Kuchel of California had expressly approved of the neither claim or denial language as part of rivers legislation in the previous Congress<sup>109</sup>, was the sponsor of amendments to clarify the section on water rights, and expressly approved of the final language on the floor.<sup>110</sup>

That leaving the status quo of the law as it was and not infringing in any way on state water laws was understood as allowing establishment of federal water rights for federal purposes also was made clear by a discussion that ensued after an amendment was proposed that would have required a federal water right for wild and scenic river purposes to be obtained under state law. The amendment was rejected on the grounds that it would frustrate the purpose of the legislation, that the current language protected both federal and state law within their respective spheres, and that the current language allowed both the federal and state governments to seek judicial determination of the respective rights of each. In urging rejection of the amendment, Sen. Church introduced a legal analysis by the Department of the Interior that clearly indicated that the existing wording of the Wild and Scenic Rivers Act preserved the status quo as to current water law and that the status quo permitted both federal and state rights.<sup>111</sup>

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<sup>108</sup> 112 Cong. Rec. 431 (1966).

<sup>109</sup> 112 Cong. Rec. 430 (1966)(remarks of Sen. Kuchel).

<sup>110</sup> 112 Cong. Rec. 431 (1966).

<sup>111</sup> 112 Cong. Rec. 433 (1966). The analysis of the Department stated:

1. The amendment assumes erroneously that under the terms of the bill the Secretary of the Interior or the Secretary of Agriculture is required to take some affirmative action in order to reserve water for the purpose of the act. The bill neither requires nor permits the Secretary to take such action. The enactment of the bill is itself a reservation of the water needed to carry out its purposes.

2. The amendment assumes that a water right could be perfected under State law for the purposes of the wild rivers program. In fact, however, State laws do not provide for the appropriation of water for the purpose of maintaining the natural flow of a stream. It would therefore normally not be

This detailed sequence of explanation by speakers who were the same principal players who were pivotal in developing the same language only two years before appears to be harmonious with the more succinct comments and explanations offered during the consideration of the Wilderness Act and to offer a more in-depth discussion and elaboration of the earlier expositions. If so, then this material appears quite helpful in illuminating further the proper interpretation of Congressional intent as to the earlier use of the same statutory language.

The only written opinion to date delivered by a court that heard arguments similar to those set out in the Solicitor's Opinion is in the Sierra Club II case. The court in that case rejected the arguments, finding section 4(d)(7) clearly to be a preservation of the status quo as to water law, and hence a provision that actually negates the argument that Congress precluded federal water rights:

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possible to comply with State law, and the amendment would defeat the purpose of the Federal legislation.

3. It is settled law that Federal legislation authorizing Federal lands to be used for a particular purpose reserves sufficient unappropriated water flowing through the Federal lands to accomplish that purpose. This reservation does not affect prior valid rights under State law, but it does establish a priority that is good against subsequent appropriators. This principle of law is recognized and applied by section 5(h) of the bill which provides:

"Designation of any stream or portion thereof shall not be construed as a reservation of the waters of such stream for purposes other than those specified in this Act, or in quantities greater than necessary to accomplish these purposes."

The amendment would reverse this established principle of law by requiring the Secretary to acquire an appropriation right under State law to carry out the Federal program—a requirement with which it would probably be impossible to comply.

4. One of the major premises of the wild rivers bill, as stated in section 5(d) is that "the jurisdiction of the States and the United States over waters of any stream included in a wild river area shall be determined by established principles of law." The amendment is inconsistent with this premise and purports to write new water law. The wild rivers bill is not an appropriate vehicle for undertaking a major revision of Federal-State water jurisdiction. The wild rivers bill maintains the status quo with respect to water law, and we believe that such action is highly desirable. It would be a mistake, in our judgment, to imperil the wild rivers program by injecting a new and highly controversial change in established water law.

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By its own terms, § 4(d)(7) does not purport to work any substantive change in the rights parties may acquire under the various doctrines of water law, including the reserved rights doctrine. Any decisions in that regard are properly left to case-by-case adjudication.<sup>112</sup>

#### *Section 4(d)(6) - Conclusion*

No issue of federal and state water rights is ever beyond debate. It must be kept in mind that the Supreme Court has been taking an increasingly narrow approach to federal water rights in recent years. Furthermore, it was Justice Rehnquist, now Chief Justice Rehnquist, who wrote the opinions in both *United States v. New Mexico, supra*, and *California v. United States*,<sup>113</sup> which opinions are generally perceived as evidencing a greater sensitivity to the position of the states on water issues than previously.

Nevertheless, considering the text of section 4(d)(6), which appears to be a preservation of the status quo; the fact that the language that became section 4(d)(6) was changed from a waiver of any claim of federal exemption from state water laws to being neither a claim nor denial of such exemption; the full context of all significant comments by Members on both sides of the issue; the explanations by the same key Members (including the leading advocates of the position of the western states) of the same provision in another conservation statute enacted soon after the Wilderness Act; the fact that Congress has used very clear language in other acts to waive creation of express or implied federal water rights; and most of all the purpose of the Wilderness Act itself, which is to preserve Congressionally designated wilderness areas, including the watersheds, in their natural state, it appears more likely than not that the Supreme Court will find federal water rights to exist for the wilderness purpose in areas designated by Congress for inclusion in the National Wilderness Preservation System.

#### **Possible Features of a Federal Wilderness Water Right**

If federal water rights are held to exist in conjunction with statutory wilderness areas, it may be fruitful to examine how a court might characterize those rights.

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<sup>112</sup> *Sierra Club II, supra*, at 1494.

<sup>113</sup> 438 U.S. 645 (1978).

It will be recalled that Section 4 of the Wilderness Act states that the purposes of the Act are "*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.) Whether a court might interpret this language as a declaration by Congress that the wilderness value and purpose were always present in a unit from the time it was reserved for the other purposes, and hence allow a priority for the wilderness related water right as of the time of the underlying reservation of the area, is an open question. In this respect, a court might distinguish the Wilderness Act from the Multiple Use-Sustained Yield Act which declared those additional forest purposes merely to be "supplemental" to the original forest purposes and hence not eligible for a pre-1960 priority date, if giving rise to any federal right at all.<sup>114</sup> On the other hand, a court might hold that federal water rights would be implied for the wilderness purpose only *after* Congress had elevated wilderness to the level of being a particular purpose to which lands statutorily were dedicated, which is to say as of the date an area was designated for inclusion in the Wilderness System.

As to the extent of the right, a court would look to the purposes of the Wilderness Act and the values set out in the designation of specific areas. The Supreme Court has stated that the extent of the federal right is "that amount of water necessary to fulfill the purpose of the reservation, no more."<sup>115</sup> Yet, the Court also has been liberal in interpreting what those purposes encompass, and has permitted future needs as well.<sup>116</sup> That some

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<sup>114</sup> See *United States v. New Mexico* at 713-714. The Supreme Court held that the forest purposes set out in MUSYA were secondary with respect to considering federal water rights with a priority date relating back to the 1897 Act. The Court expressly did not rule on whether the purposes set out in MUSYA might be viewed as primary purposes for national forests after enactment of MUSYA in 1960.

<sup>115</sup> *Cappaert v. United States*, *supra*, at 141, quoted in *United States v. New Mexico*, *supra*, at 700.

<sup>116</sup> *Arizona v. California*, *supra*, at 600-601. The Supreme Court here approved the quantity of water set by the Master at that amount that would satisfy the future as well as the present needs of the Indian Reservations involved in the litigation; this amount was enough water to irrigate all the practicably irrigable acreage on the reservations. The Court in *Cappaert v. United States* at 141 found that enough water in Devil's Hole Monument was reserved to the United States to carry out the purposes of the Monument: "the preservation of the unusual features of scenic, scientific, and educational interest....The pool need only be preserved, consistent with the intention expressed in the Proclamation, to the extent necessary to preserve its scientific

types of reservations might give rise to rights more extensive than those the U.S. Supreme Court found for the national forests under the 1897 Act is indicated by the Court's discussion of the broad purposes for which national park and monuments may be created, which purposes include conserving the scenery and the natural objects and the wildlife therein.<sup>117</sup> The broad purposes set out by Congress for the units the national park system are analogous to those of wilderness areas.

It will be recalled that areas of "wilderness character" are to be preserved in "untrammelled", "primeval", "natural", "unimpaired" state. Given the emphasis in the Act on preserving designated wilderness areas in their natural state, the federal right might encompass the full flow of water sources in an area. Even if some diversion might be possible that still preserved the scenic, wildlife, and recreational values, there is considerable language in the statute and its legislative history that the intent of the establishment of the Wilderness System and of individual designations was to preserve designated areas in their pristine character, basically unaffected by the actions of man.

On the other hand, some management flexibility is permitted under the Act, such as intervention in case of fire, insects, and diseases. Also, the Act includes special provisions for allowing water resource projects if these are approved by the President. Therefore, the argument could be made that the federal rights do not necessarily encompass the full flow of the water source, but that (for example) some upstream diversions could be made without intruding on the federal rights. The contrary argument would be that Congress intended all water development projects that would draw water from a wilderness area to be evaluated by the President and allowed only if the need for the development outweighed the benefits of preserving the wilderness area in pristine and natural condition.

As to the lands regarding which a federal water right might be found, it appears that all of the Supreme Court cases to date involved federal land areas and reservations of lands created from the public domain. Yet some

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interest. The fish are one of the features of scientific interest...Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation."

<sup>117</sup> U.S. v. New Mexico, *supra*, at 709.

units of the Wilderness System, especially since the enactment of the Eastern Wilderness Act,<sup>118</sup> are acquired rather than public domain lands. Depending on the underlying reasoning of the Court as to the source of the federal power, that distinction may be significant. However, the Court has never articulated federal rights in a manner that necessarily was premised on factors that relate only to the public domain, and at times the Court has spoken broadly in terms of "federal enclaves", so this difference may not be significant.

Congress also has not always used the historical terms in their strict sense, as for example, in the Wild and Scenic Rivers Act which speaks of "reserved" water, yet applies to rivers in all areas of the country. The fact that the cases regarding federal property happened to be public domain lands probably is not dispositive as to the authority of the federal government over other types of lands.

As an analysis by the Justice Department stated in speaking of the property power:

It is important to understand that any water rights that may be asserted by the federal government outside of state law -- whether called reserved, non-reserved or by some other name -- rests on this same constitutional basis. Thus, federal reserved rights are not a unique species of federal rights that arise directly out of the reservation of federal lands, so that, absent a reservation of land, no federal water rights can exist.<sup>119</sup>

Furthermore, as discussed above, the property power is not the only source of the federal authority over water. Still, the factual context in which the issue of wilderness water rights reaches the Court is likely to affect at least the manner in which the Court articulates the issues, and may affect the resolution.

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<sup>118</sup> Act of January 3, 1975, Pub. L. 93-622, 88 Stat. 2096.

<sup>119</sup> T. Olson, *Federal Non-reserved Water Rights*, Memorandum for Assistant Attorney General, Land and Natural Resources Division, June 16, 1982 at 48, reprinted in 6 OLC 328 (1982).

## Prospective Problems

It appears that several factors may result in Congress considering whether and what kind of express language on the subject of water rights and protection for wilderness areas should be in future wilderness legislation.

As discussed above, whether the Wilderness Act itself results in Congressionally designated wilderness areas having reserved water rights sufficient to protect the lands in their natural state is a controversial issue. Regardless of whether one agrees or disagrees with the analysis and conclusion of the recent Solicitor's Opinion, the Opinion was promulgated and approved by the Attorney General and carries considerable weight. Congress may be faced with the problem of whether and what response might be appropriate to consider in crafting future legislation.

Also, it will be recalled that the Wilderness Act originally designated only national forest lands, which is to say lands that had underlying water rights sufficient for forest purposes. In recent times, however, areas have been proposed for inclusion in the wilderness system that are administered by the Bureau of Land Management and may not have underlying water rights. Therefore, the question of whether the wilderness designation alone provides federal water rights is particularly urgent for such areas.

Typically too, the early wilderness areas were at the headwaters of the watersheds, and therefore there were no upstream users. Because of the restrictions on water project facilities in wilderness areas, all of the water in such areas passed through them and down the streambed to locations outside the wilderness areas for distribution and use under state laws and policies. Other areas now being considered may be National Forest Service or BLM lands that are not at the headwaters of the water source. In all likelihood there will be other property owners who hold state recognized water rights upstream and downstream from the federal areas, and there is great concern that federal wilderness rights may interfere with the exercise of these rights.<sup>120</sup>

The federal wilderness "use" of water is basically a nonconsumptive use, consisting of natural instream flows as the water source passes through the protected area. Therefore, the federal rights would not result in a depletion of the amount of water flowing to downstream areas. The existence of federal

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<sup>120</sup> Not all commentators agree that the problems are severe. *See, e.g.,* John D. Leshy *Water and Wilderness/Law and Politics*, 23 *Land and Water Law Review* 389 (1988).

wilderness rights may be significant nonetheless. Under the water laws of many western states, a rightholder cannot change certain aspects of the rightholder's use if doing so will adversely affect other rightholders on the same water course. For example, a water rightholder might not be able to change an existing point of diversion to another point further upstream if doing so would adversely affect a rightholder somewhere along the intervening stretch of the water source.

It is important to recognize that this restriction is a product of state law, and that it results whenever there is an intervening rightholder located between the existing diversion point and the proposed one, not just if the rightholder is the federal government. On the other hand, others point out that it is important also to recognize that there is likely to be considerable resentment if the presence of federal lands and associated federal water rights precludes consideration of a rearrangement of existing water diversions that a state might seek to accomplish for economic and policy reasons. It is important to note that a state can condemn nonfederal rights in order to carry out desired projects, but cannot condemn federal property rights.

In the past, Congress has taken special circumstances into account when considering the suitability of a particular area for wilderness designation, and may wish to provide some mechanism for the consideration of changed circumstances regarding already designated midstream wilderness areas. For example, such a mechanism might consist of authorizing the President after making certain determinations of public interest, to waive or convey part of the water to which a wilderness area is entitled--a provision analogous to the Presidential weighing of the public interest in authorizing water projects in wilderness areas. Or, perhaps Congress might wish to put in place some form of expedited Congressional consideration of legislated adjustments. Provisions in FLPMA<sup>121</sup> currently provide for expedited consideration of certain land withdrawals (though Congress may wish to avoid the legislative veto aspects of these provisions). The "national need mineral activity recommendation process" in the Alaska National Interest Lands Conservation Act<sup>122</sup> allows access to certain otherwise protected lands in Alaska after certain findings as to need for mineral development, and also provides for expedited Congressional review. A provision similar to these might provide assurance that the goals and needs of a state desiring to restructure the use of a water source would receive consideration in an expeditious manner.

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<sup>121</sup> Section 204 of FLPMA, 43 U.S.C. 1714.

<sup>122</sup> Section 1501-1503 of the Act of December 2, 1980, Pub. L. 96-487, 94 Stat. 2374, 16 U.S.C. 3101, 3231-3233.

**Summary and Conclusion**

Considering the analysis of water rights issues by the Supreme Court in the past and the cases in which the Supreme Court has found federal water rights to exist, it appears more likely than not that the Court will conclude that wilderness areas designated under the Wilderness Act are federal land reservations for which water is essential to carry out the Congressional purposes to which the lands are dedicated, and hence federal water rights would be found to exist. The issue is not free from doubt, however, and several subsidiary questions remain to be addressed, such as the extent and characteristics of the rights, and how best to coordinate the federal water rights with the needs and policies of the states in which the areas lie.



Pamela Baldwin  
Legislative Attorney  
American Law Division  
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