

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Water as a Public Resource: Emerging Rights  
and Obligations (Summer Conference, June  
1-3)

---

1987

6-2-1987

### New Developments in Water Rights on Public Lands: Federal Rights and State Interests

Christopher H. Meyer

Follow this and additional works at: <https://scholar.law.colorado.edu/water-as-public-resource-emerging-rights-and-obligations>



Part of the [Administrative Law Commons](#), [Agriculture Law Commons](#), [Animal Law Commons](#), [Aquaculture and Fisheries Commons](#), [Biodiversity Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Energy and Utilities Law Commons](#), [Environmental Health and Protection Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [European Law Commons](#), [Hydraulic Engineering Commons](#), [Judges Commons](#), [Jurisdiction Commons](#), [Land Use Law Commons](#), [Legislation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Property Law and Real Estate Commons](#), [Public Policy Commons](#), [Recreation, Parks and Tourism Administration Commons](#), [State and Local Government Law Commons](#), [Urban Studies and Planning Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

---

#### Citation Information

Meyer, Christopher H., "New Developments in Water Rights on Public Lands: Federal Rights and State Interests" (1987). *Water as a Public Resource: Emerging Rights and Obligations (Summer Conference, June 1-3)*.

<https://scholar.law.colorado.edu/water-as-public-resource-emerging-rights-and-obligations/12>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library  
COLORADO **LAW**  
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

Christopher H. Meyer, *New Developments in Water Rights on Public Lands: Federal Rights and State Interests*, in *WATER AS A PUBLIC RESOURCE: EMERGING RIGHTS AND OBLIGATIONS* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1987).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

NEW DEVELOPMENTS IN WATER RIGHTS ON PUBLIC LANDS:  
FEDERAL RIGHTS AND STATE INTERESTS

Christopher H. Meyer

Counsel

National Wildlife Federation  
Rocky Mountain Natural Resources Clinic  
Campus Box 401, Fleming Law Building  
Boulder, Colorado 80309  
303/492-6552

Water as a Public Resource:  
Emerging Rights and Obligations

Eighth Annual Summer Program  
Natural Resources Law Center  
University of Colorado School of Law

June 1 - 3, 1987



## I. HISTORY OF THE FEDERAL ROLE IN STATE WATER LAW

### Federal water law rejected

The federal government was the original owner of virtually the entire American West. As states were admitted to the Union, the United States retained title to the vast public lands, subject to disposal under the federal lands laws.

Although the federal government continues to retain and manage vast acreage, it rejected adoption of a general federal water law and instead acquiesced in the appropriation of waters on the federal lands by private persons pursuant to state law.

### Congressional recognition of state water law

In the Acts of 1866, 1870, and 1877<sup>1/</sup> Congress acknowledged the established practice of the early settlers that water on public lands may be diverted by private citizens on the basis of first in time and without regard to the eastern rules of riparian rights.<sup>2/</sup>

---

<sup>1/</sup> For ease of reading, all cases and statutes are referred to throughout by short name. Full citations are provided in the Appendix.

<sup>2/</sup> The Act of July 26, 1866 provided: "That 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 the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed . . . ." The Act of July 9, 1870 stated: "[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or right to ditches and reservoirs used in

(Footnote continued on next page)

In California Oregon Power v. Beaver Portland Cement (U.S. 1935) the Court, in rejecting a claim that riparian rights attached to land acquired under the Homestead Act, found that acts of 1866, 1870, and 1877 "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself". Moreover, the Court ruled, the effect of the Act was not limited to desert land entries, but to all lands acquired from the public domain under any land statute before or after 1866.

While it is clear that Congress in enacting these three statutes "severing" water from the public lands rejected the development of a comprehensive federal water law, it cannot be said that Congress intended to relinquish all federal interest in waters on its land. Such a conclusion is fundamentally at odds with the well established recognition of federal regulatory power under the reserved rights doctrine, the navigation servitude, the reclamation laws, the federal power act, and other authority. The better construction is that articulated in the Olson Opinion (1982): "[W]e believe that the sounder view is that the Mining Acts and Desert Land Act authorize state control only over appropriations by private individuals of unappropriated water on federal lands, and do not, by their terms, cede to the states control over the federal government's use of water for federal purposes and programs." Opinion at 58.

---

(Footnote continued from previous page)  
connection with such water rights, as may have been acquired under or recognized by the [1866 Act]." The Desert Land Act of 1877 provided: "Provided, however, That the right to the use of water [by the claimant] shall depend upon bona fide prior appropriation: . . . and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights."

## II. RESERVED WATER RIGHTS

### Source of the doctrine

The reserved rights doctrine was foreshadowed by Rio Grande Dam (U.S. 1899), a case in which the Court found that Congress had not waived its superior authority under the Commerce Clause to protect navigation despite the fact that it had acquiesced in the recognition of the prior appropriation doctrine in the western states.

Winters (U.S. 1906), dealing with an Indian reservation in Montana, was the first case to articulate the reserved rights doctrine which holds that where Congress (or the President) reserves land for a particular purpose it also reserves, by implication, sufficient unappropriated water to accomplish the purposes of the reservation.

In FPC v. Oregon (U.S. 1955) the Court first hinted that the doctrine might extend to other federal reservations. There the Court held that the Desert Land Act (which subjected public lands to the rule of prior appropriation) was inapplicable to reservations. While the case was not decided under the rubric of the reserved rights doctrine, and did not involve the direct use of water on a federal reservation by the United States, the Court implied that the private licensee was exercising a right of the United States which had been withheld from state control as a function of the reservation of land for a power site.

In Arizona v. California (U.S. 1963) the Court confirmed that the doctrine was equally applicable to all federal reservations.

In Cappaert (U.S. 1976) the Court reaffirmed the doctrine and clarified that the amount of water impliedly reserved was the amount necessary to fulfill the purpose of the reservation.

In U.S. v. New Mexico (U.S. 1978) the Court limited reserved rights that water needed to achieve the "primary purposes" of the reservation.

Theoretical basis

These cases make clear that the federal power to reserve water is constitutionally grounded in the property clause and the commerce clause, and that inconsistent state law may be preempted under the supremacy clause. But this only shows that Congress has the power to reserve water, not that it has chosen to do so. The reserved rights theory comes in to play to fill the gap when Congress has not said one way or the other.

While the doctrine is technically no more than a principle of statutory construction aimed at divining congressional intent, the cases' often mechanical application of the doctrine has caused some to ponder whether the doctrine is really one of federal common law. See Grow & Stewart (1977). Take, for instance, the courts' preoccupation in Block/Lyng and Watt with the fine question of whether a particular statute did or did not effect a withdrawal. It hardly seems that this technicality could be controlling on the issue of congressional intent, yet the courts treat it like it is.

What priority?

A fundamental element of the reserved rights doctrine is that the water right is awarded a priority date tied to the date of reservation. This is so even when the actual use begins some time later, and private appropriators subsequent to the reservation are thereby made junior to the federal right.

Loss of  
Priority

In Bell (Colo. 1986), however, the Colorado court ruled that the federal government's failure to assert a reserved rights claim in an ongoing general adjudication in which it had been joined results in loss of priority under Colorado's system of ongoing adjudications. The court implies, however, that the federal government is immune from loss of priority until it is joined, and may then be awarded a back-dated priority date if it asserts its reserved rights prior to the close of the calendar year. See Bell at 644 n. 16.



Double  
Reservations

In U.S. v. Denver the court awarded reserved rights for the Rocky Mountain National Park which had first been reserved as a national forest, and later as a national park. The court awarded separate priority dates: the earlier date where the purposes related to the original forest reservation, and the later date where the purpose arose only upon designation as a park.

Likewise in Block/Lyng the court found where the purposes of the wilderness designation overlapped with the purposes of the previous designation, the right would retain the earlier priority date.

What lands  
are reached?

Indian  
reservations

Winters (U.S. 1906) involved an Indian reservation, and for many years the doctrine was thought to apply only to such lands.

Other  
reservations

Arizona v. California (U.S. 1963) and subsequent cases have made clear that the doctrine applies to all federal reservations. As the court said in County of Eagle (Colo. 1971), "The federally reserved lands include any federal enclave." County of Eagle at 523.

Public lands

In Sierra Club v. Watt (D.C. Cir. 1981) the D.C. Circuit rejected Sierra Club's argument that FLPMA effectively reserved all the public lands thereby creating reserved water rights on those lands. The court ruled that FLPMA did not reserve any land and that its savings clause precluded the creation of any reserved rights.

Acquired  
lands

The Olson Opinion (1982) concluded that the reserved rights doctrine was applicable to acquired lands as well as to lands originally withdrawn from the public domain. Opinion at 77-78.

MUSYA

In U.S. v. New Mexico (U.S. 1978) the Court held (arguably in dictum) that the Multiple

Use Sustained Yield Act did not constitute a separate reservation of land with attendant water rights, but merely outlined additional supplemental purposes for forest management.

The Colorado court followed suit in U.S. v. Denver (Colo. 1982) holding that the MUSYA created no new water rights.

So did the Special Master in Molycorp (1986).

#### Wilderness

In Sierra Club v. Block/Lyng (D. Colo. 1985) (now on appeal) the district court recognized the existence of reserved water rights for wilderness areas, but stopped short of ordering the federal government to assert the rights. Instead, Judge Kane ordered the United States to prepare a report identifying methods of protecting wilderness values in the twenty-four wilderness areas in Colorado. On November 26, 1986, the United States submitted a two and one half page report concluding that there was no practical need to assert these rights.

Meanwhile in New Mexico the United States has been defending the principle of reserved rights for wilderness (as well as under the Wild and Scenic Rivers Act and MUSYA). The special master in Molycorp., however, recently rejected the reasoning of Block/Lyng and ruled that no reserved rights exist for wilderness or for wild and scenic rivers. The sparsely reasoned opinion concluded that these statutes were mere land management programs whose savings clauses denied the implication of new reserved rights.

#### Wild and scenic rivers

The Wild and Scenic Rivers Act is the only federal statute which contains explicit recognition of reserved water rights (albeit phrased in the negative): "Designation of any stream or portion thereof as a national wild, scenic or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter,

or in quantities greater than necessary to accomplish these purposes." Rivers Act, § 1284(c).

The legislative history, as well, contains clear recognition of the intent to reserve water. "Enactment of this bill would reserve to the United States sufficient unappropriated water flowing through Federal lands involved to accomplish the purpose of the legislation." 114 Cong. Rec. 28,313 (Nov. 26, 1968) (Sen. Gaylord Nelson).

Curiously, the immediately preceding subsection (b) seems to contradict subsection (c). "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." Rivers Act, § 1284(b). This savings clause was found to be "a non sequitur" by the Krulitz Opinion at 608 n.99.

The special master in MolyCorp, however, seized upon the language of subsection (b) and ignored the language in subsection (c) in reaching its conclusion that the Rivers Act does not create reserved water rights.

Stockwatering  
reservations

Public Water Reserve No. 107 (1926) reserved "every smallest legal subdivision of the public land surveys which is vacant, unappropriated unreserved land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land".

In Hyrup v. Kleppe (D.Colo. 1976) the district court ruled that the reservation of watering holes pursuant to Reserve No. 107 was limited to non-tributary sources.

This reasoning was rejected by the Colorado court in U.S. v. Denver (Colo. 1982) which held that the reservation included both tributary and nontributary sources. The Colorado court, however, ruled that the reservation was not for the entire yield of the springs, but only for animal and human consumption in the amount needed to prevent monopolization.

The State Engineer of Nevada followed the Denver reasoning as well in his award of stockwatering rights under the 1926 reservation to the BLM in 1985.

The Krulitz Opinion concluded that the 1926 order reserved water not only for stockwatering but for crops, fish, and wildlife, and for flood, soil and erosion control. The Opinion went on to hold that the quantity reserved was the total yield of each source. Finally, the Opinion concluded that the reservation encompassed both tributary and nontributary sources.

In 1983 Solicitor Coldiron rejected the Krulitz Opinion and adopted the reasoning and conclusions of the Colorado Supreme Court.

What waters  
are reached?

Typically the only waters claimed to fall within the scope of the reserved rights doctrine are waters flowing within or adjacent to a federal enclave.

Cappaert (U.S. 1976), however, applied to groundwater.

In Bell (Colo. 1986) the United States claimed reserved water from the Colorado River which ran within one half mile of a federal Naval Oil Shale Reserve. Because of the government's failure to timely assert the claim, however, the Colorado court found it unnecessary to reach the question of whether waters outside a reservation can be reserved. Bell at 645 n.1.

What purposes  
are included?

U.S. v. New Mexico (U.S. 1977) was the first case in which the Court denied a federal reserved water right. In this 5-4 decision, the Court drew a distinction between the primary and secondary purposes of a

reservation, holding that the Forest Service Organic Act (1897) contained only two primary purposes: timber production and watershed management. Reserved rights for recreation, wildlife, aesthetics, and stockwatering on national forests were rejected.

In U.S. v. Denver (Colo. 1982) the United States tailored its reserved rights claims around the New Mexico holding, but the Colorado court rejected the claims because the government's factual case was based on "sparse evidence" of the need for instream flows for watershed and timber protection.

In the same case the court also rejected the federal government's claim for a reserved right for rafting flows on the Yampa River flowing within the Dinosaur National Monument on the basis that as a matter of law the primary purpose of the withdrawal was to protect dinosaur bones and historic fish habitat, not boating.

Likewise in U.S. v. Alpine Land (9th Cir. 1983) the Ninth Circuit found that the evidence presented by the United States of the need for instream flows for timber and watershed was "insignificant".

### III. PREEMPTIVE ADMINISTRATIVE AUTHORITY TO APPROPRIATE

#### Basic theory

A great deal has been written about the yet untested theory of federal "nonreserved water rights".

#### Misnomer

At the outset it should be said that the term "nonreserved water right" is a misnomer--a handy but misleading shorthand. Unlike reservations of land which carry with them property rights in water by virtue of the reservation, the theory first announced in the Krulitz Opinion does not involve direct congressional creation of water rights. Rather, the idea is that the Congress may implicitly confer upon a federal agency a power or authority to appropriate water at a later date. For a good discussion of this semantical point see Wilkinson & Anderson (1985) at 232.

Scope

On the one hand, this theory of preemptive administrative authority is narrower than the reserved rights theory in that rights do not arise automatically when land is reserved, but only upon use of the water. Thus the United States cannot claim a back-dated priority which overrides all private uses subsequent to the congressional action.

On the other hand, it is broader than the reserved rights doctrine in that it is not dependent upon a reservation of land nor limited to the primary purposes of the reservation.

In short, the federal agency must wait in line like any other user, but once it gets to the counter the state may not reject the agency's application so long as it relates to any federal land management objective.

Administrative interpretation

Krulitz

The first and the broadest articulation of the administrative authority to appropriate is found in the Krulitz Opinion (1979). Solicitor Krulitz determined that the federal government is empowered to preempt state law as necessary when four conditions are met: (1) the Congress assigns a land management function to a federal agency, (2) the Congress did not expressly prohibit the preemption, (3) unappropriated water is available, and (4) the water is in fact put to use.

Martz

Solicitor Martz's Opinion (1979) embraced the general reasoning of the Krulitz Opinion, but concluded that as applied to the Taylor Grazing Act and FLPMA no authority to preempt state law was intended. This left the theory in tact but of vastly diminished applicability.

Coldiron

Solicitor Coldiron did an about face with his 1981 Opinion which flatly announced, "[T]here is no federal 'non-reserved' water right". Opinion at 1064. Even Solicitor Coldiron, however, did not doubt the Congress' power to preempt. Instead, he concluded that Congress has not exercised it (except in the case of reserved rights and the navigation servitude).

Olson

Finally, the Olson Opinion (1982) was released with great fanfare by the Department of Justice. Their press releases announced, "The nightmare is over." Environmentalists quickly responded, "The nightmare is just beginning for fish and wildlife." The opinion itself, however, was a far cry from what the public posturing on both sides would have suggested. In fact the Opinion is a thoughtfully reasoned rejection of the Coldiron Opinion, and it articulates a theoretical basis for asserting preemptive federal appropriative water rights. After 80 pages of analysis, however, the Opinion stopped short of applying its reasoning to particular statutes, settling instead for the observation that "such rights probably cannot be asserted under the current statutory schemes".

Why it matters

The only reason that this theory of preemptive administrative authority is necessary is that traditional western state water law often frustrates federal land management objectives. In other words, where state law permits the sort of appropriations the federal government seeks, there is no need for and nothing to be gained by preemption.

Instream flows The typical sore spot is instream flows. Historically western states required diversion to a beneficial use before a water right may be recognized. In recent years virtually all of the western states have made some progress toward accommodation of instream uses into the prior appropriation system.

But even in those states which have recognized instream flow rights, barriers remain to federal acquisition of water for instream flow purposes under state law.

Colorado

For instance, the National Park Service acquired an inholding in the Rocky Mountain National Park with appurtenant agricultural water rights. When the United States sought to apply the water to instream use in the Park, the State Engineer placed it on the

abandonment list on the theory that only the Colorado Water Conservation Board may hold an instream flow right. (That's an interesting response coming from a state which has argued repeatedly that if the federal government wants water for instream flows it should pay for it! Here the federal government has paid for it, and the state still refuses to accommodate it.) The United States has now filed for a change in use, the Water Board is opposing it, and the matter is before the water court. If it turns out that the Park Service cannot hold the right under state law, the argument for federal preemption would seem to follow.

#### Nevada

A similar case is now before the Nevada Supreme Court. In 1979 the Bureau of Land Management filed an application for an instream flow water right to protect a spectacular mountain fishery known as Blue Lakes. The Attorney General objected arguing that a diversion is still a prerequisite to a water right in Nevada (despite the fact that the legislature had declared recreation to be a beneficial use in 1969). NWF and the Sierra Club intervened in support of the BLM. When the State Engineer granted the water right to the BLM, the Attorney General sued the State Engineer. The trial court upheld the issuance of the instream flow water right (and reversed on an unrelated stockwatering issue), and the matter is now on appeal. Again, should the state refuse to accommodate the BLM's instream flow needs, the preemption issue will be raised.

#### Alternative approaches

##### "Regulatory water rights"

Some have suggested that various federal regulatory powers which interfere with water rights create new "regulatory water rights". (For a good discussion, see Tarlock (1985).) For instance, if the federal government prohibits a person from exercising her water right held under state law by denying her a section 404 permit, the government, it is said, has thereby created a property right in itself. This analysis,



however, is a precarious one in two respects. First, most property rights (as opposed to contractual rights) vest interests which may be asserted against all other parties. But if the federal government stops person X from using her water, it does not thereby obtain an exclusive "property" interest in X's water. This is so because nothing stops person Y who does not need a section 404 permit from appropriating the water.

Moreover, what is to distinguish this sort of "regulatory property right" from "rights" which might be said to arise any time the government regulates anything? If the government zones land to prohibit tall buildings, does it obtain "regulatory air rights"? If it requires people to mow their lawns, has it obtained "regulatory scenic easements"? If it insists that people stop their cars at red lights, doesn't the same analysis require that we label this some sort of a property right too?

While the "regulatory rights" approach has some appeal, in the long run it may do more to confuse the analysis than to enlighten it.

#### Purchase

Others have suggested that if the government wants to control water, it should pay for the right. While this argument makes at least academic sense when applied to reallocation of existing rights, it has no applicability to the issue of reserved rights or preemptive administrative authority--because these theories relate only to unappropriated water.

#### IV. PROCEDURAL ISSUES

##### McCarran Amendment

The McCarran Amendment (1952) waived federal sovereign immunity and granted consent to joint the United States in state court general adjudications of water rights.

In Dugan v. Rank (U.S. 1963) the Court held that the McCarran Amendment only applies to general adjudications wherein priorities are set among all users of a particular stream.

In County of Eagle (U.S. 1971) the Court rejected an argument by the United States that the McCarran Amendment applies only to federal water rights acquired under state law and not to reserved rights. The Court also found that the act applies to Colorado's system of permanent, ongoing general adjudications.

In CRWCD v. U.S. (U.S. 1976) the Court ruled that while the McCarran Amendment does not establish the exclusive jurisdictional basis for adjudication of federal water rights, a duplicative federal suit may be dismissed where a McCarran Amendment proceeding is underway.

In South Delta Water Agency (9th Cir. 1985) the court reiterated that the McCarran Amendment is not "a condition that must be met to bring a water rights dispute case against the United States" if jurisdiction could be grounded in other general jurisdiction statutes such as section 1331.)

#### Quantification

The Idaho court ruled in Avondale Irrigation Dist. (Idaho 1978) that the United States may claim the entire flow of streams on reserved land, without quantifying the claim, even though a state statute requires numerical quantification. But if entire flow is not needed to meet the primary purposes of the reservation, then the United States must quantify its needs.

In U.S. v. Denver (Colo. 1982) the court ordered the federal government to quantify its water rights on the Yampa River within six months.

#### Res judicata

In Nevada v. U.S. (U.S. 1983) the Court ruled that the federal government's claims to reserved rights are subject to rules of res judicata.

## V. THE FUTURE

### Explicit congressional directives

Regardless of whether one views the reserved rights doctrine as a technique of statutory construction or a rule of federal common law, there is no doubt that either way Congress has the power to change the doctrine as it pleases.

To date the Congress has shied away from the issue, speaking when it does in meaningless gobbledygook. (Take, for example, "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." Wild and Scenic Rivers Act, 16 U.S.C. § 1284(b) (1982).)

But there are signs that those days may be over. Two recent reservations contained explicit rejections of new reserved rights.<sup>3/</sup>

- 
- <sup>3/</sup> (1) "Nothing in [this act] shall be construed to reserve any water for purposes of the [Mono Basin National Forest] Scenic Area or to affirm, deny, or otherwise affect the present (or prospective) water rights of any person or of the State of California or of any political subdivision thereof (including the city of Los Angeles), nor shall any provision of [this act] be construed to cause, authorize, or allow any interference with or infringement of such water rights so long as, and to the extent that, those rights remain valid and enforceable under the laws of the State of California." California Wilderness Act (1984).
- (2) "Nothing in [this act] shall be construed to establish a new express or implied reservation to the United States of any water or water-related right with respect to the land described in [this act]; Provided, That the United States shall be entitled to only that express or implied reserved water right which may have been associated with the initial establishment and withdrawal of Humboldt National Forest and the Lehman Caves National Monument from the public domain with respect to the land described in [this act]. No provision of [this act] shall be construed as authorizing the appropriation of water, except in accordance with the substantive and procedural law of the State of Nevada." Great Basin National Park Act (1986).

This appears to be timely, as at least one court has shown some impatience with Congress' unwillingness to grapple with the water issue: "When Congress passed MUSYA, it was aware of the reserved rights doctrine. Congress, however, chose not to reserve additional water explicitly. In the face of its silence, we must assume that Congress intended the federal government to proceed like any other appropriator and to apply for or purchase water rights when there was a need for water." U.S. v. Denver at 26 (Colo. 1982) (citations omitted). One might argue that just the opposite implication should be drawn from congressional silence, but however that may be, the point is that continued silence constitutes a form of congressional Russian roulette.

#### Quantification

Clearly there is a need to resolve uncertainties attending federal water rights by quantifying them and putting them in the State Engineer's computer for consistent administration. When particular conflicts arise over particular new additions to federal reservations, we may expect precisely that result.

Quantifying water rights on existing federal lands or on large new reservations, however, presents a far more difficult problem. Unless the entire flow is to be claimed (which often may be the simplest solution) the government is required to conduct complex on-site measuring throughout each of the seasons before it can determine what flows are necessary to maintain natural systems.

Ways are now being explored by the Sierra Club v. Block/Lyng litigants to allow for quantification, but postpone the task until an actual conflict arises. Recognizing the prohibitive cost of quantifying all wilderness water rights (unless the entire flow is claimed), this may be the best alternative.

#### Conclusion

While Congress has rejected a general federal water law, its deference to state water law has been equivocal. In

fundamental ways it has refused to let the states go their own way, and has in many respects brought about reform and conformity within western state allocation systems--particularly in the area of instream flow management and environmental protection.

At the same time the reserved rights doctrine has had an undeniably disruptive effect on western water administration. This may best be remedied by gradual--not hasty--quantification.

At the same time, much of the steam may be taken out of the "administrative authority to appropriate" (a/k/a non-reserved rights) argument if western states continue to make progress toward accommodating federal interests, particularly in the area of instream flows. This would appear to be a win/win solution for all concerned.

APPENDIX

LIST OF CITATIONS

Federal Water Rights Cases (by year)

(omitting cases dealing primarily with Indian water rights)

- 1899: United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).
- 1906: Winters v. United States, 207 U.S. 564 (1908), aff'g 143 F. 740 (9th Cir. 1906) and 148 F. 684 (9th Cir. 1906).
- 1935: California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935).
- 1955: Federal Power Comm'n v. Oregon, 349 U.S. 435 (1955) (Pelton Dam case).
- 1963: Dugan v. Rank, 372 U.S. 609 (1963).
- 1963: Arizona v. California, 373 U.S. 546 (1963), decree entered, 439 U.S. 419 (1979), modified, 460 U.S. 605 (1983).
- 1971: United States v. District Court in and for the County of Eagle, 401 U.S. 520 (1971), aff'g 169 Colo. 555, 485 P.2d 760 (1969); United States v. District Court for Water Division No. 5, 401 U.S. 527 (1971) (companion case).
- 1976: Cappaert v. United States, 426 U.S. 128 (1976).
- 1976: Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976), rev'g United States v. Akin, 504 F.2d 115 (10th Cir. 1974).
- 1976: Hyrup v. Kleppe, 406 F.Supp. 214 (D.Colo. 1976).
- 1978: United States v. New Mexico, 438 U.S. 696 (1978), aff'g Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977).
- 1978: Avondale Irrigation Dist. v. North Idaho Properties, Inc., 99 Idaho 30, 577 P.2d 9 (1978).
- 1978: California v. United States, 438 U.S. 645 (1978), prior and subsequent history, 403 F.Supp. 874 (E.D. Cal. 1975); 558 F.2d 1347 (9th Cir. 1977); 521 F.Supp. 491 (E.D. Cal. 1980); 509 F.Supp. 867 (E.D. Cal. 1981); 694 F.2d 1171 (9th Cir. 1982), (New Melones Dam case).

- 1981: Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981),  
aff'g Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C.  
1080) (Escalante decision).
- 1982: United States v. City and County of Denver, 656 P.2d 1  
(1982); United States v. City and County of Denver, 656  
P.2d 36 (1982) (companion case) .
- 1983: United States v. Alpine Land and Reservoir Co.,  
modified, 697 F.2d 851 (9th Cir. 1983), modifying 503  
F. Supp. 877 (D. Nev. 1980), cert. denied sub nom.  
Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson  
Irrigation Dist., 464 U.S. 863 (1983); United States v.  
Alpine Land & Reservoir Co., 431 F.2d 763 (9th Cir.  
1970), cert. denied sub nom. Pyramid Lake Paiute Tribe  
v. United States, 401 U.S. 909 (1971) (related case).
- 1983: Nevada v. United States, 463 U.S. 110 (1983), rev'g  
United States v. Truckee-Carson Irrigation Dist., 649  
F.2d 1286 (9th Cir. 1981), and amendment 666 F.2d 351  
(9th Cir. 1982), on remand 720 F.2d 622 (9th Cir.  
1983), and 107 F.R.D. 377 (D. Nev. 1985), (federal  
government's claims to reserved rights are subject to  
rules of res judicata).
- 1985: South Delta Water Agency v. United States Dep't of  
Interior, 767 F.2d 531 (9th Cir. 1985).
- 1985: In the Matter of Applications 37061, et al. (Ruling of  
the Nevada State Engineer, July 26, 1985) (some aspects  
of this ruling are on appeal sub. nom. State v. Nevada  
Division of Water Resources, No. 18105 (Nev. filed Mar.  
4, 1987)).
- 1985: Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985),  
appeal filed sub nom. Sierra Club v. Lyng).
- 1986: United States v. Bell, 724 P.2d 631 (Colo. 1986).
- pending: New Mexico v. Molybdenum Corp. of America, No.  
CV-9780 C (D. N.M. Special Master's report March 27,  
1986) (Red River Adjudication); New Mexico v. Arellano,  
No. CV-76-036-C (D. N.M. Special Master's report March  
27, 1987) (San Cristobal Adjudication) (consolidated  
cases referred to jointly as "Molycorp.").
- pending: State v. Nevada Division of Water Resources, No. 18105  
(Nev. filed Mar. 4, 1987)

Federal Land Statutes and Executive Orders (by year)

- 1862: Homestead Act of May 20, 1862, ch. 75, 12 Stat. 392 (previously codified in part as amended at 43 U.S.C. §§ 161-163 (1982)) (repealed by FLPMA).
- 1866: Mining Act of 1866, ch. 262, 14 Stat. 251 (codified at 50 U.S.C. §§ 51, 52, 43 U.S.C. § 661 (1982)).
- 1877: Desert Land Act of Mar. 3, 1877, ch. 107, 19 Stat. 377 (codified generally at 43 U.S.C. §§ 321-339 (1982)).
- 1897: Forest Service Organic Administration Act of June 4, 1897, ch. 1, 30 Stat. 34 (codified as amended at 16 U.S.C. §§ 473-482, 551 (1982)).
- 1906: American Antiquities Preservation Act of June 8, 1906, ch. 3060, 34 Stat. 255 (codified at 16 U.S.C. §§ 431-433 (1982)).
- 1916: National Park Service Act of August 25, 1916, ch. 408, 39 Stat. 535 (codified as amended at 16 U.S.C. §§ 1, 2-3 (1982)).
- 1926: Public Water Reserve No. 107, Executive Order of April 17, 1926 (issued pursuant to section 10 of the Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 865 (formerly codified to 43 U.S.C. § 300 (repealed by FLPMA))).
- 1934: Taylor Grazing Act of June 28, 1934, ch. 865, 48 Stat. 1269 (codified at 43 U.S.C. §§ 315-315m (1982)).
- 1952: McCarran Amendment, 43 U.S.C. § 666 (1982) (enacted in 1952 as an rider to the Department of Justice Appropriations Act, §§ 208(a)-(c), 66 Stat. 560 (1952)).
- 1960: Multiple Use Sustained Yield Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified at 16 U.S.C. §§ 528-531 (1982) ("MUSYA")).
- 1964: Wilderness Act of Sept. 3, 1964, Pub. L. No. 88-577, 78 Stat. 890 (codified at 16 U.S.C. §§ 1131-1136 (1982)).
- 1966: National Wildlife Refuge Administration Act of Oct. 15, 1966, Pub. L. No. 89-669, 80 Stat. 927 (codified at 16 U.S.C. § 668dd (1982)).
- 1968: Wild and Scenic Rivers Act of Oct. 2, 1968, Pub. L. No. 90-542, 82 Stat. 906 (codified as amended at 16 U.S.C. §§ 1271-1287 (1982 & Supp. 1985)).



- 1976: Federal Land Policy and Management Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2744 (codified primarily at 43 U.S.C. §§ 1701-1784 (1982)) ("FLPMA").
- 1978: Public Rangelands Improvement Act of Oct. 25, 1978, Pub. L. No. 95-514, 92 Stat. 1803 (codified at 43 U.S.C. §§ 1901-1908 (1982)).
- 1984: California Wilderness Act of Sept. 28, 1984, Pub. L. No. 98-425, 98 Stat. 1632 (codified at 16 U.S.C. § 543c(h) (1985 Supp.)).
- 1986: Great Basin National Park Act of Oct. 27, 1986, Pub. L. No. 99-565, 100 Stat. 3182 (codified at 16 U.S.C.A. § 410mm-(h) (1987 pocket part)).

DOJ and DOI Opinions on Federal Water Rights (by year)

- 1979: Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (June 25, 1979) (by Solicitor Leo Krulitz) (Opinion M-36914).
- 1981: Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 88 Interior Dec. 253 (Jan. 16, 1981) (by Solicitor Clyde O. Martz) (Opinion M-36914, Supp.).
- 1981: Nonreserved Water Rights--United States Compliance with State Law, 88 Interior Dec. 1055 (Sept. 11, 1981) (by Solicitor William H. Coldiron) (Opinion M-36914, Supp. I).
- 1982: Office of Legal Counsel, U.S. Dep't of Justice, Legal Memorandum: Federal "Non-Reserved" Water Rights (June 16, 1982) (by Assistant Attorney General Theodore B. Olson) (this unpublished opinion is available from the author).
- 1983: Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, 90 Interior Dec. 81 (Feb. 16, 1983) (by Solicitor William H. Coldiron) (Opinion M-36914, Supp. II).

Background Articles on Federal Water Rights:

Bazil, Sierra Club v. Block: A Second Reserve Water Right for Wilderness Areas?, 15 Colo. Law. 233 (1986).

Boles and Elliott, United States v. New Mexico and the Course of Federal Reserved Water Rights, 51 Colo. L. Rev. 209 (1980).

Fairfax & Tarlock, No Water for the Woods: A Critical Analysis of United States v. New Mexico, 15 Idaho L. Rev. 509 (1979).

Grow & Stewart, The Winters Doctrine as Federal Common Law, 10 Nat. Resources Law. 457 (1977).

Kosloff, Water for Wilderness: Colorado Court Expands Federal Reserved Rights, 16 Env'tl. L. Rptr. 10,002-07 (1986).

Morreale, Federal-State Conflicts over Western Waters--A Decade of Attempted 'Clarifying Legislation', 20 Rutgers L. Rev. 423 (1966).

Ranquist, The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water, 1975 B.Y.U.L. Rev. 639.

Robb, Applying the Reserved Rights Doctrine in Riparian States, 14 North Carolina Central L.J. 98 (1983).

Samelson, Water Rights for Expanded Uses on Federal Reservations, 61 Denver L.J. 67 (1983).

Sax, Legal Control of Water Resources: Cases and Materials 493-572 (1986) (casebook by West Publishing Co.).

Shupe, Reserved Instream Flows in the National Forests: Round Two, Western Natural Resources Law Digest at 23 (Spring 1985).

Shurts, FLPMA, Fish and Wildlife, and Federal Water Rights, 15 Env'tl. L. 115 (1984).

Simms, National Water Policy in the Wake of United States v. New Mexico, 20 Nat. Resources J. 1 (1980).

Smith, Stability Amid Change in Federal-State Water Relations, 15 Cap. U.L. Rev. 479 (1986).

Tarlock, The Endangered Species Act and Western Water Rights, 20 Land & Water L. Rev. 1 (1985)

Tarlock & Fairfax, Federal Proprietary Rights for Western Development: An Analysis of a Red Herring?, 3 J. Energy L. & Pol'y 1 (1982).

Tarlock, Protection of Water Flows for National Parks, 22 Land & Water L. Rev. 29 (1987).

Trelease, Uneasy Federalism--State Water Laws and National Water Uses, 55 Wash. L. Rev. 751 (1980).

Waring and Samelson, Non-Indian Federal Reserved Water Rights, 58 Denver L.J. 783 (1981).

Wilkinson & Anderson, Land and Resource Planning in the National Forests, 64 Or. L. Rev. 1 (1985).

Witte, The Instream Effect of Reserved Rights (1986)  
(unpublished article produced by the Colorado Office of the Attorney General).

Comment, Federal Non-Reserved Water Rights, 15 Land & Water L. Rev. 67 (1980).

Comment, Federal Reserved Water Rights in National Forest Wilderness Areas, 21 Land & Water L. Rev. 381 (1986).

Comment, The Metamorphosis of the Federal Non-Reserved Water Rights Theory, 6 Public Land L. Rev. 116 (1985).

Comment, Wyoming's Experience With Federal Non-Indian Reserved Rights: The Big Horn Adjudication, 21 Land & Water L. Rev. 433 (1986).

Note, Federal Acquisition of Non-Reserved Water Rights After New Mexico, 31 Stan. L. Rev. 885 (1979).

Note, Federal Nonreserved Water Rights, 48 U. Chi. L. Rev. 758 (1981).

Note, Federal Non-Reserved Water Rights: Fact or Fiction?, 22 Nat. Resources J. 423 (1982).

Note, The Limits of Federal Reserved Water Rights in National Forests: United States v. City and County of Denver, 19 Land & Water L. Rev. 71 (1984).

Note, Reevaluating the Applicability of the Reservation Doctrine to Public Water Reserve No. 107, 26 Ariz. L. Rev. 126 (1984).

Note, The Winters of Our Discontent: Federal Reserved Water Rights in the Western States, 69 Cornell L. Rev. 1077 (1984).

