Public Land & Resources Law Review

Volume 9 Article 7

June 1988

Reserved Water Rights for Wilderness and Forest Lands: The Interaction of United States v. New Mexico and Sierra Club v. Block

Leif Magnus Johnson

RESERVED WATER RIGHTS FOR WILDERNESS AND FOREST LANDS: THE INTERACTION OF *UNITED STATES V. NEW MEXICO* AND *SIERRA CLUB V. BLOCK*

Leif Magnus Johnson

TABLE OF CONTENTS

I. INTRODUCTION

On the great expanses of the American West, the distribution of water plays a pivotal role in defining the distribution of man. The use and allocation of this limited resource breeds conflict. And in the wake of this conflict, a considerable body of law has developed.

The arid western states are also characterized by large tracts of public lands including public domain lands and federal reservations of American Indian lands, refuges, parks, monuments, recreation areas, forest, range

and wilderness lands.[1] On the arid western reservations, water acts as an important land management tool. Yet Congress failed to include express reservations of water to accompany the Executive's power to reserve lands. Instead, courts have recognized the implied authority of the Executive to reserve water for the purposes of the federal land reservation. This body of judicial opinion constitutes the reserved water rights doctrine.

The most recent addition to the doctrine involves adjudication of Colorado wilderness water rights in *Sierra Club v. Block*.[2] The *Block* opinion, however, ignores an important contradiction between the purposes of the Wilderness Act of 1964(WA)[3] and those in the Forest Service Organic Act of 1897(FSO)[4] as interpreted by the Supreme Court in *United States v. New Mexico*.[5] Yet, in drafting the WA, Congress relied upon the compatibility between the purposes of the two acts. This comment addresses the strength and validity of the legal analysis in *Block* and its relation to *New Mexico*. For the sake of consistency in applying the law, judges and legal scholars must recognize incompatible holdings within the reserved water doctrine. The court in *Block* ignores an important contradiction between the WA and the FSO that calls into question the holding in *United States v. New Mexico*.

II. History of the Reserved Water Doctrine

The United States Supreme Court first recognized impliedly reserved water rights on the Fort Belknap Indian Reservation of Montana in 1908. In *Winters v. United States*,[6] the Fort Belknap Indian Tribes sought to protect waters present at the time of reservation from appropriation by upstream users.[7] The Tribes argued that they could not remain in one place and practice the vocation intended by the government, irrigation farming, without a reservation of water for that purpose.[8] The Court acknowledged that the land would have little value without adequate water supplies.[9] The Court held that within the reservation of land, Congress implied the power

1. Public lands fall within two general categories, public domain lands and reserved lands. The government may dispose of public domain lands because they are not held for any particular purpose. Reserved lands, however, are those "expressly withdrawn from the public domain by statute, executive order, or treaty, and are dedicated to a specific federal purpose." United States v. City and County of Denver, 656 P.2d 1, 5 (Colo. 1982).

2. 622 F. Supp. 842 (D. Colo. 1985), *reh'g granted sub nom.*, Sierra Club v. Lyng, 661 F. Supp. 1490 (D. Colo. 1987). *See infra* text accompanying notes 44-48 and 63-66.

3. 16 U.S.C. §§ 1131-1136 (1982).

4. 16 U.S.C. §§ 471-475, 478, 479-482, 551 (1982).

5. 438 U.S. 696 (1978).

6. 207 U.S. 564 (1908).

7. *Id.* at 565.

8. *Id.* at 576.

9. *Id.*

to reserve water to fulfill the purposes of the reservation.[10]

In 1955, the United States Supreme Court reviewed the authority of the Executive to regulate the use and allocation of water on federal lands. In *Federal Power Comm'n v. Oregon*,[11] the Court considered the Federal Power Commission's approval of the Pelton Dam Project which included an allocation of water from the reserved federal lands at the dam site.[12] The State of Oregon contended that the Congressional Act of July 1866[13], the Congressional Act of July 1870[14] and the Desert Lands Act[15] subjected the appropriation and disposal of all water on federal lands to state water laws.[16] However, the Court held that these acts refer to water rights only on "public lands", not those water rights implied for the management of federal reservation lands.[17] The Court distinguished domain lands, public lands subject to private appropriation, from reserved lands, public lands reserved for a federal purpose. Consequently, the federal government retains the authority to regulate water on federal reserved lands because these acts do not apply to federal land reservations.[18] Thus, the designation of federal lands to a specific purpose gives rise to water rights distinct from the state allocation systems governing public domain lands.

The federal reserved water doctrine lay dormant until 1963 when the Supreme Court heard argument on the application of impliedly reserved water rights to non-Indian federal lands. In *Arizona v. California*,[19] the Court held that the same policy of reserving water for American Indian reservations applied to all federal reservations.[20] The Court reasoned that the federal government could claim state waters through the regulatory powers of the Commerce[21] and Property[22] clauses of the United States Constitution.[23]

In 1976, the reserved water doctrine grew to include the preservation of groundwater levels. In *Cappaert v. United States*,[24] use of groundwater

---

10. *Id.* The purposes of the Fort Belknap Reservation include a grant of the resources necessary for irrigation farming. Foremost among these resources are arable land and water. *Id.*

11. 349 U.S. 435 (1955).

12. *Id.* at 438.

13. ch. 262, § 9, 14 Stat. 253 (1866).

14. ch. 235, § 17, 16 Stat. 218 (1870).

15. ch. 235, § 1, 19 Stat. 377 (1877)(codified as amended at 43 U.S.C. § 321 (1982)).

16. *Federal Power Comm'n*, 349 U.S. 446-47.

17. *Id.* at 448; *See* 16 U.S.C. § 796(1), (2) (1982) (codifying the distinction between public domain and federal reservation lands as held in *Federal Power Comm'n*).

18. *Federal Power Comm'n*, 349 U.S. at 448.

19. 373 U.S. 546 (1963).

20. *Id.* at 601.

21. U.S. CONST. art. I, § 8, cl. 2.

22. *Id.* at art. IV, § 3, cl. 2.

23. *Arizona*, 373 U.S. at 597-98.

24. 426 U.S. 128 (1976).

on the Cappaert ranch lowered the water levels in caves at the neighboring Devil's Hole National Monument and threatened to destroy the scenic and biologic resources that Congress intended the National Monument to protect.[25] The depletion of groundwater threatened the survival of a relic population of diminutive and nearly blind pupfish.[26] Nevertheless, the United States Supreme Court recognized the Congressional directive to preserve the fish and their habitat and extended the reasoning in *Arizona* to reserve water from the public domain for the primary purposes of the National Monument.[27]

This case established the federal power to extinguish water appropriations junior to the date of the federal reservation. However, the Court tempered this power by limiting the amount of reserved water to the volume necessary to fulfill the purposes of the reservation.[28] Therefore, the purposes of the reservation define the amount of water available for allocation by the land management agency.

A. *United States v. New Mexico*

In 1978, the United States Supreme Court refined the reserved water doctrine by distinguishing primary purposes from secondary purposes in a federal reservation. In *United States v. New Mexico*,[29] the Court determined whether the Forest Service Organic Act(FSO)[30] and the Multiple Use and Sustained Yield Act(MUSY)[31] reserved water for allocation by the Forest Service for the management of Gila National Forest.[32] The United States Forest Service asserted reserved water rights for the forest purposes of aesthetics, fish, wildlife and forest preservation as outlined in MUSY.[33] The Supreme Court of New Mexico upheld the defendant's allegation that the Forest Service could only reserve water on a national forest for the primary purposes enumerated in the FSO.[34]

In *New Mexico*, the Court began its analysis by restating the core of the reserved water doctrine: implied water rights on federal reservations could extend only to the primary purposes of the reservation.[35] The Court

---

25. *Id.* at 133.
26. *Id.*
27. *Id.* at 143.
28. *Id.* at 141.
29. 438 U.S. 696 (1978), *aff'g* Mimbres Valley v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977).
30. *See supra* note 4.
31. 16 U.S.C. §§ 528-531 (1982).
32. *New Mexico*, 438 U.S. at 713.
33. *Id.* at 704.
34. Mimbres Valley Irr. Co. v. Salopek, 90 N.M. 410, 412, 564 P.2d 615, 617 (1977).
35. *New Mexico*, 438 U.S. at 700. This rule, as formulated in *Cappaert*, stated that the purpose of the reservation deserved the minimal amount of water necessary to accomplish that purpose. *Cappaert*, 426 U.S. at 141. In *New Mexico*, the Supreme Court modified the rule to allow reserved

explained, "[w]here water is only valuable for a secondary use of the reservation, . . .there arises a contrary inference that Congress intended. . .that the U.S. would acquire water in the same manner as any other public or private appropriation."[36] Consequently, the existence of reserved water for the purposes of MUSY depended upon whether the legislation created primary rather than secondary purposes.[37]

The Court cited the purpose section of MUSY as indicating the nature of the reservation.[38] The MUSY purposes of outdoor recreation, range, timber, watershed and wildlife protection must be supplemental to, but not in derogation of, the purposes for which the national forests were established.[39] In addition, the Court cited the House Report accompanying the act which explains that the Executive may establish a forest for the purposes contained in MUSY only if the Executive includes a purpose from the FSO.[40] MUSY purposes cannot stand alone; they must accompany one of the original FSO purposes. This "supplemental" clause convinced the Court that the MUSY purposes could only function subordinate to one of the purposes of the FSO.[41] Thus, the Court held that the Forest Service must seek water for the secondary purposes of MUSY through the state's prior appropriation system.[42]

The Supreme Court proceeded to interpret the primary land use purposes set forth in the FSO. The act provides:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States. . . .[43]

In spite of the plain language of the FSO, the Court deferred to the legislative history of the bill to define the primary purposes of federal forest lands.[44] The Court cited the legislative debates of the bill, administrative regulations and subsequent legislation as supporting the interpretation that the FSO contains the following purposes: 1) for securing favorable conditions of water flows, and 2) for furnishing a continuous supply of

---

water only where the primary purpose of the reservation depended upon it to exist. *New Mexico*, 438 U.S. at 702.

36. *New Mexico*, 438 U.S. at 702.

37. *Id.*

38. *Id.* at 713.

39. 16 U.S.C. § 528.

40. *New Mexico*, 438 U.S. at 714-15 (quoting H.R. REP. No. 1551, 86th Cong., 2d Sess., 4 (1960)).

41. *Id.* at 715.

42. *Id.*

43. 16 U.S.C. § 475.

44. *New Mexico*, 438 U.S. at 707-08.

timber.[45]

The court's twofold interpretation required the following alteration of the FSO: "No national forest shall be established, except to improve and protect the forest; or *in other words. . . .*"[46] This additional phrase restricts the meaning of the words "to improve and protect the forest" to the two purposes contained in the remainder of the sentence. The majority supported this interpretation by noting that the organic acts of the National Park Service and National Refuges expressly included the purposes of preserving natural scenery, fish and wildlife.[47] Had Congress intended to provide for these purposes in the FSO, the Court concluded, Congress would have expressly included them in the legislation.[48]

B. *Sierra Club v. Block*

1. *Facts*

On November 25, 1985, the Sierra Club brought suit against several federal defendants[49] to compel the Forest Service to assert impliedly reserved water rights in Colorado's twenty-four wilderness areas for adjudication within the state's water allocation system.[50] The Sierra Club alleged that the Forest Service failed to adequately protect wilderness water rights in violation of Wilderness Act[51] and the public trust doctrine.[52] Relying on the holding in *New Mexico*, the defendants contended that the land use purposes of wilderness areas are secondary to the purposes of the original national forest reservation. Consequently, implied water rights on those lands extend only to the primary forest uses outlined in the FSO.[53] In *Block*, the District Court of Colorado primarily addressed whether impliedly reserved water rights exist in wilderness areas.[54]

---

45. *Id.* at 707.

46. *Id.* at 707 n.14.

47. *Id.* at 709-11.

48. *Id.* at 711.

49. The defendants included the Secretary of Agriculture, John Block, the Chief of the Forest Service, Max Peterson; Secretary of the Interior, William Clark; and the Director of the National Park Service, Russell Dickenson. *Block*, 622 F.Supp. at 845.

50. *Id.* at 846.

51. *See supra* note 3.

52. The public trust doctrine arises in the common law. The defendants argued that the Forest Service had an obligation to assert reserved water rights as a trustee manager of public lands. The court in *Block* dismissed this issue because the WA provides the basis for federal managerial obligations, thus rendering any common law duties redundant. *Block*, 622 F. Supp. at 866.

53. *Id.* at 855.

54. The court also considered the issues of the Plaintiff's standing, and whether the court could compel agency action under the Administrative Procedure Act, 5 U.S.C. § 701-706 (1982), and the public trust doctrine. *Block*, 622 F. Supp. at 846-47.

2. *Wilderness Areas as Reservations*

The existence of reserved water rights in Colorado wilderness areas necessarily depends upon the resolution of two subissues: 1) whether the WA reserves lands for specific purposes, and 2) whether Congress implied a reserved water right to fulfill those purposes.[55] In this endeavor, the court in *Block* examined the unique problem of whether wilderness lands withdrawn from an aggregate of land previously reserved for the purposes of the FSO constituted a primary land reservation.

The court in *Block* distinguished the WA from land management statutes such as MUSY where the purposes of a former reservation govern those purposes of subsequent legislation. Although the Congress reserved the wilderness lands in question from previously reserved forest lands, the court found that these wilderness areas no longer share any of the use-related purposes of the FSO.[56] Instead, the court found that Congress reclassified wilderness lands from their former designation as forest lands.[57] "In preserving the natural state of the wilderness areas," the court stated, "Congress prohibited or seriously limited most uses inconsistent with the protection of the wilderness. . . ."[58] By the nature of the restrictive purposes of the WA, the court held that the WA constitutes a primary reservation of land.[59]

For instance, sections of the WA specifically withdraw wilderness lands from use-related purposes.[60] Furthermore, the legislative history of the bill provides evidence to support the legal conclusion that the WA creates a new and distinct reservation of public lands. The court noted that the Supreme Court had previously observed legitimate primary reservations of land redesignated from land reserved for different purposes.[61] With these findings, the court in *Block* held that Congress reserved wilderness lands with the intent that these lands receive the benefits of that classification.[62]

---

55. These were issues of first impression nationally in *Block*. *Id.* at 854.

56. *Id.* at 855-57.

57. *Id.* at 858.

58. *Id.* at 851.

59. *Id.*

60. *Id.* at 855-56. The court cited specifically 16 U.S.C. §§ 1131(a) (purposes of preservation),(b) (retention of the primeval nature of the land), (c) (limiting commercial and use-related purposes) and (d) (limiting grazing and water impoundment and prohibiting logging).

61. *Block*, 622 F. Supp. at 857 (citing *Arizona v. California* 373 U.S. 546 (1963) (The Court granted reserved water rights for the secondary withdrawal and reservation of both Lake Mead National Recreation Area and Havasu National Wildlife Refuge).

62. *Block*, 622 F.Supp. at 858.

3. *The Purposes of the Wilderness Act*

One benefit, the reservation of water to fulfill wilderness management purposes, depends upon an implied reservation within the purposes of the WA.[63] The explicit and lengthy policy statement of the WA enumerates the express purposes of the WA.[64] The WA provides:

> [Wilderness areas] shall be administered for the use and enjoyment of the American people in such a manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character. . . .[65]

The essence of this purpose statement reduces neatly into the phrase, "[wilderness areas are designated for the purpose of] preservation and protection in their natural condition."[66] In support, the court also cited statements of several Congressmen stressing the importance of preserving wilderness resources for future generations to enjoy.[67] Because these purposes require water, the court held, the Executive may implement the management of the land through a corresponding reservation of water.[68]

The court granted summary judgment on the issue of the existence of wilderness water rights and compelled the Forest Service to submit a plan outlining the management alternatives in protecting wilderness purposes on Gila National Forest.[69] However, the court could not order the Forest Service to take specific action to protect WA purposes. As the court deftly explained, the Forest Service may comply with its duty to protect wilderness resources in many ways.[70] The Forest Service may utilize reserved water rights as one management tool among many to preserve the natural integrity of the land.[71] Although the court found that the WA reserves water rights to fulfill its purposes, the court yielded to the discretion of the agency in complying with those purposes.[72]

In a rehearing of *Block* to review the court ordered forest plan, the

---

63. As the reserved water doctrine directs, a reserved water right arises only where Congress expressed water dependant purposes in the reservation legislation. *New Mexico*, 438 U.S. at 702-03.

64. *Block*, 622 F. Supp. at 858.

65. 16 U.S.C. § 1131(a).

66. *Block*, 622 F. Supp. at 855 (citing 16 U.S.C. § 1131 (a)).

67. *Block*, 622 F. Supp. at 858-59. Rep. Libonati stated, "This act guarantees to this generation and future generations of Americans the enduring *resources of wilderness*. . . ." 110 Cong. Rec. 17444 (statement of Rep. Libonati)(emphasis added by the court). *See also*, 110 CONG. REC. 20602 (statement of Sen. Humphrey).

68. *Block*, 622 F. Supp. at 862.

69. *Id.* at 865.

70. *Id.*

71. *Id.*

72. *Id.* at 863-65.

court in *Sierra Club v. Lyng*[73] assessed the viability of the alternatives set forth by the Forest Service to comply with the purposes of the WA. The court found the forest plan woefully inadequate.[74] In dicta, the court stated that the legislature must take action to clear the economic and philosophic conflicts impeding the adjudication of wilderness water rights.[75] This dicta captures the heart of the contradiction between the Wilderness Act and the Forest Service Organic Act. In essence, the policies of preservation and development collide in the reserved water doctrine between the *Block* and *New Mexico* cases.

III. ARGUMENT

A. *The Contradiction within* Block

1. *Introduction to Argument*

The court's call for a legislative policy statement in *Lyng* reflects the continuing ambiguity surrounding wilderness water rights after the *New Mexico* holding. In 1981, Waring and Samuelson wrote, "[m]any ambiguities of the reserved water rights doctrine will not be settled until they arise in litigation, thus creating the danger that conflicting decisions may be handed down."[76] Indeed, when following the course of reserved water rights through *Block*, the ambiguous nature of wilderness water rights creates a contradiction between the WA and the FSO which calls into question the reasoning in *New Mexico*.

The express language of the WA presented a significant hurdle for the court in *Block*. In the WA, Congress stated, "[n]othing in this chapter shall be deemed to be in interference with the purposes for which the national forests are established. . . ."[77] Congress further declared that WA purposes "are within and supplemental to the purposes for which national forests. . .are established and administered. . . ."[78] Through this clause, Congress tied the purposes of the WA to those of the FSO. The WA purposes must emanate from a purpose within the FSO. However, the United States Supreme Court stated in *New Mexico* that Congress reserved the national forests for the purposes of securing favorable conditions for water flows and providing a continuous supply of timber.[79] A contradiction arises in the WA where Congress seemingly reserved lands

---

73. 661 F. Supp. 1490 (1987).
74. *Id.* at 1502.
75. *Id.*
76. Waring and Samuelson, *Non-Indian Federal Reserved Water Rights*, 58 DEN. L. J. 783, 799 (1981).
77. 16 U.S.C. § 1133(a)(1).
78. *Id.* at 1133(a).
79. *New Mexico*, 438 U.S. at 706-07.

for the purpose of preservation while stating that this purpose must supplement the use-related purposes of the FSO. The court in *Block* ignored this apparent contradiction.

A comparison of the purposes of the WA and the FSO has fostered varying conclusions. In 1979, the Solicitor General stated that the "supplemental" clause of the WA cannot be interpreted to limit the WA to secondary uses reserving no water.[80] One commentator declared that the *New Mexico* holding should not pertain to wilderness reserved water litigation.[81] Several other commentators reached a similar conclusion based on the definition of reserved water rights conceived in *Cappaert* and repeated in *New Mexico* as follows: reserved water rights arise where the very purpose of the reservation depends upon water to exist.[82] However, other commentators suggested that to put the preservation purposes of the WA within the two purposes of the FSO essentially renders the WA purposes subordinate to the FSO purposes.[83] This conclusion echoes that portion of the *New Mexico* opinion where the majority used the "supplemental" clause to support the holding that MUSY purposes are secondary and reserve no additional water for the forest.[84]

The court in *Block* agreed with the Solicitor's Opinion regarding the application of the primary purpose test of *New Mexico* to wilderness water rights. The court stated that a failure to reserve water in wilderness areas would entirely defeat the purposes of the WA.[85] Accordingly, the court held that, the WA reserves water to the extent necessary to accomplish its purposes.[86]

2. *The WA and Providing a Continuous Supply of Timber*

Although the court in *Block* found it difficult to conceive of wilderness without reserved water, the WA directs that its purposes must lie within

---

80. Op. Solic. Dep't. of Interior, 86 I. D. 553, 610 (1979). The Solicitor did not directly compare the purposes of the WA and the FSO. The Solicitor did, however, refute the argument inferred from *New Mexico* that the "supplemental" clause of the WA subordinates the purposes of the WA to those purposes within the enacting legislation of the original federal reservation.

81. Abrams, *Water in Western Wilderness Areas: The Duty to Assert Reserved Rights*, 1986 U. ILL. L. REV. 387, 393 (1986).

82. *See* Samuelson, *Water Rights for Expanded Uses on Federal Reservations*, 61 DEN. L. J. 67 (1983). Samuelson agreed with the dissent in *New Mexico* that the denial of reserved water for MUSY purposes(as secondary uses) amounts to inconsequential dicta. *Id.* at 75-76. *See also*, Comment, *Federal Reserved Water Rights in National Forest Wilderness Areas*, 21 LAND AND WATER L. REV. 381, 390 (1986). The author argued that courts should limit the scope of *New Mexico* from wilderness issues.

83. Waring and Samuelson, *supra* note 76, at 792.

84. *Id.*

85. *Block*, 622 F. Supp. at 862.

86. *Id.*

the accepted interpretation of FSO purposes.[87] The United States Supreme Court, however, did not interpret the FSO purpose clause until fourteen years after the passage of the WA. Inescapably, the WA purposes of preserving lands in their natural state cannot arise within the strict interpretation of FSO purposes given in *New Mexico*. This conflict clearly emerges in *Block* by the court's comparison of WA purposes with the purpose of providing a continuous supply of timber.

The court in *Block* dealt with this apparent contradiction of purposes summarily. The comparison of preservation with the harvest of timber merited only a footnote to the effect that a comparison was meaningless.[88] The court reasoned that although timber harvesting contravenes the WA purposes, lands proposed for wilderness designation in 1964 had no immediate timber producing value. Therefore their loss from production would not remarkably affect timber production.[89] The court in *Block* concluded, "It is clear that Congress was not referring to the purpose of providing a continuous supply of timber."[90] Thus, the court held that WA purposes need not supplement the harvest of timber.

This circuitous conclusion, however, does not flatter the vision of Congress. The court supported its reasoning with evidence that Congress had no immediate interest in the timber production on proposed wilderness lands in 1963.[91] However, modern logging techniques coupled with increased demand for federally subsidized timber harvesting may make wilderness and proposed wilderness lands attractive to the timber industry. Courts have enjoined logging in wilderness study areas on the grounds that this FSO purpose would destroy the value of the land as wilderness.[92] In addition, the court's reasoning in *Block* ignores the present and future designation of wilderness in premier timber producing old growth forests. Meanwhile, with increasing demands for wilderness designation, the potential conflict between these mutually exclusive resource uses increases.

The effects and methods of commercial logging inherently destroy the land's wilderness qualities. Clearcuts, terracing, replanting, herbicide

---

87. 16 U.S.C. § 1133(a).

88. *Block*, 622 F. Supp. at 866 n. 13.

89. *Id.*

90. *Id.*

91. *Id.*; *See* S. R. REP. No. 109, 88th Cong. 1st Sess. at 4 (1963). The Senate stated, "There is no timber harvest today from the lands being considered for inclusion in the wilderness system. . . ."

92. *See, e.g.*, California v. Block, 690 F.2d 753 (9th Cir. 1982). The Ninth Circuit found the RARE II environmental impact statement deficient, and therefore, void. To preserve the status quo on wilderness study lands until the Forest Service prepared an adequate EIS, the court enjoined wilderness disturbing activities including logging on lands released from wilderness designation under RARE II. *See also* City of Tenakee v. Block, 778 F.2d 1402 (9th Cir. 1985)(reaffirming the holding in *California v. Block* with regard to logging activities on wilderness study lands).

application and road building radically alter the composition and regeneration of the forest ecosystem.[93] Furthermore, the mechanized nature of timber extraction disrupts the established distribution of local and migratory wildlife and creates significant damage to waterways through siltation.[94] On this issue, the court in *Block* discretely stated that the contradiction between wilderness and logging will never arise because these uses do not coincide.[95] This statement simply ignores a contradiction not easily surmounted.

3. *The WA and Favorable Conditions for Water Flows*

With respect to securing favorable conditions for water flows, the court in *Block* found that the WA and the FSO purposes coincide.[96] The court cited legislative history replete with rhetoric praising the WA purposes as beneficial to the protection of watercourses for supplying downstream appropriators with high-quality water.[97] The court held that non-consumptive water reservations would supplement the quantity and quality of water available to downstream appropriators.[98] Therefore, reservation of high alpine waters could not affect the forest purpose of securing favorable conditions for water flows.[99]

This statement requires an unrealistically narrow interpretation of the phrase, securing favorable conditions for water flows. If this phrase contains only the restricted purpose of benefitting downstream appropriators in the same drainage, then the court in *Block* held correctly that the WA supplements this purpose; for preserving water in wilderness watersheds naturally supplements the purpose of providing water for downstream appropriators. This narrow interpretation, however, fails to capture the nature of the modern water project.

The Forest Service has interpreted this phrase, securing favorable conditions for waterflows, to include the exportation of water to entirely

---

93. A. BOLLE, A UNIVERSITY VIEW OF THE FOREST SERVICE, S. DOC. No. 91-115 91st Cong., 2d Sess. 14-16 (1970). The University of Montana Dean of Forestry and a number of forestry scientists commented on the timber harvesting practices in the Bitterroot Valley of Montana. The report considered environmental, aesthetic and societal aspects of clearcutting timber management.

94. *See* Northwest Indian Cemetery Protective Assoc. v. Peterson, 764 F.2d 581, 587-88 (9th Cir. 1985), *rev'd on other grounds*, 108 S.Ct. 1319 (1988).

95. *Block*, 622 F. Supp. at 860 n. 13.

96. *Id.* at 860.

97. *Id.* In one case, Congressman Riehlman flatly stated that the WA purposes will not only enhance water quality, they would not conflict with FSO purposes. 110 CONG. REC. 17437 (statement of Rep. Reihlman). *See also*, 110 CONG. REC. 17442 (statement of Rep. Olsen) (non-consumptive uses on wilderness lands), 110 CONG. REC. 5895 (statement of Sen. Church) (protection of wilderness watersheds).

98. *Block*, 622 F. Supp. at 859.

99. *Id.* at 859-60.

different drainages. The Owens Valley Project of California, ambitious in its own day, serves as a example of what securing favorable conditions for water flows may mean. The project involved the construction of the historic aqueduct providing Los Angeles with much needed water from the distant Owens Valley. The aquaduct secured the water flows of the Owens Valley not for downstream appropriators in the valley, but for a city 250 miles distant in another drainage.[100] The upper Owens Valley was designated as Inyo National Forest for the very purpose of securing favorable conditions for waterflows to Los Angeles.[101]

Yet the Owens Valley Project represents but one example among many projects and plans to secure favorable conditions for water flows to entirely different drainages.[102] As one scholar suggests, the diversion and storage of water in alpine wilderness lands becomes economically feasible as demand for water rises.[103] This demand, as evidenced by the Owens Valley Project and many other diversion schemes, may arise in highly developed areas far removed from the source of diversion.

In short, the WA purposes prescribe a natural flow of water within streams and rivers to sustain the flora and fauna of the wilderness. The court in *New Mexico*, however, struck down any purpose in the FSO prescribing instream flows of reserved water.[104] This interpretation of the FSO may allow the Forest Service to manage a forest expressly for the purpose of removing water. A wilderness area with substantial water needs for instream flows cannot be found within a forest purpose to export water elsewhere.

Even in the face of this contradiction between the purposes of the WA and the FSO, the WA must reserve water. The court in *Block* stated, "[i]t is beyond cavil that water is the lifeblood of wilderness. . .[for] without access to the requisite water, the very purposes for which the [WA] was established would be entirely defeated."[105] This statement of the necessity of water for reservation purposes provides the basis for all reserved water rights. It is indisputable and repeated throughout the reserved water doctrine.[106]

---

100. M. REISNER, THE CADILLAC DESERT 63-64 (1987).

101. *Id.* at 86. As the author points out, the Inyo National Forest, as enacted in 1907, contained no timber worth harvesting. *Id.* at 87.

102. *See Id.* at 506-14. Reisner examines numerous plans and installations removing water from one drainage to an entirely different area. The North American Water and Power Alliance, a major interbasin diversion plan, would divert waters from Canada, Washington and Oregon to Southern California and Arizona affecting the flow of nearly every major drainage on the western seaboard.

103. Abrams, *supra* note 81, at 390.

104. *New Mexico*, 438 U.S. at 705.

105. *Block*, 622 F. Supp. at 862.

106. *See* text accompanying *supra* note 35.

B. *Dissolving the Contradiction between the WA and the FSO*

1. *Introduction*

In *New Mexico*, the United States Supreme Court gave a restricted interpretation of the FSO purposes that inadvertently alienates the purposes of the WA. In many instances, the purpose of preservation cannot supplement the purposes of providing timber or securing favorable conditions for water flows. The conflict between the purposes of the WA and the FSO suggest two possible results. One, that Congress did not intend to give effect to the "supplemental" clause of the WA; or two, that the Supreme Court misinterpreted the purpose clause of the FSO.

As the dicta in *New Mexico* reveals, the United States Supreme Court predicated its holding on the concern to preserve state control over water allocation.[107] In *New Mexico*, the Forest Service sought a reserved water right on the fully appropriated Rio Mimbres. The resulting loss of water to private and state appropriations, the Court stated, could not have escaped the attention of Congress.[108] Trelease echoed this concern when he stated that an expanded reserved water doctrine may damage state systems of water allocation.[109] A third forest purpose would give rise to a relatively unquantified reserved water right which could confound state determination of the amounts of water available for beneficial use.[110]

Consequently, the *New Mexico* holding reduced the likelihood of uncertainty in state water regulation by restricting the purposes of the FSO. But the *New Mexico* holding failed to consider the impact of this restriction on reserved water rights in wilderness areas. This interpretation of the purposes of the FSO has cast a cloud on the discovery and quantification of reserved water rights in wilderness areas.

2. *Harmonizing the FSO with the WA*

The "supplementary clause" of the WA indicates that, in 1964, Congress interpreted the FSO to include a purpose that could provide the foundation for the expansive purposes of the WA. The Court in *New Mexico* failed to consider the implicit interpretation of the FSO contained in the WA. To harmonize the FSO with the WA as originally intended by Congress, the purpose statement of the FSO must include a separate purpose to "improve and protect the forest". The remaining purposes acknowledged in *New Mexico*, for "providing a continuous supply of

---

107. *New Mexico*, 438 U.S. at 701-05.

108. *Id.* at 705.

109. F. Trelease, *Uneasy Federalism: State Water and National Water Uses*, 55 WASH. L. REV. 751, 757 (1980).

110. *Id.* at 751-66.

timber" and "securing favorable conditions for water flows", serve to modify the ignored purpose, not conceal it. The dissent in *New Mexico* admonished the Court for this oversight and stated that this phrase includes a basic purpose of protecting and improving the forest as an ecosystem.[111]

If the FSO has a general preservation purpose as the dissent perceived, then the preservation purposes of the WA would logically supplement, but not derogate the FSO. Wilderness designations give protection to the entire forest ecosystem distinct from the provisions for supplying timber or securing favorable conditions for water flows. The "supplemental" clause, then, provides evidence that Congress interpreted the FSO in 1964 more broadly than did the Supreme Court in 1978.

Several commentators support this threefold interpretation of the FSO with a number of persuasive arguments. The plain meaning of the FSO purpose clause clearly establishes three purposes.[112] Following the conventions of the construction of unambiguous statutory language, the FSO provides for improvement and protection of the forest as an ulterior purpose in the designation and management of forests.[113] With the three purposes of the FSO contained in one sentence, each carries weight in the management criteria imposed upon the Forest Service.[114] The Supreme Court ignored this plain meaning interpretation for a more restricted interpretation supported by selected portions of legislative and western history.[115]

The legislative and general history surrounding the passage of the FSO, however, also point to a threefold purpose clause.[116] The interpretation of the FSO purpose clause in *New Mexico* appears to align closely to an interpretation of the purposes of the original Organic Act of 1891[117] by the Division of Forestry.[118] In 1897, however, Congress redrafted the Act to include the phrase "to improve and protect the forest."[119] This phrase

---

111. *New Mexico*, 438 U.S. at 723-24 (Powell, J. dissenting).

112. J. Elliot, *Unites States v. New Mexico: Purposes That Hold No Water*, 22 ARIZ. L. REV. 19, 29-30 (1980).

113. *Id.* at 36.

114. *Id.* at 37.

115. *Id.*

116. S. Fairfax and A. Tarlock, *No Water for the Woods: A Critical Analysis of United Stated v. New Mexico*, 15 ID. L. REV. 509, 533, 549 (1979). The authors came to a different conclusion than the Court in *New Mexico* regarding the interpretive uses of legislative history of the FSO and general history at that time. They concluded that the Congressional debates and contemporary historians, such as G. MARSH, MAN AND NATURE (1864) and S. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY (1869), all clearly evince a tension between use and preservation on the forests.

117. Act of Mar. 3, 1891, ch. 561, 24 Stat. 1103 (1891) (repealed by 16 U.S.C. § 471 (a) (1976)).

118. DIVISION OF FORESTRY, U.S. DEPT. OF AGRICULTURE, REPORT OF THE CHIEF OF THE DIVISION OF FORESTRY FOR 1891, at 233-55.

119. 16 U.S.C. § 475 (1982).

accurately reflects the contemporary tension between development and preservation described by Marsh and Hays.[120] Therefore, even the basis for the *New Mexico* holding rests on an uncertain foundation.

3. *Subsequent Legislation as an Aid to Interpretation*

In *New Mexico*, the Supreme Court relied heavily upon the discovery of Congressional intent to delineate the purposes of the FSO. The Court cited several examples of post-FSO legislation that specifically included water related purposes.[121] The FSO, however, includes no specific water reservation relating to the protection of the forest. By inverse logic, the Court held that Congress did not intend to reserve water for any unspecified duties in the protection of the forest. The Court reasoned that Congress intended water reservations only where legislation contains express purposes to override the general rule of express deference to state water appropriation systems.[122] The Court, however, failed to look to the comprehensive body of subsequent legislation to interpret the meaning of the original statute.

In addition to the WA, other Congressional acts subsequent to the FSO reflect a threefold interpretation of the FSO purpose clause. For instance, the Weeks Act[123] of 1924 directed the Secretary of Agriculture to evaluate the management of activities on the forests and instigate new programs to protect the forest purposes. The Weeks Act further provided that the Secretary of Agriculture shall recommend systems of fire prevention and systems to protect the forest, watershed and the continuous supply of timber.[124] Although the Weeks Act fell within the era of intensive timber management and resource use on the forests, this legislation clearly enumerates three purposes derived from the FSO.[125]

Further, MUSY may also be interpreted to incorporate a three purpose interpretation of the FSO.[126] Many of the myriad purposes found

---

120. Fairfax and Tarlock, *supra* note 116, at 548-50.

121. *New Mexico*, 438 U.S. at 709-11. The Court compared the purpose statement of the FSO with the express purposes of the National Parks and National Wildlife Refuges. In Parks and Refuges, Congress explicitly provided for the protection of fish and wildlife. The FSO makes no mention of these resources. Hence, the Court concluded that the clause "to improve and protect the forest" carries no broad protection for the forest's flora and fauna beyond the provision for timber.

122. *Id.* at 715.

123. Weeks Law of July 1, 1924, 43 Stat. 653 (repealed by 16 U.S.C. §§ 564, 565 (1982)).

124. *Id.* at 653.

125. *Id.* at 653-54. In the eyes of many historians, the era of intensive timber management began with the passage of the Transfer Act in 1905, ch. 288, 33 Stat. 628(1905)(codified as amended 16 U.S.C. § 472 (1982). In 1924, well within this era of intensive resource use, Congress passed the Weeks Act. Although the Act clearly emphasizes the forest uses of timber and watershed management, protection of the forest remained the first use from which the remaining two could spring.

126. R. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal*

in MUSY naturally emanate from protection and improvement of the forest. In this light, MUSY codified many of the Forest Service policies that supplement the improvement and protection of the forest.[127] Examples include aesthetics, non-destructive recreation, and fish and wildlife preservation. Once again, these MUSY purposes supplement the protection of the forest while they may conflict with the purposes of providing timber and securing favorable conditions for water flows.[128] The Supreme Court ignored this evidence in the interpretation of the FSO.

As extrinsic aids of statutory construction, the Weeks Act, the WA and MUSY all provide evidence that Congress intended three purposes in the management of the national forests. A court may decide not to weigh evidence of Congressional intent through subsequent legislation in statutory interpretation. However, case law has established that where Congress amends or clarifies a statute by subsequent legislation, the latter legislation provides strong evidence of the legislative intent in the first statute.[129] Furthermore, where latter legislation depends in part upon the reference to and interpretation of a former statute, the Congress intended a continuity of interpretation between the statutes.[130] Continuity between the WA and the FSO relies upon a forest purpose to improve and protect the forest.

IV. REWRITING *BLOCK*

Sierra v. Block ignores any conflict between the WA and *New Mexico*. Ignoring the conflict exposes an Achilles heel in the *Block* reasoning. Waring and Samuelson argue that the conflicting purposes of the WA and the FSO require the subordination of WA to the classification of a secondary withdrawal of forest lands.[131] This argument correctly illuminates the conflict, but it fails to account for Congress' intent to reserve water essential for the purposes of wilderness. The strength and cohesiveness of the reserved water doctrine depends upon the recognition of this conflict in the legal reasoning surrounding the existence of wilderness reserved water rights.

To dispel the confusion surrounding the effect of *New Mexico* upon the WA, further adjudication of wilderness reserved water rights should delineate this contradiction of purposes. While the Supreme Court's

---

Jurisdiction: The Colorado River Decision, 30 STAN. L. REV. 1111, 1136-37 n. 173 (1978).

127. *See* H.R. REP. No. 1551, 86th Cong., 2d Sess. 2, 4-7 (1960). The House Report states in part that the Forest Services' authority to administer forest lands for recreation and wildlife purposes arises within the FSO.

128. *Id.*

129. 2 SUTHERLAND STATUTORY CONSTRUCTION, § 51.01 (N. Singer 4th ed. 1984).

130. *Id.* § 51.02.

131. Waring and Samuelson, *supra* note 76, at 792.

twofold interpretation of the FSO conflicts with WA purposes, *New Mexico* contains elements of the reserved water doctrine that support the holding in *Block*. Namely, a reserved water right arises where the purposes of a reservation depend upon water to exist.[132] Wilderness, by definition, cannot exist without natural supplies of water. Therefore, the *New Mexico* holding, in part, would support a wilderness reserved water right. To attain consistency in the application of the reserved water doctrine, the Congress or the Supreme Court must resolve this conflict.

V. CONCLUSION

The muddying of reserved waters began in *New Mexico* with the adjudication of national forest reserved water rights and continues with the current adjudication of wilderness reserved water rights in *Block*. In *New Mexico*, the Supreme Court held that the phrase "to improve and protect the forest" had no substantive effect upon the management of the forests. Therefore the Court held that this statement could not reserve water for the improvement and protection of the forest. But clearly, the WA indicates that Congress intended to create a forest purpose "to improve and protect the forest." Without a three purpose interpretation of the FSO, the WA appears to contradict the purposes of the FSO.

This apparent conflict between the WA and the FSO arises in *Sierra Club v. Block*. However, in adjudicating Colorado's wilderness water rights, the conflict escapes the court. On appeal or in another jurisdiction, the court must acknowledge that the *New Mexico* decision runs counter to the purpose for designating wilderness. Only through a careful delineation of the problem can Congress or the Supreme Court decide which will yield, the *New Mexico* holding or wilderness water rights. Should the legislature or the judiciary decide to overrule *New Mexico*, the adjudication of wilderness water rights will have far-ranging impacts on both wilderness and forest lands. And only then will reserved waters run clear.

132. *New Mexico*, 438 U.S. at 702.