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THE SHALLOWS WHERE FEDERAL RESERVED WATER RIGHTS FOUNDER: STATE COURT DEROGATION OF THE *WINTERS* DOCTRINE

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THE SHALLOWS WHERE FEDERAL RESERVED WATER RIGHTS FOUNDER: STATE COURT DEROGATION OF THE *WINTERS* DOCTRINE

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ABSTRACT

The doctrine of implied federally reserved water rights, as established over a century ago by *Winters v. United States*,[1] is critical to realizing federal land management goals. Recently, the doctrine's ability to protect those goals, particularly with respect to federal lands set aside for non-Indian purposes, has

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1. 207 U.S. 564 (1908).

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been greatly limited by several poorly reasoned and result-oriented state court decisions. The primary factors that have led to the erosion of the *Winters* doctrine's utility are: (i) the McCarran Amendment,[2] which allows states to force the federal government to assert its reserved water rights claims in state court general stream adjudications; (ii) state hostility to the assertion of *Winters* claims for political and economic reasons; (iii) state court expansion of the US Supreme Court's restrictive interpretation of reserved water rights in *United States v. New Mexico*;[3] and (iv) state court abuse of the inconsistent and often ambiguous language included in executive and congressional public land reservations.

The arid western states are unlikely to become more amenable to the assertion of federally reserved water rights, and the US Supreme Court is almost as unlikely to issue a more enlightening exposition of the *Winters* doctrine anytime soon. It is fair to surmise that the problem can only be fully and, due to its political nature, appropriately resolved by Congress. Ideally, Congress would repeal the McCarran Amendment to undo some of the damage done and to prevent the future derogation of this important aspect of federal land management law. This, too, may be unlikely given the current political climate, which tends to prioritize states' rights over federal interests and also tends to be antagonistic to environmental concerns. An alternative congressional fix would be to amend the organic acts or the enabling statutes governing the establishment and management of federal lands. Should Congress fail to respond to the problem, federal agencies might be more proactive in litigating their reserved water rights in federal court in order to ensure the integrity of water bodies and water-dependent resources.

I. INTRODUCTION

Congress has well-established authority to reserve water necessary for federal lands pursuant to the Commerce Clause and the Property Clause.[4] Since 1908, the US Supreme Court has held that when the federal government sets aside land from the public domain without specifically reserving the requisite water, the government has implicitly exercised its constitutional power to reserve water sufficient to accomplish the purposes of that reservation.[5] This particular exercise of the federal government's constitutional power over water has become known as the doctrine of implied federally reserved water rights or, more commonly, the "*Winters* doctrine."[6]

Despite the Supreme Court's long-standing recognition of the *Winters* doctrine, western states, fearing the doctrine's potential effect on water rights acquired under state law, have met the federal government's exercise of its

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2. 43 U.S.C. § 666(a) (2012).
3. 438 U.S. 696 (1978).
4. Cappaert v. United States, 426 U.S. 128, 138 (1976).
5. *Winters*, 207 U.S. at 577-78.
6. *See* Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 573 (1983) (referring to the doctrine of federally reserved water rights as the "*Winters* doctrine").

constitutionally-granted power with vehement resistance.[7] The states' resistance has led to several poorly reasoned, result-oriented state court decisions that have greatly reduced the doctrine's utility.[8] This development is especially disconcerting because the *Winters* doctrine was created to ensure that the purposes of federal land withdrawals would not be defeated.[9] For example, the early doctrine recognized water rights for an Indian reservation where the Indian tribe would have otherwise had none under state law,[10] and, in another instance, the doctrine prevented the likely extinction of the desert pupfish by preserving the water levels in Devil's Hole National Monument.[11] In sharp contrast to those early successes, several state court holdings have since failed to acknowledge the existence of non-Indian federally reserved water rights, even in the most compelling situations.[12] These derogations of the *Winters* doctrine inhibit the federal agencies' ability to effectuate fundamental land management goals, many of which depend upon adequate quantity and flow of water.[13]

This Article strives to identify the factors that led to this problem and to explore ways it could be resolved or, at least, to discern a means of mitigating further damage to the doctrine of implied federally reserved water rights. Part II of this Article examines the US Supreme Court's creation and early extension of the *Winters* doctrine. Part III identifies factors that have adversely affected the doctrine's development and implementation, including (i) the passage of the McCarran Amendment,[14] (ii) state court bias, (iii) the US Supreme Court's decision in *United States v. New Mexico*;[15] and (iv) inconsistent, and often ambiguous, congressional action. Part IV then analyzes the role of these factors in several recent state adjudications of non-Indian federally reserved water rights. Ultimately, Part V concludes that Congress, as the only government branch with the ability to provide a comprehensive solution, should respond. Congress could prevent future state court mistreatment of the federal government's reserved water rights by repealing the McCarran Amendment

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7. *See infra* Parts III-IV.
8. *Id.*
9. *See infra* Part II.
10. *Arizona,* 463 U.S. at 575-76.
11. Cappaert v. United States, 426 U.S. 128, 133-34, 147 (1976).
12. *See infra* Part IV. Federally reserved water rights claims for Indian reservations have generally received better treatment in state courts than those asserted for non-Indian purposes. *See, e.g., In re* Gila River Gen. Stream Adjudication, 35 P.3d 68, 76-77 (Ariz. 2001) (rejecting *New Mexico*'s primary-secondary purpose rule on the basis that non-Indian reservations of land are significantly different than Indian reservations). This may be due, in part, to the liberal construction courts give Indian treaties. *See* Potlatch v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260, 1264 (Idaho 2000) (citing *Winters* for the rule that ambiguities in treaties with Native Americans are to be interpreted in the tribes' favor and stating that where there has been no bargained-for exchange, as is the case with a treaty, "[t]he opposite inference should apply.").
13. *See* Michael C. Blumm, *Reversing the* Winters *Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications,* 73 U. COLO. L. REV. 173, 173 (2002) (stating that the *Winters* doctrine "is central to achieving federal land management goals in the arid West, because without water most federal goals cannot be achieved.").
14. 43 U.S.C. § 666(a) (2012).
15. 438 U.S. 696 (1978).

or, alternatively, it could at least mitigate further damage by amending the various organic and enabling statutes under which Congress designates federal land reservations and directs their management. Absent a congressional response, however, federal agencies likely can and should make efforts to circumvent damage to the *Winters* rights associated with federal lands by proactively asserting those rights in federal courts.

II. THE EARLY *WINTERS* DOCTRINE

A. ESTABLISHING THE DOCTRINE

In *Winters v. United States,* the US Supreme Court established the doctrine of implied federally reserved water rights.[16] In that case, the Court affirmed a lower court order enjoining several Milk River appropriators, who had acquired water rights under Montana state law, from interfering with that river's flow into the Fort Belknap Indian Reservation downstream.[17]

In the 1888 treaty creating Fort Belknap, various Indian tribes ceded their rights to a larger portion of land in exchange for the United States' creation of a "permanent home and abiding place" for them within Montana.[18] Although the treaty was silent with respect to water, the Supreme Court looked to the surrounding circumstances to discover the intent underlying the treaty.[19] The Court explained that, prior to the treaty, the "Indians had command of the lands and the waters, [and] command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization."[20] It found that the treaty lands were arid and "practically valueless" without water to irrigate them,[21] and asked whether one could believe the tribes would have agreed to "reduce the area of their occupation and give up the waters which made it valuable or adequate?"[22] It concluded that the tribes would not have assented to such a treaty, and therefore the creation of the Fort Belknap reservation had implicitly reserved sufficient water for the survival of that reservation and its people.[23] The Court emphasized that "[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, *and could not be*."[24]

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16. 207 U.S. 564 (1908).
17. *Id.* at 565, 578.
18. *Id.* at 565-68, 576 (internal quotation marks omitted) ("It was the policy of the government, it was the desire of the Indians, to change [their nomadic] habits and to become a pastoral and civilized people.").
19. *Id.*
20. *Id.* at 576.
21. *Id.*
22. *Id.*
23. *Id.* at 576-77.
24. *Id.* at 577 (emphasis added) (citation omitted). The rectitude of such an assertion cannot be doubted. *See* U.S. CONST. art. VI, cl. 2 ("[The] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land . . . .").

Consequently, despite the potential damage to the upstream appropriators' sizeable investments (and thus the potential frustration of those appropriators' expectations), the Court rejected the appropriators' argument that the Indian tribes ceded their right to use the Milk River's water.[25]

B. EXTENDING THE DOCTRINE

Although the US Supreme Court established the doctrine of implied federally reserved water rights in *Winters*, that sparse decision left a number of questions open. Central among them was whether the *Winters* doctrine applied only to Indian reservations or extended to other federal reservations of land as well. The Court did not address this important issue until several decades later. When it finally did so, the Court's answer was rendered without equivocation.[26]

In its 1963 decision in *Arizona v. California*, the Court considered whether the *Winters* doctrine applied to federal land withdrawn from the public domain for non-Indian purposes.[27] The Court found "that the principle underlying the reservation of water rights for Indian Reservations was *equally applicable* to other federal establishments . . . ."[28] It held the federal government had intended to reserve water from the Colorado River when it created two national wildlife refuges, a national recreation area, and the Gila National Forest.[29]

Following *Arizona v. California*, in 1976, the Court issued its first opinion that examined non-Indian federally reserved water rights in depth.[30] In *Cappaert v. United States*, the Court considered whether the Presidential proclamation reserving Devil's Hole as a detached component of Death Valley National Monument also reserved sufficient water to sustain a pool situated within the Devil's Hole cavern.[31] The Court began its analysis with what is, to date, its best explanation of the *Winters* doctrine:

> 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.[32]

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25. *Id.* at 569-70, 576-78 (state appropriators alleging that they had invested more than $100,000 and that "[i]f they [were] deprived of waters 'their lands [would] be ruined, it [would] be necessary to abandon their homes, and they [would] be greatly and irreparably damaged[.]'").
26. Arizona v. California, 373 U.S. 546, 601 (1963).
27. *Id.* at 600-01.
28. *Id.* (emphasis added).
29. *Id.*
30. Cappaert v. United States, 426 U.S. 128, 138 (1976).
31. *Id.* at 131-38.
32. *Id.* at 138.

The Court continued with a description of the doctrine's constitutional foundation and scope:

> 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.[33]

As it had in *Winters*, the Court in *Cappaert* again adamantly refused to complicate the doctrine of federal reserved water rights by weighing the gravity of the interests competing for the water at issue.[34] In *Cappaert*, because a finding of federally reserved water rights for the Monument would adversely affect a nearby commercial ranch's groundwater pumping, Nevada argued the *Winters* doctrine was an equitable one, "calling for a balancing of competing interests."[35] The Court roundly rejected this argument, stating that "[i]n determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water," and that such an "[i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."[36]

After rejecting the balancing test suggested by Nevada, the Court in *Cappaert* looked to whether an intent to reserve water could be inferred from the language of the Devil's Hole reservation and the circumstances surrounding the reservation.[37] In doing so, the Court observed "[t]he Proclamation discussed the pool in Devil's Hole in four of the five preambles and recited that the 'pool . . . should be given special protection.'"[38] This led the Court to conclude that the 1952 reservation of Devil's Hole pool constituted a reservation of then unappropriated water sufficient to preserve its scientific value, despite the impact on other water users, "[because] a pool is a body of water, [therefore,] the protection contemplated is meaningful only if the water remains."[39]

As is evident from these cases, the doctrine of implied federal reserved water rights enjoyed a relative lack of complexity from the time the Court established it in the *Winters* case up until the Court's first full explanation of the doctrine in *Cappaert*, despite the contentious nature of water allocation in the West.[40] As a judicially-created rule of construction, the doctrine prevented federal lands withdrawn from the public domain for a specific purpose from

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33. *Id.*
34. *Id.* In *Winters*, the US Supreme Court found implied federally reserved water rights despite the adverse effect those rights would have on heavily-invested state appropriators. *See supra* note 28 and accompanying text.
35. *Cappaert*, 426 U.S. at 138.
36. *Id.* at 138-39.
37. *See id.* at 139-42.
38. *Id.* at 139-40.
39. *Id.* at 140, 147.
40. Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639, 674-77 (1975).

being denied the water necessary to accomplish that purpose. It did so by examining the sparse language of the reservation at issue, as well as the statutory authority for the reservation, and by giving effect to both the expressed intent and what was logically required to accomplish that intent.[41] In sum, as evidenced by the Supreme Court's decision in *Cappaert*, the *Winters* doctrine served as a common-sense judicial interpretation of federal reservations and their unique circumstances. However, this would not continue.

III. FACTORS LEADING TO STATE COURT DEROGATION OF THE *WINTERS* DOCTRINE

Despite its status as a relatively straightforward and common-sense doctrine for the first sixty-eight years of its existence, the years since have not been kind to the *Winters* doctrine. Recent years have witnessed repeated efforts by state courts to side-step non-Indian federal reserved water rights.[42] Those efforts have led to a patchwork of result-oriented state court decisions of questionable reasoning, which have impaired the ability of the *Winters* doctrine to effectuate federal land management goals.[43] As detailed in this section, this impairment has been caused by: (i) the McCarran Amendment, which allows states to force the United States to assert its federally reserved water rights claims in state court general stream adjudications;[44] (ii) state hostility to the assertion of *Winters* claims for political and economic reasons;[45] (iii) state court manipulation of the reasoning utilized by the US Supreme Court in its most recent substantive decision on non-Indian federal reserved water rights, *United States v. New Mexico*;[46] and (iv) state court abuse of the inconsistent and often ambiguous language included in the various congressional reservations.[47]

A. THE PASSAGE OF THE MCCARRAN AMENDMENT

After *Cappaert*, a confluence of four factors significantly increased the complexity of federally reserved water rights law and facilitated the erosion of the doctrine's usefulness. The first of these factors was the expansion of state court jurisdiction with the passage of the McCarran Amendment in 1952.[48]

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41. *See* Cappaert v. United States, 426 U.S. 128, 147 (1976) (reasoning that the pool reserved by the proclamation at issue could only be protected if granted sufficient water to remain a pool); Winters v. United States, 207 U.S. 564, 576 (1908) (rejecting the argument that the Native Americans of the Fort Belknap Indian Reservation had given up water rights necessary to the viability of their Reservation by entering into a treaty with the Unite States).

42. *See infra* Part IV.

43. *See infra* Parts IV, VI.

44. *See infra* Part III.a

45. *See* discussion *infra* Part III.c.

46. *See* discussion *infra* Part III.b.

47. *See* discussion *infra* Part III.d.

48. 43 U.S.C. § 666(a) (2012).

Prior to the McCarran Amendment questions of the existence and scope of federal water rights were almost exclusively decided by federal courts.[49] Indeed, *Cappaert* arose out of litigation in federal court.[50] Before the 1950s, federal sovereign immunity prevented most federal water rights cases from being decided by state courts, despite the fact that many states had adopted judicial and administrative procedures for determining water rights within their boundaries.[51] This led Nevada Senator Patrick McCarran and others to attack the application of sovereign immunity in the area of water rights.[52] They argued that federal water rights, which could affect rights obtained under state law, should be decided in tandem with state water rights in comprehensive state court proceedings.[53] Despite the well-founded fears of the Departments of Justice and Interior,[54] their argument gained momentum, and the Amendment was passed as a rider to an appropriations bill for the Departments of State, Justice, and Commerce, and the Judiciary.[55]

The passage of the McCarran Amendment effectively reversed the *status quo*, allowing state courts to become the primary adjudicators of federal water

49. Stephen M. Feldman, *The Supreme Court's New Sovereign Immunity Doctrine and the McCarran Amendment: Toward Ending State Adjudication of Indian Water Rights,* 18 HARV. ENVTL. L. REV. 433, 438-39 (1994).

50. Cappaert v. United States, 426 U.S. 128, 134-38 (1976) (noting that after the state engineer rejected the National Park Service's protest to the Cappaerts' petition for a change in their water rights during a state administrative proceeding, the United States filed an injunction against the Cappaerts under 28 U.S.C. § 1345, which gives federal district courts jurisdiction in cases where the United States is a plaintiff), *aff'g* 508 F.2d 313 (9th Cir. 1974), *aff'g* 375 F. Supp. 456 (D. Nev. 1974).

51. Feldman, *supra* note 49, at 438-39.

52. *Id.* at 439-40.

53. *Id.*

54. In opposition to the Amendment as it was first proposed in 1949, the US Department of Justice argued "that the proposal would subject the United States to 'a piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions.'" John Thorson, *State Watershed Adjudications: Approaches and Alternatives*, 42 ROCKY MTN. MIN. L. INST. 22-1, 22-18 (1996) (quoting Letter from P. Ford, Ass't U.S. Attn'y Gen., to P. McCarran (Feb. 27, 1950)). The US Department of the Interior argued that the Amendment should "only extend to water rights established under state law by the United States and specifically exclude any water rights held by the United States on behalf of Indians." *Id.* at 22-18. In subsequent hearings before the Judiciary Subcommittee, the Justice Department's representative argued "the legislation would result in prolific litigation and 'the forward progress of the West, for which we are all fighting, would be impeded tremendously.'" *Id.* at 22-19 (quoting Catherine Anne Berry, The McCarran Water Rights Amendment of 1952: Policy Development, Interpretation, and Impact on Cross-Cultural Water Conflicts 111-12 (1993) (unpublished Ph.D. thesis, University of Colorado)); *see also infra* Part III.c.

55. Feldman, *supra* note 49, at 440 n.36; *see also* Thorson, *supra* note 54, at 22-19 ("During this period, the fate of McCarran's proposed legislation became fatefully intertwined with two major California water controversies. Neither of these controversies directly related to the purpose of McCarran's bill; but, once a slight linkage was made, McCarran received considerable support for his legislation from the large and powerful California delegation."). For a discussion of the devious character of appropriations riders, see Sandra Zellmer*, Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457 (1997).

rights.[56] The Amendment allowed States to join the United States as a party "in any suit . . . for the adjudication of rights to the use of water of a river system," and waived the federal government's sovereign immunity for the purpose of such adjudications.[57] Unfortunately for the continued utility of the *Winters* doctrine, in 1971, the US Supreme Court extended the Amendment's waiver of sovereign immunity to federally reserved water rights.[58] Allowing states, which are often hostile to federal control of water resources, to force the US government to litigate its *Winters* claims before state courts would significantly contribute to the derogation of the doctrine of implied federal water rights.[59]

B. *UNITED STATES V. NEW MEXICO*

The McCarran Amendment's implementation led to the US Supreme Court's decision in *United States v. New Mexico*,[60] the second factor that would eventually impair the continued utility of the *Winters* doctrine. In *New Mexico*, the Court revisited the subject of the Gila National Forest's federally reserved water rights.[61] The Court considered what, if any, water the federal government had reserved for instream flows and recreational purposes in the Rio Mimbres River when it created the Gila National Forest, an area known for its scenic vistas, recreational trails, and wildlife.[62] Prior to the Court's consideration of that issue, the Supreme Court of New Mexico, using McCarran Amendment-derived jurisdiction, affirmed a lower court's decision that the United States did not reserve water for recreation, aesthetics, wildlife conservation, or cattle grazing when it set aside the Gila National Forest from other public lands.[63] It reached this conclusion despite the court-appointed special

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56. *See* Blumm, *supra* note 13, at 176 (noting that the passage of the McCarran Amendment and subsequent U.S. Supreme Court decisions holding that the Amendment applied to federally reserved water rights "made state judges . . . the key decisionmakers concerning the existence and scope of federal water rights").

57. 43 U.S.C. § 666(a) (2012).

58. *See* United States v. Dist. Ct. in & for Cnty. of Eagle, 401 U.S. 520, 524 (1971) (construing the McCarran Amendment's consent to join the United States as a defendant in suits for adjudication of rights to use water of a river system as an all-inclusive provision for adjudication of water rights, including appropriated rights, riparian rights, and reserved rights); *see also* United States v. Dist. Ct. Water Div. No. 5, 401 U.S. 527, 529-30 (1971) (construing "general adjudication" broadly).

59. *See* Blumm, *supra* note 13, at 176 (observing that state judges "are subject to election and therefore quite sensitive to irrigation and other local uses threatened by federal instream water rights").

60. United States v. New Mexico, 438 U.S. 696, 697-98 (1978) (arising from a state court general stream adjudication aimed at allocating water rights on the Rio Mimbres River).

61. *Id.* The Gila National Forest was one of the federal reservations at issue in *Arizona v. California,* 373 U.S. 546, 601 (1963). *See supra* Part II.c.

62. *New Mexico*, 438 U.S. at 697-98. The Gila is the sixth largest national forest in the country. US DEP'T. AGRIC., LAND AREAS OF THE NATIONAL FOREST SYSTEM 9 (2012), *available at* http://www.fs.fed.us/land/staff/lar/LAR2011/LAR2011_Book_A5. For details about the forest, see U.S. Forest Service, Gila National Forest, http://www.fs.usda.gov/main/gila/about-forest (last visited Mar. 10, 2013).

63. Mimbres Valley Irrigation Co. v. Salopek, 564 P.2d 615, 615, 617-18 (N.M. 1977). The original suit was filed in 1966 as a private action to enjoin diversions of the Rio Mimbres, a river that flows through the Gila National Forest. *Id.* at 615. The State of New Mexico filed a com-

master's findings of fact and conclusions of law, which supported the United States' claim to six cubic feet per second of water in the National Forest for minimum instream flows and recreational purposes.[64]

In its analysis of this issue, the US Supreme Court, for the first time in a *Winters* case, distinguished between the primary and secondary purposes of federal reservations, and it held that water rights for non-Indian reservations could only be reserved by implication for the former.[65] Utilizing this novel distinction, the Court concluded that the primary purposes for which the forest had been set aside could be discerned by parsing the language of the Organic Administration Act of 1897: "to conserve water flows, and to furnish a continuous supply of timber for the people."[66] Based on that narrow reading of the reservation's purpose, the Court in *New Mexico* rejected the United States' arguments that the creation of Gila National Forest had reserved water for recreation, aesthetics, wildlife, and grazing.[67]

While it is apparent that the Supreme Court sought to restrict the scope of the *Winters* doctrine in *New Mexico*,[68] the manner in which it did so was deeply flawed. The problematic reasoning in *New Mexico* would later serve as a guide to state courts seeking to side-step federally reserved water rights.[69] Three significant defects in the Supreme Court's analysis are detailed below.

1. The Assertion That Congress Has "Invariably Deferred" to State Water Law

The first, and arguably most fundamental, problem with the Supreme Court's decision in *New Mexico* was its heavy reliance on Congress's so-called deference to state water law.[70] Early in the opinion, the Court asserted that "[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law," and then the Court used that purported principle of federalism as the justification for its new and more restrictive approach to the *Winters* doctrine.[71] For example, the Court prefaced its introduction of the primary versus secondary purpose distinction in *New Mexico* with the above quote, making clear that its belief that Congress had "invariably deferred" to state water law served as an impetus for introducing that distinction.[72] Additionally, later in the

plaint-in-intervention seeking a general adjudication of water rights in the river and named as defendants all parties claiming any interest in and use of the Rio Mimbres. *Id.* The State's motion to intervene was granted, the suit proceeded as a general adjudication, and the United States was joined as a defendant pursuant to 43 U.S.C. § 666(a). *Id.*

64. *Id.* at 616.

65. *New Mexico*, 438 U.S. at 700-02.

66. *Id.* at 707, n.14 (quoting the language of the Act to show Congress intended the national forests to be established for only two purposes).

67. *Id.* at 705, 708-09, 711-12, 718.

68. *See* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation,* 4 U. DENV. WATER L. REV. 271, 276 (2001).

69. *See infra* Part IV.

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

71. *Id.*

72. *See id.*; *see also infra* Part III.b.ii.

opinion, the Court used its "invariable deference" reasoning as a basis for interjecting a balancing test into non-Indian water rights application of the *Winters* doctrine despite the Court's express rejection of such a test just two years earlier in *Cappaert*.[73] In doing so, the Court stated that "the reality" of the assertion of "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators . . . has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests."[74]

The Court's characterization of Congress' past actions in this area was an expansion on a statement it had made in another case involving federal reclamation projects.[75] In that case, the Court rejected the United States' argument that it could impound as much unappropriated water as it deemed necessary for a federal reclamation project without complying with state law.[76] However, the statute in question—the 1902 Reclamation Act—specifically provides that the Secretary of the Interior must follow state law as to the appropriation of water and condemnation of water rights.[77] For the Court to take this statement out of context and extend it to the federal reserved water rights doctrine—a creature of federal law through and through—was inappropriate.

More generally, there has not been "invariable deference" in other water-related matters.[78] In fact, prior to the Court's blanket assertions in *New Mexico* about congressional actions and intent with regard to water law, Congress passed the Wilderness Act in 1964 and the Wild and Scenic River Act in 1968, neither of which deferred to state water law.[79] In addition, Congress had passed the Clean Water Act of 1972, which significantly expanded federal authority over the nation's water bodies.[80] Although the 1977 amendments to

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73. *New Mexico*, 438 U.S. at 705; *see* Cappaert v. United States, 426 U.S. 128, 138-39 (1976) (rejecting the State of Nevada's argument that the doctrine of federal reserved water rights was an equitable doctrine that called for the weighing of competing interests).

74. *New Mexico*, 438 U.S. at 705, 713-15. The Court also invoked Congress' "invariable deference" as a justification for its conclusion regarding the limited effect of the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31 (1960), in identifying the "primary purposes" of the forest. *Id.* It characterized the *Winters* doctrine as "an exception to Congress' explicit deference to state water law in other areas." *Id.*

75. *See* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use,* 2006 UTAH L. REV. 241, 243 (2006) ("In *California v. United States*, the Court declared that the history of federal-state relations over irrigation development in the West 'is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.") (quoting California v. United States, 438 U.S. 645, 653 (1978)) [hereinafter Benson, *Deflating the Myth*].

76. California v. United States, 438 U.S. 645, 647, 672, 674-75 (1978).

77. Reclamation Act of 1902 § 8, 43 U.S.C. §§ 372, 383 (2012).

78. *See* Benson, *Deflating the Myth, supra* note 75, at 249 (calling the conventional wisdom that Congress consistently defers to state authority over water "a myth" and stating "Congress and the Supreme Court have generally refused to cede control over water to the states if there was a potential conflict with an important national interest").

79. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 936 (4th ed. 2006) (noting the language found in the Wilderness Act, 16 U.S.C. § 1133(d)(6), and the Wild and Scenic River Act, 16 U.S.C. § 1284(b)).

80. 33 U.S.C. §§ 1251-54 (2012).

the Clean Water Act included a provision stating that the states' authority "to allocate quantities of water . . . shall not be superseded, abrogated or otherwise impaired by this chapter," the Act's substantive provisions and broad jurisdictional scope remained intact.[81] Tellingly, the Endangered Species Act, another enactment from this era, has had tremendous impacts on water management and it simply provides that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."[82]

Given this backdrop, the Court's assertion was, at best, an overgeneralization about congressional action in the water arena.[83] It was more likely the product of the Court's own biases and federalism assumptions than that of a reasoned analysis.[84] Subsequent objective analysis and commentary have revealed a more nuanced picture of federal deference to state water law, the truth being that Congress has sometimes deferred to state water law and sometimes has not.[85]

2. Introduction of the Primary Purpose Rule

Whatever the merits (or lack of merit) of the Court's generalization about the level of congressional deference in the area of water law, it undoubtedly served as the Court's justification for limiting the application of the *Winters* doctrine to the primary purposes of a federal reservation of land.[86] This limitation, the primary purpose rule, was the second major flaw in the Court's rea-

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81. *Id.* § 1251(g). Congress adopted the so-called "Wallop" amendment, named for Senator Malcolm Wallop from Wyoming, in response to a Water Resources Council policy paper that argued that reducing water diversions might be necessary to resolve persistent water quality problems. Water Resources Council Water Resource Policy Study, 42 Fed. Reg. 36,788, 36,793 (July 15, 1977). Senator Wallop convinced his colleagues that, in light of the report, it was necessary to "reassure the State[s]" that Congress did not intend for the Clean Water Act to be "used for the purpose of interfering with State water rights systems." 123 CONG. REC. S39,211 (daily ed. Dec. 15, 1977) (statement of Sen. Malcolm Wallop).

82. 16 U.S.C. § 1531(c)(2) (2012); *see* Reed D. Benson, *So Much Conflict, Yet So Much in Common: Considering the Similarities Between Western Water Law and the Endangered Species Act*, 44 NAT. RESOURCES J. 29, 41-42 (2004).

83. *See* Benson, *Deflating the Myth*, *supra* note 75, at 242-66 (questioning the conventional wisdom that the federal government had consistently deferred to state water law); George Cameron Coggins & Robert L. Glicksman, 1 PUB. NAT. RESOURCES L. § 5:36 (2d ed. 2013) ("Justice Rehnquist repeatedly emphasized the general contemporary congressional deference to state water law—at the expense of some contrary evidence in the Organic Act's legislative history.") (citing Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of* United States v. New Mexico, 15 IDAHO L. REV. 509, 533-36 (1979)).

84. Constitutional law scholars note the "New Federalism" became evident in a number of Supreme Court opinions during the early 1970s and appeared to be in full swing by 1978, when the *New Mexico* opinion was handed down. *See, e.g.*, David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 306 (1976) (framing the Court's reasoning in a federal law that extended minimum wage and maximum hours provisions to state and local employees as an "invasion of state sovereignty"); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1067 (1977).

85. *See* Benson, *Deflating the Myth*, *supra* note 75, at 243.

86. *See supra* Part III.b.i.

soning. The Court's effort to limit the doctrine of non-Indian implied federal water rights by distinguishing between the primary and secondary purposes of federal reservations lacked any basis in precedent.[87] Moreover, as the *New Mexico* opinion and subsequent state court cases show, the primary purpose distinction resists principled application and invites result-oriented and arbitrary judicial line drawing.[88]

The arbitrariness of the Court's primary purpose rule is apparent throughout the *New Mexico* opinion. As stated above, in applying this rule, the Court concluded that the primary purposes of the Organic Administration Act of 1897[89] (the "Organic Act") were "to conserve water flows, and to furnish a continuous supply of timber for the people,"[90] despite the Organic Act's amenability to other, arguably more reasonable, constructions.[91] In *New Mexico,* the Court reached its conclusion through a strained and puzzling parsing of the language of the Organic Act.[92] The actual language of the Organic Act provides "[*n*]*o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.*"[93] *The majority read this provision as* "[f]orests would be created only 'to improve and protect the forest within the boundaries,' *or, in other words*, 'for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber.'"[94]

In so reading the language of Organic Act, the majority effectively disregarded the congressional intent to "improve and protect" any other aspect of the forest "except the usable timber and whatever other flora [that was] necessary to maintain the watershed."[95] After all, what is a "forest" or, for that matter a watershed, deprived of its constituent parts? With regard to the majority's finding that the Gila National Forest was not set aside for wildlife purposes, Justice Powell argued in dissent:

> One may agree with the Court that Congress did not, by enactment of the Organic Administration Act of 1897, intend to authorize the creation of national forests simply to serve as wildlife preserves. But it does not follow from this that Congress did not consider wildlife to be part of the forest it wished

87. The distinction between the primary and secondary purposes had no basis in the seventy years of Supreme Court precedent establishing the reserved water rights doctrine. *See* Cappaert v. United States, 426 U.S. 128, 138 (1976); Arizona v. California, 373 U.S. 546, 582, 584 (1963); Winters v. United States, 207 U.S. 564, 566 (1908).

88. United States v. New Mexico, 438 U.S. 696, 696 (1978); *see infra* Part IV.

89. Organic Administration Act, 16 U.S.C. § 473 (2012). The Court examined this because it provided the statutory authority for the reservation of Gila National Forest. *See New Mexico,* 438 U.S. at 706-07.

90. *New Mexico*, 438 U.S. at 707 (quoting 30 CONG. REC. 967 (1897) (statement of Rep. Thomas McRae)).

91. *See id.* at 720 (Powell, J., dissenting).

92. *Id.* at 706-07, 707 n.14 (majority opinion).

93. *Id.* at 706-07 (alteration in original) (quoting 16 U.S.C. § 475 (1976)).

94. *Id.* at 707 n.14 (alteration in original) (emphasis added) (quoting 16 U.S.C. § 475 (1976)).

95. *Id.* at 721 (Powell, J., dissenting).

> to "improve and protect" for future generations. It is inconceivable that Congress envisioned the forests it sought to preserve as including only inanimate components such as the timber and the flora.[96]

Further, Justice Powell noted that the idea that a forest included the creatures inhabiting it had been around since early English law, and explained that this broad conceptualization of a forest has remained affixed in the American mind.[97] As Justice Powell pointed out, a more natural reading of the Organic Act's language would have identified three, not the majority's two, primary purposes for the establishment of a national forest: "1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber."[98] The first of these—improving and protecting the forest—was utterly ignored by the majority. By engaging in such a contorted reading of the Act, the US Supreme Court seemingly ignored its own admonishment in *Cappaert*—that the authority for a reservation "must be read *in its entirety*."[99]

3. Introduction of the Selective Use of Legislative History and a Balancing Test

The third and, perhaps, most confounding flaw in the reasoning of *New Mexico* was the Court's selective use of legislative history[100] and its weighing of state and federal interests in an effort to support its finding of no federally reserved water rights for recreational, aesthetic, wildlife, or grazing purposes.[101] The use of those justifications had no place in the application of the *Winters* doctrine to non-Indian federally reserved water rights.

In finding that the primary purposes of Gila National Forest were limited to "securing favorable water flows" and "providing a continuous supply of timber," the majority made such extensive use of legislative history that a reader of the opinion might believe that there were no materials supporting any inference to the contrary.[102] There was, however, legislative history that cut against the majority's conclusions regarding the intent behind the Organic Act.[103] As Justice Powell pointed out in his dissent, when the Organic Act was originally introduced, it stated that national forests were established "to preserve the timber and other natural resources, and such natural wonders and curiosities and game as may be therein, from injury, waste, fire, spoliation, or other de-

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96. *Id.* at 723-24.
97. *Id.* at 721 (citations omitted).
98. *Id.* at 720 (quoting Mimbres Valley Irrigation Co. v. Salopek, 564 P.2d 615, 617 (N.M. 1977)).
99. Cappaert v. United States, 426 U.S. 128, 141 (1976) (emphasis added).
100. *See New Mexico*, 438 U.S. at 720-24 (Powell, J., dissenting).
101. *Id.* at 705 ("When, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators. This reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests.").
102. *Id.* at 706 (majority opinion) (quoting 16 U.S.C. § 475 (1976)).
103. *Id.* at 720-24 (Powell, J., dissenting).

struction."[104] Justice Powell found no convincing evidence that Congress, in rewording the Organic Act before its passage, intended to abandon this intent.[105] Furthermore, prior to *New Mexico*, none of the Supreme Court cases dealing with federally reserved water rights engaged in an extensive examination of legislative history when deciding whether federal water rights existed, let alone a selective examination of the sort engaged in by the Court in *New Mexico*.[106]

Finally, as mentioned above, the Court justified its finding of limited purposes for the reservation of the Gila National Forest by weighing the state and federal interests in the water at issue.[107] By doing so, the US Supreme Court, in effect, overruled part of its holding in *Cappaert* without acknowledging that it was doing so.[108] In *Cappaert*, the Court considered and expressly rejected the argument that *Winters* required an equitable balancing of competing interests, and held that the only question relevant to ascertaining the existence of federally reserved water rights was whether "the Government intended to reserve unappropriated and thus available water."[109] The approach adopted by the Court in *Cappaert,* which turned on whether water was necessary to both the expressed and the reasonably discernible purposes of a federal land reservation,[110] is a more logical gauge of congressional intent than the approach utilized by the Court in *New Mexico*, which led it to hypothesize about Congress' opinion on how water should be allocated between public and private users.[111] By justifying its holding in such a way, the Court needlessly complicated an inquiry that *Cappaert* had left clear and, as subsequent state court decisions show, imprudently left the door open for future abuse.[112]

C. STATE HOSTILITY TO THE ASSERTION OF FEDERALLY RESERVED WATER RIGHTS

Western states' very real hostility towards the assertion of federal water rights, born of the supreme nature of federal rights and the states' desire to

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104. *Id.* at 722 (quoting 28 CONG. REC. 6410 (1896) (statement of Rep. Thomas McRae)).
105. *Id.*
106. *See generally* Arizona v. California, 373 U.S. 546 (1963); Winters v. United States, 207 U.S. 564 (1908). The reservation at issue in Cappaert v. United States, 426 U.S. 128 (1976), was created by executive order, so there would have been no legislative history. Notably, in modern Supreme Court jurisprudence, the use of legislative history has fallen out of favor. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 617 (1991) (Scalia, J., concurring) (arguing that legislative history is "unreliable . . . as a genuine indicator of congressional intent"); *id.* (observing, with regard to Committee Reports, "We use them when it is convenient, and ignore them when it is not.").
107. *New Mexico*, 438 U.S. at 722 (Powell, J., dissenting).
108. *Cappaert*, 426 U.S. at 138-39; *see also* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*),* 99 GEO. L.J. 1 (2010) (discussing the practice of "stealth overruling" and its costs).
109. *Cappaert*, 426 U.S. at 138-39; *see* Friedman, *supra* note 108.
110. *Cappaert*, 426 U.S. at 139; *see* Friedman, *supra* note 108.
111. *New Mexico*, 438 U.S. at 722 (Powell, J., dissenting).
112. *See infra* Part IV.

protect the integrity of their own prior appropriation systems,[113] was a third factor that led to the erosion of the *Winters* doctrine's utility. Most western states have adopted the doctrine of prior appropriation for allocating the water within their boundaries.[114] Under the prior appropriation system, future water users must divert water for a "beneficial purpose" and receive some sort of permission or acknowledgement from the state before they possess a water right.[115] Further, in times of water shortage, the doctrine of prior appropriation holds that the user who is "first in time" is "first in right."[116]

It is not difficult to see why western states, which have almost universally adopted comprehensive procedures for determining rights under their prior appropriation systems,[117] do not like federally reserved water rights. First, under the *Winters* doctrine, neither diversion for a state-recognized "beneficial purpose," nor state approval, are prerequisites to finding a federally reserved right.[118] A second, and related, reason for the western states' disdain for *Winters* rights is that a large number of federally reserved water rights do not divert water at all but are "instream" in nature.[119] Instream rights—water rights that require a certain amount of water to remain in the river—are not typically recognized by pro-irrigator western states unless they are held by the states themselves.[120] The third, and most important reason for western state enmity toward *Winters* water rights, is that those rights do not vest on the day they are claimed and put to use as is the case of state prior appropriative rights; rather, they vest whenever the federal government decides to reserve land for a water-dependent purpose.[121] This aspect of federally reserved water rights is particularly upsetting to western states because quite a few federal land reservations were made very early on[122] and, as a result, any water rights attached to those reservations would have priority over many if not most water rights obtained under state law.[123] Finally, the fact that federally reserved water rights, unlike water rights acquired under state law, cannot be lost through nonuse has exac-

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113. *See* Benson, *Deflating the Myth*, *supra* note 75, at 242 ("The states, particularly in the West, have jealously guarded their water allocation authority against real or imagined federal interference . . . ."); A. Dan Tarlock, *General Stream Adjudications: A Good Public Investment?*, 133 J. OF CONTEMP. WATER RES. & EDUC. 52, 57 (2006) (noting that, by the early 1960s, "state hostility to the idea of federal water rights had become ingrained in the region's political consciousness."); *see infra* Part V (state court hostility typically surfaces during general stream adjudications).

114. Blumm, *supra* note 13, at 174-75.

115. *Id.*

116. *Id.*

117. *See id.*

118. *Id.*

119. *Id.* at 175.

120. *Id.* at 174-75; *see* Janet Neuman, *Sometimes A Great Notion: Oregon's Instream Flow Experiments*, 36 ENVTL. L. 1125 (2006) (discussing details on the law of instream flow rights); Mary Mead Hammond, *Federal Instream Flow Reserved Rights: New Decisions with Big Impacts*, 46 ROCKY MTN. MIN. L. INST. 26 (2000).

121. Blumm, *supra* note 13, at 174-75.

122. *See, e.g., Winters,* 207 U.S. at 577 (finding that the Fort Belknap Indian Reservation had a federally reserved water right that vested on the date of that Reservation's creation in 1888).

123. Blumm, *supra* note 13, at 174-176.

erbated state animosity towards the federal government's assertion of those rights.[124]

D. INCONSISTENT CONGRESSIONAL ACTION

Inconsistent and ambiguous congressional action is the final factor that has played a significant role in the erosion of the utility of the *Winters* doctrine in the context of non-Indian implied reserved federal water rights.[125] Congress has failed to express its intent clearly with respect to the reservation of water for federal purposes both in its specific land reservations[126] and in the Organic Acts that authorize their management by the various federal land management agencies.[127]

Even though the US Supreme Court's decision in *New Mexico* made it clear that courts would base their decision about whether Congress intended to reserve water rights for particular parcels of land, in part, on a comparison of the language of the reservation at issue to other, similar statutory authority,[128] Congress has continued to act inconsistently when setting aside federal land.[129] It has sometimes made land reservations that are silent on federal water rights,[130] occasionally made reservations expressly claiming[131] or disclaiming federal water rights,[132] and still other times made reservations disclaiming any claim or denial of those important rights.[133] And Congress has acted no more

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124. *Id.*

125. *See* SAX ET AL., *supra* note 79, at 938 ("Congress has not always in recent years been able to fashion agreement on specific language that addresses water (other than a disclaimer) in legislating on federal land management issues.").

126. *See id.* at 936-38 (citing examples where Congress expressly reserved water, expressly not reserved water, or has not expressly addressed water rights at all).

127. *See id.* at 932, 936 (comparing provisions addressing the reservation of water in Organic Act for the National Wildlife Refuge System, the Wilderness Act, and the Wild and Scenic Rivers Act).

128. *See New Mexico,* 438 U.S. 696, 709 (1978) (comparing the Organic Administration Act, 16 U.S.C. §§ 473 et seq., with the National Park Service Act of 1916, 16 U.S.C. § 1 (1976 ed.)).

129. Sax, *supra* note 79, at 936-39.

130. *See id.* at 936 fn. 12 (citing Las Cienegas National Conservation Area Act, 114 Stat. 2563 (2000), Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area Act, 114 Stat. 2763 (2000), Santa Rosa and San Jacinto Mountains National Monument Act, 114 Stat. 1362 (2000), and Steens Mountain Cooperative Management and Protection Act, 114 Stat. 1655 (2000), as examples of congressional silence on federally reserved water rights).

131. *See id.* at 937-38 (citing the Act establishing El Malpais National Monument, El Malpais National Conseravation Area, and other reservations, 101 Stat. 1539, 1549 (1987), and the Act designating wilderness area within Olympic National Park, Mount Ranier National Park, and North Cascades National Park Service Complex, 102 Stat. 3961, 3968 (1988), as examples of Congress expressly claiming federally reserved water rights). *See also* Arizona Desert Wilderness Act of 1990, Pub. L. 101-628, 104 Stat. 4469 § 101(g) (Nov. 28, 1990) (codified at 16 U.S.C. § 460ddd note) ("Congress hereby reserves a quantity of water sufficient to fulfill the purposes of this title . . . The Secretary and all other officers of the United States shall take steps necessary to protect the rights reserved by paragraph").

132. *See* Sax, *supra* note 79, at 938 (citing Hagerman Fossil Beds National Monument, 102 Stat. 4571, 4576, § 304 (1988), as an example of Congress expressly disclaiming federally reserved water rights).

133. *See e.g.,* Sawtooth National Recreation Area Act, 16 U.S.C. § 460aa-8 (2012).

consistently when crafting the Organic Acts that grant management authority for the various types of federal land reservations.[134] As a result, courts often have little congressional guidance when determining whether reserved rights exist and, if so, how much water may be necessary for the purposes of the reservation in question.

IV. POST-*UNITED STATES V. NEW MEXICO* STATE COURT DEROGATIONS OF NON-INDIAN FEDERALLY RESERVED WATER RIGHTS

Following the passage of the McCarran Amendment in 1952,[135] many decisions regarding the existence and scope of reserved federal water rights have been issued by state courts vulnerable to the influence of state appropriators and other competing local interests.[136] This has impaired the utility of the *Winters* doctrine in some states and thereby inhibited the ability of government administrators to effectuate federal land management goals.[137] These state court derogations of the *Winters* doctrine have been facilitated by the US Supreme Court's poor guidance in *New Mexico* and the continuing influence of that case in state courts,[138] as well as Congress's failure to protect federally reserved water rights in a consistent and unambiguous fashion.[139] For state courts that were already biased in favor of state-sanctioned diversionary uses of water, it has proven all too easy to take *New Mexico*'s cue and avoid finding federally reserved water rights.[140] In fact, it did not take long for state courts to heed *New Mexico*'s direction; in 1982, the Colorado Supreme Court authored a decision on reserved water rights that unmistakably bore the watermarks of *New Mexico*'s influence.[141]

In *United States v. City and County of Denver*, the Colorado Supreme Court contemplated whether the federal government, by withdrawing various lands in western Colorado for specific federal purposes, also reserved water

134. *See supra* note 131 and accompanying text (describing Organic Acts for the National Wildlife Refuge System, Wilderness, and Wild and Scenic Rivers).

135. 43 U.S.C. § 666(a) (2012).

136. *See* Blumm, *supra* note 13, at 176.

137. *See* Tarlock, *supra* note 113, at 53 ("[General stream] adjudications, with the help of the United States Supreme Court, have succeeded in cabining, or tightly circumscribing, the extent of non-Indian federal reserved rights for public lands . . . .").

138. *See* SAX ET AL., *supra* note 79, at 925 (stating that *New Mexico* remains the leading modern federal reserved rights case).

139. *See supra* Part III(d).

140. *See, e.g.*, United States v. Jesse, 744 P.2d 491 (Colo. 1987); United States v. City & Cnty. of Denver, 656 P.2d 1 (Colo. 1982); United States v. State, 23 P.3d 117 (Idaho 2001); State v. United States (*In re* SRBA), 12 P.3d 1284 (Idaho 2000); Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260 (Idaho 2000); United States v. City of Challis (*In re* SRBA), 988 P.2d 1199 (Idaho 1999).

141. *See generally Denver*, 656 P.2d 1 (noting that, similar to the *New Mexico* case, the Colorado Supreme Court's task was to limit and contour the exercise of the federal power over water rights in Colorado; the Court explicitly relied on *New Mexico* when discussing judicial recognition of federal reserved water rights and extent of the application of the federal reserved water rights doctrine to the national forests, parks, and monuments).

for those purposes.[142] In light of the US Supreme Court's guidance in *New Mexico* and *Cappaert*, the Colorado Supreme Court correctly ruled on the basic issue, and held that the *Winters* doctrine was applicable to the federal lands at issue.[143] However, the Colorado court's restrictive interpretation of the scope and extent of the federally reserved water rights was undoubtedly tainted by *New Mexico*.[144] Most notably, the *Denver* court's conclusion that Congress' 1960 enactment of the Multiple-Use Sustained-Yield Act ("MUSYA")[145] did not reserve "additional water for the existing national forests with a 1960 priority date for recreational and wildlife conservation purposes" reflected the *New Mexico* opinion's influence.[146] With regard to the United States' claim that MUSYA reserved additional water for national forests for the purposes enumerated by that statute, the Colorado court came to the interesting conclusion that the US Supreme Court's opinion in *New Mexico* completely foreclosed such a claim.[147] The reasoning behind the Colorado court's holding on this issue is weak.[148] It cannot be disputed that the issue before the Colorado court, whether the enactment of MUSYA in 1960 reserved water in existing forests for additional purposes with a 1960 priority date, was not at issue before the US Supreme Court in *New Mexico*.[149] The *only* MUSYA-related issue decided by the Court in *New Mexico* was whether MUSYA "confirm[ed] that Congress *always* foresaw broad purposes for the national forests and authorized the Secretary of the Interior as early as 1897 to reserve water for recreational, aesthetic, and wildlife-preservation uses."[150] Because of the Court's express MUSYA disclaimer in *New Mexico*, the Court's discussion of that issue was dicta and not binding.[151]

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142. *Id.* at 5-6 (involving the adjudication of the reservations of approximately 1,500 public waterholes, seven national forests, three national monuments, two mineral hot springs, and one national park).

143. *Id.* at 20.

144. *See, e.g.*, *id.* at 20 (stating that Congress had generally deferred to state law); *id.* at 27; *id.* at 27 n.44 (weighing various interests when deciding whether implied reservation for recreational purposes existed at the Dinosaur National Monument); *see* SAX ET AL., *supra* note 79, at 925 ("[T]he Supreme Court's reading of the 1891 and 1897 Acts [in *New Mexico*] 'is arguably wrong because the reservation of water for instream uses is consistent with the original purpose of reservations.'" (citing Sally Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L. REV. 509 (1979))).

145. 16 U.S.C. §§ 528-31.

146. *Denver,* 656 P.2d at 24-27.

147. *Id.* (citing *New Mexico,* 438 U.S. 696).

148. *See New Mexico,* 438 U.S. at 713-15 n. 21, 22. Interestingly, the Colorado court's later reasoning with regard to the relative priority dates of various water rights for land originally reserved as a national forest then re-reserved as a national park might provide a tenable counterargument to some its MUSYA reasoning. *See Denver,* 656 P.2d at 30-31.

149. *New Mexico*, 438 U.S. at 713 n.21 (asserting that the issue decided was not whether MUSYA "reserved additional water for use on national forests," and stating "[e]ven if the 1960 Act expanded the reserved water rights of the United States, of course, the rights would be subordinate to any appropriation of water under state law dating to before 1960").

150. *Id.* (emphasis in original).

151. *Id.* at 718 n.1 (Powell, J., dissenting).; *see also* 20 AM. JUR. 2d *Courts* § 134 ("For a case to be stare decisis on a particular point of law, that issue must have been raised in the action decided by the court, and its decision made part of the opinion of the case.").

The more pertinent aspect of the Colorado court's conclusion regarding MUSYA was how the court sought to justify it.[152] After finding that the *New Mexico* decision foreclosed the reservation of any water for MUSYA purposes, the Colorado court sought to bolster its argument in two ways that reflected the US Supreme Court's reasoning.[153] First, the Colorado court relied on legislative history to support its tenuous conclusion that MUSYA was only intended for the narrow purpose of giving the Forest Service the ability "to broaden its forest management practices" beyond logging.[154] Second, the Colorado court engaged in an impermissible weighing of the competing state and federal interests.[155] The court's statements in that portion of its opinion are a particularly telling example of a state court using *New Mexico*'s poor reasoning and Congress' inconsistent legislation to avoid finding federally reserved water rights.[156] In *Denver*, the Colorado court reasoned:

> We are convinced that the "implied-reservation-of-water doctrine" must be narrowly construed. *Additional federal water rights in Colorado may reduce water available to satisfy long-held adjudicated water rights, especially in streams which have been fully appropriated.* 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.[157]

While the existence of implied federal reserved water rights is a matter of federal law, the Colorado court's decision regarding the application of the *Winters* doctrine to MUSYA is significant. It has, at a minimum, adversely affected the application of the doctrine within the jurisdiction of Colorado.[158] The Colorado court's subsequent decision in *United States v. Jesse* made that much clear.[159]

In *Jesse*, the Colorado court assessed whether the reservation of San Isabel and Pike National Forests impliedly reserved instream water rights for the

152. *See Denver*, 656 P.2d at 24-27.
153. *Id.* at 25 (quoting *New Mexico*, 438 U.S. at 713-15).
154. *Id.* (citing H.R. Rep. No. 86-1551, at 3 (1960)). For details on MUSYA's history and broad congressional purposes, *see* George Coggins & Robert L. Glicksman, *Capsule History of Multiple Use, Sustained Yield Law,* 3 PUB. NAT. RESOURCES L. § 30:1 (2d ed.) (2013); George C. Coggins, *Some Direction for Reform of Public Natural Resources Law*, 3 J. ENVTL. L. & LITIG. 67 (1988); Marion Clawson, *The Concept of Multiple Use Forestry*, 8 ENVTL. L. 281 (1978).
155. *Denver*, 656 P.2d at 25-27; *see also id.* at 27 n. 44 (repeating this mistake in its analysis of whether the establishment of Dinosaur National Monument reserved water for recreational boating).
156. *Id.* at 25-27.
157. *Id.* at 26 (emphasis added) (internal citations omitted). The Colorado court added, "The federal government has the power to act in condemnation proceedings if it wishes to obtain water outside the state appropriation system for additional national forest purposes." *Id.*
158. *See* United States v. Jesse, 744 P.2d 491, 496, 502 (Colo. 1987) (relying on the holding in *Denver*).
159. *See id.*

purposes of "secur[ing] favorable conditions of water flows," and "furnish[ing] a continuous supply of timber."[160] In considering this issue, the court addressed an argument, advanced by various state appropriators, that the decision in *Denver* foreclosed any claim for federally reserved water rights in the national forests.[161] In its analysis, the court pointed out that the *Denver* decision held "(1) that the United States does not have reserved instream flow rights to protect recreational, scenic, or wildlife values in the national forests, and (2) that the United States did not claim or prove that instream flow rights were necessary to achieve the national forest purposes of timber and watershed protection."[162] Because the federal government had not claimed federally reserved water rights for national forests based on the Organic Act in *Denver*, the *Jesse* court concluded that "any language suggesting that minimum instream flow rights are not to be recognized [for national forests], as a matter of law, is dictum and not binding on us in the present case."[163] Although the Colorado court gave the appropriators' argument relatively short shrift, it only reached this decision after citing its own MUSYA decision in *Denver* approvingly and recounting its erroneous characterization of the MUSYA holding in *New Mexico*.[164] It stated:

> The Supreme Court [in *New Mexico*] also held that the adoption of MUSYA neither broadened the water rights impliedly reserved when the national forests were created, nor reserved additional water to achieve the supplemental purposes of preserving recreation, range and wildlife values. In [*Denver*], we applied *New Mexico* to a general adjudication of water rights . . . No appeal was taken by party from our decision in [*Denver*].[165]

As a result, *Jesse* made it clear that Colorado state courts will not recognize implied federally reserved water rights for national forests under MUSYA.[166]

While the Colorado court's decision in *Denver* may have been one of the first state court opinions that utilized *New Mexico*'s ill-advised revision to the

160. *Id.* at 497 (citing United States v. New Mexico, 438 U.S. 696, 707-08 (1978)) (noting that these were the only two purposes identified by the US Supreme Court in *New Mexico* for the reservation of national forests).

161. *Id.* at 493, 498 (contending that "recent advances in the science of fluvial geomorphology demonstrate that minimum instream water flows are necessary to preserve efficient stream channels in the national forests and 'to secure favorable conditions of water flows,' one of the purposes for which the national forests were created under the Organic Act").

162. *Id.* at 497 (citing *Denver,* 656 P.2d at 22-23).

163. *Id.* at 503; *see also supra* Part IV (ironically, the Colorado court's argument why its decision in *Denver* did not foreclose it from considering the issue in *Jesse* shows why the former opinion's conclusion that *New Mexico* was dispositive of the MUSYA federally reserved water right claims before it was wrong).

164. *Jesse*, 44 P.2d at 497, 502-03 (citing *New Mexico*, 438 U.S. at 707-08; *Denver*, 656 P.2d at 35).

165. *Id.* at 497 (citing *Denver*, 656 P.2d at 22-23).

166. *Id.* The federal district courts in Colorado, by contrast, have been more receptive to federal reserved water rights claims. *See infra* notes 241-45, 259 and accompanying text (citing High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235 (D. Colo. 2006); Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985)).

Winters doctrine to avoid finding federally reserved water rights,[167] it was certainly not the last, nor even the most significant. In 1987, the State of Idaho began a massive general stream adjudication of the Snake River Basin.[168] The Snake River Basin Adjudication ("SRBA") is still ongoing as of the date of publication of this article and involves ninety percent of all the water right claims in Idaho, including some 50,000 federal claims.[169] The SRBA has resulted in numerous Idaho state court decisions determining the existence (or, more frequently, the nonexistence) and extent of the reserved water rights of various types of federal public lands.[170]

In an early SRBA decision, *United States v. City of Challis*, the Idaho court addressed the exact same MUSYA question that the Colorado court had in *Denver*.[171] The issue received no better treatment in Idaho than it had in Colorado.[172] In *Challis*, the United States argued:

> *New Mexico*'s language relating to MUSYA is dictum because the Supreme Court did not have before it the question of whether MUSYA established a federal reserved water right with a priority date of 1960, but rather addressed whether MUSYA reached back before its enactment to expand the purposes of national forests as of the date of the Organic Act of 1897.[173]

Although a fair reading of the *New Mexico* opinion supports the United States' argument,[174] the Idaho court rejected it and concluded "the Supreme Court's analysis as to whether MUSYA reserved water for its purposes and thus created a federally reserved water right applies to either priority date."[175] Thus, according to the Idaho court, MUSYA was not intended to re-reserve water for MUSYA's expanded list of national forest purposes, regardless of reservation or priority date.[176] Noticeably, the Idaho court did not cite any authority addressing why the US Supreme Court's decision on one point of law

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167. *Denver*, 656 P.2d at 22-23.
168. Blumm, *supra* note 13, at 180.
169. *Id.* at 176, 180.
170. *See generally* United States v. State (*In re* SRBA), 23 P.3d 117 (Idaho 2001); State v. United States (*In re* SRBA), 12 P.3d 1284 (Idaho 2000); Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260 (Idaho 2000); Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch I*), No. 24546, 1999 WL 778325 (Idaho Oct. 1, 1999), *aff'd in part, rev'd in part, and vacated in part*, 12 P.3d 1260; United States v. City of Challis (*In re* SRBA), 988 P.2d 1199 (Idaho 1999).
171. *Compare Challis*, 988 P.2d at 1201 (considering whether MUSYA reserved additional water in national forests for its purposes with a 1960 priority date), *with Denver*, 656 P.2d at 24-27 (considering whether MUSYA reserved additional water in national forests for its purposes with a 1960 priority date).
172. *Compare Challis*, 988 P.2d at 1206-07 (holding that MUSYA does not create a federal reservation of water as of the date its enactment in 1960), *with Denver*, 656 P.2d at 27 (holding that MUSYA does not reserve additional water for outdoor recreation purposes).
173. *Challis*, 988 P.2d at 1205.
174. *See supra* notes 151-56 and accompanying text.
175. *Challis*, 988 P.2d at 1205.
176. *Id.*

would be binding on another, distinct, point of law that the US Supreme Court refused to decide.[177]

The Idaho court also misread MUSYA's statement that national forests "*are established and shall be administered* for outdoor recreation, range, timber, watershed and wildlife and fish purposes."[178] The US reasonably posited that the statute's language evidenced an intent to re-reserve national forests for additional purposes. The Idaho court disagreed and chided that the statute states not only that the national forests "are established" but, *also*, that they "shall be administered" for MUSYA purposes.[179] Of course, the same criticism could be leveled against the Idaho court's own parsing of the statutory language. Specifically, the court's conclusion that "the statute as a whole indicates that MUSYA was intended *only to expand the purposes for which the national forests are administered*" reads the "are established" language right out of the statute.[180] Finally, the court stated that, even if it believed MUSYA constituted a re-reservation of national forests for additional purposes, the statute was not intended to expressly or impliedly reserve water for those purposes.[181] Its analysis on this point hinged almost entirely on the same legislative history that the *New Mexico* majority discussed when considering the MUSYA issue before it.[182]

Despite Idaho's hostility toward the assertion of federally reserved water rights, as was apparent in *Challis* and later SRBA decisions, another early decision arising out of the adjudication of the Snake River Basin served for a short time as an example of a state court faithfully adhering to the *Winters* decision and to sound reason.[183] The primary issue in *Potlach v. United States* (*Potlatch I*) was whether federal water rights were impliedly reserved upon the establishment of three wilderness areas.[184] In the majority opinion, the Idaho Supreme Court analyzed this question in a straightforward and common sense fashion reminiscent of the US Supreme Court's pre-*New Mexico* opinions on the *Winters* doctrine. The Idaho court stated that, because the claims in question were based on the purposes of the Wilderness Act, its "analysis must begin with an examination of the Wilderness Act, the acts establishing the Wilderness Areas, and the circumstances and history surrounding their designation, to determine whether federal reserved water rights exist . . . ."[185] The Idaho court took heed of the language of the Wilderness Act and noted that

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177. *See id.*
178. *Id.* (citing 16 U.S.C. §§ 528-31).
179. *Id.* (citing 16 U.S.C. §§ 528-31).
180. *See id.* (emphasis added).
181. *Id.*
182. *Compare Challis*, 988 P.2d at 1206 n.4, *with New Mexico*, 438 U.S. 696, 713-15 (footnotes omitted).
183. *Potlatch I,* No. 24546, 1999 WL 778325 (Idaho Oct. 1, 1999), *aff'd in part, rev'd in part, and vacated in part*, 12 P.3d 1260.
184. *Id.* at *2.
185. *Id.* at *3 (citing 16 U.S.C. §§ 1131-1136). *Cf. Cappaert,* 426 U.S. 128, 139-42 (beginning its analysis of whether federally reserved water rights existed with an examination of the statutory authority of the reservation and relying primarily on a natural reading of that authority to reach its conclusion) (citations omitted).

the statute plainly proclaimed that wilderness areas were to be established "[i]n order to assure that an increasing population . . . does not occupy or modify all areas within the United States and its possessions, leaving no lands designated for the preservation and protection in their natural condition . . . to secure for the American people . . . the benefits of an enduring resource of wilderness."[186]

The court also noted the statute defined wilderness "as an area 'retaining its primeval character and influence, without permanent improvements or human habitations, which is protected and managed so as to preserve its natural conditions.'"[187] Based on the Act's clear statutory language, the Idaho Supreme Court sensibly concluded that Congress's primary purpose in designating the three wilderness areas at issue was "wilderness preservation."[188] Consequently, because the court believed that human development under Idaho's system of prior appropriation was incompatible with wilderness preservation, the court in *Potlatch I* found the US government had reserved all of the then-unappropriated water within the wilderness areas upon the date it set them aside from the public domain.[189]

But the soundly reasoned decision in *Potlatch I* would not stand. To the great misfortune of both the doctrine of implied federally reserved water rights in Idaho and Idahoans that enjoy their state's wilderness, the Idaho Supreme Court's decision in *Potlach I* caused such a public outcry among that state's water appropriators and "states' righters" that the author of that decision, Justice Cathy Silak, lost her bid for reelection.[190] Following this, the Idaho Supreme Court decided to rehear the issues raised in *Potlatch I.*[191] Unsurprisingly, the court reversed its Wilderness Act decision upon rehearing the case.[192] The Idaho Supreme Court's second *Potlatch* opinion (*Potlatch II*) was, from start to finish, result-oriented and constitutes an egregious example of a state court embracing *New Mexico*'s crabbed interpretation of the *Winters* doctrine.[193]

In *Potlatch II,* the Idaho Supreme Court again took up the issue of whether water rights were reserved when Congress designated the Frank Church River of No Return, Gospel-Hump, and Selway-Bitterroot Wilderness Areas.[194] The new majority began its analysis of this issue by surveying the US Supreme Court's *Winters* jurisprudence,[195] but the analysis ignored the non-Indian federally reserved water rights holding in *Arizona* and cited *New Mexico* in a way that made it look like that decision foreclosed the possibility of *any* impliedly reserved rights.[196] The Idaho Supreme Court's analysis of the United

186. *Potlatch I,* 1999 WL 778325, at *4 (quoting 16 U.S.C. § 1131(a)).
187. *Id.* (quoting 16 U.S.C. § 1131(c)).
188. *Id.* at *4, *8.
189. *Id.* at *8.
190. *See* Blumm, *supra* note 13, at 186-88.
191. *Id.* at 188.
192. Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260 (Idaho 2000).
193. *Id.*
194. *Id.* at 1262.
195. *Id.* at 1263-64.
196. *Id.* at 1264-66.

States' Wilderness Act claims led the court to conclude that there was nothing within that Act compelling the conclusion that the Act's purposes would be defeated without water.[197] The court supported this holding by selectively citing some of the Wilderness Act's legislative history,[198] pointing to the availability of other means of protecting the wilderness areas' water,[199] and weighing state and federal interests.[200]

Fortunately, Justice Silak's time on the Idaho Supreme Court was not yet at an end. Silak wrote an impassioned dissent that rejected the majority opinion's contorted reasoning on many fronts.[201] Silak began by pointing out that the majority's discussion of the *Winters* doctrine precedent was "misleading."[202] She continued by admonishing the majority for rejecting wilderness area water rights simply because other means of protecting those rights may have been available:

> I disagree with the majority opinion's theory which simply stated is: because the structure of the Wilderness Act prevents development of the land in wilderness areas and, therefore, water will be protected as a natural side-effect of the limits on land-development, the federal government does not need a federal water right. The majority uses this theory as a substitute for implying a water right in wilderness areas. Although this is an attractive theory, only the United States Supreme Court may articulate new legal theories regarding federal law.[203]

Silak further characterized the majority's reasoning as "so restrictive that it eliminates the 'implied' aspect of the *Winters* doctrine and leaves no room for any Act of Congress to ever imply a 'water' right."[204] Justice Silak then repeated her holding in *Potlatch I*: based on the express statutory language, the primary purpose of Wilderness Act designations was to "set aside certain designated areas and preserve their untouched wilderness character."[205] She concluded that the majority should have found implied federal reserved water rights for the wilderness areas because the areas' purpose would be entirely defeated without water.[206]

The Idaho Supreme Court's abuse of the *Winters* doctrine did not end with *Potlatch II*; nearly all of that court's subsequent SRBA decisions regard-

197. *Id.* at 1266-67.
198. *Id.* at 1280 (Silak, J., dissenting).
199. *Id.* at 1266-68 (majority opinion).
200. *Id.*
201. *Id.* at 1273-83 (Silak, J., dissenting).
202. *Id.* at 1273.
203. *Id.* at 1273-74.
204. *Id.* at 1276.
205. *Id.* at 1278; Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch I*), No. 24546, 1999 WL 778325, at *4 (Idaho Oct. 1, 1999), *aff'd in part, rev'd in part, and vacated in part*, 12 P.3d 1260.
206. Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260, 1282 (Idaho 2000).

ing federal reserved rights have been similarly flawed.[207] In *Idaho v. United States,* another SRBA opinion handed down on the same day as *Potlatch II*, the Idaho Supreme Court considered whether Congress, when it established the Sawtooth National Recreational Area ("Sawtooth NRA"), impliedly reserved water to satisfy the purposes of that reservation.[208] The Act establishing the Sawtooth NRA stated it was created "*to assure the preservation and protection* of the natural, scenic, historic, pastoral, and *fish and wildlife values* and to provide for the enhancement of the recreational values associated therewith."[209]

The Idaho Supreme Court began its analysis correctly by setting forth the bedrock principle that a "[c]ourt need merely apply the statute without engaging in any statutory interpretation" if the language of the Act is "clear and unambiguous," and by stating "[i]n this case, the primary purpose of the Act is clear from the plain language of the statute itself."[210] However, after stating this, the court chose to ignore the principle it had just recounted and eschewed any reasonable reading of the plain language of the Sawtooth NRA Act.[211] Based on an extremely strained reading of the statute, the Idaho Supreme Court concluded "a review of the entire legislation reveals the primary purpose of the Act was to protect the Sawtooth NRA from the dangers of unrestricted development and mining operations."[212] This contorted reading of the Act ultimately led the court to hold the Act did not expressly or impliedly reserve water for the purposes of the NRA.[213]

Still serving out her remaining time on the bench, Justice Silak was, yet again, the lone dissenter. Justice Silak argued that the majority's analysis of the primary purpose of the Sawtooth NRA Act was unsupportable:

> [W]ithout support in either the Act itself or in the legislative history it confuses the means for the end: the "means" of preservation is regulating subdivisions and mining. The "end" is to "assure the preservation and protection of the natural, scenic, historic, pastoral and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith . . . ." This is the primary purpose of the Act and it cannot be achieved, under the *Winters* doctrine, without water.[214]

In her view, the express words of the Act were sufficient to determine the primary purpose of the reservation and a more objective review of the Act's legislative history "reaffirm[ed] what Congress expressly stated in the statutory language."[215]

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207. *See generally* Blumm, *supra* note 13 (criticizing the Idaho Supreme Court's SRBA decisions pertaining to implied federally reserved water rights).
208. State v. United States (*In re* SRBA), 12 P.3d 1284, 1286 (Idaho 2000).
209. *Id.* at 1286 (citing 16 U.S.C. § 460aa(a)) (emphasis added).
210. *Id.* at 1288.
211. *See id.* at 1288-91.
212. *Id.* at 1289.
213. *Id.* at 1291.
214. *Id.* at 1291 (Silak, J., dissenting).
215. *Id.*

The Idaho Supreme Court was not yet finished. One year after *Potlatch II* and *Idaho v. United States*, it decided another SRBA case dealing with non-Indian implied federally reserved water rights.[216] In *United States v. Idaho*, the Idaho court considered whether water was set aside by a series of executive and public land orders that reserved approximately ninety-four islands and created Deer Flat Migratory Waterfowl Refuge.[217] The various orders that withdrew the refuge islands from the public domain stated "all *islands* . . . within the . . . limits of the following described area . . . are hereby withdrawn as a *refuge and breeding ground for migratory birds and other wildlife*" in order to further the purposes of the Migratory Bird Conservation Act ("MBCA").[218] Based on this language, the United States argued that the purpose of reserving the Deer Flat islands would be frustrated without water because "[i]slands by definition must be surrounded by water, and waterfowl and many other migratory birds need riparian habitat and access to open water for feeding, breeding, resting, and protection from predators."[219]

Despite the soundness of the argument, and despite the US Supreme Court's decision thirty-eight years earlier in *Arizona* that the United States intended to reserve water for Havasu Lake National Wildlife Refuge and Imperial National Wildlife Refuge when they were established "as . . . refuge[s] and breeding ground[s] for migratory birds,"[220] the Idaho Supreme Court concluded that withdrawal of the Deer Flat islands had not impliedly reserved any water.[221] It conceded that the islands did indeed require water to remain islands, but refused to recognize its relevance to the question of whether the orders at issue also reserved water for the island refuge.[222] The court reasoned that "[i]t is the purpose of the reservation at issue, not the definition of the land reserved."[223]

Even though the reservations at issue in *Arizona* were identical in every material respect, the Idaho Supreme Court distinguished the Deer Flat Migratory Refuge reservations from those in *Arizona*.[224] The court made this distinction because *Arizona* was decided prior to *New Mexico*'s introduction of the primary purpose rule and because, unlike the reservations in *Arizona*, the

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216. United States v. State, 23 P. 3d 117, 120 (Idaho 2001).
217. *Id.*
218. *Id.* at 121 (citations omitted) (emphasis added).
219. Brief of Appellant United States at 26, United States v. State (*In re* SRBA), 23 P.3d 117 (Idaho 2001) (No. 25546), 1999 WL 33913490 at *26.
220. *See* Arizona v. California, 373 U.S. 546, 601 (1963) (determining that the United States intended to reserve water for Havasu Lake National Wildlife Refuge and Imperial National Wildlife Refuge when the Refuges were established "as a refuge and breeding ground for migratory birds"); Exec. Order No. 8,647, 6 Fed. Reg. 593 (Jan. 22, 1941) (establishing Havasu Lake National Wildlife Refuge); Exec. Order No. 8,685, 6 Fed. Reg. 1016 (Feb. 14, 1941) (establishing Imperial National Wildlife Refuge).
221. *United States v. State*, 23 P.3d at 126.
222. *Id.* at 125.
223. *Id.* Here, the Idaho Supreme Court's opinion ignored the fact that the US Supreme Court felt differently when it had previously addressed a reservation of federal land that similarly, by definition, included water in *Cappaert*. *See supra* Part IV; *see also infra* Part VI.
224. *United States v. State*, 23 P.3d at 127.

Deer Flat reservations were made under the authority of the MBCA.[225] Based on its narrow reading of the MBCA's legislative history, the court reasoned that the primary purpose for the withdrawal of the Deer Flat islands was *not* to provide migratory waterfowl with a sanctuary in general.[226] Rather, the Court found that the islands' reservation was intended only prevent human predation.[227] As Justice Silak would have likely pointed out,[228] here, the Idaho Supreme Court confused the means of the MBCA—protection from human predation—with the end (*or purpose*) of the land reservations—migratory bird conservation.[229] Nevertheless, because the court's analysis determined the refuge would provide the birds with protection from hunting irrespective of the presence or absence of water and islands, the court concluded that the federal withdrawal of the refuge's islands did not reserve any water.[230]

As with the Colorado cases, the derogation of the *Winters* doctrine at the hands of the Idaho Supreme Court in its SRBA cases transcends these individual cases. While the decisions of the Idaho Supreme Court regarding federally reserved water rights are just that—state court decisions on federal law that are not binding on other state courts or federal courts—they are still interpretations of federal law that lower courts in Idaho are bound to follow (and that other state courts may be tempted to look to as persuasive precedent). In a span of just two years, the Idaho Supreme Court effectively destroyed the ability of the federal government to successfully assert its federally reserved water rights in Idaho state courts to meet the needs of national forests reserved for MUSYA purposes, national wilderness areas, and, possibly, any other federal land that is not withdrawn by an instrument that expressly reserves water for its purposes.[231]

V. IMPLEMENTING JUSTICE SILAK'S PLEA AND BEYOND

Justice Silak's dissenting opinion in *Potlatch II*[232] is notable not only for its faithful adherence to the *Winters* doctrine, but also for its insight and prudence. Near the end of that opinion, she identified the problem inherent in modern state court *Winters* jurisprudence as well as a solution.[233] There, she stated:

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225. *Id.*
226. *See id.* at 123-26.
227. *Id.* at 123-24.
228. *See supra* note 214 and accompanying text.
229. *See* Migratory Bird Conservation Act, 16 U.S.C. §715c (2013); *United States v. State*, 23 P.3d at 123, 126.
230. *United States v. State*, 23 P.3d at 125-29.
231. *See id.*; United States v. City of Challis (*In re* SRBA), 988 P.2d 1199 (Idaho 1999). In a companion case, the Idaho court recognized that the Wild and Scenic River Act, in contrast to the other statutes at issue, expressly reserved federal water rights. *See* Potlatch v. U.S., 134 Idaho 912, 12 P.3d 1256 (2000) (citing 16 U.S.C. § 1284(b)).
232. Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260, 1273-83 (Idaho 2000) (Silak, J., dissenting).
233. *Id.* at 1282.

> In sum, it is not for this Court, nor any court, to make or change the law, but to interpret the law as enacted by the legislative branch. Until Congress enacts further legislation clarifying the Wilderness Act as to federal reserved water rights, or otherwise resolves this issue, courts must apply the *Winters* doctrine to resolve these disputes. In applying the *Winters* doctrine, some states will recognize an implied federal water right via the Wilderness Act and some states will not, resulting in a patchwork of different interpretations of the same federal statute across the country.[234]

This statement, like so many other aspects of Silak's *Potlatch II* dissent, hits the nail squarely on the head. Because it seems unlikely that the US Supreme Court will overrule its decision in *New Mexico* anytime soon[235] and it is even more unlikely that state appropriators will start looking kindly on water rights that have the potential to interfere with their own,[236] Congress may be the most appropriate body to solve this problem. Repealing the McCarran Amendment or amending the organic or enabling acts under which federal land reservations are made to require future land designations to be accompanied by express claim of water rights represent viable ways for Congress to resolve the problem created by state court abuses of the *Winters* doctrine.

A. REPEALING THE MCCARRAN AMENDMENT

An outright congressional repeal of the McCarran Amendment, at least as applied to federal reserved rights, would return the adjudication of federally reserved water rights to its pre-1952 *status quo* and put federal courts back in the driver's seat.[237] Repealing the Amendment would once again grant the federal government sovereign immunity in this area,[238] and would prevent state courts of questionable neutrality from deciding the existence and extent of the federal government's reserved water rights.[239] This reinstatement of sovereign immunity would mean that the agencies charged with managing federal lands could litigate these issues exclusively in federal court.

Although there have not been many federal court decisions on the substantive parameters of the *Winters* doctrine with respect to non-Indian reservations,[240] those that have been issued by federal courts have been well-reasoned, by comparison to the state courts' decisions. For example, in *Sierra Club v. Block*, the Colorado federal district court considered whether federally re-

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234. *Id.*

235. The holding in *United States v. New Mexico*, 438 U.S. 696 (1978), was the Supreme Court's last substantive decision on non-Indian implied federal water rights. The Court has not since granted certiorari on a substantive reserved water rights issue, despite widespread recognition that several state court decisions have horribly misapplied the *Winters* doctrine. *See generally* Blumm, *supra* note 13; Leshy, *supra* note 68.

236. *See supra* Part III.c.

237. *See supra* Part III.a.

238. U.S. CONST. amend. XI.

239. *See Environmental Law—State Court Adjudication of Federal Reserved Water Rights*, 13 J. URB. CONTEMP. L. 239, 240-41 (1977), *available at* http://digitalcommons.law.wustl.edu/urbanlaw/vol13/iss1/14/.

240. *See supra* Part III.a.

served water rights existed for wilderness areas in Colorado.[241] In analyzing this issue, the court in *Block* examined both the Wilderness Act itself and the Act's legislative history to determine whether Congress intended to reserve water for the federal lands withdrawn as wilderness areas.[242] The federal court's conclusion about the purposes of wilderness areas, drawn from its examination of those sources, could not have been more different from the Colorado court's analysis of the federal land reserves at issue in *Denver* or, even more to the point, the Idaho Supreme Court's conclusion regarding wilderness areas in *Potlatch II*.[243] The court in *Block* concluded "the legislative history and the provisions of the Wilderness Act make it abundantly clear . . . [that] the primary motivation of Congress in establishing the wilderness preservation system was to 'guarantee that these lands will be kept in their original untouched natural state.'"[244] This led the federal court to hold Congress did, indeed, intend to reserve water for wilderness areas "to the extent necessary" to accomplish this purpose:

> It is beyond cavil that water is the lifeblood of the wilderness areas. Without water, the wilderness would become deserted wastelands. In other words, without access to the requisite water, the very purposes for which the Wilderness Act was established would be entirely defeated. Clearly, this result was not intended by Congress.[245]

Perhaps as important to the integrity of the *Winters* doctrine as restoring more neutral federal courts to their former preeminence in this area of federal law, a repeal of the McCarran Amendment with respect to federal reserved rights could undo most of the damage done to the *Winters* doctrine. The greatest impact of such a repeal would likely occur in states like Colorado and Idaho, whose high courts have foreclosed important issues associated with the doctrine.[246] Following repeal, the federal government could avoid this foreclosure by, once again, refusing to have its rights in those states litigated by state courts, and by proactively championing its reserved water rights in federal courts.[247]

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241. Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985).

242. *Id.* at 849-63.

243. *See* United States v. City & Cnty. of Denver, 656 P.2d 1 (Colo. 1982); Potlatch Corp. v. United States (*In re* SRBA) (*Potlatch II*), 12 P.3d 1260, 1262 (Idaho 2000). These cases are assessed *supra* notes 142-58, 192-206, and accompanying text.

244. *Block*, 622 F. Supp. at 850.

245. *Id.* at 862. *See also* High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235 (D. Colo. 2006) (holding that the US could not abdicate its responsibility to maintain adequate streamflows by relinquishing its water rights to the state). Although federal courts have been receptive to federal implied reserved water rights for reserved or withdrawn lands (*e.g.,* national parks, wildlife refuges, and wilderness areas), they have refused to recognize such rights for non-reserved public domain lands. Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir 1981).

246. *See supra* Part IV.

247. However, *res judicata* would preclude the establishment of federal reserved rights for areas that were previously adjudicated in state court so long as the claims involve the same issues and parties. *See* 18B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 4468-69 (2d ed. 2012).

One might question whether a repeal of the McCarran Amendment with respect to federal reserved rights is truly necessary, given that general stream adjudications are so few and far between these days. While basin-wide adjudications are not as prevalent as they once were, those that have occurred have established a "superstructure" for water management in the basins in question, and they will likely continue to set the playing field in at least portions of the West in the foreseeable future.[248] Furthermore, as Professor Dan Tarlock explains, "the experience to date suggests that general adjudications will function as one of several management instruments rather than the primary instrument as the western states struggle to cope with continued urbanization, the pressures to maintain and restore degraded watersheds, and global climate change."[249]

Admittedly, repealing the McCarran Amendment would be difficult to bring about politically. Opposing forces include the state water appropriators' influence in western states,[250] the full-throated support for states' rights among many congressional members, and congressional antipathy toward the environment in recent years.[251] Moreover, repealing or even amending the McCarran Amendment may not undo the harm already done to the federal lands at issue in the state cases discussed above.[252]

B. EXPRESS RESERVATIONS IN FEDERAL PUBLIC LANDS ORGANIC AND ENABLING ACTS

Alternatively, Congress could amend the organic acts for the various types of federal lands, or the enabling acts under which specific federal land reservations are made, to include an express claim of federally reserved water rights.[253] Amending the various statutes that grant authority for federal reservations of land in such a way would prevent future federal withdrawals from being deprived of water through result-oriented judicial ingenuity by state courts.[254] Other than a repeal of the McCarran Amendment, such an action likely represents

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248. Andrea K. Gerlak & John E. Thorson, *General Stream Adjudications Today: An Introduction*, 133 UCOWR J. CONTEMP. WATER RES. & EDUC. 2 (2006). This Article should not be construed as a call to do away with General Stream Adjudications ("GSAs") altogether. They have fulfilled some important objectives, for example, empowering "Indian tribes to obtain congressional water rights settlements that give them much more economic and ecological benefits" than they might otherwise have achieved. Tarlock, *supra* note 113, at 53. Yet "[c]ontrary to the hopes of the proponents of general adjudications, most [GSAs] have not proceeded to the entry of a final decree in a reasonable period of time and at a reasonable cost." *Id.* at 59.

249. Tarlock, *supra* note 113, at 59.

250. *See supra* Parts III.c., IV.

251. *See* Sandra Zellmer, *Treading Water While Congress Ignores the Environment*, 88 NOTRE DAME L. REV. (forthcoming 2013) (analyzing post-1990 congressional gridlock on environmental issues).

252. *See supra* note 247 (describing *res judicata* effect of judgments).

253. *See* Leshy, *supra* note 68, at 280 (arguing that explicit provisions on federal water rights, albeit difficult to craft, are desirable and that "[p]unting to the courts to decide the matter at some future time is playing a form of roulette with the outcome, given the historical shifts of the Supreme Court on the subject").

254. *See supra* Part IV. For specific examples, *see supra* note 131 and accompanying text.

the next most effective way to resolve the problem that state courts have created in the federally reserved water rights doctrine.

In the foreseeable future, however, Congress may be unlikely to adopt even the most discrete reforms to federal public lands laws.[255] Beyond the general environmental gridlock experienced in recent congressional sessions, congressional disputes over federal water rights have stalemated the passage of new laws that reserve federal lands for conservation purposes.[256] Sidestepping the issue altogether and leaving it for the courts to sort out is sometimes the only way to move legislation forward. Moreover, amending the existing organic acts and existing and future enabling acts would only partially resolve the problem, as it is unlikely that federal reserved water rights of federal lands set aside prior to the passage of such an amendment would benefit. The *New Mexico* opinion cast serious doubt on the likelihood of success of any attempt to retroactively assert new statutory purposes for previously reserved federal lands.[257]

C. Managing the *Winters* Rights of Federal Lands Absent Legislative Reform

Given that Congress may be disinclined to take action to strengthen federally reserved water rights, it is important for federal agencies to be aware that they are not entirely without the means of preventing the lands they manage from being disseized of *Winters* rights. A fair understanding of the nature of the problem affecting the assertion of federally reserved rights suggests a way for federal land management agencies to circumvent it—avoid litigating non-Indian *Winters* claims before state courts. Responsible federal agencies can achieve this by proactively asserting their federal reserved water rights claims in federal courts.

As discussed above, federal courts have proven themselves to be much fairer arbiters of the *Winters* doctrine than have state courts.[258] Consequently, should Congress fail to act, federal land management agencies can best protect the lands they manage by bringing their federally reserved water rights before federal courts. Rather than feeling powerless in the face of state and/or appropriator opposition and being reticent with their reserved rights claims while state-sanctioned water appropriations threaten the lands appurtenant to those rights, agencies should be emboldened to go as far as the evidence will support

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255. *See generally* Zellmer, *Treading Water, supra* note 251.

256. *See* Leshy, *supra* note 68, at 277-78 (noting that "Silence is a convenient way to paper over differences on a difficult or controversial aspect of the proposal under consideration," but also noting that stalemates over reserved water have been broken in some instances by negotiated provisions that either explicitly reserve water or define alternative ways to protect water resources within the federal lands).

257. *See* United States v. New Mexico, 438 U.S. 696, 713 (rejecting the argument that the passage of MUSYA, 16 U.S.C. §§ 528-31, "confirm[ed] that the Congress always foresaw broad purposes for the national forests and authorized . . . as early as 1897 [the reservation of] water for recreational, aesthetic, and wildlife-preservation uses").

258. *See supra* Part V.a. It is also worth noting that *Cappaert* originated in federal court (in contrast to *New Mexico,* which started as a state GSA). *See supra* note 50, and accompanying text.

regarding streamflows needed to fulfill reservation purposes. Indeed, at least one federal court has recognized that federal land management agencies have the *duty* to protect the federally reserved water rights of the lands they oversee.[259] Absent the initiation of a general stream adjudication in state court—and those are few and far between these days[260]—agencies whose resources are in jeopardy should not wait until they are forced to assert their *Winters* claims before a potentially hostile state court.

VI. CONCLUSION

Recent years have witnessed a significant erosion of the *Winters* doctrine's ability to protect federal lands and help agencies managing those lands meet their management goals.[261] As the survey of cases in this Article makes clear, this erosion is due, in large part, to state court decisions that deny the existence of non-Indian implied federal reserved water rights.[262] In the post-McCarran Amendment world, where state courts have become the primary arbiters of federally reserved water rights, *New Mexico*'s poor reasoning has allowed hostile state courts to contort the *Winters* doctrine to the utmost extremes in order to deny implied federal water rights, frustrating the very reasons the doctrine was created in the first place and creating an incongruous patchwork of decisions.[263] . While not all state courts have engaged in the type of result-oriented abuses evident in the SRBA cases and, to a lesser extent, *Denver*,[264] the problem represented by such cases should not be ignored. Even though the *Winters* doctrine is federal law, the decisions in *Denver* and the SRBA cases have unquestionably impaired the federal government's ability to assert its reserved water rights and thereby protect federal land management goals within Colorado and Idaho.[265]

Despite this ongoing derogation, Congress continues to act in an inconsistent or ambiguous manner when passing laws affecting federal reservations.[266] This serves to exacerbate the problem and allows state courts to further limit the usefulness of a doctrine originally intended to give effect to the intent of the often thinly-worded statutes, executive orders, and proclamations that set aside federal land.[267]

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259. *See* High Country Citizens' Alliance v. Norton, 448 F. Supp. 2d 1235 (D. Colo. 2006) (holding that federal agencies may not relinquish Organic Act and Wilderness Act responsibilities for preserving necessary stream flows in the Black Canyon of the Gunnison by delegating those responsibilities to state agencies). This opinion is all the more notable because US District Judge Clarence Brimmer wrote it. *See* Ray Ring, *Tipping the Scales*, HIGH COUNTRY NEWS, Feb. 16, 2004 (noting that Brimmer "often rules against environmental concerns").

260. *See supra* notes 248-49 and accompanying text.

261. *See generally* Blumm, *supra* note 13.

262. *See supra* Part IV.

263. *See supra* Part IV.

264. *See supra* Part IV. For example, the Arizona Supreme Court gave relatively fair treatment to the federally reserved water rights at issue in *In re Gen. Adjudication of All Rights to Use the Gila River Sys. & Source*, 989 P.2d 739, 745-49 (Ariz. 1999).

265. *See supra* Part IV.

266. *See supra* Part III.D.

267. *See supra* Part II.

Absent new US Supreme Court guidance, only Congress has the ability to prevent the *Winters* doctrine from further state court abuses, at least at the macro level. When, as now, state courts serve as the primary adjudicators of federally reserved water rights, this problem will only continue, and possibly worsen, unless Congress takes affirmative steps to reduce the complexities that have been interjected into the *Winters* doctrine and return the doctrine to some semblance of uniformity.[268] This Article discussed two ways Congress could accomplish this: repealing the McCarran Amendment or amending the organic and/or enabling acts under which federal land is reserved.[269] Undoubtedly, there are other solutions in the judicial or perhaps administrative realms. Indeed, federal agencies likely can and, absent congressional resolution, should strive to circumvent potential damage to the *Winters* rights associated with federal lands by proactively asserting those rights in federal courts. That said, a problem such as this one, which is "permeated with conflicting philosophical views and economic interests,"[270] should not be left unresolved. There can be little doubt that our nation's legislative branch should be more sensitive to this threat to the *Winters* doctrine and, more broadly, to the public's interest in maintaining the integrity of its public lands.

268. *See supra* Part III.C, Part V.
269. *See supra* Part V.
270. *Potlatch II*, 12 P.3d 1260, 1282 (Silak, J., dissenting) (quoting *Sierra Club v. Lyng*, 661 F. Supp. 1490, 1502 (D. Colo. 1987)).