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The Duty of Agencies To Assert Reserved Water Rights in Wilderness Areas*

Jason Marks**

INTRODUCTION

A longstanding doctrine of federal law provides that when the federal government reserves land for a particular purpose or set of purposes, it simultaneously, by implication, reserves for federal use whatever quantity of water flowing on or near the land reservation is necessary for those purposes.1 The resulting "federal reserved water right" can be quantified by either a state or federal court and integrated into the general adjudication of the rights to a stream system,2 but the court will apply federal law to determine the existence and size of the federal right.3

If the United States is joined in a general stream adjudication4 and fails to assert all or part of its reserved rights in that stream system, those rights may be lost through the res judicata effect of the general adjudication decree,5 as well as through state statutes of limitations and "postponement" provisions.6

This Comment argues that federal wilderness management agencies have a duty to assert reserved rights when joined in a general adjudication. It then traces the contours of that duty and the means by which the duty may be enforced. The Wilderness Act requires managing agencies to preserve wilderness water rights. Agencies may violate this duty when

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6. See infra notes 31-38 and accompanying text.
they fail to assert or defend those property rights in state adjudications. The duty, however, is limited. A managing agency can justify its failure to pursue a reserved water right by showing that it reasonably decided to settle a dubious claim or that it had no resources with which to pursue a claim. The duty to protect reserved rights, then, is subject to potentially broad areas of agency discretion. At the same time, the duty may be difficult to enforce; courts will be reluctant to issue an injunction requiring the agency to litigate a particular reserved rights claim, and plaintiffs may find themselves limited to declaratory relief.

For these reasons, the conflicts resulting from executive discretion may be resolved more effectively in some instances by allowing private advocates for preservation of the public rights to participate in state stream adjudications, asserting or protecting the public right in place of the government. This Comment briefly examines the procedural possibilities for such participation.

The question of an agency's duty to assert reserved rights has been raised in two recent cases in which the Sierra Club challenged inaction on the part of federal agencies: Sierra Club v. Andrus,7 and Sierra Club v. Block.8 Although the facts and specific holdings of these cases are discussed later,9 one important point can be noted here. In both Andrus and Block, the courts treated the availability of alternatives to assertion of reserved rights as potentially dispositive of the duty issue.10 One thesis of this Comment is that the government's duty to prevent loss of reserved rights does not depend on whether the water flows could be protected by other means. This Comment urges that at least in the case of wilderness, a federal agency has a duty to keep the reserved rights (as distinct from the water flows) in federal hands as part of the real property placed in the reservation and entrusted to the agency.11 However, this Comment also examines alternative means of protecting water flows and notes their deficiencies in contrast to the assertion of reserved rights.12

Although the question of executive discretion in asserting reserved rights extends to all federal reservations, this Comment examines primarily the duty to assert or to protect wilderness reserved rights. The commands of the Wilderness Act provide perhaps the strongest case for finding a federal duty to protect reserved rights. In addition, wilderness

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9. See infra notes 127-42 and accompanying text.
10. See infra note 141 and accompanying text.
11. See infra notes 144-60 and accompanying text.
12. See infra notes 161-92 and accompanying text.
water rights are of significant political importance at present, and may be the focus of substantial economic, political, and legal conflict in the future.

Part I of this Comment introduces the reserved rights doctrine and its application to wilderness areas. It also outlines the potential physical and legal conflicts between wilderness instream flow rights and other water rights. Part II examines the duty of agencies to assert reserved rights, the possible remedies for breach of that duty, and the alternatives to the assertion of reserved rights. Part III explores direct participation in the state proceedings by private parties dissatisfied with federal inaction.

I WILDERNESS RESERVED WATER RIGHTS

A. The Implied-Reservation-of-Water Doctrine

The settlement of public lands in the arid western states in the mid-19th century created conflicts between the federal patentees and the miners, ranchers, and farmers already in the area. While the new settlers claimed riparian water rights, the miners and irrigators claimed rights of prior appropriation, rights recognized by state and territorial law and custom. Between 1866 and 1877, Congress, in a series of three statutes, gave federal recognition to the local appropriative rights and authorized future private appropriation of water from nonnavigable streams on the public lands. As a result of these statutes, the United States retains ultimate authority over all of the unappropriated waters on

13. See infra note 138.
14. See infra notes 83-101 and accompanying text.

The rights recognized by local law and custom in the arid West generally were appropriative rather than riparian; that is, they depended on application of the water to a beneficial use rather than on ownership of the riparian land. Priority of right under the appropriative system was, and in general still is, derived from priority in time. In times of shortage, the earlier-established right is satisfied in full, even to the total exclusion of those who began their appropriations later. W. Hutchins, Water Rights Laws in the Nineteen Western States 396-97 (1978).


17. The Act of 1866 provided that "[w]henever, by priority of possession, rights to the use of water . . . have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 43 U.S.C. § 661 (1982). The Desert Land Act of 1877 provided that homesteaders in 13 western states would have rights to the use of only that water "necessarily used for the purpose of irrigation and reclamation," and that all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and
public lands.\textsuperscript{18} Nonnavigable waters on public lands, however, remain appropriable under state law until the federal government withdraws them from appropriation.\textsuperscript{19}

Indeed, one method of obtaining water for federal purposes on federal land is to withdraw both the water and the appurtenant land from the public domain.\textsuperscript{20} Withdrawing the water and reserving it for a particular federal purpose ends state authority to approve appropriation of the water.\textsuperscript{21}

While Congress can, and on occasion has, explicitly reserved water along with the appurtenant land,\textsuperscript{22} any reservation of the public lands by the federal government may create reserved water rights by implication. The standard formulation of the implication doctrine is found in \textit{Cappaert v. United States}:\textsuperscript{23}

\textit{[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water rights is empowered by the Commerce Clause, Art[icle] I, section 8, which permits federal regulation of navigable streams, and the Property Clause, Art[icle] IV, section 3, which permits federal regulation of federal lands. The doctrine applies to}

\begin{itemize}
  \item not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. 43 U.S.C. § 321 (1982).
  \item \textsuperscript{18} In the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).
  \item \textsuperscript{19} For the argument that the statutes discussed above do not preclude the United States from regaining authority over water on public lands simply by putting the water to use for federal purposes (thereby acquiring “nonreserved” rights to the water), see Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553, 562-71, 574-78 (1979) [hereinafter Krulitz Opinion]. Nonreserved rights are also discussed \textit{infra} at note 174 and accompanying text.
  \item \textsuperscript{20} Public domain lands are those open to homestead or other settlement and disposal laws, mineral exploration, and disposal for mining. “Withdrawal” from the public domain is the process by which the lands are removed from the operation of those disposal laws. “Reservation” refers to the dedication of the lands to a specific federal purpose. Sierra Club v. Block, 622 F. Supp. 842, 854-55 (D. Colo. 1985) (citing Public Land Law Review Comm’n, One Third of the Nation’s Land 42 n.1 (1970)). See \textit{infra} text accompanying notes 42-53 for discussion of withdrawal.
  \item \textsuperscript{21} See Federal Power Comm’n v. Oregon, 349 U.S. 435, 448 (1955) (holding the Desert Land Act’s grant of authority to the states inapplicable to land reserved from the public domain).
  \item \textsuperscript{22} See, e.g., 16 U.S.C. § 272 (1982) (reserving land and waters as Arches National Park); \textit{id.} § 273a (Capitol Reef National Park).
  \item \textsuperscript{23} 426 U.S. 128 (1976).
\end{itemize}
Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.24 Thus, only unappropriated water is reserved, and only in amounts necessary for the purposes of the land reservation. In United States v. New Mexico,25 the Court added an important proviso: the implication doctrine is limited to the primary purpose for which a federal reservation was created. No water is reserved for secondary or supplemental purposes.26

Unlike water rights in most western states, the federal reserved right is not dependent on actual use of the water. The existence and scope of reserved rights are questions solely of federal law. Therefore, the substantive restrictions of state prior appropriation law do not apply to the federal reserved right.27 This does not mean, however, that reserved rights cannot be impaired through the operation of a state's procedural requirements.

B. Loss and Postponement of Reserved Rights

This section discusses two ways that federal reserved rights may be impaired through nonassertion. First, if federal reserved rights are not asserted in a state adjudication to which the United States is a party, they may be lost through res judicata or statutes of limitation. Second, their priority may be lost under the doctrine of "postponement."

Until 1952, the United States was immune from involuntary joinder in water adjudications. In that year, in a statute commonly known as the McCarran Amendment,28 Congress waived federal sovereign immunity in general stream adjudications. The United States thus became subject to involuntary joinder in either federal or state court stream adjudications.

The McCarran Amendment led to greatly increased adjudication of federal rights, thereby increasing the opportunity for loss of reserved rights through nonassertion.29 In addition to the doctrine of res judicata,
some state statutory schemes for water adjudication include statutes of limitation, which preclude later substantive challenges to a water decree.\textsuperscript{30}

Some state schemes also include what has been referred to as a "postponement" doctrine, under which any right decreed in an earlier adjudication is superior to any right decreed in a later adjudication of the same stream.\textsuperscript{31} In Colorado, for example, postponement operates by calendar year: priority of appropriation governs priority among rights awarded in a given calendar year, but even the earliest appropriation date awarded in that year is inferior to \textit{all} rights awarded in previous years.\textsuperscript{32}

Res judicata or collateral estoppel also can have the effect of postponing rights. Wyoming, for example, provides that all claimants on a stream who fail to assert their claims at a general adjudication "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream."\textsuperscript{33} Although acquired rights are lost by non-assertion, the applicant still can seek a right based on her current use of the water (and thus bearing a current priority date). The provision therefore can have the effect of "postponing" rights with early appropriation dates, making them inferior to all earlier decreed rights.

Because the United States was not subject to suit prior to the McCarran Amendment, reserved rights—in Colorado at least—have enjoyed a limited immunity from the postponement doctrine.\textsuperscript{34} For example, reserved right priorities dating to the establishment of the reservation have been decreed superior to previously adjudicated rights on the

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\textsuperscript{30} See, e.g., COLO. REV. STAT. § 37-92-304(10) (1973) (three-year statute of limitations). Although federal reserved rights are not subject to the limitations of state substantive law, their adjudication in state water courts is subject to the state procedural law. \textit{Bell}, 724 P.2d at 642-43; \textit{Avondale Irrigation Dist. v. North Idaho Properties}, 96 Idaho 1, 3-4, 523 P.2d 818, 820-21 (1974) (both holding that Congress, in subjecting the United States to joinder in state adjudications, necessarily intended federal compliance with state procedures, at least where those procedures were essential to fix rights on the stream with certainty).

\textsuperscript{31} \textit{Bell}, 724 P.2d at 641-42.


\textsuperscript{33} WYO. STAT. § 41-4-310 (1977); see \textit{Town of Pine Bluffs v. State Bd. of Control (In re Change in Use and Change in Place of Use for Ekxtron No. 1 Well)}, 649 P.2d 657 (Wyo. 1982); see also OR. REV. STAT. § 539.200 (Supp. 1985) ("The determinations of the Water Resources Director, as confirmed or modified ... in proceedings, shall be conclusive as to all prior rights and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the determination." (emphasis added)).

\textsuperscript{34} \textit{Bell}, 724 P.2d at 642; see also United States v. District Court, 169 Colo. 555, 577-79, 458 P.2d 760, 771 (1969), aff'd, 401 U.S. 520 (1971) (raising, but not deciding, the postponement issue).
Federal reserved rights in Colorado, however, are not completely immune to the postponement doctrine. Once the United States is joined in a stream adjudication in which it claims reserved rights, it must assert all of its claims of reserved rights in the stream or risk their postponement, that is, their subordination to all rights decreed in years prior to their assertion. The United States thus has an incentive to assert all its reserved rights in a given stream system once it becomes a party to the adjudication of rights in that system; otherwise, it will lose the early priority dates of its reserved rights—i.e., the dates of the land reservations.

Thus, reserved rights may be lost or their priorities postdated in state adjudications by res judicata, by operation of the statute of limitations, or by the doctrine of postponement.

C. Reserved Instream Flows in Wilderness Areas

The claim that wilderness designation creates reserved water rights raises the following three issues: (1) whether wilderness designation is a withdrawal or reservation of lands; (2) when portions of previously reserved lands—e.g., national forests and national parks—are designated as wilderness, whether the new management purposes added by wilderness designation are "primary" to the reservation, or merely "secondary"; and (3) whether anything in the Wilderness Act or its legislative history indicates that Congress intended not to reserve water. This section examines each of these three issues in turn, concluding that wilderness designation is a withdrawal and reservation, that its purposes are "primary" to the reservation, and that Congress did not indicate an intent to refrain from reserving water. Given these conclusions, it follows from the doctrine of implied reservation of water that some quantity of water is reserved by wilderness designation.

I. Withdrawal and Reservation

As discussed above, the operation of the reserved water rights doctrine depends on the federal government withdrawing land from the public domain and reserving it for a particular purpose. The question of whether the federal government has withdrawn and reserved land in wilderness areas arises from the nature of the scheme established in the Wil-

36. Bell, 724 P.2d at 642-44.
37. Id.
38. Id. at 641-45.
41. See generally Krulitz Opinion, supra note 19, at 609-10.
The Act designates areas of the federal lands to be preserved as nearly as possible in their natural state and to be used and administered for the purposes of recreation, conservation, scenery, education, and history. At the same time, Congress created a mechanism for review of the many additional roadless areas in federal ownership to determine their suitability for preservation as wilderness.

The Act, however, did not create a new agency to administer the wilderness areas; instead, it left them in the jurisdiction of the agencies that managed them before designation. The administering agency, according to the mandate of the Act, "shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character." Other sections of the Act prohibit or strictly limit timber cutting, road building, mining, and other commercial uses.

Despite the fact that wilderness designation does not change agency jurisdiction over the area, it is a withdrawal and reservation from the public domain. The Act severely restricts nonwilderness uses, and the Act's legislative history makes numerous references to the "reservation" of areas. In addition, the Act explicitly "withdraws" designated areas from operation of the mining laws.

When Congress designates a wilderness area in a national forest or park, it operates on land already withdrawn and reserved from the public domain. It should not be crucial that wilderness designation be the initial reservation. In Arizona v. California, for example, the Supreme
Court awarded reserved rights to Lake Mead National Recreation Area and Havasu Lake National Wildlife Refuge, although both initially had been withdrawn for possible use as national monuments; only later were they dedicated to the uses for which the Court held that water had been reserved. In addition, when Congress in 1976 provided for the designation of wilderness areas from the public lands, it was an initial withdrawal from the public domain. The theory that water rights are reserved only within the initial withdrawal would lead to the anomalous result that wilderness areas created from the public lands would have reserved rights, while those within national parks or forests would not.

2. Primary and Secondary Purposes

After determining that the wilderness designation does withdraw and reserve land, an issue remains whether the purposes of wilderness designation are "primary" or "secondary." Limitation of reserved water rights to the "primary purposes" of a reservation derives from the Supreme Court's decision in United States v. New Mexico. In New Mexico, the Court held that the original purposes for which Congress established the national forests under the 1897 Organic Administration Act did not include aesthetics, recreation, or wildlife preservation, and therefore no water was reserved for those purposes. Rather, the national forests were established to protect watersheds (so as to secure water flows for private users) and to assure a continuous supply of timber. The Court also held that although the Multiple Use Sustained Yield Act (MUSYA) of 1960 expanded the purposes for which national forests are administered, it did not reserve any additional water through

52. Id. at 601; see also United States v. City & County of Denver, 656 P.2d 1, 30-31 (Colo. 1982) (approving award of water for park purposes to Rocky Mountain National Park, which was created out of previously withdrawn national forest lands). The Court in United States v. New Mexico, while rejecting a claim for new reserved water, nevertheless implied that Congress can reserve new water by a more definite dedication of the lands to new purposes. 438 U.S. 696, 714-15 (1978); see also discussion infra notes 54-61 and accompanying text. The claim was rejected only because, in the Court's view, Congress intended the additional purposes to be "secondary." 438 U.S. at 715. Such a result is inconsistent with the theory that water can be reserved only by the initial withdrawal and reservation of the land.


56. 438 U.S. at 707-08.
57. Id.
a reinterpretation of the 1897 Act.\textsuperscript{59} The Court noted that Congress intended the new purposes—recreation, range, and fish and wildlife—to be "supplemental to, but not in derogation of, the purposes for which the national forests were established."\textsuperscript{60} Deeming the new purposes "secondary," and believing that a reserved instream flow right would interfere with the "primary" purpose of providing water for domestic use and irrigation use, the Court concluded that no instream flow was reserved for the new purposes.\textsuperscript{61}

Language in the Wilderness Act bears a resemblance to the MUSYA language that the New Mexico Court held denoted "secondary" purposes. The wilderness purposes are to be "within and supplemental to the purposes for which national forests . . . are established and administered," and nothing in the Wilderness Act "shall be deemed to be in interference with the purpose for which national forests are established."\textsuperscript{62} Similarly, the Act does not "modify the statutory authority under which units of the national park system are created" or "lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system."\textsuperscript{63}

This language, however, cannot be taken literally. For example, the prohibition on cutting timber in wilderness areas obviously interferes with the lumber-producing function of national forests. Furthermore, though the Wilderness Act does say that management for wilderness purposes should not interfere with forest purposes, it also says the converse: the preexisting purposes of the land shall be administered so "as also to preserve its wilderness character."\textsuperscript{64} Reading the two provisions together, one concludes that the administrator should continue to pursue the prior uses of the land to the extent that they are consistent with preservation of the wilderness.\textsuperscript{65}

\begin{footnotes}
\textsuperscript{59} 438 U.S. at 713-15. The Court also stated, arguably in dictum, that MUSYA did not create an independent reservation of water. \textit{Id.} at 715. Justice Powell, dissenting in part, argued that the Court should not have decided whether the 1960 Act created an independent reservation of water rights, since the attorneys for the United States had not urged that position. \textit{Id.} at 718 n.1 (Powell, J., dissenting in part). Dictum or not, however, the Court's opinion has been followed as controlling precedent. \textit{See, e.g.}, United States v. City & County of Denver, 656 P.2d 1, 24 (Colo. 1982).

\textsuperscript{60} 438 U.S. at 714.

\textsuperscript{61} \textit{Id.} at 713-15.


\textsuperscript{63} 16 U.S.C. § 1133(a)(3).

\textsuperscript{64} \textit{Id.} § 1133(b).

\textsuperscript{65} This interpretation is supported by the legislative history of the Wilderness Act. \textit{See} H.R. Rep. No. 1538, 88th Cong., 2d Sess. 9, \textit{reprinted in} 1964 U.S. Code Cong. & Admin. News 3615, 3617 ("The underlying principles of [the Act dictate that] currently authorized uses that are incompatible with wilderness preservation should be phased out over a reasonable period of time.").
\end{footnotes}
The Wilderness Act, unlike MUSYA, does not establish merely secondary purposes for the reservation. The court in Sierra Club v. Block pointed to the strong language of the Act itself, as well as consistent legislative history, to show that Congress intended the Wilderness Act to establish primary uses for the designated lands. Indeed, the purposes of MUSYA and the Wilderness Act are "supplemental" to forest administration purposes in very different ways. In New Mexico, the Supreme Court relied on a House report stating that a MUSYA purpose alone would not be sufficient to warrant reservation of the land as a forest, because MUSYA's purposes were merely supplemental. In contrast, a wilderness area may be withdrawn from the public domain and reserved for the sole purpose of preservation in its natural condition. In the Wilderness Act, unlike MUSYA, Congress considered its purposes crucial enough to support reservation of land from the public domain. Thus, wilderness purposes are not "supplemental" in the sense in which the Court in New Mexico used that term.

3. **Contrary Intent**

It has been argued that Congress, in section 4(d)(7) of the Wilderness Act, showed its intent not to reserve water by wilderness designation, stating: "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws." Although reservation of federal water rights usually is not termed an "exemption from state water law," such a construction is possible on the face of the Act. The legislative history

67. Id. at 861.
68. Id. at 862.
69. "Thus, in any establishment of a national forest a purpose set out in the 1897 Act must be present but there may also exist one or more of the additional purposes listed in the bill." United States v. New Mexico, 438 U.S. 696, 715 (1978) (quoting H.R. REP. No. 1551, 86th Cong., 2d Sess. 4 (1960)).
70. See supra note 43.
72. State substantive law applies on federal reservations with respect to all water not needed for the primary purposes of the reservation. See New Mexico, 438 U.S. at 702-03. In addition, the United States must comply with state procedural law in adjudicating its reserved rights. See supra note 30.
of section 4(d)(7), however, suggests that it was meant to avoid, not resolve, the problem of water rights.\footnote{74}

In addition to the Act's legislative history, comparison of the Wilderness Act with the Wild and Scenic Rivers Act (WSRA),\footnote{75} a related statute, provides a strong argument against the inference that section 4(d)(7) forecloses the reservation of water rights in wilderness areas. As noted by the Solicitor of the Department of the Interior, the WSRA contains language identical to section 4(d)(7) of the Wilderness Act.\footnote{76} Congress nevertheless explicitly reserved water in quantities necessary to meet the purposes of wild and scenic designation.\footnote{77} The Solicitor concluded that both the WSRA and Wilderness Act provisions were "non sequitur[s] roughly designed to preserve the status quo of federal-state relations in water law."\footnote{78}

D. Quantity of Water Reserved

The issue of how much water is reserved by wilderness designation was not argued or decided in \textit{Block}, nor has any other court addressed the issue.\footnote{79} The crucial question is whether wilderness designation always reserves all of the unappropriated natural flow of the stream, or whether the quantity reserved should be calculated on a case-by-case basis, taking into account the particular recreational, scenic, and ecological features present.\footnote{80}

By mandating the preservation of wilderness areas in their natural condition, Congress may have intended to reserve all of the then-unappropriated water flowing through or resting on the wilderness. Section 4(b) of the Wilderness Act, in addition to listing six specific management

\footnote{74. The issue of water rights initially was introduced into the wilderness debate by Senator Kuchel of California, at the urging of that state's Department of Water Resources. See \textit{National Wilderness Preservation Act: Hearings Before the Senate Comm. on Interior and Insular Affairs}, 85th Cong., 1st Sess. 84-85, 286-87 (1957). At hearings in 1961, Senator Kuchel indicated that the "exemption" language of section 4(d)(6) was intended to set aside the wilderness water rights issue to be dealt with in the context of the more general legislation then under consideration. \textit{The Wilderness Act: Hearings Before the Senate Comm. on Interior and Insular Affairs}, 87th Cong., 1st Sess. 65 (1961).


77. 16 U.S.C. § 1284(c).

78. Krulitz Opinion, supra note 19, at 607 n.99, 610.


80. \textit{See Krulitz Opinion, supra note 19, at 610; see also United States v. City & County of Denver}, 656 P.2d 1, 27-29 (Colo. 1982) (national monuments); Krulitz Opinion, supra note 19, at 596 (national parks); \textit{id.} at 600 (national monuments); \textit{id.} at 608 (wild and scenic rivers).}
purposes (recreation, scenery, science, education, conservation, and history), also directs the agency administering a wilderness area to preserve "the wilderness character of the area."81 Wilderness, in turn, is defined in part as "an area . . . protected and managed so as to preserve its natural conditions."82 If instream flows are one of the "natural conditions" of the wilderness, the Act by implication reserves those flows in their entirety.

E. Conflicts Between Wilderness Instream Flows and Other Water Uses

The importance of asserting wilderness reserved rights depends on the extent to which protection of wilderness instream flows potentially conflicts with consumptive uses of water. Unfortunately, available information on potential conflicts is fragmentary at best. This section discusses the available evidence on physical conflicts in the context of state and federal water law.

The potential conflicts between wilderness instream flows protected by a federal reserved right and other uses of the water can be understood best by dividing the nonwilderness users into several groups according to their location on the stream (upstream, downstream, or within the wilderness) and the temporal priority of their claims (junior or senior to the wilderness designation). The greatest number of potential conflicts, as will be seen, involves upstream junior appropriators, and senior appropriators who wish to change their point of diversion or type of use.

The users most obviously affected by the reservation of water for wilderness are upstream junior appropriators, i.e., those diverting water upstream of the wilderness area under claims dated after the wilderness area was designated. Because the wilderness rights have an older priority date, these users could be required to curtail or cease any diversion of water that would deprive the wilderness area of its reserved water. As discussed above, the quantity of water reserved by wilderness designation is uncertain. The greatest conflict with nonwilderness users would occur if the United States claimed the entire natural flow of the stream throughout the year. Such a claim would prevent upstream juniors from applying water to any consumptive use.

Upstream junior appropriators are rare both because wilderness designations are a relatively recent phenomenon, and because most wilderness areas designated thus far are located at or near the headwaters of streams. A study in Colorado, for example, found a large number of upstream junior users near only one wilderness area, the Black Canyon

82. Id. § 1131(c).
of the Gunnison Wilderness. The area, located within the national monument of the same name, was designated as wilderness in 1976, yet since that time 550 appropriators have made claims on the Gunnison River or its tributaries at points above the Black Canyon. The study also identified a small number of junior appropriations upstream of the Maroon Bells-Snowmass, West Elk, and Raggeds Wildnesses, which are located in national forests.

As the Colorado study indicates, major upstream competitors are not likely to be found above wilderness areas located in national forests, but are likely to be found upstream of wilderness areas located in national monuments, parks, or wildlife refuges, or on former public domain lands managed by the Bureau of Land Management (BLM). In Utah, BLM found that forty-two wilderness study areas have notable perennial surface streams, many of them originating outside the wilderness study area.

The second group potentially affected by wilderness reserved rights are junior appropriators taking or storing water from within wilderness areas. Like the upstream junior, the rights of a junior appropriator diverting from or storing within the wilderness would be limited by the federal reserved right as quantified.

Diversion or storage of water from within wilderness areas can occur in two ways. First, many private owners hold land within wilderness boundaries. Information provided by the Forest Service during the Sierra Club v. Block litigation documented private holdings within twenty of Colorado’s twenty-four national forest wilderness areas. Wilderness

84. Id.
85. Id. In Colorado, water development is possible upstream of six wilderness areas within national forests: Cache La Poudre, Lost Creek, Raggeds, Mt. Evans, Flat Tops, and Weminuche. Federal Defendants’ Response to Sierra Club’s Third Set of Requests for Admissions to Federal Defendants at admission 9, Sierra Club v. Block, 622 F. Supp. 842 (D. Colo. 1985) (Civ. No. 84-K-2).
86. In New Mexico’s Latir Peaks Wilderness Area (located in the Carson National Forest near Taos), the potential for diversion exists from West Latir Creek, a stream flowing into the wilderness area from headwaters on private land. The Forest Service has claimed reserved rights for the wilderness portion. Amended Statement of Water Claims of U.S.D.A. Forest Service, New Mexico ex rel. Reynolds v. Molycorp, Inc., Civ. No. 9780-C (D.N.M. filed Apr. 28, 1986).
88. Sierra Club’s Exhibits In Support Of Sierra Club’s Cross Motion For Summary Judg-
designation leaves intact rights-of-way previously granted by the Forest Service, so private inholders may be able to divert water to points outside the national forest (e.g., to distant cities). Second, the Wilderness Act explicitly provides for special Presidential approval of water development within wilderness areas. This provision, however, has never been used, and it remains unclear whether, by approving a water diversion or storage project, the President could divest the United States of its wilderness reserved rights insofar as they conflict with the project.

The third group of junior appropriators, downstream juniors, generally will be unaffected—or in some cases will be benefited—by wilderness reserved rights. Downstream consumption does not deplete wilderness flows. Downstream uses, therefore, generally do not conflict with wilderness rights. By requiring that flows through the wilderness be maintained, reserved rights actually may benefit consumptive users immediately downstream. On the other hand, downstream juniors, like downstream seniors, are subject to possible restraints on changing their place of use.

Senior appropriators, whose diversion and use predate wilderness designation, may also be affected by the implied reservation of an in-stream flow for wilderness purposes. Seniors are protected in any water rights they possess at the time Congress designates a wilderness area, because wilderness designation reserves only unappropriated water for in-stream flow. Nevertheless, the implied reservation of water for wilderness may restrict a senior's right to change the place of her diversion or the place or manner of her use. Under the law of most western states, a water user may change her type of use or her diversion point (while keeping the original priority date) only if the change can be made without injuring the rightful uses of other water users on the stream, including junior appropriators. The United States, like any other junior rights-holder, could block a change of use that would impair the instream flow within the wilderness. In particular, a senior appropriator could be prevented from doing any or all of the following: (1) moving her point of diversion from below to above or within the wilderness, (2) altering an upstream use from in-basin to out-of-basin, and (3) altering the type of use from less consumptive to more consumptive (e.g., from agricultural

89. 16 U.S.C. § 1133(c) (1982).
90. Id. § 1133(d)(4).
91. See infra notes 151-53 and accompanying text.
92. See infra text accompanying notes 93-95.
93. See supra text accompanying note 24.
An example of the conflict between instream flow rights and a senior’s desire to change its point of diversion arose recently in Colorado’s Holy Cross Wilderness. In 1958, two Front Range cities (Colorado Springs and Aurora) obtained a conditional right, under Colorado law, to divert water from points high on four streams near Holy Cross Mountain. This “Homestake II” project is part of a large transmountain water transfer. Designation of the area as wilderness in 1980 did not invalidate the cities’ senior rights, even though the diversion points are within the wilderness. In 1985, the cities applied to the state water court for permission to change their diversion points for engineering reasons. In some cases the proposed moves were upstream. Although the United States did not file to oppose the change of diversion points, two conservation groups intervened. They alleged that the cities, by moving the diversion points upstream, would reduce or eliminate instream flows within portions of the wilderness, thus depriving the United States of part of the right it reserved by the 1980 designation.

It may be that senior users will have the most conflicts with wilderness reserved rights. In Utah, for example, BLM has noted that the state’s streams are already, on average, eighty-five to ninety percent appropriated. Thus, there will be few opportunities for new appropriations regardless of wilderness designations. Senior users, however, may wish either to move their point of diversion upstream so that water can be gravity fed, or to sell their irrigation rights to a growing municipality or industrial user. The United States might be able to block such a change in diversion or use if it would reduce the amount or alter the timing of flows through the wilderness.

Finally, conflicts may develop between groundwater users and wilderness reserved rights if those users draw from the same source that supplies springs or seeps within a wilderness area. In the Dirty Devil Wilderness Study Area in Utah, for example, BLM has found that possible groundwater withdrawals for tar sand exploitation outside the study

95. All of these changes may injure downstream users even though the quantity of water diverted has not increased.
99. See supra note 98. The Aurora case is still pending.
100. 1 UTAH DEIS, supra note 87, at 184.
area could impair the quantity and quality of spring water within the study area.\footnote{101}

II
LIMITS ON AGENCY DISCRETION

As discussed above, federal reserved rights may be lost by res judicata or postponement if they are not asserted in a general stream adjudication. This Part considers whether there is a federal duty to assert reserved rights in a general adjudication and examines the limits on that duty. It begins with the question of whether a federal agency’s failure to assert reserved rights is subject to judicial review.

A. Availability of Judicial Review of Agency Inaction

The availability of judicial review of an agency’s failure to assert reserved rights is debatable in light of the Supreme Court’s decision in Heckler v. Chaney.\footnote{102} In Chaney, the Court held that, under the Administrative Procedure Act (APA), a federal agency’s failure to take “enforcement” action is presumptively unreviewable. The presumption is rebuttable, however, by showing that there is “law to apply” to the review.\footnote{103}

The Court drew three distinctions between action and inaction to justify the presumption.\footnote{104} First, inaction more than action involves a

\footnote{101. 4 id. at 17, 21.}
\footnote{102. 470 U.S. 821 (1985).}
\footnote{103. Id. at 830, 834. The APA provides that an agency decision is not subject to judicial review if “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(2) (1982 & Supp. III 1985). This section forecloses judicial review when “statutes are drawn in such broad terms that in a given case there is no law to apply.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971) (quoting S. REP. No. 752, 79th Cong., 1st Sess. 26 (1945)). But cf: Dunlop v. Bachowski, 421 U.S. 560 (1975) (decision by a federal agency not to pursue a civil suit held reviewable under the APA where nothing in either the statute or its legislative history indicated an intent to preclude judicial review).

In Chaney, the Court did not alter the Overton Park standard for either action or inaction, but it made review of inaction more difficult to obtain by establishing a rebuttable presumption that inaction is unreviewable. See generally Sunstein, Reviewing Agency Inaction After Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985).

104. Chaney, 470 U.S. at 831-32. These three distinctions are important outside the immediate context of the Chaney decision as well. Even when inaction is clearly reviewable under section 701(a), these distinctions support the propositions that review should be highly discretionary and that remedies should be narrow. See infra text accompanying notes 200-05.

A related question is whether federal agency inaction requires the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act. See 42 U.S.C. § 4332(c) (1982); 40 C.F.R. § 1508.18 (1986). Compare Defenders of Wildlife v. Andrus, 627 F.2d 1238 (D.C. Cir. 1980) (no EIS needed for Department of the Interior’s decision not to interfere in Alaskan wolfhunt) and Alaska v. Andrus, 591 F.2d 539 (9th Cir. 1979) (same) with Virginians for Dulles v. Volpe, 541 F.2d 442 (4th Cir. 1975) (Federal Aviation Administration’s acquiescence in expanded use of airport requires an EIS).}
"complicated balancing of a number of factors," such as the agency's priorities and resources and the likelihood of success in the action. Second, when an agency fails to act, it generally does "not exercise its coercive power over an individual's liberty or property rights." Third, failure to act may not provide a sufficient focus for judicial review. As argued later in this Comment, the Chaney factors are not fully applicable to an agency's failure to assert reserved rights.

In Chaney, the Court confirmed and restated the previously established requirement that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." A court also may not review an agency decision that is "beyond the judicial capacity to supervise." Finally, in holding that the inaction at issue in Chaney was unreviewable, the Court emphasized that the relevant enforcement provision was framed permissively. By contrast, the Chaney Court found in Dunlop v. Bachowski an example of "statutory language which supplied sufficient standards to rebut the presumption of unreviewability" since it "indicated that the Secretary was required to file suit if certain 'clearly defined' factors were present."

Thus, the Chaney standard has two elements. First, the relevant statute must impose some mandatory duty on the agency. If the statute merely authorizes agency action, the failure to act always will be within agency discretion, since Congress gave the agency the freedom not to act. Second, even if the statute imposes a mandatory duty on the agency, the agency may retain some discretion because the duty may be conditioned on statutory criteria. This discretion must be governed by administrable standards. A court must have some guidelines in order to review the agency's use of discretion.

The Wilderness Act's management provisions satisfy the "mandatory duty" element of the Chaney standard. Section 2(a) of the Act requires that wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness." Similarly, section 4(b) provides:

105. Chaney, 470 U.S. at 831.
106. Id. at 832.
107. See infra text accompanying notes 200-05.
108. See supra note 103.
110. Id. at 834 (quoting Bachowski v. Brennan, 502 F.2d 79, 87-88 (3d Cir. 1974)).
111. Id. at 835.
113. Chaney, 470 U.S. at 833-34.
114. See supra note 111 and accompanying text.
Except as otherwise provided in this chapter, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.  

The Wilderness Act, therefore, imposes on federal agencies a mandatory duty to protect wilderness resources from uses that are inconsistent with those set out in the Act. Relying on the mandatory language of the Act, the district court in Sierra Club v. Block concluded that an agency's failure to protect water rights was reviewable.  

Although the duty to protect wilderness is mandatory, it also is worded broadly. Read literally, the Act sets out an absolute duty to protect wilderness resources, subject only to the narrow exceptions of section 4(c) and 4(d); yet resource constraints limit the ability of agencies to protect wilderness areas. Agencies must be allowed some discretion, but the contours of that discretion are not delineated in the Act. Thus, it can be argued that the Act does not provide "clearly defined factors" by which to review the agency's decision not to protect wilderness.  

This argument overstates the threshold for the availability of judicial review under Chaney. Judicial review is not premised on the total absence of discretion; it requires only that the discretion be definitely limited by statute. For example, the Chaney Court was well aware that agencies generally are limited by the resources allocated to them. In the Court's view, however, the omnipresent factor of limited resources did not foreclose judicial review of all decisions not to act. Even in Dunlop v. Bachowski, the agency retained discretion not to waste resources on an arguably unsuccessful enforcement action. Yet Dunlop is the Chaney Court's example of adequately circumscribed discretion.

116. Id. § 1133(b) (emphasis added). Other provisions of the Act restrict the ability of the agency to infringe on the wilderness character. See id. § 1133(c) (motorized equipment allowed only "as necessary to meet the minimum requirements for the administration of the area for the purpose of this chapter"). The National Park Service has received a similar mandate:

The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established . . . .

16 U.S.C. § 1a-l (1982). Like the Wilderness Act, the Park Service mandate provides a clear and unequivocal law to apply to agency inaction.


118. 16 U.S.C. § 1133(c)-(d). Nonwilderness uses are allowed, for example, in emergencies, for control of fire, and in some cases by special permission of the President.

119. Chaney, 470 U.S. at 827-35.

120. See id. at 831.

In the view of the *Chaney* Court, that measure of latitude did not preclude review of the agency’s decision not to act.\(^{122}\)

The scope of the protective duty imposed by the Wilderness Act is broad indeed. But far from showing congressional intent to leave the agencies wide discretion, breadth here shows that Congress was acting with an unusual singleness of purpose. As Chief Justice Burger remarked in another context, "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms."\(^{123}\)

There is one additional obstacle to review in federal court of an agency’s failure to assert wilderness reserved rights: the prudential dismissal doctrine announced in *Colorado River Conservation District v. United States*.\(^{124}\) Under the prudential dismissal doctrine, actions brought by the United States or by Indian tribes, asking the federal court to declare the existence of or to quantify reserved rights, may be dismissed in favor of an ongoing general stream adjudication in a state court.\(^{125}\) That doctrine, however, should not apply to a federal court suit challenging the failure of a federal agency to assert reserved rights. Such a suit does not involve the federal court in the allocation or quantification of reserved rights; rather, it challenges federal inaction under the APA and substantive federal land management statutes.

Thus, a decision by a federal agency not to protect reserved water rights in wilderness areas should be subject to judicial review under the *Chaney* standard. The Wilderness Act mandates that the agencies responsible for managing wilderness areas protect wilderness resources. The Act, which creates an absolute duty subject to specific exceptions, provides sufficient guidelines for judicial review. Finally, the possibility that resource constraints will require an agency to exercise some discretion should not immunize agency inaction from judicial review under *Chaney*.

### B. Defining the Duty to Assert Reserved Water Rights

As discussed above, federal agencies have a strict duty, subject only to exceptions specified in the Wilderness Act, to maintain the natural integrity of wilderness areas under their management. This section addresses the question of whether that duty obligates federal agencies to protect and preserve, whenever possible, the nation’s property interest in wilderness water (i.e., its reserved rights). Such a duty can and should be

\(^{122}\) *Chaney*, 470 U.S. at 833-34.


\(^{124}\) *424 U.S. 800* (1976).

inferred from the Wilderness Act and its legislative history, and from the reserved rights doctrine. The necessary limitations on the duty, resulting both from the need for executive discretion in litigation and from the many ways in which destructive inaction can be justified, are discussed later in this Comment.126

Only two cases to date, *Sierra Club v. Andrus*127 and *Sierra Club v. Block*,128 have dealt with the issue of whether federal agencies have a duty to protect reserved rights. In *Andrus*, plaintiffs alleged that land management agencies had failed to assert reserved instream flow rights in Grand Canyon National Park, Glen Canyon National Recreation Area, and public lands in Utah and Arizona.129 Plaintiffs claimed that, as a result of nonassertion, the United States was in danger of losing its right to needed instream flows, which as a consequence might be depleted by energy projects contemplated for the region.130 The district court held that the controversy was not ripe because the United States had not been joined in a state adjudication in which its rights could be lost.131 Moreover, the court noted that a set of alternative methods suggested by the federal government could protect instream flows.132

*Sierra Club v. Block*, a pending case involving the duty to assert reserved rights, concerns national forest wilderness areas in Colorado. The United States asserted a variety of reserved rights claims for federal land reservations when it was joined in several general adjudications in the state courts,133 but it did not seek reserved rights for any congressionally designated wilderness areas in the state’s national forests.134 Plaintiffs sought a declaratory judgment that the United States possessed reserved water rights resulting from wilderness designation and that the government’s failure to assert those rights was arbitrary and capricious.135 In addition, plaintiffs sought both a declaration that the government’s proposed reliance on alternative measures to preserve wilderness waters was arbitrary,136 and an injunction requiring the gov-

126. See infra text accompanying notes 193-208.
130. Id.
131. Id. at 450-51.
132. Id. at 448, 451-52. Only that part of the ruling which concerned the public domain lands was appealed. *Watt*, 659 F.2d at 205. The court of appeals, holding that no reserved rights exist on the public domain, did not reach the issue of a duty to assert them (although by the time the appeal was heard, the United States had been joined in a general adjudication). Id. at 205-06.
133. See United States v. City & County of Denver, 656 P.2d 1 (Colo. 1982).
134. *Block*, 622 F. Supp. at 862-63; see also infra note 227 and accompanying text.
136. Id.
ernment to assert its reserved rights.\(^{137}\) The district court held that Congress did reserve water rights by wilderness designation,\(^{138}\) but that executive inaction—failure to assert the rights—was not arbitrary and capricious.\(^{139}\) The court found the record inadequate on the issue of the rationality of the alternatives proposed by the government and remanded the matter to the Forest Service for a more definite statement of the agency's plan to protect wilderness instream flows.\(^{140}\)

Both the *Andrus* and *Block* courts concluded that although agencies have no specific duty to assert water rights, they do have a duty to protect the water itself.\(^{141}\) Under this view, a duty to assert rights arises only if there is no other reasonable way to protect the water resources

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137. Id.


140. Id. The government appealed the remand order, and the court of appeals granted a stay. The Tenth Circuit, however, held that the remand order was not a final judgment, and therefore dismissed the appeal and dissolved the stay. Sierra Club v. Lyng, Nos. 86-1153, 86-1154, 86-1155 (10th Cir. Oct. 8, 1986).

141. In *Andrus*, the court stated:

Thus, it seems clear that in the event of a real and immediate water supply threat to the scenic, natural, historic or biotic resource values of the Glen Canyon National Recreation Area or the Grand Canyon National Park, the Secretary must take appropriate action. However, nowhere in either 16 U.S.C. [sections] 1 or 1a-l is there a specific direction as to how the protection of Park resources and their federal administration is to be effected. Certainly the Secretary is not restricted in the protection and administration of Park resources to any single means. The Court concludes that defendants have broad discretion in determining what actions are best calculated to protect Park resources . . . . Such actions may include, but are not limited to: 1) asserting reserved water rights, 2) acquiring water rights and rights-of-way, 3) denying the land exchanges and rights-of-way which may constitute or aid a threat to Park resources, or 4) bringing trespass or nuisance actions if appropriate.

487 F. Supp. 443, 448 (D.D.C. 1980) (citations omitted). Similarly, the court in *Block* stated:

These [Wilderness Act] mandates evince Congress' intent to impose a duty on the administering agencies to protect and preserve all wilderness resources, including water. Thus, there is a general duty under the Wilderness Act to protect and preserve wilderness water resources. There is, however, no specific statutory duty to claim reserved water rights in the wilderness areas even though Congress impliedly reserved such rights in order to effectuate the purposes of the Act . . . .

622 F. Supp. at 864. The court continued:

As the briefs and the administrative record show, reserved water rights is only one of several tools available to federal defendants to meet their statutory duty to protect and preserve wilderness water resources. Despite Sierra Club's attempts to prove that assertion of reserved water rights is the only means by which to protect the water resources, I find that the briefs and administrative record are simply inadequate to fully evaluate this issue. Thus, I shall remand to the agencies involved to reevaluate their alternatives in light of this decision that federal reserved water rights do exist in the wilderness areas.

Id. at 865.
with which Congress has entrusted the agency.\textsuperscript{142} The extent of the agency's duty depends, then, on the immediacy of threats to the federally reserved water and on the alternative means by which the agency could prevent loss of the water. Under this theory, reserved rights represent one available technique for protecting water resources on federal lands; whether to use that technique or others is left to agency discretion.

This section argues that the \textit{Andrus} and \textit{Block} courts were mistaken in holding that federal agencies have discretion to use whatever methods they wish to protect wilderness water. Both the Wilderness Act and the principles of the reserved rights doctrine strongly suggest that agencies have a duty to protect reserved water \textit{rights} as well as water \textit{flows}.\textsuperscript{143} By reserving water rights in the federal reservation and charging the agency with protecting the reserved lands, Congress also intended that the reserved water rights be protected. Reserved rights are not just one technique available to the agency; they are the technique selected by Congress when it reserved the water.

It is fundamental to the system established by the Wilderness Act that the authority to add or to remove lands from the wilderness system belongs exclusively to Congress. Only Congress can change the boundaries of a wilderness,\textsuperscript{144} just as only Congress can designate a wilderness.\textsuperscript{145} Prior to the passage of the Wilderness Act, the Forest Service had designated many roadless areas in the National Forests as wilderness, wild, or primitive. One significant innovation of the Wilderness Act was to keep in congressional hands the sole authority to designate or cancel the designation of wilderness areas. The Act thereby assured "that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or make wholesale designations of additional areas in which use would be limited."\textsuperscript{146}

\begin{footnotes}
\item[142] See supra note 141.
\item[143] See infra text accompanying notes 144-60.
\item[144] 16 U.S.C. § 1132(e) (1982); see also 43 U.S.C. § 1761(a) (1982); 43 C.F.R. § 2800.0-7(c) (1986) (authority of Secretaries of Agriculture and the Interior to grant rights-of-way over federal lands does not extend to wilderness areas). Similarly, the Secretary of the Interior may not convey from federal ownership any property within a national park or within "national monuments of scientific significance." 16 U.S.C. § 460f-22(a) (1982).
\item[146] H.R. REP. No. 1538, 88th Cong., 2d Sess. 8, reprinted in 1964 U.S. CODE CONG. & ADMIN. NEWS 3615, 3616-17. As Representative Saylor, author of the House bill and ranking minority member of the reporting committee, stated:

Wilderness is not only fragile but also perishable. . . . Once the stroke of the pen is made to change a wilderness area to one of development the act has a finality that enables few comparisons. . . . Therefore, it is deemed advisable that these remaining areas be given the statutory protection that can only be afforded by the act of law. 110 CONG. REC. 17,430-31 (1964); see also Parker v. United States, 309 F. Supp. 593, 597 (D. Colo. 1970) (major purpose of Wilderness Act was to transfer discretion in designation of wilderness from Department of Agriculture to Congress), aff'd, 448 F.2d 793 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972).
\end{footnotes}
The House bill as reported from committee included a provision allowing the Secretary of Agriculture some control over the designation or deletion of areas from the wilderness system.\textsuperscript{147} The bill would have allowed the Secretary to delete areas from the list of "primitive" areas before they were considered by Congress for designation as wilderness.\textsuperscript{148} On the House floor this provision was removed by amendment because, according to those who spoke in favor of the amendment, the discretion granted the Department of Agriculture was inconsistent with the Act's main thrust of giving Congress complete control over the designation of wilderness areas.\textsuperscript{149}

A major purpose of the Act, then, was to give Congress maximum control over the scope of the wilderness system. Therefore, Congress most likely did not intend water rights, which are part of the real property included in a wilderness, to be disposable at the discretion of the Agriculture or Interior Departments.

Congress intended the water resources of wilderness areas to have the same protection given to the land. Referring in part to the protection of water, the Senate Committee on Interior and Insular Affairs said:

S.4 accordingly establishes a Wilderness Preservation System and provides that areas within it may not be yielded to other uses except after examination of the issue at the highest levels of Government and that no variance from the wilderness use should be approved except upon a clear showing of greater public good which cannot be met by alternative means.\textsuperscript{150}

Section 4(d)(4) of the Wilderness Act does provide for the construction of facilities for water diversion or impoundment within wilderness areas upon the President's determination that such development is necessary to the public interest.\textsuperscript{151} Section 4(d)(4) provides a standard and a procedure for approving the construction of water facilities within a wilderness area, but it says nothing as to how wilderness areas are to be protected from diversions upstream.\textsuperscript{152} Nor does section 4(d)(4), on its face, authorize the President or any other executive officer to give or sell water rights.\textsuperscript{153}

\textsuperscript{148.} Id.
\textsuperscript{149.} See 110 CONG. REC. 17,434 (1964) (remarks of Rep. Dingell); id. at 17,446 (remarks of Rep. Reuss); id. at 17,457 (remarks of Rep. Goodling).
\textsuperscript{152.} See id.
\textsuperscript{153.} See id. It might be argued that section 4(d)(4) also authorizes the transfer or nonassertion of water rights needed for a presidentially approved diversion or impoundment. In delegating the approval power, Congress (so the argument goes) must have intended also to delegate the control over water rights as needed for approved projects. The implication, however, is not a necessary one. Water impoundment or diversion projects might be completed
Both the text and history of the Wilderness Act, therefore, indicate that Congress intended to provide with maximum certainty that the areas it designated would be maintained unimpaired as wilderness. Congress granted the executive only narrowly limited discretion to approve development in the designated areas. In addition, Congress gave the executive no authority to modify or delete areas; indeed, a provision giving such authority was removed by amendment. There is nothing to indicate that Congress intended that water be treated any differently than land.

Furthermore, allowing federal agencies to exercise wide discretion in deciding whether to assert a reserved right would be inconsistent with principles of the reserved rights doctrine. Under that doctrine, the purposes for which water is reserved are those for which the land was set aside, as those purposes were understood by Congress at the time of withdrawal and reservation. By reserving the land for preservation as a wilderness, Congress impliedly reserves unappropriated water in an amount needed to fulfill the purpose of wilderness reservation. The water reservation vests and is dated at the time of land reservation (designation as a wilderness). No further action by the administering agency is needed in order to vest the reserved rights.

When a reserved right is quantified, the court or agency quantifying it should look to the purposes of the reservation as set out in the instrument of reservation or in the congressional act creating a class of reservations. Later congressional or executive glosses on the purposes of an existing reservation do not change the amount of water reserved, even if the right remains unquantified. In United States v. New Mexico, for example, the Supreme Court rejected the United States' argument that the Multiple Use Sustained Yield Act of 1960 (MUSYA) retroactively broadened the national forest uses set out in the Organic Administration Act of 1897. To the extent that the MUSYA did reserve water for using water rights that predate wilderness designation or that remain unappropriated after the wilderness reserved right has been quantified. Thus, it is possible that Congress intended to delegate only the authority to approve construction and operation of facilities, and not the authority to transfer water rights.

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154. See supra text accompanying notes 22-26.
155. Cappaert v. United States, 426 U.S. 128, 138 (1976). It is possible that an earlier administrative withdrawal of an area may have reserved water rights for wilderness purposes. See Krulitz Opinion, supra note 19, at 600 (discussing "relation back" of reserved rights to date of administrative withdrawal).
156. For a more extensive exposition of the idea that the reserved rights doctrine limits agency discretion, see Abrams, Water in the Western Wilderness: The Duty to Assert Reserved Water Rights, 1986 U. ILL. L. REV. 387.
157. See, e.g., Cappaert, 426 U.S. at 141 (finding in the proclamation establishing Death Valley National Monument an intent to assure the preservation of the Devil's Hole Pupfish).
broader uses, the Court said, that reservation would have a priority date of 1960.160

The first step in quantification of a reserved right, then, is historical, looking back to the land use purposes intended at the time of reservation. The purposes for which Congress reserved water may or may not correspond to the present administrator's ideas of how the land and water should be used. Only the congressional intent, however, is relevant in quantifying the reserved right. If the managing agency arbitrarily can decline to protect reserved rights, it effectively may frustrate the intention of Congress to make a reservation of water.

C. Alternatives to Asserting Reserved Instream Flow Rights

According to the prevailing understanding of a federal agency's duty with respect to water under its management, the agency is not specifically bound to protect water rights, but only water flows.161 Reserved rights, in this view, is only one of several tools at the disposal of the agencies that administer wilderness, and the agencies have complete discretion as to which tools to use. Whether an agency is obliged to assert reserved rights depends, under this view, on whether alternatives to reserved rights will adequately protect the water.

Three alternatives to reserved rights were proposed by the government and relied on by the court in Sierra Club v. Andrus.162 These alternatives included: (1) acquiring water rights, rights-of-way, and private inholdings; (2) denying land exchanges and rights-of-way that threaten wilderness water flows; and (3) bringing actions in trespass or nuisance.163 In the course of the Block litigation, the Forest Service reaffirmed its reliance on these three methods and added a fourth:164 denying presidential approval of water development projects in wilderness areas.165 Other alternatives included objecting in state judicial and administrative forums to appropriations that will harm the wilderness,

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160. Id. at 713 n.21.
161. See supra note 141 and accompanying text.
163. Id. at 448.
164. Sierra Club Exhibits, supra note 88, exhibit D at 3.
165. See 16 U.S.C. § 1133(d)(4) (1982). In December 1986, the Forest Service filed with the district court a "Report On Methods For Protecting Wilderness Water Resources." Only two pages long, it merely reiterated the alternatives advanced earlier. In June 1987, however, the court granted the Sierra Club's request for a declaration that the adoption by the Forest Service of that set of alternatives was an abuse of discretion. The court called the plan "grossly inadequate" and characterized the government's approach as "languor[ous]" and "insouciant." Sierra Club v. Lyng, Civ. No. 84-K-2, slip op. at 14-17 (D. Colo. June 3, 1987). The court again remanded the action to the Forest Service, ordering it to submit a new plan by September 1, 1987. Id. at 17.
None of these six alternative means of protecting wilderness water yields the definite and permanent protection mandated in the Wilderness Act. Even in the short term, the loss of wilderness water rights may leave an agency with no effective means to meet its obligation to preserve wilderness resources.


Federal agencies may acquire water rights by applying through the state water rights system under state or federal substantive law or by purchasing existing water rights through voluntary sale or congressionally authorized condemnation. In most western states, however, a federal agency would not be able to establish a right under state law to the instream flow of water for wilderness purposes. Traditionally, establishment of an appropriative right required both a "beneficial use" and a "diversion" from the stream. Although state laws have come to recognize some instream uses in many states, the power to appropriate instream flows for recreation or wildlife is restricted largely to state agencies that have been delegated that authority. Moreover, under a narrower definition of "beneficial use," the purchase of existing rights would serve only to increase the certainty and permanence of the agency's right to water for wilderness purposes.

166. See Andrus, 487 F. Supp. at 452. Although Andrus approved the policy of negotiation, the court, in dismissing the plaintiffs' claims, relied mainly on the lack of any immediate threat to the water rights. Id. at 450-52. It is not clear whether the Andrus court would have allowed the Interior Department to bargain away water rights essential to a federal reservation.

167. In addition to greater certainty and permanence, one commentator has argued that the "water rights approach" to preserving federal instream flows is superior to the "regulatory" approach (denying or conditioning permits) because the water rights approach integrates federal and state interests within a single adjudicatory system, as intended by the McCarran Amendment. Hobbs, Federal Environmental Law and State Water Law: Accommodation or Preemption, 1 NAT. RESOURCES & ENV'T, Winter 1986, 23, 23-25.


169. D. GETCHES, supra note 4, at 79.


171. A recent survey found that only three western states (Arizona, South Dakota, and Washington) allow private parties to hold instream flow rights. B. Driver, Western Water: Tuning the System 33 (July 7, 1986) (Report to the Western Governors' Ass'n from the Water Efficiency Task Force); see McClellan v. Jantzen, 26 Ariz. App. 223, 547 P.2d 494 (1976) (applying Arizona statute). A 1984 survey of water law in western states reached similar results. It found that at least nine states required a diversion from the stream in order to perfect a private appropriation, and that instream use generally was limited to state agencies. Shurts, FLPMA, Fish and Wildlife, and Federal Water Rights, 15 ENVTL. L. 115, 149-50 (1984). The author concluded that it would be "entirely speculative" to predict whether the United States in a given case could use state law to convince the state government to preserve needed water flows over federal lands. Id. at 150-51. For examples of the restrictions on appropriation of instream flows, see California Trout, Inc. v. State Water Resources Control Bd., 90 Cal. App. 3d 816, 153 Cal. Rptr. 672 (1979); COLO. REV. STAT. § 37-92-305(9)(a) (Supp. 1986); Tarlock, Appropriation for Instream Flow Maintenance: A Progress Report on "New" Public Western
that threaten wilderness water may be legally impossible.\textsuperscript{172} Finally, purchasing water rights in some cases would be prohibitively expensive.\textsuperscript{173} Thus, acquiring instream rights under state law is not, except perhaps in rare cases, a realistic option.

At one time, the Department of the Interior advocated that the federal government overcome state laws prohibiting the appropriation of in-stream flows by establishing "federal nonreserved rights," which would not be subject to the diversion and beneficial use restrictions of state law.\textsuperscript{174} The Department now disputes the executive's power to withdraw water in this way independent of a land reservation,\textsuperscript{175} and the United States has never asserted nonreserved rights. Nonreserved rights, furthermore, would be inferior to reserved rights in that nonreserved rights would not date back to the time of the land reservation. In short, nonreserved rights are not a viable alternative because their validity is questionable and they have no significant advantage over reserved rights.

Land management agencies may be able to prevent diversion or impoundment within a wilderness area by acquiring rights-of-way or private inholdings needed for the water development project. Diversions from private land above a wilderness, however, could not be prevented in this way. In addition, any purchase would have to be by a voluntary sale or by a condemnation proceeding specifically authorized by Congress.\textsuperscript{176} By the time private development plans have progressed to the point of imminently threatening wilderness water, however, the private developers are likely to extract a high price for a voluntary sale, if they are willing to sell at all. Acquisition of rights-of-way generally is not a viable alternative, therefore, because it depends on voluntary sale or a specific congressional authorization.

\textit{Water Rights}, 1978 Utah L. Rev. 211, 247 (approving restriction of the appropriation power to state agencies).

\textsuperscript{172} Some states do not recognize instream ecological and recreational uses as beneficial. See I W. Hutchins, supra note 15, at 523-24. The United States, having purchased a private water right, would cease to "use" the water by letting the water flow through the wilderness, and therefore would be open to a charge of abandonment.

\textsuperscript{173} The water rights owned by the private appropriators in Colorado's Homestake II project, for example, are estimated to be worth between $40 million and $60 million. Sierra Club Exhibits, supra note 88, at exhibit I.

\textsuperscript{174} In 1979 the Solicitor of the Department of the Interior advocated the existence of nonreserved rights. See Krulitz Opinion, supra note 19.


\textsuperscript{176} 16 U.S.C. § 1134(c) (1982) only permits federal agencies to purchase sites within wilderness areas by voluntary sale or congressionally authorized condemnation. Congress has restricted the Interior Department's use of eminent domain in areas outside of wilderness to acquiring access routes to public lands. 43 U.S.C. § 1715(a) (1982).
2. Denying Rights-of-Way and Land Exchanges

As an alternative means of protecting wilderness water, denying applications for rights-of-way and for exchanges of private land for public land suffers from an obvious limitation: it cannot affect diversions over nonfederal lands or existing rights-of-way.177 On forest and public lands, the Federal Land Policy and Management Act (FLPMA)178 does allow BLM and the Forest Service to deny rights-of-way and land exchanges on public interest grounds.179 Denying right-of-way applications is a useful tool, therefore, only where a diversion is proposed on or over federal lands.

3. Bringing Trespass or Nuisance Actions

The federal government has full authority to protect the public lands against trespass and injury.180 The government also has a remedy under state law to restrain the upstream diversion of water reserved to a wilderness area.181 The government has no tort remedy, however, against one diverting water under a valid permit. In addition, if the federal government loses reserved rights through nonassertion, it then has no remedy against an upstream appropriator because no federal rights are impaired. Thus, tort action is only a means of enforcing reserved rights that have not been lost; it is not an alternative to asserting reserved rights.

4. Denying Presidential Authorization

The Wilderness Act allows the President to make an exception, if in the public interest, to the Act's prohibitions on water development within wilderness areas.182 This provision is a means of allowing the wilderness to be damaged by water development, not a means of protecting wilderness water. A policy of denying such exceptions is no substitute for asserting rights to instream flows in wilderness areas.

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179. See id. §§ 1716, 1761, 1765. These agencies also may deny proposed rights-of-way that are not in the public interest or that are inconsistent with surrounding land uses. See 36 C.F.R. § 251.54(h) (1986) (national forests); 43 C.F.R. § 2802.4(a) (1986) (public lands).
5. Objecting to Competing Appropriations in State Forums

If the United States loses wilderness reserved rights through nonassertion, those rights cannot later provide grounds for objecting to competing appropriations. In some states, however, the state courts or the state water agency can deny appropriations of water that are not in the public interest. If the state also provides for broad participation in water rights proceedings, the United States may be able to raise a public interest objection to a proposed appropriation that threatens the wilderness. This approach, even when allowed under state law, puts the government in a much weaker legal position than if it retained its reserved rights, which allow the federal government directly to challenge competing appropriations. Thus, instead of asserting a right to maintain instream flow, the federal lawyers could only request that the state recognize a public interest in maintaining the flow.

6. Negotiating With State Governments and Private Users

Effective negotiation with state governments depends on the state's ability to provide, in return for federal reductions in reserved rights claims, an assured means of protecting the wilderness stream flows. Because negotiating with numerous private appropriators is impractical, it is essential that the state be able to negotiate on their behalf. Montana began the only comprehensive system for negotiating reserved rights in 1979. The nine-member Montana Reserved Water Rights Compact Commission has authority to negotiate on behalf of the state with federal agencies and Indian tribes. Adjudication of the federal claim is suspended if the tribe or agency agrees to negotiate an agreement with the Commission. If an agreement is reached—and ratified by both the state legislature and the appropriate tribal or federal body—its terms are incorporated into a water court decree for the basin.

Montana's system provides a method by which the state can enforce a reserved rights settlement without securing the agreement of the numerous private appropriators within a basin. Some other states may be able to achieve the same result by agreeing to deny private appropria-

183. See, e.g., Tanner v. Bacon, 103 Utah 494, 506-10, 136 P.2d 957, 962-64 (1943) (State Engineer authorized to deny appropriations "in the interest of the public welfare"); UTAH CODE ANN. § 73-3-8 (1953 & Supp. 1987); D. GETCHES, supra note 4, at 150-52.
184. In Colorado, for example, one may object to an appropriation without claiming a right to the use of the stream. See infra notes 233-43 and accompanying text.
187. Id. § 85-2-217.
188. Id. §§ 85-2-231(1)(c), 85-2-234(2).
tions,189 by withdrawing some or all of the stream from appropriation,190 or by applying to state courts for minimum stream flow appropriations.191

In order for a federal agency to negotiate for instream flows, however, it must have a potential reserved rights claim to litigate. Once the federal government has lost those reserved rights through nonassertion, the federal agency will have nothing with which to bargain. Negotiation with state governments therefore is not an alternative to litigation of reserved rights; rather, it is a possible means of settling such lawsuits once they have been initiated.192

D. The Need for Agency Discretion—Limits on the Duty

This Comment argues that federal agencies have a duty to assert their reserved rights in wilderness areas when state water adjudications threaten the loss or postponement of those rights.193 Agencies need some discretion, however, in determining whether and how to litigate reserved rights claims. This section attempts to define the limits of that discretion by examining the reasons that could justify an agency’s failure to protect reserved rights. The answers given here are not intended to be definitive; the subject involves complex questions that are beyond the scope of this paper, such as the degree of political autonomy desired in executive legal officers.

Inaction by federal agencies that results in a loss of wilderness water rights is not immune from legal scrutiny. Although the Wilderness Act does not expressly require that the agencies that administer wilderness areas take positive action to protect water rights, it does provide that "each agency administering [a wilderness area] shall be responsible for preserving the wilderness character of the area."194 By implication, the Act thereby requires the agency to take all positive steps necessary to maintain federal ownership of both the land and water resources of the wilderness.

189. See, e.g., CAL. WATER CODE § 1243 (West Supp. 1987) (requiring the Water Board to consider fish and wildlife needs).


192. In Wyoming, for example, some federal reserved rights claims were settled recently, but only after the United States filed claims for every federal reservation in the water district. See Comment, Wyoming's Experience with Federal Non-Indian Reserved Rights: The Big Horn Adjudication, 21 LAND & WATER L. REV. 433, 435 & n.19 (1986).

193. See supra text accompanying notes 126-60.

The loss of federal property through inaction is analogous to cases involving claims of estoppel or laches against the United States. While these cases rest in part on a general principle that estoppel by acquiescence does not run against the United States, courts also have cited the need to prevent the loss of public property through executive inaction.

The estoppel cases demonstrate that inaction, like action, creates the potential for loss of public property, but that a strong public policy runs against allowing such breaches of the duty to preserve public property. In United States v. California, for example, the Supreme Court addressed the competing claims of California and the federal government to dominion or ownership of the three-mile territorial sea. California argued that the United States was precluded from challenging the state's ownership or dominion because federal officers previously had acted in a manner consistent with the state's claim. Assuming arguendo that the officers had acquiesced in California's claim, the Court nonetheless rejected the assertion of estoppel:

The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

Although some additional deference should be given to an agency's decision not to assert reserved rights (since it is a decision not to act), the three distinctions between inaction and action made in Heckler v. Chaney are not fully applicable to the nonassertion of reserved rights. First, a ready focus for judicial review exists in the context of reserved rights, because the duty to assert those rights arises only when the United States is joined in a general adjudication of a stream on which it has reserved rights. At that point the government is faced with a decision: it must either assert its reserved rights or forfeit those rights. The rules of procedure give a temporal focus to the decision; the government will be precluded from asserting its rights if it does not assert them in a timely manner.

196. See, e.g., id. (suit to maintain public lands not subject to estoppel); City & County of Denver v. Bergland, 517 F. Supp. 155, 197 (D. Colo. 1981), aff'd, 695 F.2d 465 (10th Cir. 1982).
198. Id. at 39.
200. 470 U.S. 821 (1985). The second factor involved in Chaney, "coercive power," is not relevant because the duty to assert reserved rights does not involve an enforcement issue.
201. See supra note 104 and accompanying text.
For similar reasons, no "complicated balancing of factors" typi-
cally is needed to make the decision. Although agencies no doubt have
limited litigation budgets, the costs of alternative means of protecting the
water are comparable or higher. Further, the cost of adding one claim
to those already being made in a stream adjudication is likely to be small.
The "proof" of a reserved rights claim is largely legal, resting on inter-
pretation of the congressional or executive mandates creating the reser-
vation. Federal agencies would like to pick and choose which rights they
will litigate—and when—but that power was lost with the McCarran
Amendment. An agency should have the discretion to settle claims it
reasonably regards as doubtful. Beyond that, however, a defense
based on "litigation priorities" should require evidence that the agency
lacks the resources to assert the claim at issue.

An agency's decision not to pursue a reserved rights claim in some
cases may be based on politics rather than budget constraints. Whether
political motivations justify an agency's failure to assert reserved rights is
a difficult question. In designating a wilderness area, Congress deter-
mines that preservation is the most appropriate use of the area, and it
reserves water rights in an amount needed for preservation. A political
accommodation of public and private development interests, including
competing water uses, is implicit in the congressional action. An admin-
istrator arguably has no authority to reopen that political bargain and
grant back water that Congress reserved for the wilderness. Lacking
such authority, an administrator should never fail to assert a reserved
right simply because she believes it would be more politic to allow state
law appropriators to use the water.

On the other hand, one can argue that the agency should have the
authority to consider political effects when making decisions about wil-
derness management, as long as doing so does not violate an express
command of the statute. Similarly, it can be said that, in practice, attor-
neys in land management agencies and the Justice Department must be

202. See supra notes 104-07 and accompanying text.
203. See supra note 173 and accompanying text.
204. See supra notes 28-29 and accompanying text.
205. See infra text accompanying note 208.
206. Likewise, the court that quantifies the right has no authority to alter the political
competing interests in establishing reserved water rights). Competing interests may be rele-
vant, however, when determining the balance intended by Congress. See, e.g., United States v.
New Mexico, 438 U.S. 696, 715 (1978) (inferring from the potential harm to private users that
Congress did not intend to reserve instream flow).

The needs for which Congress sets aside water may include, of course, foreseeable future
needs. Thus, in reserving land near the Colorado River for Indian tribes, Congress by implica-
tion reserved enough water to irrigate all the practicably irrigable reservation land; only a
small part of that water was needed for irrigation at the time of reservation. Arizona v. Cali-
responsive to the politically motivated commands of their superiors, and not simply to their own judgments of a claim’s legal merits.

After determining the purposes for which the water was reserved, it is necessary to determine the amount and time of use needed to fulfill those purposes. In general, the agency administering a statutory scheme will have the expertise to determine how best to meet the statute’s purposes. An agency managing reserved land and water, for example, has the expertise to determine how much water is needed to fulfill the purposes of the reservation. The agency’s role in adjudications, therefore, should be to present all relevant evidence regarding the present or future uses of water for the reservation purposes and to propose a quantity sufficient to meet those needs.

Settlement of dubious claims is the clearest situation in which an agency, or the Justice Department in its role as litigator for the agency, should have discretion to seek less than the maximum reserved rights theoretically available. An agency, for example, should have no obligation to pursue claims with no reasonable potential for success. Similarly, the agency and the Justice Department must have some discretion to settle claims when by doing so they reasonably can expect to obtain a better or larger water right than could be obtained through litigation. An agency, then, legitimately can decide to settle a particular reserved rights claim if there is no reasonable prospect of success or if settlement provides the best prospect of establishing the rights. In addition, an agency could justify its failure to assert reserved rights by showing that it cannot obtain the resources required to litigate the claim. Finally, political motivations in some cases may justify an agency’s failure to assert reserved rights.

E. Remedies for Breach of the Duty

If, as argued above, federal agencies have a limited duty to protect reserved rights, the question remains how such a duty can be enforced. This section concludes that while injunctive relief—ordering an agency to assert a claim to reserved rights in an ongoing stream adjudication—would be unavailable in most cases, declaratory relief—deciding the legality of the agency’s decision not to protect reserved rights—should be available and may prove effective in coercing the agency to take action.

A reviewing court probably would not order a federal agency to assert its reserved rights in full. Courts understandably are wary of ordering an executive agency to litigate or to adopt a particular posture in litigation. Such an order would raise a separation of powers problem.

208. Settlement may not be possible under some state adjudication systems. See supra notes 185-92 and accompanying text.
209. See Sierra Club v. Department of the Interior, 424 F. Supp. 172, 175 (N.D. Cal.)
and would be difficult to administer. If, however, an agency completely neglects to implement a mandated program, it would be within the court's power to order the agency to implement the program according to the statutory directive, without requiring specific action in individual cases.

The power to order action in a specific case is more doubtful. In *Dunlop v. Bachowski*, the Supreme Court reserved the question of whether a district court has the power to order an agency to file a civil suit. The Court advised the district court below that if the district court found the agency's failure to sue to be arbitrary and capricious, it should so rule. The Supreme Court assumed that the agency would then file the desired lawsuit without further prodding.

Even if an injunction is unavailable, judicial examination of the agency's reasons for not asserting a claim of reserved rights, coupled with a decision as to the legality of the agency's inaction, may provide effective relief. As the Supreme Court assumed in *Dunlop*, agencies often will reverse a decision that a federal court has declared illegal, even if there is

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210. To administer the decree on a continuing basis, the federal court issuing the decree would have to supervise the many litigation decisions and tactics taken by the United States in the state court adjudication.

211. See *Nader v. Saxbe*, 497 F.2d 676, 679 & n.19 (D.C. Cir. 1974) (stating in dictum that “prosecutorial discretion” does not extend to a policy of not implementing the Federal Corrupt Practices Act). In *Iowa ex rel. Miller v. Block*, 771 F.2d 347 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 3312 (1986), the court approved an order that the Secretary of Agriculture implement a program of emergency farm aid payments as mandated by Congress: It is not the business of this Court to order the Secretary to make payments under the [Special Disaster Payment Program] to specific farmers. But when Congress has created a program which contemplates that such payments will be made in appropriate circumstances, it is the clear duty of the Secretary to promulgate regulations which carry out the intent of Congress.


213. Id. at 575.

214. Id. at 575-76.
no immediate prospect of an injunction. Thus, a declaration that an action or decision by an agency was arbitrary and capricious could be effective relief. Before declaring agency inaction legal or illegal, however, the court first must examine some record of the agency's reasoning. The court then must decide whether that reasoning, and the facts on which the reasoning depends, provide a rational basis for a decision that the agency is authorized to make.

As argued above, a land management agency has a duty to assert reserved rights when it is joined in a state adjudication involving those rights unless it can show that the claims have no reasonable chance of success, that it can obtain maximum water rights in the wilderness through a negotiated settlement, or that it lacks resources to pursue the claim. A reviewing court, therefore, should find the agency inaction unlawful if the failure to act is not justified on at least one of these grounds.

This approach might seem to turn the APA's "arbitrary and capricious" standard on its head; normally, the burden is on the challenger to show the lack of a rational basis. That allocation of the burden of proof, however, does not preclude courts from requiring agencies to meet an intermediate burden of production of evidence. Such a shift in the burden of production is justified, because reserved rights are a part of the real property held in trust for the people by federal agencies, and because the agencies, at least in the wilderness case, cannot dispose of any part of the property they manage.

Even under the broader theory of agency discretion (according to which the agency must protect water flows, though not necessarily water rights), a reviewing court can require that the agency provide a statement of the alternative means it intends to use to protect the water flow. The Block court took this course.


217. See supra notes 193-208 and accompanying text.

218. See, e.g., International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 643 (D.C. Cir. 1973) (requiring the EPA to "bear a burden of adducing a reasoned presentation supporting the reliability of its methodology" (emphasis added) before denying extensions of automobile emission standards under the Clean Air Act, even though the Act requires the applicant to establish that control technology is unavailable). Although at points the court in Ruckelshaus speaks in terms of a shift in the burden of proof, the court makes it clear that it means something closer to a burden of production. See id. at 648.

219. See supra note 141 and accompanying text.

If the agency presents a statement asserting factually that it can protect water resources in the wilderness through alternative means (or that its decision not to assert reserved rights is justified on other grounds), the court will face a crucial choice: should the court allow factual challenges to the feasibility of the agency's alternatives (or to other factual premises of the agency's position), or should it accept the factual premises of the alternatives and examine them only for rationality? The Block court was not explicit on this point. By stating the issue as whether the agency can meet its statutory obligation to protect the water, however, the court implied that its review would extend to factual matters.221

In Dunlop v. Bachowski,222 the Supreme Court held that the district court could order the Department of Labor to state its reasons for not bringing a suit. The Court also ruled, however, that the district court should not hear factual challenges to the truth of any assertions used to justify the Department's decision.223 On remand, the district court found that the Department’s reasons rested on improper premises.224 The standard of review mandated in Dunlop nevertheless is weak, and it may be useless when the dispute is largely factual.225

Thus, it is uncertain whether the duty to assert reserved rights can be enforced effectively. Courts are unlikely to require, through an injunction, that the agency litigate a particular claim. Although declaratory relief may be available and may spur the agency to change its course, the standard under which courts will review the agency's failure to assert reserved rights is unsettled. If the courts forgo factual review of the agency's conclusions and review only the agency's legal reasoning, the agency in most cases will be able to justify its decision not to assert reserved rights.

III
PARTICIPATION IN WATER PROCEEDINGS BY PRIVATE PARTIES ASSERTING A FEDERAL RESERVED INSTREAM FLOW RIGHT

Although the executive department has a duty to assert and protect federal reserved rights to instream flow, the agencies responsible for protecting those rights must retain discretion to make sound decisions as to

221. Id.
223. Id. at 573.
225. See Note, Dunlop v. Bachowski and the Limits of Judicial Review under Title IV of the LMRDA: A Proposal For Administrative Reform, 86 YALE L.J. 885, 897 (1977). In all three of the cases applying Dunlop (other than Dunlop itself on remand), “plaintiffs presented colorable factual arguments, only to have the court dismiss the complaint because the Secretary's statement of reasons was not irrational on its face.” Id. at 898.
litigation strategy. That discretion makes the duty difficult for courts to administer. It is worthwhile, therefore, to explore alternatives to direct challenge of agency inaction. This Part briefly discusses intervention and other forms of participation by interested private parties (e.g., conservation groups) in state adjudications involving federal reserved rights. Because water adjudication systems in the western states vary greatly, it is not possible to discuss the procedural law generally. The following discussion focuses on Colorado, and briefly notes some aspects of adjudication systems in other states. This Part also discusses opportunities for intervention under state rules modeled on Rule 24 of the Federal Rules of Civil Procedure (FRCP).

There are four principal situations in which a private group might want to intervene or otherwise to participate in order to assert a federal reserved instream right. First, a private party might seek to intervene in order to obtain adjudication of the remaining federal claims where the United States has been joined in a general stream adjudication in state court but has not stated a claim for the full reserved right to which it may be entitled. In this situation, the intervenor might face a formidable obstacle arising from the nature of water court proceedings: even if intervention were allowed, the court probably would not have jurisdiction to adjudicate a claim that had not come properly before it through the application and notice process.

Second, a private party might seek to intervene in order to pursue an appeal of a state court's denial of an instream flow right. If the United States declines to appeal an adverse ruling, conservation groups may attempt to appeal the court's decision in order to establish the federal instream flow right. In this situation, the proposed intervenors would have to show that they have standing to appeal and that the United States should not have complete control over the litigation of its own claims.

A similar situation arises when the United States proposes to compromise its reserved rights claims through settlement. Intervenors may have the opportunity to argue to the court against approval of the settle-
ment, but they probably would not be able to block it.231

Finally, private parties may attempt to intervene in order to object to the water rights claim of a private appropriator. This situation arises where the appropriator's diversion or storage would remove from a federal reservation water reserved to instream use and the United States does not object to the diversion or storage.232

A. Participation Under the Colorado Water Rights Adjudication Statute

The Colorado system allows broad participation in water rights adjudication; participation is not limited to those claiming water rights on their own behalf. Interested persons or groups have three opportunities for participation. First, "[a]ny person who wishes" may file written objections to an application for water rights.233 Second, "any person" may protest or support the ruling of a water court referee.234 The protester or supporter becomes a party to the water court proceedings.235 Finally, "any person" may move to intervene in the water court proceeding.236

In *Bunger v. Uncompahgre Valley Water Users Association*,237 the Colorado Supreme Court held that the statute's broad participation language should be given a literal interpretation. Specifically, the court held that a person need not claim a property interest in the stream at issue in order either to protest a ruling or to join the water court proceeding at a later time.238 Under the Colorado statute, therefore, a private conserva-

231. See Local No. 93, International Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3079 (1986).

232. See infra text accompanying note 243 (Colorado example). Conservation groups in Colorado have recently joined a state "change of use" proceeding regarding the Homestake II project in the Holy Cross Wilderness. The groups argue that the applicants' proposal to move their points of diversion upstream would impair the instream reserved rights guaranteed by wilderness designation. The United States has not objected to the proposed upstream moves. See Brief in Support of Applicants' Motion for Partial Summary Judgment at 5, In re Water Rights of the Cities of Aurora & Colorado Springs, Nos. 85CW151, 85CW582, 85CW583 (Colo. Dist. Ct., Water Div. No. 5 filed May 13, 1987).

233. COLO. REV. STAT. § 37-92-302(1)(b) (Supp. 1986). In Colorado, surface water appropriations are administered by the district courts of the state through "water judges," who may spend full or part time on water matters, and "referees," masters to whom water matters are referred by the water judge for investigation, hearing, and proposed rulings. Id. § 37-92-203 (1973 & Supp. 1986). Applications for water rights are filed with the clerk of the water court. Id. § 37-92-302(1)(a) (Supp. 1986). The clerk includes a description of each application in a monthly resume of applications, which is mailed to all known claimants and is published in newspapers. Id. § 37-92-302(3).

234. Id. § 37-92-304(2).

235. Id. § 37-92-304(3).

236. Id. An intervenor contesting the referee's ruling must show that her failure to protest the ruling previously was due to excusable neglect, surprise, or mistake. Id.


238. Id. at 165, 557 P.2d at 392. At the time of the *Bunger* decision, "interested" persons could appear in the water court without formally intervening. COLO. REV. STAT. § 37-92-304(3) (1973). The court read "interested" to include any person who could have protested
tion group could become party to a water court adjudication of federal reserved rights. The statute, however, would not allow the private party to urge reserved rights claims that were not the subject of an application by the United States, because the water court has no jurisdiction to decide claims not properly presented in an application and circulated in the resume required by statute.\textsuperscript{239}

The Colorado statute also allows a private group to appeal a judgment adverse to the United States' reserved rights if the group joined the proceeding prior to trial either by protesting the referee's ruling or by intervening.\textsuperscript{240} The water adjudication statute, however, may preclude a private group from intervening after judgment in order to pursue an appeal that the United States has decided to forgo.\textsuperscript{241}

Private parties also may be able to continue to press claims that the federal government is prepared to settle, because there is no provision in

\textsuperscript{239} Danielson v. Jones, 698 P.2d 240, 244 (Colo. 1985). This principle has been applied to reserved rights claims as well as state law claims. United States v. City & County of Denver, 656 P.2d 1, 35 (Colo. 1982).

A question remains as to whether a private party could apply for a reserved instream flow right on behalf of the United States. See City & County of Denver v. Northern Colo. Water Conservancy Dist., 130 Colo. 375, 409-15, 276 P.2d 992, 1009-12 (1954) (allowing, under former adjudication statute, owners of appropriative water rights to file statement of claim for storage rights when United States, as trustee for the owners, had withdrawn its claim but remained a party). The statute currently allows an application by "[a]ny person who desires a determination of a water right... and the amount and priority thereof." COLO. REV. STAT. § 37-92-302(1)(a) (Supp. 1986).

\textsuperscript{240} Bar 70 Enters., Inc. v. Tosco Corp., 703 P.2d 1297, 1303 (Colo. 1985). The appellant in Bar 70 Enterprises had participated in the water court proceeding by filing an "entry of appearance." See id. at 1301; COLO. REV. STAT. § 37-92-304(3) (1973) (amended 1983). Because the appellant had participated fully in the trial, the court held that the appellant had the same standing (including the right to appeal) as if it had become a party by filing a protest to a ruling of the referee. Bar 70 Enterprises, 703 P.2d at 1303. The procedure for entering an appearance has been replaced in Colorado by intervention as a full party. See COLO. REV. STAT. § 37-92-304(3) (Supp. 1986). The reasoning of Bar 70 Enterprises implies that an intervenor would have standing to appeal.

\textsuperscript{241} It can be argued that, even after judgment, intervention is governed by the water adjudication statute rather than by normal Colorado civil procedure. See Meyring Livestock Co. v. Wamsley Cattle Co., 687 P.2d 955, 959-60 (Colo. 1984) (holding that the Colorado civil rules yield to inconsistent provisions in the water adjudication statutes); COLO. R. CIV. P. 81(a). Under the Meyring analysis, the provision allowing intervention prior to trial in water cases was intended to preclude any intervention after trial.

In order to intervene at the appellate stage the applicant might have to show an interest equivalent to that needed for standing, see infra note 254, and would have to show that the decision by the United States to drop its appeal constitutes inadequate representation. See COLO. R. CIV. P. 24(a)(2). These issues are considered infra in the discussion of Rule 24 accompanying notes 248-53.
the water rights adjudication statute for consent decrees. If the United States were to make a claim for instream flow rights in a given stream, then to withdraw the claim prior to judgment, a private party to the adjudication presumably could continue to urge that claim as a matter of either supporting or protesting that aspect of the referee's ruling.242

Perhaps the clearest opportunity under the Colorado statute for effective participation by a private conservation group is in opposing a proposed diversion or storage right that would impair instream reserved rights. For example, if a current rights-holder seeks to move his diversion point upstream of a wilderness area, and the United States does not oppose the application, a private group may wish to join the proceeding in order to protect the reserved flows. Since "any person" may oppose an application, standing is no obstacle. On proof that a change of diversion point will injure a federal reserved right, the water court must deny the application.243

The water rights adjudication statutes of some other western states do not provide, on their faces at least, for participation as broad as that allowed by Colorado. Arizona, for example, allows intervention at the administrative level only by "claimants."244 Wyoming does the same,245 and allows appeal of administrative action to the courts only by those "aggrieved or adversely affected."246 New Mexico provides for participation by all "claimants" to the use of the water at issue.247

B. Intervention of Right Under Generally Applicable Intervention Rules

In some instances, participation in appeals from state administrative agencies and from state trial courts may be governed by generally applicable intervention rules, rather than by a special water adjudication statute. This section considers what intervention rights a private party would have under the state rules modeled on FRCP 24, which has been adopted without substantial changes by several western states.248 For convenience, most cases discussed here are federal, rather than from any one of the western states.

As discussed below, intervention might be available under rules modeled on Rule 24 for a private group asserting a federal reserved right.

242. See Northern Colorado, 130 Colo. at 421-22, 276 P.2d at 1015 (allowing water users to press claim abandoned by the United States).

243. The applicant first has an opportunity to propose conditions on the appropriation that will prevent injury. COLO. REV. STAT. § 37-92-305(3) (1973).

244. ARIZ. REV. STAT. ANN. § 45-254(E) (Supp. 1986).

245. WYO. STAT. § 41-4-310 (1977).


247. N.M. STAT. ANN. § 72-4-17 (1985).

The intervenor, however, probably would have fewer opportunities effectively to establish or to protect the right than are available under the Colorado system. In particular, intervenors probably would not have the opportunity to appeal an adverse judgment that the government voluntarily has accepted or to continue to press a claim on which the government has sought dismissal. FRCP 24(a)(2) provides for intervention of right when the applicant claims an interest relating to the property or transaction which is the subject of the action, and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.249

A conservation group whose members actually make recreational use of the area through which the stream at issue flows probably would have an interest in the water rights in that stream sufficient for intervention in a general adjudication. The Supreme Court has recognized that an environmental organization has a protectable interest in the preservation of a natural area used for recreation by the group's members (recreation is used here in the broad sense, including simple appreciation of the area in its natural state).250

Rule 24, moreover, does not require an intervenor to have a property interest in the litigation, even when the issue in which the intervenor is interested is the disposition or use of property.251 Further, although courts have sometimes said that an intervenor's interest must be "direct,"252 there are many examples of intervention of right taken to protect interests that could be described as "indirect."253

249. FED. R. CIV. P. 24(a)(2).
250. Sierra Club v. Morton, 405 U.S. 727 (1972). Referring to the destruction of wildlife, scenery, and other natural features of Sequoia National Park, impairing the present and future enjoyment of the Park, the Court in Morton said:

We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under [section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1982)]. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.

Morton, 405 U.S. at 734. Morton involved standing to sue under the APA, not intervention. Courts and commentators agree, however, that intervention at trial should not require an interest greater than that needed to initiate a lawsuit. See, e.g., Trbovich v. United Mine Workers, 404 U.S. 528, 539 (1972) (approving intervention by a union member in the Labor Department's civil suit to set aside a union election, even though the union member would have had no private right of action); United States v. Board of School Comm'rs, 466 F.2d 573, 577 (7th Cir. 1972) (stating principle); Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 HARV. L. REV. 721, 726-28 (1968).

252. See, e.g., United States v. 36.96 Acres of Land, 754 F.2d 855, 859 (7th Cir. 1985).
253. See, e.g., Trbovich, 404 U.S. at 539; Cascade Natural Gas, 386 U.S. at 132-36; Sanguine Ltd. v. Department of the Interior, 736 F.2d 1416, 1420 (10th Cir. 1984) (Indian tribe may intervene on the side of the United States to defend a Department regulation that, if
A stricter standard would apply to a conservation group seeking intervention in order to pursue an appeal forgone by the United States. The Supreme Court has indicated that an interest equivalent to that needed for standing is required for an intervenor to pursue an appeal.254

In order to intervene as of right, the conservationists would need to show that the United States has not adequately represented the public interest in preserving stream flows.255 In some circumstances the government’s potential conflict of interest in being both trustee of the wilderness corpus and manager of various federal land programs may itself show sufficient possibility of inadequate representation to warrant intervention by a more single-minded party.256

A conservation group’s showing of inadequate representation may be strengthened if the group first obtains from the federal court either a declaration of the reserved right’s existence or a declaration that the government’s failure to assert the reserved right in a state court is arbitrary and capricious or otherwise unlawful.257 If the right has been declared to exist as a matter of federal law, there is less justification for the government lawyers to fail to assert it in the state proceeding. A declaration of

applied to Sanguine, would benefit the tribe’s land holdings); Lipscomb v. Wise, 643 F.2d 319, 321 (5th Cir. 1981) (attorney may appeal a denial of statutory attorney’s fees); Fleming v. Citizens for Albemarle, 577 F.2d 236, 238 (4th Cir. 1978) (citizens group has sufficient interest to intervene to defend exclusionary zoning suit settled by city); United States v. Dixwell Housing, 71 F.R.D. 558, 560 (D. Conn. 1976) (tenants of HUD-subsidized housing development had interest in maintaining their leases and subsidy certificates sufficient to support intervention as of right to oppose foreclosure by HUD).

254. In Bryant v. Yellen, the Court affirmed the Ninth Circuit’s ruling allowing intervention by a group of residents in an irrigation district. 447 U.S. 352, 366-68 (1980). The United States had brought suit against district water users seeking to enjoin their use of district water on farms larger than 160 acres. The district court dismissed the action, the United States did not appeal, and local residents intervened in order to pursue the appeal. The court of appeals evaluated the residents’ interests under traditional standing analysis, United States v. Imperial Irrigation Dist., 559 F.2d 509, 521 (9th Cir. 1977), which the Supreme Court agreed was “a proper application of our cases.” Bryant, 447 U.S. at 368; accord Maine v. Taylor, 106 S. Ct. 2440, 2446-47 (1986).

255. The Supreme Court has held that the intervenor’s burden is satisfied by a showing that representation of the applicant’s interest “may be” inadequate, and that the burden of that showing should be treated as minimal. Trbovich, 404 U.S. at 538 n.10. An applicant’s failure to present any claim or defense on a matter has been held to constitute inadequate representation. See Sanguine Ltd., 736 F.2d at 1419; Dixwell Housing, 71 F.R.D. at 560 n.1. An applicant’s settlement of claims under circumstances indicating the possibility of coercion or collusion also may constitute inadequate representation. See Cascade Natural Gas, 386 U.S. at 141 (government attorneys “knuckled under” to El Paso in agreeing to settlement); Fleming, 577 F.2d at 238 (court found indications of “hanky-panky”).

256. See Trbovich, 404 U.S. at 1227 (finding potentially inadequate representation in government’s dual role in labor election suit). But see United States v. Nevada, 463 U.S. 110, 135 n.15 (1983) (stating, in res judicata context, that when Congress has assigned multiple interests to the protection of the government, the government, in performing its divided duties, “does not by that reason alone compromise its obligation to any of the interests involved”).

257. See supra notes 215-17 and accompanying text.
arbitrariness, moreover, is equivalent to a finding that the government is not adequately protecting the water resources of the area.

The issue of Department of Justice control over federal litigation is related to the issue of inadequate representation. Courts on occasion have invoked the principle of Justice Department control, both in dismissing appeals by intervenors or by those not a party to the action below and in supporting broad Justice Department authority to settle cases. Nevertheless, courts frequently have allowed intervention on the side of the United States. In some cases intervenors have taken appeals forgone by the government, or have urged that a proposed settlement, to which the government has agreed, not be approved by the court. Although courts pay deference to preserving the government's control over its litigation, the issue of control is not dispositive.

CONCLUSION

As the process of adjudicating and quantifying federal reserved rights in the western states proceeds, it will generate increasing conflict between environmentalists and recreationists, on the one hand, and federal land management agencies, on the other. Environmentalists and recreationists hope that federal reserved rights will protect instream flows in the West's parks, monuments, forests, and wilderness areas. The land management agencies, however, are under pressure from consumptive water users to moderate or abandon their reserved rights claims.

This Comment has explored two means of resolving the conflicts: direct judicial review of the failure by federal agencies to assert reserved rights and private participation in the state proceedings in which federal rights are adjudicated. With respect to the former, federal land management agencies have a duty to protect from loss or postponement the reserved rights entrusted to them—at least in the case of wilderness areas. The duty, however, is limited, and it will not always be possible to obtain judicial enforcement of the duty. Thus, private advocates of instream flows should explore direct participation in water adjudications.

Opportunities for participation by private advocates in state adjudications.
cations will vary widely from state to state, depending on the scope of participation allowed in water adjudications. Under a system allowing broad participation in water adjudications, exemplified by the Colorado statute, private advocates may be able to use state adjudications to object to the federal government's settlement of claims or to its failure to appeal adverse rulings. Private advocates also may participate in state adjudications in order to block new diversions or changes in existing water rights that would threaten reserved rights in wilderness areas. Even without such broadened participation, general rules of intervention still may allow a private party to block competing diversions.

Conservation and recreation groups are relatively new players in the western water rights game. Their impact will depend not only on their energy and ingenuity, but on the political and legal flexibility of the water rights system.