REVERSING THE *WINTERS* DOCTRINE?: DENYING RESERVED WATER RIGHTS FOR IDAHO WILDERNESS AND ITS IMPLICATIONS

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INTRODUCTION

When the federal government dedicates its land for particular purposes, the reserved water rights doctrine holds that it also implicitly sets aside sufficient water to fulfill those purposes.[1] This doctrine is central to achieving federal land management goals in the arid West, because without water most federal goals cannot be achieved. But because federal reserved water rights are an exception to a tradition of state primacy in water allocation, and because most western states are hostile to recognizing federal water rights, judicial recognition of the doctrine has been controversial.

The reserved water rights doctrine has deep historical roots, tracing its origins back to the United States Supreme Court's 1908 decision of *Winters v. United States*,[2] where the Court held that when the federal government created a homeland for the Indians, it implicitly reserved sufficient water to fulfill that purpose.[3] Thus, the Indian reservation had a fed-

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1. *See* 4 WATERS AND WATER RIGHTS § 37.01 (Robert E. Beck ed., Michie 1996) (1967).

2. 207 U.S. 564 (1908).

3. *Id.* at 577 ("The power of the Government to reserve the waters and exempt them from appropriation under state laws is not denied, and could not

eral reserved water right entitling it to adequate water for its needs.[4] Moreover, the priority date for the water right was the date the reservation was created, thus antedating the competing non-Indian diversions.[5]

Although the notion that the reserved rights doctrine lay dormant for most of the first half of the twentieth century is a myth,[6] the courts did not extend the doctrine to federal reserves other than Indian reservations until the Supreme Court's 1963 decision in *Arizona v. California*.[7] Eight years earlier the Court had hinted that the doctrine was not confined to Indian reservations in the Pelton Dam case.[8] Thus, it was not until after mid-century that western states began to understand that the notion of federal water rights was not simply a special quirk of Indian law.[9]

Western states' hostility to the doctrine of federal reserved rights is a consequence of both the origin and nature of the concept.[10] Unlike state water rights, which historically required a diversion of water from a stream, and which today usually require state sanction of some sort, federal reserved rights are not dependent on state approval. Instead, they spring from federal decisions to reserve federal land for specific purposes, such as national forests, parks, wildlife refuges, and wilderness areas, as well as Indian reservations. Moreover, although some federal rights are used to divert water from the stream, such as those serving tourist facilities in national parks, the largest federal claims are instream in nature, such as for streamflows supporting the fish, wildlife, recreation, and aesthetic purposes of the land reserves. Most western states do

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be . . . . That the government did reserve them we have decided, and for a use that would necessarily continue through the years.").

4. *See* 4 WATERS AND WATER RIGHTS, *supra* note 1, § 37.01(b)(2), at 227–28.

5. *Winters*, 207 U.S. at 576.

6. *See generally* JOHN SHURTS, INDIAN RESERVED WATER RIGHTS: THE *WINTERS* DOCTRINE IN ITS SOCIAL AND LEGAL CONTEXT, 1880S–1930S (2000) (stating that reserved water rights were actively litigated following the 1908 Supreme Court decision in both Montana and Utah).

7. 373 U.S. 546 (1963).

8. Fed. Power Comm'n v. Oregon, 349 U.S. 435 (1955) (holding that reservation of federal land as a power site included reserved water).

9. Frank J. Trelease, *Federal Reserved Water Rights Since the PLLRC*, 54 DENVER L.J. 473, 475 (1977) ("At no time prior to 1955 did I ever hear a suggestion that the reserved rights doctrine was anything but a special quirk of Indian water law.").

10. *See* 4 WATERS AND WATER RIGHTS, *supra* note 1, § 37.01(c), at 232.

not recognize water rights without diversions unless they are held by the state, which disqualifies the federal government from holding instream rights under state law.[11] In addition, federal instream reserved water rights frequently conflict with state water rights authorizing water diversions. Worse, from the states' perspective, federal water rights often have early priority dates, a critical component of the western states' law of prior appropriation, which adheres to the principle of "first in time, first in right."[12] This means that the first diverter of water has a vested right to all water diverted and put to beneficial use, and is not subject to sharing shortages with later diverters. These early priority dates result from the fact that it is the act of reserving land, not the actual use of water, which creates the right.

Another conflict with state prior appropriation laws, in which rights are created by use and lost through nonuse, concerns the fact that federal reserved water rights are not lost through nonuse. The upshot of these differences between federal and state law is that the assertion of federal reserved water rights to instream flows can often cause state-granted diversionary rights, usually for irrigation, to lose water "gallon for gallon," in Chief Justice Rehnquist's famous words.[13]

This federal-state conflict over western water, largely between federal instream rights and state diversionary rights, is one of the central conflicts in modern public land management, and indeed, over the future of the West. This conflict involves differences over whether public lands should be managed primarily for commodity production or for preservation. The conflict threatens long-established but economically marginal farming and ranching operations, and provokes the deep-seated resentments that some westerners have for the federal government.

Since the United States Supreme Court's determination that federal reserved water rights apply to non-Indian lands in

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11. *See* Lawrence J. MacDonnell & Teresa A. Rice, *The Federal Role in In-Place Water Protection, in* INSTREAM FLOW PROTECTION IN THE WEST 5–17 (1993); State v. United States, 996 P.2d 806 (Idaho 2000) (rejecting an appropriation right under state law for the Minidoka National Wildlife Refuge because Idaho law requires a diversion for an appropriative right except for stockwatering and state instream rights specifically authorized by state statute).

12. *See* 2 WATERS AND WATER RIGHTS § 12.02 (Robert E. Beck, ed., Matthew Bender and Company, Inc. 2001) (1967).

13. United States v. New Mexico, 438 U.S. 696, 705 (1978).

1963,[14] western states have resisted federal attempts to restructure streamflows to recognize federal instream water rights. The states successfully persuaded the Supreme Court to interpret broadly an otherwise obscure 1953 appropriations rider, known as the McCarran Amendment, to enable states to force the federal government to have its reserved water rights adjudicated in state courts, even though the rider never mentioned reserved rights.[15] This jurisdictional victory made state judges—who are subject to election and therefore quite sensitive to the irrigation and other local uses threatened by federal instream water rights—the key decisionmakers concerning the existence and scope of federal reserved rights. And because most western states do not recognize federal water rights until they have been quantified,[16] there has been no rush to effectuate federal rights. In fact, the status quo has been effectively maintained for many years by the time-consuming and mind-numbing complexities of state basinwide adjudications.[17] However, several basinwide adjudications have progressed sufficiently to have produced substantive results.[18] The most notable of these is Idaho's Snake River Basin Adjudication (SRBA), as it involves nearly ninety percent of the water rights in that state.

The SRBA proceeding has produced several decisions by the Idaho Supreme Court on the nature of federal reserved rights, including a decision to reverse itself and declare that wilderness designations in the state confer no water rights.[19]

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14. Arizona v. California, 373 U.S. 546, 601 (1963); *see* 4 WATERS AND WATER RIGHTS, *supra* note 1, § 37.01(b)(3).

15. 43 U.S.C. § 666 (1994); 4 WATERS AND WATER RIGHTS, *supra* note 1, § 37.04(a)(1).

16. *See* Reed D. Benson, *Can't Get No Satisfaction: Securing Water for Federal and Tribal Lands in the West*, 30 ENVIRON. L. REP. 11,056, 11,057 (2000), *available in* Legal Resource Index (DIALOG), LRI File 150.

17. *See id.*; *see generally* Reed D. Benson, *Maintaining the Status Quo: Protecting Established Water Uses in the Pacific Northwest, Despite the Rules of Prior Appropriation*, 28 ENVTL. L. 881 (1998).

18. *See, e.g.*, *In re* Gila River, 989 P.2d 739, 748 (Ariz. 1999) (finding that reserved rights may include groundwater); State Dept. of Ecology v. Yakima Reservoir Irrigation Dist., 850 P.2d 1306, 1322–23, 1329–31 (Wash. 1993) (holding scope of tribe's reserved water for fish diminished by a series of unspecified legislative, executive, and judicial actions); *In re* Big Horn River, 753 P.2d 76, 99–100 (Wyo. 1988) (holding reserved rights do not include groundwater); United States v. City & County of Denver, 656 P.2d 1, 27–30 (Colo. 1982) (holding no reserved water for instream flows in Dinosaur National Monument).

19. Potlatch Corp. v. United States, 12 P.3d 1260 (Idaho 2000).

This 3-2 decision was handed down only after the author of the earlier decision upholding federal water rights for wilderness areas was defeated for reelection in a controversial judicial campaign in which her wilderness water rights opinion became a centerpiece of her opponent's election strategy.[20] This outcome is a reminder of just how contentious the concept of federal reserved water rights remains today.

This Article critiques the Idaho Supreme Court's decision, a decision reached only by narrowly construing the purposes of the Wilderness Act of 1964 and wholly ignoring the subsequent wilderness statutes that established two Idaho wilderness areas. The Article also examines two other reserved water rights decisions of the Idaho Supreme Court, handed down the same day as the wilderness decision,[21] involving the Sawtooth National Recreation Area (NRA) and wild and scenic rivers in the state. These decisions are relevant because the Chief Justice of the Idaho Court—who supplied the crucial swing vote in the wilderness decision—thought they shed considerable light on the wilderness case.[22] Finally, the Article assesses the effects of these decisions on the future of the reserved water rights doctrine, streamflows in Idaho (a headwaters state for imperiled Columbia Basin salmon runs), and the water right claims of the Nez Perce Tribe concerning its reserved fishing rights.[23]

Part I of the Article begins by explaining the disadvantages that federal reserved rights advocates face in pursuing their claims in state proceedings like the SRBA. Part II discusses the SRBA, the Idaho Supreme Court's initial decision concerning wilderness water rights, and the firestorm of controversy the decision created. Part III analyzes the court's reversal of its earlier ruling, faulting the court for its misunderstanding of the reserved rights doctrine and its result-oriented jurisprudence. Part IV considers the Sawtooth NRA and wild and scenic river decisions that influenced the Chief Justice's decision to switch her vote in the wilderness case. Part V assesses the implications of the Idaho Supreme Court's decisions

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20. *See infra* notes 70–73 and accompanying text.

21. State v. United States, 12 P.3d 1284 (Idaho 2000) (addressing the Sawtooth NRA); *see also infra* notes 168–188 and accompanying text; Potlatch Corp. and Hecla Mining v. United States, 12 P.3d 1256 (Idaho 2000) (addressing wild and scenic rivers); *see also infra* notes 189–201 and accompanying text.

22. *See infra* notes 92, 113, 120, 190 and accompanying text.

23. *See infra* Part V.

on the future of the federal reserved water rights doctrine, the prospects for streamflows in Idaho, and the Nez Perce Tribe's water claims. The Article concludes that the Idaho Supreme Court's decision is a poor precedent that should not influence other courts' interpretations of the existence and scope of federal reserved water rights in other states. Moreover, the decision threatens to undermine the concept of an independent judiciary in Idaho.

I. THE DISADVANTAGEOUS POSITION OF FEDERAL RESERVED WATER RIGHTS

National environmental awareness is not focused on federal reserved water rights. Law professors teach the doctrine as an obscure by-product of federal public land law or as an exception to the water law principle of state primacy. There are few practitioners of reserved rights law; reserved water rights cases are slow, cumbersome, and subject to different rules and procedures in different states, even though reserved water rights are federal property. With few exceptions, the ultimate determiners of the existence and scope of federal reserved rights are state courts, which have proved largely hostile to reserved rights because their recognition can effectively defease long-held state rights.[24] State-granted rights may be lost through the successful assertion of federal reserved rights, because reserved rights typically have earlier priority dates, which are determinative in the western states' system of prior appropriation ("first in time, first in right").[25] Even though assertion of federal reserved rights is sometimes the only effective means to restore streamflows depleted by diversions, the public usually is not—and cannot be—represented in adjudications involving the validity and scope of reserved rights.[26]

The obscure status of reserved water rights works to the great advantage of western irrigators, whose diversions account for nearly eighty percent of western water usage.[27] Pro-

24. *See* 4 WATERS AND WATER RIGHTS, *supra* note 1, §§ 37.04(a)(1)–(2), at 273–78 (discussing the McCarren Amendment).

25. *Id.* § 37.01(c)(1), at 232–33.

26. *See* Benson, *supra* note 16.

27. WESTERN STATES WATER POLICY REVIEW ADVISORY COMM'N, WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY 2–22 (1998) (irrigation accounted for seventy-eight percent of western water use in 1990); Benson, *supra* note 16 (citing WAYNE B. SULLEY ET AL., U.S. GEOLOGICAL SURVEY, ESTIMATED WATER

tected by friendly state judges and fora in which the public is not invited to participate, supported by state water resources departments that lend technical support and political legitimacy, and employing rules hostile to federal reserved rights,[28] irrigators have been able to largely ignore the federal and tribal interests served by reserved water rights. The upshot is that some western streams run nearly dry in the summer and fall, to the detriment of fish and wildlife, water quality, and recreation.[29] In effect, the ability of state diversionary water rights to prevail over federal reserved water rights provides a great case study of Public Choice Theory. This theory posits that small, concentrated, well-organized interests will be highly successful in maintaining a status quo that disadvantages large numbers who seek change but are not as well organized.[30] Public Choice Theory seemed to be at work in the SRBA wilderness water rights decision, because the Idaho Supreme Court's original decision was subjected to a sustained attack in the Idaho press, then became the focus of a successful campaign to unseat the opinion's author, Justice Cathy Silak. Eventually, the opponents of wilderness water rights convinced the Chief Justice of the Idaho Supreme Court, Linda Copple Trout, to switch her position in the case on rehearing. Her vote was pivotal, as the original decision was 3-2. The reversal, handed down after Justice Silak lost her bid for reelection, but before she left the court, was also by a 3-2 margin. The fact that the Chief Justice was scheduled to run for reelection only a year after her colleague was defeated, Chief Justice Trout

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USE IN THE UNITED STATES IN 1995 (1998)) (determining that irrigation accounts for about eighty percent of western diversions).

28. *See* Benson, *supra* note 16, at 11,057. One rule that works to the states' advantage is the one refusing to protect federally recognized reserved rights until they are quantified in state adjudications.

29. For example, in 2000, low flows due to low snowpack and irrigation diversions on the Lemhi River, a tributary of Idaho's Salmon River, led the National Marine Fisheries Service to conclude that there was "substantial evidence that injury to listed chinook salmon and steelhead has occurred and is ongoing in the Lemhi River." Bill Rudolph, *Four Dead Smolts Get NMFS and Idaho Water Users Together*, NORTHWEST FISH LETTER #106 (Energy Newsdata), July 14, 2000, *available at* http://www.newsdata.com/enernet/fishletter//fishltr106.html (quoting letter from Will Stelle, NWFS Regional Adminstrator, to Dirk Kempthorne, Governor of Idaho (May 2000)).

30. *See generally* DANIEL FARBER & PHILIP FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

claimed, was merely coincidental.[31] Nevertheless, the result did seem to call into question the existence of judicial independence in Idaho.

II. THE IDAHO SUPREME COURT'S INITIAL WILDERNESS DECISION

A. The Snake River Basin Adjudication

The SRBA[32] is perhaps the most complex state stream adjudication ever undertaken. It began in 1987 and involves some 150,000 water right claims, including 50,000 filed by the federal government for ten departments and four Indian tribes. The Idaho Department of Water Resources (IDWR), which issues area-wide reports, has been investigating each state law-based claim since 1990. The IDWR, which the Idaho legislature removed from the case as a party in 1994, now serves as "an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported."[33] Thus far, the IDWR has issued reports for three of the twenty-four reporting areas and a report on all federal and tribal nonconsumptive claims.

Once the IDWR files its report, parties may file objections and responses to its recommendations with the SRBA court. Objections, responses, and other pleadings to a single water right constitute a subcase. The presiding SRBA judge appoints special masters to conduct hearings in each subcase. Special masters may convene settlement proceedings or preside over trials without juries. After trial or completion of settlement proceedings, the master makes recommendations to the presiding judge. These recommendations can be challenged before the presiding judge, who may in turn adopt, modify, or reject the recommendations and may also hold evidentiary hearings. Decisions of the SRBA judge are appealable to the Idaho Supreme Court.

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31. *See* Dan Popkey, *Trout Says Politics Had Nothing to Do with Ruling*, IDAHO STATESMAN, Oct. 28, 2000, at 1A; *see infra* text accompanying notes 114–115.

32. For more on the SRBA, see *Background Information on the Snake River Basin Adjudication, available at* http://www.srba.state.id.us/DOC/BROCH1.HTM #SEC1 (last visited Dec. 7, 2001).

33. IDAHO CODE § 42-1401B (Michie 2000).

Until 1998, the SRBA's presiding judge was Daniel Hurlbutt. Judge Hurlbutt ruled on several significant reserved rights decisions. For example, he denied that the federal government retained its sovereign immunity or possessed due process protections under the Idaho Constitution.[34] As a result, the government had to either pay filing fees or lose its water rights, a result ultimately reversed by the Idaho Supreme Court.[35] Judge Hurlbutt also denied reserved water rights for the Deer Flat National Wildlife Refuge and for national forest lands under the Multiple-Use Sustained-Yield Act,[36] and was upheld each time by the Idaho Supreme Court.[37] He also initially decided the cases discussed in this Article, holding that the federal government possessed reserved water rights for wilderness areas, for the Hells Canyon NRA, for the Sawtooth NRA, and for wild and scenic rivers.[38]

Judge Hurlbutt retired at the end of 1998 and was replaced by Barry Wood. Judge Wood handed down a controversial decision in 1999, denying federal reserved water rights for the Nez Perce Tribe's treaty-reserved fishing rights.[39] However, Judge Wood failed to disclose that both he and his family had water rights at issue in the SRBA, and he twice refused to recuse himself from the case after the tribe and the federal

34. *In re* SRBA, No. 90-12-027 (Idaho Dist. Ct. Dec. 7, 1990), *aff'd*, Idaho Dep't of Water Resources v. United States, 832 P.2d 289 (Idaho 1992), *rev'd. sub nom.* United States v. Idaho, *ex rel.* Director, Idaho Dept. of Water Resources, 508 U.S. 1 (1993).

35. *Id.*

36. 16 U.S.C. § 528–31 (1994).

37. *In re* SRBA, No. 39576, Subcase No. 02-10063 (Idaho Dist. Ct. Dec. 31, 1998), *aff'd*, 23 P.3d 117 (Idaho 2001) (denying reserved rights for Deer Flat National Wildlife Refuge); *In re* SRBA, No. 39576, Subcase 75-13605 (Idaho Dist. Ct. Dec. 18, 1997), *aff'd sub nom.* United States v. City of Challis, 988 P.2d 1199 (Idaho 1999) (denying reserved rights for secondary purposes of national forests). Judge Hurlbutt also denied reserved water rights for stock watering at public waterholes but was reversed by the Idaho Supreme Court. *In re* SRBA, No. 39576, Subcase No. 72-15929C (Idaho Dist. Ct. Apr. 15, 1998), *rev'd sub nom.* United States v. State, 959 P.2d 449 (Idaho 1998).

38. *In re* SRBA, No. 39576, Subcase 75-13605, slip op. 5–11 (Idaho Dist. Ct. Dec. 18, 1997) (addressing wilderness); *id.* at slip op. 20–22 (discussing Hells Canyon NRA); *In re* SRBA, No. 39576, Subcase 75-13316 (Idaho Dist. Ct. July 27, 1998) (discussing wild and scenic rivers); *In re* SRBA, No. 39576, Subcase 65-20766 (Idaho Dist. Ct. Sept. 16, 1998) (Sawtooth NRA).

39. *In re* SRBA, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct. Nov. 10, 1999).

government made that information public.[40] Judge Wood was finally removed from the case by the Idaho Supreme Court because his brother-in-law defeated the author of the Supreme Court's original wilderness reserved water rights decision in a bitter judicial election. The Supreme Court felt it would be improper for Judge Wood's decisions to be reviewed by his brother-in-law.[41] Thus, on August 31, 1999, the Supreme Court removed Judge Wood and, on December 15 of that year, replaced him with Judge Roger Burdick.[42]

B. The SRBA Court's Decisions

The Idaho Supreme Court's decisions of October 27, 2000, reviewed Judge Hurlbutt's reserved rights decisions concerning wilderness areas, the Hells Canyon and Sawtooth NRAs, and wild and scenic rivers in the state. Judge Hurlbutt consolidated the reserved rights claims for wilderness areas, the Hells Canyon NRA, and the national forest claims based on the Multiple-Use Sustained-Yield Act[43] into the same case, which he decided in May 1997. Although he rejected the national forest reserved rights claims,[44] he upheld the others.

Judge Hurlbutt ruled that the federal government was entitled to an implied reserved right for all the unappropriated water within the Frank Church River of No Return Wilderness, the Gospel-Hump Wilderness, and the Selway-Bitterroot Wilderness.[45] He also held that the Hells Canyon NRA possessed reserved rights to all the unappropriated flows in Snake River

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40. *See* Michael C. Blumm, Dale D. Goble, Judith V. Royster & Mary Christina Wood, *Judicial Termination of Treaty Water Rights: The Snake River Case*, 36 IDAHO L. REV. 449, 475–77 (2000). Chief Justice Trout, the swing vote in the wilderness water rights case, also has a water right at issue in the SRBA, *see infra* note 111.

41. Editorial, *Tap Burdick to Lead the Snake River Water Court*, TIMES-NEWS (Twin Falls, Idaho), Sept. 15, 2000, at A6 (mentioning the Supreme Court's decision to remove Judge Wood).

42. Michael Journee, *Court Removes Wood. District Judge Won't Hear Idaho Water Cases*, TIMES-NEWS (Twin Falls, Idaho), at A1, Sept. 1, 2000; N.S. Nokkentved, *Jumping in the Water: New Adjudication Judge Begins Work*, TIMES-NEWS (Twin Falls, Idaho), Dec. 15, 2000, at A1.

43. 16 U.S.C. § 528–31 (1994).

44. *In re* SRBA, Case No. 39576, Subcase 75-13905 (Idaho Dist. Ct. Dec. 18, 1997); *see id.* at slip op. 16–19 (rejecting reserved water for national forests under the Multiple-Use Sustained-Yield Act).

45. *Id.* at slip op. 5–11.

tributaries originating within the NRA.[46] The state and irrigators appealed these decisions to the Idaho Supreme Court.

C. The Idaho Supreme Court's Initial Decision

On October 1, 1999, the Idaho Supreme Court, in a 3-2 decision, affirmed the SRBA court's decisions on the wilderness and Hells Canyon NRA water rights. Judge Cathy Silak wrote for the majority, which included Chief Justice Linda Copple Trout and Justice Jesse Walters, in an opinion that would cost Justice Silak her Supreme Court position.

The court began by explaining that reserved water rights occur (1) when there is a land reservation by the federal government, and (2) when there is evident in the reservation either an express or implied intent to reserve water.[47] The majority determined that the first element was met because wilderness designations did in fact amount to reservations of lands, reasoning that, unlike the Multiple-Use Sustained-Yield Act, which merely expanded the purposes for which national forest lands are managed, wilderness designations changed the primary purposes of national forest management. This interpretation in turn foreclosed the National Forest Organic Act's directive of "providing a continuous supply of timber" because the Wilderness Act bans most timber harvesting.[48] Thus, the court upheld the SRBA's conclusion that the primary purpose of the Wilderness Act was preservation of the reserve.[49] The court rejected the notion that the statute's grandfathering of pre-existing uses defeated its primary preservation purpose.[50]

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46. *Id.* at slip op. 20–22.

47. Potlatch Corp. v. United States, No. 24546, 1999 WL 778325, at *2 (Idaho Oct. 1, 1999).

48. *Id.* at *5 (also noting that the Wilderness Act is worded more broadly than the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 (1994), since, unlike the latter statute, the Wilderness Act does not include language that it was not to be construed "in derogation of" the purposes of the national forests established in the Forest Service Organic Act). 16 U.S.C. § 475 (1994).

49. *Id.* ("The SRBA district court correctly held that . . . Congress intended wilderness preservation to be the primary purpose for Wilderness Areas, but that pre-existing purposes would continue to the extent that they are consistent with preserving the wilderness character of the designated areas.").

50. *Id.* at *6 (rejecting claims that permission to continue to stake mining claims until nineteen years after the enactment of the Wilderness Act and the authorization of the president to situate power projects in wilderness areas (neither of which has ever been invoked) undermined the primary wilderness purpose of the statute).

In doing so, the court brushed aside claims by the state and other opponents of reserved rights, who claimed that Congress' use of "designation" instead of "reservation" in the Wilderness Act meant that Congress intended no reservation of land. Pointing to the fact that the Arizona Desert Wilderness Act of 1990 used the term "designate" and expressly reserved water rights, the court concluded that there was no distinction between "designating" wilderness areas and "reserving" them, noting that "Congress, under its constitutional mandate to manage federal lands, has the authority to re-reserve lands for changed purposes."[51]

Perhaps the largest impediment to recognizing wilderness reserved water rights is section 4(d)(6) of the Wilderness Act, which states that "[n]othing 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."[52] The SRBA court interpreted this language to mean only that pre-existing state water rights would be unaffected by wilderness designations.[53] A majority of the Idaho Supreme Court initially agreed with this interpretation, largely on the basis of the statute's legislative history.[54] The majority concluded that a statement by Senator Humphrey in the statute's legislative history made "clear that the intention of the provision was to assure western representatives that no then-existing water rights would be affected."[55] The court also noted that the application of state water law to wilderness areas would "clearly de-

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51. *Id.* (citing Arizona Desert Wilderness Act of 1990, 16 U.S.C. § 1132 (1994)); *cf.* Arizona v. California, 373 U.S. 546, 601 (1963) (concerning a water project reserve that was re-reserved as a national recreation area); United States v. City & County of Denver, 656 P.2d 1, 30–31 (Colo. 1982) (concerning national forest land re-reserved as a national park).

52. 16 U.S.C. § 1133(d)(6) (1994) (originally enacted as § 4(d)(7) but recodified in 1978 as § 4(d)(6)), *cited in Potlatch Corp.*, 1999 WL 778325, at *7.

53. *See Potlatch Corp.*, 1999 WL 778325, at *7 (quoting from the SRBA court to the effect that "the language simply preserved the status quo between the states and the federal government with respect to water rights.").

54. *Id.* at *7 (quoting 104 CONG. REC. 11, 555 (1958) (statement of Sen. Humphrey)):

> [Section 4(d)(6)] contains language vital to colleagues from the West. When the first wilderness bill was being discussed, some of its opponents charged that its enactment would change existing water law and would deprive local communities of water, both domestic and irrigation. Although this was certainly not the intention of the sponsors, it has seemed necessary to insert a short sentence to remove any doubts.

55. *Id.*

feat" the congressional purpose of preserving wilderness areas; therefore, reserved water rights accompanied each area, with a designation date priority.[56]

Finally, the majority upheld the SRBA court's decision that the "minimum amount" of water reserved—the scope of reserved rights under the United States Supreme Court's decision in *Cappaert v. United States*[57]—required all unappropriated water. The court reasoned that all subsequent diversions necessarily defeated the Wilderness Act's primary purpose of preserving unimpaired the wilderness character of the designated areas: "[w]ater is required to effectuate the purpose of maintaining wilderness in its pristine natural condition. Because removing water necessarily impairs the natural state of wilderness lands, Congress must have intended to reserve all unappropriated water."[58] The majority also noted that under Idaho law the scope of a water right can extend to the entire flow of a stream when it is necessary to accomplish its purpose.[59]

In the same decision, the majority also sustained the SRBA court's determination that the Hells Canyon NRA possessed reserved water. Unlike the wilderness designations, which merely implied that water was necessary to fulfill their purposes, the court concluded that the language of the Hells Canyon NRA Act, which defined the NRA as including the "lands and waters" of the area, expressly reserved water.[60] The majority pointed to express disclaimers in the NRA Act concerning effects on water upstream and downstream from the NRA as indicating an intent to reserve water originating within the NRA itself.[61] In addition, the court affirmed the SRBA court on the scope of the reserved water right as being all of the water originating in tributaries within the NRA.[62] In

56. *Id.* at *7–8 (noting the congressional "premise that wilderness preservation is incompatible with human development").

57. 426 U.S. 128, 139 (1976).

58. *See Potlatch Corp.*, 1999 WL 778325, at *8 (pointing to language in the Wilderness Act calling for wilderness areas to be managed "unimpaired for future use and enjoyment" and defining wilderness areas as "undeveloped" federal lands "without permanent improvements." 16 U.S.C. § 1131(a), (c) (1994 Supp.)).

59. *Potlatch Corp.*, 1999 WL 778325, at *9 (relying on Avondale Irrigation Dist. v. North Idaho Props., Inc., 577 P.2d 9 (Idaho 1978)).

60. *Id.* at *11 (noting that section 1(b) of the Hells Canyon NRA Act defined the area as including "lands and waters" (citing 16 U.S.C. § 460gg(b))).

61. *Id.* at *11–12 (interpreting 16 U.S.C. § 460gg-3(a) and (b)).

62. *Id.* at *12.

so doing, the majority rejected the state's argument that the scope was limited by the "minimal need" of the reservation. According to the court, the *Cappaert* "minimal need" standard was limited to implied reserved water rights; it had no application regarding reserved rights created by the express language of a statute.[63]

The 3-2 decision[64] seemed to be a smashing vindication of federal reserved water rights in a hostile state forum. But the decision also prompted a firestorm of opposition, culminating in the court's decision to rehear the case.

III. THE DECISION ON REHEARING

A. The Protests and the Election

Howls of protest in response to the court's wilderness reserved rights decision were registered by virtually every newspaper in the state. The largest, the *Idaho Statesman*, featured the decision across four columns on its front page and nearly a full page of the interior under the headline: "Court ruling could siphon Idahoans' water rights: If decision holds, thousands may lose water for homes, farming, business."[65] Four days later, the paper's editorial page suggested that the result should cost Justice Silak her Supreme Court seat.[66]

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63. *Id.*

64. Justices Kidwell and Schroeder wrote dissents. Justice Kidwell claimed that there were no reserved water rights for the wilderness areas because he concluded that the Wilderness Act expressly disclaimed any intent to reserve water, and the Hells Canyon NRA Act indicated an intent to reserve only water that did not interfere with both present and future upstream and downstream uses. *Id.* at 13–15, 18–21. Justice Schroeder joined in Justice Kidwell's dissent and added that "[t]here is no evidence that any purpose of the Wilderness Act has been defeated by appropriations upstream from the wilderness." *Id.* at 22. He complained about the extension of wilderness "far beyond its boundaries, locking into place development as it existed in 1964 and the dates of later designations." *Id.* He also disputed the majority's interpretation of legislative history, claiming that "Congress could not and would not have passed a bill that stated what the Court says is implied" and asserting that Idaho Senator Frank Church would never have advocated and voted for a bill that would "cripple economic growth of portions of Idaho outside of wilderness." *Id.* at 23–24.

65. Rocky Barker, *Court Ruling Could Siphon Idahoans' Water Rights: If Decision Holds, Thousands May Lose Water for Homes, Farming, Business*, IDAHO STATESMAN, Oct. 10, 1999, at 1A.

66. Editorial, *Idahoans Could Place Water Rights Issue in Their Own Hands*, IDAHO STATESMAN, Oct. 14, 1999, at 6B.

The virulent nature of the protest had to do with the fact that, unlike most wilderness areas, the Idaho wilderness areas are not at the headwaters of their watersheds. Instead, for example, the Salmon River flows through the towns of Stanley, Challis, and Salmon, as well as numerous private lands before entering the Frank Church River of No Return Wilderness downstream. So, when that wilderness area was designated in 1980, there were already upstream diversions senior to the reservation. Those diversions would be unaffected by the wilderness designation, but subsequent diversions would be subject to the wilderness area's prior claims. However, after the 1980 designation of the wilderness areas, the state of Idaho continued to issue water rights as if there were no federal water rights downstream, despite the United States Supreme Court's decision seventeen years before in *Arizona v. California,* which recognized reserved water rights in non-Indian federal lands.[67] Even when a Colorado district court in 1985 ruled that wilderness areas possessed water rights,[68] Idaho continued to issue water rights upstream of its wilderness areas. The state's oblivious attitude put the rights of the upstream junior diverters, numbering up to three thousand at the time of the court's

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> Through the hand-wringing over Idaho's water rights, there is one quick-fix solution available to voters: elect a new Supreme Court justice. Justice Cathy Silak, who on Oct. 1 wrote the explosive opinion that turns over water rights in wilderness areas to the federal government, is up for reelection in May. Hers is the only seat that will be available. That leaves an opening for anybody who thinks she was in error in assuming the intent of Congress to give the federal government rights over Idaho's wilderness water . . . all it takes is one change on the supreme court—one individual who demonstrates a greater sensitivity to what is at stake, which is Idaho's water sovereignty.

Id. The editorial demonstrated a remarkable obliviousness to the difference between judicial interpretation of existing laws and popular sentiment: "Silak should be aware that there is not a single Idaho politician in the last 30-plus years—Democrat or Republican—who would dare to run on the platform to allow the federal government to control every drop of water in designated areas of the state." *Id.*

67. Arizona v. California, 373 U.S. 546, 598 (1963).

68. Sierra Club v. Block, 622 F. Supp. 842, 858–62 (D. Colo. 1985), later decision *sub nom.* Sierra Club v. Lyng, 661 F. Supp. 1490 (D. Colo. 1987) (finding a government report submitted to fulfill its duty to protect wilderness water rights deficient), *vacated sub nom.* Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (wilderness water right issue not ripe for judicial review).

decision,[69] and the downstream federal wilderness on a collision course.

The court agreed to rehear the case in response to petitions from the state, several mining and irrigation companies, and upstream cities—and no doubt the public protest, which included sharp criticism from Idaho Governor Dirk Kempthorne.[70] On February 12, 2001, Daniel Eismann, a district court judge and brother-in-law of then SRBA Presiding Judge Barry Wood, accepted the *Idaho Statesman's* challenge and decided to campaign against Justice Silak.[71] Two days later, the Idaho Supreme Court reheard the case. In May 2000, in an election result reminiscent of the fate of Southern politicians who supported the Supreme Court's school desegregation decision in *Brown v. Board of Education*,[72] Justice Silak was defeated for reelection by 32,000 votes, or eighteen percent.[73] Recognizing federal reserved water rights in Idaho at the turn of the century proved to be about as popular as supporting school desegregation in the South at mid-century.[74]

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69. Rocky Barker, *Water Ruling Reversed: Idaho Court Decides Feds Don't Own Wilderness Flows But Reserve Control Of 'Wild And Scenic' Salmon*, IDAHO STATESMAN, Oct. 28, 2000, at 1A [hereinafter Barker, *Water*].

70. Dirk Kempthorne, *Water Ruling Deserves Second Look*, IDAHO STATESMAN, Oct. 21, 1999, at 6B.

71. Popkey, *supra* note 31, at 1A.

72. *See* LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS 58–62 (2000) (discussing James J. Kilpatrick's revival of the theory of interposition—that Supreme Court opinions are not binding without approval of the states—and the Southern Manifesto, signed by over one hundred southern congressmen, which declared *Brown v. Board of Education* "a clear abuse of judicial power," and noting that two out of the three North Carolina congressmen who refused to sign it were defeated in the 1956 primary election).

73. *See* Ken Miller, *Silak Blames Partisanship for Loss More than Water Rights Ruling*, IDAHO STATESMAN, May 22, 2000, at A6. See also John D. Echeverria, *Changing the Rules By Changing the Players: The Environmental Issue in State Court Elections*, 9 N.Y.U. ENVTL. L.J. 217, 247–55 (2001), for a detailed account of the election campaign, which included (1) Eismann's launching his allegedly non-partisan campaign at a Republican fundraiser, (2) an allegation (rejected by the state's Republican attorney general) that Eismann's endorsement of creationism and his declared opposition to abortion in response to questions posed by the Idaho Christian Coalition violated the Idaho Code of Judicial Conduct, (3) an illegal "push-poll" conducted by a Pennsylvania telemarketing firm and financed by an "independent" organization based in South Carolina which was ultimately enjoined by a district court judge, and (4) an advertising blitz against Justice Silak late in the campaign which included full-page ads in newspapers across the state asking, "will partial-birth abortions and same-sex marriages become legal in Idaho?"

74. Justice Greg Hobbs of the Colorado Supreme Court recently compared Justice Silak's defeat to that of another state supreme court justice who lost re-

On October 27, 2000, five months after the election, and just over a year after its initial decision, the court reversed itself. Just as in the initial decision, the decision on rehearing was by a 3-2 vote. This time, however, Chief Justice Trout—scheduled to face reelection—switched her position and provided the necessary vote to deny the existence of federal wilderness water rights. Justice Silak, who remained on the court until her term expired at the end of 2000, wrote now in dissent instead of for the majority.

B. The New Majority Decision

Justice Gerald Schroeder, author of one of the initial dissents,[75] now wrote the court's opinion, denying the existence of reserved wilderness water rights. He began by repeating the formula that reserved water rights require (1) a land reservation, and (2) either an implied or express intent to reserve water to fulfill the primary purpose of the reservation.[76] Justice Schroeder believed that the court did not have to ascertain the existence of a land reservation because there was neither an express nor an implied intent to reserve water in the wilderness designations.[77] Unlike the original reserved water rights case, *Winters v. United States,*[78] which involved a treaty—a bargained-for exchange that invoked rules of construction favorable to the Indian tribes—the Wilderness Act, according to Justice Schroeder, was a mere statute, invoking no rules of construction favorable to reserved rights. In fact, he suggested that "[t]he opposite inference should apply" because "Congress could define the scope of any water right as it chose," and it included no express recognition of water rights in the Wilderness Act.[79] He noted that without water the federal purpose of cre-

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election over authoring a water law opinion adverse to local interests: former Colorado Chief Justice Mortimer Stone, who lost reelection in November 1954. Greg Hobbs, *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 40 QUINNIPIAC L. REV. 669 (2001). Justice Silak, appointed by Democratic Governor Cecil Andrus (and also the first woman to sit on the Idaho Supreme Court), had the misfortune to be up for reelection during party primary elections, when approximately eighty-six percent of the votes cast were Republican. *Id.* at 690, n.87.

75. *See supra* note 64.

76. *See supra* 47 and accompanying text.

77. Potlatch Corp. v. United States, 12 P.3d 1260, 1264 (Idaho 2000).

78. 207 U.S. 564 (1908).

79. *Potlatch*, 12 P.3d at 1264.

ating the Fort Belknap Indian Reservation in *Winters* would have been defeated: the reservation would not have been fit for habitation; therefore, the United States Supreme Court found an implied water right using favorable rules of construction.[80] On the other hand, Justice Schroeder reasoned, because the Wilderness Act was not a bargained-for exchange and expressly reserved no water, a reserved water right should not be implied, since it was a statute simply setting aside land to "immuniz[e] it from further development."[81]

For the new majority, because "Congress did not define a water right as a specific purpose of the Wilderness Act," there was a "contrary inference" that there was no reserved water right.[82] This seemed to suggest that without the favorable rules of Indian treaty construction, there could be no implied reserved rights, a result contrary to the Supreme Court's 1963 decision in *Arizona v. California*,[83] in which the Court awarded implied reserved water rights for a national forest, two wildlife refuges, and the Lake Mead NRA, as well as for several Indian reservations.[84]

The new majority denied that "the Wilderness Act define[d] purposes that necessitate a reservation of water," contrasting the statute to the facts in *Winters*, *Arizona v. California*, and *Cappaert*, in which the Idaho Supreme Court claimed that the United States Supreme Court recognized a "standard for quantification" for either "human habitation or preservation of a rare fish."[85] In the case of Idaho wilderness, however, the court claimed that the "absence of any standard for quantification is indicative of the fact that quantification was not meant to be determined."[86] The court claimed that it could find "no language in the Wilderness Act compelling the conclusion that there must be reserved water rights to fulfill the purposes of the Act."[87] The court reached this conclusion only by placing an extremely high proof burden on reserved rights and ignoring the Wilderness Act's definition of wilderness as areas "untrammeled" by man, which retain their "primeval character,"

80. *Id.*
81. *Id.*
82. *Id.*
83. Arizona v. California, 373 U.S. 546 (1963).
84. *Id.* at 601.
85. *Potlatch*, 12 P.3d at 1266.
86. *Id.*
87. *Id.*

and where "the imprint of man is substantially unnoticeable."[88] According to the court, the purpose of the Wilderness Act was simply to "set[] aside land and prohibit[] development, nothing more."[89] In other words, because the land restrictions imposed on wilderness areas supplied incidental protection against water diversions within the reserves, there was no need for a federal water right preventing upstream diversions. Thus, upstream diverters were free to dry up wilderness water, even where the diversions were initiated after the establishment of the wilderness.

The court determined that the Wilderness Act's disclaimer of "express or implied claim or denial" of an exemption from state water law in section 4(d)(6) "neither establishes a federal water right nor precludes recognition of such a right if water is otherwise reserved."[90] The court noted that Congress included similar disclaimer provisions in the Sawtooth NRA, National Wildlife Refuge Administration Act, and Wild and Scenic River Act (WSRA), but in the latter, it expressly reserved water in another section of the statute.[91] It was the contrast between this express reservation in the WSRA versus the Wilderness Act that convinced Chief Justice Trout to switch her vote in the case, as discussed below.[92] The new majority could find no similar reservation in the Wilderness Act because it construed the statute's purpose only to "prevent the development of land within the designated wilderness areas and to preserve those lands in their natural state for future generations."[93] This purpose apparently could be satisfied without restraining upstream appropriators from diverting water that would otherwise flow naturally into the wilderness.

The court sought to distinguish the diversions upstream of the Idaho wilderness from the off-reservation groundwater pumping enjoined in *Cappaert*, by asserting that, unlike the

88. 16 U.S.C. § 1131(c) (Supp. 1999).

89. *Potlatch*, 12 P.3d at 1266.

90. *Id.* (interpreting 16 U.S.C. § 1133(d)(6) (Supp. 1999)).

91. *Id.* (citing to Sawtooth NRA Act of 1972 § 9, 16 U.S.C. § 460aa-8 (Supp. 1999)); National Wildlife Refuge System Administration Act of 1966 §4(i), 16 U.S.C. § 668dd(j) (Supp. 1999); and Wild and Scenic Rivers Act of 1968 §13(b), 16 U.S.C. § 1284(b) (Supp. 1999). Reserved water rights claims under the Sawtooth National Recreation Act § 9 and the Wild and Scenic Rivers Act § 13(b) are discussed at *infra* notes 168–201 and accompanying text.

92. *See infra* notes 113, 120, 190 and accompanying text.

93. *Potlatch*, 12 P.3d at 1266.

Devil's Hole National Monument at issue in *Cappaert*, "there is no basis to conclude that the effect of the Wilderness Act was to extend beyond the borders of the wilderness areas."[94] The grounds for this distinction were quite unclear, however. The court suggested that "well over a quarter century" had passed between the establishment of the Idaho wilderness areas and the assertion of the federal reserved rights claims.[95] That is true for only one of the three wilderness areas at issue.[96] Even so, the existence of reserved rights is not a function of how quickly they are asserted, but instead, of what is necessary to fulfill the purpose of the reservation.[97] In *Cappaert*, for example, the federal claims were filed some nineteen years after the establishment of the national monument, a longer time period than two of the Idaho wilderness areas at issue.[98] Further, it is hardly clear that the federal government delayed in filing its Idaho wilderness area claims, since the state did not establish the SRBA court until 1987. The state's willingness to issue post-1980 water rights, while ignoring the water right claims of designated wilderness, seems much more at the root of the conflict. Moreover, in *Cappaert*, the United States Supreme Court noted that federal reserved rights were not dependent upon "competing equities."[99] Thus, the Court expressly refused to consider the detrimental effect reserved water rights might have on a 12,000 acre ranch with 1700–1800 head of cattle, eighty employees, and an investment of over $7 million.

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94. *Id.* at 1267.

95. *Id.*

96. The federal government filed its reserved rights claims in 1996; the Selway-Bitterroot Wilderness Area was designated in 1964, meaning that the claims were filed thirty-two years after designation; the Gospel-Hump Wilderness Area was designated in 1978, meaning the claims were filed eighteen years after designation; and the Frank Church River of No Return Wilderness was designated in 1980, meaning that the claims were filed sixteen years after designation. *Id.* at 1262.

97. Cappaert v. United States, 426 U.S. 128, 138–39 (1976). (The Court stated that "[i]n determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purpose for which the reservation was created.").

98. *Potlatch*, 12 P.3d at 1262. The Devil's Hole National Monument at issue in *Cappaert* was established in 1952; the federal government filed suit in 1971. *Cappaert*, 426 U.S. at 132, 135.

99. *Cappaert*, 426 U.S. at 139.

By disregarding the express provisions of the Wilderness Act, such as the phrase "untrammeled by man,"[100] and the statutes creating two of the three Idaho wilderness areas—one of which mentioned "watershed preservation" and fish and game research as purposes, and the other which gave protection to "lands and waters" for "wilderness dependent wildlife and resident and anadromous fish"[101]—the court was able to suggest that the legislative history of the Wilderness Act indicated no intent to affect water outside the boundaries of wilderness areas. Citing a statement by Senator Humphrey about how the definition of wilderness had been refined and liberalized to not "unduly hamper present land-use programs or legitimate economic, commercial, or commodity uses,"[102] the court concluded that the "attitude" of Congress was not "to strangle the economic life from areas outside the wilderness."[103] A statement from Senator Frank Church about two provisions of the Wilderness Act concerning water resources development (that have never been invoked) convinced the court that the Idaho senator would have never supported a statute that would "cripple the economic growth of portions of Idaho outside the wilderness."[104] On the basis of such economic concerns—concerns the United States Supreme Court in *Cappaert* held were irrelevant[105]—the Idaho court concluded that in enacting the Wilderness Act, Congress did not intend to reserve water.

In addition to the wilderness water rights issue, the case involved federal claims to reserved water in the Hells Canyon NRA, on Idaho's border with Oregon. The 1975 Hells Canyon

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100. *See supra* note 88 and accompanying text.

101. Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, § 1(b), 92 Stat. 40 (1978) ("watershed protection"); Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312, 94 Stat. 948 (1980) ("lands and waters . . . resident and anadromous fish").

102. *Potlatch*, 12 P.3d at 1267 (quoting 109 CONG. REC. 5901 (Apr. 8, 1963) (statement of Sen. Humphrey)). Senator Humphrey's statement appears *supra* note 54.

103. *Potlatch*, 12 P.3d at 1267.

104. *Id.* at 1268. The two provisions mentioned by Senator Church which the court cited concerned allowing the President and the Federal Power Commission (now the Federal Energy Regulatory Commission) to authorize water developments in wilderness areas. The latter provision was apparently deleted in the Conference Committee, since it never became part of the Wilderness Act. The former provision, now 16 U.S.C. § 1133(d)(4) (Supp. 1999), has never been used by any president.

105. *Cappaert*, 426 U.S. at 138–39; *see infra* note 219 and accompanying text.

NRA Act withdrew the "lands and waters" of the area for the purpose of "assur[ing] that the natural beauty, and historical and archeological values of the Hells Canyon area . . . are preserved for this and future generations, and that the recreational and ecologic values and public enjoyment of the area are thereby enhanced."[106] This language led the SRBA court to conclude that Congress intended to reserve all the unappropriated water in tributaries originating within the NRA.[107] The Idaho Supreme Court agreed that this purpose, along with the statute's exemption for "present or future uses of water" in the Snake River and its tributaries above the NRA, and a disclaimer of any intent to impose flow requirements in the mainstem Snake River below Hells Canyon Dam, amounted to an express reservation of water in the tributaries originating within the NRA.[108] Unlike the wilderness areas, the court ruled that reserved water rights need not be implied from the statute, since the intent to reserve water was evident on its face.

The court did reverse the SRBA court on the scope of the waters reserved, however. Relying on *Cappaert*, where the Supreme Court limited the scope of reserved water to "appurtenant water sufficient to maintain the level of the pool to preserve [the desert pupfish's] scientific value," the court held that SRBA's award of all the unappropriated flows was unwarranted. It therefore remanded the scope issue to the SRBA to conduct a "factual inquiry" to "determine the amount of water necessary to fulfill the purpose[s] . . . of the Hells Canyon National Recreation Area."[109]

C. Chief Justice Trout's Concurrence: The Switch

The key vote in reversing the initial decision to uphold wilderness reserved water rights was supplied by Chief Justice Linda Copple Trout who, like former SRBA Judge Wood,[110] had a water right at issue in the adjudication.[111] Justice Trout told

106. *Potlatch*, 12 P.3d at 1269 (quoting 16 U.S.C. § 460gg(a) (Supp. 1999)).
107. *See id.* at 1270.
108. *Id.* at 1269 (quoting 16 U.S.C. § 460gg-3(a) and (b) (Supp. 1999)).
109. *Id.* at 1270 (quoting *Cappert*, 426 U.S. at 147).
110. *See supra* note 40 and accompanying text.
111. Chief Justice Trout's claim is for groundwater, but the Idaho Supreme Court has ruled that all water in the Snake River Basin is hydrologically connected as a matter of law. A&B Irrig. Dist. v. Idaho Conservation League, 958

a reporter for the *Idaho Statesman* that she found the suggestion that politics and her impending reelection may have influenced her turnabout to be "insulting."[112]

Instead, Chief Justice Trout suggested that her change of mind was mainly due to her reconsideration of the wilderness water issue in the context of the related cases of reserved water claims for the Sawtooth NRA and the wild and scenic river case, discussed below.[113] She claimed not to have been influenced by the public outcry over the decision, including the critical remarks by the governor, nor was she swayed by meetings with elected representatives from municipalities that could have lost water as a result of the initial opinion.[114] She maintained that she changed her mind the day after the rehearing argument and informed her colleagues on the court on February 15, 2000, three months before Eismann defeated Silak in the election, but three days after he announced his candidacy.[115]

Chief Justice Trout's concurrence was brief—just three paragraphs long. She began by erroneously asserting that in each case in which the Supreme Court found a federal reserved water right "the particular reservation involved was created prior to the holding in *Winters v. United States*."[116] From this factual error she drew the conclusion that "[b]ecause Congress was not yet aware of the potential conflict between state and federal water rights, it was understandable that Congress could have remained silent about the existence of a water right, and yet still intended to reserve water for the purposes of the reservation."[117] But in the case of wilderness water rights, Chief Justice Trout maintained, the reservations were created "long after the development of the *Winters* doctrine . . . [and] it

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P.2d 568, 578 (Idaho 1998). Chief Justice Trout's claim makes her a party to the SRBA by statutory definition. IDAHO CODE § 42-1401A(6) (Michie 2001). Thus, she cast the deciding vote in a case in which she was a party.

112. Barker, *Water*, *supra* note 69, at 4A.

113. *See* Popkey, *supra* note 31, at 4A. On the wild and scenic rivers claim, *see infra* notes 189–201 and accompanying text.

114. Popkey, *supra* note 31, at 4A.

115. *Id.* The thought that her about-face might be seen as an effort to ward off the kind of bloody reelection contest that Silak endured allegedly never occurred to Chief Justice Trout until after Silak's defeat in May 2000, three months after she claimed to have changed her mind. *Id.*

116. Potlatch Corp. v. United States, 12 P.3d 1260, 1270 (Idaho 2000) (Trout C.J., concurring). *See infra* notes 120–121 and accompanying text.

117. *Id.*

must be assumed that Congress was aware of the federal reserved water rights doctrine at the time the [1964 Wilderness] Act was passed."[118] According to the Chief Justice, this congressional awareness, due to the Supreme Court's 1963 decision in *Arizona v. California,* ended the doctrine of *implied* reserved water rights: "Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a right is necessary to fulfill the purposes of the reservation."[119] She would recognize only express reserved water rights, such as the Idaho court found in the Hells Canyon NRA and the WSRA.[120]

Chief Justice Trout, however, mischaracterized the origin of the reserved rights the Supreme Court recognized in both *Arizona v. California* and *Cappaert.* In each case, reservations were created long after the Court's 1908 decision in *Winters.* In the former, the Lake Mead NRA was first reserved by executive order in 1929, while the Lake Havasu National Wildlife Refuge was established in 1941.[121] In the latter, the addition of Devil's Hole to the Death Valley National Monument was created by Presidential Proclamation in 1952.[122] Justice Trout may have thought that only Congress can create reserved water rights, but that is clearly an error, as the results of the two cases just mentioned indicate that presidential action can be the source of reserved water.

Moreover, it is hardly clear why congressional awareness of a conflict between federal and state water law—even assuming that it first arose after the Court's decision in *Arizona v. California* in 1963—should, without more, terminate a judicially created inference of congressional intent more than a half-century old. The majority concluded that section 4(d)(6) of

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118. *Id.* at 1271.

119. *Id.*

120. *Id.* (citing express reservation in the WSRA, 16 U.S.C. § 1284(c) (1994)). *See infra* notes 189–201 and accompanying text.

121. Lake Mead National Recreation Area was first withdrawn and reserved by two executive orders, anticipating a possible national monument designation. Exec. Order No. 5105 (May 3, 1929); Exec. Order No. 5339 (Apr. 25, 1930). Congress subsequently reserved the area for recreation purposes in 1964. 16 U.S.C. §§ 460n-1 to 460n-9 (1994). Havasu Lake National Wildlife Refuge was established by executive order in 1941. Exec. Order No. 8647, 6 Fed. Reg. 493 (Jan. 22, 1941).

122. Proclamation No. 2961, 3 C.F.R. 147 (1949–1953), *reprinted in* 66 Stat. 618 (Jan. 17, 1952).

the Wilderness Act simply preserved the status quo;[123] Justice Trout seemed to think it reversed the status quo.[124] That conclusion cannot be easily squared with the language of the provision, however, which disclaims any intent to "claim or den[y]" an exemption from state water laws.[125] Justice Wayne Kidwell, who also wrote a concurrence in the case, claimed that the "denial" language was meant to apply only to "then-existing federal water rights."[126] But he was able to cite no documentation or authority for such a conclusion.[127] Without a clear indication that section 4(d)(6) actually means something other than its language seems to indicate, congressional inaction in the face of an awareness of the potential conflict between state and fed-

123. *Potlatch*, 12 P.3d at 1264 ("The language of 4(d)(6) neither establishes a federal water right nor precludes the recognition of such a right if water is otherwise reserved."). This section was originally enacted as section 4(d)(7) but in 1978 Congress repealed former section 4(d)(5) and renumbered the remaining sections. Act of Oct. 21, 1978, Pub. L. No. 95-495, 92 Stat. 1650 (1978).

124. *Id.* at 1271.

125. 16 U.S.C. § 1133(d)(6) (1994).

126. *Potlatch*, 12 P.3d at 1272 (Kidwell, J., concurring). In 1994, Justice Silak, who had been appointed to the Supreme Court the year before by then Democractic Governor Cecil Andrus, defeated Kidwell, who sought to unseat her. In 1998, in the first election for an open court seat in thirty years, Kidwell, who was publicly associated with the Republican Party, defeated Mike Wetherell, identified as a Democrat. The 1998 contest began the era of partisan judicial elections in Idaho. Echeverria, *supra* note 73, at 238–39.

127. Justice Kidwell referred to an undocumented statement by the Justice Department that the language of section 4(d)(6) would ensure that no "then-existing" federal water rights would be affected by the law. *Potlatch*, 12 P.3d at 1272 (Kidwell, J., concurring). He claimed that the suggestion that the provision merely aimed to maintain the status quo was "contrary to the words [of the provision]." *Id.* But none of the statements in the legislative history which he alleged indicated that Congress intended to disclaim federal reserved water rights made mention of the words in section 4(d)(6) which expressly disclaim "den[ying]" an exemption from state water laws. *Id.* Justice Kidwell might have cited a now withdrawn 1988 Opinion of the Interior Solicitor, which also interpreted section 4(d)(6) to preserve only then-existing federal water rights. But even that opinion acknowledged a lack of legislative history of the Wilderness Act indicating the reasons for the addition of the language disclaiming any intent to "deny" an exception from state water law. Federal Reserved Water Rights in Wilderness Areas, 96 Interior Dec. 211, 224 (1989) ("One of the major problems here is the lack of legislative history to document the consultations referred to above and, thus, the reasons why California's suggested language was changed to the 'no claim *or denial*' language presently in the law."), *suspended* 58 Fed. Reg. 68,629 (1993), *withdrawn* 59 Fed. Reg. 19,692 (1994). The opinion did point to legislative history in a bill under consideration at the same time as the Wilderness bill that would have overturned the Supreme Court's decision in Fed. Power Comm'n v. Oregon, 349 U.S. 435 (1955) (the *Pelton Dam* case), see *supra* note 8 (holding that non-Indian federal lands may possess reserved water rights), but that bill was never enacted.

eral water law signaled a continuation, not a termination, of the implied reservation of waters doctrine.

D. A Reversal of Winters*?*

Although the Idaho Supreme Court reversed itself on the issue of wilderness water rights, the three-member majority gave three different reasons for doing so. Justice Schroeder decided that the Wilderness Act's land use restrictions would provide sufficient incidental protection for water, making reserved rights unnecessary. He found this to be especially true given what he perceived as the drastic economic consequences for upstream junior diverters and a lack of a "standard for quantification."[128] Justice Kidwell, on the other hand, based his concurrence on his interpretation of the meaning of the disclaimer provisions found in section 4(d)(6).[129]

Justice Schroeder's approach accounted for the context of reserved rights claims but ignored the Supreme Court's admonition to not consider present-day equities.[130] It thus invites courts to favor local economic concerns over federal rights. It also establishes as a prerequisite to reserved rights a "standard for quantification."[131] Not only does this standard seem capable of gross manipulation, but the question of how to quantify reserved rights is logically subsequent to whether they exist.[132]

Justice Kidwell's approach emphasized the text of the Wilderness Act, but interpreted the disclaimer provision to preserve state water law and renounce federal reserved rights. However, its plain language—announcing that the statute was neither a "claim or denial" of exemption from state law—seemed to be designed, as Justice Schroeder and the lower court concluded,[133] to preserve the status quo. The legislative history also revealed that Congress considered language that would have clearly restricted federal wilderness water rights to those obtained in compliance with state law, and it rejected that language.[134]

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128. *See supra* notes 85–86 and 102–105 and accompanying text.
129. *See supra* notes 126–127 and accompanying text.
130. Cappaert v. United States, 426 U.S. 128, 139 (1976).
131. *See supra* notes 85–86 and accompanying text.
132. *See infra* note 148 and accompanying text.
133. *See supra* notes 45, 90 and accompanying text.
134. *See Hearings on S.1176 Before the Senate Committee on Interior and Insular Affairs*, 85th Cong., 286–87 (1957), in which the state of California sub-

The third reason for refusing wilderness water rights was Chief Justice Trout's notion that congressional "awareness" of potential conflicts between federal reserved rights and state water law eliminated any possibility of implied reserved rights.[135] This is the most radical of the three reasons for rejecting wilderness water rights because it would effectively confine federal reserved rights to reservations established prior to this congressional "awareness." Even assuming this congressional "awareness" may be established by a *non sequitur* like section 4(d)(6), it is not clear why Congress cannot simply indicate that it intends to acquiesce to existing judicial interpretations of congressional intent. The doctrine of congressional acquiescence is quite well established, allowing the United States Supreme Court to conclude, for example, that major league baseball did not involve interstate commerce in 1972,[136] and that state hydroelectric licensing laws were preempted by the Federal Power Act in 1990.[137] Why congressional acquiescence should not apply to water rights is hardly clear. A conscientious legislator certainly could have voted for the 1964 Wilderness Act on the basis of the belief that section 4(d)(6) preserved existing law instead of changing it, especially considering Congress' rejection of a provision that would have expressly made state law govern federal water rights.[138]

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mitted the following provision in an effort to ensure that federal reserved rights for wilderness would not block its State Water Project:

> Notwithstanding any other provisions of this act and subject to existing rights all unappropriated *** waters within the area of the national wilderness preservation system are for appropriation and use of the public pursuant to State law, and the rights to the use of such waters for the beneficial purposes shall be acquired under state laws relating to appropriation, control, and distribution of such waters.

Reprinted in Brief of Respondent the United States at 25–26, *In re* SRBA, Case No. 39576, Subcase Nos. 75-13605, 79-13597 (Idaho Oct. 1998).

135. *See supra* note 120 and accompanying text.

136. Flood v. Kuhn, 407 U.S. 258 (1972), *aff'g* Fed. Baseball Club v. Nat'l League, 259 U.S. 200 (1922) (ruling baseball not subject to the Sherman Act because its games were "purely state affairs," not directly involved in interstate commerce).

137. *See generally* California v. Fed. Energy Regulatory Comm'n, 495 U.S. 490 (1990), *aff'g* First-Iowa Hydroelectric Corp. v. Fed. Power Comm'n, 328 U.S. 142 (1946) (holding state hydroelectric licensing laws preempted by the Federal Power Act, 16 U.S.C. § 791 (1994), despite two provisions of the statute apparently saving state laws).

138. *See supra* note 134 and accompanying text.

Chief Justice Trout's approach would allow the opponents of *Winters* reserved water rights to terminate the doctrine by simply making Congress "aware" of the issue, thereby relieving them of their burden of convincing a majority of Congress to make a change. There are many peculiar rules governing western water law, but an exemption from the doctrine of congressional acquiescence should not be one of them. Some of the opponents of reserved rights in the wilderness case argued that Congress should not constitutionally acquiesce to the Court's interpretation of its intent,[139] but the Court has never declared that Congress must affirmatively act to ratify a judicial interpretation of congressional intent.[140] And it is clear that when Congress wishes to renounce reserved rights, it knows how to do so.[141]

E. The Dissents

Justices Silak and Walters, formerly in the majority, wrote dissenting opinions in response to the court's new holding. The principal dissent was Justice Silak's, which Justice Walters joined.[142] Justice Silak criticized the new majority's interpretation of the reserved rights doctrine as a failure to faithfully apply United States Supreme Court precedent, resulting in

> [t]he practical effect of . . . the extinction of the doctrine of implied water rights . . . [since t]he majority has taken the position that it will not recognize an implied reservation by Congress in the absence of anything less than an express clause reserving water. The ultimate result in Idaho is that there will only be either expressed reservations or no reservation; thus, the United States Supreme Court's holding in

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139. *See* Reply Brief of Appellants Potlatch Corporation, Dewey Mining Company, & Thunder Mountain Gold, Inc., at 8–11, *In re* SRBA, Case No. 39576, Subcase Nos. 76-13605, 79-13597 (Idaho Dist. Ct. Dec. 11, 1998) [hereinafter Potlatch Reply Brief]; *see also infra* note 230.

140. *See e.g.*, Flood v. Kuhn, 407 U.S. at 281–84 (upholding congressional acquiescence based on the "positive inaction" of Congress).

141. *See, e.g.*, Snake River Birds of Prey National Recreation Area, 16 U.S.C. § 460iii-5(d)(2) (1994) ("Nothing in this subchapter or any action taken pursuant thereto shall constitute an express or implied reservation of water rights for any purpose.").

142. Justice Walters' separate dissent urged the United States Supreme Court to review the case, a surprising request from a state court judge in a water rights case. Potlatch Corp. v. United States, 12 P.3d 1260, 1284 (Idaho 2000) (Walters J., dissenting).

> *Winters* and its line of cases, that water rights may be either expressed or implied, will no longer be recognized in Idaho.[143]

Justice Silak suggested that the new majority's chief reason for concluding that the Wilderness Act's purpose of protecting and preserving wilderness failed to reserve water—because the Act's limits on land development would necessarily provide some incidental protection for water, eliminating the need for a reserved water right—was the product of unwarranted judicial activism. She noted that the Idaho Supreme Court is bound by the principles of the United States Supreme Court's reserved rights cases and may not articulate new legal theories regarding federal law: "This Court is bound to the *Winters* doctrine and may not deviate from it by proposing its own novel theory of federal law."[144] Moreover, none of the parties to the case argued that there were no wilderness reserved rights due to the fact that the land use restrictions made water rights unnecessary; the new majority created that theory on its own motion.[145]

Another innovative theory adopted by the new majority, to which Justice Silak objected, concerned its conclusion that the Wilderness Act's purpose of protecting and preserving the wilderness failed to reserve water because it provided no "standard for quantification."[146] As Justice Silak pointed out, whether a reserved water right exists is a function of explicit or implicit intent to reserve water to carry out the purpose of federal reservations.[147] The quantification question—how much water is reserved—is logically a subsequent issue to the question of whether a reserved right exists; it is not a means to defeat the reserved right itself.[148]

According to Justice Silak's apt summary, "[i]n this case, the issue of implied reservation must be addressed in two steps: first, ascertaining the primary purpose of the Wilderness

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143. *Id.* at 1276 (Silak. J., dissenting).

144. *Id.* at 1274 ("The *Winters* doctrine is a judicial doctrine enunciated by the United States Supreme Court not as guidance or a mere recommendation to state courts, but as binding precedent on all lower courts, including this Court.").

145. *Id.* ("[N]one of the parties has raised this argument; the majority created this theory *sua sponte* instead of simply applying the *Winters* doctrine.").

146. *Id.* at 1277.

147. *Id.*

148. *Id.* ("Quantification need not be determined until after a water right is deemed to exist.").

Act, and second, determining whether water is necessary such that this purpose would be entirely defeated without water."[149] Justice Silak examined language in the Wilderness Act[150] and a federal district court decision, both ignored by the majority.[151] She concluded that the conservation and recreational purposes of the statute are "primary and crucial,"[152] and included watershed protection and conservation of water flows for downstream users, as well as the preservation of the character of the wilderness areas themselves.[153] These purposes served to distinguish wilderness areas from national forests, where reserved water was limited; instead, wilderness water rights were analogous to those of national parks, whose broad purpose the United States Supreme Court had indicated warranted expansive reserved water rights.[154]

Unlike the new majority, Justice Silak examined the specific statutes that reserved two of the Idaho wilderness areas at issue. The 1978 legislation which established the Gospel-Hump Wilderness Area stated that its purpose was to "promote and perpetuate the wilderness character of the land and its specific multiple [use] values for watershed preservation."[155] The statute also directed federal and state agencies to engage in a "comprehensive fish and game research program" to investigate "resident and anadromous fisheries resources (including water quality relationships)."[156] Justice Silak concluded that it would have been "pointless for Congress to mandate a research

149. *Id.*

150. *Id.* at 1277–78 (quoting § 2(a) of the Act, which calls for protecting and preserving wilderness areas to "leave them unimpaired for future use and enjoyment as wilderness;" the definition of wilderness in § 2(c), which is "an area where the earth and its community of life are untrammeled by man . . . retaining its primeval character and influence . . . which is protected and managed so as to preserve its natural conditions;" and § 14(b), which directs that the use of wilderness areas "shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use").

151. *Id.* at 1278–79 (discussing Sierra Club v. Block, 622 F. Supp. 842, 855, 859–61 (D. Colo. 1985) (ruling that wilderness areas possess reserved water rights)).

152. *Id.* at 1278.

153. *Id.* at 1278–79, (citing, *inter alia*, the Wilderness Act's legislative history mentioning that wilderness areas would "provide watershed protection and clear, pure water for users downstream," S. REP. NO. 109, 88TH CONG., 15 (1963)).

154. *Id.* at 1279 (relying on United States v. New Mexico, 438 U.S. 696, 708–11 (1978)).

155. Endangered American Wilderness Act of 1978, Pub. L. No. 95-237, § 1(b), 92 Stat. 40 (1978), *cited in Potlatch*, 12 P.3d at 1279 (Silak, J., dissenting).

156. *Id.* at § 4(c)(1).

program for management of fisheries if the federal government had no right to the water in the area."[157] In the 1980 statute establishing the Frank Church River of No Return Wilderness Area, Congress was even more explicit about its fish and wildlife purpose, reserving the area "in order to provide statutory protection for the lands and waters and the wilderness-dependent wildlife and the resident and anadromous fish which thrive within this undisturbed ecosystem."[158] A similar reservation of "lands and waters" produced reserved water for the Hells Canyon NRA,[159] but because the majority ignored the existence of its 1980 enabling statute, the language produced no water for the Frank Church wilderness.

Justice Silak also accused the majority of a selective parsing of the legislative history of the Wilderness Act to justify its decision. She showed that the statements by Senators Humphrey and Church, which the majority suggested reflected an intent not to reserve water for wilderness,[160] were taken out of context. In fact, the majority ignored many other statements, including several by Senator Church, which indicated that the Wilderness Act's purpose was to preserve water and dependent wildlife and protect all natural features in wilderness areas.[161] A particularly egregious omission on the part of the new majority was a statement by the Wilderness Act's Conference Committee indicating that wilderness areas would "provide watershed protection and clear, pure water for users below them."[162] But Justice Silak did not chide her colleagues for their manipulation of the legislative history; she simply stated that "the focus of a court's statutory interpretation must center on ascertaining the meaning of the statute from the text itself," citing both Justices Holmes and Scalia.[163] This was an admonition the new majority ignored, just as it ignored the text of the statutes reserving the Idaho wilderness areas at issue.

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157. *Potlatch*, 12 P.3d at 1279 (Silak, J., dissenting).

158. Central Idaho Wilderness Act of 1980, Pub. L. No. 96-312 § 2(a)(2), 94 Stat. 948 (1980), *cited in Potlatch*, 12 P.3d at 1280 (Silak, J., dissenting).

159. *See supra* notes 106–108 and accompanying text.

160. *See supra* notes 54, 102–104 and accompanying text; *Potlatch*, 12 P.3d at 1280 (Silak, J., dissenting).

161. *Id.*

162. *Id.* at 1280 (citing S. REP. NO. 109, 88TH CONG., 15 (1963)).

163. *Id.* at 1281 (citing Oliver W. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) and Pierce v. Underwood, 487 U.S. 552, 566 (1988)).

A reserved water right must be necessary to ensure that that primary purpose is not "entirely defeated."[164] Justice Silak was particularly eloquent here:

> Congress set aside the areas in question to preserve their wilderness character. Although the wilderness is generally a non-consumptive user of water in its streams and lakes, water is still necessary for wilderness protection. Thus it is necessary that the federal government possess a right to the water in the area in order to fulfill the primary purpose of the Wilderness Act. Without water no wilderness, or the vegetation, animals, and fish within it can survive. . . . In both *Winters* and *Arizona*, Congress set aside land for Indian reservations but did not expressly retain a water right in the land, nor did Congress need to. The United States Supreme Court determined the purpose of the areas as Indian reservations was defeated without water and, therefore, Congress must have implicitly reserved sufficient water to make the land useful. The same is true here. Wilderness areas may not contain an express reservation of water by Congress, but the areas will never retain their "wilderness character" without water. These areas are to be preserved unchanged, *but a change in the flow of streams would change their wilderness character.* Therefore, Congress implicitly reserved sufficient water to fulfill the purpose of the Wilderness Act just as it did in both the Indian reservations considered in *Winters* and *Arizona.*[165]

Justice Silak concluded with a plea for judicial restraint:

> [I]t is not for this Court, nor any court, to make or change the law, but to interpret the law as enacted by the legislative branch. Until Congress enacts further legislation clarifying the Wilderness Act as to federal reserved water rights, or otherwise resolves this issue, courts must apply the *Winters* doctrine to resolve these disputes.[166]

The new majority chose not to heed this advice, perhaps schooled by the election results five months earlier, which cost

164. *Id.* (citing United States v. New Mexico, 438 U.S. 696, 700 (1978)).
165. *Id.* at 1281–82 (emphasis added).
166. *Id.* at 1282.

Justice Silak her position. The lesson seemed to be that it is better to be electorally popular than judicially restrained.[167]

IV. THE SAWTOOTH NRA CLAIMS

Congress established the Sawtooth NRA in 1972 "to assure the preservation and protection of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith."[168] The reserve consists of both a wilderness area and a non-wilderness recreational area.[169] Congress directed that the non-wilderness portion be managed for fisheries protection and the conservation and development of natural, scenic, historic, pastoral, and wildlife values contributing to public recreation.[170] Congress also directed that the wilderness portion of the Sawtooth NRA be managed under the provisions of either the Wilderness Act or the Sawtooth NRA, whichever was more restrictive.[171] In 1998, the SRBA court awarded the federal government reserved water rights for all the unappropriated flows within the wilderness area and the minimum amount of water necessary to fulfill the purposes of the non-wilderness portion of the Sawtooth NRA.[172]

The Idaho Supreme Court reversed the SRBA court, 4-1, in an opinion written by Chief Justice Trout, who ruled that the Sawtooth NRA possessed no reserved water. Chief Justice Trout's reasoning was similar to the court's wilderness reserved water decision. She construed a disclaimer clause in the Sawtooth NRA concerning water rights like that in the Wilder-

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167. Justice Silak also dissented from the new majority's determination that the Hells Canyon NRA did not possess reserved water rights to all the unappropriated flows originating within the NRA. She felt that the majority's limiting the scope of the Hells Canyon NRA's reserved rights to that necessary to fulfill the purpose of the reservation incorrectly merged express reserved water rights with implied reserved rights. Only the latter, according to Justice Silak, were limited to the amount necessary to fulfill the reservation's purpose. *Id.* at 1283.

168. Sawtooth National Recreation Area Act (NRA), 16 U.S.C. § 460aa (1994).

169. State v. United States, 12 P.3d 1284, 1286 (Idaho 2000).

170. *Id.* at 1288–89 (citing § 2(a) of the Sawtooth NRA Act, 16 U.S.C. § 460aa-1(a) (also calling for "the management, utilization, and disposal of natural resources on federally owned lands")).

171. *Id.* at 1289 (citing § 2(b) of the Sawtooth NRA Act, 16 U.S.C. § 460aa-1(b)).

172. *See id.* at 1286.

ness Act to eliminate the possibility of express reserved rights.[173] She also interpreted the purposes of the Sawtooth NRA extremely narrowly to allow her to conclude that no reserved water was necessary to fulfill the reservation's primary purpose.[174] Notably, she made no mention of the theory she propounded in the wilderness water case that no implied reserved water rights were possible after Congress was made aware of the conflict with state water law.[175] That thesis apparently could not command a majority of the court.

Section 1 of the statute listed preservation and protection of fish and wildlife among the purposes for establishing the Sawtooth NRA.[176] Section 2 directed the Secretary of Agriculture to protect and conserve salmon and other fisheries resources in managing the non-wilderness area.[177] Nevertheless, Chief Justice Trout concluded that "it is clear the primary purpose of the Act is to regulate development and mining in the non-wilderness portions of the Sawtooth NRA in order to preserve and protect the natural, scenic, historic, pastoral, and fish and wildlife values of the area."[178] She cited some legislative history indicating Congress's concern over the prospect of small subdivisions of summer cottages as evidence that the primary purpose of the non-wilderness area was to protect against unregulated development and mining.[179] Chief Justice Trout asserted that this purpose did not require water because, despite the statute's mention of fish and wildlife, "the purpose of the Act was not simply to protect fish habitat, but rather to protect that habitat, as well as other values associated with the recreation area, from the dangers associated with unregulated mining operations."[180] Thus, while Chief Justice Trout acknowledged that although "we agree fish require water, we do not agree judicial notice of this fact establishes that without such water the

173. *Id.* at 1288 (construing § 9 of the Sawtooth NRA, 16 U.S.C. § 460aa-8, which states in pertinent part: "Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal government as to exemption from State water laws.").

174. *See id.* at 1288–91.

175. *See* Potlatch Corp. v. United States, 12 P.3d 1260, 1270 (Idaho 2000), *supra* notes 117–120, 124 and accompanying text.

176. Sawtooth National Reservation Area Act, § 1(a), 16 U.S.C. § 460aa(a) (1994).

177. *Id.* § 2(a), 16 U.S.C. § 460aa-1(6).

178. State v. United States, 12 P.3d 1284, 1288–89 (Idaho 2000).

179. *Id.*

180. *Id.* at 1290.

purposes of the non-wilderness portion of the Sawtooth NRA will be entirely defeated."[181] Through such legal legerdemain, the Sawtooth NRA was deprived of water rights, although it may have saved Chief Justice Trout's position on the court.

The wilderness portion of the Sawtooth NRA fared no better with Chief Justice Trout. Even though Congress supplied the Sawtooth Wilderness Area with more protection against mining claims than the Wilderness Act did, this extra protection actually worked against wilderness water rights, since it enabled Chief Justice Trout to characterize the congressional purpose as simply to protect against mining operations.[182] Despite the fact that the House Report on the Sawtooth Act referred to the migration of salmon and steelhead trout to the Salmon River as a "significant biological feature" and mentioned the importance of "[p]reservation of the spawning grounds from destruction from dredging, stream alteration, silt deposits, or pollution," Chief Justice Trout interpreted this language to mean that "the Act was [only] intended to protect fish and habitat from damage caused by mining operations within the wilderness area."[183] According to Chief Justice Trout, depleting streamflows or producing water pollution through water diversions would be consistent with the primary purpose of the Sawtooth NRA wilderness because "it is clear that despite the fact the Act mentions the protection of fish habitat, a federal reserved water right is not necessary for the type of protection contemplated by the Act."[184] So, while a mining operation damaging salmon habitat would be prohibited by the Sawtooth NRA, destroying the same habitat through water diversions would not violate the Act, despite the statute's fish and wildlife purpose and its directive to manage the area to preserve salmon habitat.

Justice Silak, in a sole dissent, thought that the majority's notion that the Sawtooth NRA's purposes did not require water—because they were limited to preventing unregulated land development and restricting mining—ignored the express lan-

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181. *Id.*

182. *See id.* at 1289. The Sawtooth NRA Act prohibited mining, while the Wilderness Act allowed mining claims to be located until December 31, 1983, so the Sawtooth Act ended mining claims seventeen years early. *Id.* (citing 118 CONG. REC. H28106-7 (daily ed. Aug. 14, 1972) (statement of Rep. Aspinall)).

183. *Id.* at 1290–91 (quoting H.R. REP. NO. 92-762, at 13 (1971)).

184. *Id.* at 1291. Diversions can raise stream temperatures, causing water quality standards violations.

guage of the Sawtooth NRA Act referring to the preservation and protection of the area's natural, scenic, and recreational values.[185] According to Justice Silak, the majority confused the means of the statute—regulating subdivisions and mining—with its ends—preserving and protecting the natural, scenic, historic, pastoral, and fish and wildlife of the area.[186] She concluded that these ends, the statute's primary purposes, require water because, for example, protecting fish habitat requires water for fish to survive.[187] She also cited numerous statements from the legislative history confirming the statute's preservation goals, including the Senate Report's concern with protecting the area's fisheries and "numerous lakes, streams, and rivers," and the House Report's intent to preserve "180 gem-like lakes" and "several hundred miles of rushing streams."[188] The majority ignored this legislative history, while elevating the means to preserve the area over the goal of preservation itself.

A. The Wild and Scenic River Act Claims

The same day it denied reserved water rights to Idaho wilderness and the Sawtooth NRA, a unanimous Idaho Supreme Court upheld the SRBA court's recognition of reserved water for the state's federally recognized wild and scenic rivers.[189] Since Chief Justice Trout cited this case as one of the reasons she switched her position in the wilderness case,[190] it bears examination.

The court's brief opinion was written by Justice Schroeder, author of the wilderness decision. The SRBA court had recognized reserved rights in four designated wild and scenic rivers—the Middle Forks of both the Salmon and the Clearwater (including the Lochsa and Selway), the Rapid, and the Salmon Rivers.[191] The lower court did, however, reject the federal gov-

185. *Id.* at 1292 (Silak, J., dissenting).
186. *Id.*
187. *Id.*
188. *Id.* (citing S. REP. NO. 92-797, at 3 (1972) and H.R. REP. NO. 92-762, at 5 (1972)).
189. Potlatch Corp. and Hecla Mining v. United States, 12 P.3d 1256 (Idaho 2000).
190. *See* Potlatch Corp. v. United States, 12 P.3d 1260, 1271 (Idaho 2000) (Trout, C.J., concurring), discussed *supra* note 120 and accompanying text.
191. *Potlatch and Hecla Mining*, 12 P.3d at 1256–57.

ernment's claim for all the unappropriated flows in the Rapid and Salmon Rivers, ruling that the scope of the reserved rights was only that necessary to fulfill the purposes of the WSRA.[192] The federal claim was initially opposed by the state of Idaho and numerous irrigation and mining concerns, but only Potlatch Corporation and Hecla Mining Company appealed the SRBA court's decision. The state and others apparently accepted the lower court's result.[193]

Justice Schroeder identified section 13(c) of the WRSA as the key to the case. That provision states:

> Reservation of waters for other purposes or in unnecessary quantities prohibited. Designation of any stream or portion thereof as a national wild, scenic, or recreational river area shall not be construed as a reservation of the waters of such streams for purposes other than those specified in this chapter, or in quantities greater than necessary to accomplish these purposes.[194]

From that language, Justice Schroeder determined that:

> The legislative intent is awkwardly stated in the negative . . . but it is clear that Congress intended to reserve water to fulfill the purposes of the Act. . . . It would be anomalous to logic to say that the Act which was expressly created to preserve free-flowing rivers failed to provide for the reservation of water in the rivers."[195]

Apparently, Justice Schroeder saw no irony in his earlier inability, expressed in his majority opinion in the wilderness decision, to recognize the "anomalous logic" allowing the dewatering of wilderness areas which were set aside to preserve their "primeval character," as areas "untrammeled by man."[196]

Potlatch and Hecla argued to no avail that because section 13(c) of the WRSA failed to affirmatively reserve water rights, there could be no reserved water absent an "urgent need" for water. Additionally, they argued that the WRSA failed to re-

192. *See id.* at 1257.
193. *See id.*
194. 16 U.S.C. § 1284(c) (1994).
195. *Potlatch and Hecla Mining*, 12 P.3d at 1258.
196. 16 U.S.C. § 1131(c) (1994); *see supra* text accompanying note 88.

serve land necessary to create reserved water rights.[197] The court ignored both arguments in favor of relying on the express text of the statute, although it also cited legislative history, including a statement by a sponsor of the bill, Idaho Senator Frank Church, indicating that Congress intended to reserve water when it enacted the WRSA.[198]

The federal government did not appeal the SRBA court's rejection of its claim that the scope of reserved water was all the unappropriated flows in the rivers.[199] This was probably because the government's position was inconsistent with the position articulated in a 1979 Interior Solicitor's opinion on reserved rights, which concluded that "it is clear that river designation does not automatically reserve the entire unappropriated flow of the river and an examination of the individual features which led to each component river's designation must be conducted to determine the extent of the reserved water right."[200] The Idaho Supreme Court therefore ruled that the amount of water reserved to fulfill the purposes of the WSRA must be determined in proceedings before the SRBA court.[201]

V. THE IMPLICATIONS

The Idaho Supreme Court's decision may have potentially far-reaching implications, perhaps even leading to the end of the doctrine of implied federal water rights first laid down by the United States Supreme Court in *Winters* nearly a century ago.[202] That would be an unfortunate and unwarranted interpretation of the Idaho Supreme Court's decision because, as this Part discusses, it was the court's miserly interpretation of the Wilderness Act, not its rejection of the concept of implied federal reserved water rights, that produced the result the court desired. Moreover, denying wilderness water rights should not be an omen that the court will deny the reserved water claims of the Nez Perce Tribe for its off-reservation

197. *Potlatch and Hecla Mining*, 12 P.3d at 1258. Potlatch also argued that the WSRA's primary purpose was to prevent dam construction, while Hecla thought it was primarily a protection against water pollution. *Id.*

198. *Id.* (citing 112 CONG. REC. 403, 433 (Jan. 17, 1966)).

199. *Id.* at 1257.

200. 86 Interior Dec. 553, 609 (1979).

201. *See Potlatch and Hecla Mining*, 12 P.3d at 1259.

202. Winters v. United States, 207 U.S. 564 (1908).

treaty fishing rights because, as the court noted,[203] the rules of interpretation differ in each case and the court has employed rules favorable to tribes in the past. Finally, the actual effect of the decision to deny wilderness water rights may be minimized by the court's recognition of reserved water for wild and scenic rivers.

A. The Future of the Reserved Rights Doctrine

One possible result of the Idaho cases could be the end of the *Winters* doctrine: the century-old principle that, where water is necessary to carry out the reservation's purpose, courts will infer a federal reserved water right in order to serve that purpose. Such a result is unlikely, however, because the Idaho Supreme Court's weak reasoning, its neglect of express statutory provisions, and its disregard of United States Supreme Court precedent make its decisions poor precedents for other courts.

Any precedential value of the majority opinion in the wilderness case ought to be confined to non-Indian reserved rights. Justice Schroeder was careful to distinguish the case of wilderness water from the *Winters* case, which involved a bargained-for exchange between the tribe and the federal government. No such bargain existed in the case of the Wilderness Act. As a result, the favorable rules of Indian treaty construction employed by the *Winters* Court did not apply. In fact, Justice Schroeder determined that an "opposite inference" should apply, since Congress was capable of expressly reserving wilderness water rights.[204] According to the majority, congressional failure to do so inferred no intent to reserve water. No such inference should be drawn in the case of Indian reserved rights, where the tribes ceded millions of acres of lands in exchange for federal recognition of reserved rights and federal protection of those rights.

Moreover, the existence of this inference against non-Indian reserved rights is questionable outside of Idaho. The Idaho court never satisfactorily reconciled its failure to recognize reserved water from the United States Supreme Court's decisions concerning non-Indian reserved water in *Arizona v.*

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203. *See supra* text accompanying notes 80–81.
204. *Potlatch*, 12 P.3d at 1264.

California[205] and *Cappaert*.[206] In both of those cases, the Court recognized implied reserved water rights from the purposes of the reserves: a national forest, national recreation area, and two national wildlife refuges in *Arizona*, and a national monument in *Cappaert*. The Idaho court suggested that the statutes at issue in these cases were distinguishable from the Wilderness Act because they provided "standards for quantification."[207] The court claimed that the national monument in *Cappaert* satisfied this standard because it "expressly reserved a pool to maintain a unique variety of fish."[208] The Wilderness Act failed to do so, even though its purpose is "preservation and protection [of lands] in their natural condition . . . unimpaired for future use and enjoyment."[209] The court ignored this purpose, and also disregarded the facts that Congress expressly established one of the wilderness areas at issue for watershed preservation and fisheries research, and another for fish and wildlife preservation. This willingness to ignore the express provisions of the statutes reserving the particular wilderness areas makes the Idaho court's decision seem especially result-oriented and should undermine its precedential value.

The court also mischaracterized the Supreme Court's *Arizona* decision, suggesting that reserved water rights were recognized in that case only for the purpose of providing "habitable land" for tribes.[210] In fact, that was only part of the reserved water rights awarded in *Arizona*; the Court also recognized reserved water for a national forest, a national recreation area, and two national wildlife refuges.[211] The Idaho court never attempted to explain how those reservations provided a "standard for quantification," but the Wilderness Act did not.[212] This "standard for quantification" prerequisite, which the Idaho court created out of whole cloth, apparently is malleable enough to sanction reserved water for fish preservation at a na-

205. 373 U.S. 546 (1963).
206. 426 U.S. 128 (1976).
207. *Potlatch*, 12 P.3d at 1266.
208. *Id.*
209. 16 U.S.C. § 1131(a) (1994).
210. *Potlatch*, 12 P.3d at 1266.
211. *See* Arizona v. California, 373 U.S. 546, 601 (1963).
212. For example, all the executive order which established the Havasu Lake National Wildlife Refuge said was that specified lands were reserved "as a refuge and breeding ground for migratory birds and other wildlife." Exec. Order No. 8647, 6 Fed. Reg. 593 (Jan. 25, 1941). The Idaho court made no attempt to explain how this language provided a "standard for quantification."

tional wildlife refuge or a national monument, but to deny water for fish preservation in wilderness areas expressly reserved for that purpose. The emptiness of the standard made it appear to be a function of what the majority wanted it to be.

Justice Schroeder did attempt to distinguish the wilderness situation from the national monument in *Cappaert*. He suggested, but did not explain, that the purpose of the national monument in *Cappaert* indicated an intent to affect junior water rights off-reservation, whereas the wilderness reservations evinced no such intent.[213] He also seemed to suggest that the federal government was guilty of waiting too long to assert its claim for reserved rights. As previously explained, however, the time between the establishment of two of the wilderness areas and the assertion of the reserved rights claim was actually shorter than it was in *Cappaert*.[214] Again, these facts were ignored by the court.

All of the reservations in *Arizona* and *Cappaert* were established initially by actions of the executive. All of the reservations at issue in the cases discussed in this Article were established by Congress. The results seem to indicate that it is easier to create reserved water rights by executive action than by congressional action, which is counterintuitive. Where Congress has expressly established a reservation for watershed or fish and wildlife protection, as it did in the case of Idaho wilderness,[215] there would seem to be a stronger case for reserved rights than where the president designates reserves like the national monument in *Cappaert* or the national recreation area and the wildlife refuges in *Arizona*.

The chief reason the Idaho Supreme Court rejected reserved water for wilderness was the court's extremely narrow construction of the purpose of the Wilderness Act. According to Justice Schroeder, the purpose of wilderness designation was merely to prevent development within wilderness areas, not, as the text of the statute suggests, to preserve undeveloped areas untrammeled by man in order to retain their primeval character.[216] Depleting upstream water flows into wilderness areas would certainly conflict with these statutory directives, even if the depletions were not caused by development within the wil-

213. *Potlatch*, 12 P.3d at 1267.
214. *See supra* notes 95–96 and accompanying text.
215. *See supra* notes 155–158 and accompanying text.
216. *Compare Potlatch*, 12 P.3d at 1266, *with* 16 U.S.C. § 1131(c) (1994).

derness areas. Nevertheless, to the majority, because the Wilderness Act prevented land development within wilderness areas, there would be some incidental protection for water flows, thereby obviating the need for a reserved water right. But as Justice Silak, in dissent, pointed out, "[w]ithout water[,] no wilderness, or the vegetation, animals, and fish within it can survive."[217]

The new majority, however, was interested in neither a functional nor statutory definition of wilderness; instead, it adopted what appeared to be an equitable resolution to the conflict.[218] Denying wilderness reserved rights would secure the water rights the state had granted since 1980 to diverters, including the towns of Stanley, Salmon, and Challis. However, balancing equities such as these was rejected by the United States Supreme Court in *Cappaert*, which ruled that the existence of reserved rights is not a function of "competing equities."[219]

Although the role of a state court under the McCarran Amendment[220] is to apply, not revise, federal reserved rights law,[221] the Idaho Supreme Court in fact made a significant revision. The United States Supreme Court has repeatedly held that where water is necessary to fulfill the purposes of a federal reservation, a reserved water right may be created as a consequence of this implied federal intent.[222] The Idaho Supreme Court changed this doctrine to require a demonstrated need for a senior water right, not a need for water. The result was that the court seemed to require the federal government to demonstrate a conflict between upstream diversions and wilderness needs.[223] Some of the petitioners in the case somewhat disingenuously argued to the court that there were no such

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217. *Id.* at 1281 (Silak, J., dissenting) (citing Karin P. Sheldon, *Water for Wilderness*, 76 DENV. U. L. REV. 555, 590 (1999)).

218. *See* Petition For Rehearing of Potlatch Corporation, Dewey Mining Company & Thunder Mountain Gold, Inc. at 20 n.8, *In re SRBA*, Case No. 39576, Subcase No. 13605 (Idaho Oct. 21, 1999) [hereinafter Potlatch Rehearing Brief] (claiming that some 2000 water rights would be upstream and junior to reserved water rights for the Gospel-Hump Wilderness and over 1500 would be upstream and junior to the Frank Church Wilderness).

219. Cappaert v. United States, 426 U.S. 128, 139 (1976).

220. 43 U.S.C. § 666 (1994).

221. *See Potlatch*, 12 P.3d at 1277 n.6 (Silak, J., dissenting).

222. *See* United States v. New Mexico, 438 U.S. 696, 702 (1978); *Cappaert*, 426 U.S. at 139.

223. *See Potlatch*, 12 P.3d at 1267.

conflicts.[224] Yet in the wake of the initial decision, the state's water resources department claimed that, if the decision were not reversed, it would be forced to shut off some three hundred diverters.[225] If the wilderness areas did not require presently appropriated water, it is hard to understand the furor over the initial decision. Moreover, the petitioners' argument that the federal government had to demonstrate "a compelling, urgent need for a water right"[226] is simply not part of reserved rights law: the United States Supreme Court has made clear that water may be reserved for "future requirements" of federal reservations.[227]

While the majority emphasized its narrow construction of the purposes of the Wilderness Act, and ignored the watershed and fishery purposes of the 1978 and 1980 statutes establishing the Gospel-Hump and Frank Church wilderness areas,[228] Chief Justice Trout's brief concurrence went much further. She changed her vote on the ground that "Congress was aware that conflicts had developed over the issue of water rights for federal reservations of land."[229] Thus, apparently by 1964, this new congressional awareness, upon which Chief Justice Trout did not elaborate, required express reservations of reserved water.[230] This would effectively overturn the *Winters* doctrine of

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224. Potlatch Rehearing Brief, *supra* note 218, at 18–20.

225. E-mail from Peter C. Monson, Senior Attorney, U.S. Dept. of Justice, to author (Apr. 23, 2001). The state's brief on rehearing claimed that over 1,700 water rights perfected since creation of the wilderness areas would become junior water rights. State of Idaho's Brief in Support of Petition for Rehearing at 19 , *In re* SRBA Case No. 39576, Subcase Nos. 75-13605, 79-13597 (Idaho Oct. 1, 1999).

226. Potlatch Rehearing Brief, *supra* note 218, at 19.

227. Arizona v. California, 373 U.S. 546, 601 (1963).

228. See *supra* notes 155–158 and accompanying text.

229. Potlatch Corp. v. United States, 12 P.3d 1260, 1271 (Idaho 2000) (Trout, C.J., concurring).

230. Petitioners Potlatch Corporation, Dewey Mining Company and Thunder Mountain Gold argued in their petition for rehearing that, in light of this new "congressional awareness," the reserved rights doctrine violated separation of powers principles. Potlatch Rehearing Brief, *supra* note 218, at 25. ("It is not the job of the courts to take on legislative functions which the legislature finds difficult to handle. Consequently, the courts have no power to announce a rule of law which carves out a portion of power allocated to the legislature and executive branches."). The petitioners were apparently unaware of the doctrine of congressional acquiescence. *See supra* notes 136–138 and accompanying text. However, a brief for the states of Colorado, Utah, and North Dakota agreed with the petitioners. Brief of Amici Curiae at 6, *In re* SRBA, Case No. 39596, Subcase No. 2543605 (Idaho Sept. 3, 1998). The brief was submitted on behalf of the state of Colorado by Gale Norton, now Secretary of the Interior.

implied federal water rights for any reservations established after 1964, even where the express purpose of the reservation was to preserve fish or provide watershed protection. If this revolutionary theory is to become attractive to other courts, however, more evidence reflecting changed congressional intent than that which Chief Justice Trout supplied will be necessary.[231] It bears noting that Chief Justice Trout wrote only for herself;[232] the new majority relied on its parsimonious construction of the purpose of the Wilderness Act to reach its result.

The irony of the Idaho court's wilderness water rights ruling was that it awarded reserved rights to the Hells Canyon NRA while denying water to Idaho wilderness. The reason was that the Hells Canyon NRA Act mentioned that it reserved "lands and waters,"[233] while the Wilderness Act merely defined wilderness areas as "untrammeled by man."[234] The result was that the Idaho court awarded water rights to the Hells Canyon NRA, a far less protective land reservation than wilderness, while denying lands reserved as wilderness any water at all.

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231. Potlatch, Dewey, and Thunder Mountain argued that "the reserved rights doctrine does not apply to 'modern' legislation in which water rights were debated and not reserved." Potlatch Reply Brief, *supra* note 139, at 8 n.3. They claimed that after the Supreme Court's decision in the 1955 Pelton Dam case, in which the Court first indicated that non-Indian federal reservations could possess reserved water rights, Fed. Power Comm'n v. Oregon, 349 U.S. 435, 457 (1955), Congress began to discuss water rights when making land reservations, thus "end[ing] the era of Congress' 'inadvertent oversight' of the question whether to reserve water rights." Potlatch Rehearing Brief, *supra* note 218, at 11. No detailed evidence of these post-1955 debates was provided by the petitioners, although they did cite and discuss Senator Humphrey's discussion of the Wilderness Act's disclaimer provision. *Id.* at 27–28, *reprinted in supra* note 54. The petitioners also suggested that the designation of a special mining management zone near the town of Salmon in the Central Idaho Wilderness Act of 1980 and that statute's exclusion of other mining areas from the wilderness boundaries were evidence of a congressional intent not to reserve water. *Id.* at 29–31. None of the five opinions in the wilderness water case mentioned these alleged indications of congressional intent.

232. Justice Kidwell, who based his concurrence on his interpretation that the disclaimer clause in section 4(d)(6) of the Wilderness Act did not preserve the status quo, but in fact renounced any intent to reserve water, see *supra* notes 126–127 and accompanying text, might agree with Justice Trout that Congress must expressly act to reserve water. But, even so, Justices Trout and Kidwell would not constitute a majority of the court.

233. 16 U.S.C. § 460gg(b) (1994).

234. 16 U.S.C. § 1131(c) (1994).

B. The Effect on Streamflows in Idaho

Because there are substantial numbers of diverters upstream of the Idaho wilderness areas, including three growing municipalities,[235] the potential for de-watering these "primeval" areas could be considerable.[236] However, the court's ruling recognizing reserved water rights for wild and scenic rivers may significantly mitigate the effects on the wilderness areas. The court held that both the mainstem Salmon and Middle Fork of the Salmon, which flow through and drain the Gospel-Hump and Frank Church wilderness areas, possessed reserved water necessary to fulfill their purposes.[237] But the federal government must prove the amount of water necessary to fulfill those purposes in subsequent quantification proceedings.[238]

Once quantified, reserved water rights for downstream wild and scenic rivers could limit upstream water diversions junior to the 1968 establishment of the wild and scenic rivers. The purposes of the WSRA include protection of "outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values . . . in their free-flowing condition."[239] In 1979, the Interior Solicitor opined that the scope of reserved water for wild and scenic rivers "is the amount of unappropriated waters necessary to protect the particular aesthetic, recreational, scientific, biotic, and historic features . . . and to provide public enjoyment [of them]."[240] No court has ever quantified the amount of water reserved for a wild and scenic river, but unless the case is settled, the SRBA court will become the first. The ecological integrity of not only Idaho's wild and scenic rivers but also its wilderness areas will be at stake.

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235. *See supra* text between notes 218 and 219 (towns of Stanley, Salmon, and Challis).

236. A map prepared by the Idaho Department of Water Resources indicated that there were more than 18,000 water right diversions (both junior and senior) within or upstream of the Gospel-Hump and Frank Church wilderness areas.

237. Potlatch Corp. and Hecla Mining v. United States, 12 P.3d 1256, 1257, 1259 (Idaho 2000); *see supra* notes 195–196 and accompanying notes.

238. *Id.* at 1259; *see supra* note 201 and accompanying text.

239. 16 U.S.C. § 1271 (1994). *See* Peter M.K. Frost, *Protecting and Enhancing Wild and Scenic Rivers in the West*, 29 IDAHO L. REV. 313 (1992–1993); Brian Gray, *No Holier Temples: Protecting National Parks Through Wild and Scenic River Designation*, 58 U. COLO. L. REV. 551 (1986).

240. 86 Interior Dec. 553, 608 (1979).

C. The Effect on the Nez Perce Tribe's Claims

In November 1999, after Judge Hurlbutt retired as SRBA Presiding Judge, his replacement, Judge Barry Wood, rejected the federal government's and Nez Perce Tribe's claims for reserved water for the tribe's off-reservation fishing rights.[241] Judge Wood's errors led four law professors to characterize his decision as "a startling departure from case law and the settled principles of Indian law jurisprudence."[242] Among other things, Judge Wood articulated the rules of Indian treaty construction—under which courts construe ambiguous treaty language favorably to tribes—but failed to apply them to the Nez Perce claim.[243] Justice Schroeder was likewise cognizant of the rules of treaty construction;[244] in the wilderness water rights decision he distinguished wilderness from Indian reservations, suggesting that because the former did not benefit from the latter's favorable rules of construction, an "opposite inference should apply."[245] In the Nez Perce Tribe's claim, the usual inference, favorable to the tribal claim, should govern.

One of the reasons why the usual rules favoring the tribes should continue to apply to the Nez Perce is that the property rights exchange embodied in the Nez Perce Treaty of 1855[246] was hardly fair. The tribe ceded some 12.5 million acres of land to the United States in that treaty and a later one, while reserving a small homeland and the "the right of taking fish at all usual and accustomed places."[247] The United States Supreme Court has interpreted the reserved right of the tribe to include the right to "a livelihood."[248] That promise has not been

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241. *In re* SRBA, No. 39576, Subcase No. 03-10022 (Idaho Dist. Ct., Nov. 10, 1999).

242. Blumm, Goble, Royster & Wood, *supra* note 40, at 451.

243. *Id.* at 453.

244. Potlatch Corp. v. United States, 12 P.3d 1260, 1264 (Idaho 2000).

245. *Id.*

246. The Nez Perce Treaty was signed on June 11, 1855, but not ratified by the United States Senate until 1859. Treaty between the United States of America and the Nez Perce Indians, June 11, U.S.-Nez Perce Tribe, 1855, 12 Stat. 957, 962.

247. *Id.* at 958. The tribe conveyed 6.5 million acres to the United States in the 1855 treaty, and an additional six million acres in the 1863 Treaty of Lapwai, Treaty between the United States and the Nez Perce Tribe of Indians, June 9, 1863, 14 Stat. 647.

248. Washington v. Washington Passenger Fishing Vessel Ass'n, 443 U.S. 658, 686 (1979).

fulfilled by any objective measure. As one recent economic analysis concluded:

> Viewed from the perspective of objective statistics, the peoples of the study tribes [including the Nez Perce Tribe and other Columbia Basin tribes with treaty fishing rights] must today cope with overwhelming levels of poverty, unemployment that is between three and thirteen times higher than for the region's non-Indians, and rates of death that are from twenty percent to more than twice the death rate for residents of Washington, Oregon and Idaho as a whole. If located outside the United States, such conditions might fairly be described as "third world."[249]

The Idaho Supreme Court has employed the rules of treaty interpretation to broadly interpret the scope of treaty rights in the past. In 1972, in *State v. Tinno*,[250] the court construed the Fort Bridger Treaty, which recognized the Shoshone-Bannock Tribe's "right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts," to include the right to fish.[251] The Idaho court relied on the facts that the treaty language did not separate hunting from fishing, that salmon fishing was a major part of tribal life at the time the treaty was signed, and that treaty negotiators expressed concern with both hunting and fishing.[252] If the Shoshone-Bannock's treaty includes an implied right to fish, it is difficult to see how the Nez Perce Treaty, which expressly reserves the tribe's right to continue to fish, does not include the water necessary for fish to be harvested to ensure tribal members a livelihood from fishing.[253]

The Idaho Supreme Court should not be able to avoid having to construe the scope of the Nez Perce Treaty through the formula it has announced for interpreting reserved rights. As

249. MEYER RESOURCES, INC., TRIBAL CIRCUMSTANCES AND IMPACTS FROM THE LOWER SNAKE PROJECT'S EXECUTIVE SUMMARY 2 (report to the Columbia River Inter-Tribal Fish Commission, n.d.)

250. 497 P.2d 1386 (Idaho 1972).

251. *Id.* at 1389 (quoting Treaty between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, July 3, 1868, art. 4, 15 Stat. 673, 674–75).

252. *Tinno*, 497 P.2d at 1389–90.

253. *Washington*, 443 U.S. at 686 (treaty fishing right entitles the tribes to a livelihood); *see* Blumm, Goble, Royster & Wood, *supra* note 40, at 460–64.

declared in *United States v. City of Challis*[254] and reiterated in the wilderness water case, this formula asks "(1) whether there has been a reservation of land, and if so (2) whether the applicable acts of Congress contain an express reservation of water, and (3) if not, whether the applicable acts imply a reservation of water."[255] In *Challis*, the court denied reserved water rights to national forests under the Multiple-Use Sustained-Yield Act[256] because it concluded that Congress did not intend the statute to be a reservation of land but merely an expansion of the purposes for managing previously reserved national forests.[257] It is conceivable that the court's result-oriented jurisprudence could deny reserved water rights for the Nez Perce's off-reservation fishing rights if the court convinces itself the Nez Perce Treaty of 1855 reserved only reservation lands, thereby disqualifying the tribe's off-reservation fishing sites under the court's reserved rights formula. Such a result would be counter-factual, since the treaty clearly reserved off-reservation, non-fee interests in lands, known as *profits à prendre*.[258] It would also be inconsistent with the *Tinno* court's generous interpretation of the scope of reserved rights.[259] Finally, it would hardly be a fair result, considering the equities involved.

As previously noted,[260] the Idaho court's emphasis on the economic effects of recognizing reserved water rights for wilderness—the court mentioned "strangl[ing] the economic life from areas outside the wilderness"[261]—was inconsistent with the Supreme Court's instruction in *Cappaert* that present-day equities are irrelevant to determining the existence of reserved rights.[262] But even if one were to balance the economic equities in the Nez Perce water rights claim, it is hardly clear that the balance would favor the junior diverters. In its treaties, the tribe ceded over twelve million acres of land[263] in return for a small land reservation and the right to continue to fish at usual

254. United States v. Challis, 988 P.2d 1199 (Idaho 1999).
255. *Id.* at 1203–04.
256. 16 U.S.C. § 528–31 (1994).
257. *Challis*, 988 P.2d at 1205.
258. *See* Blumm, Goble, Royster & Wood, *supra* note 40, at 464–68.
259. *See supra* notes 251–252 and accompanying text.
260. *See supra* notes 218–219 and accompanying text.
261. Potlatch Corp. v. United States, 12 P.3d 1260, 1267 (Idaho 2000).
262. Cappaert v. United States, 426 U.S. 128, 138–39 (1976).
263. *See supra* note 247 and accompanying text.

fishing places. These cessions made possible the development of much of Idaho and the Northwest. Today, the salmon that are the subject of the tribe's fishing rights are on the Endangered Species Act list,[264] making any pretense that the treaties were fair bargains fanciful. Refusing to recognize that water rights for fish were an implicit part of the bargain the tribe struck a century-and-a-half ago would conflict with the tribe's reasonable understanding of the treaty, which the *Tinno* decision recognized as the proper means to interpret the treaty language.[265]

CONCLUSION

The outcome of the Idaho wilderness reserved water rights case is certainly not a happy one for the ecological integrity of the wilderness areas or for judicial independence. Nearly two decades ago, Justice Brennan opined that a broad Supreme Court interpretation of the McCarran Amendment's jurisdictional scope would not disadvantage federal reserved rights because state courts "have a solemn obligation to follow federal law."[266] While the Idaho Supreme Court technically did not ignore United States Supreme Court precedent—because the issue of reserved water for wilderness had never been before the Court—it is hard to see how the Idaho court faithfully applied precedents such as *Arizona v. California*[267] and *Cappaert*.[268] The upshot is that the national wildlife refuges, national recreation areas, and national monuments have reserved water, but Idaho wilderness areas do not.

One strongly suspects that if the wilderness areas in question were like most wilderness areas, in that they were at the headwaters of streams instead of downstream of diversions, the Idaho court would not have found reason to deny them reserved water. But according to the United States Supreme Court, such economic inconveniences are not sufficient reason to deny the existence of reserved rights.[269] The Idaho court ig-

264. *See* Michael C. Blumm & Greg D. Corbin, *Salmon and the Endangered Species Act: Lessons From the Columbia Basin*, 74 WASH. L. REV. 519 (1999).

265. State v. Tinno, 497 P.2d 1386, 1391 (Idaho 1972).

266. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571 (1983).

267. 373 U.S. 546 (1963).

268. Cappaert v. United States, 426 U.S. 128 (1976).

269. *Id.* at 138–39.

nored that admonition and instead focused on achieving a result that ratified the status quo, however inconsistent with a proper interpretation of the fishery and watershed purposes of the wilderness areas at issue.

The Idaho court did not ultimately accept what would have been the death knell of the *Winters* doctrine of implied reserved water rights: the claim of some of the petitioners that there were simply no longer any implied reserved water rights by 1964, when the Congress enacted the Wilderness Act.[270] At most, two members of the court (Chief Justice Trout and perhaps Justice Kidwell) subscribed to this scantily developed theory that the doctrine which the Supreme Court first applied to non-Indian reserved public lands in its *Arizona v. California* decision in 1963 had suddenly vanished by the next year, due to congressional "awareness" of the conflict between federal reserved rights and state water law.[271] Instead, the court employed a penurious interpretation of the purposes of the Wilderness Act to achieve the result it desired.[272] Just as the Idaho court completely ignored the decision of the federal district court of Colorado on the wilderness water rights issue,[273] other courts are free to ignore the peculiar interpretation the Idaho court gave to the Wilderness Act.

Perhaps the most unfortunate result of the Idaho wilderness water case is the effect it may have on judicial independence. Justice Silak's opinion, recognizing the existence of reserved water for wilderness, made her a reviled figure in Idaho, ultimately costing her her Supreme Court seat in an election in which her wilderness water opinion was the major issue. Chief Justice Trout's changed position, which produced the court's turnaround, may not have been related to her reelection, scheduled a year after Justice Silak's. Nevertheless, Justice Silak's overwhelming defeat, which no doubt was anticipated for some time, could not have escaped her attention. The rather obvious lesson was: do not decide against entrenched water interests in Idaho and expect to remain a member of the Idaho

270. *See supra* notes 175, 230–231 and accompanying text.

271. *See supra* notes 118–120, 228–231 and accompanying text.

272. *See supra* notes 85–89 and accompanying text.

273. Sierra Club v. Lyng, 661 F. Supp. 1490, 1501 (D. Colo. 1987) (federal government's plan for protecting wilderness water "woefully inadequate and constitute[d] an insouciant disregard of the government's statutory responsibility to protect wilderness area federal reserved water rights") *appeal dismissed by, vacated by* Sierra Club v. Yeuter, 911 F.2d 1405 (10th Cir. 1990).

judiciary. Justice Brennan was a great justice but, if the Idaho experience is representative, his faith in western state courts' ability to fairly judge the merits of federal water claims seems to have been badly misplaced.[274]

In Idaho, the disadvantageous position of reserved rights is especially crippled by the hostile political response to adverse decisions. That response has certainly not been lost on the Idaho Supreme Court. After the decisions discussed in this Article, the court decided that a national wildlife refuge consisting of ninety-four islands in the Snake River did not include any reserved water because "[w]ithout water there would be no island[s], but there would be a sanctuary as defined by the Migratory Bird Conservation Act."[275] The court was unconcerned that, without the protection of islands, the birds might lose their isolation from their most serious predators. When reserved rights threaten Idaho irrigators, evidently islands no longer require water.[276] Perhaps such a result is politically popular in Idaho, but subsuming the rule of law with what is politically popular is unlikely to serve Idahoans well in the long run.

The Idaho decision might be seen as a reflection of how Public Choice Theory operates in practice. Most Public Choice studies demonstrate how small, focused, well-organized interest groups are able to effectively pressure the legislative and executive branches of government to pursue policies maintaining the status quo.[277] The wilderness water decision shows the operation of Public Choice Theory on the judiciary in a most vivid fashion. This is a most regrettable development, for if the

274. It needs to be noted, however, that the Arizona Supreme Court, populated by several lower court judges after members of the supreme court recused themselves, rewarded Justice Brennan's faith, by ruling that tribal reserved water rights may include groundwater, rejecting the Wyoming Supreme Court's contrary conclusion. *In re* Gila River System & Source, 989 P.2d 739, 745 (Ariz. 1999).

275. United States v. State, 23 P.3d 117, 126 (Idaho 2001).

276. *See id.* ("One can assume that there was an expectation that the 'islands' would remain surrounded by water, but that does not equate to an intent to reserve a federal water to accomplish that purpose. The two concepts are not equivalent."). *See also In re* SRBA, Case No. 39576, Subcase 61-11783 et al., (Idaho Dist. Ct. Apr. 6, 2001), *available at* http://www.srba.state.id.us/srba7.htm (rejecting the federal government's claim for reserved water rights for the Mountain Home Air Force Base, even though no one objected to those claims).

277. *See* FARBER & FRICKEY, *supra* note 30, at 19; Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405, 420–21 (1994).

courts cannot temper interest group pressure, there does not appear to be an available check in the American political system. Perhaps the lessons of the case are limited to state courts where judges must run for election in potentially contested elections. If so, it would place a considerable burden on federal courts which, in the instance of federal reserved water rights, have been largely displaced by state courts.

State court primacy over federal water rights was, of course, the goal of reserved rights opponents in the wake of *Arizona v. California*, where the Warren Court extended reserved rights to non-Indian federal reservations.[278] The reserved rights opponents succeeded in winning the jurisdictional battle in the 1970s and the early 1980s.[279] The Idaho wilderness decision illustrates the substantive significance of those procedural victories: a court quite cognizant of the Idaho political factions controlling the state's electorate reversed itself—only after the author of the original decision upholding reserved rights lost a bitter reelection—and declared that the most protective type of federal land reserve possessed no water rights. The influence of special interests on judicial decisionmaking could hardly be more evident.[280]

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278. Arizona v. California, 373 U.S. 546, 601 (1963).

279. United States v. Eagle County Dist. Ct., 401 U.S. 520, 524 (1971) (concluding that the "or otherwise" language in the McCarran Amendment indicated congressional intent to subject federal reserved rights to state adjudications); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) (McCarran Amendment gives state courts jurisdiction over Indian reserved water rights claims as well as non-Indian federal claims); Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) (McCarran Amendment subjects Indian tribes' reserved rights claims to state adjudications even in states with constitutional provisions disclaiming any intent to assert jurisdiction over Indian lands or resources).

280. Four days after the court reversed itself, the *Idaho Statesman*, which had encouraged challengers to contest Justice Silak's seat on the court, see *supra* note 66 and accompanying text, suggested that the state should reexamine its method of selecting judges through contested elections. Editorial, IDAHO STATESMAN, Oct. 31, 2000, at Local 8. Perhaps, as Justice Hobbs has suggested, Idaho should emulate Colorado, where voters eliminated contested judicial elections in 1966 (twelve years after Chief Justice Stone's defeat), as a model. Hobbs, *supra* note 74, at 683, 695. As John Echeverria noted:

> [I]n recent years state judicial elections have become increasingly indistinguishable from the rest of the American political process, complete with large campaign contributions, "independent expenditures" by special interest groups, and massive television and print advertising .... Even if one accepts the inherently "political" nature of state judicial elections, [there should be] public concern about disproportionate influence

For Idaho wilderness, water may come inadvertently through the Idaho Supreme Court's recognition of reserved water for the state's wild and scenic rivers.[281] No one knows how much water fulfilling the purpose of a wild and scenic river requires, since the amount necessary to fulfill the purpose of a wild and scenic river has never been ascertained. One way to find out is through a costly, time-consuming quantification procedure. Another way is to settle the case. A good model would be the Warm Springs Water Rights Settlement in Oregon, where the Warm Springs Tribe effectively subrogated the future use component of its reserved rights to existing junior central Oregon diverters, while the state recognized the tribe's reserved water rights to both surface and groundwater.[282] Applied to the Idaho situation, the settlement might grandfather existing diversions while recognizing the existence of sufficient river flows in the Middle Fork and mainstem Salmon Rivers to supply substantial protection to tributaries within Idaho wilderness areas.[283] Yet even if such a settlement were politically possible—effectively giving Idaho wilderness some water rights—the damage wrought by the Idaho Supreme Court's decision will remain.

Although the case should not be interpreted to endorse the end of implied reserved water rights—even in Idaho—the court recognized no implied reserved rights in the Wilderness Act,

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by well-heeled special-interest groups, conscious efforts to disguise or misrepresent the ideological or financial interests being served by certain advocacy efforts, and misleading reports and rhetorical attacks on judicial candidates.

Echeverria, *supra* note 73, at 218–19, 220.

281. *See supra* notes 192–201, 237–240 and accompanying text.

282. Susan K. Driver, *Confederated Tribes of the Warm Springs Reservation Reach Historic Water Settlement Agreement*, BIG RIVER NEWS, Winter 1998, at 1, 3 (The state also recognized the tribe's on-reservation management authority over water rights, even those possessed by non-Indians.).

283. A satisfactory alternative would be for Congress to declare a federal water right for Idaho wilderness with a statutory priority date (which would threaten no existing diverters). This would ensure that there would be a federal purpose and a federal right but state administration and quantification. The model would be § 9(b)(2)(B) of the Great Sand Dunes Park and Preserve Act of 2001, 16 U.S.C. § 410hhh-7 (2001). *See* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation*, 4 U. DENV. WATER L. REV. 271, 285–88 (2001). This alternative might seem wholly unlikely, since the Idaho congressional delegation would have to approve it, but if the threat of wild and scenic river reserved rights (with a 1968 priority date) were sufficiently real, the delegation might be interested in supporting an equitable settlement.

and might be inaccurately interpreted to disclaim implied reserved rights entirely. Actually, the court should be cited principally for its miserly interpretation of that statute, not for more abiding principles. The real enduring—and unfortunate—principle the Idaho wilderness water case will be remembered for is that political expediency is always a factor in decisions of state court judges who are subject to reelection. The Idaho electorate that removed Justice Silak largely for her wilderness water rights decision will not in the long run be well served by a judiciary that is indistinguishable from its legislature. That will prove to be an even greater cost than the loss of water in Idaho's wilderness.