

FEDERAL RESERVED WATER RIGHTS & AMERICA'S RIVERS

10 KEY QUESTIONS

Water sustains all.

- Thales of Miletus (600 B.C.)

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Introduction

Congress has a unique and critical role to play in protecting and restoring America's water resources. Federal reserved water rights are a tool Congress can use to ensure protection of rivers, streams, and the ecosystems that depend on them. Reserved rights may be used to promote the goals of the Endangered Species Act and the Clean Water Act, and may help buffer the impacts of climate change.

For those who are concerned about protecting endangered species, clean water, and free-flowing rivers, federal reserved water rights are a critical issue.

But federal reserved water rights are at risk. In recent years, special interests have successfully lobbied public land bills that jeopardize the ability of federal agencies to protect water resources for national purposes. Some bills explicitly deny the existence of federal water rights. Others arise from local stakeholder negotiations, where national interests are not fully represented. Some states simply refuse to recognize or give effect to federal water rights.

This paper offers basic information about federal reserved water rights, with a focus on how those water rights protect rivers. If Congress wishes to continue the tradition of protecting the national interest in public lands and waters, it must carefully examine the water language in public lands bills.

What Are Federal Reserved Water Rights?

When Congress designates federal lands for a specific purpose – be it military base, Indian reservation or national park – it also reserves sufficient water to serve the purposes of that designation. These water rights are known as “federal reserved water rights” or simply, reserved rights. Reserved rights are implied rights, meaning that Congress need not expressly state in a bill that it intends to reserve federal water right. The right exists whether or not Congress explicitly mentions it.

This principle has been the law of the land since two U.S. Supreme Court decisions issued in 1908 (*Winters v. United States*, establishing reserved rights for Indian reservations) and



Imperial National Wildlife Refuge, California

Photo: Knox Gardner

Imperial Refuge benefited from the 1963 U.S. Supreme Court ruling that federal lands carry implied reserved water rights.



Black Canyon of the Gunnison National Park, Colorado

Photo: Paul Pitzer

Only Congress can dispose of federal property, including reserved water rights.

Former Secretary of Interior Gale Norton granted Colorado control over Black Canyon's federal water rights. But that agreement was held illegal because federal water rights are property rights, and "only Congress can authorize the disposition of federal property." *High Country Citizens Alliance v. Norton* (2006).

tems. When the primary purpose of a federal lands bill involves environmental protection (as in many of our national parks, monuments and wilderness areas), then agencies may assert federal reserved rights to maintain and protect free-flowing rivers and other aquatic resources.

By reserving water rights for federal lands, Congress ensures that national interests are served.

Are Federal Reserved Water Rights At Risk?

Federal reserved rights are controversial, particularly in the western United States, because demand for water exceeds supply. Reserved rights for federal lands designated in the late 1800s and 1900s represent a substantial amount of water and potential conflict with state water allocation systems and users. Nonetheless, if federal purposes are to be served, Congress must continue to ensure that federal water rights are reserved in new public lands bills.

Partisan politics take a toll on federal reserved water rights. To reassert the national interest inherent in federal reserved water rights, it is appropriate for Congress to explicitly reserve water rights when it creates new national parks and recreation areas, wilderness areas and other federal enclaves.

1963 (*Arizona v. California*, extending reserved water rights to other federal lands). While the law of federal reserved water rights is subject to judicial interpretation, Congress has the power to expand or contract federal water rights by expressly legislating on the subject.

Reserved water rights extend to both surface water and groundwater, and are limited to the quantity necessary to fulfill the purposes of the federal enclave. For federal (non-tribal) reservations, water rights are limited to the primary purposes of the lands. For Indian reservations, reserved rights can serve both primary and secondary purposes. This paper focuses on non-tribal federal reserved rights.

Why Are Federal Reserved Water Rights Important?

Federal reserved water rights are important because water is important. Almost all human activities require water. Reserved rights allow federal agencies to engage in normal business, such as operating national park centers, forest campgrounds, military installations and other essential tasks.

In addition, federal reserved rights may be utilized to protect and maintain healthy rivers and ecosys-

- During the Reagan era, Attorney General Edwin Meese directed staff to not claim or defend reserved rights for wilderness areas. Congress responded by including explicit water reserve language in several wilderness bills enacted during that period. Later, Attorney General Janet Reno rescinded the Meese policy and the need for explicit protection became less urgent.
- Former Secretary of the Interior Gale Norton negotiated an agreement that gave the state of Colorado essential authority over federal

**“If water were abundant,
Congress' silence would pose
no problem.”**

— U.S. Supreme Court Justice Wm. Rehnquist, *U.S. v. New Mexico* (1978).

water rights for the Black Canyon of the Gunnison. The Black Canyon park was created under the National Park Act and the Wilderness Act to conserve scenic, aesthetic, scientific and historic values, as well as wilderness, wildlife and fish. In September 2006, a Colorado federal judge ruled that the Secretary unlawfully delegated federal authority over Black Canyon reserved water rights to the state of Colorado, and unlawfully disposed of federal property without Congressional authorization.

Some western states are opposed to the very concept, let alone implementation of implied federal reserved water rights.

- In 2000, contrary to 90 years of federal legal precedent, the Idaho State Supreme Court ruled that implied reserved rights do not exist in that state. According to the Idaho state court, Congress must include explicit language to reserve water rights for federal lands. This ruling deprived water to several Congressionally protected areas in Idaho, including the Frank Church-River of No Return Wilderness and the Sawtooth National Recreation Area.
- Pending bills for Idaho public lands are silent or explicitly deny federal reserved water rights. If Congress does not explicitly reserve water in these bills, Idaho courts will continue to deny the existence of federal water rights.



Desert pupfish, Salt Creek, Death Valley National Monument, California

Photo: John Osborn

Federal water rights protect natural waters. Endangered desert pupfish led to a landmark decision affirming that federal lands carry reserved water rights that may be used to keep water 'instream.'

Rio Mimbres, New Mexico

Photo: NASA/USGS

No water for forest streams. In 1978, the courts ruled that national forests do not carry a federal reserved water right to protect rivers for fisheries, wildlife, and recreation.



How Does Congress Ensure that Reserved Rights are Created?

Congress has the power to specifically identify purposes to include protection of water resources on federal lands, and to explicitly reserve water rights to satisfy those purposes. For example:

- In a landmark case concerning reserved rights in Devils Hole, a cavern and underground pool located in Death Valley National Monument, the U.S. Supreme Court held that statutory language that identified the need to protect the pool and its unique, endangered species of fish (Devil's Hole Pupfish), constituted both an express and implied reservation of federal water rights.¹
- In *United States v. New Mexico*, the U.S. Supreme Court held that national forest lands are not designated for the purpose of aesthetics, recreation & wildlife.² Therefore the U.S. Forest Service may not claim federal water rights to protect instream flows in national forests. However, the Court acknowledged that Congress may explicitly reserve water for those purposes, citing the Lake Superior National Forest Act ("In order to preserve the shore lines, rapids, waterfalls, beaches and other natural features of the region in an unmodified state of nature, no further alteration of the natural water level of any lake or stream . . . shall be authorized.") and the Yosemite National Park

Act (the Secretary to protect all "the natural curiosities, or wonders within such reservation, . . . in their natural condition.")³

- In the Reagan-Bush era, Congress began to explicitly reserve water rights to ensure that the executive branch would protect such rights. Explicit reservation language includes: "with respect to each wilderness area designated by this Act, Congress hereby reserves a quantity of water sufficient to fulfill the purposes of this Act. The priority date of such reserved water rights shall be the date of enactment of this Act."⁴

How Do Federal Water Rights Fit with State Water Rights?

With the exception of federal reserved rights, the states own and manage water resources within their jurisdiction. In the West, states allocate water according to the prior appropriation doctrine, based on the twin principles of seniority (first in time is first in right) and beneficial use (use it or lose it). In the eastern U.S., water is allocated according to principles of riparianism, based on ownership of lands adjacent to water and equal sharing among all such landowners.

Federal water rights are not subject to allocation or control by the states, however, federal rights do integrate with water rights that are issued by the states. Federal reserved rights are created and vested on the date that any bill designating a

federal enclave is enacted into law. Thus, federal water rights do not supercede or interfere with water rights that pre-date the enactment. In the western U.S., federal reserved rights fit into the long-established priority system.

How Are Federal Water Rights Implemented?

Because federal water rights are “implied,” they are not immediately quantified. The usual mechanism for quantification is a court proceeding known as a “stream adjudication.” Adjudications may be held in either federal or state courts, but typically are conducted in state courts.

Few federal claims to water were asserted until the 1970s. In 1976, it was held that the McCarran Amendment, a 1953 law, waived U.S. sovereign immunity and allowed states to sue federal agencies to determine water rights in state courts.⁵ Hence, federal water claims may be quantified in state stream adjudications, but only if such proceedings are comprehensive (meaning that all claimants to a specific water body are joined in the suit).

When a state commences a general stream adjudication, the Department of Justice must file and pursue claims on behalf of Indian tribes and for other federal lands and projects within the river basin being adjudicated.

How Do Federal Statutes – such as the Wilderness Act and Wild & Scenic Rivers Act – Address Federal Water Rights?

The Wilderness Act of 1964 does not explicitly address reserved water rights for wilderness areas. The Act states:

- Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.⁶

Wilderness Act sponsor Senator Hubert Humphrey reported that “federal-state relationships concerning water laws and wildlife are maintained without change,” i.e., Congress accepted the status quo. As it turns out, the Wilderness Act was enacted shortly after the landmark 1963 U.S. Supreme Court decision in *Arizona v. California*, which held that the reserved rights doctrine applies to federal lands.⁷ Because of this history, we know that Congress intended that implied water

rights would apply to wilderness areas.

The Wild & Scenic Rivers Act is unique among federal enabling statutes, because it expressly reserves water rights for designated rivers (although it does so by negative implication). That Act states:

- ‘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.’⁸

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

- *Cappaert v. U.S.* (1976)

Language.”

No other enabling statutes speak, one way or the other, to the question of federal reserved water rights. However, many examples exist of differing language used in individual land designation statutes. For details, see Columbia Institute’s “15 Years of Federal Reserved Water Rights

Can Reserved Rights Help Protect America’s Rivers and Endangered Species?

As is evident from the Devil’s Hole pupfish case, Congress may reserve lands to protect species. If the species is dependent on a stream or pool for survival, then Congress may reserve water rights to ensure survival. Congress may also reserve water rights to protect and maintain water quality. In these respects, federal reserved rights may be consistent with the goals of the Endangered Species Act and the Clean Water Act, two laws that represent substantial national interests.

Instream reserved rights may also ensure that rivers are maintained to protect wildlife and riparian areas. Instream water rights ensure that public lands stay viable as wildlife habitat.

Instream reserved rights also protect recreational uses such as whitewater and other boating, and fishing and swimming in the exceptional rivers of America. Instream reserved rights protect aesthetic use and enjoyment of rivers.

The Special Problem of Idaho

In 2000, the Idaho Supreme Court reversed 90 years of federal court decisions and Congressional intent, ruling that federal reserved water rights do not exist for federally-designated wilderness areas in Idaho. As a result, the spectacular rivers, lakes, and waterfalls of the Sawtooth National Recreation Area are at risk, unprotected from appropriation under state water laws.

The Idaho decision was highly politicized — one of the Supreme Court justices lost her seat on the court because she wrote an opinion stating, correctly, that it is the job of state courts to protect federal reserved water rights. Of more concern, the Idaho decision stands as a potential legal precedent — a beacon for other states that are hostile to protection of federal public lands and waters.

Congress can rectify the 'Idaho problem' by explicitly re-asserting federal reserved water rights for the Sawtooth NRA, to ensure that Salmon River headwaters are protected for endangered salmon that migrate 900 miles from the Pacific to spawn there, as well as to protect the spectacular Sawtooth Valley for use and enjoyment by future generations.



Petit Lake, Sawtooth NRA, Idaho

Photo: John Osborn

Idaho Water Bonanza. Petit Lake and other waters of the Sawtooth Valley are at risk under Idaho state water laws.

Chinook salmon spawning near Stanley, Idaho

Photo: Gary Gadwa ©2006

Chinook migrate 900 miles to spawn in the headwaters of the Salmon River in Central Idaho. Under Idaho law, these waters are at risk.



Should Congress Expressly Reserve Water Rights?

Because federal reserved water rights are under attack, Congress should consider inclusion of language expressly reserving water rights whenever its acts to create new protective designations on public lands.

EXPLICIT RESERVATION CONCEPTS

Identify Purposes. As an initial step, Congress should always include language clearly stating that protection and use of water resources is a “primary purpose” of the enactment. The bill should identify water bodies by name, along with their uses (e.g., aquatic habitat, recreation, aesthetic value) and specifically state that it is a purpose of the bill to protect those waters.

Explicit General Reservation. Congress may adopt general language to explicitly reserve water rights, such as that utilized in the late 1980s/early 1990s to counter anti-reserved right policies. For example:

- ‘With respect to the federal public lands designated by this Act, Congress hereby reserves a quantity of water sufficient to fulfill the purposes of this Act. The priority date of such reserved water rights shall be the date of enactment of this Act.’

Alternative Quantified Reservation. Congress may reserve an explicit quantity of water (to the extent available) to ensure that specific water needs of the new federal enclave are met.

Avoid Explicit Denial of Reserved Rights. Explicit denial of federal water rights often results in a failure to protect public waters. Default to state laws may not provide an avenue to protect in-stream resources. Because reserved rights do not pose a threat to existing water rights, denial of federal water rights should be avoided.

Water Resources Inventory. Congress may wish to learn more about aquatic species and ecosystems in the new federal enclave. In such circumstances, Congress may authorize an inventory of water resources.

Resources & Information

• Congressional Research Service

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Instream Flow Council, *Instream Flows for Riverine Resource Stewardship* (rev. ed. 2004) (see <http://www.instreamflowcouncil.org/index.htm>).

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Columbia Institute for Water Policy, *Fifteen Years of Federal Reserved Water Rights Language* (2006).

• Federal Agencies

Bureau of Land Management:
www.blm.gov/nstc/WaterLaws/fedreservedwater.html

National Park Service:
www.nature.nps.gov/water/flow.cfm

U.S. Fish & Wildlife Service:
www.fws.gov/policy/403fw1.html

Endnotes

¹ *Cappaert v. United States*, 426 U.S. 128 (1976).

² *United States v. New Mexico*, 438 U.S. 696 (1978).

³ 16 U.S.C. § 577b; Act of Oct. 1, 1890, § 2, 26 Stat. 651.

⁴ See, for example, California Desert Protection Act of 1994, Pub. Law No. 103-433, §§ 202-204, 706, 108 Stat. 4471; Arizona Wilderness Act of 1990, Pub. L. No. 101-628, § 101(g), 104 Stat. 4469, 4473-74; Nevada Wilderness Protection Act of 1989, Pub.L. No. 101-195, § 8, 103 Stat.1784, 1788; Washington Parks Wilderness Act of 1988, Pub. Law No. 100-668, § 502, 102 Stat. 3961, 3968.

⁵ *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

⁶ 16 U.S.C. § 1133(d)(6).

⁷ *Arizona v. California*, 373 U.S. 546 (1963).

⁸ 16 U.S.C. § 1284(c).

*Columbia Institute
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The Columbia Institute for Water

Policy is an advocate for the public interest in water resources. Using interdisciplinary research, public outreach, and education focused on law and public policy, Columbia Institute strives to promote sustainable, equitable, and ethical management of the transboundary freshwater resources of the Columbia River watershed and beyond. Through these efforts, Columbia Institute seeks to transform public discourse regarding the governance and use of rivers and aquifers to embrace environmental values and justice, and a sustainable future focus.

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Federal Reserved Water Rights

Federal reserved water rights protect the nation's interest in rivers and streams, springs and ponds, geysers and groundwater . . . in our national parks, monuments, recreation areas, fish & wildlife refuges and wilderness areas

But our national waters are at risk and Congress needs to take notice . . .

Federal reserved water rights protect water where it's plentiful . . .



Glacier National Park, Montana

Photo: Bulgar

Glacier Park's magnificent water resources are protected by a compact between the National Park Service and the State of Montana that recognizes federal reserved water rights.



. . . and where it isn't.

Cedar Breaks National Monument, Utah

Photo: John Osborn

Scarce desert waters of the Cedar Breaks are protected by agreement between the National Park Service and the state of Utah recognizing federal reserved water rights.