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Idaho's Snake River Basin Adjudication: A Window on Western Water Law

Jeffrey C. Fereday

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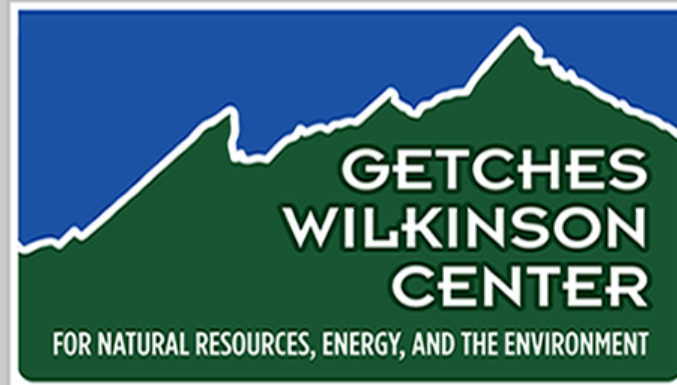
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**IDAHO'S SNAKE RIVER BASIN ADJUDICATION:
A WINDOW ON WESTERN WATER LAW**

Jeffrey C. Fereday, Esq.
Givens Pursley LLP
Boise, Idaho

Strategies in Western Water Law and Policy:
Courts, Coercion and Collaboration
June 8-11, 1999

NATURAL RESOURCES LAW CENTER
University of Colorado
School of Law
Boulder, Colorado

IDAHO’S SNAKE RIVER BASIN ADJUDICATION: A WINDOW ON WESTERN WATER LAW

by
Jeffrey C. Fereday, Esq.
Givens Pursley LLP
Boise, Idaho

OVERVIEW

Idaho’s Snake River Basin Adjudication: A McCarran-type General Stream Adjudication

Idaho’s Snake River Basin Adjudication (“SRBA”) is the West’s largest general stream adjudication. It was begun in 1987 when the Idaho Department of Water Resources (“Department”), as directed by the legislature, petitioned the state district court in Twin Falls to commence a general water rights adjudication. The federal government was joined pursuant to the McCarran Amendment, 43 U.S.C. § 666.

The action involves claims to some 175,000 water rights in the 53 separate sub-basins comprising Idaho’s portion of the Snake River Basin, including over a thousand instream flow claims filed by Indian tribes and federal agencies on the basis of the federal reserved rights doctrine. The SRBA involves over 80% of all of Idaho’s water sources. All ground water rights within the basin also are included, as are domestic and stockwater claims.

Procedure

The SRBA proceeds under Idaho’s adjudication statute, Idaho Code (“I.C.”) §§ 42-1401 to 1428. The SRBA Court (previously State District Judge Daniel Hurlbutt, now Judge Barry Wood, sitting in Twin Falls) has adopted special rules covering a variety of matters in the case, such as pleading requirements, forms for various motions, rules for reconsidering special masters’ rulings, and the like. See SRBA Court Administrative Order No. 1 (Amended October 10, 1997).

The SRBA Court has consolidated the 53 subbasins into 22 “reporting areas” for which the Department, acting through its Director, will produce reports to submit to the court (“Director’s Reports”) detailing the facts the Department’s investigation has shown as to current uses under each state-law-based water right claimed. As to claims arising under federal law—that is, federal and Indian reserved rights claims—the Director’s Reports provide only an abstract of what is claimed.

The Director’s Reports contain the foundational information about each water right; unless successful objections are received, these will form the basis for the decrees for each water right in each reporting area. Ultimately, all of these “partial decrees” will be consolidated into one enormous final decree.

Claimants may object to the way their water right was recommended in a Director’s Report, and they may file responses to objections filed by others. The litigation over objections and responses occurs in “subcases,” individual cases involving discovery, motions and ordinary trial practice which usually are heard first by special masters appointed by the SRBA Court. (Currently there are three special masters.)

The SRBA Court posts large amounts of information about the case (including water right claims, rules, orders, and recent decisions) on the web at www.srba.state.id.us.

Post-commencement legislation affecting the SRBA

In 1994, the Legislature amended several portions of Idaho’s water adjudication statutes, I.C. §§ 42-1401 to 1428, to remedy several perceived problems with the SRBA. Among other things, the Legislature:

1. Removed the Department (and, thus, the Director) as a party to the adjudication, instead designating the Director an “independent expert and technical assistant to assure that claims to water rights ... are accurately reported” I.C. § 42-1401B. Removing

the Director as a party probably caused more problems than it solved (see discussion of “one party subcases,” below.)

2. Declared that the Director’s Reports no longer are pleadings in the case, but are to be received by the court as “prima facie evidence” of the nature and extent of the water rights they describe. I.C. § 42-1411(4). The statute still places the ultimate burden of persuasion on the claimant to establish each element of the claimed water right. I.C. § 42-1411(5), and authorizes the Department to conduct fact-finding hearings as necessary “for a full and adequate disclosure of the facts.” I.C. § 42-1410(1). To date, the Department has not yet conducted any such hearings, and the SRBA court has not indicated that it would welcome such hearings.

3. Enacted two “amnesty” provisions for those water right holders who, prior to 1987, changed or transferred a water right without going through the statutory procedure (I.C. § 42-1425) or who enlarged the use under their water right without increasing the rate of diversion (I.C. § 42-1426). Both of these provisions include conditions supposedly designed to prevent injury to any existing water rights—including those water rights existing on the date the statutes were enacted. The more controversial of these two provisions, section 42-1426 (amnesty for certain enlargements) was the subject of an Idaho Supreme Court ruling and is discussed below.

4. Enacted a provision stating that, where a prior decree is “ambiguous,” the Department is to look to conditions existing in 1987 (when the SRBA began) to determine the elements of a water right. This provision promises to generate more controversy in the case. It is being advanced by some water users to assert that the Department essentially is supposed to don blinders and ignore any other facts that come to light about a water use other than those occurring in 1987. I.C. § 42-1427. The Idaho Supreme Court also has spoken, if briefly, about this provision, indicating that the Department is not limited to those facts existing in 1987.

Progress

In 1992 and 1993, Director's Reports were filed for the first three reporting areas (Subbasins 34, 36, and 57). The SRBA Court refers to these three subbasins as "test basins" because they were selected on the presumption that they would give rise to a wide variety of issues that should be resolved early in the process. That presumption proved correct. Lots of litigation has arisen from these three reports, including some so-called "Basin-Wide Issues," discussed below. Some of this litigation is still continuing, primarily on the duty of water question. More on this below.

The Department is just now completing a fourth Director's Report for an area that includes solely ground water rights in a portion of Eastern Idaho (Subbasin 35). Litigation has recently arisen here as well, involving objections filed by two large surface water diverters (North Side and Twin Falls Canal Companies) who assert that these ground water users have depleted the Snake River and reduced flows to the Companies' headgates.

The Department also has produced Director's Reports for certain categories of claims, such as federal and tribal instream flow claims and de minimis domestic and stockwater claims, that are handled outside of the reporting area structure. So far, about nearly half of the water right claims in the SRBA have been decreed, most of these small and unopposed domestic and stockwater claims. The federal and tribal claims, with the exception of the on-reservation water rights claims of the Shoshone-Bannock Tribe in eastern Idaho, are mostly all now in active litigation (also discussed further below).

One of the more significant single achievements in the SRBA to date is the final decree accepting the settlement between the Shoshone-Bannock Tribes, the State, and water users. This partial decree approved 27 federal water rights claims for these Tribes for on-reservation uses.

The SRBA is perceived by many, including some legislators and water users, as a protracted process with little to show for itself and no end in sight. It likely has given rise to far more litigation—including litigation of seemingly basic water law questions—than many observers or

participants expected. With the appointment in 1996 of Karl Dreher as the Department's new Director, the working relationship between the SRBA Court and the Department improved. Certainly, a productive relationship between the Court and the Department is essential. Nonetheless, there are varying levels of frustration over the costs, to the state and to the parties, the perceived slow pace, and the concern that one-party subcases or other circumstances will lead to overstated water rights. Many water users are not convinced that the process will result in an accurate accounting of actual water rights based on beneficial use and a reasonable duty of water.

Basin-Wide Issues

The SRBA Court also has designated and decided several "Basin-Wide Issues"—questions of law seen to have overriding importance. All of those raised to date have been decided by the Idaho Supreme Court. As noted below, the high court also has decided other important legal questions outside of the Basin-Wide Issue format.

The "one-party subcase" - a uniquely Idaho experience.

Since the 1994 legislation the Department has not been a party to the SRBA. Consequently, many of the subcases proceed as "one-party subcases," where only the claimant objects to his or her water right (invariably arguing that the Director's report understated it) and no other claimants enter the case as respondents. The special masters generally have afforded little opportunity for testimony from the Department beyond the Director's Report itself, and often have allowed no real examination of the claimant's position in these one-party affairs.

However, as noted above, the legislature designated the Department an "independent expert and technical assistant" in the SRBA and charged it with the duty to "assure that claims to water rights ... are accurately reported," and retained its authority to hold its own fact-finding hearings to produce "a full and adequate disclosure of the facts" supporting each water right. It would seem that this and similar statutory language would afford the court ample latitude to involve the Department in a meaningful way as it determines the facts about each objecting claimant's

water right.

Most claimants outside the one-party subcase are unaware of the precedent the case might set, or are unable to afford getting in. Others may simply believe that somehow the process will end up with water decrees for reasonable, supportable amounts and uses of water, but this remains to be seen. Although the Idaho Supreme Court ruled that these one-party subcases are inappropriate for summary judgment (because that presumes an adversarial process), many of these cases continue to proceed to a “trial” of sorts where the claimant faces little contrary factual evaluation.

A REVIEW OF SEVERAL SIGNIFICANT SRBA DECISIONS

The SRBA has given rise to several important water law issues, and promises to produce more. Some of the more noteworthy are listed below:

Can one forfeit a portion of a water right?

One of the central decisions so far in the case, designated by the SRBA Court as Basin-Wide Issue No. 10, is whether Idaho’s water right forfeiture law, I.C. § 42-222(2), allows the court to find forfeiture of only a part of a water right, or whether the use of any water under a right protects the entire right from forfeiture. The SRBA Court ruled that there is no such thing as “partial forfeiture” under Idaho law—in other words, the use of any portion of a water right maintained the validity of a long-unused (or even unusable) portion.

Obviously, there was a grave concern among many water right claimants—especially juniors—that a ruling upholding the SRBA Court would result in the decreeing of thousands of “paper” water rights in the SRBA and placing rights at risk. Not surprisingly, the Idaho Supreme Court found that a water right can be forfeited either in whole or in part and overturned the SRBA Court.

What is the effect of prior decrees in the SRBA?

Are decrees in prior private water rights adjudications, though affecting only those who were parties, nonetheless “conclusive” and “binding” on the Department and on all SRBA parties as it investigates actual beneficial uses under water rights today, absent a finding of forfeiture or abandonment. This was one of several questions in *State of Idaho v. Hagerman Water Right Owners, Inc.*, 947 P.2d 409 (Idaho 1997).

The Supreme Court, overturning the SRBA Court, ruled that such prior decrees are not binding on the Department or other parties. Also involved in the *Hagerman* case was the issue of whether the Director’s Report should be treated as a mere “presumption” in the adjudication which can be overcome by virtually any evidence offered by the claimant. The Idaho Supreme Court ruled that the report is actual evidence that must be weighed against any other evidence.

Inclusion of “general provisions” in the water rights decree

Idaho’s general stream adjudication statute under which the SRBA proceeds states that the decree of water rights is to include, in addition to the basic elements of each water right, “such general provisions necessary for the definition of the rights or for the efficient administration of the water rights.” I.C. § 42-1412(6). In Basin-Wide Issues 5, 5A and 5B, the SRBA Court had taken an essentially minimalist position on this issue, rejecting as unnecessary several proposed general provisions the Department had recommended. The SRBA Court also had suggested that a general provision should not be included unless it applied to all water rights in the basin equally. The general provisions rejected by the SRBA Court included guidances on the use of water for firefighting, the definition of “irrigation season” for particular areas, the practice of using “excess water” outside the irrigation season, the use of irrigation water for incidental stock watering, and language regarding the relationship between ground and surface waters.

In *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 958 P.2d. 568 (1997), the Idaho Supreme Court rejected the SRBA Court’s view that a general provision must

apply to all rights or none, finding instead that such a provision could apply to less than all water rights in the basin.

The court upheld some of the Department's general provisions and rejected others: for example, a general provision authorizing the use of water for firefighting without a water right was held permissible because it was deemed necessary for the efficient administration of water rights. But a provision addressing the practice of diverting "excess water" was improper because such diversions could not be protected by a water right.

The court also held that, with respect to each irrigation water right, the decree must identify a "specific period of use setting forth a beginning date and an ending date." Consequently, the court rejected the SRBA Court's determination that the period of use should simply be generally described as "the irrigation season." *Id.* at 423. See also *State of Idaho v. Nelson*, 131 Idaho 12,951 P.2d 943 (1998) (pertaining to general provisions regarding rotation of diversions, treating a stream as two separate sources, and specially addressing storage water rights in a particular system).

Conjunctive management of ground and surface water rights

An important part of the Court's decision on Basin-Wide Issue No. 5 was its ruling vacating the SRBA Court's order rejecting the Department's general provision addressing conjunctive management of ground and surface waters. *A & B Irrigation District v. Idaho Conservation League*, 131 Idaho 411, 423, 958 P.2d. 568, 580 (1997). The Idaho Supreme Court stated that the Legislature, in launching the SRBA, intended ground and surface water rights to be decreed and managed together, and ordered the SRBA Court to conduct hearings to determine whether general provisions on this subject are necessary. These hearings have not yet been held.

Currently, litigation is getting underway in an SRBA subcase due to over 1,100 objections to ground water rights filed in Basin 35 in eastern Idaho by two senior surface water diverters: Twin

Falls and Northside Canal Companies. This action may further develop the law of conjunctive management in Idaho.

The conjunctive management issue also arose, at least implicitly, earlier in the SRBA in *Musser v. Higginson*, 125 Idaho 392, 871 P.2d 809 (1994). There, the Idaho court ruled on a narrow point: that the Director has a mandatory duty under Idaho's water distribution statute, I.C. § 42-602, to deliver water upon demand to a holder of a decreed water right.

The court upheld the SRBA Court's writ of mandate requiring the Director to deliver water to serve Mr. Musser's decreed entitlement. The statute applies to adjudicated streams where there are watermasters to administer rights in priority. However, in this case the adjudicated stream was a canyon-wall spring which is fed by the vast Snake Plain Aquifer, and rights in the aquifer had not yet been adjudicated or placed under the management of a watermaster. While there were others who diverted from the spring, the presumed real targets of the action were the ground water pumpers upgradient.

The court's opinion in *Musser* does not address how the statute was to apply to the ground water right holders, who had not yet had an opportunity to have their rights adjudicated as against the spring diverters' surface water rights, or how the ground water pumpers would be provided some sort of due process in the matter.

The *Musser* decision was one of the factors leading to the Department's adoption of conjunctive management rules, which set forth the considerations that are to apply when a delivery call is imposed on ground water rights by senior surface rights. As the writ of mandate itself, the matter became moot when Mr. Musser received a supply of water from another source.

Geographic scope of the SRBA

Early on in the SRBA the Idaho Supreme Court ruled that the Idaho Legislature intended to include, in the adjudication, water rights on previously adjudicated tributaries. Part of the court's

decision was based on the observation that the Legislature intended to leave no doubt that it would have McCarran jurisdiction. *In re Snake River Basin Water System*, 115 Idaho 1, 832 P.2d 289 (1992), *cert. denied* 490 U.S. 1005 (1989).

Can the United States be required to pay filing fees in the SRBA?

The Idaho Supreme Court thought so, but the U. S. Supreme Court gave this question a unanimous “no.” *United States v. Idaho*, 113 S. Ct. 1893 (1993).

Is it constitutional for the Legislature to make changes in the SRBA after this court case has begun?

As noted above, in 1994, seven years after the SRBA had begun, the legislature mandated certain procedural changes in the SRBA and removed the Director as a party. The Idaho Supreme Court upheld virtually all of the significant changes. *State of Idaho ex rel. Higginson v. United States*, 912 P.2d 614 (Idaho 1995) (Basin-Wide Issue Nos. 2 and 3).

Conditions on amnesty for illegal enlargements of water rights

Beginning in 1971 for surface water diversions (1963 for ground water) Idaho legislature prohibited the use of the “beneficial use” or “constitutional” method of appropriation. After these dates, all water rights could be acquired only by obtaining a permit and, ultimately, a license, from the Department. However, when it was writing the general adjudication statute to govern the SRBA, the legislature became aware that many water users have enlarged their uses, often through the adoption of more efficient irrigation techniques, such as sprinklers and pipelines, that seemingly made more water available. This “conserved” water often was simply applied to newly developed land. In response to concerns raised by these irrigators, the legislature enacted an amnesty for these enlargements as part of the 1994 amendments to the adjudication statute, retroactively waiving the mandatory permit statute in their favor in certain circumstances.

The question in Basin-Wide Issue No. 4 was whether the legislature can retroactively validate illegal enlargements of water rights by such a waiver. *Fremont-Madison Irrigation District v. Idaho Ground Water Appropriators, Inc.*, 961 P.2d 1301 (Idaho 1996). The answer is “yes,” but the Idaho Supreme Court cautioned that a waiver cannot operate so as to injure, such as by dilution of priority, any water right existing on the date the amnesty statute was enacted. The effect of this ruling is to require mitigation or a condition, such as a subordination, before an enlargement can be given a date-of-enlargement priority.

**Public trust doctrine’s applicability to water rights:
the court says yes, the legislature says no**

Conservation groups sought to intervene in the SRBA to assert public interest and public trust concerns. They argued that the SRBA Court is to consider and apply the public trust doctrine as a part of its evaluation of water right claims in the adjudication. The Idaho Supreme Court agreed with the SRBA Court that the public trust doctrine is not properly considered in the SRBA, and therefore upheld the denial of intervention. However, the high court stated that “the water rights adjudicated in the SRBA, as with all water rights, are impressed with a public trust.” *Idaho Conservation League v. State of Idaho*, 911 P.2d 748, 750 (Idaho 1995). The Idaho Legislature responded to this ruling by abrogating the public trust doctrine’s application to water in Idaho. See I.C. § 58-1201.

**Irrigators holding only a contract right to receive federal project
storage water lack standing to file objections in the SRBA**

In *Fort Hall Water Users Ass’n. v. United States*, 129 Idaho 39, 921 P.2d 739 (1996), a water users association filed objections in the SRBA to the director’s report of water rights that earlier had been agreed upon in a settlement between an Indian tribe, the State, and numerous other parties. The Idaho Supreme Court held that because the association was not itself a water right claimant, it lacked standing to file objections to the proposed water rights of others. See I.C.

§ 42-1401A(1). The court also noted that the association held only contract rights to receive storage water under rights held by the federal government, and the government had not asserted ownership rights in the SRBA on behalf of the association.

State common law instream water right for wildlife refuge

In *In re Snake River Basin Adjudication, Subcase No. 36-15452*, (the “Smith Springs” case) (decided February 20, 1996), the SRBA Court concluded that the United States had obtained a “beneficial use” or “constitutional method” state water right in the instream flows of a stream and creek system by creating a wildlife refuge and managing wildlife there, despite the fact that it diverted no water. The State and several water user organizations appealed, and the case recently was argued to the Idaho Supreme Court.

Whether federal reserved water rights were created by Public Water Reserve No. 107

President Coolidge’s 1926 Executive Order withdrew and reserved thousands of tracts of public land containing water holes and other water sources used by the public for watering purposes. In Basin-Wide Issue No. 9, the SRBA Court concluded that the Executive Order did not create a federal reserved water right. The Idaho Supreme Court reversed, ruling that the Executive Order was an express statement showing an intent to reserve federal water rights in the waters on these lands. *United States v. State of Idaho (Basin-Wide Issue No. 9—PWR 107)*, 131 Idaho 468, 959 P.2d 449 (1998).

Denial of federal reserved right for instream flow in Snake River to protect islands within wildlife refuge

In 1937 President Franklin Roosevelt established the Deer Flat National Wildlife Refuge near the Snake River, and included within it numerous islands in the river itself. The U.S. Fish & Wildlife Service claimed that Roosevelt's executive order established federal reserved water rights to instream flows in the Snake River to preserve these lands as islands, including channel scouring flows and flows necessary to maintain patterns of land accretion on them. The SRBA Court ruled that there is no federal reserved water right for these purposes. *Memorandum Decision Granting State of Idaho's Motion for Summary Judgment*, In re SRBA, Deer Flat Wildlife Refuge Claims, Consolidated Subcase No. 02-10063, Idaho Fifth Judicial District Court (December 31, 1998). The U.S. Fish & Wildlife Service has appealed to the Idaho Supreme Court. (The State recently moved to dismiss the appeal on grounds that it was not timely filed.)

Municipal water rights

A special master's ruling in 1995 noted that there is substantial authority in Idaho that municipal water suppliers have flexibility, under the prior appropriation doctrine, to acquire water rights for future, reasonably projected growth even though they have not yet fully developed them. While the decision did not rule on this point, it did conclude that the city's water right at issue would not be restricted to specified boundaries as the place of use other than the general notation of the "city limits." *Special Master's Report, Findings of Fact and Conclusions of Law*, In re SRBA, Case No. 39576, Subcase No. 10030 (April 8, 1997). The decision was consistent with the position advanced in the case by United Water Idaho Inc., a municipal water supplier serving the Boise area. Subsequently, the Idaho Legislature passed a statute specifically recognizing, and placing limitations upon, water rights for municipal purposes.

Whether the United States has federal reserved water rights for:

Wilderness areas. *Potlatch Corporation v. United States*, Idaho Supreme Court Docket Nos. 24545-48 and 24557-59 (appeal filed February 24, 1998). This case has been briefed and argued before the Idaho Supreme Court, with a decision expected in the second half of 1999. **See the attached reply brief** of Potlatch Corporation for an explanation of the arguments being made in the SRBA against the application of the reserved water rights doctrine to modern statutes like the Wilderness Act. The SRBA Court's decision finding federal reserved water rights for wilderness can be found at *In re SRBA, Consolidated Subcase No. 75-13605 Order Granting in Part and Denying in Part United States' Motions for Summary Judgment*, Idaho Fifth Jud. Dist. Ct. (Dec. 17 1997). Also on appeal to the Idaho Supreme Court are the SRBA Courts decisions on similar grounds finding federal reserved water rights for the Hell's Canyon and Sawtooth National Recreation Areas. *See* SRBA Consolidated Subcase Nos. 79-123597 (Hell's Canyon) and 65-20766 (Sawtooth).

Wild and scenic rivers. *Potlatch Corporation v. United States, In Re SRBA (wild and Scenic Rivers Claims)*, Nos. 25153 and 25154, (Idaho Supreme Court) (appeal filed November 25, 1998) (currently being briefed to the Idaho Supreme Court). The SRBA Court found that the language in the Wild and Scenic Rivers Act, 16 U.S.C. § 1284(c), expressly created a reserved water right, but denied the United States' motion for a ruling that the reservation was for all unappropriated flows—this second question will be left for trial. *Memorandum Decision Granting in Part and Denying in Part the United States' Motion for Summary Judgment*, Consolidated Subcase No. 75-13316, Idaho Fifth District Court (July 24, 1998).

Channel maintenance flows in National Forests under 1897 Organic Act. The SRBA Court denied the State of Idaho's motion for summary judgment seeking a ruling that the United States had no claim to channel maintenance flows under the Forest Organic Act of 1897. *Memorandum Decision Denying State of Idaho's Motion for Summary Judgment*, Idaho Fifth District Court, *In Re SRBA, Case No. 39576, Organic Act Claims Consolidated Subcase 63-25243* (December 22, 1998). Accordingly, the United States is entitled to put on evidence at trial on the necessity for

channel maintenance flows in streams in on National Forest reservations. The State and other parties have appealed this decision to the Idaho Supreme Court (appeal filed January 5, 1999).

Federal reserved water rights in National Forests under 1960 Multiple Use-Sustained Yield Act.

The SRBA Court ruled that the Multiple Use-Sustained Yield Act (“MUSYA”), 16 U.S.C. §§ 528-531, did not establish any reserved water rights. The United States has appealed this decision to the Idaho Supreme Court. *United States v. City of Challis*, Idaho Supreme Court No. 24560 (appeal filed March 12, 1998).

Whether the Nez Perce Tribe has Indian reserved water rights for substantial instream flows at off-reservation locations in the Snake River, the Clearwater River, the Salmon River, and most of their tributaries.

Discovery and a court-ordered mediation both are continuing in the summer of 1999 on the Nez Perce Tribe’s far-reaching claims. These claims raise the question whether the “Stevens Treaty” of 1855, particularly in light of subsequent treaties and agreements, reserved any instream flow water rights in favor of the Nez Perce Tribe. The claims encompass vast portions of the Snake Basin in Idaho, including the Salmon River drainage, the Clearwater, and significant portions of the Snake.

Duty of water

Several disputes have been fought, and many are ongoing, about the duty of water question. Probably the most notorious to date have been the disputes in the Hagerman Valley along the Snake River west of Twin Falls where many claimants assert a right to more than three miner’s inches of water per acre. (A miner’s inch in Idaho is .02 cfs; 3 inches per acre would account for diversions of about 18 acre-feet per acre in a 150-day irrigation season.) There are instances of claimants asserting the right to over 6 inches per acre. In other instances, claims have been filed on more water than a pipeline or other conveyance system can accommodate.

Other examples

1. Decrees for aesthetic and fish propagation dating back to the original priority date based on an early-century decree that specified only domestic, irrigation and “other uses.”
2. Decrees for more water than claimed, due to the theory that each water right on a ditch is entitled to have a decree for the entire amount of carriage water needed to deliver the water to the claimant’s place of use, and should not be limited to a sharing of conveyance water with other rights. *See, e.g., Findings of Fact and Conclusions of Law, Subcase Nos.36-0003A et al.*, SRBA District Court, Special Master Haemmerle (July 29, 1998).

GENERAL OBSERVATIONS ABOUT IDAHO’S SRBA.¹

General water rights adjudications pose a simple question to the claimant: What is your water right? With the exception of the legal issues raised by some of the federal and Indian reserved water rights claims (or an occasional dispute between private claimants), the answer to this question usually is not difficult to answer, and is tied as much to physics as to law: how many acres actually have been irrigated? what is the capacity of your diversion facility? what is the actual annual volume of water used in your manufacturing plant? When did the use begin? Is it continuing today?

The question may be simple, but in the SRBA achieving the answer often has proved difficult to wrest from the process. With respect to the state-law-based claims, most of the problems, and most of the costs to the parties, can be traced to one or more of the following:

The difficulty and contentiousness that arise when one claims a larger water right than one has, “mistakes paper for water,” disputes the usufructory nature of water rights, or does not know (or neglects to tell) the truth about one’s water right and its use. Coupled with this is the fact that there is no incentive for claimants not to overstate their water rights.

¹ This section is taken largely from a presentation I made to the ABA annual water law conference in San Diego in February 1997. The issues covered in this general discussion have changed little since then.

A failure of the fact-finder to cut through the hail of legal arguments and procedural wrangling that litigants marshal in defense of what they believe their water rights to be—in other words, a failure to zero in on the essential simplicity of the proceeding as to most disputes.

The problems inherent in determining or implementing the judicial procedures for carrying out a general water rights adjudication. These actions are *sui generis* (one-of-a-kind); in large measure, they have to be invented especially for this purpose and often adjusted as they go along. And they are of such a large size that they are bound to be slow and unwieldy in the best of circumstances. There are strong arguments that an adjudication based on initial administrative fact-finding would be more efficient than the formal judicial model, and Idaho's statute actually allows the Department to conduct hearings as necessary. I.C. § 42-1410(1) (in carrying out his investigation of a claimant's use, the Director "may conduct any fact-finding hearing necessary for a full and adequate disclosure of the facts.") However, so far there has been no attempt to use this power.

The legislature attempting to override or shade the appropriation doctrine in favor of certain groups, practices, or types of uses. Such efforts often lead to more litigation. An example in Idaho is the passage of the so-called "amnesty" statutes, whereby the Legislature retroactively waived the mandatory permit requirement for enlargements of use under existing water rights. I.C. § 42-1426. It took a trip to the Idaho Supreme Court for junior water right holders to show that they could not have additional water rights created now with priorities ahead of them.

APPENDIX

**Appellant's Reply Brief In Wilderness Reserved Water Rights Case
Nos. 24545, 24546, 24547, 24548, 24557, 24558 and 24559**

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN RE: SRBA CASE NO. 39576,
WILDERNESS RESERVED CLAIMS,
CONSOLIDATED SUBCASE NO. 76-13605, AND
HELLS CANYON NATIONAL RECREATION AREA CLAIMS,

POTLATCH CORPORATION, A&B IRRIGATION DISTRICT, BURLEY IRRIGATION DISTRICT, TWIN FALLS CANAL CO., NORTHSIDE CANAL CO., HARRISON CANAL CO., BURGESS CANAL & IRRIGATION CO., PROGRESSIVE IRRIGATION DISTRICT, ENTERPRISE IRRIGATION DISTRICT, NEW SWEDEN IRRIGATION DISTRICT, SNAKE RIVER VALLEY IRRIGATION DISTRICT, IDAHO IRRIGATION DISTRICT, EGIN BENCH CANAL, INC., NORTH FREMONT CANAL SYSTEMS, INC., STATE OF IDAHO, DAKOTA MINING CORPORATION, USMX, INC., DEWEY MINING COMPANY, THUNDER MOUNTAIN GOLD, INC., HECLA MINING COMPANY, CITY OF SALMON and CITY OF CHALLIS,

Appellants,

v.

UNITED STATES OF AMERICA,

Respondent.

**REPLY BRIEF OF APPELLANTS POTLATCH CORPORATION,
DEWEY MINING COMPANY, AND THUNDER MOUNTAIN GOLD, INC.**

Appeal from the SRBA District Court of the Fifth Judicial District
of the State of Idaho, in and for Twin Falls County
Honorable Daniel C. Hurlbutt, Jr., Presiding District Judge

Jeffrey C. Fereday, Esq.
Christopher H. Meyer, Esq.
GIVENS PURSLEY LLP
277 North 6th Street, Suite 200
P.O. Box 2720
Boise, Idaho 83701-2720
Office: 208-388-1200
Facsimile: 208388-1201
For Appellants Potlatch Corporation,
Dewey Mining Company and
Thunder Mountain Gold, Inc.

(See Certificate of Service for
additional counsel)

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This Reply Brief is submitted on behalf of Potlatch Corporation, Dewey Mining Company and Thunder Mountain Gold, Inc. (“Water Users”).² These Water Users have appealed from the December 18, 1997 decision of the SRBA District Court, Judge Daniel Hurlbutt presiding, which ruled that the United States is entitled to federal reserved water rights for all the water flowing within and adjacent to wilderness areas in Idaho (the “Decision”), R. Vol. II, pp. 280-302.

I. INTRODUCTION

The “implied reservation of water rights doctrine” (herein, the “Reserved Rights Doctrine”), is properly employed by courts as an interpretive aid where a statute is silent on the issue of water rights through obvious oversight, and, as a result of this silence, Congress failed to expressly reserve a water right that is essential to carrying out the primary purpose of a federal land reservation. The Reserved Rights Doctrine has no application in the wilderness designation statutes at issue here,³ where the congressional inaction on water rights was plainly not inadvertent, but a conscious political choice attended by substantial debate and discussion. To apply the Reserved Rights Doctrine in the face of a congressional decision not to legislate constitutes not only an unwarranted expansion of the doctrine, but an unconstitutional incursion by the judiciary into the legislative arena.

Because the SRBA Court’s decision expands the doctrine in this way, and inserts into the wilderness statutes language which Congress deliberately chose not to include, the decision should be reversed.

² The Water Users’ Opening Brief was filed jointly with Hecla Mining Company. Hecla has elected to file a separate reply brief emphasizing the public land law issues in this case, arguments in which the Water Users concur.

³ These statutes are the Wilderness Act of 1964, 78 Stat. 790, 16 U.S.C. §§ 1131-36 (establishing the Selway-Bitterroot Wilderness); the Hells Canyon National Recreation Area Act, 89 Stat. 1117 (1975), 16 U.S.C. § 460gg(1)-(13) (establishing the Hell’s Canyon Wilderness); the Endangered American Wilderness Act of 1978, 92 Stat. 40, 16 U.S.C. §§ 1132 (establishing the Gospel Hump Wilderness); and the Central Idaho Wilderness Act of 1980, 94 Stat. 948 (establishing the Frank Church-River of No Return Wilderness). These acts will be referred to collectively in this brief as the “wilderness statutes.”

II. ARGUMENT

A. **The power to legislate lies exclusively with Congress. Courts should approach the Reserved Rights Doctrine for what it is: a canon of construction to be employed cautiously, not a delegation of statute-writing authority.**

This case presents a question fundamental to our constitutional form of government: whether Congress makes laws, or whether this is a job that can be transferred to the courts. The answer, of course, is self-evident. Only Congress makes laws. U.S. Const. Art I, Sec. 1 (“All legislative powers herein granted shall be vested in . . . Congress . . .”). The court’s job is to determine what Congress intended by interpreting the statute and, under proper circumstances, its legislative history. It would violate the Constitution if “Congress gives up its Legislative power and transfers it to the President, or to the Judicial branch.” *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405-406 (1928). Likewise, it is constitutionally beyond a court’s province to write into legislation words which Congress considered and debated, but then deliberately left out. This is the case with the wilderness statutes at issue.

For the Court to rule in this case that the wilderness statutes created reserved water rights, the Court must step into the role of making statutory law. This the Court cannot do.

The Reserved Rights Doctrine is not a law. It is not some sort of special rule which automatically or magically transforms congressional silence into an Act of Congress creating a federal water right. The doctrine is a tool the Supreme Court fashioned to determine congressional intent in those unusual cases, like *Winters v. United States*, 207 U.S. 564 (1908), where Congress omitted language expressly reserving a water right under circumstances where the omission plainly was inadvertent and where a protectable water right was essential to the primary purpose of the land reservation. In the *Cappaert* case, the Court ruled that the question in a reserved water rights case is “whether the Government intended to reserve” water for the primary purpose associated with a reservation of land.⁴ *Cappaert v. United States*, 426 U.S. 128,

⁴ The Water Users emphasize, as they did in their Opening Brief, that the wilderness statutes did not constitute reservations of land, and therefore are ineligible for the application of the Reserved Rights Doctrine. However, this argument is covered in Hecla’s and the State’s reply briefs—argument in which the Water Users concur—and will not be further examined here.

139 (1976) (emphasis added). Of course, under our Constitution, this is as much as the courts can do in this area: interpret statutes to determine the intent of Congress.

The United States Supreme Court, which created the Reserved Rights Doctrine, has observed that it is not to be applied by rote without analysis, but only upon “careful examination” of the underlying congressional action. *United States v. New Mexico*, 438 U.S. 696, 701-02 (1978). In that decision, the Court also noted that “Congress’ silence” with regard to the question of water is problematic because any federal water right found to arise from this silence by implication would “vie with other public and private claims for the limited quantities” of water in the arid West. *Id.* at 699. The need for cautious application is underscored because in these statutes Congress is, by definition, silent on the matter of water rights; because any intent to create a reserved right is “implied, rather than expressed”; and because such a finding contravenes Congress’ longstanding policy of deferring to state water law. *Id.* at 701-02. A careful examination here requires a determination of what was meant by Congress’ silence in these wilderness statutes where—unlike the 100-year-old statute being construed in New Mexico—the water rights issue was fully considered by Congress.

The rationale behind the Reserved Rights Doctrine is that, because of the circumstances—such as those where a protected water right was essential to the land designation—express reservation language would have been included had the subject been brought to the lawmakers’ attention. The courts properly may construe a statute in a way that fills inadvertent silence. “But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.” *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1980). Where the matter was squarely placed before Congress and where Congress knowingly declined to act, a court may not supply the missing reservation language without crossing a constitutional barrier.

In sum, despite its lofty name, the Reserved Rights Doctrine is but a license to interpret congressional acts pertaining to land reservations, something courts are well suited to do. It is not, and cannot be, a license to legislate where an informed Congress fails to. The courts have no power to fill a deliberate legislative gap—under any doctrine.

B. In enacting the wilderness statutes, Congress was well aware of the Reserved Rights Doctrine, it debated the question of water rights for wilderness, and, ultimately, it declined to legislate in the area.

As the briefs of the United States and the other parties demonstrate, there is no question whatsoever that, when Congress enacted the Wilderness Act, it knew about and considered water rights issues. It knew full well about the Reserved Rights Doctrine from the Supreme Court's decisions in *Winters v. United States*, 207 U.S. 564 (1908); the "Pelton Dam" decision, *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955); and *Arizona v. California*, 373 U.S. 546 (1963). At the time the Gospel Hump and Frank Church Wilderness areas were designated, Congress also had the benefit of the rulings in *Cappaert* and *New Mexico*, both of which construed pre-Pelton land reservations. In each of the wilderness designation statutes at issue here, Congress considered enacting a federal reservation of water for wilderness. With its eyes open, Congress did not do so. Therefore, neither can any court. This is the essence of this case.

C. The idea that the Congress is entitled to "rely" on the Court to impose federal reserved water rights is repulsive to the constitutional separation of powers.

Much of the discussion contained in the United States' brief appears aimed at demonstrating that Congress is entitled to "rely" on the Reserved Rights Doctrine, on an ongoing basis, to fill in the parts of new federal legislation which Congress deliberately left blank. The model of jurisprudence being forwarded by the United States in this case is one that suggests that Congress need not grapple with the hard political questions—such as overriding state water law—but may count on the courts to handle the tough stuff. It is a model which would place less than all legislative powers in Congress.

Undoubtedly, this would be an attractive situation for some. Politicians, rather than facing up to the hard votes on issues which sharply divide the electorate, could simply adopt some ambivalent, fence-sitting language which neither asserts nor denies anything, issue a superficial press release pandering to as broad a spectrum of voters as possible, and then wash their hands of the matter, leaving the courts to grapple with the political and policy choices, make the tough calls, and, most importantly, take the heat.

This is a contemptuous view of our Congress, and contrary to the Constitution. But it is essentially what is urged by those who advocate the continuing application of the Reserved Rights Doctrine to modern legislation in which Congress was fully aware of the water rights implications of its actions, and, for whatever reason, chose not to reserve water rights.

D. The disclaimer provision is a plain demonstration, in the wilderness legislation itself, that Congress considered, but declined to enact, a reservation of water rights.

The United States' brief contains an extensive discussion about the meaning of the much-fussed-over "disclaimer" language in section 4(d)(6) of the Wilderness Act, and its analogues in the later statutes at issue.⁵ But the United States' argument misses the point. Whether the language constitutes an affirmative declaration that Congress intended no reservation of water rights or whether it means that Congress merely wanted to preserve the current state of the law regarding reserved water rights, the result is the same: under no plausible reading did Congress reserve new water rights for wilderness.

If, as the United States says in its brief, Congress' purpose with the "no claim or denial" language was to prevent the statute from affecting "already existing reserved water rights," then the inquiry needed to resolve this case is truly at an end. The language cannot keep things the same while simultaneously changing them. If its purpose was to maintain the status quo by not affecting existing reserved water rights (such as those ultimately found for National Forest reservations), that is fine. But the same language cannot be read as intending to preserve the status quo while at the same time intending to disrupt the status quo by creating new federal water rights (thereby preempting state water rights which are part of the status quo).

Put another way, the United States' argument is that, in the Wilderness Act, Congress was saying:

"We know all about water rights, reserved and otherwise, and in this statute we're going to disclaim any intention either way about them."

And, argues the United States, while it was saying that, Congress was intending this:

⁵ Section 4(d)(6), 16 U.S.C. § 1133(d)(6), states that "Nothing in this chapter shall constitute an express or implied claim or denial . . . as to exemption from State water law."

“However, we of course do intend that the courts are to construe this Act to find that we implicitly intended to establish reserved water rights for wilderness.”

Such a scenario is simply insupportable. Congress cannot be seen to have considered doing a thing, not do it, announce that it was not making a decision to do it, and then be held to have done it by implication. Upholding the SRBA Court’s ruling in this case would put the Court in the untenable position of writing law which Congress deliberately refused to write itself.

As is discussed in more detail in the next section of this brief, we agree with the obvious fact that Congress addressed the water rights question looming inconveniently in its path. Indeed, the way it addressed it was to studiously steer around it. While Congress spoke in the legislation about water rights, it decided not to expressly say anything about establishing water rights; it deliberately left a gap. It knowingly refrained from acting. It punted. Under these circumstances, it is constitutionally impossible to conclude that the courts now have the power and the duty to find—that is, to enact—a reserved water right. There is no “implication” to support it. Given what Congress knew and openly discussed, any implication that does exist plainly runs the opposite direction.

E. As the United States’ brief demonstrates, Congress was well aware of, and expressly considered, the question of federal reserved water rights—and yet declined to act.

The United States devotes a substantial portion of its brief to elaborating on the fact that the Pelton Dam and Arizona v. California decisions gave rise to serious concerns, reflected in Congress’ wilderness debates, over the question of federal reserved water rights. Exactly so. And this is precisely why no implied reservation of water rights can be found in the wilderness statutes. Given the keen level of interest and debate on the subject, it is impossible to conclude that Congress’ conscious choice not to include language establishing a water right for these areas was overcome by any “implied intent.” No “implied intent” can be built on a foundation of affirmative silence.

Indeed, the United States notes that “various interests attempted to persuade Congress to insert a disclaimer of new federal reserved water rights into any wilderness legislation which might

be enacted.” United States Brief at 25. The United States misses a huge point in presuming that this circumstance helps its cause here. The unavoidable fact is that these alarums—both the decisions regarding past implied reservations of water rights and the requests for an express disclaimer on the subject—themselves proved, and guaranteed, that Congress could not in the wilderness statutes be seen as “implicitly” reserving a water right.

There are other examples where the United States’ own arguments cut against the conclusion that Congress implicitly intended any reserved water right for wilderness. In its brief, the United States recites that, as part of Congress’ consideration of a 1956 wilderness bill, one hearing witness testified that

[t]he Federal courts might well hold that land within such a [wilderness] system was reserved in the same sense as the land involved in the Pelton Dam case, . . . and that State water law need not be followed.

United States’ Brief at 25, n. 21. When viewed in light of the branches’ respective roles, this is a startling statement. It suggests that the courts are in the position of saying to Congress: “You can consider the water rights issue, and choose to be silent on it in the statute you are enacting. But if you are silent, a court can read your silence as the intent to establish a water right.” How could this possibly be? Once the subject of reserved water rights is brought to Congress’ attention—and repeatedly hammered home as it was in the wilderness debates—it is impossible within our constitutional system to interpret Congress’ silence on the subject as not silence, but an affirmative enactment.

The Reserved Rights Doctrine, originating with *Winters*, is that, if Congress had been asked, it would have confirmed that it intended to reserve the right. As the United States has so clearly underscored in its papers here, when Congress considered the wilderness statutes, it was asked—not to mention cajoled, lobbied, coaxed, and reminded—about the question of reserved water rights. Under such circumstances, the only reserved water right that possibly could be achieved in the Wilderness Act is one that was expressly reserved. When the question is asked and silence (or the “neither yes nor no” evasion) is the answer, such a response can be taken only for what it is—intended silence. Not implicit enactment of anything.

F. A water right is not necessary for these wilderness areas, and, in any event, Congress considered the matter and declined to act.

The United States rests a significant portion of its argument on a classic red herring: the argument that Congress could not have intended to establish a “dewatered ‘wilderness’.” State Brief at 20. This rhetoric does not capture what this case is about. There is no cognizable threat to the flow of waters in any Idaho wilderness. In the *Winters* situation, the question was whether the tribe would be able to irrigate lands without a solid, protectable water right that could, to use a phrase from *New Mexico* actually “vie with . . . private claims for the limited quantities” in the Milk River. *United States v. New Mexico*, 438 U.S. at 699. The obvious answer was no. To serve a primary purpose of the land reservation, the tribe needed the guarantee that it could divert water from a stream which also was to serve lands of non-Indian settlers.

Here, the wilderness areas in question do not need a water right to continue to function as wilderness. No one, neither in this case nor in the legislative history of the statutes involved, ever asserted that the problem facing these National Forest wildlands was that they would be dried up—turned into “dewatered wilderness”—without the federal preemption of state water law necessary to create an instream water right with a priority as of the date of the reservation. A need for a preemptive water right for wilderness was never raised in any of the debates about water that took place with regard to the statutes at issue here. The location of these areas, the lack of threats to or significant competition for the water flowing through them, and the management agencies’ powers to control access and any proposed water development within wilderness—all these factors, and more, remove the wilderness situation from those in which a water right is necessary.⁶

In any event, the unavoidable fact is that Congress squarely faced the issue of whether to enact a reservation of water for these wilderness areas and declined to do so. Under these circumstances, and regardless of what the United States and amici might hypothesize about the

⁶ As has been pointed out in the opening briefs to this Court, finding no reserved water right under the Wilderness Act also is consistent with other provisions of the Act. For example, a reserved water right, and certainly one for all the water in these areas, would conflict with the provision in section 1133(d)(4) authorizing the President to approve water development projects in wilderness areas. 16 U.S.C. § 1133(d)(4).

purported “necessity” of an instream water right in these areas, there simply can be no federal reserved water right in this case. The SRBA Court’s decision should be reversed.

It is important also to recognize what a federal reserved water right is. It is a water right that takes its place in a state’s priority line-up of water rights. Although there are many conditions and legal conditions attending any water right, the basic purpose of a water right is to enable its holder to force the curtailment of diversions by more junior rights so that the holder’s water right can be satisfied. In *Winters*, the situation was one where the Milk River was certain to be subject to appropriations by non-Indians who would divert water that then would not be available to the Indians. If the reservation was to function as the federal government intended, then the tribe must have the ability—that is, the legal right—to assert its own priority in the line-up of river diversions. The situation was one where a water right was indicated. Likewise *Cappaert*, where a primary purpose of the land reservation was to maintain a pool of water at a certain level. Doing so would be impossible without a protectable water right.⁷

It is difficult to overstate the contrast between the sharp necessity which gave rise to the Reserved Rights Doctrine in the context of the *Winters* line of cases and the facts of this case. In this case, there is no clear reason why a water right is necessary to protect water flows or any other values in the Idaho wilderness areas. Idaho wilderness areas face no credible threat to their ecological integrity from the modest needs of upstream water users in these remote areas.

Moreover, the concerns Congress may have had with maintaining water quantity and water quality within wilderness areas are not dependent upon the creation of federal reserved water rights. Indeed, the Wilderness Act provides federal managers with an arsenal of regulatory weapons to address these issues.

Finally, wilderness areas will not be deprived of all federal water rights in wilderness even if there are no wilderness reserved water rights. The Idaho wilderness areas at issue in the present case all were designated within pre-existing National Forest land reservations. Under the Supreme Court’s decision in *New Mexico*, these underlying reservations already are entitled to

⁷ At first glance, the forest reserves seem to present a less clear picture. However, the 1897 Organic Act plainly expresses an intent to establish protected water flows in National Forests. Since neither Congress nor the Executive addressed the water rights question in the legislation or in the reserving documents themselves, it was appropriate for the Court to find an implied reservation. The wilderness statutes present a completely different picture because Congress addressed the water rights issue and declined to act.

assert federal reserved water rights for the forest purposes enumerated in the 1897 Organic Administration Act, 16 U.S.C. §§ 473 et seq.

This not only puts the lie to the “wilderness without water” scare tactic. It also explains why the majority in Congress did not feel compelled to attach to the wilderness legislation a measure abrogating state water law in favor of additional federal reserved rights for the new wilderness purposes. Instead, Congress found it sufficient to maintain the status quo, that is, existing federal water rights for national forest purposes. In short, unlike the challenge faced with Indian irrigation, the desert pupfish, or even national forests, the creation of water rights in derogation of state law is not essential to the achievement of the federal purpose for wilderness.

G. It is inconceivable that Congress intended to bar the communities and private inholdings situated upstream from the Frank Church-River of No return Wilderness from acquiring any water rights after 1980.

The federal government asks the Court to imagine wilderness without water. Water Users respond such an image is imaginary indeed. As discussed in the prior section, there is simply no present threat to our wilderness which could result in dewatering wilderness streams and rivers.⁸

A more realistic question is whether one can imagine Thunder Mountain Gold, Inc., and Dewey Mining Company, as well as cities and towns such as Salmon, Challis, Leadore, and Stanley without any new water supply. These entities all are situated upstream from the Frank Church-River of No Return Wilderness, and all hold water rights, some junior to the date of the wilderness designation. If the District Court is correct, the Congress intended in 1980 permanently to bar every upstream user within Idaho from ever again acquiring a consumptive water right. Unlike the concocted frenzy over “wilderness without water,” the situation faced by water users upstream of wilderness area is stark, real and immediate.

⁸ Even though there is no plausible current threat to wilderness rivers and streams, the Court may be concerned that at some time in the future some threat, unknown today, might arise. Conceding solely for purposes of discussion that such a threat could emerge some day, Water Users respond that the Reserved Rights Doctrine has never been used or intended to address remote or hypothetical concerns.

III. CONCLUSION

The Reserved Rights Doctrine cannot possibly be more than a canon of construction, a means of helping to uncover what Congress intended. In *Winters*, *Cappaert*, and *New Mexico*, the question was: “What must Congress have intended by enacting this land designation—one for which an actual, protected water right would prove essential—given that it did not consider the water rights question?” Here, the situation is radically different, because the question is: “What must Congress have intended by enacting this wilderness land designation, given that it did consider the water rights question and failed to include an express reservation?” There can be no finding here of inadvertent omission. The courts cannot fill the purposeful gap.

The United States’ brief uncloaks a starkly monolithic version of the Reserved Rights Doctrine, and makes no effort to mask the startlingly rigid application of the Reserved Rights Doctrine which it urges on this Court. The United States describes a rule of law in which deciphering the intent of the Congress is not even the objective. Rather, the United States’ brave new vision of the Doctrine is that of an automatic, immutable federal override of state water law—regardless of the circumstances surrounding the legislation or the intent of the legislators—any time the government creates a new reservation which, in some abstract way, could be said to “need” water. Such a vision is contrary to the rules of statutory construction and to the roles of the legislature and the judiciary as coordinate branches of government.

The Water Users urge this Court to reverse the SRBA Court’s decision and hold that the United States is entitled to no reserved water rights under the wilderness statutes.

Respectfully submitted this 11th day of December, 1998.

GIVENS PURSLEY LLP

By _____

Jeffrey C. Fereday
Christopher H. Meyer

Attorneys for Potlatch Corporation,
Dewey Mining Company and
Thunder Mountain Gold, Inc.