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FEDERAL RESERVED WATER RIGHTS AS A RULE OF LAW

MICHAEL C. BLUMM*

Reserved water rights—in which the federal government retains sufficient water to carry out the purposes of federal land reservations¹—have never been popular among the Western water diversion lobby, some of whom view these federal water rights with alarm and steadfast opposition. Although first articulated by the Supreme Court over a century ago,² federal water rights are seen throughout the West as a threat to established rights holders because their early priority dates could defease what they assumed were vested property rights.³ If there are actually any diverters who've been

* Jeffrey Bain Faculty Scholar & Professor of Law, Lewis and Clark Law School. Many thanks to Hope Babcock, Reed Benson, Barb Cosens, Rob Glicksman, Eric Freyfogle, John Leshy, Zyg Plater, and Sandi Zellmer for commenting on a draft of this essay. Thanks also to Sam Shurts, 2L, Lewis and Clark Law School, for research assistance. Dedicated to the memory of Frank J. Trelease, who taught me water law through his casebook in a law school class in 1975 and again in 1980, when he visited Lewis and Clark Law School to teach a summer school class.

1. *See generally* 2 WATERS AND WATER RIGHTS ch. 37 (Amy K. Kelley ed., 3rd ed. 2014) (comprehensive analysis of federal reserved water rights).

2. *Winters v. United States*, 207 U.S. 564, 577 (1908) (“The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. . . . That the Government did reserve them we have decided and for a use which would be necessarily continued through the years.”). Thus, reserved rights are so-named because they reserve water from state systems of allocation.

3. Western water law is a system of state-granted usufructuary rights that allocated rights to water diverters based largely on the mining-camp rule of temporal priority (thus, the name “prior appropriation law”), or “first in time, first in right” to put water to a “beneficial use.” Beneficial use, an anti-waste concept, was also the measure of a water right. Failure to use resulted in forfeiture of the right, since the system was premised on putting property rights in water into as many hands as possible and out of the hands of speculators. Another antimopolization concept concerned the fact that rights-holders did not have to own land as under the riparian rights system governing Eastern water. *See generally* DAVID SCHORR, THE COLORADO DOCTRINE: WATER RIGHTS, CORPORATIONS, AND DISTRIBUTIVE JUSTICE ON THE AMERICAN FRONTIER (2012). Although founded on antimopolization principles, the alienability of Western water rights encouraged transfers that led to domination by large landowners, mostly irrigators. *See, e.g.*, DONALD W. WORSTER, RIVERS OF EMPIRE: WATER, ARIDITY, AND THE GROWTH OF THE AMERICAN WEST (1985).

The beneficial use concept could have been (and still might be) used to update prior appropriation law in the twenty-first century, but in the hands of state water agencies captured by the water diversion lobby, it has not. *See* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: the Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 958–59 (1998). Absent a modern version of beneficial use, Western law has become extremely rigid and hierarchical, far from the intentions of its founders, now controlled by the few at the expense of the many. The system is unlikely ever to change, given the inheritability of water rights as well as the ability to sell to the highest bidder.

Modernization of Eastern water has come by converted common law riparian rights into rights granted for a term. *See* 2 WATERS AND WATER RIGHTS, *supra* note 1, at § 9.03(a)(4) (noting a variety of approaches to the length of the term for so-called regulated riparian rights, from 20 to 50 years). Although a state’s attempt to convert Western prior appropriation rights into term rights would likely be resisted as an unconstitutional taking without just compensation, if the state were California—where there are no vested water rights under the *Mono Lake*

defeated by federal reserved rights, however, they've been few and far between.⁴

Once thought to be expansive in their scope, the U.S. Supreme Court confined reserved waters on the largest federal land system with reserved rights—the national forest system—to timber production and watershed protection nearly four decades ago.⁵ Moreover, many federal rights have been integrated into state water systems as a result of water right settlements, most notably in Montana.⁶ But reserved rights still generate hostility and

doctrine, *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 732 (Cal. 1983)—the takings claim would fail. Outside of California, conversions could be upheld by analogy to the law of amortization of non-conforming land uses. See 1 JULIUS L. SACKMAN ET AL., *NICHOLS ON EMINENT DOMAIN* § 1.42[10] (3rd ed. 2015) (discussing various amortization provisions in the context of zoning law). Moreover, in Idaho, it is hardly clear that a takings claim for a water right could succeed given the clear legislative pronouncement of the public nature of all the water in the state:

All the waters of the state, when flowing in their natural channels, including the waters of all natural springs and lakes within the boundaries of the state are declared to be the property of the state, whose duty it shall be to supervise their appropriation and allotment to those diverting the same therefrom for any beneficial purpose, and the right to the use of any of the waters of the state for useful or beneficial purposes is recognized and confirmed; and the right to the use of any of the public waters which have heretofore been or may hereafter be allotted or beneficially applied, shall not be considered as being a property right in itself, but such right shall become the complement of, or one of the appurtenances of, the land or other thing to which, through necessity, said water is being applied . . .

IDAHO CODE ANN. § 42-101 (West 2015).

4. Dean Trelease found few, if any, practical effects of reserved rights on state rights-holders. FRANK J. TRELEASE, *NAT'L WATER COMM'N, FEDERAL-STATE RELATIONS IN WATER LAW* 758, 769 (1971); Frank J. Trelease, *Federal Reserved Water Rights Since PLLRC*, 54 *DENV. L.J.* 473, 491–92 (1977) (“[N]ot a single case of harm has been reported . . . for all of the outcry . . . not one state, not one county, not one municipality, not one irrigation district, not one corporation, not one individual has come forward to plead and prove that the United States...has destroyed any private right.”).

5. *United States v. New Mexico*, 438 U.S. 696, 707 (1978) (denying reserved water rights for fish and wildlife, recreation, and aesthetic purposes on national forest lands); see also Sally K. Fairfax & A. Dan Tarlock, *No Water for the Woods: A Critical Analysis of United States v. New Mexico*, 15 *IDAHO L. REV.* 509, 509–54 (1979) (criticizing the Court's decision).

6. Established in 1979, the Montana Reserved Water Rights Compact Commission acts as a mediator between Montana, its people, and tribes and federal agencies claiming reserved water rights within the state. The Commission negotiates settlements on behalf of the state, which are then ratified by the Montana legislature, the tribes, and federal authorities. *Reserved Water Rights Compact Commission*, MONTANA.GOV, <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission> (last visited Nov. 29, 2015). Barbara Cosens has written extensively on the Montana water rights settlements in the following articles: *Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-wide Problem Solving*, 33 *ENVTL. L.* 949 (2003); *A New Approach in Water Management or Business as Usual? The Milk River, Montana*, 18 *J. ENVTL. L. & LITIG.* 1 (2003); *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*, 16 *UCLA J. ENVTL. L. & POL'Y.* 255 (1997–1998); *Negotiation of the Montana—National Park Service Compact*, 5 *RIVERS* 35 (1995) (published with co-authors D. Amman and J. Specking).

litigation. A prominent example is the series of cases growing out of the Snake River Basin Adjudication (SRBA), Idaho's massive McCarran Act adjudication that consumed three decades and countless billable hours for water lawyers.⁷

Two veterans of that litigation, Jeff Fereday and Chris Meyer,⁸ seek to continue an unsuccessful argument they made in the SRBA wilderness case⁹ in the pages of this journal.¹⁰ They claim that the implied reserved water rights doctrine—under which federal water rights have been created by land reservations since 1908 if necessary to carry out the purposes of the reservation—no longer exists.¹¹ The doctrine disappeared, according to Fereday and Meyer, in 1955 when the Supreme Court first hinted in the *Pelton Dam* decision that the reserved rights doctrine might not be limited to Indian reservations.¹² This judicial hint, they maintain, had the effect of imposing on Congress the duty to expressly claim or disclaim federal water rights in post-1955 land reservations.¹³ After that date, their argument goes, Congress could no longer assume that the judicially created doctrine of federal water rights would persist, and therefore had to expressly reserve water rights in land management statutes.¹⁴ In effect, their claim is that legislative history revealing congressional debate over the reserved rights issue categorically ended the implied reserved water rights doctrine.¹⁵

7. The SRBA was a 27-year legal effort to resolve numerous disputes and determine water rights in the Snake River Basin. The adjudication began in 1987, developing out of the Swan Falls Agreement between the State and Idaho Power Co., and its "Final Unified Decree" was signed on August 25, 2014. See generally 42 IDAHO L. REV. No. 3 (2006); Symposium on the Settlement of Indian Reserved Water Rights Claims (2005). Some of the important case law that the SRBA generated include: *United States v. State*, 959 P.2d 449, 131 Idaho 468 (1998) (the Pickett and Stock-Raising Homestead Acts included express congressional intent to reserve federal water rights); *United States v. Challis*, 988 P.2d 1199, 133 Idaho 525 (1999) (the federal Multiple-Use Sustained-Yield Act created no federal reserved water rights); *Potlatch Corp. v. United States (Potlatch II)*, 12 P.3d 1260, 134 Idaho 916 (2000) (no reserved federal water rights for wilderness areas; limited water rights for the Hells Canyon National Recreation Area as well as under the Wild and Scenic Rivers Act); *Idaho v. United States (Sawtooth)*, 12 P.3d 1284, 134 Idaho 940 (2000) (no federal water rights for the Sawtooth National Recreation Act); *United States v. State (Deer Flat)*, 23 P.3d 117, 135 Idaho 655 (2001) (no federal water rights for the Deer Flat National Wildlife Refuge).

8. Fereday and Meyer represented Potlatch Corp., various irrigation districts, canal and mining companies, and the cities of Salmon and Challis, Idaho.

9. *Potlatch II*, 12 P.3d at 1283–84, 134 Idaho at 939–40 (in which their clients prevailed, although not on the theory they propound in their journal article).

10. Jeffrey C. Fereday & Christopher H. Meyer, *What is the Federal Reserved Water Rights Doctrine, Really? Answering This Question in Idaho's Snake River Basin Adjudication*, 52 IDAHO L. REV. 341 (2016).

11. *Id.* at 343.

12. *Fed. Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435, 443–45 (1955) ("[T]he project is to occupy land which come within the term 'reservations' as distinguished from 'public lands' Since the Indian Treaty of 1855, the lands . . . have been reserved for the use of the Indians. More recently, they were reserved for power purposes").

13. Fereday & Meyer, *supra* note 10, at 343–44.

14. *Id.* at 344.

15. *Id.*

The Fereday/Meyer thesis was adopted by one, and perhaps both, of the concurrences in the SRBA's wilderness water decision—a fractured and bloody 3-2 decision,¹⁶ reversing a 3-2 decision the year before.¹⁷ Although their clients prevailed when the Idaho Supreme Court eliminated the biggest reserved rights threats to irrigation and municipal diverters in the state, the authors now seek to bag bigger game, in the hope of exporting their flawed theory elsewhere.¹⁸

This responsive essay suggests that the Fereday/Meyer thesis has some serious holes in it. But they are fortunate to be able to argue before exceedingly friendly state courts, whose judges must run for reelection.¹⁹ The pressure their clients with diversionary water rights can bring to bear in a state like Idaho was of course evident in the judicial sacking of the author of the original SRBA wilderness water rights which recognized the federal rights.²⁰ Justice Cathy Silak was electorally ousted by the organized opposition of the irrigation community and perhaps the Republican Party.²¹

16. For the majority's reasoning, see *infra* notes 45–49 and accompanying text.

17. Before the case was reheard, Fereday and Meyer's clients lost 3-2. *Potlatch Corp. v. United States (Potlatch I)*, No. 24546, 1999 WL 778325, at *2 (Idaho Oct. 1, 1999), *superseded on reh'g sub nom. by Potlatch II*, 12 P.3d 1260, 134 Idaho 916 (2000). After they successfully petitioned for rehearing, the Idaho Supreme Court reversed itself, again by a 3-2 split, because Chief Justice Linda Copple Trout switched sides after Justice Cathy Silak, who wrote the majority opinion in *Potlatch I* (and the dissenting opinion in *Potlatch II*), was subjected to an intense political backlash. Silak ultimately lost her seat on the court to Daniel Eismann, whose campaign was openly critical of *Potlatch I*.

The court's reversal was widely criticized as the product of interest group politics and difficult to separate from the charged political atmosphere surrounding the ousting of Justice Silak. See Gregory J. Hobbs, Jr., *State Water Politics Versus an Independent Judiciary: The Colorado and Idaho Experiences*, 5 U. DENV. WATER L. REV. 122 (2001); Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights For Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173 (2002) [hereinafter *Reversing Winters*]; Justin Huber & Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 16 U. DENV. WATER L. REV. 261 (2013). See also *infra* note 19 and accompanying text.

18. Fereday & Meyer, *supra* note 10, at 351–52.

19. See Huber & Zellmer, *supra* note 17, at 267, 278, 284.

20. See *id.* at 284–85.

21. See Hobbs, *supra* note 17, at 140–42. Justice Silak's opponent, current Justice Daniel Eismann, announced that he opposed abortion rights and evolution as part of his campaign, and he benefited from what appeared to be an illegal push-poll late in the election that he declared he had no part in arranging. See Brennan Center for Justice, *Idaho Judicial Elections* 1–3 (Dec. 12, 2002) (noting that the 2000 election between Justice Silak and Eismann broke the record as the most expensive in Idaho judicial election history). On the Republican Party's involvement, see John D. Echeverria, *Changing the Rules by Changing the Players: The Environmental Issue in State Judicial Elections*, 9 N.Y.U. ENVTL. L. J. 217, 243–52 (2001) (noting that Eismann received major financial support from the party, spoke at a party fund-raiser, and generated an election complaint from former Idaho Supreme Court justice Robert Huntley, which alleged that Eismann violated a state constitutional prohibition against judicial candidates being endorsed by a political party).

The abrasive 2000 campaign spilled over into Chief Justice Trout's reelection campaign the following year, despite her changed vote in the wilderness water case. Although she did win reelection, a similarly fractious campaign led her to resign before her six-year term ended. See *infra* note 58. Thus, both campaigns continue to affect the makeup of the Idaho Supreme Court over a decade later.

Given such favorable fora, it is possible that Fereday and Meyer may succeed. The costs of their success will be imposed on fish and wildlife whose habitat lies on federal lands, on recreationalists, and on those who think Western streams shouldn't dry up every summer. Public Choice political theory predicts that the better organized water diverters will eventually prevail over federal instream claims.²² Fereday and Meyer aim to ensure that the proponents of federal water rights lose their principal legal defense against state diverters: the implied reserved water rights doctrine.

This brief response explains the great success that Fereday and Meyer and other challengers to federal reserved water rights have achieved in Idaho courts, results that may be a harbinger of the fate of implied reserved water rights elsewhere, then examines their argument for the complete evisceration of the implied reserved rights doctrine. This essay maintains that the Fereday/Meyer thesis should not be adopted by state courts because legislative history reflecting congressional knowledge of or debate over an issue cannot overturn a long-established Supreme Court doctrine without some specific action by Congress. Legislative history revealing congressional debate and inaction is simply not a substitute for an express statement by Congress, which has repeatedly shown it knows how to disclaim reserved water rights when it wishes to do so.²³ First, however, the Fereday and Meyer's article warrants criticism for its failure to grasp the concept of reserved property rights in natural resources like water.

I.

The concept of reserved rights grows out of the basic property law principle of reserving pre-existing rights. Thus, when the federal government reserves land for a particular purpose of what was once the vast public domain, it is not creating new rights but maintaining old ones.²⁴ New land rights were available for private acquisition from the federal government—and sometimes from the states and railroads.²⁵ In the case of water, Congress and the federal government allowed the states to determine private rights in water for lands that were privatized. But that didn't mean that the federal government renounced water rights for its retained lands, as the Supreme Court

22. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Michael C. Blumm, *Public Choice Theory and the Public Lands: Why Multiple Use Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

23. See *infra* notes 81–83.

24. My thinking in this section benefited from comments from my casebook coauthor, Eric Freyfogle. See generally ERIC T. FREYFOGLE ET AL., *NATURAL RESOURCES LAW: PRIVATE RIGHTS AND THE PUBLIC INTEREST* (West 2015).

25. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* §§ 13:19–13:23 (2d ed. 2015) (discussing land grants and sales to private entities).

made clear in the 19th century.²⁶ Lands owned by the federal government included all appurtenant natural resources like forests, oil and gas, and water until they were privatized.

Beginning in the late 19th century and continuing to this day, Congress and the Executive began to “reserve” lands for particular purposes, meaning they would no longer be subject to the otherwise applicable disposition laws. Such land reservations did not actually create new water rights, any more than a landowner reserving a profit a prendre in land she is donating to another party is creating a new right.²⁷ She is instead reserving a pre-existing right. Reservations are commonplace in private land transactions. A reserved right is a declaration that the landowner intends to hold pre-existing rights. In the case of reserved water rights, the federal landowner is simply halting the disposition of resources it already owns. Thus, a federal reservation right is merely declaratory of pre-existing rights, not a new property right created at the time of the land reservation.²⁸

In the case of reserved water rights, which courts have upheld reservation date priority rights as an accommodation to state systems of water allocation and to the deference to state laws consistently expressed in a number of federal statutes,²⁹ Congress certainly can and has made its specific intent known in numerous directives, many cited by Fereday and Meyer.³⁰ But it need not do so to reserve a pre-existing right. The rule of reserved rights law is that water is part of the land, no less appurtenant than trees or minerals. The fact that states have adopted contrary water rights systems does not mean that states may change federal property law, even if the federal government seeks to accommodate state law whenever possible.

26. *United States v. Rio Grande Dam & Irrigation Dist.*, 174 U.S. 690, 703 (1899) (observing that the states’ power to create water rights was subject to two limitations: 1) they cannot “destroy the right of the United States as [a landowner] to the continued flow of the waters; so far at least as may be necessary for these beneficial uses of the government property, and 2) impede the navigable capacity of streams).

27. A profit a prendre, which the Restatement has now shortened to “profit,” is the right to take and remove a natural resource in land owned by another. *See* RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 1.2 (2000).

28. The fact that federal reserved rights have reservation priority dates is due to the federal courts’ efforts to accommodate state water allocation systems by incorporating federal rights into the states’ temporal priority schemes. Accommodating state systems of water allocation is a consistent congressional policy, evidenced by the 1952 McCarran Amendment, 43 U.S.C. § 666 (waiving federal sovereign immunity to allow federal water rights to be determined in state comprehensive water adjudications) and in section 8 of the 1902 Reclamation Act, 43 U.S.C. §§ 372, 383. *See generally* Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 268–85 (2006) (emphasizing, however, that congressional deference to state water law is not invariable).

29. *See, e.g.*, statutes *supra* note 28; *infra* note 30; *see also* section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g) (deferring to state water allocation systems) and section 101(c)(2) of the Endangered Species Act, 16 U.S.C. § 1531(c)(2) (calling for federal and state cooperation in the conservation of listed species). *See* Benson, *supra* note 28, at 298–311.

30. *See* Fereday & Meyer, *supra* note 10, at 351–52; *see also* John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn of the Century Evaluation*, 4 U. DENV. WATER L. REV. 1001, 1016–19 (2001) (citing statutes).

It is not inaccurate to think of the federal reserved water right as based on intent,³¹ since when Congress enacts a statute, the issue of intent is foremost. Congress can expressly establish or renounce reservation water rights and has often done so.³² Fereday and Meyer seem confident that it will continue to do so.³³ If they are right, future reservations are likely to expressly reserve or disclaim water rights. If Congress consistently does so, federal reserved water rights will indeed become a function of express congressional intent.

As for existing reservations without express legislative intent, however, they possess federal water rights,³⁴ just as a private land sale implicitly includes fixtures absent an express provision to the contrary.³⁵ State law may refuse to recognize federal rights, refuse to quantify them, refuse to enforce them. But it may not overturn them,³⁶ as the Idaho Supreme Court has repeatedly done³⁷—in what will be long regarded as a consequence of tainted judicial electoral politics.³⁸ That court’s judicial integrity would have better preserved had it affirmed the SRBA court on the existence of federal rights but remanded the issue of the amount of water “necessary” to fulfill wilderness purposes. No doubt the issue would have settled, as many other water disputes have,³⁹ and likely in the state’s favor, perhaps with the federal government subordinating its rights to existing rights and maybe some future ones.⁴⁰ Even if such a result led to capping water diversions in cities like Salmon and Challis, that would not have necessarily been a bad thing, as it no doubt would have produced viable water markets, which might have been

31. However, the *Winters* doctrine is part of a long tradition of judicial implication of federal rules to protect federal property against non-recognition by state laws. *See, e.g.*, *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973) (refusing to allow Louisiana to single out minerals reserved under lands purchased by the federal government for a wildlife refuge for special “anti-lapse” treatment); *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974) (rejecting an attempt by North Dakota to frustrate federal acquisition of waterfowl areas by refusing to recognize waterfowl easements), discussed in GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 178–87 (7th ed. 2014) (further arguing that these principles support a federal reserved water right for the Great Sand Dunes National Monument, established in 2000, 16 U.S.C. § 410hhh-7).

32. *See infra* notes 81–83 and accompanying text. *See* COGGINS ET AL., *supra* note 31, at 514–16 (citing statutes expressly reserving and renouncing reserved rights).

33. Fereday & Meyer, *supra* note 10, at 344, 351.

34. *United States v. Winters*, 207 U.S. 564, 577 (1908).

35. *See* RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* § 57.05 (2000) (defining and discussing fixtures).

36. *See* Benson, *supra* note 28, at 260–61, 268–74, 278–80 (explaining that state law cannot change federal property law, even if the federal government often defers to state water law). Under a basic public land law rule of construction, federal land grants are construed favorably to the government, with doubts resolved in its favor. *See* *United States v. Union Pacific R.R.*, 353 U.S. 112, 116 (1957); *see also* John D. Leshy, *A Property Clause for the 21st Century*, 75 U. COLO. L. REV. 1101, 1106–15 (2004).

37. *See infra* notes 41–43 and accompanying text.

38. *See supra* notes 17, 21; *see infra* note 58 and accompanying text.

39. *See* WATERS AND WATER RIGHTS, *supra* note 1, § 37.04(c) (discussing both Indian and non-Indian water settlements).

40. *See infra* note 55.

models in the coming era of climate change. Instead, the Idaho court used tortured logic to reach a result that the water diversion lobby sought, which might not prove to be in the best long-term interests of the state. Fereday and Meyer seek to export the promise of the Idaho result—if not the theory—to other Western states. This would be a bad idea for a number of reasons, as explained below.

II.

The SRBA results have been fairly catastrophic to federal reserved water rights in Idaho. The Idaho Supreme Court declared that wilderness areas in the state have no reserved rights because, unlike reserved rights for Indian reservations, wilderness reserved rights did not benefit from favorable rules of statutory construction which allowed the U.S. Supreme Court to imply water rights in the lodestar case of *Winters v. United States*.⁴¹ Reversing the SRBA court, the Idaho Supreme Court buttressed its rejection of reserved water for wilderness with some legal legerdemain about the 1963 U.S. Supreme Court's decision in *Arizona v. California*, which recognized non-Indian reserved rights;⁴² a misinterpretation of the Court's 1976 decision in *Cappaert v. United States*--which applied reserved rights against off-reservation groundwater pumping⁴³--a complete disregarding of specific language concerning watershed preservation, fish and wildlife, and resident and anadromous fish protection in the statutes creating the individual wilderness areas

41. *Potlatch II*, 12 P.3d 1260, 134 Idaho 916 (2000). The *Winters* case, 207 U.S. 564 (1908), adopted the reasoning of the Court three years earlier in litigation over tribal access to fishing sites on the Columbia River. *United States v. Winans*, 198 U.S. 371 (1905). See WATERS AND WATER RIGHTS, *supra* note 1, §§ 37.01(b)(2), 37.02(a)(1).

42. In *Arizona v. California*, 373 U.S. 546, 601–02 (1963), the Court ruled that national forests, national wildlife refuges, and national recreation areas had reserved rights to Colorado River water. The Idaho Supreme Court discounted the Colorado River decision because the Wilderness Act lacked a so-called “standard of quantification.” *Potlatch II*, 12 P.3d at 1266, 134 Idaho at 922. The court never explained why the reservations in the Colorado River case had a quantification standard but those in the SRBA cases did not, nor that quantification issues are a separate issue from the existence of a reserved right. In fact, the “quantification standard” lies in the purpose of the statute or executive document establishing the reservation, and the amount of water reserved is that which is “necessary” to effectuate those purposes.

43. *Cappaert v. United States*, 426 U.S. 128 (1976) (upholding the application of reserved water rights against off-reservation groundwater pumping to protect the fish purposes of Devils Hole National Monument in Nevada).

at issue;⁴⁴ and extremely narrow interpretation of the Wilderness Act's disclaimer clause concerning water rights.⁴⁵ The Idaho court also rejected reserved rights for both the Sawtooth National Recreation Area (NRA) and the Deer Flat National Wildlife Refuge, again reversing the SRBA court.⁴⁶ In the former, after the SRBA court awarded rights for the NRA, the state supreme court, on a 4-1 vote, construed the relevant statutory disclaimer clause to deny reserved rights.⁴⁷ In addition, the court interpreted the purpose of the NRA to not require reserved water to fulfill the reservation's primary purposes, even though the statute expressly included recreation and preservation and protection of the area's fish and wildlife, including salmon.⁴⁸ The court reasoned that, despite this express language, the overarching purpose of the Sawtooth NRA was to preserve the land from mining and residential development, a purpose that apparently required no water.⁴⁹ Thus, the court narrowly construed the purpose of the reserve, despite express language concerning protecting fish that was remarkably similar to the language in Devils

44. The Idaho court seemed to suggest that the federal government waited longer in the SRBA wilderness case to file suit than it did in *Cappaert*. *Potlatch II*, 12 P.3d at 1267, 134 Idaho at 923. But that simply wasn't true. See *Reversing Winters*, *supra* note 17, at 192. The court also ignored *Cappaert's* declaration that federal reserved water rights were not dependent on "competing equities." *Cappaert*, 426 U.S. at 138-39. Thus, the court felt free to emphasize statements in the legislative history of the 1964 Wilderness Act that the court thought reflected accommodations with economic concerns in that statute. See *Reversing Winters*, *supra* note 17, at 193.

45. The court interpreted the Wilderness Act's confusing disclaimer provision—stating that the establishment of a wilderness was not an "express or implied claim or denial" of a reserved right to neither establish nor preclude the establishment of a reserved right if one is otherwise expressly reserved. 16 U.S.C. § 1133(d)(6) (2012); *Potlatch II*, 12 P.3d at 1266, 134 Idaho at 922. But, according to the court's majority, that interpretation meant that the disclaimer overturned the Supreme Court's implied reserved rights doctrine, as decided by the U.S. Supreme Court in both *Arizona* and in *Cappaert*, without saying so. *Id.* A more persuasive interpretation of the disclaimer was that Congress aimed to preserve the status quo, including the judicially created doctrine of implied reserved rights. This is the interpretation of the Interior Solicitor, 86 Interior Dec. 553, 609-10 (1979), discussed in BARTON H. THOMPSON, JR. ET AL, LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 1055 n.18 (5th ed. 2012). Because the disclaimer says that Congress is expressly not denying the existence of reserved rights, that statement would seem to be a sufficient refutation of the Fereday/Meyer thesis concerning congressional intent.

46. *Sawtooth*, 12 P.3d 1284, 134 Idaho 940 (2000); *Deer Flat*, 23 P.3d 117, 135 Idaho 655 (2001).

47. *Sawtooth*, 12 P.3d at 1286, 134 Idaho at 942 (construing 16 U.S.C. § 460aa-8(a) (2012)).

48. *Id.* at 1288-89, 134 Idaho at 942-43 (interpreting 16 U.S.C. §§ 460aa(a), -1(a), -1(b), -2, -3(a) (2012)).

49. *Id.* at 1290, 134 Idaho at 943 (although "we agree fish require water, we do not agree judicial notice of this fact establishes that without such water the purposes of the non-wilderness portion of the Sawtooth NRA will be entirely defeated."); see also *id.* at 1290-91, 134 Idaho at 943-44 ("the Act was [only] intended to protect fish and wildlife habitat caused by mining operations within the wilderness area").

Hole Monument that the U.S. Supreme Court in *Cappaert v. United States* concluded reserved federal water rights.⁵⁰

In the latter case, the Idaho court decided that the Deer Flat National Wildlife Refuge, consisting of nearly a hundred islands in over a hundred miles of the Snake River for the purpose of establishing “a refuge and breeding ground for migratory birds and other wildlife,” did not require reserved water because the purpose of the refuge was merely to protect the birds from hunters, not from water depletions that could connect the islands to adjacent lands, exposing the birds to predators.⁵¹ The court also decided that the executive order establishing the refuge contained no standard for quantifying the amount of reserved water, quoting from the *Cappaert* decision⁵² and repeating its earlier declaration in the wilderness water case.⁵³

The Idaho Supreme Court did uphold reserved water rights in the case of the Hells Canyon NRA and several wild and scenic rivers because their governing statutes contained language that the court interpreted to expressly reserve water.⁵⁴ What happened in the aftermath of those decisions is instructive; both cases were settled in a manner to threaten no existing diversions and to allow some limited future ones.⁵⁵ In short, there’s virtually no one who can claim any injury from the assertion of reserved rights in Idaho.

50. See *supra* notes 43–44 and accompanying text; *infra* note 52 and accompanying text.

51. *Deer Flat*, 23 P.3d at 126–67, 135 Idaho at 664–65 (2001) (“Even if it were shown that the purpose of the island reservations has evolved over the years to . . . foster isolation from predators, those purposes were not present at the time of the reservations.”).

52. *Id.* at 125, 135 Idaho at 663 (“Unlike *Cappaert* where specific quantification could be determined to preserve the endangered fish . . . there is no standard for the amount of water necessary to have an island.”). In *Cappaert*, the Court’s statement about congressional intent needs context, as the case involved an express reservation of water, not an implied reservation, so naturally the Court would be concerned about congressional intent. See *Cappaert v. United States*, 426 U.S. 128, 139–41 (1976) (noting that the 1952 Proclamation establishing Devil’s Hole expressly mentioned both the preservation of the pool and the pupfish that resided there). However, in reserved rights cases involving implied intent the Court has looked to the purpose of the reservation, and whether that purpose required water. See, e.g., *Arizona v. California*, 373 U.S. 546, 599–600 (1963) (intent inferred from the purposes of a national recreation area, a national wildlife refuge, and a national forest); *United States v. New Mexico*, 438 U.S. 696, 707 n.14 (1978) (water reserved only for purposes of timber supply and watershed protection, not for fish and wildlife). The “standard of quantification” the Idaho court called for but could not find lies in the purposes of the statute or executive order reserving the lands. See *supra* note 42 and accompanying text.

53. See *supra* note 45.

54. *Potlatch II*, 12 P.3d 1260, 1268–69, 134 Idaho 916, 924–25 (2000) (interpreting 16 U.S.C. § 460gg(b), which includes “waters” within the NRA, and 460gg-3(a) and (b), which disclaimed any affect upstream of the reservation and any flow requirements on the Snake River below the reservation); *Potlatch I*, No. 24546, 1999 WL 778325 (Oct. 1, 1999) (unpublished opinion) (concluding that it would be “anomalous” to conclude that the Wild and Scenic Rivers Act (16 U.S.C. § 1271 *et seq.*), a statute “expressly created to preserve free-flowing rivers failed to provide for the reservation of water in the rivers”).

55. The SRBA court decreed multiple federal reserved water rights within the Hells Canyon NRA, including tributaries of, but not the Snake River itself, and for various rivers covered by the Wild and Scenic Rivers Act of 1968, namely segments of the Salmon, Clearwater and Rapid Rivers and their tributaries. However, as a result of a settlement, the federal wild

You would think that the lawyers of the winners would be satisfied with their immense success. Not so, as they now seek to export and grow the idea they almost sold to the Idaho Supreme Court: that the critical determinant in the existence of federal reserved water is whether the land reservation was established before or after 1955.

III.

In a nutshell, the Fereday/Meyer thesis is this: whatever the reserved rights doctrine meant in the Supreme Court decisions of 1955 and 1963, those decisions concerned pre-1955 land reservations.⁵⁶ In 1955, they maintain that the *Pelton Dam* decision fundamentally changed reserved water rights law.⁵⁷ That is an unusual interpretation of *Pelton Dam*, previously reviled by water diverters as a decision undermining the security of their water rights. Fereday and Meyer, on behalf of their water-diverter clients, now claim that the decision was a landmark heralding the end of the doctrine they long opposed. Their revolutionary interpretation of reserved rights law would virtually end the capability of the doctrine to retain water on federal lands for non-consumptive uses, like fish and wildlife protection and recreational uses.

The Fereday/Meyer interpretation of the disappearance of implied reserved rights succeeded in convincing the Chief Justice of the Idaho Supreme Court, to switch her vote on rehearing, providing the crucial third vote to deny wilderness water.⁵⁸ Justice Linda Copple Trout wrote that congressional

rivers water rights were made subordinate to existing upstream diversions, and a permit process was created by which the Idaho Department of Water Resources (IDWR) may allocate diversionary water rights in the future, up to certain stipulated limits. See Stipulation and Joint Motion for Order Approving Stipulation and Entry of Partial Decrees, *In re* SRBA, Subcase No. 75-13316 (Idaho Dist. Ct. Aug. 20, 2004), https://www.idwr.idaho.gov/WaterManagement/WaterRights/Wild_Scenic/PDFs/Wild&Scenic_STIPULATION_AND_JOINT_MOTION_FOR_ORDER_APPROVING_STIPULATION_AND_ENTRY_OF_PARTIAL_DECREES.pdf; Order Approving Stipulation and Entry of Basin 78 Partial Decrees, *In re* SRBA, Subcase No. 79-13597 (Idaho Dist. Ct. May 2, 2005), <http://srba.idaho.gov/Images/2013-12/7913597xx00567.pdf>. Fereday and Meyer state that there is likely to be “only limited opportunity for conflict” between future Idaho water users and the federal government in the Hells Canyon NRA. Fereday & Meyer, *supra* note 10, at 366.

56. Fereday & Meyer, *supra* note 10, at 343–44.

57. *Fed. Power Comm’n v. Oregon (Pelton Dam)*, 349 U.S. 435 (1955) (holding that under the Federal Power Act, the Federal Power Commission has exclusive authority to grant licenses for hydroelectric projects on federally reserved land, and that the Desert Land Act of 1877, which suggested that Oregon could regulate the use of these waters instead, did not apply).

58. *Potlatch II*, 12 P.3d at 1270, 134 Idaho at 926 (Trout, C.J., concurring). This switch was perhaps prompted by Chief Justice Trout’s concern over her impending reelection, given the full-throated political campaign against Justice Silak the initial wilderness water rights opinion engendered. Justice Trout was successfully reelected in 2002, but she resigned before serving out the full term because she objected to increasingly partisan nature of Idaho judicial elections. See DIALOGUE, <http://idahoptv.org/webstream/dialogue/13/d1334.mp3> (June 14, 2007) (discussing the reason for her resignation and her support for changing judicial elections to reduce their partisan nature).

awareness of the implied reserved rights doctrine, at least after the Supreme Court's 1963 decision in *Arizona v. California*, ended the doctrine: "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."⁵⁹ A separate concurrence by Justice Wayne Kidwell also embraced the Fereday/Meyer interpretation, writing: "application of the federal reserved water rights doctrine is not appropriate where Congress has expressly discussed, then refused to reserve, water rights."⁶⁰ But these two concurrences did not make a majority,⁶¹ and therefore Fereday and Meyer's article aims to revive their argument, although they see the source of the doctrinal change in the 1955 Pelton Dam decision, not the 1963 Colorado River decision.⁶²

Pelton Dam is an unlikely source of their revolution in reserved rights law, as the decision has long been considered the harbinger of *Arizona v. California*, which upheld reserved water for national forests, wildlife refuges, and national recreation areas.⁶³ This decision produced considerable Western alarm—as it expanded the scope of the federal reserved water rights doctrine beyond Indian reservations.⁶⁴ But actually, according to Fereday/Meyer a half-century later, the case led to the termination of the century-old federal reserved water rights doctrine. Even more startling, this termination occurred quite quietly, with no definitive congressional action at all. That's a lot of freight for any legal theory, so it requires some unpacking.

The Fereday/Meyer thesis begins with the proposition that reserved rights are a function of congressional intent.⁶⁵ Certainly Congress can—and has—both declared and disclaimed its intent to establish reserved rights, as the Executive Branch.⁶⁶ From this unremarkable observation Fereday and Meyer wade into murkier waters, arguing that by hinting that reserved rights applied to non-Indian federal reservations,⁶⁷ the U.S. Supreme Court fundamentally transformed federal reserved rights law. Their idea is that although

59. *Potlatch II*, 12 P.3d at 1271, 134 Idaho at 927 (disagreeing with the majority, which ruled that the Wilderness Act's disclaimer provision, *supra* note 45, simply preserved the status quo; in her view, the provision reversed the status quo). See *Reversing Winters*, *supra* note 17, at 196–97.

60. *Potlatch II*, 12 P.3d at 1272, 134 Idaho at 928 (Kidwell, J., concurring).

61. The majority opinion is explained *supra* notes 41–45 and accompanying text.

62. Fereday & Meyer, *supra* note 10, at 346.

63. *Arizona v. California*, 373 U.S. 546, 564–65 (1963).

64. See B. Abbott Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1 (1964); Todd A. Fisher, *The Winters of Our Discontent: Federal Reserved Water Rights in the Western States*, 69 CORNELL L. REV. 1077 (1984); Janice L. Weis, *Federal Reserved Water Rights in Wilderness Areas: A Progress Report on a Western Water Fight*, 15 HASTINGS CONST. L.Q. 125 (1987).

65. Fereday & Meyer, *supra* note 10, at 343. As mentioned above, *supra* note 45, the search for congressional intent, if not express, centers on the purposes of the reservation: if water is necessary to achieving those purposes, there is a federally reserved water right.

66. See *infra* notes 7–9 and accompanying text.

67. *Fed. Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435, 444 (1955).

Congress could—and did—establish reserved water rights before 1955 by reserving lands for particular purposes which required water, after the *Pelton Dam* decision politicized the issue and engendered congressional debate about reserved water rights, Congress lost the ability to create federal water rights by reserving lands for purposes that required water.⁶⁸ Post-1955, their argument goes, Congress had to expressly reserve federal water rights.

Neither Congress nor the Supreme Court has ever recognized the allegedly transformative effect of the *Pelton Dam* decision. Congress continued to establish reserved lands for purposes requiring water,⁶⁹ and the Court handed down decisions in 1976 and 1978 affirming the implied nature of federal reserved water rights.⁷⁰ Fereday and Meyer are undaunted by these cases, since they involved federal land reservations established before 1955.⁷¹

Fereday and Meyer repeatedly argue that the reserved rights doctrine is not an “immutable rule of law,” but a matter of congressional intent.⁷² If there is such a thing as an “immutable” rule of law, it is clearly not the implied reserved water rights doctrine, which Congress has acted to alter on numerous occasions.⁷³ When it does do so, however, their claim is that Congress can no longer rely on the Supreme Court-sanctioned doctrine because implied federal water rights for reserves established after 1955 disappeared. How this happened is the basic problem with their thesis, as explained below.

IV.

To make the Fereday/Meyer thesis operative, one has to believe that dicta in a Supreme Court opinion can change legal doctrine accepted for over a half-century.⁷⁴ And effectuate dramatic change: instead of being able to rely on Supreme Court rulings concerning how public land statutes setting aside reserved lands created implied water rights, according to Fereday/Meyer, Congress was suddenly disabled from relying on what was the clear state of reserved rights law.

68. Fereday & Meyer, *supra* note 10, at 351–52.

69. Alaska National Interest Lands Conservation Act (ANICLA), 16 U.S.C. § 3101 (2007).

70. *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978).

71. Devils Hole National Monument, at issue in *Cappaert*, was established by an executive order of President Truman in 1952. 426 U.S. at 131. Gila National Forest was established by multiple separate presidential proclamations in 1899, 1905, 1907, 1908 and 1910. *Mimbres Valley Irrigation Co. v. Salopek*, 564 P.2d 615 (N.M. 1977) *aff'd sub nom.* *United States v. New Mexico*, 438 U.S. 696 (1978).

72. See, e.g., Fereday & Meyer, *supra* note 10, at 343, 345, 347, 351, 355, 365, 367.

73. See *infra* notes 7–9 and accompanying text.

74. See *Fed. Power Comm'n v. Oregon (Pelton Dam)*, 349 U.S. 435, 444–48 (1955).

The *Pelton Dam* opinion suggested that the reserved rights doctrine of *Winters* might apply to federal reservations, but was actually decided based on the authority of the federal government under the Federal Power Act to preempt any regulatory powers that Oregon acquired through the Desert Land Act of 1877.

Fereday and Meyer acknowledge that the Wilderness Act's disclaimer's language⁷⁵ could be interpreted, as the U.S. Justice Department always has, as a disavowal of intent to affect reserved rights already in existence or those that would be created in the future.⁷⁶ They cite legislative history indicating that Congress meant in the disclaimer to adopt the Justice Department's interpretation.⁷⁷ Ironically, this interpretation should have been enough to justify the initial Idaho Supreme Court decision affirming the existence of wilderness water rights, since Congress aimed in the Wilderness Act to ratify the existing law of implied federal water rights.

Although Fereday and Meyer concede that reservations established before 1955 have implied reserved water rights,⁷⁸ their theory denies such rights for land reservations created after 1955 (post-*Pelton Dam* decision). Their position is that "where Congress debated the reserved water rights question for a land designation and then declines to establish an associated water right by express language, there can be no implication that Congress intended to create the right. In fact, without an express reservation, the opposite implication arises."⁷⁹ They cite no authority for this dramatic change in reserved rights law.

Apart from Wilderness Act legislative history and statutory language that undermines their position,⁸⁰ the Fereday/Meyer argument makes no effort to explain why Congress would think that debating an issue without taking action would change the law. Even without the disclaimer's apparent attempt to maintain the existing law, a conscientious legislator, with knowledge of reserved rights law, would reasonably interpret congressional inaction to ratify the status quo, not radically overturn it.⁸¹ In short, mere debate over the wisdom of reserving water rights for particular federal lands reflects insufficient congressional intent to change settled legal doctrine established by the Supreme Court. The Fereday/Meyer thesis fundamentally misunderstands the nature of the legislative process. Since there are many

75. See *supra* note 45 and accompanying text.

76. Fereday & Meyer, *supra* note 10, at 351.

77. *Id.* at 351 n.52.

78. See *supra* text accompanying notes 56-57. It is not clear how their theory about the significance of 1955 accounts for their interpretation of the 1964 Wilderness Act's disclaimer, which claimed not to deny the existence of reserved water rights.

79. Fereday & Meyer, *supra* note 10, at 350 (discussing 104 CONG. REC. 6344 (1958)).

80. See *supra* notes 75-77 and accompanying text.

81. See, e.g., RICHARD E. LEVY & ROBERT L. GLICKSMAN, STATUTORY ANALYSIS AND THE REGULATORY STATE 215-20 (Foundation Press 2014), discussing, *inter alia*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) ("considerations of *stare decisis* have special force in the area of statutory interpretation, for . . . Congress remains free to alter what we have done."); see also *United States v. Home Concrete & Supply*, 132 S.Ct. 1836, 1841 (2012); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); see also *Blue Chip Stamps v. Manor Drugs Stores*, 421 U.S. 723, 733, 749 (1975) ("The longstanding acceptance by the courts, coupled with Congress' failure to reject *Birnbaum's* reasonable interpretation of the wording of § 10(b), wording which is directed toward injury suffered 'in connection with the purchase or sale' of securities, argues significantly in favor of acceptance of the *Birnbaum* rule by this Court... We are dealing with a private cause of action which has been judicially found to exist, and which will have to be judicially delimited one way or another unless and until Congress addresses the question.").

reasons for legislators to favor silence on a particular issue, inferring a congressional position from silence is hazardous.⁸²

Justice Scalia has long counseled against using legislative history as a surrogate for the words that Congress actually used.⁸³ For example, in his concurring opinion in *Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson*, a 2010 case involving the application of the False Claims Act to state officials, he warned against using “stray snippets” of legislative history to divine congressional intent, since members only vote on the text of a bill.⁸⁴ In another case, he discounted legislative history as a kind of “ventriloquism” in which “[t]he Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists).”⁸⁵ Justice Scalia’s textualism triumphed in the Court’s recent affirmation of the application of federal subsidies in the Affordable Care Act to federally-operated insurance exchanges, as Chief Justice Roberts opinion relied on the text, not the legislative history of the statute.⁸⁶ It seems safe to suggest that Justice Scalia’s admonitions against the use of legislative history apply fully to the Fereday/Meyer theory of congressional inaction changing the underlying law of implied federal reserved water rights.

Congress is fully capable of indicating when it does not wish a federal reserve to have waters rights and has done so many times. For example, the

82. See Lawrence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515, 515–17 (1982); Levy & Glicksman, *supra* note 81.

83. See, e.g., Elizabeth A. Liess, Comment, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568 (1993).

84. 559 U.S. 280, 302 (2010):

I agree that the stray snippets of legislative history respondent, the Solicitor General, and the dissent have collected prove nothing at all about Congress’s purpose in enacting [the statute]. But I do not share the Court’s premise that if a ‘legislative purpose’ were ‘evident’ from such history it would make any difference. The Constitution gives legal effect to the ‘Laws’ Congress enacts [] not the objectives its Members aimed to achieve in voting for them. If [the statute’s] text includes state and local administrative reports and audits, as the Court correctly concludes it does, then it is utterly irrelevant whether the Members of Congress intended otherwise. Anyway, it is utterly impossible to discern what the Members of Congress intended except to the extent that intent is manifested in the only remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.

85. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004).

86. *King v. Burwell*, 135 S.Ct. 2480 (2015). See Jon Healy, *Justice Scalia’s method triumphs in Obamacare case, if not his views*, L.A. TIMES (June 26, 2015), <http://www.latimes.com/opinion/opinion-la/la-ol-scalia-obamacare-legislative-history-20150626-story.html>.

1993 Colorado Wilderness Act rejected reserving water rights,⁸⁷ as did the 1988 congressional reservation of Idaho's Hagerman Fossil Beds National Monument.⁸⁸ The president also knows how to disclaim reserved rights, as President Clinton did in the 1996 Grand Staircase-Escalante National Monument.⁸⁹ The problem that Fereday/Meyer have is not with congressional or presidential authority; it's their clients' inability to get Congress or the president to exercise it. That political difficulty is no reason for the courts should radically change federal reserved rights law.

Fereday and Meyer also attempt to distinguish other examples of congressional acquiescence to Supreme Court rules similar to the implied reserved water rights rule by suggesting that the examples of the judicially created antitrust exemption for major league baseball and judicial deference to federal preemption despite a states' rights saving clause in federal hydroelectric licensing are distinguishable.⁹⁰ These decisions are different, according to Fereday and Meyer, because those cases involved reauthorization of the same statute, something that does generally occur in the case of reserved lands. However, the same reserved water issue reoccurs in all virtually new federal land reservations, as evidenced by the fact that Fereday and Meyer claim that the issue is so familiar to Congress that there will never be another federal reserve without express language claiming or renouncing the creation of federal water rights.⁹¹

Finally, Fereday and Meyer emphasize that the Idaho Supreme Court stated that neither Senator Frank Church (in the case of Idaho wilderness areas) nor President Franklin Roosevelt (in the case of the Deer Flat National Wildlife Refuge) would have intended to hinder economic development by claiming reserved water rights.⁹² Neither the court nor the authors provided any specifics as to this alleged intent to curb reserved water rights; the court merely made vague allegations, which the authors' repeat. Without specifics, one is left to conclude that it served the interests of both the Idaho Supreme

87. Colorado Wilderness Act of 1993, Pub. L. No. 103-77, 107 Stat. 756 § (8)(b)(2)(B) (1993) ("Nothing in this Act shall be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the United States in the State of Colorado existing before the date of enactment of this Act . . .").

88. An Act to Provide for the designation and conservation of certain lands in the states of Arizona and Idaho, and for other purposes, Pub. L. No. 100-696, 102 Stat. 4571 § 304 (1988) ("Nothing in this title, nor any action taken pursuant thereto, shall constitute either an expressed or implied reservation of water or water right for any purpose").

89. Establishment of the Grand Staircase-Enscalante National Monument, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996) ("This proclamation does not reserve water as a matter of Federal law").

90. *Flood v. Kuhn*, 407 U.S. 258, 273 (1972); *California v. FERC*, 495 U.S. 490, 497 (1990).

91. Fereday & Meyer, *supra* note 10, at 351 ("As a practical matter, all new federal land designations will deal with the question whether federal water rights are intended,," and citing nine federal reserves in which Congress expressly reserved or denied federal water rights).

92. See Fereday & Meyer, *supra* note 10, at 354-55, 367 (citing *Potlatch II*, 12 P.3d 1260, 1268, 134 Idaho 916, 924 (2000)); *Deer Flat*, 23 P.3d 117, 128-29, 135 Idaho 655, 666-67 (2001).

Court and the authors to invoke iconic political figures to support their position in the absence of specific intention by either Church or FDR.

CONCLUSION

The weaknesses in the Fereday/Meyer theory should not mask its potential to revolutionize federal reserved water rights. Because of the McCarran Amendment,⁹³ their argument is likely to be heard by extremely receptive judges who face reelection in states dominated by the political power of water diverters. Given the fractured federalism of reserved water rights created by the McCarran Amendment, it is possible that the most hostile anti-federal arguments that succeed in state courts (or threaten to succeed, as in the case of the Idaho Supreme Court's wilderness water decision) could proliferate across a West long filled with anti-federal sentiment, especially among extractive industries.⁹⁴

If the Fereday/Meyer argument prevails in other state courts, post-1955 reservations in which water is clearly necessary to fulfill their purposes would have no water rights. For example, the Black Canyon of the Gunnison, expanded to include wilderness in 1999, would presumably have no water.⁹⁵

93. 43 U.S.C. § 666(a) (2012) (authorizing state court jurisdiction over so-called comprehensive water rights adjudications); see 2 WATERS AND WATER RIGHTS, *supra* note 1, § 37.04(a) (discussing the McCarran Amendment and its continuing effect on western water law).

94. See RICHARD WHITE, *IT'S YOUR MISFORTUNE AND NONE OF MY OWN: A HISTORY OF THE AMERICAN WEST* 576 (University of Oklahoma Press, 1991) (describing the New Right's revival of old resentments against the federal government in the 1960s), 604 (describing the New Right's "sweeping indictment of the federal government," epitomized by the political rise of Ronald Reagan). On the dangers of having "extractive elites" like the Idaho water diversion lobby dominate government; see DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATION'S FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (Crown Business, 2012), discussed in Zygmunt J.B. Plater, *Human-Centered Environmental Values Versus Nature-Centric Values: Is This the Question?*, 3 MICH. J. ENVTL. & ADMIN. L. 273, 278 (2014).

Some sense of the continuing political antipathy extractive industries have generated toward the federal government in the arid West can be gleaned from the effort of the state of Utah to demand that the federal government gift it specified federal lands in the state; see Utah Transfer of Public Lands Act, U.C.A. 1953 §§ 63L-6-101-1905 (2012). Although garnering some political support—at least in Utah—the transfer demand has no legal basis. See Robert B. Keiter & John Ruple, *The Transfer of Public Lands Movement: Taking the 'Public' Out of Public Lands*, Stegner Center White Paper No. 2015-01, S.J. Quinney College of Law Research Paper No.99. (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555922; Nick Lawton, *Utah's Transfer of Public Lands Act: Demanding a Gift of Federal Lands*, 16 VT. J. ENVTL. L. 1 (2014).

95. The federal water rights of Black Canyon National Park were the subject of the litigation in *High Country Citizens' Alliance v. Norton*, 448 F.Supp. 2d 1235, 1241–42, 1252–53 (D. Colo. 2006) (ruling that a 2003 settlement in which the federal government would have subordinated its reservation priority date to preserve existing diversionary rights violated the federal trust obligation to protect trust resources, which required the government to protect park resources, including its water rights); see Reed D. Benson, *A Bright Idea From Black Canyon: Federal Judicial Review of Reserved Water Rights Settlements*, 13 U. DENV. WATER L. REV. 229 (2010). Under the Fereday/Meyer view, the 1999 wilderness designation would carry no water rights.

Neither would the Boundary Waters Canoe Area Wilderness, created by the 1964 Wilderness Act.⁹⁶ Numerous other federal lands would lack water rights, including over fifty reserves established in the 1960s by the Kennedy and Johnson Administrations under the leadership of Secretary of the Interior Stewart Udall.⁹⁷

Fereday and Meyer's effort to extend their success in the SRBA litigation West-wide, could, if successful, substantially damage federal public land resources in the service of their diversionary clients. That's not a prescription that augers well for a Western environment that figures to be under severe stress due to the effects of climate change during the remainder of the 21st century.⁹⁸

96. National Wilderness Preservation System, 16 U.S.C. § 1131 (2012) (reserved for the purpose of preserving wilderness "as an area where the earth and its community of life are untrammelled by man"); *see generally Symposium on the Wilderness Act at 50*, 44 ENVTL. L. 285 et. seq. (2014).

97. *See* Phil Taylor, *Inspired by his environmentalist father, senator faces dramatically different landscape*, Environment & Energy Daily (June 9, 2015) <http://www.eenews.net/eedaily/stories/1060019855> (observing that Secretary Udall oversaw the establishment of four national parks, six national monuments, and over 50 national wildlife refuges as well as numerous national seashore, historic sites, and recreation areas).

98. *See, e.g.,* Leshy, *supra* note 30; Sandra Zellmer, *Wilderness, Water, and Climate Change*, 42 ENVTL. L. 313 (2012).