1986

Water in the Western Wilderness: The Duty to Assert Reserved Water Rights

Robert H. Abrams
robert.abrams@famu.edu

WATER IN THE WESTERN WILDERNESS: THE DUTY TO ASSERT RESERVED WATER RIGHTS

*Robert H. Abrams**

Imagine an Ansel Adams photograph of the spring thaw in a remote Rocky Mountain wilderness. The roar of a spring freshet cascading over the boulders near the tree line is almost audible from the picture alone. Now, using a computerized process of digital retouching, reduce the streamflow to a trickle. The scene loses its tumult and becomes more like a hushed still-life. Take a second photograph in August or September. Retouch the original to eliminate the stream and all of the signs of wildlife that it attracts; color the landscape yellow or brown instead of deep, mountain green. The spring and summer photographs, those with the water that naturally flows in the valley and those without that water, will hardly seem pictures of the same place. The presence or absence of the stream's water, which sustains both plant and animal communities, causes this difference.

Assume now that the area involved is federally designated wilderness, and that the cause of the altered landscape is an upstream dam and reservoir system that diverts the water before it flows into the wilderness. Assume further that the federal official charged by Congress with the stewardship of the wilderness has, as a matter of federal law, a water right that could prevent the diversion and thereby allow the spring freshet to roar and the summer stream to flow. Can that federal official stand aside and permit the upstream diversion without violating his legal duties of stewardship?

This question is at the core of *Sierra Club v. Block*[1] and is the question explored in this essay. As the opening example highlights, wilderness values can disappear if federal officials have no duty to protect them. In *Sierra Club*, the federal wilderness manager (the Secretary of Agriculture) argued that he lacked any federal legal right to protect wilderness streamflows. The Secretary also claimed that, even if wilderness protective water rights did exist, he possessed the unreviewable discretion to refrain from asserting them.

---

* *Interim Dean and Professor of Law, Wayne State University Law School. A.B. 1969, J.D. 1973, University of Michigan.*

1. 622 F.Supp. 842 (D. Colo. 1985).

The central thesis of this essay is that the reserved water rights of the federal government are fixed at the time they are created and that the federal official to whom the government entrusts reserved water rights has an obligation to assert those rights to their fullest extent. Applied to the wilderness setting, this duty leaves the Secretary without any authority to deny that the rights exist, without any discretion to fix the amount of water reserved, and, most importantly, without any discretion to fail to assert vigorously the reserved rights. These aggressive claims about the responsibility of federal officials to vindicate reserved rights extend beyond the wilderness context to cover as well other species of federal reserved water rights, such as those favoring Indian reservations.

The body of the essay has two major parts. Part I reviews some of the basics of prior appropriation law and the federal reserved water rights doctrine, and attempts to show the gravity of the wilderness reserved rights issues raised in *Sierra Club*. It demonstrates that real water use conflicts can and will arise between those who wish to reserve water rights for wilderness streamflows and private appropriators under state law who wish to use that water in different ways. Part I also summarizes the arguments supporting the existence of reserved water rights for federally designated wilderness areas.

Part II of the essay argues that managing federal officials must faithfully assert these reserved water rights. The initial discussion explains why federal officers responsible for reserved rights lack the power to deny that reserved rights exist or to reduce the size of the reserved rights. Thereafter, the essay explores why these officials are under affirmative duties to vindicate reserved rights. The essay considers counterarguments based on *Heckler v. Chaney*, the recent United States Supreme Court case which grants administrative officials unreviewable discretion to refrain from enforcement actions, and finds these arguments unpersuasive in this context. Finally, the essay discusses the discretion federal officials have to negotiate and reach compromise settlements in reserved rights disputes and finds the permissible range of discretion narrow.

I. Reserved Rights And Wilderness Streamflows

A. The Potential Conflict Between Wilderness Reserved Rights and State Law Water Users

The important water resource management issues probed in this essay may be unfamiliar to some readers. Federal wilderness lands are located principally in the arid Western states, which employ the prior appropriation doctrine as the basis for their water law. Unlike the riparian doctrine of the East, under which most water rights are appurtenant to neighboring lands, prior appropriation severs water from the land and creates an independent regime of water rights. More specifically, an individual in a prior appropriation state acquires rights to a flow of water by applying that water to a beneficial use, without regard to his ownership

of land bordering the stream. With few exceptions, a water user acquires a water right simply by physically withdrawing as yet unappropriated water from a stream and transporting that water to the place of use.[2] State law protects these water rights against interference by other water claimants on the basis of seniority: prior in time is prior in right.

Superimposed on these state systems of quantified priorities are federal reserved water rights. These rights exist by virtue of a common law doctrine created by the United States Supreme Court.[3] The basic thrust of the reserved rights doctrine is that the federal government, by dedicating federal lands to a specific use, simultaneously reserves the water found on those lands for that use. The amount of water reserved is the amount the government needs to fulfill the specific purposes for which the land is to be used. To prevent a conflict with existing state-created appropriative rights, the reserved rights doctrine operates only on waters that are unappropriated when the federal government reserves the lands. For example, in the case of federal land reserved in 1900 for an Indian reservation, the federal reserved rights would be subordinate to all pre-1900 appropriations but would be superior to all post-1900 appropriations. The water rights possessed by the Indian reservation would have this priority over post-1900 appropriations, even if the resident Indians did not begin using their water until many years after subsequent appropriators obtained their rights.

The possibility that the federal government might assert reserved rights after many years of dormancy can retard water-dependent economic development. The existence of an unused and unquantified federal water right can disrupt the plans of a later appropriator, who needs certainty in his own water flow before he will make water-dependent investments with a long useful life. Federal reserved rights, particularly reserved rights that protect instream flows, can directly prevent economic development. As an example, a reserved right might require that sufficient water remain in a stream to enable an Indian tribe to fish in the stream. Water that must remain in the stream to support fish populations is unavailable for diversion and use by other appropriators, who might use the water for other, possibly more economically valuable purposes.

Reserved rights to protect wilderness streamflows often have little or no impact on potential development. Most designated wilderness areas are relatively remote and near the headwaters of streams; most state law appropriators, by contrast, are located downstream. Thus, a federal reserved right that maintained water in the stream until the water flowed through the wilderness area would not affect these downstream uses. A

2. In many states an appropriator must physically divert and withdraw the water to perfect a valid appropriative right. Some jurisdictions have modified modern appropriation doctrine, however, so that appropriation can insure minimum streamflows. *See, e.g.*, NEB. REV. STAT. §§ 46-2,107 to 46-2,119 (1984).

3. *See* Winters v. United States, 207 U.S. 564 (1908).

wilderness reserved right of this type would also permit upstream uses, as long as the upstream appropriators did not compromise the superior federal right. Thus, an upstream use would be permissible if it returned the bulk of the water to the stream without significantly polluting or altering the timing of the flow.

A wilderness reserved right will usually affect adversely an upstream diversion and storage project.[4] This is of concern because upstream diversion and storage projects offer attractive benefits. They can alter the timing of flows from a high-flow, low-demand period like the spring to a low-flow, high-demand period like the late summer or early fall. At upstream locations, water may be more abundant, often in the form of snow pack. In addition, many upstream areas have deep, narrow valleys suitable for constructing dams at a low cost, which means that water can be stored there relatively inexpensively. Lands located upstream of wilderness areas almost assuredly are undeveloped lands, usually in public ownership. This too reduces the cost of purchasing flowage easements on these lands. Storage of water upstream of a wilderness area also expands the potential for use of the water at distant points. Water impounded and diverted at a relatively high elevation upstream of a wilderness area can flow by gravity to its intended point of use, without any need for pumping. This potential cost-economy is particularly important if the destination of the water is itself at high elevation, or if the destination is another water basin. Consider, for example, water on the west slope of the Rocky Mountains needed to meet the water needs of Denver on the east slope.[5] The diversion of this water at high elevations, perhaps above wilderness areas, will minimize costs by reducing the pumping or tunneling needed to transport the water across the mountains.

B. The Reserved Rights Doctrine

Federal reserved water rights exist as a matter of federal law. The United States Supreme Court has stated:

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so

4. "Diversion" describes instances in which users physically withdraw water from the watercourse and transport it by canal or other conveyance device to a distant location for use. "Storage" refers to building dam and reservoir systems. Some form of storage apparatus almost invariably accompanies diversion projects. Storage provides a head of water to permit diversion and, often, permits users to tap the diversion when the water is in demand, not when it would naturally flow down the stream. Even an upstream storage facility that controls flows for the benefit of a diversion facility downstream of the wilderness could affect profoundly the timing of water flows through the wilderness.

5. A Colorado study of state law appropritions that might be affected by recognition of reserved rights for wilderness instream flows concluded that the "only significant occurence of potential conflict is above the Black Canyon of the Gunnison National Monument . . . ." Letter from David Getches (Executive Director Colorado DNR) and Jeris Danielson (Colorado state water engineer) to U.S. Sen. Gary Hart & U.S. Reps. Hank Brown & Ken Kramer (Feb. 24, 1986).

doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.[6]

Federal reserved rights arise under federal law, yet they are similar in many ways to appropriations made under state law. Reserved rights are like appropriative rights in their most essential qualities—they are rights of priority to an ascertainable quantity of water. Although the federal government reserves rights in a manner that differs radically from the creation of appropriative rights under state law, reserved rights, once created, function much like appropriative rights. Reserved rights protect their holder on the basis of priority in time against invasion by junior water users.

The similarity of reserved rights to appropriative rights goes even further. The rights are meaured when created. In the appropriation system, the actual beneficial use made of the water provides the measure of the water right; under the federal common law reserved rights doctrine, the congressional or executive act that creates the reserved rights provides, as the measure of the right, the amount of unappropriated water required to meet the needs of the reserved land. In *United States v. New Mexico*,[7] the United States Supreme Court stated that when "water is necessary to fulfill the very purposes for which a federal reservation was created, . . . the United States intended to reserve the *necessary* water."[8] The Supreme Court quantified the amount of water reserved by refering to historical facts about Congress's intent and to the amount of then unappropriated water necessary to fulfill that intent. Although the Court did not attach a numerical measure to the right, the only uncertainty lay in divining the precise intent and proving the amount of water then needed.

Recent decisions in which courts have quantified reserved rights lend support to the view that reserved rights are fully defined in terms of quantity when created.[9] Contemporary reserved rights cases focus, first, on identifying the purposes for which water is reserved and, second, on

6. Cappaert v. United States, 426 U.S. 128, 138 (1976).

7. 438 U.S. 696 (1978).

8. *Id.* at 702 (emphasis added).

9. Litigation that would quantify reserved rights was inhibited for many years because the federal government refused to waive sovereign immunity and expose those rights in litigation. Eventually, after the Western states waged a long battle, Congress in 1952 passed the McCarran Amendment, 43 U.S.C. § 666 (1982), which waived federal immunity in certain qualifying general stream adjudications. *See also* United States v. District Court of Eagle County, 401 U.S. 520 (1971). For roughly 30 years, most reserved rights litigation focused on procedural and jurisdictional disputes that arose in interpreting the Amendment. In 1976, the United States Supreme Court ruled that Congress in enacting the McCarran Amendment had not only consented to waive immunity but had also established the state courts as the preferred forum for such lawsuits. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). Judgments that quantify reserved rights receive res judicata effect. *See, e.g.*, Nevada v. United States, 463 U.S. 110 (1983).

determining the amount of water needed to satisfy those purposes.[10] As noted above, the litmus test that the United States Supreme Court now uses to determine the extent of reserved water rights is stated in terms of the amount of water needed to accomplish the reservation's purpose at the time of the reservation.

Purpose review of this type is a backward-looking inquiry that attempts to determine a matter of historical intent. In undertaking this review, courts consider only the primary purposes of a particular land reservation. Only these purposes are weighed in determining the amount of water that the federal government reserved. This limitation to the primary purposes of the federal reservation narrows the number of purposes that the courts must consider. The limitation does not, however, alter the fundamental nature of the quantification process. In *United States v. New Mexico*,[11] for example, the Supreme Court held that the only *primary* purposes of the National Forest system were producing timber and protecting water flows. The Court refused to entertain reserved rights claims for instream flows to support recreation, because recreation was a later, secondary purpose. The focus of the Court's inquiry was on the intent of Congress in 1897 when it passed the Organic Act that established the National Forest System, not on the intent of Congress in later years when it expanded the aims of the national forests. Subsequent acts of Congress, and the views of the administrative officials in charge of the National Forests, failed to affect the primary purposes.

Purpose review, when applied in the wilderness reservation context, supports the view that Congress intends to reserve water for wilderness instream flows whenever it creates wilderness areas. As its language and legislative history make clear, the Wilderness Act has as its primary purpose the preservation of existing natural conditions. The Wilderness Act lists as its primary purposes "preservation and protection [of wilderness lands] in their natural condition . . . to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[12] The Act defines wilderness as "an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain . . . [and wilderness is an area] retaining its primeval character and influence . . . ."[13] Accordingly, as the Act and its unusually clear legislative history describe the aims of wilderness, wilderness designation carries with it an intent to prevent man-induced changes in the area. Instream flows are part and parcel of the natural environment which wilderness areas are designed to preserve;[14] those

10. *See* United States v. New Mexico, 438 U.S. 696 (1978). *See also, e.g.*, United States v. City and County of Denver, 656 P.2d 1 (Colo. 1982).

11. 438 U.S. 696 (1978).

12. 16 U.S.C. § 1131(a) (1982).

13. *Id.* § 1131(c).

14. Judge Kane in *Sierra Club v. Block* expressed the matter forcefully: "It is beyond cavil that water is the lifeblood of the wilderness areas. Without water, the wilderness would become deserted wastelands. In other words, without access to the requisite water, the very purposes for which the

flows are therefore reserved by wilderness designation.

The Wilderness Act's explicit emphasis on preservation provides a distinct contrast between wilderness reservations and National Forest reservations made pursuant to statutes having timber production and watershed protection as their primary purposes.[15] Because of this distinction, the *New Mexico* case does not preclude wilderness instream water reservations; these reservations foster the primary mandate of the Wilderness Act—maintaining land in its present, pristine condition, unaltered by human activity.

Courts engage in a second backward-looking process when they undertake to quantify reserved rights. State adjudications that quantify the rights of private appropriators undertake to determine the amount of water beneficially applied to the land by each user when he began his use. Similarly, courts that quantify federal reserved rights attempt to discern the historical fact of how much water the government impliedly reserved on the date of the reservation. Changing conditions in the intervening years are irrelevant to the initial quantification decision.

One of the seminal cases on reserved rights quantification is the famous case between Arizona and California over rights to Colorado River water. In *Arizona v. California*,[16] the Supreme Court decided that the government, when it created certain Indian reservations, reserved enough water to irrigate the "practicably irrigable acreage" found on the reservations.[17] The Court adopted this standard because it fulfilled the discerned purpose for which the government reserved the water: settling the tribes into a pastoral life on the reservations. For every Indian reservation sharing that purpose, the reserved right attaches to the amount of water needed for irrigation. This is a fixed quantity that is calculated as the product of the number of irrigable acres on the reservation and the water duty[18] of those acres.[19]

Even before the Supreme Court announced the irrigable acreage standard, the amount of water reserved was not open to debate; debate

---

Wilderness Act was established would be entirely defeated." Sierra Club v. Block, 622 F. Supp. 842, 862 (D. Colo. 1985). The opinion presents more extensive arguments in favor of implied reservation of wilderness protective streamflows than the summary arguments adduced in this essay. *See also* Comment, *Water for Wilderness: Colorado Court Expands Federal Reserved Rights*, 16 ENVTL. L. REP. (ENVTL. L. INST.) 10,002 (1986); Comment, *Federal Reserved Water Rights in National Forest Wilderness Areas*, 21 LAND & WATER L. REV. 381 (1986).

15. *But see* Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The* Colorado River *Decision*, 30 STAN. L. REV. 1111, 1135 (1978) (criticizing so restrictive a view of National Forest purposes).

16. 373 U.S. 546 (1963).

17. *Id.* at 600-01.

18. The term "water duty" describes the amount of water required to irrigate land during a growing season. The term is usually expressed as a number of acre-feet of water per acre of land. For example, if Congress established a 100-acre Indian reservation to provide an agricultural existence for the tribe with a water duty of 4, the yearly reserved right entitlement of the reservation would be 400 acre-feet of water (100 acres x 4 acre-feet per acre).

19. *See, e.g.*, Arizona v. California, 460 U.S. 605 (1983) (continuing battle regarding irrigable acreage found within Indian reservations).

focused only on the formula to calculate the amount. Congress or the Executive, by fixing the purposes of the reservation and acting to reserve the land, set the amount. The task left undone was to decide how to measure the amount of water *necessary* to fulfill those purposes. "Necessity" here, as shown by the irrigable acreage standard approved by the Supreme Court in *Arizona v. California*, is a term of art that refers not so much to strict physical necessity as it does to necessity to fulfill a discerned intent.[20] Nevertheless, in all cases, the minimum measure of a reserved water right is the amount of water physically necessary to insure the success of the primary federal purpose in reserving the land.

A court that quantifies reserved rights by referring to strict physical necessity engages in an exercise in rote calculation just as much as it does when it employs the more generous irrigable acreage standard used for Indian agricultural reservations. In *Cappaert v. United States*,[21] the United States Supreme Court found that the executive order which reserved land at Devil's Hole had, among its primary purposes, the goal of preserving from extinction the biologically extraordinary Devil's Hole pupfish. After identifying this purpose, all that remained was to calculate mechanically the water needed to preserve the pupfish. Testimony established that the pupfish would perish unless the water level maintained in Devil's Hole was high enough to permit continued pupfish reproduction. To sustain this needed water level, nearby groundwater pumpers with later priority dates were required to curtail their pumping.

Case law, in short, supports the position that reserved rights are definite in amount when created. The opposite claim—that the rights are indefinite at the time of creation—lacks any real legal support. But even if it were supportable, this position would give little comfort to water users with later priority dates. The concept of "indefinite" reserved rights is itself unclear. The concept could mean that those rights are subject to revision by later federal action, which would be supreme under Article IV of the Constitution.[22] Under this possibility, Congress or the Executive could alter at any time the quantity of water reserved in response to perceived changes in the water needs of the reserved lands. If the federal government has this power, however, no logical reason would limit its exercise to adjustments that decrease rather than increase the size of the right. The possibility of increase, of course, would pose grave risks for later appropriators. The Supreme Court has for policy reasons evident in water adjudication laws rejected the view that the amount of reserved rights could change over time. Such flexibility would conflict with the desire for certainty evident in the McCarran Amendment's waiver of federal immunity for state adjudication suits and with the final-

20. The reserved rights of many Indian tribes under the irrigable acreage standard undoubtedly surpass their need for the water to provide the tribe with subsistence. *See, e.g.*, Back & Taylor, *Navajo Water Rights: Pulling the Plug on the Colorado River*, 20 NAT. RESOURCES J. 71 (1980).

21. 426 U.S. 128 (1976).

22. U.S. CONST. art. IV.

ity of adjudication principles that underlie all judicial proceedings.[23]

Even the more guarded position—that the government can alter the amount of reserved rights at any time prior to binding adjudication—is unworkable. Again, if the rights are to an "indefinite" amount of water, Congress or the Executive could alter their amount by later action. Thus, for example, in the National Forest setting, when Congress passed the Multiple Use Sustained Yield Act in 1960, it arguably enlarged the primary purposes of the Organic Act of 1897 beyond the original purposes of timber production and watershed protection. The Supreme Court, however, expressly rejected in the *New Mexico* case the claim that this 1960 act altered the water rights of the national forests.[24]

In the wilderness setting as in other settings, courts should recognize expressly that the quantity of reserved rights is certain as of the date of reservation. The primary intent of Congress, to preserve wilderness lands and protect them against man-induced changes, surely requires sufficient water flows in wilderness streams to prevent the types of radical alterations in wilderness ecology depicted at the outset of this essay. Even using the *Cappaert* standard of strict physical necessity, the amount of water needed in wilderness areas is substantial. Physical data, not the subjective views of the Secretary of Agriculture or other federal officials, provide the measure of water needed in such areas.

II. THE DUTY TO ASSERT RESERVED RIGHTS

Reserved rights cannot be lost by nonuse as can their state law counterparts, appropriative rights. To date, the principal legal means to extinguish or limit reserved rights is quantification litigation, which quantifies the federal right and results in a decree binding on the federal government.[25] Federal legislation and negotiated settlements ratified by Congress can also extinguish or limit reserved rights, although Congress has yet to adopt any of these additional avenues of altering reserved rights.[26] Thus, it is important to focus on quantification litigation.

In quantification litigation, the federal government can lose its reserved rights by default if it fails to assert them, regardless of the good or bad faith of the federal official who has failed to act.[27] The failure by

23. *See, e.g.*, Nevada v. United States, 463 U.S. 110 (1983).

24. *See, e.g.*, 438 U.S. 696, 713 n.21.

25. *See, e.g.*, Nevada v. United States, 463 U.S. 110 (1983).

26. *See, e.g.*, Comment, *Paleface, Redskin, and the Great White Chiefs in Washington: Drawing Battle Lines Over Western Water Rights*, 17 SAN DIEGO L. REV. 449 (1980); DuMars & Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, 20 NAT. RESOURCES J. 17 (1980). *See also* J. SAX & R. ABRAMS, LEGAL CONTROL OF WATER RESOURCES 553-54 (1986); D. GETCHES, WATER LAW IN A NUTSHELL 322-23 (1984).

27. In Nevada v. United States, 463 U.S. 110 (1983), the United States Department of Interior inadequately represented the reserved water rights which protected the fishery of the Pyramid Lake Paiute Tribe. The tribe's only legal remedy was a damage suit against the United States for breach of trust, not re-quantification of the inadequate reserved rights award. If representing reserved rights in bad faith does not subject quantification to collateral attack, a loss or reduction of those rights despite the good faith efforts of the rights holder will also be final.

Secretary Block to assert legal claims for wilderness reserved rights in several pending Colorado stream adjudication cases, and the resulting jeopardy to reserved rights caused by Block's failure to act, impelled the Sierra Club to bring the suit that provides the background for this essay.

This essay asserts in the introduction that the Secretary of Agriculture, like other federal officials empowered to protect reserved rights, has no role in denying the existence of rights and only a ministerial role in determining their extent. That official does have, as discussed below, a narrow role that permits a compromise settlement of reserved rights claims when the rights might be lost absent the compromise or when federal interests would otherwise substantially benefit from the settlement. With the preceding discussion of reserved rights doctrine as background, it is now time to attempt to prove these assertions and to demonstrate, most importantly, that federal officials possess enforceable duties to vindicate federal water rights.

A. The Nonsubstantive Role of the Official

The first two propositions in the preceding paragraph emanate from the simple fact that Congress (or the Executive, in the case of executive order reservations) creates and vests reserved water rights on the date the federal land is set aside. As discussed above, reserved rights come into this world, like Athene, fully matured and possessed of all their essential faculties: a priority date and a calculable flow of water. Given this heritage, the views of the current federal land managers are clearly irrelevant in determining the existence of reserved rights. In litigation determining whether water was impliedly reserved, the only issue is the intent with which the government reserved the land. A court does not inquire into what current federal officials (or legal scholars) find useful in their current work; rather, it weighs only evidence that elucidates an historical event that Congress or the Executive completed on the date of reservation.

The only issue, in short, is whether Congress intended to reserve water when it withdrew lands for wilderness, and the views of the current Secretary of Agriculture on this issue are simply irrelevant. In this aspect, reserved rights cases are unlike administrative law decisions that grant special importance to a statutory interpretation made by the federal official charged with the statute's enforcement. In the reserved rights cases, the administrative official's day-to-day experience in administering the law does not provide special insights. The legal issue that the court decides is historical; it is an accomplished fact.

Consider what would happen if, for example, a Secretary of Interior believed that reserved water rights did not attach to Indian reservations. Surely the Secretary could not advance that view in litigation without risking a violation of the Secretary's trust responsibility to the Indians of the reservation. In the *Nevada* case, for example, the Supreme Court

afforded the Pyramid Lake Paiutes a remedy against the Department of the Interior because the Department under-represented their entitlement to fishing water rights in an earlier adjudication. The necessary implication of *Nevada* is that the amount of a reserved right, like its very existence, is a matter of fact uninfluenced by the views of any federal official.

Another example makes even plainer the irrelevance of officials' views about the existence and extent of federal reserved water rights. Assume that in 1960 Congress reserved land from the public domain for the Upper Pick-a-Name River National Recreation Area and expressly reserved a minimum instream flow of the Pick-a-Name of 40 cubic feet per second (cfs). Assume further that the appropriate federal official believes no water was reserved. The view of the federal official who now manages the recreation area is irrelevant on the issue of whether Congress intended to reserve water. The official's view is not irrelevant because it is plainly wrong; rather, it is irrelevant because it has no bearing on the intent of Congress in 1960, and the intent of Congress in 1960 is what the court must decide. Similarly, that same federal official may be confident that 35 cfs will permit all the recreation uses that Congress sought to foster. That view too must give way to the historical fact that Congress reserved a flow of 40 cfs.

Consider next, quantification litigation about the river. If, in a general adjudication of the Upper Pick-a-Name, the United States claimed only a right to 35 cfs, a suit for mandamus would lie to force assertion of a claim for the full 40 cfs. The constitutional assignment of powers provides the basis for this result. Congress, even when it delegates power to executive agencies, retains the authority to issue the marching orders for the federal bureaucratic army. This is true even when congressional intent is less clear. The well-informed view of the federal official about the needed flow in the Pick-a-Name would still lack any special relevance even if Congress had failed to specify in numerical terms the amount of the reserved flow. In such a case, the court would employ a quantification standard based on physical necessity—the amount of water necessary to carry out the prescribed recreational aims. The managing official may hold a view about the optimum use of the resource or about the types of boating and recreation the river can support and the quantum of water needed to support the boating and recreation. Ultimately, however, the only relevant opinion is that of the court reached after weighing the available evidence concerning congressional intent and the flows needed to carry out that intent. Especially in regard to calculating the amount of water needed, the court, as trier of fact, would rely more on the expert testimony of the agency staff than on the editorial conclusions of the agency head.

In reserved rights quantification litigation, the federal official is best seen as a type of litigation counsel for the reserved water right. The official, through the efforts of the agency staff, marshals the evidence in favor of the water right. In a case like *Sierra Club v. Block*, this ministe-

rial role devolves upon the federal official by virtue of congressional action giving that governmental official responsibility to act as custodian of the federal property. Congress empowers no one else to act,[28] nor is anyone else better situated to adduce the necessary proofs regarding how much water is needed to fulfill the reservation purposes.

B. The Affirmative Duty To Pursue Reserved Rights

The most difficult to demonstrate of this essay's assertions is the existence of an affirmative agency duty to assert reserved water rights. That duty arises because the managing federal official's relationship to the lands is that of a custodian; because the official is, in effect, a trustee or steward for the American people. In a number of reserved rights cases, the federal official's role is plainly that of a trustee, and the role requires the official to fulfill fiduciary duties to vindicate reserved rights that benefit others. For example, when the Interior Department represents a tribe in Indian reserved rights cases, the Interior Department owes duties to the tribe and must assert the reserved rights to the fullest extent. A harder case arises when the federal official who is the custodian of the federal property (the reserved rights) also oversees the federal operations on the benefited land. In such a case, there is no identifiable group like an Indian tribe to whom fiduciary or trust duties are owed. Wilderness areas and National Parks present cases of this harder type.

To the extent that even these hard cases are aptly labeled custodianships or trusteeships, they too fit easily into this essay's schema. If wilderness reserved rights exist, the government vests them as federal property in the constructive custody of the Secretary of Agriculture (or Interior) in much the same way that gold is in the custody of the federal official commanding Fort Knox. No one would claim that the commander of Fort Knox lacked an enforceable duty to refrain from losing the gold by inaction or default. So too, no one should say that the Secretary can sit idly by and fail to prevent the destruction of vested federal property rights, especially when the rights *sub judice* are by definition "necessary" to his mission as manager of wilderness.

The custodial duty analysis gains support from the traditional posture of sovereign ownership of natural resources as ownership impressed with a trust. The public trust doctrine in water law is a good example of a judicial finding that the government must preserve trust property for the common good. For example, in the famous *Illinois Central* public trust case, the court found that the Illinois legislature lacked the power to alienate irrevocably the lands and superjacent waters adjoining Chicago.[29] In the reserved rights setting, a decision to default or to assert no

28. *Cf.* Valleyforge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982) (limiting private party standing to challenge disposition of federal property on establishment clause grounds).

29. Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

reserved rights in a lawsuit that can extinguish those reserved water rights threatens permanent alienation of the water, water that, as noted before, is by legal definition "necessary" to fulfill the purposes of the set aside land. Even if a custodial default of this type is not itself a breach of trust, the loss of water that is "necessary" to fulfill the purposes of the reservation is a breach of duty. Losing the water and with it the means to succeed in managing the reservation is a breach of the duty assigned to the official by Congress or the Executive when it delegated the authority to manage the resource in the first place.

C. Distinguishing Cases Where Deference Is Due

The custodial view that finds enforceable duties to pursue reserved water rights departs from administrative law doctrines favoring judicial deference to administrative decisionmaking. The deferential review doctrines have special force when the issues involve administrative decisions refusing to pursue enforcement actions. In *Heckler v. Chaney*[30] the Supreme Court held that courts should presume that administrative enforcement decisions meeting certain criteria are within the unreviewable discretion of the agency. In *Heckler* death row inmates attempted to require the Food and Drug Administration to take enforcement action preventing the use of a number of drugs for lethal injections. The inmates' complaint alleged several violations of the relevant statute, each of which arguably provided a sufficient ground for FDA enforcement actions. Enforcement would have benefited the inmates by preventing prison officials from using the drugs for lethal injections. The Supreme Court sustained the FDA's claim that it had discretion to refuse enforcement. The Supreme Court found the matter committed to agency discretion; further, that discretion was unreviewable by a court.[31]

The applicability of *Heckler* to the reserved rights context is no more than slight. *Heckler* rested on an interpretation of the Administrative Procedure Act (APA);[32] in particular, Section 706, which sets forth the rules for judicial review of agency action. The basic position of the APA is that all agency actions and failures to act[33] are subject to judicial review.[34] Section 701(a) announces two exceptions to the reviewability norm: first, when the governing statute precludes review and, second, when the matter "is committed to agency discretion by law."[35]

The Supreme Court used the second exception to reviewability to support its finding that courts could not review the nonenforcement decision in *Heckler*. Justice Rehnquist's majority opinion found that several

30. 105 S. Ct. 1649 (1985).

31. *Id.* at 1659. For an excellent discussion of this case and the relevant administrative law, see Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985).

32. 5 U.S.C. §§ 551-706 (1982).

33. The Act defines "failures to act" as the equivalent of actions. 5 U.S.C. § 551(13) (1982).

34. *See* Sunstein, *supra* note 31, at 655.

35. 5 U.S.C. § 701(a) (1982).

factors gave rise to a rebuttable presumption that nonenforcement decisions fit within the second exception, thereby shielding them from judicial review under the APA.[36] The factors included: (1) the wide range of considerations that affect setting enforcement priorities, (2) the noncoercive nature of nonenforcement decisions, (3) the fact that inaction, unlike action, provides little focus for judicial review, and (4) the similarity to prosecutorial discretion regarding indictments, a discretion which implicates the "take care" clause of the Constitution[37] authorizing the executive branch to enforce the laws without inappropriate judicial oversight. The presumption could be overcome if "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[38]

Heckler does not control the reserved rights situation. "Enforcing" reserved rights and "enforcing" substantive statutes against targeted violators are distinctly different tasks. The former is not an enforcement proceeding at all; it is a defense of a vested property right of the United States against possible loss. The United States is a defendant in most reserved rights cases. As a defendant, the United States does not exercise any prosecutorial discretion when it asserts its rights to the water.

Even if *Heckler* applied to the failure to enforce reserved rights, the *Heckler* factors that trigger a presumption of nonreviewability would not support the presumption in the reserved rights situation. Of the four factors, only the first is present in a refusal to "prosecute" reserved rights. The second and fourth factors are inapposite when the federal government is not coercing anyone, but only laying claim to water rights in the context of a general lawsuit. A ready focus exists for review of a failure to assert reserved rights. The finality that courts will accord the general adjudication makes a failure to assert reserved rights a final decision to forfeit those rights. To the extent that a party with standing to complain raises the issue,[39] an extraordinarily concrete case ripe for decision arises. The legal duties of the administrative official are plain: the official must do what is necessary to fulfill the reservation intent, which requires him to claim precisely as much water as the government reserved.

The first of the *Heckler* factors creates intra-institutional competence questions about the allocation of an agency's limited resources. Although this consideration is present in the reserved rights setting, it does not by itself trigger the presumption of unreviewability. The Secretary has only limited resources with which to fulfill the many mandates of the office, and the vigorous assertion of all reserved rights might tax those resources. A quest for rights to instream flows in all wilderness

36. 105 S. Ct. at 1656.
37. U.S. CONST. art. II, § 3.
38. 105 S. Ct. at 1656.
39. *See, e.g.*, Sierra Club v. Block, 622 F. Supp. 842, 847-49 (D. Colo. 1985).

areas could involve the Secretary in a welter of cases throughout the West. Multiple litigation would be a demanding undertaking which might not, in the Secretary's view, involve sufficiently important interests when weighed against other administrative responsibilities that the same staff must meet out of a limited budget.

Even if the Secretary's administrative management dilemma is real,[40] the forfeiture of federal water rights is not a permissible way to solve the problem. Consider, for example, the plight of a trustee under ordinary trust law who finds the conservation of the trust's assets unworkably expensive. The trustee cannot jettison valuable trust assets without the consent of the settlor of the trust or of a court that reviews and approves the trustee's action.[41] Here, where Congress has created these rights that are "necessary" to the enterprise, the proper course of administrative action surely lies in seeking legislative or judicial relief from the predicament rather than abandoning the rights.

D. The Narrow Range Of Permissible Discretion

To this point, this essay has argued that federal officials must act to vindicate reserved rights, lest their inaction cause a forfeiture. It has argued also that these rights are of a determinate magnitude. In combination, these two propositions imply that federal officials in reserved rights cases should seek an award of the full amount of water that Congress reserved. Fettering the administrative officer in this fashion would transform the officer into the legal advocate of the reservation, much like the role of the Department of Interior as representative of Indian tribes' reserved water rights. The Indian reserved rights example of a federal official as the lawyer for the right's holder can be extended to all reserved rights cases. In the wilderness setting, however, the "client" that the federal government represents is *not* the Secretary of Agriculture, the nominal party in the litigation, but either the Congress that reserved the water or the American people who are the intended beneficiaries of the reservation.

A model of the federal administrative officer as advocate or attorney, and not as principal is well-suited to reserved rights litigation and defines the role of the federal agency head and agency staff. The amount of water necessary to fulfill the purposes of a reservation, though fixed, is not always easily established by competent proof. The National Forest reserved rights litigation is a prime example of the difficulty facing the federal administrative officer in the role of advocate. *New Mexico* settled

40. In a landmark Colorado quantification case involving numerous reserved rights claims, federal officials claimed that they would be unable to meet a rigorous six-month time deadline in regard to the quantification of reserved rights claims. After indicating that it did not think the six-month period unreasonable, the Colorado Supreme Court went on to say that "[I]f unexpected difficulties arise during quantification, the federal government may seek an extension of time from the water court." United States v. City and County of Denver, 656 P.2d 1, 30 (Colo. 1982).

41. 76 AM. JUR. 2D *Trusts*, § 380 (1975).

the historical fact issue that the 1897 Organic Act and the 1960 Multiple Use and Sustained Yield Act had as primary purposes timber growth and watershed protection. Thereafter, the Forest Service could no longer seek to obtain reserved rights protection for National Forest instream flows by referring to recreation uses and similar uses plainly served by minimum streamflows.

Rather than abandoning reserved rights streamflow claims after the *New Mexico* setback, the Forest Service as reserved rights advocate continued to seek maximum streamflow rights in pending litigation.[42] First, the Service claimed that streamflows were necessary for continued timber growth in the forests. When pressed in litigation, however, the Service was unable to marshal persuasive supporting evidence.[43] The Service next attempted to adduce evidence that instream flows in the forests insured favorable streamflow conditions for state law appropriators. The Service developed a theory of channel maintenance which required continuous instream flows to transport sediments downstream to maintain viable stream channels. Absent viable channels, greater erosion occurs and streams meander, back up, and flood. As a result, water loss to evaporation and seepage increases. In short, the Service tried to prove that viable channels maintained by minimum streamflows are necessary to insure the continued streamflow quantity and quality that was a primary purpose of the National Forest legislation.[44] The roles of the federal official and the agency became like those of an attorney and retained experts trying to win a contested issue of fact regarding the amount of water needed to fulfill reservation purposes.

The attorney or advocate image suggests the circumstances in which an official could exercise discretion and opt to compromise reserved rights claims without breaching the representational duty to seek the full measure of reserved rights. Normally, when a client's rights are at risk in litigation, an attorney will seek to negotiate a compromise settlement rather than litigate if the settlement option serves the client's best interests. The risk of a loss, or of an incomplete victory in court, coupled with the financial burdens of trial, favor settlement of all but the surest victories. Like most cases, the results of reserved rights cases are somewhat unpredictable and the official should not dismiss the risks of loss or expense of litigation as trivial.

Consider the surest of all reserved rights settings, Indian reserved rights for irrigation under the irrigable acreage standard. Barring a major Supreme Court reversal of existing doctrine, the official could estimate the probable outcome of these cases by multiplying the number of

42. *See generally* Shupe, *Reserved Instream Flows In The National Forests: Round Two*, W. NAT. RESOURCE LITIG. DIG. Spring 1985, 13B 16(a) at 23.

43. United States v. City and County of Denver, 656 P.2d 1, 22 n.35 (Colo. 1982).

44. *See* United States Forest Service, *A Procedure and Rationale for Securing Favorable Conditions of Water Flows on National Forest System Lands in Northern Wyoming*, Draft Report (1982). *See also* Shupe, *supra* note 42, at 28.

irrigable acres by the applicable water duty.[45] Even here, the difficulty and expense of proving the precise number of irrigable acres and the precise water duty provide an incentive to negotiate and settle. In the Indian context, the tribe is an easily identified client to whom the federal official, like an attorney, recommends settlement. The federal official does not ultimately decide whether to forego some portion of the right to gain certain victory by settlement. The federal official's role instead is that of advising the client that the settlement best serves the client's interests. In this advisory capacity, the official does not recommend a compromise based on the federal official's own interests or predilections about reserved rights—the standard for compromise is the client's best interest.

Because the real client in many reserved rights cases is either the Congress that years ago created the reservation (not unlike the deceased settlor of a trust) or the American people as a whole, it is impossible for the federal official to seek the client's informed approval of any settlement that falls short of total victory. In those cases, the federal official fills two roles. First, as holder or manager of the affected lands the federal official becomes the alter ego of the real client; simultaneously, the federal official serves as the director of the legal team that fights to vindicate the reserved rights. Although the two roles are distinct, the standard for recommending and accepting a compromise is monolithic. The official as attorney must strive to achieve the best possible result for the client; that same official, as custodian of valuable federal property rights which belong to the real client, can accept no less.

A best-interests-of-the-client standard, applied for compromise, will not vest the federal official with so much latitude to compromise reserved rights cases that the official can bypass the duty of ardent representation. For example, assume in the wilderness reserved rights setting that the Secretary of Agriculture, as advocate, believes in good faith that the exact quantity of instream flow needed to preserve the wilderness will be hard to prove and that no major upstream diversions are occurring or planned for any of the streams that traverse the wilderness. Can the Secretary simply default by claiming that default satisfies the best-interests standard because it saves costs and because the rights at issue are unimportant?

A court should not allow the Secretary to default under these circumstances. If it did permit default, a court would have wrongly equated the best interests of the official as administrator with the best interests of that same official as the persona of a reserved-rights-holding client. The assumed difficulty of proof, standing alone, may permit the official to compromise and settle, but it cannot justify a default of the case. Assuming as the hypothetical does that the rights do exist, they are

45. *Cf.* J. SAX & R. ABRAMS, *supra* note 26, at 548-53 (some opponents of Indian reserved water rights questioning the continued application of the irrigable acreage standard).

the rights that Congress reserved under the 1964 Wilderness Act and they attach to some quantity of water. A default in the case loses whatever rights exist. If the Secretary can adduce some evidence of the need for flows to support wilderness, that evidence will lead to an award of reserved rights in favor of the wilderness. At the very worst, the proffered evidence will be insufficient and the litigation will fail to win any rights, leaving the client as badly off as would a default. The federal official fails to serve the client's best interest by foregoing whatever hopes the client has of preserving a legal entitlement. The official will save litigation effort, which will benefit the administrative official in his role as manager of a bureaucratic department. Staff time not channelled into reserved rights litigation is available to pursue other projects. Even so, as decisionmaker in this instance, the official's custodial or trust responsibility supercedes administrative convenience.

The cases in which federal officials may compromise reserved rights are of two kinds. First, when reserved rights holders face a real threat of loss, the administrative official may seek a compromise settlement that does not frustrate the purposes for which Congress reserved the lands, but is less than all the water that Congress arguably reserved. Here, the judgment of the official involves the subjective weighing of probabilities concerning the likely outcome of litigation and more objective assessments regarding the exact water needs of the reserved lands. Although this judgment should not be completely free from judicial scrutiny, deferential judicial review is appropriate in this setting.

The other situation that justifies compromise of reserved rights arises when the settlement generates benefits apart from the right to the water itself. For example, in the Indian reserved water rights context, settlement terms that reduce the magnitude of the water rights might be attractive if the tribes also receive nonwater considerations. Such considerations may include money or in-kind construction of water projects that enable the tribe to exercise its rights.

III. CONCLUSION

A rule insuring that water will always flow in the wilderness is only one of the many important manifestations of a well-developed reserved rights doctrine. Because a default by an administrative official can vitiate such rights, controls on official discretion are as vital a part of the reserved rights doctrine as any substantive issue. The litigation challenging the Secretary of Agriculture's failure to protect wilderness area reserved rights is a case in point. The initial legal position of the Secretary, who has claimed that no reserved rights exist and that he possesses a total, unreviewable discretion to refuse to protect those rights, bespeaks a fundamental misconception of the law of reserved rights on the part of the Secretary.

Perhaps the Secretary is not at fault, for the magnitude of his error

is apparent only after a careful inquiry into the complex nature of the law that surrounds reserved rights and the obligations of federal officials who are the custodians of those valuable, necessary property rights. The Secretary's position ignores the genesis of reserved rights and the custodial duties of his office as the alter ego of the real client, the beneficiaries of the reserved rights. An official in this position has no role in deciding the existence of the rights, only a ministerial role in producing evidence regarding the extent of the right, and a judicially reviewable duty to fully assert those rights. The only qualification of that duty is that the official can temper an attempt to win the full amount of the rights by compromising if the rights otherwise may be lost or if the official by doing so can gain important nonwater rights benefits. Even then, a court should stand ready to review the compromise decision.[46]

46. *See, e.g.*, Sunstein, *supra* note 30; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). *Cf.* FED. R. CIV. P. 23(e).