The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine

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THE SHALLOWS WHERE FEDERAL RESERVED WATER RIGHTS FOUNDER: STATE COURT DEROGATION OF THE WINTERS1 DOCTRINE

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Abstract

The doctrine of implied federally reserved water rights, as established by Winters v. U.S., 207 U.S. 564 (1908), is important to the realization of federal land management goals. Recently, the doctrine’s ability to protect those goals when federal land is set aside for non-Indian purposes has been greatly limited by several poorly reasoned and result-oriented state court decisions. The primary factors that have led to these erosions of the Winters doctrine’s utility are: (1) the McCarran Amendment, 43 U.S.C. § 666, which allows states to force the U.S. to assert its federally reserved water rights claims in state court general stream adjudications; (2) state court hostility to the assertion of Winters claims for political and economic reasons; (3) state court abuse of the poor reasoning utilized by the U.S. Supreme Court in its most recent substantive decision on non-Indian federal reserved water rights, U.S. v. New Mexico, 438 U.S. 696 (1978); and (4) state court abuse of the inconsistent and sometimes ambiguous language included in the various executive and Congressional reservations. Because it is unlikely that the mostly western states will become more amenable to the assertion of federally reserved water rights and almost as unlikely that the U.S. Supreme Court will issue a new substantive opinion on the Winters doctrine anytime soon, the problem should be resolved by Congress. That body could undo some of the damage done to this important part of federal land management law and prevent its future debilitation by repealing the McCarran Amendment or, alternatively, by amending the various organic and enabling statutes under which federal reservations of land are made.

I. Introduction

It is well-established that Congress has the right to reserve water necessary for federal lands pursuant to the Commerce Clause, Art. I, § 8, and the Property Clause, Art. IV.2 Since 1908, the U.S. Supreme Court has held that, when the federal government sets aside land from the public domain for a water dependent purpose without specifically reserving the requisite water, the government has indeed exercised its constitutional power and reserved water sufficient to accomplish the

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primary purposes of that reservation. This particular exercise of the federal government’s constitutional power over water has become known as the doctrine of implied federally reserved water rights or, more commonly, the *Winters* doctrine.

Despite the Supreme Court’s long recognition of the *Winters* doctrine, recently the federal government’s exercise of this constitutionally-granted power has been met by vehement resistance in western states who fear the doctrine’s potential effect on water rights acquired under state law. Unfortunately, this resistance has led to several poorly reasoned, result-oriented state high court decisions that have greatly reduced the doctrine’s utility in those states. This is especially disconcerting because the *Winters* doctrine was created to prevent the frustration of the legislative intent behind federal land withdrawals—for example, the early doctrine recognized water rights for an Indian reservation water where the Indian tribe would have otherwise had none under state law and, in another instance, prevented the likely extinction of the desert pupfish by preserving the water levels in Devil’s Hole. However, the *Winters* doctrine has now been subjected to numerous state court holdings that failed to uphold non-Indian federally reserved water rights, even in the most compelling situations. These derogations of *Winters* are a significant important problem because they inhibit the ability of federal agencies to effectuate federal land management goals in the West.

This article strives to identify the factors that have led to this problem and explore ways in which it could be resolved or, at least, to discern means of mitigating further damage to the doctrine of implied federally reserved water rights. In pursuit of this purpose, Part II of the article examines the U.S. Supreme Court’s

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3 *Winters* v. U.S., 207 U.S. at 577-78. See *U.S. v. New Mexico*, 438 U.S. 696, 699-702 (1978) (limiting the implication of federally reserved water rights to “[w]here water is necessary to fulfill the very purposes for which a federal reservation was created”) (citations omitted).


5 See discussion infra Parts III, IV.

6 Id.

7 *Winters*, 207 U.S. 564, 575-76.

8 *Cappaert*, 426 U.S. 128, 133-34.

9 See discussion infra Part IV. Federally reserved water rights claims for Indian reservations have generally received better treatment in state courts than those asserted for non-Indian purposes. See, e.g., *In re Gila River General Stream Adjudication*, 35 P.3d 68, 76-77 (Ariz. 2001) (rejecting *New Mexico*’s primary purpose rule on the basis that non-Indian reservations of land are significantly different than Indian reservations). This is probably due, in part, to the liberal construction given Indian treaties. See *Potlatch v. U.S.* (*Potlatch II*), 12 P.3d 1260, 1264 (Idaho 2000) (citing *Winters*, 207 U.S. 564, 577, for the rule that ambiguities in agreements with Native Americans are to be interpreted in the tribes’ favor and stating that, in the context where there has been no bargained-for exchange such as a treaty, “[t]he opposite inference should apply”).

creation and early extension of the doctrine of implied federal reserved water rights. Part III identifies factors that have adversely affected the application of that doctrine in recent state court decisions, including the passage of the McCarran Amendment,\textsuperscript{11} traditional state court bias, the Supreme Court’s poorly reasoned decision in \textit{U.S. v. New Mexico},\textsuperscript{12} and inconsistent Congressional action. Part IV then discusses several recent state adjudications of non-Indian federally reserved water rights and the role these factors played in those decisions. Ultimately, in Part V, the article concludes that Congress is the proper entity for resolving the problems that have arisen in the doctrine and a substantial amount of future harm can only be avoided by affirmative action on the part of that body. This article posits that Congress could prevent the mistreatment of U.S. government’s future federally reserved water rights claims by the hands of hostile state courts by repealing the McCarran Amendment or, alternatively, could, at least, mitigate against further damage by amending the various organic and enabling statutes under which federal reservations of land are made.

\section{II. The Early Winters Doctrine

\subsection{a. Establishing the Doctrine}

The doctrine of implied federally reserved water rights was established by the U.S. Supreme Court in \textit{Winters v. U.S}, a case that has, as mentioned above, widely served as the doctrine’s namesake.\textsuperscript{13} In \textit{Winters}, the Supreme Court affirmed a lower court order enjoining several Milk River appropriators, who had acquired water rights under state law, from interfering with that river’s flow into the Fort Belknap Indian Reservation downstream.\textsuperscript{14} Fort Belknap was created by an 1888 agreement in which various Indian tribes ceded their rights to a larger portion of Montana land in exchange for the United States’ creation of a “‘permanent home and abiding place’” for them within that state.\textsuperscript{15} In its short opinion, the Supreme Court addressed whether the lower court’s injunction was proper by engaging in a straightforward analysis of the circumstances surrounding the treaty and the terms of that agreement.\textsuperscript{16} The Court found that the lands comprising Fort Belknap were arid and “practically valueless” without water to irrigate them.\textsuperscript{17}

Consequently, despite the potential damage to the upstream appropriators’ sizeable investments (and, therefore, the potential frustration of those appropriators’ expectations), the Court rejected the appropriators’ argument that

\begin{footnotes}
\item[\textsuperscript{11}]McCarran Amendment, 43 U.S.C. § 666 (2012).
\item[\textsuperscript{12}]\textit{New Mexico}, 438 U.S. 696.
\item[\textsuperscript{13}]\textit{Winters}, 207 U.S. 564.
\item[\textsuperscript{14}]\textit{Id.} at 565-69.
\item[\textsuperscript{15}]\textit{Id.} at 565. The Supreme Court believed that agreement evinced a desire, on the part of the United States and the Indians, “to change [the Indians’ nomadic] habits and to [allow them to] become a pastoral and civilized people.” \textit{Id.} at 574.
\item[\textsuperscript{16}]\textit{Id.} at 575-78.
\item[\textsuperscript{17}]\textit{Id.} at 576.
\end{footnotes}
the Indian tribes had ceded their right to use the Milk River’s water. Instead, the Supreme Court framed the circumstances of the case in accordance with the dictates of common sense. It explained that, prior to the treaty, the “Indians had command of the lands and the waters,—command of all their beneficial use, whether kept for hunting, ‘and grazing roving herds of stock,’ or turned to agriculture and the arts of civilization.” The Court then asked whether it was to be believed that, by this agreement, the Indians had “reduce[d] the area of their occupation and give[n] up the waters which made it valuable or adequate?” It concluded that the Indians would not have assented to a treaty with such masochistic terms and that the 1888 creation of the Indian reservation had implicitly reserved sufficient water for the survival of that reservation and its people.

b. Extending the Doctrine

Although the U.S. Supreme Court established the doctrine of implied federally reserved water rights in *Winters*, that sparse decision left a number of questions open. Central amongst those questions was whether the doctrine announced in *Winters* applied only to Indian reservations or extended to other federal reservations of land as well. The Court did not address this important issue until several decades later. However, when it finally did so, the Court’s answer was rendered without equivocation.

In its 1963 decision in *Arizona v. California*, the U.S. Supreme Court considered whether the *Winters* doctrine applied federal land withdrawn from the public domain for other, non-Indian purposes. There, the Court found “that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments.” It held that the federal government had intended to and did reserve sufficient water from the Colorado River when it created two national wildlife refuges, a national recreation area, and the Gila National Forest.

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18 *Id.* at 567-73, 576. The state appropriators alleged that they had invested more than $100,000 and that “if they [were] deprived of waters ‘their lands [would] be ruined, it [would] be necessary to abandon their homes, and they will be greatly and irreparably damaged.’” *Id.* at 574.

19 *Id.* at 574-76.

20 *Id.* at 576.

21 *Id.*

22 *Id.* at 576-77.

23 *Id.* at 577-78 (quoting U.S. v. Rio Grande Dam & Irrig. Co., 174 U.S. 702 (1899)). The rectitude of such an assertion cannot be doubted. See U.S. Const. art. VI, cl. 2 (stating that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land”).


25 *Id.*

26 *Id.* (emphasis added).

27 *Id.*
Following *Arizona*, in 1976, the Supreme Court gave its first opinion that examined non-Indian federally reserved water rights in depth. In *Cappaert v. U.S.*, the Court considered whether the Presidential proclamation reserving Devil’s Hole as a detached component of Death Valley National Monument also reserved sufficient water to sustain the pool within that cavern. The Court began its analysis with what is, to date, its best explication of the *Winters* doctrine:

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

The Court continued with an explanation of the doctrine’s constitution foundation and scope:

Reservation of water rights is empowered by the Commerce Clause, Art. I, s 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, s 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

As it had in *Winters*, the *Cappaert* Court again adamantly refused to complicate the doctrine of federal reserved water rights by weighing the gravity of the interests competing for the water at issue. In *Cappaert*, because a finding of federally reserved water rights for the Monument would adversely affect a nearby large commercial ranch’s groundwater pumping, Nevada argued that the *Winters* doctrine was an equitable one, “calling for a balancing of competing interests.” The Court roundly rejected this baseless argument and stated, “[i]n determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water,” and that “[s]uch an [i]ntent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.”

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28 *Cappaert*, 426 U.S. 128.
29 Id. at 131-38.
30 Id. at 138 (citations omitted).
31 Id.
32 Id. In *Winters*, the U.S. Supreme Court found implied federally reserved water right despite the adverse effect those rights would have on heavily invested state appropriators. *Winters*, 207 U.S. 564, 574; see supra note 20.
34 Id. at 138.
After rejecting the balancing test suggested by Nevada, the *Cappaert* Court looked to whether an intent to reserve water could be inferred from the language of the reservation of the Devil’s Hole and the circumstances surrounding it.\(^{36}\) In doing so, the Court noted that “[t]he Proclamation discussed the pool in Devil’s Hole in four of the five preambles and recited that the ‘pool...should be given special protection.’”\(^{37}\) Reasoning that “[because] a pool is a body water, the protection contemplated is meaningful only if the water remains,” the Court ultimately concluded that the 1952 reservation of Devil’s Hole pool constituted an express reservation of then unappropriated water sufficient to preserve its scientific value—despite the impact on other water users.\(^{38}\)

As is evident from these cases, the doctrine of implied federal reserved water rights enjoyed a relative lack of complexity from its establishment by the *Winters* Court in 1908 up until the Court’s first full explanation of the doctrine in *Cappaert* despite the contentious nature of water allocation in the West. As a judicially created rule of construction, it prevented federal lands withdrawn from the public domain for a specific purpose from being denied the water necessary to accomplish that purpose. It did so by examining the often sparse language of the reservation at issue, as well as the statutory authority for the reservation, and giving effect to both expressed intent and what was logically required to accomplish that intent.\(^{39}\) In sum, through the Supreme Court’s decision in *Cappaert*, the *Winters* doctrine served as a judicial application of common sense interpretation to federal reservations and their unique circumstances. Unfortunately, this would not continue.

### III. Factors Leading to State Court Derogation of the Winters Doctrine

Despite its status as a relatively straightforward and common sense doctrine for the first 68 years of its existence, the years since have not been kind to the *Winters* doctrine. Recent years have witnessed several efforts by state courts to avoid recognizing non-Indian federal reserved water rights.\(^{40}\) The result is a patchwork of poorly reasoned and result-oriented state court decisions, which have impaired the *Winters* doctrine’s ability to accomplish federal land management goals.\(^{41}\) This has been largely caused by: (1) the McCarran Amendment,\(^{42}\) which allows states to force the U.S. to assert its federally reserved water rights claims in state court general stream adjudications; (2) state hostility to the assertion of

\(^{36}\) *Id.* at 139-42.

\(^{37}\) *Id.* at 139-40 (citing Proclamation No. 2961, 3 C.F.R. 147 (1949-1953)).

\(^{38}\) *Id.* at 140, 147.

\(^{39}\) See *id.* (reasoning that the pool reserved by the proclamation at issued could only be protected if granted sufficient water to remain a pool); *Winters*, 207 U.S. 564, 576 (rejecting the argument that the Native Americans of the Fort Belknap Indian Reservation had given up both water rights necessary to the viability of their Reservation by entering into a treaty with the U.S.).

\(^{40}\) See discussion *infra* Part IV.

\(^{41}\) See discussion *infra* Parts IV, VI.

\(^{42}\) 43 U.S.C. § 666.
Winters claims for political and economic reasons; (3) state court abuse of the poor reasoning utilized by the U.S. Supreme Court in its most recent substantive decision on non-Indian federal reserved water rights, U.S. v. New Mexico;43 and (4) state court abuse of the inconsistent and sometimes ambiguous language included in the various executive and Congressional reservations.

a. The Passage of the McCarran Amendment

As noted above, after Cappaert,44 a confluence of four factors significantly increased the complexity of federally reserved water rights law and facilitated the erosion of the doctrine's usefulness. The first of these factors was the expansion of state court jurisdiction with the passage of the McCarran Amendment in 1952.45 Prior to the McCarran Amendment,46 questions of the existence and scope of federal water rights were almost exclusively decided by federal courts.47 Indeed, Cappaert arose out of litigation in federal court.48 Prior to the 1950s, federal sovereign immunity prevented most federal water rights cases from being decided by state courts, despite the fact that many states had adopted judicial and administrative procedures for determining water rights within their boundaries.49 This situation led Senator Patrick McCarran and the Amendment’s other proponents to attack the application of sovereign immunity in the area of water rights.50 They argued that federal water rights, which could affect rights obtained under state law, should be decided with state water rights in large and comprehensive state court proceedings.51 Unsurprisingly,52 their argument gained momentum and the

43 New Mexico, 438 U.S. 696.
44 Cappaert, 426 U.S. 128.
46 Id.
48 After a state engineer rejected the United States’ protest to the Cappaerts’ petition for a change in their water rights in a state administrative proceeding, the United States filed suit against the Cappaerts under 28 U.S.C.A. § 1345, which gives federal district courts jurisdiction in cases where the U.S is a plaintiff. The U.S. District Court entered judgment for the United States, 375 F.Supp. 456, the Ninth Circuit Court of Appeals affirmed, 508 F.2d 313, certiorari was granted, and the U.S. Supreme Court affirmed the decision in favor of the United States. 426 U.S. 128.
49 Id. at 438-40.
50 Id.
51 Id.
52 See discussion infra Part III.c. In opposition to the Amendment as it was first proposed in 1949, the U.S. Department of Justice argued “that the proposal would subject the United States to ‘a piecemeal adjudication of water rights, in turn resulting in a multiplicity of actions.”’ John Thorson, State Watershed Adjudications: Approaches and Alternatives, 42 RMMLF-Inst. 22 (1996). The Interior Department argued that the Amendment should “only extend to water rights established under state law by the United States and specifically exclude any water rights held by the United States on behalf of Indians.” Id. In subsequent hearings before the Judiciary Subcommittee, the Justice Department’s representative argued, “the legislation would result in prolific litigation and ‘the forward progress of the West, for which we are all fighting, would be impeded tremendously.” Id., (quoting Catherine
Amendment’s proponents succeeded in passing it as a rider to an appropriations bill for the Departments of State, Justice, Commerce, and the Judiciary.\textsuperscript{53}

The passage of the McCarran Amendment effectively reversed the status quo, allowing state courts to become the primary adjudicators of federal water rights.\textsuperscript{54} By waiving the federal government’s sovereign immunity for the purposes of such adjudications, it allowed the United States to be joined as a party “in any suit for the adjudication of rights to the use of water of a river system” and waived the federal government’s sovereign immunity for the purposes of such adjudications.\textsuperscript{55} Unfortunately for the continued utility of the \textit{Winters} doctrine, in 1971, the U.S. Supreme Court held that the Amendment’s waiver of sovereign immunity extended to federally reserved water rights.\textsuperscript{56} By allowing states hostile to federal control to force the U.S. government to litigate its \textit{Winters} claims before state courts,\textsuperscript{57} this development significantly contributed to the future derogation of the doctrine of non-Indian implied federal water rights.

\textbf{b. U.S. v. New Mexico}

The effect of the McCarran Amendment\textsuperscript{58} directly led to the second factor that would eventually impair the continued utility of the \textit{Winters} doctrine—the U.S. Supreme Court’s decision in \textit{U.S. v. New Mexico}.\textsuperscript{59} In \textit{New Mexico}, the Court revisited the subject of the Gila National Forest’s federally reserved water rights.\textsuperscript{60} There, the
Court considered what, if any, water the federal government had reserved for instream flows and recreational purposes in Rio Mimbres River when it created the Gila National Forest.\footnote{\textit{New Mexico}, 438 U.S. at 697-99.} Prior to the Court’s consideration of that issue, the Supreme Court of New Mexico, using McCarran Amendment jurisdiction, had affirmed a lower court holding that the United States, in setting aside the Gila National Forest from other public lands, did not reserve water for recreation, aesthetics, wildlife preservation, or cattle grazing.\footnote{Mimbres Val. Irr. Co. v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977).} The lower court held that the United States had not reserved water rights in the Gila National Forest for recreational purposes despite the findings of fact and conclusions of law entered by the special master appointed by the trial court, which supported the United States’ claim to 6.0 cubic feet per second of water in the Gila National Forest for minimum instream flows and recreational purposes.\footnote{Id.}

In its analysis of this issue, the U.S. Supreme Court, for the first time ever in a \textit{Winters} case, distinguished between the primary and secondary purposes of federal reservations and held that water rights for non-Indian reservations could only be reserved by implication for the former.\footnote{\textit{Id.} at 707 (quoting 30 Cong.Rec. 967 (1897) (statement of Cong. McRae)).} Utilizing its novel distinction, the Court concluded that the primary purposes for which the forest had been set aside were derived from a parsing of the 1897 National Forest Organic Act—“‘to conserve water flows, and to furnish a continuous supply of timber for the people.’”\footnote{\textit{Id.} at 704-12, 718.} Based on this narrow reading of the reservation’s statutory purpose, it rejected the United States’ arguments that the creation of Gila National Forest had reserved water for recreation, aesthetics, wildlife preservation, and cattle grazing.\footnote{John D. Leshy, \textit{Water Rights for New Federal Land Conservation Programs: A Turn-of-the-Century Evaluation}, 4 U. DENV. WATER L. REV. 271, 276 (2001).} While it is apparent that the Supreme Court sought to restrict the scope of the \textit{Winters} doctrine in \textit{New Mexico},\footnote{See discussion \textit{infra} Part IV.} the manner in which it sought to do so was deeply flawed. Sadly, the flawed reasoning of the Supreme Court’s decision in \textit{New Mexico} would later serve as a guide to hostile state courts on how to avoid finding implied federally reserved water rights.\footnote{Id.} Three significant defects in the Court’s analysis are detailed below.

\textbf{i. Assertion that Congress had “invariably deferred” to State Water Law}

\footnote{\textit{New Mexico}, 438 U.S. at 697-99.}
The first, and arguably most fundamental, problem with the Court’s decision in New Mexico was its heavy reliance on Congress’s “traditional” deference to state water law. Early in its opinion, the Court made the assertion that “[w]here Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law,” and used that purported principle of federalism as the justification for, amongst other things, its new and more restrictive approach to the Winters doctrine. For example, the Court prefaced its introduction of the primary versus secondary purpose distinction with that statement, making clear that its belief that Congress “invariably deferred” to state water law served as an impetus for introducing that limitation. Additionally, later in the opinion, the Court used its “invariable deference” reasoning as a basis for injecting a balancing test into non-Indian water rights application of the Winters doctrine despite the Cappaert Court’s express rejection of such a test just two years earlier. There, the New Mexico Court stated that “the reality” that the assertion of “federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators…has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests.”

The Court’s characterization of Congress’s past actions in this area was an expansion on a statement it had made in another case involving federal reclamation projects. There, the Court rejected the United States’ argument that it could impound whatever unappropriated water it deemed necessary for a federal reclamation project without complying with state law. However, the statute in question—the 1902 Reclamation Act specifically provides that the Secretary of the Interior must follow state law as to the appropriation of water and condemnation of water rights. To take this statement out of context and extend it to the federal reserved water rights doctrine—a creature of federal law through and through—

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69 New Mexico, 438 U.S. at 702.
70 Id. at 705.
71 See discussion infra Part III.b.ii.
72 New Mexico 438 U.S. at 702.
73 Id. at 705; see Cappaert, 426 U.S. 128, 138-39 (rejecting the State of Nevada’s argument that the doctrine of federal reserved water rights was an equitable doctrine that called for the weighing of competing interests).
74 New Mexico 438 U.S. at 705. The Court’s use of Congress’s “invariable deference” as a justification was also apparent in its discussion of the effect of the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31 (1960). Id. at 713-15. There, it characterized the Winters doctrine as “an exception to Congress’ explicit deference to state water law in other areas.” Id.
was inappropriate.

More generally, there has not been “invariable deference” in other water-related matters. In fact, prior to the New Mexico Court’s blanket assertions about congressional actions and intent with regard to water law, both the Wilderness Act (1964) and the Wild and Scenic River Act (1968) had been passed, neither of which deferred to state water law despite specifically addressing water rights. In addition, Congress had passed the Clean Water Act of 1972, which significantly expanded federal authority over the integrity of the nation’s water bodies. Although the 1977 amendments to the Clean Water Act included a provision stating that the states’ authority “to allocate quantities of water . . . shall not be superseded, abrogated or otherwise impaired by this Act,” the Act’s substantive provisions and jurisdictional scope remained intact. Tellingly, another 1972 enactment, the Endangered Species Act, which has had tremendous impacts on water management, simply provides that “Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.”

Given this backdrop, it is clear that the Court’s blanket assertion was, at best, a gross overgeneralization about congressional action in the water arena. Moreover, it was as likely to have been the product of the Court’s own federalism assumptions and biases as it was a reasoned analysis. Subsequent objective

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77 See Benson, supra note 77, at 249 (calling the conventional wisdom that Congress consistently defers to state authority over water “a myth” and stating that “Congress and the Supreme Court have generally refused to cede control over water to the states if there was a potential conflict with an important national interest”).


79 33 U.S.C. §§ 1251 et seq.


82 See Benson, supra note 77, at 242-66 (questioning the conventional wisdom that the federal government had consistently deferred to state water law).

analysis and commentary have revealed a much more nuanced picture of federal deference to state water law, the truth of the matter being that Congress has sometimes deferred to state water law and sometimes not.\textsuperscript{84}

\textbf{ii. Introduction of the Primary Purpose Rule}

Whatever the merits (or lack of merit) of the Court’s generalization about congressional deference in the area of water law, it undoubtedly served as the Court’s justification for limiting the application of the \textit{Winters} doctrine to the primary purposes of a federal reservation of land.\textsuperscript{85} This limitation, the primary purpose rule, was the second major flaw in the Court’s reasoning. The Court’s effort to limit the application of the doctrine of non-Indian implied federal water rights by distinguishing between the primary and secondary purposes of federal reservations was shortsighted.\textsuperscript{86} As the \textit{New Mexico} opinion itself and subsequent state court cases show, the primary purpose distinction is a poor one because it resists principled application and invites result-oriented and arbitrary judicial line drawing.\textsuperscript{87}

The arbitrariness of the \textit{New Mexico} Court’s new rule is apparent throughout its opinion.\textsuperscript{88} As stated above, in applying this rule, the Court concluded that primary purposes of the Organic Administration Act of 1897\textsuperscript{89} were “‘to conserve water flows, and to furnish a continuous supply of timber for the people,’”\textsuperscript{90} despite that Act’s amenability to other, arguably more reasonable, constructions.\textsuperscript{91} The \textit{New Mexico} Court reached this conclusion through strained and puzzling parsing of the language of the Organic Act.\textsuperscript{92} The majority read the actual language of the Act, “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber,”\textsuperscript{93} as “[f]orests would be created only ‘to improve and protect the forest within the boundaries;’ or, \textit{in other words},


\textsuperscript{84} See generally Benson, supra note 77.

\textsuperscript{85} See discussion supra Part III.b.i.

\textsuperscript{86} This is leaving aside the fact that the distinction that the \textit{New Mexico} Court drew between the primary and secondary purposes had no basis in the 70 years of Supreme Court precedent establishing the doctrine. \textit{See generally Cappaert}, 426 U.S. 128; \textit{Arizona}, 373 U.S. 546; \textit{Winters}, 207 U.S. 564.

\textsuperscript{87} \textit{New Mexico}, 438 U.S. 696; \textit{see infra} Part IV.

\textsuperscript{88} \textit{See generally New Mexico}, 438 U.S. 696.

\textsuperscript{89} Organic Administration Act, 16 U.S.C. §§ 473 et seq. (2012). The Court examined this because it provided the statutory authority for the reservation of Gila National Forest. \textit{See New Mexico}, 438 U.S. at 706-07.

\textsuperscript{90} \textit{Id.} at 707 (quoting 30 Cong.Rec. 967 (1897) (statement of Cong. McRae)).

\textsuperscript{91} \textit{Id.} at 720 (Powell, J., dissenting).

\textsuperscript{92} \textit{Id.} at 706-07, 707 fn. 14.

\textsuperscript{93} \textit{Id.} at 706-07 (quoting 16 U.S.C. § 475).
‘for the purpose of securing favorable conditions of water flows, and to furnish a
continuous supply of timber.”’

In so reading the language of Organic Act, the majority effectively
disregarded any congressional intent to “improve and protect” any other aspect of
the forest “except the usable timber and whatever other flora [that was] necessary
to maintain the watershed.” After all, what is a “forest” or, for that matter, a
watershed, deprived of its constituent parts? With regard to the majority’s finding
that Gila National Forest was not set aside for wildlife purposes, Justice Powell
argued:

One may agree with the Court that Congress did not, by enactment of the
Organic Administration Act of 1897, intend to authorize the creation of
national forests simply to serve as wildlife preserve. But it does not follow
from this that Congress did not consider wildlife to be part of the forest it
wished to “improve and protect” for future generations. It is inconceivable
that Congress envisioned the forests it sought to preserve as only including
inanimate components such as the timber and the flora.

Further, Powell noted that the idea that a forest included the creatures
inhabiting it had been around since early English law and that understanding has
remained in the American mind. As Justice Powell pointed out in his dissenting
opinion in New Mexico, a more natural reading of the Act’s language would have
identified three, not the majority’s two, primary purposes for the establishment of a
national forest: “1) improving and protecting the forest, 2) securing favorable
conditions of water flows, and 3) furnishing a continuous supply of timber.” In
sum, by engaging in such a contorted reading of the Organic Administration Act, the
U.S. Supreme Court, again, seemingly ignored its own admonishment in Cappaert—
that the authority for a reservation “must be read in its entirety.”

iii. Introduction of the Selective Use of Supportive Legislative
History and Weighing of Interests

The third and, perhaps, most confounding flaw in the reasoning of New
Mexico was the Court’s selective use of legislative history and its weighing of state
and federal interests in an effort to support its finding of no federally reserved
water rights for recreational, aesthetic, wildlife preservation, or cattle grazing

95 Id. at 720-21 (Powell, J., dissenting).
96 Id. at 723-24 (Powell, J., dissenting).
97 Id. at 721 (Powell, J., dissenting) (citations omitted).
98 Id. (Powell, J., dissenting) (quoting Mimbres Valley Irrigation Co. v. Salpek, 564 P.2d 615, 617
(1977)).
99 Cappaert, 426 U.S. 128, 141 (emphasis added).
100 New Mexico, 438 U.S. at 720-24 (Powell, J., dissenting).
purposes.\textsuperscript{101} Now, over thirty years later, the Court’s motivations for relying on supportive legislative history and a balancing of the competing federal and state interests in the water at issue can only be guessed at, but one thing is certain: the use of these justifications had no place in the application of the \textit{Winters} doctrine to non-Indian federally reserved water rights.\textsuperscript{102}

In finding that the primary purposes for which the Gila National Forest was reserved were limited to “securing favorable water flows” and “providing a continuous supply of timber,” the majority made such extensive use of legislative history that a reader of the opinion might believe that there were no such materials supporting any inference to the contrary.\textsuperscript{103} But, there was indeed legislative history that cut against the majority’s conclusions about the legislative intent behind the Organic Act.\textsuperscript{104} Again, as pointed out in Justice Powell’s dissent, when the Organic Act was originally introduced, it stated that national forests were established “to preserve the timber and other natural resources, and such natural wonders and curiosities and game as may be therein, from injury, waste, fire, spoliation, or other destruction”\textsuperscript{105} and subsequent congressional actions under the authority of that Act did not show that Congress, in rewording the Act before its passage, intended to abandon this intent.\textsuperscript{106} Further, prior to \textit{New Mexico}, none of the Supreme Court cases that dealt with the substantive law of non-Indian federally reserved water rights ever engaged in an extensive examination of legislative history when deciding whether federal water rights existed, let alone a selective one of the sort engaged in by the \textit{New Mexico} majority.\textsuperscript{107}

Finally, as mentioned above, the \textit{New Mexico} Court quite clearly justified its finding of limited purposes for the reservation of Gila National Forest on a weighing of the state and federal interests in the water at issue.\textsuperscript{108} By doing so, it seems that the U.S. Supreme Court, in effect, overruled part of its holding in \textit{Cappaert} without acknowledging that it was doing so.\textsuperscript{109} In \textit{Cappaert}, the Court considered and expressly rejected an argument that the \textit{Winters} doctrine called for an equitable balancing of competing interests in water and held that the only question relevant to ascertaining the existence or nonexistence of implied federally reserved water rights was whether “the Government intended to reserve unappropriated and thus

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101 Id. at 705 (stating that “[w]hen, as in the case of the Rio Mimbres, a river is fully appropriated, federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators...[t]his reality has not escaped the attention of Congress and must be weighed in determining what, if any, water Congress reserved for use in the national forests”).


103 See \textit{New Mexico}, 438 U.S. at 706-18.

104 Id. at 720-24 (Powell, J., dissenting).

105 Id. at 720-24 (Powell, J., dissenting) (quoting 28 Cong. Rec. 6410 (1896) (statement of Cong. McRae)).

106 Id. at 722 (Powell, J., dissenting).


108 See supra note 103 and accompanying text.

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available water." Regardless of whether *New Mexico* quietly overruled a portion of *Cappaert*, it is hard to deny that the approach adopted the *Cappaert* Court—whether water was necessary to the purposes of a federal land reservation—is a far more logical gauge of congressional intent than the approach utilized by the *New Mexico* Court, which led it to hypothesize about Congress’ opinion on how water should be allocated between public and private users. By justifying its holding in such a way, the *New Mexico* Court needlessly complicated an inquiry that *Cappaert* had left clear and, as subsequent state court decisions show, imprudently left the door open for future abuse.

**c. State Hostility to the Assertion of Federally Reserved Water Rights**

A third factor that, taking into account the McCarran Amendment’s subjection of federal rights to state adjudications, led to the erosion of the *Winters* doctrine’s utility is western states’ very real hostility towards the assertion of federal water rights. States’ traditional hostility to federally reserved water rights is mostly a creature born of the nature of those rights and states’ desire to protect the integrity of their prior appropriation system.

Most western states have adopted the doctrine of prior appropriation for allocating the water within their boundaries. Under the prior appropriation system, a would-be water user must divert water for a “beneficial purpose” and receive some sort of permission from the state before he or she has a water right. Further, in times of water shortage, the doctrine of prior appropriation holds that the user that is “first in time” is “first in right.”

Knowing this, it is not difficult to see why western states, who have almost universally adopted comprehensive procedures for determining rights under their systems of prior appropriation, do not like federally reserved water rights. First of all, under the *Winters* doctrine, neither diversion for a state-recognized “beneficial purpose” nor state approval are prerequisites to finding federally reserved rights. A second, and related, reason for the western states’ disdain for *Winters* water rights is that a large number of federally reserved water rights do not divert water at all but are instream in nature. Instream rights, water rights that require a certain

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110 Id.
111 Id.
112 See supra note 103 and accompanying text.
113 See discussion infra Part IV.
114 See Benson, supra note 77, at 242 (stating that “[t]he states, particularly in the West, have jealously guarded their water allocation authority against real or imagined federal interference...”); see also Blumm, supra note 12, at 174-176.
115 Blumm, supra note 12, at 174-176.
116 Id.
117 Id.
118 Id.
119 Id.
amount of water to be left in its source, are not typically recognized by pro-irrigator western states unless they are held by the states themselves. The third, and most important, reason for western state enmity toward the Winters doctrine water rights is that those rights do not vest on the day they are claimed and put to use like state prior appropriative rights but whenever the federal government decides to reserve land for a water-dependent purpose. This aspect of federally reserved water rights is particularly upsetting to western states because quite a few federal land reservations were made very early on and, as a result, any water rights found to be attached to those reservations will have priority over many years of water rights obtained under state law. Finally, the fact that, unlike water rights acquired under state law, federally reserved water rights cannot be lost through nonuse has exacerbated state animosity towards the federal government’s assertion of those rights.

d. Inconsistent Congressional Action

Inconsistent Congressional action is the final factor that has played a significant part in the erosion of the utility of the Winters doctrine in the context of non-Indian impliedly reserved federal water rights. Despite its awareness of the Winters doctrine, Congress has responded to the issue inconsistently and, consequently, irresponsibly. It has inconsistently addressed its intent to reserve water for federal purposes both in its specific land reservations and in the statutes that authorize them.

Even though the U.S. Supreme Court’s decision in New Mexico made it clear that courts would base their decision about whether Congress intended to reserve federal water rights when setting aside particular parcels of land, in part, on a comparison of the language of the reservation at issue to other, similar statutory

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120 Id.
121 Id.
122 See, e.g., Winters, 207 U.S. 564, 577 (finding that the Fort Belknap Indian Reservation had a federally reserved water right that vested on the date of that Reservation’s creation in 1868).
123 Blumm, supra note 12, at 174-176.
124 Id.
125 Sax, supra note 80, at 936-39.
126 Although it has been noted Congress’ inconsistent treatment of water rights for federal land is not due to any outright abrogation of the duty the American public has imposed on that body, it is at least arguably inherently irresponsible for Congress to continue to pass such legislation without clearly expressing its intent with regard to such a contentious and important aspect of federal land management. See Sax, supra note 80, at 938 (stating that “Congress has not always in recent years been able to fashion agreement on specific language that addresses water (other than a disclaimer) in legislating on federal land management issues”).
127 See id. (citing examples where Congress expressly reserved water, expressly not reserved water, or has not expressly addressed water rights).
authority, Congress has continued to act inconsistently when setting aside federal land. It has sometimes made land reservations that are silent on federal water rights, occasionally made reservations expressly claiming or disclaiming federal water rights, and still other times made reservations disclaiming any claim or denial of those important rights. And, unfortunately, Congress has acted no more consistently when crafting the statutes that grant authority for the various types of federal land reservations.

IV. Post-New Mexico State Court Derogations of Non-Indian Federally Reserved Water Rights

Following the passage of the McCarran Amendment, many decisions regarding the existence and scope of impliedly reserved federal water rights have been issued by state courts vulnerable to the influence of state water appropriators' and other competing local interests. Unfortunately, this has led to the impairment of the utility of the Winters doctrine in some states and, thereby, inhibited government administrators' ability to effectuate federal land management goals. These state court derogations of the Winters doctrine have been facilitated by the U.S. Supreme Court's poor guidance in New Mexico and that case's continuing influence, and Congress's failure to protect federal rights by addressing federally reserved water rights in a consistent fashion. For state courts that were already biased toward state diversionary uses of water, it has proven all too easy to take New Mexico's cue and avoid finding implied federally reserved water rights through result-oriented jurisprudence. In fact, it did not take long at all for state courts to take heed of New Mexico's direction: in 1982, the Colorado Supreme Court authored

130 Sax, supra note 74, at 936-39.
133 See id. at 938 (citing the statute establishing Hagerman Fossil Beds National Monument, 102 Stat. 4571, 4576, § 304 (1988), as an example of Congress expressly disclaiming federally reserved water rights).
135 See supra note 130.
137 See supra note 56 and accompanying text.
138 See supra note 12.
139 New Mexico, 438 U.S. 696, has proven to be most influential case in the area. Sax, supra note 80, at 925.
140 See discussion supra Part III.d.
a decision regarding impliedly reserved federal water rights that unmistakably bore the watermarks of New Mexico’s influence.141

In U.S. v. City and Co. of Denver, the Colorado Supreme Court considered whether the federal government, by withdrawing various lands for specific federal purposes, also reserved water for those purposes.142 The Colorado court correctly decided several of the questions before it, in light of the U.S. Supreme Court’s previous guidance,143 but its analysis of some of the other federally reserved water issues were almost undoubtedly erroneous and smacked of New Mexico’s poor reasoning.144 Most notably, the Denver court’s consideration of whether Congress’ 1960 enactment of Multiple-Use Sustained-Yield Act (MUSYA)145 “reserved additional water for the existing national forests with a 1960 priority date for recreational and wildlife conservation purposes” reflected the New Mexico opinion’s insidious influence.146

With regard to the United States’ claim that MUSYA reserved additional water for national forests for the purposes enumerated within it, the Colorado court came to the interesting conclusion that U.S Supreme Court’s opinion in New Mexico was dispositive of the issue and foreclosed such a claim.147 The reasoning behind the Colorado’s Supreme Court’s holding on this issue is, at best, befuddling, and, at worst, flatly wrong.148 It cannot be disputed that the issue before the Colorado court, whether Congress’s enactment of MUSYA reserved water in existing forests for additional purposes with a 1960 priority date, was not an issue before the U.S. Supreme Court in New Mexico.149 The only MUSYA-related federally reserved water rights question decided by New Mexico Court was whether MUSYA “confirm[ed] that Congress always foresaw broad purposes for the national forests and authorized the Secretary of the Interior as early as 1897 to reserve water for recreational, aesthetic, and wildlife-preservation purposes.”150 Because of the New Mexico Court’s express

141 See generally U.S. v. City and Co. of Denver, 656 P.2d 1 (Colo. 1982).
142 Id. at 5-6. The adjudication involved the reservations of approximately 1500 public waterholes, 7 national forests, 3 national monuments, 2 mineral hot springs, and 1 national park. Id.
143 See, e.g., id. at 20 (rejecting Denver’s arguments that the Winters doctrine didn’t apply); id. at 22-23 (finding no instream flow rights for purposes other than water flow conservation and timber protection under the Organic Administration Act of 1897, 16 U.S.C. §§ 473 et seq.).
144 See, e.g., id. at 20 (stating that Congress had generally deferred to state law); id. at 27 & 27 fn. 44 (weighing of interests when deciding whether there were rights for Dinosaur National Monument).
146 Denver, 656 P.2d at 24-27.
147 Id. at 24-27 (citing New Mexico, 438 U.S. 696).
148 See New Mexico, 438 U.S. at 713-15 fn. 21 & 22. Also, interestingly enough, the Colorado court’s later reasoning with regard to the relative priority dates of various water rights for federal land originally reserved as a national forest then re-reserved as a national park might provide a tenable counterargument to some its MUSYA reasoning. See Denver, 656 P.2d at 30-31.
149 See New Mexico, 438 U.S. at 713 fn. 21 (asserting that the issue decided was not whether MUSYA “reserved additional water for use on national forests” and stating “[e]ven if the 1960 Act expanded the reserved water rights of the United States, of course, the rights would be subordinate to any appropriation of water under state law dating to before 1960”).
150 Id.
disclaimer of any holding on whether MUSYA reserved water in previously established national forests for additional purposes with a 1960 priority date, any discussion of that issue by the U.S. Supreme Court in that case was dicta and not binding.

That said, the more pertinent aspect of the Colorado court’s conclusion that MUSYA did not affect the federally reserved water rights of national forests was how the court sought to justify it. After reasoning that the New Mexico decision foreclosed this issue, the Colorado Supreme Court sought to bolster its argument in two ways reflective of the U.S. Supreme Court’s reasoning in that case. First, the Colorado court relied on legislative history to support its tenuous conclusion and propose that MUSYA was only intended for the narrow purpose of giving the Forest Service the ability “to broaden its forest management practices” by granting that agency additional administrative authority. Second, the Colorado Supreme Court engaged in an impermissible weighing of the competing state and federal interests. The court’s statements in that portion of its opinion are a particularly telling example of a state court using New Mexico’s poor reasoning and Congress’s inconsistent legislation to avoid finding federally reserved water rights where, at least arguably, they should have been found:

We are convinced that the “implied-reservation-of-water doctrine” must be narrowly construed. Additional federal water rights in Colorado may reduce water available to satisfy long-held adjudicated water rights, especially in streams which have been fully appropriated. When Congress passed MUSYA, it was aware of the reserved rights doctrine. Congress, however, chose not to reserve additional water explicitly. In the face of its silence, we must assume that Congress intended the federal government to proceed like any other appropriator and to apply for or purchase water rights when there was a need for water. The federal government has the power to act in condemnation proceedings if it wishes to obtain water outside the state appropriation system for additional national forest purposes.

While the existence of implied federal reserved water rights is a matter of federal law, the importance of the Colorado state court’s faulty decision regarding the application of the Winters doctrine to MUSYA should not be belittled because it

151 See supra notes 150-52 and accompanying text.
152 New Mexico, 438 U.S. at 720 fn. 1 (Powell, J., dissenting).
153 See 20 AM. JUR. 2d Courts § 134 (stating “[f]or a case to be stare decisis on a particular point of law, that issue must have been raised in the action, decided by the court, and its decision made part of the opinion of the case”).
154 See Denver, 656 P.2d 1, 24-27 (citing the Multiple-Use Sustained-Yield Act, 16 U.S.C. §§ 528-31).
155 Id. (citing New Mexico, 438 U.S. 696).
156 Id. at 25 (quoting H.R.Rep. No. 1551, 86th Cong., 2d Sess. 3 (1960)).
157 Id. at 25 fn. 40.
158 Id. at 26. The court also repeated the latter mistake in its analysis of whether the establishment of Dinosaur National Monument reserved water for recreational boating. Id. at 27, 27 fn. 44.
159 Id. at 26 (emphasis added).
has, at a minimum, adversely affected the application of the doctrine within its jurisdiction. *U.S. v. Jesse*, a later decision by the Colorado Supreme Court, made that much clear.\textsuperscript{160}

*Jesse* considered whether the reservation of San Isabel and Pike National Forests impliedly reserved federal water rights “for the purposes of securing favorable water flows and furnishing a continuous supply of timber.”\textsuperscript{161} In its consideration of this issue, the Colorado court addressed an argument, forwarded by various state appropriators, that the court’s decision in *Denver* foreclosed any claim for any federally reserved water rights in the national forests.\textsuperscript{162} In its analysis of that argument, the court pointed out that, in *Denver*, it had held “(1) that the United States does not have reserved instream flow rights to protect recreational, scenic, or wildlife values in the national forests, and (2) that the United States did not claim or prove that instream flow rights were necessary to achieve the national forest purposes of timber and watershed protection.”\textsuperscript{163} Because the federal government had not claimed or proved federally reserved water rights for national forests based on the Organic Act in *Denver*, the *Jesse* court concluded that “any language suggesting that minimum instream flow rights are not to be recognized [for national forests], as a matter of law, is dictum and not binding on us in the present case.”\textsuperscript{164} Although the Colorado court ultimately gave the appropriators’ argument relatively short shrift, it is important to note that the court did not reach this decision before recounting its erroneous characterization of the MUSYA holding in *New Mexico*\textsuperscript{165} and citing its own MUSYA decision in *Denver* approvingly.\textsuperscript{166} It stated:

> The Supreme Court [in *New Mexico*] also held that the adoption of MUSYA neither broadened the water rights impliedly reserved when the national forests were created, nor reserved additional water to achieve the supplemental purposes of preserving recreation, range and wildlife values. In [*Denver*], we applied *New Mexico* to a general adjudication of water rights...No appeal was taken *New Mexico* from our decision in [*Denver*].\textsuperscript{167}

As a result, following *Jesse*, it is clear that no implied federally reserved water rights

\textsuperscript{160} U.S. v. Jesse, 744 P.2d 491 (Colo. 1987).
\textsuperscript{161} *Id.* at 497-98. These were the only two purposes identified by the U.S. Supreme Court in *New Mexico* for the reservation of national forests. *Id.* (citing *New Mexico*, 438 U.S. 696, 707-08).
\textsuperscript{162} *Id.* at 493-503 (citing *Denver*, 656 P.2d 1).
\textsuperscript{163} *Id.* at 497 (citing *Denver*, 656 P.2d at 22-23) (internal citations omitted).
\textsuperscript{164} *Id.* at 502-03 (citing *Denver*, 656 P.2d at 22-23, 23 fn. 37, 35). Ironically, the Colorado Supreme Court’s argument why its decision in *Denver* did not foreclose it from considering the issue in *Jesse* shows why the former opinion’s conclusion that *New Mexico* was dispositive of the MUSYA federally reserved water right claims before it was clearly wrong. *See discussion supra Part IV.*
\textsuperscript{165} *Jesse*, 44 P.2d 491, 497 (citing *New Mexico*, 438 U.S. 696, 707-08).
\textsuperscript{166} *Id.* at 502-03 (citing *Denver*, 656 P.2d at 22-23).
\textsuperscript{167} *Id.* at 497 (citing *Denver*, 656 P.2d at 22-23) (internal citations omitted).
for national forests will be recognized under MUSYA by a Colorado state court.\textsuperscript{168}

While the Colorado Supreme Court’s MUSYA decision in \textit{Denver} may have been one of the first state court opinions that utilized \textit{New Mexico}'s ill-advised additions to the \textit{Winters} doctrine to avoid finding federally reserved water rights,\textsuperscript{169} it was certainly not the last nor even the most significant. In 1987, the State of Idaho began a massive general stream adjudication of the Snake River Basin that is still ongoing today.\textsuperscript{170} The Snake River Basin Adjudication (SRBA) involves ninety percent of all the water right claims in Idaho, including some 50,000 federal claims.\textsuperscript{171} Although the SRBA continues to this day, over 133,000 of these claims have already been determined\textsuperscript{172} and it has resulted in numerous Idaho Supreme Court decisions determining the existence (or, more frequently, nonexistence) and extent of the reserved water rights of various types of federal public lands.\textsuperscript{173}

In an early SRBA decision, \textit{U.S. v. City of Challis}, the Idaho Supreme Court addressed the exact same MUSYA question that the Colorado Supreme Court had in \textit{Denver}.\textsuperscript{174} The issue received no better treatment in Idaho’s highest court than it had in Colorado.\textsuperscript{175} In \textit{Challis}, the U.S. argued “that \textit{New Mexico}'s language relating to MUSYA is dictum because the Supreme Court did not have before it the question of whether MUSYA established federal reserved water right with a priority date of 1960, but rather addressed whether MUSYA reached back before its enactment to expand the purposes of national forests as of the date of the Organic Act of 1897.”\textsuperscript{176} However, even though a fair reading of the \textit{New Mexico} opinion (or even a rudimentary legal education provided by a first year civil procedure course) would affirm the validity of that argument,\textsuperscript{177} the Idaho high court rejected this argument and concluded that “the Supreme Court’s analysis as to whether MUSYA reserved water for its purposes and thus created a federally reserved water right applies to either priority date.”\textsuperscript{178} Noticeably, the court did not cite any authority for why a superior court’s decision on one point of law would be binding on another, distinct,

\textsuperscript{168} \textit{Id.} The federal district courts in Colorado, by contrast, have been much more receptive to federal reserved water rights claims. \textit{See note} 247, \textit{infra}, and accompanying text (citing High Country Citizens’ Alliance v. Norton, 448 F.Supp.2d 1235 (D. Colo. 2006); Sierra Club v. Block, 622 F.Supp. 842 (D. Colo. 1985); Sierra Club v. Watt 659 F.2d 203 (D. Colo. 1981)).

\textsuperscript{169} \textit{Denver}, 656 P.2d at 22-23.

\textsuperscript{170} Blumm, \textit{supra} note 12, at 176-80.

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} http://www.idwr.idaho.gov/WaterManagement/AdjudicationBureau/default.htm.


\textsuperscript{174} \textit{Compare Challis}, 988 P.2d at 1201 (considering whether MUSYA reserved additional water for its purposes in national forests with a 1960 priority date) \textit{with Denver}, 656 P.2d at 24-27 (same).

\textsuperscript{175} \textit{Challis}, 988 P.2d at 1205-07.

\textsuperscript{176} \textit{Id.} at 1205 (citing \textit{New Mexico}, 438 U.S. 696, 715 n. 22; \textit{New Mexico}, 438 U.S. 696, 718 n. 1 (Powell, J., dissenting)).

\textsuperscript{177} \textit{See supra} notes 150-55 and accompanying text.

\textsuperscript{178} \textit{Challis}, 988 P.2d at 1205.
point of law that the superior court expressly did not decide.\footnote{179}{Id.}

Following this, the \textit{Challis} Court went on to state that its own analysis also supported the conclusion that MUSYA was not intended to re-reserve national forest land for its purposes in 1960 and, thereby, additional water for that land.\footnote{180}{Id. (citing 16 U.S.C. §§ 528-31).} Because MUSYA states that national forests “\textit{are established and shall be administered}” for outdoor recreation, range, timber, watershed and wildlife and fish purposes,” the U.S. reasonably posited that the statute’s language pointed to an intent to re-reserve national forests for additional purposes.\footnote{181}{Id. (citing 16 U.S.C. §§ 528-31).} The Idaho court disagreed and chided that the statute states not only that the national forests “are established” but, \textit{also}, that they “shall be administered” for MUSYA purposes.\footnote{182}{Id.} Oddly, the Idaho Supreme Court did not seem to realize that same criticism could be leveled against its own parsing of the statutory language: its conclusion that “the statute as a whole indicates that MUSYA was intended \textit{only to expand the purposes for which the national forests are administered}” reads the “are established” language right out of the statute.\footnote{183}{Id.} Finally, the court stated that, even if it believed that MUSYA constituted a re-reservation of national forests for additional purposes, that statute was not intended expressly or impliedly reserve water for those purposes.\footnote{184}{Id.} Its “own analysis” on this point consisted almost entirely of citing the same legislative history that the \textit{New Mexico} majority did when considering the MUSYA issue before it.\footnote{185}{Compare \textit{Challis}, 988 P.2d at 1205-06 with \textit{New Mexico}, 438 U.S. 696, 713-15.}

Despite Idaho’s hostility toward the assertion of federally reserved water rights, as was apparent in \textit{Challis}\footnote{186}{Challis, 988 P.2d 1199.} and would continue to become more obvious later SRBA decisions,\footnote{187}{See generally cases cited supra note 175.} another early decision arising out the adjudication of the Snake River Basin actually served, for a short time, as an example of a state court faithfully adhering to both U.S. Supreme Court precedent and sound reason.\footnote{188}{\textit{Potlatch I}, 1999 WL 778325.} The primary issue in that case, \textit{Potlatch v. U.S. (Potlatch I)}, was whether implied federal water rights were reserved for the purposes of three wilderness areas upon their establishment.\footnote{189}{Id. at *2.} The majority analyzed this question in a straightforward and common sense fashion reminiscent of the U.S. Supreme Court’s pre-\textit{New Mexico} opinions on the \textit{Winters} doctrine: it stated that, because the claims in question were based on the purposes of the Wilderness Act, its “analysis must begin with an examination of the Wilderness Act, the acts establishing the Wilderness Areas, and the circumstances and history surrounding their designation, to determine whether
federal reserved water rights exist.” The court took heed of the language of the Wilderness Act and noted that the statute plainly proclaimed that wilderness areas were to be established “in order to assure that an increasing population...does not occupy or modify all areas within the United States and its possessions, leaving no lands designated for the preservation and protection in their natural condition,...to secure for the American people...the benefits of an enduring source of wilderness.” It noted that the statute defined wilderness “as an area ‘retaining its primeval character and influence, without permanent improvements or human habitations, which is protected and managed so as to preserve its natural conditions.’” Based on the Act’s clear statutory language, the Idaho court sensibly concluded that “wilderness preservation” was Congress’s primary purpose in designating the three wilderness areas at issue. Consequently, because it believed that human development under Idaho’s system of prior appropriation was incompatible with wilderness preservation, it found that the U.S. government had reserved all of the then-unappropriated water within the wilderness areas upon the date it set them aside from the public domain.

Lamentably, the soundly reasoned decision in Potlatch I would not stand. To the great misfortune of both the doctrine of implied federally reserved water rights in Idaho and Idahoans that enjoy their state’s wilderness, the Idaho Supreme Court’s decision in Potlatch I caused such a public outcry amongst that state’s water appropriators and states’ righters that the author of that decision, Judge Cathy Silak, lost her bid for reelection. Following this, the Idaho high court decided to rehear the issues raised in Potlatch I. Unsurprisingly, the Idaho Supreme Court reversed its Wilderness Act decision in Potlatch I upon rehearing the case. As you might expect from a state so clearly affected by hostility to federal water control, the Idaho Supreme Court’s second Potlatch opinion (Potlatch II) was, from start to finish, result-oriented and constituted an egregious example of a state court abusing New Mexico’s impetuous additions to the doctrine of implied federally reserved water rights.

In Potlatch II, the Idaho Supreme Court again took up the issue of whether water rights were reserved when Congress designated the Frank Church River of No Return, Gospel-Hump, and Selway-Bitterroot Wilderness Areas. The new

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190 Id. at *3 (citing 16 U.S.C. §§ 1131-1136). Compare Cappaert, 426 U.S. 128, 139-40 (beginning its analysis of whether federally reserved water rights existed with an examination of the statutory authority of the reservation and relying primarily on a natural reading of that authority to reach its conclusion).

191 Potlatch I, 1999 WL 778325 at *4 (16 U.S.C. § 1131(a)).

192 Id. at *4 (citing 16 U.S.C. § 1131(c)).

193 Id. at *8.

194 Id. at *8-10.

195 See Blumm, supra note 12, at 186-89.

196 Id.

197 Id.

198 See generally Potlatch II, 12 P.3d 1260.

199 Id. at 1262.
majority began its analysis of this issue by providing a survey of the U.S. Supreme Court’s Winters precedent that notably ignored the non-Indian federally reserved water rights holding in Arizona and cited New Mexico in a way that made it look like that decision foreclosed the possibility of any impliedly reserved rights.\textsuperscript{200} The court’s analysis of the United States’ Wilderness Act claims led it to conclude that there was nothing within that Act that compelled the conclusion that its purposes would be defeated without water.\textsuperscript{201} It supported this holding exclusively through selectively citing some of the Wilderness Act’s legislative history,\textsuperscript{202} pointing to the availability of other means of protecting the wilderness areas’ water, and weighing state and federal interests.\textsuperscript{203}

Fortunately, Judge Silak’s time on the Idaho Supreme Court’s bench was not yet at an end. Silak wrote an impassioned dissent that rejected the opinion’s contorted reasoning on all fronts.\textsuperscript{204} Silak began by pointing out that the majority’s discussion of the Winters doctrine precedent was “misleading.”\textsuperscript{205} She continued by admonishing the majority for not finding wilderness area water rights based on the availability of other means of protecting those rights:

I disagree with the majority opinion’s theory which simply stated is: because the structure of the Wilderness Act prevents development of the land in wilderness areas and, therefore, water will be protected as a natural side-effect of the limits on land-development, the federal government does not need a federal water right. The majority uses this theory as a substitute for implying a water right in wilderness areas. Although this is an attractive theory, only the United States Supreme Court may articulate new legal theories regarding federal law.\textsuperscript{206}

Silak further characterized the majority’s reasoning as “so restrictive that it eliminates the ‘implied’ aspect of the Winters doctrine and leaves no room for any Act of Congress to ever imply a ‘water’ right.”\textsuperscript{207} Following this, Judge Silak concluded by repeating her holding on the issue in Potlatch I: that, based on the express statutory language, the primary purpose of Wilderness Act designations was to “set aside certain designated areas and preserve their untouched wilderness character.”\textsuperscript{208} She concluded that the majority should have found implied federal reserved water rights for the wilderness areas because that purpose would be entirely defeated without water.\textsuperscript{209}

\textsuperscript{200} Id. at 1264-66.
\textsuperscript{201} Id. at 1266-67.
\textsuperscript{202} Id. at 1280-81 (Silak, J., dissenting).
\textsuperscript{203} Id. at 1266-68.
\textsuperscript{204} Id. at 1273-83 (Silak, J., dissenting).
\textsuperscript{205} Id. at 1273 (Silak, J., dissenting).
\textsuperscript{206} Id. at 1273-74 (Silak, J., dissenting).
\textsuperscript{207} Id. at 1276 (Silak, J., dissenting).
\textsuperscript{208} Id. at 1278-82 (Silak, J., dissenting).
\textsuperscript{209} Id. (Silak, J., dissenting).
Unfortunately, the Idaho Supreme Court’s abuse of the *Winters* doctrine did not end with the second *Potlach* case: nearly all of the Idaho Supreme Court’s subsequent SRBA decisions regarding federal reserved rights have been severely flawed.\footnote{See generally Blumm, supra note 12 (criticizing the Idaho Supreme Court’s SRBA decisions pertaining to implied federally reserved water rights).} In another SRBA opinion handed down on the same day as *Potlach II*, *Idaho v. U.S.*, the Idaho Supreme Court considered whether Congress, when it established the Sawtooth National Recreational Area (Sawtooth NRA), had impliedly reserved water to satisfy the purposes of that reservation.\footnote{*Idaho v. U.S.*, 12 P.3d 1284, 1286.} The Act establishing the Sawtooth NRA stated that it was created “*to assure the preservation and protection* of the natural, scenic, historic, pastoral, and fish and wildlife values and to provide for the enhancement of the recreational values associated therewith.”\footnote{*Id.* at 1286 (citing 16 U.S.C. § 460aa(a)) (emphasis added).} The Idaho court began its analysis of the issue by setting forth the bedrock principle that a “[c]ourt need merely apply the statute without engaging in any statutory interpretation” if the language of the Act is “clear and unambiguous,” and by stating “[i]n this case, the primary purpose of the Act is clear from the plain language of the statute itself.” So far, so good, right? Wrong. After setting forth this principle, the court chose to ignore it and eschew any reasonable reading of the plain language of the Sawtooth NRA Act.\footnote{*Id.* at 1288-91.} Instead, it engaged in an analysis of that would come to serve as yet another example of the abuse that *New Mexico* is susceptible to when put in the hands of a state court hostile to federal water rights.\footnote{*Id.* at 1289.} Based on its extremely strained reading of the statute, the Idaho court first concluded that “a review of the entire legislation reveals the primary purpose of the Act was to protect the Sawtooth NRA from the dangers of unrestricted development and mining operations.”\footnote{*Id.* at 1289.} This contorted reading of the Act ultimately led the Idaho Supreme Court to hold that the Act did not expressly or impliedly reserve water for the purposes of the NRA.\footnote{*Id.* at 1291-93 (Silak, J., dissenting).}

Still serving her time on the bench, Judge Silak was, yet again, the lone voice of reason in the Idaho Supreme Court.\footnote{*Id.* at 1291-93 (Silak, J., dissenting).} In her dissent, Silak argued that the majority’s analysis of the primary purpose of the Sawtooth NRA Act was unsupportable:

[W]ithout support in either the Act itself or in the legislative history it confuses the means for the end: the “means” of preservation is regulating subdivisions and mining. The “end” is to “assure the preservation and protection of the natural, scenic, historic, pastoral and fish and wildlife values and to provide for the enhancement of the recreational values associated
In her view, the express words of the Act were sufficient to determine the primary purpose of the reservation and that a more objective review of the Act’s legislative history “reaffirm[ed] what Congress expressly stated in the statutory language.”219

And the Idaho Supreme Court wasn’t done yet. A year after Potlatch II and Idaho v. U.S., the Idaho high court decided another SRBA case dealing with non-Indian implied federally reserved water rights.220 The Idaho court’s opinion in U.S. v. Idaho, unhobbled by the logic of former Judge Cathy Silak, who had since left the bench, may be the most offensive example of a state court abuse in this area of the law.221 In U.S. v. Idaho, the Idaho court considered whether, under the Winters doctrine, water was set aside by a series of executive and public land orders that reserved approximately 94 islands and created Deer Flat Migratory Waterfowl Refuge.222 The various orders that withdrew the refuge islands from the public domain stated “all islands...within the...limits of the following described area, ...are hereby withdrawn as a refuge and breeding ground for migratory birds and other wildlife” in order to further the purposes of the Migratory Bird Conservation Act (MBCA).223 Based on this language, the U.S. argued that the purpose for which Deer Flat islands were reserved would be frustrated without water because “[i]slands by definition must be surrounded by water, and waterfowl and many other migratory birds need riparian habitat and access to open water for feeding, breeding, resting, and protection from predators.”224

Despite the U.S. Supreme Court having previously found that the United States intended to reserve water for Havasu Lake National Wildlife Refuge and Imperial National Wildlife Refuge when they were established “as...refuge[s] and breeding ground[s] for migratory birds and other wildlife” 38 years earlier in Arizona,225 and despite the federal government’s reasoned argument, the Idaho court concluded that withdrawal of the islands did not impliedly reserve any water.226 In its consideration of the issue, the court conceded that islands did indeed require water to remain as islands, but refused to recognize its relevance to the question of whether the orders at issue also reserved water for the island refuge, stating that “[i]t is the purpose of the reservation at issue, not the definition of the

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218 Id. (Silak, J., dissenting).
219 Id. at 1291 (Silak, J., dissenting).
221 See generally id.
226 U.S. v. Idaho, 23 P.3d at 126.
land reserved." Instead, even though the reservations at issue in Arizona were identical in every material respect to the withdrawal of Deer Flat Migratory Refuge, the Idaho Supreme Court distinguished the refuge reservation before it from those in Arizona because that case was decided prior to New Mexico's introduction of the primary purpose rule and because some of reservations setting aside Deer Flat were made under the authority of the MBCA.

Based on its narrow reading of the MBCA's legislative history, the court reasoned that primary purpose for the federal government's withdrawal of the islands was not to provide the migratory waterfowl with a sanctuary in general. Rather, it found that the islands' reservation was not meant to do anything but prevent human predation. In this, of course, the Idaho court conveniently ignored the fact that Congress has seldom felt the need to try to regulate wildlife preying on other wildlife. Without Judge Silak's presence on the bench, it seems that there was no one left on Idaho Supreme Court to point out that this was not a good distinction, since the purpose of the Migratory Bird Conservation Act obviously does not provide a reasoned basis for distinguishing the reservation at issue in U.S. v. Idaho from those that were before the Court in Arizona. As Silak would have pointed out, here, the Idaho high court confused the means of the MBCA, protection from human predation, with the end (or purpose), migratory bird conservation. Nevertheless, because the court believed that the refuge would provide the birds with protection from hunting irrespective of water or whether its islands actually existed, the court concluded that the federal government's withdrawal of the refuge's islands did not reserve any water.

For the same reasons stated above for the Colorado cases, the derogation of the Winters doctrine at the hands of the Idaho Supreme Court in its SRBA cases should not be ignored or condoned. While the decisions of Idaho's highest court regarding federally reserved water rights are just that—state court decisions on federal law and not binding on state courts outside of Idaho or on any federal courts, they are still interpretations of federal law that Idaho lower courts are bound to follow. In a span of just two years, the Idaho Supreme Court effectively destroyed the ability of the federal government to successfully assert its federally reserved

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227 Id. at 125. Here, the Idaho court's opinion ignored the fact that the U.S. Supreme Court felt differently when it had previously addressed a reservation of federal land that similarly, by definition, included water in Cappaert. See supra note 37 and accompanying text.
228 The refuge in U.S. v. Idaho and the refuges in Arizona were reserved "as refuge[s] and breeding ground[s] for migratory birds" subject to existing reclamation projects. Id. at 127.
229 Id.
230 Id. at 126.
231 Id. at 123-24.
232 On those occasions when Congress has weighed in on depredation issues, it has crafted provisions related to wildlife preying on domestic livestock, not wildlife preying on other wildlife. See Animal Damage Control Act, 7 U.S.C. § 426 (authorizing federal control of predators); George Cameron Coggins and Robert L. Glicksman, Pub. Nat. Res. L. § 32:30 ("Other pests, such as pigeons, skunks, and starlings, are subject to the uncertain mercies of state and local law").
233 Id. at 125-29.
water rights in Idaho state courts to meet the needs of national forests reserved for MUSYA purposes, national wilderness areas, and, possibly, any other federal land that is not withdrawn by an instrument that expressly reserves water for its purposes.234

V. Implementing Silak’s Plea

Judge Silak’s dissenting opinion in Potlatch II235 is not only notable for its faithful adherence to the U.S. Supreme Court’s Winters doctrine, it is also both insightful and prudent. Near the end of that opinion, she identified the problem inherent in modern state court Winters doctrine jurisprudence as well as its solution.236 There, she stated:

In sum, it is not for this Court, nor any court, to make or change the law, but to interpret the law as enacted by the legislative branch. Until Congress enacts further legislation clarifying the Wilderness Act as to federal reserved water rights, or otherwise resolves this issue, courts must apply the Winters doctrine to resolve these disputes. In applying the Winters doctrine, some states will recognize an implied federal water right via the Wilderness Act and some states will not, resulting in a patchwork of different interpretations of the same federal statute across the country.237

This statement, like so many other aspects of Silak’s Potlatch II dissent, hits the nail squarely on the head. Because it seems unlikely that the U.S. Supreme Court will overrule its decision in New Mexico anytime soon238 and even more unlikely that state appropriators will start looking kindly on water rights that have the potential to interfere with their own,239 this problem can only be abated or resolved by Congress. Repealing the McCarran Amendment240 or amending the organic or enabling acts under which federal land reservations are made to require future land designations to be accompanied by express claim of water rights represent viable ways for Congress to resolve the problem created by state court abuses of the Winters doctrine.

In this regard, an outright Congressional repeal of the McCarran Amendment241 would remove the problem most definitively. Such a repeal would

234 See cases cited supra note 175.
235 See Potlatch II, 12 P.3d 1260, 1273 (Silak, J., dissenting).
236 Id. at 1282 (Silak, J., dissenting).
237 Id. (Silak, J., dissenting).
238 New Mexico, 438 U.S. 696, the Court’s last substantive decision on non-Indian implied federal water rights, was issued in 1978 and it has not granted certiorari since, despite widespread recognition that several state court decisions have horribly misapplied Winters precedent. See generally Blumm, supra note 12; Leshy, supra note 68.
239 See discussion supra Part III.c.
241 Id.
return the adjudication of federally reserved water rights to its pre-1952 status quo and put federal courts back into the driver's seat. Repealing the Amendment would grant the federal government sovereign immunity in this area again and would allow it to avoid having the existence and extent of its reserved water rights decided by state courts of questionable neutrality. This re-grant of sovereign immunity would mean that the agencies charged with managing federal lands could only be forced to litigate these issues in federal court. Although, for the reasons stated above, there have not been many federal court decisions on the substantive Winters doctrine, the decisions that have been issued by federal courts have been well-reasoned and most of them have managed to avoid the lapses of judgment and logic represented by the state court cases discussed by this article.

For example, in *Sierra Club v. Block*, the Colorado federal district court considered whether federally reserved water rights existed for all of the wilderness areas in the state of Colorado. In its analysis of this issue, the *Block* Court examined both the Wilderness Act and that Act's legislative history to discover whether Congress intended to reserve water for the federal lands withdrawn under that statute, much like Idaho Supreme Court did in *Potlach II* when it was considering whether rights existed for the wildernesses in question there. However, the conclusion that the federal court reached about the purposes for which wilderness areas were reserved from its reading of the Wilderness Act and its history could not have been more different than those arrived at by the Idaho Supreme Court. The *Block* Court concluded that "the legislative history and the provisions of the Wilderness Act make it abundantly clear. . . .[that] the primary motivation of Congress in establishing the wilderness preservation system was to 'guarantee that these lands will be kept in their original untouched natural state.'" This led the federal court to hold that Congress did, indeed, intend to reserve water for wilderness areas "to the extent necessary" to accomplish this purpose:

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 Wilderness Act was established would be entirely defeated. Clearly, this was not the result intended by Congress.

Perhaps equally important to the integrity of the Winters doctrine as

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242 See discussion supra Part III.a.
243 U.S. CONST. amend. XI.
244 See discussion supra Part III.a.
247 Id. at 849-62.
248 Id. at 858 (citing 110 Cong.Rec.17448 (Rep. Cleveland); 16 U.S.C. § 1131(a)).
249 Id. at 862. *High Country Citizens' Alliance*, 448 F.Supp.2d 1235, is another excellent example of a well-reasoned opinion recognizing and enforcing federal reserved water rights for the Black Canyon of the Gunnison National Park and Conservation Area.
restoring more-neutral federal courts to their former preeminence in that area of federal law, a repeal would effectively undo the damage done to the *Winters* doctrine in states like Colorado and Idaho, whose high courts have foreclosed important issues associated with the doctrine on dubious bases, because, again, the federal government could simply refuse to have its rights in those states litigated by the states’ courts. Of course, given the strength of state water appropriators’ influence in western states, this remedy would be difficult to bring about politically and it would not undo the harm already done to the federal lands that were at issue in the state cases discussed above.

Alternatively, Congress could amend the organic acts for the various types of federal lands, or the enabling acts under which specific federal land reservations are made, to require future federal designations to be accompanied by express claim or denial of water rights. Amending the various statutes that grant authority for federal reservations of land in such a way would prevent future federal withdrawals from being deprived of the water through result-oriented judicial ingenuity like the reservations that were at issue in the various Colorado and Idaho cases discussed by this article. Other than a repeal of the McCarran Amendment, such an action probably represents the next most effective way to resolve the problem created by the result-oriented abuses wielded by state courts in federally reserved water rights cases. However, it is important to note that amending the existing organic acts and existing and future enabling acts would only partially resolve the problem: it is unlikely that federal reserved water rights of federal lands set aside prior to the passage of such an amendment would benefit. The U.S. Supreme Court, in *New Mexico*, cast doubt on the likelihood of any attempt to assert new statutory purposes retroactively to federal lands succeeding in this area of the law.

**VI. Conclusion**

Recent years have witnessed a significant erosion of the *Winters* doctrine’s ability to protect federal lands and to help the agencies managing those lands to fulfill their management purposes in some states. As the survey of state court cases discussed in this article make clear, this erosion is due, in large part, to recent state court decisions denying the existence of non-Indian implied federal reserved

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250 *See* discussion *supra* Part IV.
251 Although, unfortunately, for the specific federal reservations at issue in poorly decided cases, that damage would continue to be done.
252 Generally speaking, “a state-court judgment commands the same res judicata effects in federal court that it would have in the court that entered it.” 18B FED. PRACT. & PROC. JURIS. § 4469 (2d ed.).
253 *See* discussion *supra* Parts III.c; IV.
255 *See New Mexico*, 438 U.S. 696, 713, 713 fn. 21 (rejecting the argument that the passage of MUSYA, 16 U.S.C. §§ 528-31, “confirm[ed] that the Congress always foresaw broad purposes for the national forests and authorized... as early as 1897 [the reservation] of water for recreational, aesthetic, and wildlife-preservation uses”).
256 *See supra* note 12.
water rights on questionable bases.257 In the post-McCarran Amendment world where state courts have become the primary arbiters of federally reserved water rights, New Mexico’s poor reasoning has allowed hostile state courts to contort the Winters doctrine to the utmost extremes in order to deny implied federal water rights, frustrating the reasons the doctrine was created in the first place and creating an incongruous patchwork of inconsistent decisions.258 And while it should be noted that not all state courts have engaged in the type of result-oriented abuses evident in the SRBA cases and, to a much lesser extent, Denver,259 the problem represented by such cases should not be ignored. Even though the doctrine of federally reserved water rights is federal law, the decisions in Denver and the SRBA cases have unquestionably impaired the federal government’s ability to assert those rights in order to protect federal land management goals within the states where those decisions were handed down.260

Unfortunately, despite this ongoing derogation, Congress has continued to act in an inconsistent manner when passing laws affecting federal reservations.261 This has served only to exacerbate the problem and allow state courts to further limit the usefulness of a doctrine that was originally intended to give necessary effect to the intent of the thinly worded acts, executive orders, and proclamations that are used to set aside federal land.262

Absent new U.S. Supreme Court guidance, only Congress has the ability to prevent the Winters doctrine from being damaged further by state court abuses.263 When, as now, state courts serve as the primary arbiters of federally reserved water rights, this problem will only continue and possibly worsen unless Congress takes affirmative steps to reduce the complexities that have been injected into the Winters doctrine and return it to some semblance of uniformity.264 This article has discussed two such ways that Congress could accomplish this, repealing the McCarran Amendment or amending the organic and enabling acts under which federal land is reserved.265 There are undoubtedly more solutions that could be effectuated. Regardless, with a problem such as this one, which is “permeated with conflicting philosophical views and economic interests,” there can be little doubt that it should be resolved by our nation’s legislative branch.266

257 See discussion supra Part IV.
258 Id.
259 Id. For example, the Arizona Supreme Court gave remarkably fair treatment to the federally reserved water rights at issue in In re the General Adjudication of Gila River System. See generally In re the General Adjudication of Gila River System, 989 P.2d 739, 745-49 (Ariz. 1999).
260 See discussion supra Part IV.
261 See discussion supra Part III.d.
262 See discussion supra Part II.
263 See discussion supra Part V.
264 See discussion supra Part III.c.
265 See discussion supra Part V.
266 Potlatch II, 12 P.3d 1260, 1282 (Silak, J., dissenting) (quoting Sierra Club v. Lyng, 661 F.Supp. 1490, 1502 (D.Colo. 1987)).