

STATE WATER POLITICS VERSUS AN
INDEPENDENT JUDICIARY: THE COLORADO
AND IDAHO EXPERIENCES, 20 QUINNIPIAC L. REV.
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*The Honorable Gregory J. Hobbs, Jr.**

A great privilege of being a state supreme court justice is the opportunity to author an important water opinion. It could also be one's last important opinion. Especially if the case involves a close, split decision of your court and you are up for reelection in a contested race.

In May of 2000, Justice Cathy Silak lost reelection to the Idaho Supreme Court. In November of 1954, Chief Justice Mortimer Stone lost reelection to the Colorado Supreme Court. There was a unifying element of both defeats: each justice authored a decision with a one-vote-margin in favor of the United States in a highly contested water case.

Chief Justice Stone's 4-3 opinion held that the downstream Colorado-Big Thompson Reclamation Project of the Bureau of Reclamation on the Blue River had storage rights and direct flow hydropower rights senior to the Denver Water Board's upstream municipal diversions on the same river.¹ Justice Silak's three-to-two

* Justice Hobbs was appointed by Governor Roy Romer to the Colorado Supreme Court on April 18, 1996, and was retained for a ten-year term by the Colorado voters in November of 1998. He has an A.B. in History from the University of Notre Dame. After graduation with a J.D. from Boalt Hall, University of California, Berkeley, in 1971, he served as law clerk to Tenth Circuit Judge William E. Doyle, then practiced as an EPA enforcement attorney for two years and a Colorado Assistant Attorney General for four years. He was a partner with the law firms of Davis, Graham & Stubbs, as well as Hobbs, Trout & Raley before becoming a justice. For the seventeen years of his private practice, he represented the Northern Colorado Water Conservancy District, among other water, environmental, land use, and transportation clients. While in private practice, he represented the Colorado Water Congress in the wilderness water rights litigation in Colorado federal courts on behalf of water interests opposing the Sierra Club's assertions that wilderness area designation creates implied reserved water rights.

1. See *City and County of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992,

opinion held that congressional designation of three downstream Idaho wilderness areas included federal reserved water rights with seniority over upstream agricultural, municipal, and commercial diversions.²

In both instances, Colorado and Idaho state law provided for contested elections of supreme court justices.³ During the campaigns, media attention focused on assertions that present and future state water users who depended on upstream sources of supply would be deprived of water. While it does not appear that the litigating parties or their attorneys orchestrated public reaction to the court decisions, the cases were still pending before the two supreme courts as the judicial election contests unfolded. Underlying the press reports on the rehearing petitions were the suggestions that the pending election might lead the authoring justice to reconsider, the concurring justices to reconsider, or that defeat of the authoring justice would bring in a new justice who would be favorable to reversing the one vote outcome of the case. This situation created speculation that the court's original decisions, and any reconsideration of them, might be politically motivated. In both instances, the justices authoring the majority decisions overwhelmingly lost reelection. Their opponents assumed office under a cloud of partisan controversy.

In the case of Justice Silak, the court granted a rehearing in which a member of the court's initial majority switched her vote, so that the dissenting position became the majority. Justice Silak voted for rehearing, but on rehearing maintained her earlier position and became the author of a two-member dissent. The court announced its new decision reversing the old, while she was serving out her term.

It appears from the press attention in both decisions, and to the election races following them, that each justice lost largely because of one opinion they authored, among the many they were responsible for during their judicial service. Many members of the bar had held each justice in high regard for his and her prior judicial performance. Nevertheless, given the initial outcry over the decisions, the public reaction took on a life of its own, eclipsing the merits of both the

1023 (Colo. 1954).

2. See *In re SRBA*, No. 24546, 1999 Idaho LEXIS 119, at *31-33 (Idaho Oct. 1, 1999), *superseded on rehearing* *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000).

3. In 1966, the Colorado voters approved a constitutional amendment requiring the Governor to appoint judges and justices from a list of two or three nominees forwarded by the nominating commissions. The appointed judge or justice serves for two years before standing at the next general election for retention, on a yes or no basis, for a specified term of years. COLO. CONST. art. VI, §§ 20, 24, 25.

besieged justices and the justices' opponent.

The Colorado and Idaho experiences, forty-five years apart, reverberate the ability and commitment of the western states to provide fair state proceedings in the ongoing McCarran Amendment⁴ adjudications. State commitment to fair judicial proceedings underpins the exercise of jurisdiction under the McCarran Amendment, by which Congress waived the sovereign immunity of the United States to suit in state court for determination of federal agency and tribal water rights claims. This Article first addresses the landscape of the McCarran proceedings and the intersection of state water politics as viewed through the Colorado and Idaho experiences. These experiences point out the need for recommitment by state judiciaries, the water bar, and state officials to maintain the appearance and the reality of fairness in state water proceedings for all parties, regardless of whether their claims are based on state or federal law.

I. THE MCCARRAN LANDSCAPE

ASK ME

Some time when the river is ice ask me
mistakes I have made. Ask me whether
what I have done is my life. Others
have come in their slow way into
my thought, and some have tried to help
or to hurt: ask me what difference
their strongest love or hate has made.

I will listen to what you say.
You and I can turn and look
at the silent river and wait. We know
the current is there, hidden; and there
are comings and goings from miles away
that hold the stillness exactly before us.
What the river says, that is what I say.

William Stafford⁵

A. Creation of Use Rights in Water, A Public Resource

Congress carved the states west of the continental divide out of the

4. 43 U.S.C. § 666 (1952).

5. WILLIAM STAFFORD, *Ask Me, in THE WAY IT IS: NEW AND SELECTED POEMS BY WILLIAM STAFFORD* 56 (1998).

public domain from lands it had acquired through the 1803 Louisiana Purchase, the 1846 Oregon Compromise, and the 1848 Treaty of Guadalupe Hidalgo.⁶ While the discovery of gold and silver jump-started the entire region's settlement, public land and water have been the most enduring treasures of the West, along with its magnificent landforms and vistas. Reducing public land and water to possession and ownership has been a preoccupation of state and territorial law from the outset.⁷

Congress created wealth in the western states by making the public land and water available for ownership and use. The Homestead Act of 1862,⁸ the Railroad Acts of 1862 and 1864,⁹ and other significant statutes resulted in the disposition of two-thirds of the West's surface acreage into state and private ownership.¹⁰ The other one-third remains today in federal ownership,¹¹ which is principally comprised of lands managed by the Forest Service and the Bureau of Land Management.¹² They include the critical watersheds the states depend upon for water supply. On them, through them, and from them exist the reservoirs, rights-of-way, ditches, and pipelines necessary to store and convey water to farms, cities, and businesses.

Congress early decided to separate legal interests in land and water. Through federal statutes, it authorized conveyance of patents to land without interests in water. Water remained a public resource subject to disposition through the operation of state and federal law. This was most notable through the 1866 Mining Act¹³ and the 1877 Desert Land Act:¹⁴ (1) Congress conceded to the states and territories jurisdiction to

6. LOREN L. MALL, PUBLIC LAND AND MINING LAW 7-8 (3d ed. 1981).

7. For example, Colorado defined "any right to occupy, possess and enjoy any portion of the public domain" to be "a chattel real *possessing the legal character of real estate*," a departure from the common law concept of "naked possession" that the Colorado Supreme Court termed "remarkable" in *Gillett v. Gaffney*, 3 Colo. 351, 358 (1877). See *Bd. of County Comm'r v. Vail Ass'n, Inc.*, 19 P.3d 1263, 1269 n.8 (Colo. 2001).

8. 37th Cong., 2d. Sess., ch. LXXV, 12 Stat. 392-94 (1862).

9. The Railroad Act of 1862, ch. CXX, § 3, 12 Stat. 489, 492 (1862), *amended by* The Railroad Act of 1864, ch. CCVI, § 4, 13 Stat. 356, 358 (1864); see *McCormick v. Union Pac. Res.*, 14 P.3d 346, 352-53 (Colo. 2000).

10. For a review of the public land laws, see MALL, *supra* note 6; BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1939).

11. PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND, A REPORT TO THE PRESIDENT AND TO THE CONGRESS 27-28 (1970) [hereinafter ONE THIRD OF THE NATION'S LAND].

12. National Forest Management Act of 1976, 16 U.S.C. §§ 1600 to 1687 (1994); Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 to 1784 (2001).

13. The Mining Act of 1866, ch. CCLXII, 14 Stat. 251-53 (1866).

14. The Denver Land Act of 1877, ch. 107, 19 Stat. 377 (1877).

create property interests in the use of all available unappropriated waters on the public domain, subject to the right of the government, at anytime in the future, to reserve then-unappropriated waters for federal purposes; and (2) Congress provided for water users to have occupancy of retained federal land for the purpose of constructing and maintaining storage and conveyance works necessary to place the water to use for state and private purposes.¹⁵ The Public Land Law Review Commission, in 1970, reported that federal lands are the source of most of the water in the eleven coterminous western states, providing approximately sixty-one percent of the total natural runoff occurring in the region.¹⁶

The custom of appropriation—first in time of use, first in right for the amount of water placed from the natural streams to beneficial use—was the chosen law of the western territories and states,¹⁷ while California recognized pre-existing riparian rights.¹⁸ Each state adopted its own water allocation mechanism, confirming uses solely through judicial proceedings, as in Colorado's instance,¹⁹ or through a combination of administrative and judicial proceedings in the other western states.²⁰

The western states universally recognize that waters of the natural stream are a public resource. Private rights therein arise only by use of unappropriated waters, in the amount of the appropriation taken at an identified point of diversion, for a beneficial use, in order of priority from the available source of supply, subject to the exercise of prior uses.²¹ The most important function of a water right is to afford legal protection for its owner to intercept water in priority at the point of the right's operation, wherever that is in the watershed within the state. Thus, a senior water right located downstream commands the passage of the needed water past the upstream junior users. Historically, large

15. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-65 (1935).

16. ONE THIRD OF THE NATION'S LAND, *supra* note 11, at 141-55.

17. *See, e.g., Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 447-49 (1882).

18. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 295-97 (3d ed. 2000).

19. *See* Gregory J. Hobbs, Jr., *Colorado's 1969 Adjudication and Administration Act, Settling In*, 3 U. DENV. WATER L. REV. 1, 19 (1999).

20. *See* John E. Thorson, *State Watershed Adjudications: Approaches and Alternatives*, 42 ROCKY MTN. MIN. L. INST. §§ 22-01, 22-06 to 22-13 (1996); SAX ET AL., *supra* note 18, at 183-87.

21. *See* SAX ET AL., *supra* note 18, at 280; *see, e.g., Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 53-54 (Colo. 1999) (holding that diversions made pursuant to a decreed water right, when not used for decreed uses, may not be considered as establishing historical use for the purposes of a change of water right proceeding).

downstream agricultural rights have exercised this control, requiring municipal and other later evolving demands for water to take the risk of shortage or develop alternative sources of supply.

From their inception, the western territories and states proceeded without interruption to create property rights in water under territorial and state law. Four significant events that altered the states' presumed sole possession of the field occurred at the turn of the Nineteenth Century. First, the federal forest reservations came into being under the 1897 Forest Organic Act, which included a state and federal water law savings provision.²² Second, with the passage of the 1902 Reclamation Act,²³ which directed that water rights for the projects be obtained in accordance with state law, the United States began to construct and manage federal water projects both for the benefit of state and local sponsors and to achieve ancillary federal purposes, such as recreation, flood control, and power production. Third, in 1907, the United States Supreme Court, in a case involving a tribal reservation,²⁴ determined that federal reservations—in the absence of an express reservation of water—carry with them an implied reservation of sufficient, theretofore, unappropriated water necessary to prevent defeat of the reservation's primary purposes. Fourth, the Supreme Court, in 1907, first exercised its original jurisdiction to resolve water allocation disputes between states, fashioning the law of equitable apportionment of interstate streams between states.²⁵ This, in turn, gave rise to a fifth major occurrence; entry of interstate water compacts between states, which was approved by Congress under the Compact Clause of the United States Constitution in the 1920s.²⁶

Hence, from the earliest part of the Twentieth Century, the states have known of the existence of retained congressional authority to reserve unappropriated waters for federal purposes. The *Winters* doctrine had been presaged in an 1899 Supreme Court case,²⁷ and the year before the enactment of the 1964 Wilderness Act, the Supreme Court applied the reserved rights doctrine not only to Native American reservations, but also to certain recreation and wildlife area and a

22. National Forest Organic Act of 1897, 16 U.S.C. § 481 (1994).

23. Reclamation Act of 1902, 43 U.S.C. § 383 (1994).

24. *Winters v. United States*, 207 U.S. 564, 577 (1907).

25. *Kansas v. Colorado*, 206 U.S. 46, 117-18 (1907).

26. U.S. CONST. art. I, § 10, cl. 3; *see e.g.*, Colorado River Compact, 43 U.S.C. § 617 (Boulder Canyon Project Act ratifying the Colorado River Compact, ch. 72, 42 Stat. 171 (1921)).

27. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899).

national forest as well.²⁸ The states themselves encouraged the federal government to have a significant role concerning intrastate and interstate streams, primarily to secure federal funding for water projects they could not afford or did not choose to finance themselves. In regard to the reclamation program, the states understood that the Bureau of Reclamation would hold water rights appropriated under state law, originally for the benefit of agricultural users, later extended to a variety of purposes, including municipal, industrial, power production, flood control, fish and recreation, and water compact deliveries.²⁹ The tribal rights³⁰ and agency rights for primary purposes of federal reservations were another matter. They arose out of federal law, in particular congressional exercise of the property clause.³¹

B. The Interest of the States in Adjudicating Federal Claims

The immunity of the United States to compelled appearance in state court proceedings became an increasing problem as the states continued to exercise their congressionally-conferred and repeatedly-recognized authority to create water rights in unappropriated public waters. Whether state law based, as with the reclamation projects, or federal law based, as with the tribal and federal land reservations, water rights of the United States government were not subject to determination by state forums. Whatever litigation occurred to determine federally held water rights occurred in federal court, while the states proceeded on a separate track as to state based claims not owned by the United States government.

The situation became intolerable to the western states.³² The security and dependability of water rights turned squarely on the enforceability of their priority in times of short river supply. The right to divert a certain amount of water from the available natural stream

28. *Arizona v. California*, 373 U.S. 546, 601 (1963). *See also* *California v. United States*, 438 U.S. 645, 662 (1978) (stating that “except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters”); *Federal Power Comm’n v. Oregon*, 349 U.S. 435, 444-45 (1955) (upholding authority of Federal Power Commission to license power projects on reserved lands, subject to prior vested rights).

29. *Bd. of County Comm’rs of Arapahoe County v. Crystal Creek Homeowners Ass’n*, 14 P.3d 325, 329-40, 342 (Colo. 2000).

30. Susan M. Williams, *The Winters Doctrine On Water Administration*, 36 ROCKY MTN. MIN. L. INST. §§ 24-1, 24-6 to 24-8 (1990).

31. U.S. CONST. art. IV, § 3, cl. 2.

32. Thorson, *supra* note 20, at §§ 22-16 to 22-24.

supply at a specific location, to the exclusion of all others not then in priority, is the essence of a water right. The reason for adjudicating a federal reserved water right is the same as all other rights to the use of water—to realize the value and expectations that enforcement of that right's priority secure.³³ In times of short supply, water users depend on the state to exercise its police power to curtail junior uses in favor of senior uses, regardless of the identity of the owner of the right, state or federal. To accomplish this, the amount and priority of rights drawing on the watershed had to be determined.

Because the states could not haul the federal agencies and tribes into state court, they were unable to secure reliability for state-created water rights and meet future needs due to uncertainty about the nature, extent, and priority of federal water rights. In sum, administration of rights within the watershed, who gets to divert, and who must be curtailed, cannot occur in the absence of comprehensive identification and adjudication of all rights entitled to command delivery of available water to their place of use, whether based on state or federal law.

Accordingly, after a prolonged effort and over the resistance of the Justice Department and federal agencies, Congress passed the 1952 McCarran Amendment permitting state joinder of the United States and Indian tribes in state court water adjudications.³⁴ In order to assert this jurisdiction, states relying primarily on administrative mechanisms commenced comprehensive adjudications to determine the rights of all users, including federal entities.

Three Colorado cases ultimately decided by the United States Supreme Court established that federal courts and state courts, under the McCarran legislation, have concurrent jurisdiction to determine federal rights. However, when a McCarran proceeding has been initiated in the state court, the federal court should defer to the state judicial determination of the federal rights, whether or not the federal litigation was filed first.³⁵

Implicit in the refusal of federal courts to exercise their concurrent jurisdiction is that the federal agencies and tribes will have equal access to fair state judicial forums, along with state and private claimants. As

33. Navajo Dev. Co. v. Sanderson, 655 P.2d 1374, 1380 (Colo. 1982).

34. Bennett W. Raley, *Chaos in the Making: The Consequences of Failure to Integrate Federal Environmental Statutes with McCarran Amendment Water Adjudications*, 41 ROCKY MTN. MIN. L. INST. §§ 4-1, 24-21 to 24-30 (1995).

35. The Colorado Trilogy: Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 810, 820 (1976); United States v. Dist. Court, 401 U.S. 527, 530 (1971); United States v. Dist. Court, 401 U.S. 520, 525 (1971).

Justice Brennan wrote for the Court in the Colorado case recognizing the authority of the states to join tribal claims under McCarran:

We emphasize, however, that we do not overlook the heavy obligation (of the federal courts) to exercise jurisdiction. We need not decide, for example, whether, despite the McCarran Amendment, dismissal would be warranted if more extensive proceedings had occurred in the District Court prior to dismissal, if the involvement of state water rights were less extensive than it is here, or if the state proceedings were in some respect inadequate to resolve the federal claims.³⁶

Additionally, when joined by a state in a McCarran proceeding, the United States must assert all federal claims to water rights; if not, the priority of the federal rights, including both reserved and appropriative rights, may be conceded to intervening state and private junior rights.³⁷ In turn, this has compelled federal agencies and tribes to participate in litigation they might otherwise have postponed or foregone entirely.

Congressional adoption of a plethora of environmental laws starting in the 1960s has caused federal agencies to manage the lands they administer with greater attention to values other than resource extraction, such as recreation, fish and wildlife, wild and scenic river, national park, and wilderness area preservation, among others. Members of the water bar have pointed out that the failure of the United States to claim state or federal appropriative water rights for environmental purposes, such as endangered species protection, defeats the purposes of the McCarran Amendment and the federal environmental laws, since reserved water rights either will not exist or will be uncertain. The argument is that a secure water right that can be administered in priority, vis-à-vis other water rights, is the most rational and consistent way to accommodate important state and federal interests in water. Resorting to regulatory mechanisms on an ad hoc basis, such as by-pass flows imposed by the Forest Service as a condition for right-of-way permit renewal, diminishes the yield of pre-existing water rights, and undermines reliability, promotes disorder, intensifies hostility, leads to takings actions, and generally favors chaos over law.³⁸

36. *Colo. River Water Conservation Dist.*, 424 U.S. at 820.

37. *United States v. Bell*, 724 P.2d 631, 636 (Colo. 1986).

38. *Raley*, *supra* note 34, at § 24-48. The problem for federal agencies with this approach is that such claims provoke intense state political reaction and litigation, as evidenced by the federal filings in Idaho's Snake River Basin adjudication. The right of the United States to obtain appropriative rights under federal law, in contradistinction to state law, has also been highly controversial and, although the western states except for New

In short, whether for a traditional type of consumptive use, such as agricultural or municipal, a non-consumptive use, such as hydropower or flood control, or environmental uses, which are largely non-consumptive, federal officials and agencies who do not assert federal water rights claims in the McCarran proceedings may be in dereliction of their congressionally-assigned public duties. When these claims are asserted, state judges must give them fair consideration and uphold federal ownership of rights that have a basis in either state or federal law, regardless of political controversy within the state over the filing, existence, nature, or extent of them.

McCarran adjudications are underway in the state courts of Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming, with Texas already having completed a comprehensive adjudication.³⁹ The United States Constitution provides for the authority of state judges to apply both state and federal law. Under the Supremacy Clause, they must uphold federal law when there is federal preemption.⁴⁰ The experiences of Colorado and Idaho, sparked by the majority opinions of Justices Stone and Silak, demonstrate the magnitude of the legal and governmental issues involved, goes straight to the heart of federalism, separation of powers, and the ability of judges to refrain from political influence in making decisions.

II. THE COLORADO EXPERIENCE

I tell you, gentlemen, you are piling up
a heritage of conflict and litigation
over water rights, for there is not
sufficient water to supply these lands.

John Wesley Powell⁴¹

In October of 1954, the Colorado Supreme Court issued its opinion in the Blue River case, pitting Denver's claims for municipal supply

Mexico have state law mechanisms for instream flow water rights, they typically hold these in state ownership and do not allow federal agencies or others to appropriate or hold them.

39. Raley, *supra* note 34, at §§ 22-37, 22-39; *see also* Thorson, *supra* note 20, at § 22-36. For example, the Arizona proceedings involve 77,000 water right claims, and the Idaho Snake River proceedings involve 185,000 claims. Raley, *supra* note 34, at §§ 22-37, 22-39.

40. U.S. CONST. art. VI, cl. 2.

41. JOHN WESLEY POWELL, OFFICIAL REPORT OF THE INTERNATIONAL IRRIGATION CONGRESS 109, 112 (1893), *quoted in* DONALD WORSTER, A RIVER RUNNING WEST: THE LIFE OF JOHN WESLEY POWELL 529 (2001).

against a United States reclamation project.⁴² At that time, Colorado law provided for contested election of judges. The author of the four-to-three decision, Chief Justice Mortimer Stone, was up for reelection in November. He had drawn a ballot challenger.

The case was highly significant. It involved the water right priorities of the City and County of Denver, the City of Colorado Springs, seven counties of northeastern Colorado, and fifteen counties of Colorado's western slope, which encompasses most of Colorado's future demand for surface water. The principal focus was the relative priorities of Dillon Reservoir and Green Mountain Reservoir, which is situated not far downstream from Dillon on the same river.

Congress had authorized Green Mountain Reservoir as part of the Colorado-Big Thompson Project, a Bureau of Reclamation project designed to provide 100,000-acre feet of water per year for future uses on the western slope of Colorado's continental divide, and 240,000-acre feet of water per year to the seven county area of northeastern Colorado for agricultural, municipal, and industrial uses via a trans-mountain diversion tunnel running west to east under the surface of Rocky Mountain National Park.

In addition, Green Mountain Reservoir was to store an additional 52,000-acre feet of water to provide replacement water for senior uses on the western slope drawing on Colorado River water, thereby allowing out-of-priority diversions to northeastern Colorado. Power production at the Green Mountain site would help repay the United States for C-BT construction costs, along with project power features on the eastern slope, and the repayment obligations of the Northern Colorado Water Conservancy District, the project's northeastern Colorado sponsor. The water users of the fifteen county Colorado River Water Conservation District were the primary beneficiaries of Green Mountain Reservoir.

The agreement between northeastern Colorado and the western slope water interests was an elevated achievement. Colorado is the state of the Great Divide, hydrologically and politically. Eighty percent of the average annual precipitation arises on the western slope; eighty percent of the population and much of the irrigable acreage of the state lies on the eastern slope. The River District and the Northern District

42. See generally *City and County of Denver v. N. Colo. Water Conservancy Dist.*, 276 P.2d 992, 1012 (Colo. 1954) (holding that, following the Act of 1877, all nonnavigable waters, then a part of the public domain, became *publici juris*, subject to the plenary control of designated states).

were both established in 1937 to safeguard the water interests of their regions. The authorizing legislation for formation of the Northern District required mitigation to the western slope for trans-mountain diversions from the natural basin of the Colorado River within the state. Congressman Ed Taylor of the western slope had successfully insisted on provisions in the Congressional authorization requiring that the western slope protective feature, the Green Mountain Reservoir, would be constructed before any of the features designed to benefit the eastern slope.

The Bureau of Reclamation proceeded with construction of the C-BT Project commencing with Green Mountain Reservoir first, as directed by Congress, however, litigation over water rights priorities was inevitable.⁴³ The City and County of Denver, proceeding with its own financial resources and unbound by any state or federal legislative provisions, planned on constructing Dillon Reservoir to divert Blue River waters through its own trans-mountain tunnels for use in the City and County and its service areas in the mushrooming metropolitan area.

Although a water right arises only from actual application of water to a beneficial use, Colorado law allows for relating the priority date of the water right back to the date when the claimant took its first act evidencing the intent to appropriate a certain amount of available unappropriated water at a specific location for beneficial use, provided that construction of the project proceeds with reasonable diligence.⁴⁴ The relation-back doctrine thereby permits the appropriator the time required to engineer, finance, and construct the water works necessary to use the water.

Relying on an appropriation date of 1935 for the Colorado-Big Thompson Project, the Northern District and the Colorado River District—allied as they were in the construction and operation of the federal reclamation project—claimed that Denver had not been diligent in pursuing its Blue River claims. Denver had asserted a 1921 date for Dillon Reservoir based on its overall planning for a comprehensive water system along the eastern and western slope sources. Refusing to appear in the state court suit pre-McCarran, the United States filed a parallel suit in the Colorado Federal District Court.

The Colorado Supreme Court's decision provided a date of 1946

43. DANIEL TYLER, *THE LAST WATER HOLE IN THE WEST: THE COLORADO-BIG THOMPSON PROJECT AND THE NORTHERN COLORADO WATER CONSERVANCY DISTRICT* 205-15 (1992).

44. *Steber v. Frink*, 153 P. 901, 903 (Colo. 1884).

based on Denver starting work on the Montezuma trans-mountain tunnel that year. Concluding that Denver had not been diligent in pursuing its Blue River claims, the court postponed the City and County's asserted earlier priority in favor of the federally held priority for the C-BT Project. The dissent—signed by the only three judges from the Denver metropolitan area—declared that because of Denver's work on its comprehensive water system, the City and County had been diligent and was entitled to the earlier date.

Denver newspapers proclaimed calamity and sided with the dissent. Denver's future would be dried-up because the majority, through Justice Stone, had turned over control of the Blue River to the United States. The *Denver Post* started its coverage on October 19, 1954, in an article reporting a rumor that the Colorado Supreme Court was "close to a ruling deciding against Denver in the proposed Blue River diversion case."⁴⁵ The rumored outcome was four-to-three against Denver. The *Post* said there were "widespread reports that attempts were being made by the state Republican high command to hold up the decision until after the election because of jolting political consequences."⁴⁶ It quoted the Denver Water Board's attorney as saying that the city "needs court approval of its priority claim in order to divert 177,000 acre feet of water annually."⁴⁷

The court issued its opinion late in the afternoon of the day the *Post's* morning edition had broken the story. The next day, October 20, the *Post* reported that the priority date awarded to Denver of June 24, 1946, would "entitle Denver only to a little surplus flood water in wet years."⁴⁸ Justice Stone had "doomed" Denver's future. A "Denver spokesman," commenting on the decision, said, "the city will make no attempt to divert the 788 second-feet permitted, declaring that such diversion would not be financially feasible."⁴⁹ An accompanying editorial asserted that the "effect of the decision is to award virtually the entire flow of the Blue River to Green Mountain reservoir, a part of the Colorado-Big Thompson project, and to the Green Mountain hydroplant where the government generates electricity."⁵⁰

On October 26, the *Denver Post* endorsed Justice Stone's opponent, Henry S. Lindsley, stating: "Justice Stone wrote the recent

45. *4-3 Decision Against City, Lawyers Told*, DENVER POST, Oct. 18, 1954, at 1.

46. *Id.*

47. *Id.*

48. *City Failed to Establish Claim, Jurist Says*, DENVER POST, Oct. 19, 1954, at 2.

49. *Id.*

50. *The Supreme Court vs. a Growing City*, DENVER POST, Oct. 20, 1954, at 16.

majority opinion of the state supreme court which constituted a serious blow to Denver's plans for increasing its dwindling water supply by tapping the Blue River."⁵¹ The *Post* acknowledged that "Justice Stone has been a distinguished jurist."⁵² Discounting political motivations of its own, the *Post* nevertheless said that Justice Stone should go, stating, "[W]e do not believe court decisions should be made a matter of politics," but "it is important, however, that younger men be elected to the court whenever younger men of demonstrated knowledge, understanding and character are offered as candidates."⁵³ Justice Stone was 72; his opponent, 51.

Denver filed for rehearing and a series of *Post* stories and columns up to election day speculated on the severe damage dealt to Denver and the chances of getting a rehearing granted—and reversal obtained—if Justice Stone's opponent was elected. Newspapers in northeastern Colorado and on the western slope countered with articles, columns, and editorials in favor of Justice Stone's decision and his retention.

On the first Tuesday of November 1954, a flood of Denver metropolitan votes took Justice Stone down.⁵⁴ The Denver Water Board filed successive rehearing petitions, including one after Justice Lindsley had taken his place on the court. Justice Lindsley refused to vote for rehearing;⁵⁵ as a result, Justice Stone's opinion stood.

The Colorado Supreme Court's decision produced a settlement in the federal court case the next year. In return for a power interference agreement, that would store and divert water which would otherwise be required to run through the turbines at Green Mountain dam downstream of Dillon Reservoir, Denver stipulated in 1955 to the senior priority of the Colorado-Big Thompson Project. Denver today operates Dillon Reservoir as its premier water storage reservoir; the C-BT Project has a long record of service to Northeastern Colorado; and the 100,000-acre feet of water in Green Mountain Reservoir is fully

51. *On Selecting Judges*, DENVER POST, Oct. 26, 1954, at 16.

52. *Id.*

53. *Id.*

54. *Denver's Vote Decisive in Supreme Court Race*, DENVER POST, Nov. 3, 1954, at 23.

55. Justice Holland, one of the dissenting justices, explained that he and his fellow dissenters and the new member of the court, Justice Lindsley, "unhesitatingly participated in the matter of the denial of the last of the subsequent motions (for rehearing) as proper procedure to establish finality as is proper in this, as well as other litigated cases," despite the dissent of the three and the arrival of a new judge who had not participated in the majority's decision. See *City and County of Denver v. N. Colo. Water Conservatory Dist.*, 276 P.2d 992, 1023 (Colo. 1954) (Holland, J., dissenting).

subscribed for western slope uses, mainly providing replacement water for junior out-of-priority diversions on the western slope that would be subject to curtailment otherwise.⁵⁶

In 1966, the voters of Colorado approved a state constitutional amendment abolishing contested judicial races, in favor of citizen-commission nomination of trial court and appellate court candidates, followed by appointment by the Governor, and a retention/non-retention vote for a term of years after two years of service. Upon Justice Stone's death, the Colorado Supreme Court presided over a eulogy to his excellence as a justice and the example his reelection defeat had set for a better way of selecting and retaining judges. Said Leonard Campbell, a leader of the Colorado Bar Association, on this occasion:

I listened and remembered well when Alden Hill spoke about the election of 1954 when Mortimer Stone was defeated, improperly defeated in the election held that year. Perhaps it's somewhat fitting as a Denverite born here, somewhat related on occasion to the Water Department, that we acknowledge what has been acknowledged countless times, that never was there an election for any judge of this supreme Court that was more discussed after the election in which the judge gained in stature: he gained in stature every time that it was discussed; and never was it more clearly demonstrated that there was a deficiency in the elective process that did not return him to office.⁵⁷

After his defeat, Justice Stone went on to serve as a referee with the National Railroad Adjustment Board and Mediation Board, deciding dockets of disputes between railroads and their employees. He died twenty-four years after his election defeat at the age of ninety-five.

III. THE IDAHO EXPERIENCE

Ideals and actions do not automatically coincide. Given the history of Idaho's irrigated landscape, a corollary might be added to this basic observation. A

56. Every one of these water features helps to put Colorado's entitlement under the Colorado River Compact to use within the state, while serving important recreational and environmental needs. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 690 (Colo. 2001). Particularly in the headwater counties of Grand, Summit, and Eagle, home to ski area, summer resort, and residential development, the western slope's recreational and residential economy is largely possible because of replacement releases from Green Mountain Reservoir, permitting out-of-priority diversions. *In re Application of Denver by Bd. of Water Comm'rs*, 935 F.2d 1143, 1146 (10th Cir. 1991).

57. See Proceedings in the Supreme Court of Colorado, Friday, April 14, 1978, to honor the memory of the late Honorable Mortimer Stone as a Justice and Chief Justice of the Court, *in* unpaginated preface to 195 Colo. (1978).

belief that humans should conquer and exploit the environment does not necessarily mean that they will actually achieve their objectives. As the irrigated landscape showed, nature often eluded ideals: a conquest myth did not produce a conquered land.⁵⁸

In October 1999, the Idaho Supreme Court issued its opinion on wilderness water rights in the Snake River Basin McCarran adjudication.⁵⁹ Idaho provides for the contested election of judges but without party identification. If a candidate in the primary does not obtain a majority vote, a run-off election occurs as part of the general election. The author of the three-to-two decision, Justice Cathy Silak, was up for reelection. The controversy over her opinion drew a ballot opponent who defeated her overwhelmingly.

This case had its predecessor in inconclusive Colorado litigation. The Idaho case involved a United States Forest Service for implied federal reserved water rights for three wilderness areas, some of which were downstream of upstream agricultural, municipal, and mining areas. Although the Sierra Club had brought federal litigation against the Forest Service in Colorado seeking to compel it to claim wilderness water rights, the Tenth Circuit Court of Appeals refused to do so, and found the case to be hypothetical and non-reviewable.⁶⁰ The Colorado Federal District Court had ruled in favor of the theory of such rights, but stated its inability to order the Forest Service to adjudicate them. Instead, it ordered the Forest Service to devise a plan to protect wilderness water resources in the absence of obtaining water rights for them.⁶¹ In finding the case not ripe for decision, the Tenth Circuit vacated the district court's decision.

Colorado water user interests had intervened in the Sierra Club litigation with an eye towards the designation of downstream wilderness areas then being proposed for designation on forest lands in the state, where reservation of a wilderness water right could block future upstream water development on non-wilderness lands.⁶²

58. MARK FIEGE, *IRRIGATED EDEN, THE MAKING OF AN AGRICULTURAL LANDSCAPE IN THE AMERICAN WEST* 207-08 (1999).

59. *See generally In re SRBA*, No. 24546, 1999 Idaho LEXIS 119, at *1 (Idaho Oct. 1, 1999) (affirming the district court's order granting the United States's reserved water rights for the Frank Church River of No Return, the Selway-Bitter Root, and the Gospel-Hump Wilderness Areas).

60. *Sierra Club v. Yeutter*, 911 F.2d 1405, 1421 (10th Cir. 1990).

61. *See Sierra Club v. Lyng*, 661 F. Supp. 1490, 1503-04 (D. Colo. 1987); *Sierra Club v. Block*, 622 F. Supp. 842, 866-67 (D. Colo. 1985).

62. The subsequent 1993 Colorado Wilderness Act—mostly headwaters areas, but

In Idaho, the designation wilderness areas downstream of developing lands upstream had already occurred. The Forest Service, therefore, undertook in Idaho's McCarran proceedings to meet its perceived responsibility for asserting the existence of federal reserved water rights for wilderness areas, where such rights could make a difference in protecting wilderness water resources, namely for the Selway-Bitterroot (designated by Congress in 1964), the Gospel-Hump (designated by Congress in 1978) and the Frank Church River of No Return (designated by Congress in 1980) wilderness areas.

The wilderness water rights claims were highly controversial from the outset. Cities, irrigation districts, and mining and timber companies contested them both in the trial court and on appeal. The state district judge, conducting the comprehensive Snake River Basin Adjudication, ruled in favor of the federal wilderness water rights claims, as well as those for national recreation areas and wild and scenic rivers in Idaho.

Idaho water users filed a brief arguing that the doctrine of implied reserved water rights is an anachronism. They argued that when Congress raises and debates the water issue, then fails to resolve it, as with the Wilderness Act, the courts should refuse to act to imply a reserved water right, for this would violate separation of powers. In such a circumstance, they asserted, the *New Mexico* doctrine of deference to state water law should apply to the case rather than the *Winters* doctrine. In *United States v. New Mexico*,⁶³ the United States Supreme Court held that instream flows for fish and wildlife, recreation, and other multiple uses of forest lands, were secondary purposes of national forest designation, the primary purposes being timber production and water production for western settlers.⁶⁴ Accordingly, contended the water users, implied reserved water rights do not exist for wilderness designations.

A majority of the Idaho Supreme Court justices agreed with the adjudication court. Justice Silak's opinion relied on the *Winters* doctrine, as further developed by other United States Supreme Court

including three downstream segments—disclaimed the creation of wilderness reserved water rights as being a result of that particular designation, while preserving any pre-existing federal rights in the areas. Pub. L. No. 103-77, 107 Stat. 756-65 (1993).

63. 438 U.S. 696 (1978).

64. *Id.* at 710. Applying *New Mexico*, the Idaho Supreme Court unanimously decided in another case that the Multiple Use and Sustained Yield Act of 1960 did not create and express or implied reservation of water. *United States v. City of Challis*, 988 P.2d 1999, 1207 (Idaho 1999).

decisions spelling out the doctrine of implied reserved water rights to prevent defeat of the primary purposes of federal reservations.⁶⁵

As Judge John Kane had done in his vacated Colorado Federal District Court decision, the Idaho Supreme Court determined that congressional designation of wilderness area on forest lands is a new reservation overlaid on an existing one, the primary purpose of which is to protect the wilderness values existing as of the date of designation.⁶⁶ Because water is an essential attribute of wilderness, a federal water right is necessary to prevent its impairment. Justice Silak wrote:

Through the Wilderness Act, Congress established a new category of federal lands—the national Wilderness Preservation System. Unlike the MUSYA [Multiple Use and Sustained Yield Act], the Wilderness Act prescribes a unique management scheme that clearly aims to preserve the wilderness character of the designated lands. The designation of the Wilderness Areas at issue in this case continued the withdrawal of these areas from the public domain. Moreover, it is also clear that the Wilderness Areas were established for the purpose of wilderness preservation. Therefore, we conclude that the congressional designations of the Wilderness Areas are reservations of land established for the primary purpose of wilderness protection and preservation.⁶⁷

Citing the opaque language of the 1964 Wilderness Act regarding water rights—“nothing in this Act shall constitute an express claim or denial on the part of the Federal Government as to exemption from [s]tate water laws”—the majority concluded that wilderness designation did not create an express federal reserved water right.⁶⁸ It then undertook to determine the existence of an implied reserved water right.⁶⁹

The majority opinion focused on the central function of Idaho water law—to provide for the future appropriation of unappropriated, unreserved water—versus the forceful language of Congress regarding its intent to preserve the wilderness areas as they were at the time of their designation:

Idaho law provides that all non-reserved, unappropriated water within the state is subject to appropriation to further domestic and economic development. . . .

65. *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976); *Arizona v. California*, 373 U.S. 546, 600 (1963).

66. *In re SRBA*, No. 24546, 1999 Idaho LEXIS 119, at *19-20 (Idaho Oct. 1, 1999).

67. *Id.*

68. *Id.* at *20.

69. *Id.*

A review of the Wilderness Act demonstrates that the prior appropriation doctrine is inconsistent with the congressional intent to preserve the wilderness character of the Wilderness Areas.⁷⁰

The three-member majority determined that the wilderness water reservation was for all the water:

As discussed above, the appropriation of water from within the Wilderness Areas would defeat Congress's primary purpose of preserving the unimpaired wilderness character of the areas. The Wilderness Act makes clear Congress' intention that the Wilderness Areas "be administered . . . in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for . . . the preservation of their wilderness character." . . . Congress defined wilderness as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions." . . . Water is required to effectuate the purpose of maintaining wilderness in its pristine natural condition. Because removing water necessarily impairs the natural state of the wilderness lands, Congress must have intended to reserve all unappropriated water. Therefore, we hold that the SRBA district court correctly concluded that the entire unappropriated amount of water within the Wilderness Areas is necessary to accomplish the purposes of wilderness preservation and protection.⁷¹

The majority did not address the water users argument that the implied reserved water right doctrine is an anachronism and creates separation of powers problems if applied to wilderness designations, because courts cannot legislate to create a water right when Congress has raised the issue but has declined to resolve it.

The dissent wrote that implied reserved water rights cannot exist when it is clear that Congress has taken up the water issue and has not expressly reserved unappropriated water.⁷² The language no claim/no denial of exemption from state water law, it said, meant Congress intended no claim for wilderness water rights.⁷³ The dissent also concluded that wilderness designation is a management directive to the administering agency, not a reservation overlying original Forest reservation.⁷⁴

Reacting to a torrent of immediate and widespread adverse reaction

70. *In re* SRBA, 1999 Idaho LEXIS 119, at *24 (citation omitted).

71. *Id.* at *27-28 (citations omitted).

72. *Id.* at *38 (Schroeder, J., dissenting).

73. *Id.* at *41 (Schroeder, J., dissenting).

74. *In re* SRBA, 1999 Idaho LEXIS 119, at *47 (Schroeder, J., dissenting).

to the decision across Idaho that took on a life of its own, *The Idaho Statesman* editorialized on October 14, 1999, for Justice Silak's reelection defeat:

Through the hand-wringing over Idaho's water rights, there is one quick-fix solution available to voters: elect a new Supreme Court justice. Justice Cathy Silak, who on Oct. 1 wrote the explosive opinion that turns over water rights in wilderness areas to the federal government, is up for reelection in May. Hers is the only seat that will be available. That leaves an opening for anybody who thinks she was in error in assuming the intent of Congress to give the federal government rights over Idaho's wilderness water.⁷⁵

The editors went on to opine that Silak "should be well aware" that not a single Idaho politician in the last thirty-plus years, "Democrat or Republican," would dare run on a platform to allow the federal government "to control every drop of water in designated areas of the state."⁷⁶ While the editorial said it was too early to tell whether she should be defeated based on the basis of one decision, the "controversial ruling was approved on a three-to-two vote, so all it takes is one change on the [s]upreme [c]ourt—one individual who demonstrates a greater sensitivity to what's at stake, which is Idaho's water sovereignty."⁷⁷

The Statesman went on to say that "[s]ome state leaders warn that thousands of Idaho water users, including Treasure Valley residents, could lose their right to use water for drinking, farming, and making microchips. Farmers are especially worried about their livelihoods coming to an end and fields turning to sagebrush."⁷⁸ The trial attorney for the United States was reported as saying it was not the government's aim to claim every drop of water allocated since 1980. The editorial concluded that "if Silak wants to help her cause, she could push for a rehearing on this case and be open to changing her mind. Her future on the Idaho Supreme Court may depend on what she does on this issue."⁷⁹

Shortly after this editorial appeared, the court granted a rehearing, with Justice Silak also voting to grant rehearing. A state district judge

75. Editorial, *Idahoans Could Place Water Rights Issue In Their Hands*, THE IDAHO STATESMAN, Oct. 14, 1999, at 6b. The author thanks reporter Dan Popkey of the *Idaho Statesman* for the courtesy of providing articles and editorials of that newspaper appearing over the course of the election controversy.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Idahoans Could Place Water Rights Issue In Their Hands*, *supra* note 75, at 6b.

filed his candidacy to oppose her. On March 13, 2000, *The Statesman* reported that Justice Silak's adversary had recused himself from further proceedings at the trial court level in a controversial school finance case because, in his view, the Idaho Supreme Court had rewritten the Idaho constitution and for him to implement the court's decision would be to violate his oath of office.⁸⁰ *The Statesman* also quoted a state republican legislator as saying, "Three strikes against this court, and especially against Cathy Silak. She's out. We have to send that message. If we can't do it legislatively, by tying their hands, then we've got to send a message by replacing her."⁸¹ The article said, "Critics, including virtually every elected official in Idaho, contend the court misinterpreted congressional intent on reserved water rights in the 1964 Wilderness Act."⁸²

Justice Silak attempted to respond by pointing to her record. *The Statesman* on April 29, quoted a Boise attorney, who was chairing Justice Silak's reelection campaign, as saying that the court's five justices issued unanimous rulings in 74 of 88 cases before them and Justice Silak had filed only three dissents.⁸³ Asked to respond, Justice Silak's opponent pointed to her vote in the school funding and water rights decisions as indicative of her disregard for the law.⁸⁴

Within days of the upcoming election, *The Statesman*—reviewing the judicial record and statements of both candidates—reversed its initial editorial suggestion that Justice Silak should be voted out of office. It endorsed her reelection:

Silak's record shows no evidence of judicial activism. Last year, she sided with the court's majority in 93 out of 96 published opinions; this is hardly the record of a maverick. Silak declined to answer the same religious questionnaire (her opponent) answered, saying it would be unethical to discuss her opinion. She's right.⁸⁵

80. Mark Warbis, *Tempers Run Hot Over High Court's Recent Rulings*, THE IDAHO STATESMAN, Mar. 13, 2000, at 1b.

81. *Id.* The reference to three strikes was to a case where the Idaho Supreme Court had overruled a lower-court decision absolving St. Alphonsus Regional Medical Center of an employee's molestation of a minor, the public schools case where the court determined that the state had a constitutional obligation to ensure that students can attend public schools that provide "a safe environment, conducive to learning," and the wilderness water rights case.

82. *Id.*

83. *Candidate Takes on Justice Silak's Record of Rulings*, THE IDAHO STATESMAN, Apr. 29, 2000, at 1b.

84. *Id.*

85. Editorial, *Justice Silak Has Experience and Judicial Temperament*, THE IDAHO

The editorial pointed out that Justice Silak's opponent had

answered an endorsement questionnaire from a religious group, where he discussed his evangelism, opposition to abortion and deeply held belief in creationism and his conviction that the Bible is the source of our moral law. . . . Revealing religious and moral views for a political endorsement leaves the public to question (his) detachment and erode confidence in his decisions.⁸⁶

Justice Silak fell to overwhelming defeat on May 23. Although she attributed her defeat to "partisanship" and not necessarily her water opinion,⁸⁷ *The Statesman* on May 27, 2000, quoted a political analyst as saying that her vote in support of federal water rights was the likely cause.⁸⁸ "Water rights is the third rail of Idaho politics. Because of that decision, most of the focus was on her. Even though there was a lot of good reporting on (her opponent's) missteps, the focus was on water rights."⁸⁹ The election campaign cost both candidates a total of \$290,000, with Justice Silak slightly outspending her successful opponent.

On October 27, 2000, with the election five months behind, the Idaho Supreme Court reversed directions, determining that no implied federal reserved water rights existed for the three wilderness areas.⁹⁰ The lead opinion for the new majority stated that the "language of the Wilderness Act indicates that it sets aside land and prohibits its development, nothing more."⁹¹ Accordingly, the wilderness designation has no extraterritorial effect on water development outside of wilderness boundaries. "A clear indication of the creation of implied water rights as claimed by the United States does not exist in the language of the Wilderness Act or in its legislative history."⁹²

STATESMAN, May 21, 2000, at 10b.

86. *Id.*

87. Idaho's system of scheduling judicial elections at the time of the party primaries may accentuate former party affiliations, although the judicial election is theoretically non-partisan. Media coverage regarding the Idaho election continuously reported that a Democratic Governor had appointed Justice Silak, and she had been active in Democratic politics before taking office. Approximately, eighty-six percent of the total votes cast in the primary election were Republican.

88. Ken Miller, *Politics Under Scrutiny After Court Election*, THE IDAHO STATESMAN, May 27, 2000, at 1a.

89. *Id.*

90. *Potlatch Corp. v. United States*, 12 P.3d 1260, 1266 (Idaho 2000).

91. *Id.*

92. *Id.* at 1268.

Specially concurring, the chief justice questioned the continued viability of the *Winters* doctrine: “Where, as in this case, Congress has chosen for whatever reason, not to create an express water right despite its knowledge of a potential conflict, I believe it can no longer be inferred that such a right is necessary to fulfill the purposes of the reservation.”⁹³ She said to *The Statesman* on October 28, 2000, that the suggestion she had made a political rather than legal decision was “insulting.”⁹⁴ Acknowledging that, “You’re asking a question that’s fair game,” the chief justice explained that she had changed her mind based on the briefs and the oral argument on rehearing, lengthy discussion, and her own lengthy restudy of the applicable law.⁹⁵

The *Times-News* issue of October 28, 2000, quoted Idaho’s Governor as saying the “[s]upreme [c]ourt made the right call” and the Idaho Deputy Attorney General’s office as saying the new ruling “reaffirmed the long-standing principle of primacy of state water law.”⁹⁶ Pointing to the existence of more than 150,000 water rights claims in 38 counties involved in the pending Snake River Basin adjudication, the Speaker of Idaho’s House of Representatives proclaimed, “[i]t gets us to where we can, in the negotiations and the mediations, proceed from a position of strength rather than a defensive posture.”⁹⁷

In light of the Idaho experience, *The Statesman* editorialized on October 31, 2000, that the state should reexamine its method of selecting judges through contested elections: “[u]ntil there is change in the system, challengers in [s]upreme [c]ourt contests will continue to press the political envelope.”⁹⁸

IV. FEDERALISM, AN ENDURING HERITAGE

That open space that fills your vision and lifts your heart when you drive across the West is federal open space, most of it. Federally owned, protected, managed, federally kept open to almost any sort of reasonable public use. If it brings some irritations from hordes of tourists, it also fills the local treasury, and it gives a large part of the spaciousness and satisfaction to western living. As for

93. *Id.* at 1271.

94. Rocky Barker, *Water Ruling Reversed*, THE IDAHO STATESMAN, Oct. 28, 2000, at 01.

95. *Id.*

96. *Justices Reverse Water Ruling*, TIMES-NEWS, Oct. 28, 2000, at A1, A3.

97. *Id.*

98. *Our View*, THE IDAHO STATESMAN, Oct. 31, 2000, at 08.

wilderness areas, if we had had to depend on the states for their protection, there would pretty clearly be none . . . If the West is going to be saved in anything like its present state, it will not be by the states or the oligarchs who dominate most western capitals. It will be accomplished, if at all, by the greatest cooperation possible between state and federal, private and federal, private and state, business and agriculture.

Wallace Stegner⁹⁹

The Idaho election result reverberated across the United States. The Georgetown University Law Center's Environmental Policy Project urged environmental interests nationwide to take an active role in future state judicial elections.¹⁰⁰ In light of national news reports, those interested in preserving judicial independence and resisting political influences on judges questioned whether the Idaho Supreme Court, particularly its chief justice, had found itself in a political firestorm, the intensity of which it had not foreseen and did not withstand.

The impact of the Idaho experience on western state McCarran adjudications cannot yet be ascertained. The states differ in their methods for selecting state judges and their political climates. While fed-supplicating and fed-denigrating may be a stock-in-trade of water politics—raising the fervor and the fever of water lawyers—a state judge takes an oath of office to uphold the constitution and the laws of the United States and the state. In instances of preemptive conflict, federal law prevails. In addition, judicial ethics require judges to reach reasoned decisions and not alter the conclusions they reach because of political considerations.

Evidence that state water politics is poisoning the well of fair hearings has its remedy in the exercise of federal court concurrent jurisdiction over the claims of the federal agencies and the tribes. The split of the Idaho Supreme Court on the issue of wilderness water rights dramatizes the toll federalism can take on state judges, as they grapple with strongly advocated, inherently adversarial positions with political content and implications.

Scholarship, deference to legislative intent, and straightforward exposition of the court's reasoning—this is the judicial ideal. The

99. WALLACE STEGNER, *Land: America's History Teacher*, in MARKING THE SPARROW'S FALL: WALLACE STEGNER'S AMERICAN WEST 274, 276 (Page Stegner ed., 1998).

100. *Changing the Rules by Changing the Players: The Environmental Issue*, in STATE JUDICIAL ELECTIONS 48 (Geo. U. L. Center, Env'tl. Pol'y Project, 2000).

judicial ideal should be the expected norm.

Justice Silak's opinion in favor of wilderness water rights, like Judge Kane's before it in Colorado, was based on the forceful declarations Congress made in legislation favoring wilderness preservation. Her opinion was principled, not outlandish. It relied on the words of the statutes, the evident intent of Congress, leaving to legislators the evident policy issues.

The dissent to Justice Silak's opinion was also principled. It pointed out that neither the 1964 Wilderness Act, nor the individual Idaho wilderness designations created an express reserved water right.¹⁰¹ The language of no claim/no denial of exemption from state water law was patently the product of compromise designed to sidestep the issue. However, because the intent of Congress is determinative and Congress raised the very issue and then declined to resolve it, any court could logically conclude that Congress was not concerned with the creation of reserved water rights for wilderness areas, leaving the *New Mexico* doctrine applicable, as opposed to the *Winters* doctrine.

The Idaho Supreme Court majority and dissenting opinions—both sets of them—are well joined. The strength of the court's combined exposition, together with the evident need for final resolution, would seem to have made the Idaho case a logical candidate for United States Supreme Court review, but the government did not pursue a petition for certiorari. The polar opposites of wilderness water rights advocacy, the not-one-drop-shall-you-take from a wilderness area position versus the thou-shalt-not-tred-on-me state water law position, is yet unresolved by Congress or the Supreme Court.

The dilemma the Idaho Supreme Court faced is a study for other state supreme courts. Justice Silak's reelection bid, like Justice Stone's before it, became a political crucible, overshadowing the role of courts in the separation of powers and the merits of those serving in judicial office. Unlike Justice Stone's instance, where the Colorado Supreme Court refused to grant rehearing, the Idaho Supreme Court granted rehearing and the outcome was reversed when the chief justice, who had concurred with Justice Silak's opinion, agreed with the two dissenters to deny the wilderness water claims. The rehearing process extended through Justice Silak's defeat.

While a judge should vote for rehearing if he or she may have misapprehended the facts or the law of the case, a rehearing and the

101. *In re* SRBA, No. 24546, 1999 Idaho LEXIS 119, at *41 (Idaho Oct. 1, 1999) (Kidwell, J., dissenting).

substitution of an opposite opinion, is rare, in contrast with modifying the decision to make corrections while maintaining the same outcome and denying the rehearing petition. The essence of appellate deliberation is to test the strength of the proposed opinion, intellectually and practically. The appellate process is deliberate enough to allow thorough study and consideration before the court's final vote and release of a majority opinion. Non-authoring justices have a choice when two proposed opinions are offered to choose between them or to author yet a third opinion for the purpose of gaining a clearer majority or sharpening the court's analysis.

Significant questions deserve doubled efforts at consensus building among the justices whenever possible. Because justices must work in isolation, rather than the consultation in which the officials of the legislative and executive branches are free to engage in, they always owe to each other the courtesy of well-expressed critique, thoughtful insight, and prudent foresight.

The Idaho Supreme Court's switched outcome is likely to be the source of continued speculation. Did the court engage in politics in reaching its first decision, in granting the rehearing, in reversing itself on rehearing amidst a public outcry? Or did the majority justices simply get it wrong, with the authoring justice bearing the ultimate responsibility?

Lost in the Idaho controversy is the fact that the Idaho Supreme Court, despite denying the wilderness water rights claims on rehearing, nevertheless determined that congressional legislation designating certain Idaho national recreation areas and wild and scenic rivers carried with them expressly reserved water rights, the amount thereof to be quantified on remand.¹⁰² Idaho water users also strongly contested the existence of these rights, and the Idaho Supreme Court decisions in this regard, and others like it arising from the McCarran proceedings, are likewise candidates for United States Supreme Court review.

Thus, despite the surrounding political rhetoric of state primacy and sovereignty in water matters, it is clear that the Idaho Supreme Court did not take Justice Silak's defeat as a reason to retreat to an unmitigated application of state water law, in the face of the

102. *Potlatch Corp. v. United States*, 12 P.3d 1260, 1268-69 (Idaho 2000); *Potlatch Corp. v. United States*, 12 P.3d 1256, 1258-59 (Idaho 2000). The court refused to recognize the reserved water rights claims for certain recreation areas and national wildlife refuges in the state, applying the *New Mexico* doctrine. *United States v. Idaho*, No. 25546, 2001 Idaho LEXIS 7, at *1 (Idaho May 1, 2001); *State v. United States*, 12 P.3d 1284, 1290-91 (Idaho 2000).

Constitution and laws of the United States. These McCarran decisions in Idaho's Snake River Basin Adjudication bode well for the ability of western state courts to go about the judicial business of resolving state and federal water claims.

The role of settlement in these complex adjudications is also important. Subordination of federal claims to present and reasonable future needs of the state is a possibility, in return for recognition of enforceable rights for protection of environmental values. Those committed to absolutist positions on both sides of the equation always have difficulty with such proposals, but significant differences can make for significant settlement achievements, accommodating important interests. Surely, Congress has delivered severely contrasting mixed messages through its traditional deference to state law and its strong environmental protection statutes.

Water users of all stripes, including those favoring environmental uses, are bound—in the system of water use property rights that Congress and the states have fostered—to the fundamental precept that juniors must stand aside while seniors exercise their rights, when there is not enough supply to fill all uses. Ignoring this in favor of passionate commitment to one's own point of view and interest mistakenly ignores the operative principle that water remains a public resource committed to disposition and use in priority.

Undoubtedly, the Idaho Water Bar will look both to the boundaries of its advocacy role and to its role in fostering a continuously independent and fair judiciary. So will the water bars of the other western states, in light of the Colorado and Idaho experiences. Fair judges conducting fair hearings must be the norm. Political decision-making by judges has no place in the separation of powers. That would undermine public confidence even more surely than a handful of controversial decisions.

The media plays a very important role. Through reporting and editorializing, it can stand watch on the maturation and well being of each state's community. Operating in the community requires good scholarship, common sense, an eye to history, attention to detail, and well-considered premonitions of future possibilities. If judges must run against opponents for election and raise funds, can they really focus on the merits of the cases before them? In light of the recent experience, the Idaho press began to engage in reflective deliberation on the important issues of government, natural resource use and preservation, and the federal relationships involved. Such public inquiry has a way of

spilling into public policy.

The two chambers of the western heart, the two lobes of the western mind, are beneficial use and preservation. Growth and glorious natural habitat, this is the heritage of the public domain. Our rapidly urbanizing western experience—bridled by our love for the vistas, rivers, and all life, our natural optimism, our need for each other—in this our western place, so prized by the entire country, shall carry us forward.