Implications of Wilderness Statute Water Language

Section 4(d)(6) states: "Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."

Implications

This statement in the Wilderness Act is not an easy sentence to understand on the first read. Because it is listed as a special provision, many assume it is excepting water protection from the wilderness designation. In fact, the provision neither creates nor denies an exemption from state water law. The provision does not create an exception to the purpose of wilderness or the prohibited uses identified in the Wilderness Act; it does not necessitate a state issued water right or assert that one is not required; it does not expressly reserve a federal water right, or forgo a federal water right. The provision merely maintains the status quo. As one DOI Solicitor said in reflecting on the meaning of 4(d)(6): "Congress is kicking the can down the road and saying, 'we're leaving this up to you to sort out.'" The status quo remains that a federal reservation (such as wilderness) also reserves the water necessary to accomplish the purposes of the reservation. At least one court has weighed in on whether the Wilderness Act creates an implied federal water right. The U.S. District Court for the District of Colorado stated: *"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" Sierra Club v. Block*, 615 F. Supp. 44 *(D. Colo. 1985).*

Implications of enabling legislation which forgoes federal reserved water rights

Some wilderness enabling legislation states it is not creating an express or implied federal water right. On face value, this appears as direction that Congress does not intend to afford full protection of wilderness character for the subject wilderness. Of the enabling laws that forgo a federal reserved water right, however, none prohibit acquisition of a state permitted water right for the wilderness. In fact, half of those laws acknowledge that where a water right is needed to preserve wilderness character it should be secured through the state issuance process.

Where there is a federal reserved water right, it is still necessary for the water right to be adjudicated. In practice, the outcome of protecting water through a federal reserved or state issued water right is likely to be the same. That is, the state will have a major role in setting the quantity of water protected. However, there are two main differences when a water right is a state issued water right. First, if state water law does not recognize non-consumptive uses as a beneficial use (instream rights for fisheries, wildlife, recreation, scenery, etc.), it will not be possible to secure a water right for wilderness purposes. Second, if an instream beneficial use can be secured, the priority date will not be the date of designation. Therefore, it is important to file with the state as soon as possible after wilderness designation, to establish the earliest priority date possible. Unfortunately, many of the more recent wilderness designations are so late in the process that there may be insufficient amounts of unappropriated water to reserve.