

**First Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO**

PREAMENDED

LLS NO. R13-0110.01 Thomas Morris

HJR13-1004

HOUSE SPONSORSHIP

Sonnenberg,

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House Committees

Agriculture, Livestock, & Natural Resources

Senate Committees

Agriculture, Natural Resources, & Energy

HOUSE JOINT RESOLUTION 13-1004

101 **CONCERNING OPPOSITION TO NEW SPECIAL USE PERMIT WATER**
102 **REQUIREMENTS.**

1 WHEREAS, Most ski areas in Colorado are located in national
2 forests, and consequently are subject to special use permits issued by the
3 United States Forest Service; and

4 WHEREAS, Pursuant to federal law, waters arising on federal
5 lands in the western United States are available for appropriation and use
6 by the public according to the law of the state in which the federal lands
7 are located; and

8 WHEREAS, Most ski areas in Colorado have appropriated water
9 rights to facilitate ski area operations, and while some of this water arises

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

HOUSE
Amended Final Rdg.
February 4, 2013

1 on federal lands, including national forest lands that may or may not be
2 subject to the ski area special use permit, some of the water arises on
3 nonfederal lands; and

4 WHEREAS, The Forest Service has recently changed the terms of
5 its special use permits for ski areas by issuing Interim Directive
6 2709.11-2012-2 (the 2012 Directive); and

7 WHEREAS, The 2012 Directive prohibits ski area operators from
8 transferring certain water rights associated with the ski area to any third
9 parties and requires that, if the special use permits are terminated, the ski
10 area operators must transfer certain water rights associated with the ski
11 area to the United States or succeeding special use permit holders without
12 any further compensation; and

13 WHEREAS, Pursuant to federal law, the United States can acquire
14 water rights, other than by purchase or a similar transaction, in one of
15 only two ways: By impliedly reserving rights to supply water for the
16 primary purposes of a withdrawal of federal lands from the public
17 domain, or by complying with applicable state law to supply water for any
18 other federal purpose; and

19 WHEREAS, Colorado's constitution provides that water rights are
20 acquired according to the doctrine of prior appropriation, pursuant to
21 which the first person to put water to a beneficial use acquires the right
22 to continue to use the water; and

23 WHEREAS, To effectuate the appropriation of federal water rights
24 pursuant to state law, the McCarran amendment, 43 U.S.C. § 666, waives
25 the United States' sovereign immunity for the purpose of adjudicating and
26 administering water rights pursuant to the applicable state's water laws;
27 and

28 WHEREAS, A Federal Water Rights Task Force was created by
29 federal law in response to a controversy in Colorado regarding the Forest
30 Service's attempt to use its permitting authority to require water users to
31 relinquish a part of their water supply or to provide water for the
32 secondary purposes of the national forests; and

33 WHEREAS, In the task force's final report, the task force
34 concluded that "Congress has not delegated to the Forest Service the
35 authority necessary to allow it to require that water users relinquish a part

1 of their existing water supply or transfer their water rights to the United
2 States as a condition of the grant or renewal of federal permits"; and

3 WHEREAS, No federal law explicitly gives the Forest Service the
4 authority to prohibit the transfer of water rights owned by the holders of
5 special use permits or to require the holders of special use permits to
6 transfer to the United States water rights used on federal lands but arising
7 off the federal lands; and

8 WHEREAS, The National Ski Areas Association, on behalf of its
9 ski area members, including 22 ski areas on National Forest Service lands
10 in Colorado, has sued the Forest Service in federal district court, alleging
11 that the 2012 Directive amounts to a taking of private property without
12 due compensation and asking for a declaration that the Forest Service
13 cannot "condition the issuance of a ski area special use permit on the
14 assignment of, or restriction of alienability or severance of, water rights";
15 and

16 WHEREAS, In December 2012, the federal district court entered
17 an injunction that prohibits the Forest Service from enforcing the 2012
18 Directive based on federal procedural laws that the Forest Service
19 violated in adopting the 2012 Directive, and remanded the issue back to
20 the Forest Service; and

21 WHEREAS, Roughly 40% of the nation's cow herd and 50% of
22 the sheep herd spend some time on federal lands, and there has been an
23 increasing number of examples, not only with the ski industry, but also
24 with water districts, and, recently, with permitted ranching activities, in
25 which the Forest Service has tried to acquire ownership of water rights in
26 return for the continuance of permitted activities on National Forest
27 System lands; and

28 WHEREAS, While the Forest Service has not formally rejected
29 use permits in Colorado, it has delayed issuing those permits in order to
30 pursue its policy of obtaining stockwater rights in other states, which has
31 prevented the full use of the range by wildlife as well as livestock; and

32 WHEREAS, The Forest Service's policy of withholding water
33 improvement permits in exchange for stockwater rights flies in the face
34 of the prior appropriation doctrine for water rights that exists in much of
35 the West, including Colorado, is a threat to federal lands grazing
36 throughout the West, and must be addressed; and

1 WHEREAS, The Water Resources Review Committee has
2 reviewed the issues raised by this joint resolution and strongly urges the
3 General Assembly to adopt it; now, therefore,

4 *Be It Resolved by the House of Representatives of the Sixty-ninth*
5 *General Assembly of the State of Colorado, the Senate concurring herein:*

6 (1) That the General Assembly encourages the Forest Service to
7 not appeal the injunction regarding the 2012 Directive and to follow the
8 current federal procedural laws to determine whether any action is needed
9 with regard to special use permits;

10 (2) That, for the benefit of the range resource and our economy,
11 the General Assembly urges the Forest Service to immediately reevaluate
12 and discard its policy and actions whereby water rights are demanded in
13 exchange for permitted uses; and

14 (3) That the General Assembly urges the Forest Service to utilize
15 state laws and procedures to appropriate water rights if it wishes to ensure
16 that water is available for fish and aquatic habitat protection purposes on
17 the national forests rather than impose exactions in special use permits.

18 *Be It Further Resolved,* That a copy of this Joint Resolution be
19 provided to Harris Sherman, Under Secretary for Natural Resources and
20 Environment of the United States Department of Agriculture; *Daniel*
21 *Jiron, Rocky Mountain Regional Forester, United States Forest Service;*
22 the members of Colorado's congressional delegation; Glenn E. Porzak;
23 Geraldine Link, Director of Public Policy for the National Ski Areas
24 Association; Terry R. Fankhauser, Executive Vice President of the
25 Colorado Cattlemen's Association; and Melanie Mills, CEO of Colorado
26 Ski Country USA.