HOUSE RESOLUTION 13-1009


CONCERNING OPPOSITION TO NEW SPECIAL USE PERMIT WATER REQUIREMENTS.

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

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

WHEREAS, Most ski areas in Colorado have appropriated water rights to facilitate ski area operations, and while some of this water arises on federal lands, including national forest lands that may or may not be subject to the ski area special use permit, some of the water arises on nonfederal lands; and
WHEREAS, The Forest Service has recently changed the terms of its special use permits for ski areas by issuing Interim Directive 2709.11-2012-2 (the 2012 Directive); and

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

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

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

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

WHEREAS, A Federal Water Rights Task Force was created by federal law in response to a controversy in Colorado regarding the Forest Service's attempt to use its permitting authority to require water users to relinquish a part of their water supply or to provide water for the secondary purposes of the national forests; and
WHEREAS, In the task force's final report, the task force concluded that "Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits"; and

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

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

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

WHEREAS, Roughly 40% of the nation's cow herd and 50% of the sheep herd spend some time on federal lands, and there has been an increasing number of examples, not only with the ski industry, but also with water districts, and, recently, with permitted ranching activities, in which the Forest Service has tried to acquire ownership of water rights in return for the continuance of permitted activities on National Forest System lands; and
WHEREAS, While the Forest Service has not formally rejected use permits in Colorado, it has delayed issuing those permits in order to pursue its policy of obtaining stockwater rights in other states, which has prevented the full use of the range by wildlife as well as livestock; and

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

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

Be It Resolved by the House of Representatives of the Sixty-ninth General Assembly of the State of Colorado:

(1) That the House of Representatives encourages the Forest Service to follow the current federal procedural laws to determine whether any action is needed with regard to special use permits;

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

(3) That the House of Representatives urges the Forest Service to utilize state laws and procedures to appropriate water rights if it wishes to ensure that water is available for fish and aquatic habitat protection purposes on the national forests rather than impose exactions in special use permits.
Be It Further Resolved, That a copy of this Resolution be provided to Harris Sherman, Under Secretary for Natural Resources and Environment of the United States Department of Agriculture; Daniel Jiron, Rocky Mountain Regional Forester, United States Forest Service; the members of Colorado's congressional delegation; Glenn E. Porzak; Geraldine Link, Director of Public Policy for the National Ski Areas Association; Terry R. Fankhauser, Executive Vice President of the Colorado Cattlemen's Association; and Melanie Mills, CEO of Colorado Ski Country USA.

Marilyn Eddins
CHIEF CLERK OF THE
HOUSE OF REPRESENTATIVES

Dickey Lee Hullinghorst
MAJORITY LEADER OF THE
HOUSE OF REPRESENTATIVES