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9-15-1986

### Protection of Waters Within and Without Park Boundaries to Support National Parks and Other Units of the National Park System

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#### Citation Information

Tarlock, A. Dan, "Protection of Waters Within and Without Park Boundaries to Support National Parks and Other Units of the National Park System" (1986). *External Development Affecting the National Parks: Preserving "The Best Idea We Ever Had" (September 14-16)*.  
<https://scholar.law.colorado.edu/external-development-affecting-national-parks/16>

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A. Dan Tarlock, *Protection of Waters Within and Without Park Boundaries to Support National Parks and Other Units of the National Park System*, in EXTERNAL DEVELOPMENT AFFECTING THE NATIONAL PARKS: PRESERVING "THE BEST IDEA WE EVER HAD" (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1986).

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PROTECTION OF WATERS WITHIN AND WITHOUT PARK BOUNDARIES  
TO SUPPORT NATIONAL PARKS AND  
OTHER UNITS OF THE NATIONAL PARK SYSTEM

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External Development Affecting the National Parks:  
Preserving "The Best Idea We Ever Had"  
September 14-16, 1986  
Estes Park, Colorado

Sponsored by the  
Natural Resources Law Center  
University of Colorado  
School of Law

I. RELATIONSHIP BETWEEN LAND USE AND WATER. National parks and other units of the national park system consist of public land reservations and acquisitions for general and enumerated park purposes. Park lands must be managed by the National Park Service to fulfill these objectives. The protection and regulation of stream flows within and without park boundaries may be necessary to fulfill the management objectives of a unit.

II. PROTECTION OF PARK SERVICE NEEDS BY congressional or agency WATER MANAGEMENT

A. Inter-bureaucratic battles. The Park Service has fought with other agencies of the Department of the Interior to prevent water impoundments within the boundaries of the national park or external impoundments from encroaching on the park. The Service has had limited success at eliminating past incursions such as reservoirs built before the park was created. See R. Richter, *Crucible for Conservation: The Creation of Grand Teton National Park* (1982) for an account of the problems caused by the construction of Jackson Lake prior to the creation of the Grand Teton National Park. The Service has been the beneficiary of political

victories to exclude dams from national monuments and parks, but power lines are still permitted in national parks, 16 U.S.C. Section 5, and reservoirs are authorized in specified parks. e.g., 16 U.S.C. Section 227 (Grand Canyon National Park). Legislation has been approved by the House Interior and Insular Affairs Committee's subcommittee on National Parks and Recreation to prohibit all new impoundments within national parks or monuments and new impoundments that would flood a park or monument. H.R. 4089.

B. Too Much and Too Little: A Case Study of the Everglades National Park. The Everglades National Park requires large amounts of water from upstream drainage areas to sustain its ecosystem. See M. Douglas, *River of Grass* (1947). The upstream drainage patterns have been altered in this century to drainage land for agriculture, to provide a fresh water supply for the urban areas on the Atlantic coast and for flood control. The resulting canals and retention structures altered the flow of water across the area that is now the Everglades National Park by replacing the slow natural flow artificial flows that are often too much or too little. See Flowers, *Starting Over in the Everglades*, *National Wildlife* 55 (April-May 1985) and Hansen, *South Florida's water: A Trickle of Hope*, 26 *Environment* 14 (June, 1984).

1. Congress set minimum water delivery levels in 1970, P.L. 91-282, which must be honored by the Corps of Engineers and the South Florida Water Management District. However, the replacement of the historic sheet flow pattern with water from four sets of floodgates proved to have detrimental consequence's for the Park's wildlife. The National Park Service, the Corps, the District and the State of Florida have

embarked on an ambitious plan to restore natural water flows. State of Florida, Save Our Everglades: Second Anniversary Report Card, August 9, 1985.

2. In 1983 the National Park Service proposed an emergency seven point plan to the U.S. Army Corps of Engineers. The Corps in acting on some proposals, studying others but it has concluded that the dechannelization of the crucial Kissimmee River does not qualify as a federal project. The Park Service has asked the Corps and the South Florida Water Management District to test a new water delivery schedule. National Park Service, Water Delivery Schedule to Everglades National Park, January 2, 1986.

### III. NATIONAL PARK SERVICE WATER RIGHTS

- A. Higher priority equals priority. Most park water uses are instream uses so waters arising within national parks will flow to downstream state users and there will often be no conflict between park management objectives and state created water rights.
- B. Federal Reserved Water Rights. The reservation of land for a water-related objective may carry with it federal

proprietary rights. These federal reserved rights are created when:

1. Congress expressly or impliedly intends to create them incident to the withdrawal and reservation of land. *Cappaert v. United States*, 426 U.S. 128 (1976).
2. The rights are necessary to fulfill,
3. The primary not secondary purpose of the reservation. *United States v. New Mexico*, 438 U.S. 696 (1978).

C. Status of Federal Reserved Water Rights For National Parks.

1. The Supreme court has held that the creative Act of 1981 did not create reserved rights for national forests because instream flows are secondary not primary objectives. *United States v. New Mexico*, supra.

2. New Mexico suggested that withdrawals for aesthetic and ecological reasons carried within reserved rights and a 1979 Solicitor's Opinion claimed reserved rights for (a) pre-1916 Organic Act units of the system and (b) post-1916 Parks and National Monuments for scenic, natural and historic conservation uses, wildlife conservation, sustained public enjoyment at visitor



accommodations and NPS personnel uses. Federal Water Rights of the National Park, Fish and Wildlife Service Bureau of Reclamation, Bureau of Land Management Solicitor, Opinion No. M-36914. 86 Interior Decisions 561, 594- 602 (June 25, 1979).

3. A Colorado state supreme court decision has recognized reserved rights for the Rocky Mountain National Park, *United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1982), for the protection of watershed and timber resources and the conservation of scenery, historic and scientific objects and wildlife, 656 P.2d at 30, but refused to recognize instream flows for recreational boating in Dinosaur National Monument. A Colorado federal district court recently held that the protection of instream flows in wilderness areas is a primary not secondary purpose. *Sierra Club v. Block*, 622 F. Supp. 842 (D. Colo. 1985).

3. The duty of federal land management agencies to claim federal reserved rights is disputed. Some duty may exist, compare *Sierra Club v. Andrus*, 487 F. Supp. 443 (D.D.C. 1980) with and *Sierra Club v. Block*, supra. Federal land management agencies failure to claim reserved rights may be reviewable under the

Administrative Procedure Act, but the review has been light, in part, because the legal uncertainty over the "existence" and scope of non-Indian federal reserved water rights.

4. Reserved Rights for national parks may be claimed under state procedures. For example, Montana has a federal reserved rights commission to negotiate agreements with Indian tribes and federal agencies. Mont. Code Ann. Section 85-2-703. The Commission currently has received numerous Park Service filings for streams within Glacier National Park, In The Matter of the Claim of the United States of America For Reserved Water Rights Within the Boundaries of Glacier National Park, Montana, and some concern has been expressed about the future consequences of granting the NPS's requested rights.