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

A. Dan Tarlock

Follow this and additional works at: http://scholar.law.colorado.edu/external-development-affecting-national-parks

Part of the Administrative Law Commons, American Art and Architecture Commons, Animal Law Commons, Biodiversity Commons, Dispute Resolution and Arbitration Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Policy Commons, Hydrology Commons, International Law Commons, Jurisdiction Commons, Land Use Planning Commons, Legal History, Theory and Process Commons, Legislation Commons, Literature in English, North America Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Property Law and Real Estate Commons, Public Policy Commons, Recreation, Parks and Tourism Administration Commons, Science and Technology Policy Commons, State and Local Government Law Commons, Transnational Law Commons, Water Law Commons, and the Water Resource Management Commons

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).
http://scholar.law.colorado.edu/external-development-affecting-national-parks/16

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
PROTECTION OF WATERS WITHIN AND WITHOUT PARK BOUNDARIES
TO SUPPORT NATIONAL PARKS AND
OTHER UNITS OF THE NATIONAL PARK SYSTEM

A. Dan Tarlock
Professor of Law
Chicago/Kent College of Law
Illinois Institute of Technology

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

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:


2. The rights are necessary to fulfill,


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

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.