

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

RESOLUTION A

*Temporary storage location: S:\PUBLIC\LLS\2013A\Bills\Interim\Water Resources Review
Committee\13-0110.wpd*

LLS NO. R13-0110.01 Thomas Morris x4218

HOUSE Joint Resolution

HOUSE SPONSORSHIP

Sonnenberg and Baumgardner, Swerdfeger, Wilson

SENATE SPONSORSHIP

(None), Brophy, Giron, Hodge, Roberts

House Committees

Senate Committees

HOUSE JOINT RESOLUTION

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

*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.*

1 WHEREAS, The Forest Service has recently changed the terms of
2 its special use permits for ski areas by issuing Interim Directive
3 2709.11-2012-2 (the 2012 Directive); and

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

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

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

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

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

30 WHEREAS, In the task force's final report, the task force
31 concluded that "Congress has not delegated to the Forest Service the
32 authority necessary to allow it to require that water users relinquish a part
33 of their existing water supply or transfer their water rights to the United
34 States as a condition of the grant or renewal of federal permits"; and

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

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

1 and

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

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

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

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

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

23 (1) That the General Assembly encourages the Forest Service to
24 immediately rescind the 2012 Directive and settle the pending litigation
25 over the 2012 Directive;

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

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

34 *Be It Further Resolved,* That a copy of this Joint Resolution be
35 provided to Harris Sherman, Under Secretary for Natural Resources and
36 Environment of the United States Department of Agriculture; the
37 members of Colorado's congressional delegation; Glenn E. Porzak;
38 Geraldine Link, Director of Public Policy for the National Ski Areas
39 Association; Terry R. Fankhauser, Executive Vice President of the
40 Colorado Cattlemen's Association; and Melanie Mills, CEO of Colorado
41 Ski Country USA.