



Legislative Bulletin.....March 13, 2014

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H.R. 3189 – Water Right Protection Act

H.R. 3189 – Water Right Protection Act (Tipton, R-CO)

Order of Business: The bill is scheduled to be considered on March 13, 2014, under a rule combined rule for both H.R. 3189 and H.R. 4015.

With respect to H.R. 3189, the rule provides for the consideration of the bill in the Committee of the Whole House on the state of the Union. The rule waives all points of order against the legislation and provides for one hour of general debate.

After general debate, the legislation shall be considered for amendment under the five-minute rule. The rule makes in order three amendments that are summarized below in this document. After amendment debate the Committee shall rise and report the legislation to the House. At that time, any Member may demand a separate vote on any amendment that was adopted in the Committee of the Whole. The rule allows for one motion to recommit with or without instructions. The rule can be [viewed here](#).

Summary: The legislation prohibits the Secretary of Interior and the Secretary of Agriculture from conditioning the approval of a permit, lease, or easement based on the receipt of water rights from the permit holder.

Additionally, the legislation clarifies that it does not limit or expand any existing authority of the Secretary to condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use on federal lands subject to their respective jurisdictions.

Additional Information: Eastern states have typically used the riparian right of law for water rights questions. The riparian right pertains to properties adjacent to a waterway, and it gives the landowner of rights to the water, whether the right is exercised or not.¹

Western states generally use the prior appropriation since an incentive was needed for the development of water rights from sources often far away from their point of use. Prior appropriation equates to the first person to use the water can acquire rights to the water.² This allows for an individual to own water rights without owning the land adjacent to the water.

¹ <http://www.britannica.com/EBchecked/topic/504336/riparian-right>

² http://www.law.cornell.edu/wex/prior_appropriation_doctrine

According to the Natural Resources Committee:

“Recent federal efforts are undermining water rights and recreation on public lands. Specifically, the U.S. Forest Service (Forest Service) is pursuing regulatory actions impacting 121 ski areas operating facilities on federal lands in Arizona, California, Colorado, Idaho, Montana, Nevada, New Hampshire, New Mexico, Oregon, Utah, Vermont, Washington, and Wyoming.

“The Forest Service authorizes ski areas to operate on its lands through the use of ski area special-use permits. Such permits do not confer water rights on permit holders, but merely govern the terms of use for the Forest Service land. Water rights arising within or outside of the ski permit area must be acquired in accordance with state law and paid for at the expense of the ski area.^{3 4} Ski areas use these private water rights for snowmaking, which is critical to their operations, and as collateral to secure financing for maintenance, expansion, and job creation. Ski areas also use water rights for providing water supplies to nearby communities.⁵

“In 2011, the Forest Service issued an interim directive for ski area special use permits in Region Two (Colorado and Wyoming). **The directive included a clause requiring applicant ski areas to relinquish privately held water rights to the United States as a permit condition. It also required that water rights arising on Forest Service lands off-site be relinquished to the United States in the event that the permit expires or is terminated.**⁶ [Emphasis added]

“Nearly identical policies have been adopted which impact the water supplies of ranchers and municipalities. Similar to ski area permits, the Forest Service authorizes ranchers to run grazing operations on its lands through the use of grazing permits. As with ski area permits, these permits do not confer water rights on permit holders. Such rights must be acquired in accordance with state law and appropriated for beneficial use. In the case of grazing permits, as with ski area permits, the Forest Service has stated that the purpose of the policy is to tie the water to the land in order to ensure its continued use as a healthy rangeland. Extracting private water rights for the purpose of “continued support for the public land livestock grazing program” would replace western ranchers with federal bureaucrats as stewards of land and water resources, and requiring the relinquishment of appropriated water rights as a permit condition would result in lack of financing for ranching operations, reduced water supply reliability, and inevitable job loss.⁷ H.R. 3189 has been introduced to counter these policies, provide certainty to water users, and to maintain the longstanding deference to state water law.”

Amendments Made In Order:

Mullin (R-OK): The underlying legislation prohibits the Secretary of Agriculture, or the Secretary of Interior, from conditioning the approval of a permit to operate on federal land based on the receipt of water rights from the permit holder. This amendment adds language that extends that prohibition to tribal lands, therefore protecting tribal lands from overreaches by the Secretaries. The amendment also prohibits the legislation from altering any existing reserved water right or treaty right of any federally recognized Indian tribe. The text of the amendment can be [viewed here](#).

³ Colo. Const. Art. XVI, Section 5 (Declaring all natural waters subject to prior appropriation set forth in Colo. Const. Art. XVI, Section 6). See also, Colo. Rev. Stat. Title 37 Article 92.

⁴ *Forest Service Regulatory Roadblocks to Productive Land Use and Recreation: Proposed Planning Rule, Special-use Permits, and Travel Management: Oversight Hearing Before the Subcommittee on National Parks, Forests and Public Lands of the H. Comm. on Natural Resources*, 112th Cong. (2011) (written testimony of Glenn Porzak Esq., Porzak, Browning, and Bushong).

⁵ *Id.*

⁶ Forest Service Interim Directive No: 2709.11-2011-3, XII.F.2.a.d.

⁷ *USDA Forest Service Briefing Paper*, August 15th, 2008.

Tipton (R-CO): The amendment makes several technical changes to the legislation. Additionally, the amendment adds language that clarifies that the legislation does not interfere with existing or future Bureau of Reclamation contracts. It further states that the legislation does not affect implementation of the Endangered Species Act. The amendment also states that the legislation does not alter any existing water rights of the federal government on lands administered by the Secretary of Agriculture or the Secretary of Interior. The text of the amendment can be [viewed here](#).

Polis (D-CO): The amendment acts as a substitute to the legislation. The amendment prohibits the Secretary of Agriculture from conditioning the issuance, renewal, or extension of any ski area permit based on the receipt of water rights from the permit holder. This amendment is similar to the underlying legislation, but it much narrower in scope. The text of the amendment can be [viewed here](#).

Outside Support:

- American Farm Bureau Federation
- National Water Resources Association
- U.S. Chamber of Commerce

Committee Action: H.R. 3189 was introduced on September 26, 2013, and was referred to the House Natural Resources Subcommittee on Water and Power, as well as the House Agriculture Subcommittee on Conservation, Energy, and Forestry. A full Natural Resources Committee markup was held on November 14, 2013, and adopted the legislation, as amended, by a [roll call vote of 19-14](#).

Administration Position: The Administration strongly opposes H.R. 3189. The Administration’s statement can be [viewed here](#).

Cost to Taxpayers: CBO estimates that enacting the bill would have no impact on the federal budget. CBO’s report can be [viewed here](#).

Does the Bill Expand the Size and Scope of the Federal Government?: No.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: According to CBO, H.R. 3189 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

Does the Bill Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?: The legislation does not contain earmarks, limited tax benefits, or limited tariff benefits.

Constitutional Authority: Rep. Tipton states “Congress has the power to enact this legislation pursuant to the following: The constitutional authority of Congress to enact this legislation is provided by Article 4 Section 3 Clause 2 of the United States Constitution, which states the Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be

so construed as to Prejudice any Claims of the United States, or of any particular State.” The statement can be [found here](#).

RSC Staff Contact: Curtis Rhyne, Curtis.Rhyne@mail.house.gov, (202) 226-8576.

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