

“Water, Wilderness and Wayne Aspinall”

By

Steven C. Schulte, Colorado Mesa University

2014 is the fiftieth anniversary of one of the United States’ most signal conservation achievements. On September 3, 1964, President Lyndon B. Johnson signed the Wilderness Act into law. Few laws in American history have traveled such a long, torturous route to passage. The idea of federally-protected wilderness extends back to the 1920s. In the 1930s, The Wilderness Society formed to advocate for the permanent protection of public lands as wilderness. By the 1950s, at the behest of organized conservation groups, Congress began considering legislation to establish a National Wilderness Preservation System (NWPS). Following 8 years and volumes of volatile hearings, the Wilderness Act passed Congress.

However, as this story implies—the route to passage was never an easy one. The Wilderness Act defined wilderness as a place where the earth and its community of life are “untrammeled by man, where man himself is a visitor who does not remain.” Land to be included needs to meet several criteria including retention of a “primeval character,” without permanent improvements.

Additionally, it must contain “outstanding opportunities for solitude” and “unconfined type of recreation.” The legislation required wilderness parcels to be at least 5000 acres or of sufficient size to make possible its preservation “in an unimpaired condition.”¹

The Wilderness Act originally set aside 9.1 million acres as wilderness in 54 designated areas, with more land slated for inclusion after several more review processes. Additional land could be added but only with Congressional approval. Significantly, the Act directed the National Forest Service and National Park Service to inventory lands under their jurisdiction for possible inclusion. In 1976, the nation’s largest federal land agency, the Bureau of Land Management (BLM), was directed to inventory its vast estate for lands with wilderness characteristics. Congress has enacted 117 subsequent statutes designating wilderness areas, and eight other laws requiring wilderness study. Some of these statutes provide management direction different from the original Wilderness Act. Through additions to the Wilderness Preservation System, today nearly 110,000,000 million acres or five percent of the national acreage are managed as wilderness by the federal government.²

Colorado's Western Slope Congressman, Wayne Aspinall, played a central role in Congressional deliberations over the Wilderness Act. It is not stating the case too strongly to suggest that no politician did more to shape the final form of the legislation. Aspinall, from Palisade Colorado, already had a long career in Colorado and national politics when he locked-horns with wilderness supporters in the mid-1950s. A former member of the Colorado Assembly as a State Representative and Senator, Aspinall was elected to the United States Congress in 1948 and would represent Colorado's Fourth Congressional District from 1948-1972. By 1959, he had risen to the job of Chairman of the House Interior and Insular Affairs Committee. The House Interior Committee dominated Western natural resource policy, reclamation, and environmental policy. From this lofty perch, Aspinall would be able to shape wilderness legislation to conform to his wishes, which often ran quite contrary to those of the nation's growing environmental movement.³

From its first introduction, Western water users joined with ranching, agricultural, and mining interests to oppose the Wilderness Act. In 1959, the recently created Colorado Water Congress began taking strong stands against wilderness legislation. Wilderness foes believed that the Wilderness bill was spawned by the same groups who had "bushwhacked" the region's hopes for

water and power development at Echo Park within Dinosaur National Monument. In the early 1950s, early drafts of the Upper Colorado River Project had contained plans for 1-2 large dams within Dinosaur National Monument. After much hand-wringing, political mudslinging, and national debate, the CRSP was authorized in 1956 without dams located within National Park Service properties. In this way, water and wilderness issues became entangled in the wilderness debate. Aspinall admitted he had learned some valuable political lessons from the loss of dams at Echo Park. Western resource users, he counseled, had to recognize that they represented a national minority when they were pitted against the growing political power of East and West Coast conservation interests.⁴

Both House and Senate foes kept the bill bottled up until 1961 when the new Kennedy Administration began associating the American people's growing conservation sensitivities with votes. Interior Secretary Stuart Udall indicated that he hoped to build a conservation legacy "worthy of the two Roosevelt's."⁵ Such words alarmed western resource users who saw, in an ambitious wilderness program, a threat to their interests. A sampling of Western Colorado resource user objections is most revealing about fears over how water rights might be compromised in wilderness legislation. In the 1961 House Wilderness Hearings, numerous public land user- interests spoke against Wilderness, often using fear of

losing control of water resources as a rallying point. A former president of the Colorado Cattlemen's Association pointed out that the construction of small dams and reservoirs would likely not be possible at the headwaters of streams in proposed wilderness areas. By banning mechanized equipment, water conservation values would be compromised. Judge Dan Hughes of Montrose, a rancher and member of the Colorado River Water Conservation Board questioned how his family, which owned 7000 acres adjoining the Mount Wilson Primitive Area, would be able to clean its irrigation ditches by non-mechanical means? "It could be done by shovel and hand, and some of the ditches were originally built that way," Hughes remarked. However, modern man is not "constituted today" to do this work by hand—"we would rather use machinery." Hughes and others saw the nation veering away from traditional public land policies by entertaining a wilderness bill. With no access roads, and no access permitted by mechanized works of man, Hughes rhetorically asked "how are we going to maintain our ditches?"⁶

Delta's F.M. Peterson, a member of the CWCB also raised objections to wilderness legislation as a threat to Colorado's Colorado River Compact entitlements. If it passed, "The Source of nearly all of our water [in the State] would be under a wilderness blanket," Peterson maintained. "The requirement of

water for wilderness and its effect on existing supplies” needed to be determined before any law passed. In every major hearing on wilderness from 1960-64, western land user spokespersons, at Congressman Aspinall’s encouragement and often invitation, were paraded before both House and Senate committees to express their fears that wilderness status could undermine state water rights, as well as open the door, like a Trojan-Horse, to increased federal water prerogatives. Maybe legendary Denver Board of Water Commissioners Chief Counsel Glenn G. Saunders said it best: the wilderness bill, as originally introduced, “would have made it impossible to carry on any further development of the natural resources of Colorado.”⁷

Aspinall buried the bill in his House Interior Committee through 1963. Meanwhile the Senate passed another version of the bill friendlier to wilderness interests. When he finally came out in support of passing a wilderness act, Aspinall modified earlier Senate bills to make Congress responsible for passing additions to the National Wilderness System, and to make many of the bill’s details conform to his multiple use philosophy and to the interests of people who made their living near or on the federal lands.

The actual Wilderness Bill which passed on September 3, 1964 was not as apocalyptic as Western Water users feared, nor as utopian and idealistic as wilderness advocates had dreamed. Like many landmark federal laws, it was a product of compromise. Furthermore, it carried the indelible stamp of Colorado Congressman Wayne Aspinall who delayed consideration of the bill until he could ensure that western resource and water use interests could co-exist with a Wilderness Act.

The Wilderness Act of 1964 mentions water rights under the heading “Water resources and grazing”⁸, stipulating that within wilderness areas, in the national forests designated by this Act, the President may “authorize prospecting [interesting choice of words] for water resources, establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines,....including the road construction and maintenance essential” to their development and use, “if it is determined that these uses will serve the national interest more than denying it.” The act also allowed for the continuation of livestock grazing on lands where it had been permitted prior to the establishment of the Wilderness Act. Aspinall also insisted upon the inclusion of the proviso that nothing in the Act “shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.”

By insisting upon these wordings, Aspinall clearly was protecting state water laws, preexisting uses, and the possibility that future water supplies could be accessed within wilderness areas. Maybe more significantly, it flung the door wide open for including this type of forceful language to maintain state water rights in later additions to the wilderness system.

In subsequent years, water has figured prominently in the wording of additions to the National Wilderness Preservation System. While I do not have time to consider all the dimensions of this debate, much of the argument has surrounded the question of the intentions of what are termed Federally Reserved Water Rights which have figured increasingly in the toolbox of the environmental community. The United State Supreme Court first recognized federal reserved water rights in *Winters v. United States*, 207 U.S. 564 (1908), an Indian reservation case that established water claims for Native American tribes. Since that time, court cases have extended the so-called Winters Doctrine to other types of federal land withdrawals such as national parks, forests, and wildlife refuges. Reserved rights have also been filed on behalf of some wilderness areas, though it should be noted that Congress has often deferred to state law in the regulation of water allocation and use in wilderness areas.⁹

Water-user concerns over reserved rights heightened in 1985 in the federal district court decision of *Sierra Club v. Block*.¹⁰ In 1984, the Sierra Club brought suit in the Federal District Court for Colorado seeking to force the US Forest Service to assert a reserved water right for the protection of Colorado's 2.6 million acres of wilderness. Wilderness proponents argued that reserved rights were needed to ensure enough water flowed through each wilderness area to protect the very wilderness characteristics that led to the area's original designation. During and after the 1985 case, wilderness foes argued that wilderness status did not justify the creation of a water right guaranteeing a full natural flow. Others have argued, perhaps nudging the argument toward a middle ground that wilderness purposes could be accomplished with much less than a 100 percent natural flow.¹¹

Block v. Sierra Club was subsequently vacated in the 1990 *Sierra Club v. Yeuter* [UT-ER] decision by the United States Court of Appeals for the Tenth Circuit. Colorado officials, farmers, ranchers, and municipalities, and state water organizations had pushed hard for this action, arguing that existing state water rights could be endangered if reserved rights were quantified for every wilderness area. The Court said that there must be a demonstration of harm to the wilderness area to justify judicial consideration of whether the rights do or do not

exist. To pursue a reserved water right in wilderness areas, the burden was placed upon those who desired to assert both why and how much water would need to be reserved to preserve wilderness characteristics.¹²

After the Yeuter decision, states, through Congressionally-enacted wilderness bills, could decide whether to reserve water for wilderness areas or not. Almost every Western states has approached the question differently. One state called for “sufficient” waters for wilderness areas; another state requested “minimal flows Congress also could “muddy the waters” [so to speak] by not explicitly stating how much water would be needed to maintain wilderness characteristics.

Colorado’s 1993 Wilderness Bill took a different pathway altogether than most other Western states. The wilderness water right question had delayed the bill’s serious consideration from the late 1980s through the early 1990s. As an alternative to no legislation, wilderness –friends agreed to bill language that specifically denied reserved rights in wilderness areas, arguing that the high headwaters location of wilderness areas proposed in the 1993 bill areas implicitly protected their wilderness character.¹³

The question of water in wilderness areas remains very much a point of contention and will likely remain so until further guidance is obtained, perhaps from the U.S. Supreme Court. Until that day occurs Congress can be expected to deal with the question of wilderness water rights on a case by case basis. The current political climate works against an assertion of Federal Reserve rights in Wilderness areas and the piecemeal approach seems to be the wave of the future. This wilderness water policy reality would likely make Wayne Aspinall smile since it is a reversion, after the more stringent attempt to assert reserved rights in the 1980s, to his implicit goal of protecting water rights from further federal encroachment. At this point, it appears as if Wayne Aspinall's wishes to protect state water rights has become the standard for any near- future wilderness legislation.

ENDNOTES

¹Wilderness Act, Public Law 88-577 (16 U.S. C. 1131-1136_, 88th Congress, Second Session, September 3, 1964.

²Congressional Research Service, Russ W. Gorte, *Wilderness Laws: Statutory Provisions and Prohibited and Permitted Uses*. February 22, 2011. <http://www.wilderness.net/NWPS/documents/Wilderness%20Laws-Statutory%20Provisions%20and%20Prohibited%20and%20Permitted%20Uses.pdf>

³ For an overview of Aspinall's life and career see Steven C. Schulte, *Wayne Aspinall and the Shaping of the American West* (Boulder: University Press of Colorado, 2002).

⁴ *Ibid.*, 120-23.

⁵ *Ibid.*, 124.

⁶ *Wilderness Preservation System*, Hearings Before the Subcommittee of the Committee on Interior and Insular Affairs, House of Representatives, 87th Congress, First Session on S.174, HR 293, et al. October 30-32, 1961, 552-53, 556.

⁷ Glenn G. Saunders to Board of Water Commissioners, September 3, 1964, Gordon Allot Papers, fd: "Parks and Forests 1, Wilderness-a," Box 46, University of Colorado-Boulder Archives.

⁸ Wilderness Act, Public Law 88-566.

⁹ Gorte, "Wilderness Laws".

¹⁰ *Sierra Club v. Block*, 622 F.Supp 842 (D.C.Colo. 1985).

¹¹ Hugh Dangler, "Sierra Club v. Block, Wilderness Water Rights Protected Where Not in Conflict with Purposes of National Forest in Colorado." *Natural Resources Journal*, Vol. 27 (Spring 1987), pp, 448-456.

¹² Greg Hobbs, Federal Appellate Court Vacates Judge Kane's Water Rights Decision," *Colorado Water Rights*, Vol. 9, No. 3 (Summer Fall 1990).

¹³ *Colorado Wilderness Act of 1993*, Public Law 103-77.