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PRESERVATION SYSTEM

SPEAKER: Mr. BROWN; Mr. CAMPBELL; Mr. KENNEDY

TEXT: [*S10452]

Mr. KENNEDY. Madam President, I ask unanimous consent that the Senate proceed to immediate consideration of Calendar No. 176, H.R. 631, an act to designate certain lands in the State of Colorado as components of the National Wilderness Preservation System, that the bill be deemed read three times, passed and the motion to reconsider be laid upon the table; further that any statements relating to this measure appear at the appropriate place in the Record.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill (H.R. 631) was deemed read three times and passed.

Mr. BROWN. Madam President, today we consider H.R. 631, the Colorado Wilderness Act of 1993. Efforts to enact Colorado wilderness legislation have spanned more than a dozen years. This bill is the product of extensive meetings among the Colorado delegation and the House and Senate committee leadership, leading to this compromise. Both Colorado environmental groups and the general public who use Federal property have endorsed this compromise as an acceptable solution. The water issues associated with these proposed wilderness areas were particularly difficult to resolve because of the strong and diametrically opposed views held by many members of the water user and environmental communities. Fortunately, this bill contains water language that is a true compromise that does not injure the fundamental principles that have much value for [*S10453] Colorado -- protection of wild lands and protection of Colorado's future ability to develop and use all of its interstate water entitlements.

The issue of the existence of Federal reserved water rights for the upstream areas is moot, because the bill provides that no one can assert a claim for water or water rights based on the designation of these wilderness areas, and no court or agency could ever consider in any fashion such a claim. This ensures that wilderness status will never result in an

encroachment on Colorado's ability to use its interstate water allocations. The bill also addresses the difficult issue of downstream wilderness study areas, where there could be conflicts with upstream water storage and diversion. Where potential conflicts exist, the areas are not designated as wilderness areas. This ensures that there will be no effect on existing and future water use. In order to make this intent crystal clear, there is also an explicit disclaimer of a Federal reserved right for these areas, and the existence of these areas cannot be used as a basis to affect upstream activities as a part of any administrative or regulatory program.

As stated in the findings, section 8 is entirely premised on certain specific characteristics of the lands designated as wilderness by section 2(a) of the bill, namely:

First, these lands are located at the headwaters of the streams and rivers located on those lands, with few if any opportunities for diversion, storage, or other uses of water that could occur outside these areas that would adversely affect the wilderness values of the areas;

Second, these lands are not suitable for use for development of new water resources facilities or the expansion of existing water resources facilities; and

Third, therefore, proper management and protection of the wilderness values of the specific areas covered by section 2(a) can be provided for in ways different from those employed with regard to wilderness lands lacking these particular attributes.

This being the case, section 8 is intended to protect the wilderness value of the lands designated by means other than those based on assertion of Federal reserved water rights.

I would like to thank Senator Campbell for his years of working on this legislation, and to ask him to explain how this bill goes about eliminating unnecessary litigation regarding reserved water rights.

Mr. CAMPBELL. I want to thank Senator Brown for his comments. Subsection 8(b)(1) would prohibit any person, including the Secretary of Agriculture and any other officer, employee, representative, or agent of the United States, from asserting in any court or agency any claim for water or water rights in Colorado based on construing any portion of the bill as construing either an express or implied reservation of water or water rights. It also would deny any court or agency the ability to consider any such claim.

The effect of enactment of paragraph 8(b)(1) will be to deny anyone, including but not limited to a person holding an established office of the national Government, the authority to assert, and to deny a court or agency the jurisdiction to consider, a claim that the bill's designation as wilderness of the lands described in section 2(a) has the effect of reserving any water or water right with respect to those lands. Congress is not consenting to any suit against the United States in State court or to have considered in any other forum any claim that these designations created a basis for a claim to water or water rights.

Mr. BROWN. The explanation of the distinguished Senator is consistent with my own understanding of the provision. I also understand that concern has been raised regarding whether this provision violates the U.S. Constitution in the way it goes about eliminating the threat of unnecessary and burdensome litigation. I think you would agree that the Colorado delegation has considered several issues which have been raised regarding section 8(b)(1) of H.R. 631. First, the preclusion of consideration of any claim to or for water or water right by any court or agency in this section was not intended to and does not address or affect the original jurisdiction of the U.S. Supreme Court under article III, Section 2, clause 2 of the U.S. Constitution.

Second, an act of Congress is required to designate a wilderness area, and Congress is fully aware of its ability to expressly reserve water or water rights for such areas. Congress has considered the issue and has chosen not to assert a Federal reserved water right or claim to water for these areas. Rather, it has decided to protect the resources of these areas in another manner. This legislative decision regarding how best to preserve these areas is within the sole prerogative of Congress. The preclusion of assertion of any claim for water or water rights by any agency or person is a limitation on the assertion of a theoretical cause of action relating to wilderness designation. There cannot be a denial of rights granted under the first amendment to the U.S. Constitution, where, as here, Congress determined that there is no Federal question to be litigated as to the existence of a Federal reserved water right for these areas. Further, the prohibition of any such claim or assertion serves to avoid frivolous litigation while defining the jurisdiction of the courts over Federal questions. In this language, Congress makes clear that it does not want others to assert or claim water or water rights where it has explicitly chosen to not assert a Federal reserved water right or other claim to water for these wilderness areas.

Finally, I would like to emphasize that the wilderness areas designated by this act would not have been designated in the absence of this prohibition.

Mr. CAMPBELL. I believe it is clear that the Colorado delegation has adequately considered and addressed these issues. It is my understanding that the committee has also reviewed these issues and have come to the same conclusion.

Mr. BROWN. Looking at paragraph 8(b)(2), I believe this provision is unique in the fact that it clarifies several aspects of the bill's effects with regard to water or water rights. As I read it, subparagraph (b)(2)(A) states that nothing in the bill constitutes or is to be construed as either an express or implied reservation of any water or water right with respect to the Piedra, Robideau, and Tabeguache areas identified in section 9, the Bowen Gulch Protection Area identified in section 5, or the Fossil Ridge Recreation Management Area identified in section 6. For this reason, these areas are not designated as wilderness.

Mr. CAMPBELL. I believe Senator Brown is exactly right. In addition, we should note that subparagraph (b)(2)(B) goes on to state that nothing in the bill is to be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the

United States in Colorado existing before the bill's enactment, except as provided in subsection 8(g)(2). Thus, with the one exception cited, the bill would have no effect on any water rights of the United States that may already exist in Colorado. Further, subparagraph (b)(2)(C) provides that with the exception of subsection 8(g)(2), nothing in the bill is to be construed as constituting an interpretation of any other Act and subparagraph (b)(2)(D) provides that nothing in section 8 is to be construed as establishing a precedent with regard to any future wilderness designations.

Mr. BROWN. Key to the protection of the wilderness values in this newly designated wilderness is the provision in subsection 8(c) dealing with water resource facilities. Senator Campbell, could you explain to us exactly how this subsection would work?

Mr. CAMPBELL. I would be happy to discuss this important provision. This subsection would simply prohibit any U.S. officer, employee, or agent, including the President, from funding, assisting, authorizing, licensing, or permitting the development of any new water resource facility or the enlargement of any existing water resource facility within the Fossil Ridge Recreation Management Area, the Bowen Gulch Protection Area, the Piedra, Roubideau, and Tabeguache Areas, or the lands the bill designates as wilderness areas. This prohibition would apply notwithstanding any other provision of the law.

In addition to the excellent protection for wilderness areas, I understand that protection for existing water facilities is also offered. Is that correct? [*S10454]

Mr. BROWN. Senator Campbell is correct. Subsection 8(d) addresses access to and operation of existing water resource facilities within the areas described in sections 2, 5, 6, and 9 of the bill. Paragraph (d)(1) would direct the relevant Secretary to allow reasonable access to such facilities in existence on the date of enactment of the bill, including motorized access where necessary and customarily employed on routes in existence on that date, subject to the provisions of subsection 8(d).

Paragraph (d)(2) specifies that existing access routes within the areas described in sections 2, 5, 6, and 9 customarily employed as of the date of the bill's enactment may be used, maintained, repaired and replaced to the extent necessary to maintain their present function, so long as the function, design and serviceable operation of these routes is not modified so as to increase the adverse impacts on these areas.

Paragraph (d)(3) provides that, subject to other provisions in this bill, the relevant Secretary is to allow water resource facilities in existence on the date of the bill's enactment within the areas described I've previously outlined to be used, operated, repaired, maintained and replaced to the extent necessary for the continued exercise, in accordance with Colorado law, of vested absolute or conditional water rights adjudicated prior to the bill's date of enactment by a court of competent jurisdiction for use in connection with such facilities. The paragraph also specified that the impact of an existing facility within an area previously mentioned on the water resources and values of such an area shall not be increased as a result of any change in the adjudicated type of use

of such a facility (as compared with the type of use adjudicated as of the date or enactment of the bill).

This paragraph (d)(3) establishes that the obligation of the relevant Secretary to allow the continued operation, maintenance, and use of water resource facilities is limited to those facilities that are in existence as of the date of this Act for the exercise, in accordance with Colorado law, of all water rights adjudicated for use in connection with those facilities prior to enactment of this act. These existing water rights may also be changed under State law so long as the impact on the water resources and values of the wilderness area is not increased as a result of the change. Consequently, by way of example, there would be no barrier to changes in the location or type of use so long as the change did not increase the quantity or time of diversion from these facilities in a manner which increased the impact of the existing facility on the water resources and values of the area. This paragraph does not modify or change Colorado law relating to these water rights in any respect.

Paragraph (d)(4) is a mandatory requirement that water resources facilities, and access routes serving such facilities, in existence on the date of the bill's enactment within the areas described in sections 2, 5, 6, and 9 shall be maintained and repaired when and to the extent necessary to prevent increased adverse impacts on the resources and value of those areas.

Finally, subsection 8(e) is a savings clause, stating that except as provided in subsections 8(c) and 8(d), neither the provisions of the bill related to the Fossil Ridge Recreation Management Area, the Bowen Gulch Protection Area, the Piedra, Roubideau, and Tabeguache Areas, and the lands designated as wilderness by section 2(a), nor the wilderness status of the lands so designated by section 2(a), is to be construed to affect or limit the use, operation, maintenance, repair, modification, or replacement of water resource facilities in existence on the date of the bill's enactment within the boundaries of any of these areas. The intent of subsection 8(e) is to make clear that subsections 8(c) and 8(d) are the only parts of the bill that govern such use, operation, maintenance, repair, modification, or replacement of existing water resource facilities within these areas.

Subsection 8(g) addresses a number of difficult interstate water matters. Senator Campbell has asked to be recognized to discuss this particular matter.

Mr. CAMPBELL. I thank the Senator. Subsection 8(g) has two paragraphs. Paragraph 8(g)(1) provides that nothing in the bill or in any previous act designating any lands as wilderness is to be construed as limiting, altering, modifying, or amending any of the interstate compacts or equitable apportionment decrees that apportion water among and between the State of Colorado and other States. This paragraph also states that except as expressly provided in section 8, nothing in the bill will affect or limit the development or use of Colorado's full apportionment of such waters by existing and future holders of vested water rights.

Paragraph 8(g)(2) relates solely to the Platte River Wilderness established by P.L. 98-550, which is located on the boundary between Colorado and Wyoming. This paragraph provides that no person, including the Secretary of Agriculture or any other officer, employee, or agent of the United States, shall assert in any court or agency any rights, and no U.S. court or agency shall consider any claim or defense based on such rights, which may be determined to have been established for waters of the North Platte River for purposes of such wilderness area, to the extent that such rights would limit the use or development of water within Colorado by present and future holders of vested water rights in the North Platte River and its tributaries to the full extent allowed under interstate compact or applicable U.S. Supreme Court equitable decree. The paragraph also provides that any such U.S. rights are to be exercised so as not to prevent the use or development of Colorado's full entitlement to interstate waters of the North Platte and its Colorado tributaries allowed under interstate compact or U.S. Supreme Court equitable decrees.

Mr. BROWN. As has been fully explained, H.R. 631 represents a bipartisan effort on behalf of the Colorado delegation to establish wilderness areas within their State. I would like to commend the committee for allowing the Colorado delegation to determine wilderness issues within their own boundaries. I urge support of H.R. 631