



WATER-RIGHT DOCKET

North Cascades National Park

Docket No: 1

MILLER PROPERTY

Preliminary Docket Information

00-00-0000: water right/source docket information

WATER DOCKET INFORMATION

A R E A NORTH CASCADES

DOCKET NO. _____

APPLICATION NO. _____

PERMIT NO. _____

CERTIFICATE NO. 1299 1908

TITLE OF DOCKET COURTNEY PROPERTY

PRIORITY _____

REMARKS: _____

North Cascades Complex: Assessment of Impact on National Park Water Rights
of State-Determined Instream Flow Levels

November 8, 2000

The Washington Department of Ecology ("Department") has proposed a rule that would establish minimum instream flows in the Skagit River basin.¹ The purpose of the proposed rule is to "ensure adequate water remains in the river system to protect fish and other uses in a stream." The rule would require that diversion pursuant to water rights junior to the instream flow would be subject to reduction or elimination in the event the stream flow reaches the established minimum levels. Any proposed groundwater withdrawals would be likewise subject to a determination by the Department that any pumping of an aquifer that is hydraulically connected to streamflow in the basin would not interfere with maintaining the minimum stream flow. The instream flow would have no impact on water rights that were established prior to the instream flow.

This assessment was conducted to determine the impact that this rule would have on NPS rights held for the North Cascades National Park ("North Cascades"), the Ross Lake National Recreation Area ("Ross Lake"), and the Lake Chelan National Recreation Area ("Lake Chelan"), and to determine the impacts this rule might have on future attempts to obtain water rights within the affected basin.

State Appropriative Rights

In order to determine NPS holdings of state appropriative water rights in the Skagit basin, the Natural Resource Manager for the park units and the Department of Ecology were consulted. In addition, the dockets maintained by the Water Resources Division were reviewed.

NPS holds no state appropriative water rights for either North Cascades or Ross Lake. The dockets maintained by WRD document two water rights associated with Lake Chelan. However, Lake Chelan does not lie within the Skagit basin and would consequently not be affected by the proposed instream flow. A summary of these rights is footnoted for information purposes below.²

¹ More specifically, the Comment and Hearing Notice issued by the Department in November 2000 indicates that the rule would apply to the Lower and Upper Skagit River and Cultus Mountain tributaries, but that the Samish River sub-basin would not be affected.

² The dockets contain only two state appropriative rights associated with the North Cascades Complex. The information contained in the dockets--sketchy at best--is summarized below.

NOCA-0001: Certificate No. 1299--"Miller Property"
Source: Purple Creek
Amount: 0.05 cfs

In 1971, NPS purchased land, with an appurtenant water right (Certificate No. 1299), from George Miller. The purchased lands are in three parcels, each in Section 31, T33N, R18E, W.M. The point of diversion is located within the Lake Chelan National Recreation Area. The docket contains no copy of the certificate, although there is a copy of the letter sent by Mr. Miller in 1971 to the Department indicating that the land and appurtenant water right had been conveyed to NPS.

NOCA-0002: Lake Chelan Area--"Orval Williams"
Source: Unnamed spring
Amount: 5 gpm

The docket contains only water right Application No. 10501 by Orval Williams. The Department of Ecology was contacted as to the status of this right. Their records indicate that the right never moved beyond the application stage and was rejected by the Department. Documentation of this rejection is forthcoming from the Department.

Discussion with Bruce Reed, the Natural Resource Manager, indicated that North Cascades and Ross Lake utilize surface and groundwater within the boundaries of each unit, largely for campground, domestic, and administrative uses. These uses are not supported by state water rights. Should either North Cascades or Ross Lake seek a state appropriative right for future administrative or other domestic needs, such a right would be junior to the instream flow, and so be subject to call.³ Seeking to file an application before the instream flow rule is passed is not an option--the Comment Period and Hearing Notice states that water right applications in the Skagit Basin are on hold until the instream flows are addressed.

North Cascades has entered into an agreement with Seattle Lights utility for use of water at NPS facilities in and around the town of Newhalem. This water is presumably supported by state water rights senior to the instream flow, and so would not be impacted by the imposition of the instream flow. It would be helpful to understand the nature of this agreement and the specifics of the water right presumably held by Seattle Lights.

Federal Reserved Rights

The United States Supreme Court has held that where water is needed to fulfill the purposes of a reservation of federal land, Congress intended to reserve that amount of water needed to fulfill the purpose of the reservation.⁴ Such reservations of water have been recognized for national forests,⁵ national parks,⁶ and national recreation areas.⁷ A reservation of water is implied to meet only the "primary" purposes of the reservation; water needed for "secondary" purposes should be obtained through a state's appropriative system.⁸ The primary purposes of a national forest are to secure favorable conditions for water flows and to furnish a continuous supply of timber,⁹ and a federal reserved water right associated with a national forest would be limited to that amount of water needed to accomplish those purposes.¹⁰ The primary purposes of a national park are "to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner...as will leave them unimpaired...."¹¹ a federal reserved right associated with these purposes would be limited to that amount needed to accomplish those purposes. Ross Lake and Lake Chelan were created in order to provide for the public outdoor use of scenic, scientific, historic and other values contributing to public enjoyment of such lands *and waters*. Based on the express mention of enjoyment of waters as a primary purpose of a national recreation area, a federal reserved right exists in a national recreation area for recreational uses.¹² The effective date of a federal reserved water right is the date the reservation was made.¹³

The Washington Forest Reserve was established by Presidential Proclamation on February 22, 1898. It was then redesignated (in part) as the Chelan, Snoqualmie, and Wenatchee National Forests by Executive Order 822 on June 18, 1908. A portion was again redesignated as the Mount Baker National Forest by Executive Order 3943 on January 21, 1924. The Mount Baker and Snoqualmie National Forests were administratively consolidated on July 7, 1974.

The North Cascades Complex (North Cascades National Park, Ross Lake National Recreation Area, and Chelan Lake National Recreation Area) was established October 2, 1968, largely from lands within the

³ The Notice provided by the Department of Ecology indicates that water use by a junior appropriator could be interrupted on a frequent basis, particularly during August and September.

⁴ *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

⁵ *Arizona v. California*, 373 U.S. 546, 601 (1963).

⁶ *United States v. New Mexico*, *supra*; *Cappaert v. United States*, 426 U.S. 128 (1976).

⁷ *Arizona v. California*, at 601.

⁸ *Id.*, at 716.

⁹ Organic Administration Act of June 4, 1897, 20 Stat. 34, 16 U.S.C. § 473 et seq.

¹⁰ *United States v. New Mexico*, at 718.

¹¹ Act of Aug. 25, 1916; 39 Stat. 535; 16 U.S.C. § 1.

¹² Moreover, in *Arizona v. California*, the U.S. Supreme Court recognized federal reserved rights for the Lake Mead National Recreation Area. *Id.*, at 601.

¹³ See *Cappaert v. United States*, 426 U.S. 128, 147 (1976).

Mount Baker-Snoqualmie, Wenatchee, and Chelan National Forests. North Cascades National Park was established

in order to preserve for the benefit, use, and inspiration of present and future generations certain majestic mountain scenery, snowfields, glaciers, alpine meadows, and other unique natural features.... The park shall consist of the *lands, waters*, and interests therein (emphasis added)....¹⁴

Ross Lake National Recreation Area was established

in order to provide for the public outdoor use and enjoyment of portions of the Skagit River and Ross, Diablo, and Gorge Lakes, together with the surrounding lands, and for the conservation of the scenic, scientific, historic, and other values contributing to public enjoyment of such *lands and waters* (emphasis added)....¹⁵

The Lake Chelan National Recreation Area was established

in order to provide for the public outdoor recreation use and enjoyment of portions of the Stehekin River and Lake Chelan, together with the surrounding lands, and for the conservation of the scenic, scientific, historic, and other values contributing to public enjoyment of such *lands and waters* (emphasis added)....¹⁶

In determining the nature of a federal reserved water right, the North Cascades Complex presents a situation similar to that addressed in *United States v. City and County of Denver* ("*U.S. v. Denver*").¹⁷ The situations are similar in that the lands in question were initially withdrawn from the public domain and reserved for national forest purposes, and then were subsequently reserved for national park and recreation area purposes. The Colorado Supreme Court held that the United States had, in essence, two federal reserved water rights—one to fulfill the purposes of the national forest reservation, and one to fulfill the purposes of the national park reservation:

The purposes for which the national forests are administered were not rescinded by the simple reclassification of the lands. The reclassification changes the status of the lands from national forests to national parks, but the original purposes of timber and watershed protection continue even though the land is placed under National Park Service administration. There is no reason to believe that the transferal of national forest lands extinguishes the purposes of timber and watershed protection established by the Organic Act of 1897. Therefore, to the extent that the purposes of the national forests and national parks overlap, the federal government has reserved water rights in the amount minimally necessary to effectuate the purposes of the national forest lands. [Citation omitted.] Reservation of water for other purposes, however, will have a priority date from the time the national park was established.¹⁸

Based on the foregoing, North Cascades National Park, Ross Lake National Recreation Area, and Lake Chelan National Recreation Area would have federal reserved water rights dated February 22, 1898 for purposes of watershed protection and timber supply. North Cascades would have an additional federal reserved water right dated October 2, 1968 for purposes of conserving scenery, natural and historic objects, and wildlife. Ross Lake and Lake Chelan have an additional federal reserved water right dated October 2,

¹⁴ An Act to establish the North Cascades National Park and Ross Lake and Lake Chelan National Recreation Areas, to designate the Pasayten Wilderness and to modify the Glacier Peak Wilderness, in the State of Washington, and for other purposes, § 101, Oct. 2, 1968; 82 Stat. 926.

¹⁵ *Id.*, § 201.

¹⁶ *Id.*, § 202.

¹⁷ 656 P.2d 1 (Colo.1982).

¹⁸ *U.S. v. Denver*, at 30.

1968 for the conservation of the scenic, scientific, historic, and other values contributing to public enjoyment of the lands and water within the recreation area.

Clearly, Lake Chelan, being outside the boundaries of the Skagit River basin, would not be affected by this rule. However, North Cascades and Ross Lake are located within the Skagit River basin, and so would be subject to the rule. The federal reserved rights associated with both these units, having been established in 1898 and 1968, are senior to an instream flow imposed by the State of Washington. However, uncertainty arises because the federal reserved rights have never been quantified or officially recognized by the State. Case law indicates that a federal reserved water right need not have been either quantified or adjudicated in order to be protected. In *Arizona v. California*,¹⁹ the United States Supreme Court stated:

The court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *** We...agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means...that these water rights, having vested before the [Boulder Canyon Project Act] became effective June 25, 1929, are "present perfected rights" and as such are entitled to priority under the [Boulder Canyon Project Act].²⁰

Similarly, in *Sierra Club v. Andrus*,²¹ a federal district court, in discussing a federal reserved water right that had not been quantified or adjudicated, stated:

The federal reserved right is "perfected" as of that date [when created by a reservation of public lands] and is superior to any and all rights of future appropriators. *Arizona v. California*. Indeed, even where there has been substantial appropriation by "junior" appropriators, the rights of the United States remain senior and unimpaired.²²

Based on the foregoing, it is reasonably concluded that the federal reserved rights held by Ross Lake and North Cascades would remain unimpaired by the proposed instream flow rule, despite not having been quantified or adjudicated.

There is some concern whether the park units will be able to meet their water needs for domestic/administrative uses. It is uncertain whether a federal reserved right exists for domestic/administrative uses. In *United States v. New Mexico*,²³ the court, in determining whether stockwatering was a primary purpose, phrased the test as follows:

If stockwatering could not take place on the Gila National Forest, Congress' purposes in reserving the land would not be defeated.²⁴

Applying such a strict standard, it would seem that a recreation area could be used for its intended purposes without domestic or administrative water available. However, in the past NPS has entered into agreements with other states for the purpose of settling federal reserved rights issues. Each has made provision for administrative/domestic use of a federal reserved water right. Examples of these agreements are set forth below.

¹⁹ 373 U.S. 546 (1963).

²⁰ *Id.*, at 600.

²¹ 487 F.Supp. 443 (D.D.C. 1980).

²² *Id.*, at 450.

²³ 438 U.S. 696 (1978).

²⁴ *Id.*, at 716.

Zion National Park

On December 4, 1996, NPS entered into an agreement with the State of Utah to settle the federal reserved rights claims of Zion National Park ("Zion"). Zion held federal reserved rights with priority dates ranging from 1909 to 1976, and state appropriative rights with priority dates ranging from 1877 to 1965. In the agreement, the NPS agreed to subordinate all federal reserved rights, with the exception of those amounts used for administrative purposes, to all valid existing state appropriative rights with priority dates prior to January 1, 1996. Zion would meet its administrative water needs through its state appropriative rights first; any remaining administrative water needs would then be met through Zion's federal reserved rights. In return, the State of Utah and other water development parties, agreed to abandon certain water projects upstream from Zion, and accepted volume limitations on future water development in the Virgin River basin.

Montana Water Rights Compact

In 1979, the State of Montana commenced a general adjudication of the waters within the state, including all federal reserved and appropriative water rights. In 1994, NPS entered into a compact with the State of Montana in settlement of all NPS claims to water associated with NPS lands within the state. The compact quantifies federal reserved water rights for instream flows and subordinates these rights to specified amounts of consumptive use state appropriative rights. The compact also recognizes federal reserved rights for administrative and other consumptive uses by park units. While future administrative needs are recognized, amounts are specified for current administrative uses. Unlike the federal reserved rights for instream flows, these rights are not subordinated to state appropriative rights, but retain the priority date that reflects the date the park unit was created. In return, the State of Montana agreed to limit or preclude future water development.

Such an approach might be used to obtain and protect administrative water needs in the context of the Department's determination of a minimum instream flow. Subordination of the remainder of a park unit's federal reserved right might be particularly attractive if the Department's proposed instream flow levels are consistent with the federal reserved rights levels needed to accomplish the primary purposes of North Cascades or Ross Lake.

Summary and Conclusions

Lake Chelan, lying beyond the boundaries of the Skagit basin, would not be affected by the proposed instream flow rule. However, both North Cascades and Ross Lake lie within the boundaries of the Skagit basin, and so would be affected by the proposed rule. It is reasonably concluded that the instream flow rule will not affect the federal reserved rights associated with each park unit, but the rule could impact each unit's ability to meet future water needs through the state appropriative system. However, the proposed rule presents an opportunity for the park units to consider. Using the Zion National Park agreement and the Montana Compact as models, the park units could meet their administrative needs with a fairly senior federal reserved right, and meet their instream flow needs if the state's instream flow levels are sufficient to fulfill each park unit's purposes. Moreover, if the state's instream flow levels are sufficient to fulfill each park unit's purposes, the proposed rule would provide a state-sanctioned enforcement mechanism for protecting each park unit's instream flow needs.

[illegible]

RECEIVED			
WATER RESOURCES SECTION			
AUG 30 1971			
ACT.	INFO.	INITIALS	DATE
	WITU, D. O.		
	BARRETT, D.		
	WILKINSON, D.		
	CHAVEZ, D.		
	KENNEDY, M.		
	GOLD, S.		
	FILE		
REMARKS			

NOCA-LACH
Miller, G. F.
(Tracts 03-107 and 03-124)

Water Resources Division
Washington State Department
of Ecology
335 General Administration Building
Olympia, Washington 98501

Gentlemen:

Please be advised that we have sold our property, as described in the attached documents, together with all water rights appurtenant thereto, to the United States as represented by the Department of the Interior, National Park Service, Office of Land Acquisition and Water Resources, 450 Golden Gate Avenue, Box 36025, San Francisco, California 94102. The following certificate, application or permit numbers apply:

Certificate No. 1299 Application No. _____

Permit No. _____

together with any others that may be more easily identified in your files.

The abovementioned rights are within the boundaries of the Lake Chelan National Recreation Area.

It would be appreciated if you would advise the National Park Service, at the above address, when this change of ownership is noted in your files.

Sincerely yours,


George F. Miller
30 South Miller
Wenatchee, Washington 98801

WFSO

attachment "A"

IN, THE COUNTY OF CHELAN, STATE OF WASHINGTON

PARCEL "A"

A PARCEL OF LAND SITUATED IN GOVERNMENT LOT 5 OF SECTION 31, TOWNSHIP 33 NORTH, RANGE 18, E.W.M., DESCRIBED AS FOLLOWS:
COMMENCING AT THE QUARTER CORNER OF SAID SECTION 31;
THENCE WEST ALONG THE SOUTH BOUNDARY OF SAID SECTION 31, A DISTANCE OF 325 FEET TO A BRONZE MONUMENT;
THENCE NORTH $13^{\circ}39'$ WEST, 200 FEET;
THENCE NORTH $13^{\circ}46'$ EAST, 250 FEET;
THENCE NORTH $15^{\circ}46'$ EAST, 190 FEET;
THENCE SOUTH $85^{\circ}14'$ EAST, 101.9 FEET TO THE TRUE POINT OF BEGINNING FOR THIS DESCRIPTION;
THENCE EAST TO THE EAST BOUNDARY OF GOVERNMENT LOT 5;
THENCE NORTH $0^{\circ}52'$ EAST ALONG EAST BOUNDARY OF GOVERNMENT LOT 5 TO A POINT 486.6 FEET FROM THE NORTHEAST CORNER OF GOVERNMENT LOT 5;
THENCE WEST 184.2 FEET;
THENCE SOUTH $5^{\circ}18'$ EAST 217.6 FEET TO THE TRUE POINT OF BEGINNING.

PARCEL "B"

THAT PORTION OF GOVERNMENT LOT 5, SECTION 31, TOWNSHIP 33 NORTH, RANGE 18, E.W.M., DESCRIBED AS FOLLOWS:
BEGINNING AT THE SOUTH QUARTER CORNER OF SAID SECTION 31;
THENCE DUE WEST ALONG THE SOUTH LINE OF SAID SECTION, 325 FEET, MORE OR LESS TO A WITNESS POINT FOR THE MEANDER CORNER ON THE EAST SIDE OF LAKE CHELAN;
THENCE NORTH $13^{\circ}39'$ WEST, 200 FEET;
THENCE NORTH $13^{\circ}46'$ EAST, 250 FEET;
THENCE NORTH $13^{\circ}46'$ EAST, 190 FEET TO A POINT HEREINAFTER REFERRED TO AS POINT "A";
THENCE NORTH $05^{\circ}11'$ WEST, 250 FEET;
THENCE NORTH $17^{\circ}56'$ WEST, 90 FEET;
THENCE SOUTH $72^{\circ}37'$ WEST TO THE WESTERLY RIGHT OF WAY LINE OF COUNTY ROAD NO. 119, AND THE TRUE POINT OF BEGINNING;
THENCE SOUTH $72^{\circ}39'$ WEST TO A POINT FROM WHICH POINT "A" BEARS SOUTH $85^{\circ}14'$ EAST;
THENCE SOUTH $85^{\circ}14'$ EAST TO THE 1079 CONTOUR, THE ORIGINAL ELEVATION OF LAKE CHELAN;
THENCE NORTH $05^{\circ}11'$ WEST, 20 FEET;
THENCE NORTH $85^{\circ}00'$ EAST TO THE WESTERLY RIGHT OF WAY LINE OF SAID COUNTY ROAD;
THENCE NORTHERLY ALONG SAID ROAD RIGHT OF WAY LINE TO THE TRUE POINT OF BEGINNING;
EXCEPT THOSE PORTIONS THEREOF CONVEYED TO THE UNITED STATES OF AMERICA BY DEED RECORDED SEPTEMBER 28, 1970, UNDER AUDITOR'S FILE NO.703838, IN VOLUME 700, PAGE 562,
AND EXCEPT THAT PORTION THEREOF LYING WITHIN THE FOLLOWING DESCRIBED TRACT:
BEGINNING AT SAID POINT "A", AND
THENCE NORTH $05^{\circ}11'$ WEST, 125 FEET TO THE TRUE POINT OF BEGINNING;
THENCE CONTINUING NORTH $05^{\circ}11'$ WEST, 125 FEET;
THENCE SOUTH $73^{\circ}19'$ WEST, 269.2 FEET;
THENCE SOUTHERLY ALONG THE 1079 CONTOUR, THE ORIGINAL LEVEL OF LAKE CHELAN, TO A POINT SOUTH $84^{\circ}02'$ WEST OF THE TRUE POINT OF BEGINNING;
THENCE NORTH $84^{\circ}02'$ WEST, TO THE TRUE POINT OF BEGINNING.

PAGE 2

PARCEL "C"
BEGINNING AT THE SOUTH QUARTER CORNER OF SECTION 31, TOWNSHIP 33
NORTH, RANGE 18, E.W.M.,
THENCE WEST ALONG SOUTH LINE, 317 FEET TO MONUMENT;
THENCE NORTH 14° WEST, 200 FEET;
THENCE NORTH 14° EAST, 250 FEET;
THENCE NORTH 16° EAST, 190 FEET;
THENCE NORTH 6° WEST, 50 FEET TO TRUE POINT OF BEGINNING;
THENCE NORTH 6° WEST, 50 FEET;
THENCE NORTH 84° EAST, 100 FEET;
THENCE SOUTH 6° EAST, 50 FEET;
THENCE SOUTH 84° WEST, 100 FEET TO TRUE POINT OF BEGINNING, BEING
KNOWN AS LOT 14 OF UNRECORDED PLAT OF PURPLE POINT ADDITION.

MAY 7 - 1971

L1425(WSC)LW
NOCA(LACH)
MILLER

Trs 03-107 and
03-124

MAY 4 1971

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. and Mrs. George F. Miller
30 South Miller
Wenatchee, Washington 98801

Dear Mr. and Mrs. Miller:

This refers to the Offer to Sell Real Property which you executed on March 26, 1971, covering Tracts 03-107 and 03-124 in Lake Chelan National Recreation Area. The offer in the amount of \$34,125 was accepted on behalf of the United States on April 30, 1971, and has been assigned contract No. 4973V10395. A copy of the contract is enclosed for your records.

You will be contacted in the near future regarding closing of this transaction.

Your cooperation is appreciated.

Sincerely yours,

(Sgd) A. W. GRAY

fr John E. Ritchie
Chief, Office of Land Acquisition
and Water Resources

Enclosure

cc:
Director, Pacific Northwest Region
w/out encl
Supt., North Cascades, w/cy of encl
Chief, MLC, WASO, w/cy of encl

1	SUP	NOCA	NOV
2	IRM	NK	DEC
	NOV		
	DEC		
	JAN		
	FEB		
	MAR		
	APR		
	MAY		
	JUN		
	JUL		
	AUG		
	SEP		
	OCT		
	NOV		
	DEC		



IN REPLY REFER TO:

LWSSC
L1425 NOCA

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
SAN FRANCISCO PLANNING AND SERVICE CENTER
450 GOLDEN GATE AVENUE, BOX 36025
SAN FRANCISCO, CALIFORNIA 94102

July 18, 1969

Memorandum

To: Chief, Office of Land and Water Rights, SSC
Attention: Supervisory Hydrologist, Div. of Water Resources, SSC

From: Chief Appraiser, Office of Land and Water Rights, SSC

Subject: Water rights relating to Tract 03-102 (Courtney Property),
North Cascades

The following water right data pertaining to the subject property is
submitted for the information of the Supervisory Hydrologist:

Domestic water is supplied by pipe line from Purple Creek under Surface Water Certificate #1299 which allows for 0.05 cubic feet per second to Lots 1, 2, 3, and 13 thru 25 of Blankenship's Purple Point addition to Stehekin, Washington. Surface Water Certificate #1908 allows for 0.10 cubic feet of water per second for Lots 1, 2, and 3; however, this is for power purposes only. Domestic water is filtered and piped into the buildings. Purple Creek is the source of most of the domestic water at Stehekin Landing.

Joseph T. Schubert

Docket Information

Number of Documents in Docket 13

Documents Dated from 7/18/1969 to 11/8/2000

Docket Compiled: 3/22/2012