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## Water Wrongs

*The federal government is giving away our Western rivers.*

**By Ted Williams**

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**On September 30, 2002**, in a move that opened the way for irrigators and developers to desiccate trout streams all over the West, the Bush Administration abandoned a reserved federal water right to Colorado's Gunnison River, one of the best trophy wild trout fisheries in America. Along with the water and fish, Bush and company also abandoned the National Park System, the National Wilderness System and all Americans who love nature, including sportsmen, most of whom supported Bush in the last election.

"Sportsmen for Bush," read the bumper stickers. "I never understood [that] and still don't," comments sportsman Mike Pennington on FR&R's website bulletin board.

But in this case at least, sportsmen have an excuse for being ill informed. The giveaway of the water right held by the Black Canyon of the Gunnison National Park was conducted entirely in secret. Because the issue was being debated in Colorado's Water Court, the National Environmental Policy Act did not kick in. The federal government's decision required neither public hearings nor public comment. The Bush administration just ordained that a national park established around a river and its canyon "to protect the roar of the river" didn't need water.

The Clinton administration had sought to protect the public's water rights that the Bush administration is now ceding to Western states. For example, in January 2001, Clinton's Park Service filed an application for a natural-flow regime (including a base flow of 300 cubic feet per second) through 14-mile-long Black Canyon of the Gunnison National Park. Western water rights are based on seniority, and the park—established in 1933 as a national monument and upgraded in 1999—had plenty of seniority. In 1978 that seniority and right were upheld by Colorado's Water Court, which found that the purpose of the park "is to conserve and maintain in an unimpaired condition the scenic, aesthetic, natural and historic objects of the monument, as well as the wildlife therein, in order that the monument might provide a source of recreation and enjoyment for all generations of citizens of the United States." With that, the court directed the federal government to apply for the amount of water the park needed "within five years of final decree." But since the court didn't get around to issuing a final decree, the five-year countdown never started, and the feds didn't come up with flow figures until President Clinton was about to leave office.

The park wanted to approximate the natural conditions that had existed in the river and its canyon before 1965. That was the year the Bureau of Reclamation shut the gates on its enormous Blue Mesa dam, which backs up a million-acre-foot reservoir for irrigation and power--the toilet tank of the three-dam Aspinall Unit, named for the crusty, dam-fixated, anti-environmental US congressman Wayne Aspinall, who funneled pork into the state from 1949 to 1973. The Park Service's mission, after all, is to protect and recreate natural processes, and, wherever practical, let them "proceed unimpeded." When it is serious about this mission, as it was under the leadership of former Interior Secretary Bruce Babbitt, it takes the long view.

And the long view is this: For about 12 million years the Gunnison sliced down through soft volcanic and sedimentary rock. Then, two million years ago, it hit the much harder Precambrian gneiss of the Gunnison Uplift. Trapped in the canyon it had already excavated, the river began eating away this metamorphic layer at the approximate rate of the thickness of one human hair per year or one inch per century until, in places, it was 2,400 feet below the rim. When this ancient process was abruptly and unnaturally curtailed in 1965 bad things began to happen. An unnatural plant community sprang up along the bottom of the canyon, constricting the channel and quickening the flow. In the canyon

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and far downstream the annual production of large, woody debris, so critical for trout survival, ceased, and in its place came alien plants. Rubble, clay and sand—swept down from the side canyons by the flash floods of summer—began accumulating in the main channel. The spaces under cobbles and boulders—habitat for the salmonflies that comprise a huge part of the diet of Gunnison River trout—were cemented shut. Tubifex worms, which pass whirling disease to trout, proliferated in the sediments.

The Colorado Division of Wildlife has just finished an electro-fishing survey of a two-mile stretch of river just below the park. In the late 1980s, before whirling disease showed up, this stretch held 12,000 wild rainbows over six inches, 2,000 of them between 16 and 22 inches. In 2002 it held 87. Browns evolved in Europe with whirling disease, so they can usually tolerate the parasite. But because browns require structure and slower flows than rainbows, they've not filled the vacant niche.

Dr. Jack Stanford, professor of ecology at the University of Montana, grew up around the Black Canyon and has been studying its ecology since the mid 1970s. "The river hasn't flushed well in a long time," he told me. "Because peak flows have been so badly curtailed we have large accumulations of organic matter in backwaters. If these backwaters are flushed regularly, groundwater moves up through the gravel bars to produce a real healthy food web and very important rearing areas for trout. The terrestrial vegetation also clogs the river, creating habitat not conducive to trout. And the vegetation narrows the channel so sandbars don't form. When I was a kid the canyon had huge sandbars. Now they're gone or covered with plants."

The sandbars and backwaters that the Park Service had hoped to restore provided critical spawning and nursery habitat for four endangered fish that evolved with high spring flows--the humpback chub, razorback sucker, bonytail chub and Colorado pikeminnow (the new PC name for squawfish). Under the Endangered Species Act state and federal managers are mandated to protect the habitat of threatened and endangered species, but the Bush administration has decided to ignore its legal responsibilities.

**After extensive research**, park officials applied for a year-round minimum flow of 300 cubic feet per second (cfs), shoulder flows (an average in wet years) of 800 cfs for 80 days and a one-day scouring flow of between 2,000 and 12,000 cfs, depending on available water. The Colorado Water Conservation Board already had a right to a minimum flow of 300 cfs (except in droughts when it drops to 200 cfs), but that right is inadequate for trout protection because it was established in 1965 and therefore is junior to the right of the Aspinall Unit, which was established in 1956. The Water Conservation Board and Gunnison River trout could get nothing if the current drought continues and Aspinall water is allocated for other uses. Aspinall's right, however, is junior to the park's, which Colorado's Water Court says dates to 1933. So by announcing that it was going to protect Aspinall's yield, the Bush administration threw away the water right the Park Service had worked for, planned for, and gone to court for--a right owned by the American people.

"Fisheries are not built around minimum flows but around favorable flows," remarks David Nickum, director of Colorado Trout Unlimited. "A minimum flow will typically get you a minimum fishery. That's not what we have today in the Black Canyon of the Gunnison and the Gunnison Gorge [a Bureau of Lands Management wilderness area directly downstream]. I'm very concerned that it may be what we see in the future if steps aren't taken to protect the resource."

Melinda Kassen, who directs TU's Colorado Water Project, adds this: "If we have 300 cfs year after year, there will be no gold-medal fishery in the Gunnison River. Trout need that base flow but they also need those shoulder flows and peak flows." Because of the drought, the Bureau of Reclamation released only 250 cfs from Aspinall during the winter of 2002-03.

The park's proposal wasn't perfect. For example, Nickum and Kassen worried that quick drawdowns after the scouring flows might leave trout stranded. But the park had a good attitude and let all hands

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know it would be happy to work out the kinks. It let the downstream town of Delta know it didn't want to flood the buildings that had mushroomed in the floodplain since Blue Mesa Dam started holding back spring runoff in 1965. It let upstream hay growers, about half of whom have water rights junior to, and therefore subordinate to, the park's, know that it had no wish to cut into their profits. After all, the feds had not claimed any of the water that was legally theirs since FDR established the monument in 1933. They expressed a willingness to work with irrigators and to spare them economic hardship. It wouldn't have been difficult.

Still, the state, irrigators and developers threw a hissy fit. In Colorado, as elsewhere in the West, federal reserved water rights are considered an attack on states' rights. People who live in New Jersey and California, for example, who own the Black Canyon of the Gunnison National Park, who love it and thank God for it, even though they might never get to it—are presumed to have no rights. The park's filing for its court-approved water right prompted 383 statements of opposition at state Water Court. "There is undeveloped water in the Colorado Basin," declares Rod Kuharich, director of the Colorado Water Conservation Board. "And we don't want to see the federal government come in and lay claim to water that could be used for the benefit of people in the state of Colorado."

**As Bush** was moving into the White House the state began a shrill lobbying campaign in DC, then presented the new administration with a list of demands. Spooked by the yelling, the Bush team rolled over, and on September 30, 2002 the Justice Department issued a "settlement communication" to disputing parties, announcing that the federal government would: ensure "that the park's water right will not impact private water rights that are senior to the Aspinall Unit; ensure that the park's water right does not interfere with the development of the 60,000 acre-feet of Upper Gunnison basin water development to which the Aspinall Unit is already subordinate . . . and work with the City of Delta to devise a mechanism to ensure that a flow regime is developed that will adequately protect the park without contributing to flooding Delta."

The park and advocates of fish, wildlife and natural processes had expected and wanted nothing less. But, in the same document, Justice also promised that any water taken by the park would not "impact the yield of water from the Aspinall Unit" even though the unit can take the whole river and even though its yield hasn't been entirely spoken for.

What this was really about was Colorado's grandiose plans for metro Denver. Developers inside and outside state government have long dreamed of diverting the Gunnison over the Continental Divide in a multi-billion-dollar complex of reservoirs, pumps and pipes, the better to fuel speculative development on the Front Range. Basically, the Bush Administration is sacrificing the property of the American people as well as the needs of fish, wildlife and a national park for projects that are only gleams in greedy eyes.

"Reducing the water right for the Black Canyon of the Gunnison National Park takes the heart out of the park," says TU's national president and CEO Charles Gauvin. "It will be devastating for both the park and its fishery. No one would think of sucking the Colorado River dry just before it enters the Grand Canyon, or putting a shopping mall in the middle of the Gettysburg battlefield or allowing the development of a hard rock mine at the base of Mount Rushmore. Failing to protect healthy water flows through the Black Canyon of the Gunnison National Park--the water that made the canyon the unique resource it is today—is no different."

**The abdication of the Bush Administration** only begins with the Gunnison River. In California, at virtually the moment of the Gunnison giveaway, the last of about 33,000 adult salmonids—mostly chinooks, but also steelheads and cohos (the last of these listed as threatened)—were turning belly up. As a result, the chinook run in the Trinity River, a major Klamath tributary in California, was down

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by about 75 percent. The previous March, having decided that salmon didn't need water, the Bush Administration had suppressed the warnings of its own biologists and allocated an unprecedented portion of the flow to valley irrigators. Now Bush officials are shrugging off the die-off as just another bad roll in the no-win crap game they play, with America's fish and wildlife as the stakes.

"There will always be setbacks because we don't have an ultimate authority on how natural systems work," James Connaughton, chairman of the White House Council on Environmental Quality and the president's top advisor on environmental issues, explained to the press. "The trick is to manage risk in a way that minimizes and localizes and creates limited opportunities of time for those setbacks to occur." No previous administration in the memory of living Americans was willing to take these kinds of risks. And, when these risks involve threatened or endangered species, as in the Klamath and Gunnison, they're illegal.

On May 1, 2001 the Idaho Supreme Court decided that Deer Flat National Wildlife Refuge had no federal reserved water right because: 1) Congress hadn't hatched a standard for quantifying the amount of water; and 2) The mere act of setting aside a reserve for certain birds doesn't imply the need to set aside water. This despite the fact that the birds in question were waterfowl. It was bizarre logic, typical of Western states when it comes to water issues. But US Interior Secretary Gale Norton promptly decided not to appeal to the US Supreme Court.

"The future of the parks, especially in the arid West, is written in acre-feet," writes Frank Buono, former assistant superintendent of Joshua Tree National Park and now a board member of Public Employees for Environmental Responsibility. "Imagine finding that a pub with no beer is still a pub! You would be laughed out of court. . . . Bush and his Interior Secretary Gale Norton will try to convince us that they care about America's national parks. Bush's concern for the national parks is a fraud. . . . The heart of great national parks . . . are wildlife, wilderness and water. Without them the parks would be green spaces on the map. Without them, the parks are hollow shells. . . . The word . . . 'water' frightens [the Bush administration]. Not all water; only water reserved to fulfill the purpose of federal reservations."

As you may know, shortly after this story broke, several prominent members of Congress demanded a full investigation of this incident claiming that it "threatened the very economy of rural America". It is now under investigation by the GAO, the USDA Inspector General, and other Congressional entities.

There's a general feeling out there that there has to be a controversy and a court-determined activity that finally gets to that normative condition. It really shouldn't be that polarized. In all the rivers I've worked on it has been pretty easy to get to a normative condition, but it requires tradeoffs on both sides. Frankly, I believe that the Park Service people who have been negotiating this have been very professional about it and have provided in every instance very sound and thoroughly documented science. It's just very unfortunate to see the Bush Administration back away from that level of commitment from its own agency."

If the Administration is unwilling to use a federal reserved water right for its own National Park System dedicated to preserving natural processes and for a trophy wild trout fishery equal to any in the nation, it's clear that it's unwilling to use federal reserved water rights anywhere. This should surprise no one. As Colorado's attorney general, Gale Norton aggressively challenged federal water claims. And Norton, to whom the Park Service answers, is a protégé and former colleague of former Interior Secretary James Watt, who dedicated himself to discarding federal reserved water rights and who, in 1981, repealed part of the water rights opinion of his own agency's solicitor.

All Americans who love fish and wildlife, especially sportsmen, need to stop judging presidents by what they say and start judging them by the people they appoint. Missing trout of the Gunnison, missing salmon of the Klamath, missing ducks of Deer Flat National Wildlife Refuge and all manner of other missing fish and wildlife across our nation have been brought to you by people Dubya has hired, people who were either following his orders or working with his blessings. Think about that next time you see a bumper sticker that says "Sportsmen for Bush," especially if it's on the back of your vehicle.