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"BYPASS FLOWS" ON NATIONAL FOREST LANDS

JOINT OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON FORESTS AND FOREST HEALTH

AND THE

SUBCOMMITTEE ON WATER AND POWER

OF THE

COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED SEVENTH CONGRESS

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JOINT OVERSIGHT HEARING ON "BYPASS FLOWS" ON NATIONAL FOREST LANDS

Tuesday, May 22, 2001
U.S. House of Representatives
Subcommittee on Forests and Forest Health and
Subcommittee on Water and Power
Committee on Resources
Washington, DC

The Subcommittee met, pursuant to call, at 3:30 p.m., in Room 1334, Longworth House Office Building, Hon. Scott McInnis [Chairman of the Subcommittee] presiding.

Mr. MCINNIS. The Subcommittee on Forests and Forest Health is now called to order.

Because of the schedule of the afternoon, we are going to alter our schedule significantly. We expect votes in 1 hour, which could run well past 5 o'clock, which means that we have 1 hour to conclude this hearing.

So what I intend to do is, I intend to call the first three witnesses. I will wait for the Ranking Member to show up before we give opening statements.

So between the first panel, which would be, of course, Senator Allard, former Senator Hank Brown, and Randy Phillips, in between the first panel and what is now going to be called the second panel, both the Ranking Member and I will give opening statements.

Unfortunately, with the time restriction, I can either do one of the two. I can either allow questioning by the Committee or I can allow our witnesses to testify. So under the discretion of the Chair, I am going to forfeit any questioning by the Committee. We will only take testimony from witnesses.

The reason for that, of course, is that we have witnesses—Mr. Treese, for example, who has traveled half way across the country today to testify in front of us. And Mr. Treese is the last one for witness testimony.

Which means that if we took questions, Mr. Treese, you and others would not have an opportunity to testify after you made this effort to come half way across the country to testify. I am not going to subject you to that.

So that is what we are going to do. We will begin with our first witness.

Senator Allard, I am not sure how, up in your country, you yield to rank, whether you consider the former senator, your predecessor, ranking, but I will let the two of you—

[Laughter.]

Senator Allard, you may proceed with your statement.

Senator ALLARD. First of all, I—

Mr. MCINNIS. Thank you very much, by the way, for coming. We appreciate it.

STATEMENT OF WAYNE ALLARD, A UNITED STATES SENATOR IN CONGRESS FROM THE STATE OF COLORADO

Senator ALLARD. Thank you, Mr. Chairman.

First of all, I am just delighted to have sitting on my right side here former Senator Hank Brown.

And if it is all right with the Chair, what I would like to do is submit my entire testimony for the Committee. And then there are some other provisions with my testimony that I wish the Chairman would make a part of the Committee record.

One of them is an editorial from the Greeley Tribune dated April 4, and an op-ed by yourself and me in the Rocky Mountain News dated April 10, and another op-ed by Congressman Schaffer and myself in the Greeley Tribune. These are on bypass flows.

Mr. Chairman, first of all, I want to thank you.

Again, I am going to shorten my testimony considerably because of the constraints of your Committee time, and I certainly appreciate those. And those people who traveled a long ways need to have time to get back.

Many westerners, I believe, appreciate what we have in the State of Colorado, as far as water law is concerned. And basically, in the West, what we have is a water policy that is directed by the states.

And Colorado, actually, has been pretty effective in setting up a program where they can manage their instream flows to protect Colorado's rivers from future development.

We have a basic, underlying philosophy that anybody who wants to use that water simply needs to go through our water courts, justify their need, verify that they will not injure any other water users that are relying on that water for their livelihood or for green parks in cities or other needs within the state.

Since 1990, the United States Department of Agriculture has attempted to use some their Federal land-use permitting authority to require that that water be turned over to them. And this is contrary to what we do in the State of the Colorado and many Western States.

And, actually, as late as 1997, there was a task force that was convened to evaluate this policy. And it was determined that there was no authorization in any legislation giving them that authority.

This has concerned many of us. In 1991, under then-Secretary of Agriculture Madigan, he issued a department directive codifying the historical Forest Service policy against imposing bypass flows. And then in 1993, the directive was secretly repealed.

And we got into the closing months of the Clinton Administration, and once again, the intent to require water bypass flows for existing water facilities was beginning to be implemented.

So now here we are, and I am just here to ask the Committee to move forward in any attempt that you deem appropriate to try and restrain the activities of the Forest Service from taking this very valuable property right in the State of Colorado, and to recognize that the states have a role that does protect the environment, that protects private property rights, allows for a lot of local input.

And with that, I will conclude my testimony.

[The prepared statement of Senator Allard follows:]

Statement of The Honorable Wayne Allard, a U.S. Senator from the State of Colorado

Thank you Chairman McInnis and Chairman Calvert for holding today's oversight hearing concerning the United States Forest Service's use of water bypass flows. I appreciate the opportunity to speak to you today on this important issue.

Many westerners believe that Colorado and the states, not Washington, should establish state water policy. We know that Colorado already has an effective in-stream flow program in place to protect Colorado rivers from future development. We believe that if the Forest Service wants to increase flows in rivers that cross National Forests, it should work with Colorado's and other states' in-stream programs and/or purchase additional water rights consistent with western water law.

Since approximately 1990, the United States Department of Agriculture, Forest Service, has attempted to use federal land use permitting authority to require that the owners of existing water supply facilities located on National Forest lands relinquish a part of the water supply that would otherwise be provided from these facilities. While this controversy originated in Colorado, information provided to a congressional Task Force convened in 1997 revealed that conflicts with the Forest Service exist in other states in the West, including Montana, Arizona, Idaho and Nevada.

To understand the bypass flow controversy it's important to realize that much of Colorado's municipal and agricultural water is stored in high-mountain reservoirs. Much of this water is released and diverted on or across Forest Service property.

While no one argues that the Forest Service has legitimate interests when considering new or future water projects, it is a different matter entirely to condition permit renewal on water forfeiture.

Water users in the Cache La Poudre basin with permits up for renewal negotiated a settlement with the Forest Service. This Joint Operating Agreement actually put much more water into more than 70 miles of Colorado's only scenic and wild river (in critical winter months) than the bypass flows considered by the Forest Service. The negotiated agreement was praised by everyone from the State of Colorado to the Denver Post. Yet it was immediately dragged into court by environmental groups which published pictures of less than one mile of the Poudre River that would not have been helped by the agreement.

At the federal level, bypass flow arguments became so heated that in 1992 then Secretary of Agriculture Ed Madigan issued a departmental directive codifying historical Forest Service policy against imposing bypass flows. This directive was secretly repealed in the fall of 1993 without public or congressional input. This policy change was not announced until nearly a year later by sheepish Forest Service personnel.

In the closing months of the Clinton Administration, the Forest Service once again announced its intent to require water "bypass flows" for existing water facilities. This issue is of great importance to the West, as bypass flow requirements are used to take water that is owned by cities and farmers without compensation, notwithstanding the fact that the Task Force found that Congress has not delegated this authority to the Forest Service.

Since the new administration has taken office, I have requested that the Secretary of Agriculture Ann Veneman reinstate the historical policy of the Department, that the Forest Service may not impose water "bypass flows" and direct that the Regions and the Office of the General Counsel follow this policy in all Forest Plans and other decisions. In addition, I along with Senator's Thomas, Enzi, Domenici and Crapo wrote to Attorney General John Ashcroft requesting that the historical policy be reinstated.

As you know, I have been involved with the debate over the attempts by the Forest Service to assert federal permitting authority over historical use for quite sometime now. The United States Congress has taken, and will continue to take an active role in monitoring how the Forest Service goes about obtaining water from Colo-

rado water users. The Federal Water Rights Task Force was specific in its report that requiring water users to relinquish part of their existing water supply, or transferring of their water rights through the granting or renewal of federal permits is not included in the Forest Service's authority.

The real issue surrounding this debate is philosophical: Should the federal government or the state government control water resources in Colorado? As an avid fly fisherman I am convinced that the State of Colorado has protected our rivers and will continue to do so. That's why I so strongly oppose allowing the Forest Service to embark on this path.

[Senator Allard submitted the following newspaper articles and letter for the record:]

1. Newspaper article "Water rights again at issue"
2. Newspaper article "Feds again trying to usurp historic state water rights"
3. Newspaper article "Bypass flow a threat to our water rights"
4. Letter from Jon Monson, Director, Greeley Water and Sewer Department, Greeley, Colorado.

Wednesday, April 4, 2001

A6 GREELEY (Colo.) TRIBUNE

tribuneopinion

Water rights again at issue

▲ Senator continues to fight good fight

Another shot in the long and sometimes heated battle for water rights in the state's mountains was fired last week by Sen. Wayne Allard.

The issue deals with bypass flows. The U.S. Forest Service said it needs more of them to keep streams and rivers flowing through federal lands to protect the forests, fish and habitat.

They have been in place for decades and Allard would like the U.S. Agriculture Department to reinstate its historical policy, which prevents the forest service from imposing bypass flows on owners of existing water facilities.

In the past 10 years, the forest service has attempted to get more water for those rivers and streams. It has done so by requiring owners of storage facilities, such as the city of Greeley, to provide more water or lose its permits to operate them. It stopped doing that, but was then sued by Trout Unlimited. That suit is pending.

Owners of those facilities would not be given any compensation for the additional water supplies required, which Allard said is a violation of private property rights.

Previously, the forest service attempted to get bypass flows through the courts, but has lost case after case, beginning in 1978 in New Mexico and extending to the latest one heard in Greeley in the mid-1990s.

So in the closing months of the Clinton Administration, the forest service decided to ignore those court rulings and announced its intent to require bypass flows for all existing water facilities.

That would include those owned by the city of Greeley in the Poudre Canyon, where it gets 30 percent of its annual water supplies, and on irrigation companies which rely on runoff from the mountain snowpack to irrigate thousands of acres of farmland.

We applaud Allard's efforts, who said he is optimistic the Bush Administration will look favorably on his request.

April 10, 2001

Rocky Mountain News

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"Give light and the people will find their own way"

Feds again trying to usurp historic state water rights

By Wayne Allard and Scott McInnis

When you survey the landscape of politics and public policy in Colorado, few issues compare in importance to water. Indeed, if you've lived in Colorado for any period of time at all, you know that in this great state water is sacrosanct. It's our life-blood. And when outsiders start meddling with our water resources — whether it's Los Angeles, Las Vegas or the federal government — they can and should expect a fight.

Such is the case with a new U.S. Forest Service policy that seeks to give the federal government de facto authority to strip water users of a significant portion of their water rights. The policy, one of a litany of legally suspect pronouncements made in the waning weeks and months of the Clinton administration, is known as "bypass flow" authority. And while its name might sound innocent enough, the policy's far-reaching implications have serious consequences for Coloradans.

In our opinion, the policy represents the single largest threat to water users in Colorado. More broadly, it promises to permanently upset the time-honored preeminence of the states in their dealings with the federal government on water-related issues.

The underpinnings of Colorado's system for appropriating water dates back to the expansion of the American West in the 1840s and 1850s. As aspiring farmers and ranchers settled the arid West, they learned quickly that the legal remedy of allocating water in the East was wholly inadequate for the purposes of divvying up water rights here. And so these settlers established a legal framework for allocating the West's comparatively scarce water resources, a legal process that has stood the test of time.

Known as prior appropriation, the doctrine allocates water based on when an individual applies a given amount of water to a beneficial use. So long as that beneficial use is maintained, the water right remains. What that means in simple terms is this: Any new water rights are subject — and therefore secondary in legal importance — to more senior (older) water rights. This system was originated in Colorado and adopted by other western states in the late 1800s.

For 135 years, Congress has expressly deferred to the states in matters related to the allocation and administration of water rights. Instead of creating sweeping national guidelines, Congress has largely let the states handle water issues for themselves. In Colorado, that has meant the doctrine of prior appropriation has reigned supreme.

Unfortunately, the Forest Service's bypass flow policy seeks to overturn more than a century of water law. Bypass flow authority would allow the Forest Service to blackmail water users to surrender a portion of their water rights as a condition for renewing land use permits for existing water facilities — a pipeline or a ditch, for instance — on National Forest lands.

For example, if a rancher uses a pipeline on Forest Service land to obtain water for a cabin, under the bypass flow policy the Forest Service could force that water user to surrender a significant share of his or her legally held water right as a condition for reauthorizing the pipeline permit. At a practical level, if the Forest Service is allowed to maintain this authority, existing water users will be denied critical supplies without compensation, including every Colorado community that gets its water from an existing reservoir.

In 1992, the Forest Service lost a court case in water court seeking what it is now trying to accomplish through administrative rule-making. In our estimation, this policy is a clear overreach that is without any legitimate foundation in federal statute or case law. It also is a marked departure from the policies of every previous administration, including former Presidents John F. Kennedy and Jimmy Carter. Every president over the last 100 years has honored the supremacy of state-sanctioned water rights.

In addition to being illegal, the federal bypass flow restrictions needlessly duplicate actions already taken by the state of Colorado. For the last 25 years, the Colorado Water Conservation Board has protected fish habitat and the aesthetic values of Colorado's streams and rivers by regulating instream flow levels. Unlike the federal bypass flow program, the state's instream flow regime protects riparian areas in a manner that honors the doctrine of prior appropriation and all preexisting water rights. This is a fundamental balance that the federal bypass flow misses badly.

For these compelling reasons we have both urged the Bush administration to rethink the Forest Service's bypass flow policy. Like leading water experts throughout the West, we believe strongly that there is a way to protect the ecological values of our state's rivers and streams without usurping the legal rights of our citizens. The state of Colorado has achieved this balance without the interference of federal land managers. It is our hope that the Bush administration will allow that balance to be returned to Coloradans.

Sen. Wayne Allard and Rep. Scott McInnis represent Colorado in Washington.

A8 GREELEY (Colo.) TRIBUNE

Tuesday, May 1, 2001

'Bypass flow' a threat to our water rights

Wayne Allard

U.S. Senator

Bob Schaffer

U.S. Congressman

COLORADO VALUES ITS water resources, and when outsiders interfere with Western water rights, they can expect a fight. For years, the independent-minded people of Colorado have battled outsiders seeking Colorado water.

Such a battle has developed over a U.S. Forest Service policy that gives the federal government authority to strip water users of a significant portion of their water rights. The policy, one of a litany of legally suspect pronouncements made during the Clinton administration, is known as "bypass flow" authority. And while the name might sound innocent enough, the policy's far-reaching implications have serious consequences for all Coloradans. In our opinion, the policy represents the single largest threat to water users in northern Colorado. More broadly, it promises to permanently upset the time-honored preeminence of the sta n their dealings with the federal gov ment on water-related issues.

For 135 years, Congress has expressly deferred to the states in matters related to the allocation and administration of water rights. Instead of creating sweeping national guidelines, Congress has largely let the states handle water issues for themselves.

In Colorado, the system of allocation has been governed by the doctrine of prior appropriation for more than a century. This process allocates water to an individual who maintains a given amount of water for a beneficial use.

Therefore, water rights are subject — and therefore secondary in legal importance — to older water rights. This system originated in Colorado and was adopted by other western states in the late 1800s.

Unfortunately, the current Forest Service bypass flow policy interferes with more than a century of Western water law. In [illegible] current bypass flow authority would allow the Forest Service to blackmail water users, including the cities of Fort Collins, Loveland and Greeley, to surrender a portion of their water rights as a condition of renewing land-use permits for existing water facilities.

Since 1852, Congress and the Supreme Court have recognized federal claims to water are subject to state laws. In our estimation, the Forest Service's policy is a clear regulatory overreach. In addition to being illegal, the federal bypass flow restrictions needlessly duplicate actions already taken by the state of Colorado.

For more than 25 years, the Colorado Water Conservation Board has protected fish habitat and the aesthetic values of Colorado's streams and rivers by regulating instream flow levels. Unlike the federal bypass flow program, our state's instream flow process honors the doctrine of prior appropriation and all preexisting water rights.

For these compelling reasons, we have both urged the Bush administration to examine the Forest Service's bypass flow policy. Like leading water experts throughout the West, we believe strongly that there is a way to protect the ecological values of our state's rivers and streams without usurping the legal rights of our citizens.

Wayne Allard, a Republican from Loveland, is a U.S. Senator for Colorado.

Congressman Bob Schaffer is vice chairman of the House Education Subcommittee on Education Reform, the speaker's appointee to the House Policy Committee, and president of the Republican Junior Class. His official Internet Web site address is www.house.gov/schaffer.

City of Greeley

Water and Sewer Department

1100 10th Street, 3rd Floor • Greeley, CO 80631 • (970) 350-9812

May 18, 2001

Honorable Scott McInnis
320 Cannon House Office Building
Washington, D.C. 20515

Dear Congressman:

On behalf of the City of Greeley and the Greeley Water and Sewer Board ("Greeley"), thank you for the opportunity to comment on some of the issues before the House Resources Subcommittees on Forests and Forest Health and Water and Power, specifically regarding the bypass flow lawsuit between Trout Unlimited and the U.S. Forest Service, a lawsuit in which both the State of Colorado and Greeley are interveners.

Greeley established Colony Ditch Company (now the Greeley Irrigation Company) two weeks before the city itself was actually founded in April 1870. First things first. Ever since that time, Greeley residents have obtained water supplies from the Cache la Poudre River, a tributary of the South Platte River. Greeley owns and operates water storage reservoirs in the upper Poudre River basin. These facilities capture the abundant spring runoff and release water for treatment and use downstream in late fall and winter when Greeley's other water supplies are inadequate to meet municipal water demands. The reservoirs are especially important during a multi-year drought. Several of these facilities are located in part in the Roosevelt National Forest.

Two Greeley facilities, Barnes Meadow Reservoir and Peterson Lake Reservoir, faced the prospect of losing part of their historical water supplies when the Forest Service renewed special use authorizations for these facilities in the early 1990's. The Forest Service desired to impose bypass flows on these reservoirs. The citizens of Greeley have indebted themselves and have invited other families to settle in Greeley in anticipation of being able to use those water supplies. Accordingly, Greeley officials have faced the real-world challenge of maintaining an existing drought-year water supply and enhancing the National Forest environment through the use of its water facilities located on Forest lands. The solution being challenged by Trout Unlimited provides more flow to more stream habitat than bypass flows would have, and at the same time keeps Greeley's water rights in classical beneficial use.

Honorable Scott McInnis May 18, 2001

Greeley is in substantial agreement with the briefs submitted to the federal court by the Colorado Attorney General, the Northern Colorado Water Conservancy District, Water Supply and Storage Company, and others concerning the Forest Service's lack of legal authority to impose "bypass flow" requirements upon existing water facilities located within our National Forests. Greeley wishes to stress, however, that such facilities can operate, in the words of former Secretary Madigan, "to accommodate resource goals of the Forest... to the extent feasible without diminishing the water yield or substantially increasing the cost of water yield from the existing facility." As the enclosed material indicates, the Poudre River Joint Operations Plan ("JOP") is a notable success story which can actually enhance aquatic habitat over natural conditions, without materially affecting the water supply functions of the reservoirs involved.

The Forest Service should be commended for recognizing the benefits of the JOP, a cooperative approach to meeting the needs of the water users and the Forest environment. Greeley officials thank you for your support and would be happy to discuss with you Greeley's experiences under this approach in more detail. Thank you again for the opportunity to offer these comments.

Sincerely,

Jon Monson, Director
Greeley Water and Sewer Department

c: Honorable Ben Nighthorse Campbell
Honorable Wayne Allard
Honorable Bob Schaffer
Honorable Jerry Wones

Joint Operations Plan: Enhanced Fisheries Without Bypass Flows

Nancy Koch & Jon Monson, Water and Sewer Department, Greeley, Colorado May 2001

In the early 1990's the Arapaho/Roosevelt National Forest asserted that the renewal of land use authorizations for a number of existing water supply reservoirs located in the Poudre River drainage in Colorado would include a requirement that water historically stored in these facilities be "bypassed" in order to achieve Forest Plan goals for the protection of aquatic habitat. Several of these reservoirs are owned by the City of Greeley and the Water Supply and Storage Company. The reservoirs store water when their water rights are in priority under Colorado water law so that the water can be released later for municipal and agricultural uses downstream. This stored water is typically used either in times of drought or when stored water is needed because extreme winter temperatures have reduced the natural flows in the river. The proposed bypass flow requirements could have reduced the water supply from these facilities by 50% or more.

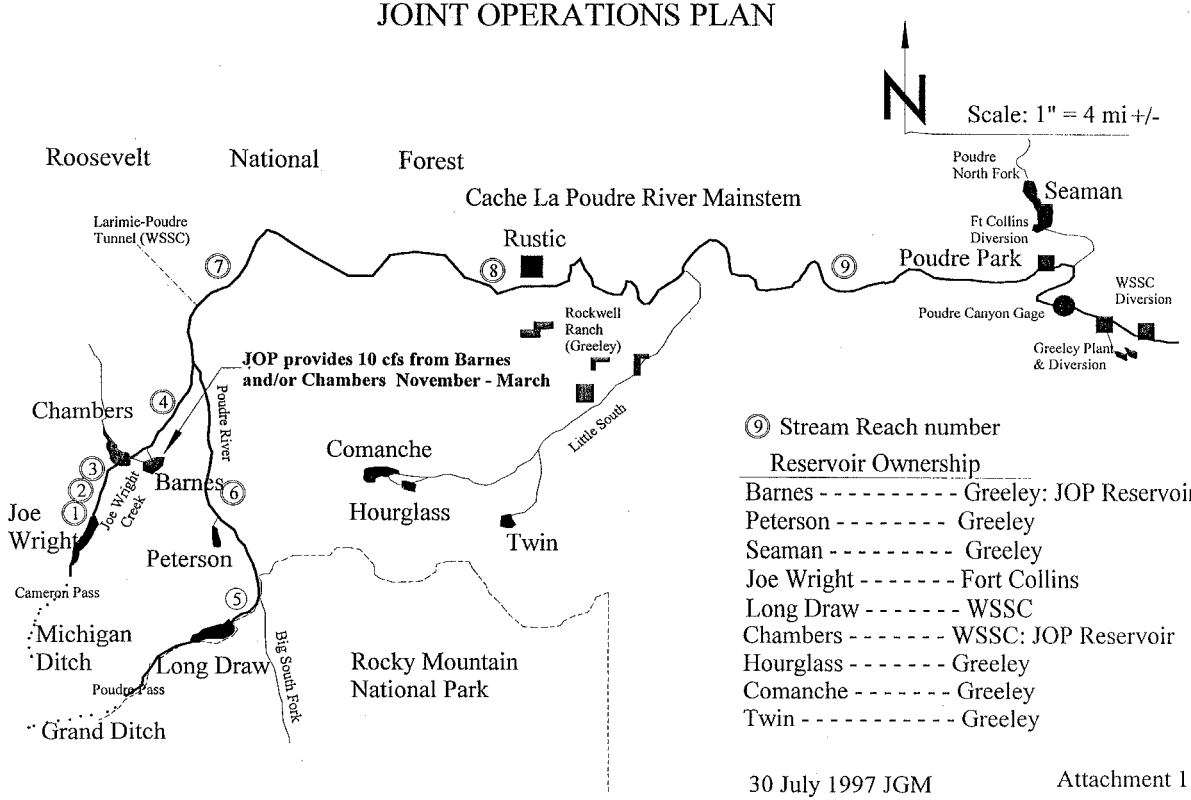
The Forest Service and the water users disagreed as to whether the Forest Service has the legal authority to impose bypass flow requirements as a condition of the renewal of these land use authorizations. However, as an alternative to disputing this issue, the water users and the Forest Service developed a plan for the coordinated operation of four reservoirs located in the Poudre River headwaters. This "Joint Operations Plan" (JOP) was designed to optimize aquatic habitat on National Forest lands without causing a loss of the water supply provided from the reservoir facilities. The JOP was included as a term and condition of the renewed land use authorizations for the reservoirs owned by the City of Greeley and the Water Supply and Storage Company.

The JOP focused on the fact that low natural stream flows caused by freezing conditions in winter, have adverse effects on aquatic species and also create a need for reservoir releases. In the Poudre River basin, naturally occurring, low wintertime flows are the limiting factor for the trout fishery. Under JOP, 3,000 acre feet of storage water is released for beneficial uses by the cities of Greeley and Fort Collins when it will also augment low wintertime flows which would otherwise occur in Joe Wright Creek and the 37 miles of the Cache la Poudre main stem. The reservoir releases are then diverted from the stream below the forest boundary for municipal water supply purposes.

The Poudre River JOP provides a case study for optimization of reservoir operations to attain National Forest purposes without causing a loss of water supply from these facilities. The JOP has operated successfully for seven years now. Actual implementation of the JOP has not cause any loss of water supply from any of the reservoirs. The effects of the implementation of the JOP during winters of 1994-95 (a dry year) and 1995-96 (a wet year) have been reviewed and compared to what would have occurred if bypass flows had been imposed on these facilities.

Attachment 1 is a map of the Cache la Poudre basin that shows the stream reaches and reservoirs that are included in JOP. Attachment 2 shows the amount of water which would have been lost if the Forest Service had imposed bypass flow as a requirement for one of Greeley's reservoir use authorizations in a dry year (1989). Attachment 3 shows the actual improvements in Cache la Poudre River that resulted from JOP compared with the river flow which would have occurred with bypass flows and with pre-1994 existing flows. JOP even provided more flow than would native (no dam) conditions. The environmental benefits of JOP were always superior to those that would have resulted from bypass flows. Also on Attachment 3, JOP demonstrated significant improvements in Brown Trout habitat in both wet and dry years, the winters of 1994-95 and 1995-96.

GREELEY - FORT COLLINS - WATER SUPPLY & STORAGE
JOINT OPERATIONS PLAN



⑨ Stream Reach number

Reservoir Ownership

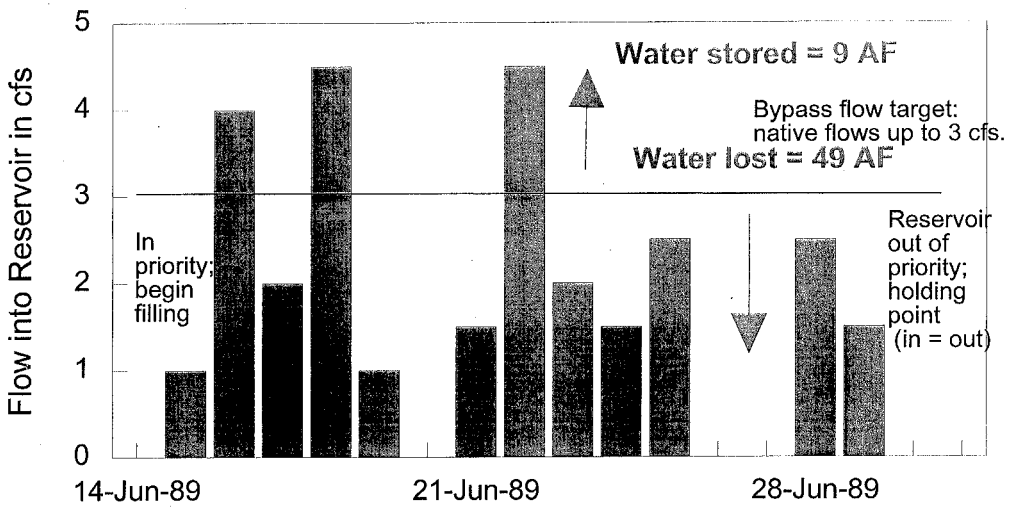
Barnes - - - - - - - - - - Greeley: JOP Reservoir
Peterson - - - - - - - - Greeley
Seaman - - - - - - - - - Greeley
Joe Wright - - - - - - - Fort Collins
Long Draw - - - - - - - WSSC
Chambers - - - - - - - WSSC: JOP Reservoir
Hourglass - - - - - - - Greeley
Comanche - - - - - - - Greeley
Twin - - - - - - - - - - - Greeley

30 July 1997 JGM

Attachment 1

Potential Storage Lost to Bypass Flow

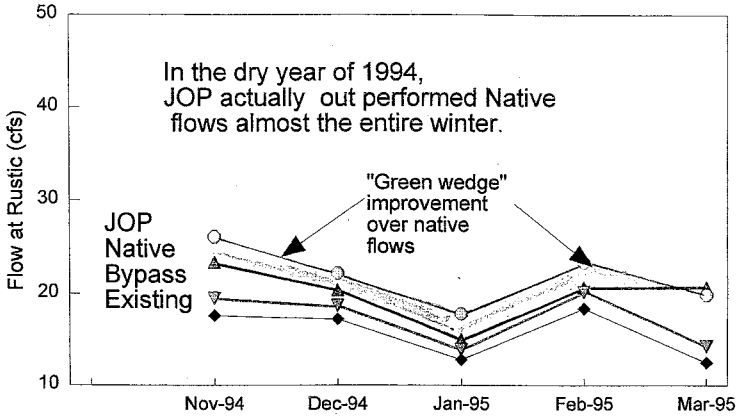
Peterson Reservoir with Hypothetical 3 cfs Bypass Flow Requirement



Graph shows actual reservoir flow data in a dry year taken from staff gage.
Reservoir storage rights were in priority for 16 days with storable flows for 12 days.

Poudre River Flow Enhancement

Under Joint Operations and Alternative C Bypass Flows

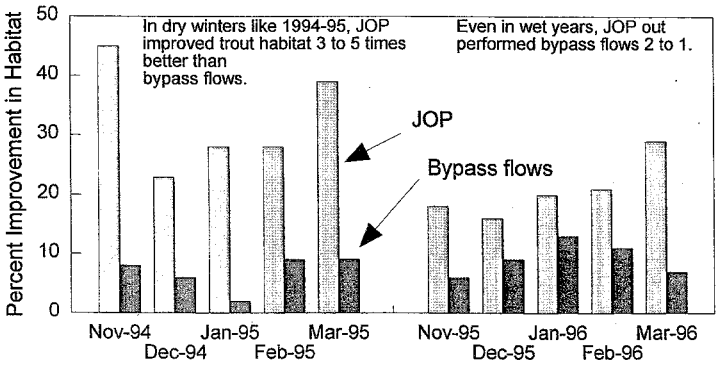


07/29/9707:06 PM JGM

JOP-GRN.WK4

JOP vs Bypass Flows

Habitat Improvement for Adult Brown Trout



Note: improvements over existing (pre-JOP) flows. Bypass flows are NEPA Alternative C. JOP = 3,000 AF/winter (10 cfs).
Data from Miller Ecological Consultants 7/97 Report on Poudre River. Improvements for all reaches combined.

07/29/97 JGM JOP-SUM.WK4

Attachment 3

Mr. MCINNIS. Thank you, Senator.

One of the advantages of having former Senator Brown return is the institutional knowledge.

I know, Senator Brown, that you have done exhaustive research and have extensive experience in Colorado water law. I appreciate very deeply that you took away from your now nonpolitical life to come back here and kind of refresh us on the institutional knowledge and the issues.

So, Senator, welcome back to your old digs. Appreciate you coming all this way. You may proceed.

STATEMENT OF FORMER SENATOR HANK BROWN, PRESIDENT, UNIVERSITY OF NORTHERN COLORADO

Mr. BROWN. Thank you, Mr. Chairman.

Mr. Chairman, let me thank you for holding this hearing and reviewing this issue. I appreciate the Committee's willingness to examine it.

I must say, I am personally delighted to see that the Merchant Marine Committee was done away with. They deserved it a long time ago.

[Laughter.]

And I think it is only fair that you acquired the Committee room. Even though former Chairman Udall probably would be too modest to want more Committee rooms than the one he had, I think it is more than appropriate that we meet in this hearing room.

Mr. Chairman in three decades of viewing public issues and having some involvement in them, I do not know of a single area where the Federal Government or a state government has acted with more arrogance and deceit. I don't say those words lightly. They truly apply in this area.

What you have seen is one of the most outrageous approaches to denying people their rights that I have ever witnessed.

This issue originally got started when the Forest Service attempted to expropriate—and I use that word because I believe it applies—agricultural water rights. Rights of the farmers who produce the food for this country.

Congressman Mike Strang, representing the west slope at that time, became involved and ended the exploration. Thanks to his efforts and others in the Congress, it was solved.

And that is why, in the 1990's, the Forest Service moved over to attacking municipal water districts. These are primarily nonprofit municipal water providers. What was involved was simply an extortion; that is, the cutoff of the renewal of a permit to cross Federal ground if you don't forfeit a third of your water rights.

It is sad to report that a number of cities in Colorado literally gave in because they didn't have the money to fight. Even though they were advised by the attorneys that they had a good case, they didn't have the money to fight it through courts.

What you have seen is the Forest Service literally take a position they know is not sound in law. Their attorneys make filings that are not honestly done and extort millions of dollars of water rights from people or impose on them millions of dollars of attorneys fees in a frivolous action.

To some extent, it has worked. You have had a number of cities who simply didn't have the means to fight the Forest Service and concede.

At times the Forest Service, got their hand slapped, as they did with agriculture. They backed off and said they wouldn't do this again. Then they turned around and did the same thing to municipalities.

When they did it with municipalities, we contacted Secretary Madigan. He issued a direct order contravening their action. And the Forest Service promised to end the practice, and then they broke that promise again.

Mr. Chairman you asked the nominee for the assistant secretary his exact position when he came up for confirmation. He misrepresented the truth of what they were going to do.

When my office found that the Forest Service had broken their word, we offered a bill that would legislatively deal with this problem. And the Forest Service came and said that they would stop this practice. They asked for a compromise, and the compromise was a year moratorium with the issue being studied. They agreed to abide by the results of the study.

Once again, the study came out with a majority vote, indicating there was no legal basis for this action. The Forest Service indicated they would comply and then broke their word again.

I mention all of this background, Mr. Chairman, because I hope this Committee will not be satisfied with assurances from the Forest Service.

In all due deference to the fine people that are here at the table and others that will come from the Forest Service, they have not stuck by their word. It would be very foolish for us to assume that they are going to mean their word this time after they have broken it so many times in the past.

Mr. Chairman, there are three thoughts I would like to leave with this Committee.

One, this is not an issue that affects only western Colorado. If you establish the position that you have a right to extort water rights and drinking water from municipalities on the basis of renewing or not renewing a permit to cross Federal ground, every major city in this country is at risk. Not just small towns in western Colorado that had to give up their water, but New York and San Francisco and every other major one as well.

And whether it is a matter of crossing a Federal highway to deliver your drinking water or crossing a Forest Service area, all of them are at risk. It is simply wrong to deny people their water rights over renewal of a permit issue.

Secondly, Mr. Chairman, I hope very much that this Committee will recognize what an important environmental issue this is. It is an environmental issue. And tragically, the Forest Service has not been able to understand the important environmental issue that is here before you.

I do not come as someone late to the party in terms of environmental issues. I was a prime sponsor of Colorado's conservation trust fund. I was one of the prime sponsors of Colorado's minimum stream flow bill. So my interest in minimum stream flow in the forest and other parts of Colorado goes back a quarter of a century.

I was the prime sponsor of one of the state's biggest wilderness bills and the last large one that passed for Colorado. I was a prime sponsor of the state's only wild and scenic river bill. And I was the prime sponsor of the state's only heritage area bill.

I was the first in the delegation to advocate turning the Rocky Mountain Arsenal into a wildlife sanctuary.

I come here with credentials that at least allow me to speak on behalf of environmental concerns.

If the Forest Service has their way and diminishes or eliminates water storage, which is what the purpose of this is, action—it is not a bypass issue; this is an issue to eliminate water storage.

If they have their way, a consequence of their winning will be simply this: You will have bigger runoffs in spring when you have the floods. Having a flood is not a plus, environmentally. And you will have lower minimum stream flow or no stream flow at all in the winters.

It is very simple. If you reduce the amount you can store during the spring runoff, you have more spring runoff and more floods. And that water is not there in the fall and the winter of the year, when you need the minimum stream flow to maintain aquatic life.

So it is a terribly important environmental issue. It is one I hope this Committee will act on.

And finally, I hope this Committee will not be satisfied with Forest Service assurances this time. They have misrepresented their intentions too many times. And I hope very much this Committee will proceed with legislation that makes sure no community ever faces this kind of extortion again.

Moreover, Mr. Chairman, I hope that at some point this Committee will also ask the cities that have faced such terrible consequences from this irresponsible action to come forward and that you will compensate them for the misconduct of the Forest Service.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Brown follows:]

Statement of The Honorable Hank Brown, President, University of Northern Colorado and Former United States Senator (Colorado)

Mr. Chairman and the Members of the Committee:

Thank you for the opportunity to testify this afternoon. In over three decades of involvement in public issues I know of few incidences where a federal agency has acted with greater arrogance and deceit, than the U.S. Forest Service action on the so called "bypass flow" issue. Without legislative authorization the Forest Service has literally used it's power to deny the renewal of permits across federal ground in an effort to extort drinking water from municipalities. They have taken our cities property rights without compensation. They have thumbed their nose at legislative intent and the public.

In the 1980's when the Forest Service used these tactics against farmers Congressman Mike Strang won protection for agriculture and the issue was closed. Having failed in their effort to extort agricultural water the Forest Service turned its attention to municipalities. In the early 90's they succeeded in forcing some small water districts and cities to forfeit up to a third of their water rights simply because the non-profit water districts couldn't afford the attorneys to defend themselves in court.

In response to these tactics I had contacted the Regional Forester in Colorado. The Forest Service was unable to identify any legal basis for the water takings. Despite the fact they had no legal basis they continued in their efforts to demand a third of the cities water in exchange for continuation of the permits to cross federal ground. Faced with the potential loss of their drinking water many cities felt they had no choice, but to forfeit their rights.

I contacted the Secretary of Agriculture and outlined the abuse that had been taking place. Secretary of Agriculture, Madigan responded by a clear directive to the Forest Service to cease the practice of extorting water from municipalities. The Forest Service promised they would follow the Madigan directive, but in 1993 and 1994 they broke their word and returned to their old ways. Doing the opposite of Secretary Madigan's directive the Forest Service renewed its efforts to extort water rights from non-profit water districts.

Faced with this flip-flop by the Forest Service, I offered legislation to end this extortion. With the likely passage of the legislation the Forest Service again reversed courses and agreed to stop withholding permit renewals and abide by the results of an independent review of experts on the water law. The panel that came in to being in response to the one-year moratorium found that there was no legal basis for the Forest Service action. Many assumed that the crisis was over, and the Forest Service indicated they would abide by the findings. But again the Forest Service reversed itself and broke its word by resuming it's program of taking water rights.

Mr. Chairman, there are three points that I would like to leave you with this afternoon: This is an issue that is of importance to every American whether you live in San Francisco, New York or even a small town in western Colorado. Your drinking water supply most likely crosses federal ground at some point on its way to your home. If an agency can arbitrarily cut off your ability to cross federal ground all of us are at risk. An easement for water lines shouldn't be withheld to appropriate water rights, whether it involves crossing under a federal highway in New York or crossing a forest in Colorado.

Secondly, I would hope this committee would not be satisfied with assuredness from the Forest Service that they will end this abusive practice. The Forest Service has promised to end this practice numerous times and each time has broken its word. I hope you will pass new legislation ending this extraordinary practice of withholding the renewing of permits.

Finally, Mr. Chairman I want to suggest to the committee that this is an important environmental issue and that eliminating existing water storage projects, which appears to be the goal of the Forest Service, would increase flood flows in the springs and result in lower flows in our streams during the dry periods of the year. The Forest Service actions clearly endanger wildlife and fish populations. Their policy should be rejected because it harms our environment. Sadly the Forest Service seems oblivious to the true consequences of their actions.

As the author and prime sponsor of Colorado's Conservation Trust Fund Bill and coauthor of the state's Minimum Stream Flow Bill I have demonstrated record of concern in this area. I was the sponsor of Colorado's first Wild and Scenic river and Colorado's only federal heritage area. I was the first member of the Colorado delegation to actively work to turn the Rocky Mountain Arsenal into a wildlife sanctuary and along with Senator Wirth was the prime sponsor of our most recent and one of Colorado's largest wilderness areas. The Forest Services actions will diminish minimum stream flow and harm the environment. I hope you will end their practice of "bypassing" people's rights.

Mr. MCINNIS. Thank you, Senator.

And, again, I want to emphasize also to you how much I appreciate you coming half way across the country. I know that your beliefs are very deeply founded in regard to this issue.

So once again, on behalf of the Committee, I appreciate your testimony today. Thank you for your appearance.

Next, we are going to go to Mr. Phillips.

Mr. Phillips, before you proceed, I did have an opportunity to read your testimony, and I didn't find in your testimony at any point exactly where the position of the Forest Service was, specifically in regard to whether they are going to follow the Madigan letter or not.

So during your comments, I would suspect you are probably going to read from your statement. I would appreciate you incorporating that position within it.

Mr. Phillips, thank you for coming today, and you may proceed.

STATEMENT OF RANDY PHILLIPS, DEPUTY CHIEF, PROGRAMS AND LEGISLATION, USDA FOREST SERVICE

Mr. PHILLIPS. Thank you, Mr. Chairman.

First, let me apologize for getting the testimony to you so late. We were developing our testimony on fairly short notice, so we will try not to let happen that again.

But I am here to represent the views of the Department and the Forest Service regarding the use of bypass flows in the management of our national forest lands.

The bypass flow issue has raised considerable concerns among a number of water users in the West, particularly in this year with a low snow pack.

As you know, the Forest Service is currently involved in litigation over the use of bypass flow. While this suit prevents a discussion of the matters related to the litigation, I do want to share with the Committee the agency's policy views.

The Secretary has received several letters from Members of Congress requesting the direction established by Secretary Madigan in an October 6, 1992, letter to Senator Hank Brown be reinstated. A written response to these letters is forthcoming.

The Administration is reviewing the direction in this letter suggested and will consider the benefits and costs of a change from current policy.

I want to state that it is the Forest Service policy and custom to work collaboratively with water facility permit holders to ensure that these authorizations appropriately consider environmental values while enabling permittees to operate and maintain their water facilities.

The Forest Service's water policy manual dated May 1974 and amended in 1980 states the Forest Service in all matters related to water use and water rights will endeavor to work cooperatively with the states. Such cooperation will recognize the state's authority and responsibilities for allocation of waters with the state and the need for the state to be informed as to uses and future needs of the water on the national forests.

This policy guidance also states even though a beneficial use of water on national forest system lands is made by a permittee in connection with the use and occupancy of such lands, the regional forester retains the authority to make discretionary determinations of needed management actions in accordance with the rules and regulations for the use and occupancy of these lands.

It is therefore the responsibility of the regional forester to work with the state permittees and other interested parties to resolve issues related to the reauthorization of water facility permits.

On November 30, 2000, the Forest Service completed a paper entitled, "Water for the National Forest and Grasslands; Instream Flow Protection Strategies for the 21st Century."

The purpose of this paper was to inform national forest managers of currently available tools for use in dealing with a variety of instream water flow issues to encourage more collaboration with state, tribal, and local officials on these issues and to discuss recent court rulings involving agency instream flow claims. The white paper is currently under review.

The Forest Service recognizes the sensitivity of the bypass flow issue in its dealings with thousands of permit holders, and the agency is committed to working with states, permittees, interested parties, and the Congress to address concerns associated with water facility authorization.

Mr. Chairman, I think it is important to understand that while the Administration and the Forest Service has not completed a comprehensive approach to water management, the agency will approach water supply reauthorizations using the principles described in the Madigan letter.

We feel it is undesirable to develop a unilateral approach to require bypass flows when other solutions are generally available.

If you look at the history behind the use of bypass flow restrictions, they are very minimal in their use. Out of roughly 8,000 permits, I believe there only 13 cases where bypass flow restrictions have been used.

This completes my statement, Mr. Chairman.

[The prepared statement of Mr. Phillips follows:]

Statement of Randy Phillips, Deputy Chief, Forest Service, U.S. Department of Agriculture

Members of the Committee, thank you for the opportunity to appear before you today. I am Randy Phillips, Deputy Chief for Programs and Legislation, USDA Forest Service. I am here today to present the views of the Department regarding the use of bypass flows in the management of national forest lands.

Introduction

The bypass flow issue has raised considerable concerns among a number of water users in the West, particularly in this year of unusually low snow pack. As you know, the Forest Service is currently involved in litigation over the use of bypass flow. While this suit prevents a discussion of matters related to the litigation, I would like to share with the Committee the agency's policy views.

Madigan Letter

The Secretary has received several letters from Members of Congress requesting the direction established by Secretary Madigan in an October 6, 1992 letter to Senator Hank Brown be re-instated. A written response to these letters is forthcoming. The Administration is reviewing the direction that this letter suggested and will consider the benefits and costs of a change from current policy.

Collaboration

It is Forest Service policy and custom to work cooperatively with water facility permit holders to ensure that these authorizations appropriately consider environmental values while enabling permittees to operate and maintain their water facilities. The Forest Service's water policy manual dated May 1974, and amended in 1980, states "The Forest Service in all matters related to water use and water rights, will endeavor to work cooperatively with the States. Such cooperation will recognize the State's authority and responsibilities for allocation of waters within the State, and the need for the State to be informed as to uses and future needs of water on the National Forests." This policy guidance also states: "Even though a beneficial use of water on National Forest System lands is made by a permittee in connection with the use and occupancy of such lands, the Regional Forester retains the authority to make discretionary determinations of needed management actions in accordance with the rules and regulations for the use and occupancy of these lands." It is therefore the responsibility of the Regional Forester to work with the State, permittees, and other interested parties to resolve issues related to the re-authorization of water facility permits.

On November 30, 2000, the Forest Service completed a white paper titled "Water for the National Forests and Grasslands: Instream Flow Protection Strategies for the 21st Century." The purpose of this paper was to inform national forest managers of currently available tools to use in dealing with a variety of in-stream flow water issues, to encourage more collaboration with State, tribal and local officials

on these issues, and to discuss recent court rulings involving agency in-stream flow claims. This white paper is currently under review.

Conclusion

The Forest Service recognizes the sensitivity of the bypass flow issue in its dealings with thousands of permit holders. The agency is committed to working with States, permittees, interested parties, and Congress to address concerns associated with water facility re-authorization. We believe, however, that any course we choose will inevitably require local people to work together to find common sense solutions.

This concludes my testimony. I would be happy to answer any questions that you may have.

Mr. MCINNIS. Thank you, Mr. Phillips.

Mr. Phillips, in your testimony, I guess the response to my request in your testimony was that you are going to follow the principles of the Madigan letter, which moves you from the previous administration policy. Is that what you were trying to say the in statement or intended to say?

Mr. PHILLIPS. I did intend to say it. And I would also add that it is interesting to note that while the Madigan letter was rescinded by Secretary Espy, from everything I can tell, the Forest Service never received any instructions from the department related to that action.

Mr. MCINNIS. So meaning that it could still be in effect?

Mr. PHILLIPS. Well, I don't know that for a fact.

Mr. MCINNIS. All right.

Mr. PHILLIPS. I just wanted you to be aware of that.

Mr. MCINNIS. Mr. Phillips, you were here and heard my previous statement in regard to the testimony and the restriction on questioning. I would appreciate it, since you are representing the principal agency, if you could remain, because if we do have time at the conclusion of the witness statements, I then will open it up to the panel to ask questions. And I am sure you would probably be one of their priorities to ask questions to.

Mr. PHILLIPS. I would be happy to.

Mr. MCINNIS. Thank you, Mr. Phillips.

Mr. Inslee, prior to your arrival, in order to accommodate our witnesses—you have been updated by staff.

At this point, I thought that you and I would each give opening statements. I will proceed and then turn it over to the Ranking Member, Mr. Inslee, to give his opening statement.

Then we will proceed with our second panel. While we are giving the opening statements, it would probably be helpful, for time consideration, if the second panel could go ahead and take their seats.

It would be Mr. Holsinger, Mr. Getches, Mr. Lynch, Mr. Gauvin, and Mr. Treese. I think I have everybody on the second panel. Is that correct?

STATEMENT OF THE HONORABLE SCOTT MCINNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. MCINNIS. I called the joint Committee hearing today on Forests and Forest Health and Water and Power to conduct oversight on the use of the so-called bypass flows on national forests lands.

As I have said on a number of occasions before, I believe that the Forest Service coercive of practice of tying bypass flow restrictions

to land use authorization for existing water facilities represents probably the single-largest threat to water users in Colorado and, indeed, throughout the West and, in fact, throughout the entire country.

I would point out that Senator Brown said in his comments that even in the East, where you do not have large holdings of public lands, you could very well have a bypass flow issue come up if you had to cross a Federal highway.

In my mind, this policy looks like an awful lot of Federal greenmail. I, too, like Senator Brown, say that word with a great deal of thought and with restraint.

In practical terms, what the policy means is this: If you are a municipality or a farmer or a rancher, and you rely on a diversion or a ditch or a pipeline located within public lands for your drinking water or for other purposes, you are at risk to this policy.

You see, every 10 to 15 years the Forest Service requires as a routine these permittees to renew their permit for diversion or ditch or pipeline. Under the Federal bypass flow program, the Forest Service can say to water users, "Sure, we will renew the permit for your ditch. But in return, we want 10, 15, 25, or even 50, percent of your annual water yield."

It doesn't matter if your diversion is 50 years old and you have had a number of permits issued on a routine basis. And it doesn't matter if your water rights are a century old. Under this policy the Federal Government has exercised the questionable authority to the effect that it puts them in a position to demand greenmail or greenwater or whatever you want to call it out of a portion or taking of your legal water rights.

That policy should not be coming from the government of the United States of America.

This policy represents a seismic shift in 135 years, meaning the policy of exercising a bypass flow confiscation of water rights. It represents a huge shift in 135 of Federal policy and obviously contrary to the Madigan letter of which we have previously spoken.

As my colleagues know, since 1866, the Congress has shown near total deference to states in allocation and administration of water resources. Time and time over, Congress and the courts have made it exceedingly clear that when the Federal Government wants water, it has to get in line just like every other water user in America.

The Forest Service bypass flow policy of the previous administration blatantly runs afoul of this fundamental legal document.

Having said that, I am sympathetic and, indeed, very supportive of efforts to protect the health and vitality of our nation's rivers and streams.

In Colorado, the Colorado Water Conservation Board, of which I am familiar with in great detail, and the Colorado River Water Conservation District, which is represented here today by Mr. Treese, have done an outstanding job in promoting this crucially important objective.

If there are ways the Forest Service can provide assistance and support in these community-based efforts, I am all for it. And I am certainly open to suggestions.

But a command and control approach to imposing bypass flows will never be acceptable.

Keep in mind that in the East you often file lawsuits to get rid of water. In the West, water runs like blood.

A final point I would like to make is on a local note, but I think it is instructive on a much larger scale. When the forest planners on the White River National Forest, which is located in the heart of western Colorado, which also is in the heart of my congressional district, released their preferred forest plan revisions, there was not even a mention of the yeoman's effort of organizations like the Colorado Water Conservation Board and the Colorado Water Conservation District and myself in my own forest plan that I submitted to protect instream flow values.

Instead of signaling an intent to work cooperatively with these distinguished organizations, the Forest Service instead issued an inflexible maxim in its standards and guidelines, dictating that the bypass flows shall be imposed irrespective of what state water users are doing to promote the same values.

I look forward to hearing what the Forest Service says in the future about this. I am particularly interested in the statements made by the chief last week in front of this Committee that the Forest Service would work cooperatively with affected state and local entities on this important issue.

That concludes my opening statement.

[The prepared statement of Mr. McInnis follows:]

Statement of The Honorable Scott McInnis, Chairman, Subcommittee on Forests and Forest Health

I called this joint hearing of the Subcommittees on Forests and Forest Health and Water and Power to conduct oversight over the use of so-called "bypass flows" on National Forest Lands. As I have said on a number of occasions before, I believe that the Forest Service's coercive practice of tying bypass flow restrictions to land use authorizations for existing water facilities represents the single largest threat to water users in Colorado and indeed throughout the West. In my mind, the policy looks an awful lot like federal blackmail.

In practical terms, what the policy means is this: if you're a municipality or a farmer or a rancher and you rely on a diversion or a ditch or a pipeline located within a National Forest for your drinking water, you are at risk to this policy. You see, every 10 or 15 years, the Forest Service requires these permittees to renew their permit for their diversion or ditch or pipeline. Under the federal bypass flow program, the Forest Service can say to water users: "Sure, we'll renew your permit for your ditch, but in return, we want 10–15–25-even 50% of your annual water yield."

It doesn't matter if your diversion is 50 years old and your water rights are a century old—under this policy, the federal government has the authority to, in effect, blackmail you out of a massive portion of your legally held water rights.

This policy represents a seismic shift in a 135 years of federal water policy. As my Colleagues know, since 1866 Congress has shown near total deference to the States in the allocation and administration of water resources. In Act of Congress after Act of Congress and court decision after court decision, Congress and the Courts have made it exceedingly clear that when the federal government wants water, it has to get in line just like every other water user in America. The Forest Service bypass flow policy blatantly runs afoul this fundamental legal doctrine.

Having said that, I am sympathetic, and indeed very supportive, of efforts to protect the health and vitality of our nation's rivers and streams. In Colorado, the Colorado Water Conservation Board and the Colorado River Water Conservation District have done an outstanding job in promoting this crucially important objective. And if there are ways the Forest Service can provide assistance and support in these community-based efforts, I'm all for it and I'm certainly open to suggestions. But a command and control approach to imposing bypass flows will NEVER be acceptable.

A final point I would like to make is on a local note, but I think its instructive on a larger scale. When the forest planners on the White River National Forest—located in my district in the heart of western Colorado—released their preferred forest plan revisions, there was not even a mention of the yeoman's effort of organizations like the Colorado Water Conservation Board and the Colorado River Water Conservation District to protect instream flow values. Instead of signaling an intent to work cooperatively and collaboratively with these distinguished organizations, the Forest Service instead issued an inflexible maxim in its standards and guidelines dictating that bypass flows SHALL be imposed, irrespective of what State water users are doing to promote the same values. I look forward to hearing what the Forest Service intends to about this, particularly in light of statements made by the Forest Chief last week in front of this committee that the Forest Service would work cooperatively with affected state and local entities on this important issue.

Mr. MCINNIS. I now recognize the Ranking Member, Mr. Inslee, for his statement.

Mr. Inslee, you may proceed.

Mr. INSLEE. If I may defer to my colleague from Colorado, Mr. Udall, I would be happy to do that.

Mr. MCINNIS. That is certainly appropriate.

Mr. Udall?

STATEMENT OF THE HONORABLE MARK UDALL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mr. MARK UDALL. I thank my colleague from Washington. I thank the Chairman for the time.

Mr. Chairman, I don't know that I have seen so many Coloradans in a room since I last sat in the statehouse in the agriculture, livestock, and resources Committee. But it is great to see all of you here today.

I will keep my remarks brief. And I would ask unanimous consent that my total statement be included in the record, Mr. Chairman.

Mr. MCINNIS. Without objection, so ordered.

Mr. MARK UDALL. I want to listen closely to what each person today has to say. And I hope that everyone here will do that as well. This is an important topic.

My hope is that the hearing will give us a chance to better understand all the aspects of this issue and also the different points of view. I say that because I know how divisive this issue or any issue related to water and water rights can be in the West, and especially in Colorado.

From my brief acquaintance with this issue, it seems that it has many of the elements that make for heated controversies in our state.

To begin with, it involves water; that means that it will attract attention, even though the Forest Service has not called for bypass flows very often.

In fact, I understand that out of more than 8,000 water facilities on national forest lands that there have been only 15 or so times that the Forest Service have called for bypass flows.

Still, anything involving water in Colorado is important. As the Chairman pointed out, Coloradans often say that water is the lifeblood of our state, and that is certainly true.

We are an arid state. The mountains catch the snows of winter, but you can't make a living selling umbrellas because it doesn't rain very often. So our agriculture and our cities depend on access to water from Colorado's snow-fed streams and rivers.

But that same water is also the lifeblood of our forests and the range lands and other species with whom we share our state. So there are, of course, a variety of interests that must be considered.

In addition, the bypass flow question is a legal issue that is complicated because it involves the sensitive matter of relations between the Federal and state governments. And on that aspect of the matter, we will be hearing from some real experts today.

I am not a lawyer, and I am certainly not an expert in the fine points involved here. But I do know one thing for sure, and that is, trying to resolve these issues through confrontation and litigation is tempting but often not very productive or satisfactory for anyone.

Usually it is better in the long-run for people to sit down and explore their differences and try to find more constructive ways to resolve them.

Some of the testimony notes that the city of Boulder, which I represent, and the Forest Service sat down with regard to the city's need to build a pipeline to bring water across the Arapaho-Roosevelt National Forests. And thanks in part to the work by my predecessor, Congressman Skaggs, the city of Boulder and Forest Service were able to reach an agreement that met the needs of both parties.

Now, in fairness, this particular approach may not work in other situations, but I think it does show that if there is willingness on the part of everybody involved to sit down and work together, it is possible to find some common ground.

So, Mr. Chairman, to conclude, I am here mostly to listen and to learn, and I hope the hearing will help us identify some ways that we can work together whenever possible, rather than putting our energies into fighting each other.

So thank you very much.

[The prepared statement of Mr. Mark Udall follows:]

Statement of The Honorable Mark Udall, a Representative in Congress from the State of Colorado

Mr. Chairman, I appreciate having this opportunity to hear from our witnesses.

I plan to listen closely to what each witness has to say, and I hope that everyone else here will do that too—because this is an important topic.

I hope that the hearing will give us a chance to reach a better understanding of all aspects of this issue and also of the different points of view.

I say that because I know how divisive this issue—or any issue related to water and water rights—can be in the west, and especially in Colorado.

From my brief acquaintance with this issue, it seems that it has many of the elements that make for heated controversies in our state.

To begin with, it involves water. That means that it will attract attention—even though the Forest Service has not called for bypass flows very often.

In fact, I understand that out of more than 8000 water facilities on national forest lands, there have been only 15 or so times that the Forest Service has called for bypass flows.

Still, anything involving water is important in Colorado.

Coloradans often say that water is the lifeblood of our state—and that is true.

We are an arid state. The mountains catch the snows of winter, but you can't make a living selling umbrellas because it doesn't rain very often.

So, our agriculture and our cities both depend on access to water from Colorado's snow-fed streams and rivers.

But that same water is also the lifeblood of the forests and the rangelands—and the other species with whom we share our state.

So, there are a variety of interests that must be considered.

In addition, the "bypass flow" question is a legal issue that is complicated because it involves the sensitive matter of relations between the federal and state governments.

On that aspect of the matter, we will be hearing from some real experts today

I am not a lawyer, and I certainly am not an expert in the fine points involved.

But I do know one thing for sure—and that is that trying to resolve these issues through confrontation and litigation is tempting but often not very productive or satisfactory for anyone.

Usually, it is better in the long run for people to sit down and explore their differences and try to find more constructive ways to resolve them.

For example, as noted in some of the testimony, that has been the approach taken by the City of Boulder and the Forest Service with regard to the city's need to build a new pipeline to bring water across the Arapaho–Roosevelt National Forest.

Thanks in part to work by my predecessor, Congressman Skaggs, the city and the Forest Service were able to reach an agreement that met the needs of both parties.

That particular agreement may not work as well in other cases. But I think it does show that if there is a willingness on both sides to listen and to work together, it is possible to find some common ground.

So, as I say, Mr. Chairman, I am here mostly to listen and to learn—and I hope that goes for everyone else as well, and that maybe this hearing will help identify some ways for everyone involved to work together rather than to put our energies into fighting. I am ready to help in any way that I can to assist that process.

Mr. MCINNIS. Thank you, Mr. Udall. I appreciate the statement.

We will now proceed with the second panel. The panel will note, you have a timer sitting at the center of the table. Each member of the panel will be allowed 5 minutes. I think at about the 4-minute, where you have about 1 minute remaining, you will get a little sum up.

As a courtesy to the remaining witnesses, I ask that you respect the time when it expires and conclude your remarks so that we may move on to the next witness.

With that in mind, Mr. Holsinger, you may proceed.

STATEMENT OF KENT HOLSINGER, ASSISTANT DIRECTOR, COLORADO DEPARTMENT OF NATURAL RESOURCES

Mr. HOLSINGER. Thank you, Mr. Chairman. It is a great pleasure and a great honor to be here on behalf of the State of the Colorado.

I would like to start by thanking you, Senator Allard, Congressman Schaffer, and the many others that are interested in this issue and continue to work on it.

The State of Colorado envisions a new era of cooperation and comity between the Federal Government and the state. But for that to happen, the Federal Government must abandon their practice of imposing what we believe are ill-founded and, indeed, illegal bypass flows on water providers.

For one, bypass flows don't work. They don't work within the priority system of many Western States, and they don't respect private property rights.

This is an issue of tremendous scope and importance. It is not just a Colorado issue. In fact, seven Western States have weighed in on a pending lawsuit with Trout Unlimited, saying that bypass flows are indeed illegal, and that the Forest Service has no author-

ity to impose them upon water providers as conditions to permit renewals.

True, there haven't been many imposed yet. But we know from the Forest Service and the instream flows strategies paper that was referenced earlier today that they advocate the increased use of bypass flows; they even go so far as to say condemnation of water rights should be considered.

We don't believe these are good policies, and we certainly hope that policies such as these, as we have seen in the White River National Forest as well, will be abandoned in favor of a more collaborative effort that respects state water laws and even relies on state instream flow programs.

I might add that this is a bipartisan issue in Colorado. Colorado's Democratic attorney general, Ken Salazar, has asked that we introduce for the record a paper that he recently did for the Colorado Water Congress. His paper talks about the unfair use of bypass flows and recommends other means by which we might achieve these purposes.

I would like to submit that for the record, if I may, Mr. Chairman.

Mr. MCINNIS. Without objection, so ordered.

[The paper referred to follows:]

Buying Water Rights For Instream Flows -- An Opportunity to Resolve Environmental Conflicts

BY ATTORNEY GENERAL KEN SALAZAR, TO APPEAR IN THE SPRING 2001 ISSUE OF COLORADO WATER RIGHTS, PUBLISHED BY THE COLORADO WATER CONGRESS

The current budget surplus gives the Bush administration a unique opportunity to achieve the instream flow protection sought for our federal public lands without using the confrontational tactics that have led to many of our Western water wars. Federal agencies in the past have used reserved rights claims or land use permitting authority to attempt to preserve instream flows on federal lands. Too often these tools have threatened to upset decades of pre-existing water uses and the local economies that those uses support. The end result of these approaches has enriched water lawyers and engineers, but little protection of the resource has been achieved. Indeed, the United States has unsuccessfully spent over $70,000,000 in the last three decades in an effort to protect instream flows with little success. All of that could change if the Bush administration would aggressively use the Land and Water Conservation Fund to help states purchase or lease senior water rights from private sellers and dedicate those rights to instream flows.

The members of the Colorado Water Congress are only too familiar with the attempts by various federal agencies to impose by-pass flows during the re-permitting or re-licensing of structures impounding on, diverting from, or passing through federal lands. This approach has endangered the yield of many municipal and irrigation water suppliers, years and even decades after those water users first began their diversions. Though the State understands and supports the water needs of our public lands, the federal government's by-pass flow approach is unfair and must change if meaningful protection for our public lands is to be achieved.

Even when the federal government has been willing to work with water suppliers to balance protection of instream flows with the needs of water right owners, lawsuits have threatened the implementation of agreements between water users and the Forest Service. In Trout Unlimited v. U.S. Dept. of Agriculture, currently pending in federal court in Colorado, Trout Unlimited has challenged the Forest Service's failure to require bypass flows as a condition of renewing a Special Use Permit for a reservoir within the Arapaho National Forest. The Forest Service had concluded that bypass flows were unnecessary after modeling showed that a Joint Operations Plan among the owners of several reservoirs and the Forest Service would preserve the rights of the water owners as well as improve the overall fish habitat.

The good news is that there is a better tool available that would allow federal land managers to assure the preservation of instream flows. This tool is the Land and Water Conservation Fund. The Land and Water Conservation Fund (LWCF) is

a special account created in 1964. While this fund has primarily been used in the past to acquire new recreation lands, the law creating the fund specifically authorizes use of the fund to acquire water.

In the Forest Service's November 30, 2000, white paper concerning "Instream Flow Protection Strategies for the 21 " Century," one of the ten tools mentioned for protecting instream flows through public lands was the purchase or lease of water rights from willing private sellers. This approach has been very successful in acquiring over 7 million acres of important recreational lands over the last 35 years. As public land managers now turn more of their efforts in the western United States from acquisition to stewardship of existing public lands, water takes on an increased importance.

The Land and Water Conservation Fund accumulates revenues from federal outdoor recreation user fees, the federal motorboat fuel tax, surplus property sales, and revenues from oil and gas leases on the Outer Continental Shelf. While the LWCF is authorized to spend up to $900 million a year, Congress must authorize appropriations and if not authorized, the revenues remain in the U.S. Treasury. Large budget deficits in many of the last 35 years have caused great fluctuation in funding.,. So while $24.5 billion could have been appropriated from the fund since 1965, only. $11.4 billion has been authorized.

The Bush Administration has announced that it will seek full funding for the entire $900 million LWCF authorization for this year. In addition, the proposed Conservation and Reinvestment Act (CARA - currently H.R. 701), if passed, would authorize an additional $900 million annual expenditure from the LWCF, with half of these funds (also derived from off shore oil and gas leases) set aside for state administered grants. I will request that the Bush administration sustain and build upon these efforts in the years ahead.

Though the LWCF funds exist, federal land managers have voiced some skepticism about Colorado's eligibility to participate in these programs for water acquisition. The expressed concerns involve a requirement that the federal government retain title to any acquired water rights used for instream flow purposes. The land managers seem confused by the prohibition in state law that restricts ownership of an instream flow to the Colorado Water Conservation Board (CWCB). While it is true that only CWCB can own instream flow water rights, the same statute allows parties to donate acquired water rights to the CWCB and maintain considerable operational control over the donated rights pursuant to the terms of the donation agreement.

Imposition of by-pass flows has caused unnecessary and wasteful controversy that has distracted all of us from the goal of protecting Colorado's precious public lands. Just as the land acquisition program of the LWCF has been successful in preserving a public land legacy, the purchase of water rights through the LWCF can also be successful in providing the water for these public lands.

As Colorado Attorney General, I would be pleased to structure donation agreements between CWCB and the federal government so water rights acquired can provide the long-term protection of instream flows we all desire. I urge Congress to fund LWCF to its full $900 million limit and to adopt the CARA legislation in order to augment the funds available for these important resource protection activities.

Mr. HOLSINGER. I might talk a minute about the congressional task force. All members of the congressional task force agreed that the Forest Service should forego bypass flows and instead look at cooperative efforts, at incentive programs for water providers, and at using state instream flow programs—and for good reason.

Over the last three decades, the Forest Service has spent some $70 million, according to our attorney general, on fighting to obtain instream flows with very limited success.

By contrast, the State of Colorado, through our water conservation board, has appropriated instream flows on over 8,000 miles of streams within the state.

I brought a map with me today to show the scope of the instream flows that the State of Colorado has appropriated, particularly on national forests lands. And I think the members of the Subcommittees can see that we have extensive appropriations that literally cover the state.

There are several success stories I might touch on that really demonstrate that there is a precedent for working together to get over these issues.

One is the Joint Operating Plan on the Poudre River. This is a plan that, through a voluntary agreement worked out with the Forest Service, more flows are guaranteed for aquatic habitat than bypass flows or even historic conditions.

Nevertheless, Trout Unlimited has sued, saying the Forest Service must impose bypass flows. That is the lawsuit that is pending today.

On Boulder Creek that Congressman Udall mentioned, there was a tremendous example of the state, local, and Federal Government working together. The city of Boulder donated instream flows to the water conservation board, except in emergencies when they can take back those flows. It has worked out very well for all parties involved.

Hanging Lake is another example. I brought a picture; this is in Glenwood Canyon. The state and the Federal Government have worked cooperatively to protect this incredible natural environment and, indeed, all of the unappropriated flows.

There is ample precedent for the states and the Federal Government to work together. This is a huge issue, again, across the Western States. Several states are concerned about where the Forest Service is going.

More than 8,000 permits out there; true. That is more than 8,000 opportunities for conflict.

We would rather see this issue addressed up front, honestly, forthrightly, with the participation of all parties.

And with that, Mr. Chairman, I will conclude my remarks.

[The prepared statement of Mr. Holsinger follows:]

Statement of Kent Holsinger, Assistant Director, Colorado Department of Natural Resources

Introduction

We greatly appreciate Chairman McInnis' interest and work on this issue. We thank Chairmen McInnis and Calvert for holding this hearing on such an important matter. We also thank Congressman Schaffer and Senator Allard for circulating and sending letters to Secretary Veneman and Attorney General Ashcroft respectively.

Everyone's heard the old adage, "Whiskey's for drinkin' and water's for fightin'." With all due respect to Mark Twain, at least in this case, we beg to differ. The State of Colorado envisions a new era of cooperation: one of comity with the federal government that results in real environmental benefits.

For this to happen, the U.S. Forest Service must abandon the ill-founded, and we believe, illegal, practice of imposing bypass flows on water providers. Instead, it must work collectively with the states and water providers to protect resource values. Specifically, the Forest Service must work within the bounds of state water laws and pursue any federal claims to water in state adjudications.

Federal claims for water have always been contentious and have rarely been successful. With Congress' enactment of the McCarran Amendment in 1952, the United States waived its sovereign immunity and consented to the jurisdiction of state water adjudications. In 1993, the U.S. Supreme Court, in U.S. v. Idaho, affirmed that the McCarran Amendment subjected federal claims to water rights to state adjudications and clarified that federal claims were subject to state laws.

The Forest Service must attain the secondary purposes of the National Forests by obtaining and exercising water rights in accordance with state and federal laws. Bypass flow claims contravene one of the primary purposes for which the forest lands were reserved--to secure favorable water flows for water providers. Moreover, bypass flows simply don't work. They fail to provide environmental protection and instead create an atmosphere of hostility, litigation and distrust. Opposition to by-

pass flows is a bipartisan issue in Colorado. Attorney General Ken Salazar also believes the policy of imposing bypass flows is illegal and ill founded. He asks that you include the following article about alternative strategies to protect instream flows in the record for this hearing.

History

Many of Colorado's water supply facilities are located on, or transport water across, federal lands. So our relationship with the Forest Service is vitally important. While we understand, and concur with, the Forest Service's desire to protect resource goals, the Supreme Court and the Congress have clearly established that federal claims on water are subject to state laws through a long series of carefully considered decisions and thoughtfully executed laws. The system thereby established protects well-established principles of federalism and property rights. We remain prepared to vigorously defend Colorado law against any Forest Service attempt to make an end-run around Congress and the rights of Coloradans.

The Forest Service started imposing bypass flows in Colorado in the early 1990s as a condition of permit renewals. As Chairman McInnis is well aware, bypass flows are among several contested issues in the controversial White River National Forest Plan in Colorado. Several other Western States face these issues as well. In fact, seven Western states recently filed briefs in a pending lawsuit against the position that the Forest Service has the authority to impose bypass flows.

In 1992, then Secretary of Agriculture Madigan stated the Forest Service would not wrest water from permit holders through bypass flows. The Clinton Administration revoked this policy in 1994. Since then, the Forest Service has publicly stated its intent to use bypass flows more frequently. For example, in the November, 2000 "Water for the National Forests and Grasslands: Instream Flow Strategies for the 21st Century" by the USDA Forest Service, the agency advocates imposing bypass flows as conditions to Ditch Bill easements[1] (an issue of immense scope and consequence for thousands of farmers and ranchers) and even condemnation of water rights.

That document goes on to lament that federal claims on water, "are always heard in often hostile state courts before judges without juries that never understand them" and that flexing their perceived regulatory power is, "a key component of the policy shift the FS needs to undertake if we are really going to protect and restore instream flow values." (pp.5 and 11 respectively). We strongly disagree. And so did a congressional task force convened in 1997.

Congress convened a Water Rights Task Force in response to the bypass flow controversy. The Task Force concluded there was no legal authority for the Forest Service to impose bypass flows.

The Forest Service Has No Legal Authority to Impose Bypass Flows

"Absent an explicit grant of authority by Congress," said the Task Force, there is no such regulatory power to impose bypass flows on water providers.[2] The Forest Service lacks statutory authority to impose bypass flows through forest plans. Under NFMA, land use authorizations are subject to "valid existing rights." 16 U.S.C. Section 1604(I) (1988). Moreover, Congress explicitly protected the existing use, "allocation and state jurisdiction over water" as well as all valid existing rights when it enacted FLPMA. See generally 43 U.S.C. Sections 1701–1784 (1988). Specifically, subsections 701(g) and (h) of Title VII of FLPMA are clear on this proposition.

According to the Task Force, Congress did not intend FLPMA to operate in contradiction to existing water rights, water development, water laws or compacts. In fact Congress preserved water rights language in the 1866 Mining Act while repealing right-of-way provisions under that same Act. Neither FLPMA nor NFMA justify anything but deference to state water laws.

Not all members of the Task Force agreed with these conclusions. However, they all agreed upon the following recommendations:

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[1] The Ditch Bill, a 1986 amendment to of the Federal Land Policy Management Act (FLPMA) (43 U.S.C. Section 1761(c)), provided agricultural water users with the option of accepting a permanent easement from the Forest Service for certain ditches, reservoirs or other facilities constructed on Forest Lands. It applied to all structures in existence prior to the October 21, 1976 effective date of the Federal Land Policy Management Act, (FLPMA) and was enacted to give agricultural water users the opportunity to avoid a Forest Service process that was increasingly seeking to attach on them burdensome terms, conditions and fees. Unfortunately, this and other controversies related to Ditch Bill easements continue to this day.

[2] While the State of Colorado strongly believes there is no legal authority for bypass flows, we recognize the Forest Service may require non-flow related permit conditions such as: dam safety requirements; best management practices; conditions for recreational purposes; or conditions for stocking or management of fish and wildlife.

- Achieving national forest purposes, whenever possible, through the use of alternative water management strategies, rather than through bypass flow requirements;
- Using state instream flow programs, where available, to acquire rights and provide water for national forest purposes; and
- Seeking voluntary agreements with non-federal water rights holders.

Alternatives to Bypass Flows

Alternative management strategies such as: federally funded mitigation; collaborative measures; land exchanges; and non-flow alternatives, including structural measures should be pursued. These could more effectively protect resources than litigation or hotly contested bypass flows. Also, operational changes to water supply facilities can sometimes provide environmental benefits without interfering with water rights.

Incentives to water providers could help propel the federal government into a new era of successful environmental protection. For example, the Task Force recognized Congress could amend 16 U.S.C. Section 499 and other applicable laws to ensure permit revenues are deposited into accounts, without additional authorization or appropriation, to create incentives in the national forests from which revenues are derived. Another opportunity for funding incentives for better environmental protection may stem from the Land and Water Conservation Fund (LWCF). The State of Colorado supports the Bush budget proposal to fully fund this important program. The State hopes Congress will consider how best to create incentive programs from the LWCF. However, utilization of state instream flow programs may hold the most promise for protecting resource values.

Working with State Instream Flow Programs

State instream flow programs may provide the best avenue towards real environmental protection on forest lands. The Colorado Water Conservation Board (CWCB, or the "Board"), created in 1937, is responsible for the appropriation, acquisition and protection of instream flow and natural lake level water rights to preserve the natural environment. Today, we have a program that effectively balances the needs of people and the environment. This program is particularly well suited to protecting instream values on national forest lands.

Since the creation of the State's Instream Flow Program in 1973, the CWCB has appropriated instream flow water rights on more than 8,000 miles of streams (8,433 in 1,421 reaches) and 486 natural lakes in the state. In 1986, the Colorado General Assembly authorized the CWCB to acquire even senior water rights to preserve the environment.[3] By working with water right owners, Colorado can protect more streams or improve the priority of existing instream flow rights.

CWCB's Water Acquisition Program

In 1986, the Colorado legislature amended the instream flow statute with Senate Bill 91 (SB–91) to accommodate federal instream flow needs. The new statute required the CWCB, in addition to requesting instream flow recommendations from state agencies, to request recommendations from the United States Department of Agriculture and the United States Department of the Interior.

The SB–91 was intended to eliminate the need for federal agencies to independently pursue instream flows through bypass flows and environmental statutes on federal lands. Under this law, federal agencies have the opportunity to provide instream flow recommendations to the Board for protecting the natural environment on the public lands. The Water Acquisition Program (WAP) was then created to acquire water for instream flow uses. This innovative program provides the means for the CWCB to acquire more water than ever before through various contractual agreements, ranging from donations to leases and purchases. While original appropriations may only be acquired by the CWCB, the Board may contract with federal agencies to obtain interests in water that have already been appropriated. In such a case, the Forest Service could retain title to water rights, but work out an arrangement with the CWCB to ensure they protect both instream flows and property rights.

Enforcement of State Instream Flows

While some may argue the CWCB does not adequately protect its interests, the Board aggressively enforces instream flow water rights. The CWCB monitors all of its Instream flow water rights throughout the state. They rely on existing USGS

[3] The CWCB has acquired over 390 cubic feet per second (cfs) and 3,652 acre feet (af) of senior rights on streams and lakes across the State. Donors have given the CWCB 378 cfs and 200 af. In addition, the CWCB has entered into leases and contracts for 3,451.7 af and 13.5 cfs.

gages, a network of satellite gages, and numerous staff gages. In addition, the CWCB coordinates closely with the Division Engineers' offices to make sure that the Board's water rights are being administered in priority. If a water right application is determined to injure the Board's Instream flow water rights, then the staff files a Statement of Opposition.

Once a Statement of Opposition is filed, the Board works with the water right applicant to resolve potential concerns. Then, if terms and conditions can be worked out to protect the instream flows, they are entered into the Applicant's water right decree without the need for litigation. Not only does this ensure full protection of the Board's ISF water rights, but it also streamlines the process, saving the applicant and the state valuable time and resources. However, if sufficient terms are not worked out, the Board proceeds to trial.

The State of Colorado recognizes there is room to improve upon these areas. For this reason, we have urged our congressional delegation to support increased funding the USGS stream gages and we have entered into agreements with other entities, including the Colorado chapter of Trout Unlimited, to monitor stream levels. Nevertheless, from 1977 to the present, the CWCB has filed a total of 694 Statements of Opposition to protect its instream flow water right appropriations. With regard to the White River National Forest, the Department of Natural Resources and CWCB have numerous agreements in Summit County that provide protection for ISF water rights.

Cooperation Between the CWCB and the Federal Government

The CWCB has a very productive relationship with the Bureau of Land Management (BLM). To date, some 33 stream segments have been protected in collaboration with the BLM. There, we have entered into contractual arrangements and long-term leases that meet the needs of both the federal government and the State. The BLM also supplied a series of instream flow priorities, which CWCB plans to pursue across the State of Colorado.

Unfortunately, at this time, only one agreement between the CWCB and the Forest Service has been signed utilizing the tools provided by SB–91.[4] This agreement provided the transfer of some of the Forest Service's water rights associated on Hunter Creek to the CWCB for instream flow purposes. Through these types of agreements, the CWCB, can address some, if not all, of the instream flow needs of the Forest Service in the White River National Forest and other national forests in the state.

The CWCB has initiated several conversations with the Forest Service in an attempt to develop cooperative efforts for the protection of the environment on forest lands. These include discussions on potentially transferring interests in water rights with lands the Forest Service has acquired (via purchase or land exchange) to the CWCB for instream flow purposes. Discussions in Region Two continue in the "Pathfinder Project" which hopes to resolve controversies related to flows, travel management, etc. on the Gunnison and Uncompaghre National Forests (GMUG). The State of Colorado appreciates the effort and is an active participant, but new the forest planning regulations would hinder an already onerous federal process to the point discussions may be fruitless.

Success Stories

Several examples bolster the State's contention that environmental purposes are best fulfilled by cooperation with the states and water providers.

Operational Changes in the Cache la Poudre River

Water storage can serve two purposes -- providing water for municipal and agricultural purposes and augmenting streamflows to enhance aquatic habitat. In fact, the Division of Wildlife cited naturally occurring low winter flows as the limiting factor in the Poudre River fishery. Thanks to a cooperative agreement between water providers and the Forest Service, aquatic habitat is protected above and beyond historic conditions.

While water providers disagreed that the Forest Service had the legal authority to impose bypass flows, they worked with the Forest Service to develop a plan for the coordinated operation of a number of reservoirs located in the Poudre River headwaters. This "Joint Operation Plan" (JOP) was designed to optimize aquatic habitat on National Forest lands without causing a loss of the water supply. Under

[4] Unfortunately, the Forest Service often takes the position that such agreements illegally forfeit a federal property interest in water without prior Congressional approval. See "Water for the National Forests and Grasslands: Instream Flow Strategies for the 21st Century" by the USDA Forest Service, November 30, 2000 at 8. This concern is without merit.

the JOP, 3,000 acre-feet of storage water is released for beneficial uses when it will also augment low wintertime flows.

The Poudre River JOP provides a case study of the potential for optimization of the operation of water supply facilities to attain National Forest purposes without causing a loss of water supply from these facilities. When comparing the JOP with bypass flows during a series of years, more environmental benefits, and more water, derive from the cooperative agreement.

Ironically, Trout Unlimited rejected the JOP and sued the USDA alleging the Forest Service not only has authority, but an obligation to impose bypass flows. The parties to the Trout Unlimited v. USDA case are now entering briefs with the federal district court in Colorado. The State of Colorado joined as a defendant intervenor in the case. The States of Alaska, Wyoming, Idaho, New Mexico, Nevada and Arizona have all filed amicus briefs to the effect that the U.S. Forest Service has no legal authority to impose bypass flows. That seven Western states have weighed in on this issue speaks volumes.

Boulder Creek -- Protection of Instream Flows under Colorado Law

Boulder Creek arises near the Continental Divide in the mountains west of Boulder, Colorado. Historically, diversions on all three branches have dried up the creeks at various locations during periods of low flow—mostly in late summer and winter.

The Forest Service threatened bypass flows on a special use permit required for a rebuilt pipeline needed by the city. Boulder pointed to its agreement with the Colorado Water Conservation Board (CWCB), the only entity that can hold instream flows under Colorado law, for instream flow protection consistent with the Forest Service standard.

This innovative agreement combines new instream flow filings by the CWCB with some of Boulder's historic water rights to ensure adequate resources for aquatic habitat. The result is a respectable trout fishery and riparian habitat in the midst of an urban environment.

While the Forest Service was at first unwilling to accept this arrangement, after extensive negotiations, they agreed the City's contract with the CWCB suffices for national forest purposes so long as it remains in effect and so long as the CWCB upholds and protects those instream flows.

Hanging Lake

In 1996, instream flow and natural lake protections for Hanging Lake and East, West and Main Dead Horse Creek resulted from cooperative efforts between the regional forester and the CWCB. While the CWCB's statute requires them to appropriate the "minimum amount necessary to preserve the environment to a reasonable degree," the Board demonstrated great flexibility and obtained rights to all unappropriated flows in the basin to preserve the unique hydrologic and geologic environment including Bridal Veil Falls and Hanging Lake. Working together, the State of Colorado and the Forest Service protected a unique natural environment that provides outstanding recreation and aesthetic qualities that attract thousands of travelers from around the world.

Examples in Other States

There are success stories in other states as well. Arizona, Idaho and Montana have taken strides to work with the federal government rather than against it. But they are plagued by many of the same challenges we face in Colorado. In Arizona, a state process would guarantee consultation with the Forest Service. But the agency created a controversy where none needed exist by insisting it needed to "retain control." The USFS also sued in Idaho, claiming Idaho law is inadequate to protect federal interests in water uses on forest lands.

By contrast, the Bureau of Land Management requested the Idaho Water Resources Board hold instream flow and storage rights on federal lands. No federal-state tension exists on those successful efforts. In 1993, the Montana Compact Commission and the Forest Service entered into a Memorandum of Understanding (MOU) on federal claims to water. The State and the Forest Service have been working out these issues, but any threat of bypass flows could potentially hinder their good work.

Misplaced Criticism of State and Voluntary Efforts

The minority of the Task Force mentioned the agency has "usually attempted" to respect the equities and that they have "tried" to accommodate facilities. But is it good enough to "attempt" or "try" to respect the will of Congress and the laws of the land? Even detractors agree state and collaborative measures to protect the environment should be "vigorously pursued" by the Forest Service. The minority contention that the agency needs bypass flows to secure, "voluntary protective meas-

ures" on forest lands is nothing less than extortion. That word is defined as "the act or practice of wresting anything from a person by force, by threats, or by any undue exercise of power; undue exaction; overcharge.

Sound Science

Some detractors argue state instream flow programs often do not provide sufficient flows. However, the State of Colorado's instream flow methodology, R2 Cross, is more than adequate to address instream flow needs. In fact, that methodology was developed by Region Two of the Forest Service and improved upon by the State of Colorado. We simply insist that recommendations are based upon sound science and recognize existing water rights and interstate compacts. It is critical that the Forest Service base their recommendations on sound science and a specific assessment of species or habitat needs. Even then, we should work with the Forest Service to monitor and accurately evaluate the actual impacts of such acquisitions.

Prior Appropriations and Interstate Compacts Help Protect Flows

While some argue states must make substantial changes in their programs and laws before the Forest Service quits imposing bypass flows, the priority system often protects instream resources. As to the assertion that state law might allow the dam owner to dry up the stream, that is simply not the case in Colorado. Senior demands pull water past upstream junior diversions and assure healthy streams in the process. Interstate compacts do the same on a much larger scale. A full 75% of the Colorado River must pass through Colorado to fulfill compact requirements to other Colorado River Basin States. Forty percent of the Arkansas River must do the same. In fact, of all rivers in this headwaters state, only portions of warm water habitat on the South Platte are occasionally dewatered in dry years.

Some rivers and several tributaries historically dried up, including the South Platte. Since 1900, South Platte River flows, as many in the state, have increased steadily due to irrigation and more efficient water use through storage. According to the Colorado Division of Wildlife, water storage has greatly increased the sustainable trout fisheries in Colorado. For example, Gold Medal trout water exists below several major reservoirs and provides better trout habitat, particularly in dry years, than existed prior to development.

Endangered Species

Instream flows for cutthroat trout streams (the greenback cutthroat trout is listed as a threatened species and the Colorado River cutthroat trout has been petitioned for listing) are among the highest priorities in the 2002 Work Plan for the CWCB.

The greenback cutthroat trout has done exceptionally well in recent years in streams administered by the prior appropriations doctrine in Colorado. In this case, the U.S. Fish and Wildlife Service delegated incidental take authority under Section 9 of the Endangered Species Act (ESA) to the Colorado Division of Wildlife for the greenback cutthroat trout, a threatened species. Thanks to state-led efforts, it has nearly recovered to the point of delisting.[5]

Conclusion

The State of Colorado recognizes that laws governing management of National Forests direct the Forest Service to prevent damage to the resource. Our interest lies in working with the Forest Service to do just that. The State of Colorado insists, however, that resource protection be done consistent with the prior appropriations system and the property rights of Coloradans. Some assert bypass flows are not a serious issue. Seven Western states, including Colorado, disagree. Prevention is nine-tenths of the cure for the 8,370 permits for which bypass flow controversies could arise.

Where the Forest Service does obtain water, it must do so in priority and respect that water rights are vested property rights. The Forest Manual will not solve the problems discussed at this hearing. Even with direction from the agency, many employees at the regional and local levels simple ignore such prescriptions even if they come from the Secretary. Accordingly, forest plans should reflect a strong preference for working with state instream flow laws and collaborative agreements with water users.

Using strategies that comply with the McCarran Amendment and state water laws, the Forest Service can both accomplish the purposes of the national forests and enjoy a cooperative relationship with the states and their water providers. The

[5] Ironically, the ESA may have actually inhibited recovery efforts for the Greenback Cutthroat. Private waters often provide the most productive habitat for these fish, but landowners have been unwilling to let the State stock greenbacks on their land because of the looming shadow of the ESA.

State of Colorado has extended an open invitation to work with the Forest Service to protect our unique and important environment and we look forward to doing that. Thank you.

[The following article was submitted for the record by Mr. Holsinger:]

Buying Water Rights For Instream Flows – An Opportunity to Resolve Environmental Conflicts

***By* Attorney General Ken Salazar**
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The current budget surplus gives the Bush administration a unique opportunity to achieve the instream flow protection sought for our federal public lands without using the confrontational tactics that have led to many of our Western water wars. Federal agencies in the past have used reserved rights claims or land use permitting authority to attempt to preserve instream flows on federal lands. Too often these tools have threatened to upset decades of pre-existing water uses and the local economies that those uses support. The end result of these approaches has enriched water lawyers and engineers, but little protection of the resource has been achieved. Indeed, the United States has unsuccessfully spent over $70,000,000 in the last three decades in an effort to protect instream flows with little success. All of that could change if the Bush administration would aggressively use the Land and Water Conservation Fund to help states purchase or lease senior water rights from private sellers and dedicate those rights to instream flows.

The members of the Colorado Water Congress are only too familiar with the attempts by various federal agencies to impose by-pass flows during the re-permitting or re-licensing of structures impounding on, diverting from, or passing through federal lands. This approach has endangered the yield of many municipal and irrigation water suppliers, years and even decades after those water users first began their diversions. Though the State understands and supports the water needs of our public lands, the federal government's by-pass flow approach is unfair and must change if meaningful protection for our public lands is to be achieved.

Even when the federal government has been willing to work with water suppliers to balance protection of instream flows with the needs of water right owners, lawsuits have threatened the implementation of agreements between water users and the Forest Service. In Trout Unlimited v. U.S. Dept. of Agriculture, currently pending in federal court in Colorado, Trout Unlimited has challenged the Forest Service's failure to require bypass flows as a condition of renewing a Special Use Permit for a reservoir within the Arapahoe National Forest. The Forest Service had concluded that bypass flows were unnecessary after modeling showed that a Joint Operations Plan among the owners of several reservoirs and the Forest Service would preserve the rights of the water owners as well as improve the overall fish habitat.

The good news is that there is a better tool available that would allow federal land managers to assure the preservation of instream flows. This tool is the Land and Water Conservation Fund. The Land and Water Conservation Fund (LWCF) is a special account created in 1964. While this fund has primarily been used in the past to acquire new recreation lands, the law creating the fund specifically authorizes use of the fund to acquire water.

In the Forest Service's November 30, 2000, white paper concerning "Instream Flow Protection Strategies for the 21st Century," one of the ten tools mentioned for protecting instream flows through public lands was the purchase or lease of water rights from willing private sellers. This approach has been very successful in acquiring over 7 million acres of important recreational lands over the last 35 years. As public land managers now turn more of their efforts in the western United States from acquisition to stewardship of existing public lands, water takes on an increased importance.

The Land and Water Conservation Fund accumulates revenues from federal outdoor recreation user fees, the federal motorboat fuel tax, surplus property sales, and revenues from oil and gas leases on the Outer Continental Shelf. While the LWCF is authorized to spend up to $900 million a year, Congress must authorize appropriations and if not authorized, the revenues remain in the U.S. Treasury. Large budget deficits in many of the last 35 years have caused great fluctuation in funding. So while $24.5 billion could have been appropriated from the fund since 1965, only $11.4 billion has been authorized.

The Bush administration has announced that it will seek full funding for the entire $900 million LWCF authorization for this year. In addition, the proposed Conservation and Reinvestment Act (CARA – currently H.R. 701), if passed, would authorize an additional $900 million annual expenditure from the LWCF, with half of these funds (also derived from off shore oil and gas leases) set aside for state administered grants. I will request that the Bush administration sustain and build upon these efforts in the years ahead.

Though the LWCF funds exist, federal land managers have voiced some skepticism about Colorado's eligibility to participate in these programs for water acquisition. The expressed concerns involve a requirement that the federal government retain title to any acquired water rights used for instream flow purposes. The land managers seem confused by the prohibition in state law that restricts ownership of an instream flow to the Colorado Water Conservation Board (CWCB). While it is true that only CWCB can own instream flow water rights, the same statute allows parties to donate acquired water rights to the CWCB and maintain considerable operational control over the donated rights pursuant to the terms of the donation agreement.

Imposition of by-pass flows has caused unnecessary and wasteful controversy that has distracted all of us from the goal of protecting Colorado's precious public lands. Just as the land acquisition program of the LWCF has been successful in preserving a public land legacy, the purchase of water rights through the LWCF can also be successful in providing the water for these public lands.

As Colorado Attorney General, I would be pleased to structure donation agreements between CWCB and the federal government so water rights acquired can provide the long-term protection of instream flows we all desire. I urge Congress to fund LWCF to its full $900 million limit and to adopt the CARA legislation in order to augment the funds available for these important resource protection activities.

Mr. MCINNIS. Thank you, Mr. Holsinger.

Mr. Getches, you may proceed.

STATEMENT OF DAVID GETCHES, BYPASS FLOWS CONGRESSIONAL TASK FORCE MEMBER

Mr. GETCHES. Thank you, Mr. Chairman, for the opportunity to be here. I have submitted written testimony, and I will just highlight a few of the things that were in there and add to those remarks briefly.

Let me step back for a minute and put this in historical perspective. It is legitimate to ask, how did this issue become as visible as it is and get as much attention as it has gotten? And the history there goes back to the mid-1980's when permits for maintenance of water facilities on the national forests were coming up for renewal, as they must under the Federal Land Policy and Management Act.

The Forest Service at that point was just beginning to implement the then about 10-year-old mandate of FLPMA, and they didn't have well-established procedures on how to do this.

To match their lack of experience in dealing permit renewals and permit issuance is their, if I may be a bit pejorative and speculative here, their lack of appreciation for how we in Colorado think about water rights. They had no idea what it was like for a Federal agency to mess around with water rights in Colorado. They found out.

They found out because we have congressional delegation that is always vigilant about how those water rights are asserted and protected and that respects the state's system for administration of water rights. And that delegation moved into action.

They perceived what was going on at that time, which was a few instances where the Forest Service had asked for bypass flows as a condition of renewing permits for existing water facilities on the national forest to be a "policy" or a "practice" or a "program."

And Senator Brown, as he indicated, and Mr. Allard, now Senator Allard, set in motion inquiries to the Department of Agriculture about this practice.

Now, at the same time as they were involved in correspondence with Forest Service, work began on solutions to the very problems that we are talking about.

Mr. Udall addressed the Lakewood problem. The issue involving the Poudre River, where bypass flows were requested by the Forest Service, is summarized also in the task force report.

I assume that the report of the Federal Water Rights Task Force has been made part of the record here in this Committee. If not, I would request that it be made part of the record.

The task force was established by Senator Brown's amendment to the farm bill. And I was a member of that task force with my friend Bob Lynch here, who will address you in a moment.

That task force looked into this problem comprehensively. And to the surprise of myself, and I think of the whole Committee, we found virtually no instances of the use of the bypass flow authority outside Colorado. We found a handful of what could arguably be call bypass flow conditions nationwide.

We held hearings in 10 different places, and we had meetings stretching over a year and received written testimony. The record is just about void of any use of this authority.

And I understand that since the task force completed its work in 1997, there have been none. So it appears that the problem is a very small one, if it is a problem at all.

Now, it is not a great problem because the Forest Service has a large and varied tool box: reserved rights; appropriation of water under state systems; management programs; use of state instream flow programs, like the one that Mr. Holsinger described.

The three of us who signed on to the separate views of the Committee agreed with most of the task force recommendations. Our points of agreement and disagreement are outlined in my testimony as well as in the report itself.

But we could not agree that there was a lack of Forest Service authority. Three of us were lawyers, and our considered legal opinion was that it is clearly lawful for the Forest Service, as a proprietor of public land, to require as a condition of maintaining a dam or other water facility on public lands, that instream flows be maintained for fisheries. This they must do under Section 505 of FLPMA. Secondly, any proprietor of land is privileged to do this.

In conclusion, I would like to say that the bypass flow issue has always been a Colorado-specific issue. The issue arose only when local Forest Service officials, arguably precipitously, asserted their authority to impose conditions on permit renewals.

But in all of those cases, the parties found collaborative solutions to the problems. Water users may be contentious, but they are also creative and intelligent, and they found ways to solve these problems.

Why keep the bypass flows as a tool in the toolbox? If you take it away—if you take that authority away or you force a policy decision not to use bypass flows authority—you undermine collaborative efforts to find reasonable solutions.

Without the motivation to reach a negotiated solution, and absent the ability as a last resort to use this bypass flow authority, collaborative efforts will collapse. And FLPMA's mandate won't be carried out.

The only tool the Forest Service will have left then is a complete denial of the permit.

[The prepared statement of Mr. Getches follows:]

Statement of David Getches, Professor, University of Colorado

Good afternoon, Mr. Chairman and subcommittee members. Thank you for the opportunity to testify today. We are here to discuss an important tool for the preservation of the nation's water resources. My perspective on bypass flows is informed by my occupation, professor of water and natural resource law for the University of Colorado, my service as Director of Colorado's Department of Natural Resources from 1983–87, and my service as a member of Congress' Federal Water Rights Task Force. Through these activities, I have had a long history of involvement in both the legal and policy aspects of water resource conservation, including questions surrounding federal authority to protect water resources on federal lands.

It is my opinion that the Forest Service's authority to impose bypass flows is:

- Legally sound,
- Not the cause of any demonstrable hardship on the part of historic water users, and
- A regulatory strategy that the agency has used sparingly in the past and must be allowed to continue to use in the future.

In the balance of my testimony, I will explain how I arrived at these conclusions, describing first my experience on the Federal Water Rights Task Force (Task Force) and then reviewing some more recent events.

Many private water rights holders obtain their water directly from the National Forests. The dams, reservoirs, canals, and pipelines they use frequently occupy National Forest land, operating under permits and rights-of-way granted by the Forest Service.[6]

The issue before you today is what conditions the Forest Service may require in granting permission to use Forest Service land for water infrastructure. Under the Property Clause of the Constitution, the authority of the United States to control use of land belonging to the United States is quite broad, essentially without limits. In the case of National Forests, the Forest Service has, since its inception, and through the Organic Act of 1897, had the delegated authority to limit access to the Forests, and to require terms and conditions in doing so. Subsequent law has shaped the exercise of that authority, but has not diminished it.

With the United States' proprietary authority over the National Forests as the backdrop, this hearing addresses whether the Forest Service may require those holding federal permits or rights-of-way to use National Forest land for water infrastructure to release water in order to protect fish and wildlife habitat and other environmental resources on National Forest land.

Federal Water Rights Task Force

This unremarkable effort on the part of the Forest Service to exercise authority over use of National Forests last received congressional attention in 1995. The 1996 Farm Bill contained a provision creating the Federal Water Rights Task Force to investigate the need for a legislative solution to the bypass flows "controversy." By statute, the seven members of the Task Force were to be appointed by the Majority Leader in the Senate (2), the Speaker of the House of Representatives (2), the Minority Leader in the Senate (1), the Minority Leader in the House of Representatives (1), and the Secretary of Agriculture (1). I was asked to sit on the Task Force by the Secretary of Agriculture.

The Task Force held a series of twelve meetings between September 24, 1996, and August 25, 1997. In order to ensure that all interested parties were better able to attend, meetings were held throughout the West, in Reno, Nevada; San Francisco, California; Boise, Idaho; Portland, Oregon; and Denver, Colorado as well as Washington, D.C. All meetings were open to the public. Oral and written testimony was solicited. The Task Force received for the record and reviewed thousands of pages of comments and documents.

More than three years ago, the Task Force delivered its final report to Congress, Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of P.L. 104–127 [Task Force Report] (August 25, 1997). The fact that I am here today suggests that the report failed to lay to rest some congressional concerns over the Forest Service's use of bypass flow conditions.

Although the Task Force was divided on some of its fundamental conclusions, an important factual point can be made without dispute. This "controversy" is of extremely limited scope. Bypass flow conditions have rarely been imposed.[7] Despite the Task Force's repeated inquiries, we received virtually no complaints about the Forest Service's use of bypass flow conditions outside the State of Colorado. Moreover, the Colorado cases where water users objected were all resolved through negotiation. Settlements reached by the Forest Service and water users took the place of mandatory bypass flow requirements in nearly all instances. Only a few conflicts have reached the courts. Of these, most have involved situations where members of the public and environmental organizations challenged the Forest Service for not being sufficiently protective of public lands by failing to exercise fully its authority to impose such bypass flows. In addition, one water user demonstrated that its facility pre-dated the requirement to obtain a Forest Service right-of-way.

Accordingly, the initial approach of the Task Force members was to seek common ground. The members all recognized the need to divert water from sources on the National Forests in order to secure water for off-stream uses, such as irrigation and municipal supply. They also agreed that certain fish and wildlife habitat on National Forest lands should be protected and that minimum instream flows might be

[6] The Task Force identified 8,370 permits issued for water facilities on the National Forests. Report of the Federal Water Rights Task Force Created Pursuant to Section 389(d)(3) of P.L. 104–127, August 25, 1997 (Task Force Report) at IX–3.

[7] The Task Force was able to identify only fifteen instances in which a bypass flow condition may have been required. Task Force Report at IX–3. Even this figure included some water-related conditions that do not technically require "bypass flows.

necessary in some cases to do so. The Task Force sought out practical solutions that would both protect off-stream water users and meet the mandate of the US Constitution and the Forest Service's statutory missions to secure favorable water flows on National Forests with non-federal diversions.

At the last minute, however, these efforts were abandoned. Rather than seeking an accommodation between competing uses, a one-vote majority on the Task Force chose to opine that the Forest Service's use of bypass flow conditions was improper under any circumstances. Because of the majority members' sudden insistence on reducing the Task Force Report to a legal brief, broad areas of agreement, achieved after months of work by all the Task Force members, received little recognition.

Still, a careful reading of the majority report and the separate views of the minority reveals that there was much consensus among the Task Force members. For example, all members of the Task Force agreed upon several actions the Forest Service and this body could undertake that would help secure adequate flows of water to preserve National Forest resources and, therefore, reduce even further those circumstances in which bypass flow conditions might be required. The Task Force members joined in the following recommendations:

- The Forest Service should use reserved water rights awarded the United States in McCarran Amendment proceedings to meet National Forest purposes.
- National Forest purposes should be achieved, where possible, through the use of alternative water management strategies.
- The Forest Service should use state programs that protect instream flows to acquire rights and provide water for forest purposes where adequate state programs are available.
- The Forest Service should seek voluntary arrangements with non-federal water rights holders where possible.
- Congress should amend 16 U.S.C. § 499 and other applicable laws to allow the Forest Service to expend revenues from the grant or renewal of FLPMA authorizations for water supply facilities and related recreational uses of National Forest lands for environmental protection in the National Forest from which the revenues are derived. With these funds, the Forest Service might be able to purchase water rights where available. Task Force Report at IX–4 to IX–5.

In addition, the minority members, embracing elements of the abandoned compromise, recommended that the Forest Service Manual itself be amended to direct the Forest Service to require bypass flow conditions only if other strategies are either unavailable or inadequate to achieve National Forest purposes.[8] Task Force Report at IX–10.

The fact that the minority members recommended that the Forest Service explore other available options before requiring bypass flow conditions reflected a traditional respect for state water law and administration as well as a recognition of the importance of federalism in such matters. It should not be construed to mean that I or other members of the minority determined that the Forest Service lacked the legal authority to impose such conditions. In fact, we concluded just the opposite, that the imposition of a bypass flow is a legitimate exercise of the Forest Service's proprietary and regulatory authority over use of federal lands.

The authority to impose bypass flows as a condition of access to federal lands is secured by the Property Clause of the United States Constitution. The Property Clause provides that "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." U.S. Const., art. IV, § 3, cl. 2. The Supreme Court has upheld executive action preventing private entry on specified public lands, even where Congress has authorized private entry generally.[9] While express delegation is not required, Congress, in fact, has consigned land management authority to the Forest Service pursuant to a long list of federal statutes beginning with the Organic Act of 1897.[10] For example, in making the grant or renewal of special land use permits contingent upon a willingness to comply with bypass flow conditions, the Forest Service is act-

[8] In addition, the minority recommended that the Forest Service Manual be amended to provide for alternative forms of dispute resolution for FLPMA authorizations involving non-federal water rights and facilities and to allow other interested parties to participate equally in those procedures. Task Force Report at IX–10.

[9] See United States v. Midwest Oil Co., 236 U.S. 459 (1915) (upholding a 1909 executive withdrawal of land that had been opened to entry under the 1872 General Mining Act.)

[10] These statutes are the Organic Act of 1897 (Organic Act), 16 U.S.C. § 551 (1994); the Multiple–Use and Sustained–Yield Act of 1960 (MUSY), 16 U.S.C. §§ 528–31 (1994); the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600–14 (1994); and the Federal Land Policy and Management Act (FLPMA) 43 U.S.C. §§ 1701–84 (1994).

ing pursuant to its general authority "to regulate . . . occupancy and use" in the National Forests under the Organic Act, 16 U.S.C. § 551.

The Supreme Court has characterized the power given through the Property Clause over the public lands as without limits.[11] It includes the authority to protect the public lands "from trespass and injury and to prescribe conditions upon which others may obtain rights in them.[12] The United States, like any other property owner, "should be expected to allow uses of and access to its lands only on conditions that are consistent with its land management objectives." Task Force Report at IX–6.

Congress has made clear that its land use management objectives for the National Forests include the protection of fish and wildlife habitat and other environmental resources. The Multiple Use and Sustained Yield Act (MUSY) specifically directs the Forest Service to manage the National Forests for many uses, including fish and wildlife. The National Forest Management Act (NFMA) recognizes that fish and wildlife are public values that must be preserved on the National Forests. The Federal Land Policy and Management Act (FLPMA) mandates that the Forest Service include terms and conditions in rights-of-way that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.[13] The Forest Service, therefore, is obligated to ensure that water diversion structures permitted on National Forest lands do not damage environmental resources. Short of denying access entirely, bypass flow conditions represent the only feasible method available to protect environmental resources in some instances.

The Task Force majority claimed that the Forest Service's authority to control land use is limited by the McCarran Amendment.[14] However, the McCarran Amendment applies only if and when the United States is joined in a general stream adjudication. "The McCarran Amendment does not purport to define the limits of Forest Service authority as a landowner or a sovereign to control activities on the National Forests . . .." Task Force Report at IX–7.

The majority also argued that the savings clause of FLPMA precludes the imposition of bypass flow conditions. Task Force Report at VI–2 to VI–3. The problem with this argument is that it overreaches. Section 701(g) of FLPMA states that nothing in FLPMA "shall be construed . . . as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands" or "expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control." The Task Force majority reads § 701(g) as preventing any impact on individual state-created water rights, even those on federal lands. Section 701(g) provides no such protection. It merely preserves the legal status quo between Federal and State governments. Under the law in existence at the time FLPMA was passed, the Forest Service had the authority to restrict access to National Forest lands and to impose conditions on that access intended to prevent harm to natural resources.[15] Since the Forest Service had such authority prior to the adoption of FLPMA, it retains that authority under § 701(g). In any event, such a saving clause has no effect in the face of specific congressional purposes or mandates.[16] Section 505 of FLPMA merely states that conditions sufficient to minimize adverse environmental impacts shall be imposed on all rights-of-way across National Forest lands.[17]

The Task Force majority simply ignored existing case law to reach its conclusion regarding §701(g). The United States Court of Appeals for the Ninth Circuit concluded that Congress intended the savings provision of § 701(g) "to mean that no federal water rights were reserved when Congress passed [the Act].[18] Language similar to that of § 701g, common in federal statutes authorizing regulatory programs, has never been construed to preclude any and all impacts on water rights.[19]

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[11] See United States v. San Francisco, 310 U.S. 16, 29 (1940).

[12] Utah Power & Light v. United States, 243 U.S. 389, 405 (1917); see also Light v. United States, 220 U.S. 523, 536–37 (1911).

[13] 16 U.S.C. § 1765 (1994).

[14] 43 U.S.C. § 666(a)(1) (1994).

[15] See, Utah Power and Light Co. v. United States, 243 U.S. 389 (1917) (" . . . this is not a controversy over water rights but over rights of way through lands of the United States, which is a different matter . . ."); Multiple–Use Sustained–Yield Act of 1960.

[16] See, California v. Federal Energy Regulatory Comm n, 495 U.S. 490 (1990); Riverside Irr. Dist. v. Andrews, 758 F.2d 508, 513 (10th Cir. 1985).

[17] 43 U.S.C. § 1765.

[18] Sierra Club v. Watt, 659 F.2d 203, 206 (9th Cir. 1981).

[19] See California v. Federal Power Comm n, 345 F.2d 917, 923–24 (9th Cir. 1965); see also, Charles B. White, "The Emerging Relationship Between Environmental Regulations And Colorado Water Law", 53 U. Colo. L. Rev. 597, 618–19 (1982) (commenting on a similar savings provision in Section 101 of the Clean Water Act, 33 U.S.C. ◖1251(g)).

As long as bypass flow conditions are prompted by legitimate FLPMA purposes, any incidental effect on water rights is permissible.

The authority to condition or deny access to National Forest lands for water diversion facilities has been recognized by both federal and state courts. The Colorado Supreme Court found that the federal government may deny the use of a state-granted water right where its exercise is dependent upon a right of access across public lands.[20] The United States Court of Appeals for the Ninth Circuit upheld the authority of the Forest Service to limit the use of water resources in the National Forests on the grounds that NFMA "directs the Service to manage conflicting uses of forest resources.[21] Similarly, the United States Court of Appeals for the Tenth Circuit held that the Forest Service's failure to assert federal reserved water rights was not ripe for adjudication, partially on the grounds that the Forest Service had other options for managing its water needs, including administrative land controls.[22] Finally, in a Colorado water court case, the court held that the Forest Service's permitting authority allowed it to preserve "favorable water flows" in the National Forests without the need to resort to reserved water rights.[23]

Despite disagreement over the Forest Service's authority to impose bypass flows, many water rights holders with facilities on National Forest lands have found innovative ways to accommodate their water rights with the water needs of other forest resources. To its credit, the Forest Service has shown a growing willingness to accept workable alternatives to the imposition of bypass flow conditions. For example, the Joint Operations Plan (JOP) on the Arapaho–Roosevelt National Forest seeks to optimize aquatic habitat on the Forest without any impact on water supply by coordinating operations for a number of reservoirs.[24] The Forest Service accepted the JOP as a permit condition rather than require bypass flows for the reservoirs. Task Force Report at VIII–1 to VIII–6. The City of Boulder donated senior water rights to the Colorado Water Conservation Board (CWCB) for instream flows. In time of drought or emergency, the City retains its ability to call the water for municipal purposes, providing a safety net for Boulder citizens. Maintenance of these "imperfect" instream flows was incorporated, in lieu of bypass flows, as condition of Boulder's permit for a pipeline across National Forest land. Id., at VIII–10 to VIII–12.

The Task Force majority members cite both the Arapaho–Roosevelt JOP and Boulder's donation of water rights to the CWCB as examples of creative compromises that are compatible with state law regarding water appropriations. I agree. However, it is unlikely that either would have occurred without the Forest Service's legal authority to insist that its permittees leave some water in the stream. As the minority members of the Task Force pointed out, although bypass flows are infrequently imposed, "without the availability of this tool, efforts to secure voluntary protective measures would be seriously undermined." Task Force Report at IX–6.

Recent Events

Since the Task Force filed its report with Congress in 1997, the Forest Service's bypass flow authority has remained virtually unused and Forest Service practice

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[20] See, United States v. City of Denver, 656 P.2d 1, 34 (Colo. 1982) (holding that "the federal government has complete control over access to federally held geothermal resources and can therefore fully regulate water appropriation").

[21] Nevada Land Action Ass n v. United States Forest Service, 8 F.3d 713, 719 (9th Cir. 1993).

[22] Sierra Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990). See also Wyoming Wildlife Federation v. United States, 792 F.2d 981 (10th Cir. 1986) (suggesting that bypass flow requirements were mandated by an environmental impact statement).

[23] See, In re Amended Application of the United States for Reserved Water Rights in the Platte River, No. W–8439–76 at 9–13 (Colo. Dist. Ct., Water Div. No. 1, February 12, 1993). In this instance, the Forest Service sought an adjudication of federal reserved water rights pursuant to state law in a state court. Water rights holders and the State of Colorado argued that the Forest Service was not entitled to reserved water rights because of the agency's ability to protect its resources by controlling access and use on the National Forests. They asserted then that this "approach ha[d] the added benefit of considering site-specific information regarding a particular project at a particular location . . . . Certain Objectors' Joint Opening Post–Trial Brief Regarding Historical and Policy Issues (April 12, 1991) at 278 (signed by attorneys for the State of Colorado and the Northern Colorado Water Conservancy District).

[24] Whether or not the JOP achieves its goal currently is the subject of a legal challenge. Trout Unlimited v. United States Dept. of Agric., No. 96–WY–2686–WD (D. Colo. Filed June 5, 1995). The fact that Trout Unlimited felt compelled to sue over the JOP does not negate the potential effectiveness of these kinds of approaches to water management on the National Forests. It does suggest that negotiations over permits for water diversion facilities ought to include all interested parties. Many, if not all, of Trout Unlimited's objections to the JOP might have been resolved had the public, including Trout Unlimited, been allowed to participate fully in Forest Service discussions with the permittees.

has remained cautious and respectful of state water law. The mere possibility that its authority might be used has been controversial, however. In 1999, the Forest Service's Acting Deputy Chief issued a short guidance memorandum cautioning employees in the field not to settle federal reserved water rights claims in a manner that would impair the Forest Service's ability to impose bypass flows in the future. ("The ability to fully exercise discretionary regulatory authority over National Forest System lands, particularly during future permitting procedures for private water diversion and storage facilities on national Forest System lands, must not be constrained, foregone, impeded or prohibited.")

In 2000, many commenters filed comments with the Forest Service on both sides of the bypass flow issue in the context of the Draft Management Plan for the White River National Forest.

Also last year, the Forest Service released a white paper in November, "Water for the National Forests and Grasslands, Instream Flow Protection Strategies for the 21st Century." The product of several years' worth of effort throughout the agency, this white paper echoes many of the themes sounded in the Task Force's minority report three years earlier. The paper reaffirms the Forest Service's authority to impose bypass flows while simultaneously cautioning field staff to pursue collaborative means for protecting water resources whenever possible. While not a regulatory document, the white paper suggests a total of ten strategies for the Forest Service to pursue to fulfill its various mandates, including the requirement that it "minimize damage to fish and wildlife habitat and otherwise protect the environment." Bypass flow authority is listed as one of these strategies.

The white paper emphasizes that the Forest Service must "develop sound objectives and standards in Forest Plans to use as the basis for any instream flow requirements specified in the terms and conditions of land use authorizations." (p. 11.) Moreover, the white paper stresses that, "[t]he cooperation of the States will be sought wherever State laws meet our needs." (p. 3.) In addition, the white paper urges Forest Service staff to explore resolution of instream flow controversies in the context of the public process that accompanies forest planning. The document mentions as one example, the " pathfinder" watershed collaboration effort the Grand Mesa–Uncompahgre–Gunnison National Forest in Colorado." (pp. 9–10.) In short, the white paper lays out a reasonable approach to the issue, expressly exhorting the Forest Service staff to use the most effective tool in a specific situation.

The Forest Service has more often attempted to achieve its mission using the strategies listed in the white paper other than imposing bypass flow conditions. These attempts are often unsuccessful. For example, the Forest Service's assertion of federal reserved rights to protect its water resources, after decades of litigation, has secured only a few dedicated rights. Nor has the Forest Service fared much better in appropriating other non-consumptive rights in state courts. And there are also some severe limitations, varying state by state, on the efficacy of state instream flow programs to provide sufficient protection for national water resources. As noted above, cooperative and creative measures often can work but only if there is the possibility of regulation measures i.e., imposition of a bypass flow to focus negotiations.

Finally, just a few months ago, Agriculture Secretary Veneman affirmed the Chief's decision in an appeal involving the extent of the Forest Service's authority to impose bypass flows. The decision involved Forest Plans for both the Rio Grande and Routt National Forests in Colorado. Both Forest Plans asserted the Forest Service's authority to impose bypass flows in permits or rights-of-way for new facilities, but limited the imposition of bypass flows for existing facilities to situations where it would be "feasible." Several environmental groups challenged this distinction on the grounds that FLPMA does not distinguish between existing and new facilities, and in fact, the NFMA specifically talks about revising existing permits to incorporate new protective provisions of Forest Plans. The Chief agreed with these groups and the Secretary upheld the Chief's decision insofar as he ruled that the Forest Service could not adopt different standards for existing and new facilities when considering the imposition of bypass flows.

Conclusion

For Congress or the Forest Service to turn away from the current practical approach would be folly. Given the many statutory underpinnings for the Forest Service's goal of preserving water resources on forest lands, retaining the ability to impose bypass flow conditions where these are the best tool for the job remains critical to achieving meaningful protection. It is not only legal for the Forest Service to impose bypass flows, even on existing facilities, it is necessary for the Forest Service to be able to do so, both to fulfill its stewardship consistent with the Property Clause of the U.S. Constitution and to fulfill its many other statutory directives. The Forest Service has not exercised its authority unduly in the past. In fact, the

"controversy" exists almost entirely over a theoretical disagreement with the Forest Service's legal position, rather than because of real disputes. In most instances where the Forest Service has actually raised the possibility of its imposing a bypass flow on an existing facility, there has been a successful negotiation of a solution that protects both the water user who is seeking approval to use federal land and national objectives.

If anything, I would urge the subcommittees to consider the five consensus recommendations of the Task Force described above and propose legislation to enable the Forest Service to use FLPMA revenues to buy water rights for the protection of water resources on national forest lands.

Thank you for the opportunity to state my views. I would be happy to answer any questions.

Mr. MCINNIS. Thank you, Mr. Getches.

Mr. Lynch?

STATEMENT OF ROBERT S. LYNCH, BYPASS FLOWS CONGRESSIONAL TASK FORCE MEMBER

Mr. LYNCH. Mr. Chairman, members of the Committee, I appreciate the opportunity to appear here this afternoon and testify. I am Bob Lynch. I am an attorney in Phoenix, Arizona. And as David said, I was a member of the Federal Water Rights Task Force.

I have supplied the Committee with written testimony, which I ask be submitted for the record. I would like to make some separate remarks.

First of all, I am sorry to be here. I wish we had been able to settle this issue with our report, and I wish the Forest Service had owned up to the fact that they don't have legal authority to do what they are trying to do with bypass flows and other strategies about coercing water rights out of nonfederal people and entities that hold them.

I used to represent the Forest Service back in the days when I was at the Justice Department and multiple-use wasn't a dirty word.

This isn't an issue about the environment. I take issue with former Senator Brown about this. It is not an issue about water. It is an issue about arrogance.

In the November 30 policy, the Forest Service says they will use state law whenever state laws meet our needs. Well, since the founding of our country, state laws with regard to water rights have always been what the Federal Government respected, not just when they met their needs; they respected them period.

It is an issue about power. Page 2 of that policy: The Forest Service wants instream flows for "desired conditions and beneficial uses." Whose desired conditions? Whose beneficial uses?

National forests are not national parks. Forests were established for economic reasons. All of this outlined in detail in U.S. v. New Mexico, an opinion written by current Chief Justice Rehnquist.

This is an issue about control. On the task force, the Forest Service repeated again and again, "We wouldn't have this problem if everybody was like Arizona."

What is different about Arizona? We allow Federal agencies to hold water rights, including instream flow rights. Now, Colorado doesn't do that. Idaho doesn't do that. They have state entities that hold these public water rights.

And the Forest Service can't control that. They have to work with states under those schemes. Well, they have to work with states like Arizona under our scheme too, but at least they have the title, and it makes them feel better. It makes them feel like they are in control.

We don't know whether they are in control yet, because we haven't finished our adjudications.

A couple of minor issues with my friend David Getches. I have mentioned the control issue, and he says, "Well, there aren't very many of these instream flow rights the Federal Government has that have been adjudicated."

Well, in Arizona, none of them have been adjudicated. They have granted the agencies, not only the Forest Service but other agencies; they just haven't been adjudicated.

The Arizona experience was different. The Forest Service said, if you want your cattle grazing permit renewed, turn over your water rights to the Forest Service, your stock ponds, your diversions, your pipes. We weren't going to do that.

And it created a little local war, and we are not through with that issue yet. We don't know exactly where it is going. Still the same issue: permit authority and the use of it to take control of water resources.

Ellie Towns, who was our Federal babysitter on this task force, blurted out at one of the meetings, "You know, if we can't get title to the water, we will never get the cattle off the land." I mean, she said it.

And that is your problem. It is the embedded attitude of senior managers within the agency that continue from administration to administration that have a different view than Congress has given them.

One last thing, if I might. There is no property clause basis for this power. If there were, there would be no secondary purposes for national forests under U.S. v. New Mexico and California v. U.S. Everything would be a primary purpose and the Federal Government could ignore the states.

That is not what our Supreme Court has said. It is not the law. It is not an appropriate constitutional basis. This power does not exist.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lynch follows:]

Statement of Robert S. Lynch, Appointed Member of the Water Rights Task Force

Mr. Chairman, Members of the House Resources Committee, thank you for the opportunity to appear here today and testify on the experiences and findings of the Water Rights Task Force with regard to the Forest Service's illegal use of bypass flows. My name is Robert S. Lynch, and I was an appointed member of the Water Rights Task Force, which was created in 1996 pursuant to Section 389(d)(3) of Public Law 104–127. Under this law seven voting members were appointed, one by the Secretary of Agriculture, two by the Majority Leader in the Senate, two by the Speaker of the House, and one each by the Minority Leaders of the House and Senate.

The Task Force's creation was sparked by the controversy in Colorado regarding the attempt by the Forest Service to use its permitting authority to require urban and agricultural water users to relinquish a part of their water supply in order to provide water for secondary purposes of the national forests. Additionally, we considered related issues in Arizona, Montana, Idaho, and Nevada, and examined

concerns brought to us from other areas, including California and Oregon. In Arizona, we focused on attempts by the Forest Service to use its permitting authority to require that grazing allottees transfer title to non-federal water rights obtained under State law to the United States.

In summary, the Task Force concluded that no legal authority exists that would allow the Forest Service to require water users to relinquish part of their water supply in exchange for a facilities permit or permit renewal. Short of authorizing condemnation, Congress had not delegated to the Forest Service the authority necessary for that purpose. Additionally, we concluded that McCarran Amendment adjudications provided the appropriate forum for the Forest Service to test its theories about the relative importance of water uses for federal and non-federal purposes. We also concluded that the Forest Service must attain the secondary purposes of the national forests by obtaining and exercising water rights in accordance with state law and by working with owners on non-federal water rights to achieve national forest purposes without interfering with the diversion, storage, and use of water for non-federal purposes.

Before coming to these conclusions, the Task Force met and conducted extensive hearings. We also received considerable amounts of written testimony and other documents. The Task Force held its initial meeting on September 24, 1996. We held a total of twelve meetings, including meetings in Reno, San Francisco, Boise, Denver, Portland, and Washington D.C. All meetings were open to the public. Oral and written testimony was provided by water users, conservation groups, environmental groups, state officials, and current and former federal employees. At our Washington, D.C. hearing in the Dirksen Senate Office Building, we even were favored with testimony from then–Congressman David Skaggs of Colorado. The Task Force spent considerable time searching for and discussing alternatives which would avoid or reduce conflict between the Forest Service and water users.

To achieve this goal, we made extensive efforts to hear testimony from those impacted by the actions of the Forest Service, as well as the proponents of federal bypass flow authority. Tom DeBraggen with the Truckee–Carson Irrigation District summed it up best when he stated that, "this issue is clouded by too much politics and that local people should be heard." Mr. DeBraggen also stated that, "the agencies need to protect endangered species, but that they should use common sense in doing so.

An example of a need for common sense is the plight of Idaho Rancher Jack Yantis. At the time of the Reno hearing, Jack and his wife Donna owned a quarter-mile ditch that crosses the Payette National Forest. The ditch had been in continuous use as originally constructed since 1924. The National Marine Fisheries Service determined that his ditch was likely to affect an endangered fish. Although Mr. Yantis was invited to attend meetings with Forest Service personnel, the Forest Service ultimately installed 80 yards of pipe, which prevented Mr. Yantis from diverting water from Boulder Creek into his ditch. At the time of the Reno hearing in 1996, Mr. Yantis had been without water for four years.

Even my esteemed colleague, Professor David Getches, acknowledged that Mr. Yantis had no forum in which to discuss the bypass flow conditions the Forest Service was imposing on him. Professor Getches further indicated the need for a process in which an individual property owner, such as Mr. Yantis, would be able to have a voice in protecting his vested property rights in an efficient manner. As of 1996, when the Task Force heard the testimony of Mr. Yantis, the Forest Service did not have such a process in place. As evidenced by their November 30 policy statement, it still doesn't.

The Task Force also heard testimony from environmental group representatives claiming that commercial industries benefit from bypass flow requirements. In San Francisco, Louis Blumberg of the Wilderness Society testified in favor of the Forest Service, stating that it should be allowed to retain the bypass flow program since it seems to be working well in California. In addition, Mr. David Nickum of Trout Unlimited emphasized that bypass flows help to maintain the resources necessary for commercial fisheries. It is clear from this testimony that the Task Force was faced with a daunting challenge: balancing the protection of water rights of cities and towns and ranchers and farmers with the interests of environmental groups and, possibly, commercial fisheries and other advocates of bypass flows.

In April 1997, the Task Force traveled to Washington, D.C. and conducted an open meeting in the Dirksen Senate Office Building where, as I mentioned previously, former Representative Skaggs addressed the Task Force. He encouraged practical solutions, putting aside both states' rights and federal supremacy issues. He suggested ideas such as using non-profit dispute resolution firms with environmental expertise, having a cooling-off period before any litigation commences, and evaluating the last best offer with a mediator. The Task Force also heard from

representatives from Senator Allard's office as well Representative Schaffer's office. They acknowledged that not every conflict is a win-win situation for all parties involved, and tough decisions will be necessary to resolve these conflicting interests.

Ultimately, the Task Force made the necessary tough decision in concluding that the actions of the Forest Service, while beneficial to certain parties involved, were without any legal foundation. Specifically, no legal foundation was found in The Organic Act, FLPMA, or the NFMA. Additionally, Congress had not enacted or authorized a federal permit system to allocate water between federal and non-federal purposes. Most importantly, the actions by the Forest Service raised important 5th Amendment takings issues. Congress clearly has plenary authority to manage and protect National Forests. Congress may be able to reach beyond the federal land boundaries under the Property Clause to regulate activity for the protection of federal property. However, the Supreme Court made it quite clear in United States v. New Mexico that water rights for secondary forest purposes must be acquired under state law. As the Court said, national forests are not reserved "for aesthetic, environmental, recreational, or wildlife-preservation purposes." Attempting to create, in effect, a federal water right for these secondary purposes by imposing permit restrictions on non-federal water users is simply illegal. It is also foolish. Federal coercion that cannot be legitimized in adjudications leaves non-federal water users damaged and federal land managers without any assurance of a permanent water supply. No one wins.

In light of the absence of statutory or constitutional authority, the majority of the Task Force made several recommendations to Congress as possible solutions. First, the Forest Service should pursue alternative management strategies which do not require a change in ownership or exercise of water rights before considering any acquisition of new Federal water rights for National Forest purposes. Second, where state laws allow water rights, reservations, or conditions to be established for protection of instream flows, the Forest Service should use these laws to attain National Forest purposes. Finally, whenever possible, the Forest Service should seek voluntary agreements with non-federal water rights holders. I am confident that these recommendations came from a solid foundation of information gathered by the Task Force. I am disappointed that they were effectively ignored by the Forest Service.

Mr. MCINNIS. Thank you, Mr. Lynch.

Mr. Gauvin?

STATEMENT OF CHARLES GAUVIN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, TROUT UNLIMITED

Mr. GAUVIN. Mr. Chairman, Committee members, I appreciate the opportunity to appear today to present Trout Unlimited's views on the protection of fishery and water resources on our nation's national forests.

In my oral testimony, I would like to make three points about bypass flows, and then I want to describe, briefly, a very hotly contested bypass flows case—that involving the Long Draw Reservoir in Colorado where my own organization has been engaged.

Before I go into the bypass flows observations that I have, I just want to note that while the chart you saw on Colorado's instream flow program appears impressive, you have to bear in mind that those are very junior water rights.

They are not evenly monitored. They have almost never been enforced. And therefore, although there is a lot of ink on that map, it is a lot less impressive than it would seem.

Now, regarding the bypass flows situation, contrary to the Committee's letter of invitation here today, this is not a new phenomenon. Bypass flow conditions in the Forest Service land use authorizations date back to the 1970's.

Secondly, as has been noted earlier today, it has been a very, very rarely and very, very modestly used tool. I won't repeat the

statistics, but I will note that, in the few cases in which bypass flows have been required, mandated releases have been minuscule, on the order to 1 to 5 percent of a particular water diversion.

Almost all water users up here recognize that the release of a minimal amount of water is a fair quid pro quo for the use of reserved public lands.

And then third, the controversy about bypass flows is not about water law or water rights. It is about the Forest Service's ability to be a good steward of the public lands and fish and wildlife resources with them. That is why the National Forests Management Act and FLPMA were passed.

Dams and other water diversions, as we know, often have adverse and sometimes extremely adverse, devastating effects on watershed health. According to the Western Water Policy Commission report, 70 percent of the West's native fish are imperiled or extinct. Bypass flow authority is about managing aquatic habitats to try to restore and maintain those resources.

Now, to the Long Draw Reservoir litigation. La Poudre Pass Creek flows out of Rocky Mountain National Park on the Arapaho-Roosevelt National Forests. Long Draw Reservoir stores the creek's water for release to downstream irrigators.

Without a bypass flow requirement, the reservoir's gates are closed at the end of the irrigation system and aren't reopened until the following spring. So it is important to bear in mind that for 6 months a year, La Poudre Pass Creek is dry. Without year-round water, that stream does not support a fishery, and its larger watershed functions are severely impaired.

When the Forest Service reissued the Reservoir's special use permit, they prepared an EIS, and the EIS noted that the only way to meet the aquatic goals in the forest plan was by a bypass flow.

Now, in hindsight, this was an unusual step that Forest Service took. Frankly, I think we all would have been better off if the Forest Service in this case had pursued a negotiated solution on this one. But this is what the Forest Service opted to do.

In the end, though, the Forest Service decided not to—it was a sudden shift of position—it decided not to impose a bypass flow and instead imposed the Joint Operating Plan, essentially a voluntary agreement with the water users.

At the same time, the Forest Service's own biologists and hydrologists analyzed the Joint Operating Plan and concluded that its purported benefits for fisheries and other resources were, I quote, "unfounded from a physical and biological perspective."

Well, after attempting to resolve the matter by voluntary agreement, by negotiation with the Forest Service and with the Long Draw Reservoir operator, Trout Unlimited was forced to challenge this by administrative appeal, and then upon the denial of that appeal, was forced to litigate it.

Our basic contention is that while the Joint Operating Plan in some ways mitigates habitat damage caused by the Reservoir, it in no way minimizes that damage as required by FLPMA.

We remain open to a negotiated solution. There have been discussions between us and the water supply and storage company. And of course, we remain open to a negotiated solution and would prefer one.

I have to say that, in perspective, the chain of events leading to this litigation fairly illustrates the difficulties the Forest Service faces when renewing these land use authorizations. And if you take away the bypass flow authority, there will be no venue for negotiated solutions. And essentially, we will be in the boat that David Getches so aptly described.

In closing, I want to leave you with just a view of a couple of photographs.

This is La Poudre Pass Creek below Long Draw Reservoir. And as you can see, if this is your idea of perfect Colorado trout stream or good quality aquatic habitat, then you really need to look for the water. It is just not there. This is seriously degraded and damaged habitat.

The other one I want to show you is, this is the inflow of Idylwilde Reservoir on the Big Thomspon River. And then I want to show you the outflow. This is a bypass flow. This is the amount of water we are talking about. We are not talking about a big piece of that inflow. We are talking about a very modest amount of water.

That will conclude my remarks. Thank you.

[The prepared statement of Mr. Gauvin follows:]

Statement of Charles F. Gauvin, President, Trout Unlimited Inc.

Mr. Chairman and committee members, good afternoon. I appreciate the opportunity to address the subcommittees today regarding the protection of our nation's fish and wildlife.

I am the President of Trout Unlimited (TU), a national, non-profit organization dedicated to the conservation, protection and restoration of North America's trout and salmon fisheries and their watersheds. Prior to joining TU, I practiced law here in Washington D.C. at Beveridge and Diamond, where I specialized in permitting under the federal Clean Water Act.

TU has over 130,000 members nationally. Many of our members recreate on National Forest lands, and are also involved in partnerships throughout the country with the Forest Service staff on fish habitat restoration projects. Thus, for TU, the topic for today's hearing is an important one: protecting fish and wildlife resources on the National Forests by requiring water diverters using National Forest land to allow a trickle of water to flow in the streams on these public lands.

Characterization of Issue for Hearing

As a preliminary matter, I would note that I disagree with the characterization of this issue in today's hearing. It is TU's position that the Forest Service has legal authority for its rare imposition of bypass flows for the land use authorizations it grants. Indeed, the Forest Service is required by the Federal Land Policy Management Act and other laws to protect fish and wildlife habitat by conditioning those authorizations.

For three separate reasons, I also disagree with the statement in the letter of invitation for this hearing that there are "adverse implications of [a] newly promulgated [bypass flow] regulation on water users." First, the Forest Service's use of bypass flow conditions dates to the 1960s, so it is simply wrong to characterize the authority as of recent origin. Even during the two-year period in the 1990's when the Secretary of Agriculture limited the Service's ability to impose bypass flows, he did so only in the context of existing facilities undergoing re-issuance of permits, where the previous permit had not included a bypass flow condition.

Second, there is simply no "newly promulgated regulation" regarding this tool for fish and wildlife resource protection. The recent Forest Service white paper (Water for the National Forests and Grasslands, Instream Flow Protection Strategies for the 21st Century, November, 2000) is a guidance document completely consistent with 40 years of past policy and practice. The white paper discusses the imposition of bypass flow permit conditions as only one of ten strategies that the Forest Service can use to protect its aquatic resources. The authors expressly caution field staff to impose a bypass flow permit condition only when it would be the most effective tool to accomplish the Forest Service's mission.

Third, there is virtually no verifiable evidence of real harm to existing water users. After 18 months of hearings, the Federal Water Rights Task Force was unable to find any actual examples of water users being adversely affected by the imposition of a bypass flow condition in a Forest Service permit. The Task Force's record is consistent with a Freedom of Information Act request TU submitted to elicit all information pertaining to Forest Service permits with bypass flow conditions. In the responses to our request, there were fewer than 20 such conditions imposed in the over 8000 currently active special permits.

Moreover, in cases where bypass flows have been imposed, there is no evidence that the releases are large. To the contrary, bypass flows typically require the release of between one and five percent of a particular water diversion. (A visual example of the minimal flows required, in this instance on the Big Thompson River in Colorado, is attached.) Often, this amount is minuscule in comparison to what the stream needs to meet its functions within the ecosystem. When a user of reserved federal lands receives a free right-of-way to build a project that will dry up a stream, it hardly seems burdensome that the land user be required to release an absolute minimum flow in a stream, rather than dry the stream up completely. There are several places in Colorado, where even the state's instream flow program has appropriated (e.g., St. Louis Creek) or is seeking to appropriate (e.g., Yampa River) a higher flow than the Forest Service's bypass flow permit condition.

The Forest Service's Missions

The bypass flow "controversy" is not about water law; it is about the Forest Service's responsibilities and authorities to execute national policy on National Forest lands.

The federal Property Clause of the U.S. Constitution provides that, "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." As one of the nation's major land stewards, the Forest Service's actions with regard to forest lands are governed by a number of different congressional authorizations and directives.

Starting with the Forest Service's Organic Act of 1897, Congress directed the Forest Service to "secure favorable water flows" of the waters that cross the National Forests and to "regulate occupancy and use" of the nation's forest lands. The Federal Land Policy Management Act (FLPMA) requires the Forest Service to impose terms and conditions in the permits and rights-of-way it grants that "minimize damage to—fish and wildlife habitat." In the National Forest Management Act (NFMA), the basic purpose of which is to provide for forest planning, Congress recognized that the public values the Forest Service must preserve include fish and wildlife. Finally, the Multiple Use and Sustained Yield Act again directs the Forest Service to manage the forests for fish and wildlife purposes.

Legality of Forest Service Exercise of Bypass Flow Authority

The common thread that runs through these various directives and authorities is that the Forest Service has both an obligation to manage its lands in a way that preserves the nation's fish and wildlife resources, and the tools to accomplish this goal. Derived from the Property Clause, as they are, these powers are significant. Those who oppose the imposition of bypass flows must show that the Forest Service does not have the authority to regulate those who come upon the National Forests to divert water. I believe that Professor Getches will address in his testimony the reasons why meeting this burden is not possible given the directives and authority granted to the Forest Service under the Property Clause, the Forest Service's Organic Act, FLPMA and NFMA.

I would like to add my own thoughts on two other constitutional issues that bypass flow opponents have raised. First, there have been rumblings that the imposition of a bypass flow somehow constitutes a prohibited taking of property under the U.S. Constitution's Fifth Amendment. Second, one creative group of attorneys has even suggested that the Constitution's Tenth Amendment prohibits the imposition of bypass flows in conflict with a state's water rights system. Neither of these contentions has any merit.

The imposition of a bypass flow is highly unlikely to lead to a successful claim that the Forest Service has taken the permittee's or right-of-way owner's property. For one thing, it has never been the case that the grant of a vested water right by any state authority includes a guarantee of access over federal land. As experts have noted repeatedly, to divert water, one needs both a water right and access to the water. In some states, such as Colorado, the holder of a water right can condemn a right-of-way or easement to access water; however, that power does not, of course, extend to a private entity's condemnation of federal land. The Forest Service's imposition of a bypass flow is separate and apart from the state's water law

system. Nothing in law suggests that a takings occurs merely because the Forest Service might reasonably condition a private party's use of federal land in order to meet federal statutory directives requiring the Forest Service to maintain fish and wildlife and other values.

The contention that the imposition of a bypass flow violates the Tenth Amendment can be similarly dismissed. The Supreme Court has characterized the Property Clause as an almost limitless power. The Forest Service's bypass flow authority derives directly from the Property Clause, through the various congressional grants of authority in the Organic Act, FLPMA and NFMA. Nothing in the recent Tenth Amendment jurisprudence suggests that the Tenth Amendment stands as a bar to federal regulation of private parties using federal lands. Notwithstanding the deference that Congress has always shown to state water rights systems, it is simply not possible to squeeze the imposition of a bypass flow as a condition upon the use of federal lands under the umbrella designed to protect state sovereignty.

Impacts of Dams and Diversions on Fish and Wildlife Resources

While I certainly recognize the sensitivity that surrounds this issue, I believe that it is important to take a step back and look at the reason that the Forest Service ever considers imposing a bypass flow in a special use permit to fulfill its statutory obligations toward fish and wildlife resources on forest lands.

The Forest Service acts as the landlord for large swaths of our nation's public lands. Thousands of entities seek permission from the Forest Service to use the public lands for a variety of purposes. As the federal landlord, the Forest Service considers each request to use federal land and issues permits to virtually all who request. Among those requesting the privilege of using federal lands are water users who seek to build and operate dams on public lands, or to cross National Forest lands for the purpose of diverting water from the rivers and lakes within the federal reserve.

Dams and diversions often have adverse effects on watersheds. A loss of flow, in terms of timing, velocity, or volume, can change a stream channel by stopping the movement of sediment, by increasing water temperature and by exposing usually wetted habitat. It is axiomatic that fish need water every day. However, a loss of water in a river system has impacts far beyond the fishery. Riparian areas, particularly wetlands, protect lands downstream from flooding. Also, many wildlife species depend on healthy riparian habitat for sustenance. In addition, there are numerous species for which fish and other aquatic life are an important part of their food sources. The water that dams and diversions on National Forest lands supply to agricultural, municipal and industrial users is, of course, a part of the very fabric of our society. However, we have learned in the last few decades that this supply has been made available at a cost. Most dramatically, perhaps, is the fact that over 70 percent of our native fishes west of the Rockies are imperiled or already extinct.[25] There are economic costs as well, from the huge increases in salinity throughout the Colorado River basin, which the federal government is spending hundreds of millions of dollars to abate, to the loss of commercial fisheries from Northwestern salmon, to the declining Colorado River delta shrimp fishery. It is these very real economic and ecologic losses that drove Congress to direct the Forest Service to do a better job of granting permits to allow people to use forest lands that, at the same time, protect our nation's resources.

Long Draw Reservoir Litigation

I am painfully aware that the lawsuit TU filed in 1995 challenging the Forest Service's failure to impose a bypass flow when re-issuing a permit for Long Draw Reservoir has caused significant controversy. For the record, I would like to clarify our goals for this case. La Poudre Pass Creek flows out of Rocky Mountain National Park to form the boundary between the Comanche Peak Wilderness area and other Arapaho–Roosevelt National Forest land. Ultimately, La Poudre Pass Creek joins the Cache La Poudre River, Colorado's only river designated under the Wild and Scenic Rivers Act. Long Draw Reservoir stores water for release to downstream irrigators. Without a bypass requirement, the operator closes the reservoir's gates at the end of the irrigation season each year and does not begin to release any water again until the following spring. Thus, for six months, La Poudre Pass Creek below the reservoir is dry. Obviously, since fish need water every day, this means that La Poudre Pass Creek does not support a fishery and its larger watershed functions

[25] Minckley, W.L. (1997). Sustainability of western native fish resources. In W.L. Minckley (Ed.), Aquatic Ecosystem Symposium (pp. 65–78) Denver, CO. Western Water Policy Review Advisory Commission. Available at http://www.den.doi.gov/wwprac/reports/aaquatic.htm.

are severely impaired. Attached to my testimony are pictures of La Poudre Pass Creek above and below Long Draw Reservoir.

When the Forest Service was faced with re-issuing a permit for the reservoir, the Forest Service did an Environmental Impact Statement. In the EIS, the Forest Service determined that the only way to fulfill its duty not to damage fish and wildlife habitat was to require a bypass flow from the reservoir during the six months when the stream would otherwise be dry. Notwithstanding this determination, however, the Forest Service instead opted not to impose a bypass flow condition in the permit. Instead, the Forest Service agreed to the applicant's proposal to participate in a voluntary Joint Operating Plan (JOP), along with several other water users in the Cache–La Poudre watershed. There were several problems with the JOP. Most importantly, the JOP provided no additional stream flow in La Poudre Pass Creek below the reservoir, although the JOP did put some additional water into certain tributaries and the Poudre mainstem. In addition, the water users and Forest Service refused to allow TU or other members of the public to participate in any of the meetings or negotiations that led to the JOP, even though TU had commented extensively on the EIS.

Although I have the utmost respect for the Forest Service's decision-making processes, the process by which the Forest Service came to a final decision in the Long Draw case was severely flawed, both procedurally and substantively. The procedural flaws are the subject of the above-referenced litigation, and I will not reiterate them here, except to note that the record of decision does not explain sufficiently why the agency chose to ignore the analysis of its own fishery biologist, who found that, in comparison to the bypass flow alternative, the JOP's purported benefits were "unfounded from both a physical and a biological perspective.[26]

Subsequent analysis of the JOP by Dr. N. Leroy Poff of Colorado State University, who formerly served as TU's senior scientist, but reviewed the JOP in 1997 as an independent consultant, corroborates the findings of the Forest Service biologist. Dr. Poff's conclusion is that the JOP "contains unsupported assumptions and unjustified extrapolations that critically undermine the conclusion that the JOP will provide more ecological benefits to the Cache La Poudre—Basin than will [the bypass flow alternative].[27]

After attempting to resolve this matter by agreement with the Forest Service and the applicant, and left with no other means to assure flowing water in La Poudre Pass Creek, TU challenged the Forest Service's final action in federal district court in 1995 on the grounds that the Forest Service's ultimate solution (the JOP) did not minimize damage to fishery habitat in La Poudre Pass Creek, as required by the Federal Land Policy Management Act. This case is still not resolved. It was put on hold during the pendancy of the Federal Water Rights Task Force. Thereafter, the parties discussed settlement, but to no avail. The parties have recently filed briefs with the court and expect a ruling sometime in the not-too-distant future. In the meantime, TU has continued to pursue a negotiated solution and remains open to proposals that meet the objectives of both the water users and the forest plan.

The Tools Available to the Forest Service to Fulfill its Missions

In trying to accommodate all those who want to use federal lands to develop water, i.e., who want rights-of-way or permits to build, operate, and have access to dams and diversions that store and carry water across the forest to private land for private use, the Forest Service has to balance a congressional directive to allow multiple use with the directives to protect the environment and fish and wildlife habitat. As its recent white paper suggests, the Forest Service has a number of ways to achieve its missions. Unfortunately, many of the tools described in the white paper have significant limitations.

- Obtain Reserved Water Rights. The Forest Service has had little success anywhere in the West in obtaining reserved rights through McCarran Act adjudications. In fact, in Colorado, for the Forest Service's claims in the South Platte River Basin, both the state and other water users argued (among other things) that the court should deny the Forest Service's application because the Forest Service could adequately protect flows on National Forest lands with its bypass

[26] Trout Unlimited v. Dept. of Agric., No. 96–WY–2686–WD (D. Colo. Filed June 5, 1995), Administrative Record (Longdraw) at 4483.

[27] Memorandum from N. LeRoy Poff to Steve Moyer, Trout Unlimited regarding "Review of Trout habitat evaluation for Joint Operatings Plan flows November 1994 through March 1995 and November 1995 through March 1996" (Miller Ecological Consultants, Inc. 1997) dated November 10, 1977.

flow authority. The judge accepted this argument.[28] Western water users and western states have fought virtually all applications for reserved water rights and at least insofar as the Forest Service's claims go, they have succeeded in defeating all but a few of the Forest Service's claims.

- Obtain Appropriative State–Law Rights. Only five or six states west of the Mississippi even allow the Forest Service to obtain such rights, but in those states, the Forest Service has had at least some success in obtaining rights this way. A significant disadvantage of this approach, of course, is that in many places, obtaining a 2001 water right priority will not allow for meaningful protection of aquatic resources.
- Exercise Regulatory Authority. It is using this strategy that would lead the Forest Service to impose a bypass flow condition in a permit or right-of-way. Even today, the Forest Service imposes such conditions in a quite limited fashion, particularly on existing facilities.
- Use State Instream Flow Programs. States have long urged the Forest Service to rely on their instream flow programs in lieu of any federal action to preserve healthy flows on National Forest lands. While there may be instances where state programs can provide adequate protection, they are less frequent than we all might hope. This is because most state instream flow programs are seriously limited. As relatively new programs in the world of water rights, they often do not command senior enough priority dates to provide meaningful protection. Many are limited as to who can hold or enforce an instream flow right, thus requiring the Forest Service to rely on a third party not only to appropriate a sufficient quantity of water, but also to make the calls and otherwise enforce the right. The likelihood that the actual holder of the water right may disagree with the Forest Service regarding enforcement significantly lowers the effectiveness of this strategy to fulfill federal requirements. Most state programs are also limited in the quantities of water they may appropriate, usually to minimum amounts, and further constrained by other state actions. For example, in Colorado, state instream flow rights are subordinate even to undecreed water uses, a restriction placed on no other state water right.
- Buy/Lease Instream Flow Rights. Where this works without the problems associated with many state instream flow programs, it is a promising approach, provided that Congress agrees to fund such efforts at sustainable levels.
- Develop Cooperative Agreements. TU believes that this approach can be a positive way of resolving disputes with permittees. Unfortunately, we have also learned that, without public involvement or a mandate that provides incentives reaching agreements, negotiating may be inadequate. We would encourage the Forest Service and Congress to ensure that the pursuit of cooperative agreements is done in an open manner, with all interested parties participating.
- Coordinate with Downstream Users. Similar to the strategy of using cooperative agreements, this approach allows the Forest Service to take advantage of downstream users' calls on the river as a mechanism to pass water across National Forest land. Again, TU supports this type of coordination as leading to win-win situations, provided that all interested parties are involved in the deal-making.
- Use FERC License 4(e) Conditions. Section 4(3) of the Federal Power Act of 1920 requires that hydropower licenses include reasonable terms for "the conservation, protection, mitigation of damage to and enhancement of, fish and wildlife, recreation and environmental quality." Where there is a hydropower facility on National Forest lands, the Forest Service participates in licensing, or re-licensing, proceedings to advance its opinion regarding such terms. Since the ultimate outcome is often a bypass flow requirement, these conditions can be controversial in the same way that bypass flows imposed under FLPMA authority are. However, the even stronger directive in the FPA has meant fewer objections to these types of bypass flow requirements. (But, there are exceptions; for example, the current re-licensing of the El Dorado Irrigation District's facilities on the South Fork of the American River in California.)
- Set Forest Plan Instream Flow Standard. The National Forest Management Act focuses the Forest Service on adopting management plans for each National Forest. To fulfill its responsibilities to minimize damage to fish and wildlife habitat, as well as to protect the environment, it is appropriate for the Forest Service to adopt standards within its plans specifically to provide guidance regarding stream preservation. In the Grand Mesa–Uncompahgre–Gunnison National Forest in Colorado, a TU volunteer is currently participating in a "pathfinder"

[28] In Re Amended Application of the United States for Reserved Water Rights in the Platte River No. W–8439–76 Colo. Dist. Court Water Div. No. 1 Feb 12, 1993, Final Opinion (unpublished), pp. 9–13.

project in advance of re-drafting that forest's plan to develop such a standard, and perhaps more importantly, a set of strategies for use in protecting instream flows on Forest Service lands.

- Use Eminent Domain Power. I am unaware of any instance where the Forest Service has exercised its power under the Fifth Amendment to condemn a water right. Certainly, were the Forest Service to use this power, and provide just compensation, there could be no claim of illegality. Nonetheless, I suspect that the water user community would be outraged by such an exercise of federal power.

Conclusion

TU would urge these committees not to propose legislation regarding bypass flows, other than to make funds available for the Forest Service to buy water back for its de-watered streams. To do otherwise would significantly weaken the Forest Service's ability to protect public land resources using the means available to it.

The Forest Service, as one of the nation's largest land manager, needs all of the tools available to ensure adequate protection of National Forest lands. Bypass flow conditions are one such tool. There is no concrete evidence that the Forest Service's exercise of this authority has substantially harmed existing water users. This is because the Forest Service has sought to reach accommodations through other means and has imposed bypass flows only rarely.

The Forest Service's continued ability to impose bypass flows is, of course, one reason why permittees and those seeking rights-of-way have been willing to sit at a table to look for alternative mechanisms that can achieve the Forest Service's statutory responsibilities to protect its fish and wildlife resources. Taking away the Forest Service's ability to seek a bypass flow will, without doubt, also take away any incentive for water users to negotiate alternatives. If the Administration and Congress are serious about maintaining our nation's fish and wildlife resources, they will leave the Forest Service the authority to continue its current policy.

Mr. MCINNIS. Thank you. I appreciate your comments.

Mr. Treese, you may proceed.

STATEMENT OF CHRIS TREESE, EXTERNAL AFFAIRS, COLORADO RIVER WATER CONSERVATION DISTRICT

Mr. TREESE. Thank you, Mr. Chairman, members of the Committee. I appreciate the opportunity to visit with you today to share some concerns and views on this clearly contentious issue.

From the outset, I would like to acknowledge that I distinguish between the practice of conditioning with bypass flows or other conditions new permits versus a relatively new practice of forcing water users to forfeit historical water rights, some of which have been in continuous for 50 years, when renewing a permit.

You have heard the legal arguments for and against bypass flows and the authorities which grant the Forest Service that opportunity. It is my testimony, however, that irrespective of the legal authority, that this is simply a failed practice; that it does not, in fact, accomplish what the Forest Service intends; that there are successful alternatives, some of which have been described here today; and that other agencies of the Federal Government are, in fact, finding alternatives to accomplish the stated goals which the Forest Service claims under the bypass flow conditions without the generating the same hostility, litigation and air of distrust that bypass flows engender.

We are also concerned about the institutionalization of this practice, especially in the White River National Forest plan that the Chairman mentioned.

Until the last couple years, bypass flow practices had only existed in a limited number of forests and apparently on a discre-

tionary basis. But with the White River National Forest draft management plan, it appears it is becoming institutionalized.

That plan, in the goals and objectives section, states that the Forest Service shall acquire instream flow protection measures through special use permit authorizations. That places more than 31 reservoirs and 200 water diversions, which exist under special use permits in the White River National Forest, each at risk of Federal taking as a result of this draft objective.

The irony is that the White River National Forest has been the one forest that previously has not engaged in bypass flows and, in fact, has respected the state's instream flow program that Mr. Holsinger described and the state's authority to adjudicate and administer Colorado water.

When the Aspen Ski Company requested the state review the water conservation board's instream flow filings on Snowmass Creek, the White River forest stayed out of the ensuing environmental suits. When the White River forest desired protection for Dead Horse Creek and Hanging Lake, that Mr. Holsinger described, the White River forest approached the state, and the state adjudicated the entire stream flow of Dead Horse Creek and also maintained by filing on protective lake levels for Hanging Lake.

Further, the draft management plan gave no indication of why the White River forest had abandoned its historical and successful practice of partnering with state agencies and local interests to accomplish these goals.

Our recommendations are that the Forest Service first consider nonappropriative alternatives. Direct mitigation of deficient or at-risk habitats, such as drop structures, stilling pools, stream bank stabilization programs, have all proven to be successful alternatives.

Second, the Forest Service should explore cooperative ventures with permit holders to consider existing permitted facilities as a resource rather than as an insult, and the opportunity to reoperate those existing facilities without loss of yield to the permittees, such as was the eventual settlement of most of the Arapaho-Roosevelt forest litigation.

However, I would take exception to Mr. Getches's testimony. The existence of bypass flow authority does not create the collaborative environment that he suggests. In fact, I suggest that it is not even possible to have this kind of discussion between the Forest Service and current permittees under the relationship with the Forest Service seen as Big Brother unilaterally imposing its will without regard to existing private or public property rights.

Proper forest management practices, such as vegetative reductions through commercial harvest or controlled burns and other measures, will not only reduce fire dangers but also increase the yield of water from the forests.

Finally, when new rights are desired, the Forest Service should follow traditional and proven adjudication of Federal rights under state law in companion with the Federal McCarran amendment.

These are both appropriate for appropriative rights, new appropriative rights, and reserved rights where Congress has established them. If junior rights are not sufficient for protective measures, they can work with existing water rights holders to acquire legal

interest in that water and then convert those or donate those to the water conservation board so that in fact that water can be legally administered.

Since bypass flows permit conditions do not create a water right, bypassed water is legally available to the next downstream diversion, including downstream Forest Service permittees who have not have the misfortune of a recent renewal of a permit.

Even those who construe the legal authority for the Forest Service to condition permits must concede that the practice does not inure the benefits for which the bypass is imposed.

Therefore, I respectfully ask this Committee to act in any way possible to discontinue the Forest Service practice of conditioning permit renewals with counterproductive bypass flow conditions and to direct the use of constructive alternatives, which in fact accomplish the goal the Forest Service contends are the purposes for which they are imposing these flows.

I will conclude my testimony.

[The prepared statement of Mr. Treese follows:]

Statement of Christopher J. Treese, External Affairs, Colorado River Water Conservation District, Glenwood Springs, Colorado

I want to thank Congressman McInnis for this opportunity to share the Colorado River Water Conservation District's concerns and recommendations regarding the U.S. Forest Service's practice of conditioning permits with bypass flow requirements. I also want to extend our gratitude to Chairmen McInnis and Calvert for sponsoring a hearing on this important issue.

The Colorado River Water Conservation District is the principal policy body for the Colorado River within Colorado. We are a political subdivision of the State of Colorado responsible for the conservation, use, and development of the water resources of the Colorado River basin to which the State of Colorado is entitled under the 1922 and 1948 Colorado River compacts. The River District includes all or part of 15 counties in west-central and northwest Colorado, including six different National Forests.

As a member of the third panel for this hearing, I will forego any lengthy legal critique of the Forest Service's practice of imposing bypass flow conditions on water-related permits and rights-of-way. Instead, I would like to focus on the practical failure of this particular permitting practice. Accordingly, I will cite a specific example of the Forest Service's failure to accomplish its stated purpose in imposing these conditions, as well as an example of another federal agency's success with an alternative approach. Additionally, I will describe the treatment of bypass flows in the White River National Forest planning process. Finally, I will conclude by offering several constructive alternatives that accomplish the stated goals of the U.S. Forest Service in requiring these bypassed flows, remove the federal government from the role of "Big Brother," and satisfy state and federal law, thereby saving countless dollars of public and private funds currently earmarked for future litigation on this subject.

Introduction:

I would like to state at the outset that I distinguish between the practice of imposing bypass flow conditions on permits for new water diversion or storage facilities and the more controversial practice of exacting new bypass flow conditions on permit renewals or replacement easements. My comments are focused on the Forest Service's relatively recent practice of forcing water users to forfeit portions of their historical water rights by sole virtue of needing to renew an existing Forest Service permit.

In selected forests in Colorado, the Forest Service has attempted to impose bypass flow permit conditions requiring municipal and agricultural water users to relinquish significant portions of their historical water supplies in order to provide water for the secondary purposes of the National Forests. When it has succeeded in doing so, the Forest Service's actions have had the effect of reallocating water from public and private senior water rights to relatively recently adopted federal purposes. Further, the Forest Service has done so in a manner that is wholly inconsistent with the adjudication and administration of federal and non-federal water rights in Colo-

rado. As such, the Forest Service's bypass flow practice constitutes an illegal federal instream flow program within the State of Colorado and one which cannot even be legally administered in the state. Such a federal water grab causes significant losses. When water users are forced to forfeit a portion of their historical water supply, their initial investment in these historical water supplies is lost and the replacement supplies, if available at all, are significantly more expensive to develop and will, undoubtedly, result in additional environmental impacts.

The imposition of bypass flow conditions on water-related permits also fails to achieve the Forest Service's stated goal for the bypassed water. A bypass requirement on a special use permit, easement, or right-of-way does not create a legal water right in Colorado or any other Western state, to my knowledge. Consequently, water bypassed is simply available for diversion by the next downstream junior water right holder, who may not otherwise be entitled to such water depending on stream volumes at the particular time. Let me offer one such example of a failed bypass flow condition.

Overland Ditch and Reservoir Company:

The Overland Ditch and Reservoir Company is a small, mutual ditch and reservoir company in Western Colorado situated within the Gunnison National Forest. The company was founded in 1893 and today serves 138 family farms and orchards. In 1905, the Overland Company constructed and has since operated the Overland Reservoir for the benefit of its agricultural share holders. The Overland Company constructed its reservoir under an easement granted under an 1891 Act[29] intended to guarantee ditch and reservoir companies access to their facilities across public lands.

In 1985, the Overland Ditch and Reservoir Company applied to the Gunnison National Forest for a special use permit to conduct rehabilitation work on a portion of the existing dam and outlet works. This maintenance activity was required in order to comply with a Colorado State Engineer's dam safety order. The Overland Company did not intend to enlarge or change in any way the configuration or operation of its reservoir or collection system. The Gunnison National Forest issued a new easement, but added a condition requiring that 2.0 cubic feet per second (cfs) of water be bypassed year-round from the reservoir for the stated purpose of enhancing the fishery in Cow Creek. This bypassed water was required to be measured at an existing stream gauge two miles downstream. Because of this, the Overland had to bypass more than 2.0 cfs in order to account for evaporative losses. The Overland Company initially appealed this new condition, but, faced with construction delays and attendant cost increases, the share holders had no choice but to accept the new easement with the 2 cfs bypass condition attached.

The year-round bypass of 2 cfs represented a 25% reduction of stored water in dry years. For a share holder to secure a comparable 2 cfs flow of water from the Overland Reservoir, they would have to own approximately 400 shares at $1000/share, or $400,000, and pay a $4800/year operations and maintenance charge to the mutual company. Further, that $400,000 investment and $4800 annual payment would only provide 2 cfs of water on a seasonal basis for irrigation use, whereas the Forest Service, by permitting fiat, secured a year-round flow of 2 cfs at no charge.

Because the Forest Service does not hold any legally recognized or enforceable right to this bypassed water, there is no way to protect it from subsequent diversion. As a result, two junior water right owners, located downstream of the gauging station, routinely diverted those 2 cfs for their use. This diversion is allowed under Colorado law because the water was, as a result of the bypass condition, freely available in the stream. A similar bypass condition has never been imposed on the two downstream, junior diverters presumably because there has been no federal nexus, to date.

It is important to note that although the circumstances in the Overland Company's case resulted in additional water in Cow Creek for at least a couple miles, the particular facts of other bypass situations could result in bypassed water being almost immediately diverted by downstream, junior water right owners.

White River National Forest: Resource Management Planning Process:

Of even greater concern, however, is the process to update the White River National Forest's Land and Resource Management Plan. The White River Forest contains the headwaters of six rivers which flow into the Colorado River. Within the White River National Forest, there are 31 reservoirs and more than 200 water diversions each with Forest Service permits. Many of these permits are coming up for

[29] 43 U.S.C. §§ 946–949.

renewal in the near future. This Draft Plan positions each of these public and private property interests at risk of federal taking.

Although the local forest planning staff held periodic meetings with various interest groups for several years prior to the Draft Plan's publication, the water language calling for routine, autocratic use of permitting authorities to secure bypass flows contained in the Draft Plan came as a complete surprise to everyone.

In the overarching Goals and Objectives section, the Draft Plan included the following:

Goal 1.10–Water Quantity:

> "Provide instream flows that support the achievement and maintenance in perpetuity of those federal purposes for NFS lands (i.e., safe drinking water and swimming, aquatic life and habitat, recreation and aesthetics, and the natural conveyance of water and sediment) that depend on such flows."

Objective 1.10:

> "By the end of the plan period acquire instream flow water rights or establish instream flow protection measures in special-use authorizations which protect 10% of all perennial streams."

(White River National Forest, USDA, Proposed Revised Land and Resource Management Plan; "Forest Plan," August 1999. Page 1–5.)

This companion Goal and Objective garnered widespread outrage across Colorado. The Objective's call to "establish instream flow protection measures in special-use authorizations" is offensive in its overt declaration of intent to extort water from legal water right owners through the Forest Service's special use authorization process. These statements in the Draft Forest Plan made clear the Forest Service's intention to ignore both Colorado water law and Colorado's exemplary instream flow program.

Moreover, this Goal and Objective is simply unnecessary, since the State of Colorado has a state-administered program to protect its natural stream environments through an instream flow water rights program. Under Colorado law, the Colorado Water Conservation Board (CWCB) is vested with the exclusive authority to appropriate instream flow water rights to "protect the natural environment to a reasonable degree."[30] The CWCB currently holds more than 1300 instream flow rights on more than 8000 miles of Colorado streams and rivers. Each of these rights has been adjudicated through Colorado's water court system and, as a result, can be administered, in priority, by the State Engineer.

The River District noted with dismay that this offensive Goal and Objective represented a significant departure from the historical practice of the White River Forest in dealing with stream flow-related concerns. Previously, when the Aspen Ski Company requested a modification of the state's instream flow filings on Snowmass Creek, the White River Forest rightly chose to stay out of the ensuing litigation, which was ultimately resolved within Colorado's water courts. When the White River Forest desired aquatic and riparian protections for Dead Horse Creek, a tributary to the Colorado River in Glenwood Canyon, the White River Forest worked with the Colorado Water Conservation Board to successfully adjudicate a state instream flow right for the entire flow of the stream and preserved the natural lake levels of Hanging Lake, a popular tourist attraction, as well. The White River Forest's Draft Plan gave no indication of why the Forest Service chose to abandon its historical and successful practice of partnering with appropriate state agencies to accomplish its goals.

The White River Forest's Draft Plan garnered more than 14,000 public responses, including a comprehensive comment letter by Congressman McInnis constituting nearly a complete rewrite of the plan. As a result of the many serious changes in the historical management practices proposed in the Draft Plan, a final record of decision and publication of the final plan have been delayed numerous times, leaving local forest officials without clear guidance or direction. However, these delays and the overwhelming public response offer the Forest Service, and the White River National Forest in particular, the opportunity to explicitly reject the offensive use of bypass flow permit conditions and to commit to a more constructive and ultimately successful approach to protecting the aquatic resources which the Forest Service suggests is the purpose behind these bypass flows.

Unless the U.S. Forest Service commits to respecting Western states' individual water rights adjudication systems to accomplish its Goals and Objectives, the states cannot protect bypassed water from subsequent, or even immediate, downstream diversion. The only sure outcome of the Forest Service's continuing its practice of ex-

[30] Colorado Revised Statutes § 37–92–102 (3).

acting bypass flow requirements is contentious, lengthy, and expensive litigation. This is a result in no one's interest.

Wolford Mountain Reservoir:

In contrast, when my employer, the Colorado River District, obtained permits for its Wolford Mountain Reservoir on BLM lands in western Colorado, we secured stream flows for Muddy Creek which are both protective of the environment and enforceable under state law. Our BLM permits required that we work cooperatively with the BLM and the Colorado Water Conservation Board to establish and adjudicate instream flows downstream from our dam. As a result, the state filed on a three-tiered, seasonally fluctuating flow, which better represents the natural hydrograph than a single year-round bypass amount. Although the instream flow right is a junior right to our storage diversions, we have voluntarily met the instream flow targets every year, to date. This year, however, due to a relatively light snow pack, we have agreed to the state's recommendation for a slightly reduced flow target for the peak, runoff months which is more reflective of stream conditions in a dry year, but will, in fact, provide greater and more consistent flow to Muddy Creek than if the dam were never built.

Recommendations:

Rather than asserting permitting authority to impose bypass flows which cannot be legally administered, the Forest Service should avail itself to one of several well-established methods for federal agencies to secure enforceable water rights: 1) reserved rights, 2) appropriative rights, or 3) CWCB instream flow rights. Colorado law, in companion with the federal McCarran Amendment,[31] provides an adequate and proven means for federal agencies to secure enforceable reserved or appropriative water rights pursuant to Colorado's procedural laws. Federal agencies have used and continue to use Colorado's procedural water law processes to secure such adjudications. Federal water rights adjudicated through Colorado's substantive and procedural processes are recognized and administered by Colorado's water officials, a condition not enjoyed by bypass flows secured through federal permitting mandates.

Therefore, the Forest Service must commit to obtaining water rights which would be protectable under Colorado's priority system. Fundamental fairness, federal respect for states' sovereignty in water adjudication and administration, as well as a genuine desire to achieve the goals that the Forest Service espouses regarding bypass flows, all argue for this more constructive approach. The Forest Service should acquire interests in water that the CWCB can convert to instream flow rights pursuant to its exclusive statutory authority, or secure the CWCB's agreement to appropriate and adjudicate such flows directly, as is also its exclusive authority.[32]

Additionally, the U.S. Forest Service should fully explore alternatives other than taking water from existing water users in order to accomplish its goals for a specific stream reach. Often direct mitigation of stream deficiencies resulting from reduced stream flows will accomplish the desired goals without placing existing water rights at risk. Drop structures, stilling basins, and channel manipulation are just a few examples of stream work that may be more effective than flow requirements.

Other related forest practices that influence stream flows should also be addressed. Declining timber harvests and decades of fire suppression have resulted in dangerously over-mature and dense forests. In addition to creating the potential for catastrophic fires and their associated water quality problems, these conditions increase evaporative losses, reducing total water yields from the forests. Proper vegetative management can increase year-round runoff, which would benefit both the forest streams and downstream water users who rely on adequate flows arising from the forests. Additionally, the Forest Service should fully explore partnering opportunities with existing permit holders to cooperatively investigate reoperations alternatives which achieve the desired forest conditions without impacting water users' historical yield. This was the ultimate resolution to the expensive and divisive legal battles over permit renewals of decades-old water facilities in the Arapaho-Roosevelt National Forests.

These approaches require a level of trust and a working dialogue which, frankly, the practice of compelling bypass flows precludes. These approaches would create an entirely different relationship with area water users. They could accomplish the goals intended with the bypass conditions in a more efficacious manner and would not have the legal and emotional encumbrances associated with bypass conditions.

[31] 43 U.S.C. § 666.
[32] Colorado Revised Statutes § 37–92–102 (3).

Conclusion:

Even those who construe a legal authority for imposing bypass flows conditions must accept that the practice does not ensure that the purposes for which the bypass is imposed can be realized. Federal permit conditions to forego legally available water do not confer a legal water right on the permitting agency. Bypass flow requirements only serve to reallocate water from a senior water user to a junior user in abrogation of Western states' substantive and procedural water law.

The U.S. Forest Service has not considered, or at least fails to acknowledge, that the subsequent environmental impacts associated with replacing the water yield that water users are forced to relinquish may overshadow the intended benefits of the bypass flows. Water required to be bypassed as a result of a condition imposed upon permit renewal must be replaced by the permittee. The Forest Service must at least acknowledge that this can only be accomplished at considerable, often prohibitive, expense and that the environmental impacts associated with development of replacement water supplies and associated delivery systems may be much greater than even the intended benefit of the bypass flows.

There are constructive and proven alternatives to the failed practice bypass flows. Since 1973, Colorado, through its Water Conservation Board, has established an extensive network of protected instream flows and natural lake levels, the vast majority of which are located on Forest Service lands. Six other arid, Western states have similar programs. A commitment to work with this program and within Colorado's legal and administrative water rights system is the only way to achieve the Forest Service's own stated objective of "provid(ing) instream flows that support the achievement and maintenance in perpetuity of those federal purposes for NFS lands (i.e., safe drinking water and swimming, aquatic life and habitat, recreation and aesthetics, and the natural conveyance of water and sediment) that depend on such flows." (White River National Forest, USDA, Proposed Revised Land and Resource Management Plan; "Forest Plan," August 1999. Page 1–5.)

Mr. MCINNIS. Thank you, Mr. Treese.

And I thank the entire panel for making the effort to appear today. I can assure you that I am sure my colleagues, certainly myself, have a number questions and areas that I would like to explore with each one of you. But the time is not going to allow that today.

What I intend to do is ask one question and then, as a courtesy, grant the Ranking Member one question as well. I think we can both, if we keep it to a couple of minutes, we can do it.

The voting that is going to be required now will take us past the 5 o'clock hour, so at the conclusion of our questions, we will adjourn the Committee hearing.

Mr. Phillips, I have one question, very briefly. In regard to the White River National Forest, as you heard Mr. Treese and myself in earlier comments, I want to see, is it the intent of the Forest Service to follow the policy of the Madigan letter in regard to the White River National Forest plan.

You can go ahead and approach the microphone there.

Mr. PHILLIPS. That is difficult for me to answer right now. I know that the plan is between the draft and the final stage, and I know the comment that chief Bosworth made about collaboration, he was serious about. And I will take that back to him.

Thank you very much, Mr. Phillips.

With that, I want to allow Mr. Inslee an opportunity to ask a question.

Mr. Inslee?

Mr. INSLEE. I appreciate that opportunity.

Perhaps Mr. Treese is the best one to answer this question. I have some degree of confusion—and maybe it is not me that is confused; maybe others—but I perceive the discussion I have heard

today is about a water right. Under the assumption that a water right also includes, by necessity, a right of access on other people's lands to get access to convey or store that water.

My understanding of a water right does not give the water right holder, by itself, the right to go across another entity's property for conveyance purposes or for storage purposes. And my understanding of what is going on here is that because the water right does not vest in an irrigator or a water right holder the right to go on Federal property, they have to ask Uncle Sam for permission to come on Uncle Sam's property.

And my understanding of what is going on here is that Uncle Sam in certain very limited circumstances is saying, you can come on our property at the end of your permit process when you have to re-up, when you have to ask Uncle Sam for permission. Uncle Sam is striking a bargain, saying, in certain circumstances, we are only going to allow you to come on our property if you take care of fish a little bit.

Now, your constituency may not care about those fish. I can tell you that my constituency does, who are the owners of this property where these storage facilities are located.

To the extent you can, tell me what is wrong with my logic, which is the belief that my constituents have the right to draw certain conditions on the use of their property for the maintenance of storage facilities.

Mr. TREESE. Thank you.

In fact, in Colorado, with the exception of Federal lands, water is in fact a dominant estate. So that, absent the need to cross Federal lands, you would, in fact, as a water right holder, have the right of eminent domain to access the storage or conveyance of that water.

However, on a water right that involves Federal lands, in fact, you are correct. It does require the permission of the Federal Government.

I think what I would like to distinguish here is that these are water rights that have been exercised for generally 50 years, the term of a permit. And it is simply the permittee coming in and not asking to do anything different.

They have already made the capital investment in those facilities. They are just trying to renew the permit. They are not asking to increase their storage. They are not asking to change their diversion. They are not asking for access to construct or improve anything. They are simply asking to take care of this bureaucratic requirement that says you have to re-up your permit.

Mr. MCINNIS. Mr. Treese, I am going to have to adjourn the Committee in order that we can make the vote. We have about 6 minutes remaining.

Mr. Treese, I would appreciate very much if you would send correspondence, responding to Mr. Inslee's remarks—

Mr. TREESE. Be happy to.

Mr. MCINNIS. —to Mr. Inslee. I would be interested in the response. You can give us a little more detailed response.

Again, I thank all of you for making this effort to come out the distance you did. And I am sorry about the time.

But that is life in Congress.

The Committee is adjourned.

[Whereupon, at 4:35 p.m., the Subcommittee was adjourned.]

[The items listed below were submitted for the record:]

1. Letter from David Nickum, Colorado Trout Unlimited, et al.
2. Letter to Senator Hank Brown from Secretary of Agriculture Edward Madigan
3. Letter from Dr. N. LeRoy Poff, Colorado State University,

May 18, 2001

The Honorable Scott McInnis, Chair
Subcommittee on Forests and Forest Health
1337 Longworth House Office Building
U.S. House of Representatives
Washington, D.C. 20515–6205

Re: May 22 Subcommittee hearing on instream flow protection on National Forests

Dear Representative McInnis:

The undersigned Colorado organizations believe that protection of streamflows on National Forests is a critical issue for our state and the nation. We strongly support Forest Service authority to require minimum "bypass flows" below water developments built on National Forests. We believe that operators of dams and diversions on National Forests, as tenants on public lands, have a responsibility to the American people to ensure that their activities are conducted in a manner that protects the health of our National Forests. Maintaining sufficient water in streams to support aquatic life and riparian vegetation is part of that responsibility. Therefore, we disagree with the name of the May 22, 2001 hearing. The Forest Service is not engaged in the "illegal use of 'bypass flows' on Forest Service lands;" rather the Forest Service is using properly delegated authority to meet its express duty to preserve aquatic resources on National Forests.

Adequate streamflows are essential to a wide range of public uses on National Forests. Of course, fish and other aquatic life require water every day. Streamflow is also vital to maintaining healthy riparian corridors, which are critical for wildlife. Riparian and aquatic ecosystems make up about five percent of the area in the West, but are used (for at least part of their life cycle) by 65 percent of the species. Riparian areas also serve an important function as natural firebreaks. For example, it was the North Fork of the South Platte River corridor that ultimately stopped the northward advance of the disastrous 1996 Buffalo Creek fire in Colorado. Water-based recreation is another major use of National Forests; fishing use of National Forests alone contributes more than $8.5 billion to the economy each year and supports more than 95,000 jobs (based on 1996 data). Most fundamentally, rivers and streams are the arteries for forest ecosystems and the water they carry is the lifeblood. Without adequate flows in streams, healthy forests cannot be maintained.

The problem Colorado faces is that its historic water rights system allows streams to be dried up completely, even on protected public land. We do not object to the use of National Forests for water development, as that is one of the many appropriate multiple uses for which these lands can be managed. However, the expectations for water development are no different than those for any other forest use such as logging, grazing, or recreation: the use must be managed so as to ensure healthy, sustainable forest ecosystems. When water developers seek the privilege of operating their ditches or reservoirs on lands belonging to the American people, we do not believe it is too much to ask that some small amounts of water be allowed to "bypass" their projects so that streams and riparian zones can be sustained.

Each of the thousands of reservoirs and diversions on National Forest lands alters natural flows and impacts fish and wildlife habitat both above and below the facility. Many of the permits for these facilities were first issued before anyone really understood the environmental cost of dewatering native stream channels. When the Forest Service now considers renewal of such permits, it has a legal duty to preserve the forest's flow-dependent resources. When possible, the Forest Service uses other means to protect its water resources, including state-issued water rights and voluntary arrangements with permittees. We encourage the use of these collaborative tools, but sometimes they are inadequate or unavailable. In these instances, the Forest Service must be allowed to rely on its ability to require that some water remain instream as a condition of permit issuance.

We ask that our letter be included with the Subcommittee hearing record. Thank you for your consideration.

Sincerely,

David Nickum, Colorado Trout Unlimited
Dan Luecke, Environmental Defense
Carmi McLean, Colorado Clean Water
Jean C. Smith, Action Upper Arkansas and South Platte Project
Roz McClellan, Rocky Mountain Recreation Initiative
Bruce Driver, Land and Water Fund of the Rockies
Steve Glazer, High Country Citizens Alliance
Kirk Cunningham, Sierra Club, Rocky Mountain Chapter
Pam Eaton, The Wilderness Society
Elise Jones, Colorado Environmental Coalition

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20250

October 6 1992

Honorable Hank Brown
United States Senate
717 Hart Senate Office Building
Washington, D. C. 20510

Dear Hank:

Thank you for your August 12 letter regarding the renewal of special-use permits for water supply facilities on the Arapaho/Roosevelt National Forest in Colorado. I understand the importance of this issue to cities throughout the west that depend on facilities located on national forest lands for their water supplies.

This is a complex issue, but one that I believe has been resolved in a manner that is satisfactory to all interests. This progress is due in no small part to your ongoing interest and leadership in this important area.

I want to assure you that it is the policy of the Forest Service to ensure that private property rights, including water rights, will be recognized and protected in the course of special-use permitting decisions for existing water supply facilities. In addition, the Forest Service will recognize and respect the role of the States in water allocation and administration.

I agree that the Forest Service should not take actions that reduce historical water supplies from facilities located on national forest lands. The Forest Service will reissue permits for existing water supply facilities for 20 years with provisions to recognize and respect both the rights of the applicants and the multiple use objectives of the national forests. New bypass flow requirements will not be imposed on existing water supply facilities. However, unless amended, all permits will authorize only historical water rights associated with existing facilities. The permits will also obligate the permittee to accommodate resource goals of the Forest. This accommodation will be to the extent feasible without diminishing the water yield or substantially increasing the cost of the water yield from the existing facility.

In summary, special-use permits for existing water supply facilities will:

- Authorize the use, operation, maintenance, repair, and replacement of the existing facilities described in an enclosure to the permit for the exercise of the water rights

and water conservation or management practices described in an additional enclosure to the permit. The permit will not authorize expansion or enlargement of the facilities or water rights, water conservation, or management practices described in the enclosure.

- Require the permittee to operate the facilities in a manner that accommodates the resource goals of the national forest without reducing the yield of the water rights or significantly increasing the cost of the water yield from the existing facility.

- Require the permittee to provide the Forest Service, on an annual basis, a copy of the official records of the State agency having responsibility for administration of the water rights for the facilities described in the enclosure.

I am pleased to see that progress has been made on this issue and will instruct the Forest Service to reissue permits in accordance with this letter. I have asked the Chief of the Forest Service to initiate discussions with local interested parties to identify ways for carrying out the provisions and objectives of the individual permits.

Sincerely,

for Edward Madigan
Secretary

May 21, 2001

The Honorable Rep. Scott McInnis, Chair
Subcommittee on Forests and Forest Health
Committee on Resources
U.S. House of Representatives
1337 Longworth Building
Washington DC 20515

Re: May 22 Subcommittee Hearing on Bypass Flows in National Forests

Dear Representative McInnis:

I understand there is a hearing on Tuesday, May 22 dealing with the issue of federal bypass flows. I wish to offer my professional opinion for the record on some biological issues related to bypass flows, based on my experience in Colorado. I am a stream and river biologist in the Department of Biology at Colorado State University. I have extensive experience with streams and rivers in Colorado, including headwater streams on US Forest Service lands.

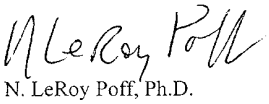
Flows in many stream segments on federal lands in Colorado are unnaturally low and cause demonstrable biological harm. For example, in the headwaters of the Poudre River, in Larimer County Colorado, some stream segments below municipal reservoirs are completely dewatered during the winter period. Obviously, a dry streambed cannot support aquatic life. Further, the seasonal drying impairs these stream segments during the period they are wetted. Other stream segments that maintain perennial flow are managed in an ecologically damaging manner. For example, some streams experience rapid reductions in streamflow in spring due to reservoir filling, abruptly exposing much of the streambed habitat to drying. In short, complete dewatering and dramatic seasonal reductions in flow are characteristic of current management of stream channels in the upper Poudre River (and on other Forest Service lands). This kind of management causes habitat loss, which translates directly into a reduction in biodiversity of the stream fauna and flora and into a reduction in the production potential of invertebrates and the fish that feed on them.

At a minimum, fish and invertebrates in high elevation streams in Colorado require wetted habitat on an annual basis. The science is clear on this point. Any management policy that retains a minimum flow in the channel is ecologically beneficial and necessary to sustain baseline function of the stream/river ecosystem. Ideally, mountain streams and rivers will eventually be managed in a more ecologically informed manner, that is by reinstating some semblance of natural flow dynamics. Recent advances in scientific understanding of how riverine ecosystems function indicate that not only are minimum ("survival") flows needed, but so are occasional high flows ("riparian" flows) that rejuvenate aquatic habitat and allow for exchange of nutrients and sediment between

the channel proper and the floodplain[12]. As a biologist interested in the long-term health of our western streams and rivers, I am strongly in favor of using any tools that may be available to protect the integrity and self-sustainability of our heavily managed headwater streams in Colorado.

I urge the subcommittee to consider a science-based approach to managing streamflow on federal lands. Thank you for your inclusion of my opinion in the Subcommittee hearing record.

Sincerely,



N. LeRoy Poff, Ph.D.
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Department of Biology
Colorado State University
Fort Collins, Colorado 80523

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[1] Poff, N.L., J.D. Allan, M.B. Bain, J.R. Karr, K.L. Prestegaard, B.D. Richter, R.E. Sparks, and J.C. Stromberg. 1997. The Natural Flow Regime: A Paradigm for River Conservation and Management. BioScience 47:769-784.

[2] Standford, J.A., J.V. Ward, W.J. Liss, C.A. Frissell, R.N. Williams, J.A. Lichatowich, and C.C. Coutant. 1996. A General Protocol for Restoration of Regulated Rivers. Regulated Rivers-Research & Management 12:391-413.