

Committee on Resources, Subcommittee on Forests & Forest Health

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U.S. House of Representatives, Washington, D.C. 20515-6205 - - (202) 225-0691

Subcommittee on Water & Power

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Witness Statement

Testimony of Professor David Getches
Before the US House of Representatives
Committee on Resources
Subcommittees on Forest & Forest Health and on Water & Power
Regarding the Use of Bypass Flows on National Forest Lands
May 22, 2001, 3:00 pm

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Professor, University of Colorado
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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.⁽¹⁾

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.⁽²⁾

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 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.⁽³⁾ 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.⁽⁴⁾ 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.⁽⁵⁾ 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 acting 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.⁽⁶⁾ 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."⁽⁷⁾ 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."⁽⁸⁾ 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.⁽⁹⁾ 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.⁽¹⁰⁾ 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.⁽¹¹⁾ 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.⁽¹²⁾

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]."⁽¹³⁾ 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.⁽¹⁴⁾ 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.⁽¹⁵⁾ 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."⁽¹⁶⁾ 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.⁽¹⁷⁾ 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.⁽¹⁸⁾

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.⁽¹⁹⁾ 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 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 US 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.

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1. 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.
 2. 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."
 3. 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.
 4. 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.)
 5. 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).

6. See *United States v. San Francisco*, 310 U.S. 16, 29 (1940).
7. *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).
8. 16 U.S.C. § 1765 (1994).
9. 43 U.S.C. § 666(a)(1) (1994).
10. 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.
11. 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).
12. 43 U.S.C. § 1765.
13. *Sierra Club v. Watt*, 659 F.2d 203, 206 (9th Cir. 1981).
14. 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)).
15. 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").
16. *Nevada Land Action Ass'n v. United States Forest Service*, 8 F.3d 713, 719 (9th Cir. 1993).
17. *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).
18. 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).
19. Whether or not the JOP achieves its goal currently is the subject of a legal challenge. *Trout Unlimited v. United States Dep't 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.

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