

## **Committee on Resources, Subcommittee on Forests & Forest Health**

[forests](#) - - Rep. Scott McInnis, Chairman

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

## **Subcommittee on Water & Power**

[water](#) - - Rep. Ken Calvert, Chairman

U.S. House of Representatives, Washington, D.C. 20515-6204 - - (202) 225-8331

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### **Witness Statement**

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**Statement of Kent Holsinger  
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BYPASS FLOWS ON NATIONAL FOREST LANDS  
United States House of Representatives  
Subcommittee on Forests and Forest Health  
Subcommittee on Water and Power  
May 22, 2001**

#### **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 bypass 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<sup>(1)</sup> (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.<sup>(2)</sup> 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:

- 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 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 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 measures" 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 simply 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 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.

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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.

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.

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 21<sup>st</sup> Century" by the USDA Forest Service, November 30, 2000 at 8. This concern is without merit.

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.

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