

## **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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**Testimony of Charles F. Gauvin  
President, Trout Unlimited Inc.  
Before the U.S. House of Representatives, Resources Committee  
Subcommittee on Forests & Forest Health and  
Subcommittee on Water and Power  
Regarding Use of Bypass Flows on National Forest Land  
May 22, 2001**

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 21<sup>st</sup> 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 miniscule 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 US 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.<sup>(1)</sup> 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 Arapahoe-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 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."<sup>(2)</sup>

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]."<sup>(3)</sup>

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 pendency 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 flow authority. The judge accepted this argument.<sup>(4)</sup>

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" 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.

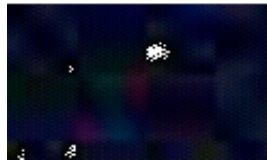
- Use Eminent Domain Power. I am unaware of any instance where the Forest Service has exercised its power under the Fifth Amendment to condemn a water right. Certainly, were the Forest Service to use this power, and provide just compensation, there could be no claim of illegality. Nonetheless, I suspect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



Big Thompson River above Idylwilde Dam  
Arapaho-Roosevelt National Forest, Colorado  
1993



Big Thompson River below Idylwilde Dam  
Arapaho-Roosevelt National Forest, Colorado  
1993

The upper photograph shows the robust Big Thompson River flow above Idylwilde Dam. A trickle released as a result of bypass flow requirements is visible in the center foreground of the lower photograph, below the dam.





La Poudre Pass Creek above Long Draw Dam  
Arapaho-Roosevelt National Forest, Colorado  
October 1993



La Poudre Pass below Long Draw Reservoir  
Arapaho-Roosevelt National Forest, Colorado  
October 1993

The result of failure to impose bypass flow requirements is demonstrated in these photographs. In the upper photograph, La Poudre Pass Creek has a substantial late fall flow as it enters Long Draw Reservoir. In the lower photograph, the Creek is essentially dry.

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<sup>1</sup> 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>.

<sup>2</sup> Trout Unlimited v. Dep't of Agric., No. 96-WY-2686-WD (D. Colo. Filed June 5, 1995), Administrative Record (Longdraw) at 4483.

<sup>3</sup> Memorandum from N. LeRoy Poff to Steve Moyer, Trout Unlimited regarding "Review of 'Trout habitat evaluation for Joint Operations Plan flows November 1994 through March 1995 and November 1995 through March 1996' (Miller Ecological Consultants, Inc. 1997) dated November 10, 1997.

<sup>4</sup> 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.

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