

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

Witness Statement

STATEMENT OF ROBERT S. LYNCH
APPOINTED MEMBER OF THE WATER RIGHTS TASK FORCE
BEFORE THE HOUSE COMMITTEE ON RESOURCES
SUBCOMMITTEES ON FOREST & FOREST HEALTH AND ON WATER & POWER
CONCERNING THE USE OF "BYPASS FLOWS" ON NATIONAL FOREST LAND
May 22, 2001

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.

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