



## WATER QUALITY / QUANTITY COMMITTEE (QQ)

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Post Office Box 2308 • Silverthorne, Colorado 80498  
970-468-0295 • Fax 970-468-1208 • email: qqwater@nwccog.org

### QQ Quarterly Board Meeting

Thursday, March 13, 2013  
Community Meeting Room  
Silverthorne Recreation Center – Silverthorne, CO

#### *AGENDA*

- 10:00 Welcome and Introductions
- 10:05 Presentation: SWSI 2010 Critique and What this Means for the Colorado Water Plan.  
*John Currier, Colorado River Water Conservation District*
- 10:50 Presentation: Colorado River Basin Implementation Plan and Input from QQ.  
*Louis Meyer, SGM, Inc. (contracted to develop the Colorado Basin Implementation Plan)*
- 11:50 Presentation: H.R. 3189, Water Rights Protection Act (Federal bill)  
*Glenn Porzák, counsel, Eagle River Water and Sanitation District*
- 12:30 Lunch
- 1:30 Member Updates
- 1:40 2014 Legislative Session – *Torie and Barbara*
- 2:30 Water Quality Control Commission Updates- *Lane*
- 3:00 Adjourn





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March 10, 2014

*RE: West Slope Principles for the Colorado Water Plan*

The attached West Slope Principles for the Colorado Water Plan ("Principles") have been updated to reflect additional endorsements. The Principles remain unchanged from the earlier November 6, 2013 version.

The Principles are a set of broad values and principles designed as a guide to the Governor and the Colorado Water Conservation Board ("CWCB") during preparation of the Colorado Water Plan ("CWP"). The Principles reiterate and augment water policy statements adopted by the key west slope organizations over the years.

The Principles were prepared by local government officials, basin roundtable members, and other water leaders on the west slope. The goal is that these Principles inform the CWP process by expressing commonly-held west slope interests.

A list of the entities that have officially endorsed the Principles is attached.

## ***West Slope Principles for the Colorado Water Plan***

1. **Solutions in the Colorado Water Plan (CWP) to supply water for growth and development in one part of the state should not over-ride land use plans and regulations adopted by local governments in the part of the state from which water will be taken.** <sup>1,2,3,4,5,6,7</sup>
  - 1.1 No new water supply projects or major changes in operation of existing projects should be planned unless agreed to by the county, conservancy district, and conservation district in the area from which water would be diverted. <sup>1,3,5,6,7</sup>
  - 1.2 The CWP must take into account pending projects, water supply plans, comprehensive land use plans, local regulatory authority, water quality plans (208 Plans), watershed plans, multi-party water agreements and related documents adopted by local governments in the area from which water would be taken. <sup>1,2,3,4,5,6,7</sup>
  - 1.3 Both the legislative basis and the legal impact of local government regulatory tools adopted to mitigate impacts of water projects should be recognized and protected. <sup>3,6,7</sup>
  - 1.4 The CWP should never elevate the agricultural interests in one part of the state over the agricultural interests in another part of the state to meet the demands of Front Range development. Agriculture is an important segment of the state's economy as a whole. Agriculture provides food independence, open space, wildlife habitat, cultural value, and economic activity wherever it is located.
  - 1.5 Any new supply projects taking water from one area of the state to another should include funding for "compensatory projects" to serve the area from which the water is taken. <sup>7</sup>
2. **The CWP should protect and not threaten the economic, environmental, and social well-being of the west slope.** <sup>1,2,3,5,6</sup>
  - 2.1 The cornerstones of the west slope's economy are tourism, recreation, agriculture, and resource development, all of which are highly dependent upon water to be successful. The CWP should not facilitate additional diversions that could threaten the region's environmental, social and economic well-being. <sup>1,2,3,6</sup>
  - 2.2 To educate the public about existing conditions on the west slope, the CWP should identify the location and amounts of water that are already diverted every year from the west slope to the east slope, and discuss the historic and current consequences of those diversions. <sup>1,2,3,6,9</sup>

- 2.3 The state should not facilitate, politically, financially, or legally, any new water supply projects from the Colorado, Yampa/White or Gunnison River Basins to the Front Range without the consent of the county, conservancy district, and conservation district in the basin of origin, and unless impacts are avoided and mitigation is provided. <sup>1,2,3,6,7</sup>
  - 2.4 New supply projects that involve storage on the west slope must make a significant amount of water available to west slope water uses. New supply projects that involve storage of west slope water in an east slope storage project must provide compensatory storage to protect existing and future west slope water uses, as well as the environmental and non-consumptive needs of the basin of origin. <sup>7</sup>
  - 2.5 The CWP must protect investments in public water and wastewater facilities by ensuring that costs to upgrade and operate these facilities do not increase because of Front Range water projects. <sup>5</sup>
  - 2.6 The CWP must afford recreational in-channel diversions and CWCB instream flows the same status as other water rights that are protected under Colorado law. <sup>3,6</sup> Other west slope non-consumptive water needs must be factored into the CWP.
  - 2.7 Water quality protection efforts of the west slope must be respected and enhanced by the CWP. <sup>4,5,6</sup>
  - 2.8 The historic use of west slope agricultural water rights provides a river flow regime that is relied upon by all west slope users and must be maintained. <sup>8</sup>
3. **The CWP should identify a process and requirements for each basin to exhaust available water supply within its own basin before planning diversions from another area of the state.** <sup>1,2,3,7</sup>
- 3.1 Transmountain diversion water should be re-used to extinction to the extent allowed by law, before any proposed new supply development focuses on further west slope water supply. <sup>1,2,3,6,7</sup>
  - 3.2 Re-allocation of existing supplies in areas that need more water should be evaluated (e.g. rotational fallowing, changing to new uses, deficit irrigation). <sup>1,3,6,7</sup>
  - 3.3 Front range infrastructure and water should be shared to meet future demands (e.g. WISE). Laws and regulations that improve such sharing should be considered.

- 3.4 New Front Range in-basin projects should be pursued to fully utilize in-basin supplies (e.g. Chatfield Reallocation, SDS, Arkansas Conduit, indirect and direct re-use, gravel pit storage projects), including maintaining and enhancing existing storage facilities. The CWP should encourage and facilitate dredging to keep capacity, and streamline efforts to enlarge storage by dredging when practical.<sup>3,6</sup>
  - 3.5 The CWP should promote mechanisms to reduce demand through agricultural or municipal efficiency/conservation, land use and smart growth policies that further water conservation, and controls on water usage.<sup>3,6,7</sup> Under no circumstances should agriculture be penalized for switching to more efficient water use methods.
  - 3.6 The CWP should reject proposals for water to supply new development when and where there are insufficient water resources available to support them under all hydrologic conditions without creating risks for other water users.<sup>1,3,6,7</sup> Any new supply projects that rely on diversions from the west slope should be developed within the existing water rights system and not afforded special status.
  - 3.7 Front Range areas with present and future projected water shortages should pursue collectively financing projects that provide water resources to their areas.
4. **The CWP should outline mechanisms to mitigate the risk of potential Compact curtailment of the Colorado River. For example, the CWP should adopt low-risk legal and hydrologic assumptions related to Colorado's obligations under the Colorado River Compact and the Upper Colorado River Basin Compact in order to minimize the risk of curtailment on existing uses of Colorado River basin water.<sup>7</sup>**
- 4.1 There is disagreement on how much, if any, additional consumptive use water is available from the Colorado River. Because of justifiable reliance and financial investment, existing uses and users should be protected and not put at risk by new development.
  - 4.2 The facilities and methodologies for protecting existing users from a compact curtailment, as well as for mitigation, must be in place prior to any new project or methodology that would take additional water out of the Colorado River Basin.
  - 4.3 The CWP must disclose that fully developing the state's Colorado River compact entitlement will increase the chance of a compact curtailment that would impact existing users.
  - 4.4 New projects in the Colorado River Basin should be supported and approved, if at all, only on conditions that will allow diversion and storage at times and in

amounts that will not increase the risk of compact curtailment of other post-Compact water rights.

5. **The State should not assume a role as a proponent of a water project until the State regulatory process has been completed and the project has been agreed to by the impacted counties, conservancy districts and conservation districts in the area from which water would be diverted.**

The above principles are taken from many sources of earlier water principles around the state. The numbers in the above principles indicate in which documents a similar principle may be found, including:

- <sup>1</sup> Colorado 58 *Water Principles*. In approximately 1999, 58 Colorado Counties, signed onto these Water Principles, which were passed as a House Resolution as well.
- <sup>2</sup> Colorado River Water Conservation District Policy Statement: Existing Transmountain Diversions, Adopted July 15, 2008, readopted July 2011. [http://www.crwcd.org/media/uploads/20110719-policies\\_TMD\\_Existing\\_Projects.pdf](http://www.crwcd.org/media/uploads/20110719-policies_TMD_Existing_Projects.pdf)
- <sup>3</sup> Colorado River Water Conservation District Policy Statement: Transmountain Diversions, adopted March 16, 2000, revised and readopted July 2011. [http://www.crwcd.org/media/uploads/20110719-policies\\_TMDs.pdf](http://www.crwcd.org/media/uploads/20110719-policies_TMDs.pdf)
- <sup>4</sup> Colorado River Water Conservation District Policy Statement: Water Quality, adopted July 2010. [http://www.crwcd.org/media/uploads/20100720\\_policy\\_water\\_quality.pdf](http://www.crwcd.org/media/uploads/20100720_policy_water_quality.pdf)
- <sup>5</sup> NWCCOG Water Quality/ Quantity Committee Policies, readopted November 2012.
- <sup>6</sup> 2012 NWCCOG Regional Water Quality Management Plan (208 Plan). [http://nwccog.org/docs/wss/rwqmp\\_2012/Vol%201\\_Policy%20Plan%202012%20208%20Plan.pdf](http://nwccog.org/docs/wss/rwqmp_2012/Vol%201_Policy%20Plan%202012%20208%20Plan.pdf)
- <sup>7</sup> Colorado Basin Roundtable Vision Statement (Nov. 2010).
- <sup>8</sup> Orchard Mesa Check Case, 91CW247, Water Division No. 5.
- <sup>9</sup> i.e. Senate Document No. 80, Windy Gap Project, Windy Gap Firing Project, Colorado River Cooperative Agreement

JURISDICTIONS ENDORSING  
THE WEST SLOPE PRINCIPLES FOR THE COLORADO WATER PLAN

Eagle County  
Grand County  
Gunnison County  
Pitkin County  
Park County  
Routt County  
Summit County

Town of Avon  
Town of Breckenridge  
Town of Crested Butte  
Town of Dillon  
Town of Frisco  
Town of Fraser  
Town of Grand Lake  
Town of Gypsum (with exceptions)  
Town of Kremmling  
Town of Silverthorne  
Town of Vail  
Town of Yampa

Arrowhead Metropolitan District  
Berry Creek Metropolitan District  
Copper Mountain Consolidated Metropolitan District  
Eagle River Water & Sanitation District  
EagleVail Metropolitan District Board of Governors  
Edwards Metropolitan District  
Middle Park Water Conservancy District  
Upper Eagle Regional Water Authority  
Winter Park Ranch Water and Sanitation District

Colorado Basin Roundtable



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P.O. Box 2308 • Silverthorne, Colorado 80498  
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Feb. 10, 2014

Representative Jared Polis  
1433 Longworth House Office Building  
Washington, DC 20515

Representative Scott Tipton  
218 Cannon House Office Building  
Washington, DC 20515

Senator Michael Bennet  
458 Russell Senate Office Building  
Washington, DC 20510

Senator Mark Udall  
Hart Office Building Suite SH-730  
Washington, D.C. 20510

Dear Representatives Polis and Tipton and Senators Bennet and Udall,

We are writing to convey concern of the Northwest Colorado Council of Governments/ Water Quality/ Quantity Committee (QQ) over H.R. 3189, the Water Rights Protection Act, and its companion bill, S. 1630.

QQ comprises elected and appointed officials from the municipalities, counties, water and sanitation districts, and conservancy districts in the headwaters region of Colorado located in Grand, Summit, Eagle, Pitkin, Park and Gunnison counties (membership list attached). A significant portion of the economy of the QQ region is recreation- based. The majority of the state's ski areas are located within the region and are a key part of the region's economy. Fishing, kayaking, rafting, hunting, hiking, and camping create year-round economic activity reliant on clean water in rivers.

QQ believes that ski areas should retain their water rights, and does not advocate for any action that is contrary to water law in the State of Colorado. However, QQ also has serious concerns with H.R. 3189 as currently written. The language is far broader than it needs to be, which creates the potential for negative unintended consequences for streams in the headwaters region of Colorado. The bill's over-breadth endangers the important federal agency authority to include in special use permits bypass flows to protect fisheries and other values that have been so essential to stream health. Bypass flows have been critically important in providing minimum protection to headwaters' streams. For example, bypass flow permit conditions on the operation

of the Dillon Reservoir/ Roberts Tunnel, the Moffat Tunnel system, the Williams Fork Reservoir and the Homestake project have afforded some protection to fisheries and allowed for recreation-based economic growth in Grand, Summit and Eagle Counties.

The savings clause, subsection 4, does not put our concerns to rest. It preserves "existing authority," an ambiguous term, which could be read to protect only the authority that exists after the bill passes. In fact, this subsection could be read to limit federal authority, since it preserves only that authority "subject to [the agency's] respective jurisdictions." This could narrow existing authority to condition permits under Section 404 of the Clean Water Act, the Endangered Species Act, and the Wild and Scenic Rivers Act. Additionally, Representative Tipton neglected to add any testimony during hearings on the bill that would have indicated a legislative intent to preserve authority to impose bypass flows as a condition of federal approvals.

Before the November 14<sup>th</sup> amendments to H.R. 3189, many QQ counties and municipalities suggested savings clauses, such as:

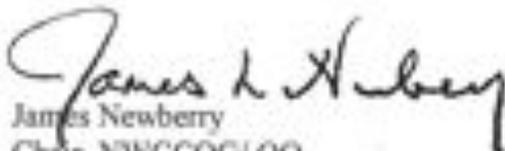
*Nothing in this Water Rights Protection Act shall:*

- (1) abrogate State water law, or*
- (2) abrogate the United States authority to include terms and conditions in its land use approvals on Federal land, including but not limited to bypass flows.*

A clause like this, or clear, direct legislative history stating the intent to preserve bypass flows, would go along way toward addressing our concerns

Thank you for the opportunity to provide these comments.

Sincerely,



James Newberry  
Chair, NWCCOG/ QQ  
Grand County Commissioner

CC:

US Forest Service Regional Forester, Region 2, Daniel Jirón  
Senator Gail Schwartz  
Senator Randy Bumgartner  
Representative Diane Mitsch-Bush  
Representative Millie Hamner  
Representative KC Becker  
NWCCOG/ QQ Membership

QQ's 2013 members, associate members, and participating water and sanitation districts include:

|   |                     |  |
|---|---------------------|--|
| Eagle County  | Aspen               | Basalt Sanitation District                   |
| Grand County  | Avon                | Bellyache Ridge Metro District               |
| Gunnison County                                     | Basalt              | Copper Mountain Consolidated Metro           |
| Pitkin County                                       | Breckenridge        | Dillon Valley Metro District                 |
| Summit County                                       | Carbondale          | Eagle River Water and Sanitation District    |
| Park County*  | Crested Butte       | East Dillon Water District                   |
| Colorado River Water<br>Conservation District*      | Dillon              | Fraser Sanitation District                   |
| Upper Gunnison River Water<br>Conservancy District* | Eagle               | Granby Sanitation District                   |
|   | Fraser              | Grand County Water & Sanitation District     |
|   | Frisco              | Hamilton Creek Metro District                |
|   | Granby              | Kremmling Sanitation District                |
|   | Grand Lake          | Mid-Valley Metro District                    |
|   | Gypsum              | Silverthorne Dillon Joint Sewer Authority    |
|   | Hot Sulphur Springs | Silver Creek Water District                  |
|   | Kremmling           | Snowmass Water & Sanitation                  |
|   | Minturn             | Three Lakes Sanitation District              |
|   | Red Cliff           | White Horse Springs Water & Sanitation       |
|   | Silverthorne        | Winter Park Water and Sanitation             |
|   | Steamboat Springs   | Winter Park West Water & Sanitation District |
|   | Vail                |  |
|   | Winter Park         |  |
|   | Yampa               |  |

\* Associate members





**EAGLE RIVER WATER & SANITATION DISTRICT  
UPPER EAGLE REGIONAL WATER AUTHORITY**

846 Forest Road ♦ Vail, Colorado 81657  
Phone (970) 476-7480 ♦ FAX (970) 476-4089  
[www.erwsd.org](http://www.erwsd.org)



February 27, 2014

Rep. Scott Tipton  
218 Cannon HOB  
Washington, DC 20515

Rep. Jared Polis  
1433 Longworth House Office Building  
Washington, DC 20515

Sen. Michael Bennet  
458 Russell Senate Office Building  
Washington, DC 20510

Senator Mark Udall  
Hart Office Building Suite SH-730  
Washington, D.C. 20510

Dear Representatives Polis and Tipton and Senators Bennet and Udall:

Please be advised that we are in receipt of the February 10, 2014 letter to you on the letterhead of the Water Quality/Quantity Committee of the Northwest Colorado Council of Governments (NWCCOG) regarding H.R. 3189, the Water Rights Protection Act, and its companion bill, S-1630. That letter gives the improper impression that all of the listed members, associate members, and participating water and sanitation districts support the position taken in that letter. They do not.

As the largest municipal water provider within NWCCOG, serving the over 60,000 customers from Vail to Wolcott, we strongly support H.R. 3189 and S. 1630, and do not agree with the amendments proposed by the NWCCOG letter. In particular, the Forest Service does not have the legal authority to impose bypass flows and a Federal Water Rights Task Force has so determined, and any amendment that they do would be a major expansion of federal authority over state granted water rights. Federal bypass requirements are really just a taking of water rights by another name and on a smaller scale. It is hard to imagine that the members of NWCCOG support the federalization and taking of any of the property of their residents and area businesses regardless of the name the federal government gives to its taking. Moreover, bypass flows should not be thought of as an environmental solution to low stream flows as they are not water rights that can be administered by a water commissioner and shepherded downstream. Rather, senior water rights from public lands that are required to be bypassed can simply be taken up by a junior water right holder just past the Forest Service boundary. This is one of the main reasons why the Colorado Water Conservation Board, which is the State agency with

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exclusive authority to obtain in-stream flows, has consistently opposed federal attempts to impose bypass flows.

We have enclosed a copy of a piece prepared by The Federal Water Rights Task Force entitled "The Colorado 'Bypass Flow' Controversy" for your review. It is an excellent review of the limitations on existing rights of the Forest Service to impose bypass flows and practical reasons why imposing such flows is not a good idea. (The link for the entire report is <http://www.fs.fed.us/land/water/>.)

We believe that many of the largest water users within NWCCOG agree with our position.

Very truly yours,

EAGLE RIVER WATER & SANITATION DISTRICT



Frederick P. Sackbauer, IV  
Chairman of the Board

UPPER EAGLE REGIONAL WATER AUTHORITY



George Gregory  
Chairman of the Board

cc: U.S. Forest Service Regional Forester, Region 2, Daniel Jirón  
Senator Gail Schwartz  
Representative Diane Mitsch-Bush  
Representative Millie Hamner  
Representative KC Becker  
James Newberry  
Bill Baum  
Gary LeFrange  
Glenn Porzak

## THE COLORADO "BYPASS FLOW" CONTROVERSY

*("The Colorado 'Bypass' Controversy" is Part III from the Report of the Federal Water Rights Task Force Created Pursuant to Section 389(D)(3) of P.L. 104-126. The link for the entire report is <http://www.fs.fed.us/land/water/>.)*

In the early 1990's, the Arapaho-Roosevelt National Forest informed the owners of a number of existing water facilities along the Colorado Front Range that they would have to renew the federal land use authorizations for those facilities. The Forest Service asserted that the renewal of these authorizations would include conditions for requiring that certain minimum amounts of water be left in the streams (by-pass flows). The Forest Service defended the conditions as required to achieve the numerical standards for aquatic habitat protection adopted in the 1984 Arapaho and Roosevelt Forest Plan. The Forest Service asserted that legal authority for the imposition of bypass flow requirements was based in the Property Clause of the United States Constitution, and delegated to it by Congress in the **1897 Organic Administration Act, Multiple Use and Sustained Yield Act, Federal Land Policy and Management Act and the National Forest Management Act**. In particular, the Forest Service asserted that §505(a) of FLPMA and 16 U.S.C. § 1604(i) (NFMA) provided authority for the imposition of bypass flows.

The proposed bypass flow requirements were met with strong objections. The owners of these facilities asserted that 1) the Forest Service did not have the legal authority to require bypass flows as a condition of renewal of the land use authorizations, relying in part on §701(g) and (h) of FLPMA; 2) some facilities would be physically incapable of making winter-time releases; 3) the conditions would deprive them of part of their decreed water rights and, therefore, constitute a taking of property rights; and 4) the requirements were effectively federal claims to water that were inconsistent with traditional federal deference to state water law and with the requirement that federal claims to the use of water be asserted, quantified, and adjudicated in McCarran Act proceedings in Colorado. Some of the facilities were also asserted to be authorized by pre-FLPMA land use authorizations that did not need to be renewed.

A number of United States Senators and Congressmen wrote to the Secretary of Agriculture and objected to the attempted imposition of bypass flow conditions on the basis that these requirements would "violate the law, [injure] vested property rights, [destroy] established management practices, and ... result in the implementation of environmentally damaging alternatives . . ." The Secretary of Agriculture responded with a letter regarding the Forest Service policy regarding the renewal of land use authorizations for existing facilities, and instructed the Forest Service to reissue the permits in accordance with the policy outlined in the letter. This policy statement was based on the interpretation of the Organic Act as explained by the United States Supreme Court in *New Mexico*, as well as the water rights savings and valid existing rights provisions of FLPMA and NFMA.

In July 1994, the Forest Service issued decisions on five of the seven facilities that were initially a part of this controversy (an alternate timetable for federal action had been agreed to by the Forest Service and the owners of two of the facilities). For the five facilities, the land use authorizations were renewed based on a variety of terms and conditions. The Cache la Poudre River Case Study, which is included in Part VIII of this Report, provides a more detailed

discussion of the basis for the decision to renew some of the land use authorizations without the imposition of bypass flow requirements. The Forest Service also amended the Forest Plan so that it was consistent with the decisions made for these land use authorizations. These decisions were then challenged in federal court by environmental groups, and the case is now pending in the United States Federal District Court for Colorado. However, at the request of the Department of Justice and Plaintiff, Trout Unlimited, the litigation has been stayed pending the completion of the Report of this Task Force.

**Bypass Flows - A Definition.** Any analysis of this issue must include a definition of what constitutes a "bypass flow" requirement. A simple definition of a "bypass flow" condition is that the term refers to a requirement that water which would otherwise be diverted in priority instead be "bypassed" from the diversion and left in the stream. For the purposes of this analysis, a "bypass flow" requirement has the following elements: 1) it is imposed by the Forest Service, 2) on the operation of a water supply or hydropower production facility, 3) for the purpose of or with an intent to protect or establish stream flows or water levels in the National Forests, 4) in order to achieve National Forest "purposes" other than those for which a federal reserved water right has been obtained (commonly referred to as "secondary" forest purposes), or to achieve purposes for which a federal reserved or other water right was obtained, but in a manner which is not consistent with the exercise in priority of that federal water right, and 5) results in a loss of the water yield from the affected facility which would otherwise result from the operation of that facility in accordance with water rights established under state or federal law, or a material increase in the cost of that yield, or otherwise interferes with the use of the water supply in accordance with the terms and conditions of the water rights associated with the water supply.

Accordingly, conditions imposed on the operation of affected facilities that are intended to protect public health and safety (dam safety requirements or restrictions on recreational use), or which are intended to protect forest resources by means other than the regulation of water use or flow levels (regulation of stocking of non-native species, reasonable access restrictions, regulation of commercial activities such as marinas, the requirement of BMP's for construction and maintenance activities) do not constitute a bypass flow requirement.

**Bypass Flows interfere with the exercise of water rights.** Throughout the Colorado bypass flow controversy, the Forest Service asserted that the imposition of bypass flows did not interfere with the exercise of a water right. The Forest Service attempted to justify this position by asserting that 1) because title to the water right remained in non-federal ownership, there was no interference with the water right, 2) there was no interference with water rights because the Forest Service was not "seeking" or "claiming" a water right, 3) water users could simply take the water at a different time and place, and 4) any impact on water rights was *de minimis* or inconsequential.

The argument that a bypass flow requirement is not an interference with the exercise of a water right because title to the water right remains with the permittee draws a distinction without a difference. Having title to a water right is meaningless if the owner is not allowed to exercise the right in accordance with its terms, i.e. time and place of diversion or storage, quantity, and priority.

Likewise, the argument that a bypass flow requirement does not interfere with the exercise of a water right because the Forest Service was not itself "seeking" or "claiming" a "water right" fails the test of common sense and prior interpretations of public land laws. Regardless of whether the Forest Service chooses to label its demand for water a "water right," the purpose of a bypass flow requirement is to take water from the owner of a water right so that it is available for use by the Forest Service to attain National Forest purposes. Three different Solicitors of the Interior, two serving in a Democrat Administration and the other in a Republican Administration, have conceded that an attempt to obtain water for federal purposes that is based on FLPMA is in fact a "use of water" for which a water right must be obtained and exercised in priority. Solicitor of the Interior Coldiron also concluded that "The Court thus held [in *United States v. New Mexico* and *California v. United States*] that the United States water use is limited until it reserves the water or complies with the various state laws to appropriate that water, in the same manner as any other individual." Finally, the attempt by the Forest Service to evade the requirements and implications of McCarran through the simple artifice of denying that they are asserting a right to or making a use of water is identical to the unsuccessful attempt by gravel pit owners in Colorado to "disavow any wish to obtain a water right" despite the fact that they were clearly using water to the detriment of other water users.

The argument that a bypass flow requirement is not an interference with the exercise of a water right because the water can be diverted at a later time or in a different place also ignores basic water law and the reality of geography. Several examples illustrate the injurious effects of bypass flows on water rights. First, if a federal agency imposes bypass flows on the operation of a ditch or direct-flow water delivery structure, the water remains undiverted in the stream and flows past that structure in order to fulfill the Forest Service's desired use. Because the water is bypassed at the point of diversion and continues downstream, the ditch owner will not be able to recover the bypassed water, reconvey it upstream to the diversion point, and place it to its decreed, historical beneficial use. Contrary to Forest Service assertions, the bypassed water, once converted to the agency's preferred use, is often lost forever and no longer available for beneficial use by its owner.

Second, bypass flows imposed upon reservoirs have the effect of converting water storage rights to direct-flow rights. The owner of this type of facility usually releases previously stored water from an upstream reservoir to satisfy a downstream demand (e.g., at an irrigation ditch headgate or municipal treatment plant intake). Most agricultural and municipal water users in the West need storage water to meet demands during times of drought. Many of these water users also need storage water to meet demands during annual periods of low flows (typically in late summer or in the winter.) Like deposits to a saving account, this water is saved for use in times of shortage. If the water is not stored when it is available, it will not be there for use when water is needed but is either legally unavailable (because all of the water in the stream belongs to senior appropriators) or physically unavailable (because of actual water shortage). Bypass flow requirements defeat the purpose of water storage. In addition, the bypassed flows which are not diverted by downstream water users and actually arrive at the downstream intake point often do so at times when there is no demand or when other water rights (e.g., decreed direct-flow water rights) fully satisfy the existing demand. In these circumstances, the bypassed water has no value to the entity that owns it.

Finally, as is demonstrated by the Poudre River Case Study and the letters to the Task Force from the City of Thornton and the Water Supply & Storage Company, the bypass flow requirements that the Forest Service initially attempted to impose would have taken over 50% of the water supply provided from the facilities at issue in dry-years. This is not *de minimis* or inconsequential. In addition, based on the fact that the demand for bypass flows was based on attaining goals and standards defined in the Forest Plan, and because these plans are periodically amended and revised, Forest Service employees asserted that they might raise these bypass flow requirement in the future.

A Forest Service employee recently made a telling admission regarding the impact of bypass flows on a water right in Colorado when he asserted that other water rights developed by the reservoir owner could replace the resulting loss of yield: "The increased capacity realized by the perfection of [your additional water rights] will . . . increase your ability to meet the bypass amounts required." While the appropriation of junior water rights may replace water lost to bypass flows in some circumstances, this alternative is clearly not available when other water rights have appropriated all of the remaining flows. More importantly, this statement admits that bypass flows do impact water rights.

**Bypass Flow Conditions are inconsistent with State Water Administration Systems.** Bypass flow conditions also threaten the ability of a state to administer water rights. The administration of water rights is typically a function performed by State officials. These State officials enforce water rights priorities established under state and federal law. Unless there is enough water to satisfy all demands, the water rights administrators must be able to curtail junior uses in order to ensure that the water is available for senior water rights. If the Forest Service has the authority to impose bypass flow conditions on senior water rights, State water rights administrators will be unable to ensure that water is delivered in accordance with existing priorities. In some cases, the imposition of a bypass flow condition simply takes water from a senior water user and makes it available to a junior water right that is not entitled to the water.

In an actual example which occurred in Colorado, downstream junior appropriators diverted the water which the Forest Service required to be bypassed by the owner of an upstream senior ditch and reservoir located on Forest land. The interception of the bypassed water occurs just a few miles downstream of the bypass, and many miles above the stream reach which the bypass flow allegedly would protect. Consequently, the assertion of bypass flow authority took water from the ditch company that owned it, gave it to a non-federal party who would not have otherwise received this water, and left the federal desire for water unmet. As was conceded by the Department of Agriculture's Office of General Counsel, "[a]fter the water is required to be bypassed & left in the stream at that identified point, the FS has no continued right to maintain the water in the stream downstream . . . We don't have a protectable water right, over a given stream segment, with a bypass flow . . . [W]e may be able to get a junior water right for a stream stretch, but this should be discussed at a site specific basis to determine whether it offers the FS any advantage." This statement concedes that bypass flows cannot keep water in the stream, as they are not capable of being administered in priority by state water rights administration systems.

As the Director of the Colorado Water Conservation Board explained, after observing that Colorado's instream flow program provides protection for "over 8,000 miles of streams and 486 lakes statewide" in a manner that protects water rights:

A tool which the Forest Service has attempted to use to secure resource protection in Colorado which does not work is the bypass requirement. Federally mandated by-pass flows do little, if anything to protect the natural environment. They do, however, have significant negative effects on the property rights of others. By-pass flows reduce the yield of the structure on which they are imposed, thus resulting in a net loss to the water right owner. By-pass flows cannot be administered past the point of release as they carry no priority, and become available to the next downstream diverter in priority. This may result in a senior water user being forced to release his senior water to the benefit of his downstream junior neighbor. As you can see, by-passes totally frustrate the state's prior appropriation system and ignore the property rights of water users, unlike the state's [instream flow] Program which works within the prior appropriation system and respects the rights of other water users.

*Source: <http://www.fs.fed.us/land/water/bypass5.html>*





March 3, 2014

James Newberry  
Grand County Commissioner  
308 Byers Avenue  
P.O. Box 264  
Hot Sulphur Springs, CO 80451

Sent via email

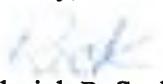
Dear James:

As chairman of the board of the Eagle River Water and Sanitation District, the largest municipal water provider within the Northwest Colorado Council of Governments, I am writing to express the District's extreme displeasure over your letter to Colorado's congressional delegation regarding H.R. 3189 and S. 1630. The letter seems to be written in a way to give the impression that most, if not all, of its members concurred. To the best of my knowledge, that letter was never voted upon by the NWCCOG members and NWCCOG has never sent such a letter without the unanimous consent of its members. It is for those reasons we sent the attached letter to Congressmen Tipton and Polis and Senators Bennet and Udall. We trust that you will notify the Congressmen and Senators that your letter was not discussed or brought up for a vote with the NWCCOG members.

I would appreciate our water counsel, Glenn Porzak on your March 13<sup>th</sup> Board meeting agenda to further explain our position on these issues. Please advise to [sackbauer@aol.com](mailto:sackbauer@aol.com).

Please call with comments or questions.

Sincerely,

  
Frederick P. Sackbauer, IV

cc: Torie Jarvis  
Glenn Porzak  
George Gregory  
Jim Collins  
District Board of Directors

Clean Water. Quality Life.™

846 Forest Road Vail Colorado 81657 Tel (970) 76-7480 Fax (970) 476-4089 [erwsd.org](http://erwsd.org)

QQ March 13, 2014 Page 21



NATIONAL  
SKI AREAS  
ASSOCIATION



February 11, 2014

Rep. Scott Tipton  
218 Cannon HOB  
Washington, DC 20515  
Fax: (202) 226-9669

Rep. Jared Polis  
1433 Longworth House Office Building  
Washington, DC 20515  
Fax: (202) 226-7840

Senator John Barrasso  
307 Dirksen Senate Office Building  
Washington, DC 20510  
Fax: 202-224-1724

Senator Mark Udall  
Hart Office Building Suite SH-730  
Washington, D.C. 20510  
Fax: 202-224-6471

**Re: Support for Water Rights Protection Act**

Gentlemen:

I am writing on behalf of the ski industry to express the reasons ski areas strongly support passage of the bipartisan Water Rights Protection Act, H.R. 3189/S. 1630, and to advocate changes to the bill to narrow its scope. At the outset, the ski industry would like to express our deep appreciation of your efforts to protect ski area water rights from federal encroachment over the past couple of years. Your leadership on protecting water rights and your commitment to working in a bipartisan fashion to solve this problem on behalf of ski areas and other permittees on federal land have had very positive and real effects to date. While ski areas have enjoyed a long and successful partnership with the Forest Service spanning almost eight decades, Forest Service water policy is an issue on which we simply do not agree. We have invested too much in water rights to simply hand them over to the federal government.

As you are well aware, the Water Rights Protection Act would stop the federal government from illegally seizing water rights from private parties that develop them, such as ski areas, in violation of State water law and 5<sup>th</sup> Amendment property rights protections. The intent of the bill is narrow – to protect valuable assets of ski areas and other permittees that use federal land from seizure without compensation by the federal government. Essentially everyone agrees on the need for this protection, given recent (and past) Forest Service policy that demands transfer of valuable water rights to the U.S. without compensation. This policy threatened to rock the foundation of over a hundred years' worth of water law in the West, and again, thanks to your intervention, beneficial changes are expected in the future.

The intention of the Water Rights Protection Act is not to impact stream health or aquatic species in any way. Some conservation groups contend that HR 3189 has a broader effect than simply protecting water rights, and in fact would hinder federal efforts to protect stream health and fish. Ski areas and other stakeholders strongly disagree with this interpretation of the bill and would never support a bill that had this result. In fact, a “savings clause” was included in the bill to explicitly state that the measure had no other impacts than to protect permittees' water rights from forced transfers. More importantly, the bill does not alter in any way the minimum stream flow protections that are set and enforced by the states on virtually every river and stream. Ski areas support and abide by these minimum stream flow requirements and would never take action to undermine them.

However, to make it abundantly clear that ski areas have a narrow and pointed agenda with respect to this legislation and that we are committed to maintaining stream and aquatic species health, **we are now advocating changes to the bill to narrow its scope even further.** These changes include narrowing the scope of the bill to apply just to the U.S. Forest Service, and clarifying that the bill prohibits forced transfers of ownership of water rights to the United States by inserting the term “title” into the bill. We offer these changes to demonstrate emphatically our unwavering commitment to maintain stream health and aquatic species, and our narrow focus of simply protecting our valuable water rights assets. These changes are directed at solving the concrete problem at hand, which is overreaching policy by the Forest Service that requires a forced transfer of ownership of water rights from permittees to the United States. The bill will continue to benefit all permittees on Forest Service lands, not just ski areas.

The release of a new water policy is expected from the Forest Service sometime in 2014. Ski areas welcome this new policy change, which we understand will not require a forced transfer of ownership of water rights. **The release of this policy will not change the need for federal legislation however.** First, the new policy is expected to apply prospectively, such that existing water rights subject to past Forest Service water clauses could continue to be in jeopardy of a taking by the Forest Service. Ski areas are proposing an amendment to the bill to protect against the implementation of such clauses beginning with the effective date of this bill. Ski areas have experienced four changes in Forest Service water policy in the last ten years. Only Congress can help stop the pendulum from swinging and provide ski areas the kind of stability they need to grow and succeed in the future.

After prevailing on our challenge of the Forest Service's water rights takings policy in federal court in 2012, ski areas offered an alternative approach for the Forest Service to consider that would not involve forced transfers of water rights. We offered this alternative in the spirit of partnership, and as a way for the Forest Service to work cooperatively with ski areas to support their viability, and the viability of mountain communities, over the long term. The alternative offered by ski areas was to require resorts to provide successors in interest an option to purchase water rights at fair market value upon sale of a ski area. We continue to support this approach as a viable alternative that meets the needs of the agency, provides ski areas needed flexibility, and respects state water law.

Ski areas are great stewards of water resources. It is important for everyone to remember that only a small portion of water that is used for snowmaking is consumed. Most of the water diverted from streams for snowmaking *returns to the watershed*. Although it varies from region to region, studies show that approximately 80 percent of the water used for snowmaking returns to the watershed. Since the majority of water used for snowmaking is water purchased by a ski area, brought onsite through diversions, stored on-slope, and typically released more slowly back into the watershed with the seasonal melting of the winter snowpack, snowmaking typically benefits the watershed in which it is taking place, as well as downstream users, and can help counteract the harmful effects of drought. In addition to using a whole array of conservation measures, many resorts impound or store water in reservoirs for use during low flow times of the year without affecting fish or aquatic habitat. **The ability to control our water assets and investments – which will be the outcome of passage of the Water Rights Protection Act - will enable us to continue this stewardship in the future.** It will also allow us to continue to provide a high quality recreation opportunity for millions of people on the National Forests.

In closing, we thank you for your work to date on this issue, and we look forward to continuing to work together in cooperation to ensure the bill's passage.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Berry', with a stylized flourish at the end.

Michael Berry  
President

cc: Tom Tidwell



May 22, 2001, Tuesday  
CAPITOL HILL HEARING TESTIMONY  
COMMITTEE: HOUSE resources  
SUBCOMMITTEE: FORESTS AND FOREST HEALTH

## Testimony National Forest Pipeline Permits

TESTIMONY-BY: DAVID GETCHES, PROFESSOR,  
UNIVERSITY OF COLORADO AT BOULDER

May 22, 2001  
Testimony of David Getches  
Professor, University of Colorado  
Before the U.S. House of Representatives Resources Committee

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, the Speaker of the House of Representatives, the Minority Leader in the Senate, the Minority Leader in the House of Representatives, and the Secretary of Agriculture. 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. 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.<sup>(3)</sup> 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.<sup>(4)</sup> 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.<sup>(5)</sup> 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.<sup>(6)</sup> 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."<sup>(7)</sup> 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." 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. 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. 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. 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. 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." 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. 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.<sup>(15)</sup> 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." 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. 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. 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. 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, "the 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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320 F.Supp.2d 1090 (2004)

**TROUT UNLIMITED, et al., Plaintiffs,**

**v.**

**UNITED STATES DEPARTMENT OF AGRICULTURE, et al., Defendants,**

**v.**

**The Water Supply and Storage Company, a Colorado nonprofit corporation, the City of Greeley, a Colorado municipal corporation, the Greeley Water and Sewer Board, the State Engineer of the State of Colorado, and the Colorado Water Conservation Board, Defendant-Intervenors.**

No. CIV.A. 96-WY-2686-WD.

**United States District Court, D. Colorado.**

April 30, 2004.

1094 \*1091 \*1092 \*1093 \*1094 J. Gregory Whitehair, Gibson, Dunn & Crutcher, Denver, CO, Michael Kemp Murphy, Gibson, Dunn & Crutcher, Washington, DC, for Plaintiffs.

1095 \*1095 Wendy Carol Weiss, Attorney General's Office, Denver, CO, David William Gehlert, U.S. Department of Justice Environment & Natural Resources Division, Denver, CO, William Ross Fischer, Fischer, Brown & Gunn, PC, Fort Collins, CO, for Defendants.

James Stow Witwer, Adam T. Reeves, Trout & Raley, PC, Carol D. Angel, Attorney General's Office, Denver, CO, for Defendant-Intervenors.

## **ORDER ON COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

DOWNES, District Judge.

This matter comes before the Court on Plaintiffs' Complaint for Declaratory and Injunctive Relief, Plaintiffs' Motion for Summary Judgment and Defendants' and Defendant-Intervenors' Affirmative Defenses. The Court, having considered the briefs and materials submitted in support of the parties' various positions and the opposing parties' respective oppositions thereto, having heard oral argument of counsel, and being otherwise fully advised, FINDS and ORDERS as follows:

### **BACKGROUND**

Plaintiffs challenge the Forest Service's approval of a land use authorization (easement) for Long Draw Reservoir on La Poudre Pass Creek in the mountains west of Fort Collins, Colorado. Long Draw is one of numerous high mountain water storage facilities on tributaries of the headwaters of the Cache la Poudre River. Construction of the Long Draw Dam was completed in 1929. The expansion of the reservoir almost thirty years later caused water to back up onto 390 acres of additional National Forest land and required Water Supply and Storage Co. (WSSC) to obtain authorization for the use of that land, which it did in 1973. That permit expired in 1976 and the Forest Service issued a series of short term renewals until 1980. In 1980 the agency issued a new permit, which was amended in 1981 to extend its life until December 31, 1991. The 1981 amendment acknowledged that future permits would be subject to conditions imposed by the Forest Service. In 1991 the special use permit was extended until July 31, 1994, to allow for analysis of the environmental impacts of issuing a renewal of the land use authorization. It is this environmental analysis and the renewal of the authorization that is the subject of this litigation.

In 1986, Congress designated the segment of the Cache la Poudre River from Poudre Lake to the confluence of the river and Joe Wright Creek as a wild river pursuant to the Wild and Scenic Rivers Act. Several fish species are native to the Cache la Poudre River and its tributaries. The water supply from the La Poudre Pass Creek is vital to several threatened and endangered species and is a habitat for the greenback cutthroat trout. WSSC stores water in the Long Draw Reservoir to be released for

downstream municipal and agricultural use by its shareholders. Under the original permit, the gates of the Long Draw Reservoir were typically closed from November through March or April each year. During this period, all native flows of the La Poudre Pass Creek are captured in the reservoir, and no water is released to the Creek downstream of the reservoir. As a result, La Poudre Pass Creek is effectively dried up during the winter months.

1096 After issuance of the original permit, final regulations implementing the Federal Land Policy and Management Act (FLPMA) were promulgated. These regulations, administered by the Forest Service, include the requirement that "each special use authorization must contain: (l) terms and conditions which will: (A) Carry \*1096 out the purposes of applicable statutes and rules and regulations issued thereunder; [and] (B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment..." 36 C.F.R. § 251.56(a). Consistent with this regulatory requirement, the Forest Plan for the Arapaho and Roosevelt National Forests provides that "[h]abitat for each [existing vertebrate] species on the forest will be maintained at least at 40 percent or more of potential," and requires the Forest Service to "manage waters capable of supporting self-sustaining trout populations to provide for those populations." (AR-LD at 4587.) The Forest Plan also states one of its goals is to "recognize the value of water for the future of western states." *Id.*

During the early 1990s, various applicants for and holders of expiring special use authorizations for water development projects on Forest Service lands complained to Congress that their activities should not be subject to the environmental protections of FLPMA, including any requirements for bypass flows. Some members of Congress then approached then-Secretary of Agriculture Edward Madigan with objections to the Forest Service's authority to require minimum bypass flows in authorizations for use of lands in the Arapahoe and Roosevelt National Forests. Secretary Madigan responded by letter, assuring those members of Congress that "[t]he Forest Service will reissue permits for existing water supply facilities for 20 years" and that "[n]ew bypass flow requirements will not be imposed on existing water supply facilities" (Madigan Policy).

In September of 1993, the cities of Fort Collins and Greeley, Colorado, and WSSC, submitted a "Proposed Joint Operations for Mainstem Poudre River Flow Enhancement" (JOP) to the Forest Service, providing for additional flows for the Poudre between December and March. In November of 1993, pursuant to the National Environmental Protection Act (NEPA), the Forest Service issued a Draft Environmental Impact Statement (EIS) to evaluate WSSC's request that its special use permit for operation of Long Draw Reservoir be renewed. The Draft EIS identified four alternatives for the renewal. Alternative B, identified as the Forest Service's proposed action, was the issuance of a special use permit without a bypass flow condition, but with WSSC "voluntarily committing to an operation that would accommodate Forest Plan resource goals" pursuant to the JOP. This alternative did not provide for any stream flow in La Poudre Pass Creek during the winter months.

Alternative C, the "Environmentally Preferred Alternative," was the issuance of a special use permit with a requirement for minimum bypass flows that would mimic the natural flow of La Poudre Pass Creek. Not only did Plaintiffs urge the agency to select Alternative C and object to Alternative B, the Regional Administrator for EPA Region VIII commented that "EPA has Environmental Objections to the proposed Alternative B since it does not impose terms and conditions requiring new bypass and replacement flows necessary to protect aquatic habitat as required by FLPMA." (AR-LD at 1144.) The Park Service also recommended that the Forest Service require "instream flows during the winter season for La Poudre Pass Creek below Long Draw Reservoir." (AR-LD at 711.) The Forest Service's own interdisciplinary team recommended that the Forest Service adopt Alternative C, stating that this alternative "is the only alternative which achieves a reasonable degree of resource protection.... Voluntary measures by the permittees to protect forest resources are not effective." (AR-G at 2584.)

1097 \*1097 In May of 1994, the cities and WSSC offered the Forest Service a revised JOP which, the government asserts, provided additional environmental benefits when compared with the original JOP. The Final EIS was issued in July of 1994. The government states that because production of the FEIS was substantially complete when the Forest Service received the revised JOP, the revised JOP was addressed in a separate addendum rather than in the main volume of the FEIS. In the FEIS, the Forest Service informs the public that implementation of the proposed action, Alternative B, would require amendment of the Forest Plan provisions calling for the agency "to issue permits with bypass flows and to maintain habitat potential."

The FEIS includes as Appendix I a detailed assessment by the Forest Service of the May 1994 JOP:

... [T]he applicants' claims of habitat enhancement in the Cache la Poudre River System are overstated. While the Plan represents an improvement over existing conditions for a five month period, it does not fully mitigate project impacts. At no place does the Plan represent an enhancement above natural conditions that would offset negative effects to aquatic habitat elsewhere. Due to the fact that the JOP is limited to a five-month period, and

that no mitigation is proposed for several stream segments, reservoir operations continue to have a detrimental effect on all stream segments evaluated.

(AR-LD at 4483.)

The Forest Service's assessment ultimately concludes that "[c]laims that the JOP results in more aquatic habitat than Alternative C [which requires bypass flows from Long Draw Reservoir] appear to be unfounded from both a physical and biological perspective. In consideration of the facts as we now understand them, there is little question that implementation of Alternative C, as opposed to the Joint Operations Plan, would be in the best interest of National Forest aquatic resources." *Id.*

Ultimately, Forest Supervisor Underwood issued a Record of Decision (ROD) which granted WSSC a land use authorization for the reservoir including the revised JOP as a mitigation measure. (AR-LD at 4581-4607.) The ROD included an amendment to the Forest Plan to exempt Long Draw from Forest Plan requirements. (Amendment No. 20a, AR-LD at 4615.) In disregarding the comments urging the adoption of Alternative C, Supervisor Underwood stated that he reached his decision only after "considerable consultation, deliberation, and reflection upon the proper balance of multiple uses of Federal lands and the appropriate environmental mitigation...." (AR-LD at 4599.) Six months after the ROD was issued, the Forest Service executed a fifty-year water facility easement to WSSC for the use and operation of the Long Draw Dam and Reservoir expansion area. (AR-LD at 4898-4907.) Plaintiffs challenge these actions.

Plaintiffs' Complaint alleges the following claims for relief: (1) Violation of FLPMA § 505; (2) Violation of National Environmental Policy Act (NEPA) in failing to consider all reasonable alternatives; (3) Violation of NEPA in failing to include all necessary information in the EIS; (4) Violation of NEPA in failing to prepare a supplemental EIS discussing the grant of an easement; (5) Violation of NEPA in failing to prepare a supplemental EIS evaluating the Forest Plan amendment with sufficient particularity; (6) Violation of NEPA in failing to prepare a supplemental EIS evaluating the May 18, 1994 JOP; (7) Violation of the Forest and Rangeland Renewable Resources Planning Act (FRRRPA) in exempting certain facilities from substantive requirements of the \*1098 Forest Plan; (8) Violation of FRRRPA in failing to ensure that authorization for use of National Forest system lands be consistent with the Forest Plan; (9) Violation of FRRRPA's implementing regulations in failing to require minimum bypass flows; (10) Violation of FRRRPA in failing to allow public participation in amending the Forest Plan; (11) Violation of the Wilderness Act;<sup>[1]</sup> (12) Violation of the Wild and Scenic Rivers Act; and (13) Violation of the Administrative Procedures Act (APA) § 553 in failing to subject the Secretary's directive to public notice and comment procedures.

As affirmative defenses, Defendants and Defendant-Intervenors both assert that Plaintiffs have failed to exhaust their administrative remedies with respect to some of their claims. Defendant-Intervenors also argue that the federal Defendants lack the authority to impose water "bypass flow" conditions upon the continued operation of existing water facilities located on National Forest lands. Defendant-Intervenors argue that the exercise of this authority by the Forest Service would contradict decisions by Congress to defer to and respect state authority over water allocation and use, and would be contrary to Congressional intent to authorize the National Forest system principally to enhance the quantity of water that would be available for non-federal water users.

## STANDARD OF REVIEW

Judicial review of final agency action is made available through the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* A reviewing court may hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). In making its determinations, the court is directed to review the whole record or those parts of it cited by a party.<sup>[2]</sup> 5 U.S.C. § 706. "The APA's arbitrary and capricious standard is a deferential one; administrative determinations \*1099 may be set aside only for substantial procedural or substantive reasons, and the court cannot substitute its judgment for that of the agency." *Utahns for Better Transp. v. United States Dept. of Transp.*, 305 F.3d 1152, 1164 (10th Cir.2002).

In determining whether the agency acted in an arbitrary and capricious manner, we must ensure that the agency decision was based on a consideration of the relevant factors and examine whether there has been a clear error of judgment. ... We consider an agency decision arbitrary and capricious if the agency ... relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

could not be ascribed to a difference in view or the product of agency expertise.

*Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1167 (10th Cir.1999) (internal quotations and citations omitted).

## DISCUSSION

### A. EXHAUSTION OF ADMINISTRATIVE REMEDIES

Section 10(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 704(c), requires exhaustion of administrative appeals where mandated either by statute or agency rule. The Forest Service regulations expressly require administrative appeal of a decision documented in a Record of Decision before judicial review may occur. 36 C.F.R. § 215.7 (1994). Under these regulations, an appellant must file a written appeal which provides sufficient written evidence and rationale to show why the decision should be remanded or reversed. 36 C.F.R. § 215.14(a) (1994). The regulations require an appellant to both identify the specific changes in the decision that the appellant seeks, or portion of the decision to which the appellant objects, and state how the appellant believes the decision violates the law, regulation or policy. 36 C.F.R. § 215.14(b)(4) & (b)(5) (1994). "[T]he claims raised in the administrative appeal and in the federal complaint must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised in federal court." *Kleissler v. U.S. Forest Serv.*, 183 F.3d 196, 202 (3rd Cir.1999). Other courts have applied the APA's statutory exhaustion requirement based on the part 215 regulations to dismiss claims. See, e.g., *Wilderness Society v. Bosworth*, 118 F.Supp.2d 1082, 1099-1101 (D.Mont.2000); *Shenandoah Ecosystems Defense v. U.S. Forest Serv.*, 144 F.Supp.2d 542, 556-57 (W.D.Va.2001); *Friends of the Earth v. U.S. Forest Serv.*, 114 F.Supp.2d 288, 291 (D.Vt.2000).

On September 13, 1994, Plaintiffs submitted a Notice of Appeal and Statement of Reasons regarding the land-use authorization issued for Long Draw Dam and Reservoir. That Notice spanned 27 pages of text. (AR-LD 5114-41.) Plaintiffs' Second Claim for Relief alleges the Forest Service violated NEPA by failing to consider all reasonable alternatives, specifically an alternative requiring "bypass flows designed to meet Forest Plan requirements." Plaintiffs' Fifth Claim alleges a violation of NEPA by failing to prepare a supplemental EIS that sufficiently evaluated the Forest Plan amendment. Plaintiffs maintain that they "generally allege[d]" such NEPA violations in their Notice of Appeal by stating that "a supplemental draft EIS should have been prepared and circulated for public comment," that "the draft EIS ... did not include any relevant information on the alternative finally selected by the Forest Service," and that "[t]here are other inadequacies \*1100 in the FEIS as well." (AR-LD at 5121.) These allegations are not sufficiently similar to the allegations that are the basis for Plaintiffs' Second and Fifth Claims for Relief before this Court so as to put the agency on notice of, and provide an opportunity to consider and decide, such claims.

Plaintiffs' Ninth Claim for Relief alleges the Forest Service violated its "viability regulation," 36 C.F.R § 219.19 (1994). Plaintiffs do not dispute that they failed to cite that regulation in their Notice but instead argue that they raised the concept behind that regulation by alleging that "the Forest Service regulations that sanction plan amendments cannot authorize the total suspension of all standards and guidelines for species protection...." Standards and guidelines are components of a Forest Plan; therefore, referencing them generally does not put the agency on notice of Plaintiffs' specific claim regarding the viability regulation.

Plaintiffs' Thirteenth Claim for Relief asserts that the Forest Service failed to subject the Madigan directive to public notice and comment procedures before implementing the directive in the ROD, in violation of APA § 553. Plaintiff's Notice of Appeal failed to even mention the Madigan directive. Instead, Plaintiffs argue that their repeated assertions that "the forest plan amendment suspends standards for protecting species habitat" should have put the agency on notice that they wished to take issue with the Madigan directive. Such references do not expressly challenge the directive itself, nor do they suggest Plaintiffs' present claim that the directive should have been subjected to the APA's public notice and comment procedures. The Court finds that such vague references are patently insufficient to put the Forest Service on notice of Plaintiffs' Thirteenth Claim for Relief.

Plaintiffs also maintain that they preserved this claim for review by raising their concern about the Madigan directive in numerous comment letters sent prior to the submission of the Notice of Appeal. Where an issue is raised in a comment letter but not in a subsequent administrative appeal, the logical conclusion is that the agency's response satisfactorily addresses the issue or the appellant has otherwise decided the issue was no longer worth pursuing. Allowing judicial review of issues raised solely in comment letters turns that logic on its head and generates needless paperwork. Instead of being able to assume that an administrative appeal addresses all the issues an appellant wishes to pursue, administrative agencies would have to fish

through all the appellants' comment letters for issues that might have been raised and then address those issues in its administrative decision — even though the appellant may no longer be interested in pursuing the issue. This Court does not countenance such a result.

Defendant-Intervenors also argue that Plaintiffs did not sufficiently raise, in their Notice of Appeal, the issue addressed in their Tenth Claim for Relief. Plaintiffs' Tenth Claim alleges a violation of NFMA by failing to allow public participation in amending the Forest Plan. However, Plaintiffs stated,

1101 Neither the notice issued regarding the Long Draw Dam and Reservoir land-use authorization, nor the vague statements contained in the DEIS that adoption of Alternative B would require amendment of the forest plan were sufficient to notify the public that the Forest Service intended to remove the 40 percent habitat protection guideline in its entirety from sections of the Forests. NEPA requires full disclosure of an action with such serious environmental impacts. *Moreover, under Forest Service regulations, \*1101 amendment of a forest plan requires notice and comment procedures.* 36 C.F.R. § 219.10(f).

(AR-LD at 5128) (emphasis added).

The Court finds that the foregoing paragraph, albeit in a footnote at page 14 of their Notice, was sufficient to put the Forest Service on notice of the alleged failure to allow public participation in amending the forest plan.

Plaintiffs argue that they should be excused from the exhaustion requirement because further agency appeal would have been futile in this situation, and the claims raise issues of statutory interpretation. Plaintiffs argue that appeal of the issues they failed to raise in their administrative appeals would have been futile because the "Forest Service was clearly biased against Plaintiffs, as demonstrated by the Madigan memorandum." However, the Court cannot simply "presume the agency would not have provided [Plaintiffs] with an adequate remedy had the issue been raised before it." *Bd. of County Comm'rs of the County of Adams v. Isaac*, 18 F.3d 1492, 1499 (10th Cir.1994). The existence of the Madigan memo does not demonstrate the Forest Service had predetermined that bypass flows would not be imposed. Indeed, even when the Madigan directive was in effect, the agency did not read the memorandum as prohibiting bypass flows in all cases — on the very same day the agency declined to impose a bypass flow in reauthorizing Long Draw Reservoir, it did include a bypass flow in the reauthorization of Joe Wright Reservoir.

Plaintiffs also argue that the exhaustion requirement does not apply because the issues in question involve statutory interpretation. The Tenth Circuit has recognized, "The general rule requiring exhaustion of remedies before an administrative agency is subject to an exception where the question is solely one of statutory interpretation." *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369, 371 (10th Cir.1980). On the other hand, "[e]xhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise." *McKart v. United States*, 395 U.S. 185, 194, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969). The Court disagrees with Plaintiffs' assertion that the unexhausted claims are purely a matter of statutory interpretation.

Plaintiffs argument fails because resolution of these claims requires application of law to facts developed in the administrative record. See *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 744 (10th Cir.1982) (distinguishing the question of pure statutory construction that was before it from a question where a factual administrative record would be essential to the court's determination). Here, Plaintiffs' Second Claim requires examination of the alternatives developed by the agency and a comparison of those alternatives with that Plaintiffs insist the agency should have considered. See *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1528 (10th Cir.1992). Similarly, Plaintiffs' Fifth Claim cannot be resolved without considering the scope and nature of the amendment to determine whether it is significant for the purposes of the National Forest Management Act, and the Ninth Claim requires interpretation of the agency's species viability regulation. Likewise, Plaintiffs' Thirteenth Claim requires an evaluation of whether the Madigan directive was implemented by the Forest Service as if it were a binding rule in reaching a decision on the Long Draw Reservoir.<sup>[3]</sup>

1102 \*1102 Plaintiffs failed to raise the issues addressed in their Second, Fifth, Ninth and Thirteenth Claims for relief in their administrative appeal. Accordingly, those claims must be dismissed for failure to exhaust their administrative remedies.

## B. FOREST SERVICE'S AUTHORITY TO IMPOSE BYPASS FLOWS

Defendant-Intervenors, as well as certain *amicus* parties, assert that the issue at the heart of this case is whether Congress has authorized the Forest Service to prohibit historic diversions of water by non-federal parties in order to make water available for downstream use by the Forest Service for fish and wildlife habitat protection. Intervenors contend that Congress has *not* granted to the Forest Service the authority to impose bypass flow conditions in order to reallocate water from existing uses to unmet National Forest needs. In support of their contention, Intervenors assert, first, that the exercise of this authority by the Forest Service would contradict the repeated and explicit decisions by Congress to defer to and respect state authority over water allocation and use. Second, Intervenors assert that the imposition of bypass flow requirements on existing water uses would be contrary to Congressional intent to authorize the National Forest system principally to enhance the quantity of water that would be available for nonfederal water users. Third, Intervenors argue that the statutes upon which Plaintiffs rely for a grant of bypass flow authority to the Forest Service do not support this claim, and in fact explicitly and broadly disclaim any agency authority to affect existing nonfederal uses of water or to interfere with state control over the allocation and use of water. Intervenors further argue that these statutes also limit the exercise of Forest Service authority by making it subject to valid existing rights such as existing water rights and facilities. Finally, Intervenors assert that the use of bypass flow requirements by federal agencies to obtain water for federal purposes is inconsistent with the McCarran Amendment, 43 U.S.C. § 666, by which Congress established a unified and all-inclusive method to allocate the use of water between federal and non-federal water uses, including the riparian uses which Plaintiffs seek to protect in this case. Consequently, Intervenors contend, the failure of the Forest Service to impose conditions beyond its legal authority cannot provide the basis for Plaintiffs' claims that the Forest Service has violated procedural or substantive requirements of law.

The Government Defendants contend that the Forest Service's authority to establish bypass flows as a condition to the use of Forest Service land rests on two significant principles. First, when the Forest Service requires bypass flows it is imposing a condition on the use of federal land rather than asserting a water right. Second, a Colorado water right carries with it no right to the use of federal land. Defendants argue that the Forest Service has broad regulatory authority to impose conditions on the use of its land even when those conditions affect private water rights. Defendant assert that this authority arises from three sources: (1) the Organic Act of 1897, which granted the agency broad authority to impose conditions on the occupancy and use of National Forest land; (2) FLPMA, in which Congress granted the agency authority to issue and condition rights-of-way on National Forest \*1103 lands; and (3) the agency's proprietary capacity, which also allows the agency to impose terms and conditions on the use of National Forest lands. Similarly, Plaintiffs contend that the Forest Service has the authority to issue special-use permits requiring bypass flows under specific grants of power under FLPMA and the Organic Act, and the United States' inherent powers as property owner.

Intervenors rely on *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978), in asserting that Congress intended that water for fish and wildlife protection purposes be appropriated by the Forest Service in priority and subject to the rights of prior users. In *U.S. v. New Mexico*, the Supreme Court stated,

Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

*Id.* at 702, 98 S.Ct. 3012.

The Supreme Court determined that, pursuant to the Organic Act of 1897, Congress intended national forests to be reserved for only two purposes — to conserve the water flows, and to furnish a continuous supply of timber for the people. *Id.* at 707, 98 S.Ct. 3012. "National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." *Id.* at 708, 98 S.Ct. 3012. In 1960, Congress passed the Multiple-Use Sustained-Yield Act (MUSYA), which provides that the national forests shall be administered for additional purposes, including wildlife and fish. However, the *New Mexico* Court concluded that while MUSYA "was intended to broaden the purposes for which national forests had previously been administered, ... Congress did not intend to thereby expand the reserved rights of the United States." *Id.* at 713, 98 S.Ct. 3012. The Court noted that a reservation of additional water for *secondary* purposes "could mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principal purpose of securing favorable conditions of water flow." *Id.* at 715, 98 S.Ct. 3012.

While finding that Congress did not, in enacting the Organic Act and MUSYA, intend to reserve water rights for wildlife

preservation purposes when it set aside lands for national forests, *U.S. v. New Mexico* did not address the power of the Forest Service to restrict the use of rights-of-way over federal land for fish and wildlife purposes. *County of Okanogan v. Nat'l Marine Fisheries Serv.*, 347 F.3d 1081, 1086 (9th Cir.2003). In *County of Okanogan*, the appellants argued that the Forest Service did not have the authority to condition the use of the rights-of-way in a national forest on the maintenance of instream flows because such restrictions denied them their vested water rights under state law. The Ninth Circuit Court of Appeals rejected that argument, finding that the imposition of such restrictions in the right-of-way permits was within the authority of the Forest Service. The Ninth Circuit found such authority in FLPMA, NFMA, the Organic Act, and MUSYA.

1104 The Federal Land Policy and Management Act of 1976 (FLPMA) authorizes the Secretaries of the Interior and Agriculture to "grant, issue, or renew rights-of-way over, [upon, ... or through such \*1104 lands for reservoirs, canals, ditches, ... and other facilities and systems for the impoundment, storage, transportation, or distribution of water.]" 43 U.S.C. § 1761(a)(1). Such rights-of-way "shall contain ... terms and conditions which will ... minimize damage to ... fish and wildlife habitat and otherwise protect the environment" and that will "require compliance with applicable ... water quality standards established by or pursuant to applicable Federal or State law." *Id.* § 1765(a). In addition, the National Forest Management Act requires the Forest Service to specify guidelines for land management plans that "provide for ... watershed, wildlife, and fish" and "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(A) & (B). The Organic Administration Act, 16 U.S.C. § 475, provides that "[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows...." The Multiple Use Sustained-Yield Act of 1960 (MUSYA), 16 U.S.C. § 528, provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *These statutes, in our view, give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the Okanogan National Forest to protect endangered fish species.*

*County of Okanogan*, 347 F.3d at 1085 (emphasis added).

Like the Defendant-Intervenors here, the appellants in *County of Okanogan* argued that the "savings clauses"<sup>[4]</sup> of FLPMA is evidence that Congress did not intend to diminish any vested water rights guaranteed under state law. The Ninth Circuit court dismissed this argument, noting that the appellants' rights-of-way were always, by their written terms, revocable at the discretion of the federal government. Moreover, the 1901 Act under which the permits had been earlier granted provided that right-of-way permits did not grant vested property rights. *Id.* at 1085-86. Ultimately, the *Okanogan* court concluded that that case was "not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter, and is so treated in the right-of-way acts before mentioned." *Id.* at 1086 (quoting *Utah Power & Light Co. v. United States*, 243 U.S. 389, 411, 37 S.Ct. 387, 61 L.Ed. 791 (1917)).

1105 The Tenth Circuit has recognized that the Forest Service's authority over its lands may be exercised to limit a water right holder's use of water. See *City and County of Denver v. Bergland*, 695 F.2d \*1105 465 (10th Cir.1982). There the Tenth Circuit rejected Denver's argument that its water rights prevented the Forest Service from regulating the right-of-way upon which the city was building a water transmission system. *Id.* at 483. The Court of Appeals held that although the water decree, determining the priority of water rights, prohibited the Forest Service from challenging Denver's right to appropriate those waters, it had no effect on the agency's ability to regulate Denver's use of National Forest lands — despite Denver's claims that the Forest Service was interfering with its right to divert and utilize the water. *Id.* at 483-84. In doing so, the Tenth Circuit recognized both that the law had long held that a water right did not include the right to use another's land and that the Organic Act "conferr[ed] upon the Forest Service the duty to protect the forests from injury and trespass, and the power to condition their use and prohibit unauthorized uses." *Id.* at 476, 483-84 (emphasis added). See also *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209 (10th Cir.1999) (affirming a district court's finding that "Whether Plaintiffs own certain water rights ... does not change the fact that such rights do not deprive the Forest Service of its statutory authority and responsibility to regulate the use and occupancy of National Forest System lands....").

Title V of FLPMA repealed over thirty statutes which had granted rights-of-way across federal lands and replaced them with a single grant of authority to the Secretaries of Agriculture and the Interior to "grant, issue, or renew rights-of-way over, upon, under, or through" public and National Forest Lands. 43 U.S.C. § 1761(a). Congress' grant of authority included the obligation to include terms and conditions in each right-of-way which will, *inter alia*, "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. § 1765(a). The Forest Service's exercise of its regulatory

authority to impose bypass flows as a condition on the use of National Forest land does not constitute the assertion of a water right.

The argument that imposition of bypass flows implicates or conflicts with state water rights has been rejected by the Supreme Court in *PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994). In that case, PUD No. 1 argued that a minimum instream flow requirement imposed pursuant to the federal Clean Water Act ran afoul of disclaimers provided in that act which preserved the state's authority to allocate water rights.<sup>[5]</sup> *Id.* at 720, 114 S.Ct. 1900. The Court rejected that argument, holding that the disclaimers "preserve the authority of each State to allocate water quantity as between users," but did not limit the scope of federal regulation (in that case pollution controls) that may be imposed on users with water rights obtained under state law. In doing so, the Court recognized that the regulatory action under federal law (minimum stream flow requirements) did not interfere with the state allocation because it neither "reflected nor established" a water right. *Id.* at 720-21, 114 S.Ct. 1900.

1106 Like the CWA certification required in *PUD No. 1*, the authorization for \*1106 the use of federal land required in this case represents a federal action that is a prerequisite to the use of a water right obtained under state law. A review of the foregoing authorities convinces this Court that, on the rare occasions when bypass flows are required as a condition to the use of federal lands, they neither reflect nor establish a water right; rather, they merely address the nature of the use to which a water right might be put once the right is obtained from the State. *Id.* at 721, 114 S.Ct. 1900. Thus, pursuant to its regulatory authority, the Forest Service could have imposed bypass flows as a condition to the renewal of WSSC's authorization for Long Draw Reservoir.

## C. FEDERAL LAND AND POLICY MANAGEMENT ACT

In his Record of Decision, Supervisor Underwood stated,

Section 505 of FLPMA, requires me to protect the public interest in the lands traversed by the right-of-way or adjacent thereto. I considered that responsibility, and I conclude that I have the authority to impose winter bypass flows below the dam to protect the Park. However, in my discretion, I have balanced the public's interest in water facilities and the environment.

(AR-LD at 4603.)

Plaintiffs argue that Defendants' decision to grant the Long Draw Easement without requiring the maintenance of minimum bypass flows was arbitrary, capricious, an abuse of discretion and not in accordance with FLPMA. Specifically, Plaintiffs argue that the easement does not carry out the purposes of FLPMA and will cause significant damage to fish and wildlife. Plaintiffs maintain that the Forest Service does not have authorization to balance local business concerns with the protection of the environment. Plaintiffs further contend that FLPMA's requirement that rights-of-way include terms and conditions that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment" mandates that WSSC's authorization include the requirement for minimum bypass flows. Plaintiffs also contend that the Forest Service wrongfully relied on the illegally promulgated regulation issued by Secretary Madigan.

The government responds that FLPMA is not focused solely on protecting the environment. The government argues that the Forest Service has discretion when implementing the requirements of FLPMA, and that national forest lands are managed under a congressional multiple-use and sustained-yield mandate. The government also argues that the record supports its decision. Defendant discounts the Madigan Policy asserting that it did not control its decision.

As set forth previously, Section 505 of FLPMA states: "Each right-of-way shall contain — (a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; [and] (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment..."<sup>[6]</sup> 43 U.S.C. § 1765. The Forest Plan suggests that the Forest Service determined that the most appropriate way to minimize damage to fish habitat is to maintain such habitat at least at 40 percent or more of potential, requiring the Forest Service to "manage waters capable of supporting self-sustaining trout populations to provide for those populations." The purposes of FLPMA include: (1) the \*1107 establishment of goals and objectives "as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;" and (2) management of public lands in a manner "that will protect the quality of scientific,

scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use[.]" 43 U.S.C. § 1701(a)(7) & (8).

The evidence in the Administrative Record clearly shows that requiring bypass flows was the environmentally preferred alternative. Following a comprehensive assessment of the revised JOP, which was the applicants' attempt to mitigate damage to fish habitat, the Forest Service found that "the applicants' claims of habitat enhancement in the Cache la Poudre River system are overstated." (AR-LD at 4483.) More specifically, the Forest Service stated:

Under the JOP, effects to ... Segment 5 of the La Poudre Pass Creek, and to Segment 6 of the Cache la Poudre River remain unchanged from the existing condition. As these negative impacts are considered at increasingly larger scales ... they become less apparent. However, at the local scale, we believe these are significant environmental effects that are meaningful from a physical, biological, and ecological perspective. Effects to [these segments] are not mitigated under the JOP, but are fully to partially mitigated under Alternative C for a five month period.

(AR-LD at 4482-83.)

Additionally, the ROD itself recognized that the "JOP is not as environmentally desirable as bypass flows" because "[c]ritical habitat conditions occur during months outside those addressed in the JOP.... These months are of equal importance to maintaining aquatic habitat." (AR-LD at 4601.)

Under the current operation of Long Draw Reservoir there are extended periods of zero or near zero flow below the reservoir from at least October through March or April, and longer during some years.... The extended periods of zero to near zero flow result in zero habitat potential.... It is unlikely that viable self-sustaining fish populations will exist immediately below Long Draw Dam. This condition persists for approximately 1.2 miles downstream and possibly farther. Progressing downstream, aquatic habitat conditions improve somewhat as ground water contributions and tributary inflow occur, but the amount of aquatic habitat for fish remains marginal. The average size and abundance of trout are reduced for the entire 2.3 mile section of stream between Long Draw Dam and the Cache la Poudre River.

(AR-LD at 4593.)

Despite the evidence before him, Supervisor Underwood did not select the environmentally preferred alternative "because WSSC offered *voluntary* mitigation toward meeting Forest Service resource goals in the JOP that *reasonably protects* NFS lands." (AR-LD at 4597) (emphasis added). Concerned by the fact that the Long Draw Reservoir is part of an irrigation water supply upon which many people depend, the Forest Supervisor concluded,

1108 Water uses continue to be a welcome and legitimate use of the public's lands, just as they have been for decades.... I desire to accept voluntary measures that reasonably protect resources on public land.... My job is to find a balance between the use of NFS lands for water \*1108 facilities and protection of aquatic resources.

(AR-LD at 4601.)

The Supervisor's ROD goes on to discuss the difficulties WSSC would face in implementing bypass-flows, including upgrading the outlet works on the Long Draw Dam to operate during the winter months. *Id.* ("WSSC is concerned about the difficult winter access and thinks that is another reason that winter operation is neither feasible nor safe.") Finally, the Supervisor concluded that "[o]ne of the assurances that I have received from WSSC that makes the JOP acceptable is WSSC's willingness to have the JOP be a condition of the land-use authorization." *Id.*

FLPMA itself does not authorize the Supervisor's consideration of the interests of private facility owners as weighed against environmental interests such as protection of fish and wildlife habitat. FLPMA *requires* all land-use authorizations to contain terms and conditions which will protect resources and the environment. In responding to public comments, the Forest Service expressly acknowledged that issuing a special use authorization without terms and conditions requiring by-pass flows, "depending instead on voluntary achievement of Forest Plan objectives appears to be inconsistent with FLPMA." (AR-LD at

3162.) "Once it is determined that certain resources are at risk and require such terms and conditions to protect them, then neglecting to include the terms and conditions in the authorization, as proposed in Alternative B, would be inconsistent with FLPMA." *Id.* The Act simply does not allow a forest supervisor to ignore options that would minimize environmental degradation because of the costs to private parties and difficulty in implementation.

The Government argues that the obligations of § 505 of FLPMA must be placed in the context within which the Forest Service operates when fulfilling its statutory obligations of "multiple use." The Government contends that meeting the mitigation requirements of FLPMA is a case-by-case determination controlled not only by the terms of § 505, but also by the terms of the other statutes governing the National Forest lands: the Organic Administration Act, the Multiple-Use, Sustained-Yield Act, and the National Forest Management Act. Thus, the Government argues, Supervisor Underwood clearly had the discretion to engage in balancing as he considered the requirements of § 505.

Even assuming that the Forest Service was entitled to balance environmental interests against the use of Forest lands for water facilities, its explanation for its decision runs counter to the evidence before the agency. After identifying Alternative B (without bypass flows) as the proposed action, the Forest Service received numerous comments from within the federal government condemning its decision. For example, the Environmental Protection Agency (EPA) stated that the voluntary solution proposed by permittees is "clearly insufficient to meet the FLPMA, [Endangered Species Act] and [Clean Water Act] objectives." (AR-G at 2324.) The EPA further asserted that any claim that bypass flows would result in a loss of historic yield was unsubstantiated.

This is particularly so since each of these permittees seems to have the flexibility to subsequently capture and store bypassed flow in lower reservoirs using existing water storage without significant change in their flexibility to store stream flow. Further, the concern that the capital investment in these facilities would be lost or diminished in value requiring significant new investment has not been documented.

1109 \*1109 *Id.*<sup>[7]</sup>

The Court finds that the administrative record is devoid of any verifiable evidence, save conclusory predictions by WSSC, that the imposition of bypass flows pursuant to Alternative C would adversely affect its ability to fully utilize the Long Draw Reservoir.

The Forest Service's own interdisciplinary (ID) team pointed out the inherent weaknesses of the JOP's supposed strong points. In order to trumpet the value of its plan, the WSSC claimed that the JOP would result in "winter aquatic habitat ... improve[ments] over existing conditions by approximately 20% overall." (AR-G at 4350.) However, no independent study was ever completed by the Forest Service to assess the environmental impact of the JOP. The Forest Service's ID team discounted claims made by the WSSC about the effectiveness of the JOP, concluding that:

[T]he applicants' data should not be considered accurate in terms of absolute values and should be used only as an index to assess relative differences among the alternatives presented. It is also important to understand that emphasis placed on the analysis done by the Cities was to compare differences in fish habitat between Alternatives B and C for a five month period only, and does not consider other time periods or other resource values.

(AR-LD at 4461.)

Furthermore, while the JOP increased flows to the Cache la Poudre River, the plan only required WSSC, "[t]o the extent water is available in storage and can be put to beneficial use, [to release water] from Barnes Meadow and Chambers Lake Reservoirs at a target rate of 10 cfs for the period of November 1 through March 31 each year." (AR-G at 4354.) Therefore, any mitigation afforded by the JOP accrues only downstream on the mainstem of the Cache la Poudre River. By increasing flow from other reservoirs to the River, the plan's very terms do not mitigate the environmental damage to the La Poudre Pass Creek, which remains dry during the winter months.

On the same day the ROD for Long Draw Reservoir was issued, the Forest Service also issued a ROD for the Joe Wright Dam and Reservoir. (See Joe Wright ROD attached at Tab A to Memo. in Support of Plaintiffs' Motion for Summ. J.) Unlike the Long Draw Easement, however, the renewed land-use authorization for the Joe Wright Dam and Reservoir required the maintenance of a "bypass flow of three (3) cfs from April 1 through September 30, and a bypass flow of one (1) cfs from October 1 through March 31 (or natural flows, whichever is less) in Joe Wright Creek directly below Joe Wright Reservoir." *Id.* at 1. As he did in the Long Draw ROD, Forest Supervisor Underwood recognized that FLPMA directed him to put terms and conditions in land-use

authorizations to protect fisheries. *Id.* at 10.

The Forest Supervisor determined that bypass flows were required under the Joe Wright permit because:

1110 Aquatic habitat conditions on NFS lands below Joe Wright Reservoir are marginal.... There remain up to eight months \*1110 of zero or near zero flows. In the half-mile section immediately below the reservoir the habitat potential for all life stages of all fish species is zero. Viable self-sustaining fish populations do not exist for 1.0 miles downstream and possibly farther. I wanted to find a balance between the use of NFS lands for water diversions and protecting the aquatic resources, but the JOP does not provide the minimum acceptable levels of resource protection that I desire.

*Id.* at 11.

Supervisor Underwood declined to require bypass flows from the Long Draw Reservoir, despite similar conclusions concerning zero flow conditions and destruction of aquatic habitat. (AR-LD at 4593.)

The Forest Supervisor determined that the voluntary mitigation offered by the applicants in this case *reasonably* protects NFS lands. However, the clear weight of the evidence in record does not support a finding that Alternative B, even with the JOP mitigation measures, *minimizes* damage to fish and wildlife habitat and otherwise protects the environment as required by FLPMA. Therefore, the Forest Service's selection of this alternative in issuing a land-use authorization for Long Draw Dam and Reservoir was arbitrary and capricious.

## D. NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

Plaintiffs' remaining claims pursuant to NEPA are: (1) failure to include all necessary information in the EIS; (2) failure to prepare a supplemental EIS discussing the grant of an easement; and (3) failure to prepare a supplemental EIS evaluating the May 18, 1994 JOP. NEPA requires all federal agencies to use a "systematic, interdisciplinary approach" in agency decision-making. *Utah Shared Access Alliance v. U.S. Forest Service*, 288 F.3d 1205, 1207 (10th Cir.2002).

NEPA places upon federal agencies the obligation "to consider every significant aspect of the environmental impact of a proposed action." *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council*, 462 U.S. 87, 97, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). It also ensures that an agency will inform the public that it has considered environmental concerns in its decision-making process. *Id.* The Act does not require agencies to elevate environmental concerns over other appropriate considerations; however, it requires only that the agency take a "hard look" at the environmental consequences before taking a major action.... The role of the courts in reviewing compliance with NEPA "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary and capricious." *Baltimore Gas & Elec.*, 462 U.S. at 97-98, 103 S.Ct. 2246.

*Id.* at 1207-08.

### 1. Failure to include all necessary information in the EIS

Plaintiffs fault the Forest Service for amending the Forest Plan while acknowledging "detailed flow and habitat assessments have not been conducted for the Cache la Poudre River between La Poudre Pass Creek and Joe Wright Creek to determine consistency with Forest Plan standards." (AR-LD at 4603.) Plaintiffs urge such studies were necessary to determine whether that portion of the Cache la Poudre could be exempted from the Forest Plan standards.

1111 NEPA regulations require agencies to include complete information in an environmental impact statement "[i]f the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice \*1111 among alternatives and the overall costs of obtaining it are not exorbitant." 40 C.F.R. § 1502.22(a). To demonstrate a violation of NEPA on this basis, Plaintiffs must show (1) the missing information is essential to a reasoned decision between the alternatives, and (2) that the public was unaware of the limitations of the data the Forest Service relied on. See *Colorado Environ. Coalition v. Dombek*, 185 F.3d 1162, 1172-73 (10th Cir.1999). Plaintiffs have made no attempt to demonstrate that such information is

essential to a reasoned decision. The record demonstrates that the Forest Service had information addressing aquatic habitat and explained the limitations of the information it relied on.

When the water users presented the revised JOP to the Forest Service, they also included extensive analysis done by their hydrology and fishery consultants which compared Alternative B(JOP) with Alternative C (bypass flows). (AR-G at 4364-4620.) The Forest Hydrologist and Fishery Biologist evaluated the consultants work in a report included as Appendix I to the FEIS. (AR-LD at 4459-4563.) The Forest Service analysts cautioned that because the habitat results generated by the consultants relied on limited data, the results "should not be considered accurate in terms of absolute values." *Id.* at 4461. That limitation, however, did not mean the consultants' analysis had no value in the decision-making. The analysis provided "an index to assess relative differences among the alternatives presented." *Id.* Plaintiffs have not demonstrated that NEPA regulations required inclusion of the missing information.

## **2. Failure to prepare a supplemental EIS**

NEPA regulations provide that federal agencies "[s]hall prepare supplements to either draft or final environmental impact statements if: (i) [t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii)[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1). This requirement does not mean that a SEIS must be done every time an agency is presented with new information. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989). Instead, an SEIS is only required if the new information shows the proposed action will affect the quality of the human environment in a significant manner or to a significant extent not already considered. *Id.* at 374, 109 S.Ct. 1851.

Plaintiffs first contend that the Forest Service should have issued a supplemental EIS before adopting the May 18, 1994 JOP, because the public was given no opportunity to comment on the revised JOP. Where the agency has been presented with new information, an agency's decision to forego a SEIS must be upheld so long as the record demonstrates the agency reviewed the proffered supplemental information, evaluated the significance — or lack of significance — of the new information, and provided an explanation for its decision not to supplement the existing analysis. *Colorado Environ. Coalition*, 185 F.3d at 1178. Because the Forest Service had substantially completed the FEIS when the revised JOP was submitted, it produced an addendum to the FEIS addressing the revised JOP (AR-LD at 4565-66), and the Forest Fisheries Biologist and Forest Hydrologist collaborated on an extensive analysis of its impacts (*Id.* at 4459-4563).

1112 The addendum explains that the IDT considered whether to issue a supplemental EIS and determined that doing so was not necessary "because the revised proposal did not make substantial changes to the \*1112 proposed action or present significant new circumstances." *Id.* at 4565. Although Plaintiffs characterize the JOP and the revised JOP as "vastly different", they offer no explanation to support that characterization. The IDT concluded the revised JOP did not represent a substantial change from the initial JOP for two reasons: (1) the revised JOP was an environmental improvement; and (2) two key elements remained the same between the two draft proposals. *Id.* As the IDT observed, both the initial JOP and the revised JOP mitigate by increasing the water flow in the mainstem Cache la Poudre River, and both proposals left La Poudre Pass Creek below Long Draw Reservoir dewatered for several months of the year. *Id.*

In the ROD, Supervisor Underwood further explained the decision not to issue a supplemental EIS:

I also had to consider whether or not to issue a Supplement to the DEIS to give the public an opportunity to review and comment on the revised JOP. Our analysis of the original proposal in the DEIS focused on the fact that La Poudre Pass Creek below Long Draw Reservoir would be dewatered six months of the year. That was the significant issue identified in the DEIS. Although the revised plan did propose to put more water in the lower Cache la Poudre River below the confluence with Joe Wright Creek, it did not change the effects on the stretch below Long Draw Dam. The revised JOP is within the range of alternatives the public should have reasonably anticipated and the public's comments on the draft EIS alternatives also apply to the revised JOP. The public's comments on the DEIS meaningfully informed me of the public's attitudes toward granting land-use authorizations and the terms and conditions that should be applied. For those reasons I determined that a Supplemental EIS was not required under 40 CFR 1502.9.

(AR-LD at 4597.)

The record demonstrates that the Forest Service reviewed the revised JOP, evaluated the significance — or lack of significance — of the new information, and provided an explanation for its decision not to supplement the existing analysis. Thus, the Forest Service's decision that a SEIS was not required is not arbitrary and capricious.

Plaintiffs also argue that the Forest Service should have issued a SEIS when it chose to grant an easement rather than a special use permit. Plaintiffs argue that the distinction is significant because the twenty-year special use permit contemplated in Alternative B in the DEIS states that "[t]his permit is a license for the use of federally owned land and does not guarantee permanent, possessory interest in real property...." (AR-LD at 471.) Unlike the special use permit, the Long Draw Easement cannot be amended at the discretion of the Forest Service and has the effect of conveying an actual property interest in National Forest land to WSSC.

As set forth above, NEPA regulations require the agency to supplement an EIS only when the agency makes substantial changes in the proposed action *that are relevant to environmental concerns*. 40 C.F.R. § 1502.9(c)(1)(I). Here, the issuance of an easement changes the legal status of WSSC's authorization, but it does not change either the footprint of the reservoir upon the environment or the operations analyzed in the FEIS. The easement gives the Forest Service the right to impose conditions as with a special use permit. Subparagraph I.B. of the Easement provides: "The terms and conditions of this authorization shall be subject to revision in the years 2014, and 2034 to reflect \*1113 changing times and conditions as specified in subparagraph I.C." (AR-LD at 4899.) Subparagraph I.C. provides: "Upon revision in the years 2014 and 2034, this easement is subject to then-current laws, regulations, Federal and State land use plans and other management decisions of the authorized officer or his or her superior applicable to management of National Forest System lands to the same extent as if the easement had been terminated and a new easement issued except that the question of whether the occupancy is in the public interest and can be continued will be answered in the affirmative." *Id.* Moreover, the easement can be revoked by the Forest Service if WSSC fails to comply with the terms and conditions. *Id.* at 4901.

Finally, although the DEIS included a proposed special use permit, both the FEIS and the ROD considered the issuance of a land use authorization. Both the DEIS and the FEIS explained that two of the alternatives being considered were effectively perpetual grants, as is an easement. As the FEIS explained, "Alternatives A and B both establish a policy that has the effect of making the land use and its affects permanent by removing the opportunity for the public to change permit conditions, when that use has been shown to have avoidable adverse effects. This has the effect of converting the temporary land-use authorization into a perpetual grant or property right." (AR-LD at 3126.) The Forest Service's determination that a SEIS was not required to change the authorization to an easement is not arbitrary and capricious.

## **E. FOREST AND RANGELAND RENEWABLE RESOURCES PLANNING ACT**

Plaintiffs allege the following claims: (1) a violation of FRRRPA in exempting certain facilities from substantive requirements of the Forest Plan; (2) a violation of FRRRPA in failing to ensure that authorization for use of National Forest System lands be consistent with the Forest Plan; and (3) a violation of FRRRPA in failing to allow public participation in amending the Forest Plan. The National Forest Management Act of 1976 (NFMA), which amended Section 6 of FRRRPA, requires the Secretary of Agriculture to "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System...." 16 U.S.C. § 1604(a). The Forest Service developed the Land and Resource Management Plan for the Arapaho and Roosevelt National Forest and Pawnee National Grassland ("Forest Plan") in 1984, with considerable public notice and involvement. (AR-G at 752.)

1114 The Forest Plan contains standards and guidelines to assist the Supervisor in managing the Forest's fishery resources. In particular, the Forest Plan's Direction required the Forest Supervisor to "[m]anage waters capable of supporting self-sustaining trout populations to provide for those populations," "[i]mprove fish habitats and manage wildlife habitats to maintain viable populations of native species," and "[m]aintain habitat for viable populations of all existing vertebrate wildlife species." (AR-G at 2446-47.) The Forest Plan's Direction also required that "[s]pecial use permits, easements, rights-of-way, and similar authorizations for use of [National Forest System] lands shall contain conditions and stipulations to maintain instream or bypass flows necessary to fulfill all National Forest uses and purposes." *Id.* at 2447. Plaintiffs argue that these requirements are non-discretionary and given these directives, the Forest Service's decision to grant the Long Draw Easement and exempt Long Draw from the Forest Plan requirements was arbitrary and capricious and unlawful. Plaintiffs further contend that the

amendment to the \*1114 Forest Plan was a "significant change" requiring public involvement pursuant to NFMA.

Congress has authorized the Forest Service to amend forest plans "in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section." 16 U.S.C. § 1604(f)(4).<sup>[8]</sup> Under the regulations in effect at the time of the Forest Service's decision, the appropriate procedures for amending the plan turned on whether the amendment is significant or non-significant. When an amendment is non-significant, the agency need only provide "appropriate public notification and satisfactory completion of NEPA procedures" before adopting the amendment. *Sierra Club v. Cargill*, 11 F.3d 1545, 1547 (10th Cir.1993); 36 C.F.R. § 219.10(f). The Forest Service applied the procedures for a non-significant amendment when it amended the Forest Plan to allow Long Draw reservoir to be reauthorized without bypass flows. Both the DEIS and the FEIS informed the public that if an alternative were selected which did not impose bypass flows, the Forest Plan "direction to issue permits with bypass flows and to maintain habitat potential" would have to be amended. (AR-LD at 364, 3077-78.)

The regulations provide little guidance as to when a change is significant, directing only that the determination should be "[b]ased on an analysis of the objectives, guidelines, and other contents of the forest plan." 36 C.F.R. § 219.10(f). However, as a general matter we review such an agency determination only as to whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).... Further, in this case the regulation expressly commends the determination of the significance of an amendment to the Forest Supervisor's judgment. 36 C.F.R. § 219.10(f).

*Cargill*, 11 F.3d at 1547.

Here, the Forest Service considered whether the proposed amendment would impact Forest Plan objectives and management prescriptions in determining that the proposed amendment was not significant. (See AR-G at 2301A.) The Forest Service reasoned that the amendment would have a relatively short time frame since the entire plan was due for revision within one or two years. *Id.* While Plaintiffs argue the amendment must be significant because of its impact on the 1.2 mile segment of La Poudre Pass Creek, the Forest Service observed that the amendment would impact a small area relative to the size of the overall planning area. The Forest Service also found that the change brought about the amendment would not affect any Forest Plan objectives or outputs nor affect management area prescriptions. *Id.* Moreover, the Forest Service has the authority to amend a Forest Plan to allow a project to go forward. See *Citizens' Committee To Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012 (10th Cir.2002). Applying the proper deferential standard, this Court cannot say that the Forest Service acted arbitrarily and capriciously in treating the proposed forest plan amendment as a non-significant change or in ultimately amending the plan to allow for implementation of Alternative B.

## F. WILD AND SCENIC RIVERS ACT

1115 Plaintiffs allege that the Defendants' decision to grant the Long Draw \*1115 Easement without terms and conditions requiring the maintenance of minimum bypass flows to the La Poudre Pass Creek fails to protect and enhance the portion of the Cache la Poudre River designated as "wild" under the Wild and Scenic Rivers Act (WSRA), 16 U.S.C. §§ 1271-1287. La Poudre Pass Creek is a tributary to this segment of the Cache la Poudre. "Wild" rivers are defined under the WSRA as "[t]hose rivers or sections of rivers that are free of impoundments and generally inaccessible except by trail, with watersheds or shorelines essentially primitive and waters unpolluted. These represent vestiges of primitive America." 16 U.S.C. § 1273(b)(1).

Each component of the national wild and scenic rivers system shall be administered in such manner as to protect and enhance *the values which caused it to be included in said system* without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration primary emphasis shall be given to protecting its esthetic, scenic, historic, archaeological, and scientific features. *Management plans for any such component may establish varying degrees of intensity for its protection and development, based on the special attributes of the area.*

16 U.S.C. § 1281(a)(emphasis added).

Plaintiffs contend that the absence of minimum bypass flows from Long Draw Reservoir to La Poudre Pass Creek negatively

affects the scenic, scientific and recreational values for which the Cache la Poudre was designated as a wild and scenic river.

The FEIS concluded that adoption of either Alternative A or B would have no effect on the Wild and Scenic River values because the designation was based on the current streamflow and recreation use on the Cache la Poudre. (AR-LD at 3117.) It is significant both as a matter of fact and as of law that the Cache la Poudre was designated a Wild and Scenic River although Long Draw Reservoir had been largely dewatering La Poudre Pass Creek during the winter for over sixty years. It is significant as a matter of fact because that flow regime created the conditions and values recognized as "outstandingly remarkable" by the designation of the Cache la Poudre. It is significant as a matter of law because when Congress designated the Cache la Poudre as a Wild and Scenic River it expressly protected existing water uses, including reservoir operations.

Inclusion of the designated portions of the Cache la Poudre River in the Wild and Scenic Rivers System under section 101 of this title shall not interfere with the exercise of existing decreed water rights to water which has heretofore been stored or diverted by means of the present capacity of storage, conveyance, or diversion structures that exist as of the date of enactment of this title, or operation and maintenance of such structures.

Pub.L. 99-590, § 102 (1986).

Accordingly, the Court finds that the Forest Service met its obligations pursuant to the Wild and Scenic Rivers Act.

## CONCLUSION

For the reasons stated herein, Plaintiffs' Second, Fifth, Ninth and Thirteenth Claims are DISMISSED for failure to exhaust administrative remedies; Plaintiff's Motion for Summary Judgment is GRANTED as to their First Claim for violation of FLPMA, and DENIED as to all other remaining claims for relief. THEREFORE, it is hereby

1116 ORDERED that the decision of the Forest Service to issue the Long Draw Easement is REVERSED. This matter is \*1116 REMANDED to the agency for further consideration in accordance with its obligations under FLPMA.

[1] Plaintiffs voluntarily moved to dismiss this claim with prejudice upon learning that the de-watered zone of the Cache la Poudre is just outside the boundaries of the Comanche Park Wilderness.

[2] Both Plaintiffs and Defendant-Intervenors filed motions to supplement the Administrative Record submitted by the agency. Plaintiffs offer a copy of the Record of Decision on the Land Use Authorization for Joe Wright Dam and Reservoir and Amendment to the Land and Resources Management Plan issued on July 29, 1994 (attached to Plaintiffs' motion to supplement at Tab A), a copy of a Decision Memorandum for the Secretary of Agriculture from James R. Lyons, Assistant Secretary, signed on August 15, 1994 by Secretary of Agriculture Michael Espy (attached to motion at Tab B), and a copy of § 1909.12, Forest Plan Implementation and Amendment Process from the Forest Service Handbook. The Court finds it appropriate to supplement the Record with Tab A and the first two pages of Tab B. Tab C will be treated as a courtesy attachment for the Court.

Defendant-Intervenors offer five documents to which there is no objection: WSSC's Decrees dated 12/18/45, 4/24/79, and 5/12/86; a FEIS for Long Draw Reservoir Enlargement Project dated 2/7/73; and a DEIS for Long Draw Reservoir Enlargement Project dated 6/6/72. Those documents are accepted. In addition, intervenors offer eight documents relating to an application for water rights filed by the United States in the District Court for Water Division No. 1, State of Colorado, for federal lands including Roosevelt National Forest and Rocky Mountain National Park. The Court agrees with Plaintiffs that supplementation of the record with these eight documents is inappropriate because the Forest Service did not rely upon these documents in making its decision to grant the right-of-way permit at issue. As discussed in Section B of this order, the issue of reserved water rights is wholly unrelated to the Federal Government's right to regulate and manage Federal lands.

[3] Defendants contend that Plaintiffs' Thirteenth Claim is moot because the Madigan directive was repealed well before this lawsuit was even filed. Although Plaintiffs argue throughout their briefing that the Madigan directive is evidence of the arbitrary and capriciousness of the Defendants' decision, their Thirteenth Claim challenges the procedures in allegedly adopting this binding rule as violative of the APA. Such a claim is moot because the Madigan directive no longer affects agency decision-making.

[4] Those clauses provide in pertinent part:

(a) Nothing in this Act ... shall be construed as terminating any valid lease, permit, ... right-of-way, or other land use right or authorization existing on the date of approval of this Act [October 21, 1976].

(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or —

(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

(4) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto;

(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

FLPMA § 701(a), (g)(1,2,4) & (h), Historical Note, 43 U.S.C. § 1701.

[5] The disclaimers in the CWA are similar to the savings clauses in § 701(g) of FLPMA. Section 101(g) of the CWA provides: "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter." 33 U.S.C. § 1251(g). Similarly, § 510(2) provides that nothing in the CWA shall "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters ... of such States." 33 U.S.C. § 1370.

[6] FLPMA § 103(f) defines "right-of-way" as "an easement, lease, permit, or license to occupy, use, or traverse public lands granted for the purpose listed in subchapter V of this chapter." 43 U.S.C. § 1702(f).

[7] The EPA also stated that bypass flows are "a significant factor in ensuring satisfaction of [Clean Water Act] objectives, and we support the alternatives in the EISs which include bypass flows. The proposed bypass flows, which are aimed at achieving a 40 percent level of aquatic habitat protection, appear to be reasonable in terms of ensuring a minimal, but adequate level of protection." (AR-G at 2742.) The Forest Service's Fishery Biologist similarly warned that if bypass flows were not implemented, the Service would not likely "meet the intent of existing environmental law." *Id.* at 2449.

[8] The Government represents that at the time of the Forest Service's decision in this case, the forest plan for the Arapaho and Roosevelt National Forests had already been amended nineteen times since its adoption in 1984.

Save trees - read court opinions online on Google Scholar.

## PRESS RELEASE

March 4, 2014

FOR IMMEDIATE RELEASE

### **Denver Water, Trout Unlimited, Grand County reach agreement on river protections for Moffat Project**

***The deal, years in the making, provides water management and project funds to benefit Fraser River habitat, trout populations***

(Denver)— Denver Water, Trout Unlimited and Grand County today announced agreement on a package of river protections designed to keep the Fraser River and its trout populations healthy.

The Mitigation and Enhancement Coordination Plan brings to a close several years of discussions over the proposed [Moffat Collection System Project](#) and its potential impacts on the Fraser River. All sides hailed the stakeholder agreement as a breakthrough that balances municipal needs and environmental health.

Trout Unlimited called the agreement “a victory for the river.”

“This package of protections and enhancements, if adopted in the final permit, gives us the best opportunity to keep the Fraser River and its outstanding trout fishery healthy far into the future,” said Mely Whiting, counsel for Trout Unlimited. “This pragmatic agreement underscores the value of a collaborative approach to water planning — one that recognizes the value of healthy rivers. It shows that, working together, we can meet our water needs while protecting our fisheries and outdoor quality of life.”

“In an effort to move past a disagreement on impacts from the Moffat Project, Grand County reached out to Denver Water and Trout Unlimited to propose additional environmental mitigations,” said Lurline Curran, Grand County manager. “To all parties’ credit, this effort has succeeded.”

“The Fraser is a river beloved by generations of anglers, boaters and other outdoor enthusiasts —it’s the lifeblood of our community,” said Kirk Klancke, president of TU’s Colorado River Headwaters chapter in Fraser and a longtime advocate for the river. “As an angler and Fraser Valley resident, I’m gratified that this agreement keeps our home waters healthy and flowing.”

The package includes environmental enhancements and protections to ensure the Fraser River will be better off with the Moffat Project than without it, said Denver Water. The Moffat Project will improve the reliability of Denver Water’s system, which serves 1.3 million people in the Denver-metro area.

The centerpiece of the agreement is Learning by Doing, a monitoring and adaptive management program overseen by a management team that includes Denver Water, Grand County, Trout Unlimited, Colorado Parks and Wildlife, the Colorado River District and the Middle Park Water Conservancy District. Upon the project permit being issued, the management team will implement an extensive monitoring program to assess stream health based on specific parameters including stream temperature, aquatic life and riparian vegetation health. Water, financial and other resources committed by Denver Water through project mitigation, the Colorado River Cooperative Agreement and other agreements will be deployed to prevent declines and improve conditions where needed.

Learning by Doing is a unique and groundbreaking effort to manage an aquatic environment on a permanent, cooperative basis. Notably, the program will not seek a culprit for changes in the condition of

the stream, but will provide a mechanism to identify issues of concern and focus available resources to address those issues. Mitigation measures to prevent impacts of the Moffat Project on stream temperature and aquatic habitat will also be implemented through Learning by Doing.

“Like the Colorado River Cooperative Agreement, this plan represents a new, collaborative way of doing business together when dealing with complex water issues,” said Jim Lochhead, CEO/manager of Denver Water. “Since the beginning of our planning for the Moffat Project, we set out to do the right thing for the environment, and we believe coming together with Trout Unlimited and Grand County on the Mitigation and Enhancement Coordination Plan demonstrates a monumental step in making the river better. It’s satisfying that after more than 10 years of study and discussion, Trout Unlimited and Grand County have stayed at the table with us in good faith.”

Denver Water, Grand County and Trout Unlimited have submitted the Grand County Mitigation and Enhancement Coordination Plan to federal and state agencies charged with permitting the Moffat Project and have requested that it be made part of the U.S. Army Corps of Engineers’ permit.

The Final Environmental Impact Statement for the Moffat Project is expected by the end of April, and a final permitting decision by the Army Corps of Engineers is expected in early 2015.

For more information about the Mitigation and Enhancement Coordination Plan, see the full agreement [here](#).

**Contact:**

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*Trout Unlimited is the nation’s largest coldwater conservation organization, with 140,000 members dedicated to conserving, protecting, and restoring North America’s trout and salmon fisheries and their watersheds. Colorado Trout Unlimited has 10,000 grassroots members across the state. Follow TU on [Facebook](#) and [Twitter](#), and visit us online at [tu.org](http://tu.org)*

*Denver Water proudly serves high-quality water and promotes its efficient use to [1.3 million people](#) in the city of Denver and many surrounding suburbs. Established in 1918, the utility is a [public agency funded](#) by water rates, new tap fees and the sale of hydropower, not taxes. It is Colorado’s oldest and largest water utility.*

*Grand County is the most impacted county in Colorado due to transmountain diversions. With two additional projects planned that will remove more water from the county, local impacts are even more critical. By forming a partnership with Denver Water and Trout Unlimited, Grand County has worked to improve the streams and rivers that are so important to our way of life and economy while recognizing the needs of the Front Range.*

# BILLS OF INTEREST

## 2014 LEGISLATIVE SESSION

For legislative information, go to the Colorado State Legislative Web Page:

[www.leg.state.co.us](http://www.leg.state.co.us)

### HOUSE BILLS

**[HB 12-1026](#) CONCERNING THE AUTHORIZATION OF FLEXIBLE WATER MARKETS.**

*Sponsors:* **HOUSE Fischer**  
**SENATE Schwartz**

*Status:* Senate Ag Committee, scheduled March 26

*Bill Summary:* The bill would authorize a new type of water right that can be approved through a change of use case. This “flexible” water right allows for a flexible use of an agricultural water right that is temporarily not used due to fallowing, deficit irrigation, reduced consumptive use cropping, or other alternative ag transfers. The water must still be delivered from fixed point for any consumptive use. The bill also allows for a nonconsumptive flex use of water, “where appropriate.”

*Analysis:* The bill was amended to prohibit flexible water markets outside of the Basin of Origin and to allow a flexible use for compact obligations. Finally, the amendment added language to prevent permanent buy-and-dry and injury to other water users through reconsideration by the water judge. This bill offers alternatives to transmountain diversions and the-buy-and-dry of agriculture, in line with QQ policies.

*QQ RECOMMENDED Position:* SUPPORT

*CRWCD:* Amend

*CWC:* Support

**[HB 14-1028](#) CONCERNING A LIMITATION ON THE UNITED STATES' ABILITY TO IMPOSE CONDITIONS ON A WATER RIGHT OWNER IN EXCHANGE FOR PERMISSION TO USE LAND.**

*Sponsors:* **HOUSE Sonnenberg, Coram, Mitsch Bush**  
**SENATE Roberts, Brophy**

*Status:* Senate State Affairs Committee, scheduled 3/12

*Bill Summary:* This bill would limit the US's ability impose a permit condition that would require a water rights holder to convey or transfer his or her already-existing, privately-held water right. If the US attempted to require that permit holder to convey or transfer that water right to the US as the condition of a permit, this bill instructs a water court to view the US's water right as speculative and therefore forfeited. The right would revert back to the original owner for its original purposes.

*Analysis:* This bill is a state counterpart to federal bills, HR 3189 and S-1630. The Colorado bill was amended to add that it will not affect "any legal authority the United States may have to impose bypass flow requirements in connection with any special use permit or other authorization." While many QQ members support this bill or support the concept of the bill, some members also continue to worry about the implications of the bill to the authority of the US to impose bypass flows. State legislative attempts to dictate to impose requirements on the federal government also raise concerns with members.

*QQ RECOMMENDED Position:* MONITOR

*CRWCD:* Monitor

*CWC:* Support

## SENATE BILLS

**SB14-017**      **CONCERNING A LIMITATION ON THE APPROVAL OF REAL ESTATE DEVELOPMENTS THAT USE WATER RIGHTS DECREED FOR AGRICULTURAL PURPOSES TO IRRIGATE LAWN GRASS.**

*Sponsors:*      **SENATE Roberts and Hodge**  
**HOUSE Vigil and Coram, Fischer**

*Status:*          House Ag Committee, scheduled 3/17.

*Bill Summary:* This bill changed significantly through amendments on the Senate Floor. The bill, as amended, instructs the Interim Water Resource Review Committee to investigate issues of water consumption related to irrigated lawns, including:

- Identification and quantification of best practices that can limit outdoor water consumption;
- Potential legislation, if appropriate, to facilitate implementation of those practices.

*Analysis:* The original bill required local governments to enact an enforceable ordinance or resolution that limits the amount of irrigated turf grass on residential lots to 15% if the new development uses water changed from agricultural irrigation to

municipal or domestic use. This was viewed as unwarranted interference with local control over land use by many local governments. The amended bill provides a forum for QQ and other stakeholders to discuss the intersection of outdoor water conservation best practices and maintaining local regulatory authority over land use.

*QQ RECOMMENDED Position:* SUPPORT as amended  
*CRWCD:* Support as amended  
*CWC:* Support

**SB 14-023 CONCERNING AN AUTHORIZATION OF THE VOLUNTARY TRANSFER OF WATER EFFICIENCY SAVINGS TO THE COLORADO WATER CONSERVATION BOARD FOR INSTREAM USE PURPOSES IN WATER DIVISIONS THAT INCLUDE LANDS WEST OF THE CONTINENTAL DIVIDE**

*Sponsor:* **SENATE Schwartz  
HOUSE**

*Status:* Senate Second Reading, scheduled 3/12.

*Summary:* This bill would allow an irrigator to convert agricultural efficiency savings to instream flow (under the Colorado Water Conservation Board Program). The change would occur through a water court change of use proceeding. This bill would apply only in water divisions west of the continental divide.

*Analysis:* QQ policies include developing strategies to improve conservation measures on the West Slope and supporting the instream flow program on the West Slope. This bill is in line with both of those QQ policies. The River District Board remains concerned with the costs represented by this new water right to neighboring irrigators who just want to continue historical practices; more specifically, they are concerned over the cost and time associated with having to go to water court to protect against injury.

*QQ RECOMMENDED Position:* SUPPORT  
*CRWCD:* Oppose  
*CWC:* Support

**SB 14-103 CONCERNING THE PHASE-OUT OF THE SALE OF CERTAIN LOW-EFFICIENCY PLUMBING FIXTURES.**

*Sponsor:* **SENATE Guzman  
HOUSE Fischer**

*Status:* House Transportation/ Energy, scheduled March 13

*Bill Summary:* This bill would prohibit the sale of any lavatory faucets, showerheads, flushing urinals, tank-type toilets, and tank-type water closets that are *not* water-sense listed (aka high efficiency fixtures) after September of 2016. Denver Water has done substantial outreach work with homebuilders and retailers, and decided upon the 2 year phase out through those conversations (to prevent hardships to retailers).

*Analysis:* The bill would increase indoor water conservation in Colorado without mandating local government action.

*QQ RECOMMENDED Position:* SUPPORT

*CRWCD:* Support

*CWC:* Support

**SB 14-115 CONCERNING PROCEDURAL REQUIREMENTS APPLICABLE TO STATE WATER PLANS.**

*Sponsor:* **SENATE Roberts & Schwartz**  
**HOUSE Fischer & Coram**

*Status:* Passed Senate Ag Committee (with substantial amendments)

*Bill Summary:* The bill was amended to eliminate any approval/ veto of the Plan by the General Assembly. The bill includes a statement of existing law without legislative approval, nothing in the Water Plan is the force of law.

Key provisions of the bill:

Public process:

- CWCB must provide opportunities for public comment before adopting any final or significantly amended plan. This requirement includes public process to be part of any amendments in the future.
- CWCB will present to WRRC at least twice before the first draft Water Plan is finalized and WRRC will accept public comment at that time.
- WRRC will hold public meetings in each geographic region associated with the Basin Roundtables (at a minimum of twice-- once in 2014 and once in 2015 with the draft final plan).
- Any legislator can request a hearing on the plan through the WRRC.

Legislative process:

- CWCB must consider any input from the WRRC and notify them of major amendments at any time in the future.
- CWCB must present a draft plan to the WRRC by July 15, 2015.

- All implementation bills for the Water Plan must go through the WRRC (so will not count against each legislator's allotted number of bills)

*Analysis:* The public input requirement is responsive to QQ concerns about the Colorado Water Plan process and consistent with QQ policies. The bill would result in greater transparency for the Colorado Water Plan.

*QQ RECOMMENDED Position:* SUPPORT

*CRWCD:* Monitor

*CWC:* Support

**SB 14-145 CONCERNING INCENTIVES FOR THE CONSERVATION OF WATER.**

*Sponsor:* **SENATE Hodge & Roberts**  
**HOUSE**

*Status:* **POSTPONED INDEFINITELY** in Senate Ag Committee

*Bill Summary:* Bill sought to amend statutes relating to county and municipal subdivision regulations and the authority of water and sanitation districts:

- County or municipal subdivision regulations cannot mandate a required minimum amount of irrigated vegetation within a subdivision.
- When adopting a subdivision regulation, a county board or town commission must *consider* whether water service tap fees should be reduced if developer commits to water efficiency and conservation measures.
- Water and sanitation district or water district boards also must consider whether water service tap fees should be reduced if the developer of a subdivision commits to implementing water efficiency and conservation measures
- CWCB incentive grants for water conservation and efficiency shall be prioritized in favor of local governments that require new subdivisions to implement water efficiency and conservation measures.

*Analysis:* Parts of this bill were incentive-based, which is a better way to influence local planning decisions that will result in conservation and reduced water consumption—in line with QQ principles. Other parts of the bill are mandate changes to local governments' ability to regulate, contrary to QQ's policy to protect local government authority to protect water resources.

This bill may be reintroduced following the likely passage of SB 017; therefore, we recommend QQ take a position on this bill at its March, 2014 meeting.

*QQ RECOMMENDED Position:* OPPOSE unless amended to remove mandates on local government.

*CRWCD:* Support in Concept

CWC: Oppose

| Bill No.                   | Sponsor                             | Description  | Status  | Calendared | Recommended Position  | Notes  |
|----------------------------|-------------------------------------|--|---|------------|-----------------------|--|
| <b>HOUSE BILLS</b>         |                                     |  |   |            |                       |  |
| <a href="#">HB 14-1026</a> | Fischer/ Schwartz                   | Flexible Water Markets   | Passed House (2/3)<br>Senate Ag Committee         | 26-Mar     | Support               | The House adopted an amendment to limit use of FLEX water to the basin of historical use (no TMD uses)   |
| <a href="#">HB 14-1028</a> | Sonnenberg/ Roberts                 | Limiting the US' ability to impose conditions on a water right owner                 | Passed House<br>Senate State Affairs              | 12-Mar     | Monitor               | Riv. Dist- Monitor (1/22)<br>2/13 - Amendment added re: the protection of bypass flows- Conservation Colorado and TU concerned about scope of amendment.   |
| <a href="#">HB 14-1150</a> | Rankin/ Roberts                     | Creating the Division of Federal Land Coordination (in DOLA)                         | Postponed Indefinitely (2/21)                     |            | Monitor               | Riv. Dist- Monitor (2/6)   |
| <a href="#">HB 14-1219</a> | Rankin                              | Water Conveying Structure Maintenance Obligations                                    | Postponed Indefinitely (2/20)                     |            | Monitor               | Riv. Dist- Oppose  |
| <b>SENATE BILLS</b>        |                                     |  |   |            |                       |  |
| <a href="#">SB 14-017</a>  | Roberts/ Hodge<br>Vigil/Coram       | "Turf Bill." Limiting approval of developments that use Ag water for lawn irrigation | Passed Senate<br>House Ag Committee               | 17-Mar     | Support               | Riv Dist- Support in Concept<br>CWC- Support<br>2/7- Amended in Committee to allow local government to delegate enforcement to an HOA; Also states a local gov't has sole discretion to determine what stage in development permit process this bills' applicability is triggered. |
| <a href="#">SB 14-023</a>  | Schwartz                            | Transfer of water efficiency savings to CWCB ISF                                     | Second Reading, Senate                            | 12-Mar     | Support               | Riv Dist- Oppose (3/7).  |
| <a href="#">SB 14-093</a>  | John/ May & Sonnenberg              | Pipeline Right-of-Way  | Passed Senate<br>House Judiciary Committee        | 14-Mar     | Monitor               |  |
| <a href="#">SB 14-103</a>  | Guzman/ Fischer                     | Phase In High-efficiency Water Fixture Options                                       | Passed Senate<br>House Transport/Energy Committee | 13-Mar     | Support               | Riv. Dist- Support   |
| <a href="#">SB 14-105</a>  | Lambert / Duran & Gerou             | Stop Water Cash Fund Transfers To General Fund                                       | Passed Senate and House                           |            |                       | Riv Dist- Support  |
| <a href="#">SB 14-115</a>  | Roberts & Schwartz/ Fischer & Coram | State Water Plan Public Review & GA Approval   | Passed Senate Ag                                  |            | Support               | Riv Dist- Monitor<br>Substantially amended in Senate Ag Committee, including removing mandatory General Assembly approval  |
| <a href="#">SB 14-134</a>  | Hodge/ May & Gerou                  | Repeal Statutory Water Quality Fee Schedules   | Postponed Indefinitely                            |            | Oppose                | River District-- Oppose (2/6)<br>CLM- Oppose   |
| <a href="#">SB 14-145</a>  | Hodge & Roberts                     | Concerning Incentives for the Conservation of Water                                  | Postponed Indefinitely                            |            | Oppose unless amended | CWC- Oppose<br>CML- Oppose<br>River District- Support in Concept   |
| <a href="#">SJR 004</a>    | Schwartz/ Fischer                   | Water and Power Authority Projects Approvals   | Passed Senate Ag Committee                        |            | Support               | River District- Support  |





## WATER QUALITY / QUANTITY COMMITTEE (QQ)

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**To:** QQ Members  
**From:** Lane, Barbara and Torie  
**Subject:** 2014 WQCC Standards Rulemaking

The Colorado Water Quality Control Commission's Notice for the Rulemaking on the Upper Colorado River Water Quality Standards and Classifications (WQCC Regulation #33) came out last week. This Notice outlines the changes to the region's standards and classifications the Water Quality Control Division is proposing. It also includes proposed changes by several other parties, including a joint proposal related to Grand Lake clarity from Grand County, NWCCOG and Northern Water Conservancy District.

The following link will take you to the Notice:

<http://www.colorado.gov/cs/Satellite/CDPHE-WQCC/CBON/1251590851421>

The Notice outlines the process for participating in the Rulemaking including the dates for certain required actions, like getting party status to take part in the Rulemaking.

**QQ will be a party to this Rulemaking and can represent your interest and concerns . The Rulemaking will take place June 9<sup>th</sup> in Grand Junction. Party status requests are due on April 1, 2014 if you are interested in filing an individual motion for party status, or having us submit an individual party request on your behalf.**

We are beginning to analyze the proposed changes and would appreciate your input on any part of the Division's proposal. We have had some discussions with members to identify issues, but would like more input.

Please contact any of us to discuss your concerns, opinions or positions or if you want to strategize on any of these proposals. QQ's comments in response to the Division's proposal are due on April 22, so we need your input by April 1<sup>st</sup>.

Thank you.