

STILL NO WATER FOR THE WOODS
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Lois G. Witte¹

In 1979 Sally K. Fairfax and A. Dan Tarlock published an article in the *Idaho Law Review* titled “*No Water For The Woods: A Critical Analysis of United States v. New Mexico.*”² This article analyzed the first Supreme Court opinion to answer the question of whether a federal land management agency, in this instance the United States Department of Agriculture, Forest Service, could assert the implied reserved theory of water rights to obtain instream flows for the protection of recreation, fish, and wildlife.³ Fairfax and Tarlock examined the five-to-four split decision of the Supreme Court and concluded that the minority opinion, which would have granted instream flows to the Forest Service, was the better reasoned.

The majority opinion in *New Mexico*, written by Chief Justice Rehnquist, narrowly construed the implied reserved water rights doctrine and denied instream flows to the United States. Citing the “hostility” of the Chief Justice, who authored the majority opinion, Fairfax and Tarlock also declared that the majority’s opinion overreached in an attempt to resolve issues not before the court in a manner detrimental to future instream flow claims of the United States.⁴ Although *New Mexico* involved instream claims made with an 1897 priority date for fish, wildlife, and recreation purposes, the Supreme Court took pains to expound upon the merits of instream flow claims not before it, specifically fish, wildlife, and recreation instream flow claims which could be made with a 1960 priority date. The majority’s reasoning led the authors to conclude that “the case is too flawed and hence unstable to have a long term influence.”⁵

¹ Lois Witte is the Deputy Regional Attorney, Office of the General Counsel (“OGC”), Mountain Region, U.S.D.A. and is also the national Water Team Leader for OGC. The views expressed in this paper are her personal views and opinions and do not necessarily reflect the opinions of her agency or client.

² Sally K. Fairfax and A. Dan Tarlock, *No Water For The Woods: A Critical Analysis of United States v. New Mexico*, 15 IDAHO L.R.509 (hereinafter “Fairfax and Tarlock”).

³ *United States v. New Mexico*, 438 U.S. 696 (1978), hereinafter *New Mexico*, The implied reserved water right theory is also known as the “Winters Doctrine” because it originated in *Winters v. United States*, 207 U.S. 564 (1908). In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether Congress intended to reserve unappropriated water. Intent is inferred if the water is necessary to accomplish the purposes for which the reservation was established. *Cappaert v. United States*, 426 U.S. 128, 139 (1976). This doctrine was found to apply to National Forest System lands in 1963. *Arizona v. California*, 373 U.S. 546 (1963).

⁴ Fairfax and Tarlock, p. 526.

⁵ *Id.* at p. 554.

As the Fairfax and Tarlock article pointed out, and as most everyone who lives in the Western United States knows, in the West, the availability of water determines the value of land.⁶ Given the importance of water to the value of land, it is timely today to take a look at the protections available to water on National Forest System (“NFS”) lands and to see how well the water resources on federal lands have been protected in our legal and judicial systems.

This paper will examine the federal government’s track record in protecting aquatic resources on federally reserved lands in the West,⁷ using lands administered by the Forest Service as an example.⁸ It will look at how the Forest Service has fared in securing instream flows on NFS lands under the implied federal reserved water rights doctrine,⁹ state appropriate water laws, federal land management statutes, and the Endangered Species Act.¹⁰

⁶ Id. at p. 509.

⁷ Federal reserved lands include those lands reserved by Congress or the president for a specific purpose, such as National Forest System lands or National Park lands. It excludes unreserved federal lands, or those lands administered as public domain by the Bureau of Land Management (“BLM”). *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981).

⁸ It is important to note that the experience of the Forest Service is not identical to other federal land management agencies, such as the National Park Service, which has different statutory reserving language and which has been granted implied reserved water rights and has negotiated flows with states. In contrast to the National Park Service, BLM administers its federal land not as reserved land but as part of the public domain. Consequently, BLM has never had the ability to assert the implied reserved water rights doctrine to protect instream flows.

⁹ This paper will not examine the congressional statutes which have expressly reserved water. Under express reservation statutes such as the Wild and Scenic Rivers Act, 16 U.S.C. 1271-1287, the Forest Service has obtained instream flow rights to six rivers in Idaho, one river in Colorado (*Concerning the Application of the United States of America for Reserved Water Rights for the Cache La Poudre Wild and Scenic River in Larimer County*, District Court, Water Division No. 1, State of Colorado, Case No. 86CW367), and one river in Wyoming (Permit No. 9 I. F., Clarks Fork of the Yellowstone Wild and Scenic Instream Flow). Under the Nevada Wilderness Protection Act of 1989, Pub. L. No. 101-195 (Dec 5, 1989) the Forest Service received a expressly reserved wilderness water right in a preliminary decree issued by the State Engineer. *In the Matter of the Determination of the Relative Rights in and to the Waters of Monitor Valley, Southern Part*, (140-B) Nye County, Nevada, *State Engineer’s Order of Determination*, September 15, 1998 (*hereinafter Monitor Valley Adjudication*). The Forest Service also received an express water right for the Hells Canyon National Recreation Area. *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000).

¹⁰ Endangered Species Act of 1973, 16 U.S.C. 1531 to 1544.

HISTORY OF NATIONAL FOREST RESERVES

NFS lands occupy approximately 192 million acres of national forests and grasslands in 43 states. The original reserves were initially established by presidential withdrawals of forest reserves from the public domain under the Creative Act of 1891.¹¹ Maintaining supplies of clean water and protecting watersheds were major reasons for removing the lands from the public domain system. The withdrawals prevented disposal of the lands to private parties.

The Organic Administration Act of 1897 first defined the purposes for which the forest reserves could be withdrawn and managed. This Act reads:

No 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, and to furnish a continuous supply of timber for the use and necessities of citizens . . .¹²

This Act recognized the importance of watershed protection to the establishment of NFS lands. It also provided the Forest Service with the authority to administer those lands to protect this valuable resource. The Act expressly gave the federal government jurisdiction over water usage on NFS lands by requiring that all waters within the boundaries of the national forest be used under the rules and regulations of the United States as well as under the laws of the states.¹³

¹¹ Creative Act of 1891, 16 U.S.C. 471, repealed.

¹² Organic Administration Act of June 4, 1897, 16 U.S.C. 473 et seq.

¹³ 16 U.S.C. 481. Also see Charles F. Wilkinson and H. Michael Anderson, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS, (Island Press, 1981), at pp. 211-212 for the legislative history of the concurrent jurisdiction provision. Express concurrent federal and state jurisdiction over resources on federal lands is unusual. Other resources do not generally have an express federal jurisdictional clause. It should be noted that in the eastern United States, many Forest Service lands were acquired under the Weeks Law, Act of March 1, 1911, 16 U.S.C. 480, 500, 515, 516, 517, 517a, 518, 519, 521, 522, and 563. The Weeks Law authorized the Secretary of Agriculture to purchase primarily cut over and denuded lands within the watersheds of navigable streams that were determined necessary to the regulation of the flow of navigable streams or for the production of timber.

The next statute which defined how NFS lands were to be established and managed was the Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”).¹⁴ MUSYA codified long-standing administrative practices and authorized forest management for a wide range of coequal purposes. With MUSYA, federal law was clear that National Forests are established and administered for outdoor recreation, range, timber, watershed, wildlife, and fish.¹⁵ Water instream is integral to many of these purposes. Today, greater than one third of NFS lands have been identified as important to maintaining aquatic biodiversity.¹⁶ Wetlands and riparian areas offer some of the most productive and most used portions of the landscape.¹⁷ Rivers, streams, and lakes provide major recreational and aesthetic resources.

Many people, including employees and policymakers at the Forest Service itself, assume that these purposes require surface water flowing on NFS lands. Not only does the Forest Service believe this, but Congress does as well as evidenced by the numerous congressional mandates provided to the Forest Service relative to water. The Forest Service is faced with a myriad of congressionally-mandated responsibilities, including but not limited to those set forth in the Organic Administration Act, the Multiple-Use Sustained-Yield Act, the National Forest Management Act, the Federal Land Policy and Management Act, the Clean Water Act, and the Endangered Species Act. In fact, there are more than 30 federal statutes which articulate federal responsibilities for management of water-dependent resources on NFS lands and which direct the actions of the Forest Service relative to water resources. These parties would be surprised to learn the position of most Western States: that water on NFS lands is not a part of the federal estate, and that all of the water within National Forests not already diverted and appropriated for a beneficial use¹⁸ is freely subject to appropriation and diversion by any private party.”¹⁹

¹⁴ Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 -531.

¹⁵ 16 U.S.C. 528.

¹⁶ WATER AND THE FOREST SERVICE, USDA publication by Forest Service, FS-660, January 2000, p. 22.

¹⁷ *Id.* p. 18.

¹⁸ Beneficial uses are defined by each state and historically pertained only to out-of-stream uses of water for agriculture and economic development purposes. While states have begun to recognize instream uses of water for fisheries or recreation, generally only state agencies can hold water rights for these beneficial uses without prior diversion or storage of the water.

¹⁹ IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS, In Re SRBA, Case No. 39576, *Order Granting and Denying the United States’ Motions for Summary Judgment on Reserved Water Right Claims*, p. 1; upheld on Appeal to the Idaho Supreme Court, Oct. 1, 1999, overturned on rehearing, *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000); also see IDAHO CONST. art. 15 sec. 1, 3; ARIZ. CONST. art. XVII sec. 2; COLO. CONST. art. XVI sec. 5, 6; MONT. CONST. art. III sec 15; NEB. CONST. art. XV sec. 5,6; N.M. CONST. art. XVI sec 1, 2, 3; TEX. CONST. art. XVI, sec. 59(a); UTAH CONST. art. XVII, sec. 1; WYO. CONST. art. VIII, sec 3

FEDERAL OWNERSHIP OF INSTREAM FLOW WATER RIGHTS FOR RECREATION, FISH, AND WILDLIFE PURPOSES UNDER FEDERAL LAW

In *New Mexico* the United States Supreme Court denied the fish, wildlife, and recreation claims of the United States made under an 1897 priority date, pursuant to the original Organic Administration Act of 1897. The Supreme Court narrowly construed the original purposes of the forest reserve to be conservation of favorable water flows and production of timber.²⁰ In strongly-worded dicta, it also stated that fish, wildlife, and recreation purposes were “secondary” forest purposes and should not be claimed with a 1960 date under MUSYA but that necessary water “should be acquired in the same manner as by any other public or private appropriators.”²¹

The Court may have been compelled in its decision, in part, by the arguments of the State of New Mexico and the amicus Western States. The amicus brief filed on behalf of New Mexico stated:

(T)he New Mexico Supreme Court decision does not preclude or inhibit federal and state initiatives to secure minimum stream flows to protect recreation, wildlife, and other values of the national forests . . .²²

As such, it would appear that the states proffered both federal and state law as an alternative to an implied reserve water right for MUSYA purposes. We examine below how these proffered federal and state initiatives have failed to protect instream flows for recreation, fish, and wildlife on NFS land.

²⁰ *New Mexico*, 438 U.S. at 1061-1062.

²¹ *Id.* at 702.

²² See *Brief of Amici Curiae in Support of Respondent New Mexico In United States v. New Mexico*, U.S. Supreme Ct. No. 77-510, , October Term, 1977, No. 77-510, pp. 27-28. Amici Curiae states include Arizona, California, Utah, Montana, Idaho, Washington, Nevada, Oregon, Colorado, and Wyoming. Also see *Brief for State of New Mexico in Opposition to Petition for Writ of Certiorari*, and *Brief for the State of New Mexico on Petition for Writ of Certiorari*.

Despite the “flawed and hence unstable” reasoning of *United States v. New Mexico*, the United States Supreme Court language concerning the original purposes of the 1897 Organic Act and the 1960 MUSYA has been echoed by every state water court²³ since that time. To date, the Forest Service has not received even one implied reserved instream flow water right for fish, recreation, or wildlife purposes in a contested proceeding.²⁴ The only instream reserved flow protections received in adjudications were the result of negotiations in two water basins²⁵ and a small basin closure in Utah.²⁶

²³ The United States argues its claims in state water courts by virtue of the McCarran Amendment, 43 U.S.C. 666 (1994). This Act is a limited waiver of sovereign immunity which provides state water courts with jurisdiction to hear federal water right claims.

²⁴ The Forest Service has negotiated instream flows in two river basins, the Big Horn River Adjudication and Water Division No. 3, the Rio Grande, in Colorado. In the Big Horn River Adjudication in Wyoming the Forest Service settled the case by agreeing to subordinate to all existing and future water development projects, which “almost completely eliminated the value of the rights” according to many commentators. David M. Gillilan & Thomas C. Brown, *Instream Flow Protection: Seeking a Balance in Western Water Use*, Island Press 1997, p. 191. *In Re: The General Adjudication of all Rights to Use Water in the Big Horn River System and all other Sources*, State of Wyoming, Civ. No. 4993, In the District Court of the Fifth Judicial District, State of Wyoming. In the Rio Grande settlement, the Forest Service also agreed to subordinate to all existing and conditional water rights, as well as to a “poison pill” re-opener which results in the loss of the instream flow water right if the Forest Service exercises its regulatory authority in a manner defined by the agreement. *In the Matter of the Application of the United States of America for Reserved Water Rights in the Rio Grande River, in Hinsdale County (Gunnison National Forest) and in Alamosa, Archuleta, Conejos, Hinsdale, Mineral, Rio Grande, Saguache, and San Juan Counties (Rio Grande National Forest)*, District Court, Water Division No. 3, Colorado, Case Nos. 81CW183, 81CW184, 81CW185, 81CW186, 81CW187, 82CW04, 82CW05, 82CW06, 82CW26, and 82CW27, hereinafter Water Division No. 3.

²⁵ While the Forest Service had a short-term victory in Idaho for an implied reserved wilderness instream flow water rights, the victory was short-lived. The Idaho Supreme Court reheard the case on its merits, after the Justice who authored the original opinion which granted implied reserved water rights for wilderness was removed from office in a bitterly contested election. The election centered in large part around her wilderness opinion. *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d 1260 (2000). In *Idaho v. United States*, 134 Idaho 940, 12 P.3d 1199 (1999) the United States was denied reserved instream claims to the Sawtooth National Recreation area and MUSYA. In *United States v. Denver*, 656 P.2d 1 (Colo. 1982) reserved instream claims under MUSYA were rejected in Colorado. In *State of New Mexico ex rel. v. Aamodt*, Civil No. 6639-M, U.S. Dis. Ct N.M. (1984) and *State of New Mexico v. Molybdenum Corp. of America*, CV 9780 C (1987) the U.S. lost MUSYA claims under both federal reserved and state appropriative theories. In Klamath Basin Adjudication, the hearing office cited *New Mexico* in ruling that there was no legal entitlement. There has been no final disposition of the MUSYA claims at this time. Before the Hearing Officer Panel for the State of Oregon Water Resources Department, *In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean*. MUSYA reserved claims were also rejected in Nevada. *In the Monitor Valley Adjudication*, and *In the Matter of the Determination of the Relative Rights in and to the Waters of Buffalo Creek, Pine Creek, Falls Creek, Horse Creek, Dog Creek, and McConnel Creek*.

²⁶ *Water Rights Settlement Agreement for Leap, South Ash, Wet Sandy, Leeds and Quail Creeks*, filed in Civil No. 800507596, Fifth Judicial District Court in and for Washington County, State of Utah, filed January 11, 1999.

FEDERAL OWNERSHIP OF INSTREAM FLOW WATER RIGHTS FOR FAVORABLE CONDITIONS OF WATER FLOW UNDER FEDERAL LAW

In *New Mexico*, the United States Supreme Court narrowly construed the primary purposes of the Forest Service to be twofold: maintaining favorable conditions of water flows and production of timber. And, since the Forest Service failed to claim water for these narrow purposes in the *New Mexico* case, the Forest Service received no implied reserved instream flows in New Mexico.

The first instream flow case developed by the Forest Service to fully articulate and claim instream flows for favorable conditions of water flows following the defeat in *New Mexico* occurred in the Platte River Drainage in Colorado, in a case commonly known as Water Division No. 1.²⁷ Following the relatively narrow holding defining the purposes for which NFS lands were reserved in *New Mexico*, the United States made instream flow claims for water necessary for channel maintenance in the Arapaho, Pike, Roosevelt and San Isabel National Forests. The United States argued that adjustable channels fully capable of transporting all of their sediment loads from the watershed headwaters to valleys downstream of forest boundaries provided the ideal situation for achieving “favorable conditions of water flows” consistent with the Organic Act.

Although the Colorado District Court ultimately agreed that stream integrity was a favorable condition of water flows, it found against the United States on other factual and legal arguments. This is not surprising given the stringent test for obtaining an implied reserve water right articulated by the U.S. Supreme Court. This test states that an implied reserved water right is found only if water is necessary for the purposes of the reserve. Moreover, the water claimed must be for the minimum amount of water necessary to fulfill the purposes of the reservation and no more.²⁸

The Court in Water Division No. 1 ruled against the federal assertion of instream flows based, in part, upon its finding that the reserved water right was not necessary. A reserved water right was not necessary, the Court believed, because the Forest Service had the ability to regulate old and new water diversion structures located on NFS lands. As stated by the Court:

The Forest Service has broad powers to regulate the construction of irrigation structures within the national forests, and as a practical matter, to control the ability of others to make diversions within the forests. Permits are required to

²⁷ *In the Matter of the Amended Application of the United States of America for Reserved Water Rights in the Platte River in Boulder, Clear Creek, Douglas, El Paso, Gilpin, Jefferson, Larimer, Park and Teller Counties*, (Dist. Ct., Water Div. No. 1, Colo. 1993)(Nos. W-8439-76, W-8977-77, W-9052-77, W-9064-77, and W-9065-77).

²⁸ *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Cappaert v United States* 426 U.S. 128, 534-536 (1976); 338 *New Mexico* 700 - 702.

establish such structures and these permits must be renewed from time to time.²⁹

This judicial ruling was in response to arguments made by the State of Colorado and other objectors in the Water Division No. 1 litigation that:

Special use permits and other federal regulatory controls are just as capable of protecting the forest purposes as the claims made in this case . . . In light of the broad federal regulatory power, there is simply no need here for a reserved right to accomplish what can be accomplished through permits.³⁰

Similar to the amicus brief in *New Mexico*, the state and water users fighting the federal claims provided the state court judge an open door -- which allegedly would ensure that water would remain instream in the woods -- and the state court judge quickly ran through it. While the state adoption of the federal regulatory authority may appear to be a positive development, as will be more fully discussed later, this adoption has been short-lived. Current litigation demonstrates a reversal in the state and water users' position on the use of broad regulatory authority by the Forest Service to protect instream flows.

The next major implied reserved instream flow litigation involving NFS lands occurred in Idaho. In arguing against the federal instream flow claims, the State of Idaho cited the Water Division No. 1 ruling and echoed the State of Colorado arguments in that case:

²⁹ *Id.* at pp. 9-16.

³⁰ *Certain Objectors' Joint Opening Post-Trial Brief Regarding Historical and Policy Issues*, filed in Water Division No. 1, p. 78.

Given that the Forest Service has authority to regulate the use and occupancy of the National Forests and the waters within them, the question arises as to why a federal reserved water right is necessary to preserve favorable conditions of water flows . . .³¹

No court has ever granted the Forest Service an Organic Act reserved instream flow claim.³² Given the lack of success, coupled with the expense, difficulty, and complexity of making channel maintenance instream flow claims, it is becoming increasingly difficult for the Forest Service to justify continuing its efforts in this regard.

FEDERAL OWNERSHIP OF INSTREAM FLOW WATER RIGHTS FOR FISH, RECREATION, AND WILDLIFE UNDER STATE LAW

In *New Mexico*, the United States Supreme Court told the Forest Service it had to obtain water for secondary uses of the reservation -- fish, recreation, and wildlife -- “in the same manner as any other public or private appropriator.”³³ Western States have also offered state law as an alternative to a federally reserved water right to protect instream flows. As such, it is appropriate to look at the federal government’s ability to protect instream flows on NFS lands under state law.

³¹ *State of Idaho’s Memorandum Regarding Matters Resolved By Court’s Summary Judgment Order, In the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Twin Falls, In Re SRBA*, Case No. 39576.

³² In the Klamath River Adjudication, the hearing administrator found in the preliminary evaluation that the Organic Act claims for favorable conditions of flow and fire protection should be granted. This ruling was objected to, and they have not yet been referred to the hearing officer. In addition to the cases previously cited, the United States litigated and lost Organic Act instream flow claims in the following cases: *Avondale Irrigation District v. Northern Idaho Property, Inc.*, 99 Idaho 30, 577 P.2d 9 (1979); *United States v. Alpine Land and Reservoir Co.* 697 F.2d 851 (1983) quiet title action; and *Monitor Valley Adjudication*.

³³ *New Mexico*, 438 U.S. at 702.

Unfortunately, the track record of the Forest Service in acquiring instream flow rights under state law in the federal name has been equal to its record in acquiring instream flow rights under the implied reserved rights doctrine. With the exception of permits issued by the State of Arizona, the Forest Service does not yet have a single instream flow water right for fish, recreation, or wildlife, although it has filed hundreds of state-based instream flow claims in numerous state adjudications or administrative proceedings.³⁴ In several states where the claims have been filed, the filings have aggressively been resisted as inconsistent with state law.

As an example, in 1994 the Forest Service filed for a small appropriative instream flow right on East Middle Creek, a tributary of Saguache Creek, located in the Rio Grande National Forest in Colorado.³⁵ The State of Colorado filed an objection to this claim arguing that only the State could hold an instream flow water right.³⁶ Eventually, the parties agreed to stay the case while working on a comprehensive reserved water right settlement for the Arkansas River basin. While the Arkansas River basin case has never been resolved, the implied reserved water right claims for the Rio Grande basin -- which includes East Middle Creek -- were resolved. As part of the Rio Grande settlement, the East Middle Creek filing was dismissed, and as a further term and condition, the Forest Service had to agree not to file any more instream flows under state appropriative law in that river basin.³⁷ This settlement requirement indicates the extent to which Colorado opposed the federal attempts to use state law to protect instream flows.

The Snake River Basin Adjudication in Idaho offers another example of how state laws will not accommodate federal instream flow needs. In 1993 the Forest Service pursued a legal strategy

³⁴ State law based MUSYA instream flow claims have been made in Colorado, Idaho, New Mexico, and Nevada. These claims were denied in New Mexico, and protested in Idaho and Colorado.

³⁵ *Application For Water Rights (Surface), Concerning The Application For Water Rights of the United States Of America in the Rio Grande River, In Saguache County* (Dist. Ct., Water Div. No. 3, Colo. 1994) (No. 94-CW-39), hereinafter East Middle Creek.

³⁶ East Middle Creek, *Statement of Opposition* filed Feb. 28, 1995, Division 3.

³⁷ Water Division No. 3.

of filing instream flow claims for fish under both state water law and federal reserved law theories.³⁸ Regardless of the legal theory supporting each claim, each claim was made for water instream necessary to achieve the purposes of MUSYA, which include the protection of fish, wildlife, and recreational values. When the claims were filed, it was not clear that a diversion was necessary to perfect a water right under Idaho state law. However, similar to Colorado, the State of Idaho took the position that only a state agency, pursuant to a state minimum stream flow program, could hold an instream flow water right.

The State of Idaho's position was challenged by the United States in a case involving an instream flow claim made by the United States Fish and Wildlife Service at the Minidoka National Wildlife Refuge. In that case, the United States argued that a diversion was not necessary to perfect the water right and that preservation of wildlife habitat was a recognized beneficial use under Idaho law. The Idaho Supreme Court reversed a favorable district court ruling. In a unanimous decision, the Idaho Supreme Court ruled:

³⁸ The federal reserved basis for the MUSYA claim was denied by the Idaho Supreme Court in *United States v. City of Challis*, 133 Idaho 525, 988 P.2 1199 (1999).

Idaho law generally requires an actual diversion and beneficial use for the existence of a valid water right . . . Only two exceptions to the diversion requirement exist. No diversion from a natural watercourse or diversion device is needed to establish a valid appropriative water right for stock watering . . . In addition, State entities acting pursuant to statute may make a nondiversiory appropriation for the beneficial use of Idaho citizens . . .³⁹

STATE OWNERSHIP OF INSTREAM FLOW WATER RIGHTS FOR FEDERAL PURPOSES ON FEDERAL LANDS

Protection of federal resources by state agencies which determine and control the establishment and protection of instream flows on federal lands appears to be the final articulation of the “state initiatives” offered by western states in the *New Mexico* amicus brief. In fact, Colorado has already established relatively modest flows for fish protection purposes on federal lands under state instream flow programs and views this program as sufficient for Forest Service instream flow protection needs. Colorado has also volunteered to protect federal lands if the federal government donates its water rights to the state for inclusion in the state program.⁴⁰ In addition, Idaho has offered to settle federally reserved instream flow claims through federal funding of state minimum stream flow programs. The Forest Service has yet to fully embrace these notions. To begin with, there are troubling questions concerning the unauthorized disposal of federal property to states, the creation of state owned in-holdings on federal lands, and the expenditure of federal funds for state purposes. Moreover, these proposals do not square with the Supreme

³⁹ *State of Idaho v. United States*, 134 Idaho 106, 996 P.2d 806 (2000).

⁴⁰ June 21, 2001 letter from Greg Welcher, Executive Director, Department of Natural Resources, State of Colorado to Honorable Scott McInnis urges Congress to allocate \$130,878,000 to the Land and Water Conservation Fund for the federal purchase of water rights which, he suggests, should then be donated to the state instream flow programs to protect the federal lands. He estimated the federal government wasted nearly \$70 million claiming instream flows on NFS lands. He did not provide an estimate of what the states have spent fighting the federal efforts to secure these flows.

Court's language in *New Mexico* which directed the Forest Service to acquire secondary flows in the same manner as other public entities. Quite simply, if states can acquire these flows on federal lands, why cannot the federal government acquire these flows on federal land? It would appear that the resistance is to the federal ownership of an instream flow water right and not to an instream flow water right itself. Telling in this regard is a recent amendment to the Colorado Water Conservation Board ("CWCB") minimum stream flow program which actively discriminates against the federal government holding recreational instream flows, while expressly allowing any local governments to do so.⁴¹

Going beyond the issue of fairness or equal treatment and parity between state and federal governments, there are significant questions concerning the legality and enforceability of flows obtained under state programs and additional questions concerning the value and quantity of water which can be protected.

⁴¹ In 2001, the Colorado General Assembly specifically recognized the appropriation and adjudication of recreational instream flows by any county, city, town, home rule city, home rule county, special district, water conservation, district, or water conservancy district. 37-92-102(6)(b)(VI) C.R.S. (2001). At the same time, it made it clear that no other entity could hold these flows. Discussion in committee indicate a desire to expand Colorado's instream flow program to allow local state governments to hold instream flows for recreation purposes, while prohibiting the ownership of recreational instream flows by federal agencies.

In addition, state minimum stream flow programs vary significantly throughout the West from no program at all, to programs which significantly limit the water and the values that may be protected. Some states have periodic review dates which allow the water right to be terminated, or which require state legislative approvals for all instream flow water rights. Most states can subordinate or extinguish the state held rights protected under the state program. No state recognizes aesthetic recreational benefits. And finally, all state programs are subject to change or defunding by state legislatures.⁴² Basing protection of water on NFS lands solely on the vagaries of state legislatures and programs subject to change, de-funding, or extinguishment by state governments does not appear to provide adequate assurance that the instream flows necessary to protect and manage water dependent resources on federal lands will be there when needed.

FEDERAL REGULATION OF PRIVATE STATE WATER RIGHTS ON FEDERAL LAND

⁴² See Cynthia F. Covell, *A Survey of State Instream Flow Programs in the Western United States*, 2 WATER LAW REVIEW 177 (1998) for an extensive survey of these programs; also see a memorandum provided to Bennett Raley, Co-chairman of the Forest Service Water Rights Task Force on November 8, 1996 by Charles F. Gauvin, Executive Director of Trout Unlimited for Trout Unlimited's critique of state instream flow programs.

It has long been Forest Service policy that special use permits authorizing water diversion facilities located on National Forest System lands incorporate stipulations to protect aquatic habitat and/or maintain stream channel stability. Permits issued since the 1950s have incorporated bypass flow stipulations for these purposes.⁴³ “Bypass flows” are, quite simply, shorthand for a specific type of term and condition imposed by the Forest Service on private parties in exchange for federal permission to place private water diversion, transportation, or storage facilities on federal lands. This term and condition requires the private party requesting the authorization to protect aquatic values on federal lands by allowing a specified quantity of water to bypass the diversion facility or be released from a dam to ensure adequate instream flows on NFS lands. In essence, this quantity of water must “bypass” the diversion point and remain on federal lands. This term and condition operates only at the diversion or storage point authorized by federal permit and does not apply downstream nor result in a water right under state law. Often, however, this term and condition, or bypass requirement, is sufficient to protect the federal aquatic resources threatened to be adversely impacted by the diversion or storage structure.

Although it always was Forest Service position that it had legal authority to impose bypass flows before the passage of the Federal Land Policy and Management Act (“FLPMA”),⁴⁴ after the passage of FLPMA this authority was crystalized. FLPMA specifically requires the Forest Service and BLM – before an authorization is granted, issued, or renewed⁴⁵ for reservoirs, canals, ditches, flumes, laterals, pipelines, tunnels and other facilities and systems for the impoundment, storage, transportation, or distribution of water on public lands⁴⁶ – to impose terms and conditions in the authorization which:

carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment . . .⁴⁷

As mentioned above, the Forest Service’s broad regulatory authority and special use process were cited by states as an adequate mechanism for protecting NFS purposes, obviating the need for federally reserved instream flows in Colorado and Idaho. However, litigation over the ability of the Forest Service to require bypass flows as a term and condition of its regulatory and

⁴³ Informational Memorandum on Stream Bypass Flows for Resource Protection as a Condition in Special Use Permits for John H. Beuter, Acting Assistant Secretary, USDA, through F. Dale Robertson, Forest Service Chief, from James C. Overbay, Deputy Chief, NFS, dated June 12, 1992.

⁴⁴ Federal Land Policy and Management Act of 1976, 43 U.S.C. 1761 - 1784.

⁴⁵ 43 U.S.C. 1761(a).

⁴⁶ 43 U.S.C. 1761 (a)(1).

⁴⁷ 43 U.S.C. 1765.

permitting authority is currently ongoing in Colorado. The state of Colorado and local water users have reversed their position and now assert that once a state water court grants an individual the right to appropriate and divert water from a river -- even if the river is located on federal land -- the federal government has no ability to impose terms and conditions which restrict that state-granted right to divert water, even if the water diversion totally dries up the river. This issue is currently pending in litigation before the United States District Court in Colorado.⁴⁸ The states of Alaska, Arizona, Idaho, Nevada, New Mexico and Wyoming have joined in these arguments with an *amicus curiae* brief filed in support of Colorado's positions.⁴⁹

⁴⁸ *Trout Unlimited, et al., vs. USDA et al.*, Civil Action No. 96-WY-2686-WD (D. Colo), hereinafter *Trout Unlimited*.

⁴⁹ *Amici Curiae Brief of the States of Alaska, Arizona, Idaho, Nevada, New Mexico, and Wyoming in Support of the Water Supply and Storage Company, the City of Greeley, and the State of Colorado*, filed in *Trout Unlimited* on March 15, 2001.

It is the position of these states that neither the Organic Administration Act of 1897 nor the Federal Land Policy and Management Act of 1976 provide the Forest Service with authority to require bypass flows. They also argue that all water needed in a bypass flow should be requested in a McCarran adjudication, and characterize the conflict as one involving the primacy of state water rights.⁵⁰

It is difficult to reconcile the current position taken by the states with their prior positions. In the Water Division No. 1 litigation, Colorado argued that the regulatory authority of the Forest Service can be “just as capable of protecting the forest purposes” as the reserved instream flow claims made by the Forest Service. Similarly, in the Snake River Adjudication, the State of Idaho asserted that the Forest Service had authority to regulate the use and occupancy of the National Forests lands and waters and had no need for a reserved instream flow water right. It was the position of the amicus states in *New Mexico* that federal initiatives, state initiatives, MUSYA reserved water rights, or state created water rights would protect recreation, fish and wildlife reserved instream flow values. Now, however, it appears that the states are not as concerned about consistency of position as they are about ensuring that the federal government has no ability to regulate or maintain water instream on NFS lands.

ENDANGERED SPECIES ACT AND INSTREAM FLOWS ON FEDERAL LANDS

The Endangered Species Act (“ESA”)⁵¹ may be the most potent legal tool for reallocating water to meet instream flow needs on federal lands. Among other requirements, the ESA requires federal agencies to use their authority to further the purpose of the ESA and to conserve endangered and threatened species.⁵² But, as the present volatile situation in the Klamath Basin

⁵⁰ *Trout Unlimited*, DEFENDANT-INTERVENOR’S REPLY BRIEF, filed June 15, 2001. When the Supreme Court ruled on a similar case involving a water right and the right to locate this water right on federal lands, it said “this is not a controversy over water rights but over rights of way through lands of the United States, which is a different matter.” *Utah Power and Light v. U.S.*, 243 U.S. 389, 411 (1917). In addition, the Court has characterized the federal government’s control over the use and disposition of its property as “complete” and “without limitation.” *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

⁵¹ Endangered Species Act of 1973, 16 U.S.C. 1531-1544.

⁵² 16 U.S.C. 1536 (a)(2).

illustrates, this tool may not always assure instream flow water for fish and wildlife species or other resources not covered by the ESA.

Despite the limitations of the ESA, complaints have been filed in Arizona and Idaho by environmental groups against the Forest Service, BLM, and the U.S. Fish and Wildlife Service alleging procedural and substantive violations of the ESA. These groups claim the federal agencies failed to consult with the Fish and Wildlife Service to determine the impacts on aquatic species from stream diversions and related water transmission facilities located on NFS and/or BLM administered lands. They also argue that this failure has adversely impacted species dependent on aquatic resources.⁵³ Conversely, a complaint has also been filed by the Okanogan County commissioners in Washington against the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, and the Forest Service for curtailing authorized water diversions on NFS lands for the benefit of threatened and endangered fish species under the ESA.⁵⁴ Numerous Freedom Of Information Act requests concerning water diversion special use authorizations have been filed in Forest Service Regions 2 and 3 by the same environmental group which filed litigation against Region 3 of the Forest Service concerning the water diversion structures in Arizona.

As this pending or threatened litigation shows, the issue of federal regulation of occupancy and use of federal lands by private water diverters, an issue which has lain dormant for years, has finally emerged from the underground. It's appearance has long been anticipated by knowledgeable water diverters, irrigators, Western States, environmental communities, and federal officials. It has not, however, been anticipated by the general public – which relies on federal lands for a full range of water-dependent multiple purposes.

Whether or not federal regulatory authority over private water diversions on federal lands proves to be the draconian force and diabolical end of state historic water allocation systems, as forecasted by the states, is yet to be determined. To date, it has not proven to be so.

WHAT NEXT?

The Forest Service has tried numerous methods to protect instream flows in McCarran Amendment proceedings. Unfortunately, the federally reserved claims have generally failed for a variety of reasons. Some failures can be attributed to hostile state court forums, others to the stringent test established by the U.S. Supreme Court for implied reserved water rights, and others

⁵³ *Western Watersheds Project and Committee for Idaho's High Desert vs. George Matejko, et al.*, CV-01-0259-E-BLW, (D. Idaho); *Idaho Watershed Project and Committee for Idaho's High Desert vs. Jones*, CIV 00-0730-E-BLW, (D. Idaho, filed Dec 19, 2000); *Forest Guardians v. United States Forest Service*, CIV-01-330 TUC FRZ (D. Ariz., filed July 9, 2001).

⁵⁴ *Okanogan County, et al. v. National Marine Fisheries Service, et al.*, CS-01-0192-RHW (E.D. Wash., filed June 19, 2001).

to the difficulty of quantifying an instream flow water right in flexible and dynamic hydrologic stream systems. Despite the direction by the Supreme Court in *New Mexico* to the Forest Service to obtain water for secondary purposes under state law in the same manner as other public or private appropriators, most states have prevented the Forest Service from obtaining instream flows for fish and recreation purposes either as a private or a public appropriator.

Most recently, the conflict over stream flows on federal lands has moved to a new arena -- federal regulatory authority over private water diversion, storage, and transportation facilities located on federal lands. Federal authority to regulate these facilities, through its express statutory authority to regulate use and occupancy of these lands, represents one of the last remaining tools available to the federal government to protect aquatic and aquatic-dependent resources on federal lands.

However, even this tool is at risk. The Department of Agriculture has received, and continues to receive, numerous letters from Western representatives expressing their concern about the use of Forest Service regulatory authority to protect instream flows on NFS lands and requesting that the Forest Service refrain from exercising this authority in a manner inconsistent with state water rights and state water primacy.⁵⁵ Whether the Forest Service will be able to withstand the legal and political pressure on its regulatory authority is not certain at this time. In addition to the pressure on the Forest Service to change its legal position, the present administration is also re-examining the legal position of the BLM to impose bypass flows to protect BLM aquatic resources pursuant to FLPMA's section 505 direction.

⁵⁵ See the following letters which all indicate opposition to the Forest Service authority to regulate water rights on NFS lands with bypass flows: March 20, 2001 letter to USDA Secretary Veneman from Senator Wayne Allard; March 15, 2001 letter to USDA Secretary Veneman from Representative Scott McInnis; April 6, 2001 letter to USDA Secretary Veneman from Representative Bob Schaffer, Jim Gibbons, John Doolittle, C.L. "Butch" Otter, Barbara Cubin, Chris Cannon, Michael Simpson, Dennis Rehberg, John Peterson; May 3, 2001 letter from Senator Larry Craig to USDA Secretary Veneman; May 4, 2001 letter to Hon. John Ashcroft, Attorney General, from Senators Wayne Allard, Pete Domenici, Craig Thomas, Michael Crapo, and Michael Enzi; August 12, 1992 letter to USDA Secretary Madigan from Senators Malcolm Wallop, Hank Brown, Orwin Hatch, Larry Craig, Jake Gavin, Ben Nighthorse Campbell, Alan Simpson, Conrad Burns, Pete Dominici, Steve Symms, and Representative Wayne Allard; February 25, 2000 letter to Regional Forester Lyle Laverty from Senator Allard; June 4, 1992 letter from Colorado Attorney General Gale Norton to Alan Raul, General Counsel, USDA; November 25, 1992 letter from Colorado Attorney General Gale Norton to Honorable Edward Madigan, Secretary USDA.

It is very clear, however, that absent the federal ability to regulate private water diversions on federal lands, there are few tools remaining to most federal land-management agencies, other than denying all applications for the use of federal lands for private water diversions. It goes without saying that no one, including the federal agencies, would or should be pleased with this outcome.

The limited federal ability to protect aquatic resources on federal lands is greatly exacerbated by the disjunct between state water laws and federal laws. Most states water systems do not recognize the need for aquatic resources on federal lands unless the need is articulated in a state-controlled water right. Most state water rights do not recognize the federal resource needs as “beneficial” and view flowing water not captured in a state water right as wasted. No state views wilderness preservation as a beneficial use which can be protected under state law. Many states grant private water rights on federal land without any concern for the aquatic needs and health of the federal land. Furthermore, for too long the state’s litigation and policy efforts have been dominated by traditional irrigation and water extraction users, and many states have not considered the broad needs of other members of its citizenry who want and enjoy the instream resources federal agencies are obligated to steward and protect. Attempts by environmental groups to advocate for non-consumptive instream flow uses have had limited success. These groups do not own water rights and have been found to either lack standing or lack an injury recognized by the water courts.⁵⁶

Clearly, protracted battles among federal and state governments have yielded little protection and are not the solution. Nor does turning all protection decisions relative to water and aquatic-dependent resources over to individual states provide a solution. Healthy aquatic resources and streams are vital to the American public and essential to aquatic biodiversity, but the question of how best to protect these national resources and lands has yet to be fully discussed at the national level. It has been more than 20 years since the United States Supreme Court decision in *New Mexico*, and still there is no fully accepted or appropriate method available to the Forest Service to protect water and water-dependent resources on NFS lands. It is time to fully open the national debate on this issue and have a full hearing from all sides.

Instream flow and aquatic resource protection on federal lands is one of the biggest public land issues facing public land administration today. One way or another, the issue must and will be resolved. It will either be resolved by states through their continued success in denying the federal government any ability to protect stream flows on federal lands, or it will be resolved when the present situation is acknowledged and addressed as a joint problem by the public and all parties. This will require the laying down of inflammatory rhetoric, historic posturing, and

⁵⁶ Despite numerous attempts to intervene to assert the public interest in the determination of water rights in the Snake River Basin Adjudication (“SRBA”), the Land and Water Fund of the Rockies (“Fund”), a non-profit group representing numerous environmental interests, was largely unsuccessful in asserting that the public interest doctrine in attempts to obtain intervention in that litigation. Similarly the Fund’s amicus brief was rejected by the Idaho Supreme Court in the wilderness reserved rights appeal in the SRBA.

jurisdictional conflicts. It will require a sharing of responsibilities and authorities between state and federal governments.

There are possible solutions. A cooperative, jointly held water right may be a partial solution which protects the procedures and integrity of both federal and state governments.⁵⁷ Integration of federal needs into state water permits and adjudications on NFS lands is another possible solution. Water needed for healthy watersheds or aquatic resources on NFS lands could simply be identified by the public, states, and Forest Service in a cooperative planning effort expressed in forest planning documents. At that time, the water identified as necessary for protection of the federal lands could be viewed as unavailable for appropriation under state law. All quantities of water in excess of the needed amount would still be available on NFS lands, and all water originating on NFS lands would still be available for appropriation and diversion off NFS lands. This would preserve the state's system of allocation of water among private parties, yet provide for the health of the federal lands. The federal government could and should also do a better job of collaborating with interest groups, tribes, and local governments to identify necessary *in situ* aquatic and aquatic-based resources and values during the forest planning process.

Three things are certain. One, water scarcity will be a bigger problem in the future than in the past as the West continues its unprecedented growth and as fresh water supplies decline in the East. Second, water development pressures on NFS lands will continue to grow in intensity. And last, what Gifford Pinchot⁵⁸ said many years ago remains true today:

The connection between forests and rivers is like that between father and son: No forests, no rivers . . . Every river is a unit from its source to its mouth. Its uses are many and with our present knowledge, there can be no excuse for sacrificing one use to another if both can be served.

Preserving healthy forests and watersheds, sustaining traditional beneficial uses, and addressing important instream flow needs on federal lands should be the mutual goal of federal, state, and local governments. In short, we need to assure there is “water in the woods” for generations to come.

⁵⁷ At various times, a jointly owned water right has been offered to the States of Idaho and Colorado as a solution to litigation over a federal claim to instream flows for fish purposes. This offer was rejected by both states.

⁵⁸ Forest Service Chief, 1905 - 10, subsequently Governor of Pennsylvania