

University of Colorado Law School

Colorado Law Scholarly Commons

Who Governs the Public Lands: Washington?
The West? The Community? (September 28-30)

1994

9-29-1994

Public Land Management Decisions Affecting Water Rights: The Issue of Requiring By- Pass Flows as a Condition of National Forest Special Use Permits for Water Facilities

David H. Getches

Follow this and additional works at: <https://scholar.law.colorado.edu/who-governs-public-lands-washington-west-community>



Part of the Administrative Law Commons, Environmental Law Commons, Environmental Policy Commons, Forest Management Commons, Land Use Law Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Property Law and Real Estate Commons, State and Local Government Law Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

Getches, David H., "Public Land Management Decisions Affecting Water Rights: The Issue of Requiring By-Pass Flows as a Condition of National Forest Special Use Permits for Water Facilities" (1994). *Who Governs the Public Lands: Washington? The West? The Community? (September 28-30)*. <https://scholar.law.colorado.edu/who-governs-public-lands-washington-west-community/4>

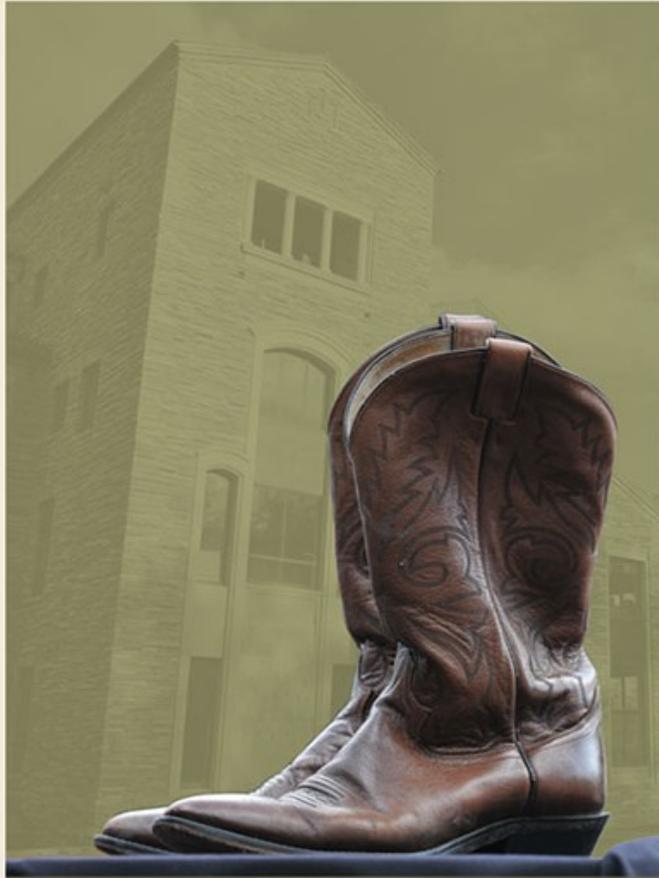
Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



David H. Getches, *Public Land Management Decisions Affecting Water Rights: The Issue of Requiring By-Pass Flows as a Condition of National Forest Special Use Permits for Water Facilities*, in WHO GOVERNS THE PUBLIC LANDS: WASHINGTON? THE WEST? THE COMMUNITY? (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1994).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

University of Colorado Law School
William A. Wise Law Library



David H. Getches Collection

David H. Getches, *Public Land Management Decisions Affecting Water Rights: The Issue of Requiring By-Pass Flows as a Condition of National Forest Special Use Permits for Water Facilities*, in *WHO GOVERNS THE PUBLIC LANDS: WASHINGTON? THE WEST? THE COMMUNITY?* (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law, 1994).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

**PUBLIC LAND MANAGEMENT DECISIONS AFFECTING WATER RIGHTS:
THE ISSUE OF REQUIRING BY-PASS FLOWS
AS A CONDITION OF NATIONAL FOREST SPECIAL USE
PERMITS FOR WATER FACILITIES**

**David H. Getches
Professor of Law
University of Colorado
School of Law
Boulder, Colorado**

**WHO GOVERNS THE PUBLIC LANDS:
WASHINGTON? THE WEST? THE COMMUNITY?**

**Natural Resources Law Center
University of Colorado
School of Law
Boulder, Colorado**

September 28-30, 1994

C

C

C

**Public Land Management Decisions Affecting Water Rights:
The Issue of Requiring By-Pass Flows as a Condition of National Forest Special Use
Permits for Water Facilities**

by David H. Getches

I. Summary

In the mid-1980s, holders of special use permits for water facilities within the Arapaho and Roosevelt National Forests applied for permit renewals or new permits for new or existing pipelines, power plants, diversion dams, or reservoirs on Forest land. The Forest Service began imposing conditions requiring that certain minimum amounts of water be left in the streams (by-pass flows). Although the Service had required by-pass flows in other places in the past, the requirements were met with objections here. Complying with the by-pass flow requirements would generally prevent them from taking the full amounts of water at particular diversion points to which they were entitled under their state water rights. The agency defended the conditions as necessary for stream channel maintenance and for fish. It referred to numerical standards for all Forest plans that were adopted in 1984.

By the end of 1991 several permit applications from Front Range cities were before the Forest Service, all of which were the subject of proposed by-pass flow conditions. The grounds asserted for imposing the requirements included general authority under the Organic Act to make rules and regulations for the Forest, NFMA requirements that decisions be consistent with the Forest plans, and FLPMA's provision that rights-of-way include conditions for protection of public land values. These arguments were challenged by the permittees who disagreed with the Service's interpretation of the statutes and said that, in any event, the requirements were effectively federal claims to water that were inconsistent with traditional federal deference to state water law recognized by several laws, and that such claims avoided established procedures for establishing federal water rights. They contended that the result could deprive water rights holders of valuable property rights protected by the Constitution's

due process clause. They also argued that the specific flows were unnecessary. By the end of 1992 it became a political issue.

Western Senators and Congressmen protested to the Secretary of Agriculture that the conditions were improper. The Secretary ordered reissuance of permits for existing facilities without any new conditions. Local Forest Service officials, however, decided that they must comply with NEPA before issuing the permits, and commenced environmental assessments. The agency then requested a list of endangered species possibly implicated by the permits from the Fish and Wildlife Service. This resulted in preliminary Forest Service findings that the permits may affect certain species, thus prompting further biological analysis. Biological opinions were issued by the Fish and Wildlife Service several months later.

In July, 1994, the Forest Service rendered decisions that five (of seven*) permits would be granted on several conditions. In two cases, an EIS had been prepared. In three, the Forest Service found an EIS unnecessary. All permittees are required to make certain by-pass flows or water releases. Effects on endangered species are to be alleviated by payments into a fund for endangered species downstream and participation in a newly created process for a Central Platte River Endangered Species Recovery Program that would develop "reasonable and prudent alternatives." Appeals were filed in all cases by the applicants objecting that the conditions were improper, and in most by environmental groups objecting that the conditions were inadequate.

The legal issues remain unresolved and any resolution of them will require lengthy and expensive proceedings. Because there are dozens of existing special land use permits on public lands in Colorado, and many more nationally, conflicts are likely to arise again and again. The Colorado example shows some of the difficulties and possibilities for solving the practical problems of the parties short of a prolonged battle over multiple legal questions.

Legal points on which the various parties rely are collected below. Panelists will

*Action on two permit applications was deferred at the request of the permittees.

give their views on these issues and discuss practical solutions and approaches to collaborative problem solving.

II. Authority to Issue Special Land Use Permits on National Forest Lands

A. The Property Clause of the Constitution empowers Congress "to dispose of and make all needful Rules and Regulations respecting" the public lands. Article IV, Section 3, Clause 2. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

B. The Forest Service Organic Act of 1897 said that forests could be reserved "for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . ." 16 U.S.C. §475.

1. This Act did not result in an implicit reservation of federal water rights for purposes such as fish and wildlife, recreation, and stockwatering. *United States v. New Mexico*, 438 U.S. 696 (1978).

a. A claim for reserved water rights requires adherence to certain procedures, including assertion of such rights in state court by the federal government when joined in a general stream adjudication. 43 U.S.C. §666(a); *United States v. District Court in and for Eagle County*, 401 U.S. 520 (1971).

b. The courts have not conclusively determined whether the purpose of "securing favorable conditions of water flow" can result in an implied reservation of water rights but, in finding that such a claimed right was unnecessary for channel maintenance, a Colorado water court noted that the Forest Service had alternatives available to it such as conditioning special land use permits on bypass flows. *In the Matter of the Amended Application of the United States for Reserved Water Rights in the Platte River*, District Court, Water Division No. 1, Colorado, Case No. W-8439-76 (Feb. 12, 1993).

2. The Organic Act includes general authority for the Secretary to "make such rules and regulations and establish such service as will insure the

objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. §551.

- a. State laws are generally applicable on public lands. See, e.g., *Omaechevarria v. United States*, 246 U.S. 343 (1918).
- b. Forest Service regulations can preempt operation of state laws. E.g., *United States v. Light*, 220 U.S. 523 (1911).

C. The Multiple Use, Sustained Yield Act, 16 U.S.C. §§ 528-531, expands the purposes for which National Forests may be administered to include "outdoor recreation, range, timber, watershed, and wildlife and fish."

1. This seems to sanction "harmonious and coordinated management," including land uses such as reservoirs and pipelines so long as it is "without impairment of the productivity of the land, with consideration being given to the relative values of the various resources." 16 U.S.C. §531(a).
2. These supplemental purposes are not in derogation of the purposes set out in the Organic Act.

D. The National Forest Management Act, 16 U.S.C. §§1600-1614, requires the Forest Service to prepare long-range management plans.

1. All "permits . . . for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. §1604(i).
2. Permits are to be revised to comport with the plans and their subsequent revisions, but a revised permit is "subject to valid existing rights." *Id.*
3. The 1984 Plan for the Arapaho and Roosevelt National Forests requires that all special use permits include conditions such as by-passes and releases to maintain instream flows sufficient satisfy certain specific standards for fish and wildlife protection:
 - a. Vertebrate wildlife must be maintained at 40% of potential;
 - b. Fish habitat must have 30% of pool area and a base flow of at least

25 % of average annual daily flow, and maximum temperature of 72°F.

- E. Provisions of the Federal Land Policy and Management Act (FLPMA) deal with the granting of rights-of-way on National Forests and other public lands. 43 U.S.C. §§1761-1770.
1. The Secretary has specific authority to permit water facilities. 43 U.S.C. §1761(a)(1).
 2. Terms and conditions must be included in each right-of-way that will, among other things, "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." 16 U.S.C. §1765.
 3. FLPMA repealed several earlier statutory grants of authority for rights-of-way for water facilities in National Forests (though not the rights-of-way existing under them):
 - a. Act of February 1, 1905 -- water storage and diversion facilities for municipal and mining purposes.
 - b. Act of February 15, 1901 -- Secretary of Interior can issue revocable permits for use of public lands for irrigation, mining, manufacturing, domestic and other water systems.
 - c. 1891 General Right of Way Act -- right-of-way for ditches on public lands granted to irrigation and drainage ditch companies and districts.
 - d. Mining Law of 1866 (partially repealed) -- confirmed rights-of-way on public lands for construction of ditches and canals without formal permit or filing.
 - e. Desert Land Act of 1877-- easements for diversion works.
 - f. Under a 1986 amendment to FLPMA, existing rights-of-way in the National Forests under old statutes that were once administered by the Secretary of Interior are now administered by the Secretary of

Agriculture. 43 U.S.C. §1761(b)(3).

- g. The Department of Agriculture announced a policy in 1990 of granting permanent easements to facilities permitted under these earlier statutes if they were used only for agricultural or livestock purposes and have been continuously in use. Extensions or enlargements fall under FLPMA. See Forest Service Manual Directive No. 90-1, dated June 25, 1990.
 - h. Two of the applicants in the Arapaho and Roosevelt National Forests have asserted that their rights exist under the pre-FLPMA statutes.
- F. The Forest Service is constrained in its issuance of special land use permits by the Endangered Species Act, 16 U.S.C. §§1531-1543, in that "every federal agency shall . . . insure that any action authorized . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . ." 16 U.S.C. 1536(2).
- 1. After consultation with the Fish and Wildlife Service as required by the Act, it was determined that the permit applications for water facilities in the Arapaho and Roosevelt National Forests might affect several endangered and threatened species.
 - 2. Biological opinions completed by the Fish and Wildlife Service in mid-1994, found that the continued existence of three bird and one fish species were jeopardized and the habitat of one bird species adversely affected by the operation of each of the facilities for which special use permits were sought.
- G. The Tenth Circuit has recognized the propriety of Forest Service's imposition of minimum instream flow requirements as a condition of granting an easement for a water project. *Wyoming Wildlife Federation v. United States*, 792 F.2d 981 (10th Cir. 1986). But see *Eugene v. Vogel*, 88 I.D. 258 (1981)(BLM improperly

refused permit without considering applicant's proposal for redesigning project to provide water for wildlife).

III. Federal Policies and Obligations Respecting State Water Rights

A. The federal government historically has recognized the primacy of the states in allocating and controlling the use of water within their borders, even on the public lands. E.g., *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *California v. United States*, 438 U.S. 645 (1978).

1. All the applications for special land use permits for water facilities in the Arapaho and Roosevelt National Forests were to allow continued use and development of water pursuant to water rights vested under Colorado state law. The permits were for existing or rehabilitated facilities on essentially the same rights-of-way as in the past.

2. Colorado has a state law that provides for the state to appropriate instream flow rights "as may be required to preserve the natural environment to a reasonable degree." Colo. Rev. Stat. §37-92-102(3). Instream flow rights had been appropriated by the state in the streams where the Forest Service has required by-pass flows in the Arapaho and Roosevelt National Forests.

B. The Federal Land Policy and Management Act, similar to provisions in other federal laws, cautions that "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" 43 U.S.C. §1701 note.

1. The Supreme Court has deferred to state law in applying such provisions in the absence of an "explicit congressional directive" creating a conflict with federal law. *California v. United States*, supra.

2. Courts have frequently found conflicts and ruled that federal law preempts

state water law notwithstanding deferential provisions if the state law would interfere with the fulfillment of national policy.

- a. Under section 8 of the Reclamation Act: *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *Fresno v. California*, 372 U.S. 627 (1963); *Arizona v. California*, 373 U.S. 546 (1963).
- b. Under section 27 of the Federal Power Act: *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946); *California v. Federal Energy Regulatory Commission*, 495 U.S. 490 (1990).
- c. Under section 101(g) the Clean Water Act: *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (1985); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C.Cir. 1982).

IV. Constitutional Limits on the Regulatory Authority of the Forest Service

- A. The fifth amendment to the Constitution prohibits taking private property for a public use without just compensation.
 1. Although water is a public resource, the right to use it secured by appropriation under state law by a private (non-governmental) party is private property protected the fifth amendment.
 2. This provision requires compensation when a property owner is deprived of all economically viable uses of property by government regulation, except when the regulation can be justified as consistent with the nature of the right (i.e., the prohibited use was not among the property interests obtained in the first place). *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992).
 3. When a property owner is required effectively to dedicate a portion of the property for public use, the exaction must be roughly proportional to the harm or impact caused. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

V. Terms of Forest Service's 1994 Decision to Issue Five Special Land Use Permits

A. Assurances of flows sufficient to meet "40% standard" (40% of optimum habitat for trout)

1. Barnes Meadow Reservoir (City of Greeley): No by-pass flows. Accepts proposal (of city, Water Supply and Storage, and Ft. Collins) for a Joint Operating Plan for Poudre that results in reducing impacts of diversions on Joe Wright Creek 5 months per year and benefits Poudre River below; Forest plan amended to waive requirement of 25% of base flow as the required method of meeting the 40% of habitat standard. Present operations divert up to 35 cfs from Joe Wright Creek to reservoir on unnamed tributary about a month a year and dry up the tributary; other times stream is augmented or unaffected.
2. Peterson Lake Reservoir (City of Greeley): No by-pass flows. Accepts proposal (of city, Water Supply and Storage, and Ft. Collins) for a Joint Operating Plan for Poudre that does not reduce impacts on unnamed creek where dam sits but benefits Joe Wright Creek and Poudre River below; Forest plan amended to waive requirement of 25% of base flow as the required method of meeting the 40% of habitat standard. Present operations dewater stream only a few weeks a year and release flows equal to or greater than natural flows balance of year.
3. Joe Wright Dam (City of For Collins): By-pass flows will require minimum flows of 3 cfs April through September and 1cfs October through March (or natural flows if less); Forest plan amended to waive requirement of 25% of base flow. Present operations dewater 1 mile of stream 8 months per year.
4. Long Draw Dam (Water Supply and Storage Co.): No by-pass flows. Accepts proposal (of Water Supply and Storage, Greeley, and Ft. Collins) for a Joint Operating Plan for Poudre that does not reduce impacts on La Poudre Pass Creek below the dam (in Rocky Mountain National Park) but

benefits Poudre River below; Forest plan amended to waive requirement of 25% of base flow as the required method of meeting the 40% of habitat standard. Present operations dewater creek for 1.2 miles more than half the year..

5. Idylwilde Reservoir, Dam and Pipeline (City of Loveland): By-pass flows of 7 cfs (but could go to 3 cfs in episodes when it would increase power rates) as set out in an agreement with the Division of Wildlife. Forest plan amended to waive requirement of 25% of base flow as the required method of meeting the 40% of habitat standard and to waive 40% standard because winter flows will be slightly below and summer flows could be less than half (13 cfs) of those required for 40% (35 cfs). Present operations now reduce natural flows ranging from 18-115 cfs in summer and as low as 3 cfs winter to an average flow of 6 cfs (3 cfs minimum per FERC requirement) for 1.6 miles of Big Thompson River.

- B. Central Platte River Recovery Implementation Program to be established within three years to change conditions in river to meet needs of endangered species. (Agreement recently signed by Colorado, Wyoming, Nebraska and U.S. Department of Interior to pursue such a program for the Platte ecosystem.)

- C. Interim measures for endangered species require annual payments for up to four years to acquire water and recover habitat:

1. Barnes Meadow -- \$813 per year
2. Peterson Lake -- \$1559 per year
3. Joe Wright -- \$3235 per year
4. Long Drew -- \$2245 per year
5. Idylwilde -- \$.93 per year