

BYPASS FLOW REQUIREMENTS AND THE QUESTION OF FOREST SERVICE AUTHORITY

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*Clean, clear and cool as the melted snow that it is, Joe Wright Creek tumbles from its headwaters at Cameron Pass into Joe Wright Reservoir. From which it does not emerge.*¹

INTRODUCTION

This comment examines a recent controversy between the United States Forest Service and the owners of several municipal water facilities in the Cache La Poudre River watershed within boundaries of the Arapaho and Roosevelt national forests just west of Boulder, Colorado. The controversy stems from the Forest Service's claimed authority to require these owners, as a condition of the renewal of the right-of-way permits that allow them to operate these facilities within the national forests, to maintain certain instream flow levels in the streams on which the facilities operate. Specifically, the Forest Service claims that these owners must release water from their reservoirs or allow a certain amount of their water to "bypass" their diversion structures during low flows in the fall and winter to protect fish and wildlife habitat and other environmental resources.

At the heart of the controversy is a conflict between state and federal power² in an area that historically has had more than its share of such disputes: western water law.³ As one observer noted: "The controversy over these dams is part of a power struggle as old as the Constitution, and a dispute as old as the values of civilization."⁴ On the one side, representatives of state

1. Jon Margolis, *Politics and Water Make Westerners Turncoats*, PORTLAND OREGONIAN, June 22, 1994, at C7.

2. See *id.* ("This is a classic issue of federalism," said Colorado lawyer, Bennett Raley . . . "The issue is whether decisions on resource uses are going to be made on the local or federal level.')

3. See, e.g., *California v. FERC*, 495 U.S. 490 (1990); *California v. United States*, 438 U.S. 645, 647 (1978); *City of Fresno v. California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946).

4. Margolis, *supra* note 1.

property interests argue that federal bypass flow authority runs directly counter to every thread of the history of the West, in which water rights have been treated as an essentially sacred form of property, virtually immune from federal regulation. "In this part of the country, water is not just two atoms of hydrogen and one of oxygen. It is a property right, supported by a complex body of laws that has assumed a station just below that of holy writ"⁵ Or, as stated by the late Colorado poet laureate Thomas Hornsby Ferrill: "Here's a land where life is written in water."⁶

Several past and present members of Colorado's congressional delegation are staunch advocates of this view. According to former U.S. Senator Hank Brown of Colorado, "This [controversy] is a prime example of the war on the West, where [the federal government] come[s] to a dry arid state and [tries] to steal the water."⁷ Similarly, U.S. Senator Wayne Allard of Colorado argues that bypass flows are part of a federal scheme to usurp state control over water allocation in order to deprive individual users of their water rights without compensation:

Groups like Trout Unlimited want the Forest Service to gain a legal foothold through the use of bypass flows. Then the real agenda can come forward, which is the usurpation of the state of Colorado's right to control its own water resources. They hope to impose federal pre-emption over state control of water. Then armed with this tool and a complex and costly court system, they will systematically begin to take water from cities and irrigators.⁸

5. *Id.*; see also *Protecting Our Water Rights*, ROCKY MTN. NEWS, Feb. 29, 1996, at A43.

For more than 100 years, water has been allocated in the West according to state laws. That system chafes against some people, to be sure, who would prefer a system less driven by markets, but the gigantic investments and longstanding property rights the system sustains should not be overridden simply by governmental force.

Id.

6. *Colorado's Water: An Illusion of Plenty*, DENV. POST, Oct. 4, 1998, at H1.

7. Tom Kenworthy, *Administration Resisting "Radical Change" in Water Rights Sought for West*, WASH. POST, Mar. 6, 1996, at A3.

8. Wayne Allard, *Congressman's Bill Would Retain State Control of its Water Resources*, COLO. SPRINGS GAZETTE TELEGRAPH, July 30, 1996, at B5. U.S. Senator Ben Nighthorse Campbell of Colorado also opposes the Forest Service's use of bypass flow requirements. See *Campbell May Go to Clinton in Water Rights Dispute*, ROCKY MTN. NEWS, Jan. 6, 1994, at A4.

On the opposite side of the debate, supporters of federal bypass flow requirements⁹ characterize them as necessary protective measures that have a relatively small impact on private water rights.¹⁰ They argue that, instead of allowing municipalities and other private users to dry up streams in the national forests with their water facilities, the Forest Service should require these users to keep the public lands in good condition in return for the easements that they receive from the agency.¹¹ According to this view, if protective measures are not included in the special land use permits issued by the agency, fish and wildlife habitat will suffer serious losses. One observer estimates that at least one-half to two-thirds of the Poudre River would stay dry during the winter without bypass flow requirements.¹² Thus, proponents of bypass flow requirements rely on different equities than those championed by the traditional property rights perspective: equities emblematic of a new western perspective that emphasizes conservation values and the fair return that the federal government should receive for its interest in the public lands.¹³

9. According to the Forest Service, those favoring bypass flow requirements are in the majority. See *Plan to Bypass Reservoir Wins Backing, Forest Official Says*, ROCKY MTN. NEWS, Apr. 28, 1994, at A33. As Regional Forest Service Director Elizabeth Estill reported to Colorado House and Senate Agricultural Committee members, the Forest Service received comments in response to the controversy that indicate the public favors the use of bypass flows by a 4 to 1 ratio. See *id.*

10. See Bob Saile, *On the Rocks: Shut-Off Dams Give Poudre's Trout Little Breathing Room*, DENV. POST, Apr. 20, 1994, at D10 (bypass flows may require as little as one to two cubic feet per second in releases per reservoir); David Nickum, Letters to the Editor, *Forest Service Acting Like Good Landlord with Its Streamflow Requirements*, ROCKY MTN. NEWS, Mar. 19, 1996, at A35 ("[B]ypass flow requirements amount to only a tiny fraction of project yield (less than 5% in most cases, and nowhere close to the one-third Brown has claimed) . . ."); Edward Zukoski, Letters to the Editor, DENV. POST, Feb. 29, 1996, at B8 ("The Forest Service generally requires that holders of water rights leave only a tiny percentage of stream flow to protect fish habitat.").

11. See John M. Biers, *Environmentalists Protest Allard Water Plan*, DENV. POST, Dec. 2, 1995, at A8 (quoting local resident as stating: "What we're saying is, 'You occupy our house—our public land—and we want you to keep it in good condition'"); Nickum, *supra* note 10 ("[B]ypass flows are] simply requirements that those who want to operate dams or diversions on the public lands keep public streams in good condition. Any good landlord would ask as much.").

12. See Saile, *supra* note 10.

13. University of Colorado law professor and public lands scholar Charles Wilkinson notes that, although the Forest Service's claim to bypass flow authority is a departure from the mid-nineteenth century western water rights system, "it is not a federal conspiracy; it is coming from Westerners themselves, because the West has changed." Margolis, *supra* note 1.

The scope of the conflict is immense, expanding outside of Colorado to "every place there is water flowing over the public lands."¹⁴ In fact, the conflict is of such great import that Congress intervened and ordered a federally appointed task force to study the issue and propose a solution that would meet the water needs of the national forests with as little intrusion as possible on state water rights.¹⁵ Unfortunately, the task force did not resolve the controversy in its August 1997 report to Congress. Rather, it proved to be hopelessly divided in its recommendations, with four members of the task force believing the Forest Service lacks authority to impose bypass flows and three members coming to the opposite conclusion.¹⁶

This comment seeks to intervene in the controversy, examine the merits of the competing task force views, and resolve the question of whether the Forest Service has the authority to impose bypass flow requirements.¹⁷ This comment takes the position that the Forest Service can impose bypass flow requirements, but only where good faith negotiations have failed. This position is based on two central arguments. First, the Forest Service, like any land proprietor, should be able to include protective terms in any easement that it grants. Second, Congress delegated the Forest Service bypass flow authority in the Federal Land Policy and Management Act ("FLPMA"), thereby allowing the agency to preempt state law.¹⁸

Part I of this comment provides a detailed history of the bypass flow controversy. Part II discusses the general contours of the conflict, with an emphasis on the tension between the

14. Kenworthy, *supra* note 7.

15. See Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 389(d)(3), 110 Stat. 888, 1021-22.

16. See FEDERAL WATER RIGHTS TASK FORCE, REPORT OF THE FEDERAL WATER RIGHTS TASK FORCE CREATED PURSUANT TO SECTION 389(d)(3) OF P.L. 104-127 (1997).

17. Such an intervention is timely in light of the fact that the Forest Service is currently involved in a lawsuit before the United States District Court for the District of Colorado on the bypass flow issue that may weave its way through the appellate ranks. See *Trout Unlimited v. United States Dep't of Agric.*, No. 96-WY-2686-WD (D. Colo. filed June 5, 1995).

18. 43 U.S.C. § 1765(a)(ii) (1994). This comment also recognizes that Congress may have delegated bypass flow authority to the Forest Service through other statutes, including the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1994), the Organic Act of 1897, 16 U.S.C. §§ 473-551 (1994), the Multiple-Use Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1994). However, this comment focuses upon FLPMA in the view that it likely has the broadest applicability.

states' traditional dominance over the administration of water rights and Congress's authority under the Property Clause of the Constitution¹⁹ to preempt state water law on the public lands. Part III provides a comprehensive analysis of the legal merits of the Forest Service's claims to bypass flow authority. This part focuses particularly upon a savings provision in FLPMA that demands a certain level of deference to state authority, and how this provision does not preclude the Forest Service's imposition of bypass flow requirements. Finally, Part IV examines how the Forest Service might use bypass flow requirements, and what limits the agency should observe in utilizing this potentially valuable management tool.

I. THE HISTORY OF THE CONTROVERSY

In the early 1990s, officials from the U.S. Forest Service informed the owners of seven water facilities in the Arapaho and Roosevelt National Forests along the Colorado Front Range that they would be required to renew the right-of-way permits authorizing them to operate their facilities within national forest lands.²⁰ As a condition of these renewals, the Forest Service announced that the owners would have to operate their facilities so as to guarantee the maintenance of certain minimum streamflows in the national forests.²¹ According to the agency, these minimum streamflows were necessary to protect aquatic and riparian²² habitat as required by the Arapaho-Roosevelt Forest Plan.²³

The specific mechanism the Forest Service chose was the potential inclusion of "bypass flow" conditions into the terms of

19. U.S. CONST. art. IV, § 3, cl. 2.

20. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at III-1.

21. See *id.*

22. "Riparian" areas are those areas "in the transition zone between aquatic and terrestrial habitat; areas which are influenced by their proximity to water but which are not actually aquatic." David Gillilan, Comment, *Will There Be Water for the National Forests?*, 69 U. COLO. L. REV. 533, 547 n.70 (1998).

23. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at III-1. The Arapaho and Roosevelt Forest Plan was created pursuant to the terms of the National Forest Management Act, 16 U.S.C. §§ 1600-1614 (1994), which requires the Forest Service to develop individual or joint forest management plans for all of its forests. See *id.*

the permits. These conditions could be invoked to require the owners of these water facilities to divert or store less water than they would otherwise be entitled to under state law. This attempt to place bypass flow requirements into the terms of the right-of-way renewals produced some political opposition from various municipal and agricultural water interests, who argued that the Forest Service was unduly interfering with their water rights authorized under state law and with the state water appropriation system in general.²⁴ As a result, eleven United States representatives and senators, including Hank Brown, Wayne Allard, and Ben Nighthorse Campbell of Colorado, wrote the Secretary of Agriculture, Edward Madigan, in August 1992 objecting to the Forest Service's proposal.²⁵ The letter criticized the plan on the grounds that it "violates the law, injures vested property rights, destroys established management practices, and would result in the implementation of environmentally damaging alternatives" by the affected cities.²⁶

Secretary Madigan responded by indicating that the Forest Service would not impose new bypass flow requirements on existing water supply facilities.²⁷ However, he did indicate that the Forest Service could require the owners of the facilities to accommodate agency resource goals, so long as the accommodations would not diminish water yield or involve substantial expense: "The permits will . . . obligate the permittee to accommodate resource goals of the Forest Service. This accommodation will be to the extent feasible without diminishing the water yield or *substantially* increasing the cost of the water yield from the existing facility."²⁸ Thus, the Secretary seemed to indicate that the Forest Service would not impose bypass flow conditions on existing facilities, but that the agency could require these facilities to undertake some expense to protect minimum streamflows in order to receive renewal permits.

24. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at Executive Summary.

25. See Letter from Senator Hank Brown et al. to Edward Madigan (Aug. 12, 1992), reprinted in FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at app. B.

26. *Id.*

27. Letter from Edward Madigan to Senator Hank Brown (Oct. 6, 1992), reprinted in FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at app. B.

28. *Id.* (emphasis added).

The Secretary's letter confused forest officials in the Arapaho-Roosevelt system,²⁹ as it appeared to conflict with existing statutory authority under FLPMA and the National Forest Management Act ("NFMA").³⁰ It left them in the difficult "position of having to act in direct conflict with their own forest management plan, if they didn't require bypass flows, or in direct conflict with their boss, Madigan, if they did."³¹ The fact that the Forest Service had used bypass flow requirements to protect its water resources since the 1960s, and Congress had apparently not withdrawn this authority, further complicated the situation.³² Finally, two recent judicial decisions, one at the federal and one at the state level, had indicated that the Forest Service can use land use controls (although not specifically referring to bypass flow requirements) to maintain favorable streamflows in the national forests.³³

As a result, notwithstanding Madigan's letter, the forest service officials proceeded to negotiate with the owners of the seven facilities, asserting throughout the process that the Forest Service did have bypass flow authority. Forest Service Supervisor Skip Underwood described the complexities of the situation in these terms:

I had before me: the Secretary's letter to authorize uses without additional bypass flows; a good faith effort and proposal by several facility owners to mitigate efforts on the Cache La Poudre River; FLPMA directing me to put terms and conditions in land-use authorizations to protect fisheries; the Forest Plan directing me to require bypass flows and meet

29. See Gillilan, *supra* note 22, at 577.

30. 16 U.S.C. §§ 1600-1614 (1994); see also *infra* Part III.A (discussing authority under NFMA).

31. Saile, *supra* note 10.

32. See Teresa Rice, *Beyond Reserved Rights: Water Resource Protection for the Public Lands*, 28 IDAHO L. REV. 715, 723 n.30 (1992).

33. See *Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990) (holding that the Forest Service is not required to obtain reserved water rights to protect a wilderness area given that administrative measures can adequately protect its resources); *In re Amended Application of the United States for Reserved Water Rights in the Platte River*, No. W-8439-76, at 9-13 (Colo. Dist. Ct., Water Div. No. 1, Feb. 12, 1993) (stating that permitting authority has proven adequate for preserving favorable water flows in the national forests without resort to reserved water rights).

aquatic habitat standards; and many interested parties' comments and opinions.³⁴

In July 1994, the Forest Service renewed five of the seven permits.³⁵ Three of the permits did not include bypass flow requirements.³⁶ Rather, the permits included a variety of terms and conditions designed to protect streamflows.³⁷ The primary approach taken by the Forest Service was to incorporate into the permits a comprehensive program of protective measures proposed by some of the water users in the form of a Joint Operations Plan ("JOP") that was designed to meet the Forest Service's water needs without resorting to bypass flow requirements.³⁸ The JOP provided for a coordinated system of reservoir releases and subsequent downstream diversions to raise low wintertime flow levels:

Under the JOP, 3,000 acre feet of storage water is to be released for beneficial uses when it will also augment low wintertime flows that would otherwise occur in Joe Wright Creek and the 37 miles of the Cache La Poudre mainstem. The reservoir releases are then diverted from the stream below the forest boundary for municipal water supply purposes.³⁹

As for the remaining two facilities, the parties proved unable to agree on adequate voluntary protective measures.⁴⁰

34. FOREST SERVICE, U.S. DEP'T OF AGRIC., RECORD OF DECISION, LAND-USE AUTHORIZATION FOR JOE WRIGHT DAM AND RESERVOIR AND AMENDMENT TO THE LAND AND RESOURCES MANAGEMENT PLAN 10 (1994).

35. See Gillilan, *supra* note 22, at 578 n.245.

36. The Forest Service indefinitely suspended decisions as to the other two facilities. See *id.* The Forest Service issued permits to the City of Greeley, the City of Fort Collins, the City of Loveland, and the Water Supply and Storage Company. See David H. Getches, Background: Imposition of By-Pass Flows as a Condition of National Forest Special Use Permits for Water Facilities and Creation of the Water Rights Task Force 7-9 (Feb. 3, 1997) (unpublished manuscript on file with author).

37. See Getches, *supra* note 36, at 7-9.

38. See *id.*; FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at VIII-1.

39. FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at VIII-1. Proponents of the JOP argue that it achieves results superior to bypass flows without losing any of the water historically produced by the facilities.

40. See Getches, *supra* note 36, at 7-9. The two facilities were Fort Collins's Joe Wright Dam and Reservoir in the Cache La Poudre watershed and Loveland's

Specifically, the project operators refused to offer anything beyond the JOP to protect a tributary of the Cache LaPoudre, even though the JOP clearly offered insufficient protection for this stream. As Underwood explained:

I did not find the JOP acceptable for Joe Wright Reservoir because it does not offer any mitigation for aquatic habitat in Joe Wright Creek below Joe Wright Reservoir and Chambers Lake. There remained up to eight months 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 was zero.⁴¹

Therefore, the Forest Service believed it had little choice but to impose bypass flow conditions.

Following issuance of the permits, Trout Unlimited and a few individual plaintiffs filed an administrative appeal claiming that the Forest Service's protective measures did not go far enough.⁴² In essence, the suit challenged the Forest Service's historic reluctance to utilize bypass flows as a management tool.⁴³ Specifically, the plaintiffs objected to the Forest Service's failure to include bypass flow requirements in the permit that was renewed for Long Draw Reservoir, located just east of the continental divide in northern Colorado.⁴⁴ The Forest Service denied the appeal, and Trout Unlimited subsequently filed an action in federal district court.⁴⁵ The action alleged, *inter alia*, that the terms and conditions included in the renewal permits did not satisfy the requirements of FLPMA and NFMA.⁴⁶ Trout Unlimited argued that the Forest Service, by neglecting to impose

Idylwilde Reservoir Dam and Pipeline in the Big Thompson River watershed.

41. FOREST SERVICE, *supra* note 34, at 9.

42. See Getches, *supra* note 36, at 9-10.

43. See *id.*

44. See *Trout Unlimited v. United States Dep't of Agric.*, 944 F. Supp. 13 (D.D.C. 1996); see also Getches, *supra* note 36, at 9-10.

45. See *Trout Unlimited v. United States Dep't of Agric.*, No. 96-WY-2686-WD (D. Colo. filed June 5, 1995).

46. See *id.* The action also alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1994), the Forest and Rangeland Renewable Resources Planning Act, 16 U.S.C. §§ 1600-1614 (1994), the Farmington Wild and Scenic River Act, 16 U.S.C. §§ 1271-1287 (1994), and the Wilderness Act, 16 U.S.C. §§ 1131-1136 (1994).

bypass flow requirements, failed its statutory duty under the two acts to minimize damage to the impacted streams.⁴⁷

The court ultimately stayed the action upon a motion by all the parties, pending action by a congressionally appointed Bypass Flow Task Force ("Task Force"), which was created pursuant to the terms of the Federal Agricultural Improvement and Reform Act of 1996.⁴⁸ The statute provided for an eighteen month moratorium on the imposition of bypass flows by the Forest Service,⁴⁹ during which time the Task Force would study issues pertaining to the bypass flow controversy.⁵⁰ Upon conclusion of its study, the Task Force would report back to Congress with recommendations as to:

(A) whether Federal water rights should be acquired for environmental protection on National Forest land;

(B) measures necessary to protect the free exercise of non-Federal water rights requiring easements and permits from the Forest Service;

(C) the protection of minimum instream flows for environmental and watershed management purposes on National Forest land through purchase or exchange from willing sellers in accordance with State law;

(D) the effects of any recommendations made under this paragraph on existing state laws, regulations, and customs of water usage; and

(E) measures that would be useful in avoiding or resolving conflicts between the Forest Service's responsibilities for natural resource and environmental protection, the public interest, and the property rights and interests of water holders with special use permits for water facilities, including the study of Federal acquisition of water rights, dispute resolution, mitigation and compensation.⁵¹

47. *See Trout Unlimited*, 944 F. Supp. at 13.

48. *See supra* note 15.

49. Congress accepted the Task Force as an alternative to an amendment to the 1996 Farm Bill proposed by Senator Hank Brown, which would have amended FLPMA to make bypass flow conditions in permit renewals unlawful while prohibiting other conditions that would increase the cost of water to water rights holders. *See Gillilan, supra* note 22, at 580.

50. *See Getches, supra* note 36, at 10.

51. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 389(d)(3), 110 Stat. 888, 1021-22.

The terms of the statute suggest that Congress expected the Task Force, if at all possible, to make recommendations as to how the Forest Service might meet the objectives of its forest management plans without impairing the exercise of privately held water rights or the management of the state appropriations system. Indeed, the statute refers to the acquisition of federal water rights pursuant to the terms of state law with no mention of bypass flow requirements.⁵² The implication is that Congress sought a resolution to the controversy that would avoid the apparent conflict between state and federal authority inherent in bypass flow conditions.

The Task Force⁵³ held a series of twelve meetings between September 24, 1996 and August 25, 1997 that culminated with the release of a report of its findings ("Report").⁵⁴ However, the group was unsuccessful in forging a consensus. Although the group concurred as to many issues it addressed in the Report,⁵⁵ it

52. *See id.*

53. The Task Force was comprised of Bennett W. Raley (Chair), Denver attorney; Elizabeth Rieke (Vice-Chair), former Director, Natural Resources Law Center, University of Colorado School of Law; Sheri L. Chapman, Executive Director of Idaho Water Users Association; Richard Roos-Collins, Senior Staff Attorney, Natural Heritage Institute; David H. Getches, Professor of Law, University of Colorado School of Law; Richard K. Golb, Executive Director of Northern California Water Association; and Robert S. Lynch, Phoenix attorney. *See* FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at Cover Page; Getches, *supra* note 36, at 11. The group was selected in accordance with section 389(d)(2) of the Federal Agriculture Improvement and Reform Act of 1996, which provided that one member shall be appointed by the Secretary of Agriculture, two members shall be appointed by the Speaker of the House of Representatives, one member shall be appointed by the Minority Leader of the House, two members shall be appointed by the Majority Leader of the Senate, and one member shall be appointed by the Minority Leader of the Senate. *See* Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 389(d)(2), 110 Stat. at 1021.

54. *See* FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at Proceedings of Task Force.

55. *See id.* at IX-4-5. As to the areas of concurrence, all members of the Task Force agreed that "the use of alternative measures can generally accomplish National Forest Service purposes." *Id.* at IX-6. Indeed, they all agreed that the preferred methods for meeting Forest Service water needs is through such alternative measures as: (1) the acquisition of federal water rights through state water law adjudications; (2) the use of federal water rights for overlapping purposes where possible; (3) the maximization of system resources through system optimization plans (e.g., Joint Operations Plans); (4) the use of state instream flow programs where possible; (5) voluntary agreements with non-federal water rights holders for efficient use; and (6) the amendment of FLPMA to allow the Forest

did not reach an agreement on what became the central issue of the proceedings: whether the Forest Service is authorized to impose bypass flow requirements as a condition of a grant or renewal of a right-of-way permit in the national forests.⁵⁶ The four member majority adhered to the view that the Forest Service is completely without authority to impose bypass flow requirements,⁵⁷ whereas the three member minority found that the Forest Service can impose such requirements where it fails after good faith efforts to reach a negotiated solution with facility owners.⁵⁸

The split on the Task Force was unfortunate. Ultimately, Congress expected the group's recommendations to serve as the basis of future legislative or agency action.⁵⁹ The fact that it could not reach a consensus lessened the general utility of its recommendations⁶⁰ and further complicated the ambiguity of the situation.

II. THE BASIS OF THE CONTROVERSY

The Forest Service faces a substantial water resources problem.⁶¹ The national forests have extensive water resources needs. Fish and wildlife habitat preservation, recreational and aesthetic opportunities, and channel maintenance all require stable streamflows.⁶² However, various legal, administrative, and financial barriers prevent the Forest Service from maintaining reliable instream flows to support these needs.⁶³ Consequently,

Service to use more of its revenues for environmental protection. *See id.* at IX-4-5.

56. *See id.* at IX-6.

57. *See id.* at Executive Summary.

58. *See id.* at IX-5.

59. *See* Telephone Interview with David Getches, Raphael J. Moses Professor of Natural Resource Law, University of Colorado School of Law (Feb. 23, 1998).

60. *See id.* Professor Getches explained that Congress wanted a unanimous report that could serve as the basis of future congressional action. Therefore, the fact that the group was divided in its decision meant that Congress would be much more cautious before enacting any future legislation. Getches further indicated that Congress intended the Report to have perhaps its greatest impact on the Forest Service, but that the split within the group limited the effect that its recommendations could have on the agency. *See id.*

61. *See generally* Gillilan, *supra* note 22.

62. *See id.* at 544-50.

63. *See generally id.* Primary among these barriers is the fact that the courts

the Forest Service must increasingly examine alternate administrative mechanisms, such as bypass flow requirements, in order to establish the reliable streamflows that are needed in the national forests.

At the same time, the mere fact that the Forest Service has a demonstrated need for adequate streamflows does not mean that it can secure such flows by preempting state law governing the administration and distribution of water rights. Rather, the Forest Service must demonstrate that Congress, acting pursuant to one of its constitutionally enumerated powers, has delegated such preemptive authority to the agency.

A. *The State Water Rights System*

Traditionally, states have had dominant jurisdiction over the administration of water rights in the West.⁶⁴ The federal

have interpreted the "reserved" water rights of the national forests—those water rights that were impliedly reserved by the federal government when it reserved the various national forests from the public domain—to exclude the vast majority of the Forest Service's real water needs. *See, e.g., United States v. New Mexico*, 438 U.S. 696 (1978). Moreover, new water rights are hard to establish because only relatively valueless junior rights are available for many of the streams flowing through the national forests. *See Gillilan, supra* note 22, at 586. Additionally, the Forest Service generally lacks adequate funding to purchase existing rights, as evidenced by the fact that both the Task Force majority and minority indicated that the agency could use additional revenues to fund the purchase of federally held water rights. *See FEDERAL WATER RIGHTS TASK FORCE, supra* note 16, at VII-6, IX-5. Finally, even if the Forest Service had the means to purchase private rights, many state regimes include various legal barriers that limit the ability of the Forest Service to hold instream flow rights. *See Gillilan, supra* note 22, at 561-66. For instance, in Colorado, only the state, through the Colorado Water Conservation Board, can hold instream rights, not the federal government. *See COLO. REV. STAT. § 37-92-102(3)* (1997).

64. The appropriative water rights system, largely a codification of customary mining law, was by nature an inherently local system. *See TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 150 (1993). Typically, the western states initially adopted these customs simply by deferring to them in their case law as the source of state water law or by codifying them in state statutes. *See id.* at 154-55. Now, all western states have water codes, which generally are much more complex than the original mining customs, but are still based primarily on the elementary mining principle of prior appropriation: "first in time, first in right." *Id.* at 236.

The doctrine of prior appropriation provides that application of water to a "beneficial use" gives the user superior title to the use of the water over all subsequent appropriators. The three primary requirements for an appropriative

government generally has deferred to the distribution system established by the states, explicitly stating an intent to leave the law governing the appropriation and distribution of water to the states where "not inconsistent" with federal objectives.⁶⁵ As stated in *California v. United States*, "[t]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress."⁶⁶

B. *The Conflict with Federal Law*

Notwithstanding the federal government's general deference to the states' administration of water rights, the federal government can and often does play an important role in the distribution of water in the West. So long as Congress acts within the scope of one of its constitutionally enumerated powers, the Supremacy Clause of the Constitution allows it to preempt state law.⁶⁷ Indeed, where state law conflicts with a valid exercise of congressional power "the law is clear: The state laws must recede."⁶⁸

The specific constitutional provision giving Congress regulatory authority over the national forests and other public lands is the Property Clause, which 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."⁶⁹ This power over the public lands is said

water right are: (1) intent to appropriate water and apply to a beneficial use; (2) the diversion of water from a natural watercourse; and (3) actual beneficial use. *See id.* at 177. The beneficial use requirement has traditionally only recognized agricultural, domestic, industrial and municipal uses, but there is a trend in some western states to expand these uses to include public interest values, such as fish and wildlife preservation, recreation, and even aesthetics. *See id.* at 195.

65. *See California v. United States*, 438 U.S. 645, 664-65 (1978).

66. *Id.* at 653.

67. U.S. CONST. art. VI, cl. 2.

68. *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976) (quoting *McKelvey v. United States*, 260 U.S. 353, 359 (1922)).

69. U.S. CONST. art. IV, § 3, cl. 2.

to be without limits.⁷⁰ Accordingly, it includes the power to protect the public lands "from trespass and injury and to prescribe the conditions upon which others may obtain rights in them."⁷¹ This authority also extends to the "power to regulate and protect the wildlife" within the public domain.⁷²

In the context of the bypass flow controversy, this broad authority logically encompasses the power to include protective conditions in the special land use permits granting private users rights-of-way over these lands.⁷³ After all, there are situations in which unrestricted use of such permits would threaten the resource values of the public lands, such as where the operation of water facilities within the national forests would lower streamflows beyond levels necessary to support stable fish and wildlife habitat.⁷⁴ Hence, the necessary implications of the Property Clause indicate that Congress can require permittees on the public lands to undertake protective measures, such as the release of bypass flows, to ensure that these lands, and the fish and wildlife dependent upon them for habitat, are not unduly injured by the permittees' activities.⁷⁵

Moreover, this broad protective authority need not be confined to Congress. Rather, Congress can delegate many of its constitutionally-enumerated powers, including its authority to regulate the public lands, to any of the federal administrative agencies.⁷⁶ Consequently, Congress can, through appropriate

70. See *United States v. San Francisco*, 310 U.S. 16, 29 (1940).

71. *Utah Power & Light v. United States*, 243 U.S. 389, 405 (1917).

72. *Kleppe*, 426 U.S. at 541.

73. See *Utah Power & Light*, 243 U.S. at 405 (stating that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury, and to *prescribe the conditions upon which others may obtain rights in them*" (emphasis added)); see also *Berman v. Parker*, 348 U.S. 26 (1954); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) (allowing federal government to impose reasonable conditions on use of federal property).

74. See *supra* Introduction and Part I.

75. Of course, Congress's authority to impose permit conditions does not mean that such conditions are not subject to takings analysis. See *infra* note 107 for a brief discussion of the takings issue.

76. See *Light v. United States*, 220 U.S. 523 (1911) (upholding delegation to Forest Service of power to create grazing regulations, which have the full effect of law, under terms of Organic Act giving agency power to regulate occupancy and use of national forests).

legislative action, give the Forest Service the authority that it possesses under the Property Clause to declare the conditions upon which private interests can utilize the public lands.

Of course, having the power to delegate and actually delegating are two different things. Although few debate Congress's power to pass legislation authorizing the imposition of bypass flow conditions,⁷⁷ many dispute whether Congress has in fact delegated this authority to the Forest Service.⁷⁸ The remainder of this comment focuses on whether Congress has delegated bypass flow authority to the Forest Service⁷⁹ and, if so, the extent of this delegation.

III. THE CENTRAL ISSUE: THE LEGITIMACY OF FOREST SERVICE CLAIMS

This part provides extensive analysis of the Forest Service's possible claims to bypass flow authority by parsing through the conflicting arguments of the Task Force majority and minority. This part focuses particularly on the savings language included in the two primary statutes relied on by the Forest Service to determine whether this language, which demands apparent deference to state law, precludes the exercise of bypass flow authority. The latter half of this part examines an issue of particular importance: how the Supreme Court would likely construe this language in light of its treatment of similar provisions included in other statutes that bear directly upon state and federal relations in the area of water law. Neither the Task Force majority nor minority gives more than cursory attention to these other Supreme Court decisions.

77. The Task Force majority itself concedes that Congress could have exercised its authority under the Property Clause and the Supremacy Clause to delegate bypass flow authority to the Forest Service, but disputes whether Congress has, in fact, chosen to do so. See *FEDERAL WATER RIGHTS TASK FORCE*, *supra* note 16, at VI-4.

78. See *supra* Introduction.

79. As discussed extensively in Part II, this delegation would be either in the form of the agency's general authority as manager of the national forests to condition the terms upon which private individuals can utilize the forests or its specific statutory authority under FLPMA or NFMA.

A. *Statutory Authority*

The two primary statutes that support the claim of delegation are the Federal Land Policy and Management Act⁸⁰ and the National Forest Management Act.⁸¹ FLPMA was enacted largely as an organic act for the Bureau of Land Management ("BLM"), in response to Congress's dissatisfaction with the agency's perceived mismanagement of the public lands.⁸² Congress intended the act to reverse decades of neglectful land management practices, which had resulted in system-wide deterioration of BLM lands.⁸³ However, various provisions in the statute, including the provisions governing right-of-way grants over the public lands, are also applicable to the Forest Service.⁸⁴ By contrast, NFMA applies solely to the Forest Service and was enacted to provide the agency with comprehensive guidelines for formulating land management plans for the national forests.⁸⁵ Once enacted, these plans become law and serve as the basis for

80. 43 U.S.C. § 1765(a)(ii) (1994).

81. 16 U.S.C. § 1604(i) (1994). This comment does not analyze possible congressional delegation of bypass flow authority under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544 (1994). However, where a permit grant would jeopardize endangered species habitat, this comment takes the position that the ESA represents a third statutory source, alongside FLPMA and NFMA, for bypass flow authority.

The reader should also note that this comment focuses solely on post-FLPMA land use authorizations. Pre-FLPMA grants are not discussed in the view that they are subject to more individualized determinations dependent upon the specific act under which the grant was made and the particular language used in the permit in making the grant. See Rice, *supra* note 32, at 736. Rice argues that "[e]ven before FLPMA was enacted, land managers were authorized to condition the use of public lands to protect 'the public interest.'" *Id.* at 725 (citation omitted).

82. See generally George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA and the Multiple Use Mandate*, 14 ENVTL. LAW 1 (1983).

83. See *id.*

84. See 43 U.S.C. § 1765(b) (1994). The provision's reference to "the Secretary concerned" indicates that it applies both to the Secretary of Agriculture, who oversees the Forest Service, and the Secretary of the Interior, who oversees the BLM. Other FLPMA provisions that apply solely to the BLM refer only to "the Secretary."

85. See Charles F. Wilkinson & H. Michael Anderson, *Land Use and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 10-12, 74 (1985). The land management plans are created at the national forest level approximately once every 10 to 15 years and are designed to provide long-term management guidelines for individual forests. See *id.*

area resource allocation decisions, such as how much timber and what acreage the Forest Service will offer for harvest annually.⁸⁶

The specific provision in FLPMA that supports the Forest Service's claim to bypass flow authority provides: "Each right-of-way shall contain—terms and conditions which will . . . minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment."⁸⁷ Importantly, FLPMA's legislative history clearly establishes that Congress intended the terms and conditions requirement to be mandatory, not merely advisory.⁸⁸ Supporting this view, the language of the statute, phrased in terms of the mandatory "shall," indicates that Congress intended—indeed required—the Forest Service to impose such conditions in its right-of-way permits as are necessary to prevent damage to national forest resources.

Significantly, the statute does not define what types of terms and conditions it requires. Rather, it simply provides that each right-of-way shall contain "terms and conditions," apparently leaving it to the Forest Service's discretion to determine the types of conditions that will best protect national forest resources. It

86. *See id.*

87. 43 U.S.C. § 1765(a)(ii) (1994). The full text of § 1765 provides:

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; (ii) minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards; and

(b) such terms and conditions as the Secretary concerned deems necessary to (i) protect Federal property and economic interests; (ii) manage efficiently the lands which are subject to the right-of-way or adjacent thereto and protect other lawful users of the lands adjacent to or traversed by such right-of-way; (iii) protect lives and property; (iv) protect the interests of individuals living in the general area traversed by the right-of-way who rely on the fish, wildlife, and other biotic resources of the area for subsistence purposes; (v) require location of the right-of-way along a route that will cause least damage to the environment, taking into consideration feasibility and other relevant factors; and (vi) otherwise protect the public interest in the lands traversed by the right-of-way or adjacent thereto.

Id. The emphasis of this language is on the protection of environmental resources.

88. *See Rice, supra* note 32, at 726.

would seem no great leap to assume that the agency may condition issuance of permits on bypass flow requirements, provided that such requirements do not conflict with other provisions of the act.⁸⁹ This view seems particularly justified in light of the broad scope of the provision. On its face, it requires permits to protect such far ranging resource values as “scenic and esthetic values,” “fish and wildlife habitat,” and the “environment” in general. The requirement of minimum streamflows would seem to fall within the ambit of these provisions. Moreover, the legislative history of FLPMA suggests that Congress intended fish and wildlife habitat protection as a major purpose of the statute.⁹⁰ The general policy objectives included in the act also expressly state that environmental protection is to be a primary purpose of the act.⁹¹ Again, this suggests that Congress intended the public land agencies to have authority to include instream flow requirements when issuing permits.

NFMA provides additional support for bypass flow authority. The statute provides:

Resource plans and permits, contracts, and other instruments for the use and occupancy of the National Forest System lands shall be consistent with the land management plans. Those resource plans and *permits*, contracts, and other such instruments currently in existence *shall be revised* as soon as practicable to be made consistent with such plans.⁹²

89. As discussed in Part III.C, *infra*, the savings provision included in FLPMA is one possible limitation on this otherwise broad power the Forest Service has to choose the types of terms and conditions it will use.

90. See John Shurts, *FLPMA, Fish and Wildlife, and Federal Water Rights*, 15 ENVTL. LAW 115, 123-32 (1984).

91. See 43 U.S.C. § 1701(a)(8) (1994).

The Congress declares it is the policy of the United States that . . . the public lands be managed 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.

Id.

92. 16 U.S.C. § 1604(i) (1994) (emphasis added).

By requiring the revision of permits where necessary to make them consistent with land management plans, this provision seemingly mandates that the Forest Service impose bypass flow requirements under certain circumstances. For instance, where a forest management plan calls for the establishment of stable riparian habitat to maintain species diversity and viability,⁹³ the Forest Service must add protective conditions, such as bypass flow requirements, to existing permits if present diversions would otherwise reduce streamflows below the level necessary to support such critical habitat. Again, as under FLPMA, NFMA seems to require that the Forest Service impose bypass flow conditions in its right-of-way permits where such conditions are necessary to implement fully environmental protection objectives in the national forests.

B. The Savings Clauses

These straightforward statutory arguments are made exceedingly more complex by the inclusion of restrictive language in both FLPMA and NFMA that suggest Congress intended to preserve existing state laws and vested water rights when it enacted both pieces of legislation. The savings clause in NFMA provides that "[a]ny revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights."⁹⁴ The language in FLPMA is even more extensive:

(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 law governing appropriation or use of, or Federal right to, water on public lands; [or]

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

....

93. Viability and diversity are two central concepts used in Forest Service regulations to support the agency's statutory directive to preserve wildlife habitat. See 36 C.F.R. §§ 219.19-.26 (1998).

94. 16 U.S.C. § 1604(i) (1994).

(h) All actions by the Secretary under this Act shall be subject to valid existing rights.⁹⁵

The central question under both of these provisions is whether they can be read consistently with a congressional purpose to require the imposition of bypass flow conditions in certain Forest Service permits, even where such conditions present a potential conflict with state law.

For the sake of avoiding redundancy, the discussion in this comment focuses primarily on FLPMA, on the grounds that it represents a broader potential source of bypass flow authority than NFMA.⁹⁶ The view here is that it is not necessary to find that both statutes grant bypass flow authority. Statutory authority under FLPMA is enough, provided, of course, that NFMA does not expressly prohibit the use of bypass flows. Moreover, if bypass flow requirements are authorized by FLPMA, they should also be available under NFMA. After all, the FLPMA savings provision includes, but goes beyond, the "subject to valid existing rights" language of NFMA. Therefore, if the Forest Service can impose bypass flow requirements, notwithstanding the savings language in FLPMA, then the less restrictive savings language in NFMA should present no additional barriers.⁹⁷

C. *The Task Force Majority's Position*

The primary thrust of the Task Force majority's position is that Congress intends state law to govern water rights in the

95. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701, 90 Stat. 2743 (included in the Historical and Statutory Notes section of 43 U.S.C. § 1701 (1994)).

96. FLPMA presents the broadest source of bypass flow authority because it requires the imposition of protective conditions in all situations in which such conditions are necessary to protect the environmental resources of the national forests. *See supra* Part III.A. By contrast, NFMA would only authorize the imposition of bypass flow requirements if the individual forest plan at issue specifically called for the maintenance of minimum streamflows. *See supra* Part III.A.

97. The reader should also note that the Endangered Species Act, the Organic Act of 1897, and the Multiple-Use Sustained Yield Act of 1960 represent additional possible sources of bypass flow authority. *See supra* note 18.

western states.⁹⁸ The majority relies heavily upon the savings provision in FLPMA as evidence that Congress had no intention to delegate bypass flow authority to the Forest Service: "Simply put, § 701(g) makes it impossible for the Forest Service to rely on FLPMA as a grant of authority for it to impose bypass flow or water right transfer requirements as a condition of land use authorizations."⁹⁹

As support for its position, the majority reads the term "affecting" broadly: "Nothing in this Act shall be construed as . . . *affecting* in any way any law governing appropriation or use of, or Federal right to, water on public lands."¹⁰⁰ Under this reading, Congress intended to preclude "the use of FLPMA authority in any manner that would interfere with the diversion and use of water allocated to and used for non-federal purposes under state law."¹⁰¹ If Congress had intended a narrower construction of the savings clause (that is, if it merely intended to preclude the Forest Service from taking vested water rights in violation of the Due Process Clause of the Fifth Amendment), it would have used the term "taking" instead of "affecting."¹⁰² From this, the majority develops an interference test to determine whether the Forest Service has overstepped its statutory mandate: Forest Service action that interferes in any way with state appropriative water rights and the system under which state rights are adjudicated is impermissible.

Similarly, the majority argues that the disclaimer in the savings clause of any intent to "expand" federal authority over "water rights, water resources development or control" is a clear indication that the Forest Service cannot use FLPMA as a basis for bypass flow authority.¹⁰³ Their premise is that the federal government historically has left the adjudication of water rights to the states. Therefore, the fact that the savings clause includes an express denial of any intent to expand federal power over state

98. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at II-1.

99. *Id.* at VI-2 to VI-3. Section 701(g) is the savings provision in FLPMA.

100. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 701(g) (included in the Historical and Statutory Notes section of 43 U.S.C. § 1701 (1994)).

101. FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at VI-2.

102. *See id.*

103. *See id.*

water rights indicates that the Forest Service continues to lack authority “to control the use of water allocated to and owned by non-federal water users under state laws, or to interfere with state water allocation and administration systems.”¹⁰⁴

Finally, the majority argues that the provision of subsection (h), which provides that “[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights,” prevents the Forest Service from interfering with previously granted rights-of-way.¹⁰⁵ According to this view, these rights are “grandfathered” in by FLPMA and are thereby placed beyond the reach of the Forest Service’s permitting authority.¹⁰⁶

Aside from the specific language of FLPMA, the majority cites several relatively recent Supreme Court decisions which seemingly demand a new degree of federal deference to state authority in the area of water law.¹⁰⁷

104. *Id.*

105. *See id.*

106. *See id.* at VI-3. Significantly, the majority chooses to rely solely upon a “plain meaning” reading of the savings clause. It does not examine any of the Supreme Court’s previous decisions interpreting similar savings provisions contained in other federal statutes potentially impinging upon state water law to determine how the Court might likely interpret the FLPMA and NFMA savings provisions. Because this comment views these other cases as central to resolution of the present controversy in light of the fact that these clauses are susceptible to more than one interpretation, the author undertakes a comprehensive analysis of the Supreme Court’s relevant savings clause jurisprudence in Part III.E.2.

107. The majority also argues that the imposition of bypass flow requirements constitutes a constitutional taking, a contention that is largely beyond the scope of this paper. *See* FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at VI-7 to VI-9. The majority’s first contention is that the Forest Service is trying to make permit applicants “bear public burdens”—i.e., pay a disproportionate share of the environmental costs associated with water development in the national forests—when, in fact, these permits have little relationship to the historical reasons for the Forest Service’s claimed water shortage. *See id.* Further, the majority suggests that bypass flow requirements might constitute a taking by causing permit holders to suffer up to a 50% reduction in their water facilities annual yield during dry years. *See id.* at III-4. Finally, the majority asserts that bypass flow requirements often do not accomplish their stated objective of putting more water in national forest streams because junior appropriators often divert reservoir releases before they reach the section of the stream that they are designed to protect. *See id.* at III-5.

These claims largely can be evaluated only on a case-by-case basis that looks at whether the bypass flow requirements are actually related to the environmental impacts produced by the facility at issue and the extent to which the requirements will reduce the economic value of the facility. *See* Rice, *supra* note 32, at 728.

However, some general conclusions can be drawn. Inasmuch as the majority argues that the Forest Service is requiring permit applicants to pay a disproportionate share of the environmental costs associated with water development, an obvious defect with this argument is that these water diversion facilities do, in fact, bear directly on the national forests' current water resources problem. After all, if these facilities were not present, streamflows in the national forests would run at their historic levels. Therefore, far from being called upon "to bear public burdens," these permit holders are rather being asked to contribute to the protection of watersheds that are being damaged directly by their diversions.

Further, the amount of water that permit holders are required to allow to bypass their water facilities is generally not overly extensive and therefore can hardly be characterized as a "disproportionate share." That is, the amounts of water that are involved in bypass flows are generally relatively small in relation to the amount being diverted as a whole and therefore do not constitute an undue burden in relation to the benefits that the permit holder obtains in receiving permission to operate a facility on Forest Service land. For instance, the Forest Service requires the Idylwilde Reservoir to maintain bypass flows of between three to seven cubic feet per second ("c.f.s.") on the regulated portion of the stream, as compared to the natural, undammed flows of 18 to 115 c.f.s. in summer and around three c.f.s. in winter. See Getches, *supra* note 36, at 8-9. Interestingly, the reservoir is already required to maintain flows of three c.f.s. in the stream as a condition of its hydropower permit from the Federal Energy Regulatory Commission. See *id.* Without bypass flow requirements, the water facility would normally allow an average flow of around six c.f.s. See *id.* Therefore, in average years, the reservoir is required to release a maximum of one c.f.s. more than it would otherwise allow to remain in the stream. See *id.*

On the other hand, the Forest Service's ability to impose bypass flow requirements without effecting a taking of private property has definite limits. To begin with, the Forest Service must demonstrate that any bypass flow requirements that it imposes in a permit substantially advance the objectives of FLPMA. See Rice, *supra* note 32, at 727. Therefore, if a water facility owner can demonstrate that a specific bypass flow requirement is not meeting the objective of protecting fish and wildlife habitat and other environmental values, then the requirement constitutes a governmental taking that requires compensation. Such would be the case if a bypass flow condition did not actually result in the availability of more water for environmental uses. See *id.*

A second limitation is that a bypass flow requirement cannot go "too far" in decreasing the value of a water facility. See *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). Of course, the question of what is "too far" is still largely unresolved. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (holding that a 100% diminution in value constitutes a taking, but not indicating at what level less than a 100% taking occurs). However, if the Forest Service is correct in contending that bypass flow requirements generally have a *de minimis* effect on the historic water yield of regulated facilities, then facility owners will have a difficult time making out a takings claim. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at III-2. By contrast, if the Task Force majority is correct in asserting that the requirements might reduce historic yield by up to 80% for particular facilities during dry years is correct, then a takings claim is more probable. See *id.* at I-1. Whatever the case, the resolution of any given takings claim will largely involve a factual inquiry: if a water facility owner can demonstrate that a bypass flow

First, the majority points to the decision in *United States v. New Mexico*,¹⁰⁸ which narrowly defined the scope of federal reserved water rights,¹⁰⁹ as support for the notion that the federal government is to defer to state authority over the disposition of water.¹¹⁰ Under this interpretation, the federal government must proceed in conformity with state law when seeking water rights; it cannot use bypass flow requirements to trump the state allocation system.¹¹¹

Second, the majority cites¹¹² to the McCarran Amendment,¹¹³ which requires federal agencies such as the Forest Service to consent to joinder in state general stream adjudications,¹¹⁴ and the strong construction given the amendment in *United States v. District Court for Eagle County*.¹¹⁵ According to the majority, the Court's holding in *Eagle County* that the federal government forfeits any reserved water rights not claimed in McCarran Amendment proceedings again shows that the Court intends the federal government to defer to the state adjudication system. As under *New Mexico*, the majority argues that *Eagle County* represents "an explicit rejection of the attempts by federal agencies to control the use of water irrespective of water rights obtained under state law."¹¹⁶

requirement is not resulting in increased streamflows or that the requirement goes "too far" in reducing the value of the facility, the courts should require the Forest Service to compensate the owner.

108. 438 U.S. 696 (1978).

109. As discussed in note 63, *supra*, reserved water rights are those rights that were impliedly reserved by the federal government when it reserved the various national forests from the public domain.

110. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at II-2 to II-3. The decision, which held that reserved water rights are only available to support the primary purposes of the national forests, arguably requires the Forest Service to comply with state law when acquiring water to support its secondary purposes.

111. *See id.*

112. *See id.* at II-3.

113. 43 U.S.C. § 666 (1994).

114. General stream adjudications are state court proceedings that seek to determine all water rights within a particular watershed. See *United States v. District Court for Eagle County*, 401 U.S. 520, 523-25 (1971).

115. *See id.*

116. *See id.*

Central to both of these arguments is the idea that bypass flow requirements are not mere land use regulations, but are actual water rights claimed by the federal government in abrogation of state law.¹¹⁷ That is, the Forest Service's claim to bypass flow authority is really no more than a disguised attempt to gain state water rights without complying with the procedural requirements established in *New Mexico* and *Eagle County*. As stated by the majority, "[r]egardless 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."¹¹⁸

D. *The Task Force Minority's Position*

The Task Force minority rejects the majority position for two primary reasons. First, it argues that the imposition of bypass flows represents a valid land use regulation,¹¹⁹ not an interference with the state water rights system. According to this "non-interference argument," the Forest Service, in making the renewal of special land use permits contingent upon a willingness to comply with bypass flow requirements, is merely acting pursuant to its general authority "to regulate their occupancy and use"¹²⁰ in the national forests. It is not acting pursuant to any specific statutory command. That is, the Forest Service is merely utilizing its general power of guardianship over the national forests to declare the conditions upon which others may acquire or maintain rights in these federally owned lands. This authority is analogous to that of a private property owner: by demanding that various protections be in place before granting or renewing a right-of-way over the public lands, the Forest Service is acting as would any land owner¹²¹ before granting an easement over

117. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at III-3.

118. *Id.*

119. See *id.* at IX-6.

120. Congress granted the Forest Service this general authority in the Organic Act of 1897, 16 U.S.C. § 551 (1994).

121. Although the Forest Service does not "own" the national forests per se, it does have exclusive management authority over these lands by grant of the United States under the original Organic Act of 1897, 16 U.S.C. §§ 473-551 (1994), the

private property. As stated by the Task Force minority: "Like any other property owner, the United States should be expected to allow uses of and access to its lands only on conditions that are consistent with its land management objectives."¹²²

Second, the minority argues, consistent with the statutory reading discussed in Part III.A, that even if a court were to reject the view that bypass flow requirements are a mere land use regulation, the Forest Service is nonetheless statutorily required by FLPMA¹²³ to impose such requirements.¹²⁴ According to this "preemption argument," FLPMA mandates that the agency include terms and conditions in right-of-way permits that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment."¹²⁵ As a result, the Forest Service must include protective conditions, such as bypass flow requirements, in any permit that it issues if unrestricted use of the right-of-way would otherwise threaten to reduce streamflows below the minimum level necessary to support stable aquatic and riparian habitat.¹²⁶ With regard to the FLPMA savings provision,¹²⁷ the minority argues that the Supreme Court has given similar provisions little force when confronted with a conflict between federal and state law.¹²⁸

Multiple-Use, Sustained Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994), and the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-1614 (1994). Therefore, under the law of agency, the Forest Service can act to protect the national forests consistent with the federal ownership interest, having received a grant from Congress that gives the agency exclusive management authority over these lands.

122. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-6.

123. The Task Force minority also claims statutory authority under NFMA (citing 16 U.S.C. § 1604(i) (1994): "permits . . . for the use and occupancy of National Forest System lands shall be consistent with the land management plans" prepared by the Forest Service) and the Organic Act (citing 16 U.S.C. § 551 (1994): the Secretary shall "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 forest thereon from destruction"). See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-2 to IX-3. For additional discussion of authority under NFMA, see *supra* Part III.A.

124. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-2; see also *supra* Part III.A (discussing 43 U.S.C. § 1765(a)(1994)).

125. FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-2 (citing 16 U.S.C. § 1765 (1994)).

126. See *id.*

127. See *supra* Part III.B (discussing savings clause).

128. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-3 n.66. At

Therefore, where strict adherence to state law would violate FLPMA's command to protect fish and wildlife habitat and other environmental values in the national forests, federal law must prevail.¹²⁹

E. The Merits of the Minority Position

This section analyzes the legal merits of each of the Task Force minority's contentions and juxtaposes them against the majority arguments. It focuses on the savings language included in FLPMA and the Supreme Court's interpretation of similar savings provisions contained in other federal statutes impinging upon federal and state relations in the area of water law. This focus is important because both the Task Force majority and minority neglect to include any meaningful discussion of the Supreme Court's savings clause jurisprudence.¹³⁰ Based on this analysis, this section concludes that the minority has the stronger of the two positions in light of the fact that the Supreme Court has, by and large, accorded similar savings provisions little deference. Even in the sole decision in which the Court gave such language some weight,¹³¹ it still held that federal law preempts state law where state law would otherwise prevent the attainment of specific congressional directives.

1. The Non-Interference Argument

This subsection analyzes the merits of the argument that the Forest Service, like any landowner, should be able to impose protective conditions in any right of way permits that it grants and that such conditions do not interfere with vested water rights

the same time, the reader should note that the minority's discussion of the Supreme Court's savings clause jurisprudence is highly conclusory. *See id.* It only refers to these cases through a single string cite in a footnote. *See id.* The Task Force majority analysis of these decisions is similarly lacking. *See supra* note 107. In light of the importance of these decisions to the interpretation of the FLPMA and NFMA savings clauses, a central purpose of this comment is to provide a comprehensive analysis of this jurisprudence. *See infra* Part III.E.2.

129. *See* FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-6 n.66.

130. *See supra* notes 107, 128.

131. *See* *California v. United States*, 438 U.S. 645 (1978).

in the way the majority claims. The subsection argues that, to the extent the Forest Service as guardian of the national forests is even subject to FLPMA's savings language, this language does not prevent the agency from exercising its general land management authority.

a. The Forest Service as Land Manager

The starting point for the non-interference argument is to concede that the states generally have exclusive authority over the administration of water rights, but to recognize further that this authority is independent of the right-of-way granted by the owner of the property over which the water is to be diverted. Under this view, an appropriative right granted by the state is of relatively little value until paired with a right-of-way. This view finds early support in the decision of *Snyder v. Colorado Gold Dredging Co.*,¹³² which held:

The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner or a lawful exercise of the power of eminent domain; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch.¹³³

According to this view, the state of Colorado, when granting a water right, only grants a right to the use of the water; it does not grant a right-of-way providing guaranteed access to that water. The Supreme Court itself adopted this view in *Utah Power & Light Co. v. United States*,¹³⁴ noting that questions of access over public lands do not present "a controversy over water-rights but over rights of way through lands of the United States, which is a different matter."¹³⁵ It follows that a private land owner can deny all use of an appropriative water right, at least in those

132. 181 F. 62 (8th Cir. 1910).

133. *Id.* at 69.

134. 243 U.S. 389 (1917).

135. *Id.* at 411.

jurisdictions that do not recognize a private right of condemnation,¹³⁶ by legally withdrawing the appropriator's right of access.¹³⁷

Given that Congress has at least the same rights over the public lands as a private property owner has over his or her lands,¹³⁸ the federal government should similarly be entitled to deny a right-of-way over the public lands.¹³⁹ As stated in a predecessor case to *Utah Power & Light Co.*, "[t]he United States can prohibit absolutely or fix the terms by which the [public lands] may be used. As it can withhold or reserve the land, it can do so indefinitely."¹⁴⁰ In fact, the federal government is not even subject to the private right of condemnation recognized in some states by virtue of its sovereign immunity.¹⁴¹ Therefore,

136. Colorado is one state that does recognize a private right of condemnation for diversion ditches. See COLO. CONST. art. XVI, § 7. However, this right may not be invoked against the federal government by virtue of the doctrine of sovereign immunity. See *Utah Power & Light Co.*, 243 U.S. at 404-05.

137. The term "legally" is used in recognition of the fact that many easements are perpetual and some licenses may raise estoppel issues. However, the general rule is that an owner might legally withdraw a right of access where it granted a license, revocable at any time according to its terms, rather than a perpetual easement. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 800 (3d ed. 1993). In this regard, it is significant that federal permits indicate by their terms that they are not perpetual. See Rice, *supra* note 32, at 728.

138. See *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) ("Congress exercises the powers both of a proprietor and of a legislature over the public domain."); see also *United States v. San Francisco*, 310 U.S. 16, 29 (1940) (the power entrusted to Congress by the Property Clause is "without limitations").

139. The reader should note, however, that 43 U.S.C. § 1761(c) (1994) requires the Secretary of Agriculture, subject to various limitations, to issue a permanent easement to owners of water systems used solely for irrigation or livestock watering purposes. Therefore, a different rule may apply where the water facility is used primarily for stockwatering or agricultural purposes as opposed to municipal water purposes. On the other hand, this provision is governed by the same requirement under 43 U.S.C. § 1765(a) (1994) that the agency include such protective terms and conditions in the permit as are necessary to protect environmental resources. Further, § 1761(c) requires the system owner to submit its application prior to December 31, 1996. See 43 U.S.C. § 1761(c) (1994).

140. *Utah Power & Light Co. v. United States*, 230 F. 328, 337 (8th Cir. 1915); see also *Sierra Club v. Andrus*, 487 F. Supp. 443, 448 (D.D.C. 1980), *aff'd sub nom. Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981) (holding that the Department of the Interior has broad discretion to determine what actions will best protect public lands, including denying rights-of-way which may constitute a threat to public land resources).

141. See *Utah Power & Light Co.*, 243 U.S. at 404-05.

Congress, acting through the Forest Service, theoretically can deny access to the national forests altogether, just as a private land holder can refuse to grant an easement over his property, at least in those states not recognizing a private right of condemnation. As one commentor stated, the authority to regulate access over the public lands "presumably includes the authority to deny applications for new permits or renewals for rights of access to the point of diversion of a water right. In the absence of express statutory authorization, the Forest Service is not required to grant a right-of-way across federal land to reach private land."¹⁴²

The logical extension of this argument is that the federal government, having the power to deny private use of the public lands altogether, can exercise the lesser power of placing conditions upon how private interests use these lands in the event the agency grants a right of entry. Significantly, the Colorado Supreme Court, which is well acquainted with the traditional state dominance over the appropriative water system,¹⁴³ has lent its apparent sanction to this view by recognizing 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.¹⁴⁴

On the other hand, some authority suggests that the federal government is under a duty to grant a right-of-way or to continue to allow ingress and egress over the federal lands once a right-of-way is granted initially. In *Montana Wilderness Ass'n v. United States Forest Service*,¹⁴⁵ for example, the Ninth Circuit held that the Forest Service cannot deny a right-of-way altogether to owners of private in-holdings within the national forests.

142. Charles B. White, *The Emerging Relationship Between Environmental Regulation and Colorado Water Law*, 53 U. COLO. L. REV. 597, 611-12 (1982).

143. See *Colorado v. Southwest Colo. Water Conservation Dist.*, 671 P.2d 1294, 1305-07 (Colo. 1983).

144. See *United States v. City of Denver*, 656 P.2d 1, 34 (Colo. 1982) (holding that "the federal government has complete control over access to federally held geothermal resources and can therefore fully regulate water appropriation").

145. 655 F.2d 951 (9th Cir. 1981) (holding that a provision of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 1323(a) (1994), gave in-holders within the national forests a regulatable right of access across the national forests).

However, this authority is still consistent with the position that the Forest Service is empowered to impose bypass flow requirements.

To begin with, although the court in *Montana Wilderness* held that the Forest Service is without authority to deny a right-of-way altogether to in-holdings within the national forests, the statute upon which the court relied expressly indicated that the Forest Service can include terms and conditions in any right-of-way permit that it grants.¹⁴⁶ Therefore, even if the Forest Service is required to grant a right-of-way to water facility operators, this grant is necessarily subject to whatever terms and conditions the agency deems necessary to protect the national forests. The clear implication is that the Forest Service need not have absolute powers of exclusion in order to have bypass flow authority.

Moreover, it is doubtful that operators of water facilities within the national forests even qualify as "in-holders," given that they are not holders of a fee interest.¹⁴⁷ If such is the case, then *Montana Wilderness* does not even apply, and the Forest Service is under no obligation to grant a right-of-way. Under this view, the general rule would again apply that the Forest Service, having absolute powers of exclusion, can include protective conditions in any permits that it does decide to grant or renew.

Under either scenario, the same underlying principles apply: because an appropriative water right is legally distinct from the right-of-way that is necessary to the exercise of that right,¹⁴⁸ the Forest Service is not interfering with or expanding its jurisdiction over state law when it imposes bypass flow requirements. Rather, it is simply acting within its rights as a property holder

146. See *id.* at 953-54.

147. See White, *supra* note 142, at 612 (arguing that the reasoning of *Montana Wilderness* does not apply where the private user merely seeks to reach a point of diversion rather than a fee interest).

148. This conceptual separation of a right-of-way and a right to appropriate is often less than evident, because a state generally will not recognize an appropriative right unless the claimant can prove that he has a right of access that will enable him to make an actual physical diversion. See *supra* note 64 (discussing the general state appropriative scheme and the requirement that any appropriator make an actual physical diversion). At the same time, because a permit granted by the Forest Service is not perpetual, it is possible for a permittee to satisfy the requirement of an actual physical diversion in the first instance, only to later have the permit revoked and be left solely with an appropriative right.

by declaring the conditions upon which private interests can use its property.¹⁴⁹

b. The Interplay with the Savings Provision

Of course, the savings clause of FLPMA,¹⁵⁰ with its apparent deference to state law, adds an additional level of complexity to this argument. On the one hand, the savings provision is not necessarily implicated in the non-interference argument by virtue of the fact that the Forest Service can claim its general land management authority under other statutes that do not include such savings language, such as the 1897 Organic Act.¹⁵¹ On the other hand, courts should seek to reconcile the savings provision with any claim to bypass flow authority by virtue of the fact that such language arguably serves as the most reliable indicator of how much deference Congress believes the federal land management agencies should accord state water law.

By its terms, the savings provision requires that nothing in the statute shall: (1) affect state appropriative water law as applied to public lands; (2) expand or diminish state or federal jurisdiction over water resources development or control; or (3) deny valid existing rights.¹⁵² However, in light of the independence of an appropriative water right from a land use authorization, nothing in these terms prohibits conditioning use of a federal right-of-way upon the imposition of a bypass flow condition. Requiring such a condition amounts to little more than providing the terms upon which private users can utilize federal property. It does not directly diminish title to the appropriative right vested under state law. If the owner of the water right can find a way to divert the water outside national forest

149. The rights of the Forest Service to regulate the federal lands under its jurisdiction are at least as great as those of a private land owner over its fee interest. *See City of Denver v. Bergland*, 695 F.2d 465, 483 (10th Cir. 1982) (holding that because a claim "would be unavailing against even a private party, it manifestly must fail against the USFS and the Interior").

150. *See supra* Part III.B.

151. *See supra* note 121 and accompanying text.

152. *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(g)-(h), 90 Stat. 2743 (included in the Historical and Statutory Notes of 43 U.S.C. § 1701 (1994)).

boundaries¹⁵³ or to divert the water on forest lands without jeopardizing minimum streamflows,¹⁵⁴ he is entitled to his full appropriation. Therefore, in conformance with subsection (h) of FLPMA's savings clause, the Forest Service does not *per se* diminish "valid existing rights" by requiring bypass flows.

Further, because state law recognizes the right of the federal government to control appropriation indirectly through its stewardship over rights of ways on public lands,¹⁵⁵ bypass flow conditions do not affect state law or expand or diminish federal or state jurisdiction, as required under subsection (h). Rather, they simply maintain the status quo, which consists of a dual-tiered system in which the states grant appropriative rights and landowners, including the federal government, grant rights-of-way.

Along these lines, one commentator has noted that the "language of the [savings] clause shows more concern with protecting federal power than state power."¹⁵⁶ In this regard, it is significant that the savings provision commences with the statement that "[n]othing in this Act shall be construed as limiting or restricting the power and authority of the United States."¹⁵⁷ Such language, placed as it is at the beginning of a savings provision dealing with state water law, is significant; it suggests congressional recognition of the fact that the federal government does have a certain level of control over state appropriative systems through its ability to dictate the terms on which private users will exercise their federal rights-of-way.

On the other hand, the majority challenges the above reasoning as a sham argument which obscures the fact that what the Forest Service is really doing is seizing private water rights

153. Of course, such alternate means of diversion are typically no more than a theoretical possibility. However, this does not change the fact that the right-of-way and right to divert are two legally distinct rights, but rather suggests that a bypass flow requirement may subject the agency to a takings claim if it goes "too far" in diminishing the value of the regulated water facility. *See supra* note 107.

154. *See* discussion of the Joint Operations Plan, *supra* notes 38-41 and accompanying text.

155. *See* *United States v. City of Denver*, 656 P.2d 1, 34 (Colo. 1982).

156. Shurts, *supra* note 90, at 135.

157. Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 701(g)-(h), 90 Stat. 2743 (included in the Historical and Statutory Notes of 43 U.S.C. § 1701 (1994)).

for its own purposes: “[T]he 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.”¹⁵⁸

However, this view overlooks the fact that rights of use and access are two separate things. Without a right of access over national forest land, a right to divert water is essentially worthless. Indeed, the majority, in criticizing the minority’s position, points to a prime deficiency in its own argument when it notes that “[h]aving title to a water right is meaningless if the owner is not allowed to exercise the right in accordance with its terms.”¹⁵⁹ It is as if the majority assumes that the falsity of the minority’s position is self-evident without offering any support for this contention.

Moreover, the majority argument ignores an equally compelling common sense argument that supports the minority position: namely, that property owners should be able to dictate the terms on which others can use their property.¹⁶⁰ In fact, by asserting that the Forest Service, as manager of the national forests, is without authority to condition the grant of a right-of-way upon protective conditions, the majority paradoxically undermines the foundations of its own position. After all, implicit in its attack on permit conditions is the idea that private property owners should not be able to include protective conditions deemed necessary to prevent harm to the dominant estate when they grant a license or easement—a position which directly counters the traditional property rights principles upon which the majority so heavily relies.

Further, the Task Force majority overlooks the fact that the federal government provides a substantial subsidy when it grants a right-of-way that the water facility owner would otherwise have to condemn or purchase if left to the private market, a subsidy for which the Forest Service arguably should demand something in

158. FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at III-3.

159. *Id.*

160. See CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN 241-42 (1992) (“Water developers have the right to use public water without charge. This is nearly unique in public resource law and policy.”).

return. Thus, although the majority argument does have some equities on its side, its attempt to challenge bypass flow authority on common sense grounds ultimately proves unconvincing by virtue of the countervailing equities supporting the Forest Service position.

Of course, if courts accept the minority's non-interference argument, there still remains the question of what is the purpose of the savings provision if it does not prevent the federal government from impeding access to water rights vested under state law. There are several possible interpretations.

First, the provision can be viewed as a statement that Congress did not intend FLPMA to replace the state appropriation system on public lands with a wholly federal system.¹⁶¹ Given the general historic concern that the federal government might seek to assume control over western water distribution,¹⁶² such a construction of the savings clause may well be what Congress had in mind. If such is the case, then the non-interference argument is fully consistent with congressional objectives. The Forest Service's exercise of bypass flow authority does not dismantle the state system, but operates independently of it by governing rights-of-way rather than appropriative rights.

A second interpretation is that the savings clause operates solely for the purpose of leaving to the states the definition of what property interests, if any, require compensation as a regulatory taking—a view adopted in *City of Fresno v. California*.¹⁶³ According to this view, the sole purpose of the savings clause is to ensure that the federal government does not redefine state water rights as unprotected property interests that are not subject to Fifth Amendment takings claims. Like the first interpretation, this reading is consistent with the Task Force

161. See, e.g., *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 291 (1958) (holding that the purpose of a savings provision similar to that contained in FLPMA is to require "the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein" and thereby suggesting that the clause's purpose is to preserve a state role, albeit a limited one, in water distribution).

162. See, e.g., WILKINSON, *supra* note 160, at 244-47 (discussing the struggle between proponents of state and federal authority at the time of passage of the Reclamation Act of 1902 as to who would control distribution of western water).

163. 372 U.S. 627, 630 (1963).

minority's position. Nowhere in the Report does the minority argue that parties subject to bypass flows are not eligible for compensation if they can demonstrate that any permit condition goes "too far" in diminishing the value of their water right under traditional takings analysis.¹⁶⁴

A third view, expressly adopted by the Ninth Circuit in *Sierra Club v. Watt*,¹⁶⁵ is that Congress included FLPMA's savings provision "to mean that no federal water rights were reserved when Congress passed [the Act]."¹⁶⁶ Again, this view is easily reconciled with the position that Congress intended to authorize the imposition of bypass flow conditions in FLPMA. After all, such conditions would not be necessary if the same purposes were achieved through the reservation of federal water rights with the passage of the act.

A fourth and final view, provided by the legislative history of FLPMA, is that, to the extent Congress even considered the savings clause, it was for the limited purpose of insuring that all existing reserved federal water rights were to remain intact.¹⁶⁷ The only relevant legislative comment on the clause is from a Senate Report that indicates Congress inserted the clause solely to indicate that it did not intend to repeal the federal common law pertaining to water rights (i.e., the law of reserved water rights) by enacting FLPMA.¹⁶⁸ Other than this, it appears that Congress hardly considered the clause at all, much less for the purpose of preserving state water law. One commentator notes: "[T]he congressional debates on FLPMA never discussed this savings clause; the congressional debates or the committee reports never mentioned the importance of preserving state water law. . . . The history of this savings clause seems to indicate that it was hardly intended to speak to the federal-state relationship at all."¹⁶⁹ In this view, the provision was merely

164. See *supra* note 107 (discussing the interplay between takings claims and bypass flow requirements).

165. 659 F.2d 203 (9th Cir. 1981).

166. *Id.* at 206.

167. See Shurts, *supra* note 90, at 140.

168. See *id.*

169. *Id.*

a neutral recognition of the status quo in federal-state control over water. It is not a specific statement of congressional deference to state water law that would destroy an interpretation of FLPMA's management functions to support water claims outside state law. In truth, section 701(g) found its way into FLPMA with little congressional thought.¹⁷⁰

Thus, the legislative history of the clause fails to support the Task Force majority's view that Congress intended the savings provision to prevent the assertion of bypass flow authority. Rather, to the extent that Congress considered the clause at all, it was for the limited purpose of preserving federal water rights on the public lands.

Which of these interpretations applies to FLPMA's savings clause need not be fully resolved in the context of the present inquiry. After all, under each interpretation, the Forest Service leaves the existing state adjudicatory system intact while adhering to its mandate under FLPMA to protect the lands under its supervision by placing conditions on the exercise of rights-of-way in the national forests.

2. The Preemption Argument

The second argument in favor of bypass flow authority is that, even if bypass flow requirements interfere with state adjudicated water rights, such interference is statutorily authorized. The view here is that the savings provision is not as broad as some, such as the Task Force majority, would purport it to be. Rather, Congress included the savings clause in FLPMA for one of the four limited purposes discussed in the previous section. Accordingly, the savings language does not purport to forbid all federal incursion onto state authority, but rather seeks to preserve the status quo: the existing balance of power between state and federal law, in which federal authority can preempt state law where there is a direct conflict between the two.¹⁷¹

Consistent with this view, the Supreme Court, though it has never addressed FLPMA's savings provision, historically has

170. *Id.* at 134.

171. *See Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

narrowly interpreted similar provisions.¹⁷² Until recently,¹⁷³ the Supreme Court's jurisprudence suggested that courts, by and large, are to accord savings provisions demanding deference to state water law little significance.

a. The Early Holdings: Ivanhoe and Fresno

In *Ivanhoe Irrigation District v. McCracken*,¹⁷⁴ the Supreme Court gave a very narrow interpretation to a savings provision in the 1902 Reclamation Act,¹⁷⁵ which is similar to the FLPMA savings clause. The provision provides:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or the Federal Government or of any landowner, appropriator, or user of water, in, to, or from any interstate stream or the waters thereof; Provided, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure and the limit of the right.¹⁷⁶

Notwithstanding this highly deferential language (“[N]othing in this Act shall . . .”), the Court found that other elements of the act did, in fact, affect state law governing “control, appropriation, use or distribution” of water.¹⁷⁷ Specifically, the Court found that a provision in the statute prohibiting the sale of project water to

172. See, e.g., *California v. FERC*, 495 U.S. 490 (1990); *City of Fresno v. California*, 372 U.S. 627 (1963); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n.*, 328 U.S. 152 (1946).

173. See *California v. United States*, 438 U.S. 645 (1978).

174. 357 U.S. 275 (1958).

175. 43 U.S.C. §§ 371, 383 (1994) (originally enacted as section 8 of the Reclamation Act, 32 Stat. 388, 390 (1902)).

176. Reclamation Act of 1902, § 8, 32 Stat. 388, 390 (current version at 43 U.S.C. §§ 371, 383 (1994)).

177. See *Ivanhoe*, 357 U.S. at 291-92.

any single landowner for use on any parcel exceeding 160 acres preempted state law, which flatly rejected the 160-acre limitation.¹⁷⁸

Further, the *Ivanhoe* Court found that the Reclamation Act preempted state law not only as to the specific 160-acre distribution limit, but as to the state distribution scheme as a whole.¹⁷⁹ Giving the deferential language of the savings clause a narrow reading, the Court found that "nothing in [section] 8 compels the United States to deliver water on conditions imposed by the state."¹⁸⁰ This reading completely exempted the federal government from compliance with the state distribution scheme, even though the Court could have subjected the federal government to state law without jeopardizing specific congressional directives appearing on the face of the statute. Thus, although the Court could have decided the case on more deferential grounds,¹⁸¹ it gave the savings clause a narrow reading in order to support the federal objective of dictating the general terms on which the federal reclamation was governed. According to the Court, Congress had "provided a system of regulation for federal projects" that should not "give way before an inconsistent state system."¹⁸²

Similarly, in *City of Fresno v. California*,¹⁸³ the Supreme Court held that congressional directives preferring irrigation over municipal use overrode contrary state provisions, notwithstanding the fact that the federal action was subject to the same deferential savings provision. Moreover, the Court went beyond the specific directives of the statute to authorize the exercise of two additional powers that would further preempt state law, even though these powers did not expressly appear on

178. *See id.*

179. *See id.*

180. *Id.* at 292. According to the Court, the savings provision merely required "the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein." *Id.* at 291.

181. The Court could have held that federal law regarding distribution only extended so far as the 160-acre requirement, with the state retaining the remainder of control over distribution.

182. *Ivanhoe*, 357 U.S. at 291.

183. 372 U.S. 627 (1963).

the face of the statute. First, the Court held that section 8 of the Reclamation Act did not preclude the federal government from utilizing the power of eminent domain to override state statutes that prohibited the condemnation of the city's preferred water rights.¹⁸⁴ Second, the Court held that the federal government could export water from the watershed without regard to county and state watershed of origin statutes.¹⁸⁵ Again, the Court narrowly construed the savings provision to displace state law in order to give the federal government general control over the implementation of a reclamation project. Although it could have limited its holding to allow preemption only as to the specific congressional directive to favor irrigation over municipal use, the Court further allowed the Bureau of Reclamation to exercise additional preemptive powers that the statute did not expressly authorize.

b. *The Break with Precedent: California v. United States*

The Supreme Court's apparent willingness to limit the reach of savings provisions in the face of competing federal objectives changed somewhat in the 1978 case of *California v. United States*.¹⁸⁶ The case involved a suit by the United States for a declaration of its authority to impound unappropriated water, without complying with state law, to support a federal reclamation project.¹⁸⁷

Breaking with its earlier holdings in *Ivanhoe* and *Fresno*, the Court construed the Reclamation Act's savings provision in broader terms than it had previously. In rejecting the federal position that state law should be preempted, the Court held that "a State may impose any condition on 'control, appropriation, use or distribution of water' in a federal reclamation project that is not inconsistent with clear congressional directives respecting the project."¹⁸⁸ Although the Court did not expressly overrule the

184. *See id.* at 629-30.

185. *See id.*

186. 438 U.S. 645 (1978).

187. *See id.*

188. *Id.* at 672; *see also id.* at 674 (disavowing the "dicta" in *Fresno* and *Ivanhoe*)

prior cases, it did reject as dicta the narrower interpretations that they had given the savings clause, which allowed federal policy to control even where not supported by clear congressional objectives appearing on the face of the statute.¹⁸⁹

Specifically, the Court reaffirmed its holding in *Ivanhoe* that the 160-acre limitation contained in section 5 of the Reclamation Act overrides state distribution law, but rejected the contention that federal law preempted state distribution law altogether.¹⁹⁰ Similarly, the Court reaffirmed its holding in *Fresno* that explicit congressional directives preferring irrigation over municipal use override contrary state law, but rejected the view that the state cannot subject the federal government to procedures governing appropriation.¹⁹¹ Hence, the Court in *California v. United States* gave broader effect to the savings language of the Reclamation Act than it had previously, allowing federal law to preempt state water law only where the state law is inconsistent with a clear congressional directive appearing on the face of the statute.

Although it is possible to read *California v. United States* as a clear pronouncement that courts should give broad effect to section 8 of the Reclamation Act and similar savings provisions in order to protect state dominance over water allocation, a closer look at the decision reveals that it actually is not all that sharp of a departure from the Court's previous jurisprudence.¹⁹² Admittedly, the decision does require that the federal government accord state water law a certain degree of deference; however, this deference only extends so far. In fact, the Court in *California v. United States* recognized that, in spite of the demand for deference in section 8, federal law is to control where there is a clear conflict between federal and state law. The rule that the court adopted is that state law governs where it is "not inconsistent" with federal law.¹⁹³ Or, phrased conversely, federal

to the extent that it would prevent the state "from imposing conditions on the permit granted to the United States which are *not inconsistent* with congressional provisions authorizing the project in question" (emphasis added)).

189. See *id.* at 671.

190. See *id.*

191. See *id.* at 674.

192. See Shurts, *supra* note 90, at 143.

193. See *California*, 438 U.S. at 674.

law governs where it conflicts with state directives. As characterized by one observer, “[w]hat emerges from [*Ivanhoe, Fresno and California v. United States*] is that even savings clauses that specifically defer to state water law, like section 8 of the Reclamation Act, cannot limit other congressional directives that would be inconsistent with the application of state law.”¹⁹⁴

In other words, even the Court in *California v. United States*, which gave a rather broad reading to the savings language of the Reclamation Act,¹⁹⁵ conceded that this language is not as deferential as it might appear. It recognized that the power retained by the federal government to preempt state law in areas within the ambit of Congress’s enumerated powers under the Constitution supplies the context in which courts must construe the language “[n]othing in this Act is intended to affect state law.” From this standpoint, assertion of bypass flow authority by the Forest Service does no more than continue the existing state of affairs: a system in which state law governs the appropriation system, but can be preempted when in direct conflict with federal law. As explained by one commentor, “the clause is a neutral recognition of the status quo in federal-state control of water. It is not a specific statement of congressional deference to state water law that would destroy an interpretation of FLPMA’s management function to support water claims outside of state law.”¹⁹⁶ Although the clause indicates that deference to state law is often appropriate, the federal government retains its authority to

194. Shurts, *supra* note 90, at 143.

195. It is worthwhile to emphasize that *California v. United States* is a genuine exception to the general construction given to such savings clauses. Indeed, the majority of cases, when confronted with similar language, generally follow the trend of *Ivanhoe* and *Fresno* in reading such savings provisions very narrowly. See, e.g., *California v. FERC*, 495 U.S. 490 (1990) (holding that because Congress intended FERC to assume a broad role in the licensing of hydropower facilities, less stringent federal licensing standards are to control in the face of competing state licensing standards); *First Iowa Hydro-Elec. Coop. v. Federal Power Comm’n*, 328 U.S. 152 (1946) (denying additional meaning to “other uses” in savings clause limiting federal incursions into state law governing irrigation, municipal or “other uses” of water); *National Wildlife Fed’n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982) (holding that Congress did not intend a savings provision to take precedence over legitimate and necessary federal water quality considerations).

196. Shurts, *supra* note 90, at 134.

preempt state law as necessary to implement the dictates of FLPMA:

The savings clause is not a specific congressional expression of federal deference to state water law. While the savings clause implicitly recognizes the strong presumption of deference to state water law, the clause does not show that this presumption cannot be rebutted by necessary implication to serve management functions which would be impossible otherwise.¹⁹⁷

In terms of the bypass flow controversy, the *California v. United States* Court's "broad" reading of the Reclamation Act's savings provision as applied to the FLPMA savings provision does not preclude the Forest Service from claiming bypass flow authority. After all, Congress expressly commanded in the statute that all right-of-way permits include terms and conditions that will minimize damage to fish and wildlife habitat.¹⁹⁸ Consequently, where adherence to the state priority system would dry up streams beyond levels necessary to protect environmental resources within the national forests, state law is flatly inconsistent with federal resource objectives, particularly considering that Congress intended fish and wildlife habitat protection as a major purpose of FLPMA.¹⁹⁹ Hence, even under the supposedly deferential approach taken by the Court in *California v. United States*, FLPMA appears to grant the Forest Service ample authority to preempt state law. If strict adherence to the state priority system would otherwise fail to protect environmental resources dependent upon certain minimum streamflow levels, the agency can impose bypass flow requirements notwithstanding contrary state law.

c. *The Most Recent Salvo: California v. FERC*

Aside from these limitations to the Supreme Court's holding in *California v. United States*, the case arguably does not even establish the proper standard against which the savings clause in

197. *Id.* at 140.

198. See *supra* Part III.A and accompanying text.

199. See Shurts, *supra* note 90, at 123-32.

FLPMA should be measured. Rather, the more recent opinion of *California v. FERC* (“*Rock Creek*”),²⁰⁰ which gave a savings clause in the Federal Power Act (“FPA”)²⁰¹ a much narrower construction than that given the savings provision in *California v. United States*, may be a better indicator of how the current Supreme Court would likely construe FLPMA’s savings provision.²⁰²

i. The *Rock Creek* Holding

The central issue in *Rock Creek* was whether an applicant for a hydropower license need only comply with minimum streamflow requirements set by the Federal Energy Regulatory Commission (“FERC”), or if the applicant must also comply with higher state requirements set as a condition for the grant of a state water permit.²⁰³ What made *Rock Creek* difficult was the fact that the FPA included a savings clause similar to that at issue in *California*, which facially seemed to demand deference to state law.

Section 9(b) of the FPA provided that license applicants must supply FERC “satisfactory evidence” of compliance with state law governing “the appropriation, diversion, and use of water for power purposes.”²⁰⁴ Similarly, section 27, which was the focus of the opinion in *Rock Creek*, provided that nothing in the act should be construed as affecting state laws “relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.”²⁰⁵ Additionally, the legislative history of the act indicated that “Congress consciously sought to preserve state

200. 495 U.S. 490 (1990).

201. 16 U.S.C. §§ 791a-825u (1994 & Supp. II 1996).

202. See *Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508, 513 (10th Cir. 1985) (giving a narrow construction to similar savings provision in section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g) (1994)).

203. See *Rock Creek*, 495 U.S. at 490.

204. 16 U.S.C. § 802(a)(2) (1994).

205. *Id.* § 821.

water laws,"²⁰⁶ thereby strengthening the case for deference to state law.

However, previous interpretations of the FPA did not require compliance with state law, notwithstanding the savings provision. For instance, in the leading case of *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,²⁰⁷ the Supreme Court in 1946 held that the savings provision did not require the Federal Power Commission²⁰⁸ to deny a federal hydropower application for failure to comply with the state dam licensing statute. As the Court explained, such a requirement "would give the state a veto over the federal licensing scheme, contrary to congressional intent."²⁰⁹

In spite of the Court's historic tendency to give little effect to the FPA's savings provision, many observers expected the Court, in light of its decision in *California v. United States*, to overturn *First Iowa* in *Rock Creek*.²¹⁰ In fact, many believed that *California v. United States* had implicitly overruled, or at least limited, *First Iowa*.²¹¹ However, these predictions proved to be incorrect. Far from deferring to state law, the Supreme Court reaffirmed *First Iowa's* holding that the state cannot set minimum flows greater than those demanded by FERC.²¹² Although the Court recognized that its decision in *California v. United States*, with its broad interpretation of the savings provision, is "in some tension with that set forth in *First Iowa*,"²¹³ it nonetheless retreated to its previous narrow interpretation of the FPA. What had been an opportunity to make a strong

206. Michael C. Blumm, *Federalism, Hydroelectric Licensing and the Future of Minimum Streamflows After California v. Federal Energy Regulatory Commission*, 21 ENVTL. L. 113, 117 (1991).

207. 328 U.S. 152 (1946); see also *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958) (federal hydropower license could be issued despite licensee's failure to obtain permission to condemn state-owned lands); *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 449-50 (1955) (federal hydropower license could be issued despite noncompliance with permit requirements from the state fish commission).

208. The FPC was the predecessor of FERC.

209. Blumm, *supra* note 206, at 119.

210. See Rebecca L. Hill, Note, *California v. F.E.R.C.: Federal Preemption of State Water Laws*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 261, 271 (1992).

211. See *id.*; Blumm, *supra* note 206, at 121.

212. See *Rock Creek*, 495 U.S. at 506-07.

213. *Id.* at 504.

pronouncement in favor of state authority over water law instead proved to be a return to the preemptive attitude that had been dominant until the decision in *California v. United States*.

Although some have interpreted *Rock Creek* as largely based on *stare decisis* principles,²¹⁴ the case was actually decided on more substantive grounds. Admittedly, the Court did indicate that the decision in *Rock Creek* was influenced by its previous decision in *First Iowa*: “[T]his Court must accord [deference] to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes.”²¹⁵ And the Court stated that the case “could be said to present a close question” were it a case of first impression.²¹⁶ However, the language of the case suggests it would have been a close question that nonetheless would have been decided in favor of federal authority. That is, the Court provided many indications that suggest that it likely would have decided the opinion on the same grounds, even without the demand for deference placed upon it as a result of its decision in *First Iowa*.²¹⁷

To begin with, the Court in *Rock Creek* indicated that its previous reading of the statute gave it “a quite natural reading.”²¹⁸ In spite of the seemingly deferential language of section 27, the Court considered its reading of the provision to be fully consistent with the intent of the statute. The implication is that the Court prefers to construe such provisions narrowly in order to prevent undue interference with federal directives announced elsewhere by Congress.

In this vein, the Court compared the language of section 8 of the Reclamation Act (the savings provision at issue in *California v. United States*) with section 27 of the FPA. The Court found that section 8 “contains an explicit direction ‘that the Secretary of the Interior, in carrying out the provisions of this Act, shall

214. See Hill, *supra* note 210, at 278.

215. *Rock Creek*, 495 U.S. at 499.

216. *Id.* at 497 (emphasis added).

217. At the outset, the reader should note that the Court distinguished a state’s authority over proprietary rights from FERC’s authority over minimum streamflows. See *id.* at 498. This distinction is important because it supports the Task Force minority’s first point that an agency can regulate streamflow levels without unduly impinging upon state control over water allocation.

218. *Id.* at 505.

proceed in conformity with such [state] laws.' This language has no counterpart in § 27 of the FPA"²¹⁹ Accordingly, because section 27 does not directly command conformance with state law, but instead merely mandates that the FPA not alter or interfere with state law, the Court found it perfectly natural to read the statute as not requiring federal authority to adhere to state requirements.

The Court also indicated that Congress's acquiescence to the decision in *First Iowa* for over forty years suggests that Congress believed the Court had interpreted the Act correctly.²²⁰ That is, the Court noted that although "Congress remains free to alter what we have done," it has failed to act, thereby implying that the Court's decision in *First Iowa* was in accordance with Congress's intentions.²²¹

Moreover, the Court was well aware of its decision in *California v. United States*, which had limited a long line of previous cases construing a similar savings provision. Squarely confronted with this recent precedent for breaking with judicial authority in a similar context, the Court was presumably in a good position to defer to state law if it believed deference was appropriate.

Finally, and of even greater importance, the Court found that state authority to establish greater minimum streamflows would interfere with congressional directives under the FPA:

Allowing California to impose significantly higher minimum stream flow requirements would disturb and conflict with the balance embodied in that considered federal agency determination. FERC has indicated that the California requirements interfere with its comprehensive planning authority, and we agree that allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would "constitute a veto of the project that was approved and licensed by FERC."²²²

219. *Id.* at 504 (citation omitted).

220. *See id.* at 499.

221. *Id.* (quoting *Patterson v. McLean*, 491 U.S. 164, 172-73 (1989)).

222. *Id.* at 506-07 (quoting *California v. FERC*, 877 F.2d 743, 749 (9th Cir. 1989)).

The Court's primary concern here was to ensure that congressional objectives not be jeopardized by subjecting hydropower license applicants to concurrent, and possibly inconsistent, federal and state jurisdiction. In order to avoid the possibility of giving states veto power over federal hydropower projects, the Court found it necessary to read section 27 narrowly.²²³

As support for this interpretation, the Court noted that "the FPA envisioned a considerably broader and more active federal oversight role in hydropower development than did the Reclamation Act."²²⁴ Accordingly, because the statute called for a much less deferential scheme than was established by the Reclamation Act, FERC should not be required to conform to state law requirements where adherence would otherwise jeopardize the agency's comprehensive planning authority. Combining all of these factors, it appears that although the *stare decisis* component of *Rock Creek* made the case easier to decide, the Court viewed its decision as "correct" on its own merits.

ii. Comparing *Rock Creek* and *California v. United States*

On one level, the analysis in *Rock Creek* is similar to that in *California v. United States*. Both cases held that state authority must yield where it is not consistent with federal law.²²⁵ However, the *Rock Creek* Court seems to grant more latitude in

223. Interestingly, the congressional directives that the Court found substantial enough to support preemption did not expressly appear on the face of the statute. Rather, FERC's authority to establish minimum stream flows is implied from its general power to include terms and conditions in a FPA. See 16 U.S.C. § 803(a) (1994).

224. 495 U.S. at 504.

225. Compare *California v. United States*, 438 U.S. 645, 672 (1978) ("[A] State may impose any condition on 'control, appropriation, use or distribution of water' in a federal reclamation project that is *not inconsistent* with clear congressional directives respecting the project." (citation omitted) (emphasis added)), with *Rock Creek*, 495 U.S. at 506 ("A state measure is preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." (citation omitted)).

determining whether a state statute actually conflicts with federal law. Instead of allowing preemption only where it is literally impossible to comply with both state and federal law, the Court allowed preemption where state law merely impedes congressional objectives. As stated by the Court, state authority is "preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."²²⁶

The Court's actual holding reaffirms this more lenient standard. For instance, the Court indicated that it was enough if state law merely "conflicts with" or "disturbs" federal authority, stopping short of saying that the application of state law must preclude the achievement of federal objectives before it will be preempted: "Allowing California to impose significantly higher minimum streamflow requirements would *disturb* and *conflict* with the balance embodied in that considered federal determination."²²⁷ Similarly, the Court cited FERC's concern that state law would interfere with its comprehensive planning authority as an important justification for its decision.²²⁸ Arguably, there is a significant difference between requiring proof that state authority would interfere with a federal agency's planning authority and requiring proof that compliance with state authority would make compliance with federal law impossible.

In this regard, it is important to note that nowhere in the FPA does Congress expressly require FERC to establish minimum flow rates for the regulated portion of the stream. The statute merely speaks of "comprehensive planning authority" and the power to include "terms and conditions" in licenses granted by the agency.²²⁹ Furthermore, the statute does not mandate that the agency prioritize any single resource value above competing interests. It merely requires the agency to balance a variety of

226. *Rock Creek*, 495 U.S. at 506 (quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984)) (emphasis added).

227. *Id.* (emphasis added).

228. *See id.* *See generally*, Charles R. Sensiba, Comment, *Who's in Charge Here? The Shrinking Role of the Federal Energy Regulatory Commission in Hydropower Relicensing*, 70 U. COLO. L. REV. 603 (1999).

229. 16 U.S.C. § 803(a) (1994).

interests—both on the development and environmental side—rather than serve a specific objective, such as environmental protection.²³⁰ FERC's task is to balance a matrix of considerations in determining which requirements, "in the judgment of the Commission," will best serve the agency's comprehensive planning goals²³¹—a relatively flexible standard that seemingly would offer some leeway for deferring to state law. Thus, the Court in *Rock Creek* seems to have relaxed the requirement in *California v. United States* that state law can be preempted only by a clear congressional directive appearing on the face of the statute: state interference with federal policy and planning objectives is enough to justify preemption.

iii. The Overlay with FLPMA

As discussed above, two of the *Rock Creek* Court's primary justifications for rejecting *California's* greater deference to state law were that the FPA envisions a more active federal role than does the Reclamation Act, and the language of section 27 does not expressly command conformance with state law.²³² Both of these justifications bode well for the Forest Service. Indeed, many parallels between the FPA, the statute at issue in *Rock Creek*, and FLPMA, the statute at issue in the bypass flow controversy, suggest that the analysis of *Rock Creek*, rather than that of *California v. United States*, should govern resolution of the Forest Service's claim to bypass flow authority.

To begin with, Congress intended FLPMA to give the federal land management agencies comprehensive planning authority

230. *See id.*

231. *Id.* § 803(a)(1). The statute specifically requires that the agency determine in its discretion which requirements

will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation and enhancement of fish and wildlife, and for other beneficial public uses, including irrigation, flood control, water supply and recreational and other purposes.

Id.

232. *See supra* Part III.E.2.c.i.

over the public lands,²³³ just as Congress intended the FPA to give FERC comprehensive planning authority over hydropower development. Neither statute gives the states a significant role. Moreover, the savings provision in FLPMA is much closer to the language of the FPA savings provision than the savings provision at issue in *California v. United States*.²³⁴ Section 8 of the Reclamation Act expressly commands the Bureau of Reclamation to proceed in conformity with state law, a factor that the *Rock Creek* Court termed "crucial" to the *California v. United States* Court's decision.²³⁵ By contrast, the FLPMA and FPA savings provisions merely require that state law not be affected by any grant of power within the statute. These similarities again suggest that courts should analyze FLPMA according to the *Rock Creek*, rather than the *California v. United States*, analysis.

Finally, aside from these similarities, one important distinction between the FPA and FLPMA further strengthens the Forest Service's position. FLPMA expressly commands the Forest Service to protect fish and wildlife habitat and other environmental resources in the national forests, whereas the FPA leaves it to FERC to determine which resources it will protect.²³⁶ Section 1765 of FLPMA provides a comprehensive list of the various resources that the Forest Service and the BLM are to protect when issuing right-of-way permits, and the clear focus of the list is environmental protection.²³⁷ By contrast, the FPA does not command strict adherence to any single resource value. Rather, the statute merely requires that FERC implement all hydropower projects to be

233. See *supra* Part III.A.

234. See *supra* Part III.E.2.a-b.

235. See *Rock Creek*, 495 U.S. at 504.

236. See 43 U.S.C. § 1765(a)(ii) (1994).

237. See *supra* note 87 for the full text of 43 U.S.C. § 1765 (1994). Presumably, the majority could use the provision's reference to "lives and property" to support its argument that the statute does not authorize any impingement upon private property rights. However, the context of the "lives and property" reference, situated as it is among an exhaustive list of environmental considerations, suggests that Congress intended the provision to protect property from environmental harm, rather than to support a traditional property rights argument.

in the judgment of the Commission . . . best adapted to a comprehensive plan for improving or developing a waterway or waterways for the benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation and enhancement of fish and wildlife, and for other beneficial public uses, including irrigation, flood control, water supply and recreational and other purposes²³⁸

If this balancing language is adequate grounds for preempting state law, then the express statutory command under FLPMA to protect a comprehensive list of environmental resources should be more than sufficient.

The conclusion to be drawn from all of this is that the decision in *Rock Creek*, with its narrow reading of section 27, indicates that the Court is not likely to allow state law to interfere with the congressional directives of FLPMA, even in areas such as water law that the courts have traditionally left to state jurisdiction. This conclusion holds true even where the claimed federal authority is not based on a clear directive appearing on the face of the statute, such as the 160-acre limitation in the Reclamation Act, but rather involves less clearly defined planning authority. Therefore, because authority to establish minimum streamflows is of central importance to the Forest Service's management and planning authority, both under FLPMA and NFMA, the states should not be able to interfere with this planning authority by claiming exemption from federal preemption.

Even were the Court to determine that the broader construction of *California v. United States* is to govern the FLPMA savings provision, the Forest Service would still have ample authority for claiming bypass flow authority. After all, the primary distinction between *Rock Creek* and *California v. United States* is a disagreement not as to *if*, but rather as to *when*, state water law can be preempted. Under *Rock Creek*, the Forest Service can cite to general interference with its overall planning authority in imposing bypass flow requirements, whereas under *California v. United States* it would need to make a factual

238. 16 U.S.C. § 803(a) (1994).

demonstration that it cannot comply with both state and federal requirements. However, this distinction should not be pushed too far; in either case, the Forest Service would have ample basis for imposing bypass flow requirements if state law would otherwise not maintain the streamflow levels needed to meet the agency's resource objectives.

3. Response to Other Majority Arguments

The two primary cases relied on by the Task Force majority, *New Mexico* and *Eagle County*,²³⁹ fall prey to the same preemption analysis that supports the holdings of *Rock Creek* and *California v. United States*.²⁴⁰ Admittedly, *New Mexico* did narrow the scope of federal reserved water rights in order to protect state law, and, from this standpoint, it does demand a degree of deference to state authority over water allocation. However, as in *California v. United States*, the Court also recognized that federal law is to prevail where it directly conflicts with state law. As noted by one commentator:

New Mexico held that state water law will not control management of reserved lands if the application of state water law would mean that the primary purposes of the reservation "would be entirely defeated." The principles of *California* and *New Mexico* lead to the conclusion that the savings clause of FLPMA cannot limit specific congressional directives to manage unreserved public lands for primary purposes that would be utterly defeated by the application of state law.²⁴¹

Therefore, if state law would otherwise thwart the environmental protection objectives of FLPMA, then the Forest Service can require the maintenance of minimum streamflows as a condition of a permit grant or renewal, even if such action interferes with state authority over the allocation of water rights. Moreover, because bypass flow requirements can be characterized as a land

239. See *supra* Part III.C.

240. See *supra* note 107 for a discussion of the majority's takings claim.

241. Shurts, *supra* note 90, at 143.

use regulation rather than a water right,²⁴² preemption principles need not even come into play in addressing the *New Mexico* argument. The Forest Service is merely requiring users, as a condition to their use of the national forests, to refrain from damaging aquatic and riparian habitat, rather than taking the vested water rights of private owners. Consequently, it need not comply with state water law in exercising this federal permitting authority.

Eagle County similarly fails to provide compelling support for the majority position. Although the Supreme Court did indicate that the federal government would forfeit any claim to reserved water rights if it failed to assert them when properly joined to a state proceeding, the Court further recognized that, where such rights are properly asserted, they prevail over priorities established in previous state court adjudications.²⁴³ Indeed, the Court recognized that, although reserved water rights “may be potentially at war with appropriative rights,”²⁴⁴ the reserved rights will prevail where properly asserted in a McCarran Amendment proceeding by virtue of the supremacy of federal law.²⁴⁵ Hence, at the core of the decision is a general recognition of federal supremacy where there is a conflict between federal and state authority. From this standpoint, *Eagle County* is more of a procedural limit on the federal government than a general call for deference to state law at the expense of federal reserved water rights. The decision does not limit the scope of federal rights, but rather requires that the federal government behave reasonably and timely in asserting its claimed rights.

Further, like *New Mexico*, *Eagle County* addressed the assertion of reserved water rights, not the exercise of the federal government’s land use authority. As the Task Force minority position noted in commenting on *Eagle County*: “The McCarran Amendment does not purport to define the limits of Forest Service authority as a landowner or a sovereign to control

242. See *supra* Part III.E.1.

243. See *United States v. District Court for Eagle County*, 401 U.S. 520, 526 n.7 (1971) (recognizing that reserved water rights may have priority over previously adjudicated state water rights).

244. *Id.* at 523.

245. See *id.* at 526 n.7.

activities on the National Forests, simply because such control might affect the manner in which real property, personal property, or water rights are used."²⁴⁶ Given that "[p]ublic land law makes it clear that, if anything, the federal authority over government-owned lands is even greater than that of a private proprietor,"²⁴⁷ the conclusion again is that the federal government can, by virtue of the fact that a right to divert and a right-of-way are two legally distinct rights, require bypass flows as a condition of the use of its property without interfering with state water rights.

IV. TOWARD THE FUTURE UTILIZATION OF BYPASS FLOWS

Bypass flow requirements represent a potentially powerful and effective management tool. However, the Forest Service historically has been reluctant to use them.²⁴⁸ This reluctance has presumably been the product of three factors: (1) the agency's preference for negotiated rather than mandated conditions;²⁴⁹ (2) the fact that there is no case law expressly holding that the Forest Service has bypass flow authority; and (3) the fact that the stresses placed upon the water resources of the national forest were not so acute in the past as they are at present.²⁵⁰

As the Forest Service begins to have increasing difficulty in protecting instream flows in the national forests, however, the agency will need to investigate new methods for protecting these resource values.²⁵¹ Accordingly, the agency should abandon its historic reluctance to impose bypass flow requirements where negotiated solutions fail.²⁵² Otherwise, this potentially valuable

246. FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-7.

247. *Id.* at IX-6 (citing *Kleppe v. New Mexico*, 426 U.S. 529 (1976)).

248. The Task Force minority reports that of the 8,370 permits issued for water facilities in the national forest, only 15 include bypass flow requirements. *See id.* at IX-3.

249. *See id.* at IX-2.

250. *See generally* Gillilan, *supra* note 22.

251. *See id.*

252. This view is similar to that taken by Trout Unlimited in the current case pending before the United States District Court for the District of Colorado. *See Trout Unlimited v. United States Dep't of Agric.*, No. 96-WY-2686-WD (D. Colo. filed June 5, 1995).

management tool will remain primarily a paper solution that will have no real impact on the agency's water resource problem.

A. *The Limits of Bypass Flow Authority*

From the extensive discussion in Part III, it is apparent that the Forest Service has sufficient authority to impose bypass flow requirements. The agency can argue, in turn, that: (1) bypass flow requirements represent a land use control mechanism rather than an interference with vested property rights; (2) it can preempt state law under *California v. United States* if it is impossible to comply with both state and federal directives; or (3) it can preempt state law under *Rock Creek* if such law merely "conflicts" with federal directives.

Consistent with these arguments, recent case law indicates a growing recognition of the Forest Service's authority to use its permit conditions as a potential means of protecting the water resources of the national forests. For instance, in *Nevada Land Action Ass'n v. United States Forest Service*,²⁵³ the 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 the conflicting uses of forest resources."²⁵⁴ Similarly, in *Sierra Club v. Yeutter*,²⁵⁵ the 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 potential options for managing its water needs, including administrative land controls.²⁵⁶ Finally, in a Colorado water court case, the court held that the Forest Service's permitting authority allowed it to preserve "favorable water

253. 8 F.3d 713, 719 (9th Cir. 1993).

254. *Id.* at 719.

255. 911 F.2d 1405 (10th Cir. 1990).

256. *See id.*; *see also* Wyoming Wildlife Fed'n v. United States, 792 F.2d 981 (10th Cir. 1986) (suggesting that bypass flow requirements were mandated by Environmental Impact Statement); *United States v. City of Denver*, 656 P.2d 1, 34 (Colo. 1982) (holding that federal government can use its control over access to water resources on public lands to regulate water appropriation).

flows" in the national forests without the need to resort to reserved water rights.²⁵⁷

Although these cases did not address bypass flow authority directly, they did indicate that the Forest Service has at its disposal various administrative measures for acquiring sufficient water to meet Forest Service needs. Because bypass flows are merely a category of administrative land use controls, the logic of these cases supports the view that the Forest Service can condition the issuance of a right-of-way permit on the permittees' adherence to bypass flow requirements. Therefore, the Forest Service should not view the lack of case law directly upholding bypass flow authority as an overly significant barrier.

At the same time, this is not to say that the Forest Service should be overly eager to impose bypass flow requirements. Rather, the agency should use such requirements primarily as a bargaining tool to encourage otherwise reluctant parties to negotiate in good faith with the agency. If the agency can minimize damage through other means (for instance, through a settlement agreement, such as the Joint Operations Plan), then it should refrain from imposing bypass flow requirements. After all, if the Forest Service has other means to protect the national forests' environmental resources, then the requirement under section 1765 that the agency include protective terms and conditions in its right-of-way permits does not even come into play. In this situation, preemption of state law is no longer justified because the imposition of bypass flows requirements is not necessary to achieve congressional directives. Again, only when good faith negotiations have failed should the Forest Service take the next step of conditioning the grant of a permit on the inclusion of bypass flow requirements in the permit's terms.²⁵⁸

257. See *In re Amended Application of the United States for Reserved Water Rights in the Platte River*, No. W-8439-76, at 9-13 (Colo. Dist. Ct., Water Div. No. 1, Feb. 12, 1993) (granting reserved rights for administrative and firefighting purposes, but denying them for channel maintenance flows, partially on the grounds that other administrative mechanisms were available for securing water for such purposes).

258. The Task Force minority similarly argues that the Forest Service should use bypass flows primarily as a tool to assist in securing voluntary protective measures, but that they should be included in a permit as a means of last resort when good faith negotiations fail. See FEDERAL WATER RIGHTS TASK FORCE, *supra* note 16, at IX-6. In support of this point, the Task Force minority further argues

In addition, the Forest Service should impose bypass flow requirements only when it can demonstrate their effectiveness with credible, scientific evidence. After all, if the requirements do not actually protect aquatic and riparian habitat and other environmental values by putting more water in the streams,²⁵⁹ then they do not fall within the terms of FLPMA. The statute only authorizes such terms and conditions as will “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.”²⁶⁰ If private water rights holders can demonstrate that bypass flows are not meeting their stated objective of actually improving aquatic and riparian habitat, then they have an actionable basis for a takings claim against the Forest Service.

B. Official Changes in Policy

In accordance with the foregoing, the Forest Service should further consider adopting some additional policies that, while not necessary for the protection of vested water rights, would serve as an indication of the agency’s good faith. First, the Forest Service should include a clearer statement in the Forest Service Manual that it can only impose bypass flow requirements as a mechanism of last resort, after good faith negotiations have failed.²⁶¹ Of course, the problem at present is not the Forest Service’s excessive use of bypass flows as a management tool, but rather its reluctance to invoke them. However, if and when the agency begins to rely more heavily upon them, such a policy statement would serve as a useful check on potential abuses.²⁶²

that the Forest Service Manual should be amended to state expressly that the agency will impose bypass flow requirements only if other strategies for protecting national forest water resources fail. *See id.* at IX-10.

259. A major criticism voiced by the Task Force majority is that bypass flows often do not accomplish their intended purpose because the releases may be diverted by junior appropriators downstream of the regulated facility, but upstream from the stream reach the flow requirements are designed to protect. *See id.* at III-5.

260. 43 U.S.C. § 1765(a)(ii) (1994).

261. The Task Force minority also endorses this suggestion. *See FEDERAL WATER RIGHTS TASK FORCE, supra* note 16, at IX-10.

262. As an aside, it is significant to note that the Task Force majority argues that negotiated solutions—such as the Cache La Poudre Joint Operations Plan for Joe Wright Reservoir—often achieve superior environmental results in comparison

A second limitation that the Forest Service should consider adopting is to make bypass flow requirements, if they are included in a permit, defeasible conditions. Such a mechanism would give parties subject to these conditions another mechanism of appeal to the agency and eventually to the courts if conditions change so that the bypass flow requirements are no longer necessary. Under this approach, if permit holders can carry the burden of proving that the conditions are no longer necessary to implement the dictates of FLPMA or are fundamentally insufficient to achieve their intended purpose, then the Forest Service should remove the conditions from the permit.

Such a scheme would serve the dual purpose of encouraging private parties to seek alternatives to the imposition of bypass flow requirements, while providing them a mechanism for removing such conditions if the parties fail to develop an alternative scheme prior to the permit's initial issuance or renewal. In this way, permit conditions need serve as no more than a temporary encumbrance on the exercise of a usufructuary water right. The Forest Service has the necessary leverage it needs in order to achieve the dictates of FLPMA, while private parties can look to negotiated solutions to achieve the minimum streamflows required as a condition of their use of the national forest land.²⁶³

Of course, placing such a matrix of evidentiary burdens on the Forest Service would have the disadvantage of potentially subjecting the Forest Service to an endless stream of appeals by water users dissatisfied with their land use conditions. However, such a threat would also have the positive effect of making the Forest Service conform to its policy of imposing such conditions only where necessary. In situations in which users challenge

with bypass flow requirements. *See id.* at VIII-2. If such is the case, then both the Forest Service and the federal permittee should have a natural incentive to negotiate rather than resort to the unilateral imposition of permit conditions, and bypass flow requirements should be the exception rather than the rule in actual practice. Therefore, the adoption of such a rule may be little more than a formality, but nonetheless a formality that produces good will among federal permittees.

263. *See, e.g.,* the Joint Operations Plan, *supra* notes 38-41 and accompanying text.

bypass flow authority, the agency should easily satisfy the burden of proving the impossibility of complying with concurrent state and federal requirements if it has truly pursued all other options.

Finally, the fact that the Forest Service has the benefit of administrative discretion²⁶⁴ would tend to discourage frivolous appeals. Where the agency could support its decisions by credible, expert testimony, courts would generally defer to Forest Service expertise and be reluctant to overturn an agency finding that a bypass flow requirement is necessary. Under this formulation, the Forest Service would be able to impose bypass flows when they are genuinely necessary to the achievement of its resource objectives, and parties subject such conditions would have a disincentive to pursue groundless appeals. At the same time, should the Forest Service impose conditions that are not necessary or that become obsolete over time, affected parties would have an adequate means of recourse that would enable them to require the agency to remove these conditions from their permit.

V. CONCLUSION

Under existing law, the Forest Service has adequate legal authority to support the imposition of bypass flow requirements in special land use permits. Whether it be under its general authority as a proprietor of the public lands or under its preemptive authority as suggested by *California v. United States* or *Rock Creek*, courts should allow the agency to place conditions on how those entering the national forests can use these public lands. However, as a showing of good faith and in order not to overstep the bounds of its legal authority, the Forest Service should make it official agency policy to use this potentially valuable management tool primarily as a point of leverage to encourage otherwise reluctant parties to enter into negotiations. Only when such negotiations and alternate remedial measures

264. See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994). The Act provides that factual determinations of an administrative agency are only to be overturned where the reviewing court finds them to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

fail should the Forest Service include bypass flow requirements as an actual permit condition. In this way, the Forest Service can better protect the environmental resources of the national forests, while private parties can rely on the availability of negotiated solutions as the preferred means of maintaining adequate streamflows to support riparian and aquatic habitat. And western water law can continue in its position of primacy, having found a means to coexist alongside the values of environmental protection.