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Glenwood Springs, Colorado

Water Rights Protection Act, discussion draft

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Chairman Lamborn, Ranking member Huffman, members of the subcommittee, thank you for the invitation to visit with you on this important issue.

My name is Chris Treese. I am the manager for External Affairs at the Colorado River Water Conservation District. The Colorado River District is the principal policy body for the Colorado River within Colorado. We are a political subdivision of the State of Colorado responsible for the conservation, use and development of the water resources of the Colorado River basin to which the State of Colorado is entitled under the 1922 and 1948 Colorado River compacts. The Colorado River District includes all or part of 15 counties in west-central and northwest Colorado, including six different National Forests and seven BLM field offices. The majority of the land in our district is owned and managed by the federal government.

Nearly all of the water used in our district and, in fact, in Colorado and the West, originates on or flows across federal lands. Accordingly, a constructive, working relationship with federal land management agencies is absolutely necessary for the sustainable use of western water.

Recent efforts by federal agencies to force transfer of ownership of water rights as a condition of agency permitting is contrary to both federal and state law and ultimately counterproductive to the cooperative relationship necessary for the stewardship of the arid West's scarce water resources.

Water in the West is a scarce resource requiring fair and equitable allocation. Unlike the relatively wet East, western states have all chosen the water allocation principal of Prior Appropriation, whereby ownership of the water is a public good, but the right to use the water is a private right created by applying the water to any of a variety beneficial uses.

The "ski area rule" has been revised and reissued to the general satisfaction of the ski industry. However, many Western water users remain wary of federal attempts to overstep its authority with regard to water rights. Unfortunately, the ski area water rights rule is not the only instance where the federal government has pushed its authority into areas of water management reserved for the states.

My testimony is principally focused on federal agencies' imposition of so-called "bypass flow"

requirements on permits. However, any proposed application of the earlier ski area rule, forcing assignment of title to water rights as a condition of permitting, to any user of federal lands for any purpose should be addressed by the Water Rights Protection Act.

The River District supports the primary purpose of the Water Rights Protection Act to prohibit the forced transfer of ownership of water rights to the federal government as a condition of agency land use permitting. However, I wish to draw your attention to the River District's more nuanced position concerning agencies imposing bypass flow conditions on permits. Generally, I distinguish between the practice of requiring bypass flow conditions on permits for new water diversions or reservoirs and the more controversial practice of imposing new bypass flow requirements on permit renewals or reissuance of permits for existing infrastructure.

Bypass flow conditions on new, large water projects have been successfully negotiated during the permitting process to ensure smaller, headwater streams are not completely dried up. In the case of transmountain diversion projects that move water from Colorado's West Slope to the more populous East Slope, reasonable bypass conditions ensure water for downstream use and reuse, in contrast to transmountain diversions that provide no return flows to the native stream for subsequent environmental or human use. Such projects are, however, few and far between.

In some circumstances, a bypass flow requirement can be an effective means to achieve the mitigation necessary for new water development projects. However, in selected forests in Colorado, the Forest Service imposed bypass flow permit conditions on existing water facilities where no previous bypass requirement existed. Such requirements may require expensive retrofits of existing facilities and can also result in water users effectively losing a significant portion of their historical water supplies. This can have the effect of reallocating water from long-established private as well as public rights to federal purposes. Furthermore, the Forest Service has often done so in a manner that is wholly inconsistent with the adjudication and administration of federal and non-federal water rights by the states. As such, water that is required by new permit conditions to be bypassed past existing structures cannot be administered by states to ensure the intended, flow-related benefits are actually accomplished.

A bypass flow requirement placed on a special use permit, easement, or right-of-way does not create a legal water right in Colorado nor, to my knowledge, any other Western state. Consequently, the bypassed water is too often simply available for diversion by the next downstream junior water right holder. Let me offer one such example of a failed bypass flow condition.

Overland Ditch and Reservoir Company:

The Overland Ditch and Reservoir Company is a small, mutual ditch and reservoir company in Western Colorado situated within the Gunnison National Forest. In 1905, the Overland Company

constructed and has since operated the Overland Reservoir for the benefit of its agricultural shareholders. The Overland Company constructed its reservoir under an easement granted under an 1891 Act¹ intended to guarantee ditch and reservoir companies access to their facilities across federal lands.

In 1985, the Overland Ditch and Reservoir Company applied to the Gunnison National Forest for a special use permit to conduct rehabilitation work on a portion of the existing dam. This maintenance activity was required in order to comply with a Colorado State Engineer's dam safety order. The Overland Company did not intend to enlarge or change in any way the configuration or operation of its reservoir or collection system. The Gunnison National Forest issued a new easement but added a condition requiring that 2.0 cubic feet per second (cfs) of water be bypassed year-round from the reservoir for the stated purpose of enhancing the downstream fishery in Cow Creek. This bypassed water was measured at an existing stream gauge two miles downstream. The Overland Company initially appealed this new condition, but, faced with construction delays and attendant cost increases, the shareholders had no choice but to accept the new easement with the 2 cfs bypass condition attached.

The year-round bypass of 2 cfs represented a 25% reduction of Overland's ability to store water in dry years. For a shareholder to secure a comparable 2 cfs flow of water from the Overland Reservoir, they would have to own approximately 400 shares at \$1000/share, or \$400,000, and pay a \$4800/year O&M charge to the reservoir company. Further, that \$400,000 investment and \$4800 annual payment would only provide 2 cfs of water on a seasonal basis for irrigation use, whereas the Forest Service, by permitting fiat, secured a year-round flow of 2 cfs at no charge. Additionally, because the Forest Service does not hold any legally recognized or enforceable right to this bypassed water, there is no way to protect it from downstream diversion.

There are two junior water right owners located on Cow Creek downstream of the gauging station. Since there is no water right associated with this bypassed water, these two junior water right owners routinely (and legally) diverted those 2 cfs for private use before the water could fully benefit Cow Creek. No similar bypass condition is imposed on the two downstream, junior diverters presumably because there has been no federal nexus, to date.

It is important to note that although the circumstances in the Overland Company's case resulted in additional water in Cow Creek for at least a couple of miles, the particular facts of other bypass situations could result in bypassed water being diverted almost immediately by downstream water rights owners.

¹ 43 U.S.C. §§ 946-949.

USFS: Resource Management Planning Processes:

When the Gunnison National Forest initiated an update of its Resource Management Plan (RMP), it convened a group of stakeholders to advise it on water resources generally and the practice of conditioning permits with bypass flows in particular. This group explicitly did not debate the legality of bypass flows, nor the equity. We did, however, consider the practical effectiveness and forest-user relations associated with bypass flow requirements. As a result, we developed a lengthy list of alternative mechanisms to achieve the stated purposes of bypass conditions. All were clearly legal and fostered, rather than destroyed, relations with the permittee. Bypass flow conditions were included in our final recommendation but only as a last resort, to be imposed only if, and after, all identified constructive alternatives failed.

State Instream Flow Programs:

The principal alternative identified for the Gunnison RMP was Colorado's instream flow program. In 1973, Colorado pioneered the concept and practice of incorporating instream flows for environmental benefit into its water law. Under Colorado law, the Colorado Water Conservation Board (CWCB), a division of state government, is vested with the exclusive authority to appropriate or acquire instream flow water rights to "protect the natural environment to a reasonable degree."² The CWCB currently holds more than 1600 instream flow rights on more than 9250 miles of Colorado streams and rivers. Each of these rights has been adjudicated through Colorado's water court system and, as a result, can be administered, in priority, by the State Engineer. Nearly all other western states, including Alaska and Hawaii, have followed Colorado's lead and today have robust, state-administered instream flow programs.

The federal practice of imposing bypass flows as a condition of permit renewal is relatively recent and a disappointing departure from historical Forest Service deference to state water law. When the White River National Forest desired aquatic and riparian protections for Dead Horse Creek, a tributary to the Colorado River in Glenwood Canyon, the White River Forest worked with the Colorado Water Conservation Board to successfully adjudicate a state instream flow right for the entire flow of the stream and preserve the natural lake levels of Hanging Lake, a popular tourist attraction.

Federal Deference to state's water law:

Historically, the federal government has recognized the unique and limited nature of water in the arid West (e.g., the Desert Land Act of 1877 and the Taylor Grazing Act of 1934). Most recently, the McCarran Amendment of 1952 explicitly deferred federal sovereignty to the states for the adjudication and administration of all federal rights to use water.

² Colorado Revised Statutes § 37-92-102 (3).

Conclusion:

Requiring bypass flows on existing structures where no such condition has historically been in place is contrary to western water law. Unless the U.S. Forest Service commits to respecting Western states' individual water rights adjudication systems to accomplish its flow-related goals, the only sure outcome is contentious, lengthy, and expensive litigation. This is a result in no one's interest, including the environment's.

The proposed Water Rights Protection Act would simply confirm those commitments and restore the working partnerships between federal agencies, states and western water users. Accordingly, I encourage your support for the Water Rights Protection Act in the 115th Congress.