WATER RIGHTS TAKINGS

IN THE POST-*LUCAS* ERA

by

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In Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992), the United States Supreme Court announced principles which are applicable to regulatory takings claims. These principles will have applicability to takings claims which may arise from implementation of efforts to restore "ecological integrity" and "bio-diversity" to the nation's streams and lakes under such statutes as the Federal Land Policy and Management Act, 43 U.S.C. § 1701 et. seq., the National Forest Management Planning Act, 16 U.S.C. §1604 et. seq., the Endangered Species Act, 16 U.S.C. § 1531 et. seq., and the Clean Water Act, 33 U.S.C. § 1251 et. seq..

Takings claims are likely to be successful when perfected water rights are converted from the property owner's beneficial use to public instream flow use for fish, wildlife, aesthetic water pollution dilution, and recreational purposes. Takings claims are less likely to succeed with regard to restrictions on the development of conditional water rights.

The Court included the following points in Lucas:

1) State law is the primary source for defining the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments of the United States Constitution (112 S. Ct. at 2901);

2) To avoid a compensable taking, newly legislated or decreed governmental regulatory limitations which prohibit all economically beneficial use of the property must already exist in the background principles of the state's law of property and nuisance applicable to that property interest, compensation may be resisted only if the proscribed use interests were not part of the title to begin with (112 S. Ct. at 2899-2900);

3) The government has the burden of identifying the background principles of nuisance and property law which prohibit the use which the property owner intends to make (112 S. Ct. at 2901-2902);

4) Takings jurisprudence is guided by understandings of citizens regarding the state's police power over the bundle of rights they acquire when they obtain title to property (112 S. Ct. at 2899);

5) A total taking need not be effectuated for compensation to be owed, the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with distinct investment-backed expectation are key to the analysis (112 S. Ct. at 2895, n. 8);

6) A governmental requirement that land be left substantially in its natural state carries a heightened risk that

private property is being converted to public use under the guise of mitigating serious public harm (112 S. Ct. at 2895);

7) The owner's reasonable expectations regarding use and value of his property interest is shaped by the state's law of property, whether and to what degree the state's law has accorded legal recognition and protection of the particular property interest which is diminished in value (112 S. Ct. at 2894, n. 7);

8) Government's power to redefine the range of interests included in the ownership of property is constrained by constitutional limits (112 S. Ct. at 2892);

9) Temporary takings are compensable (112 S. Ct. at 2891);

10) The Fifth and Fourteenth Amendments do not prevent government from effectuating a conversion of private property interests to public use, but just compensation is owed for such a conversion.

In Lucas, the Court held that the State of South Carolina owed compensation to a private property owner who was prohibited by the state's Beach Front Management Act from constructing single family homes on two residential lots. At the time of purchase the lots were buildable under then-existing law.

The Supreme Court's nuisance versus preservation rationale is especially pertinent to analyzing whether government regulation has crossed over from the legitimate exercise of police power to a taking.

In the water arena, federal environmental policy appears to be shifting from control of injurious pollution discharges to ecological preservation. Perfected water rights are becoming a target of efforts to restore "ecological integrity" and "biodiversity" to streams and lakes. Examples include: 1) attempts by the Forest Service to condition renewal of special use permits on surrender of a significant portion of developed water yield (see attached Senator Hank Brown/Bennett Raley Memorandum of August 13, 1992); 2) the proposed Clean Water Act Reauthorization bill of this past session of Congress (S. 1081) would have made restoration of "ecological integrity" to the nation's waters a primary purpose of the Clean Water Act; and, 3) efforts by environmental interests to have the Clinton Administration adopt "a policy of watershed-level aquatic ecosystem protection and restoration", through an Executive Order with the following language:

Ecological Integrity and Restoration

(9) The President should announce his strong support for reauthorization of the Endangered Species Act with provisions to promote ecosystem protection actions.

(a) The Secretary of the Interior should act expeditiously on listing threatened and endangered species and pursue timely development and implementation of ecosystem-based recovery plans, with particular emphasis on the Columbia and Snake River salmon.

(b) The Secretary of the Interior should develop a program for identifying ecosystems in distress on the public lands before it becomes necessary to list species as threatened or endangered.

(11) The President should issue an Executive Order establishing a policy of watershed-level aquatic ecosystem protection and restoration. The order should direct the EPA and the Departments of the Interior, Agriculture, Defense, and Commerce (with oversight from the Council on Environmental Quality) to: review, revise, and coordinate their activities and operations to use all authorities under existing law to manage federal lands; to operate federally-owned or licensed projects and facilities to protect and restore fish, wildlife, and their habitats on an equal basis with other primary project purposes (where such protection is not provided under the Endangered Species Act).

("America's Waters: A New Era of Sustainability, Report of the Long's Peak Working Group on National Water Policy," December, 1992, at P. 8)

Utilization of federal law and policy for the reallocation of water from vested uses under state law to federal instream flow uses has been a preoccupation of water law "reformers" since issuance of the "Water Resources Policy Study, Issues and Options Papers," 42 Fed. Reg. 36,788 in July of 1977. See Hobbs & Raley, "Water Quality v. Water Quantity: A Delicate Balance," 34 Rocky

Mt. Min. L. Inst. § 24.03 (1988).

However, "ecological integrity" and "bio-diversity", when applied to water law, are thinly disguised surrogates for riparian water law. Riparian law, the doctrine of continuous flow, restricts use of water to effecting only de minimus impacts on the quantity and quality of natural streams and lakes. See Hobbs & Raley, "Water Rights Protection in Water Quality Law," 60 U. Colo. L. Rev. 841, 844-45 (1989).

However, the riparian common law doctrine of continuous flow was rejected by Congress as the law of the United States, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 706 (1899), in favor of state law establishment of property rights in the unappropriated water resource arising on, or flowing through, the public lands, United States v. New Mexico, 438 U.S. 696, 702 (1978). Subject only to federal reserved water rights and the navigation servitude, California v. United States, 438 U.S. 645, 657 (1978), the states were accorded plenary control over non-navigable waters on the public domain, California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935).

Moreover, use of the public land to access points of diversion in the establishment of state-created water rights was an explicit provision of federal law. The National Forests were

established for two primary purposes: 1) a continuous supply of timber, and 2) a continuous supply of water to water rights under state law. Water was not reserved by the federal government for instream flow purposes such as fish, wildlife, scenery, and aesthetics (See United States v. New Mexico, 438 U.S. at 718), values which are protected under riparian water law.

The McCarran Amendment, 43 U.S.C. § 666 (a), was enacted by Congress to allow the states to require the United States to adjudicate its water claims in state forums, so that allocation and administration of state and federal water uses could be integrated within a system of priority of uses. See United States v. District Court in and for Eagle County, 401 U.S. 520 (1971); Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), reh'g. den. 426 U.S. 912 (1976).

In reliance on the federal disclaimer of riparian water law and use of the public lands for establishment of water rights under state law jurisdiction, each state has defined the range of interests which constitute a property right to allocation of water quantities for uses in that state. The states have also defined nuisance law principles which govern the exercise of those rights. For example, a water right does not include the right to discharge pollutants into the waters which command the water resource for waste assimilation purposes, or injure beneficial uses of other water rights, whether for agricultural,

municipal, industrial or aquatic life uses. The Suffolk Gold Mining & Milling Co. v. The San Miguel Consol. Mining & Milling Co., 9 Colo. App. 407, 418 (1897); Humphreys Tunnel and Mining Co. v. Frank, 46 Colo. 524, 531-32 (1909); Mack v. Town of Craig, 68 Colo. 337, 342-42, 191 P. 101 (1920).

If federal agencies, the Congress, or the states attempt to impose "ecological integrity" and "bio-diversity" restrictions upon the exercise of vested water rights, takings claims will inevitably arise, and analysis will focus on the bundle of interests which constitute a water right. In Colorado, for example, the essential element of a water right is its priority to a quantity of water for beneficial use from the available supply to the exclusion of all other uses of water which are not in priority, including federal water uses. See Navajo Development Co. v. Sanderson, 655 P. 2d 1374, 1380 (Colo. 1982).

A Colorado water right is perfected by use, and the quantity of water or yield, belonging to the right is measured by its use, Rominiecki v. McIntyre Livestock Corp., 633 P. 2d 1064, 1067 (Colo. 1981), over an historic, representative period of time, Weibert v. Rothe Brothers, Inc., 618 P. 2d 1367, 1371-72 (Colo. 1980). When a water right is changed to another point of diversion, use, place, or time of use, that right is subject to quantification based on historic use, Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717

P. 2d 955 (Colo. 1986); May v. United States, 756 P. 2d 362, 371 (Colo. 1988). Water rights owners are restrained from making changes which cause injury to other water rights, whether senior or junior, See Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P. 2d 629, 631-32 (Colo. 1954); Shawcroft v. Terrace Irrigation Co., 138 Colo. 343, 333 P. 2d 1043 (1958).

Professor Laitos argues that the essential elements of a prior appropriation water right do not include its entire quantity, but rather its priority and ultimate use, 60 U. Colo. L. Rev. at 919. However, Professor Laitos concedes that a taking could be effectuated if a federal regulation deprives a water right owner of a portion of the water to which the right is entitled and, simultaneously results in that increment of water being available for use by another appropriator. Laitos, "Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause," 60 U. Colo. L. Rev. 901, 907 (1989). The Laitos analysis focuses on the development of conditional water rights in the context of Section 404 Clean Water Act permitting requirements. Regulatory requirements which reduce the yield of perfected water rights are even more suspect when compared with regulatory action which diminishes the yield of conditional water rights.

A conditional water right holds a date in the priority system while the appropriator makes the investment in water facilities which are necessary to place water to beneficial use,

City and County of Denver v. Northern Colorado Water Conservancy District, 276 P. 2d 992, 1001 (Colo. 1954). By definition, conditional water rights have not yet ripened into an ascertainable yield based on historic use over a representative period of time, and they are subject to federal permitting requirements such as those of the Endangered Species Act, the Clean Water Act, and the Federal Land Policy and Management Act, which may affect the appropriator's ability to perfect the water right, see Riverside Irrigation District v. Andrews, 758 F. 2d 508, 513 (10th Cir. 1985) and City and County of Denver v. Bergland, 695 F. 2d 465, 480 (10th Cir. 1982). However, the court in Riverside Irrigation was also careful to emphasize that the Clean Water Act, the Endangered Species Act, the interstate water compacts, and water rights are to be implemented in a manner which gives effect to each, 758 P. 2d at 513-514.

As Professor Laitos observes, converting a conditional water right to public use can constitute a taking. A taking is even more likely to result if federal regulation converts water quantities from perfected water rights, or conditional water rights for which a substantial investment has been made, to public uses such as instream flow for fish, wildlife, scenic and aesthetic purposes.

If they wish to avoid the payment of compensation under the principles announced in Lucas, the Forest Service, Fish and

Wildlife Service, or Environmental Protection Agency, in seeking to "restore" water to the stream for "ecological integrity" or "bio-diversity" purposes from water rights, must establish that the range of rights included in the state water right do not include impacts to the environment caused by the withdrawal of water from natural streams and lakes. In other words, causing such impacts must be proscribed under nuisance law, or the bundle or rights inherent in the water right must include subordination to public water values or uses. Such a showing might be made in public trust states such as California, see National Audubon Society v. Superior Court, 33 Cal. 3d 419, 189 Cal. Rptr. 346, 658 P. 2d 709, cert. denied, 464 U.S. 977 (1983), but not in states such as Colorado which do not adhere to the public trust doctrine but, rather, award an exclusive right of use for water quantities to be withdrawn from the natural stream in priority. See People v. Emmert, 198 Colo. 137, 597 P. 2d 1025 (1979); Hobbs & Raley, supra, 60 U. of Colo. L. Rev. at 884.

Colorado water law entitles waters rights owners to remove water from natural streams and lakes, Coffin v. Left Hand Co., 6 Colo. 443, 447 (1882). Per se, the ecology of the stream will be altered by exercise of water rights. Under the Lucas rationale, water withdrawals in Colorado for beneficial use from streams do not constitute a nuisance, but rather have the status of a protected right of use under the Fifth and Fourteenth Amendments to the United States Constitution, and compensation is owed when

a whole or partial taking of water yield occurs.

On the other hand, a water right does not include the right to diminish the available water resource for other beneficial uses, including aquatic life and recreational uses, by the discharge of injurious pollutants into natural streams and lakes, See Colorado's Water Quality Control Act, C.R.S. 25-8-101 et. seq.

Under well established federal/state water law principles, as defined by the United States Supreme Court in U.S. v. New Mexico, U.S. v. California, and other cases, allocation of water to federal water uses can be accomplished by 1) the creation of federal reserved water rights in priority with respect to pre-existing water rights, or 2) under state law, or 3) by purchase or acquisition under authority of federal statute, such as Section 5 of the Endangered Species Act, 16 U.S.C. § 1534, which authorizes payment for land or water resources necessary to conserve endangered species, or 4) by a regulatory taking for which just compensation is paid. Moreover, agencies have affirmative duties to avoid takings by choosing alternative means to resolve potential conflicts. Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), Section 2 of the Endangered Species Act, 16 U.S.C. § 1531(c)(2), and Section 701(g)(1) of FLPMA, 43 U.S.C. § 1701(g)(1), all direct federal agencies to avoid impairing state water allocation systems and water rights

in carrying out the missions of those statutes.

In Lucas, the Supreme Court observed that there are a number of non-economic interests in property whose impairment will invite "exceedingly close scrutiny under the takings clause," 112 S. Ct. at 2895 n. 8. Surely the security, stability and flexibility afforded to water rights by established water allocation systems are among the range of interests whose importance cannot simply be measured by an award of damages or compensation. The health and welfare of entire populations and economies are dependent thereon.

In their zeal to reform water law, environmentalists and federal administrators are urging the Clinton Administration to disrupt long-range water supply planning and reallocate already developed water quantities from their right of use to a public use. The nation's health, welfare, and economic interest in a stable, firm and secure water supply dictate, to the contrary, that the Administration and the courts should protect water rights. If not, the federal government will be mired in counter-productive water policy warfare such as the Carter Administration experienced. See Lamm and McCarthy, The Angry West, (Houghton Mifflin Company: Boston, 1982), at 160-207.

The courts surely will be busy with water rights takings claims if "ecological integrity" and "bio-diversity" concepts are implemented in a manner which converts vested water rights to public uses.

MEMORANDUM

TO: Hank Brown
FROM: Bennett Raley
DATE: August 13, 1992
RE: USFS Authority to Require Instream Flows as A Condition of a Special Use Permit

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I. SUMMARY

The United States Forest Service is attempting to establish new instream flows within the Arapaho/Roosevelt National Forests in Colorado and Wyoming by requiring that owners of existing reservoirs agree to by-pass water flows as a condition of the issuance and renewal of land use authorizations, including rights-of-way and special-use permits for water transport, treatment, and storage facilities. In some cases, the USFS has indicated that it will require the owner of reservoirs constructed decades ago to give up over a third of the dry year yield of the reservoir.

The bottom line is quite simple -- the effect of such a requirement by the USFS is to divest the right-of-way applicant of its ability to utilize a portion of its vested state water rights for beneficial uses, and to reallocate that water to new uses by means outside of state (prior appropriation) and federal (reserved rights) water allocation laws. Simply put, the USFS wants to acquire senior water rights without paying for them.

Although the Forest Service takes the position that the requirement of by-pass flows as a condition of land-use authorizations does not constitute an assertion of federal water rights, it is a distinction without a meaningful difference for cities who are forced to give up water from their reservoirs or other points of diversion. In either case, owners of water rights vested under state law are required to by-pass water which belongs to them under their water rights. This impact results in the very sort of "gallon for gallon" reduction in the yield of the state-granted water rights rejected by the United States Supreme Court in the New Mexico case. In fact, USFS personnel have stated that one of the reasons for the assertion of this theory is that they are concerned that the US may lose in the "channel maintenance" reserved rights litigation pending in Water Court in Colorado, and that they will take by administrative action what they cannot get in court.

Even worse, this claim completely undercuts the rationale of the McCarran Amendment, which requires the United States to claim and quantify its water demands in state water allocation proceedings. Unlike federal reserved water rights claims, which are incorporated within state water administration

systems, by-pass flows imposed as a condition of land use authorizations are imposed retroactively, and take water from senior water rights. Moreover, there is no limit to the quantity of water that can be taken by the USFS under this theory, as nothing prevents it from asking for yet more water in each successive permit renewal. If allowed to stand, the USFS position would destroy state water administration systems by replacing allocation on the basis of priority with allocation by federal permit.

The assertion of these claims represents a practical abandonment by the USFS of the one of two original purposes of the National Forests - to provide and protect a water supply for the inhabitants of the west. The result of this theory will be that cities will lose part, or perhaps even all of the use of their investment in these water rights. As they seek to replace this water, they will be forced to either construct new projects, or dry-up existing irrigated agriculture. In either event, the action of the USFS would be extremely destructive for arid states such as Colorado, Wyoming, and the rest of the west.

The environmental goals professed by the USFS can and are being achieved under state law. Almost all westerns states have instream flow programs. For example, Colorado has over 7,000 miles of state-protected instream flows. If additional water is needed because these instream flow water rights are too junior, senior water rights can be purchased and dedicated to the instream flow program.

The USFS asserts that it is compelled to take this position by relevant federal law. This is simply incorrect. Not only is it not compelled to take this position, it is contrary to explicit statutory provisions which were intended to preclude this type of action. The USFS should adopt a policy which confirms that it recognizes and will protect state water rights as private property rights, that it will not interfere with the development and use of interstate water allocations made by interstate compact or equitable apportionment decrees, and that it will not interfere with state water administration systems by restricting the ability of water right owners to divert, store and use water under vested water rights.

II. BACKGROUND

As authority for its imposition of by-pass flow requirements, the Forest Service relies primarily on Section 505 of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. Section 1765 (1988) which provides in part:

> 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 esthetic 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; . . . . (Emphasis added).

However, the USFS ignores Section 701 of FLPMA entitled "Effect On Existing Rights", which provides in part:

> (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or --
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> > (1) as affecting in any way any law governing appropriation or use of, or federal right to, water on public lands;
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> > (2) as expanding or diminishing federal or state jurisdiction, responsibility, interests, or rights in water resources development or control; . . . .
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> (h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. Section 1701 note (1988) (emphasis added).

The USFS also relies on the Land and Resource Management Plan ("LRMP") for the Arapaho and Roosevelt National Forests and Pawnee National Grassland[1/], which provides that:

- The Forest Service will manage cold water streams at a base flow greater than 25 percent of average annual daily flow.

- special use permits, easements, rights-of-way, and similar authorizations for use of NFS lands shall contain conditions and stipulations to maintain instream or by-pass flows necessary to fulfill all National Forest uses and purposes. LRMP, pp. III-39; III-59.

However, nothing in the LRMP, or the Forest Management Act, authorizes or requires the USFS to take water away from the owners of vested water rights. To the contrary, NFMA makes all LRMP's subject to valid existing rights.

This memorandum examines the federal government's traditional deference to state water allocation laws and Congress' clear intent when enacting FLPMA and NFMA to maintain that federal deference to state water law. That analysis clearly demonstrates that neither Section 505 of FLPMA nor NFMA mandate or authorize the Forest Service's instream flow requirements. To the contrary, the Forest Service's actions are contrary to Congressional intent in creating the National Forests and over 100 years of consistent legal precedent.

III. ANALYSIS

A. INTRODUCTION

Although Congress has the power under the Property Clause and Commerce Clause of the United States Constitution to preempt state law governing the use of waters arising on federal lands, Congress has rarely done so.[2/] See, e.g., Nonreserved Water Rights -- United States Compliance With State Law, M-36914 (Supp. I), 88 I.D. 1055, 1058 (1981). Since the mid-1800s,

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1/ The LRMP was prepared pursuant to the National Forest Management Act of 1976 ("NFMA"), 16 U.S.C. § 1604 (1988).

2/ This constitutional authority is, of course, limited by the Fifth Amendment's prohibition on taking property without just compensation.

Congress has expressly deferred to state water law as the means for allocating this scarce and crucial resource on federal as well as non-federal lands. Only in rare cases, either (i) through the formal creation of federal reservations for specific purposes or (ii) in statutes expressly mandating specific federal actions which conflict with state water laws, has Congress provided federal agencies with the authority to utilize water for land management purposes outside of state water allocation laws.

By enacting FLPMA and NFMA, Congress neither created authority for new federal reservations, nor directed the Forest Service to take management actions that conflict with state water law. To the contrary, in the savings clauses contained in Section 701 of FLPMA, Congress again confirmed its intent to defer to state water law and expressly provided that FLPMA did not in any way infringe upon state water laws governing the use and allocation of water on federal lands. See 43 U.S.C. Section 1701 note (1988). The actions by Forest Service personnel on the Arapaho and Roosevelt National Forests to obtain new instream flows in a manner that adversely affects vested water rights violates Congress' clear intent in enacting FLPMA and NFMA as well as a over a century of statutory, judicial, and administrative law governing water allocation in the western United States.

B. HISTORIC FEDERAL DEFERENCE TO STATE WATER LAW

For over 150 years the United States has followed a policy of deferring to state laws governing the use and allocation of water in the western United States. See, e.g., United States v. New Mexico, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."); In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 749 P.2d 324, 329, cert. denied sub nom. California v. United States, 488 U.S. 824 (1988). As stated by the United States Supreme Court in California v. United States, 438 U.S. 645, 653 (1978): "The 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."

Starting in the mid-1800s, as the California gold rush and the accompanying westward expansion created a need to allocate scarce and essential water, the United States implicitly recognized the local rules and customs developed by miners to govern the use and allocation of water on the arid public

domain.[3/] See, e.g., California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154 (1935). With the enactment of the Mining Act of 1866 Congress expressly acknowledged that the local laws of the states and territories would govern the use of water on the federal lands. See 43 U.S.C. Section 661 (1988) ("Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized by local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.").

In the Desert Land Act of 1877, Congress adopted specific provisions to encourage continued settlement of the arid west by authorizing the homesteading of larger tracts than were available under previous Homestead Acts. See Act of March 3, 1877, ch. 107, 19 Stat. 377. The Desert Land Act of 1877 severed the water from public domain lands, and contained provisions governing the acquisition of water rights. See California Oregon Power Co., 295 U.S. at 158. While the 1866 Act authorized entry and settlement on the public domain in the western states, it provided that the right to use water on those lands must be obtained independently of any title to the lands and was dependant upon an appropriation of water pursuant to local law. See id. at 156. Moreover, concluding that the "well-being of the entire region depended upon a complete adherence to the rule of appropriation," Congress firmly established that all waters arising on federal lands were subject to disposition pursuant to local appropriation laws:

> all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.

Act of March 3, 1877, ch. 107, 19 Stat. 377. See also California v. United States, 438 U.S. 645, 657 (1978); California Oregon Power Co., 295 U.S. at 157. By virtue of that enactment "if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of

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3/ The following discussion highlights some of the major federal enactments deferring to state water law. For a more comprehensive list of federal statutes deferring to state water law, see California v. United States, 438 U.S. 645 (1978).

the designated states...". California Oregon Power Co., 295 U.S. at 163-64. See also United States v. City and County of Denver, 656 P.2d 1, 8 (Colo. 1982) (By virtue of these acts, Congress "largely acquiesced in comprehensive state control over the appropriation of water, including water on federal lands.").

As the country entered the era of large federal reclamation projects in the early part of this century, Congress remained firmly committed to a policy of federal deference to state laws governing water use and allocation. The Reclamation Act of 1902 authorized federal funding of reclamation projects and provided that:

> Nothing 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 of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. Section 383 (1988).

The next important step was the adoption in 1952 of the McCarran Amendment, which waives the United State's sovereign immunity to suit in state court stream adjudications. See 43 U.S.C. Section 666(a) (1988). That statute was enacted as a result of congressional recognition that since

> the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951), quoted in California v. United States, 438 U.S. at 678-79. The McCarran Amendment essentially requires the United States to claim and quantify its demands for water if it is properly joined as a party in a state water adjudication. The need for the McCarran Amendment is obvious - a rational allocation system cannot exist

if water is allocated under state law and the United States is allowed to step in at a later date and assert a claim to waters previously allocated.4/

This federal policy of deference to state water law continued through this century and was in full effect when FLPMA and NFMA were enacted in 1976.

C. CREATION OF THE NATIONAL FORESTS

As western settlement and exploitation of natural resources on the western public domain expanded toward the end of the nineteenth century, Congress enacted legislation authorizing the withdrawal of portions of the public domain from disposition and the reservation of those lands as forest reserves which ultimately became today's national forests. See Act of March 3, 1891, § 24, 26 Stat. 1095, 1103. The 1891 Forest Reserve Act also granted the public a right to use the forest reserves for the construction of certain water storage and transport facilities. See Act of March 3, 1891, § 18, 26 Stat. 1095. Consistent with federal policy deferring to state water law, that right-of-way provision provided that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." Id. The Department of the Interior, which at that time administered the forest reserves, expressly recognized that "[t]he control of the flow and use of the water is therefore a matter exclusively under State or Territorial control, the matter of administration within the

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4/ The attempt to require by-pass flows by the Forest Service is a perfect example of the chaos that the McCarran Amendment was intended to prevent. Under the Forest Service theory, senior water right owners would be forced to by-pass water that they are entitled to divert under their vested water rights. The effect of the Forest Service theory would be to reallocate water from the senior water right to these uses, even though the Forest Service does not have a water right for this purpose. Moreover, once the water passes the dam or diversion structure, it cannot be recaptured under that senior water right, and is subject to appropriation by others. Junior appropriators located downstream can and will divert this water under their water rights, which means that the effect of the Forest Service theory is to take water from a senior water right and give it to a junior water right. This destroys both the certainty of the state allocation system and the doctrine of prior appropriation. Finally, unlike state instream flows or quantified and adjudicated federal reserved rights, the by-pass flows are not consistent with or a part of state water administration systems, they cannot be protected by the state water administrators.

jurisdiction of this Department being limited to the approval of maps carrying the right-of-way over the public lands." Right of Way -- Canals, Ditches and Reservoirs, 18 Pub. L. Dec. 168, 169-70 (1894). See also Regulations Concerning Right of Way for Canals, Ditches, and Reservoirs over the Public Lands and Reservations, 30 Pub. L. Dec. 325, 327 (1900).

In 1897 Congress enacted the Organic Administration Act, which established the management mandate for the forest reserves and the purposes for which new forest reserves could be established. See 16 U.S.C. Section 475, 551 (1988). Under the Organic Act the forest reserves were established primarily because of congressional concern for supplying a sustainable supply of timber and a sustainable water supply for the growing nation. The Act provides:

> No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.

16 U.S.C. Section 475 (1988).

The Supreme Court has held that pursuant to the Organic Administration Act the national forests were created "for only two purposes": (i) to secure favorable conditions of water flows for western settlers and (ii) to furnish a continuous supply of timber for the people. See United States v. New Mexico, 438 U.S. at 707, 718. The "[n]ational forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes." Id. at 708.

Congress expressly provided in the Organic Administration Act that the favorable water flows that were to be secured by protection of the national forests were to be used for domestic, mining, milling, or irrigation purposes. See 16 U.S.C. Section 481 (1988) ("All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder."); United States v. New Mexico, 438 U.S. at 712; United States v. Jesse, 744 P.2d 491, 502 (Colo. 1987) ("The Organic Act provides for an contemplates the diversion of water by private parties within th national forests in accordance with state law."). Based upon an analysis of the Organic Administration Act and its legislative history, the Supreme Court has held that "Congress authorized th national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the

arid west." United States v. New Mexico, 438 U.S. at 713. See also Jesse, 744 P.2d at 495-96. The proposed Forest Service by-pass flow requirements are clearly inconsistent with this Congressional intent.

D. FEDERAL WATER RIGHTS

Consistent with the long-standing federal policy of deferring to state water law, federal land management agencies may acquire the right to use water for land management purposes by appropriating water in accordance with state law or by acquiring state water rights by purchase, lease, gift, or condemnation. See Supplement to Solicitor Opinion No. M-36914, On Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (Supp.), 88 I.D. 253, 255 (1981). Moreover, federal agencies may obtain federal authority to utilize water in two other limited circumstances: (i) where the use of water is necessary to fulfill the primary purposes of a federal reservation ("federal reserved water rights"); and (ii) where Congress explicitly requires the agency to utilize water for specific purposes by means that conflict with state law. Nonreserved Water Rights - Compliance with State Law, 88 I.D. 1055. See also Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, M-36914 (Supp. II), 90 I.D. 81, 83 (1983) (The right of federal agencies to use water for purposes outside of the primary purposes of a federal reservation "must be obtained pursuant to state law because those other purposes do not come within the reserved water right.").

1. Federal Reserved Rights.

Where Congress reserves public lands for particular purposes, an implication arises that Congress intended to reserve sufficient water to fulfill the primary purposes of the reservation. See, e.g., Cappaert v. United States, 426 U.S. 128 (1976); Arizona v. California, 373 U.S. 546, 597-98 (1963). However, Congress has generally intended that agencies fulfill the secondary purposes of a reservation by compliance with state law. See, e.g., United States v. New Mexico, 438 U.S. at 702.

The law is clear that the reservation of the national forests did not create any federal reserved water rights for fisheries and wildlife purposes. As discussed above, the Supreme Court has held that the national forests were created for only two purposes: to insure favorable water flows for use by settlers and to provide a continuous supply of timber for the public. Consequently, Congress had no intent to establish instream flows for wildlife and fisheries purposes when authorizing creation of the national forests. See United States v. New Mexico, 438 U.S. at 711-12; United States v. City

and County of Denver, 656 P.2d at 22 (holding that any water in excess of that necessary to fulfill the primary purposes of the national forests was made available by Congress to subsequent private appropriations). To the contrary, the Supreme Court has held that the assertion of federal water rights for such purposes "would defeat the very purpose for which Congress did create the national forest system." Id. See also United States v. City and County of Denver, 656 P.2d at 23 ("Congress' goal of enhancing the quantity of water available to western appropriations would be undercut by enlarging federal reserved rights to include minimum stream flows."). Similarly, the Forest Service's demand for instream flows as a condition to right-of-way approvals defeats the primary purpose of the national forests under the Organic Administration Act to provide water for western communities. As the Supreme Court held, Congress intended that the Forest Service obtain the right to use water for fisheries and wildlife purposes pursuant to state law. Id. at 702-03.

2. Congressional Preemption of State Water Law.

When, pursuant to one of its constitutionally delegated powers, Congress enacts legislation that conflicts with existing state law, the federal legislation overrides the conflicting state law pursuant to the Supremacy Clause. See, e.g., Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). While in the context of water law, Congress has traditionally expressly deferred to state law, Congress retains the power, subject to the fifth amendment, to assert federal jurisdiction over water arising on the federal lands pursuant to its authority under the Property Clause and Commerce Clause.

However, claims that federal legislation overrides state water law must be given close scrutiny. Because Congress has traditionally deferred to state water laws, federal legislation potentially impacting state water laws will be narrowly construed and federal preemption will not be found in the absence of clear congressional intent. See, e.g., United States v. New Mexico, 438 at 701-02. See also Nonreserved Water Rights -- United States Compliance With State Law, M-36914 (Supp. I), 88 I.D. 1055, 1064 (1981) ("[T]he presumption is that state law will control all non-reserved claims unless Congress provides otherwise. If Congress wishes to abandon its historical practice of deference it must explicitly exercise its power."). Consequently, federal preemption will be found only where a specific federal statutory mandate would be frustrated by compliance with state water law. The mere existence of management authority in a federal statute does not provide the basis for federal preemption. See California v. United States, 438 U.S. at 674.

E. EFFECT OF FLPMA AND NFMA ON STATE LAW GOVERNING THE USE AND ALLOCATION OF WATER

As discussed above, at the time FLPMA and NFMA were enacted the long-standing policy of federal deference to state water law was firmly in place. An examination of the language and legislative history of FLPMA and NFMA and judicial and administrative interpretations of those Acts demonstrates that FLPMA and NFMA did not change that policy. Neither statute mandates or authorizes the Forest Service to dictate by-pass flows which take away a private entity's ability to utilize its vested water rights. And neither statute created any federal reserved rights for fishery or wildlife purposes. Instead, Congress expressly provided in FLPMA that federal land management agencies would obtain water necessary to implement land management programs in accordance with state law.

1. The Statutes.

a. FLPMA.

FLPMA was enacted, in large part, to provide comprehensive guidelines for managing public lands under the jurisdiction of the Bureau of Land Management ("BLM"); however, certain provisions were adopted to simplify the morass of laws enacted over the prior century governing rights-of-way across all federal lands. Title V of FLPMA establishes a uniform statutory permit procedure for obtaining rights-of-way across both BLM and Forest Service lands. See 43 U.S.C. Section 1761 (1988).[5/] As

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5/ The Forest Service has incorrectly asserted that the Tenth Circuit's decision in City and County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982) supports its position that the Forest Service may impose by-pass flow requirements as a condition of approval of right-of-way authorizations for water transmission and storage facilities. That position is completely misplaced.

In Bergland the Court held that the Forest Service had no authority to impose any conditions on the City and County of Denver's use of its pre-FLPMA right-of-way since under FLPMA and prior right-of-way statutes the power to administer pre-FLPMA rights-of-way across National Forest System Lands was vested in the Department of the Interior. Id. at 480. The Court clearly held that any authority for administering rights-of-way statutes had to be found under FLPMA or the pre-FLPMA rights-of-way statutes and that the Forest Service's general forest management authorities do "not include the power to administer rights-of-way." Id. While FLPMA was amended in 1986 to authorize the (continued...)

authority for impairing the water rights of entities seeking rights-of-way across the Arapaho and Roosevelt National Forests, local officers frequently cite to Section 505(a) of FLPMA which provides in part that 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." 43 U.S.C. Section 1765(a)(ii) (1988).

FLPMA, however, also contains several savings provisions which must be considered when determining the effect of FLPMA on Forest Service authority to direct the use of vested water rights.

Section 701 of FLPMA entitled "Effect On Existing Rights" provides in part:

> (g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or --
>
> > (1) as affecting in any way any law governing appropriation or use of, or federal right to, water on public lands;
> >
> > (2) as expanding or diminishing federal or state jurisdiction, responsibility, interests, or rights in water resources development or control; . . . .
>
> (h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. Section 1701 note (1988).

5/(...continued)
Forest Service to administer pre-FLPMA rights-of-way on National Forest System Lands, the Bergland Court's analysis remains valid -- the scope of the Forest Service's authority to manage and condition rights-of-way is determined by Congress' grant of authority in FLPMA. As discussed above, Congress expressly provided in FLPMA that the Forest Service could not exercise any authority granted thereunder to affect state water rights, or to limit or affect valid existing property rights. See FLPMA S 701, 43 U.S.C S 1701 note (1988).

b. NFMA.

NFMA directs the Forest Service to prepare Regional Management Plans ("LRMPs") which provide for multiple use and sustained yield of forest resources in accordance with the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"). 16 U.S.C. Section 1604(e) (1988). The MUSYA provides that the national forests shall be managed for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. 16 U.S.C. Section 528 (1988). NFMA does not contain any other specific directives governing Forest Service management of water resources or fisheries habitat.

NFMA provides that permits for the use and occupancy of national forest lands must be consistent with the LRMPs and that existing use approvals should be revised as soon as possible to be consistent with the LRMPs. 16 U.S.C. Section 1604(i) (1988). However, NFMA expressly provides that any change in land use authorizations "shall be subject to valid existing rights." Id.

2. FLPMA and NFMA Do Not Create Federal Reserved Rights.

The law is clear that neither NFMA nor FLPMA establish federal reserved rights for fishery or channel maintenance purposes.[6/] In Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia Circuit held that FLPMA did not create any federal reserved rights for two reasons. First, the court concluded that because FLPMA did not create a reservation of federal lands, it could not provide the legal basis for a federal reserved right. See 659 F.2d at 206. Second, and more important for the purposes of the present analysis, the court held that the savings provisions of Section 701(g)(1) and (2) preclude a construction of FLPMA that creates a reservation of water rights. The court concluded that the Section 701(g)(2) provision that nothing in FLPMA shall be construed "as expanding . . . federal . . . rights

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6/ Any discussion of reserved water rights is somewhat academic since even if FLPMA did provide a basis for federal assertion of reserved rights, those rights would have a priority date of October 21, 1976, the date FLPMA was enacted, and would be very junior to most of the water rights held by the municipalities upon which the Arapaho and Roosevelt National Forests are attempting to impose by-pass flow requirements. See, e.g., Cappaert, 426 U.S. at 138. However, the analysis highlights Congress' intent in enacting FLPMA and NFMA that federal agencies look to state law as the source of water to fulfill management purposes.

in water resources development or control" means that no federal water rights were reserved when Congress enacted FLPMA. Id.

Similarly, NFMA did not create any federal reserved water rights since it did not establish any reservation of federal lands. Moreover, NFMA did not alter the primary purposes of the national forests which may serve as the basis for a federal reserved right. Instead, NFMA merely establishes a framework for implementing the management purposes established under the Organic Administration Act and the MUSYA. The Supreme Court has held that neither the Organic Administration Act nor the MUSYA create any federal reserved water rights for fisheries purposes. See United States v. New Mexico, 438 U.S. at 713-15. The Supreme Court concluded that the "fish" purposes provided for in MUSYA were to be supplemental to, but not in derogation of, the purposes for which the national forests were established under the Organic Administration Act. Id. at 714-15.

3. FLPMA and NFMA Do Not Authorize The Forest Service To Impair Vested State Water Rights For Fisheries And Wildlife Purposes.

Since FLPMA and NFMA did not create any reserved water rights that would have priority over the water rights held by municipalities seeking right-of-way authorizations, the only possible legal basis for the Forest Service's imposition of by-pass flow requirements in contradiction to state water law would be if Congress, in NFMA or FLPMA, had directed the Forest Service to take water from vested water rights established under Colorado water law. However, a review of the applicable authority demonstrates that Congress had no intention to preempt state water law when it enacted FLPMA and NFMA.

a. The Clear Statutory Language Does Not Support The Forest Service's Position.

Although FLPMA directs the Forest Service to include in right-of-way permits terms that "minimize damage to fish and wildlife habitat," there is no express directive that the Forest Service establish instream flows for fishery purposes outside of state law. To the contrary, the savings provisions in FLPMA which (i) make all agency actions subject to valid existing rights, (ii) provide that FLPMA does not affect any law governing the "use of" water on public lands, (iii) provide that FLPMA does not expand federal jurisdiction or responsibility in water resources, control and development, and (iv) provide that any actions taken under FLPMA shall not impair valid existing rights, demonstrate Congress' intent that the Forest Service manage right-of-way grants within the framework of state water law.

Section 701(g)(1) is especially relevant in that it provides that FLPMA shall not "affect" the use of water. This prohibition clarifies that the prohibited acts are not limited to a "taking" of property under the fifth amendment. Instead, the broader prohibition - "affect", goes further, and precludes any actions taken under the authority of FLPMA which would reduce or limit the use of the water right[7].

The statutory directives set forth in FLPMA are clearly distinguishable from statutes which the courts have interpreted to authorize federal actions which are contrary to state water law requirements. Unlike the savings provisions in the Clean Water Act considered in Riverside Irrigation District v. Andrews, 568 F. Supp. 583 (D. Colo. 1983), aff'd, 758 F.2d 508 (10th Cir. 1985)[8], the FLPMA savings provisions do not contain any exception to state water law where the statute establishes specific management directives. Moreover, those Clean Water Act directives required the agency to take the specific action. In contrast, Section 505 of FLPMA grants the agencies broad discretion in determining what permit requirements are appropriate for fishery and wildlife purposes. Consequently, there is no direct conflict between the directive in Section 505 and state water law, and therefore no federal preemption of state water law. See Supplement to Solicitor Opinion No. M-36914 On Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (Supp.), 88 I.D. 253, 257 (1981) (FLPMA does not mandate or authorize federal agencies to use water outside of state law to satisfy the broad management objectives of FLPMA).

7/ In fact, under the recent Supreme Court opinion in Lucas v. South Carolina, 112 S. Ct. 2886 (1992). the forced relinquishment of water may well be a regulatory taking which requires compensation by the government. In Lucas, the Court held that a regulatory requirement which results in a complete denial of use of property constitutes a compensable taking, unless the regulated act falls within the traditional scope of a "nuisance". Water by-passed from a dam or diversion cannot be used pursuant to and for the purposes of the water right, which is a complete taking of its value. Moreover, the diversion of water is clearly not a nuisance.

8/ In Riverside Irrigation District v. Andrews, 568 F. Supp. 583 (D. Colo. 1983), aff'd, 758 F.2d 508 (10th Cir. 1985), the court held that Congress authorized federal agencies to require a Section 404 permit which might impact state water rights because Section 510(2) of the Act provided that nothing in the Act was to affect state jurisdiction over water "[e]xcept as expressly provided in" the Act. See id. at 589; 33 U.S.C. § 1370(2) (1988).

In fact, there are several ways in which the Forest Service may satisfy the wildlife and fisheries management directives contained in FLPMA which would be fully consistent with state water law. For example, the Forest Service could: (i) petition the Colorado Water Conservation Board to establish instream flow appropriations in the streams that are of concern, Colo. Rev. Stat. § 37-92-102(3) (1990); (ii) acquire existing water rights and grant or lease those rights to the Colorado Water Conservation Board for instream flows, id.; (iii) under appropriate circumstances, appropriate water directly for fisheries purposes, Thornton v. Fort Collins, 830 P.2d 915, 931 Colo. 1992); or (iv) utilize hatchery programs or stream channel modification programs to enhance fishery populations. Consequently, because there is no direct conflict between state water law and the broad management directives set forth in FLPMA, there is no basis for the Forest Service's assertion that FLPMA authorizes the Forest Service to limit the exercise of a state water right in a manner inconsistent with state law and contrary to the primary purposes for which the national forests were established.[9/]

Unlike FLPMA, NFMA contains no independent directive for the Forest Service to protect fisheries. Nothing in NFMA requires the Forest Service to include provisions in LRMPs to protect fisheries or instream flows. Consequently, there is clearly no conflict between the management directives in NFMA and state water law.

NFMA's only relevant management directive is that LRMPs provide for multiple use and sustained yield of forest resources as provided in MUSYA. However, as the Supreme Court has held, the multiple-use mandate of MUSYA must be satisfied without defeating one of the primary purposes of the national forests under the Organic Administration Act -- to provide a reliable source of water for use by western communities. As discussed

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9/ In any event, the Forest Service's actions on the Arapaho and Roosevelt National Forests are inconsistent with the mandate of FLPMA Section 505. While the clear language of Section 505 is directed at mitigating ("minimize damage to . . . habitat" (emphasis added)) new impacts from right-of-way grants, the Forest Service is attempting to use the right-of-way permit process to implement habitat improvement projects where existing water transmission facilities are in place and no new impacts are expected as a result of right-of-way renewals.

above, the fisheries management objectives may be achieved[10/] by a variety of means that are consistent with state law. Provisions adopted by the Forest Service in the LRMP provide no legal basis for actions that are contrary to the Forest Service's statutory directives to comply with state water law. Moreover, NFMA provides that any directives contained in the LRMP are subject to valid existing rights, which would include existing state water rights.

b. The Legislative History of FLPMA and NFMA Does not Support the Forest Service's Position

The legislative history of FLPMA and NFMA is largely silent on the intended impact of those statutes on state water law. That silence is fully consistent with a congressional intent to maintain the long-standing federal policy of deferring to state law governing the use and allocation of water. If Congress had intended to make a significant policy change that would authorize federal land management agencies to utilize water outside of state water law systems for management purposes under FLPMA and NFMA, some meaningful discussion of the new policy would have been expected. Instead, to the extent water issues were discussed in the legislative history of FLPMA and NFMA, those discussions emphasize Congress's intent that FLPMA and NFMA not provide any authority for federal management of water resources.

The savings clauses contained in FLPMA appeared in Senate Bill 507 and were carried over into the final bill by a House/Senate conference committee. The Senate report on Senate Bill 507 repeatedly emphasizes that FLPMA is not to be construed in a manner that would "affect" state water rights. See S. Rep. No. 94-583, 94th Cong., 1st Sess. (1975). In its section-by-section analysis, the Senate Report states that the savings clause enacted as Section 701(g) "prevents construction of the Act as affecting water rights, water resources development or

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10/ This memorandum does not address the lack of a factual basis for the Forest Service policy. Significant questions exist regarding the relationship between by-pass flows and the two theories offered as a justification for this requirement - fishery management and channel maintenance. The New Mexico case disposed of the Forest Service's claim that it was entitled to preempt state water law for fishery purposes, and the facts demonstrate that some of the requested flows would either be detrimental to the fishery, or are requested in locations where a viable fishery cannot be established. The channel maintenance theory is in litigation in Colorado courts, and the United States has conceded that channels adjust to stream depletions.

control" or the "authority of federal agencies concerning development, licensing, or regulating of water resources." Id. at 77 (emphasis added). Again, in referencing the savings clauses contained in what was then Title V of Senate Bill 507, the Senate report states that Title V contains a series of savings clauses to insure, among other things, that water rights are not "affected" by the bill. Id. at 26. The Senate Report also emphasizes that the savings provision which became Section 701(h) was to ensure that "any action" taken under FLPMA will not adversely affect valid existing rights. See id. at 77. Adjudicated water rights are vested property rights, and therefore constitute valid existing rights protected under FLPMA. The Forest Service's by-pass flow requirements significantly impair those rights contrary to the legislative history and express language of FLPMA. See, e.g., City and County of Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836, 840 (1939).

Congress's continuation of its traditional federal deference to state water law is also confirmed by FLPMA's partial repeal of the Mining Act of 1866. While the right-of-way provisions of the 1866 Act were repealed, the water rights provisions of the 1866 Act were retained. The meaning of this is clear. Both the House and Senate Reports on the bills which ultimately became FLPMA emphasize that "[t]he water rights provisions [of the 1866 Act] are preserved." See S. Rep. No. 94-583 at 85; H. Rep. No. 94-1163, 94th Cong., 2d Sess. 30 (1976).

The legislative history of NFMA also shows that Congress did not intend that NFMA alter federal authority over water resources. The Senate Agriculture and Forestry Committee's report on the bill which became NFMA emphasized that NFMA "does not change the basic national forest management objectives and policies set out in the 1897 Organic Act and the Multiple-Use Sustained-Yield Act of 1960." S. Rep. No. 94-893, 94th Cong., 2d Sess., 32 (1976). Clearly, Congress did not authorize the Forest Service to adopt LRMP provisions that are directly contrary to the Organic Administration Act's purpose of providing water supplies to western communities.

In summary, the legislative history of FLPMA and NFMA demonstrates a congressional intent that the Forest Service fulfill its management directives in accordance with state water law.

c. Subsequent Judicial and Administrative Interpretations of FLPMA do not Support the Forest Service's Position.

Courts and responsible agencies have also uniformly concluded that those statutes create no independent authority for federal agencies to assert control over the allocation and use of state waters. As discussed above, the courts have held that the FLPMA Section 701(g) savings clause demonstrates that Congress intended that FLPMA not create any federal water rights. See Sierra Club v. Watt, 659 F.2d at 206.

Similarly, the Department of the Interior's Office of the Solicitor has concluded that FLPMA does not provide any authority for the assertion of federal control over water arising on federal lands. Recognizing that Congress does have authority by virtue of the Supremacy Clause to preempt state water law, the Solicitor concluded that FLPMA did not do so because: (i) FLPMA does not authorize or require agencies to "utilize water outside state recognized beneficial use concepts for the broad general purposes outlined as management objectives in the Act" and (ii) the savings clauses in Section 701(g)(1) and (2) expressly provide that FLPMA creates no authority for federal agencies to assert control over water uses. See Supplement to Solicitor Opinion No. M-36914, on Federal Water Rights of the National Park Service, Fish & Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, M-36914 (Supp.), 88 I.D. 253, 257 (1981).

The Solicitor properly distinguished other cases where the courts have found federal preemption of state water law to the extent state law conflicts with specific statutory mandates. See id. at 257. Due to the absence of any conflict between FLPMA directives and state water law and given FLPMA's express savings clauses, the Solicitor concluded that FLPMA "does not give an independent statutory basis for claims for water uses inconsistent in any way with the substantive requirements of state law." Id.

The Forest Service has previously adopted a policy that it would not impose conditions on the renewal of right-of-way permits under FLPMA that would impair existing state water rights. For example, in 1984 several bills were introduced to amend the FLPMA right-of-way provisions. Hearings were held before the Senate Subcommittee on Public Lands and Reserved Waters and Mr. Douglas W. MacCleery, Deputy Assistant Secretary of the U.S. Department of Agriculture testified on behalf of the Department of Agriculture. In discussing the lack of need for legislation clarifying the rights of FLPMA permittees, Mr. MacCleery responded to concerns that the federal government

might add conditions to water conveyance system rights-of-way at the time of renewal that would have the effect of diminishing water rights held by the permittee. Mr. MacCleery stated: "I want to make it clear that there is no intention to jeopardize water rights or other rights held by the permittee at the time of renewal." See Hearings on H.R. 2838 and S. 2692/H.R. 2982 Before the Subcommittee on Public Lands and Reserved Waters, Committee on Energy and Natural Resources, United States Senate, p. 7 (June 28, 1984) (Statement of Douglas W. MacCleery, Deputy Assistant Secretary, U.S. Department of Agriculture). The actions of local officials on the Arapaho and Roosevelt National Forest are directly contrary to that national policy adopted by the Department of Agriculture.

IV. CONCLUSION

The Forest Service does not have the legal authority to require by-pass flows as a condition of the renewal of special use permits. Neither FLPMA nor NFMA provide a basis for federal assertion of by-pass flows outside of the framework of state water law. Both the express language of those statutes, and the absence of any clear congressional intent to reverse or abandon long-standing federal policy by authorizing the Forest Service to take actions that impair valid existing water rights and contradict the water supply purposes for which the national forests were established, show that the Forest Service's reliance on FLPMA and the LRMP is misplaced. The actions by Forest Service officials on the Arapaho and Roosevelt National Forests fly in the face of FLPMA and NFMA's clear statutory language, the Acts' legislative history, and judicial and administrative interpretations of federal authority over water resources.

The USFS should adopt a policy which confirms that it recognizes and will protect state water rights as private property rights, that it will not interfere with the development and use of interstate water allocations made by interstate compact or equitable apportionment decrees, and that it will not interfere with state water administration systems by restricting the ability of water right owners to divert, store and use water under vested water rights.