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Trout Unlimited

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ABSTRACT

In April 2004, a Colorado federal district court ordered the U.S. Forest Service to reconsider a 50-year easement that had been granted to the Water Supply and Storage Company (WSSC). This easement allowed the WSSC to store water on 390 acres of federal land. The easement, however, had been granted without the imposition of bypass flows. The Colorado federal district court held that the Forest Service had authority to impose bypass flows as a condition of a renewal of a special permit. The district court reversed the easement granted to the WSSC. This article explores the arguments and authorities that the district court relied on when it held that the Forest Service had the authority to impose bypass flows in the easement granted to the WSSC. This article also presents counter-positions to the arguments relied on by the federal district court.

INTRODUCTION

Most of the water in the arid western states originates in or flows through federal lands.[1] Even though the water in the western states originates mostly on the federal lands, it is state law that governs the allocation of the water. The system of allocation in the western states is the doctrine of prior appropriation.[2] Under state law, individuals have property rights to the water that they divert and apply to a beneficial use.[3] These individuals must often use federal land to transport their water to the place of the beneficial use. The U.S. Forest Service typically grants access to its land through a license or a special use permit. The special use permits are often, by their terms, revocable and subject to the conditions imposed by the Forest Service.[4] The state law governing water allocation, the federal law governing the National Forests, and the

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1. "More than 60% percent of the average annual water in the 11 Western States is from federal reservations." United States v. New Mexico, 438 U.S. 696, 699 n.3 (1978).

2. The person who first physically diverts water from a stream and applies it to a beneficial use in a non-wasteful manner is a prior appropriator. *See, e.g.*, JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS 98 (3d ed. 2000).

3. *See generally id.* at 111-15.

4. In *Trout Unlimited v. U.S. Department of Agriculture*, the District Court refers to the special use permit as an easement; however, it is not a true easement because the parties will have to renew the permit in 50 years. 320 F. Supp. 2d 1090 (D. Colo. 2004).

increasing demand for water have given rise to numerous conflicts, most recently in Colorado.

Under the doctrine of prior appropriation, settlers of the western states were encouraged to appropriate as much water as they could use.[5] Leaving water in the streams was considered waste of a valuable resource.[6] The practice of appropriating all of the available water led to completely drying up some rivers in the West.[7] As attitudes have shifted and society's values have changed, there has been a movement toward environmental sustainability, such as protecting fish and wildlife habitats and riparian areas, as well as protecting the aesthetic qualities of the environment.[8] To support these objectives, however, it is necessary to leave some water in the streams.

The Forest Service has long recognized these "new" objectives in the federal lands.[9] Because the water has been almost completely appropriated by state users, there is essentially no water left for instream flows to support these new objectives. Even if water existed that the Forest Service could appropriate, the Forest Service would be the most junior user and the last in a long line to receive water. Therefore, the Forest Service began to look for other ways to obtain water for its needs. In the 1970s, the Forest Service asserted that they had an implied water right to maintain instream flows.[10] The state water right holders challenged the assertion that the Forest Service had an implied water right for instream flows for fish and wildlife purposes and the controversy made its way to the U.S. Supreme Court in 1978.

In *United States v. New Mexico*, the Supreme Court held that the Forest Service did not have implied reserved water rights to maintain "minimum instream flows for aesthetic, recreational, and fish-

5. *See* DANIEL M. GILLILAN & THOMAS C. BROWN, INSTREAM FLOW PROTECTION: SEEKING A BALANCE IN WESTERN WATER USE 9–43 (1997).

6. *Id.*

7. *Id.*

8. *Id.* at 43.

9. *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 704 (1978) (The Forest Service argued that it possessed an implied reserved water right to support fish and wildlife habitat.).

10. The "implied-reservation-of-water" doctrine was first articulated by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). When Congress withdrew land from public domain, such as for Indian reservations or forest land, Congress did not expressly reserve water for the federal reservations. When federal lands withdrawn from public domain required water for the purposes for which they were created, their rights often clashed with state water rights. The Supreme Court thus created the "implied-reservation-of-water" doctrine, which held that the federal government had impliedly reserved water rights "to the extent needed to accomplish the purpose of the reservation." *New Mexico*, 438 U.S. at 700 (citations omitted).

preservation purposes."[11] The Supreme Court held that the National Forest system had two primary purposes: to furnish timber and to secure favorable water flows.[12] The Supreme Court characterized the instream flows for aesthetic, recreational, and preservation purposes as "secondary" and held that the secondary purposes conflicted with Congress's intent that "the national forest system...[was] a means of enhancing the quantity of water that would be available to the settlers of the arid West."[13] The Supreme Court further reasoned that instream flows "will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators."[14] Therefore, these secondary purposes conflicted with the primary purpose of securing favorable water flows. The Court directed the Forest Service to appropriate water that it required for the secondary purposes under the applicable state law.[15]

The Court's directive was an empty one and the Forest Service's water needs for the secondary purposes did not diminish. Therefore, the Forest Service changed its focus in trying to obtain water for its purposes. After the *New Mexico* case, the Forest Service asserted that it had regulatory authority under the Federal Land Management and Policy Act (FLPMA) to require instream flows when granting or renewing permits for rights-of-way over federal lands.[16]

FLPMA directs the Forest Service to "grant, issue, or renew...rights-of-way over, upon, under or through" National Forest lands.[17] These rights-of-way should include term conditions and terms that will "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment."[18] The Forest Service asserted that FLPMA granted authority to require state water right holders to leave water instream as a condition of the renewal of the permits. Furthermore, the Forest Service claimed an inherent power as a property owner to set conditions on the use of its land. Therefore, when a state water right holder requested a new permit or, more likely, renewed an existing permit to transport its water across federal lands, the Forest Service began to impose the condition that the water right

11. *New Mexico*, 438 U.S. at 705.
12. *Id.* at 706.
13. *Id.* at 713.
14. *Id.* at 705.
15. *Id.* at 702.
16. *See, e.g.*, Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090 (D. Colo. 2004).
17. Title V of FLPMA, 43 U.S.C. § 1761(a) (2000). *See Trout Unlimited*, 320 F. Supp. 2d at 1105.
18. 43 U.S.C. § 1765(a).

holders leave water in the stream or no permit would be granted.[19] Thus, the Forest Service alleged that it was not claiming a water right but was only exercising its regulatory and proprietary authority.[20] This argument was disingenuous because the Forest Service was diminishing the state water right holder's water and applying that water to the Forest Service's purposes.

The Forest Service took this position in the lawsuit concerning the renewal of a special use permit in a Colorado district court. The *Trout Unlimited* case involved a permit renewal by the Water Supply and Storage Company (WSSC).[21] The WSSC had first obtained a permit for the use of the Forest Service land in 1973. The Forest Service issued a series of short-term renewals. In 1981, the short-term permit was extended until December 31, 1991. This permit was granted until July 31, 1994, to allow for the analysis of environmental impacts of the land use authorization. It was this environmental analysis and the renewal of the authorization that led to the *Trout Unlimited* litigation. The easement granted to the WSSC did not contain an imposition of bypass flows, despite the urging of the various governmental groups, as well as the Plaintiff, Trout Unlimited.[22]

In determining that the Forest Service had authority to impose bypass flows as a condition of renewal of a permit,[23] the district court relied on the artificial distinction between state water rights and land use rights. This artificial distinction between water and land rights allowed the federal district to distinguish the Supreme Court's holding in *United States v. New Mexico* from the facts presented in the *Trout Unlimited* case.[24] The court in *Trout Unlimited* reasoned that the Forest Service's power to prevent trespassing also gave the Forest Service power to condition the use of its land.[25] The district court concluded that instream flow conditions were a federal prerequisite to the use of its land, and it did not matter that the federal prerequisite affected the water appropriated under state law.[26]

This artificial distinction between water rights and land use rights allowed the Forest Service to obtain water from a prior appropriator without having to defer to state law or the doctrine of prior

19. The Forest Service's arguments are discussed further in *Trout Unlimited*, 320 F. Supp. 2d 1090.
20. *Trout Unlimited*, 320 F. Supp. 2d at 1102–03.
21. *Id.* at 1095.
22. *Id.* at 1096–97.
23. *Id.* at 1106.
24. *See id.* at 1103.
25. *Id.* at 1105.
26. *Id.*

appropriation and apply it to its own beneficial uses.[27] This artificial distinction is problematic in many ways. First, this distinction ignores the elements of acquiring a property right to water under prior appropriation. Second, this artificial distinction ignores the fact that under the doctrine of prior appropriation a state water right does include a right to burden another's land. Therefore, under prior appropriation, water rights and land use rights are irretrievably linked. Prior appropriation and, indeed, the West itself, would not be what it is today if water rights were separated from land use rights. Finally, when it is clear that, under the law of prior appropriation water rights and land use rights are not separate entities, the federal government may be estopped from revoking access to the Forest Land.

I. BACKGROUND OF THE *TROUT UNLIMITED* LITIGATION

Trout Unlimited v. United States began when the Forest Service issued a 50-year easement to the WSSC without imposing bypass flow requirements. The Long Draw Dam, the subject of the *Trout Unlimited* litigation, is a high mountain water storage facility located on La Poudre Pass Creek. The La Poudre Pass watershed is located in the Arapaho-Roosevelt National Forests, just west of Fort Collins, Colorado. The Long Draw Dam was completed in 1929. The expansion of the dam almost 30 years later caused water to back up onto 390 acres and required the WSSC to obtain authorization for the use of that land. WSSC stores water in the reservoir and releases water for downstream municipal and agricultural use.[28]

The permit was renewed several times from 1973 until 1980. In 1980, the Forest Service issued a new permit, which was amended in 1981 to extend the life of the permit until 1991.[29] The 1981 amendment specifically acknowledged that any future permits would be subject to the conditions imposed by the Forest Service. When the permit was subject to renewal in 1991, the Forest Service extended the life of the existing permit until July 31, 1994, so that environmental impacts of the land use could be analyzed.[30]

During the time that the permit was extended, The Forest Service warned the WSSC that the renewal of these land use authorizations could include conditions that required minimum

27. *Id.*
28. *Id.* at 1095.
29. *Id.*
30. *Id.*

amounts of water to be left in the stream.[31] The owners of the water facilities were alarmed at the possibility of the imposition of the bypass flow conditions. They complained to Congress and argued that the Forest Service did not have the authority to require instream flows as a condition for the renewal of the permits.[32] These members of Congress approached then-Secretary of Agriculture Edward Madigan. The Secretary responded to these concerns, stating that "[n]ew bypass flow requirements will not be imposed on existing water supply facilities."[33]

In September 1993, the cities of Fort Collins and Greeley, Colorado, and WSSC submitted a "Proposed Joint Operations for Mainstream Poudre River Flow Enhancement" (JOP).[34] The JOP provided for additional flows for the Poudre River between December and March.[35] The WSSC proposed the JOP in anticipation of the renewal of the permit in July 1994. This was a voluntary measure on the part of the WSSC and the municipalities it served and, in turn, they requested that the Forest Service not impose bypass flows.[36] In May 1994, the cities and the WSSC offered the Forest Service a revised JOP. The cities and the WSSC asserted that the revised JOP offered additional environmental benefits in contrast to the original JOP.[37]

The Forest Service had two alternatives in reissuing the permit to WSSC. The Forest Service could either accept the JOP as a voluntary mitigation method and issue the permit without the imposition of the instream flow requirements, or it could issue the permit imposing the condition of the instream flows.[38] Trout Unlimited, the U.S. Environmental Protection Agency, the National Park Service, and the Forest Service itself recommended that the Forest Service adopt the alternative that imposed bypass flows.[39] Ultimately, the Forest Supervisor disregarded the comments urging the adoption of the alternative imposing bypass flows and issued a Record of Decision granting WSSC a land use authorization for the reservation with the JOP as a voluntary mitigation measure.[40] The Forest Supervisor stated that he

31. *Id.* at 1096.
32. *Id.*
33. *Id.* (quoting the "Madigan Policy").
34. *Id.* at 1096.
35. *Id.*
36. *Id.*
37. *Id.* at 1097.
38. *Id.* at 1096.
39. *Id.* at 1097. The Forest Service's own assessment stated that "claims that the JOP results in more aquatic habitat than the [imposition of a bypass flow] appear to be unfounded from both a physical and biological perspective." *Id.* (internal edits omitted).
40. *Id.*

reached his decision only after "considerable consultation, deliberation, and reflection upon the proper balance of multiple uses of federal lands and the appropriate environmental mitigation." The WSSC received the renewed permit and Trout Unlimited filed suit against the United States.[41]

During the struggle between the WSSC and the Forest Service, the public controversy over bypass flows continued. Hank Brown, a Colorado Senator, proposed the "Brown Amendment" to the 1996 Farm Bill.[42] This amendment, as originally proposed, would have amended FLPMA to make bypass flow conditions in permit renewals unlawful.[43] However, a compromise was reached and the amendment imposed a 20-month moratorium on the imposition of bypass flow requirements.[44] The amendment also established a seven-member Water Rights Task Force to study and make a report on national forest water issues.[45] Trout Unlimited stayed its litigation over the easement granted to WSSC until the Task Force completed its recommendation.[46]

The Task Force concluded that Congress did not have the authority to require state water users to "relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits."[47] This conclusion did not resolve the dispute, however, because only four members of the seven-member group joined in this conclusion. The other three Task Force members disagreed with this conclusion, stating that the Forest Service had regulatory authority under FLPMA to impose bypass flow conditions as well as authority as a landowner to condition the use of its land.[48] Because the Task Force opinion did not resolve the dispute and Trout Unlimited disagreed with the majority's reasoning, Trout Unlimited reinstituted the litigation in the Colorado federal district court.[49]

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41. *Id.*

42. David M. Gillilan, Comment, *Will There Be Water for the National Forests?*, 69 U. COLO. L. REV. 533, 580 (1998).

43. *Id.*

44. *Id.* at 581 (citing Pub. L. No. 104-127 (Apr. 4, 1996), as amended Pub. L. No. 104-180 (Aug. 6, 1996) (codified in relevant part at 16 U.S.C. § 526 note (Supp. 1997)).

45. *Id.*

46. BENNETT RALEY ET AL., REPORT OF THE FEDERAL WATER RIGHTS TASK FORCE pt. III (1997), http://www.fs.fed.us/land/ (follow "Report of the Federal Water Rights Task Force" hyperlink) [hereinafter TASK FORCE REPORT) (discussing "The Colorado 'Bypass Flow' Controversy").

47. *Id.* Executive Summary.

48. *Id.* pt. IX (presenting "Separate Views of Elizabeth Ann Rieke, David H. Getches, and Richard Roos-Collins").

49. *Id.*

II. THE FEDERAL DISTRICT COURT'S OPINION

After the Task Force issued its decision, Trout Unlimited sued the Department of Agriculture (Defendants) over the Forest Service's grant of the easement to WSSC. WSSC, Greeley, the Colorado State Engineer, and the Colorado Conservation Board collectively (WSSC or Intervenors) intervened as defendants. Trout Unlimited (Plaintiff) alleged 13 claims against the Defendants. The district court dismissed four of the 13 claims because Plaintiff had failed to exhaust their administrative remedies.[50] The district court denied eight of Plaintiff's claims.[51] The district court, however, granted summary judgment in favor of Plaintiff as to Plaintiff's first allegation, violation of FLPMA section 505.[52]

In its claim under FLPMA, Trout Unlimited argued that the Forest Service violated FLPMA when it granted the easement because the easement did not contain conditions to "minimize damage...and otherwise protect the environment."[53] The district court began its opinion by noting that the standard of review required that "[a]dministrative determinations may be set aside only for substantial procedural or substantive reasons, and the court cannot substitute its judgment for that of the agency."[54]

The WSSC intervened on Plaintiff's first claim, stating that the "heart of this case" was whether Congress had authorized the Forest Service to prevent non-federal parties from diverting water "in order to make water available for downstream use by the Forest Service for fish and wildlife habitat protection."[55] The Intervenors argued that Congress did *not* authorize the Forest Service to impose bypass flows "in order to reallocate water from existing uses to unmet" Forest needs.[56] This authority would "contradict the repeated and explicit decisions by Congress to defer to and respect state authority over water allocation and use."[57] The Intervenors also asserted that the imposition of bypass flows directly contradicted the "primary purpose" of the National Forest:

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50. Plaintiff's alleged violations of National Environmental Policy Act (NEPA) and Forest and Rangeland Renewable Resources Planning Act (FRRRPA) (claims 2, 5, 9, and 13). Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1115 (D. Colo. 2004).

51. Plaintiff alleged other violations of NEPA (claims 3, 4, and 6) and FRRRPA (claims 7, 8, and 10) as well as violations of the Wild and Scenic Rivers Act and the Wilderness Act (claims 11 and 12). *Id.* at 1097, 1098, 1115.

52. *Id.*

53. *Id.* at 1106.

54. *Id.* at 1098–99.

55. *Id.* at 1102.

56. *Id.*

57. *Id.*

to enhance the quantity of water available to nonfederal water users. The Intervenors further alleged that the statutes that the Plaintiff and the United States relied on to impose bypass flows did not grant that authority, but, in fact, denied any authority of the federal government or the Forest Service to interfere with nonfederal use of water. The Intervenors concluded that imposition of bypass flows violated the McCarren Amendment.[58] Therefore, the Intervenors claimed that "the failure of the Forest Service to impose conditions beyond its legal authority cannot provide" a basis that the Forest Service violated the law.

The Defendants countered these assertions by arguing that "when the Forest Service requires bypass flows it is imposing a condition on the use of federal land rather than asserting a water right."[59] Furthermore, Defendants pointed out that a Colorado water right does not carry with it a right to use federal land.[60] Defendants argued that the Forest Service had "broad regulatory authority to impose conditions on the use of its land even when those conditions affect private water rights."[61] Defendants asserted that this authority came from the Organic Act, FLPMA, and the agency's own proprietary capacity. Trout Unlimited, agreeing with the Defendants' other arguments, further asserted that the Forest Service has power to impose bypass flows under their inherent power as a property owner.[62]

The federal district court found that the Forest Service did have authority to impose bypass flows and noted that,

> on the rare occasions when bypass flows are required as a condition to the use of federal lands, they neither reflect nor establish a water right; rather, they merely address the nature of the use to which a water right might be put once the right is obtained from the State.[63]

Because the Forest Service had authority to impose bypass flows as a condition to the renewal of the permit for WSSC, the Forest Service's

58. *Id.* The McCarren Amendment was passed by Congress in 1952 and provided that the federal government waive its sovereign immunity when a state government adjudicates water rights. *See, e.g.*, Nat'l Sci. & Tech. Ctr., BLM, Federal Reserved Water Rights, http://www.blm.gov/nstc/WaterLaws/fedreservedwater.html (last visited June 3, 2006).

59. *Trout Unlimited*, 320 F. Supp. 2d at 1102.

60. *Id.*

61. *Trout Unlimited*, 320 F. Supp. 2d at 1102.

62. *Id.* at 1103, 1106.

63. *Id.* at 1106.

actions were arbitrary and capricious in issuing the permit without the imposition of bypass flows.[64]

In its opinion, the district court first addressed the Intervenors' reliance on *United States v. New Mexico*. The district court drew a sharp distinction between water rights and land use rights, stating that, while the Court in *New Mexico* found that "Congress did not...intend to reserve water rights for wildlife preservation purposes when it set aside lands for national forests, *United States v. New Mexico* did not address the power of the Forest Service to restrict the use of rights-of-way over federal land for fish and wildlife purposes." According to the district court, this case was not about water rights; thus, *New Mexico* did not control.[65]

After the district court determined that *United States v. New Mexico* did not apply, it then relied on *County of Okanogan v. National Marine Fisheries Service*, a Ninth Circuit case holding that the Forest Service had authority to impose bypass flows.[66] The Ninth Circuit found the Forest Service's authority to impose bypass flows from the statutes governing the Forest Service, such as FLPMA, the Organic Act, the National Forest Management Act (NFMA), and the Multiple Use Sustained Yield Act (MUSYA).[67] The district court adopted the Ninth Circuit's reasoning, quoting the *Okanogan* court: "These statutes, in our view, give the Forest Service authority to maintain certain levels of flow in the rivers and streams within the boundaries of the...National Forest to protect endangered fish species."[68]

The court in *Trout Unlimited* also dismissed the Intervenors' argument that the "savings clause"[69] was evidence that Congress did not

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64. *Id.*

65. *Id.* at 1103

66. County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003).

67. These statutes are only discussed as they are referenced in the cases that rely on these statutes. For further reference on these statutes, please see the statutes themselves: Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2000); Forest Service Organic Act, 16 U.S.C. § 475 (2000); National Forest Management Act, 16 U.S.C. § 1600 (2000); Multiple Use Sustained Yield Act of 1960, 16 U.S.C. § 528 (2000).

68. *Trout Unlimited*, 320 F. Supp. 2d at 1104 (quoting *County of Okanogan*, 347 F.3d at 1085).

69. The saving clause is found in 43 U.S.C. § 701. "Nothing in this Act...shall be construed as terminating any valid lease, permit,...right-of-way, or land use right or authorization existing on the date of approval of this Act" (Oct. 1976). 42 U.S.C. § 1761(a).

> 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.

intend to diminish any vested water rights guaranteed under state law. The district court stated that the "rights-of-way were always, by their written terms, revocable at the discretion of the federal government" and, therefore, the case is "not a controversy over water rights, but over rights-of-way through lands of the United States, which is a different matter."[70]

The district court then looked to *City & County of Denver v. Bergland*,[71] stating that "the Tenth Circuit has recognized that the Forest Service's authority over its lands may be exercised to limit a water right holder's use of water."[72] According to the district court, the Tenth Circuit recognized that the right to appropriate water did not include a right to use another's land and the Forest Service had a "duty to protect the forests from injury and trespass, and the power to condition their use and prohibit unauthorized uses."[73]

The district court also found that Title V of FLPMA granted authority to the Forest Service to "'grant, issue or renew rights-of-way over, upon, under or through'...National Forest lands" and that each right-of-way will "'minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.'"[74] Therefore, the district court reasoned, the Forest Service is not asserting a water right when imposing a bypass flow requirement, rather it is placing conditions on the use of its land, as would any other property owner.[75]

Finally, the district court concluded its reasoning by relying on a U.S. Supreme Court case that rejected the argument that the imposition of bypass flows implicates or conflicts with state water rights.[76] *PUD No. 1 v. Washington Department of Ecology* involved a dispute over Clean Water Act certification. In that case, the Supreme Court held that a water right under state law "did not limit the scope of federal regulation[s]...that may be imposed" on a water right holder.[77] The minimum instream flows required under the Clean Water Act (CWA) were federal prerequisites to the use of a water right obtained under state law. The *PUD No. 1* court, therefore, "recognized that the

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43 U.S.C. § 1761 (g)(1), (2). Furthermore, "all actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.*

70. *Trout Unlimited*, 320 F. Supp. 2d at 1104 (quoting *Okanogan*, 347 F.3d at 1086).
71. 695 F.2d 465 (10th Cir. 1982).
72. *Trout Unlimited*, 320 F. Supp. 2d at 1104.
73. *Id.* at 1105 (quoting *Bergland*, 695 F.2d at 476).
74. *Id.* (quoting 43 U.S.C. §§ 1761(a), 1765(a)).
75. *Id.* at 1106.
76. PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700 (1994).
77. *Trout Unlimited*, 320 F. Supp. 2d at 1105 (citing *PUD No. 1*, 511 U.S. at 720).

regulatory action under federal law (minimum stream flow requirements) did not interfere with the state allocation because it neither 'reflected nor established' a water right."[78] Therefore, according to the district court, the requirement of instream flows by the Forest Service was a permissible federal prerequisite, similar to a federal prerequisite required under the CWA.[79] According to the *Trout Unlimited* court, the imposition of bypass flows by the Forest Service did not reflect or establish a water right.[80]

The district court, based upon the reasoning stated above, held that the Forest Service had legal authority to impose bypass flow conditions in a permit renewal. Once the district court found that the Forest Service did, indeed, have the legal authority to impose bypass flow conditions, the district court turned its attention to Plaintiff's actual claim.[81] Plaintiff alleged that the United States, through the Forest Service, had violated FLPMA when it issued a permit without the bypass flow conditions. The district court agreed with Plaintiff, stating that "requiring bypass flows was the environmentally preferred analysis."[82] Therefore, the district court determined that the Forest Service was arbitrary and capricious when it issued the permit without the condition of the bypass flow.[83] It reversed the easement granted to the WSSC and remanded determination of the easement back to the Forest Service for further consideration in accordance with its obligations under FLPMA.[84]

III. ANALYSIS OF THE DISTRICT COURT'S REASONING

The Supreme Court's decision in *New Mexico* dealt a devastating blow to the Forest Service's need for water for fish and wildlife purposes.[85] It is understandable and even desirable that there is water available for those "secondary purposes." Furthermore, the need for water for these secondary purposes has grown, rather than diminished. However, by carefully analyzing the district court's reasoning and the Forest Service's assertions, it is not clear or even particularly persuasive that the Forest Service has regulatory or proprietary authority to condition the use of their land by imposing minimum instream flows. First, the claim that the Forest Service is not asserting a water right

78. *Id.* (quoting *PUD No. 1*, 511 U.S. at 720-21).
79. *Id.*
80. *Id.* at 1105-06.
81. *Id.* at 1106-10.
82. *Id.* at 1107.
83. *Id.* at 1110.
84. *Id.* at 1115.
85. *See* Introduction *supra*.

ignores the elements of a property right under the doctrine of prior appropriation. Second, the precedent that the district court relied on to support the proposition that the Forest Service has this regulatory authority to interfere with water rights because it is regulating its land is questionable. The cases relied on by the *Trout Unlimited* court are distinguished from *Trout Unlimited* on facts presented as well as a further analysis of the federal statutes discussed within the precedent relied on by the court in *Trout Unlimited*. Third, if the Forest Service has the same rights as any other property owner to restrict access or condition the use of their land, then the Forest Service must be governed by state property law, such as prior appropriation, where water rights and land use rights are intertwined. Furthermore, the Forest Service may be equitably estopped from revoking access to its land because the state water right holders reasonably expected continued access to the land and expended substantial resources and labor on that expectation.

A. Doctrine of Prior Appropriation

To understand how the *Trout Unlimited* court creates an artificial distinction between water use rights and land use rights, it is important to understand the underlying principles of the doctrine of prior appropriation. Under state law, water flowing naturally in a stream is unowned and held by the state for acquisition by water users.[86] The first person who physically diverts the water from the natural stream and applies it to a beneficial use in a non-wasteful manner acquires a property right to that volume of water.[87] Under the modern doctrine of prior appropriation, a water right depends on the priority of the use, or "first in time, first in right."[88] However, a water right is not obtained just by an individual being the first person to physically divert water. A water right also depends on what the water is used for. It must be put to beneficial use.[89] Traditionally, water uses for domestic purposes, such as mining, livestock grazing, and irrigation were considered beneficial.[90] Water left in a stream was considered a waste of a valuable resource.[91] As society's values have shifted and environmental concerns have become more prominent, the definition of beneficial uses has broadened. Instream flows for "recreational purposes, including fishery or wildlife"

86. SAX ET AL., *supra* note 2, at 98.
87. *Id.*
88. *Id.* at 99.
89. *Id.* at 98.
90. *Id.*
91. *Id.*

are now considered a beneficial use.[92] It is also important to remember that, when water is diverted to be applied to a beneficial use, it must usually be transported across another's land from the source to the beneficial use.[93]

According to the district court in *Trout Unlimited*, the imposition of bypass flows as a condition to the use of National Forest land "does not constitute the assertion of a water right."[94] Bypass flow condition is a term that refers to a requirement that water, which would otherwise be diverted in priority, is instead "bypassed" from the diversion and left in the stream.[95] Water left in the stream reduces the amount of water that an individual holds a right to and reduces the amount of water applied to the beneficial use.[96] When the Forest Service imposes a bypass flow condition, the Forest Service prevents the state water right holder from applying her water to her beneficial use. Furthermore, the Forest Service is applying the water that it does not own to the Forest Service's beneficial use, instream flows. Therefore, when the Forest Service requires bypass flows, it is similar to a junior appropriator preventing the senior appropriator from receiving her water and the junior appropriator using the water that rightfully belongs to the senior appropriator for the junior appropriator's use. "Regardless 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."[97]

1. Precedent Relied on by the District Court

The district court concluded that the Forest Service had regulatory authority to impose bypass flow conditions on state water right holders who held permits to transport their water across National Forest land. The district court reasoned that, when the Forest Service imposes a bypass flow requirement, it is imposing a condition on the use of federal land.[98] According to the court in *Trout Unlimited*, FLPMA and other statutes governing the Forest Service mandate the imposition of the

92. COLO. REV. STAT. ANN. § 37-92-103(4) (West 2004).

93. *See infra* Part II.

94. Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1105 (D. Colo. 2004).

95. TASK FORCE REPORT, *supra* note 46.

96. *See, e.g.*, United States v. New Mexico, 438 U.S. 696, 715 (1978) ("A reservation of additional water could mean a substantial loss in the amount of water available for irrigation and domestic use, thereby defeating Congress' principle purpose of securing favorable conditions of water flow.").

97. TASK FORCE REPORT, *supra* note 46.

98. *Trout Unlimited*, 320 F. Supp. 2d at 1106.

bypass flow condition. The Ninth Circuit also reached this conclusion in *County of Okanogon v. National Marine Fisheries Service.*[99]

The court in *Trout Unlimited* relied heavily on the Ninth Circuit's reasoning in *County of Okanogan.* The *County of Okanogan* litigation was based on the same situation as the *Trout Unlimited* litigation. Irrigators, who possessed Washington state water rights, used rights-of-way located on National Forest land to deliver water to their property. Renewable permits authorized these rights-of-way.[100] The Forest Service placed instream flow conditions on these permits. The Forest Service shut off the private ditches on the Forest Service in order to protect an endangered salmon. The irrigators suffered severe property damage when the water did not arrive. The water right holders brought suit over the damage to their property.[101] The district court in *County of Okanogan* held that the Forest Service had the authority to shut off the ditches to prevent harm to the endangered species and the Ninth Circuit affirmed.[102]

In its opinion, the Ninth Circuit began with the proposition that "[t]he permits themselves, from their inception, provided the government with unqualified discretion to restrict or terminate the rights-of-way."[103] Accordingly, this unqualified discretion allowed the Forest Service to impose a condition that prevented the state water right holders from receiving all of their water for three consecutive summer months.[104] The Ninth Circuit found that the statutes governing the Forest Service (FLPMA, the Organic Act, and MUSYA) granted it the authority to impose bypass flows.[105] Specifically, the Ninth Circuit noted that the Organic Act established National Forests "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows."[106] The Ninth Circuit also noted that MUSYA provided that "national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish

99. County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003) (finding that the Endangered Species Act mandated instream flow condition).

100. *Id.* at 1092.

101. *Id.* at 1084.

102. *Id.*

103. *Id.* at 1085.

104. James D. Bowen, *The Collision of Land Use Water Law in the Methow River Valley,* 38 GONZ. L. REV. 655, 658 (2002).

105. *County of Okanogan,* 347 F.3d at 1085.

106. *Id.* (quoting the Organic Act of 1897, ch. 2, § 1, 30 Stat. 34, 35 (codified at 16 U.S.C. § 475 (2000)). The U.S. Supreme Court held in *United States v. New Mexico,* 438 U.S. 696, 707–08 & n.14 (1978), that the phrase "to improve and protect the forest" was not an independent third purpose of the Organic Act.

purposes."[107] Furthermore, the Ninth Circuit noted that the "savings clause"[108] of FLPMA did not protect the vested water rights of the irrigators.[109] The Ninth Circuit stated that, while *United States v. New Mexico* did address the Forest Service's water rights, it did not "address the power of the Forest Service to restrict the use of the rights-of-way over federal land."[110]

The *New Mexico* court, like the Ninth Circuit in *County of Okanogan*, discussed the Organic Act and MUSYA. An analysis of the Supreme Court's discussion in *New Mexico* indicates that the Ninth Circuit misinterpreted the statutes. First, the Supreme Court in *New Mexico* concluded that "Congress intended national forests to be reserved for two purposes—'to conserve the water flows, and to furnish a continuous supply of timber for the people.'"[111] In *New Mexico*, the federal government tried to argue that "improvement" and "protection" formed a third purpose of the forest system.[112] The Supreme Court rejected this argument, stating that the improvement and protection of the forests was for the two purposes of the forest system: securing favorable water conditions and furnishing a continuous supply of timber.[113] In contrast, the Ninth Circuit in *County of Okanogan* relied on the "improvement" and "protection" language in finding that the Organic Act conferred authority on the Forest Service to impose bypass flows.[114] This is the same language that the Supreme Court rejected as a primary purpose for the National Forest system.[115]

The *New Mexico* court also discussed MUSYA. The Supreme Court conceded that although MUSYA intended to broaden the purposes "for which national forests had previously been administered," MUSYA did not intend to reserve water rights for the federal forest system.[116] Congress included wildlife and fish purposes as well as recreation purposes; however, as Congress itself warned, "the purposes...of this title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in

107. *County of Okanogan*, 347 F.3d at 1085 (quoting the Multiple-Use Sustained-Yield Act of 1960 § 1, 16 U.S.C. § 528 (2000) (internal quotations omitted).

108. See *supra* note 69 for text of the savings clause.

109. *County of Okanogan*, 347 F.3d at 1085.

110. *Id.* at 1086.

111. *New Mexico*, 438 U.S. at 707 (internal edits omitted).

112. *Id.* at 707 n.14.

113. *Id.* (noting that the legislative history does not support a finding of a third and separate purpose).

114. *County of Okanogan*, 347 F.3d at 1085.

115. *New Mexico*, 438 U.S. at 707 n.14.

116. *Id.* at 713.

the Organic Administration Act of 1897."[117] Based upon this language, the Supreme Court decided that Congress did not believe that the new purposes enumerated in MUSYA were "so crucial as to require a reservation of additional water."[118]

The Ninth Circuit in *County of Okanogan* conveniently ignored the language stating that the purposes enumerated in MUSYA were to be "supplemental to, but not in derogation of" the original purposes of the forest system when it decided that the Forest Service had authority to impose bypass flow conditions. This "supplemental to" language included in MUYSA as well as the Supreme Court's discussion of MUSYA cast doubt on the Ninth Circuit's reasoning that MUSYA grants the Forest Service authority to impose bypass flows as a condition for renewing a land use permit. The *Okanogan* court dismissed the Supreme Court discussion on the two statutes, concluding that *New Mexico* did not discuss the Forest Service authority over access to its land and the Forest Service, by conditioning the use of its land, is not asserting a water right.[119] As discussed above, this argument is disingenuous and ignores the principles of prior appropriation.[120] It is clear that the *New Mexico* case holds that the Forest Service did not have an implied reserved water right for aesthetic, wildlife, and recreational purposes. The *New Mexico* court was also quite clear that the Organic Act had two primary purposes, which did not include the purpose to improve and protect the national forests. It was also clear that the Supreme Court stated that MUSYA was to broaden the National Forest system, but that MUSYA was not to be in derogation of the Organic Act.[121] But the Ninth Circuit dismissed all of these Supreme Court statements by creating a distinction between land use and water rights.[122]

The Ninth Circuit in *County of Okanogan* also reasoned that the savings clause of FLPMA did not apply to the state water right holders' vested water rights. The Ninth Circuit used two separate sections of the savings clause to reason that the "vested rights" in the savings clause was a vested right in land use or authorization.[123] The court in *Okanogan* stated, "Under this savings clause, the government could not under FLPMA divest a private party of an existing 'land use right' or other 'valid existing rights, but...the plaintiffs' rights-of-way were always, by

117. *Id.* (quoting Multiple-Use Sustained-Yield Act of 1960 § 1, 16 U.S.C. § 528 (1976 ed.) (internal edits omitted).

118. *Id.* at 715.

119. *County of Okanogan*, 347 F.3d at 1086.

120. *See supra* Part II.A.

121. *New Mexico*, 438 U.S. at 713.

122. *See County of Okanogan*, 347 F.3d at 1086.

123. *Id.* at 1085.

their written terms, revocable at the discretion of the federal government."[124] According to the Ninth Circuit, vested rights did not include water rights under state property law. However, this statutory construction of FLMPA ignores another part of the savings clause, that "nothing in this Act shall be construed as...expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control."[125] When the Ninth Circuit limited "valid existing rights" to land use rights, it ignored the part of the savings clause that specifically deferred to water rights under state law. When the section on affected rights is read in its entirety, the Ninth Circuit's argument loses its persuasiveness and the district court's reliance on the Ninth Circuit decision is misplaced. Based on this misplaced reliance, the *Trout Unlimited* district court concluded that the Forest Service had legal authority to impose bypass flows.

The *Trout Unlimited* court then turned to the Tenth Circuit for authority for the proposition that "the Forest Service's authority over its lands may be exercised to limit a water right holder's use of water."[126] In *City & County of Denver v. Bergland,* Denver owned a right-of-way across Forest land. Denver intended to use the right-of-way to transport water. Denver began construction, but the Forest Service ordered Denver to stop the construction. Denver was constructing the transportation system parallel to their original alignment; however, the new transport system was placed at a higher elevation. Denver argued that the Forest Service was interfering with their water right as approved by Congress in the Blue River Decree.[127] The Tenth Circuit, however, dismissed this argument, stating that "the decree simply recognized Denver's right to appropriate those waters."[128] The Tenth Circuit implicitly held that the Blue River Decree did not discuss Denver's right-of-way. The court concluded that the Forest Service had authority to stop the construction because Denver was exceeding the scope of their grant and trespassing on forest land.[129] The court reasoned that "[t]he right to appropriate the waters of a stream does not carry with it a right to burden the lands of another with a ditch" to transport water to its intended place of use.[130]

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124. *Id.*

125. Pub. L. No. 94-579 § 701(g)(2), 90 Stat. 2743, 2786 (codified at 43 U.S.C. § 1701(g)(2)).

126. Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1104 (D. Colo. 2004) (citing City & County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982)).

127. *Id.* at 1105. The Blue River Decree was an adjudication of state water rights. *See Bergland,* 695 F.2d 465.

128. *Id.* at 483.

129. *Id.* at 467–80.

130. *Id.* at 484.

The district court in *Trout Unlimited* relied on the idea stated in *Bergland*, namely that a water right does not carry with it a right to burden another's land with a ditch.[131] *Bergland*, however, merely stands for the proposition that a water holder cannot trespass on Forest land to transport its water. A state water right holder must either have permission to transport water across the land or must pay just compensation for the taking of the land.[132] Even though the Forest Service objected to the trespass by Denver, the *Bergland* court did not hold that the Forest Service could completely cut Denver off from their water. The *Bergland* case, as utilized by the district court in *Trout Unlimited*, does not support the proposition that the Forest Service can limit a water holder's use of her water by limiting access to the land.

The district court then looked to Supreme Court precedent in *PUD NO. 1 of Jefferson County v. Washington Department of Ecology* to find that the Forest Service has authority to impose instream flows. The court in *Trout Unlimited* stated, "The argument that imposition of bypass flows implicates or conflicts with state water rights has been rejected by the Supreme Court...."[133] Again, however, the precedent relied on by the district court was substantially different than the facts of the *Trout Unlimited* litigation. In *PUD No. 1*, the plaintiffs wanted to build a hydroelectric generator.[134] The plaintiffs had to obtain various licenses in order to complete the project, including one under state law that required minimum instream flows. The state law was promulgated pursuant to the Clean Water Act.[135]

In *PUD No. 1*, the plaintiffs argued that instream flows violated Congress's deference to state water allocation because the CWA states, "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter."[136] Justice O'Connor dismissed this argument and stated in her opinion, "This language gives the States authority to allocate water rights; we therefore find it peculiar that petitioners argue that [the CWA] prevents the State from regulating stream flow."[137] However, the Supreme Court recognized that "minimum stream flow requirements

131. This statement is not quite correct. Colorado case law actually holds that a water right does not include in it a right to burden the land of another, unless there is consent or just compensation for the taking of the land.

132. *See, e.g.*, Part II.A.2.a.

133. Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1105 (D. Colo. 2004).

134. PUD No. 1 v. Wash. Dep't of Ecology, 511 U.S. 700, 703 (1994).

135. *Id.*

136. *Id.* at 720 (quoting the Federal Water Pollution Control Act (Clean Water Act) § 101, 33 U.S.C. § 1251(g) (2000)).

137. *Id.*

neither reflect nor establish proprietary rights to water,"[138] and the required certification determined the use a water right may be put to under the CWA, "if and when it is obtained from the State."[139]

The Supreme Court reinforced its holding with the legislative history of the CWA. "The requirements [of the Act] may incidentally affect individual water rights....It is not the purpose of this amendment to prohibit those incidental effects....[The] effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations."[140] The *Trout Unlimited* district court similarly concluded, based on the reasoning of the court in *PUD No. 1*, that bypass flow conditions on special use permits were similar to permit requirements under the CWA. The court in *Trout Unlimited* stated that bypass flow conditions "merely address the nature of the use to which a water right might be put once the right is obtained from the State."[141] However, there are substantial differences between permits granted under the CWA and permits granted by the Forest Service. The court in *Trout Unlimited* misinterpreted the Supreme Court precedent in *PUD No. 1*.

First, it is unclear what the Supreme Court meant when they stated that instream flows "neither reflect nor establish proprietary rights to water." As discussed above, instream flows are considered a beneficial use and water can be appropriated for this right.[142] The doctrine of prior appropriation places the claimants to the shared resource in a legal relationship with one another. Therefore, each water holder's rights correlate with other appropriator's rights.[143] When the Forest Service demands instream flows for their "secondary" purposes, this instream flow infringes on the correlative rights of the other appropriators. This infringement on the other's rights is a measure of a water right and the Service's disclaimer that they are not asserting a water right must fail. In contrast, The Supreme Court defined and limited the definition of proprietary rights to water under the Federal Power Act and then extended this limited definition to the CWA in *PUD No. 1*. The U.S. Supreme Court did not extend this definition of proprietary rights to the Forest Service or to the statutes governing the Forest Service.[144]

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138. Id. at 720-21 (quoting Cal. v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 498 (1990)) (internal quotations omitted).

139. *Id.* at 721.

140. *Id.* (quoting 3 Legislative History of the Clean Water Act of 1977, Ser. No. 95-14, at 532 (1978) (internal quotations omitted)).

141. Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1106 (D. Colo. 2004) (quoting *PUD No. 1*, 511 U.S. at 721).

142. *See supra* Part II.A.

143. SAX, *supra* note 2, at 98-100.

144. *See generally PUD No. 1*, 511 U.S. 700.

Justice O'Connor relied on another Supreme Court case to determine that, under the CWA, minimum instream flows did not reflect or establish proprietary rights.[145] In *California v. Federal Energy Regulatory Commission,* California wanted to impose minimum instream requirements on a river where a federally licensed hydroelectric project was located.[146] The Federal Energy Regulatory Commission (FERC) argued that it had exclusive jurisdiction to determine the instream flows from the hydroelectric project. California argued that the federal energy statute reserved the right for states to "the control, appropriation, use, or distribution of water used...for...other uses," and that other uses included requiring instream flows to protect fish.[147] The Supreme Court refused to disturb the finding of an earlier Supreme Court that proprietary rights under the Federal Power Act (FPA) were limited to municipal and irrigation uses.[148] It would seem that the Supreme Court extended the definition of "proprietary rights" to the CWA in *PUD No. 1.*

At first glance, it would seem to make sense to apply this definition of "proprietary rights," limited to municipal and irrigation uses, to the Forest Service and its requirements for instream flows as a condition on its use. But in fact, it would not make sense to extend the Supreme Court's definition of "proprietary rights" to the Forest Service's because the FPA and the CWA were not concerned with the allocation of water among users. The CWA regulated the quality of water,[149] not the allocation of water. The quality of water did affect the use of the water in that case. Furthermore, Congress recognized that regulating the quality of water would have incidental effects on the water allocation.[150] In contrast, as discussed above, the main concern of the Forest Service is not with the quality of water, but their demand for instream flows is a demand for water for beneficial uses that compete with prior appropriations for other beneficial uses. To state that bypass flow requirements are a condition on the use of water is another disingenuous argument as bypass flows affect the allocation of the water rather than the quality of the water.

A careful analysis of the district court's opinion in *Trout Unlimited* casts doubt on the Forest Service's assertion that it can impose

145. *Id.* at 720–21 (quoting Cal. v. Fed. Energy Regulatory Comm'n, 495 U.S. 490, 498 (1990)).

146. 495 U.S. 490 (1990).

147. *Id.* at 497 (omissions in the original).

148. *Id.* (citing the Federal Power Act of 1935 § 27, 16 U.S.C. § 821 (1982)).

149. Low instream flows are considered pollution. *PUD No. 1,* 511 U.S. at 719.

150. *Id.* at 721 (quoting 3 Legislative History of the Clean Water Act of 1977, ser. 95-14, at 532 (1978)).

bypass flows as a condition on the use of its land. This assertion relies on the Forest Service's artificial distinction between land use and water rights. This artificial distinction has no merit because when the Forest Service demands that a state water user leave water in the natural stream, it is reallocating water for its own beneficial use. Furthermore, when the artificial distinction between land use rights and water use rights is erased, it becomes harder to ignore the dictates of the Supreme Court in *New Mexico* as to how the Forest Service is to manage its lands, as well as the water that originates within those lands. The district court mistakenly relies on case law discussing trespass to find that the Forest Service has authority to require bypass flows. Finally, the district court's reasoning to reach its ultimate holding that the Forest Service has legal authority to impose bypass flows is unpersuasive when it relies on a limited definition of "proprietary rights," as defined by the Supreme Court, and reasoning that the Forest Service is not asserting a proprietary right to the water it is demanding remain in the stream.

2. The Forest Service as a Property Owner

In *Trout Unlimited*, the district court did not separately address the federal government's argument that it has inherent powers as a property owner that allow the Forest Service to impose bypass flows as a condition of the use of its land. This discussion was embedded in the district court's analysis of the Forest Service's regulatory power. To thoroughly understand the United States' argument and the district court's reasoning, it is necessary to address this property argument. The Task Force minority summarized this argument, stating, "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."[151] Following this thought to its logical conclusion, permit holders who use federal lands must comply with conditions or they will lose their permit to use the federal land.[152] Proponents of this argument always begin the argument with "Congress [has] the power to control [the] occupancy and use [in federal lands], to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them...."[153] However, this argument distracts from the issue of whether the Forest Service has legal authority to take water that has already been appropriated by another

151. TASK FORCE REPORT, *supra* note 46, pt. IX (presenting "Separate Views of Elizabeth Ann Rieke, David H. Getches, and Richard Roos-Collins").

152. *See* County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1085 (9th Cir. 2003).

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

and apply that water to instream uses. The argument that the United States has inherent powers as a property owner to protect its land creates the artificial distinction, once again, between water rights and land use rights.

In *Utah Power & Light Co. v. United States*, the Forest Service sued to enjoin the defendants from using National Forest land.[154] The defendants did not have a grant or a license from either the Department of the Interior or the Department of Agriculture to use federal land.[155] The power company built powerhouses, transmission lines, pipelines, and diversion dams on National Forest land.[156] The Power Company then used water it acquired under state law to generate electricity.[157] The Forest Service wanted the defendants off of the land and the Supreme Court agreed with the Forest Service.[158] *Utah Power & Light Co.* stands, then, for the unremarkable proposition that one person is not allowed to go onto another's land, without their permission, and build on it.[159]

At the end of the opinion, almost as an afterthought, the Supreme Court in *Utah Power & Light Co.* addressed the defendants' argument that the Forest Service was interfering with their water rights granted under state law. This argument was quickly dismissed with the statement, "this is not a controversy over water rights, but over rights of way through lands of the United States, which is a different matter...."[160] This quote has been used again and again to support the distinction between land use regulation and water rights.[161] Therefore, the reasoning goes, because bypass flows are a condition on land use, they are not interfering with state water rights.

When determining that the *Utah Power & Light Co.* controversy was not a dispute over water rights, the court relied on the premise that "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...."[162] Of

154. *See id.*
155. *Id.* at 403.
156. *Id.* at 402.
157. *Id.* at 411.
158. *Id.*
159. 243 U.S. 389.
160. *Id.* at 411.
161. *See, e.g.*, County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1086 (9th Cir. 2003); TASK FORCE REPORT, *supra* note 46, pt. IX (presenting "Separate Views of Elizabeth Ann Rieke, David H. Getches, and Richard Roos-Collins").
162. City & County of Denver v. Bergland, 695 F.2d 465, 483–84 (10th Cir. 1982) (quoting Snyder v. Colo. Gold Dredging Co., 181 F. 62, 69 (8th Cir. 1910)).

course, the Supreme Court was correct in stating that *Utah Power & Light Co.* was not a dispute about water rights; it was a dispute about trespassing on federal lands. The power company did not have permission, in the form of an easement, grant, or license, to enter the National Forest. The case might have been about water rights if the power company had permission to enter the federal lands and then the Forest Service took some of the power company's water for National Forest purposes.

The court in *Utah Power & Light Co.* relied on a 1910 Eighth Circuit opinion for the proposition that a water right does not carry with it a right to burden another's land. In *Snyder v. Colorado Gold Dredging Co.*, the plaintiff had an easement to transport water across the defendant's land.[163] The plaintiff entered the defendant's land, without his permission, and enlarged the ditch. This enlarged ditch increased the plaintiff's water supply beyond what he had appropriated under state law. The defendant, in the meantime, built his own ditch parallel to the plaintiff's ditch and this parallel ditch caused some of the water to seep from the plaintiff's ditch. The plaintiff argued that the defendant interfered with his increased water right.[164] The *Snyder* court held that the plaintiff did not have a right to the excess water appropriated and the easement granted to the plaintiff

> extended only to the maintenance and use of the ditch, substantially as then constructed, for the purpose of diverting and carrying the volume of water theretofore appropriated, and did not give any right to enlarge the ditch, or to change its location, or to use it in diverting and carrying a largely increased volume of water.[165]

The court continued by stating that the enlargement of the original ditch required either consent from the defendant or "appropriate condemnation proceedings."[166] Because there were neither, the appropriation was initiated by the means of trespass and the maintenance and enjoyment of the appropriation depended on the continued trespass.[167]

Therefore, when the court in *Snyder* held that a water right did not carry with it a right to burden another's land, the court was clearly concerned with trespass. The court was careful to draw a distinction between trespass on the burdened land and either consent by the

163. 181 F. 62 (8th Cir. 1910).
164. *Id.* at 66.
165. *Id.* at 70.
166. *Id.*
167. *Id.*

burdened property owner or appropriate condemnation proceedings against the burdened property owner.[168] Furthermore, implicit in the court's holding is the rule that a water right in the Colorado does allow one to burden another's land in the form of a ditch to transport water as long as there is consent or just payment for the taking of the land.[169] The *Snyder* court did not hold that, once consent is granted by the burdened property owner, the property owner could then revoke all access to his land.

Because of the language that a water right does not carry with it a right to burden another's land, *Snyder* has been relied on to support the Forest Service's position that it can condition the use of its land, even when requiring bypass flows.[170] It is true that the Forest Service is allowed to determine how and when another can burden its land. However, in the *Trout Unlimited* case, the Forest Service granted permission to the state water right holders to do so. In the *Snyder* and *Utah* cases, the facts presented involved the party trespassing onto another's land to transport their water.

If the United States has inherent power as a property owner to condition the use of its land, it follows then that state law should govern the United States as a property owner as state law governs all other property owners. While "public land law makes it clear that...federal authority over government-owned lands is even greater than that of a private proprietor,"[171] it would seem that state property law would still govern the federal government. Two ideas flow from this. First, Colorado law does grant a right to use another's land in order to appropriate water. Second, even though these permits are revocable licenses, the federal government may be estopped from revoking those licenses if the licensee does not comply with newly imposed conditions, such as bypass flow conditions.[172]

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168. *Id.*

169. *See id.*

170. *See, e.g.*, Thomas K. Snodgrass, Comment, *Bypass Flow Requirements and the Question of Forest Service Authority*, 70 U. COLO. L. REV. 641, 669 (1999).

171. TASK FORCE REPORT, *supra* note 46, pt. IX (presenting "Separate Views of Elizabeth Ann Rieke, David H. Getches, and Richard Roos-Collins").

172. Another argument against the power of the Forest Service preventing state water right holders from accessing their water is put forth in *Hage v. United States*, 51 Fed. Cl. 570 (2001). In *Hage*, the Federal Claims Court ruled that state water rights were a property right that required just compensation when the government took the water. Specifically, the court held that "the government cannot cancel a grazing permit and then prohibit the plaintiffs from accessing the water to redirect to another place of valid beneficial use. The plaintiffs have a right to go onto the land and divert the water." *Id.* at 584.

a. Private Condemnation

In the eastern United States, where water is plentiful, water rights were assigned on the "basis of ownership of tracts of land that are contiguous to the water" and were limited to the "boundaries of such tracts."[173] This type of water allocation, or riparianism, worked well in humid climates, where there was sufficient rainfall to grow crops and the plentiful water supplies minimized conflicts between water users. It does not work well for arid western states, however.[174] Granting property rights in water to those whose land was contiguous with the river did not make sense in the arid west because it was not practical. The early settlers, who had to settle away from the rivers, still realized that if water could be diverted from the natural watercourses, the land could be cultivated and productive. Diverting this water away from the natural stream, however, meant that the water right holder had to cross another's land, usually in the form of a ditch.[175] Therefore, western legislators passed statutes that directed that any person who owned a water right "shall be entitled to a right-of-way through the lands which lie between the point of diversion and point of use...."[176] Clearly then, the doctrine of prior appropriation does include the right to cross another's land, as long as there is either consent or just compensation for the taking of the land. According to the Colorado Supreme Court, "Lands situated at a distance from a stream cannot be irrigated without passing over the intermediate lands, and thus all tilled lands are subject to the same necessity....[W]here the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by law."[177]

As early as 1872, the Supreme Court of the Colorado Territory had an opportunity to analyze whether a water right carried with it the right to cross another's land.[178] In *Yunker v. Nichols*, the plaintiff, together with the defendant, constructed a ditch across the defendant's land. The agreement was that all parties would share in the water supply. After the construction of the ditch, the defendant diverted all of the water and none reached the plaintiff. The parties did not have a written agreement

173. SAX, *supra* note 2, at 21.

174. Gillian, *supra* note 5, at 10-21.

175. *Id.*

176. COLO. REV. STAT. ANN. § 37-86-102 (West 2004). *See also* Clark v. Nash, 198 U.S. 361 (1905) (holding that a similar statute in Utah was constitutionally valid for the legislature to delegate its eminent domain powers to private individuals to condemn another's property for the public use of water where it was a necessity to make use of land.) The ruling distinguished between the rights of a riparian owner in the arid west and those in the east. *Id.*

177. Yunker v. Nichols, 1 Colo. 551, 553 (1872).

178. *Id.* at 552-56.

detailing the arrangement between the defendant and the plaintiff. The jury found for the defendant that he could divert all the water from the ditch on his land.[179]

The court in *Yunker* reversed the jury verdict. Each of the justices concurred that the judgment below should be reversed, but they based their decisions on different reasons. The Chief Justice reasoned that the Colorado Territory was a "a dry and thirsty land" and that the "value and usefulness of the land depends on the supply of water for irrigation...[that] can only be obtained by constructing artificial channels through which [the water] may flow over adjacent lands."[180] Therefore, the Chief Justice concluded that servitude on the land arose, not by a grant, but by "the operation of law," and that it was not necessary for defendant to convey to the plaintiff a right of way for the ditch.[181] The second justice relied on the statute passed by the legislature to find that the plaintiff should prevail. Because agriculture is so essential to the "well-being of [Colorado] and can only be developed by a system of irrigation, it seems to me a matter of absolute necessity, that the legislature should have the power to pass needful laws" to facilitate the agriculture interests.[182] The third justice relied on the necessity of the right and, even though the statute granted the right, it was the necessity of the climate that gave a right to "every proprietor to have a way over the lands intervening between his possessions and the neighboring stream for the passage of water for irrigation...."[183]

Although the justices disagreed on the reasons, they all agreed that the right to appropriate water included a right to convey that water over another's land. *Yunker* is still good law in Colorado. A recent Colorado Supreme Court ruling relied on *Yunker* when it reasoned,

> Colorado is not a riparian state in which only those lands adjacent to the streams and rivers have rights to waters. Rather, as early as the tenure of the territorial legislature, our lawmakers recognized that our arid climate required the creation of a right to appropriate and convey water across the land of another so that lands not immediately proximate to water could be used and developed.[184]

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179. *Id.* at 555.

180. *Id.* at 553 (Hallett, C.J., concurring).

181. *Id.* at 555.

182. *Id.* at 567 (Belford, J., concurring) (Justice Belford also discussed that estoppel should apply even though the lack of writing violated the statute of frauds.).

183. *Id.* at 569-70 (Wells, J., concurring in part) (Justice Wells did not agree with the ruling as based upon Belford's theory of estoppel nor on the statute of irrigated lands.).

184. Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1231-32 (Colo. 2001).

When an individual appropriated water from the stream to land that was not contiguous to the stream, the individual usually received consent from the owner of the land that the water crossed.[185] This consent was either given in exchange for consideration paid or consent was implied when the parties did not object to the construction and use of the ditch.[186] The *Yunker* case and subsequent Colorado cases illustrate that the doctrine of prior appropriation does include a right to burden another's land.[187] However, the Forest Service and other proponents of the argument that the Forest Service is just protecting its land as any other property owner would conveniently ignore that the right to burden another's land is included in the right to appropriate water.

The courts that have addressed the issue of bypass flow requirements relied on *Utah Power & Light Co.* and implicitly *Snyder* to argue that a water right does not carry with it a right to burden another's land.[188] As seen from Colorado law, this argument fails. Prior appropriation does carry with it a right to use another's land, once consent is either obtained or implied or when the parties initiate private condemnation actions.[189] The cases do not discuss, nor implicitly hold, that, once consent has been granted, the burdened property owner could then revoke all access to his property. As the discussion above on the Colorado case law clearly shows, the *Trout Unlimited* court relied on an artificial distinction between water rights and land use rights and this artificial distinction does not make sense under the prior appropriation doctrine. It is necessary to use another's land to transport water and once the burdened property owner has granted consent, he may not revoke all access to the water or to the land.[190] Therefore, the Forest Service's argument must fail.

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185. *Id.*

186. *See* Leonard v. Buerger, 276 P.2d 986, 989 (Colo. 1954) ("[W]hen ditch is used without objection...consent is presumed.").

187. *See, e.g.*, Bd. of County Comm'rs v. Park County Sportsmen's Ranch, LLP, 45 P.3d 693, 706 (Colo. 2002); *Roaring Fork Club*, 36 P.3d 1229; *Leonard*, 276 P.2d at 989.

188. *See, e.g.*, County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003).

189. *See also* Kaiser Steel Corp. v. W.S. Ranch Co., 467 P.2d 986, 991 (N.M. 1970) (holding that a corporation had the right to condemn a right-of-way over adjacent private property for the purpose of laying pipeline to transport water from the river that the corporation had water rights to for their coal mining operation). The court stated that "beneficial uses would be impossible to accomplish without the means to transport or convey the water from its source to the place of utilization." *Id.*

190. *See* cases cited *supra* note 187.

b. Equitable Estoppel

The Forest Service, as well as the *Trout Unlimited* plaintiffs, took the position that they had inherent authority as a property owner to condition the use of its land. This authority allowed the Forest Service to either exclude individuals from its land or grant individuals access to its land.[191] It then follows that the access can be limited and revoked at any time.[192] As the Ninth Circuit stated in *County of Okanogan*, the consent granted by the Forest Service was "always, by their written terms, revocable at the discretion of the federal government."[193] However, another way to view these revocable permits issued by the Forest Service is to compare these permits to licenses granted under state property law.

Licenses grant the non-property owner permission to enter the property owner's land for temporary, specific purposes and they are revocable at the will of the grantor.[194] In the present case, the WSSC's special use permits automatically expired after a certain length of time and the Forest Service had an option not to renew.[195] An obvious parallel can be drawn between WSSC's special use permit and a license granted under state law. Under state property law, a license can sometimes ripen into an irrevocable easement.[196] An owner who opens his property to another, even temporarily, may create a reasonable expectation of continued access to the property.[197] The courts may find a reasonable expectation on the part of the non-owner when the non-owner expends resources and labor on reliance of the continued permitted access.[198]

Courts in states that follow the doctrine of prior appropriation have found licenses that granted a right to transport water across another's land ripened into an irrevocable easement. For example, a Colorado court, in *De Graffenried v. Savage*, held that even though initially the right to enter the land to construct a ditch may have been a license

191. *See, e.g., County of Okanogon*, 347 F.3d 1081; TASK FORCE REPORT, *supra* note 46, pt. IX (presenting "Separate Views of Elizabeth Ann Rieke, David H. Getches, and Richard Roos-Collins").

192. *See, e.g., County of Okanogon*, 347 F.3d 1081; TASK FORCE REPORT, *supra* note 46, pt. IX (presenting "Separate Views of Elizabeth Ann Rieke, David H. Getches, and Richard Roos-Collins").

193. *County of Okanogan*, 347 F.3d at 1085.

194. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES § 5.2 (3d ed. 2002).

195. Trout Unlimited v. United States, 320 F. Supp. 2d. 1090, 1095 (Colo. D.C. 2004).

196. SINGER, *supra* note 194, § 5.3.1.1 ("Easements by Estoppel").

197. *Id.*

198. *Id.*

and therefore revocable, "after entry and construction of the ditch, [the license] operates as a grant, and such grant is presumed and implied."[199]

The Colorado Supreme Court reaffirmed this principle in *Leonard v. Buerger*.[200] When a "ditch actually is excavated and put into use without objection, or by approval, the owner of land traversed thereby may not thereafter withdraw his consent, deny the right of maintenance or destroy the ditch."[201] Both of these Colorado cases involved disputes over ditches that were used to transport water to land where it was then used to irrigate and cultivate the land. Both Colorado courts found that when an owner consented to allow another to build a ditch to transport water that the consent became a grant once the ditch was actually constructed. Neither Colorado case discussed the reasoning behind finding each license irrevocable; however, it is most analogous to an easement by estoppel.[202] The doctrine of easement by estoppel derives from the principles of equitable estoppel.[203]

In order to successfully assert estoppel, a party must show that (1) the government had knowledge of the facts, (2) the government intended its actions to be relied on, (3) the party asserting the defense was ignorant of the true facts, and (4) the party relied on the government's conduct to his detriment.[204] However, it is well settled that "equitable estoppel will not lie against the Government as it lies against private litigants."[205] Thus, while the Supreme Court has made it difficult to successfully argue equitable estoppel against the federal government, it has not completely foreclosed the use of equitable estoppel against the government.

The lower federal courts have, in some instances, applied equitable estoppel against the federal government.[206] The courts have

199. De Graffenried v. Savage 47 P. 902, 903 (Colo. Ct. App. 1897).

200. 276 P.2d 986 (Colo. 1954).

201. *Id.* at 989. *See also* Stoner v. Zucker, 83 P. 808, 809–10, 820 (Cal. 1906) (Once a licensee has spent money or labor in execution of a license, it becomes irrevocable and the license will continue as long as a need exists for it; license for "irrigating ditches...becomes, in all essentials, an easement, continuing for such length of time...as the use itself may continue."); Shepard v. Purvine, 248 P.2d 352 (Or. 1952) (An oral license promptly acted upon in the manner the plaintiffs acted is just as valid, binding, and irrevocable as a deeded right of way.).

202. *See* cases cited *supra* note 201.

203. *See* SINGER, *supra* note 194, § 5.3.1.1.

204. United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970).

205. Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 419 (1990); Heckler v. Cmty. Health Servs., 467 U.S. 51, 60 (1984).

206. *See, e.g., Georgia-Pacific*, 421 F.2d 92 (holding that government was not entitled to immunity from government estoppel); United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Fox Lake State Bank, 366 F.2d 962 (1966).

used various tools to determine whether estoppel should lie against the government, such as public policies, strict analysis of the elements of estoppel, affirmative misconduct of the government official, and determining whether the government was acting in its sovereign or proprietary capacity.[207]

When analyzing public policy issues, the courts sometimes engage in balancing the private individual's interest against the public's interest. Estoppel will be applied if there is a "serious injustice outweighing the damage to the public interest of estopping the government."[208] In *Union Oil Co. of California v. Morton*, the Ninth Circuit refused to apply equitable estoppel because "the costs to the public could be enormous if the government were estopped from maintaining vigorous regulation of the oil companies' drilling...."[209] In general, the courts have found that the potential harm to the public outweighs the injustice to the individual if equitable estoppel is applied.[210]

In the present case, the controversy between WSSC and the Forest Service is a controversy between two important public interests. The WSSC had a primary interest in maintaining its water rights, while the Forest Service was concerned with the bigger picture of environmental sustainability. However, the WSSC provided and continues to provide an important function in which the public is interested. The WSSC provides water for domestic and municipal use. If the government was not estopped to revoke access to its lands, there would be substantial damage to the public interest in its access to water for domestic and municipal uses. A court, in deciding whether to apply equitable estoppel, would have to balance these two important public interests.

Even if a court declined to find for a water right holder based on public policy grounds, a strict analysis of the elements of estoppel still favors applying estoppel against the Forest Service. The courts tend to

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207. For a more thorough analysis of these tools, see Mary V. Laitos et al., *Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context*, 17 PACE ENVTL. L. REV. 273, 275-96 (2000).

208. Bolt v. United States, 944 F.2d 603, 609 (9th Cir. 1991) (citation omitted).

209. Laitos et al., *supra* note 207, at 281 (quoting Union Oil Co. of Cal. v. Morton, 512 F.2d 743, 749, n.2 (9th Cir. 1975)). The *Union Oil* dispute involved four companies that purchased gas and oil rights in the Santa Barbara channel. The Secretary of the Interior granted permission to construct four floating drilling platforms. Two were constructed, but before the third was constructed there was a blowout on the first platform that led to a huge oil spill with disastrous consequences. The Secretary of the Interior refused to let the platforms be finished or drilling begin. The plaintiff's tried to argue equitable estoppel, but the court, in balancing the private interest with the public interest, refused to apply equitable estoppel. *Union Oil*, 512 F.2d 743.

210. *See* Laitos et al., *supra* note 207, at 280–81.

focus on whether the party asserting the defense has reasonably relied on the government to his detriment.[211] For example, detrimental reliance may exist when the party is claiming that he is deprived of something that is his by right.[212] It is, however, not reasonable to rely on oral representations by governmental officials.[213] In the instance of the *Trout Unlimited* case, it could be argued that the state water right holders reasonably relied on the Forest Service as well as the federal government that the individuals could use the forest land to transport their water to its intended beneficial use.

The federal government encouraged the growth of the sparsely populated West by providing water to family farms.[214] The federal government subsidized dams in order to provide "wide margins of safety for recurring periods of drought and highly variable rainfall patterns...."[215] These dams collected the water on federal land and state water right holders constructed ditches to transport the water through federal land to the state water right holders' land, where the water was used to cultivate the land.[216] The West grew from a sparsely populated agricultural region to a "highly urbanized region of the country."[217]

The federal government promised the new settlers in the West access to the federal land to obtain water and to ultimately encourage growth in the West.[218] The West is still steadily growing and this growth is based on the underlying promise the federal government made to the early settlers. Individuals may not be aware of how the West grew and may not consider this implicit, underlying promise that the federal government made to the early Western settlers. However, if suddenly the federal government could revoke the access to their land, life in the West would undergo a fundamental change. In this instance, Congress made a representation to the settlers of the West, the settlers believed and relied on that representation and if the government were to revoke the representation, the injury to the western states would be grave and possibly outweigh the harm to the forest lands.

Furthermore, there is a strong argument to apply equitable estoppel against the federal government when the federal government is acting in its proprietary capacity. It is important to note that courts seem

211. *Id.* at 285.
212. *Id.*
213. *Id.* at 286.
214. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770-73 (2001).
215. *Id.* at 771.
216. *See id.*
217. *Id.* at 772-73.
218. *See id.* at 770-71.

to be more willing to apply equitable estoppel against the government when it is acting in a proprietary capacity as opposed to its sovereign capacity.[219] The courts do not appear to agree when the government is acting in a proprietary capacity rather than its sovereign capacity. The general rule is that the government will not be estopped when acting in its sovereign capacity and acting for the good of the public.[220] On the other hand, the government is acting in its proprietary capacity when involved in commercial or contract transactions.[221]

In determining whether to apply equitable estoppel against the federal government, the court would need to decide in what capacity the Forest Service is acting. On one hand, it is acting as a sovereign because it wants instream flows for the benefit of the public. However, the Forest Service is asserting that it is like any other property owner and from this assertion alone—as well as viewing each agreement with each state water right holder—the government could be said to be acting in a proprietary capacity. The lynchpin of the Forest Service's assertion that it can impose bypass flows is that it has inherent power as a property owner to exclude others from its land. As the Supreme Court stated, Congress and its agents have the "power to control...occupancy and use of [federal lands], to protect them from trespass and injury, and to prescribe the conditions upon which others may obtain rights in them...."[222]

There can be little doubt that asserting an equitable estoppel claim against the federal government is difficult and it is unusual for the government to lose on such a claim. However, it is equally clear that this is a different set of circumstances than is found in most equitable estoppel cases against the government. If the government were allowed to revoke every state water right holder's access to the federal land, the repercussions of this would be felt further than just the parties involved with the property transaction. It is worth arguing for.

CONCLUSION

There is little disagreement that water in the stream is desirable to support fish and wildlife habitat as well as outdoor recreation. There is, unfortunately, little agreement about how the Forest Service will or should be permitted to obtain the water for these purposes. The foregoing discussion highlights the difficulties of the Forest Service's

219. *See* Laitos et al., *supra* note 207, at 293.
220. *Id.* at 293-94.
221. *Id.*
222. Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917).

assertion that it is not claiming a water right. The artificial distinction between land use rights and water rights ignores the fact that, when the Forest Service demands instream flows, it is preventing a senior user from obtaining her water while at the same time the Forest Service is applying that water to its own beneficial use. Likewise, the artificial distinction between land use rights and water rights does not exist in states, such as Colorado, that recognize the doctrine of prior appropriation. Finally, the states and its individual water users may be able to argue equitable estoppel against the federal government because the states and the individual water users have become substantially invested by relying on the federal government's assurances as to continued access across its land to transport their water.