Through the Lens of Legal History—The Forest Service and Water Rights

By Anthony François

The U.S. Forest Service recently proposed two new rules imposing federal controls over private water rights. Last year, the Forest Service announced its intent to require any permitted operator of a ski area on a national forest to surrender its private water rights as a condition of issuance or renewal of its permit. This summer, the Forest Service modified the proposal to require only that ski areas forsake the right to transfer their water rights to third parties. Pacific Legal Foundation, a public interest law foundation that defends private property rights, analyzed this policy and concluded that it violates the constitutional prohibition against demanding transfers of property from permit applicants where the government would otherwise have to compensate the owner. The revised proposal has also been criticized by members of Congress, with Representative Scott Tipton (R-CO) calling it "insufficient to protect water users from agency abuses."

Then, in May of this year the Forest Service announced its intention to embark on regulation of groundwater on and adjacent to national forests. The proposed new chapter 2560 of the *Forest Service Manual* would create a comprehensive program to control the use of groundwater wherever it would affect forest resources. It sets broad and vague criteria, which the Forest Service will use to regulate groundwater use, and directs staff to acquire existing and new groundwater rights from permit applicants as well as those who own preexisting private groundwater rights. The policy will also impose rigorous construction, operation, and reporting standards for wells and water pipelines that many smaller groundwater users will have difficulty meeting.

The American Farm Bureau Federation and the Colorado Farm Bureau have characterized the proposed groundwater policy as a violation of constitutional protections that "would circumvent state water rights and give the agency unprecedented control over water use in the West." The National Ground Water Association, which represents groundwater equipment makers and suppliers as well as consultants and scientists, expressed cautious support for the Forest Service policy, but warned that the proposed policy improperly defines several terms: groundwater (no small error), aquifer, groundwater

resources, recharge, and sustainable use. The National Ground Water Association also questions the Forest Service's intent to apply the policy outside the boundaries of forest units, as well as the implications of the policy for state water law.

The Forest Service's recent actions to control private water rights contrast with the history and purpose of the agency's founding. For decades prior to the first federal forest preserves, most public land in the United States was open for homesteading, and acts of Congress clarified that private citizens could also establish water rights under state law on federal lands. When the United States began establishing national forests at the dawn of the Progressive Era at the end of the nineteenth century, most of the valuable water supplies within those forests had already been privately appropriated and developed. Thousands of small towns, settlements, and homesteads existed within the boundaries of declared national forests, as well as adjacent to and downstream from them. The federal laws establishing national forests recognized the senior rights of all of these private property owners to their land and water.

Congress clearly had this situation in mind when it enacted what is now known as the Forest Service Organic Act in 1897. Under 16 U.S.C. section 475, there are only two purposes for creating national forests: "furnish[ing] a continuous supply of timber for the use and necessities of citizens of the United States" and "securing favorable conditions of water flows[.]" This second expression may be ambiguous to the modern reader, but in reading the debates in Congress, the meaning is very clear. At the turn of the twentieth century, people were indiscriminately cutting down forests in the western United States. This was a particular problem when forests were clear cut above the snow line. This practice lead to rapid melt of the winter snows, catastrophic floods, and inadequate water for irrigation during the hotter months of the year.

This history shows two important facts about the national forests and the Forest Service. First, the establishment of the national forests came *after* private settlement of the land that was valuable for farming, as well as the private development of most of the useful water resources. Second, one of Forest Service's principal purposes is to ensure that those water resources can be effectively used by those settlers. For decades, the Forest Service's approach to the lands it managed was to support those who had established prior rights and to administer a robust timber supply for a growing nation.

Forest Service policy toward water rights has changed radically and is now the subject of several decades of conflict over privately held water resources in and near the national forests. In general stream adjudications throughout the western states, the Forest Service claims federal reserved water rights for Forest Service purposes under the Winters Doctrine, as well as ownership of privately held stockwater rights that were perfected before the forests were established under federal law. The United States Supreme Court rebuffed the Forest Service's water rights aspirations in the 1978 case of *United States v. New Mexico*. That case holds that the purposes for which national forests are created do not support awarding water rights to the Forest Service. And both state and federal courts have held that the citizens who actually use water on national forests own the water rights, not the Forest Service by mere virtue of owning the land.

Despite these court decisions foreclosing Forest Service acquisition of privately held water rights, the agency persists in demanding that permit holders surrender their property rights in water and in claiming these rights in stream adjudications. Chapter 2540 of the *Forest Service Manual* directs staff to require a permit applicant to surrender water rights to the agency as a condition of issuance or renewal and to claim federal ownership of these private water rights whenever they are subject to general stream adjudications.

The proposed ski area permit clause for water rights subjects ski area operators to this regime whenever their permits are up for renewal, when they are transferring their permits in connection with sale of the facility, and any time the permit requires modification for other reasons. The new groundwater proposal also subjects well owners to these demands. The groundwater policy takes the further step of directing the Forest Service to claim federal reserved water rights in groundwater in pending water rights adjudications. This novel expansion of the Winters Doctrine promises years of resource conflicts to come if the policy is adopted.

Tony François is a staff attorney with the Pacific Legal Foundation's (PLF) National Litigation Center in Sacramento, California. Prior to his work with PLF, Tony practiced privately in water and environmental law, assisting in the litigation of numerous water right claims before the Nevada State Engineer and in the Snake River Basin Adjudication. He also worked in government relations for the California Farm Bureau Federation and KP Public Affairs on water and natural resources issues. Tony was an Infantry Lieutenant in the United States Army. He graduated cum laude from the University of California Hastings College of the Law in San Francisco. You can reach Tony at (916) 419-7111.

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