



Board of County Commissioners

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May 31, 2018

Senator Michael Bennet
261 Russell Senate Office Building
Washington, DC 20510

Senator Cory Gardner
354 Russell Senate Office Building
Washington, D.C. 20510

Dear Senators Bennet and Gardner:

We are writing to express the concerns of Eagle County, Colorado on S. 2563, the “Water Supply Infrastructure and Drought Resilience Act of 2018,” which was recently introduced by Senator Flake. The aspect of the bill that is of concern to Eagle County is Section 302 of Title III, Subtitle A, entitled “Water Rights Protection.”

Eagle County is home to two major ski areas located in the White River National Forest, the most visited national forest in the nation. Downhill skiing and snowboarding and the associated lodging, restaurant, retail, and other related business activity represent a very significant portion of the economic base in the County. Fishing, boating, hunting, and other forms of water-based recreation are equally important to residents of and visitors to the County. Ensuring the long-term viability of Eagle County’s recreational economy, including healthy riparian ecosystems, is a high priority for the County Government.

The County does not object to the provisions in Sections 302(1) and (2) of the bill that would prevent the Secretaries of Interior and Agriculture from requiring water users to convey title to existing water rights to the United States or to appropriate future water rights in its name as a condition of land use or occupancy permits. This is consistent with the final ski area water rights clause that was adopted by the USFS on December 30, 2015. In fact, the resolution of the ownership issue in the USFS policy has substantially addressed the concerns that have given rise to the bill. It is significant that the USFS has never proposed any title transfer or ownership restrictions on municipal water rights or facilities as a condition of a special use permit.

However, as drafted, the language in Section 302(3) would jeopardize the existing power of federal agencies to include, in special use permits for water projects, requirements that water that might otherwise be diverted or stored be bypassed and left in the stream for protection of fisheries, the riparian environment, or other values. Section 302(3)(A) states that the Secretary shall not “condition or withhold the issuance, renewal, amendment, or extension of any permit, approval, license, lease,



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allotment, easement, right-of-way, or other land use or occupancy agreement, in whole or in part, on— (A) limiting the date, time, quantity, location of diversion or pumping, or place of use of a State water right beyond any applicable limitations under State water law; or (B) the modification of the terms and conditions of groundwater withdrawal, guidance and reporting procedures, or conservation and source protection measures established by a State.” A bypass flow would likely be interpreted to limit the quantity of the water right by not allowing the permittee to divert the full amount.

The “savings clause” in Section 304(a) does not avoid this result. That section provides that: “Except as provided in section 302, nothing in this subtitle limits or expands any existing legally recognized authority of the Secretary to issue, grant, or condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on Federal land that is subject to the jurisdiction of the Secretary.” In other words, even if there is an “existing legally recognized authority” for a bypass flow, it would be prohibited by section 302(3)(A).

Bypass flow requirements on water diversion projects are of critical importance in protecting the environment in the headwater counties. For example, permit conditions on the operation of the Homestake Project protect fish habitat and fish populations in the Eagle River. Legislation that jeopardizes these restrictions upon the renewal or amendment of existing permits, or the issuance of new permits for other projects, would radically alter the existing stream conditions.

There is no reason to alter the current balance between federal and state authority to allocate water rights and protect water resources, including riparian ecosystems. We respectfully request that language in the bill that would impair the ability of federal agencies to condition permits, licenses, and other approvals to protect fisheries and the riparian environment be removed from the bill.

Thank you for the opportunity to provide these comments. We look forward to continuing to participate in the development of this important legislation.

Sincerely,

Kathy Chandler-Henry

Chair

Jeanne McQueeney

Commissioner

Jill H. Ryan

Commissioner