TO THE HOUSE COMMITTEE ON AGRICULTURE

SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY

STATEMENT OF DON SHAWCROFT

PRESIDENT-COLORADO FARM BUREAU

September 10, 2014

Chairman Thompson, Ranking Member Walz, members of the subcommittee, thank you for holding this hearing. My name is Don Shawcroft. I am a rancher from the San Luis Valley in Colorado. I am President of the Colorado Farm Bureau and also serve as a board member of the American Farm Bureau Federation, the nation's largest agricultural organization representing farmers and ranchers who produce virtually every agricultural product grown or raised commercially in the United States. Farm Bureau has a strong interest in ensuring that the longstanding relationship between federal land management agencies and public land ranchers is maintained, and I am pleased to offer this testimony this morning on behalf of our organization.

The subject of today's hearing is one of critical importance for farmers and ranchers, particularly those in the west where public land grazing is a vital component of rural economies and where it provides tremendous opportunities for American ranchers. Public benefits provided by science-based grazing management include thriving, sustainable rangelands, quality watersheds, productive wildlife habitat, viable rural economies, reduction of wildfire hazards, and tax base support for critical public services. The proposed Groundwater Resource Management Directive (Directive) has raised substantial concerns for two reasons. Number one, as a matter of law and process, it appears to be an effort by the USDA Forest Service (Forest Service) to grant itself, through an administrative proceeding, more authority than it has been granted by Congress.

Should it succeed in this attempt, an agency of the federal government would gain unprecedented control over waters of the states through a purely administrative action, thus giving the Forest Service greater control over the natural resources in the West. Second, on substantive grounds, if this directive were to become effective, we believe it holds the potential to significantly - and detrimentally - impact the livelihood of farmers and ranchers.

In recent years the Forest Service repeatedly has attempted to circumvent state water rights and appropriation laws. There is no provision in federal law authorizing or permitting the Forest Service or the Bureau of Land Management to compel owners of lawfully acquired water rights to surrender those rights or to acquire them in the name of the United States.

U.S. farmers play a significant role in feeding 7 billion people in our world today and contribute to the financial well-being of our country. Farm Bureau has identified a number of specific concerns related to the formalization of the proposed directive that would specifically impact landowners, farmers and ranchers. We are urging the Forest Service to withdraw the proposed groundwater resource management directive and hope the efforts of your committee will help us in this respect.

Ongoing Conflict in Colorado

It is no secret that the Forest Service has long sought to expand federal ownership of water rights in the western United States. In an August 15, 2008, Intermountain Region briefing paper addressing applications, permits or certificates filed by the United States for stock water, the agency claimed, "It is the policy of the Intermountain Region that livestock water rights used on national forest grazing allotments should be held in the name of the United States to provide continued support for public land livestock grazing programs." Further, another Intermountain Region guidance document dated August 29, 2008, states, "The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting

these claims, it is not known whether or not these claims will be recognized as water rights." During a Subcommittee on National Parks, Forests and Public Lands hearing on March 12, 2012, the Forest Service testified, "The Forest Service believes water sources used to water permitted livestock on Federal land are integral to the land where the livestock grazing occurs; therefore, the United States should hold the water rights for current and future grazing." Lastly, the Forest Service recently proposed new policy to be included in the U.S. Forest Service manual concerning ski area water rights. This proposal, which is currently under consideration by the agency, would direct the Forest Service to require the transfer of privately held water rights to the federal government as a condition of a permit's renewal.

These conflicts have placed Colorado at the center of the ongoing conflict over water rights with the federal government. Once the Forest Service began putting pressure on Colorado ski resorts to sign over water rights in exchange for receiving special use permits, it was only a matter of time before agriculture appeared in the crosshairs of the Forest Service as well.

While the agency contends that the new ski area permit condition will not require the transfer of water rights, the facts speak otherwise. Forest Service manual 2441.32 (Possessory Interests), which is currently being enforced, instructs the agency to continue to claim the water rights of permittees. Specifically, section 2541.32 of the 2007 Forest Service Water Uses and Development Manual directs:

> "Claim possessory interest in water rights in the name of the United States for water uses on National Forest System lands as follows:
>
> 1. Claim water rights for water used directly by the Forest Service and by the general public on the National Forest System.
>
> 2. Claim water rights for water used by permittees, contractors, and other authorized users of the National Forest System, to carry out activities related to multiple use objectives. Make these claims if both water use and water development are on the National Forest System and one or more of the following situations exists:
>
>   a. National Forest management alternatives or efficiency will be limited if another party holds the water right.
>
>   b. Forest Service programs or activities will continue after the current permittee, contractors or other authorized user discontinues operations."[1]

Documents obtained from the Forest Service website concerning *Ski Area Permit and the Water Rights Clause* state, "Clauses in special use permits specify the terms and conditions with which the permit holder must comply, and a permittee's failure to abide by them can be cause for suspension or revocation of the permit." If the USFS is willing to say one thing and do another on the requirement of transfer of water rights for the ski areas, how long will it be before special

[1] http://tipton.house.gov/press-release/tipton-forest-service-waging-multiple-assaults-water-rights

use permits for grazing will also contain the requirement to sign over water rights? Moreover, will future non-compliance in the relinquishment of water rights to the government be used by the Forest Service as a tool to reduce grazing on public lands?

AFBF and Colorado Farm Bureau see these Forest Service actions as another example of federal overreach and a violation of private property rights. To this end, we strongly support legislation introduced by Representative Scott Tipton (H.R. 3189), which passed the House of Representatives on March 3, 2014. This legislation would ensure those who hold water rights yet utilize federal lands through BLM or Forest Service permits that their lawfully acquired rights will not be abridged and that federal agencies may not unlawfully use the permit process to acquire rights they do not currently possess. Most importantly, that legislation does not abridge *anyone's* rights - those of individuals, the states or the federal government. It is simply a reaffirmation of longstanding federal policy. We are hopeful that the Senate will take up and pass this important legislation.

Concurrently, the state of Colorado has worked to advance two pieces of legislation, H.B. 13-1009 and H.B. 14-1028,[2] that would have prevented the federal government from obtaining water rights through coercion and placed restrictions on the federal government if it did obtain water rights. Unlike many other western states, the Colorado water courts adjudicate water rights in the first instance without any administrative, water rights permitting system, resulting in much water rights litigation.[3] The mere fact that a state would move in an attempt to prevent the Forest Service from completing its action should show that the Forest Service's actions are concerning.

At the same time that the agency sought to take water rights from federal ski area permit holders, the Forest Service introduced its proposed groundwater directive in the Federal Register on July 31, 2014. While Forest Service Chief Tom Tidwell claimed, "The goal is to improve the quality and consistency of our approach to understanding groundwater resources on National Forest System lands, and to better incorporate consideration of those resources to inform agency decision-making," it conveniently included a number of the same provisions aimed at transferring privately held water rights to the federal government and greatly expanding its regulatory control of groundwater, which is controlled by the states.

Lack of Legal Authority

One of our primary criticisms of the proposed groundwater directive is that the agency lacks legal authority to regulate groundwater in the manner proposed by the Forest Service. The Organic Administration Act of 1897 (Organic Act) vests the Forest Service with the authority to manage surface waters under certain circumstances. The statute provides no authority for management of groundwater. Nor does the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) provide the agency with authority over groundwater. That statute merely provides "that watershed protection is one of five co-equal purposes for which the NFS lands were established and are to be administered." 2560.01(1)(f). See *United States v. New Mexico*, 438 U.S. 696, 713 (1978).

[2] http://www.leg.state.co.us/CLICS/CLICS2014A/csl.nsf/BillFoldersAll?OpenFrameSet

[3] http://www.justice.gov/enrd/3245.htm

The directive requires the agency to "consider the effects of proposed actions on groundwater quantity, quality, and timing prior to approving a proposed use or implementing a Forest Service Activity." [2560.03(4)(a)(d)] The Forest Service does not currently own or manage groundwater nor does it have the authority to approve or disapprove uses of water which are granted under state law; this state authority is recognized both by federal statutes and in court precedents.

The Forest Service cites several statutes, including the Organic Act, the Weeks Act and MUSYA, to frame its expansive regulatory view in seeking authority to manage groundwater. The agency incorrectly interprets the purposes for which water is reserved as a provision of the Organic Act. The Organic Act simply authorizes the Forest Service to manage the land, vegetation and surface uses. The Act does not provide authority to manage or dispose of the groundwater or surface waters of the states based on the agency declared "connectivity."

The Weeks Act states, "The Secretary of Agriculture is hereby authorized and directed to examine, locate, and purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber." 16 U.S.C. § 515. The Forest Service inappropriately attempts to use this reference of "navigable streams" to include regulation of groundwater, which is not referenced in the Weeks Act.

The United States Supreme Court has gone to great lengths to bring clarity to the scope of the Organic Act's determination that federal authority extends only to prudent management for surface water resources. In *United States v. New Mexico*, the Court defined prudent management to:

1) "secure favorable water flows for private and public uses under state law," and
2) "furnish a continuous supply of timber for the people."

The agency authority is narrowed to proper management of the surface to achieve the specific purpose of the Organic Act - not the direct management of the groundwater and agency-declared interconnected surface waters. MUSYA does not expand the reserved water rights of the United States. *United States v. New Mexico*, 438 U.S. 696, 713 (1978). Additionally, the court denied the Forest Service's instream flow claim for fish, wildlife and recreation uses. Specifically, the court denied the claim on the grounds that reserved water rights for National Forest lands established under the Forest Service's Organic Act of 1897 are limited to the minimum amount of water necessary to satisfy the primary purposes of the Organic Act – conservation of favorable water flows and the production of timber – and were not available to satisfy the claimed instream flow uses. [4]

Inexplicably, the Forest Service also points to the Clean Water Act as a source of legal authority and direction for the directive. 2560.01 There is no explanation of how the Clean Water Act applies to this directive or how sections 303, 401, 402 or 404 of the Clean Water Act (cited in the directive) provide any legal authority to the Forest Service to regulate groundwater. The Clean Water Act does not even grant the federal government jurisdiction over groundwater. At a minimum, federal agencies must provide a modicum of justification for any claim of legal

[4] http://www.justice.gov/enrd/3245.htm

authority, particularly when the Forest Service has no authority whatsoever to implement the Clean Water Act.

Expansion of Federal Authority through Interconnectivity Clause

The directive proposed a new standard of interconnectivity [2560.03(2)] by proposing to "manage surface water and groundwater resources as hydraulically interconnected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information." Presuming that all groundwater and surface waters are interconnected implies the agency has authority to manage, monitor and mitigate water resources on all NFS lands. This assumption of federal authority violates federal and state statutes and will ultimately upset water allocation systems and private property rights on which western economies have been built. In an era of limited federal budgets, this attempt to expand the reach of the agency into individual and state activities is particularly inappropriate.

Whether or not water is "connected" is not the sole, or even most critical, factor for asserting regulatory authority. The Forest Service's attempt to use extremely controversial Clean Water Act terminology such as any "hydrological connection" to establish its authority over water rights is totally misplaced and unlawful. In fact, the Supreme Court specifically rejected the "any hydrological connection" approach to federal jurisdiction. *Rapanos et ux., v. United States* 547 U.S. 715 (2006).

Further, the directive expands current Forest Service regulatory scope of groundwater resources to a watershed-wide scale, including both Forest Service lands and adjacent non-federal lands. Specifically, the new policy states the agency will, "evaluate and manage the surface-groundwater hydrological system on an appropriate spatial scale, taking into account surface water and groundwater watersheds, which may or may not be identical and relevant aquifer systems," and "evaluate all applications to States for water rights on NFS lands and applications for water rights on adjacent lands that could adversely affect NFS groundwater resources, and identify any potential injury to those resources or Forest Service water rights under applicable state procedures (FSM 2541)." This is an unprecedented attempt to expand federal authority in approving state-granted water rights.

With the exception of federally reserved rights that are specifically set out either in statute or recognized by the courts, the states own and manage the water within their jurisdictions. The manner in which states regulate water rights differs substantially, particularly between western states, where the appropriation doctrine is common, and eastern states where the riparian system is in more general use. Farm Bureau supports the present system of appropriation of water rights through state law and opposes any federal vitiation or preemption of state water law. Water rights as property rights cannot be taken without compensation and due process of law. There is no legal or policy basis for the Forest Service to insert itself in this regulatory arena by attempting to use the permitting process to circumvent state water law or force existing water rights holders to relinquish their rights.

Without clear congressional authorization, federal agencies may not use their administrative authority to "alter the federal-state framework by permitting federal encroachment upon

traditional state power." In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001).

Although SWANCC was decided in the context of the Clean Water Act, the legal principle is the same: federal agencies must have clear congressional direction before altering the balance of federal and state authorities. The Forest Service has none here. It is clear that by proposing to manage the groundwater resources and interconnected surface waters within the states on a massive watershed basis, the Forest Service's proposed directive exceeds the agency's statutory authority and seeks to redefine the federal-state framework. The manner in which the directives insert the Forest Service in the evaluation of "all applications to States for water rights on NFS lands and applications for water rights on adjacent lands" (FSM 2560.03(6)(f)), contravenes this federally established system of deferral to the states. The Forest Service cannot and should not act where congressional authority has not been granted to it.

Constitutional Takings Violation

The directive would authorize actions that would violate the takings clause of the United States Constitution. The 5th amendment provides protections for citizens from government takings of private property without just compensation. The directive provides that the Forest Service would be required to "obtain water rights under applicable state law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM 2540)" and "[Require] written authorization holders operating on NFS lands to obtain water rights in compliance with applicable State law, FSM 2540, and the terms and conditions of their authorization."

Requiring written authorization for permitted uses including livestock grazing on NFS lands provides a vehicle for the agency to obtain water rights based on the permittee's agreement to comply with the "terms and conditions of the conditional use authorization." Under the Forest Service's terms and conditions [FSM 2541.32], the agency will now be able to require holders of water rights with permitted activities on system lands to comply with the water clause and to hold their water rights "jointly" with the United States. Further, there is no reference in the directive to the government's obligation to pay just compensation for the surrender to the government of privately held water rights legally adjudicated by the state.

We believe in the American private, competitive enterprise system in which property is privately owned, privately managed and operated for profit and individual satisfaction. Any action by government that diminishes an owner's right to use his property constitutes a taking of that owner's property. We oppose any government entity taking private property by adverse possession without just compensation.

Through statute and years of well-established case law, states have developed systems to fairly appropriate often scarce water resources to users. Because water is the lifeblood for all farm and ranch operations, we are outraged that the federal government continues to grossly and willfully ignore the established system of water rights, even after continued assurances it would respect them.

On behalf of Farm Bureau and tens of thousands of farmers and ranchers in the west who depend on our water rights, I want to thank you again for inviting us to testify on this important issue. I will be pleased to respond to questions from members of the committee.