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Subcommittee on Water, Wildlife and Fisheries
Legislative Hearing
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Chair and Members of the Committee:

It is an honor to appear before you today to testify in support of HR 7544 prohibiting "the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretary of Interior or the Secretary of Agriculture."[i] I appreciate the work of Representative Maloy and her co-sponsors in this important legislative effort.

I have had the opportunity to research and work in the natural resource policy area throughout my career. I have also had the honor to serve in leadership roles in large federal and state natural resource agencies, including time serving as the Deputy Director of Policy and Programs, and serving as the Official Exercising the Authority of the Director in the U.S. Bureau of Land Management here in Washington DC. After my time in DC, I worked as the Executive Director of the Utah Department of Natural Resources, where I oversaw eight state agencies ranging from water resources and water rights to wildlife and state parks. These roles, in addition to my current role working on resource issues on the Great Salt Lake and throughout Utah, have shown me first-hand the delicate relationship between state and federal actors in the natural resource space, especially when related to water.

Since European settlement, and continuing past statehood to the present, the U.S. Government has controlled much of the landmass in the Western U.S. This includes over half of Utah, where according to the Congressional Research Service, 63.1 percent of the state is managed by the U.S. Bureau of Land Management, the U.S. Forest Service, and various other federal agencies.[ii] With so much land in the federal estate, federal permits have an outsized influence on economic activities throughout the West. It is no exaggeration to say that federal decisions on permits can make or break small businesses, family agricultural operations, communities, and regional economies.

Water, in contrast, has never been considered to be under federal jurisdiction. Water governance in the West, including Utah, has long been deemed to be a feature of state law where the state makes decisions regarding distribution and allocation. In some of the driest areas in the nation, state decisions on water are hugely important and have become the backbone of conservation as well as economic growth and opportunity within the states.

While the states' jurisdictional authority on water is long settled in the West, there have been a number of instances where the federal governmental agencies have crept in on that jurisdiction by attempting to condition permits on either the transfer to or co-ownership with the federal government for water rights. Such instances have caused enormous concern.

In November of 2011 and in Jan. of 2012, for instance, the U.S. Forest Service issued directives that would have effectively required ski resorts operating under a special use permit on forest

lands to require co-ownership of their water rights with the United States or facilitate the outright transfer of those rights to the United States.[iii] These rules further asserted that the ski resorts would waive any claim against the United States for compensation for those water rights. Predictably, this effort resulted in huge consternation from ski area operators who had invested millions of dollars in obtaining and perfecting water rights under state law. The National Ski Areas Association sued and eventually prevailed in U.S. District Court in 2012.[iv] Based, in part, on that defeat in court, the Forest Service gave up on the plan to require transfer of water and worked on new rules that recognized the rights of ski areas to hold water rights pursuant to state authority.

Similar concerns arose in 2014, when the U.S. Forest Service promulgated its Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560 focusing on "Forest Service projects and authorizations potentially affecting groundwater resources" which contemplated "new policies and procedures for both water resources management and special use authorizations that involve access to or utilization of groundwater resources on [National Forest Service] lands."[v] These draft rules were withdrawn in 2015 after major outcry from state governors, oil and gas operators, ranchers, and others that rely on state allocated right to groundwater. Major concerns included the Forest Service's seeming presumption that it should extend its authority to the allocation of groundwater resources, something that had historically been the exclusive jurisdiction of the states. Many others were concerned that the proposed rule treated ground and surface water as connected—a presumption not held by many Western States water law.

Finally, ranchers across the West have faced the perennial concern that these types of requirements are creeping into water rights for stock watering during issuance or renewal of grazing permits. Dispute over stock watering rights in 2007 led the Idaho Supreme Court to determine that federal land agencies cannot perfect stock watering rights on the logic that the ranchers own the stock and therefore are the only ones capable of demonstrating beneficial use for the underlying water right.[vi] This ruling was also codified into Idaho State Code.[vii] Since that time, Idaho ranchers complain that they have been pressured to enter "agency agreements" with the federal government to assert that the ranchers are acting as agents of the federal government in exercising their stock watering.[viii]

The anxiety that federal agencies are pressuring ranchers to surrender stock watering rights led the Utah State Legislature to pass legislation specifying that a federal public land agency may not be considered a beneficial user of stock water unless the agency itself owns stock.[ix] The Utah State law further prohibits federal public land agencies from conditioning the issuance or renewal of a permit on the transfer of water to a federal agency or requiring the water user to apply for or acquire a water right in the name of the public land agency.

Based on the foregoing, Representative Maloy's legislation brings necessary clarity to the rights and responsibilities in the relationship between federal lands and water rights. Importantly, it codifies what should be common practice within federal agencies when it comes to acquiring water rights. Moreover, it provides specific exemptions for already acknowledged water right policies regarding federal lands and agencies.[x] It is good, common-sense legislation that should be favorably considered by this body.

I am happy to answer any questions you may have.

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[i] HR 7544

[ii] Congressional Research Service (Updated February 21, 2020) "Federal Land Ownership: Overview and Data."

[iii] Forest Service Interim Directive 2709.11–2011–3, which was soon replaced with Interim Directive Number 2709.11–2012–2

[iv] Nat'l Ski Areas Ass'n, Inc v. U.S. Forest Serv. 910 F. Supp 2d 1269 (D. Colo. 2012)

[v] Federal Register (05/06/2014) "Proposed Directive on Groundwater Resource Management , Forest Service Manual 2560"

[vi] Joyce Livestock Company v. United States of America, 156 P.3d 502 (Idaho 2007)

[vii] Idaho State Code 42-501

[viii] Shawn Ellis, Idaho Farm Bureau (July 23, 2023) "Idaho Farm Bureau Cautions Ranchers Against Signing 'Voluntary Agreements'"

[ix] Utah State Code 73-3-31

[x] Exemptions listed in the draft legislation include water rights for the purposes of U.S. Bureau of Reclamation contracts, Federal Reserved Water Rights, Federal Power Act Rights, and Indian Water Rights. The draft legislation further specifies that this bill does not impact Federal Water Rights acquired under state law and clarifies that it does not impact Endangered Species Act or Interstate Compact water allocations.