House Subcommittee on Water, Power and Oceans
John Fleming, Chairman
Hearing Memo

April 10, 2015

To: **Water, Power and Oceans Subcommittee Members**

From: **Water, Power and Oceans Subcommittee Republican Staff**

Hearing: **Water, Power and Oceans Subcommittee Oversight Hearing on "*Proposed Federal Water Grabs and Their Potential Impacts on States, Water and Power Users, and Landowners*"**

The House Water, Power and Oceans Subcommittee will hold an oversight hearing entitled *"Proposed Federal Water Grabs and Their Potential Impacts on States, Water and Power Users, and Landowners"* on **Tuesday, April 14, 2015 at 1:30 P.M. in 1324 Longworth.** This hearing will examine recent Administration actions and proposals, such as the Environmental Protection Agency's "Waters of the U.S." and the U.S. Forest Service's "Groundwater Directive." The hearing will include one panel of non-federal witnesses and a panel of federal agency witnesses.

Policy Overview

- Obama Administration proposals made under the guise of clarifying the federal regulatory roles in some water uses have only provoked more uncertainty.

- The proposed "Waters of the U.S." regulation and the "Groundwater Directive" could have significant negative impacts on water and power ratepayers, states, and localities.

- In some cases, the proposals could negatively impact local conservation and groundwater recharge efforts aimed at actually alleviating drought.

Invited Witnesses *(listed in alphabetical order)*

Panel I:

Mr. William W. Buzbee, Professor of Law, Georgetown University Law Center, Washington, D.C.

Mr. Mike Heinen, General Manager, Jeff Davis Electric Co-op, Inc., Jennings, Louisiana

The Honorable Timothy Mauck, Commissioner, District 1, Clear Creek County, Colorado

Mr. Tom Myrum, President, Washington State Water Resources Association, Olympia, Washington

Mr. James Ogsbury, Executive Director, Western Governors Association, Denver, Colorado

The Honorable Ron Sullivan, Board of Directors, Division 4, Eastern Municipal Water District, Perris, California

Panel II:

The Honorable Estevan Lopez, Commissioner, U.S. Bureau of Reclamation, Washington, D.C.

Ms. Leslie Weldon, Deputy Chief, U.S. Forest Service, Washington, D.C.

Background

Context and the Basis of State Water Law

Each state has its own system of water law that governs public and private water rights within its borders. Most western states have adopted the prior appropriation doctrine (prior appropriation), or "first in time, first in right," or have, to some degree, integrated this approach into their systems of water law.[1] Under prior appropriation, water rights are obtained by diverting water for "beneficial use", which can include such uses as domestic and municipal purposes, irrigation, stock-watering, manufacturing, mining, hydropower, aquaculture, recreation, fish and wildlife, among others, depending on state law. The amount of the water right is the amount of water put to beneficial use.[2] Eastern states normally use riparian systems of law, under which rights to use water are tied to land adjacent to waterways.[3]

From the expansion and development of the western territories into the first portion of the 20th century, the federal government generally left the western states to develop their own systems of water law with relatively little conflict or involvement, outside of large-scale water projects. By the 1920s, the United States began to pursue the establishment of water rights with greater frequency. Despite the federal government's general deference to state law on matters affecting water rights, the United States could not be bound by a water rights determination in state court because the federal government was immune from state court decisions. In 1952, the McCarran Amendment (43 U.S.C. § 666) waived this immunity when the United States is sued in a water rights dispute, and barred the United States from objecting to the application of state

[1] Mr. Stephen C. Sturgeon, *The Politics of Western Water: The Congressional Career of Wayne Aspinall* (Tucson, Arizona, The University of Arizona Press, 2002), p. 4.
[2] www.deq.idaho.gov/water-quality/surface-water/beneficial-uses.aspx
[3] Mr. Stephen C. Sturgeon, *The Politics of Western Water: The Congressional Career of Wayne Aspinall* (Tucson, Arizona, The University of Arizona Press, 2002), p. 4.

law to such a proceeding.[4] This landmark law continued the tradition of federal deference to state water law and put in place a framework under which the federal government acted similar to a private entity for purposes of seeking water rights within western states, exclusive of eminent domain authorities provided by the Fifth Amendment to the U.S. Constitution.

However, with the implementation of the federal Endangered Species Act (ESA), there have been accusations that state water law has been superseded by federal regulation and related litigation. For example, in a recent high profile case involving endangered whooping cranes, Federal District Court Judge Janis Jack's decision to stop the Texas Commission on Environmental Quality from issuing water rights led one water attorney to exclaim that: "In my view, it will require the state to change existing water rights…Under the (ESA), if Texas is required to do that for cranes, then they're legally required to do that for (other endangered species)."[5]

There have been recent instances where federal agencies have been accused of undermining state water law. In 2011, the U.S. Forest Service (Forest Service) issued a national interim directive for ski area special use permits in all 122 public land ski areas in the U.S. The directive included a clause requiring applicant ski areas to relinquish privately held water rights to the United States as a permit condition. It also required that water rights arising on Forest Service lands off-site be relinquished to the United States in the event that the permit expired or is terminated.[6] To help address this situation, the Water and Power Subcommittee held hearings last Congress and early last year, the House passed H.R. 3189, the Water Rights Protection Act (Tipton, R-CO).[7] On June 20, 2014, the Forest Service proposed an amended ski areas clause that reportedly addressed some ski area concerns. After the required 60 day comment period ended in August 2014, a final directive was scheduled to be published in February 2015.[8] With a final directive not yet published at the time of this hearing, uncertainty still exists for those impacted by the proposal.

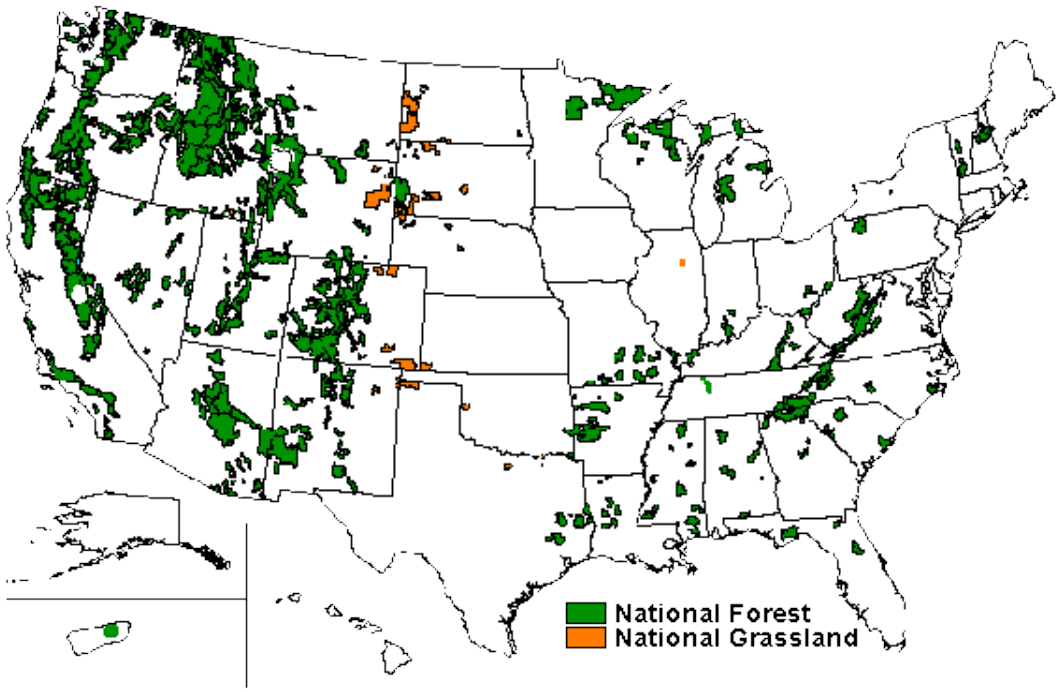
The Forest Service's Proposed Groundwater Directive

The Forest Service proposed a directive last year that met criticism on the grounds that it superseded state water law and could shut off multiple uses off and on federal lands. In proposing its draft "Directive on Groundwater Resource Management" (Groundwater Directive), the agency stated that it needed to "improve the Forest Service's ability to manage and analyze potential uses of NFS (National Forest System) land that could affect groundwater resources." It

[4] 43 U.S.C. § 6
[5] Statement of Mr. Russell Johnson**,** The Texas Observer, **"***Whooping Cranes Lawsuit Could Change Texas Water Rights*", April 11, 2013

[6] Forest Service Interim Directive No: 2709.11-2011-3, XII.F.2.a.d.
[7] http://clerk.house.gov/evs/2014/roll132.xml
[8] http://www.fs.fed.us/news/releases/us-forest-service-seeks-public-comment-proposed-rule-addressing-ski-area-water-rights

specifically pointed to the following goals: 1) provide for consideration of groundwater resources in agency activities; 2) encourage source water protection and water conservation; 3) establish procedures for reviewing new proposals for groundwater withdrawals on NFS land; 4) require the evaluation of potential impacts from groundwater withdrawals on NFS natural resources; and 5) provide for measurement and reporting to help build our understanding of groundwater resources on NFS land. [9] The proposal could govern activities on 193 million acres of forests and grasslands in 42 states (see Map 1 below).[10]



Map 1: Forest Service Lands *Source: Forest Service*

Although the Forest Service indicated that the proposed Groundwater Directive would not impact a state's ability to manage water, it specifically called for managing "surface and groundwater resources that were hydraulically interconnected, and considered them interconnected in all planning and evaluation activities."[11] In addition, the proposal indicated that the Forest Service would "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.[12]

Some environmental groups praised the Groundwater Directive. "Trout, salmon and other fish depend on cold, clean water for their survival, cold water that often originates from

[9] http://www.fs.fed.us/news/releases/us-forest-service-proposes-new-management-practices-stewardship-water-resources
[10] Id
[11] Forest Service Groundwater Resource Management Chapter 2560; p. 8
[12] Id. pp.9-10

groundwater flows," said Trout Unlimited CEO Chris Wood. "Across the West, many of our rivers and prized fisheries face severe threats, including prolonged drought, devastating wildfires and climate change. These guidelines recognize that groundwater and surface waters are connected, and that we must manage the entire watershed to keep our streams and rivers healthy and resilient."[13] However, at last year's Water and Power Subcommittee's oversight hearing on the proposed Directive, witnesses voiced concerns that the Directive intrudes on states' rights. Mr. Patrick Tyrrell, the State Engineer for Wyoming, testified that the proposal "challenges Wyoming's authority over groundwater within our borders, including Wyoming's primacy in appropriation, allocation and development of groundwater. The USFS stated that this Proposed Directive does not harm state rights. This is not accurate. The assumptions, definitions, and new permitting considerations contemplated under the Proposed Directive materially interfere with Wyoming's authority over surface and groundwater, and will negatively impact the State's water users."[14]

Additionally, witnesses testified that the proposal would have an impact on current and future water supply infrastructure. Mr. Larry Martin, representing the National Water Resources Association, testified that the Directive "would place additional permitting requirements on both existing and future water infrastructure. These permitting requirements would make meeting current and future water needs, and responding to climate variability, more difficult, more time consuming, and more expensive. The Directive would take water supply decisions out of the hands of water managers and puts it in the hands of Forest Service employees who may have little or no experience in water management."[15]

Subsequently, the Western Governors Association sent letters to the U.S. Department of Agriculture Secretary Tom Vilsack and the Forest Service expressing concerns. In one such letter, Nevada Governor Brian Sandoval and former Oregon Governor John Kitzhaber stated:

> "Congress' clear intent that the states should have authority over groundwater, as affirmed by the U.S. Supreme Court, is distorted by the proposed directive in multiple ways. The proposed directive could be construed to assert USFS ownership of state groundwater through use of the phrase "NFS groundwater resources" throughout the document. It goes on to identify states merely as "potentially affected parties" and only recognizes states as "having responsibilities" for water resources within their boundaries. This vague and insufficient acknowledgement of the states' authority over groundwater is also evident in Section 2560.02-1, which states that an objective of the proposed directive is to "manage groundwater underlying NFS lands cooperatively with states." This language misleadingly suggests that the USFS has equal authority with the states over groundwater management, which it does not."[16]

In February 2015, Forest Service Chief Tom Tidwell indicated to the Senate Energy and Natural Resources Committee that the Directive was being temporarily shelved: "Where we are

[13] http://www.bozemandailychronicle.com/news/environment/article_deab3a2a-d335-11e3-9522-001a4bcf887a.html
[14] Testimony of Mr. Pat Tyrrell before the House Water and Power Subcommittee, June 24, 2014, p. 1
[15] Testimony of Mr. Larry Martin before the House Water and Power Subcommittee, June 24, 2014, p. 10
[16] http://westgov.org/news/298-news-2014/805-western-governors-tell-forest-service-proposed-directive-does-not-recognize-state-s-sole-authority-over-groundwater

today is we've stopped," Tidwell said. "We're going to go back, and we're going to sit down with -- primarily with the states, the state water engineers -- to really sit down with them and get their ideas about how we can do this, and ideally how we can do it together."[17]

In a subsequent letter to Tidwell, Natural Resources Committee Chair Rob Bishop and the Chairs and Vice Chairs of the House Water, Power and Oceans and Federal Lands Subcommittees urged Tidwell to withdraw the Directive on a permanent basis.[18] It is unclear what the Forest Service's next steps and timeline will be for consulting with the states and issuing a new Directive. The Western Governors Association Executive Director and the Forest Service will testify at this hearing.

The Clean Water Act, two Supreme Court cases and Legislation

The Obama Administration has also proposed a controversial change to the implementation of the Clean Water Act (CWA). Enacted in 1972 (P.L. 92-500) and substantially amended in 1977 and 1982, [19] the CWA's objective is to restore and maintain the physical, chemical, and biological integrity of the nation's waters. [20] The scope of the CWA jurisdiction is "navigable waters," which are defined in the CWA statute as "waters of the United States, including the territorial seas."[21] The CWA allowed the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) to further define "waters of the United States" in federal regulation. As such, existing agency regulations define "waters of the United States" as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.[22]

CWA jurisdiction has long been subject to federal litigation. In the 2001 Supreme Court (Court) case *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*), the Court held that the use of "isolated" non-navigable intrastate ponds by migratory birds was not by itself a sufficient basis for the exercise of federal regulatory authority under the CWA.[23] In 2006, the Supreme Court yet again addressed the "waters of the United States" in *Rapanos v. United States* (*Rapanos*).[24] *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands adjacent to non-navigable tributaries of traditional navigable waters.[25] While most Members of the Court agreed that "waters of the United States"

[17] http://www.eenews.net/greenwire/2015/02/26/stories/1060014107
[18] http://www.deseretnews.com/article/865624155/Rep-Bishop-Utah-farmers-fire-back-on-federal-groundwater-proposal.html?pg=all
[19] Federal Register, Vol. 79, No. 76, Monday April 21, 2014, Proposed Rules: "Definition of 'Waters of the United States' Under the Clean Water Act."
[20] CWA section 101(a)
[21] CWA section 502(7)
[22] 33 CFR 328.3; 40 CFR 230.3(s)
[23] 531 U.S. 159 (2001)
[24] 547 U.S. 715 (2006)
[25] 547 U.S. 715 (2006)

encompasses some waters that are not navigable in the traditional sense, Justice Anthony Kennedy's concurring opinion stated that "waters of the United States" encompasses wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made."[26] He stated that wetlands possess the requisite nexus if the wetlands, "either alone or in combination with similarly situated [wet]lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'"[27] Kennedy further stated that a relationship with navigable water must be more than "speculative or insubstantial" to trigger the CWA's requirements.[28]

Former House Transportation and Infrastructure Committee Chairman Jim Oberstar (D-MN) introduced a bill during the 110th Congress as a result of the Supreme Court decisions.[29] The bill deleted the CWA's "navigable waters" term and re-defined the "waters of the US". At the time of the bill's introduction, Oberstar explained: "In 2001 and 2006, two decisions of the U.S. Supreme Court threw the Nation's clean water programs into turmoil, creating confusion and uncertainty for communities, developers, and agricultural interests, and placing at risk the Nation's ability to restore, protect, and maintain water quality and the water-related environment. Turmoil, confusion, and uncertainty are no way to run a program."[30] In response, the American Farm Bureau Federation stated that "(t)his would effectively give federal control of the development rights of 53 million acres of private land. This extension of federal control over private property rights is dangerous and unprecedented."[31] The full House never considered the bill in the 110th Congress.

The Proposed Rule, Its Impacts and Reactions

The EPA and the Army Corps jointly released a proposed "waters of the US" (WOTUS) rule on April 21, 2014. EPA Administrator Gina McCarthy stated that "(t)he proposed rule clarifies protection for streams and wetlands. The proposed definitions of waters will apply to all Clean Water Act programs. It does not protect any new types of waters that have not historically been covered under the Clean Water Act and is consistent with the Supreme Court's more narrow reading of Clean Water Act jurisdiction. We are clarifying protection for the upstream waters that are absolutely vital to downstream communities."[32]

The proposal principally re-defines "waters of the United States" in two ways: (1) it states that all waters adjacent to jurisdictional waters will themselves be jurisdictional (under the current rule, only adjacent wetlands are jurisdictional); and (2) it purports to implement a version

[26] *Id*. at 759
[27] *Id*. at 780
[28] *Id*.
[29] http://thomas.loc.gov/cgi-bin/bdquery/D?d111:24:./temp/~bdyZCa::|/home/LegislativeData.php?n=BSS;c=111|
[30] http://thomas.loc.gov/cgi-bin/query/D?r111:1:./temp/~r111c1AaeO::
[31] http://wildlifemanagementinstitute.org/index.php?option=com_content&view=article&id=448:house-bill-would-clarify-cwa&catid=34:ONB%20Articles&Itemid=54
[32] http://yosemite.epa.gov/opa/admpress.nsf/3881d73f4d4aaa0b85257359003f5348/ae90dedd9595a02485257ca600557e30

of the "significant nexus" test, as introduced by Justice Kennedy's concurrence in *Rapanos*, which states that waters or wetlands can be jurisdictional provided the agency can establish a significant nexus to a U.S. water.[33] In addition, the proposal contains a number of "exemptions" from the rule, however in testimony before the Water and Power Subcommittee last year, a number of witnesses voiced concern that the WOTUS rule would adversely impact federal and non-federal water and power projects throughout the country. Mr. Roger Clark, Director of Engineering and Operations for a Missouri electric cooperative, testified that "…under the proposed rule, transmission rights of way may be considered waters of the U.S. These simple ditches alongside roads receive road runoff, which could grow cattails even though they infrequently hold water. EPA and the Corps have said that they are exempting ditches that drain only upland and are constructed in uplands, but the term "upland" is not defined. This gives the federal government the final say on whether or not ditches are eligible for the exemption."[34]

Mr. Larry Martin also testified how the WOTUS proposal would impact groundwater replenishment and water recycling projects in southern California. Mr. Martin argued that "Reclamation and reuse facilities are frequently located in a floodplain or otherwise adjacent to jurisdictional water where all waters are categorically defined as waters of the U.S. While the original proposed rule included an exemption for artificial lakes and ponds used exclusively for settling basins, such reuse facilities can function or take on the characteristics of a wetland and can receive and discharge water into surface ditches that are not exempt (see Map 2 below of such facilities)."[35]

Map 2: Sun City Ponds (Near Salt Creek, Perris), Water Reuse Facilities

Source: Eastern Municipal Water District

[33] http://www.mondaq.com/unitedstates/x/311872/Environmental+Law/Big+Changes+To+Federal+Jurisdiction+Over+Waters+Of+The+US+Through+The+Clean+Water+Act

[34] Testimony of Mr. Roger Clark before the House Water and Power Subcommittee, June 24, 2014, p. 2

[35] Id, p. 9

The proposal garnered praise from some organizations at the same Subcommittee hearing. For example, Mr. Andrew Lemley, Government Affairs Representative for the New Belgium Brewing Company, stated:

> "The administration's Clean Water Rule would restore clear national protections against unregulated pollution and destruction for nearly two million miles of streams and tens of millions of acres of wetlands in the continental US. These water bodies prevent flooding, filter pollution, supply drinking water to millions of Americans, and provide critical fish and wildlife habitat. What's more, they provide these valuable services for free. In fact, the cost-benefit analysis done for the Clean Water Rule estimates that it would generate between $388 million and $514 million per year in economic benefits, far exceeding expected costs ($162 to $278 million annually)."[36]

On April 6, 2015, the EPA and the Army Corps sent a revised rule to the Office of Management and Budget for review. "We've worked hard to reach a final version that works for everyone – while protecting clean water," Administrator McCarthy said in a blog post. McCarthy also said, among other things, that the final rule would provide a "better description of what connections are important" for a stream, ditch or pond to have a "significant nexus" with a navigable body of water. [37] A final rule is expected to be released by the Administration later this year.[38]

The Bureau of Reclamation has been invited to testify about its role and comments on the revised rule.

[36] http://asbcouncil.org/news/asbc-member-new-belgium-testifies-capitol-hill#.VSajQU0tG-o
[37] http://kansasagnetwork.com/2015/epa-sends-controversial-wotus-rule-to-omb/
[38] Id