Committee on Natural Resources
Rob Bishop, Chairman
Markup Memorandum

June 20, 2017

To: All Natural Resources Committee Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x5-8331)

Mark-Up: **H.R. 2939 (Rep. Scott Tipton),** To prohibit the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretaries of the Interior and Agriculture, and for other purposes.
June 22 & 27, 2017; 1324 Longworth House Office Building

H.R. 2939 (Rep. Scott Tipton, R-CO), *"Water Rights Protection Act of 2017."*

Bill Summary:

H.R. 2939, the *"Water Rights Protection Act of 2017"*, upholds longstanding federal deference to state water law by prohibiting agencies within the Departments of the Interior and Agriculture from conditioning or withholding the issuance of any permit, lease or other land use arrangement on the requirement to transfer privately held water rights to the United States.

Cosponsors:

Rep. Paul Gosar (R-AZ), Rep. Doug Lamborn (R-CO), Rep. Tom McClintock (R-CA), Rep. Mike Simpson (R-ID), Rep. Mia Love (R-UT), Rep. Doug LaMalfa (R-CA), Rep. Mark Amodei (R-NV), and Rep. David Schweikert (R-AZ)

Background:

Overview of State Water Law

Each state has its own system of water law that governs public and private water rights within its borders. Eastern states normally use riparian systems of law, under which rights to use water are tied to land adjacent to waterways,[1] while western states' laws are more complex. 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.[2] Under prior appropriation, water rights are obtained by diverting water for "beneficial use," which can include domestic and municipal purposes, irrigation, stock-watering, manufacturing, mining, hydropower, aquaculture, recreation and fish and wildlife, among others,

[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] 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.

depending on state law. In that case, the water right is equitable to the amount of water put to beneficial use.[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.

This changed in 1952 with the McCarran Amendment (43 U.S.C. § 666), which waived this immunity should the United States be sued in a water rights dispute and barred the United States from objecting to the application of state 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.

Despite the protections afforded to states under the McCarran Amendment, there have been recent instances where federal agencies have been accused of undermining state water law. In 2014, the United States Forest Service (Forest Service) proposed a directive that was met with criticism on the grounds that it superseded state water law and could eliminate multiple uses on and off of federal lands. In proposing its draft "Directive on Groundwater Resource Management" (Groundwater Directive), the Forest Service stated that it needed to "improve the Forest Service's ability to manage and analyze potential uses of National Forest System (NFS) land that could affect groundwater resources."[5] The proposal governed activities on 193 million acres of forests and grasslands in 42 states. 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."[6]

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."[7] At a 2014 Water and Power Subcommittee oversight hearing on the Groundwater Directive, Mr. Patrick Tyrrell, State

[3] www.deq.idaho.gov/water-quality/surface-water/beneficial-uses.aspx
[4] 43 U.S.C. § 6
[5] United States Department of Agriculture: U.S. Forest Service Proposes New Management Practices for Stewardship of Water Resources, May 5, 2014 (press release)
[6] Forest Service Groundwater Resource Management Chapter 2560.03.03; p. 8
[7] Id. pp.9-10

Engineer for Wyoming, testified that "[t]he 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."[8] Subsequently, the Western Governors Association sent a letter to the U.S. Forest Service expressing concerns.[9]

In February 2015, then-Forest Service Chief Tom Tidwell indicated to the Senate Energy and Natural Resources Committee that the Groundwater Directive was being temporarily shelved: "Where we are 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."[10] In a subsequent letter to Chief 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 Groundwater Directive on a permanent basis.[11] Although the Groundwater Directive was withdrawn, some water users have expressed concerns that similar proposals could be resurrected in some form in the future.

The "Water Rights Protection Act of 2017"

In 2011, the Forest Service issued a national interim directive for ski area special use permits in all 122 public land ski areas in the United States. 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.[12] The purpose for the new clause, as stated by then-Forest Service Chief Tom Tidwell during a November 15, 2011, House Natural Resources Committee hearing, was to ensure that water remains at the locations of ski areas so that ski recreation can continue at those sites.[13] On June 20, 2014, the Forest Service proposed an amended ski areas clause that reportedly addressed some ski area concerns.[14] In 2015, the Forest Service released a final directive that requires ski areas to prove that there is enough water to sustain skiing for the future rather than transfer water rights to the federal government as a condition of operating on public lands.[15] At a May 2017 House Water, Power and Oceans Subcommittee hearing, Mr. Christopher Treese, External Affairs Manager for the Colorado River Water Conservation District, testified that "[t]he 'ski

[8] Testimony of Mr. Pat Tyrrell before the House Water and Power Subcommittee, June 24, 2014, p. 1
[9] Western Governors Association: Western Governors tell Forest Service proposed directive does not recognize state's sole authority over groundwater, October 6, 2014
[10] E&E News: Agency puts breaks on controversial groundwater directive, February 26, 2015
[11] The Desert News: Rep. Bishop, Utah farmers fire back on federal groundwater proposal, March 13, 2015
[12] Forest Service Interim Directive No: 2709.11-2011-3, XII.F.2.a.d.
[13] Testimony of Mr. Tom Tidwell, Chief of U.S. Forest Service, before the House National Parks, Forests, and Public Lands Subcommittee, November 15, 2011
[14] 79 FR 35513, June 23, 2014
[15] 80 FR 81508, December 30, 2015

area rule' has been revised and reissued to the general satisfaction of the ski industry. However, many Western water users remain wary of federal attempts to overstep its authority with regard to water rights."[16]

Similar policies have been adopted by the Forest Service and other federal land management agencies involving the ability of ranchers to run grazing operations through the use of grazing permits. In the spring of 2012, ranchers with livestock grazing rights on Forest Service lands in Utah's Tooele County were told by Forest Service agents to sign a "change of use" application that would allow the agency to then determine what and where the use of the livestock water would be. At an October 2013 House Water and Power Subcommittee hearing, Mr. Randy Parker, Chief Executive Officer for the Utah Farm Bureau Federation, testified that "[t]his Forest Service action called for the relinquishment of the water right in exchange for the approving the conditional use of the grazing allotment."[17] The matter was eventually resolved and characterized as a misunderstanding by regional Forest Service staff.

Mr. Parker further testified at a May 2017 House Water, Power and Oceans Subcommittee hearing that "[r]anchers, like any American business, need certainty to make decisions. The federal land management philosophy of the U.S. Forest Service and the Bureau of Land Management and their on-the-ground decision-making dictates an uncertain future for public lands ranching."[18] The *Water Rights Protection Act of 2017* provides a permanent solution to protect state water law and private property rights from future federal takings. Additionally, the bill places strict limits on future federal policies that have the potential to impact state water rights. In the 113th Congress, the Water and Power Subcommittee held a hearing and the House passed a prior version of this bill, H.R. 3189, also sponsored by Rep. Scott Tipton (R-CO).[19] A similar provision was passed twice by the House with bipartisan support in the 114th Congress as a title in both H.R. 8[20] and H.R. 2898.[21]

Major Provisions of H.R. 2939, the *"Water Rights Protection Act of 2017":*

Section 3 prohibits the Secretary of the Interior and the Secretary of Agriculture (Secretaries) from: conditioning the issuance, renewal, amendment, or extension of any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on the transfer of any water right directly to the United States; requiring any water user to apply for or acquire a water right in the name of the United States under state law as a condition for any permit or other land use or occupancy agreement; and from conditioning or

[16] Testimony of Mr. Christopher Treese before the House Water, Power and Oceans Subcommittee, May 18, 2017, p. 1
[17] Testimony of Mr. Randy Parker before the House Water and Power Subcommittee, October 10, 2013, p. 11
[18] Testimony of Mr. Randy Parker before the House Water, Power and Oceans Subcommittee, May 18, 2017, p. 4
[19] U.S. House of Representatives Roll Call vote 132, passage of H.R. 3189, March 13, 2014, 113th Congress
[20] H.R. 8, North American Energy Security and Infrastructure Act of 2015, sponsored by Rep. Upton, 114th Congress
[21] H.R. 2898, Western Water and American Food Security Act of 2015, sponsored by Rep. Valadao, 114th Congress

withholding the issuance of any permit, approval or other agreement restrictions associated with changes to water diversions or groundwater withdrawals that is contrary to state water law.

Section 4 requires the Secretaries to: recognize existing state authority for permitting and adjudicating water use; coordinate with states; and not assert any connection between surface and groundwater that is inconsistent with State water laws for any future rule, policy, directive, management plan, or similar federal action relating to the issuance of any permit, lease, license, easement or any other land use agreement.

Section 5 affirms that nothing in the bill shall adversely impact: any existing legal authority under the jurisdiction of the Secretaries, except as provided in Section 3; existing or future Bureau of Reclamation contracts; the Endangered Species Act; federally reserved water rights; the Federal Power Act; Indian water rights; and federally held state water rights.

Cost:

The Congressional Budget Office has not completed a cost estimate of this bill at this time. However, in the 113th Congress, CBO indicated that a nearly identical bill (H.R. 3189) "would have no impact on the federal budget."[22]

Administration Position:

According to comments on the bill submitted by the U.S. Department of Agriculture, the "USDA supports the overall goal of the discussion draft to ensure the integrity of state systems for allocating water and associated property rights for those who have obtained water rights in prior appropriation doctrine states."[23]

Anticipated Amendments:

None.

Effect on Current Law (Ramseyer):

None.

[22] Congressional Budget Office cost estimate of H.R. 3189, December 9, 2013

[23] U.S. Department of Agriculture, Statement for the Record on Discussion Draft of Water Rights Protection Act, submitted to the House Committee on Natural Resources Subcommittee on Water, Power and Oceans, May 18, 2017.