Subcommittee on Water, Power and Oceans
John Fleming, Chairman
Hearing Memorandum

April 11, 2016

To: All Subcommittee on Water, Power and Oceans Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x58331)

Subject: Oversight Hearing on *"Empowering States and Western Water Users Through Regulatory and Administrative Reforms."*

On **Wednesday, April 13, 2016 at 1:00 p.m. in 1334 Longworth House Office Building,** the Water, Power and Oceans Subcommittee will hold a one-panel oversight hearing on *"Empowering States and Western Water Users Through Regulatory and Administrative Reforms."*

Policy Overview:

- Numerous Obama Administration proposals made under the guise of clarifying federal regulatory roles in some water uses have only created more uncertainty and red tape.

- These policies have dis-incentivized some water users from constructing additional water infrastructure. Legislative proposals have been introduced to empower states and others to help create regulatory certainty.

- In addition, some have proposed increased transfer of some federal water projects to local water users to leverage infrastructure investment and reduce costs. However, the process – even by a federal agency's own standards – can be too long and too costly. Reforms to this title transfer process must be made.

Invited Witnesses *(listed in alphabetical order)*

Mr. Reed D. Benson
Professor of Law and Chair
Natural Resources & Environmental Law Program
University of New Mexico School of Law
Albuquerque, New Mexico

Ms. Jan Goldman-Carter
Director of Wetlands and Water Resources,
National Wildlife Federation
Washington, DC

Mr. Andy Fecko
Director of Resource Development
Placer County Water Agency
Auburn, California

Mr. Robert S. Lynch, Attorney
Robert S. Lynch & Associates
Phoenix, Arizona

Mr. Lawrence Martin, Attorney
Halverson Northwest Law Group
Yakima, Washington

Mr. Jeremy Sorensen
General Manager
Strawberry Water Users Association
Payson, Utah

Background

Context and the Basis of State Water Law

One topic for this hearing will be state water rights. 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] Eastern states normally use riparian systems of law, under which rights to use water are tied to land adjacent to waterways.[2]

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 law to such a proceeding.[3] This landmark law continued the tradition of federal deference to state water law.

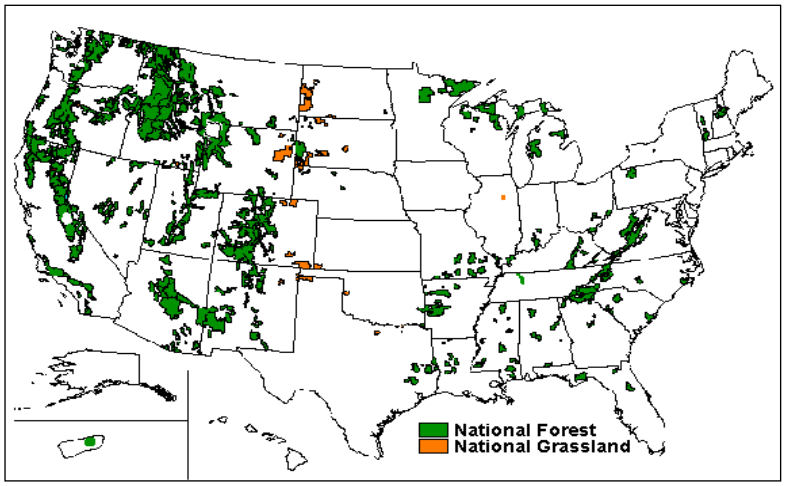
[1] Mr. Stephen C. Sturgeon, *The Politics of Western Water: The Congressional Career of Wayne Aspinall* (Tucson, Arizona, The University of Arizona Press, 2002), p. 4.
[2] Id, at 4
[3] 43 U.S.C. § 6

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 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.[4]

To help address this situation, the Water and Power Subcommittee held hearings in the 113th Congress, and the House passed H.R. 3189, the Water Rights Protection Act (Tipton, R-CO).[5] A similar provision was passed by the House in the 114th Congress as part of H.R. 2898.[6] On December 30, 2015, the Forest Service released its final directive which did not require ski resorts to transfer water rights to the federal government as a condition of operating on public land, but did require the ski areas to prove that they have the ability to produce enough water to maintain the ski area on System lands as a condition of approving their ongoing Conditional Use Permit.[7] Some in the skiing community welcomed this decision by the Forest Service while others viewed it as federal overreach.

The Forest Service's Groundwater Directive

In May 2014, the Forest Service published its Groundwater Resource Management Proposed Rule (Groundwater Directive) which was criticized on the grounds that it superseded state water law and could restrict multiple uses off and on federal lands.[8] In proposing its draft Groundwater Directive, the Forest Service stated that the Groundwater Directive was needed to "establish a consistent approach for addressing both surface and groundwater issues that appropriately protects water resources, recognizing existing water uses, and responds to the



Map 1: Forest Service Lands (Source: Forest Service)

[4] Forest Service Interim Directive No: 2709.11-2011-3, XII.F.2.a.d.
[5] http://clerk.house.gov/evs/2014/roll132.xml
[6] http://thomas.loc.gov/cgi-bin/bdquery/D?d114:1:./temp/~bdrLps:@@@L&summ2=m&|/home/LegislativeData.php|
[7] https://www.gpo.gov/fdsys/pkg/FR-2015-12-30/pdf/2015-32846.pdf
[8] https://www.gpo.gov/fdsys/pkg/FR-2014-05-06/pdf/2014-10366.pdf

growing societal need for high-quality water supplies."[9] The proposal governed activities on 193 million acres of forests and grasslands in 42 states (see Map 1).[10]

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 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."[11] At one of last year's Water, Power and Oceans Subcommittee oversight hearings, Forest Service Deputy Chief Leslie Weldon announced the agency's decision to permanently withdraw the Groundwater Directive. "This Committee, as well as several States, asked us to not proceed with the proposed draft and to consult with them before moving forward,"[12] Ms. Weldon testified. "We have listened and are actively having those conversations now."[13] Although the Groundwater Directive has been withdrawn, some water users are concerned that the Forest Service will resurrect and re-propose it in some form in the future. Witnesses will likely discuss this topic at the hearing.

The Clean Water Act and the Waters of the United States (WOTUS) Rule

Last year, the Obama Administration 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,[14] the CWA's objective is to restore and maintain the physical, chemical, and biological integrity of the nation's waters.[15] 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."[16]

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.[17] CWA jurisdiction has long been subject to federal litigation. Most notably the 2001 Supreme Court (Court) case *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of*

[9] Id.
[10] http://www.fs.fed.us/recreation/map/finder.shtml
[11] http://www.eenews.net/greenwire/2015/02/26/stories/1060014107
[12] Testimony of Ms. Leslie Weldon before the House Water, Power and Oceans Subcommittee, April 14, 2015, p. 2.
[13] Id.
[14] Federal Register, Vol. 79, No. 76, Monday April 21, 2014, Proposed Rules: "Definition of 'Waters of the United States' Under the Clean Water Act."
[15] CWA section 101(a)
[16] CWA section 502(7)
[17] 33 CFR 328.3; 40 CFR 230.3(s)

Engineers (*SWANCC*),[18] and the 2006 Supreme Court case *Rapanos v. United States* (*Rapanos*).[19] In *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.[20] The *Rapanos* decision examined the extent to which the Federal government may regulate wetlands under the CWA. Although this decision did not provide a clear delineation of federal jurisdiction under the CWA, the Court did limit the scope of the government's authority under the CWA.

The EPA and the Corps jointly released a proposed "Waters of the US" (WOTUS) rule on April 21, 2014.[21] The proposal principally re-defined "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 of the "significant nexus" test, as introduced by U.S. Supreme Court Justice Anthony 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.[22] In written testimony before the Water, Power and Oceans Subcommittee last year, Mr. James Ogsbury, Executive Director of the Western Governors' Association, testified that "While the proposed rule from the EPA and the Corps to redefine the jurisdiction of the Clean Water Act is meant to clarify the scope of the regulation, the current proposal has, instead, created new points of ambiguity."[23]

On April 6, 2015, the EPA and the Army Corps sent a revised rule to the Office of Management and Budget for review. The EPA and Corps released a final rule on May 27, 2015 which broadly defined "waters of the United States."[24] This definition is important because it determines which waters are governed by the CWA and thus subject to its permitting requirements. Many water users are concerned that these increased requirements will lead to greater expenses and delays in permitting. The rule, which went into effect on August 28, 2015, was immediately stayed in thirteen states by the Federal District Court for the District of North Dakota.[25] On October 9, 2015 the U.S. Court of Appeals for the Sixth Circuit issued a nationwide stay against the rule.[26] Witnesses will discuss how the WOTUS, if implemented, will impact Bureau of Reclamation projects and other water projects.

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[18] 531 U.S. 159 (2001)
[19] 547 U.S. 715 (2006)
[20] 531 U.S. 159 (2001)
[21] https://www.gpo.gov/fdsys/pkg/FR-2014-04-21/pdf/2014-07142.pdf
[22] http://www.mondaq.com/unitedstates/x/311872/Environmental+Law/Big+Changes+To+Federal+Jurisdiction+Over+Waters+Of+The+US+Through+The+Clean+Water+Act
[23] Testimony of Mr. James D. Ogsbury before the House Water, Power and Oceans Subcommittee, April 14, 2015, p.4.
[24] https://www.epa.gov/sites/production/files/2015-06/documents/preamble_rule_web_version.pdf
[25] http://thehill.com/policy/energy-environment/252140-judge-blocks-obamas-water-rule
[26] http://www.agri-pulse.com/Nationwide-stay-issued-on-WOTUS-rule-10092015.asp

Bureau of Reclamation Title Transfers

One witness will also discuss the need for reforms of the Bureau of Reclamation's (Reclamation) title transfer process. Title transfers, in this context, occur when Congress authorizes the transfer of all or part of a Reclamation project to local water users. Congress usually authorizes these transfers after an agreement is signed between Reclamation and water users. Over the last two decades, only 27 title transfers have been authorized by Congress.[27] Yet, many are concerned that the process that Reclamation uses is cumbersome and time consuming. Indeed, even Reclamation admitted that it remained "concerned that the process takes too long and can be too costly. The number of new proposed transfers is declining, and it may be due in part to time and cost of the process."[28]

[27] Statement of Mr. Robert Quint, Senior Advisor, Bureau of Reclamation, Before the Senate Energy and Natural Resources Committee, on S. 2034. February 27, 2014, p. 2.
[28] Id, at 2.