Testimony of
Tom Myrum
on behalf of
National Water Resources Association

House Subcommittee on Water, Power and Oceans
U.S. House of Representatives
"Proposed Federal Water Grabs and Their Potential Impacts on States, Water, and Power Users, and Landowners."
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Chairman Fleming, Ranking Member Huffman, and members of the Subcommittee, thank you for giving me the opportunity to appear before you today, and for your attention to the many water challenges facing our nation. My name is Tom Myrum; I am the Executive Director of the Washington State Water Resources Association. I am also the immediate past President of the National Water Resources Association, more commonly known as NWRA. I am here today to testify on behalf of NWRA and its members from around the United States.

NWRA is a nonpartisan, nonprofit federation made up of agricultural and municipal water providers, state associations, and individuals dedicated to the conservation, enhancement and efficient management of our nation's most important natural resource, water. The NWRA represents a diverse group of agricultural and municipal water users and water providers from throughout the American West and portions of the Southern United States. Our members provide clean water to millions of individuals, families, agricultural producers and other businesses in a manner that supports communities, the economy and the environment.

For more than eighty years our members have worked, often times in partnership with federal agencies, to provide water in a manner that provides both economic and ecosystem benefits to communities. NWRA is committed to working with the Congress and the agencies to provide a clearly defined, efficient process for all permitting requirements.

Our members' ability to provide the water that our nation depends on is directly influenced by the role and scope of federal regulation.

Importance of Water

I'm here today because water is a fundamental element for life and our economy, but until it is gone many Americans pay little attention to it. Federal regulations have a direct affect on NWRA and our members' ability to deliver this vital resource. We are blessed to have one of the most comprehensive water infrastructure systems the world has ever seen, and while not perfect, this infrastructure allows almost all Americans to access water with the turn of a tap. It is truly a wonder of the modern world.

The development of this system was not always easy and sometimes was met with failure. In fact some of the West's most iconic figures including "Buffalo Bill" Cody and

Sheriff Pat Garrett tried and failed to develop water systems. Despite these challenges our forbearers in water persisted because they saw the vital need for access to water. This is true not only in the US, but also worldwide.

Water is one of the cornerstones of our society and a building block for life. Another building block is food. According to the USDA, the United States is responsible for approximately 20 percent of the world's food exports by volume. Input costs for U.S. agricultural production affect costs both domestically and globally. Keeping food affordable is extremely important because price spikes can have disproportionate adverse affects on vulnerable populations. According to U.N. and World Bank figures, price spikes in 2008 drove 110 million people into poverty and added 44 million to the undernourished globally. As the world's population continues to grow in coming decades the need to produce food will also grow. It is estimated that by 2050 the demand for food will grow by 70 percent.

Food production in the United States must play a role in meeting this demand. This is a daunting challenge but one that NWRA members are ready to help our nation's agricultural producers meet. Our nations farmers and ranchers have successfully doubled US food production over the last half century. Much of this improvement has come during a time when agriculture is working to become more efficient in its water use. According to the USGS, since peaking in 1980 water used for irrigation has dropped from almost 150 billion gallons per day to about 115 billion gallons a day in 2010. Since 2005 alone, 950 thousand more acres of land have been put into irrigated agricultural production while water use has been reduced nine percent.

Increased production with less water is made possible because agricultural water users are making significant investments in water use technologies. As an example, NWRA members in New Mexico have invested in subsurface drip irrigation systems that help reduce water lost to evaporation. Producers in Arizona are laser leveling their fields to help reduce water lost to runoff. In my home state of Washington irrigators are using SCADA technology to help measure and respond to water demands in real time, which yields water savings.

Despite improvements in agricultural water use the world remains a thirsty place. According to the USGS the average American uses between 80 and 100 gallons of water a day. Much of this water is used for sanitary needs. This 80 to 100 gallon figure is only part of the picture of water use in the US.

Last week, the Los Angles Times had a number of articles discussing the water footprint for a variety of crops. It also featured an interactive page on it's website which allows you to construct a meal and get the total water footprint associated with that meal. This web page featured a "random plate" option that builds a meal for you, selecting a protein, grain, vegetable and beverage for you and totaling the associated water use. The random plate I selected, which is pictured below, gave me a meal consisting of:

- 8 ounces of chickpeas with an associated water footprint of 608.6 gallons;
- 6 ounces of wheat bread with an associated water footprint of 86.8 gallons;
- 8 ounces of carrots with an associated water footprint of 7.4 gallons; and
- 8 ounces of wine with an associated water footprint of 27.8 gallons

This heart health meal had a total water value of 730 gallons.

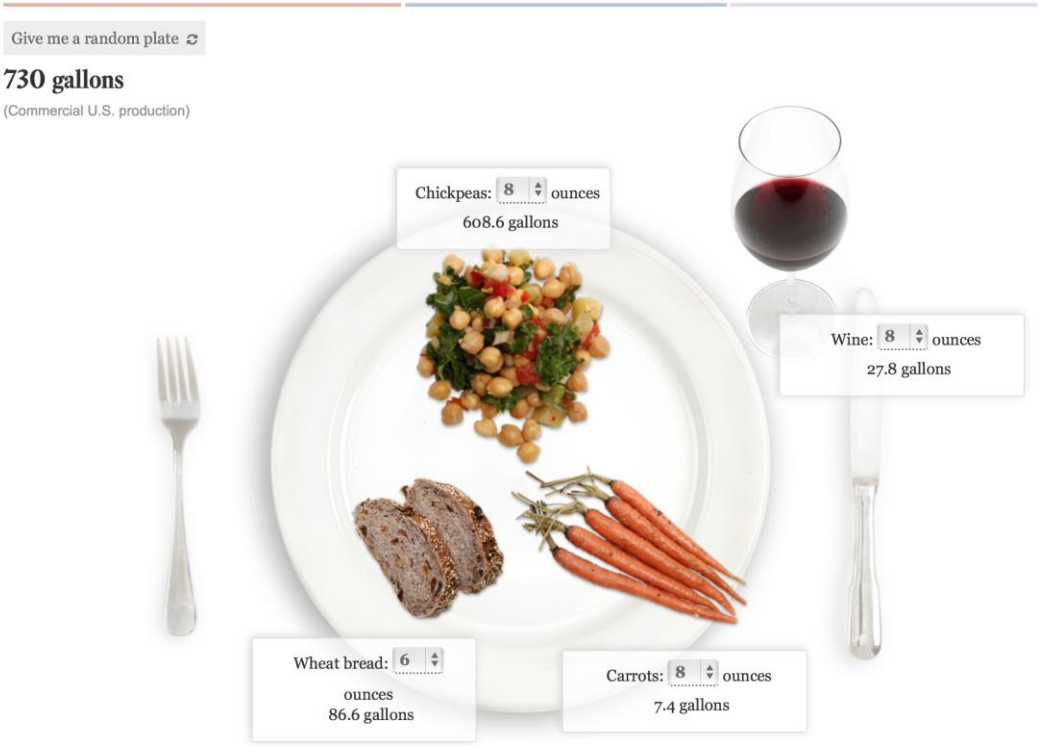

Figure 1: LA Times Food Water Footprint[1]

Food isn't the only product with a water footprint. As an example, a cotton T-shirt can utilize approximately 700 gallons of water, a 32-megabyte computer chip – which weighs about 2 grams – has a water footprint of about 8 gallons, and a single piece of paper has a water footprint of around 2.6 gallons. This means that one copy of my testimony has a water footprint of 26 gallons.

It is important to note that a water footprint is only one part of a complex picture. A product's water footprint is only one indicator that doesn't actually represent the water contained in a product. It considers larger issues associated with the full supply chain. Water is still an important component of input and should be considered but it isn't the only component that should be considered.

Should we stop growing avocadoes in California and instead only purchase them from more water rich places like New Zeeland? If so what about other environmental factors like the carbon footprint needed to transport that avocado nearly 9,000 miles to grocery store shelves here in DC?

Should Intel stop building computer components in Arizona at a factory that President Obama said is an example of: "An America that attracts the next generation of good manufacturing jobs. An America where we build stuff and make stuff and sell stuff all over the world."[2]

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[1] http://graphics.latimes.com/food-water-footprint/

[2] https://www.whitehouse.gov/the-press-office/2012/01/25/remarks-president-intel-ocotillo-campus-chandler-az

Should the federal government stop issuing final rules because, according to the Congressional Research Service, the government published 26,417 pages worth of final rules in the Federal Register in 2013?[3] That's more than 68,000 gallons of water to print just one copy of rules finalized 2013.

I ask these questions not to make light of the importance of considering water inputs, but rather to highlight the fact that these are complex questions. We use water every day in ways that most individuals don't realize. This makes addressing current and future water supply needs a major responsibility. Meeting these needs will require collaboration, creativity and flexibility. NWRA members are ready to work with the Subcommittee and federal agencies to meet these needs.

Pending Regulatory Proposals – Potential Implications for Water Supply

NWRA and our members do not oppose regulation outright. We see value in regulations when appropriately applied and are active members of the regulated community. Our members take great pride in providing water while meeting ecosystem needs. NWRA members fully understand and support the need for keeping our waters safe and clean, not only for purposes of crop production, but also for drinking water, fish and wildlife habitat, and recreational uses. To further those goals, NWRA members continue to make necessary improvements to their systems to increase efficiencies, conservation, and environmental protections.

However, we also believe that federal regulations are not, by default, universally good ideas. In many cases there is a fine line between appropriate regulation and unnecessary overreach. In these instances it is our responsibility to work to address these problems. That responsibility is why I am here today.

In my testimony this morning I will focus on three items: the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) proposed rule regarding the definition of the "waters of the United States" and its impacts on Bureau of Reclamation customers; the Forest Service's Ski Area Water Rights Clause; and the Forest Service's proposed groundwater management directive.

However, I would do the Subcommittee and water users a disservice if I failed to mention that these three items are only a small sample of the numerous pending rules, regulations, or policies proposed by federal agencies that could significantly and adversely affect water users. Last year NWRA filed eleven sets of comments on regulatory proposals. In the first quarter of this year we have filed comments on three additional items. All fourteen of our comment letters highlight that federal regulations can unnecessarily hinder water supply operations if not correctly implemented.

We file these comments because it is vital that federal agencies understand and appreciate the complex process and unique circumstances surrounding water delivery. If our members can't do our job many of your constituents can't get water.

[3] https://fas.org/sgp/crs/misc/R43056.pdf

It is also important to note that the absence of federal regulation does not translate to a total lack of regulation. All states have, at some level, statutes that protect water and address water quality issues. In fact some of these protections are more stringent than federal requirements and exceed the protections offered under the federal Clean Water Act. In addition, many municipalities and water districts undertake additional efforts to protect water quality, often at great cost, without any requirement to do so.

Clean Water Act and Proposed Definition of Waters of the United States

Last year NWRA members testified before both the House Transportation and Infrastructure Committee and the House Natural Resources Committee on the pending rule defining "waters of the United States". During these hearings it became evident that there is bipartisan interest in ensuring the Clean Water Act is appropriately applied. It also became evident that the proposed rule created an immense amount of confusion and needed clarification.

Prior to the issuance of this rule many NWRA members sought clarification to the jurisdictional questions under the Clean Water Act. Many hoped that the proposed rule would provide additional clarity that would help agencies and water users more effectively implement the Act.

The primary goal of any rulemaking should be to clarify the scope of the federal agencies' jurisdiction under the Act. Unfortunately, the rule that has been proposed by the Agencies only adds to the confusion over jurisdictional determinations. And now, almost a after we first discussed this issue with Congress, we find ourselves back testifying again. In the intervening year the clarity we have long sought remains illusive.

Under the Agencies' proposed rule all ditches are jurisdictional unless specifically exempted. The only ditches that are exempted are those which are excavated wholly in uplands, drain only uplands and have less than perennial flow or ditches that do not contribute flow to a traditional navigable water, interstate water, the territorial seas or impoundments thereof.

Contrary to EPA public statements, these exemptions are of limited utility. As an example, in many western states, ditches are often used to move water to fields for irrigation purposes or to municipal intakes. Hence, they commence at a ditch headgate "on the stream," i.e., not in an "upland". In addition, they oftentimes eventually provide return flows back to the stream after use in accordance with water court decree requirements. Further, under the proposal, the ditches themselves would be treated as jurisdictional waters even though point source discharges into the ditch that may reach a traditional navigable water will be regulated under state law.

The use of ditches is critical in meeting Western municipal and agricultural water supply needs. Most ditches are not excavated wholly in uplands or drain to another waterbody and therefore are not exempt under the current proposal.

We do not believe that Congress or the Courts ever intended for features like irrigation ditches to be jurisdictional under the Clean Water Act. The words chosen by Congress and the intent of the Act are clear: irrigation canals, ditches, and drains were not meant

to be regulated under the Clean Water Act. This was reflected in the 1975 and 1977 regulations, which provided that "manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States." 40 Fed. Reg. 31, 321 (1975); 33 CFR 323.2(a)(5)(1982).

The federal government has a vested interest in seeing that irrigation facilities are operated and maintained in a manner that protects the public from deterioration and failure of these facilities. Without the ability to conduct necessary maintenance activities, free from time consuming and costly federal processes, agricultural water delivery, and many of the efforts aimed at improving efficiencies, protecting public safety and conserving water, would be severely challenged, if allowed at all.

It also needs to be noted that many of the facilities that could now be jurisdictional for the first time provide flood control or public safety functions. In such cases, regular maintenance activities to maintain channel capacity are necessary to protect life and property. In addition catastrophic forest fires and floods are growing more commonplace events in the West. When these catastrophic fires occur it is essential to quickly undertake remedial activities after such events, including sediment and debris detention, in order to protect health, safety, infrastructure/property and environmental values. Categorizing all small drainages as jurisdictional, with accompanying regulatory requirements, will impede the ability to appropriately respond to such disasters and could jeopardize public safety and property.

The proposed WOTUS rule in its current form will make meeting future water and food supply needs more difficult. We hope that the final rule proposed by the Agencies reflects NWRA's concerns and focuses on limiting the regulatory uncertainty of "waters of the U.S." and jurisdiction, and not create unnecessary burdens on entities such as irrigation districts and water suppliers, whose purpose and facilities have no relationship to the originally envisioned scope of the Clean Water Act.

Forest Service Ski Area Water Rights Clause

Over the last several years the Forest Service has issued proposals relating to the management of water rights associated with ski areas and special use permits. The Proposed Ski Area Water Rights Directive (Water Rights Directive) ostensibly appears to apply to ski areas, but we are concerned that it could have broader policy implications that would harm people, local governments and other entities that own state allocated water rights. This proposal threatens to vastly increase Forest Service control over state allocated water rights. This is counter to state law and stands to harm water users by interfering with the management and use of their state allocated water rights.

Collectively, NWRA members have spent billions of dollars investing in the development of state issued water rights and associated infrastructure in order to provide a safe and reliable water supply to their customers. Their ability to continue meeting the nation's growing demand for clean water is dependent upon access to this vital resource. Water rights constitute a valuable property right and as such are valuable assets that are often irreplaceable.

The Water Rights Directive would require that a state allocated water right be tied to a special use permit issued by the Forest Service. Further it stipulates that these water rights can only be sold to the subsequent ski area special use permit holder and that the water can only be used in support of a ski area.

By restricting the market for a state allocated water right the Forest Service is essentially driving down the value of that water right. This amounts to a taking of property. The Forest Service seems to acknowledge this problem in the Proposed Directive and would require a water right holder to waive any claim against the United States for compensation. Specifically, the proposal states: "The holder waives any claims against the United States for compensation for any water rights that it transfers, removes, or relinquishes as a result of the foregoing provisions; any claims for compensation in connection with imposition of restrictions on severing any water rights; and any claims for compensation in connection with imposition of any conditions on installation, operation, maintenance, and removal of water facilities in support of the ski area authorized by this permit."

The Forest Service itself appears to admit that this provision is problematic and would adversely impact property rights and may run counter to the Fifth Amendment. In the June 23, 2014, Federal Register notice the Forest Service states that: "The waiver provision is constitutional, because constitutional rights, including those protected by the Fifth Amendment, can be waived." It is disconcerting that the Forest Service, an agent of the United States Government, is encouraging the parties that it negotiates with to waive constitutional rights as a condition of a special use permit. Our members do not believe that waiving a constitutional right should be considered so lightly. We also have great concern that a special use permit holder should be faced with a Hobson's choice requiring the waiver of their constitutional rights in exchange for access to water.

This proposal exceeds the agency's authority as Congress has not provided the Forest Service power over water rights owned by a third party under state law. In addition, we are concerned the Proposed Directive would lead to the decreased value of a water right, would limit water management flexibility and increase the workload for both water users and the Forest Service alike.

The creation of a process through which water deliveries could be made contingent on the modification, relinquishment or surrender of a water right is unacceptable.

Forest Service Groundwater Proposal – practical management considerations

Last year the United States Forest Service proposed a directive aimed at groundwater management. Its "Proposed Directive on Groundwater Resources Management" (Groundwater Directive) is extremely troubling to water users. As currently drafted, the Forest Service Directive unnecessarily expands the reach of the federal government into an area generally regulated by the states. The Groundwater Directive is also concerning because it makes numerous mentions to adjacent non-federal lands.

While we are extremely concerned by this proposal, we do want to state that we recognize and appreciate the efforts that the Forest Service has undertaken to communicate with our members following the initial release of the Groundwater

Directive. These interactions helped establish a productive dialogue and we believe that they were mutually beneficial. However, we remain concerned that the Proposed Groundwater Directive is fundamentally flawed.

The Forest Service lacks the authority to implement the Groundwater Directive and does not adequately consider the importance of state water law. It also does not appreciate the differences in water law between eastern states, individual western states and the territories. The Forest Service manages 155 National Forests and 20 National Grasslands on nearly 193 million acres of land in 44 states, Puerto Rico and the Virgin Islands. The water laws and water management needs in these areas vary greatly. As an example, the water laws and needs in New York are vastly different from the water laws and needs in New Mexico. The Agency's proposal does not sufficiently address this. One of our fundamental concerns is that the Proposed Groundwater Directive creates substantial uncertainty about the management of water supplies and the interaction of the Agency with respect to state allocated water rights.

Historically, Congress and the courts have recognized limits on the Forest Service's authority relating to the management of water resources. Congress passed the McCarran Amendment in 1952. Under the McCarran Amendment the United States waived its sovereign immunity to be sued in a dispute relating to water rights and cannot object to the application of a state law under such a proceeding. The McCarran Amendment also ratified the legal framework that the federal government must utilize to validate its state granted water rights, treating federal and non-federal water right holders alike. In addition, as noted by the Supreme Court in 1978, in *U.S. v. New Mexico*, this authority is not boundless. It largely extends to surface water resources and, as Justice Rehnquist stated in the opinion of the Court: "Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses *under state law (emphasis added)*."

In addition to creating an additional permitting burden we are worried that these provisions would adversely impact water supply affordability. Millions of individuals depend on NWRA's members to provide a clean, reliable and affordable supply of water. Our members are dedicated to meeting this charge. We are concerned that the Proposed Groundwater Directive would drive up water costs. There are many portions of the Proposed Groundwater Directive that we could note to discuss these concerns but we will highlight section 2562.1 and section 2563.3.

Section 2562.1 states:

> *In lieu of accessing water from NFS lands, encourage public water suppliers and other water users to employ new treatment technology to meet water supply needs when water quality in an existing water source has degraded or become polluted.*

NWRA's members are proud to be on the cutting edge of water supply technologies and many of our members are actively engaged in researching, planning and implementing these technologies. It is unclear what the Agency would do to "encourage" water suppliers to use new treatment technologies. We believe that water supply decisions should be conducted in an environmentally sensitive manner and driven by water supply demands and community needs. Responding to climate variability and the growing

demand for water will require the responsible consideration of all available options. Our members are concerned that the Proposed Groundwater Directive may unnecessarily limit these options. It is also important to note that new treatment technologies can be more costly than traditional water supply options and can also be very energy intensive.

NWRA believes that Section 2563.3 could also lead to increased water costs. It states that the Forest Service will:

> *Deny proposals to construct wells on or pipelines across NFS lands which can reasonably be accommodated on non-NFS lands and which the proponent is proposing to construct on NFS lands because they afford a lower cost and less restrictive location than non-NFS lands (FSM 2703.2).*

NWRA does not understand why the Forest Service would issue a de-facto denial of a water supply project that could yield a more affordable water supply. The Groundwater Directive does not define "reasonably." This requirement is excessively ambiguous and ignores the fact that water infrastructure can be constructed in a manner that benefits both people and the environment. Evaluating all alternatives could be a very time consuming process, and could delay already planned and vital water projects. There are few other "reasonable" alternatives to developing facilities off of NFS lands in the mountains of the western United States. In some western counties the Forest Service can hold upwards of 80 percent of the land. We also fail to understand why the Forest Service is openly embracing a policy that they know will directly increase water costs for people throughout the West.

The Groundwater Directive provides for collaboration with other federal agencies, such as experts from the USGS, state, tribal, and local agencies, and other organizations; noticeably absent is the Bureau of Reclamation, irrigation districts, and other water providers who are the largest distributors and users of water resources, many of which have existing water systems on Forest Service lands.

Our primary concerns with the Groundwater Directive are centered on its interaction with state water law. However, I also wanted to note that this proposal wouldn't be implemented in a vacuum. We are concerned that the Forest Service will attempt to tie permit approval to the modification of a state issued water right. As discussed earlier in my testimony, the Forest Service has already attempted this in regard to ski area permitting and we are concerned that the agency will attempt to apply similar policies to water users.

Conclusion

NWRA and our members are proud to preform a vital service by helping to supply the water that grows food that the world depends on. Regulations have a role in our society and when appropriately implement can be beneficial. However, if implemented in their current forms the pending WOTUS, Ski Area Water Rights Directive and Groundwater Directive will make it harder to meet current and future water needs for both agricultural and municipal water users. These proposals will make it harder to respond to the challenges posed by climate change, make it harder to feed the world and grow the economy.

Meeting current and future water supply needs a major challenge. Meeting these needs will require collaboration, creativity and flexibility. NWRA members are ready to work with the Subcommittee and federal agencies to meet these needs.

Thank you for the opportunity to testify today and for your attention to the critical issues facing water users.