Testimony of
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on behalf of
National Water Resources Association

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"Proposed Federal Water Grabs and Their Potential Impacts on States, Water, and Power Users, and Landowners."
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Mr. Chairman, Ranking Member Huffman, members of the Committee, thank you for this opportunity to testify today regarding the impact that federal actions have on water and power users and landowners. My name is Ron Sullivan, and I am speaking today on behalf of the National Water Resources Association. NWRA members are agricultural and municipal water providers, state associations, and individuals dedicated to the conservation, enhancement and efficient management of water. We are the people who deliver safe drinking water and irrigation water, and we ensure that the objectives of the Clean Water Act are met.

I have served 12 years on the board of Eastern Municipal Water District ("Eastern MWD") in Riverside County, California. My District provides water and wastewater services to 785,000 people in the growing Inland Empire. We are a leader in efficient water management, most particularly reuse and reclamation of water, also known as water recycling, where we are considered industry leaders. Providing water services in my District requires the regular engagement of at least eight federal agencies, five state agencies, several county agencies, and at least 15 municipal agencies. Water travels a long pipeline of government regulation before it comes out of the tap or is returned to a river – or in our case, is recycled for beneficial use.

The federal government plays a significant but not the only role in ensuring an adequate and safe supply of water. In fact, in Eastern MWD's case, the federal government's contribution to funding water infrastructure for supply, treatment, and environmental benefits is miniscule, at less than two percent of the capital investment we make in people and habitats. Yet federal agencies too often act as if they alone are charged with managing resources and protecting public interest in water.

I and my fellow board members, the public officials who treat and serve water, and the elected and appointed public servants who manage water resources across the country have all taken oaths to protect the public and its investment in water. We are partners with the federal government in providing this essential public service, and we need to be integrated into the decision-making process for policies that affect our mandate. When that process short-circuits local and state government involvement, the public suffers cost increases, bureaucratic delays, and ultimately a degraded, less efficient level of service to the public. This Subcommittee has a degree of jurisdiction over two recent examples of the breakdown between federal and local engagement:

Waters of the United States

The first of these examples is the proposed rule published by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers last April to redefine "waters of the U.S." that are subject to the Clean Water Act. The rule was recently referred to the Office of Management and Budget for final review, after the agencies sifted through more than one million public comments. I understand that most comments from public agencies expressed opposition to the rule, citing concerns about the proposed rule's impact on storm water, waste water and recycled water facilities, conveyance ditches, and water delivery systems. Under the agencies' proposal, jurisdiction of the rule would be expanded to include all waters, not just wetlands, adjacent to traditional navigable waters and undefined riparian areas and floodplains. Without a clear definition for a "significant" nexus to traditional navigable waters, ephemeral and intermittent streams would be considered categorically jurisdictional. During numerous congressional hearings with Administration officials, it became clear that federal regulators failed to adequately confer with and accommodate concerns raised by state and local governments. NWRA is concerned that the proposed rule misses the mark. As drafted it does not provide the additional clarity and certainty that water users and others have asked for and will make meeting current and future water supply needs more difficult. In fact, we are concerned that the cost of compliance will far out-weigh any marginal benefit in water quality.

This Subcommittee should be particularly concerned with the potential impacts of this rule on water delivery systems owned and operated by the Bureau of Reclamation. Water delivery systems in the 17 Reclamation states will be subject to new permitting requirements and additional infrastructure costs as these facilities are redefined as waters of the U.S. Certainly the current drought across much of the west has emphasized the importance of water storage and delivery and the need to maintain the capacity and operating efficiency and flexibility of these systems. The Administration's own National Climate Assessment in 2014 declared:

> The Southwest is the hottest and driest region of the United States, where the availability of water has defined its landscapes, history of human settlement, and modern economy. Climate changes pose challenges for an already parched region that is expected to get hotter and, in its southern half, significantly drier. Increased heat and changes to rain and snowpack will send ripple effects throughout the region's critical agriculture sector, affecting the lives and economies of 56 million people—a population that is expected to increase 68% by 2050, to 94 million. Severe and sustained drought will stress water sources, already over-utilized in many areas, forcing increasing competition among farmers, energy producers, urban dwellers, and plant and animal life for the region's most precious resource.

The Administration is correct to express concern about meeting water supply needs in coming decades. NWRA shares this concern. However, we are genuinely concerned that

the proposed rule will make it more difficult to meet water needs. We strongly support the Clean Water Act and the need for a rule that clarifies jurisdiction of the Act. We do not support this proposed rule and ask that Congress take action to ensure a more inclusive rule-making process.

In order to meet water supply and wastewater treatment needs, as well as storm water control requirements, municipal utilities and irrigation districts must make substantial infrastructure investments, often requiring creative and innovative approaches. These investments will include new or expanded storage reservoirs; water reuse facilities, desalinization plants; water collection, delivery, and distribution pipelines; pump-back projects; groundwater recharge facilities; and reverse osmosis water treatment plants. Many of these facilities will, of necessity, be in close proximity to traditional navigable waters, in a riparian area or floodplain, and include features that meet the definition of a ditch, tributary or wetland. Any one of those conditions would subject the entire system or elements thereof to higher regulatory requirements, additional bureaucratic review, and much greater cost.

As the demand for water continues to rise, NWRA's members are committed to undertaking a variety of innovative efforts to meet this need. These efforts include extensive water conservation as well as water recycling. Recycled water, which is generated from the treatment and purification of wastewater, is a safe, effective and environmentally friendly method to fully utilize local water resources, and reduces the demand for imported water in the arid southwest. The processes and infrastructure to treat, store and distribute recycled water are costly, but are becoming increasingly feasible in areas of the country where groundwater and surface water sources are strained and the cost or availability of imported water is prohibitive.

Water authorities across the country are investing billions of dollars in infrastructure to utilize this drought-proof water resource. My water district alone has made $188 million in capital investments in its recycled water system, and has $154 million of recycled water investments planned over the next five years. Treatment and distribution costs of recycled water are already high, making this valuable resource marginally cost-effective in some places. Any significant increase in regulation will escalate the cost of utilizing this water and discourage its further development.

Under the proposed rule, water reclamation and reuse facilities are not exempt from being designated "waters of the U.S." Further, ditches that transport effluent or discharged water could also be considered a "tributary" under the proposed rule and could be categorically regulated. The proposed rule defines as a "tributary" any natural or man-made feature that has a bed, bank, ordinary high water mark, and conducts flow to another water. In addition, water recycling storage and conveyance 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 proposed rule includes 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. The proposed rule's

wastewater treatment exemption would not extend to an associated water recycling facility because such facilities are not expressly "designed to meet the requirements of the Clean Water Act;" a condition stipulated in the rule. Many states have acknowledged the value of recycled water. Some states like California have established a statewide goal (California Water Plan) of recycling 2.5 million acre feet (MAF) of water by 2030. In 2009, 0.67 MAF was recycled; increasing to 2.5 MAF is ambitious, but necessary to help drought-proof the state. Currently 3.5 MAF of treated wastewater is being discharged to the ocean, and not beneficially reused.

The proposed rule's impact on recycled water projects can be illustrated in my own water district. Eastern MWD is a water and wastewater agency that utilizes 100 percent of the recycled water it generates, with recycled water constituting 30 percent of our entire water supply portfolio—over 38,000 acre feet annually. This critical supply is used for municipal irrigation and industrial uses, and is also used to irrigate over 10,800 acres of production agriculture in our service area. In recent years, EMWD in cooperation with federal partners at the Bureau of Reclamation, has developed 5,714 acre-feet of seasonal storage ponds, 16 million gallons of elevated storage tanks (to pressurize the system), over 200 miles of recycled distribution water pipelines, and 19 pumping facilities. EMWD currently has greater demand than supply for recycled water, and in response has prepared unique allocations for customers.

We are concerned that under the proposed rule, ten EMWD recycled water storage sites could become jurisdictional because they are located in floodplains, are adjacent to jurisdictional waters, and may possess a subsurface hydrologic connection to jurisdictional waters. After becoming jurisdictional, regular maintenance and vegetation removal of these 500 acres of ponds would require Section 404 Army Corps of Engineers permits as well as Section 401 water quality permits from the state. This added regulatory burden would not only increase the cost of recycled water, and potentially delay further development of recycled water storage ponds, but could hamper the development of this drought-proof water supply. Numerous agencies in the arid southwest share this scenario, concern, and dilemma.

Despite verbal assurances that the rule with not regulate groundwater, we also remain concerned that groundwater banking and recharge projects will be enveloped by this rule. Multiple NWRA members operate groundwater banking and recharge projects to capture and store unused irrigation water and treated effluent from municipal treatment plants. Some of these shallow banking aquifers are adjacent to rivers. The agencies should provide additional clarity in the rule that groundwater, shallow subsurface aquifers, and groundwater banking and recharge projects will not be considered waters of the U.S.

My testimony is largely focused on municipal water supplier concerns, and I understand that other witnesses will discuss agricultural water user perspectives in depth. However, it is vital I note that the proposed "waters of the United States" rule is also very concerning to NWRA's agricultural water providers. The proposed rule would largely capture irrigation features that are currently not jurisdictional. Last week Administrator McCarthy stated in a blog post that the EPA would address these concern in the revised

rule. This statement encourages us. However, we are not wholly confident that agricultural concerns will be addressed because similar assertions about protecting agriculture were made when the rule was unveiled last April.

In summary, we need Congress to act on this proposed rule. The scope of the proposed rule is so broad and its potential impacts are so great, that we cannot entrust the federal agencies to address all the concerns that have been raised with this rule. And Congress cannot wait and hope that reason will prevail in a final rule. Under the Clean Water Act, water managers are civilly and criminally liable for violations, and any citizen can file suit for a perceived non-compliance. We are vulnerable to litigation the very day this rule is finalized. NWRA members would prefer to invest public funds in infrastructure and environmental enhancement rather than litigation. Legislation that mandates intergovernmental and stakeholder involvement in defining waters of the U.S. will do far more to protect the public and the environment and provide certainty to water managers and users.

Forest Service Groundwater Management Directive

The second example of the breakdown between federal and local agency engagement is the Forest Service's Proposed Directive on Groundwater Resource Management. This is deeply concerning to many of NWRA's members because it creates a great deal of uncertainty about the management and use of groundwater. With limited exception Congress and the Courts have largely relegated groundwater management authorities to the states. The Groundwater Directive creates a number of concerns from a state's rights perspective and from a practical management perspective. Our fundamental concern is that the Forest Service does not have the statutory authority to establish a groundwater directive. However, as an on-the-ground water provider, I will focus my comments today on the practical challenges and uncertainties that this proposal would create from a water supply perspective.

Eastern MWD is designated by the State of California as the Monitoring Entity to collect and report regional groundwater data throughout the California Statewide Groundwater Elevation Monitoring program. The agency also has existing water rights and water supply components that are adjacent to, or downstream from, Forest Service lands. As a result, Eastern MWD is uniquely positioned to provide insight as both a regional agency engaged by the state in aspects of groundwater management, and as a water provider with resources that could be directly affected by the proposed groundwater directive.

Like many water providers, Eastern MWD manages a broad portfolio of water supply resources to meet municipal, industrial and agricultural demands. As previously noted, we utilize surface water supplies, recycled water supplies and groundwater supplies. In relation to groundwater, Eastern MWD has several important components that could be significantly affected by the Forest Service groundwater directive. We accrue a water supply credit for groundwater that seeps into the San Jacinto Tunnel, which is a regional water transmission facility that brings imported water into our region. The construction of the San Jacinto Tunnel intercepted a local aquifer in which groundwater seeped.

Eastern MWD had been pumping this groundwater and as a result, negotiated an agreement with the Tunnel owner to provide a credit for this seepage. This water is important because Eastern MWD is currently credited for the roughly 4,588 acre feet of tunnel seepage water annually. However, because the Tunnel is in the proximity of Forest Service land, we are concerned that the proposed groundwater directive could create an avenue for the federal government, through the Forest Service, to make a claim against this water supply. . Additionally, Eastern MWD has water rights in the San Jacinto River watershed which begins in Forest Service land. We are concerned that the proposed groundwater directive would not only limit our ability to manage this resource, but could adversely affect our water rights.

The nature of groundwater varies significantly from one region of the country to another. Water rights and legal agreements affecting surface and groundwater can be complicated. The proposed directive fails to recognize the nuances of geography and existing agreements and instead provides blank assumptions that may be detrimental to many long-standing water rights holders.

We are seeking assurances from the Forest Service that western water rights and management abilities will not be limited by this proposal. NWRA's concerns are significant enough that it has requested a withdrawal of this ambiguous and far-reaching proposal. We understand that the Forest Service has pulled back from this proposal and has indicated that they will try to address state and water user concerns. As with explanations provided by the federal agency regarding our concerns with the Clean Water Act rule, we are heartened by this news, but remain concerned that agency objectives might short-change consultations with state and local governments. We also want to emphasize that the Forest Service needs to improve its outreach efforts to stakeholders. Prior to issuing this directive, the Forest Service failed to reach out to either water users or the states.

Respecting the role of states in water management and respecting state allocated water rights is fundamental to meeting current and future water needs. Any future proposal needs to consider these facts and ensure that water rights and the role of states are clearly protected.

Conclusion

Again, I would like to thank the Committee for holding this hearing and inviting NWRA to share its views. We have enjoyed long and constructive relationships with numerous federal agencies responsible for water supply, management, and protection. And we fully anticipate maintaining and enhancing those relationships in the future. However, we are concerned when federal agencies presume a disproportionate share of authority or influence, neglecting other water partners at the state and local levels. We appreciate the oversight and, when necessary, the intervention in Congress to restore balance. Thank you for accepting that responsibility. We look forward to working with you and the federal agencies as we protect the public and its investments in water resources and infrastructure.