AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 114–399

PENDING WATER AND POWER LEGISLATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
WATER AND POWER

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

S. 593
S. 982
S. 1291
S. 1305
S. 1365
S. 1533
S. 1552

JUNE 18, 2015

Printed for the use of the
Committee on Energy and Natural Resources

Available via the World Wide Web: http://www.fdsys.gov

U.S. GOVERNMENT PUBLISHING OFFICE

95–284 WASHINGTON : 2017

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON ENERGY AND NATURAL RESOURCES

LISA MURKOWSKI, Alaska, *Chairman*

JOHN BARRASSO, Wyoming	MARIA CANTWELL, Washington
JAMES E. RISCH, Idaho	RON WYDEN, Oregon
MIKE LEE, Utah	BERNARD SANDERS, Vermont
JEFF FLAKE, Arizona	DEBBIE STABENOW, Michigan
STEVE DAINES, Montana	AL FRANKEN, Minnesota
BILL CASSIDY, Louisiana	JOE MANCHIN III, West Virginia
CORY GARDNER, Colorado	MARTIN HEINRICH, New Mexico
ROB PORTMAN, Ohio	MAZIE K. HIRONO, Hawaii
JOHN HOEVEN, North Dakota	ANGUS S. KING, JR., Maine
LAMAR ALEXANDER, Tennessee	ELIZABETH WARREN, Massachusetts
SHELLEY MOORE CAPITO, West Virginia	

SUBCOMMITTEE ON WATER AND POWER

MIKE LEE, *Chairman*

JEFF FLAKE	MAZIE K. HIRONO
JOHN BARRASSO	RON WYDEN
JAMES E. RISCH	BERNARD SANDERS
STEVE DAINES	AL FRANKEN
CORY GARDNER	JOE MANCHIN III
ROB PORTMAN	ANGUS S. KING, JR.

KAREN K. BILLUPS, *Staff Director*
PATRICK J. MCCORMICK III, *Chief Counsel*
CHRISTOPHER KEARNEY, *Budget Analyst and Senior Professional Staff Member*
ANGELA BECKER-DIPPMANN, *Democratic Staff Director*
SAM E. FOWLER, *Democratic Chief Counsel*
MELANIE STANSBURY, *Democratic Professional Staff Member*

CONTENTS

OPENING STATEMENTS

WITNESSES

ALPHABETICAL LISTING AND APPENDIX MATERIAL SUBMITTED

The text for each of the bills which were addressed in this hearing can be found on the committee's website at: *http://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=545782e0-2ade-47b3-98f9-726dfefd4d59*

PENDING WATER AND POWER LEGISLATION

Thursday, June 18, 2015

U.S. SENATE SUBCOMMITTEE ON WATER AND POWER,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:05 p.m. in Room SD–366, Dirksen Senate Office Building, Hon. John Barrasso, presiding.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM WYOMING

Senator BARRASSO. [presiding] I want to thank all of the witnesses for being here today. I call the meeting to order.

We are in the middle of votes and members may come and go based on that.

Today we are having a hearing on a series of water bills that address protecting water rights and promoting water development in the West. Four of the bills are ones I am sponsoring. They are S. 593, the Bureau of Reclamation Transparency Act; S. 1305, a bill to amend the Colorado River Storage Project Act to authorize the use of the active capacity of the Fontenelle Reservoir in my home State of Wyoming; S. 982, the Water Rights Protection Act; and S. 1533, the Water Supply Permitting Coordination Act.

I would also like to note that I am pleased to be sitting in for Subcommittee Ranking Member, Mike Lee. He and I share a commitment to ensuring that we protect water rights and examine ways to promote more water for rural and Western communities.

I will briefly explain the four bills I am sponsoring and then if other members arrive, they will have an opportunity to give opening statements. After that I will recognize any other sponsors of the bills being discussed today for their statements.

S. 593, the Bureau of Reclamation Transparency Act, is a bill to require the Secretary of the Interior to submit to Congress a report on the maintenance backlog of the Bureau of Reclamation. S. 593 seeks to expand on the information provided by Bureau of Reclamation Asset Management Plan by providing a detailed assessment of major repair and rehabilitation needs at the project level at Bureau of Reclamation owned and managed sites known as reserved works. The legislation also asks the Bureau to develop a similar assessment for sites owned by the Bureau but managed by other entities. They are known as transferred works. I believe it is important for Congress to know the maintenance backlog of these sites so that we can begin to address it. I will note that this bill unanimously passed the Senate in the last Congress.

S. 1305 is a bill which would amend the Colorado River Storage Project Act to authorize the use of the active capacity of the Fontenelle Reservoir in my home State of Wyoming. The purpose of S. 1305 is to have the Bureau of Reclamation enter into an agreement with the State of Wyoming to complete the area around the Fontenelle Reservoir to increase the storage capacity of the facility. Fontenelle Reservoir is one of the projects authorized by the Colorado River Storage Project Act of 1956. This bill directs that the State of Wyoming pay for the entire project. This includes paying for the study, the design, the planning and construction of the project. This common sense bill would provide much needed water storage for Southwestern Wyoming.

S. 982, the Water Rights Protection Act, is a bill to prohibit Federal agencies from withholding approving permits unless the permitee gives up that privately held water right to the Federal Government. This bill also prevents the implementation of the Forest Service Groundwater Directive which would essentially allow the Forest Service to comment on and require permits for anything the agency claims would impact Forest Service groundwater. This includes activities that would occur in any watershed where there is Forest Service land. This legislation would prohibit the Secretary of the Interior and the Secretary of Agriculture from asserting jurisdiction over groundwater that has been historically controlled by the states. The bill also recognizes the state's long standing authority related to protecting, evaluating and allocating groundwater resources.

The purpose of S. 1533, the Water Supply Permitting Coordination Act, is to streamline the current multiple agency permitting process that delays the construction of new or expanded surface water storage by creating a one stop shop permitting process through the Bureau of Reclamation. Currently, Federal agencies are not required to coordinate their permits and approvals with one another which can lead to significant delays in the development of new water storage. This legislation would put the Bureau of Reclamation in the lead role as a coordinating agency to expedite the process. I believe this important bill will help expedite the construction of new water storage projects throughout the West.

As other members appear I will call on them. I would like to recognize our witnesses today. Ms. Dionne Thompson, Deputy Commissioner of External and Intergovernmental Affairs at the Bureau of Reclamation (BOR); Mr. Jerry Meissner, Chairman of the Dry Red-water Regional Water Authority; Mr. Adam Schempp, the Director of Western Water Program, Environmental Law Institute; Mr. Charles Stern, Specialist in Natural Resource Policy, Congressional Research Service; Mr. Tony Willardson, Executive Director, Western States Water Council; and Mr. Ryan Yates, Director of Congressional Relations, American Farm Bureau.

With that let me please call on Ms. Thompson.

STATEMENT OF DIONNE THOMPSON, DEPUTY COMMISSIONER FOR EXTERNAL AND INTERGOVERNMENTAL AFFAIRS, BUREAU OF RECLAMATION, U.S. DEPARTMENT OF THE INTERIOR

Ms. THOMPSON. Chairman Barrasso, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation. Thank you for the opportunity today to testify on the seven bills before the Subcommittee today.

In the interest of time I will summarize the Department's views briefly and submit my full testimony on each bill for the record.

I will do my best to answer any questions proposed today; however, as you know, these bills deal with very specific ongoing issues in some of your home states, so I may need to defer with detailed answers on some questions and reply in writing for the record.

S. 593, the Reclamation Transparency Act. To begin, S. 593 directs Reclamation to improve and expand upon the information developed on the state of its infrastructure. The bill reflects extensive edits made by the sponsors during the prior Congress and is consistent with the draft infrastructure investment strategy Reclamation is initiating concurrently. For these reasons we are pleased to support the bill.

S. 982, the Water Rights Protection Act. My written statement on S. 982 explains the Department's views that this bill compromises the Federal Government's long standing authority to manage Federal lands and associated water resources, uphold proprietary rights for the benefit of Indian Tribes and insure proper management of the public lands and resources for the benefit of all citizens. This legislation is overly broad and could have numerous unintended consequences that would have adverse effects on existing law and voluntary agreements. The Department opposes S. 982.

S. 1291, the Northport Irrigation Bill. S. 1291 deals with early repayment by the Northport Irrigation District. The Department supports this legislation and supported it in prior Congresses, and we are pleased to support it today.

S. 1305, the Fontenelle Reservoir bill. S. 1305 amends the Colorado River Storage Project Act to authorize Reclamation to modify Fontenelle Dam on the Green River in Wyoming and as a result increase the amount of water developed by Fontenelle. With positive statements detailed in my written statement, the Department does not oppose S. 1305.

S. 1365, Rural Water Project Completion Act. S. 1365 creates a fund in the Treasury which would provide Reclamation with a dedicated funding stream to pay for construction of authorized rural water projects and to implement Indian water rights settlements. The Department appreciates the sponsor's desire to assist Reclamation with its important budget obligations, and we support the goals of this bill. We have some specific concerns, however, described in my written statement.

S. 1533, the Water Supply Permitting Coordination Act. S. 1533 directs the Secretary of the Interior to coordinate Federal and State permitting processes related to the construction of new surface storage projects on lands managed by Interior or the Department

of Agriculture. The Department does not find the provisions of S. 1533 to be necessary and consequently does not support the bill.

S. 1552, the Clean Water for Rural Communities Act. Lastly, as S. 1552 would authorize destruction, construction rather, of the Dry-Redwater Regional Water Authority System and the Musselshell-Judith Rural Water System in the States of Montana and North Dakota. These projects would create several hundred million dollars of new budget obligation on Reclamation's Rural Water Program. For that reason and the reasons described in my written statement, the Department does not support S. 1552.

Clean, safe, reliable water is essential to the well being of our citizens and the continuing progress of America's economic endeavors, a concept at the very heart of the Bureau's mission. We appreciate the efforts of the Subcommittee to address the water-related needs of the communities we serve. The Bureau, as well, recognizes the growing water challenges confronting families, farmers, tribes, businesses and rural economies, particularly in the face of a changing climate.

We believe and we have always believed that such challenges can only be met through tenacious collaboration on the ground and here in our nation's capital. With that in mind and noting the constraints of—budgetary resources, Federal budgetary resources, we extend our continuing commitment to work with the Subcommittee to strengthen Federal programs and projects and that deliver water and power to the people we all serve.

Thank you for the opportunity to present these views. I would be pleased to answer any questions at the appropriate time and glad to respond in more detail in writing on any questions requiring input from on the ground experts.

[The prepared statement of Ms. Thompson follows:]

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
on
S. 593, the Bureau of Reclamation Transparency Act
June 18, 2015

Chairman Lee and members of the Subcommittee, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation (Reclamation). I am pleased to provide the views of the Department of the Interior (Department) on S. 593, the Bureau of Reclamation Transparency Act. The Department supports S. 593.

S. 593 is a reintroduced version of bipartisan legislation previously introduced by Senators Barrasso and Schatz during the 113th Congress. The prior bill was numbered S. 1800, was also titled the Bureau of Reclamation Transparency Act, and Reclamation testified on the bill in February of 2014. Reclamation appreciates the constructive work conducted with the sponsor's offices and this Subcommittee to develop a number of specific changes to the bill consistent with our 2014 testimony. These changes were all incorporated into the current version of S. 593. Reclamation recognizes the value in obtaining additional information on the status of our infrastructure. The bill is consistent with a draft Infrastructure Investment Strategy and process Reclamation has initiated proactively, which I will briefly summarize here.

For the past year, Reclamation has been developing a draft Infrastructure Investment Strategy (Strategy) for assessing and reporting on infrastructure investment needs for Reclamation's approximately 4,000 unique assets. The Strategy builds upon Reclamation's ongoing asset management planning and budget processes, including the existing major rehabilitation and replacements (MR&R) database. Much of the initial focus of this Strategy has been on "reserved works"; facilities constructed, owned, and operated by Reclamation, as opposed to "transferred works", which are those facilities that were built and are owned by Reclamation, but which are operated and maintained by water and power customers pursuant to contracts.

Consistent with the directives in S. 593, Reclamation's Strategy process will focus on: improving data collection, analysis, and reporting on the condition of Reclamation-owned infrastructure; categorizing potential investments according to relative importance and urgency; and collaboration with water and power customers in planning for these investments.

Based on arrangements originating with Section 6 of the Reclamation Act of 1902, over two-thirds of Reclamation's facilities are transferred works, managed by non-federal project beneficiaries. These operating entities provide valuable input to the formulation of Reclamation's annual asset management activities. At present, Reclamation's annual budget requests include estimates of the appropriated funds needed for maintenance conducted by Reclamation at its facilities. The estimates in the budget request do not include the amounts

funded by non-federal beneficiaries for their maintenance of Reclamation facilities. Reclamation's budget documents, delivered to Congress annually and posted online, are developed over a multi-step 18-month process that begins at the field office level where managers consider the condition of the facilities under their jurisdiction, safety considerations associated with facilities' condition, and – very importantly – the ability of operating partners to fund the work identified pursuant to the terms of their contract and requirements of Reclamation Law. Investments in MR&R are analyzed and prioritized at the field, regional, and bureau levels based on criteria such as: Engineering Need; Risks and Consequences of Failure; Efficiency Opportunities; Financial Feasibility; and availability of Non-Federal Cost Share.

During this process, Reclamation categorizes the information that will go into its budget requests using its Programmatic Budget Structure (PBS). The PBS uses two of its five primary categories to show the budget request for Operations and Maintenance (O&M) activities: 1. Facility Operations, and 2. Facility Maintenance and Rehabilitation. It should be noted that in addition to the appropriated funds in these two categories, a substantial portion of O&M activities is paid for directly by water and power users with their own funds or project revenues.

The Facility Operations category includes items and activities that are necessary to operate Reclamation facilities to produce authorized project benefits for water supplies, power, flood control, fish and wildlife, and recreation. This category includes not only facility operations by Reclamation at reserved works, but also Reclamation's oversight of the operations of facilities performed by water user entities at transferred works. Facility Operations includes all routine or preventive maintenance activities. Routine maintenance is defined as recurring daily, weekly, monthly, or annually, and most tasks performed by Reclamation maintenance staff are included in this category. Also included in this category are routine safety and occupational health items, including those for workplace safety inspection and hazard abatement. The amount budgeted under this category for each facility is the funding necessary to perform routine O&M activities. On an annual basis, each region, along with centralized program management staff, determines the appropriate budget level to support staffing and other resources necessary at each facility for continued operations to deliver authorized project benefits.

The second category, Facility Maintenance and Rehabilitation, addresses the needs over and above the resources in Facility Operations, and corresponds roughly to the concept of MR&R. The Facility Maintenance and Rehabilitation category includes major and non-routine replacements and extraordinary maintenance of existing infrastructure. This category also includes activities to review and conduct condition assessments (facility O&M and dam safety inspections), as well as funding necessary for the correction of dam safety deficiencies (dam safety modifications), the implementation of security upgrades, and building seismic safety retrofits. Consequently, most of the budgeted items under this category are related to site-specific facility needs.

After Reclamation's field offices identify MR&R activities in their jurisdiction that require appropriated funds, they are evaluated at the regional level where these are compared to the needs and priorities of other activities and facilities in that region. There are five regions within Reclamation. The regions' PBS allotments for Facility Maintenance and Rehabilitation each year are then evaluated at the next level of internal review, with Reclamation's Budget Review

Committee (BRC) process. A given year's BRC is working in advance of a budget request two years into the future, and is comprised of senior management from across the agency, providing the maximum breadth of relevant experience and program knowledge. Each region presents its priorities to the BRC, which evaluates the MR&R needs and priorities against those of other regions in order to ensure that Facility Maintenance and Rehabilitation activities reflect Reclamation's greatest overall need and agency priorities. No urgent maintenance issues necessary to the safe operation of a facility are deferred in the budgeting or facility review processes. The end result is a budget request that has been prioritized and vetted across the organization, concurrent with input from the Department and Reclamation leadership.

For the purpose of reporting asset condition to the Federal Real Property Profile to meet requirements of the Executive order 13327, "Federal Real Property Management," and to better understand upcoming needs, Reclamation develops and annually updates estimates of MR&R needs. This effort, which informs the annual budget process, represents an outlook of Reclamation's best estimate of reported deferred maintenance, and identified extraordinary maintenance, dam safety modifications, repairs, rehabilitation, and replacement activities at a point in time looking forward five years, regardless of funding source, for all assets. The estimated total in 2012 amounted to $2.5 billion over five years (fiscal years 2013-2017)[1]. It is important to note that a substantial portion of projected needs to address the rehabilitation of aging infrastructure (roughly $1.2 billion of the $2.5 billion estimate) will be financed directly by our water and power customers. Cost estimates associated with these identified needs range from "preliminary" to "feasibility" level, and should not be collectively assumed to be at one particular uniform level of detail. Variability in the MR&R estimates from year to year may be the result of additional information received from the estimating source (i.e., Reclamation field offices and non-federal operating entities), changes in field conditions, further evaluations conducted, and work priorities, thus impacting the inclusion or deletion of specific identified needs within a particular year, or from year to year.

As stated in prior testimony before this Subcommittee, one of the main challenges Reclamation faces in securing funding for the identified near-term needs as well as longer-term MR&R needs is the varying economic strength of our operating partners. Given the requirement under Reclamation Law for the repayment of maintenance costs either in the year incurred or over time, Reclamation must work in collaboration with our water and power partners that must repay these investments. For some of these partners, the cost-share requirements associated with MR&R work are simply beyond their financial capabilities. Like any organization tasked with constructing, operating, and maintaining a wide portfolio of assets, Reclamation has to prioritize its actions to maximize the benefits derived from its investment of both federal and non-federal funds. Given the substantial economic and financial interest of Reclamation's non-federal partners, the development of cost estimates for maintenance requirements on reserved and transferred works is both collaborative and dynamic. We acknowledge there are tradeoffs associated with decisions to fund one identified need versus another, but Reclamation's annual budget request reflects our best effort to balance those constantly evolving needs associated with all elements of our mission.

---

1 www.usbr.gov/assetmanagement/Asset%20Inventory/FY%202012%20Reclamation%20Asset%20Management%20Plan.pdf

The requirements of S. 593 would complement the processes described above, and the bill makes allowance for the valuable input from operating partners that is central to Reclamation's asset management program.

This concludes my written statement. I am pleased to answer questions at the appropriate time.

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
Before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
United States Senate
on
S. 982, the Water Rights Protection Act
June 18, 2015

Chairman Lee, Ranking Member Hirono and members of the Subcommittee, thank you for the opportunity to provide the views of the Department of the Interior (Department) on S. 982, the Water Rights Protection Act. I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at Bureau of Reclamation. S. 982 threatens the Federal Government's longstanding authority to manage federal lands and associated water resources, uphold proprietary rights for the benefit of Indian tribes, and ensure the proper management of public lands and resources. The legislation is overly broad, drafted in ambiguous terms, and likely to have numerous unintended consequences that would have adverse effects on existing law, tribal water rights, and voluntary agreements. The Department opposes S. 982.

The federal government retains the right to regulate government lands under Article IV, Section 3 of the Constitution, which grants the United States authority to reserve water rights for its reservations and its property. Similarly, Article I, Section 8 of the Constitution granted the United States power to regulate commerce with Indian tribes, which courts have cited, along with the treaty power found in Article II, Section 2, as authority to reserve Indian water rights. Although the federal government generally defers to the States in the allocation and regulation of water rights, dating back to 1908 the Supreme Court has held that the establishment of federal reservations – whether by treaty, statute, executive order, or otherwise - impliedly reserved water necessary to fulfill the purposes of those reservations, in what is known as the doctrine of federal reserved water rights. Originally expressed as the power to reserve water associated with an Indian reservation, over time, the Supreme Court and other courts have revisited and built on the doctrine in holding that reserved rights applied to all federal lands. In the West, these reservations come with priority dates that often serve as protection from injurious surface and groundwater diversions by parties with junior priority. Whether to provide a homeland for Indian tribes, protect national parks or wildlife refuges, protect endangered or threatened species, secure safe and reliable drinking water supplies, safeguard public resource values, or maintain access for recreational uses associated with federal lands, the doctrine of federal reserved water rights along with existing federal land management authorities are a critical component in allowing the Department to fulfill its mission to protect and manage the Nation's natural resources and cultural heritage and honor its trust responsibilities and special commitments to American Indians.

Section 2 of S. 982 establishes a general definition of "water right" that is unclear and could create uncertainty among water right holders in light of the established doctrine of federal

reserved water rights. If enacted, we would interpret this definition as having no applicability to disputes involving federal reserved water rights.

Section 3 of S. 982 would prohibit the Secretary of the Interior or the Secretary of Agriculture from: (1) conditioning any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on the limitation, encumbrance, or transfer of any water right directly or indirectly to the United States, (2) requiring any water user to apply for or acquire a water right in the name of the United States under State law, (3) asserting jurisdiction over groundwater withdrawals or impacts on groundwater resources, or (4) infringing on the rights and obligations of a State in evaluating, allocating, and adjudicating the waters of the State originating on or under, or flowing from, land owned or managed by the Federal Government.

Section 3 would jeopardize the Departments of the Interior and Agriculture's ability to exercise its long-standing authority to establish conditions on the use of public lands and resources, interfering with the Departments' ability to protect the lands and resources they are entrusted to manage. The intent of this Section, along with the savings clauses in Section 5, is unclear and could potentially tie up established practices and lead to extensive and wasteful litigation. For example, the Department is concerned that this provision could lead to parties challenging the renewal of public lands use permits that are conditioned on assurances that water will continue to be available for specific on site purposes, as well as for the purposes of the reservation. This sort of legal ambiguity could hinder ongoing water use in a time where many communities are experiencing significant drought-related hardship.

Sections 3 and 4 would create uncertainty for many existing voluntary arrangements that are designed to produce a more efficient operation of U.S. facilities in the wake of ongoing drought, climate change and reduction of water supplies. We are concerned these provisions may prohibit parties from voluntarily entering into agreements with the Department or its bureaus with respect to water rights in order to protect state, federal or third party interests. For example, this bill could prevent the Bureau of Reclamation from partnering with parties who use groundwater to support recreational activities on Reclamation lands, since the recreational users often apply jointly with Reclamation for a state permit since Reclamation is the land owner. Further, there are numerous examples where Reclamation has contracts with water users that include the transfer or relinquishment of pre-existing private water rights in exchange for a license or contract that provides project benefits at Reclamation facilities, e.g. storage or delivery of water. The bill, as written, may prohibit renewal of such contracts, thus interfering with voluntary, mutually-beneficial agreements that improve water resource management.

S. 982 could preclude Departmental bureaus from protecting property interests or resource values as mandated by Congress. The bill could result in the transfer of water rights off federal reservations that may impede the Department from managing facilities and resources. For example, the legislation would prohibit the National Park Service from exercising its authority to perfect water rights in the interest of the United States for waters diverted from or used on National Park Service lands, including operations associated with National Park Service concessioners, lessors or permittees. The requirement that all water rights on National Park Service lands be held in the name of the United States is grounded, in part, on the potential damage and disruption that privately held water rights could cause to park resources and

operations. The bill could also hinder the U.S. Fish and Wildlife's implementation of the National Wildlife Refuge Administration Act if any conditions pertaining to groundwater flows, whether in or out of a refuge or hatchery, are deemed to be more restrictive than a State's law.

S. 982 would restrict the Secretary of the Interior and Secretary of Agriculture from acquiring water rights under State law, which could seriously reduce these agencies' ability to meet the established purposes of federal reserved lands, such as the National Wildlife Refuges or National Fish Hatcheries. The legislation would also put these agencies at a disadvantage, as other federal agencies would not be under similar restrictions. This restriction could also hinder the Bureau of Reclamation's ability to acquire water rights for the purposes of developing future water projects.

S. 982 would also impose unnecessary restrictions on the Bureau of Land Management's (BLM) ability to manage water-related resources vital to many multiple uses on public lands and cooperatively mitigate impacts to sensitive water resources. Under the Federal Land Policy and Management Act, the BLM has the authority to consider terms and conditions on right-of-way applications to mitigate impacts to water-related resources. The BLM does not require the transfer or relinquishment of water rights as a condition of authorizations for public land use. However, S. 982 could undermine cooperative arrangements with ranchers and local communities where BLM frequently partners with public land users through collaborative agreements to plan, finance, and develop water resources. BLM also commonly applies for new livestock water rights to the extent allowed by the laws of the State in which the land is located. Where grazing preferences are associated with a water right, the bill could limit BLM's ability to conduct grazing preference transfers. The legislation would not provide additional protections for the holders of water rights beyond current BLM policy, and if enacted, would jeopardize the BLM's ability to manage water-related resources vital to many multiple uses on public lands.

In terms of groundwater, Section 3(3) could prevent the Department from protecting against damage to groundwater-dependent resources, such as thermal features, cave-forming process, and springs, located in reserved federal lands and Indian reservations, some of which rely on springs for their daily water needs. Section 3(3) precludes Departmental managers from "asserting jurisdiction" over groundwater withdrawals or impacts, unless such assertion would impose no greater restrictions than state laws, regulations or policies regarding the protection and use of groundwater. Some states allow for unregulated groundwater use and provide no protection for groundwater-dependent resources. Because states have different laws regarding groundwater use and protection, it would be extremely difficult, if not impossible, for federal reservation managers to make such determinations on a state-by-state basis. The bill could lead to inconsistent approaches by federal managers in different states having different laws, and even potentially to litigation as parties attempt to sort out the relative levels of restriction inherent in the laws, regulations or policies of different states.

Undermining the Department's ability to manage groundwater resources could lead to significant damages to the purpose of a reservation of federal land. This Section also raises concerns about whether Reclamation can continue to exercise existing rights to return flows, including groundwater returns, at a number of Reclamation projects in various western States. In addition, Section 4(a)(2) would require the Department to "coordinate with the States in the adoption and

implementation of … *any* rulemaking, policy, directive, management plan" [emphasis added] to ensure consistency with State groundwater laws and programs. This has the potential to impose onerous new obligations on Reclamation every time a policy or directive and standard (D&S) is adopted or implemented, given that Reclamation already provides the opportunity for public review of new policies D&S's. The term "coordinate" is unclear in Section 4, and may therefore raise challenges to addressing the tremendous variability in the states' approach to groundwater regulation. In addition, Section 4(b) includes a sweeping prohibition on taking "any action that adversely affects" water rights granted by a State, a State authority over water rights, or specified State definitions related to water rights. This provision would likely generate substantial litigation and would likely interfere with legitimate federal water management activities.

It is unclear what the effect of Section 5 would be on Sections 3 and 4 of the bill. Section 5 provides a savings clause that indicates S. 982 does not: limit or expand any existing "legally recognized authority" of the Secretary of the Interior or the Secretary of Agriculture; interfere with Bureau of Reclamation contracts entered into pursuant to reclamation laws; affect the implementation of the Endangered Species Act; limit or expand any existing or claimed reserved water rights of the Federal government; limit or expand certain authorities under the Federal Power Act; and limit or expand any water right or treaty right of any federally recognized Indian tribe. Depending on the interpretation of "legally recognized authority" this provision appears to be in direct conflict with Sections 3 and 4 of the bill, and could lead to future litigation and uncertainty.

We appreciate the opportunity to present the Department's views on S. 982. As detailed above, the bill would negatively impact the Department's ability to manage water resources to protect ongoing public lands uses and the environment, allow for maximum beneficial use of Federal water facilities, and ensure adequate water is available for fisheries or threatened or endangered species. For these reasons and the potential for unintended consequences associated with its enactment, the Department opposes this bill.

This concludes my written statement. I would be pleased to answer questions at the appropriate time.

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
Before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
United States Senate
on
S. 1291
To Authorize Early Repayment Within the Northport Irrigation District
June 18, 2015

Chairman Lee and members of the Subcommittee, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation (Reclamation). Thank you for the opportunity to provide the views of the Department of the Interior (Department) on S. 1291, legislation to authorize the early repayment of obligations within the Northport Irrigation District within the State of Nebraska. The Department supports this bill.

S. 1291 would authorize landowners served by the Northport Irrigation District to prepay the remaining portion of construction costs allocated to them for the North Platte Project. Completed repayment will relieve the landowners within the District from the full cost pricing, compliance and land use certification obligations associated with the Reclamation Reform Act of 1982 (RRA). Subsection 213(c) of the RRA specifies that no authority is provided for lump sum or accelerated repayment of construction costs, except for repayment contracts that provide for lump sum or accelerated repayment that were in effect as of the enactment of RRA. Therefore, Reclamation and the Congress have interpreted current law to require water contractors to obtain additional statutory authority to make accelerated repayments of construction costs allocated to irrigation, except for those contracts already in effect as of the RRA's enactment, or for contracts otherwise exempt from the provisions of the RRA.

Northport is the only remaining district in the North Platte Project that is subject to RRA acreage limitations. All other districts with the Project have repaid their construction obligations in full to Reclamation, which relieved those districts from the full-cost pricing, compliance and land use certification obligations associated with the RRA.

As long as proposals such as this do not reduce revenues or negatively impact the United States, Reclamation typically supports legislation authorizing the pre-payment of repayment contracts, and has done so previously before the Congress[1]. Specific statutory authorization for early or accelerated repayment is not required in all cases involving construction costs that are allocated to irrigation, but would be in the case of Northport.

---

[1] HR 4562 testimony June 10, 2014; HR 818 testimony May 12, 2011; HR 5666 testimony July 27, 2006; HR 4195 testimony November 9, 2005

In general, early repayment authority in contracts is limited to landowners. In other words, a district cannot pay out early; rather, each landowner can decide if his or her land should be paid out early. It is Reclamation policy to require landowners who want to pay out early to pay out all of their land in the subject district and not just a portion of their land. This policy would continue to be applied for Northport and the North Platte Project if S. 1291 were to be enacted. Early payout would accelerate the repayment of these project costs to the United States Treasury. Where these repayment obligations are not accompanied by interest, early repayment has a net positive impact on overall repayment to the Treasury and we are highly confident that this will be the case under this bill.

This concludes my written statement and I would be pleased to answer questions at the appropriate time.

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
on
S. 1305
Amendment to the Colorado River Storage Project Act on Increasing the Active Capacity of Fontenelle Reservoir
June 18, 2015

Chairman Lee and members of the Subcommittee, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation (Reclamation). Thank you for the opportunity to provide the views of the Department of the Interior (Department) on S. 1305, which would amend the Colorado River Storage Project Act (Public Law 84-485). The amendment authorizes Reclamation to increase the active capacity and, as a result, the amount of water developed by Fontenelle Reservoir in Wyoming. With the concerns described below appropriately noted, the Department does not oppose S. 1305 in its current form.

Fontenelle Reservoir is part of the Seedskadee Project, a participating project under P.L. 84-485. The dam and reservoir are located in the Upper Green River Basin in southwestern Wyoming about 50 miles from Rock Springs. Fontenelle Dam is an embankment dam standing 139 feet high with a crest length of over a mile (5,421 feet). Fontenelle Reservoir has a total capacity of 345,360 acre-feet and is operated for municipal and industrial water use, power production, flood control, and fish and wildlife—in support of the Seedskadee National Wildlife Refuge. Recreation facilities at Fontenelle Reservoir are managed by the Bureau of Land Management under an agreement with Reclamation.

The intent of S. 1305 is to increase the yield of Fontenelle Reservoir, further developing the State of Wyoming's allocation of Colorado River water under the Colorado River Compact. To understand how S. 1305 would increase the water available to Wyoming, it is important to review some basic engineering features associated with Fontenelle Dam.

In general, the active capacity of a reservoir is the space between the highest elevation at which water can be stored and the lowest elevation from which water can be released so as to allow operation for all authorized purposes. Power is an authorized purpose of the Seedskadee Project. The lowest elevation at which Fontenelle Powerplant can be safely operated is approximately 40 feet above the bottom elevation of the inlet to the powerplant, and is referred to as "minimum power pool elevation."

In order to protect the upstream face of a dam from erosion caused by wave action, large stones that are resistant to erosion and wave action are placed on the upstream side of the dam. These

stones are referred to as "riprap". In keeping with engineering practices, Fontenelle Dam includes riprap protection on the upstream face of the embankment. Because the dam would not be operated with any frequency below the lowest power production elevation, original construction and subsequent modifications did not include placing riprap on the upstream face of dam below minimum power pool elevation.

For some years, the State of Wyoming has expressed interest in placing riprap below the minimum power pool elevation, and this project has come to be known as the "Riprap Project." By doing so, it would be possible to operate the reservoir within a greater range of elevations—increasing the operating range and yield of the reservoir. S. 1305 would authorize the Department to undertake the "study, planning, design and construction activities" necessary to consider and implement the Riprap Project (a lowering of the elevation of the riprap).

In considering the Riprap Project, Reclamation has had concerns, and we appreciate the chance to review this legislation as it was drafted over the past several months. We are pleased to note that each of these concerns appears to be addressed in the introduced language of S. 1305.

S. 1305 amends P.L. 84-485 to authorize consideration and implementation of the Riprap Project. In doing so, it grounds the Riprap Project on the statute that originally authorized the Seedskadee Project. S. 1305 relies upon the authority of the Contributed Funds Act (Act of March 4, 1921) as the means for the State of Wyoming to provide the funding to consider and undertake the Riprap Project. With this arrangement, Reclamation believes that the Riprap Project can be implemented without any request for new appropriations, and with no foreseeable impact to Reclamation's already constrained budget.

It is unlikely that the Riprap Project will adversely affect other states dependent on the Colorado River or Mexico beyond what they would face when the Upper Basin States make full utilization of their apportionments, considering their apportionments and required releases from the Upper Basin to the Lower Basin under current operational guidelines that implement key provisions of the Law of the River including the Colorado River Compact. Having said that, if S. 1305 becomes law, it will be important to conduct additional analysis to ensure that other interests are protected. S. 1305 includes the following elements that should provide some assurance of no adverse impacts to other water uses.

First, S. 1305 appears to create robust sideboards to prevent the Riprap Project from conflicting with law, compacts, and treaties. This protects against Wyoming expanding its entitlement to Colorado River water. In Section 2, S. 1305 provides reassurance that it will not modify, conflict with, preempt, or otherwise affect any applicable federal statutes or decrees, including, but not limited to:

- Boulder Canyon Project Act
- Colorado River Compact of 1922
- Boulder Canyon Project Adjustment Act
- Treaty between the United States of America and Mexico relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande
- Upper Colorado River Basin Compact

- Colorado River Storage Project Act (P.L 84-485), other than as indicated in Section 1 of S. 1305
- Colorado River Basin Project Act (Public Law 90–537; 82 Stat. 885)
- Any State of Wyoming or other State water law

Second, S. 1305 amends P.L. 84-485 to authorize the planning, design, and construction of the Riprap Project. The bill's stated purposes include "making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively." P.L. 84-485 sets a clear boundary around the Riprap Project; it cannot permit Wyoming to expand its entitlements under the Colorado River Compact and the Upper Colorado River Basin Compact.

Another important element of S. 1305 is the definition of active storage capacity. Although active capacity can generally be understood as the difference between the upper and lower elevations at which a reservoir may be operated, the elevation of both the upper and lower limit may also be defined by considerations beyond engineering. Other considerations often limit the degree to which a reservoir may be drained. These considerations include issues of law, hydrology, economics, and environment. S. 1305 acknowledges these limitations; in the bill "active storage capacity" is "defined or limited by legal, hydrologic, structural, engineering, economic, and environmental considerations."

Environmental compliance concerns also are addressed under S. 1305. The bill requires compliance under the National Environmental Policy Act, the Endangered Species Act, and the National Historic Preservation Act.

While S. 1305 is clearly written to integrate with existing law, regulations and contracts, there are some questions associated with operation and design that may limit the scope of the Riprap Project. Reclamation has not studied the operation of Fontenelle Dam at the lower elevations proposed under the Riprap Project. The original planning and design for the facility did not include operations at such low levels. Operation at lower levels could raise the following issues that should be explored by the study to be authorized by this Act:

- Water Delivery Requirements – At lower reservoir elevations, the rate at which the reservoir can be drained is slowed (because of the reduced hydraulic head). Without the study and planning that would be conducted pursuant to this bill, Reclamation does not know whether water can be delivered at such rates as would be necessary.

- Instream Flows – Under current operations and agreements, Reclamation is required to deliver 5,000 acre-feet to the Seedskadee National Wildlife Refuge for fish and wildlife purposes on an annual basis. As noted above, without additional study Reclamation does not know whether it will be able to meet these flow requirements at lower reservoir levels.

- Power Generation – Operating the reservoir at lower elevations will affect powerplant operations. There would be periods when the powerplant cannot be operated efficiently and when the powerplant cannot be operated at all. The result will be impacts on Reclamation's

ability to generate and deliver power under P.L. 84-485. There is a potential for impacts to irrigators and municipalities that use Colorado River Storage Project power as well as to the members of the Colorado River Energy Distributors Association, which rely upon and purchase the power.

That concludes my statement. I am pleased to answer questions at the appropriate time.

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
Before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
United States Senate
on S. 1365
A Bill to authorize the Secretary of the interior to use designated funding to pay for Construction of authorized rural water projects, and for other purposes
June 18, 2015

Chairman and Members of the Subcommittee, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation (Reclamation). I am pleased to be here to provide the views of the Department of the Interior (Department) on S. 1365, a bill to authorize the Secretary of the Interior to use designated funding to pay for construction of authorized rural water projects and for implementation of Indian water rights settlements. My statement today will draw upon testimony delivered before this Committee regarding S. 715 in the 113th Congress and S. 3385 during the 112th Congress.

Like the sponsors of the legislation being considered today, the Department supports the goals of encouraging vibrant rural economies and ensuring safe, reliable sources of drinking water for rural residents. Rural water projects help to build strong, secure rural communities and are important to our non-federal sponsors, which is why the President's FY 2016 Budget includes $36.6 million for Reclamation's rural water projects. Likewise, the importance of rural water has led Congress in recent years to increase appropriations for the construction of authorized projects. Since 2012, approximately $88 million in additional appropriations have been included for rural water construction projects. The Administration also recognizes that water is a sacred and valuable resource for Indian people and therefore has reaffirmed the Federal Government's commitment to addressing the water needs of Native American communities through Indian water rights settlements.

The Department has a solid history of supporting Reclamation's rural water program, allocating almost $450 million of funding between FY 2010 and FY 2015 to construct, operate, and maintain authorized rural water projects. This is in addition to $232 million provided for these projects in the American Recovery and Reinvestment Act (Recovery Act). Still, as important as the rural water program is, it must compete with a long list of other priorities within the Budget, including aging infrastructure, environmental compliance and restoration actions, and other activities needed to address future water- and energy-related needs, including the shifting challenges associated with the effects of climate change. Notwithstanding the importance of rural water projects, current budgetary constraints have limited the ability to make federal investments that match on-the-ground capabilities.

Despite such constraints Reclamation has worked diligently to promote sustainability and resiliency for water users in the West and to support the basic drinking water needs of rural communities – tribal and nontribal – as directed by the Congress.

S. 1365 would create the Reclamation Rural Water Construction and Settlement Implementation Fund. In contrast to S. 715 and S. 3385 from the previous two Congresses, which would have established a single account receiving $80 million annually for 20 years to address rural water needs, S. 1365 would establish two accounts with deposits totaling $115 million annually for 20 years.

In the first account, S. 1365 aims to provide a constant level of mandatory funding to support the construction of authorized rural water projects to deliver water to smaller, isolated communities. Similarly, the second account would be structured to provide a constant level of mandatory funds to underwrite implementation of authorized Indian water rights settlements, including planning, design and construction of water projects.

Regarding the first account, it is the Department's belief that federal investments in such projects must recognize the current fiscal constraints and the need to make tough choices in prioritizing those investments. The Administration supports the goals embodied by S. 1365 of advancing the economic security of Americans living in rural areas and on tribal lands. Constructing basic water infrastructure projects will not only help to provide the economic and health benefits associated with clean, reliable, drinking water systems that many Americans take for granted, but it would also assist in creating jobs in the short-term through ongoing construction, but the Administration supports discretionary funding for these projects.

Since the 1980s, Congress has authorized Reclamation to undertake the design and construction of specific projects intended to deliver potable water supplies to rural communities located in North Dakota, South Dakota, Montana, New Mexico and the non-Reclamation states of Minnesota and Iowa. These authorized projects exist in communities that have long experienced urgent needs for water due to poor quality of the existing supply or the lack of a secure, reliable supply. For example, in rural Montana, some communities have, from time-to-time, been subject to "boil water" orders due to the unsafe conditions of the existing drinking water supplies. In Eastern New Mexico, the communities currently rely on the diminishing Ogallala Aquifer and the current drinking water systems are projected to be depleted within 40 years. The rural water supply projects authorized for Reclamation's involvement provide a resource to these rural communities, and the Congress has authorized federal assistance to meet those needs.

In 2006, the Rural Water Supply Act (P.L. 109-451) authorized Reclamation to establish a program to work with rural communities – including tribes – in the 17 Western States to assess rural water supply needs and conduct appraisal and feasibility studies without individual acts of Congress. Pursuant to the Rural Water Supply Act, Reclamation created a program to enable coordinated examination of the various options to address rural communities' water supply needs through a cost-effective, priority-based process.

In addition to authorizing appraisal investigations and feasibility studies, Section 104 of the Rural Water Supply Act required that the Secretary of the Interior – in consultation with the

Secretary of Agriculture, the Administrator of the Environmental Protection Agency, the Director of the Indian Health Service, the Secretary of Housing and Urban Development and the Secretary of the Army – develop a comprehensive assessment of the status of the existing, authorized rural water projects. Section 104 also directed Reclamation to describe its plans for completing the design and construction of the authorized rural water projects.

In response to Section 104, Reclamation conducted a review and, in 2014, issued a report titled "Assessment of Reclamation's Rural Water Activities and Other Federal Programs that Provide Support on Potable Water Supplies to Rural Water Communities in the Western United States" which is posted on Reclamation's website (www.usbr.gov/ruralwater/docs/Rural-Water-Assessment-Report-and-Funding.pdf). It should be noted that the assessment was open to public comment and that the comments – from rural water project sponsors, water districts, Indian Tribes, and other interested parties – were carefully reviewed and resulted in modifications to the assessment and the criteria used to allocate project funding.

In addition to providing a report on the status of the existing authorized rural water projects, the assessment report describes how Reclamation's Rural Water Supply Program will be carried out and coordinated with other Federal programs that support the development and management of water supplies in rural communities in the western states while maximizing efficiency of the various programs by leveraging Federal and non-Federal funding to meet the shared goals of the programs.

As described in the assessment report, each of the Acts of Congress authorizing Reclamation's involvement in the rural water supply projects required that the cost ceilings included in the original authorizing legislation be indexed to adjust for inflation, estimated to be 4% annually. The result of these indexing requirements is that the overall cost of the authorized rural water projects has risen and continues to rise, such that the total estimated funding that would be required to complete these projects is as of 2014 approximately $2.4 billion, which is substantially higher than the original authorization amounts, which totaled $2.0 billion.

Reclamation has recognized the need to make meaningful progress in constructing authorized rural water projects, even amid severe pressure on Reclamation's budget across nearly all program areas. At the levels provided in the 2016 budget, and without additional non-federal funding, progress would be made toward project completion, but some of the currently authorized projects would be completed much later, perhaps not until well after 2063, despite close to $4.0 billion being invested by that time. In fact, it is estimated that, as of 2063, an outstanding balance of approximately $1.1 billion would remain to complete construction of currently authorized projects.

Across the country, state, local, and Tribal governments are taking a greater leadership role in water resources investments, including financing projects the federal government would have in the past. Constrained federal budgets do not preclude the ability of non-federal parties to move forward with important investments in water resources infrastructure and the Department stands ready to support that effort, even with the additional resources made available through S. 1365.

S. 1365 would create a dedicated Reclamation Rural Water Construction and Settlement Implementation Fund in the United States Treasury comprised of monies that would otherwise be deposited into the Reclamation Fund established by the first section of the Act of June 17, 1902 (32 Stat. 388, chapter 1093). This funding source would afford earlier completion of authorized water projects and would enable the payment of compensation associated with authorized Indian water rights settlements. Section 103(c) of the bill provides that the bill's cost would be offset so as to not increase the deficit. The Department supports such language. However, even if an equivalent and acceptable offset is identified, use of those funds must be weighed against other priorities across the federal government, including deficit reduction.

Section 103 of S. 1365 provides that, for each fiscal year from 2015 through 2035, $115,000,000 per year will be deposited into the Fund in addition to interest earned on invested money that is available in the Fund but not utilized for the current withdrawal. Section 104(c) of S. 1365 limits expenditures from fiscal year 2015 through 2035 from the Fund to not more than $115,000,000 in addition to interest accrued in that same fiscal year, with an allowance for the use of funds carried over from prior years. The bill further divides the total figure of $115 million between the two accounts – $80 million for the Rural Water Project Account, and $35 million for the Reclamation Infrastructure and Settlement Implementation Account.

Specific to the Rural Water Project Account, S. 1365 provides that if a feasibility study has been submitted to the Secretary by February 27, 2015, and those rural water projects are subsequently authorized by Congress, they may be eligible to receive funding through the Reclamation Rural Water Project Account. S. 1365 directs the Secretary of the Interior to develop programmatic goals enabling the expeditious completion of construction of the existing rural water projects and to establish prioritization criteria for the distribution of funds, a requirement addressed through the completion of Reclamation's assessment report.

With respect to its rural water program, Reclamation's first goal is to advance the construction of rural water projects that meet the most urgent water supply needs in the shortest amount of time, given our current budget constraints. The second goal is to give priority to rural water projects that address Indian and tribal water supply needs.

Within the context of the above goals, Reclamation recognizes that current and projected funding levels may not be sufficient to expeditiously complete the federal funding portion of every project and that it must prioritize the allocation of available funding. The assessment report outlines prioritization criteria to guide Reclamation's decision-making to maximize the agency's ability to meet its programmatic goals, to maximize water deliveries to rural communities in as short a period as possible, and to reflect the diverse needs and circumstances facing each individual project. The water construction prioritization criteria identified by Reclamation, and also reflected in Section 202(b)(2) of S. 1365, take into account the following:

- Is there an urgent and compelling need for potable water supplies in the affected communities?
- How close is the Project to being?
- What are the financial needs of the affected communities?

- What are the potential economic benefits of the expenditures on job creation and general economic development in the affected communities?
- What is the ability of the Project to address regional and watershed level water supply needs?
-
- Does the project minimize water and energy consumption and encourage the development of renewable energy resources such as wind, solar, hydropower elements?
- Does the project address the needs of tribal communities, tribal members, and the other community needs or interests?

The criteria would also take into account "such other factors as the Secretary determines to be appropriate to prioritize the use of available funds." Regarding the second account, for Indian water rights settlements, Title III of S. 1365 further defines the Reclamation Infrastructure and Settlement Implementation Account, stipulating that no less than $35 million, plus accrued interest, be expended to provide compensation to resolve congressionally authorized Indian water rights settlements and to complete planning, design and construction of authorized water projects associated with those settlements. Creating a mandatory fund for Indian Water Settlements would foster certainty in water rights and boost economic growth in Indian Country.

The Administration is proud of its record on Indian water rights settlements, and we continue to be committed to settlements as an important way to address the water needs of Native American communities. Indian water rights settlements are consistent with the general Federal trust responsibility to American Indians and with Federal policy promoting tribal sovereignty, self-determination, and economic self-sufficiency. Water settlements not only secure tribal water rights but also help fulfill the United States' promise to tribes that Indian reservations would provide their people with permanent homelands. These settlements resolve what has often been decades of controversy and contention among tribes and neighboring communities over water, replacing those conflicts with certainty, which fosters cooperation in the management of water resources and promotes healthy economies. As drought and climate change intensifies, it is all the more urgent to plan for settlement costs, enable the timely resolution of tribes' rights, and provide water to Native Americans nationwide.

Since 2009, the Administration has supported and Congress has enacted six Indian water rights settlements for nine tribes at a total Federal cost of slightly more than $2 billion. All told, these settlements resolved disputes and litigation spanning well over a century. Most recently, the Administration was pleased to support two smaller and less comprehensive water rights settlements involving Tribes, in the 113th Congress: the Pyramid Lake Paiute Tribe-Fish Springs Ranch Settlement Act and Bill Williams River Water Rights Settlement Act of 2014. The Administration is working with all of the affected tribes now to implement these settlements.

This Administration's active involvement in settlement negotiations has resulted in both significant improvements in the terms of the settlements and substantial reduction in their Federal costs, which ultimately led to our support for these six Indian water rights settlements. We stand ready to support Indian water settlements that result from negotiations with all stakeholders, including the Federal government, and that represent a good use of taxpayer dollars and good cost share contributions from states and other benefitting parties.

To date, Congress has enacted 29 Indian water settlements, a good start in addressing the need for reliable water supplies in Indian country. There are 277 federally recognized tribes in the West alone (excluding Alaska), and we are seeing increased interest in Indian water rights settlements east of the 100th Meridian. Many of these tribes are in need of: clean, reliable drinking water; repairs to dilapidated irrigation projects; and the development of other water infrastructure necessary to bring economic development to reservations.

Once a settlement is enacted by Congress, and appropriations are authorized to implement it, primary funding responsibilities fall to Reclamation and the Bureau of Indian Affairs (BIA), although other agencies can and do contribute based on the particular terms of a settlement. To support these efforts, the President's FY 2016 Budget requests $244.5 million for Indian water rights settlements ($40.8 million for negotiation and legal support and $203.7 million for implementation, including $136 million for Reclamation and $67.7 million for the Bureau of Indian Affairs).

With some notable recent exceptions, such as the $180.0 million in mandatory funding authorized by P.L. 111-291 and directed to the Navajo-Gallup Water Supply Project between the fiscal years of 2012-2014, water rights settlements generally have been funded through the Department's discretionary appropriations. Work to be performed under the settlements by Reclamation has come out of Reclamation's budget, and trust funds and other settlement costs generally have come out of the BIA's budget, but all Departmental agencies have been asked from time to time to expend discretionary funds from their budgets on implementation of these water settlements. In all of these cases, the Administration has worked successfully with Congress to secure funds to continue to implement and complete signed settlements. The Administration will certainly need to continue to work with Congress on these issues.

In conclusion, I want to underscore the importance of these settlements to this Administration. Indian water rights settlements can resolve uncertainty, produce critical benefits for tribes and bring together communities to improve water management practices in some of the most stressed water basins in the country. The Administration believes that discretionary funding is the appropriate avenue for addressing water rights settlements' while remaining cognizant of and responsive to the many competing needs for limited budgetary resources, particularly given widespread drought throughout much of the West.

This concludes my written statement. I am pleased to answer questions at the appropriate time.

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
on
S. 1533, the Water Supply Permitting and Coordination Act
June 18, 2015

Chairman Lee and members of the Subcommittee, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation (Reclamation). I am pleased to provide the views of the Department of the Interior (Department) on S. 1533, the Water Supply Permitting and Coordination Act. This testimony draws upon an earlier statement presented by the Department in February 2014 during the 113th Congress' consideration of predecessor legislation HR 3980[1].

S. 1533 directs the Secretary of the Interior to coordinate federal and state permitting processes related to the construction of new surface storage projects on lands managed by Interior and the U.S. Department of Agriculture (USDA). Section 3(a) of the bill would establish Reclamation as the "lead agency for purposes of coordinating all reviews, analyses, opinions, statements, permits, licenses, or other approvals or decisions required under Federal law to construct qualifying projects." A series of deadlines and timelines are mandated in Section 4 for notifying and consulting with cooperating agencies, completing environmental reviews, and determining project schedules. While nothing in the bill would facilitate more regular federal funding for any of these activities, the bill does allow for contributed funds from non-federal entities. Section 6(c) of the bill would prohibit use of any contributed funds for "a review of the evaluation of permits" by the Reclamation Regional Directors in the region in which qualifying projects would be built.

This legislation raises several concerns. First, establishing Reclamation as the lead agency for permitting for storage projects on Interior and USDA administered lands is problematic. Since those lands exist in all 50 states, this would put Reclamation in a significantly expanded role of administering the permitting process for activities beyond the 17 Western states where Reclamation has typically had jurisdiction under Reclamation law.

Next, in Section 2(4) the definition of "cooperating agency" leads to confusion and is inconsistent with established regulations and judicial interpretations. For example, it is inconsistent with the definition under the National Environmental Policy Act (NEPA) and its implementing regulations which identify federal, Tribal, State, and local governmental entities as potential cooperating agencies and further allows those governmental entities with subject matter

[1] www.usbr.gov/newsroom/testimony/detail.cfm?RecordID=2521

expertise to be designated cooperating agencies. In addition, it is unclear what purpose is served by the bill's limitations on the use of agencies' funding in Section 6(c).

On the whole, it is unclear what public policy problem would be addressed by the bill. Under NEPA, as well as the newly updated Principles, Requirements and Guidelines for Water and Land Related Resources Implementation Studies (P, R and G's), existing regulation, and other laws, there is already ample basis for review of projects and coordination among federal agencies involved in water supply planning.

We are not aware of any Reclamation or USDA-sited surface water storage projects that have been denied construction because of delays associated with project review or permitting, or shortcomings in communication among Reclamation, USDA, or any other state or federal partners. Rather, as stated above and in prior testimony in February 2014 and at a February 2012 House Natural Resources Committee oversight hearing on surface water storage[2], project economics and the pricing and repayment challenges in the potential markets where projects would be built are the primary reasons for some projects being authorized but not constructed. If nothing else, this bill reduces the time necessary to establish the merits of projects and, in some ways, could make favorable recommendations for project construction less likely. Reclamation is proud of its history constructing the surface water storage projects that are central to life in the West and our national economy, but what is rarely considered in the political discussion of surface storage are the realities of project repayment and market conditions associated with building large dams today. The most frequent reasons for fewer large surface storage projects being built today center around economics or an inadequate potential water market associated with the given facilities. In other cases, environmental, safety or geologic challenges came to light during a project's development, and rendered construction, completion or operation unfeasible.

This legislation places significant new requirements on the review of prospective construction of new surface water storage. But the underlying economic issues that prevent projects from being built – the difficulty of repayment – are unchanged by this bill. Reclamation's focus today must include meeting the challenge of rehabilitating the existing, aging, water and power infrastructure on which Western economies depend. We would be glad to work with the Subcommittee on this important aspect of the debate surrounding new surface water storage.

The Department believes that legislation focused on surface-storage projects should reflect consideration for the economic return to the Nation. We would be glad to work with the Subcommittee to explore these issues further. In conclusion, the Bureau of Reclamation will continue to pursue surface storage as one of many options to meet water demands in the West.

[2] "Water for Our Future and Job Creation: Examining Regulatory and Bureaucratic Barriers to New Surface Storage Infrastructure." www.usbr.gov/newsroom/testimony/detail.cfm?RecordID=2061

This concludes my written statement. I would be pleased to answer questions at the appropriate time.

Statement of Dionne Thompson
Deputy Commissioner for External and Intergovernmental Affairs
Bureau of Reclamation
U.S. Department of the Interior
Before the
Committee on Energy and Natural Resources
Subcommittee on Water and Power
United States Senate
on
S. 1552 Clean Water for Rural Communities Act
June 18, 2015

Chairman Lee and members of the Subcommittee, I am Dionne Thompson, Deputy Commissioner for External and Intergovernmental Affairs at the Bureau of Reclamation (Reclamation). I am pleased to be here to provide the views of the Department of the Interior (Department) on S. 1552, the Clean Water for Rural Communities Act, which would authorize construction of the Dry-Redwater Regional Water Authority System and the Musselshell-Judith Rural Water System in the States of Montana and North Dakota. For the reasons described below, the Department cannot support S. 1552 at this time.

Like the sponsors of this legislation, the Department supports the goals of encouraging a vibrant rural economy and ensuring safe, reliable sources of drinking water in Montana and North Dakota. Rural water projects help build strong, secure communities and are important to local economies. Public Law 109-451 authorized Reclamation to establish a Rural Water Supply Program to help rural communities and tribes in the western United States analyze and develop options for meeting water supply needs through the completion of appraisal investigations and feasibility studies. However, we have concerns with the legislation as currently written and we request the opportunity to work with Congress to adequately address our concerns. S. 1552 authorizes construction of two separate projects and my statement will speak to each of those projects separately.

Dry-Redwater

Section 4(a)(1) of S. 1552 applies to the planning, design, and construction of the Dry-Redwater Regional Rural Water Authority System in eastern Montana and a small service area in northwest North Dakota, and would require the Federal government to provide up to 75 percent of the System's overall construction cost. Reclamation estimates that this authorization would amount to federal appropriations of at least $200 million dollars. The Department last testified before the Subcommittee on legislation related to the Dry-Redwater project in May of 2011, and

prior to that, in July of 2009. Since 2011, the Dry-Redwater Regional Water Authority (Authority) has made steady progress planning and designing their System.

The Department is concerned about process issues raised by legislation authorizing a project for construction before the Dry-Redwater Regional Water System Feasibility Study (Feasibility Study) is complete, the potential strain on Reclamation's budget that could come about from this authorization, the cost share requirement proposed in the bill, and the proposed use of power from the Pick-Sloan Missouri Basin Program (P-SMBP) for non-irrigation purposes.

In 2012, the Authority submitted a Feasibility Study to Reclamation for review. Upon initial review of the Study, Reclamation was unable to identify a technically viable water treatment alternative that presented a National Economic Development (NED) plan with net positive benefits to the nation. Reclamation informed the Authority that the Study could not be supported as being financially or economically feasible under the requirements of Reclamation's Rural Water Supply Program. Consequently, there are significant review findings and recommendations that must be addressed to bring the Study up to Reclamation's standards. Since project costs have not been fully developed by the Sponsor and reviewed by Reclamation, there is both real and unknown potential for this project being financially unsustainable for the project sponsors and could result in an additional strain on Reclamation's budget.

Because of the importance of this issue, a Reclamation Design, Cost Estimating, and Construction (DEC) review further evaluated the Study in order to provide an independent analysis. The estimated cost to address the DEC Report Findings and Recommendations is in excess of $5.5 million. Neither Reclamation nor the Authority has sufficient funding to revise the Study to address the DEC Report Findings. In order to maintain their original service area and related project benefits, the Authority ruled out a scaled down approach. As a result of this decision, Reclamation entered into a Memorandum of Understanding (MOU) with the Authority on April 27, 2015, with the objective of completing a summary report that documents the current status of the draft Study. The MOU also identifies the additional level of effort needed to revise the Study technically in order to meet the requirements of Reclamation's Rural Water Supply Program. Given the findings that resulted from Reclamation's review of the Study, we are not in a position to support the project as financially viable or verify that the total project cost estimate is economically sound.

The Department is also concerned about the non-federal cost share for the System. As stated above, S. 1552 contemplates that the United States would fund 75 percent of the cost of constructing the System for the benefit of Montana citizens of Dawson, Garfield, McCone, Prairie, and Richland Counties, and North Dakota citizens of McKenzie County. While this has been the cost share level proposed in other rural water projects enacted into law, it represents the maximum federal cost share allowed under Title I of the Rural Water Supply Act of 2006 (PL

109-451), which includes a requirement for a Feasibility Report that includes an analysis of the sponsor's capability-to-pay and identifies an appropriate contribution by the local sponsors.

Section 5 of S. 1552 authorizes the delivery of 1.5 megawatts of P-SMBP pumping power to be used and delivered between May 1 and October 31 for the benefit of this System at the firm power rate. Section 5(b)(2)(A) of the bill requires that the System be operated on a "not-for-profit basis" in order to be eligible to receive power under those terms. Reclamation is not certain of the impact the bill's requirements could have on Western Area Power Administration's existing contractual power obligations. In addition to those concerns mentioned above, we have yet to verify whether or not water rights issues associated with the System have been adequately addressed.

We suggest System sponsors continue working with Reclamation's Great Plains Regional and the Montana Area Offices to further evaluate the System for scale and economic viability in an effort to refine the National Economic Development accounting such that the ratio of total benefits exceeds costs. We also recommend that they work with the Western Area Power Administration and their contractors on the issues related to the System's pumping power needs

Musselshell-Judith

Section 4(a)(2) of S. 1552 would authorize the planning, design, and construction of the Musselshell-Judith Rural Water System in central Montana and would authorize appropriations of at least 75 percent of total project costs. Since the total estimated construction cost of the project is $87,102,000, Reclamation estimates that the total federal contribution of 75% would equate to $65,327,000 (2014 dollars). While a 75% cost share level has been proposed in other rural water projects enacted into law, the Department also does not support this cost share for the same reasons as stated previously -- this represents the maximum federal cost share allowed under the Rural Water Supply Act of 2006, which includes a requirement for a Feasibility Report that includes an analysis of the sponsor's capability-to-pay and identifies an appropriate contribution by the local sponsors, based upon that analysis.

Earlier this year, the Central Montana Rural Water Authority's (Authority) Musselshell-Judith Rural Water System Feasibility Study (Feasibility Study) was submitted to Reclamation for technical review under Public Law 109-451. Even though initial indications suggest the System is technically feasible and provides benefits in excess of its costs, the Department is concerned about the strain on Reclamation's budget resulting from additional authorized rural water projects.

Common - Both Water Systems

Another unique feature to the language of S. 1552 is in Section 7(b), which addresses the cost indexing for the authorization of appropriations. Reclamation is not aware of a specific rationale for the differing indexing dates prescribed in the legislation. For the 'such sums as are necessary' appropriations authorized for the Dry-Redwater System, appropriations are to be indexed to January 1, 2008. For the Musselshell-Judith, the appropriations are to be indexed to November 1, 2014. Obviously this implies a different value in the funding authorizations, and while both projects have been on different timelines, is not clear on the specific policy rationale for these provisions since neither project has been certified by Reclamation as having a complete feasibility study at this time.

Authorized rural water projects compete with a number of priorities within Reclamation's Budget, including aging infrastructure, Indian water rights settlements, environmental compliance and restoration actions, developing sustainable water supply strategies, and other priorities intended to address future water and energy related challenges. In the Fiscal Year 2016 Budget, the Administration carried forward the President's commitment to be prudent with taxpayer dollars while setting consistent spending priorities for Reclamation. The 2016 budget request includes $36.5 million for rural water projects, $18.0 million of that total is for operation and maintenance of completed tribal systems and the remaining $18.5 million is for continued construction of authorized projects.

The Department has concerns about adding to the backlog of Reclamation's authorized rural water projects seeking federal construction funding. Discretionary rural water funding has enabled Reclamation to make progress in promoting certainty, sustainability, and resiliency in support of basic drinking water needs of rural western communities. However, Reclamation's ability to make federal investments that match on-the-ground capabilities has its limitations. Presently, the estimated federal funding requirement to complete construction on six authorized rural water supply projects exceeds $1.4 billion. Furthermore, Acts of Congress authorizing Reclamation's involvement in the existing six rural water supply projects require indexing of cost ceilings to adjust remaining construction cost balances for inflation, which is estimated at about 4 percent annually. In a climate of constrained budgets, indexing widens the gap between the original authorized amounts and the total estimated funding required to complete rural water supply projects.

Of Reclamation's six currently authorized rural water projects under construction or funded at some level today, all of the projects pre-date Title I of the Rural Water Supply Act of 2006. Authorizing additional rural water projects may delay rural water projects that are already under construction. For example, two of six authorized rural water construction projects are located in Montana and like the proposed Systems, these projects present compelling needs. As of

September 30, 2014, the Fort Peck Reservation/Dry Prairie Rural Water System was approximately 50 percent complete and the Rocky Boy's/North Central Rural Water System was approximately 22 percent complete, as financially determined. These two Montana rural water projects not only represent over $381 million in authorized federal need, but also represent significant on-the-ground construction investments and the promise of water delivery to Native American and other communities. In the 15 years since these two projects were authorized, the federal government has invested over $247 million dollars; demonstrating the long-term commitment of resources to existing rural water projects in Montana. Various levels of federal need can also be demonstrated by sponsors for other authorized rural water projects in North Dakota, South Dakota, Iowa, Minnesota, and New Mexico.

Conclusion

Given existing constraints on program resources and other rural water project commitments as described earlier, Reclamation does not recommend the authorization of Federal assistance for these Water Systems as contemplated in S. 1552 at this time.

That concludes my written statement. I am pleased to answer questions at the appropriate time.

Senator BARRASSO. Thank you so much for your testimony.
Mr. Meissner?

STATEMENT OF JERRY MEISSNER, CHAIRMAN, DRY-REDWATER REGIONAL WATER AUTHORITY

Mr. MEISSNER. Good afternoon, Senator Barrasso, Senator Daines in attendance and members of the Subcommittee. I am Jerry Meissner, Chairman of the Dry-Redwater Regional Water Authority from Circle, Montana. I appreciate the opportunity to discuss our support of both S. 1552, the Clean Water for Rural Communities Act, and S. 1365, the Authorized Rural Water Projects Completion Act.

The Dry-Redwater Regional Water Authority System, also called DRWA, is a rural water project in Eastern Montana with a current service area about 11,000 square miles covering the Montana counties of McCone, Richland, Dawson, Prairie, and Garfield. In addition, Dry-Redwater includes McKenzie County, North Dakota which sets atop the Bakken shale play and is North Dakota's leading oil producing county. This bakken boom has brought a population increase to our Eastern Montana communities increasing the stress on our drinking water situation.

Historically this part of Eastern Montana does not have good quality, water quality. Simply stated, the water is unsafe to drink. The majority of the rural residents obtain their water from private wells. Many haul all of their drinking and cooking water. The treatment of water in a private well is very costly and often complicated.

The majority of the proposed communities to be served by Dry-Redwater are currently operating their own municipal water systems and are unable to meet the requirements of the Safe Drinking Water Act without expensive, energy intensive treatments.

All of the communities are using wells as a source of water, and these wells are not providing the quality or quantity of water needed. Many of the existing systems treat their water with chlorine which, in turn, has caused problems with elevated levels of disinfection byproducts. In addition, there are problems with bacterial contamination. Total dissolved solids, organic levels, iron, manganese, lead, copper sulfate, sodium, and fluoride that render the water undrinkable.

These small rural towns cannot afford to operate, maintain and replace their own water treatment facilities; therefore, in 2002 a steering committee of volunteers was formed and the Dry-Redwater Regional Water Authority became a legal entity. In 2005, the Regional Water System will allow the small communities to come together and provide citizens with access to a reliable, safe, high quality water supply.

From a regulatory aspect, a regional water system has significant benefits. At a present time when a rule changes all area systems must react to the change individually. That means that the Montana Department of Environmental Quality is perennially facing problems with compliance issues as these smaller systems have a reduced capacity to maintain and operate. The regional water system would provide one point of regulation for all the member systems. If a rule were changed it would only affect one treatment

plant and a regional system can be upgraded and operated at a higher level of oversight than an individual municipal water system.

Dry-Redwater has been working with the Bureau of Reclamation in Billings to install this water project as stipulated in the Rural Water Supply Act of 2006 and has expressed in the interim final rules; however, various interpretations of the interim final rules has significantly strung out Dry-Redwater's approval with over $4 million spent thus far and over ten years of commitment, we respectfully request the Committee to favorably report this bill and Congress to pass it into law so that the Dry-Redwater will be Federally authorized. As it stands now our system planning has reached a point beyond which we can easily move forward without the ability to work formally with Federal agencies.

In summary, Dry-Redwater will provide a dependable regional water supply for public systems and rural water users. We have spent ten years working to provide a clean drinking water to this service area of approximately 15,000 people. We sincerely hope for our legislation to be passed into law so we may go forward with our plans to provide something that is often taken for granted in most areas in the United States, safe and clean drinking water.

I would also like to add to my testimony that the Dry-Redwater fully supports S. 1365, the Authorized Rural Water Projects Completion Act, which was introduced by Senators Tester and Daines. This bill provides funding for authorized water projects and provides a way to pay for our water system. Dry-Redwater is grateful for this inclusion in this funding bill written by our Montana Senators and respectfully urges the Subcommittee and Congress to pass this bill into law so that the rural water projects can receive funds from the Reclamation Fund to finance Western Water Development.

The BOR, in previous testimony before this Committee, has stated current projected funding levels may not be sufficient to complete the Federal funding portion of the authorized rural water systems. S. 1365 will assist the BOR in providing a level of funding to support the construction of authorized rural water projects. The Reclamation Fund was established in 1902 by Congress to be used as a funding source to construct water projects in the West.

So we fully support this legislation. It paves a pathway to actual construction of these authorized rural water systems.

Thank you for your time.

[The prepared statement of Mr. Meissner follows:]

Written Testimony of Jerry Meissner, Chairman of the Dry-Redwater Regional Water Authority U.S. Senate Energy and Natural Resources Subcommittee on Water and Power Hearing June 18, 2015

I appreciate the opportunity to discuss the Dry-Redwater Regional Water Authority's support for both S. 1552, the Clean Water for Rural Communities Act (which will authorize our Dry-Redwater Regional Water Authority System), and S.1365, the Authorized Rural Water Projects Completion Act.

The Dry-Redwater Regional Water Authority System – also called DRWA – is a rural water project in Eastern Montana with a current service area of approximately 11,000 square miles covering the Montana counties of McCone, Richland, Dawson, Prairie and Garfield. In addition, our Water System will service McKenzie County, North Dakota which sits atop the Bakken Shale play and is North Dakota's leading oil producing county, with more than 2,300 currently producing wells on file and the highest number of active oil rigs on a month-to-month basis. This Bakken boom has brought a population increase both to North Dakota and to our Eastern Montana communities, increasing the stress on our drinking water situation.

This part of Eastern Montana does not, historically, have good water quality. Simply stated, the water is unsafe to drink. Therefore in 2002 a steering committee of volunteers was formed to bring safe and clean drinking water to our citizens – and the Dry-Redwater Regional Water Authority became a legal entity in 2005. We have spent 10 years working to provide much needed clean drinking water to this service area of approximately 15,000 people. We sincerely hope this is the year for our legislation to be passed into law so we may go forward with our plans to provide something that is often taken for granted in most areas of the United States – safe and clean drinking water.

The majority of the proposed communities to be served are currently operating their own municipal water systems. All of the communities are using wells as a source of water, but these wells are not providing the quality or quantity of water needed. These small rural towns cannot afford to build, operate, maintain and replace their own water treatment facilities

and face limited availability of water sources. Therefore we strive to construct a regional rural water system that will allow these small communities to work together to provide access to a reliable, safe, and high quality water supply. DRWA uses a regional approach to improve service, reduce environmental impacts and capture financial benefits while reducing costly duplication of services. This regional system will provide a supply-managed water service to customers in a fiscally responsible manner.

Allow me to provide some examples of the problems Eastern Montanans currently face. The public water supply systems within our boundaries presently are unable to meet the requirements of the Safe Drinking Water Act without expensive energy intensive treatment options. According to the Montana Department of Environmental Quality (DEQ), one of our public water supply systems is out of compliance with the Federal Clean Water Act due to levels of secondary contaminants – sodium and total dissolved solids. Many of the existing systems treat their water with chlorine which in turn has caused problems with elevated levels of disinfection by-products. Other systems have problems with bacterial contamination and elevated levels of total dissolved solids, iron, manganese, lead, copper, sulfate and sodium that render the water undrinkable.

Three communities must treat their water because of high levels of fluoride which is a health hazard and a regulated contaminant. Jordan does not treat its water but it is high in sodium and total dissolved solids which are not currently regulated, but have detrimental effects on those drinking it. Fairview has high organic levels in its water that has led to a disinfection by-product violation and the Town operates an iron and manganese removal water treatment facility that uses chlorine as the oxidizer; which, while effective at removing the iron and manganese, does have the problem of forming disinfection by-products.

One well serves the students and faculty of the Garfield County School District No. 15. This well shows excess sodium and fluoride levels. And, the total dissolved solids are more than twice the recommended level. This well and the other private wells are not regulated by National Drinking Water Standards but the detrimental effects of the water on their users are not any less because they are not regulated.

The rural residents in the project area currently obtain their water, in the majority of instances, from private wells. Many rural residents haul all of their drinking and cooking water used, either because their well water is undrinkable or there is not a sufficient quantity to be usable. The treatment of water in a private well is very costly and sometimes complicated depending on what is in the water. Based upon preliminary review of the water quality in the wells of rural users we know the majority of them do not have access to the quality of water needed for a healthy existence. Attached is a spreadsheet documenting the quality of water samples from various wells within our service area.

A regional rural water system will allow the small communities to come together and provide citizens with access to a reliable, safe, high quality water supply. From a regulatory aspect a regional water system has significant benefits. At the present time, there are six different regulated public water systems within the region that are meeting regulatory requirements of the Safe Drinking Water Act. When a rule changes, all systems must react to the change, individually. That means that the Montana Department of Environmental Quality is perennially facing problems with compliance issues in these smaller public water systems as they have a reduced capacity to maintain and operate due to their size. A regional water system would provide one point of regulation for all of the member systems. If a rule were changed, it would only affect one treatment plant and, due to economies of scale, a regional system can be upgraded and operated at a higher level of oversight and management at a smaller per user cost than smaller individual municipal water supply systems. An increased degree of compliance can be expected from a regional water system which further assures the water users of a safe and reliable source of water.

The water for this project will be obtained from the Dry Arm of Fort Peck Lake near Rock Creek. Just under 4,000 acre feet of the 18 million acre feet has been granted to DRWA via MT Water Right 40E 30064997. The in-take and conventional surface water treatment facility will be located at North Rock Creek on the Dry Arm of Fort Peck Lake, in McCone County.

Currently, about 11,000 users have completed applications for service and have paid 'good intention' fees to show their financial commitment. The State of Montana has invested over $800,000 into studies and organizational efforts to date. In addition, DRWA has matched more than $450,000, and the Bureau of Reclamation has contributed $120,500. Total investments into DRWA to date exceed $4 million, including the funding provided by Richland County to help build DRWA's currently active Sidney South pipeline.

The project as conceptualized will consist of over 1,220 of miles of pipeline, 38 pump stations, and 20 major water storage reservoirs. The 2012 Feasibility Report projected a total project cost of $233,201,300, but as it is 2015 we must add for inflation. The DRWA is pursuing federal funding of 75% of the project cost with the remaining 25% of funds pursued in the form of a low interest loan from the Rural Utility Service (12.5%) and a grant from the Coal Tax Trust Funds (12.5%) administered through the Montana Department of Natural Resources and Conservation. Working together, the communities in the area can more efficiently and effectively provide affordable safe and reliable water to the people of the area.

The Dry-Redwater Regional Water System is also financially feasible given the funding packages currently used by the rural water systems in Montana and in comparison to rural water system costs in our three state region of Montana, South Dakota and North Dakota. The completed feasibility study includes preliminary engineering analysis of the system and the DRWA has also completed some preliminary cultural and environmental reviews. There are no fatal flaws found in these preliminary studies which included contacts with State, Federal and Local officials on NEPA compliance.

There are distinct benefits of a regional water system in our area:

- Communities will not absorb the costs of upgrading numerous smaller water facilities to keep up with water quality standards.
- A greater number of regional system users helps defray the cost of good water for every individual in the area.
- This system will provide jobs, not only during construction, but also for ongoing operation and maintenance.

- Economic and community development opportunities with the ability to attract businesses and people that need a reliable water source are greatly enhanced.
- Total water and energy consumption by all communities will be substantially less than if each community provides water treatment.
- A dependable, high-quality drinking water sources provides an incentive for business and industry to consider relocation to eastern Montana.
- Reduction in chemical usage and cost as a result of increased crop spraying efficiency.
- Rural area fire protection capacity
- Increased property values
- An alternative water sources for livestock.
- Safe and reliable household drinking water to improve the health and existence of the people.

The Dry-Redwater Regional Water Authority has been working with the Billings office of the Bureau of Reclamation to instill this water project as stipulated in the Rural Water Supply Act of 2006, and as expressed in the Interim Final Rules. However, the staff turnover within this regional office along with the various interpretations of the Interim Final Rules given by this office has significantly strung out this project's approval. Given the investment made in time and money – over $4 Million dollars has been spent thus far (see attached timeline) and over ten years of work – we respectfully request the Committee to favorably report this bill and Congress to pass it into law so that the Dry-Redwater Regional Water System will be federally authorized. As it stands now, the system planning has reached a point beyond which it cannot easily move forward without the ability to work formally with the Bureau of Reclamation, the U.S. Fish and Wildlife Service, and other federal agencies.

In summary, the Dry-Redwater Regional Water System will provide a safe and dependable municipal and rural water supply for the public water supply systems and rural users that comprise the Dry-Redwater Regional Water Authority. Many positive long-term economic impacts will be realized by the agricultural, energy, tourism and recreational industries of the area; while the potential for good quality and quantity of water will allow businesses and housing to build and develop. Our primarily agricultural-based frontier communities in eastern Montana strongly

support all components of this project as a good, clean, reliable source of water which is vital to our existence.

I would also like to add to my testimony that the Dry-Redwater Regional Water Authority fully supports S. 1365, the Authorized Rural Water Projects Completion Act, which was introduced by Senators Tester and Daines. This bill provides funding for authorized rural water projects and, as its language will include the Dry-Redwater Regional Water Authority System once it is authorized, provides a way to pay for our Water System. The Dry-Redwater Regional Water Authority is grateful for this inclusion in this funding bill written by the Montana Senators and respectfully urges the Subcommittee and Congress to pass this bill into law so that rural water projects can receive funds from the Reclamation Fund to finance western water development. The Bureau of Reclamation, in previous testimony before this Committee, has stated that "current and projected funding levels may not be sufficient to complete the federal funding portion of the authorized rural water systems." S. 1365 will assist the BOR and provide a continuous level of mandatory funding to support the construction of authorized rural water projects to deliver water to smaller, isolated communities like ours. The Reclamation Fund was established in 1902 by Congress to be used as a funding source to construct water projects in the West so we fully support this legislation that paves a pathway to actual construction of these authorized rural water systems.

Water Quality of a Small Sampling of Wells Currently Used in the Service Area

Well Site Name	County	Depth	Sodium	Bicarbonate	Sulfate	Fluoride	TDS
73 RANCH	Garfield	1003.00	1524.00	737.00	2464.00	2.80	4577.17
JORDON JOHN	Garfield	280.00	667.00	795.00	793.00	1.00	1885.00
CLAUSON WILLIAM	Garfield	300.00	502.00	812.00	391.00	1.00	1330.18
73 RANCH	Garfield	1003.00	1484.00	656.40	2346.00	<5.0	4362.31
GARFIELD CO SCHOOL DIST #15	Garfield	350.00	447.00	912.60	33.80	3.35	1048.79
BIG DRY SCHOOL HOUSE	Garfield	700.00	625.00	378.20	916.00	<0.5	1788.81
MCKERLICK JOHN	Garfield	80.00	586.00	700.20	627.80	2.00	1603.38
BURGESS RANCH	Garfield	365.00	670.00	271.00	681.00	1.00	1806.43
BAKER JIM	Garfield	390.00	979.00	1052.00	1241.00	1.00	2780.48
HOVERSON SARAH	Garfield	370.00	1062.00	1247.00	1210.00	1.50	2996.94
HAFLA JOE	Garfield	258.00	544.00	886.00	657.00	0.10	1733.50
PLUHAR PHILLIP	Garfield	255.00	460.00	688.00	424.00	0.30	1259.24
KEEBLER DEAN	Garfield	600.00	592.00	618.00	748.00	1.40	1671.91
LANDERS H	Garfield	380.00	587.00	612.00	764.00	1.10	1688.92
CITY OF CIRCLE	McCone	1624.00	412.00	907.70	<25.0	4.31	1002.02
CITY OF CIRCLE-WELL #1	McCone	150.00	775.00	829.60	1059.00	2.55	2317.44
CITY OF CIRCLE	McCone	1508.00	400.00	921.00	<0.1	5.20	1004.81
CITY OF CIRCLE	McCone	1508.00	472.20	886.90	<2.5	5.10	1109.19
PRAIRIE ELK SCHOOL	McCone	200.00	1891.00	2596.00	2055.00	0.95	5303.20
DREYER RAY	McCone	189.00	820.00	824.20	1229.00	0.80	2537.42
WHITMUS FRANK	McCone	101.00	975.00	1110.00	1350.00	1.18	2964.94
WHITMUS FRANK	McCone	640.00	476.00	1085.00	3.40	5.50	1129.85
WHITMUS FRANK	McCone	640.00	473.00	1088.20	<25.0	5.96	1123.78
WHITMUS FRANK	McCone	640.00	456.00	1003.50	<2.5	6.67	1101.34
WHITMUS FRANK	McCone	101.00	426.00	1043.10	7.40	0.06	1049.21
WALLER G	McCone	240.00	520.00	1000.40	837.70	0.10	2044.70
MERRY HERSCHEL	McCone	260.00	700.00	683.20	887.80	2.70	1967.40
KJELGAARD HAROLD	McCone	220.00	1340.00	1964.00	1345.00	1.90	3701.16
FLATTEN CLINTON	McCone	175.00	736.00	1160.00	660.00	4.07	2033.71
WAGNER R	McCone	85.00	92.00	494.80	667.20	0.10	1405.10
ZAHN DONALD	McCone	20.20	230.00	378.60	1705.70	0.20	2630.97
ZAHN DONALD	McCone	49.90	532.50	784.70	2125.80	0.20	3604.34
UNKNOWN-19.4 MI SW WELDON	McCone	?	2300.00	295.00	3700.00	NR	8128.32
PAWLOWSKI W	McCone	37.40	193.00	448.40	522.20	0.40	1107.56
SEXTON WALLACE	McCone	75.00	1015.00	493.00	4830.00	1.12	7144.25
MUELLER ARNOLD	McCone	203.00	626.00	1251.00	205.00	5.20	1527.93
UNKNOWN-10 MI S PRAIRIE ELK	McCone	?	4400.00	488.00	5000.00	NR	13717.39
FILLWORTH R CIRCLE MT 20 MI	McCone	201.00	1127.50	1018.90	2016.60	0.60	3844.26
TWITCHELL JOHN	McCone	89.00	810.00	867.60	1319.50	NR	2675.14

DREYER RAY	McCone	17.00	1116.00	915.00	3171.90	0.50	5320.63
PAINE EDWARD	McCone	123.00	1230.00	1283.90	1659.50	1.00	3591.35
HUSEBY D	McCone	20.00	445.00	878.40	673.00	0.30	1701.37
PAWLOWSKI OTTO	McCone	276.00	574.00	932.50	1014.90	NR	2237.45
JAMES MATTHEW	McCone	109.00	584.00	1191.20	344.00	1.00	1562.91
SHEFFELBINE ORVILLE	McCone	307.00	977.00	982.00	1511.00	0.20	3188.91
SHEFFELBINE ORVILLE	McCone	67.00	897.00	791.00	1528.00	0.55	2962.21
GASS MILTON	McCone	268.00	1470.00	1713.00	1794.00	0.70	4178.61
WRIGHT STEWART	McCone	365.00	954.00	1315.00	947.00	2.20	2619.10
GIBBS DAVID	McCone	210.00	825.00	819.80	1068.20	2.30	2349.54
HERZBERG JOHN	McCone	215.00	776.00	1290.00	624.00	1.10	2067.03
NEFZGER DEAN	McCone	175.00	1083.00	1576.00	1245.00	2.00	3150.22
GULDBERG	McCone	65.00	234.00	684.00	1610.00	2.10	2813.50

Meets Standards

Exceeds Standards

Source: Ground Water Information Center

Senator BARRASSO. Thank you so very much, Mr. Meissner, for your testimony.

Now, Mr. Schempp.

STATEMENT OF ADAM SCHEMPP, SENIOR ATTORNEY AND DIRECTOR OF THE WESTERN WATER PROGRAM, ENVIRONMENTAL LAW INSTITUTE

Mr. SCHEMPP. Senator Barrasso, thank you for the opportunity to be here today to provide my views on Senate bill 982, otherwise known as the Water Rights Protection Act.

I am Adam Schempp, a senior attorney and Director of the Western Water Program at the Environmental Law Institute (ELI). Founded in 1969 ELI is an internationally recognized, nonpartisan NGO with a mission of providing the highest quality research, publications, educational materials and training in environment energy and natural resources law and management.

While my testimony is intended in part to advance ELI's educational mission, the views presented here are my own and they do not necessarily reflect the views of ELI's Board of Directors or its members.

Senate bill 982 appears to address some of the concerns that prompted it including the effect of private rights to water from the Forest Service's 2011 interim directive which sought to require ski areas operating on public land to transfer their water rights to the Federal Government, but the bill would introduce into Federal law some broad and ambiguous language which, along with some internal inconsistencies could make its potential impacts sweeping. At the very least the bill could prove challenging for Federal agencies to implement and for courts to interpret.

For example, Subsection 5–1, the savings clause concerning the bill's effect on existing authority, reads in part: "Nothing in this act limits or expands any existing legally recognized authority of the Secretary of the Interior or the Secretary of Agriculture to issue, grant or condition, any permit approval, license lease, allotment, easement, right of way or other land use or occupancy agreement."

If the Secretaries do not have the authority to condition permits, leases and the like in the way prohibited in Section 3 of this bill, then the bill is unnecessary. If the Secretaries do have that authority then those prohibitions are trumped by the savings clause. The only way to square the savings clause with Subsection 3–1 is to place great emphasis on the phrase, "legally recognized," which itself is unclear. What if the Secretaries have this authority as a critical aspect of this issue and handling it in such a vague manner likely hampers rather than helps regulatory clarity?

Other vagueness in the savings clauses arises in Subsection 5–D which reads: "Nothing in this act limits or expands any existing or claimed reserved water rights of the Federal Government on land administered by the Secretary of Interior or the Secretary of Agriculture." The term "existing" clearly refers to reserved water rights that are already established at the time of the bill's passage, but the term "claimed" is unclear as to its temporal meaning. If it is interpreted to mean reserved water rights already claimed at the time of the bill's passage then there are no protections in this bill for future assertions of reserved water rights.

Turning to Section 3 of the bill, the prohibitions identified here lack specificity in their restrictions. A limitation of a water right is not a term of art and could be interpreted very broadly leading to disputes between applicants and the Federal land management agencies which might provoke delay in permit issuance and even litigation over whether a proposed permit or license condition is actually a limitation.

Also, these prohibitions may have the unintended consequence of fewer land use occupancy agreements or would circumscribe the ability of the Secretaries to protect against adverse water impacts from land use or occupancy agreements. The multiple uses for which Secretaries of the Interior and Agriculture manage lands and the environmental laws that apply still remain. Thus, if a proposed surface use activity might be acceptable but it would produce incompatible impacts on other Federal resources if water is used in a certain way, the Federal agency might be inclined not to enter the agreement at all.

Senate bill 982 also includes a prohibition against withholding, in whole or in part, land use or occupancy agreements. If withhold is interpreted to mean not issuing the land use or occupancy agreement, the Secretaries could deny any permit or could not deny any permit or application solely because of the potential impact of the resulting use of a water right. They could neither condition the use of water nor deny the use of land to ensure compliance with their other federally mandated obligations.

Senate bill 982, by using ambiguous terms and by coupling that with sweeping savings clauses in Section 5, may in fact reduce regulatory certainty rather than improve it resulting in delay, confusion and litigation.

I thank you, and I will be pleased to answer any questions at the appropriate time.

[The prepared statement of Mr. Schempp follows:]

Written Statement of Adam P. Schempp
Senior Attorney and Director of the Western Water Program
Environmental Law Institute

Before the U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power

Hearing on S. 593, the Bureau of Reclamation Transparency Act; S. 982, the Water Rights Protection Act; S. 1305, A bill to amend the Colorado River Storage Act to authorize the use of the active capacity of the Fontenelle Reservoir; S. 1365, a bill to authorize the Secretary of Interior to use designated funding to pay for construction of authorized rural water projects; S. 1291, to authorize early repayment of obligations to the Bureau of Reclamation within the Northport Irrigation District in the State of Nebraska; S. 1552, to authorize construction of the Dry Red Water Rural Water and Musselshell Rural Water Projects; and S. 1533, to authorize the Secretary of the Interior to coordinate Federal and State permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the Bureau of Reclamation as the lead agency for permit processing, and for other purposes

366 Dirksen Senate Office Building
June 18, 2015

Adam P. Schempp
Senior Attorney
Environmental Law Institute
1730 M Street, NW, Suite 700
Washington, DC 20036
www.eli.org
schempp@eli.org
202-939-3800[t]
202-939-3868[f]

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity extended to me by the Subcommittee to provide my views on S. 982, the "Water Rights Protection Act."

I am Adam Schempp, Senior Attorney at the Environmental Law Institute ("ELI"). I also am the Director of ELI's Western Water Program. While my testimony is intended in part to advance ELI's educational mission, the views presented here are my own, and do not necessarily reflect the views of ELI's Board of Directors or its members. I will start by explaining the role of the Environmental Law Institute before turning to an analysis of S. 982.

The Environmental Law Institute

Founded in 1969 and based in Washington, DC, ELI is a highly respected non-partisan non-governmental organization that does not litigate or lobby. Our primary mission is to provide the highest quality educational materials, publications, research, and training in environment, energy, and natural resources law and management. ELI seeks "to make law work for people, places, and the planet," and our institutional vision calls for "a healthy environment, prosperous economies, and vibrant communities founded on the rule of law."

The Institute's staff includes lawyers as well as scientists, and we have worked throughout the United States and around the world. We deliver impartial analysis to opinion makers, including government officials, environmental and business leaders, academics, members of the environmental bar, and journalists. ELI is a clearinghouse and a town hall, providing common ground for debate on important environmental issues. Our flagship publication, the *Environmental Law Reporter*, is the most cited legal journal of its kind. ELI has trained over 50,000 lawyers and managers as well as 2,000 judges from 25 countries in basic and advanced environmental law and practice. Graduates of ELI's Judicial Education programs are working on environmental problems all over the world.

The subject matter of S. 982 touches on several core aspects of ELI's mission and priorities. We have deep institutional expertise in the management of water and federal lands, and ELI is committed to the U.S. Constitutional foundations on which our environmental law framework stands. And at the heart of ELI's mission is a desire to make environmental law work—to ensure that laws can be implemented successfully in the real world. To this end, ELI works closely with a wide range of institutions and stakeholders—and especially with states and municipalities, which are often on the front lines of environmental protection. We also promote robust enforcement of the law.

Analysis of S. 982

Senate Bill S. 982 appears to address some of the concerns that prompted it, including the effect on private rights to water from the Forest Service's 2011 Interim Directive that sought to require ski areas operating on public land to transfer their water rights to the federal government. But the bill would introduce into federal law some broad and ambiguous language, which, along with some internal inconsistencies, could make its potential impact sweeping. At the very least, the bill could prove challenging for federal agencies to implement and courts to interpret.

Section 3 of the bill would prohibit the Secretaries of the Interior and Agriculture from conditioning (or even from "withholding") permits, licenses, leases, approvals, allotments, and other land use or occupancy agreements not only on transfers to the United States (as in the prior H.R. 3189, passed by the House of Representatives in 2014), but also on uncertain terms such as "limitation or encumbrance," or "other impairment" of any water right. The multiple uses for which these agencies manage lands and the environmental laws that apply, however, still remain (See Section 5(a)). Thus if a proposed surface use activity might be acceptable, but would produce incompatible impacts on other federal resources if water is used in a certain way, the federal agency might be inclined not to enter into the agreement at all. Hence, a potentially unintended consequence of S. 982 could be fewer land use or occupancy agreements.

Senate Bill S. 982 adds a prohibition against "withhold[ing], in whole or in part," land use or occupancy agreements. If "withhold" is interpreted to mean "not issuing the land use or occupancy agreement," the Secretaries of the Interior and Agriculture could not deny any permit or application solely because of the potential impact of the resulting use of a water right. They could neither condition the use of water nor deny the use of land to ensure compliance with their other federally mandated obligations.

Thus, either the legislation may lead to fewer land use or occupancy agreements or it would circumscribe the ability of the Secretaries to protect against adverse water impacts from land use or occupancy agreements.

Section 3 of S. 982 lacks specificity in its restrictions. A "limitation" on a water right is not a term of art and could be interpreted very broadly, leading to disputes between applicants and the federal land management agencies, which might provoke delay in permit issuance and even litigation over whether a proposed permit or license condition is actually a "limitation" or not.

Ambiguity is also present in the bill's prohibition on "assert[ing] jurisdiction over….impacts on groundwater," as used in Section 3, Subsection (3). Controls of surface uses and their impacts on groundwater can be very important in managing federal resources. Consider, for example, provisions in permits that are intended to protect springs, seeps, or cave resources on national park lands. State laws vary substantially on how (or even if) surface impacts to groundwater are addressed. The proposed bill language could leave federal agencies without sufficient authority to act, or create ambiguity in their authority.

Section 3, subsection 3 also introduces a constitutional ambiguity by stating that federal agencies are bound (in the exercise of federal authority) not only by state laws and regulations, but also by state "policies" concerning groundwater use or protection. This, in effect, would give state agencies or officials the ability to trump federal law on land management by issuing a policy or multiple conflicting policies (enacted by no legislative body) that would be prospectively adopted by Congress in this bill.

Senate Bill S. 982 also could benefit from further clarity in Section 5, the savings clauses. Subsection (d) reads, "Nothing in this Act limits or expands any existing or claimed reserved water rights of the Federal Government on land administered by the Secretary of the Interior or the Secretary of Agriculture." The term "existing" clearly refers to reserved water rights already

established at the time of the bill's passage. The term "claimed" is unclear as to its temporal meaning. If it is interpreted to mean reserved water rights already claimed at the time of the bill's passage, there are no protections in this bill for future assertions of reserved water rights. The addition of "or future" to the sentence would provide more clarity in meaning.

Section 5 of S. 982 includes the statement:

> Nothing in this Act limits or expands any existing legally recognized authority of the Secretary of the Interior or the Secretary of Agriculture to issue, grant, or condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on Federal land subject to the jurisdiction of the Secretary of the Interior or the Secretary of Agriculture, respectively.

On its face, this savings clause either contradicts Section 3 of the bill, particularly Subsection (1), or demonstrates that said portion of the bill is unnecessary. If the Secretaries of the Interior and Agriculture have existing authority "to issue, grant, or condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement," then Subsection 3(1) is trumped by this savings clause. If the Secretaries do not have that authority, then Subsection 3(1) is superfluous. Balancing this savings clause with Subsection 3(1) requires placing great emphasis on the phrase "legally recognized," which is not clear. The arguments regarding the authority of the Secretaries of the Interior and Agriculture to condition land use agreements on the handling of water rights need not be reproduced here, but that critical aspect of this issue should not be resolved in such a vague manner.

Yet another potentially significant matter is the intent and meaning of Subsection 4(b), regarding the effect on state water rights. The subsection begins with: "In carrying out this Act, the Secretary of the Interior and the Secretary of Agriculture shall not take any action that adversely affects (1) any water rights granted by a State…" The phrase "In carrying out this Act" appears to be limiting the scope of this prohibition, but it is unclear how carrying out the legislation could adversely affect a water right. The bulk of S. 982 (Section 3) concerns what the Secretaries of the Interior and Agriculture are prohibited from doing. Hence, the Subsection appears to be either redundant or nonsensical. If the intent of Subsection 4(b) is to ensure that the Secretaries of the Interior and Agriculture do not affect water rights when refraining from acting in the ways prohibited by Section 3, then that should be more clearly stated. If, however, "In carrying out this Act" is read more broadly, encompassing the activities generally addressed in this bill (such as issuing permits), the implications of Subsection 4(b) are not only sweeping but also make much of the preceding bill language unnecessary.

In law and its implementation, the balance between federal purpose and water rights is challenging, controversial, and above all, delicate. S. 982, by introducing new and ambiguous terms, and by coupling that with sweeping savings clauses in Section 5, may in fact achieve primarily disequilibrium of that balance resulting in delay, confusion, and litigation.

Senator BARRASSO. Thank you very much, Mr. Schempp.
Mr. Stern?

STATEMENT OF CHARLES STERN, SPECIALIST IN NATURAL RESOURCES POLICY, CONGRESSIONAL RESEARCH SERVICE

Mr. STERN. Senator Barrasso, my name is Charles Stern. I'm a specialist in Natural Resources Policy at the congressional Research Service. Thank you for inviting CRS to testify on S. 593, S. 1365 and S. 982. CRS takes no position on these bills but has been asked to provide background and analysis of their potential effects. S. 593, the Bureau of Reclamation Transparency Act, would require that the Bureau of Reclamation's asset management reporting be expanded to include several new components. The mixed management structure of Reclamation water resource facilities complicates reporting on needed upgrades. Reclamation has undertaken efforts to improve this reporting including annual asset management plans. These reports summarize Reclamation's infrastructure management efforts but have not included lists of facility specific repair needs.

S. 593 would make several changes to Reclamation's reporting process. Notably Section 4–B would require that the Bureau's asset management plan include an itemized list of repair needs that reserve works. This would include a cost estimate for repair needs and a categorical rating for each item. Section 5 requires Reclamation to work with local project sponsors to develop similar requirements for transferred works.

S. 593 does not address the management of projects rather it focuses on what information is made available to Congress and the general public about these facilities. Some may question how much of the information required by the legislation is already available. While some of this data appears to be tracked internally by Reclamation, it is not available in a consolidated public report. A more in depth review of some facilities, especially transferred works, could also be required by the bill.

S. 1365, the Authorized Rural Water Settlement Project Completion Act, would establish dedicated funding for ongoing and newly authorized rural water projects and certain settlement agreements with Indian tribes. Since 1980, Congress has authorized Reclamation to undertake 12 rural water supply projects, six of which are ongoing. According to Reclamation total cost to complete these projects would be about $2.4 billion. In the current budget levels they may not be complete for 50 years or more.

Indian water right settlements are also expected to be significant in terms of future year costs relative to Reclamation's budget. Overall, 29 Indian water right settlements have been approved by Congress since 1978. To date, Congress has appropriated more than $2 billion in discretionary funds to these settlements and more funding will be needed. According to the Department of the Interior, 20 other settlements between the Federal Government and Federally recognized tribes are under negotiation or have negotiation teams appointed.

S. 1365 would establish a new fund in the Treasury and transfer to it $115 million annually from 2015 to 2029 without further appropriation. These funds would be made available from future bal-

ances accruing to the Reclamation Fund. The mandatory appropriation would be divided between two accounts with an account designated for authorized rural water projects designated to receive $80 million annually and an account for Indian water rights and other related settlement agreements to receive $35 million annually.

Mandatory funding for rural water projects would be a contrast to the discretionary appropriations which typically fund these and other Reclamation projects and programs. Supporters argue that this funding is crucial to securing water supplies for these communities. Some may question elevating the priority of these projects by removing them from Reclamation's regular appropriations process. Others may ask whether rural communities are eligible for other Federal funding.

Several agencies are authorized to provide assistance of this type; however, the authorities for each agency's programs are unique and the eligibility and competitiveness of individual communities may vary. In contrast, Congress has in some cases provided mandatory funding for Indian water right settlements. Thus, the bill's proposed funding approach for these projects is not without precedent.

S. 982 would establish prohibitions related to the conditioning of certain Federal actions on the transfer of water rights. The Subcommittee asked CRS to limit its testimony to abbreviated background on Federal Reserve water rights as they relate to this legislation.

Federal Reserve water rights often arise in questions of water allocation and uses related to Federal lands. These rights co-exist with water rights administered under state law. Federal Reserve water rights were recognized by the Supreme Court in Winters v. United States in 1908.

Under the Winters Doctrine when Congress reserves land from the public domain for a Federal purpose it also, by implication, reserves water resources sufficient to fulfill the specific purposes of the reservation. Although the Winters Doctrine was originally interpreted as applying to Indian reservations, it has since been applied to other Federal land reservation including water uses in national parks, national wildlife Refuges, and other Federal areas. As a result Federal agencies have, in some cases, asserted or negotiated reserve water rights in accordance with Federally authorized purposes. There is ongoing debate as to the limits of these rights.

This concludes my statement. I would be happy to answer any questions you may have at the appropriate time.

[The prepared statement of Mr. Stern follows:]

Complete Statement of Charles V. Stern
Specialist in Natural Resources Policy for the Congressional Research Service
Before the Committee on Energy and Natural Resources
Subcommittee on Water and Power
United States Senate
Hearing to Consider Pending Legislation
June 18, 2015

Chairman Lee, Ranking Member Hirono, and members of the subcommittee, my name is Charles Stern. I am a Specialist in Natural Resources Policy at the Congressional Research Service (CRS). Thank you for inviting CRS to testify. You asked that CRS provide testimony on three bills: S. 593, the Bureau of Reclamation Transparency Act; S. 1365, the Authorized Rural Water Projects Completion Act; and S. 982, the Water Rights Protection Act.

In serving Congress on a non-partisan and objective basis, CRS takes no position on these bills but has been asked by the Subcommittee to provide background and analysis of their potential effects. The statements presented in this testimony are based on an analysis of the legislation within the time available. CRS remains available to assist the Subcommittee in its consideration of this legislation, related issues, and potential concerns among affected stakeholders.

S. 593 – Bureau of Reclamation Transparency Act

In brief, S. 593, the Bureau of Reclamation Transparency Act, would require that the Bureau of Reclamation's (Reclamation) asset management reporting be expanded to include several new components. Specifically, it would require that Reclamation annually report to Congress estimated costs for repair needs and a categorical rating for major repair and rehabilitation needs of Reclamation's facilities. Reclamation currently makes some information available on its infrastructure management activities; the proposed new requirements are directed to be incorporated into those processes.

The Bureau of Reclamation is one of the two principal agencies charged with constructing and maintaining the federal government's largest investments in water infrastructure, the other being the U.S. Army Corps of Engineers. Other agencies and federal entities have played roles in water resource development. S. 593's requirements would apply only to the Bureau of Reclamation; thus it is the focus of this testimony.

The Bureau of Reclamation's assets are concentrated in the 17 western states and include dams, canals, pipelines, hydropower facilities, and related infrastructure. Some of these facilities were constructed as far back as Reclamation's original authorization in 1902, and most of them are more than 60 years old. In previous hearings, concerns have been raised about the perceived deterioration of Reclamation's infrastructure and the information (or lack thereof) on these conditions.

Two important considerations provide context for CRS's analysis of S. 593: First, a broad discussion of the distribution of management responsibilities across different types of Reclamation facilities. Second, Reclamation's current process for reporting on repair and rehabilitation needs of these facilities. I will briefly discuss each of these topics before moving on to discuss the bill itself.

First, I will discuss distribution of management responsibilities. As stated above, the majority of Reclamation's water resources facilities are more than 60 years old, and a system of shared responsibilities to plan, construct, finance, operate, maintain, and repair this infrastructure has emerged over time. Reclamation is unique among federal water resource agencies in that it does not manage much of the infrastructure that it owns. About two-thirds of the infrastructure owned by Reclamation has been transferred to local project sponsors for operations and maintenance. While Reclamation technically owns these assets (which are referred to as "transferred works"), it is not responsible for their day-to-day maintenance. The bureau conducts periodic maintenance reviews at transferred works through its Associated Facilities Review of Operations and Maintenance Examinations program. However, the results of these examinations are typically not made public.

"Reserved works," which are owned and operated by Reclamation, make up the remainder of Reclamation's assets. Most of these projects entail large, multipurpose assets that are owned and operated by Reclamation, and Reclamation's process of overseeing their operations and maintenance is generally more involved than that used for transferred works. Reclamation operates a Facility Maintenance and Rehabilitation Program that identifies, schedules, and prioritizes the needs of its reserved works, but again, the results of these reviews are typically not made public.

The mixed management structure of Reclamation facilities complicates reporting on rehabilitation and upgrades of its assets. In recent years Reclamation has undertaken efforts to improve this reporting. These included, among other things, a major review of its infrastructure management that concluded in 2008,[1] as well as annual asset management plans for FY2011 and FY2012. The latter reports provided a high-level summary of Reclamation's infrastructure management efforts, including discussions of how the bureau tracks and plans for management activities, aggregated estimates of maintenance requirements at regional and national levels, and some of the policy tools available to address these issues. Reclamation's last management plan (for FY2012) was published in May 2014.

These and other reports and public documents issued by Reclamation generally have not included a list of facility-specific repair needs and associated estimates.[2] As noted in previous CRS testimony, some agencies, such as the Environmental Protection Agency and the Department of Transportation, publish "needs assessments" that include project level estimates for needed repairs and upgrades, although it should be noted that these agencies and the infrastructure they service are different than Reclamation. In any case, the availability of estimates for individual Reclamation facilities varies, and they are generally not compiled or regularly updated in a centralized, public report.

Similarly, to varying degrees Reclamation also reports its efforts to categorize the conditions of these facilities. Reclamation internally tracks and rates the condition of its dams and also utilizes a "Facility Reliability Rating" to categorize the condition of reserved works. Reclamation has in recent years also undertaken a program to categorize the condition of urban canals that may be vulnerable to full or partial

[1] The 2008 review was conducted in response to a 2006 National Research Council report and resulted in a number of changes to Reclamation's infrastructure management.

[2] However, Reclamation has provided higher level estimates of infrastructure needs. For instance, in 2012 Reclamation estimated that costs for needed repairs and upgrades throughout the West were approximately $2.6 billion over the 2012-2016 time period. Some of these costs would be expected to be financed by water and power customers.

failure. However, this information is not standardized or available for all of Reclamation's infrastructure, nor is it regularly reported on.

S. 593 would make several changes to Reclamation's existing reporting process. It would require Reclamation to complete an Asset Management Report (building upon previous Asset Management Plans).[3] This report would be published and made publicly available within 2 years of enactment, and updated every two years thereafter. Perhaps most prominently, Section 4(b) of the bill would require that the bureau's new Asset Management Report include an itemized list of repair needs at reserved works. This list would include both a cost estimate for repair needs at Reclamation facilities and a categorical rating for each item. Section 5 of the bill requires that the Secretary coordinate with the nonfederal operators of transferred works to develop and implement, to the maximum extent practicable, a similar ratings and cost estimate system for transferred works. That is, all Reclamation-owned infrastructure, including that operated and maintained by local sponsors, would be subject to some level of reporting. The bill would provide an exception to the public reporting requirements for sensitive or classified information, but would require that this information still be made available to Congress.

S. 593 does not address directly the management of projects by Reclamation or its local cooperators. Rather, its focus is on what information is made available to Congress and the general public about Reclamation facilities, and in what format. S. 593 would provide the Administration with some flexibility to determine how it would implement the bill; however, the extent to which the new requirements in the legislation would fit into existing processes or necessitate new ones is unclear. Similarly, it is unclear whether the bill's requirements would create new costs for Reclamation, such as costs resulting from the assessment and publishing of project repair estimates and/or ratings in the new report.[4] Some may also raise concerns about whether Reclamation's repair estimates or ratings could result in increased operations and maintenance costs being assessed on users. The extent to which such a scenario would actually be the case may be a function of how Reclamation would interpret and implement the bill.

Finally, some may also question how much of the information that would be required by the legislation is currently available in existing sources (such as through Reclamation's annual budget justifications and/or other programmatic reports). While some of this information appears to be tracked by Reclamation, it is not available in a single, consolidated public report. Additionally, it is possible that a more in-depth review of the needs at some facilities, especially transferred works, could be required by this legislation.

S. 1365 – Authorized Rural Water Settlement Project Completion Act

S. 1365 would establish dedicated funding for ongoing and newly authorized rural water projects and water and hydropower-related settlement agreements with Indian tribes. This funding would be available without further appropriation over the 2015-2035 period.

The Bureau of Reclamation has been authorized to design and construct individual rural water supply projects in the western U.S. since 1980.[5] Since that time, Congress has authorized Reclamation to

[3] To date, these Asset Management Plans have to date been produced under Reclamation's general authorities.

[4] The Congressional Budget Office estimated that a similar bill in the 113th Congress (S. 1800) would cost $2 million Reclamation $2 million to implement over the FY2015-F2019 period. See Congressional Budget Office, *Cost Estimate for S. 1800, the Bureau of Reclamation Transparency Act*, July 3, 2014, http://www.cbo.gov/sites/default/files/s1800.pdf.

[5] The first rural water project authorized for design and construction was the WEB project in South Dakota, first authorized in P.L. 96-355. Prior to this time, Reclamation was authorized to provide technical assistance for these projects.

construct a total of 12 Rural Water Supply projects throughout the West. As of 2015, six of these projects are complete, and six are ongoing. A 2014 report on rural water projects by Reclamation estimated that the total costs to complete the six ongoing projects would be about $2.4 billion (after adjusting for expected inflation).[6] The same report projected that at budgeted levels of about $50 million per year, construction of these projects may not be completed until 2065 or later (for context, the FY2015 enacted amount for rural water projects was $31 million, and the FY2016 proposed budget for these projects was $36.5 million). These estimates do not account for potential new rural water supply projects, which Reclamation has been authorized to study since 2006.[7] Reclamation has stated that demand for new rural water projects is and will continue to be significant; it estimated the range of potential future demand for these projects in the western states to be $5 billion to $9 billion (plus additional needs for tribal projects).[8]

Indian water rights settlements and other tribal agreements could also be significant in terms of future year costs relative to Reclamation's budget. Overall, a total of 29 Indian water rights settlements have been approved by Congress since 1978, including six settlements that have been approved since 2010. Congress has appropriated mandatory funding for some of these projects, while others have been funded with discretionary funds.[9] CRS estimates that to date, Congress has appropriated more than $2 billion in discretionary funding for these projects (without adjusting for inflation). According to the Department of the Interior, 20 other settlements between the federal government and federally recognized tribes are under negotiation or have negotiation teams appointed.[10] These potentially could require congressional approval and/or future appropriations.

S. 1365 would establish a new fund in the Treasury, the Reclamation Rural Water Construction and Settlement Implementation Fund, and transfer to it $115 million annually from 2015-2035. Within the proposed fund, the Secretary would be directed to establish two accounts: the Reclamation Rural Water Project Account and the Reclamation Infrastructure and Settlement Implementation Account. The $115 million transferred into the fund annually would be divided between these accounts, with the Reclamation Rural Water Project Account to receive $80 million annually and the Infrastructure and Settlement Completion Account to receive $35 million annually (with accrued interest adding to the availability of both amounts). S. 1365 defines projects eligible to receive rural water account funding as those rural water projects authorized as of the date of the enactment of the bill, or else those authorized for study under the Rural Water Supply Act of 2006 and subsequently authorized for construction after the enactment of S. 1365. The bill also designates the Reclamation Infrastructure and Settlement Implementation Account as funding compensation for certain monetary claims of Indian Tribes whose land has been used for the generation of hydropower, or to complete work on approved Indian water rights settlements and other similar tribal agreements.

---

[6] Bureau of Reclamation, *Assessment of Reclamation's Rural Water Activities and Other Federal Programs that Provide Support on Potable Water Supplies to Rural Communities in the Western United States*, October 7, 2014, http://www.usbr.gov/ruralwater/docs/Rural-Water-Assessment-Report.pdf. Hereinafter Reclamation Rural Water Assessment.

[7] The Rural Water Supply Act of 2006 (P.L. 109-451) provided programmatic authority for Reclamation to work with rural communities, including tribes, in the 17 western states to assess water supply needs and conduct studies of these projects without individual acts of Congress. These projects would still need to be authorized for construction.

[8] Reclamation Rural Water Assessment, p. 11. The extent to which the additional tribal needs cited in that report ($1.5 billion) may overlap with potential future Indian Water Rights Settlements such as those proposed for funding in S. 1365 is unknown.

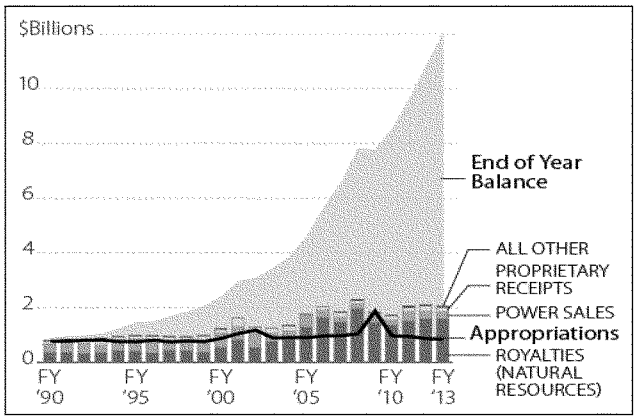
[9] For example, Title X of P.L. 111-11 created a new fund, the Reclamation Water Settlements Fund, and scheduled $1.2 billion in deposits to the fund, without further appropriation, over the 2020-2029 period. Several specific settlements are to receive priority consideration for this funding, with any remainder available to fund other eligible settlements.

[10] http://www.usbr.gov/native/waterrights/waterrights.html.

Funding directed toward the new accounts in S. 1365 would come from that which currently accrues to the Reclamation Fund. As noted in CRS Report R41328, the Reclamation Fund, which funds most traditional Reclamation activities, has a surplus due to receipts from natural resource royalties on public lands significantly exceeding appropriations from the fund (see **Figure 1** below).[11] For 19 of the past 20 years, receipts accruing to the Reclamation Fund have exceeded discretionary appropriations from it by more than $100 million; over the past 10 years receipts have exceeded appropriations by an average of $920 million per year. As of the end of FY2014, the Reclamation Fund's balance was $13.1 billion and is expected to continue to grow. S. 1365 would direct a portion of the revenues which would otherwise accrue to the Reclamation Fund to certain types of projects. This is similar to a mechanism enacted in P.L. 111-11 (2009), in which funds that would have otherwise accrued to the Reclamation Fund over the 2020-2029 period were designated to fund certain Indian Water Rights settlements, without further appropriation.[12]

Figure 1. Reclamation Fund Receipts and Appropriations

FY1990-FY2013



Source: CRS, with Bureau of Reclamation Data

Ever since Congress made Reclamation projects subject to congressional appropriations in the Reclamation Extension Act of 1914, funding for most Reclamation projects has been subject to congressional approval. S. 1365 would direct the Administration to allocate annual funding for each new account among eligible projects, potentially with limited additional input from congressional appropriators.

[11] Although under Reclamation's original authorizing legislation in 1902 the Reclamation Fund was available for expenditure without further appropriations, Congress revised its approach in the Reclamation Extension Act (1914) to limit Reclamation's expenditures to only those items for which funds are made available annually by Congress. See 43 U.S.C. § 414. Thus, most Reclamation projects have been and continue to be funded in discretionary appropriations acts.

[12] See P.L. 111-11, Title X. If enacted, mandatory funding for Indian Water Rights Settlements under S. 1365 would appear to add to and/or supplement this funding.

Opponents of this change may argue that mandatory funding for these projects outside of the regular discretionary budget process is not merited and would in essence prioritize these projects over Reclamation's traditional activities. Supporters of previous versions of this legislation have argued that underfunding these projects could jeopardize access to reliable water supplies for eligible communities. Even if these projects were to receive significant increases in their discretionary appropriations, some might point out that if they are not financed in a manner that circumvents Reclamation's regular budget and appropriations process, they could make up an increasing portion of Reclamation's budget and thereby detract from traditional mission areas.

Regarding rural water projects, some may ask whether these communities are eligible for other types of federal funding to assist with development of water infrastructure. As noted in CRS Report RL30478, several federal agencies other than the Department of the Interior may provide aid to communities to assist with these needs.[13] These include the U.S. Department of Agriculture (Rural Utilities Service and Natural Resources Conservation Service), the Department of Housing and Urban Development (Community Development Block Grants), the Department of Commerce (Economic Development Administration), the U.S. Army Corps of Engineers Civil Works Program (Environmental Infrastructure), and the Environmental Protection Agency (Clean Water State Revolving Fund and Drinking Water State Revolving Fund loan programs). However, it is worth noting that the authorities for each of these programs are unique, and the eligibility and/or competitiveness of individual communities for these funds may vary.[14] Furthermore, some argue that if current trends continue, future water supply needs are likely to outstrip the availability of future federal appropriations.

As noted above, Congress has in some past cases provided mandatory funding for Indian Water Rights Settlements. Thus, unlike rural water projects, the bill's proposed funding approach for these projects is not without precedent. However, the wording of section 301 is notably broad compared to that enacted by Congress in previous legislation providing mandatory funding for these settlements, and could thus potentially fund a wide range of these agreements.

S. 982 – Water Rights Protection Act

Finally, you also asked CRS to provide abbreviated background on federal reserved water rights as they relate to S. 982, the Water Rights Protection Act.

Federal reserved water rights often arise in questions of water allocation and uses related to federal lands. These rights coexist with water rights administered under state law. Federal reserved water rights were first recognized by the U.S. Supreme Court in *Winters v. United States* in 1908.[15] Under the *Winters* doctrine, when the federal government reserves land from the public domain for a federal purpose, it also reserves water resources sufficient to fulfill the purpose of the reservation.[16]

---

[13] For a more detailed discussion, see CRS Report RL30478, *Federally Supported Water Supply and Wastewater Treatment Programs*, coordinated by Claudia Copeland.

[14] For example, USDA's Rural Utility Service funds projects in cities and towns with a population of 10,000 or less (or to unincorporated areas, regardless of population), while P.L. 109-451 (which authorizes study of potential future Reclamation Rural Water projects) defines these as areas with a population of no more than 50,000.

[15] *Winters v. United States*, 207 U.S. 564 (1908). For more information on *Winters* doctrine, see CRS Report RL32198, *Indian Reserved Water Rights Under the Winters Doctrine: An Overview*, by Cynthia Brown.

[16] In 1976, the Supreme Court noted, "as long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." See *Cappaert v. United States*, 426 U.S. 128 (1976).

Although the Winters Doctrine was originally interpreted as applying to Indian reservations, it has since been applied to other federal land reservations, including water uses in national forests, national parks, national monuments, and other areas. As a result, federal agencies have in some cases asserted or negotiated reserved water rights in accordance with federally authorized purposes. For example, the National Park Service has a reserved water right for flows in the Gunnison River in Black Canyon of the Gunnison National Park.[17] In some cases, assertion of the reserved water rights by federal agencies has been controversial and has been denied by courts.[18]

Generally, the critical factor in determining reserved water rights has been the intent of Congress (either expressed or implied) that such rights be created. Among the many questions associated with federal lands and water rights are how limitations on these rights are applied under various circumstances and how federal management objectives are affected when water rights are held by federal agencies and others.

This concludes my written statement. I would be happy to answer any questions you may have at the appropriate time.

[17] National Park Service, "Water Right Quantification Decreed for Black Canyon of the Gunnison National Park." January 24, 2012. http://www.nature.nps.gov/water/Homepage/Black_canyon.cfm.

[18] *U.S. v. New Mexico*, 438 U.S. 696 (1978).

Senator DAINES. [presiding] Thank you, Mr. Stern.
Mr. Willardson?

STATEMENT OF ANTHONY WILLARDSON, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL

Mr. WILLARDSON. Senator Daines, Senator Hirono, I appreciate the opportunity to testify on behalf of the Western States Water Council.

This is our 50th anniversary since our creation as a policy advisory body to the Western Governors. Our members are appointed and serve at the pleasure of their Governors. We believe that the Authorized Rural Water Project Completion Act provides an appropriate and timely Federal investment of modest amounts that will minimize long term, Federal expenditures, create jobs and fulfill long standing promises and trust responsibilities in rural and tribal communities, some of which date back decades.

We strongly support the policy of encouraging negotiated settlement of any water rights claims is the best solution to this critical problem. We also support the proposed Rural Water Construction and Settlement Implementation Fund for financing these needs as identified in S. 1365.

The Council believes that receipts accruing to the Reclamation Fund, subsequent to the 1902 Reclamation Act and other acts, should be fully appropriated for their intended and authorized purposes.

We also would suggest that Congress consider converting the Reclamation Fund from a special account to a true revolving trust fund.

Some rural and tribal communities face serious water shortages now due to drought and declining stream flows and groundwater levels and inadequate infrastructure with some communities hauling water. Many rural and tribal communities are also suffering from high unemployment and lack the financial capability and expertise to meet their drinking water needs. The Reclamation Rural Water Project Supply Program was created in 2006 to provide an assessment of these rural water needs which were found to range from $5 to $8 billion as well as $1.2 billion for specific Indian water supply projects.

In 2012, Reclamation estimated that to complete eight of those projects would cost $2.6 billion and that they would likely, at current funding levels, not be completed until 2063. The constant resolving outstanding Indian water rights claims is also growing and the Administration's request for this Fiscal Year of $18.6 million for construction of authorized rural water projects and $18 million for tribal features of specific projects is not sufficient to complete them in a timely manner as would be provided by the S. 1365.

This is a relatively modest Federal investment compared to the increasing costs which will likely occur if construction is further delayed, and we recognize the Federal budget constraints but still remains this obligation to fulfill Federal trust responsibilities and other promises to states and tribes who lost land from Federal flood control projects.

I would mention the Garrison Diversion project in North Dakota which flooded 300,000 acres of private farmland as part of the Pick-

Sloan Missouri Basin program as well as inundating 550 square miles of Native American lands and displacing some 900 Native American families.

Similarly the North Central Rocky Boy's rural water project in the State of Montana would implement that tribe's settlement with the United States. According to the U.S. Conference of Mayors, $1 invested in water and sewer infrastructure increases gross domestic product by $6.35.

Similarly in the HDR study of economic impacts of the Lewis and Clark rural water system found a total economic impact of $14.4 million in direct and indirect job creation of some 7,441 jobs. Improving the infrastructure in these rural tribal communities will improve their ability to attract business and develop their economies as well as provide a higher quality of life and safe drinking water and the associated health benefits.

And despite the benefits, many of these smaller rural communities and tribal communities do not have the capacity to finance, design and construct these projects on their own. For this purpose of funding authorized Reclamation projects, the Reclamation Fund was created; however, current expenditures from that fund are far below current receipts and at the end of 2016 the Administration estimates that the unobligated balance in the Reclamation Fund will be $15 billion. So S. 1365 would set aside just a small amount of this money to complete and fulfill these obligations to these communities and further postponing these expenditures will only perpetuate the hardships that currently exist.

We very much appreciate the opportunity to testify here on the Subcommittee to approve S. 1365 and work with the states toward its effective implementation.

Thank you again.

[The prepared statement of Mr. Willardson follows:]

Testimony of Anthony Willardson, Executive Director
of the Western States Water Council

Submitted to the
Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power

regarding
S. 1365 – Authorized Rural Water Projects Completion Act

Hearing on Miscellaneous Water Bills

June 18, 2015

I. INTRODUCTION

My name is Tony Willardson and I am the Executive Director of the Western States Water Council. We would like to thank the Chair and members of the Committee for the opportunity to testify.

The Western States Water Council (WSWC), representing 18 western states from Alaska to California and Texas to North Dakota, strongly supports the Authorized Rural Water Projects Completion Act (S. 1365) as an appropriate and a timely federal investment of modest amounts that will minimize long-term federal expenditures, create jobs, and fulfill long-standing promises and trust responsibilities to rural and Tribal communities, some of which date back decades. We have supported previous legislative efforts to establish a dedicated funding source for the completion of federal rural water projects authorized by Congress for construction by the Bureau of Reclamation (see attached letter/WSWC Position #343).

By way of this testimony, we also reiterate our support for the federal policy of encouraging negotiated settlements of disputed Indian water rights claims as the best solution to a critical problem that affects almost all of the Western States, as well as a strong fiscal commitment for meaningful federal contributions to such settlements that recognize the trust obligations of the United States government. Further, the Council's position is that Congress should expand opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, while recognizing the existence of other legitimate needs that may be financed by these reserves. I would add that the Council believes Indian water rights settlements are not and should not be defined as Congressional earmarks. Lastly, once authorized by the Congress and approved by the President, the Council supports steps to ensure that any water settlements will be funded without a corresponding offset, including cuts to some other tribal or essential Interior Department program (see attached WSWC Position #376).

In addition, this testimony sets forth the WSWC's long-standing policy in support of using receipts accruing to the Reclamation Fund for authorized projects, including the types of rural water projects that would receive funding under S. 1365, through the proposed Reclamation Rural Water Construction and Settlement Implementation Fund (the Rural Water Projects "RWP" Fund). The Council believes receipts accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts should be fully appropriated for their intended purpose in the

continuing conservation, development and wise use of western resources to meet western water-related needs. Further, the Council has suggested that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts). See attached WSWC Position #367.

II. THE NEED FOR RURAL WATER PROJECTS IN THE WEST

Across the West, rural communities are experiencing water supply shortages due to drought, declining streamflows and groundwater supplies, and inadequate infrastructure, with some communities hauling water over substantial distances to satisfy their potable water needs. Moreover, those water supplies that are available to these communities are often of poor quality and may be impaired by naturally occurring and man-made contaminants, including arsenic and carcinogens, which impact their ability to comply with increasingly stringent federal water quality and drinking water mandates. At the same time, many rural and tribal communities in the West are suffering from significant levels of unemployment and simply lack the financial capacity and expertise to finance and construct needed drinking water system improvements.

Since the 1980s, Congress has authorized Reclamation to address this need by designing and constructing projects to deliver potable water supplies to rural communities in the 17 western states. Furthermore, Congress established Reclamation's Rural Water Supply Program when it enacted the Rural Water Supply Act of 2006 (Pub. L. 109-451), authorizing the agency to work with rural communities in the West, including Tribes, to assess potable water supply needs and identify options to address those needs through appraisal investigations and feasibility studies.

In 2009, the WSWC worked closely with Reclamation to identify sources of information on potable water supply needs in non-Indian rural areas of the West. Reclamation released an assessment report on July 9, 2012 ("Assessment Report") that discussed the results of this effort, finding that the identified need for potable water supply systems in rural areas of the 17 western states ranged from $5 billion to $8 billion, not including another estimated $1.2 billion for specific Indian water supply projects.[1]

The Assessment Report noted that there were eight active rural water projects located in Montana, New Mexico, North Dakota, and South Dakota, including the Lewis and Clark Rural Water Supply Project, which is located mostly in South Dakota but encompasses parts of the non-Reclamation states of Iowa and Minnesota.[2] The report also noted that of the rural water projects that Congress authorized Reclamation to undertake between 1980 and 2007 (when the Rural Water Supply Act was enacted), only four had been completed.[3]

According to Reclamation, the total amount of Federal funding needed to complete the eight authorized projects was $2.6 billion, which is substantially higher than the $2 billion

---

[1] BUREAU OF RECLAMATION, ASSESSMENT OF RECLAMATION'S RURAL WATER ACTIVITIES AND OTHER FEDERAL PROGRAMS THAT PROVIDE SUPPORT ON POTABLE WATER SUPPLIES TO RURAL COMMUNITIES IN THE WESTERN UNITED STATES, 8 (July 9, 2012), http://www.usbr.gov/ruralwater/docs/Rural-Water-Assessment-Report-and-Funding-Criteria.pdf.

[2] *Id.* 3 – 4.

[3] *Id.* at 3.

Congress originally authorized.[4] This increase is due in part to inflation and the rising costs of materials and labor.[5] Nevertheless, the Assessment Report estimated that these authorized projects could be completed by 2029 at a total Federal cost of around $3 billion, so long as Federal funding reflects the estimates provided in the original final engineering reports for each of the authorized projects – about $162 million annually.[6] However, at current funding levels of around $40-$50 million annually for construction, Reclamation estimates that some projects could be delayed beyond 2063 despite the expenditure of almost $4 billion in Federal funds by that point.[7] Moreover, an additional $1.1 billion in Federal expenditures would be needed to complete those projects that are not completed by 2063.[8] Notably, Reclamation is seeking only $36.6 million for its rural water program in fiscal year (FY) 2016, with $18.6 million for construction of authorized rural water projects and the remaining $18 million for tribal features of specific projects.[9]

III. FEDERAL FUNDING FOR RURAL WATER PROJECTS UNDER S. 1365

S. 1365 would provide $80 million per year for each of fiscal years 2015 through 2035 to complete the construction of rural water projects that have already received Congressional authorization. Other projects may be eligible for funding if: (1) a feasibility study is submitted to the Secretary of the Interior by February 27, 2015; and (2) Congress authorizes the project's construction after S. 1365's enactment.

This funding represents a relatively modest Federal investment, compared to the increased costs that will likely occur due to construction delays if funding remains at current levels. We recognize that there are Federal budget constraints. Nevertheless, such constraints do not negate the Federal responsibility to complete authorized rural water projects, particularly those intended to fulfill in part a solemn Federal promise and trust responsibility to compensate States and Tribes for lost resources as a result of the construction of Federal flood control projects.

For example, the Garrison Diversion Unit, an altered version of which would receive funding under S. 1365, is intended to compensate the State of North Dakota for the loss of over 300,000 acres of prime farmland that was lost as a result of the construction of the Pick-Sloan Missouri River Basin Program,[10] which also inundated over 550 square miles of Native American land and displaced more than 900 Native American families.[11] Additionally, the North Central/Rocky Boys rural water project will implement the tribe's water rights settlement (as codified in Pub. L. 106-163) with the United States and the State of Montana.

---

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 5.
[9] U.S. BUREAU OF RECLAMATION, RURAL WATER PROJECTS (June 15, 2015), http://www.usbr.gov/newsroom/presskit/factsheet/factsheetdetail.cfm?recordid=7.
[10] GARRISON DIVERSION CONSERVANCY DISTRICT, HISTORY & FEDERAL LEGISLATION: THE PICK-SLOAN MISSOURI BASIN PROGRAM, http://www.garrisondiv.org/about_us/history_federal_legislation/.
[11] SENATE REP. NO. 105-146, 4 (1997) (accompanying S. 156 and describing the impacts of the Pick-Sloan Missouri River Basin Program on the Lower Brule Sioux Tribe), http://www.gpo.gov/fdsys/pkg/CRPT-105srpt146/pdf/CRPT-105srpt146.pdf.

Authorizing the increased use of Reclamation Fund revenues to expedite completion of these projects fulfills a financial and moral obligation that some beneficiaries have waited decades to see honored.

It is also important to note that the Federal expenditures provided under S. 1365 would generate significant and actual returns on this investment, including but not limited to:

- National Economic Impacts: According to a 2008 U.S. Conference of Mayors report, one dollar invested in water and sewer infrastructure increases private output, or Gross Domestic Product, in the long-term by $6.35. Furthermore, for each additional dollar of revenue generated by the water and sewer industry, the increase in revenue that occurs in all industries for that year is $2.62.[12]

- Economic Impacts and Job Creation in Rural Communities: Investments in rural water projects have a direct impact on the economies of the communities serviced by those projects. For example, a 2006 study by HDR, Inc. on the economic impacts of constructing the Lewis and Clark Rural Water System, which would be eligible to receive funding under S. 1365, found that the total economic impact to South Dakota, Iowa, and Minnesota would total $414.4 million. The report also estimates that the project's construction would directly or indirectly create 7,441 jobs. On a yearly basis, this equals the creation of 532 direct and indirect jobs with average annual salaries ranging from $25,591 to $33,462. Approximately 72% of the economic impacts would be realized in South Dakota, with 17% in Iowa and 11% in Minnesota.[13]

- Improved Potential for Economic Development in Rural Areas: The economy of every community, especially rural communities, requires sufficient water supplies of suitable quality. Such supplies depend upon adequate water infrastructure. Improving the water infrastructure of the rural and Tribal communities that would be affected by S. 1365 will improve their ability to attract business and develop their economies in ways that are not possible with their current water supplies.

- Improved Quality of Life: The types of water projects that would receive funding under S. 1365 would meet the same water quality standards as public systems. These projects would therefore provide a higher quality of safe drinking water and associated health benefits than the water supplies upon which these communities currently rely.

- Reduced Costs: Rural communities would no longer need to expend limited resources drilling and maintained wells, softening and treating water, or hauling water. In addition, these communities would see decreased electrical pumping costs.

- Rural Fire Protection: Rural water systems provide water storage that fire trucks can use to assist with rural fire protection.

---

[12] THE U.S. CONFERENCE OF MAYORS: MAYORS WATER COUNCIL, LOCAL GOVERNMENT INVESTMENT IN MUNICIPAL WATER AND SEWER INFRASTRUCTURE: ADDING VALUE TO THE NATIONAL ECONOMY, i (August 2008), available at: http://www.usmayors.org/urbanwater/documents/LocalGovt%20InvtInMunicipalWaterandSewerInfrastructure.pdf.

[13] HDR, INC., THE ECONOMIC AND FISCAL IMPACTS OF CONSTRUCTING THE LEWIS AND CLARK RURAL WATER SYSTEM: 2004 STUDY AND 2006 UPDATE, 2 – 3, 63 – 64 (March 2006), available at: http://www.lcrws.org/pdf/EconomicImpactStudy/EconomicImpactStudy.pdf . *See also* BUREAU OF RECLAMATION, *supra* note 1 at 4 (discussing Federal costs for currently authorized rural water projects).

- Livestock Use: Rural water projects provide a more reliable and better supply of water for livestock. They also have the potential to decrease the impacts of livestock grazing on riparian areas by allowing for the delivery of water away from these sensitive areas.

- Increased Property Values: In some areas, the resale value of property may increase with a more reliable, safe, clean and adequate water supply.

IV. THE USE OF THE RECLAMATION FUND UNDER S. 1365

Title I of S. 1365 would provide funding for eligible rural water projects by establishing a Reclamation Rural Water Construction and Settlement Implementation Fund (the "RWP" Fund) within the U.S. Treasury, and within the RWP Fund a separate Rural Water Project Account and Reclamation Infrastructure and Settlement Account, that would be financed from revenues that would otherwise be deposited in the Reclamation Fund. These monies would not be subject to further appropriation, would be in addition to other amounts appropriated for the authorized projects, and should not result in corresponding offsets to other critical Reclamation and Department of the Interior programs. The Secretary of the Interior would also invest the portion of these receipts not needed to meet current expenses, and the resulting interest and proceeds from the sale or redemption of any obligations would become part of the RWP Fund. The RWP Fund would terminate in September 2035, at which point its unexpended and unobligated balance would transfer back to the Reclamation Fund.

Congress established the Reclamation Fund when it enacted the Reclamation Act of 1902 (Pub. L. 57-161) and it was intended to be the principle means of financing Federal western water and power projects in the 17 western states. As stated in Section 1 of the Reclamation Act, the Reclamation Fund provides monies "...reserved, set aside, and appropriated as a special fund in the Treasury."

Reclamation Fund receipts are derived from water and power sales, project repayments, and receipts from public land sales and leases in the 17 western states, as well as oil and mineral-leasing related royalties. However, the receipts that accrue to the Reclamation Fund each year are only available for expenditure pursuant to annual appropriations acts. Over the years, rising energy prices and declining Federal expenditures from the Reclamation Fund for Reclamation purposes have resulted in an increasingly large unobligated balance.

According to the Administration's FY 2016 budget request, actual and estimated appropriations from the Reclamation Fund were $901 million for FY 2014 and $914 million for FY 2015. Appropriations requested for FY 2016 from the Reclamation Fund are $856 million, a substantial decrease. This compares with actual and estimated receipts and collection to the Fund of $1.984 billion for FY 2014, $1.849 billion for FY 2015 and $1.846 billion for FY 2016. As a result, the Reclamation Fund's unobligated balance is expected to grow from an actual balance of $13.1 billion in FY 2014 to an estimated amount of over $15 billion by the end of FY 2016.[14] Contrary to Congress' original intent, instead of supporting western water development, much of the unobligated balance has gone instead to other Federal purposes. The WSWC has

[14] THE APPENDIX, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2016, 650 (April 2015), http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/int.pdf.

long supported using the Reclamation Fund for its intended purpose of financing western water development, including the types of rural water projects that would receive funding under S. 1365.

Unlike typical Congressional authorizations that often do not specify a funding source and may require more Federal monies in addition to current authorizations, S.1365 would employ an established stream of receipts and associated interest. Furthermore, as required by Section 103(c), no amounts may be deposited in, or made available from, the RWP Fund if the transfer or availability of the amounts would increase the Federal deficit.

It is also important to note that the concept of using receipts accruing to the RWP Fund to establish a separate account to finance specific water projects is not new. Specifically, Congress established the Reclamation Water Settlements Fund (RWSF) under Title X of the Omnibus Public Lands Management Act of 2009 (Pub. L. 111-11). The RWSF consists of receipts transferred from the Reclamation Fund and provides specified levels of funding starting in FY 2020 for a period of 10 years to help finance specified water infrastructure projects that are part of Congressionally-authorized water settlements, especially Indian water rights settlements. The use of these funds furthers the construction of much needed water infrastructure in the West in accordance with the Reclamation Fund's original intent and purpose.

V. FUNDING PRIORITIZATION UNDER S. 1365

Before expenditures from the RWP Fund could be made, Section 202(b)(1) of S. 1365 would require the Secretary of the Interior to develop programmatic goals to ensure that the authorized projects are constructed as expeditiously as possible, and in a manner that reflects the goals of the Rural Water Supply Act of 2006. The bill would also require the Secretary to develop funding prioritization criteria that would consider: (1) the "urgent and compelling need" for potable water supplies in affected communities; (2) the status of the current stages of completion of a given project; (3) the financial needs of affected rural and tribal communities; (4) the potential economic benefits of the expenditures on job creation and general economic development in affected communities; (5) the ability of an authorized project to address regional and watershed level water supply needs; (6) a project's ability to minimize water and energy consumption and encourage the development of renewable energy resources, such as wind, solar, and hydropower; (7) the needs of Indian tribes and tribal members, as well as other community needs or interests; and (8) such other factors as the Secretary deems appropriate.

The WSWC stated in a June 8, 2012 letter (attached) that these programmatic goals and funding priorities "...should be developed in a transparent manner in consultation with the affected communities and States – and should consider existing state water plans and priorities." States and the affected communities have on-the-ground knowledge of the facts and circumstances associated with the authorized projects that would receive funding under S. 1365, and are therefore the most appropriate entities to assist the Secretary in developing these goals and priorities.

VI. RECLAMATION AND RURAL WATER PROJECTS

Reclamation is well suited to carry out the development and construction of the authorized rural water projects that would receive funding under S. 1365. These specific projects are already authorized and under construction by Reclamation, which has a long history of

planning, designing and constructing water infrastructure projects in the West. Most other existing federal water quality and supply programs typically provide loans, grants, or loan guarantees. However, many smaller and poorer rural communities have very limited capacity and little experience to be able to design and construct water projects with financial assistance alone. Consequently, they often need the experience and assistance that Reclamation can provide to help assess needs, design, plan, and construct large water infrastructure projects.

VII. CONCLUSION

The expedited construction of authorized rural water projects facilitated by S. 1365 will save the Treasury money in the long run, as costs continue to rise, and fulfill Federal obligations in a more timely manner, including Federal tribal trust responsibilities. Postponing spending on this obligation through inadequate or insufficient funding levels only increases Federal costs and perpetuates hardships to rural and tribal communities in the West. S. 1365 would not only fulfill solemn Federal obligations, but also provide needed economic development and job creation.

Importantly, the bill would use receipts that are already accruing to the Reclamation Fund for their intended purpose of financing the construction of western water projects.

The WSWC appreciates the opportunity to submit this testimony, and urges the Committee to approve S. 1365 and work with the States towards its effective implementation.

WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

June 8, 2012 Position No. 343

Senator Jeff Bingaman, Chairman
Energy and Natural Resources Committee
United States Senate
SD-364 Dirksen Senate Office Building
Washington, DC 20510

Senator Lisa Murkowski, Ranking Member
Energy and Natural Resources Committee
United States Senate
SD-312 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

On behalf of the Western States Water Council, which represents eighteen states, I am writing to express our support for legislative action to establish a dedicated funding source for the completion of federal rural water projects authorized by the Congress for construction by the Bureau of Reclamation. These projects include components that benefit both Indian and non-Indian rural communities. Many of these communities, particularly smaller communities, are struggling to provide adequate water supplies to meet the needs of their citizens of a quality consistent with federal mandates.

It is essential that these projects be completed in a timely manner for the benefit of these communities in fulfillment of long-standing promises and trust responsibilities, some dating back decades. Another important consideration is the impact on the federal budget and economic growth. Accelerated construction scheduling, made possible by a more timely federal investment of modest amounts, will minimize long-term federal expenditures and create more jobs now.

With respect to programmatic goals and funding priorities established pursuant to directives in any legislation, these should be developed in a transparent manner in consultation with the affected communities and States -- and should consider existing state water plans and priorities.

We appreciate the opportunity to express our interests and look forward to working with you to address this important need.

Sincerely,

Phillip C. Ward
Chairman
Western States Water Council

Position No. 376

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
in support of
INDIAN WATER RIGHTS SETTLEMENTS
Scottsdale, Arizona
October 10, 2014

WHEREAS, the Western States Water Council, an organization of eighteen western states and adjunct to the Western Governors' Association, has consistently supported negotiated settlement of disputed Indian water rights claims; and

WHEREAS, the public interest and sound public policy require the resolution of Indian water rights claims in a manner that is least disruptive to existing uses of water; and

WHEREAS, negotiated quantification of Indian water rights claims is a highly desirable process which can achieve quantifications fairly, efficiently, and with the least cost; and

WHEREAS, the advantages of negotiated settlements include: (i) the ability to be flexible and to tailor solutions to the unique circumstances of each situation; (ii) the ability to promote conservation and sound water management practices; and (iii) the ability to establish the basis for cooperative partnerships between Indian and non-Indian communities; and

WHEREAS, the successful resolution of certain claims may require "physical solutions," such as development of federal water projects and improved water delivery and application techniques; and

WHEREAS, the United States has developed many major water projects that compete for use of waters claimed by Indians and non-Indians, and has a responsibility to both to assist in resolving such conflicts; and

WHEREAS, the settlement of Native American water claims and land claims is one of the most important aspects of the United States' trust obligation to Native Americans and is of vital importance to the country as a whole and not just individual tribes or States; and

WHEREAS, the obligation to fund resulting settlements is analogous to, and no less serious than the obligation of the United States to pay judgments rendered against it; and

WHEREAS, Indian water rights settlements involve a waiver of both tribal water right claims and tribal breach of trust claims that otherwise could result in court-ordered judgments against the United States and increase costs for federal taxpayers; and

WHEREAS, current budgetary pressures and legislative policies make it difficult for the Administration, the states and the tribes to negotiate settlements knowing that they may not be funded because either they are considered earmarks or because funding must be offset by a corresponding reduction in some other expenditure, such as another tribal or essential Interior Department program;

NOW, THEREFORE, BE IT RESOLVED, that the Western States Water Council reiterates its support for the policy of encouraging negotiated settlements of disputed Indian water rights claims as the best solution to a critical problem that affects almost all of the Western States; and

BE IT FURTHER RESOLVED, that the Western States Water Council urges the Administration to support its stated policy in favor of Indian land and water settlements with a strong fiscal commitment for meaningful federal contributions to these settlements that recognizes the trust obligations of the United States government; and

BE IT FURTHER RESOLVED, that Congress should expand opportunities to provide funding for the Bureau of Reclamation to undertake project construction related to settlements from revenues accruing to the Reclamation Fund, recognizing the existence of other legitimate needs that may be financed by these reserves; and

BE IT FURTHER RESOLVED, that Indian water rights settlements are not and should not be defined as Congressional earmarks; and

BE IT FURTHER RESOLVED, that steps be taken to ensure that any water settlement, once authorized by the Congress and approved by the President, will be funded without a corresponding offset, including cuts to some other tribal or essential Interior Department program.

(See also Nos. 250, 275, 310, and 336)
Originally adopted March 21, 2003
Revised and reaffirmed Mar 29, 2006, October 17, 2008, and October 7, 2011

Position No. 367
Revised and Readopted
(formerly Position No. 333 – 7/29/2011;
See also Position No. 304 – 7/11/2008)

RESOLUTION
of the
WESTERN STATES WATER COUNCIL
regarding the
THE RECLAMATION FUND
Helena, Montana
July 18, 2014

WHEREAS, in the West, water is indeed our "life blood," a vital and scarce resource the availability of which has and continues to circumscribe growth, development and our economic well being and environmental quality of life -- the wise conservation and management of which is critical to maintaining human life, health, welfare, property and environmental and natural resources; and

WHEREAS, recognizing the critical importance of water in the development of the West, the Congress passed the Reclamation Act on June 17, 1902 and provided monies "reserved, set aside, and appropriated as a special fund in the Treasury to be known as the 'reclamation fund,' to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of water for the reclamation of arid and semiarid land..." in seventeen western states, to be continually invested and reinvested; and

WHEREAS, then President Theodore Roosevelt stated, "The work of the Reclamation Service in developing the larger opportunities of the western half of our country for irrigation is more important than almost any other movement. The constant purpose of the Government in connection with the Reclamation Service has been to use the water resources of the public lands for the ultimate greatest good of the greatest number; in other words, to put upon the land permanent homemakers, to use and develop it for themselves and for their children and children's children...;"[15] and

WHEREAS, the Secretary of the Interior was authorized and directed to "locate and construct" water resource projects to help people settle and prosper in this arid region, leading to the establishment of the Reclamation Service – today's U.S. Bureau of Reclamation; and

WHEREAS, western states and the Bureau of Reclamation have worked in collaboration to meet the water-related needs of the citizens of the West, and protect the interests of all Americans, recognizing changing public values and the need to put scarce water resources to beneficial use for the "ultimate greatest good of the greatest number;" and

[15]State of the Union Address, 1907

Position No. 367
Revised and Readopted
(formerly Position No. 333 – 7/29/2011;
See also Position No. 304 – 7/11/2008)

WHEREAS, the Bureau of Reclamation has built facilities that include 348 reservoirs with the capacity to store 245 million acre-feet of water, irrigating approximately 10 million acres of farmland that produce 60 percent of the nation's vegetables and 25 percent of its fruits and nuts, as well as providing water to about 31 million people for municipal and industrial uses, while generating more than 40 billion kilowatt hours of energy each year from 53 hydroelectric power plants, enough to serve 3.5 million households, while providing 289 recreation areas with over 90 million visits annually, and further providing flood control, and fish and wildlife benefits; and

WHEREAS, project sponsors have and continue to repay the cost of these facilities, which also produce power receipts that annually return nearly one billion in gross power revenues to the federal government, prevent millions in damages due to floods each year, and generate billions of dollars in economic returns from agricultural production; and

WHEREAS, the water and power resources developed under and flood control provided by the Reclamation Act over the last century supported the development and continue to be critical to the maintenance of numerous and diverse rural communities across the West and the major metropolitan areas of Albuquerque, Amarillo, Boise, Denver, El Paso, Las Vegas, Los Angeles, Lubbock, Phoenix, Portland, Reno, Sacramento, Salt Lake City, Seattle, Tucson and numerous other smaller cities; and

WHEREAS, western States are committed to continuing to work cooperatively with the Department of Interior and Bureau of Reclamation to meet our present water needs in the West and those of future generations, within the framework of state water law, as envisioned by President Roosevelt and the Congress in 1902; and

WHEREAS, according to the Administration's FY 2015 request actual and estimated receipts and collections accruing to the Reclamation Fund are $2.046 billion for FY 2013, $2.002 billion for FY 2014, and $2.037 billion for FY2015, compared to actual and estimated appropriations of $858 million for FY 2013, $913 million for FY 2014, and $819 million for FY 2015and as a result the unobligated balance at the end of each year respectively is calculated to be $12.029 billion, $13.118 billion and $14.336 billion respectively; and

WHEREAS, this unobligated balance in the Reclamation Fund continues to grow at an increasing rate from an actual balance of $5.67 billion at the end of FY 2006, to the estimated $14.336 billion by the end of FY 2015, over a 150% increase; and

WHEREAS, under the Reclamation Act of 1902, the Reclamation Fund was envisioned as the principle means to finance federal western water and power projects with revenues from western resources and its receipts are derived from water and power sales, project repayments, certain receipts from public land sales, leases and rentals in the 17 western states, as well as certain oil and mineral-related royalties – but these receipts are only available for expenditure pursuant to annual appropriation acts; and

Position No. 367
Revised and Readopted
(formerly Position No. 333 – 7/29/2011;
See also Position No. 304 – 7/11/2008)

WHEREAS, with growing receipts in part due to high energy prices and declining federal expenditures for Reclamation purposes, the unobligated figure gets larger and larger, while the money is actually spent elsewhere for other federal purposes contrary to the Congress' original intent;

NOW THEREFORE BE IT RESOLVED, that the Western States Water Council asks the Administration and the Congress to fully appropriate the receipts and collections accruing to the Reclamation Fund subsequent to the Reclamation Act and other acts for their intended purpose in the continuing conservation, development and wise use of western resources to meet western water-related needs -- recognizing and continuing to defer to the primacy of western water laws in allocating water among uses -- and work with the States to meet the challenges of the future.

BE IT FURTHER RESOLVED, that such "needs" may include the construction of Reclamation facilities incorporated as part of a Congressionally approved Indian water right settlement.

BE IT FURTHER RESOLVED, that the Administration and the Congress investigate the advantages of converting the Reclamation Fund from a special account to a true revolving trust fund with annual receipts to be appropriated for authorized purposes in the year following their deposit (similar to some other federal authorities and trust accounts).

Senator DAINES. Thank you, Mr. Willardson.
Mr. Yates?

STATEMENT OF RYAN YATES, DIRECTOR OF CONGRESSIONAL RELATIONS, AMERICAN FARM BUREAU FEDERATION

Mr. YATES. Senator Daines, Ranking Member Hirono, Senator Franken, other members of the Subcommittee, thank you for calling this important hearing on S. 982, the Water Rights Protection Act, and inviting me to testify on behalf of the American Farm Bureau Federation and the nation's farmers and ranchers.

On behalf of the nearly six million Farm Bureau member families across the United States I commend you for your leadership in advancing legislation to prevent attempts by Federal land management agencies to circumvent long standing state water law. The Farm Bureau has a strong interest in ensuring that the relationship between Federal land management agencies and public land ranchers is maintained.

Federal land management agencies have begun to pressure private land owned businesses to surrender long held water rights which they have paid for and developed as a condition of receiving renewals in their special use permits that allow them to operate on public land. Specifically the Forest Service has applied a water clause to special use permits which requires an applicant to transfer his or her lawfully acquired water right into a joint ownership agreement with the United States Government as a condition of granting a renewal of the permit.

What's more troubling is that the clause also grants the United States Government sole ownership of the water right in the event of revocation of the permit. Use of the D30 water clause was struck down by a Federal judge in 2012 in a lawsuit brought by the National Ski Areas Association. These kinds of actions by the Federal Government violate Federal and State law and will ultimately upset water allocation systems and private property rights on which western economies have been built.

It is no secret that the Forest Service has long sought to expand Federal ownership of water rights in the Western United States. In an August 15th 2008 Intermountain Region briefing paper addressing applications, permits or certificates filed by the United States for stock water, the Forest Service claimed, "It is the policy of the Intermountain Region that livestock water rights used on National Forest grazing allotments should be held in the name of the United States."

During a House Natural Resources hearing held on March 12th, 2012 the Forest Service testified the Forest Service believes water sources used to water permitted livestock on Federal land are integral to the land where the livestock grazing occurs, therefore the United States should hold the water rights for current and future grazing.

Lastly, the recently withdrawn Forest Service Groundwater Directive would have formally codified the Forest Service efforts to require the transfer of privately held water rights to the Federal Government as a condition of a permit's renewal.

The Forest Service has even argued that the Clean Water Act provides the agency the statutory authority to implement their

policies concerning the transfer or takings of water rights. Thus, while the EPA's final Waters of the U.S. rule raises many policy questions and concerns, one additional cause for alarm is the impact that it may have on lawfully held water rights held by farmers and ranchers.

During a recent hearing of the House Natural Resources Committee this year Forest Service Deputy Chief Leslie Weldon acknowledged that the Chief of the Forest Service stated that the proposed directive has been put on hold. While we applaud the agency's withdrawal of the flawed proposal we remain concerned that this withdrawal is only temporary. After acknowledging the withdrawal, Deputy Chief Weldon testified that the Forest Service, "will publish a new draft for a new round of public comment before any direction is finalized."

In addition to land perhaps the most valuable resource for every farmer and rancher in America is water. In order to provide the food, feed, fuel and fiber for the nation and the world farmers and ranchers simply need to have access to water. This is especially crucial in the West.

Moreover we believe they have the right to expect that their lawfully acquired water rights should be respected by the Federal Government. Passage of S. 982 represents an important and necessary step in protecting private property rights and upholding long established water law by prohibiting Federal agencies from expropriating water rights through the use of permits or leases.

Further, this legislation recognizes the ability of states to confer water rights, acknowledges that the Federal Government will respect those lawfully acquired rights and assures valid holders of water rights under state law cannot have those rights diminished or otherwise jeopardized by assertions of rights by Federal agencies.

It is important to note that S. 982 does not confer any new rights or diminish any existing rights. Passage of S. 982 will not provide landowners with more than they currently have nor will it diminish any existing authority from the Federal Government. The Water Rights Protection Act simply assures that Federal agencies will respect long standing State and Federal water law and uphold the Federal Government's long standing deference to the states on matters of water rights.

The American Farm Bureau Federation appreciates the Committee's willingness to listen to the concerns of our members. The need for permanent legislation to protect private property rights from the ongoing threats of Federal takings cannot be overstated. Farmers, ranchers, and small businesses rely on regulatory certainty and the constitutional protection of private property rights to make sound business decisions.

We look forward to working with the Committee on securing enactment of this critically important legislation.

Thank you.

[The prepared statement of Mr. Yates follows:]

Statement of the American Farm Bureau Federation

TO THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

RE: "S. 982 (BARRASSO), THE WATER RIGHTS PROTECTION ACT OF 2015'

JUNE 18, 2015

Presented by:
Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

600 Maryland Ave. SW | Suite 1000W | Washington, DC 20024 | p. 202.406.3600 | f. 202.406.3606 | www.fb.org

Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

Chairman Lee, Ranking Member Hirono, and Members of the Subcommittee, thank you for calling this important hearing on the Water Rights Protection Act and inviting me to testify on behalf of the American Farm Bureau Federation (AFBF) and the nation's farmers and ranchers. My name is Ryan Yates and I am Director of Congressional Relations at AFBF.

On behalf of the nearly 6 million Farm Bureau member families across the United States, I commend you for your leadership in advancing legislation to prevent attempts by federal land management agencies to circumvent long-standing state water law. Farm Bureau has a strong interest in ensuring that the longstanding relationship between federal land management agencies and public land ranchers is maintained, and I am pleased to offer this testimony this afternoon on behalf of our organization.

The U.S. Forest Service and other federal agencies have begun to pressure privately owned businesses to surrender long-held water rights – which they have paid for and developed – as a condition of receiving renewals in their special use permits that allow them to operate on public land. These kinds of actions by the federal government violate federal and state law and will ultimately upset water allocation systems and private property rights on which western economies have been built.

It is no secret that the Forest Service has long sought to expand federal ownership of water rights in the western United States. In an Aug. 15, 2008, Intermountain Region briefing paper addressing applications, permits or certificates filed by the United States for stock water, the Forest Service claimed, "It is the policy of the Intermountain Region that livestock water rights used on national forest grazing allotments should be held in the name of the United States to provide continued support for public land livestock grazing programs." Further, another Intermountain Region guidance document dated Aug. 29, 2008, states, "The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting these claims, it is not known whether or not these claims will be recognized as water rights." During a House Natural Resources hearing on March 12, 2012, the Forest Service testified, "The Forest Service believes water sources used to water permitted livestock on federal land are integral to the land where the livestock grazing occurs; therefore, the United States should hold the water rights for current and future grazing." Lastly, the recently withdrawn Forest Service groundwater directive (directive) would have formally codified the Forest Service efforts to require the transfer of privately held water rights to the federal government as a condition of a permit's renewal into the agency's policy handbook.

During a recent hearing of the House Natural Resources Committee Water and Power Subcommittee, Forest Service Deputy Chief Leslie Weldon acknowledged that the "Chief of the Forest Service stated that the proposed directive has been put on hold." While we applaud the agency's withdrawal of the flawed proposal, we remain concerned that this withdrawal is only temporary. After acknowledging the withdrawal, Deputy Chief Weldon testified that the Forest Service "will publish a new draft for a new round of public comment before any direction is finalized."

In addition to land, perhaps the most valuable resource for every farmer and rancher in America is water. In order to provide the food, feed, fuel and fiber for the nation and the world, farmers and ranchers simply need to have access to water. This is especially crucial in the west.

Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

Moreover, we believe they have a right to expect that their lawfully acquired water rights should be respected by the federal government.

The Forest Service has even argued that the Clean Water Act provides the agency the statutory authority to implement their policies concerning the transfer or takings of water rights. Thus, while EPA's final "waters of the U.S." rule raises many policy questions and concerns, one additional cause for alarm is the impact it might have on lawfully held water rights by farmers and ranchers.

Passage of S. 982 represents an important and necessary step in protecting private property rights and upholding long-established water law by prohibiting federal agencies from expropriating water rights through the use of permits, leases and other land management arrangements. Further, the legislation recognizes the ability of states to confer water rights, acknowledges that the federal government will respect those lawfully acquired rights, and assures valid holders of water rights under state law cannot have those rights diminished or otherwise jeopardized by assertions of rights by federal agencies when those assertions have no basis in federal or state law.

Congressional History of Western Water Law

Scarcity of water in the Great Basin and southwest United States led to the development of a system of water allocation that is very different from how water is allocated in regions graced with abundant moisture. Rights to water are based on actual use of the water and continued use for beneficial purposes as determined by state laws. Water rights across the west are treated in a fashion similar to property rights, even though the water is the property of the citizens of the states. Water rights can be and often are used as collateral on mortgages as well as improvements to land and infrastructure.

The settlers in the arid west developed their own customs, laws and judicial determinations to deal with mining, agriculture, domestic and other competing uses recognizing and establishing the prior appropriation doctrine, which is first in time, first in right. Out of these grew a fairly uniform body of laws and rights across the western states. The federal government as original sovereign and owner of the land and water prior to Congress granting statehood ultimately chose to acquiesce to the territories and later the states on control, management and allocation of water.

Act of July 26, 1866:

The United States Congress passed the Act of July 26, 1866 [subsequently the Ditch Act of 1866] that became the foundation for what today is referred to as "Western Water Law." The Act recognized the common-law practices that were already in place as settlers made their way to the western territories including Utah. Congress declared:

"Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected"

(43 USC Section 661)

Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

This Act of Congress obligated the federal government to recognize the rights of the individual possessors of water, but as important, recognized "local customs, laws and decisions of state courts."

The Desert Land Act of 1877:

"All surplus water over and above such actual appropriation and use....shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing..."

The Taylor Grazing Act of 1934:

"nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes..."

The McCarran Amendment of 1952:

Congress established a unified method to allocate the use of water between federal and non-federal users in the McCarran Amendment. (43 USC Section 666) The McCarran Amendment waives the sovereign immunity of the United States for adjudications for all rights to use water.

"waives the sovereign immunity of the United States for adjudications for all rights to use water."

The 1976 Federal Land Policy Management Act:

"All actions by the Secretary concerned under this act shall be subject to valid existing rights."

Congress has been explicit in the limits it has established on sovereignty and states' rights for the United State Forest Service and other land management agencies.

Forest Service Groundwater Management Directive

While the Forest Service has stated that it has withdrawn its groundwater directive, it acknowledges that this withdrawal is only temporary. Recognizing that a new and revised directive may likely be on the horizon, we believe it is important for the Committee to understand the primary concerns that farmers and ranchers have with the proposed directive.

Lack of Legal Authority

One of our primary criticisms of ongoing federal efforts to regulate groundwater (Directive) is that the land management agencies lack legal authority to regulate groundwater. The Organic Administration Act of 1897 (Organic Act) vests the Forest Service with the authority to manage surface waters under certain circumstances. The statute provides no authority for management of groundwater. Nor does the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) provide the agency with authority over groundwater. That statute merely provides "that watershed protection is one of five co-equal purposes for which the NFS lands were established and are to be administered." 2560.01(1)(f). See *United States v. New Mexico*, 438 U.S. 696, 713 (1978).

Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

The proposed directive would have required the agency to "consider the effects of proposed actions on groundwater quantity, quality, and timing prior to approving a proposed use or implementing a Forest Service Activity." [2560.03(4)(a)(d)] The Forest Service does not currently own or manage groundwater nor does it have the authority to approve or disapprove uses of water that are granted under state law; this state authority is recognized both by federal statutes and in court precedents.

The Forest Service cites several statutes, including the Organic Act, the Weeks Act and MUSYA, to frame its expansive regulatory view in seeking authority to manage groundwater. The agency incorrectly interprets the purposes for which water is reserved as a provision of the Organic Act. The Organic Act simply authorizes the Forest Service to manage the land, vegetation and surface uses. The Act does not provide authority to manage or dispose of the groundwater or surface waters of the states based on the agency-declared "connectivity."

The Weeks Act states, "The Secretary of Agriculture is hereby authorized and directed to examine, locate, and purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber." 16 U.S.C. § 515. The Forest Service inappropriately attempts to use this reference of "navigable streams" to include regulation of groundwater, which is not referenced in the Weeks Act.

The United States Supreme Court has gone to great lengths to bring clarity to the scope of the Organic Act's determination that federal authority extends only to prudent management for surface water resources. In *United States v. New Mexico*, the Court defined prudent management to:

1) "secure favorable water flows for private and public uses under state law," and
2) "furnish a continuous supply of timber for the people."

The agency authority is narrowed to proper management of the surface to achieve the specific purpose of the Organic Act – not the direct management of the groundwater and agency-declared interconnected surface waters. MUSYA does not expand the reserved water rights of the United States. *United States v. New Mexico*, 438 U.S. 696, 713 (1978). Additionally, the court denied the Forest Service's instream flow claim for fish, wildlife and recreation uses. Specifically, the court denied the claim on the grounds that reserved water rights for National Forest System lands established under the Forest Service's Organic Act of 1897 are limited to the minimum amount of water necessary to satisfy the primary purposes of the Organic Act – conservation of favorable water flows and the production of timber – and were not available to satisfy the claimed instream flow uses.[1]

Inexplicably, the Forest Service also points to the Clean Water Act as a source of legal authority and direction for the directive. 2560.01. There is no explanation of how the Clean Water Act applies to this directive or how sections 303, 401, 402 or 404 of the Clean Water Act (cited in the directive) provide any legal authority to the Forest Service to regulate groundwater. The Clean Water Act does not even grant the federal government jurisdiction over groundwater. At a minimum, federal agencies must provide a modicum of justification for any claim of legal

[1] http://www.justice.gov/enrd/3245.htm

Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

authority, particularly when the Forest Service has no authority whatsoever to implement the Clean Water Act.

Expansion of Federal Authority through Interconnectivity Clause

The directive proposed a new standard of interconnectivity [2560.03(2)] by proposing to "manage surface water and groundwater resources as hydraulically interconnected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information." Presuming that all groundwater and surface waters are interconnected implies the agency has authority to manage, monitor and mitigate water resources on all NFS lands. This assumption of federal authority violates federal and state statutes and will ultimately upset water allocation systems and private property rights on which western economies have been built. In an era of limited federal budgets, this attempt to expand the reach of the agency into individual and state activities is particularly inappropriate.

Whether or not water is "connected" is not the sole, or even most critical, factor for asserting regulatory authority. The Forest Service's attempt to use extremely controversial Clean Water Act terminology such as any "hydrological connection" to establish its authority over water rights is misplaced and unlawful. In fact, the Supreme Court specifically rejected the "any hydrological connection" approach to federal jurisdiction. *Rapanos et ux., v. United States* 547 U.S. 715 (2006).

Further, the directive expands current Forest Service regulatory scope of groundwater resources to a watershed-wide scale, including both Forest Service lands and adjacent non-federal lands. Specifically, the new policy states the agency will, "evaluate and manage the surface-groundwater hydrological system on an appropriate spatial scale, taking into account surface water and groundwater watersheds, which may or may not be identical and relevant aquifer systems," and "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, and identify any potential injury to those resources or Forest Service water rights under applicable state procedures (FSM 2541)." This is an unprecedented attempt to expand federal authority in approving state-granted water rights.

With the exception of federally reserved rights that are specifically set out either in statute or recognized by the courts, the states own and manage the water within their jurisdictions. The manner in which states regulate water rights differs substantially, particularly between western states, where the appropriation doctrine is common, and eastern states where the riparian system is in more general use. Farm Bureau supports the present system of appropriation of water rights through state law and opposes any federal vitiation or preemption of state water law. Water rights as property rights cannot be taken without compensation and due process of law. There is no legal or policy justification for the Forest Service to insert itself in this regulatory arena by attempting to use the permitting process to circumvent state water law or force existing water rights holders to relinquish their rights.

Without clear congressional authorization, federal agencies may not use their administrative authority to "alter the federal-state framework by permitting federal encroachment upon traditional state power." In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers,* 531 U.S. 159 (2001). Although SWANCC was decided in the context of the Clean Water Act, the legal principle is the same: federal agencies must have clear

Ryan R. Yates
Director of Congressional Relations
American Farm Bureau Federation

congressional direction before altering the balance of federal and state authorities. The Forest Service has none here. It is clear that by proposing to manage the groundwater resources and interconnected surface waters within the states on a massive watershed basis, the Forest Service's proposed directive exceeds the agency's statutory authority and seeks to redefine the federal-state framework. The manner in which the directives insert the Forest Service in the evaluation of "all applications to States for water rights on NFS lands and applications for water rights on adjacent lands" (FSM 2560.03(6)(f)), contravenes this federally established system of deferral to the states. The Forest Service cannot and should not act where congressional authority has not been granted to it.

Constitutional Takings Violation

The directive would authorize actions that would appear to violate the takings clause of the United States Constitution. The 5th amendment provides protections for citizens from government takings of private property without just compensation. The directive provides that the Forest Service would be required to "obtain water rights under applicable state law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM 2540)" and "[Require] written authorization holders operating on NFS lands to obtain water rights in compliance with applicable State law, FSM 2540, and the terms and conditions of their authorization."

Requiring written authorization for permitted uses including livestock grazing on NFS lands provides a vehicle for the agency to obtain water rights based on the permittee's agreement to comply with the "terms and conditions of the conditional use authorization." Under the Forest Service's terms and conditions [FSM 2541.32], the agency will now be able to require holders of water rights with permitted activities on system lands to comply with the water clause and to hold their water rights "jointly" with the United States. Further, there is no reference in the directive to the government's obligation to pay just compensation for the surrender to the government of privately held water rights legally adjudicated by the state.

Conclusion

Through statute and years of well-established case law, states have developed systems to fairly appropriate often scarce water resources to users. Because water is the lifeblood for all farm and ranch operations, we are greatly concerned that some agencies in the federal government apparently wish to bypass or ignore the established system of water rights.

The American Farm Bureau Federation appreciates the Committee's willingness to listen to the concerns of our members. The need for permanent legislation to protect private water rights from the ongoing threats of federal takings cannot be overstated. Farmers, ranchers, and small businesses rely on regulatory certainty and the constitutional protection of private property rights to make sound business decisions. We look forward to continuing to work with you and the Senate Energy and Natural Resources Committee in securing enactment of this critically important legislation. Thank you.

Senator DAINES. Thank you, Mr. Yates.

The Chair will now yield to the Ranking Member of the Subcommittee, Senator Hirono, for her opening remarks.

STATEMENT OF HON. MAZIE K. HIRONO, U.S. SENATOR FROM HAWAII

Senator HIRONO. Thank you, Senator Daines, and I would like to thank Chairman Barrasso for holding this hearing.

Good afternoon to all of you, and I thank all the panelists for being here.

This is the first hearing of the Subcommittee on Water and Power of the 114th Congress. The Subcommittee's work is critical to communities across the nation as water is fundamental to all aspects of life.

In the native Hawaiian culture, you can guess I represent Hawaii, water or wai, is considered a sacred source of life. Water was the most sought after resource by native Hawaiians and streams often provided the boundaries for land subdivisions or Ahupua'a. It was water that shaped communities as native Hawaiians understood that a constant supply of fresh water was critical to sustain their lives. It is because of this understanding that the protection and sharing of water is so fundamental to Hawaiian culture.

Fast forward to today and water remains an essential concern. Hawaii has to be especially creative when it comes to maximizing benefits of our limited water resources. We do not have other states to lean on, and water can be a limited factor as we search for ways to be more food as well as energy sustainable.

Hawaii just recently committed to being 100 percent reliant on renewable energy sources by 2045, a bold and ambitious move. Yet we often have to make such bold and ambitious commitments far in advance of other states. Just recently the Hawaii State Legislature passed a bill to expand the development of hydro electric projects on agricultural lands, which would contribute to making Hawaii more energy and food sustainable.

Of course water is fundamental to every state. The stewardship of this precious resource includes developing smart policies that protect, conserve and manage water at the watershed scale, balancing the many water needs of our communities, supporting sustainable development of our economies and protecting the ecosystem and special places that depend on those waters. These responsibilities are at the heart of our work here on the Subcommittee, and I look forward to working with all of you and my colleagues to advance water legislation.

Regarding the legislation that is before us today, one bill, in particular, stands out as good public policy to support sustainable water supplies. Senators Tester and Daines's Rural Water Project Act, S. 1365, would provide dedicated funding for rural water projects and Indian water rights settlements. I know that when I came in at least one of you testified to that point.

It is hard to imagine that in the 21st century there are still communities in the United States that do not have adequate drinking water supplies. We have a responsibility to ensure that all communities have access to clean, potable water. Providing dedicated

funding to complete rural water projects is critical to doing so and will save taxpayers money over the long run.

This bill is also important because it supports the United States in meeting its responsibilities to Native American tribes. Since the 1970's the U.S. has enacted more than 29 Indian water rights settlements. However, the claims of hundreds of tribes remain unresolved and funding remains a major barrier.

In the coming decades, nearly two dozen settlements, costing billions of dollars, are likely to be enacted. S. 1365 would provide modest, dedicated funding for these settlements which would enable the Federal Government to better plan for settlement costs and save money over time. It would enable more timely resolution of the tribal claims, support economic development in Indian Country and bring greater certainty to water in the West, which is especially important as competition for water and drought intensify.

Among the other bills before us today, I am particularly interested in hearing the thoughts of our witnesses on S. 982, the Water Rights Protection Act. The Administration and others have raised concerns about the potential impacts of this bill on the Federal Government's authority to manage public lands and waters, protect tribal and Federal rights and ensure water is available for environmental uses. It is important that we fully understand what this bill does and its potential implications.

In developing new policies, we should be looking at how to improve the way the Federal Government does business. S. 593, the Bureau of Reclamation Transparency Act, and S. 1533, the Water Supply Permitting Act, are aimed at improving Reclamation practices in managing our nation's water infrastructure and permitting processes. We can always improve government business practices so long as they do not adversely impact the public good or the environment.

I look forward to hearing more from the experts. We will have some questions for you today about your thoughts on these legislative proposals.

Finally, the remaining bills on the agenda today involve specific infrastructure projects including a reservoir project in Wyoming, two rural water projects in Montana and an irrigation project in Nebraska. These bills are relatively straight forward.

We face significant challenges in the stewardship of our nation's water supplies, particularly in a time of unprecedented drought and climate changes.

I just read yesterday that NASA published a report indicating that 21 of our world's 37 largest aquifers are being depleted at unsustainable rates. Of those 21 troubled aquifers, two are located within the United States. There is no denying that water supply issues will continue to be a critical piece of our national conversation.

As we grapple with these issues in this Subcommittee, developing solutions will require that we work together and think creatively about water management and use, infrastructure and financing—all critical to the long term resilience of our communities and the environment.

Again, I look forward to working with all of you and the members of this Committee. Thank you very much.

I would like to ask for unanimous consent that the two statements that were submitted by the Forest Service be included in the record.

Senator DAINES. So ordered.

Senator HIRONO. Thank you.

[The information referred to follows:]

STATEMENT FOR THE RECORD
U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

BEFORE THE
UNITED STATES SENATE
COMMITTEE on ENERGY AND NATURAL RESOURCES
SUBCOMMITTE on WATER AND POWER

Concerning S. 982

June 18, 2015

Thank you for the opportunity for the U.S. Department of Agriculture (USDA), Forest Service, to provide views on S. 982, Water Rights Protection Act. S. 982 would have a significant impact on the ability of federal land management agencies to protect surface and groundwater resources on federal lands, as well as other natural resources on federal lands that depend on water. Limiting the ability of federal land management agencies to protect water on federal lands could also have negative impacts on communities, water users, and landowners downstream, as well as on fish, plants, and wildlife. The legislation is overly broad and would expose the Forest Service to litigation risk and create additional uncertainty in the administration of land uses in the National Forest System (NFS). USDA opposes S. 982.

The purposes of the NFS were established by Congress in 1897 and were primarily focused on the protection of water and watersheds and securing a continuous supply of timber. National forests in the arid West typically occupy the very top of critical watersheds, where water is stored in winter snow packs and underground and slowly released through the spring and into the summer. National forests in the east also occupy critical watersheds, preserving water quality for downstream users and moderating floods to protect downstream landowners. Communities, farmers and ranchers, Native American Tribes, and the general public depend on delivery of clean water from the national forests and grasslands. Careful consideration of activities that can have an adverse impact on waters and watersheds on NFS lands is critical to downstream water users and other inhabitants that can be impacted if these watersheds are not protected. By significantly restricting the Forest Service's ability to address these concerns, S. 982 would substantially undercut the primary purposes of the NFS established by Congress.

Section 3 of S. 982 prohibits the Secretary of the Interior or the Secretary of Agriculture from: (1) conditioning any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on the limitation, encumbrance, or transfer of any water right directly or indirectly to the United States, (2) requiring any water user to apply for or acquire a water right in the name of the United States under State law, (3) asserting jurisdiction over groundwater withdrawals or impacts on groundwater resources, or (4) infringing on the rights and obligations of a State in evaluating, allocating, and adjudicating the waters of the State originating on or under, or flowing from, land owned or managed by the Federal Government.

To the extent Section 3 precludes conditioning issuance, renewal, amendment, or extension of a land use authorization on any impairment of title to a water right, the bill would have the effect of precluding any term or condition in a special use authorization related to the exercise of water rights, since any such condition could be deemed to impair that water right. As a result, the bill would not allow the federal land management agencies to establish conditions on the exercise of water rights that are deemed necessary to ensure sufficiency of water to conduct authorized uses of NFS lands and to protect public health and safety and natural resources. The bill would limit the ability of the agencies to protect species of special concern and their habitats on federal land, particularly when they are dependent on water resources, and would limit the ability of the agencies to protect against contamination of water and other natural resources.

In addition, Section 3(1)(A) would preclude any condition limiting the transfer of a water right to a subsequent permit holder or requiring a water right to be offered for sale to a subsequent permit holder as a "designee" of the United States. Because section 3(1) would prohibit withholding issuance or renewal of a land use authorization on limitation, encumbrance, or any other impairment of a water right, this provision also could be interpreted to prohibit the Forest Service from denying a land use authorization on the basis of potential impacts on water resources from the proposed use.

Section 3(2) would prohibit the Forest Service from requiring a permit holder to acquire water rights in the name of the United States as a condition of a land use authorization. This provision would defeat the agency's ability to ensure that sufficient water exists on NFS lands to support the continuation of existing uses. The Forest Service has a longstanding responsibility to ensure sufficient water remains available for permitted activities on NFS lands. This applies to use or occupancy of NFS lands in support of a Forest Service program that uses water and needs water rights. The existing Forest Service policy does not apply to water that is diverted from NFS lands for uses off NFS lands, such as irrigation diversions and ditches, municipal reservoirs, or pipelines. The Forest Service policy also does not apply to water that is diverted from NFS lands under a state-allocated water right and used on NFS lands for oil and gas operations or mining activities.

The Forest Service recently published a proposed policy in the *Federal Register* that would establish a different approach for water rights for ski areas. Under this proposed policy, water rights for ski areas would not be required to be in the name of the United States. This different approach takes into account the long-term capital expenditures that may be involved in developing ski area water rights; the need to show their value as business assets, particularly during refinancing or sale of a ski area; the significant value ski area water rights may have, which is commensurate with the significant investment in privately owned improvements at ski areas; and the land ownership patterns at ski areas, which often involve a mix of NFS and private lands both inside and outside the ski area permit boundary, making it difficult to implement a policy of sole federal ownership for ski area water rights. Much of the development at ski areas is located on private lands at the base of the mountains. As a result, water diverted and used on NFS lands in the ski area permit boundary is also sometimes used on private land, either inside or outside the permit boundary.

The bill's provisions regarding acquisition and transfer of water rights are inappropriate or unnecessary for use and occupancy of NFS lands. In particular, the provisions in S. 982 regarding acquisition and transfer of water rights are not needed for ski areas, as the Forest Service's new ski area water clause will provide for water rights to be acquired and retained in the name of the ski area and will not require them to be in the name of or transferred to the United States.

Section 3(3) prohibits federal land management agencies from asserting jurisdiction to regulate groundwater withdrawals or impacts on groundwater resources unless exercise of that jurisdiction is consistent with and no more stringent than applicable state law and policies. This provision would allow water users to challenge the Forest Service's exercise of jurisdiction to manage uses of NFS lands to minimize adverse impacts on resources on and off those lands, including the potential for contamination resulting from those uses. Section 3(3) would limit the ability of the Forest Service to balance the multiple uses of NFS lands in accordance with the Multiple Use–Sustained Yield Act.

Section 3(4) precludes infringing on the rights and obligations of a state in evaluating, allocating, and adjudicating the waters of the state originating on or under or flowing from land owned or managed by the United States. States' authority to allocate and adjudicate water rights in prior appropriation doctrine states, where water rights are not appurtenant to the land, is already established as a matter of law. Under 43 U.S.C. § 666, the United States has waived its sovereign immunity with regard to state water rights proceedings and is subject to state water rights laws. To that extent, federal agencies like the Forest Service are already precluded from infringing on the rights of states to allocate water. However, the courts have held that the conditioning of access to water under land use authorizations by federal land management agencies to protect resources on federal lands does not infringe on the rights of the states to allocate water. This provision of the bill could be construed to override those rulings and, consistent with other provisions of the bill, to prohibit the Forest Service from including conditions in land use authorizations to protect resources and public and health and safety on NFS lands.
Section 4(a)(1) requires the Secretaries to recognize the longstanding authority of the states relating to evaluation, protection, allocation, regulation, and adjudication of groundwater by any means. Section 4(a)(2) requires coordination with the states in adoption and implementation of any Forest Service rules, policies, directives, and plans to ensure they impose no greater restrictions or requirements than state groundwater laws and programs. Like Section 3(4), this provision would make it more difficult for the Forest Service to condition land use authorizations that involve access to or use of groundwater to balance the multiple uses of federal lands and protect resources on those lands.

Section 4(b) prohibits the Forest Service from taking any action that adversely affects:

- Any water rights granted by a state.
- The authority of a state to adjudicate water rights.
- State definitions for "beneficial use," "priority of water rights," and "terms of use."
- Terms and conditions of groundwater withdrawal, guidance and reporting procedures, and conservation and source protection measures established by a state.
- The use of groundwater in accordance with state law.

- Any other rights and obligations of a state established under state law.

Collectively, these prohibitions would make it much more difficult for the Forest Service to appropriately manage NFS lands, safeguard other users of those lands, and protect the natural resources on those lands. The adverse effect of these prohibitions is amplified by their ambiguity. In particular, it is unclear how adverse effects are to be determined for many of the listed items. Moreover, the last prohibition is overbroad in that it applies to any state rights and obligations, not just state rights and obligations regarding water.

The ambiguity of the bill is exacerbated still further by Section 5, which appears to deny the plain meaning of Sections 3 and 4 of the bill. Section 5(a) provides that nothing in the bill limits or expands any existing authority of federal land management agencies to condition any land use authorization. However, this provision conflicts with Section 3 of the bill, which would effectively eliminate the Forest Service's authority to impose conditions on the exercise of water rights in its land use authorizations. Section 5(a) also conflicts with the provisions in Section 4 of the bill that limit the ability of the Forest Service to impose conditions on the use of groundwater in land use authorizations. Under existing law, the Forest Service has the responsibility to condition land use authorizations for water infrastructure to meet broad mandates that include minimizing impacts on fish and wildlife and protecting federal property, other lawful users, and public health and safety, yet this bill would significantly limit the agency's ability to carry out those responsibilities.

Section 5(c) provides that nothing in the bill affects implementation of the Endangered Species Act (ESA). This provision could conflict with other terms of the bill that limit the ability of the agency to include conditions in land use authorizations regarding water use. Section 3(1) arguably would preclude any condition on the exercise of water rights, including those that are deemed necessary to protect threatened and endangered species. Courts would normally as a matter of statutory interpretation attempt to give meaning to Section 3(1), Section 5(c), and the ESA. If the agency argued that Section 5(c) allows conditions or limits on water rights to the extent necessary to protect listed species, the Forest Service would be subject to legal challenge under Section 3(1) whenever the agency attempted to impose those conditions or limits on the grounds they were necessary to comply with the ESA.

Section 5(d) provides that nothing in the bill limits or expands existing or claimed reserved water rights of the federal government on lands administered by the Secretary of the Interior or Agriculture. This provision also would give rise to potential litigation under Section 3(1) if the Forest Service attempted to condition a federal reserved water right.

We appreciate the opportunity to present USDA views on S. 982. As detailed above, the bill would have a significant adverse impact on our longstanding authority to manage federal lands.

This concludes the USDA statement for the record.

STATEMENT FOR THE RECORD
U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE

BEFORE THE
UNITED STATES SENATE
COMMITTEE on ENERGY AND NATURAL RESOURCES
SUBCOMMITTE ON WATER AND POWER
Concerning S.1533, the Water Supply Permitting and Coordination Act

June 18, 2015

Thank you for the opportunity for the U.S. Department of Agriculture (USDA), Forest Service to provide views on S. 1533, "to authorize the Secretary of the Interior to coordinate Federal and State permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the Bureau of Reclamation as the lead agency for permit processing, and for other purposes." USDA does not support this bill.

Section 3(a) establishes the Bureau of Reclamation as the "lead agency for purposes of coordinating all reviews, analyses, opinions, statements, permits, licenses, or other approvals of decisions required under Federal law to construct qualifying projects." The Forest Service would become a "cooperating agency." Deadlines and timelines are mandated in Section 4 for notifying and consulting with cooperating agencies, completing environmental reviews (one year for an environmental assessment, and 1 year and 30 days for a draft environmental impact statement), and determining projects schedules. While nothing in the bill would facilitate more regular federal funding for any of these activities, the bill does allow for contributed funds from non-federal agencies.

The Department has serious concerns about this bill and cannot support it. Concerns include, but are not limited to mandated timeframes, creation of authority for Bureau of Reclamation which contradicts established principles of the Forest Service, NEPA inconsistencies, expanded records management requirements, and unresolved economic feasibility considerations.

We understand that water resource planning is a priority, and we look forward to working with the Committee on S.1533.

STATEMENT OF STEVE DAINES, U.S. SENATOR FROM MONTANA

Senator DAINES. Thank you, Ranking Member Hirono.

Let me start off by first thanking Chairman Barrasso for holding this hearing on this very important topic ensuring that all Americans have access to clean drinking water and water infrastructure.

I would also like to recognize Mr. Meissner for appearing today before the Committee. It is always good to have another Montanan back here in D.C. Welcome, Mr. Meissner.

Mr. MEISSNER. Thank you.

Senator DAINES. You know, some of the earliest water projects built by the Bureau of Reclamation were built in Montana. These projects provide a critical infrastructure for Montana homesteaders and were a vital importance to the long term growth of our state.

Water is a precious resource in Montana, and there are still rural communities that face barriers to access and are in dire need of clean drinking water. Water is a basic need of life.

In Montana we depend on a steady supply to irrigate our crops, to water our livestock and to provide energy through hydropower. In fact, if you look at this chart behind me, this picture, that is not in some Third World country.

[The information referred to follows:]

That is Roundup, Montana, and the quality of water that we see in a community that has about 2,000 people there in Roundup.

So the struggle for water continues to create health problems in Indian country and nearby communities in addition to making economic development that much more difficult. For far too long perpetual delays and maintenance backlogs have caused inefficient water delivery and damaged infrastructure on Montana's reservations. Every year we wait to delay funding of these essential projects.

The more expensive the construction becomes, operation maintenance costs become more expensive, and year after year these projects continue to fall by the wayside without any action to address and prioritize our limited resources for critical infrastructure like rural water project. These short-term fixes must stop. It is time that the Federal Government fulfills its obligations and promises to Montana's rural communities and provides needed funding to ensure our rural water projects are completed.

I would also like to bring the Committee's attention to two bills on the agenda today that I introduced with my colleague from Montana, Senator Jon Tester, S. 1365, the Authorized Rural Water Project Completion Act, and S. 1552, the Clean Water for Rural Communities Act.

The first bill, S. 1365, would enable the completion of construction of congressionally authorized rural water projects as expeditiously as possible. It would ensure adequate funding is directed to projects in rural communities in North Dakota, South Dakota, Montana, New Mexico, Minnesota and Iowa. It would also provide much needed access to water supplies.

The second bill, Senate bill 1552, authorizes two Bureau of Reclamation rural water projects critical to Montana, the Dry-Redwater Rural Water System and the Musselshell-Judith Rural Water System. This bill would collectively facilitate water treatment and deliver to 22,500 Montanans and North Dakotans. Senator Tester is also a co-sponsor.

It is important that our rural communities have access to clean and drinkable water, and I urge my colleagues to join me in supporting these critical measures.

I would like to start by asking a question. Mr. Meissner, in your testimony you discuss the challenges you face in working toward approval of the Dry-Redwater Authority water project which the BOR still has not granted, and I think everyone here can agree that you have had to go through much more trouble than you should have. Could you elaborate a bit further on the benefits to having this project approved as soon as possible?

Mr. MEISSNER. Benefits? Are you talking about if we started construction today?

Senator DAINES. Yes, what are the benefits of the project by having this approved as soon as possible?

Mr. MEISSNER. We have a long range goal to bring water out of Fort Peck into those counties that I suggested. Without the ability of having BOR as a Federal agency working side by side in partnership with us we are at odds. There's things that they can do. There's things we can't do.

Up to this time, it seems like bureaucracy is the issue. They have things that they have to have in order to move, and we have continually tried to meet those goals. It's like an ongoing target. We meet feasibility, and the target is changed. We've been at this like ten years, and the BOR has done everything, bureaucratically, to assist us, but the target keeps moving.

But without the ability of you to have the bills and have money in hand we can't go forward with our construction. They can't go forward with their planning.

I think financially we've proven in Sidney with the construction that we have done with assistance from Richland County and the city of Sidney, we can do this. But we need Federal assistance to complete the planning, and we need dollars.

Senator DAINES. Thank you, Mr. Meissner.

Ms. Thompson, do you believe that spending several years of staff time and resources into developing these feasibility studies for the Dry-Redwater Rural Water System and the Musselshell-Judith Rural Water System is a worthwhile use of time?

Ms. THOMPSON. Senator Daines, thank you for the question.

We, at Reclamation, believe that in order to move forward on rural water projects we need to meet our feasibility study requirements, and we have worked in concert with the Dry-Redwater, Musselshell folks to get to the point where they have a feasibility study that can be approved so we can move forward. We do believe that that sometimes takes time, but we are committed to working with them.

Senator DAINES. So considering all the time and the money that has already been invested by BOR staff on these projects, isn't it about time Congress authorized them?

Ms. THOMPSON. Senator, if Congress authorizes the program and provides appropriations we are happy to assist with that, but until we have a feasibility study and appropriations we cannot move forward.

Senator DAINES. Can I get your commitment to work with us and our Committee on creative ways we can expedite construction on these important projects?

Ms. THOMPSON. We would be happy to work with you and project sponsors on this if we have an authorization in place and the funding to go forward or to explore options for creative funding. We're happy to look into that.

Senator DAINES. Thanks so much.

Mr. Chairman?

Senator BARRASSO. [presiding] Thank you very much, Senator Daines.

Senator Hirono?

Senator HIRONO. Thank you, Mr. Chairman.

This is a question for Mr. Schempp. S. 982, the Water Rights Protection Act, contains several broad provisions which prohibit the Secretary of the Interior and Secretary of Agriculture from taking any action to limit or adversely affect a water right in a land use agreement. At the same time the bill includes several provisions stating that the bill does not affect a number of existing laws. It seems to me that these savings provisions are in conflict with the other parts of the bill.

You touched on these issues in your testimony noting that the bill would create ambiguity that could result in delays, confusion and litigation in its implementation. Can you help us better understand the potential legal uncertainties and challenges that this bill presents?

Mr. SCHEMPP. Ranking Member Hirono, I will do my best to do so.

I would particularly identify subsection 5–1 and subsection 3–1 as being potentially in conflict, particularly with regard to the effects of existing authority and the savings clauses. I think there is a significant question as to what legally recognized will consist of. And if this bill is passed that there will be a great deal of discussion, potentially litigation, over whether or not what has basically, whether the savings clause winds up trumping Subsection 3–1 or to what extent Subsection 3–1 is avoided via the savings clause.

Senator HIRONO. Thank you.

For Ms. Thompson, your testimony on S. 982 states that the Department opposes this bill. I understand that the Administration issued a formal SAP opposing the House version of this bill last year and that about 60 outside groups oppose the bill. In your testimony you state that the bill would potentially negatively impact the Department's ability to manage water, protect public lands and the environment and Federal land and tribal water rights. Can you please expand on these potential impacts and be concise? Thank you.

Ms. THOMPSON. Sure.

Senator Hirono, the impacts we expect could occur as a result of this legislative language would involve impacting our ability to carry out mandates for natural resource protection as mandated by Congress. I believe in the testimony we referenced potential impacts to the Bureau of Land Management, to the National Park Service with respect to water rights where they have obligations pursuant to legislation and statute.

We can provide more detail for the record, but at this point some of these impacts are—haven't been explored all the way simply because this is very complicated legislation.

Senator HIRONO. Thank you.

I can see that just in reading the bill I think that it does create, a lot of areas of uncertainty that would need to be clarified if we are going to go forward.

For you, again, Ms. Thompson. As you probably know many members of the Hawaii delegation, both past and present, have initiated efforts to make Hawaii eligible for resources provided by the Bureau of Reclamation. While we, as well as Alaska, are located in the Western region of the U.S. and face many similar water challenges as our friends in the 17 Western states that you cover, we have not been afforded the same opportunities to participate in these programs. As water resources become constrained and climate patterns shift, states will, no doubt, become more proactive in addressing water needs. So as it stands Hawaii is not eligible to take advantage of funding for drought resiliency projects under the SECURE Water Act and many other water projects and conservation programs.

Wouldn't it be a better use of Federal dollars to support drought resiliency projects in our states proactively instead of waiting for emergency assistance? Basically I really think that Hawaii and Alaska need to be part of what the Bureau covers.

Ms. THOMPSON. Sure, Senator, recently the Bureau of Reclamation has revisited its drought response program and we issued funding opportunity announcements for a new drought program that would allow the State of Hawaii or Alaska to apply for contingency planning assistance. That funding opportunity announcement closes on June 25th and we will welcome the state to apply for that, to benefit from the assistance that they could provide.

Senator HIRONO. Does that include other programs that your Bureau has where Hawaii and Alaska would not apply right now? So are you saying that administratively you can affect this change so that our two states can participate?

Ms. THOMPSON. Actually this authority is through the Drought Relief Act of 1992, and Hawaii has been eligible through that statute for drought contingency planning assistance. But as you said, we are not able to afford the resiliency assistance that you have spoken of.

Senator HIRONO. Thank you for that clarification. So we would require statutory change which I hope we can get your support on.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you very much.

Senator Flake?

Senator FLAKE. Thank you, Mr. Chairman.

I am glad, once again, to co-sponsor the Water Rights Protection Act. I wish this bill was not necessary, but two recent proposals by the Forest Service have created the need for the bill and to stand up for private property.

It may be lost on some not familiar with the West, but water rights, like land and vehicles and other assets used in business are private property and they are extremely valuable. Requiring a business to turn over their water rights to the Federal Government as a condition of getting a permit is about like asking the oil man to sign over his drilling rig to the BLM or making a rancher sign over the title to his truck just to use Forest Service land. It is asking a bit much.

What this bill does say is that the Federal agencies can issue permits, they can condition these permits and they can enforce environmental laws. They just cannot take people's private land or private property, I should say, as they do this. So I think this is an important piece of legislation, and I am glad to support it.

I have just a couple of questions on some of the bills before us.

Ms. Thompson, there are two projects that would be authorized as part of S. 1552. Can you tell whether these projects have completed all the necessary reviews that are required of the Rural Water Supply Act of 2006?

Ms. THOMPSON. Senator Flake, those two projects are the Dry-Redwater and Musselshell-Judith projects, and neither has a complete feasibility study before the Bureau of Reclamation although it's my understanding that the Musselshell-Judith has completed work in the region and that particular feasibility study is with our Denver Office who completes the programmatic review.

Senator FLAKE. Okay. So Reclamation has not developed a recommendation on these projects that have not completed the review?

Ms. THOMPSON. We have been in consultation with the parties who are putting forward the feasibility studies.

Senator FLAKE. But would going forward with them, kind of, circumvent some of the process that we have compared to those who have gone through all the reviews?

Ms. THOMPSON. I'm sorry. Could you repeat the question?

Senator FLAKE. Putting a program like this or authorizing funding for it when Reclamation hasn't yet issued a recommendation is, kind of, circumventing the process as we have it or not?

Ms. THOMPSON. Indeed. Indeed.

We have six projects already in construction in the West for which there is a deficit of, I'm sorry, of backlog of about $1.4 billion, so adding two more authorizations to that, of course, we would have to find additional funding for those.

Senator FLAKE. Good.

Mr. Meissner, in a June hearing on drought Deputy Secretary Connor discussed a number of water projects and provided a back of an envelope number on the cost per acre foot. What is the approximate cost per acre foot that the water for these two projects that would be authorized under S. 1552?

Ms. THOMPSON. Senator, I'm afraid I'm not able to provide information along those lines at this time. I'm not certain that we have calculated that expense, especially since those feasibility studies haven't been completed.

Senator FLAKE. Mr. Meissner, have you? Do you have any back of the envelope, kind of, cost per acre foot on these projects?

Mr. MEISSNER. Are you asking?

Senator FLAKE. Yes.

Mr. MEISSNER. No, I can't answer that as well. However, the question you asked about the feasibility. We entered into a memorandum of understanding with BOR so that we could come into an agreement with them to proceed to this point. Without the bills and funding BOR cannot do any more administrative planning for us. I don't know if that answers your question, but no, we have not yet.

Senator FLAKE. Okay.

Mr. Yates, ranching has long been an important part of Arizona's economy. I grew up on a cattle ranch myself. Can you briefly talk about the amount of grazing on public lands and the importance of water rights for these grazing operations to continue?

Mr. YATES. Well certainly, and ranching is an important part of the American West and certainly provides jobs and management of Federal Western range lands and certainly including the State of Arizona.

What has been troubling when you talk about the long standing practice of Federal land permitting and ranching across the American West is that, you know, public land ranchers have fought Federal land management agencies and environmental pressures through litigation on decreases in opportunities for continued Federal land grazing.

In 1949, the BLM and the Forest Service managed 5.4 million AUMs across all western rangelands. From 1949 to 2012 the government has reduced livestock grazing by just over three million AUMs or a total reduction in excess of 70 percent.

So again, as we look to continue to provide a tool to Federal land management agencies these kinds of pressures that continued efforts to reduce the ability for Federal land ranchers to maintain western rangelands and landscapes is certainly troubling.

When we look at the use and the application of the water clause as been used by the Forest Service the potential impacts on, not only private property rights, but the ability for a rancher to continue operating and certainly operating with a degree of certainty that he'll be able to come back not only to have his grazing permit renewed but to be able to manage that resource is certainly concerning.

So again, we appreciate your support of S. 982 and certainly hope for its passage.

Senator FLAKE. Thank you, Mr. Chairman.

Senator BARRASSO. Thank you very much, Senator Flake.

Senator Franken?

Senator FRANKEN. Thank you, Mr. Chairman for holding this hearing on rural water bills.

I am proud to co-sponsor the Authorized Rural Water Projects Completion Act, S. 1365, introduced by Senators Tester and Daines. I support this bill because rural communities in Southwestern Minnesota have critical water needs.

In 2000, Congress authorized the Lewis and Clark Regional Water System. The State of Minnesota and the local communities involved have prepaid their full share, $154 million, to bring this project to completion, but the funding at the Federal level has been woefully inadequate. And so far just until last month no water at all to Minnesota, finally we got Rock County Rural Water District got connected. But there are other communities there that have paid their full share plus, $17 million on top of that. These are small towns, and so far no water at all, not one drop.

The Authorized Rural Water Projects Completion Act would provide dedicated annual funding for Lewis and Clark and projects like it. Today's hearing is a step forward for getting that bill passed, I hope.

As I said, lack of Federal funding has delayed this project and these delays have been costing these communities money. Meanwhile the cost of construction increases, as Mr. Willardson noted in his testimony, due to inflation and rising costs of material and labor. And that is just the immediate costs, but there are also costs of the economics of these communities.

You refer to Lewis and Clark in your testimony, Mr. Willardson. Can you talk more about these costs for local communities when projects like Lewis and Clark are delayed?

Mr. WILLARDSON. Thank you for the question, Senator Franken.

While I do not have specific economic information, obviously water is critical. It's part of the infrastructure of any of the economy of a rural community. So business, in fact, more and more businesses are considering or including in their bond evaluations the access to water and the security of that water. So anytime that

you're restricting a community's water supply you're going to also limit economic growth.

Senator FRANKEN. Thank you.

Ms. Thompson, I want to clarify a few things about the Reclamation Fund. This year the Bureau of Reclamation requested about $856 million in total appropriations but left some $37 million of that for rural water projects. About how much does the Reclamation fund collect each year from receipts on public lands?

Ms. THOMPSON. Senator, I am not familiar with the exact number, but I'd be happy to get back to you for the record on that.

[The information referred to was not provided as of the time of printing.]

Senator FRANKEN. Mr. Stern, do you have an answer to that?

Mr. STERN. Senator Franken, are you asking receipts from natural resource royalties on public lands?

Senator FRANKEN. Yes.

Mr. STERN. I believe the total last year was around $1.7 billion.

Senator FRANKEN. Okay, there is a billion, about, each year that goes into the Reclamation Fund but it is not appropriated to the Bureau of Reclamation, my math, maybe $900 million. How much of an unobligated balance does that leave in the Reclamation Fund? I will go to you, Mr. Stern.

Mr. STERN. Senator Franken, I have the number here, if you give me one second.

Senator FRANKEN. Sure.

Mr. WILLARDSON. Senator, if you would like I can tell you.

Mr. STERN. Sorry.

Senator FRANKEN. Sure.

Mr. STERN. As far as the unobligated balance goes it would be around, I think, there was a balance of $13.2 billion in the Reclamation Fund as of the end of FY2014.

Senator FRANKEN. Is that about right to you, Mr. Willardson?

Mr. WILLARDSON. Yes, and the Administration's estimated balance at the end of this fiscal year will be over $15 billion.

Senator FRANKEN. Okay. So here is what is troubling to me. The Bureau of Reclamation requested less than $3 million for Lewis and Clark this year, less than $3 million. That is less than these individual communities have been paying after they fully prepaid what they were supposed to, what their share was, after the state had done it. That is just not fair to these communities.

The Minnesota State legislature, we finally got this last piece connected because the Minnesota State legislature approved a $22 million, Federal funding advance for or it allocated $22 million. Does this seem fair to you, Mr. Willardson?

Mr. WILLARDSON. Well, many of these communities have been waiting a long time to see these commitments fulfilled. As you're aware some of these were in compensation for the Missouri Pick-Sloan program, so some have been waiting 70 years to see those promises fulfilled.

And no, it is a little hard to explain that with an excess of $1 billion a year coming in that's not being spent from the Reclamation Fund that we can't fund completion of these projects.

Senator FRANKEN. My thoughts exactly. I am sorry to have gone over time, but I believe Mr. Stern took four minutes to find that data. [Laughter.]

Senator BARRASSO. But you did a great job pronouncing his name today compared to the hearing yesterday we had on Indian Affairs. So this was——

Senator FRANKEN. Well, that was Mr. Desiderio.

Senator BARRASSO. Beautifully spoken.

Senator FRANKEN. Desiderio. [Laughter.]

Senator FRANKEN. Thanks a lot for bringing that up, by the way. [Laughter.]

Senator FRANKEN. Stern is easy.

Senator BARRASSO. It is. It is good.

Senator FRANKEN. Love my background too, pronounced.

Senator BARRASSO. Thank you, Senator Franken.

Ms. Thompson, in your written testimony you talk about the Doctrine of Federal Reserve Water Rights. You said, "Originally expressed as the power to reserve water associated with an Indian reservation." You also said, "Over time Supreme Court and other courts have revisited and built on the Doctrine and holding that reserved rights applied to all Federal lands." So my question is does all Federal land come with reserved Federal water rights and do these rights trump state water rights including privately held water?

Mr. THOMPSON. Senator, Reclamation follows the Reclamation Act and Section 8 of the 1902 Act says that state waters have primacy. State rights have primacy over water rights. So we adhere to that particular statutory mandate.

Senator BARRASSO. And how about the state control of groundwater? Same?

Ms. THOMPSON. For the most part, I believe that's correct.

Senator BARRASSO. Folks in my state and across the West are obviously in serious need of more water, ranchers, farmers and rural communities trying to make a living. They depend on water to grow crops like to grow alfalfa or raise cattle. Many have junior water rights and worry about getting the water they need to keep their livelihoods. They worry about drought. They are also worried about losing their water rights to Federal agencies as a condition of renewing their grazing permits.

So they are worried about the EPA and the Army Corps expanding Federal jurisdiction over state waters, the waters of the U.S. and the WOTUS rule that is out there. All these things are happening at once and feels to be threatening of Western and rural economies. We, on this Committee, are offering some solutions, some bills before us today to address these problems. We do not want to interfere with the Bureau of Reclamation operations, but we do have constituents that need to be protected.

So my question is will you work with us to improve and to move these bills to protect water rights, to expand water storage and to provide more water to rural and Western communities?

Ms. THOMPSON. Senator, we'd be happy to work with you on these matters.

Senator BARRASSO. Thank you.

Mr. Yates, in your written testimony you state that with regard to the Forest Service requesting water rights in exchange for renewing permits, you write that these kinds of actions by the Federal Government violate Federal and State law and will ultimately upset the water allocation systems and private property rights on which Western economies have been built. Can you explain how the water allocation system and the farmers and ranchers who hold private property water rights have been negatively impacted by these actions?

Mr. YATES. Thank you, Senator, for the question.

Certainly it's been noted that not only agriculture, but ski areas have had a vested interest in this issue. But frankly all industries and public land users who require a special use permit should be equally concerned about these types of water grabs.

Obviously for any farmer or rancher good soil, good sunlight and most certainly water is a very valuable resource and asset to continue their day to day operations to continue to provide food, feed and fiber for the country.

But I think it's important to know as we look at this larger issue we have great concerns over the takings issues that the Forest Service and other land management agencies have begun to pursue. Again, obviously, the concerns over Fifth Amendment protections are critically important.

I think it's also important to go back a little bit, and when you look historically through statute and case law Congress has granted management and authority of waters to the states going back to the Ditch Act in 1866 through the McCarran amendment in 1952. The Federal Government has acquiesced to the states on all state water matters. Certainly this legislation, your legislation, would not change the status quo, but it would ensure that any future actions by these Federal agencies to go around this long standing relationship between the Federal Government and the State Government would be maintained.

Senator BARRASSO. And the final question, Mr. Yates. As you stated in your written testimony the Forest Service has temporarily withdrawn their groundwater directive. You go on to say the Forest Service Deputy Chief Weldon testified that the Service will publish a new draft after public comment. You go further to state that the Forest Service, "Does not currently own or manage groundwater nor does it have the authority to approve or disapprove uses of water that are granted under state law."

Since the Forest Service does not even have the authority to regulate ground water, is it possible for the agency to craft an acceptable directive or should it just be permanently withdrawn?

Mr. YATES. Well, certainly I appreciate the question. We were certainly thrilled following our criticism of the Groundwater Rule that the agency did decide to take a time out and withdraw the rule. You know, specifically from the proposed water clause to the expansion of authority through the establishment of an interconnectivity clause. And those of you that have followed the issue of the WOTUS rule know that there's similarities in definitions when we're talking about that interconnectivity clause to the frankly, their disregard for the historic Federal deference to states and water authorities.

I see no reason for the agency, frankly, to pursue a second or a third groundwater directive. I'd just assume have them leave it alone. They got caught with their hand in the cookie jar and they should probably stop there.

Senator BARRASSO. Thank you, Mr. Yates.

I thank everyone who has come to testify today in this important hearing. Senator Hirono has a second round of questions which she will do, and then she will adjourn the meeting. Thank you for being here today.

The record will stay open and there may be some written questions as well from both members on each side.

Thank you.

Senator BARRASSO. Thank you, Senator Hirono.

Senator HIRONO. [presiding] Thank you.

I would like to just do a very short second round. I have a question involving the Indian Water Rights Settlements issue, and that is addressed in S. 1365.

Mr. Willardson, thank you for being here with us today. In your testimony you state that the Western States Water Council supports the policies advanced by S. 1365, and I am particularly interested in the Western States' support for advancing Indian water right settlements.

I think you have probably noted that Ms. Thompson's testimony states that the current, basically piecemeal, approach to funding settlements which competes with other tribal and water priorities is the appropriate approach, but clearly your organization, your position is that you support this more permanent approach. Could you expand on that and help us understand why the Council supports settlements and a strong fiscal commitment to them?

Mr. WILLARDSON. Yes, thank you, Senator.

We have worked for 30 years with the Native American Rights Fund to resolve negotiated settlements of these claims. These claims continue to be a cloud over other private property rights, and until they can be settled and settled permanently it is a challenge to economic development on those both Indian and non-Indian lands that are adjacent.

Finding a permanent funding source has been a challenge as well as finding offsets for some of the direct funding in recent settlements that have passed Congress. We have been supportive of legislation that set aside money for the Reclamation Fund in 2009 for a settlement fund which has yet to be funded but will in the future.

This is another opportunity to provide a small amount of money which will go a long ways to help with those settlement negotiations and implementation of those to the extent that it involves projects that are built by the Bureau of Reclamation, and that's an important point.

Now this is money just for funding the infrastructure as part of those settlements and is something that we continue to strongly support and look for these permanent sources of funding given as you noted that there are many outstanding claims yet to be resolved.

Thank you.

Senator HIRONO. Thank you very much.

I recognize that there is a very strong economic argument to be made for something, a much more permanent approach, not to mention that we certainly have a Federal responsibility to the American Indian tribes to live up to our obligations to them.

I would like to echo the Chairman's thanks to all of you for participating today and being witnesses.

Some members of the Committee may submit additional questions in writing and if so, we will ask you to submit answers for the record, so I hope that that will be alright with you all.

We will keep the hearing record open for two weeks to receive any additional comments.

This Subcommittee hearing is adjourned.

[Whereupon, at 3:20 p.m., the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power
June 18, 2015 Hearing regarding Pending Legislation
Questions for the Record Submitted to Ms. Dionne Thompson

Questions from Senator Jeff Flake

Question 1: In your written testimony you state that "S.982 would restrict the Secretary of the Interior and Secretary of Agriculture from acquiring water rights under State law." Please specify which provisions of the bill the Department views as limiting the acquisitions of water rights under State law by Federal agencies.

RESPONSE: Section 4(b) of this bill creates ambiguity over the proper roles of the states and Reclamation under Section 8 of the Reclamation Act. For example, state water rights law provides water right holders (including Reclamation) the ability to take actions to protect and defend their rights so as to assure the ability of agencies to execute their mission. The language of Section 4(b) could be broadly interpreted as preventing Reclamation from exercising these provisions, in conformity with state law, that it would otherwise be allowed to do under Section 8 of the Reclamation Act. In addition, Section 4(b) could prevent Reclamation from making legitimate objections to proposed changes in State law and regulatory requirements that would adversely impact its water rights and impede Reclamation's ability to carry out its mission.

Question 2: In your written testimony on S.982 you point to "numerous examples where Reclamation has contracts with water users that include the transfer or relinquishment of pre-existing private water rights..." Please provide a list of the contracts that involve a transfer or relinquishment of water rights in exchange for a license or contract at a Reclamation facility. Please include in this list the date when the transfer or relinquishment occurred.

RESPONSE: Reclamation's ability to successfully construct and operate new or expanded Federal water projects often requires the establishment of agreements with existing private water rights holders on affected river systems to ensure the viability of the proposed project operations. Those agreements typically entail some form of commitment existing water rights holders to not fully exercise those rights under specified conditions, in exchange for a Federal commitment to provide reliable supplies of Project water. In some cases those agreements involve an actual transfer or relinquishment of private water rights. Examples include:

- **Emery County Project, Utah.** In agreements dated June 27, 1962 (with Huntington-Cleveland Irrigation Company, Contract #14-06-400-2523) and June 25, 1962 (with Cottonwood Creek Consolidated Irrigation Company, Contract #14-06-400-2522), these entities contracted with the United States to "exchange and adjust" water rights in order for the Emery County Project to proceed. In these contracts, the contractor "quitclaims to the United States its right to water in excess of the amount that it will call for as provided

above ... and further agrees to execute any appropriate conveyance or assignment to the United States of its water rights representing such excess water."

- **Vernal Unit, Central Utah Project.** In an agreement dated September 20, 1994 (with "Individual Water Users Utilizing Dodds Ditch", Contract #95-07-40-R1850), the water users agreed to accept certain guarantees of water deliveries from the United States in exchange for agreeing not to fully exercise of their 1897-decreed water right.
- **Clear Creek (Sacramento River tributary), California.** In consideration of the removal of Saeltzer Dam in 2000, Reclamation agreed (contract #00-WC-20-1735, August 18, 2000) to provide a substitute supply of water to the McConnell Foundation, holder of the water rights that can no longer be exercised due to the dam removal. As part of this arrangement, Townsend Flat Water Ditch Company provided a quitclaim deed to the United States for "all its right, title and interest in and to" a pre-1914 appropriative right for diverting up to 55 cubic feet per second from Clear Creek, in excess of 6,000 acre-feet.
- **Rio Grande Project New Mexico/Texas.** In order to facilitate the construction and operation of the Rio Grande Project (including Caballo and Elephant Butte Reservoirs), the United States acquired, in a contract dated June 27, 1906, water rights from the Elephant Butte Water Users Association and the El Paso Valley Water Users Association in exchange for federal payments and the opportunity for those districts to utilize the planned project irrigation works and repay their allocated share of project construction costs over time.
- **Fryingpan-Arkansas Project, Colorado**. In a contract with the United States (#14-06-700-6576), the Highline Canal Company agreed to transfer to the Board of Water Works of Pueblo, Colorado, a one-half interest in the Company's decreed Western Slope water rights, in exchange receiving various benefits from the United States including an entitlement to store 1,000 acre-feet of Company Water in Project facilities. Separately, the United States contracted with the Board of Water Works of Pueblo to provide for the transportation of the transferred water rights through the Fryingpan-Arkansas Project transmountain diversion works.
- **Central Valley Project, California.** Under Contract ILR-1126, dated May 24, 1939, the Madera Irrigation District conveyed its water rights and land to the United States in exchange for payments from the U.S., access to a supplemental water supply from Friant Dam (Central Valley Project), and other benefits.
- **Central Valley Project, California.** More generally in 1939, in order to construct and operate the CVP, an historic accord was struck between the United States and a group of farmers and their water supply entities who held priority water rights to the waters of the San Joaquin River. That accord allowed the United States to use those priority rights for delivery from Friant Dam, in exchange for a substitute water supply delivered to those farmers and entities from CVP Facilities. This agreement, known as the "Exchange Contract," permitted the building and filling of Friant Dam and the irrigation of 1.3 million acres on the east side of the San Joaquin Valley to proceed. The contractors agree not to "divert, dispose of, or otherwise use water" pursuant to their San Joaquin

rights so long as the United States fulfills certain Project water delivery commitments. However, these exchange contracts do not include a transfer or relinquishment of water rights.

Questions from Senator Mazie K. Hirono

Question 1: Honoring our federal trust responsibilities to American Indian tribes and our Nation's First People is absolutely paramount. I am dismayed to learn that we have advanced only 29 Indian water rights settlements over the last three and a half decades, when hundreds of tribes' water rights have not been adjudicated. Resolving these claims is of the utmost importance to honoring tribes' rights, bringing water and economic development to Indian Country, and bringing greater certainty to Western water management.

We should be doing everything that we can to resolve these claims and advance settlements in a timely manner. It is the federal government's legal and moral responsibility to do so. In your testimony you note that as drought and climate change intensify, it is all the more urgent to plan for these costs and enable the timely resolution of tribes' rights. And, yet—your testimony states that the current piecemeal approach to funding these settlements, which competes with other tribal and water priorities--is the appropriate approach. This seems incongruent, especially as the Administration is working to secure permanent funding for other important priorities such as conservation—which I also support.

There seems to be broad consensus across a wide group of tribal and state stakeholders that providing permanent funding to resolve Indian water rights settlements is one of the most important policy steps we can take.

It will not only help to resolve these settlements in a more timely manner—it makes fiscal sense from a budgeting stand-point as it would enable responsible planning and lower out-year costs.

Can I have your commitment to work with the Subcommittee to identify a path forward on this critical issue?

RESPONSE: As your question suggests, the resolution of Indian water rights claims has two phases: negotiation of a settlement agreement and the necessary implementing legislation, followed by implementation of the settlement terms. Successful completion of both phases carries significant benefits, because simply negotiating and enacting a settlement provides all parties with much needed certainty and a reliable basis for planning that had been previously lacking. To date, the United States has successfully enacted 29 Indian water settlements and is actively engaged in 18 separate, additional settlement negotiations. As the Department has stated previously, this is a good start in addressing the need for reliable water supplies in Indian

country, but we agree that much more remains to be done. To that end, the President's Fiscal Year 2016 budget request seeks a significant increase in funding for ongoing and new settlement negotiations.

On the implementation side, the Administration will need to continue to work with Congress to fund existing as well as upcoming settlements. With some notable recent exceptions, water rights settlements generally have been funded through the Department's discretionary appropriations. Work to be performed under the settlements by the Bureau of Reclamation (Reclamation) has come out of Reclamation's budget, and trust funds and other settlement costs generally have come out of the Bureau of Indian Affairs' (BIA) budget, but all Departmental bureaus have been asked from time to time to expend discretionary funds from their budgets on implementation of these water settlements. In all of these cases, the Administration has worked successfully with Congress to secure the funds needed to continue to implement and complete signed settlements. These funds already represent a significant and growing share of the bureaus' respective budgets. Finite budgetary and staff resources, as with all Department programs, will continue to be a limiting factor, particularly as the Department works to meet new and growing demands created by drought and other evolving challenges. That is why the Department has previously expressed support for looking at alternative approaches to funding settlement implementation activities.

Also, can you provide any data or estimates you have on the federal costs and economic impacts of Indian water rights settlements for the coming decades?

RESPONSE: It is difficult to speculate on the number and size of future settlements. However, the Department has estimated that the costs within the next ten years could be as high as $2.7 billion. It is not unreasonable to consider the Federal costs of existing settlements as a predictor of future costs. With respect to settlements enacted since 2009, nearly $2.6 billion in Federal cost was authorized, nearly $1.1 billion has been appropriated, and over $1.5 billion remains to be funded. The Department does not currently have an estimate of the benefits generated by funding provided to date. However, the hundreds of millions of dollars provided so far have funded significant construction and rehabilitation projects in many parts of Indian Country, which have produced substantial and tangible economic benefits for the tribal communities involved. The investments have also provided substantial health and quality-of-life benefits, including access to safe and reliable sources of water for residential and other uses. Construction funding also provides short-term economic stimulus to localities or regions.

For these reasons, a delay in funding settlements also delays the receipt of many of the economic benefits that are associated with settlements. These benefits will not fully accrue until the physical infrastructure associated with settlements is complete and operational. Given the high unemployment levels in Indian country, delaying settlement implementation also delays the stimulus effects associated with settlements.

Question 2: Access to safe, reliable drinking water is widely recognized around the world as a basic human right. In Hawaii, we are keenly aware of drinking water issues--as being an Island state we face many freshwater issues, including increased salt water intrusion with climate change.

Ms. Thompson you state that authorized rural water projects not only protect public health, but provide economic benefits. In your testimony you state that at current funding levels, some of these projects would not be completed until after the year 2063. That is nearly a half-century from now! And even then, we would still be more than a billion dollars behind the curve in funding authorized projects.

How can we ask communities suffering from inadequate water supplies to wait decades before we complete these projects? While I recognize that there are always competing demands on the federal budget, it seems unconscionable to not take action to help these communities now.

If S. 1365 is authorized, how will it advance completion of outstanding rural water projects? And, what kinds of additional policy ideas should we be thinking about in terms of advancing alternative financing for such projects?

RESPONSE: Section 103(a)(1) of S. 1365 would provide for a dedicated $80 million per-year funding stream for 20 years to carry out construction of authorized rural water projects. This level of annual funding is larger than recent years' annual appropriations, which are trending below $80 million per year. In Reclamation's 2014 Rural Water Assessment Report[1], Reclamation wrote that assuming an unconstrained level of federal funding that reflects the estimates provided in the original final engineering reports for each of the authorized projects (about $162 million annually) and non-federal party funding contributions no more than the minimum required by the authorization Acts, Reclamation estimates that all remaining rural water projects could be completed by 2035. Reclamation has not conducted an estimate for the $80 million per year funding rate provided for in S. 1365, but it is reasonable to estimate that these same projects, which are currently projected not to be substantially complete until after the year 2060, would likely be complete after 2035, possibly after 2045.

As for alternative financing for rural water projects, each of the authorized rural water projects was enacted with some level of non-federal funding, with the exception of the tribal component of the Garrison Diversion Unit Rural Water Project. And for each, Reclamation has received the minimum authorized non-federal share, but no more. If the rate of construction at these projects is to be accelerated without additional strain to limited federal resources, higher non-federal contributions should be explored. This could be achieved either through increased direct expenditures by the non-federal parties or any number of alternative financing methods such as

[1] www.usbr.gov/ruralwater/docs/Rural-Water-Assessment-Report.pdf

bonding or private sector financing. No new federal statutory authority is immediately necessary for these avenues to be pursued by the non-federal project partners.

Question 3: Ms. Thompson, S. 1533 would designate the Bureau of Reclamation as the lead agency for reviews, analyses, and permitting of water projects on federal lands.

This bill appears to apply to any new surface water storage projects constructed on lands administered by the Department of the Interior and the Department of Agriculture.

Your testimony noted that this bill would greatly expand the current scope of the Bureau's authority, and I would like to better understand that issue.

1. You note in your testimony that economic and other constraints underlie current challenges in developing new large storage projects – not permitting requirements. Can you please explain these constraints in greater detail?

RESPONSE: Water storage projects authorized pursuant to Reclamation law typically require that federally-funded construction be repaid by the project beneficiaries over a specified term. This concept is known as 'beneficiary pays'. In general, projects providing for agricultural water, the most common type of Reclamation project, are repaid over 40 years without interest pursuant to Section 9 of the Reclamation Projects Act of 1939. Projects providing municipal and industrial (M&I) water supplies are typically repaid with interest assessed on the repayment, not to exceed 3½ percent per year, pursuant to the Act.

As stated in the testimony, significant economic constraints underlie the development of new large surface storage projects. Several factors contribute to this, including the fact that in the now-settled 17 western states where Reclamation is authorized to operate, land use issues, environmental considerations, sensitive cultural resources and other factors make new surface storage far more expensive to construct than it was in the first half of the 20th century, when the majority of Reclamation's large reservoirs and projects were built. While water is no less precious today than it was in the early 20th century, it is more difficult today for water from a new large surface storage project to produce sufficient revenue for water users such that they can repay these now more-expensive projects. In addition, today's federal budget challenges make the appropriation of several hundred millions of dollars for the construction of new large surface storage projects a serious challenge.

For these reasons, Reclamation works to optimize existing surface water storage, and is at work studying authorized new surface water storage mindful of these constraints. Where new large surface storage projects make sense and the benefits outweigh the costs to construct and operate

them, Reclamation pursues those projects, subject to authority and the availability of appropriations.

2. What are the potential jurisdictional and programmatic impacts of this bill?

RESPONSE: S. 1533 puts Reclamation in a lead agency role over new surface water storage projects on lands administered by the Department of Agriculture. While many existing Reclamation facilities were constructed within or near national forests, Reclamation operates in the 17 western states, and there are USDA lands and national forests across the country[2], including several national forests in Alaska, Arkansas, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, Virginia, West Virginia and Wisconsin. Placing Reclamation in a position to lead review of proposals in these states where Reclamation has no planning role, no operational role, no historic statutory authority and no budget for these activities is one source of jurisdictional and programmatic impacts from this bill.

3. Under your existing authority and guidelines, how does the Bureau currently coordinate review and permitting with other affected Federal agencies, and what changes would this bill make to that process?

RESPONSE: Reclamation and all federal agencies involved in resources management operate pursuant to the National Environmental Policy Act of 1969 (42 USC 4321-4347); Council on Environmental Quality Regulations at 40 CFR 1500-1508; Executive Orders; the Department of the Interior's Guidelines on Implementation of NEPA, 43 CFR Part 46; Department of the Interior NEPA Procedures at 516 Departmental Manual Chapters 1-4 and 14; and the Reclamation Manual, National Environmental Policy Act, Policy document ENV P03. NEPA's implementing regulations require at Section 46.155 that agencies "consult, coordinate, and cooperate with relevant State, local, and tribal governments and other bureaus and Federal agencies concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities." Reclamation's policy on coordinating review and permitting with other federal agencies is summarized in Reclamation Manual Policy document ENV P03, and entails input and involvement by any and all planning documents likely to affect other federal agencies' land, resources or mission areas.

[2] www.fs.fed.us/recreation/map/state_list.shtml

As stated in the answer to question 2, above, the primary change to Reclamation's processes if S. 1533 were enacted would be to place Reclamation in the role of lead federal agency for projects located in areas where Reclamation historically has no role.

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power
June 18, 2015 Hearing regarding Pending Legislation
Question for the Record Submitted to Mr. Tony Willardson

Question from Senator Jeff Flake

Question: In a written follow-up question on the proposed USFS groundwater directive after the February 26th hearing of this committee, Chief Tidwell indicated that the Forest Service has "initiated discussions with the Western States Water Council over the proposed directive." What is the status of these discussions and what is the Western States Water Council doing to ensure the Forest Service respects state authority over groundwater?

July 6, 2015

In response to the question from the Honorable Senator Flake above, the Western States Water Council (WSWC) was advised of the publication of the draft guidance as it was released, on May 6, 2014. The WSWC expressed concern at the time that the States were not consulted regarding its substance beforehand. Even before the withdrawal of the proposed guidance, the WSWC noted with appreciation the fact that the USFS had stepped back and engaged western states in a meaningful conversation before acting further.

Briefly, the following outlines the direction of our involvement with this issue. The Western Governors' Association (WGA) in a July 2, 2014 letter to USDA Secretary Vilsack noted: "Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources." The WGA and WSWC have worked closely together on this issue. The WGA letter also declared that "Congress recognized states as the sole authority over groundwater."

On July 17, 2014 in Helena, Montana, Jim Pena, Associate Deputy Chief of the National Forest System (NFS), discussed the Forest Service's proposed Groundwater Management Directive. He said the directive is not a rule and is intended to be an internal guidance document that would create a comprehensive direction for the agency's management of groundwater on NFS lands. He said the directive does not seek to interfere with state groundwater allocation. Instead, the Forest Service will inventory uses and monitor effects. The agency oversees a number of activities that impact surface and groundwater, such as proposals to develop geothermal sources. As a result, the directive is intended to ensure the agency has control over activities on NFS lands. He also said the directive would not change or expand Forest Service authority over surface water users.

On September 10, 2014 on behalf of the Council, I testified regarding our concerns and those expressed by WGA. In part that testimony read: "We request that the USFS seek an authentic dialogue with the States to achieve appropriate policies that reflect both the legal division of power and the on-the-ground realities of the West. USFS should have consulted with the States before publishing the proposed directive, and should now seek

U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power
June 18, 2015 Hearing regarding Pending Legislation
Question for the Record Submitted to Mr. Tony Willardson

substantive engagement with the States in order to define and remedy any perceived deficiencies or inconsistencies. The directive may be well intentioned, but the problems that it is designed to address are not apparent, nor is the protection of groundwater a primary USFS responsibility." That testimony is attached.

On October 3, 2014, the WSWC submitted formal comments to USFS Chief Tom Tidwell (which are attached). Our comments questioned the USFS authorities related to the directive, stating flatly: "Groundwater is a state and not a federal resource." It also added: "The directive to 'apply federal reserved water rights to groundwater as well as surface water' is inappropriate and legally unsupportable as none of the USFS cited statutes and authorities mention groundwater, nor establish any basis to manage or allocate waters, nor reserve any federal rights to water." We also questioned the lack of consultation with the states prior to publication of the directive, noting the requirements of Executive Order 13132 on Federalism.

To the U.S. Forest Service's credit, while considering the formal comments on the guidance, they did agree to enter into a substantive conversation with the WSWC related to their intent, in order to clarify for the Council some of the language in the directive. For its part, the Council also agreed to explain its comments and objections to the directive and work towards finding common ground if possible to address USFS needs.

On February 13, in Denver, Colorado WSWC members and staff met with USFS representatives, including Anita Tompkins, USFS Assistant Director for Water and Aquatic Resources and Chris Carlson, USFS National Groundwater Program Leader. The substance of the conversations revolved around USFS concerns about present and potential lawsuits over the adequacy of USFS analysis under the National Environmental Policy Act (NEPA) for permitted activities on NFS lands. The need for reliable data was also discussed, as was the need to ensure consistency in USFS decisionmaking, as well as compliance with applicable federal environmental and state water laws. The WSWC also previewed some work it had done to illustrate graphically the potential number of wells that might be impacted by the directive in the states of Arizona, Colorado, Idaho, Utah and Wyoming. There was also discussion of specific provisions of the directive and the potential for further conversations. The WSWC prepared a summary of the meeting.

I believe this meeting is specifically what Chief Tidwell was referring to after the February 26th hearing when he indicated that the Forest Service had "initiated discussions with the Western States Water Council over the proposed directive." Those conversations continued, and the WSWC had asked and several states had responded with specific proposed changes to the directive, prior to its withdrawal and in anticipation of an expected reopening of the comment period. The USFS has committed to fully engage states before determining whether or not to republish a new directive. The WSWC remains concerned over the impact of any new directive, but is encouraged by the USFS willingness to continue our conversations at our upcoming meetings in Lake Tahoe, Nevada on July 9, 2015.

WESTERN STATES WATER COUNCIL

5296 Commerce Drive, Suite 202 I Murray, Utah 84107 I (801) 685-2555 I FAX (801) 685-2559

Web Page: www.westernstateswater.org

October 3, 2014

Tom Tidwell, Chief
U.S. Forest Service
1400 Independence Avenue
Washington D.C. 20250-1111

ATTN: Rob Harper
U.S. Forest Service
WFWARP, 201 14th Street, SW
Washington D.C. 20250

RE: Proposed USFS Directive on Groundwater Resources – Forest Service Manual 2560

Dear Chief Tidwell and Mr. Harper:

On behalf of the Western States Water Council, I am writing to comment on the proposed U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management, published in the Federal Register for public comment on May 6 (FSM 2560). Attached to this letter are more specific comments. We appreciate the recognition of the importance of groundwater and the impact that USFS activities and USFS-permitted surface activities can have on this vital state resource, particularly in the West, where most USFS managed lands are located. Moreover, as any other landowner, we also recognize USFS authority to permit access to federal lands for lawful activities, including water resources development and operation of facilities to exercise state granted water rights.

While perhaps well intended, our member States have serious concerns over the lack of substantive state participation in the development of the directive, especially given that the States have primary, often exclusive authority, over the protection, development and management of waters within their boundaries, including surface waters arising on, and flowing across USFS lands, and groundwater below those lands. Groundwater is a state and not a federal resource. The problems that the directive may be intended to address are not apparent, nor is the protection of groundwater a primary USFS responsibility. Indeed, the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of all non-navigable waters located within their borders.

We believe the USFS assertions of broad authority over groundwater and the potential interference with the lawful exercise of state water rights and permitted water uses on National Forest Service (NFS) lands are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States. Among other things, presumptive claims of any reserved right to groundwater are unsupported by legislation or opinions of the Court. Moreover, such claims are counterproductive and will only involve the USFS in extended litigation. Rather, USFS should partner with States to identify and address USFS needs. The existing compact between the State of Montana and USFS, as well as a Memorandum of

Understanding between USFS and the State of Wyoming, may serve as appropriate options that may be emulated by USFS in other States. The Council and our federal partners have, working through our Western Federal Agency Support Team, also entered into continuing discussion on how best to fulfill legitimate federal water needs within state water law.

The directive to "apply federal reserved water rights to groundwater as well as surface water" is inappropriate and legally unsupportable as none of the USFS cited statutes and authorities mention groundwater, nor establish any basis to manage or allocate waters, nor reserve any federal rights to water. Further, no federal court has ever upheld a reserved right to groundwater. The U.S. Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978) specifically denied USFS claims to implied reserved surface water rights claimed for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy the "primary purposes" of the national forest reservation. These primary purposes include the production of timber and watershed protection to insure favorable surface water flows. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. The proposed directive cannot extend USFS authorities beyond the limits the Court has set. Even where reserved rights are recognized, the Congress has left it up to the States, under the McCarran Amendment, to quantify such rights in general state stream adjudications in state courts.

Limited USFS resources are already overextended, as evidenced by necessary "fire borrowing," requiring careful consideration of national funding priorities. Even if it had the authority, the USFS is ill-equipped to undertake the extensive and costly processes and procedures that would be necessary to implement the directive. Moreover, much of the work the USFS envisions it would undertake or contract out would very likely duplicate existing capabilities of the States and other federal agencies.

Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors' Association, wrote Secretary Tom Vilsack on July 2nd declaring, "Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources." In an August 29th reply, Secretary Vilsack replied with an "open invitation to meet and discuss these directives." The WGA and the Council are working closely together on this issue, and we would reiterate, as also stated in the Governors' letter: "States are the exclusive authority for allocating, administering, protecting and developing groundwater resources...." This directive has significant negative federalism implications for the States.

We strongly urge you to take no final action on the directive until there has been an extended and extensive opportunity for USFS to work with our member States, the WGA, and the Council to identify and seek to resolve in a mutually acceptable manner the problems which the directive is intended to address. Notably, the directive mentions required consultation with the tribes, but not the States. We are prepared to enter into a substantive dialogue that would fulfill the requirements of Executive Order 13132 ("E.O.") on Federalism. As stated therein, "One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems." Sec. 2(f)

Moreover, the E.O. states: "National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and

the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." Sec. 3(b)

The E.O. continues: "When undertaking to formulate and implement policies that have federalism implications agencies shall…where possible, defer to the States to establish standards; in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority…." Sec. 3(d)

Sec. 6 requires: "Each agency shall have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications."

We again request that the USFS enter into an authentic dialogue with the WGA, the Council, and the States towards achieving a mutually acceptable policy that reflects both the constitutional division of power and the on-the-ground realities of the West. The USFS should also recognize that a flexible and consistent state-by-state approach may be a more effective and more feasible way of addressing USFS needs than a national approach that does not account for the significant physical, hydrological, and legal differences that exist between the states. USFS should have consulted extensively with the States before publishing the proposed directive, and should now substantively engage the States, in order to define and remedy any perceived need to "clarify existing responsibilities and provide greater consistency and accountability…."

Thank you for your attention to our concerns, and we look forward to engaging in a productive dialogue with you and other USFS representatives.

Sincerely,

Patrick T. Tyrrell

Patrick Tyrrell, Chairman
Western States Water Council

I. STATE PRIMACY OVER SURFACE WATER AND GROUNDWATER

The Congress and the U.S. Supreme Court have consistently recognized that states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of the surface water and groundwater resources. Congress has recognized States as the sole authority over groundwater since the Desert Land Act of 1877. Moreover, the Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of the non-navigable waters located within their borders.

While the proposed directive identifies States as "potentially affected parties" and recognizes States as having responsibilities for water resources within their boundaries, it does not adequately acknowledge the primary and exclusive nature of these responsibilities. Further, the proposed directive does not explain how it will ensure that it will not infringe upon state allocation and administration of water rights and uses for both surface water and groundwater. Consequently, the Council is concerned that the proposed directive could conflict with state water management and water rights administration.

First, the Council is concerned that the proposed directive will require the implementation of certain conditions and limitations as part of the approval or renewal of special use permits that may interfere with the exercise of state issued water rights. Such requirements may create a significant burden on existing surface water and groundwater right holders who need the special use permits to exercise their water rights and could limit or hinder the exercise of current and future rights as permitted by the States. For example, proposed conservation requirements could limit the full exercise of certain water rights. The proposal would also require special use permit holders to meter and report their groundwater use, which could be expensive and may run contrary to the laws of some states. Restrictions placed on injection wells, already regulated by state and federal laws, could affect groundwater recharge projects. These are just a few examples.

There is little information presented on the extent of groundwater use on USFS lands and the needs the directive is intended to address. Consequently, additional work is needed before adoption of the directive to better understand its implications for myriad projects and activities to ensure that the proposal does not impair the exercise of existing and prospective state granted water rights. The USFS should work with the state authorities, and state expertise and resources could help define the problem areas within the directive.

Second, the directive would require the USFS to evaluate all water rights applications on National Forest System (NFS) lands, as well as applications on adjacent lands that could adversely affect groundwater resources the USFS asserts are NFS groundwater resources. As any other landowner or water user, USFS has the right to participate in state administrative processes to ensure that USFS interests are represented. USFS may also condition activities on National Forest lands and permit land surface disturbances. However, to the extent that the directive purports to interfere with or limit the exercise of state granted groundwater rights and state water use permitting authorities on USFS lands, and particularly pertaining to uses on non-USFS property, the proposed directive is beyond the scope of the agency's authority. The directive's requirement could also impose an unnecessary burden on USFS staff and other resources, as

state water right administrators not only have exclusive water use permitting authority, but also have the expertise to evaluate any and all impacts on water resources and water users. The directive raises the possibility of USFS actions interfering with the exercise of valid pre-existing property rights to the use of state waters. It is inappropriate for the USFS to attempt to extend its administrative reach to waters and adjacent lands over which it has no authority.

Third, the proposal's rebuttable presumption that surface water and groundwater are hydraulically connected raises another set of questions, including the standards and methods that may be used to rebut this presumption. In fact, groundwater and surface waters may or may not be hydrologically connected requiring extensive and expensive geohydrologic analyses, which the USFS is ill equipped to undertake on a large scale. Further, the management of groundwater and rights to the use of groundwater varies by state and is as much a legal question as it is a scientific question of connectivity. Moreover, if the USFS presumes to have authority to regulate groundwater uses, then their rebuttable presumption of a connection to surface water sources could lead to an unwarranted and contentious assertion of authority over surface water uses as well, which the U.S. Supreme Court has clearly rebuffed.

II. LEGAL BASIS OF THE PROPOSED DIRECTIVE

The Council has a number of questions about the legal basis for the proposed directive. While the proposal cites various federal statutes that it describes as directing or authorizing water or watershed management on NFS lands, it contains very little discussion or analysis of how these provisions specifically authorize the activities contemplated in the proposed directive. The proposal also does not address the limits of the USFS's legal authority regarding water resources.

Instead of supporting the proposed directive's activities, many of the authorities cited in the proposal support a more limited scope for USFS water management activities. For instance, none of the cited statutes mention groundwater specifically and many are primarily limited to the surface estate. Moreover, 16 U.S. Code Section 481 specifically provides that: "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated...."

The Council is particularly troubled by language in the directive that would require application of the reserved water rights doctrine to groundwater. As noted in the Council's attached position, the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed, nor has any federal court recognized, any federal property or other rights related to groundwater. Except as otherwise recognized under State water law, the Council opposes any assertion of a federal ownership interest in groundwater or efforts to otherwise diminish the primary and exclusive authority of states over groundwater.

It is also important to note that the U.S. Supreme Court narrowly interpreted the Organic Act, which the USFS cites as one of the legal justifications for the proposal, in *United States v. New Mexico*, 438 U.S. 696 (1978). Namely, the Court denied USFS claims to implied reserved surface water rights claims for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy "primary purposes" of the national forest reservation, such as the conservation of favorable surface water flows and the production of timber. Furthermore, the Court found that all other

needs were secondary purposes that required state-issued water rights. Similarly, the Court's other decisions regarding the reserved water rights doctrine have generally narrowed its scope by imposing "primary purpose" and "minimal needs" requirements. The proposal must ensure that it complies with the limits the Court has placed upon the recognition and exercise of implied federal reserved water rights.

Further, the assertion of reserved water rights in state general water rights adjudications and administrative proceedings can be contentious, time-consuming, costly, and counterproductive, often resulting in outcomes that do not adequately provide for federal needs. For this reason, different States and federal agencies have worked together to craft mutually acceptable and innovative solutions to address federal water needs. The State of Montana and USFS have entered into a compact that recognizes and resolves such needs. These types of negotiated outcomes are often much more capable of accommodating federal interests and needs and should be considered before asserting any reserved rights claims. At a minimum, the directive should require the USFS to consider alternatives to asserting reserved water rights claims, including those made in general state water rights adjudications and administrative proceedings.

III. THE LACK OF STATE CONSULTATION

The Council is especially concerned by the lack of state consultation in the development of the proposed directive and its assertion that it will not have substantial direct effects on the States, on the relationship between the federal government and the States, and the distribution of powers between the various levels of government. WSWC Position #371 (attached) notes that E.O. 13132 requires federal agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications...."

As declared by the governors, the directive has the potential to significantly impact the States and their groundwater resources. Any federal action that involves the possible infringement on state water rights and the assertion of reserved water rights claims has, on its face, the ability to significantly impact state granted private property and water use rights, their administration, and state water management and water supply planning.

It is particularly perplexing that the USFS deems it necessary to consult with tribes under Executive Order 13175, but has determined that the States do not warrant similar consultation under Executive Order 13132. It is difficult to understand how the USFS will be able to carry out this proposal in coordination with the States, as the directive proposes, without robust and meaningful consultation with the States. Moreover, waiting until the public comment period to solicit state input, as the USFS has done in this instance, is dismissive and counterproductive. Timely and substantive discussions could have led to improvements in the directive before being proposed, recognized and incorporated State's authorities and values, and avoided or minimized conflicts. The states should have been consulted much earlier in the development of this directive, especially given that it has apparently been under discussion for years.

IV. CONCLUSION

Secretary Vilsack's letter to the Governors includes an invitation to meet and discuss the directive. The Council encourages a substantive dialogue with the States before the USFS takes any further action on this proposal. The Council is also ready to participate in a dialogue with the USFS to address questions and concerns raised herein regarding the proposed directive, as well as those raised by our member States in their comments, some of which have already been submitted.

We ask for your careful consideration of our concerns and those of our member States. We look forward to further dialogue with the USFS regarding this proposal, and hope the USFS will appropriately defer to the authority of the States to manage their groundwater and surface waters, as recognized by the United States Congress and the Supreme Court.

Anthony G. Willardson, Executive Director
Western States Water Council

testimony presented before the

House Committee on Agriculture
Subcommittee on Conservation, Energy & Forestry

Regarding

The U.S. Forest Service's Proposed Groundwater Directive

September 10, 2014

On behalf of the Western States Water Council, a non-partisan government entity created by western governors to advise them on water policy issues, I am here to express the concerns of the Council regarding the U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management, published in the Federal Register for public comment on May 6. My testimony is based on Council Position #340 – State Primacy over Groundwater (attached), as well as WGA Policy Resolution 2014-03 on Water Resources Management in the West, and a July 2nd letter to USDA Secretary Tom Vilsack from Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors' Association (also attached). The latter states: "Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources."

In an August 29th letter, shortly before the close of the originally published comment period, Secretary Vilsack responded to a number of questions raised by the Governors and the Western Governors' Association, which is considering the Secretary's explanations and plans to comment prior to the newly extended deadline of October 3rd. The Council and WGA continue to work closely together on this issue, and reiterate, as stated in the Governors' letter that "States are the exclusive authority for allocating, administering, protecting and developing groundwater resources, and they are primarily responsible for water supply planning within their boundaries."

We request that the USFS seek an authentic dialogue with the States to achieve appropriate policies that reflect both the legal division of power and the on-the-ground realities of the West. USFS should have consulted with the States before publishing the proposed directive, and should now seek substantive engagement with the States in order to define and remedy any perceived deficiencies or inconsistencies. The directive may be well intentioned, but the problems that it is designed to address are not apparent, nor is the protection of groundwater a primary USFS responsibility.

I. STATE PRIMACY OVER SURFACE WATER AND GROUNDWATER

The Congress and the U.S. Supreme Court have consistently recognized that states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of the surface water and groundwater resources. Congress has recognized States as the sole authority over groundwater since the Desert Land Act of 1877. Moreover, the Court

held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of the non-navigable waters located within their borders.

While the proposed directive identifies States as "potentially affected parties" and recognizes States as having responsibilities for water resources within their boundaries, it does not adequately acknowledge the primary and exclusive nature of these responsibilities. Further, the proposed directive does not explain how it will ensure that it will not infringe upon state allocation and administration of water rights and uses for both surface water and groundwater. Consequently, the Council is concerned that the proposed directive could conflict with state water management and water rights administration.

First, the Council is concerned that the proposed directive will require the implementation of certain conditions and limitations as part of the approval or renewal of special use permits that may interfere with the exercise of state issued water rights. Such requirements may create a significant burden on existing surface water and groundwater right holders who need the special use permits to exercise their water rights and could limit or hinder the exercise of current and future rights as permitted by the States. For example, proposed conservation requirements could limit the full exercise of certain water rights. The proposal would also require special use permit holders to meter and report their groundwater use, which could be expensive and may run contrary to the laws of some states. Restrictions placed on injection wells, already regulated by state and federal laws, could affect groundwater recharge projects. These are just a few examples.

There is little information presented on the extent of groundwater use on USFS lands and the needs the directive is intended to address. Consequently, additional work is needed before adoption of the directive to better understand its implications for myriad projects and activities to ensure that the proposal does not impair the exercise of existing and prospective state granted water rights. The USFS should work with the state authorities, and state expertise and resources could help define the problem areas within the directive.

Second, the directive would require the USFS to evaluate all water rights applications on National Forest System (NFS) lands, as well as applications on adjacent lands that could adversely affect groundwater resources the USFS asserts are NFS groundwater resources. As any other landowner or water user, USFS has the right to participate in state administrative processes to ensure that USFS interests are represented. USFS may also condition activities on National Forest lands and permit land surface disturbances. However, to the extent that the directive purports to interfere with or limit the exercise of state granted groundwater rights and state water use permitting authorities on USFS lands, and particularly pertaining to uses on non-USFS property, the proposed directive is beyond the scope of the agency's authority. The directive's requirement could also impose an unnecessary burden on USFS staff and other resources, as state water right administrators not only have exclusive water use permitting authority, but also have the expertise to evaluate any and all impacts on water resources and water users. The directive raises the possibility of USFS actions interfering with the exercise of valid pre-existing property rights to the use of state waters. It is inappropriate for the USFS to attempt to extend its administrative reach to waters and adjacent lands over which it has no authority.

Third, the proposal's rebuttable presumption that surface water and groundwater are hydraulically connected raises another set of questions, including the standard and methods that may be used to rebut this presumption. In fact, groundwater and surface waters may or may not be hydrologically connected requiring extensive and expensive geohydrologic analyses, which the USFS is ill equipped to undertake on a large scale. Further, the management of groundwater and rights to the use of groundwater varies by state and is as much a legal question as it is a scientific question of connectivity. Moreover, if the USFS presumes to have authority to regulate groundwater uses, then their rebuttable presumption of a connection to surface water sources could lead to an unwarranted and contentious assertion of authority over surface water uses as well, which the U.S. Supreme Court has clearly rebuffed.

II. LEGAL BASIS OF THE PROPOSED DIRECTIVE

The Council has a number of questions about the legal basis for the proposed directive. While the proposal cites various federal statutes that it describes as directing or authorizing water or watershed management on NFS lands, it contains very little discussion or analysis of how these provisions specifically authorize the activities contemplated in the proposed directive. The proposal also does not address the limits of the USFS' legal authority regarding water resources.

Instead of supporting the proposed directive's activities, many of the authorities cited in the proposal support a more limited scope for USFS water management activities. For instance, none of the cited statutes mention groundwater specifically and many are primarily limited to the surface estate. Moreover, 16 U.S. Code Section 481 specifically provides that: "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated…."

The Council is particularly troubled by language in the directive that would require application of the reserved water rights doctrine to groundwater. As noted in the Council's attached position, the U.S. Supreme Court has recognized federal reserved rights to surface water, but no federal statute has addressed, nor has any federal court recognized, any federal property or other rights related to groundwater. Except as otherwise recognized under State water law, the Council opposes any assertion of a federal ownership interest in groundwater or efforts to otherwise diminish the primary and exclusive authority of states over groundwater.

It is also important to note that the U.S. Supreme Court narrowly interpreted the Organic Act, which the USFS cites as one of the legal justifications for the proposal, in *United States v. New Mexico*, 438 U.S. 696 (1978). Namely, the Court denied USFS claims to implied reserved surface water rights claims for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy "primary purposes" of the national forest reservation, such as the conservation of favorable surface water flows and the production of timber. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. Similarly, the Court's other decisions regarding the reserved water rights doctrine have generally narrowed its scope by imposing "primary purpose" and "minimal needs" requirements. The proposal must ensure that it complies with the limits the Court has placed upon the recognition and exercise of implied federal reserved water rights.

Further, the assertion of reserved water rights in state general water rights adjudications

and administrative proceedings can be contentious, time-consuming, costly, and counterproductive, often resulting in outcomes that do not adequately provide for federal needs. For this reason, different States and federal agencies have worked together to craft mutually acceptable and innovative solutions to address federal water needs. The State of Montana and USFS have entered into a compact that recognizes and resolves such needs. These types of negotiated outcomes are often much more capable of accommodating federal interests and needs and should be considered before asserting any reserved rights claims. At a minimum, the directive should require the USFS to consider alternatives to asserting reserved water rights claims, including those made in general state water rights adjudications and administrative proceedings.

III. THE LACK OF STATE CONSULTATION

The Council is especially concerned by the lack of state consultation in the development of the proposed directive and its assertion that it will not have substantial direct effects on the States, on the relationship between the federal government and the States, and the distribution of powers between the various levels of government. WSWC Position #371 (attached) notes that E.O. 13132 requires federal agencies to "have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications…."

As declared by the governors, the directive has the potential to significantly impact the States and their groundwater resources. Any federal action that involves the possible infringement on state water rights and the assertion of reserved water rights claims has, on its face, the ability to significantly impact state granted private property and water use rights, their administration, and state water management and water supply planning.

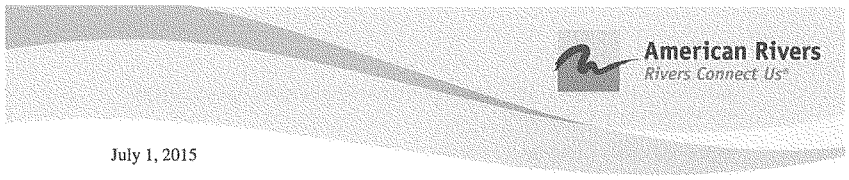
It is particularly perplexing that the USFS deems it necessary to consult with tribes under Executive Order 13175, but has determined that the States do not warrant similar consultation under Executive Order 13132. It is difficult to understand how the USFS will be able to carry out this proposal in coordination with the States, as the directive proposes, without robust and meaningful consultation with the States. Moreover, waiting until the public comment period to solicit state input, as the USFS has done in this instance, is dismissive and counterproductive. Timely and substantive discussions could have led to improvements in the directive before being proposed, recognized and incorporated State's authorities and values, and avoided or minimized conflicts. The states should have been consulted much earlier in the development of this directive, especially given that it has apparently been under discussion for years.

IV. CONCLUSION

The Council appreciates the opportunity to testify and express our concerns with the proposed directive. Secretary Vilsack's letter to the Governors includes an invitation to meet and discuss the directive. The Council encourages such a dialogue before the USFS takes any further action on this proposal. The Council is also ready to participate in a dialogue with the USFS to address questions and concerns raised herein regarding the proposed directive, as well as those raised by our member States in their comments, some of which have already been submitted and are attached to this testimony. Given the extension recently granted, some of these States may choose to supplement their comments before the new deadline. (Separately

attached for the record are comments provided USFS from Alaska, Idaho, Nevada, North Dakota, South Dakota, Washington and Wyoming.)

Thank you for your oversight efforts. We ask for your careful consideration of our concerns and those of our member States. We look forward to further dialogue with the USFS regarding this proposal, and hope the USFS will appropriately defer to the authority of the States to manage their groundwater and surface waters, as recognized by the Congress and the Supreme Court.



July 1, 2015

The Honorable Mike Lee, Chairman
The Honorable Mazie Hirono, Ranking Member
U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power
304 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Lee and Ranking Member Hirono,

On behalf of American Rivers' more than 100,000 members and supporters across the United States, I write to you to express deep concerns with the so-called Water Rights Protection bill. Far from protecting water rights, this bill would irresponsibly jeopardize the federal government's ability to manage our nation's precious water resources.

This bill is an overly broad and unnecessary attempt to address a conflict between the Colorado ski industry and the U.S. Forest Service that has since been resolved. The bill will have far-reaching, harmful consequences throughout the United States if enacted. Due to its vague and sweeping language, the bill not only affects the ski industry as intended, but all surface and groundwater rights recognized by the State in which users acquire possession of water or put it to beneficial use.

Enactment of this bill would cripple federal agencies' ability to exercise their responsibilities under the Property Clause of the United States Constitution to protect federal reservations. Instead, it prioritizes private use of river water over federal land management and stewardship, including over statutory mandates to protect habitat management, fishing, outdoor recreation, and the protection of endangered species. Because of its drafting, if S. 982 becomes law, the federal government will have to choose between issuing permits absent protections for anyone other than the applicant which would directly conflict with other statutes or to simply reject applications out-of-hand.

Curtailing the federal government's ability to place conditions on leases, permits, licenses, and other activities on taxpayer owned lands could allow lessees of public lands to drain our nation's rivers with impunity. Enactment of this legislation will almost certainly encourage cities and fracking companies to "buy and dry" rivers, encouraging trans-basin diversions which pipe water out of the ecosystems that depend on it. Prior to the Committee acting upon this legislation, the Committee should request an independent analysis on what effect such trans-basin diversions could have on watersheds that are

1101 14th Street, NW | Suite 1400 | Washington, DC 20005-5637 | phone 202.347.7550 | fax 202.347.9240 | AmericanRivers.org

chronically over allocated, such as the Lower Colorado Basin, the Rio Grande, and the Sacramento-San Joaquin system.

Without the ability to implement reasonable safeguards, the Departments of Agriculture and the Interior will be unable to protect federal land and water from pollution and overuse. Further, the bill would prevent the Federal Energy Regulatory Commission from requiring hydropower dam operators to operate in more ecologically sustainable ways, including the installation of fish ladders to enable fish to survive their spawning swims upriver.

Lastly, the bill suffers from terminally poor drafting. It posits that nothing within the act "limits or expands any existing legally recognized authority" of the federal government to issue land use permits. However, it also states that the Departments of Agriculture and the Interior shall not condition permits on limitations or "any other impairment" of any water right. Ostensibly, this negates the purpose of the bill, as it significantly cripples the agencies' authority.

Specifically, S. 982 claims to have no effect on enforcement of the Endangered Species Act, the Federal Power Act, federal reserved water rights, and Indian water rights. However, this bill directly conflicts with these existing laws and settlements enacted into law. The profoundly ambiguous savings clauses will confuse agencies and likely lead to extensive litigation where courts must decide which clause is operative. With protracted legislation, it is only the attorneys, and not the rivers, which will benefit.

This bill tips the delicate balance between riparian water use, ownership, and agency mandates to manage public resources in favor of special interests with unsustainable practices. It obstructs the government from defending our rivers from exploitation in a time of dire need for clean water. It thwarts river protection, restoration, and maximum beneficial use of federal lands. In resolving disputes between agencies and industry, careful construction, and not a legislative cudgel, is required. American Rivers opposes this legislation and requests it not move beyond the Subcommittee on Water and Power.

Sincerely,

Matt Niemerski

Director, Western Water and Public Lands Policy

MONTANA STATE SENATE

SENATOR DUANE ANKNEY
SENATE DISTRICT 20

HELENA ADDRESS:
STATE CAPITOL
PO BOX 200500
HELENA, MT 59620-0500
CAPITOL PHONE: (406) 444-4800
HOME PHONE: (406) 740-0629

HOME ADDRESS:
BOX 2138
COLSTRIP, MT 59323

COMMITTEES:
TAXATION
ENERGY
NATURAL RESOURCES

Senate Natural and Energy Committee
Chairman Senator Lisa Murkowski
Ranking Member Senator Maria Cantwell

June 15, 2015

I am writing to give support to S.1552, authorizing regional water projects in Montana. I have served for ten years both in the House and now the Senate and regional water has always been a priority. The importance of available drinking water cannot be understated. It is something those of us that live in Eastern Montana do not take for granted.
While in the House of Representatives as Chair of Appropriations and in the Senate, setting on Energy as Vice Chairman and Natural Resources the wise use of our natural resources is always a top priority as with your committee. Regional water projects are of the upmost importance to the State of Montana.
Your consideration would be greatly appreciated.

Sincerely,

Senator Duane Ankney
Senate District 20

TESTIMONY OF
ASSINIBOINE AND SIOUX TRIBES AND DRY PRAIRIE RURAL WATER AUTHORITY
FOR SENATE ENERGY AND NATURAL RESOURCES COMMITTEE, SUBCOMMITTEE
ON WATER AND POWER
IN SUPPORT OF S. 1365

1. Fort Peck Reservation Rural Water System Status and Funding Needs

The Fort Peck Reservation Rural water System consists of the Assiniboine and Sioux Rural Water System (ASRWS) and the Dry Prairie Rural Water System (DPRWS). The project was authorized by the Fort Peck Reservation Rural Water System Act of 2000, PL 106-382 (114 STAT 1451, October 27, 2000) and was enacted to ensure a safe and adequate municipal, rural and industrial water supply. The Act authorized $124 million for planning, design and construction of ASRWS and $51 million for the same activities of DPRWS. The authorization was in 1998 dollars with provision for cost indexing to adjust for inflation. The statute contemplated 10 years of construction, Sections 9(a) and (b), and the authorized construction schedule has been extended twice, first, through 2015 and, more recently, through 2020.

The project will serve 32,000 residents in northeastern Montana on the Fort Peck Indian Reservation and outside the Reservation in Valley, Daniels, Roosevelt and Sheridan counties where available groundwater is limited and of poor quality. Rural communities, farms and ranches covering 3,600 square miles will be connected by 3,200 miles of pipeline. The project area is larger than Delaware but smaller than Connecticut. The project map is included as Appendix A.

2. Project Construction Status

As shown in Table 1 below, the project will be 52% complete at the end of FY 2015. ASRWS will be 60% complete, and DPRWS will be 34% complete. The Assiniboine and Sioux Tribes have built the regional intake, water treatment plant and main transmission pipelines that serve both the Tribes and Dry Prairie. The building of the regional construction features accounts for the differences in percentage of completion.

TABLE 1

FUNDING STATUS AND NEEDS

Funding Status	ASRWS	DPRWS	Project
Total Federal Funding Authority (October 2014 $)	$212,222,000	$89,884,000	$302,106,000
Federal Funds Appropriated Through FY 2015			
Energy and Water Appropriations	$79,506,000	$30,202,000	$109,708,000
ARRA Allocation	47,371,000	0	47,371,000
Total	126,877,000	30,202,000	157,079,000
% Complete	59.79%	33.60%	51.99%
Amount Remaining After FY 2015			
Total Authorized (October 2014$)	$85,345,000	$59,682,000	$145,027,000
Adjusted for Inflation to FY 2020 at 2.41% Annually	$92,666,000	$64,808,000	$157,474,000
Years to Complete	5	5	5
Average Annual Required to End in FY 2020	$15,444,000	$10,801,000	$26,245,000

Construction funds remaining to be spent after FY 2015 total $157.474 million (Table 1) within the current authorization (in October 2014 dollars). The total assumes an average rate of construction inflation of 2.41% in future years. An average appropriation through fiscal year 2020 of $26.245 million is required. The President's budget for FY 2016 was woefully inadequate at $3.7 million.

The project is currently under budget by $12.5 million and can be completed within the authorized construction ceiling if appropriations are adequate to complete on the statutory schedule in 2020. Completion on schedule is not remotely possible with the President's FY 2016 budget of $3.7 million, which is typical of the budgeting over the last five years.

3. Remaining Appropriations to Complete Project Construction

Administrative costs of extending the project completion to FY 2020, 8 years beyond the original statutory schedule, required the project to budget an additional $7.76 million for administrative overhead, including Bureau of Reclamation oversight (October 2014 dollars), but under those constraints, the project can still complete on time and on budget in 2020 given an average annual appropriation of $26.245 million.

Administrative overhead costs beyond 2020 will reduce funds that can be applied to construction and cause the authorized ceiling to fall short of the amount needed to finish construction. The Subcommittee is urged to address the problem of inadequate budgeting of currently authorized projects in the Rural Water Program that are well advanced in construction to avoid extended annual overhead costs and inflation. S.1365 would address the problem of inadequate budgeting.

4. Reclamation's Rural Water Program Status and Funding Needs

The currently authorized rural water projects and the remaining federal cost to complete the projects after FY 2015 are summarized in Table 2. The total remaining costs to complete the projects are $1.325 billion. The projects will be 42% complete at the end of FY 2015.

TABLE 2

REMAINING FUNDS TO COMPLETE AUTHORIZED RURAL WATER PROGRAM

		Federal Expenditures			
	Total				Federal
	Federal	Through	Proposed	% Through	FY 2015
Rural Water System	Cost	FY 2014	FY 2015	FY 2015	Balance to Complete
Garrison Diversion Unit	856,679,000	516,001,319	6,496,000	60.99%	334,181,681
Rocky Boys/North Central	327,586,000	76,923,449	4,059,000	24.72%	246,603,551
Fort Peck/Dry Prairie	301,037,000	136,056,732	3,249,000	46.28%	161,731,268
Jicarilla	--	--	--		--
Lewis and Clark	417,962,000	219,813,012	2,432,000	53.17%	195,716,988
Eastern New Mexico	392,533,178	5,793,468	47,000	1.49%	386,692,710
Total	2,295,797,178	954,587,980	16,283,000	42.29%	1,324,926,198

Congress has appropriated funds for the rural water program since the 1980s and completed large-scale projects, including WEB, Mid-Dakota and Mni Wiconi. We expect Congress to continue to appropriate funds to complete the currently authorized projects. The pace of construction funding is the issue, and S. 1365 would complete the projects 20 years earlier than the historic pace of funding and bring safe and reliable water supplies to the project beneficiaries at a much earlier date.

Table 3 summarizes the budgeting by the administration over the last five years, which is declining and has averaged $30.678 million for construction. Congress has added funding to the administration's budget in three of the last five years, bringing construction funding to $48.298 million annually. The administration has become more reliant on additions by Congress to fund the construction activities of the rural water program.

TABLE 3

5 YEAR HISTORY OF RECLAMATION'S RURAL WATER PROGRAM
BUDGETING FOR CONSTRUCTION

	Effective Construction Funding by Fiscal Year					
Rural Water System	2011	2012	2013	2014	2015	Average
Eastern NM	$0	$0	$1,978,000	$649,000	$47,000	$534,800
Fort Peck/Dry Prairie	2,000,000	493,000	7,500,000	4,300,000	3,249,000	3,508,400
Jicarilla Apache	500,000	496,000	500,000	0	0	299,200
Lewis and Clark	2,000,000	493,000	4,500,000	3,200,000	2,432,000	2,525,000
Mni Wiconi	7,080,000	16,270,000	23,000,000	0	0	9,270,000
Garrison Diversion	19,954,000	4,685,000	12,605,000	11,507,000	9,001,000	11,550,400
Rocky Boy's/North Central	1,000,000	493,000	4,000,000	5,400,000	4,059,000	2,990,400
Subtotal	$32,534,000	$22,930,000	$54,083,000	$25,056,000	$18,788,000	$30,678,200
Congressional Addition		30,000,000		27,098,000	31,000,000	29,366,000
Total Rural Water Program	$32,534,000	$52,930,000	$54,083,000	$52,154,000	$49,788,000	$48,297,800

5. Taxpayer Savings with S. 1365

S. 1365 includes proposed deposits of $80 million annually into a special fund (Reclamation Rural Water Construction Fund). S. 1365 makes those deposits and interest available to complete authorized rural water projects without further appropriation. We fully endorse S. 1365 and think this bipartisan legislation should be passed by Congress and enacted into law. We applaud Senator Tester for introducing the bill and Senator Daines for cosponsoring the legislation along with five other senators.

CBO found that authorized rural water projects would cost $366 million through fiscal year 2019 and an additional $1.398 billion between fiscal years 2019 and 2035 (February 19, 2014, on S. 715, the Authorized Rural Water Projects Completion Act of 2014). S. 1365 has the same proposed rural water program funding provisions as S. 715. However, budgeting at the current pace of the administration for the authorized rural water projects has costs through fiscal

year 2019 of $123 million. Therefore, the net effect of S. 1365 (not reported by CBO) is $243 million ($366 million minus $123 million).

CBO, however, failed to report the costs of ongoing appropriations that are funding the authorized rural water projects too slowly. S. 1365 would increase the rate of appropriations but would save the taxpayer in future costs. The taxpayers will save by shortening the completion date from 2054 with the current level of budgeting to 2035 as proposed by S. 1365.

After fiscal year 2019, budgeting by the administration would require $2.488 billion through fiscal year 2054 at realistic levels of construction inflation (4%). CBO estimates to complete the projects in fiscal year 2035 are $1.398 billion with S. 1365. S. 1365 would complete the projects with a savings to the taxpayer after fiscal year 2019 of $1.09 billion ($2.488 billion minus $1.398 billion) and would complete the projects 20 years earlier.

The net savings to the taxpayer with S.1365, considering a cost increase through fiscal year 2019 of $243 million and the savings after fiscal year 2019 of $1.090 billion, would be $847 million. Authorized projects would be completed 20 years earlier and at lower costs with S. 1365 than with current levels budgeting by the administration.

Clean, reliable and adequate supplies of water are critical to the future of the communities served by the Fort Peck Reservation Rural Water System. The authorization for the rural water system has been doubled to twenty years. The fiscally prudent course of action for Congress to take is to finance the completion of authorized rural water projects now so that the cost of these projects does not rise precipitously over time and the affected communities may enjoy the benefits of the projects sooner.

The Assiniboine and Sioux Tribes and Dry Prairie Rural Water Authority fully support S. 1365.

ENMWUA
EASTERN NEW MEXICO WATER UTILITY AUTHORITY

Gayla Brumfield, Chairperson
Sharon King, Vice Chairperson

Gayla Brumfield
Chairwoman, Eastern New Mexico Water Utility Authority

Submission for the Record to the United States Senate
Subcommittee on Water and Power

Legislative Hearing on Senate Bill 1365

June 18th, 2015

Chairman Lee, Ranking Member Hirono and Members of the Subcommittee, my name is Gayla Brumfield and I am a former Mayor of the City of Clovis, New Mexico and currently serve as the Chairwoman of the Eastern New Mexico Water Utility Authority (Authority). I would like to submit testimony for the record in strong support of S. 1365, the Authorized Rural Water Projects Completion Act, which would resolve some of the most critical potable water supply issues in the Western United States and those specifically impacting the seven Eastern New Mexico Water Utility member agencies.

Mr. Chairman, we applaud and deeply appreciate the opportunity to express the importance of rural water projects and the need for the federal government to provide an adequate level of funding dedicated each year to complete these projects in a timely manner. The federal government's participation and funding capabilities are essential to making the Eastern New Mexico Rural Water System a reality for our

area residents. We are caught in a race against the failing Ogallala aquifer and the time it will take for the federal government to meet its commitment to complete this important project.

If federal funding continues along current trends and S. 1365 fails to become law then Eastern New Mexico's potable water supply will continue to decline at a rate that is outpacing our only viable alternative to meet our communities' needs. We believe this legislation will help us avoid costly delays in completing construction phases, limit long-term tax payer obligations and assures a more predictable and cost efficient means of building the Eastern New Mexico Rural Water System to realize a sustainable supply of water.

This legislation is vital for Eastern New Mexico to establish a sustainable supply of water and assure our socio-economic future. A sustainable supply of water is critical to the future of our region which supports the 27th Special Operations Wing at Cannon Air Force Base, a

number of industries including dairy, large-scale food production and processing, and colleges and universities, among others.

Providing a sustainable water supply for Eastern New Mexico is our most significant challenge. Our communities rely solely on water reserves located in the Ogallala aquifer. Our member communities are investing millions of dollars each year in buying water rights, wells and transmission lines just to keep up with a demand that is essentially flat. Even with continuous investment in production facilities pumping capacity is declining in double digit percentages every year.

The rate of decline of the aquifer is variable and it is hard to predict exactly how many more years we have. But, we absolutely know that if we do not begin receiving substantial increases in federal funding over the next several years, the outlook for our communities is dire.

Significant progress has been made since the Eastern New Mexico Rural Water System received Congressional Authorization in 2009. However, the majority of funding, more than $40 million to date, has come from the state of New Mexico and our member communities. Last year the project broke ground on Phase I, building the intake structure at Ute Reservoir. We are currently seeking federal funding for our next phase of construction, the building of an interim groundwater pipeline, which could provide relief for a few additional years while the rest of project is built.

We are at a critical point in the development of the project and appear before you today to urge Congress to expeditiously pass S. 1365. We cannot emphasize strongly enough just how important this project is for our member entities, for our military, and for the citizens and businesses of eastern New Mexico.

While our situation is dire, we are well aware that the other critical regional rural water systems are languishing and this effort will assure a future for the west.

Mr. Chairman, thank you for allowing me to submit my testimony for the record and please know that the Eastern New Mexico Water Utility Authority stands in strong support of S. 1365 and will gladly assist you in moving this important legislation through Congress.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

STEVE BULLOCK, GOVERNOR
STATE OF MONTANA
1625 ELEVENTH AVENUE
DIRECTOR'S OFFICE (406) 444-2074
FAX: (406) 444-2684
PO BOX 201601
HELENA, MONTANA 59620-1601

June 17, 2015

Honorable Lisa Murkowski, Chair
Senate Committee on Energy and Natural Resources
709 Hart Senate Office Building
Washington, DC 20510

Honorable Mike Lee, Chair
Senate Subcommittee on Water and Power
361A Russell Senate Office Building
Washington, DC 20510

RE: S. 1552 – The Dry-Redwater Regional Water Authority System and the **Musselshell-Judith Rural Water System** Authorization Act of 2015

Dear Senator Murkowski and Senator Lee:

Montana Senator Steve Daines, working with the Central Montana Regional Water Authority (CMRWA), has recently introduced legislation in the U.S. Congress for the authorization of the Musselshell-Judith Rural Water System.

The CMRWA is a coalition of eight incorporated communities, several unincorporated communities, and many rural families within six counties in the geographic center of Montana. Reliability of existing water supplies for member communities is questionable, at best. Lack of reliable water supply represents a significant public health risk to the residents of this region. Depth to decent quality potable water for wells is great, and surface water supplies run low in summer as agricultural users divert significant in-stream flows.

We know that reliable water supply is a substantial driver of the economy. Several of the communities which would be served by this regional system are within an hour's drive of Billings, a regional economic hub. Greater opportunities for sustainable growth would arrive with a regional drinking water supply.

Passage of S. 1552 would provide for federal support and funding of the regional system. The Rural Water Supply Act of 2006 authorized the Secretary of the Interior to establish and implement a Rural Water Supply Program. The Musselshell-Judith project received U.S. Bureau of Reclamation approval for its Appraisal Level Study in 2010 and approval for its Feasibility Report in January 2015. Significantly, this project is the first to complete the planning process prescribed under the Rural Water Supply Act.

The State of Montana has supported the planning and administration of the proposed Musselshell-Judith Rural Water System with appropriations and grants totaling nearly $2.2 million, to date. Most of this fiscal support originated from natural resource tax-based funds, established to fulfill the State's commitment to regional water authorities for assistance in financing the non-Federal portions of authorized regional drinking water projects.

Thank you for the opportunity to offer commentary in support of S. 1552.

Respectfully,

John Tubbs
Director, Department of Natural Resources and Conservation

cc Governor Steve Bullock
The Honorable Steve Daines
The Honorable Jon Tester
The Honorable Ryan Zinke
CMRWA Chairman Jim Kalitowski
Meghan Marino
Monty Sealey