

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

**BEFORE THE  
UNITED STATES HOUSE of REPRESENTATIVES  
COMMITTEE on NATURAL RESOURCES  
SUBCOMMITTEE on WATER, POWER, AND OCEANS**

**Discussion Draft of Water Rights Protection Act**

**May 18, 2017**

Thank you for the opportunity for the U.S. Department of Agriculture (USDA), Forest Service, to provide views on the discussion draft of the Water Rights Protection Act in the 115<sup>th</sup> Congress. USDA recognizes the authority of the states to allocate water and defers to the states to manage their processes as they relate to appropriation of water from sources located on National Forest System (NFS) lands. USDA also strives to collaborate with state water allocation agencies and engage in their processes where appropriate.

USDA supports the overall goal of the discussion draft to ensure the integrity of state systems for allocating water and associated property rights for those who have obtained water rights in prior appropriation doctrine states. Our comments pertain to the effect of the discussion draft on the Forest Service and management of NFS lands. The discussion draft also applies to the U.S. Department of the Interior (DOI) land management agencies. USDA defers to DOI to comment on the impacts of the discussion draft on DOI agencies and the federal lands under their jurisdiction.

With respect to the Forest Service, the discussion draft primarily affects permits authorizing uses of NFS lands, including permits for grazing, recreational uses, water facilities, and a wide variety of other uses. The discussion draft would prohibit the agency from including in a permit a requirement that an applicant or permit holder transfer water rights to the United States as a condition of obtaining a Forest Service authorization, and would prohibit the Forest Service from requiring an applicant or permit holder to acquire water rights supporting the authorized use in the name of the United States as a condition of the permit. USDA understands that these prohibitions address the bill's primary objectives relating to the ownership of water rights. We would like to work with the Committee on language to ensure these objectives are manifested in provisions that recognize the varying tenure and complexity of Forest Service authorized uses and their associated investments.

The discussion draft's other provisions raise more fundamental concerns with regard to the ability of the Forest Service to fulfill its statutory mandates. These provisions could adversely affect the agency's ability to carry out its multiple-use stewardship mission for NFS lands under the Multiple Use–Sustained Yield Act (MUSYA) and meet the requirements of other applicable

statutes including National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA).

Sections 3(1) and 3(3)(A) could 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 Forest Service would lose a critical mechanism under the framework of federal law to appropriately manage surface occupancy through land use authorizations if an applicant or holder of that permit also held a water right under state law.

Additionally, the scope of the discussion draft extends to unperfected or invalid claims of water rights. Section 2(2) defines the term “water right” to include water rights for which only an application for a state water right or permit has been filed. Under section 2(2), an applicant for a permit could challenge a condition in a Forest Service permit on the grounds that the condition would affect a requested water right or permit, regardless of whether the applicant would ever be able to legally acquire that right or permit from the state. Furthermore, to the extent section 2(2) appears to address only water rights that are acquired or put to beneficial use, the scope of the bill appears to be limited to water rights in prior appropriation doctrine states. However, the definition should be clarified to expressly exclude water rights in riparian doctrine states, where water rights are appurtenant to the land.

The authority of the states to allocate and permit the use of waters in prior appropriation doctrine states is recognized by the Forest Service and in federal law. However, to the extent section 4(2)(B) could be interpreted to limit the ability of the Forest Service to condition authorizations to use NFS lands, this provision would impair the ability of the Forest Service to protect water-dependent resources and ensure water is available for permitted uses and NFS programs. In particular, section 4(2)(B) would limit the agency’s ability to develop and present accurate analyses of water resources in environmental analysis documents under NEPA that involve effects on groundwater and surface water in states that do not manage them as connected resources, potentially subjecting the agency to additional litigation.

Section 5 provides that the prohibitions in the discussion draft will not affect other applicable authorities (including the ESA and Federal Power Act). We are also pleased that Section 5 recognizes that the federal government owns a wide variety of water rights, including federal reserved water rights as noted in section 5(d), which warrant recognition. However, the prohibition in section 3 on including terms and conditions in land use authorizations to protect water sources could affect the Forest Service’s ability to comply with these and other applicable laws. There is also concern that there could be an additional shift in the burden for protecting water resources to states, Tribes, or local governments. Targeted changes to section 3 could alleviate these concerns, so that the limitations on the Forest Service authority to include terms and conditions in permits would not affect the agency’s ability to comply with these other laws.

The following scenarios illustrate examples of potential consequences should the draft bill be enacted with all its current provisions:

- The Forest Service could be required to issue a road use permit to allow use of an NFS road when it is seasonally closed for resource protection, if the proponent held or had filed for a water right on a stream or for a well accessed by that road. The proponent could argue that denial of the permit or limiting road use to certain dates would impair a water right. Road use under these circumstances could jeopardize road conditions, create erosion and runoff, adversely affect wildlife by allowing motorized access during breeding seasons, create conflicts with recreational uses such as hunting, create public safety concerns, or conflict with any other effort to manage road use for multiple uses such as timber harvests, fuel reduction, or livestock grazing.
- Existing biological opinions under ESA establish terms and conditions and include incidental take statements for threatened and endangered species that allow for ongoing and future multiple uses, such as timber and fuel reduction projects, motorized use of NFS roads and NFS trails, livestock grazing, mining, and other important management activities, including water withdrawals managed by states. A requirement to issue land use authorizations without the requisite terms and conditions to effectuate biological opinions or to encourage the conservation and recovery of a threatened or endangered species through implementation of site-specific management actions called for in listed species recovery plans, could jeopardize the Forest Service's ability to comply with the ESA, generate legal challenges, and potentially require disapproval or suspension of other important activities not directly connected to water rights that are needed to sustain national forests and the goods and services they provide.

USDA would like to work with the Committee to address specific provisions in the discussion draft in an effort to avoid these and other potentially challenging scenarios while still achieving the overall goal of the bill.

Two significant efforts that demonstrate our work with citizens to develop shared solutions include a decision to withdraw a proposed groundwater policy, which aimed to manage activities on National Forest System lands, and a revision of the ski area water clause. In the case of groundwater, the Forest Service published its proposed directive for notice and comment May 6, 2014. The Agency heard from elected officials, states, Tribes, organizations, and individuals concerned about the intent of the directive and language in the proposal. The House Natural Resources Committee, as well as several states, asked the Agency not to proceed with the proposed draft and to consult with them before moving forward. The Forest Service heard these concerns and withdrew the proposal. Moving forward, the Forest Service acknowledges the authority of states in allocating and administering groundwater resources. Secondly, the final ski area water clause satisfactorily addressed key concerns raised by ski industry leaders and has earned support for its implementation.

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. For more than 100 years, the American people have depended on the availability of clean water from the national forests and grasslands to support communities, agriculture, recreation, wildlife, and other needs. USDA and the Forest Service are only interested in serving as stewards of the land,

so that water remains available for these critical needs. Continuity of the Forest Service's multiple-use mission, including the ability of the Forest Service to appropriately manage use and occupancy of NFS lands, is vital to that stewardship role for present and future generations. Abundant, sustainable flows of water are important for healthy watersheds, and healthy watersheds are critical to America's water supply. USDA and the Forest Service seek to be good neighbors and good partners with states, Tribes, communities, water rights holders, and the general public we serve in addressing sustainability of water resources on NFS lands.

We thank the Committee for the opportunity to provide this statement, and look forward to working with the Committee and bill sponsors to ensure the bill achieves its intended objectives while providing for continuity of water use and water quality on NFS lands.