Statement for the Record
U.S. Department of the Interior
Before the

Public Lands, Forests and Mining Subcommittee
Committee on Energy and Natural Resources
U.S. Senate

S. 1230, the Water Rights Protection Act of 2017

July 26, 2017

Thank you for providing the Department of the Interior with the opportunity to present our views on S. 1230, the Water Rights Protection Act of 2017. S. 1230 aims to prohibit the federal land management agencies from requiring the transfer of water rights recognized under state law directly to the United States as a condition of permit issuance or renewal. The Department supports the goals of S. 1230, and looks forward to working with the Committee to ensure the bill is calibrated to appropriately balance privately held water rights allocated under state law with the federal government's interest in managing public lands in the best interests of the American people.

Background

Any understanding of the settlement of the western United States would be incomplete without a discussion involving the role of water. Settlers of the West were fueled by the pursuit of economic advancement and stability, generally electing to settle along the rivers of the West in order to access trade and water supplies for farming, ranching, and use within the home. The federal government encouraged western expansion throughout the early 19th century through various laws and policies. For instance, soldiers were promised lands in return for enlisting in the American army during the War of 1812. Congress provided land grants and appropriated funding for the transcontinental railroad, which further consolidated the U.S. hold on the West. Under the Homestead Act of 1862, Congress authorized individuals to acquire title to 160 acres of public land. The Mining Act of 1866, the Desert Land Act of 1877, the Reclamation Act of 1902, among others all sought to encourage the development of the West.

Federal policy encouraging the settlement of the West, however, came at a price. Our Nation still grapples with the harm caused to our Nation's Native American population. The impact of many of these policies on Native Americans was profound and permanent. In terms of the conflict surrounding the allocation of water resources in the West, many of the seeds of this conflict, to both Indians and non-Indians, were planted during the rapid western expansion of the 19th century.

As our Nation struggled with the appropriate role of the federal government in western expansion, either by law or through investment in water infrastructure, western settlers could not depend upon the federal government to provide a system for water allocation. Rather, settlers developed their own customs, laws, and judicial interpretations to administer the allocation of water supplies. Settlers acquired water rights through the simple system of "first in time, first in right," whereby the individual who first appropriates water and puts it to beneficial use acquires a vested right to continue to divert and use that quantity. Traditional beneficial uses included irrigated agriculture, mining, stock watering, domestic uses, and power production. This concept later became memorialized by states as they entered the Union, and this system of "prior appropriation" remains largely intact in every state west of the 100th Meridian.

In the 20th Century, as our Nation's population continued to grow in the West, state-acquired water rights holders and the federal government began to increasingly collide. While Congress regularly deferred to the states in their authority to allocate water rights, federal courts also upheld the federal government's authority to reserve certain waters and exempt them from appropriation under state laws.[1] The conflict between state-acquired water rights holders and the federal government continued as Congress granted public land management agencies additional authorities to manage public lands or regulate activities. Legislation such as the Federal Land Policy Management Act, National Environmental Policy Act, Clean Water Act, and the Endangered Species Act often set regulatory limits on the exercise of state-acquired water rights. Now that we are over 168 years into the existence of our Department, this conflict remains real, and often acute, in parts of the West.

The Department of the Interior now manages 492 dams and operates 338 reservoirs with a total storage capacity of 245 million acre-feet of water, serving 31 million people. Interior manages more than 530 million acres of surface land, 409 units of the national park system, and 566 national wildlife refuges. Interior upholds the Federal trust responsibility to Indian Tribes and maintains relationships with 567 federal recognized Tribes. These figures serve as a constant reminder of the importance of maintaining an appropriate balance between (1) the Department's mission to protect and manage the Nation's natural resources and cultural heritage, provide scientific and other information about those resources, and honor its trust responsibilities or special commitments to American Indians, Alaska Natives, and affiliated island communities; and (2) the Department's aim to ensure our activities and policies to not have an adversarial impact on the state and local communities we interact with on a daily basis. Getting this balance is essential when allocating finite water resources.

[1] *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 702 (1899), *United States v. Winans*, 198 U.S. 371 (1905), and *Winters v. United States*, 207 U.S. 564 (1908).

Water supply is essential to supporting our Nation's public lands, which provide Americans with the opportunity to hike, fish, camp, and enjoy the great outdoors. These same lands serve as a lifeblood to many communities, which rely on them to graze, harvest timber, mine, and provide our nation with critical energy.

That is why the Department's management of public lands and water resources in the West often intersect with the water rights administered by states. Despite the inevitable conflicts over the allocation of finite water resources in the arid West, compounded during times of drought and due to growing populations, the federal government should avoid aggravating these conflicts. We can be careful stewards of our Nation's public lands and water resources while respecting the water rights of our neighbors. The Secretary of the Interior has pledged as one of his first priorities to restore trust and work with rather than against local communities and states. The distrust, anger and even hatred against some federal management policies is real, and the Secretary views this issue as an opportunity to facilitate further dialogue, rather than serving as a deaf adversary. It is with that mindset that we turn to our views on S. 1230.

S. 1230

Broadly speaking, the bill re-enforces the state's primary authority over water allocation, in particular as it relates to establishing and recognizing rights to use water. The federal government owns a wide variety of water rights, whether obtained under state law or through federal reservation, and has a wide variety of responsibilities for managing those water sources, such as allocating the waters of the Colorado River through the Boulder Canyon Project Act or utilizing unreserved waters for federal purposes or in the aid of navigation. At the same time, the Department recognizes the goals of the bill to prohibit the Secretaries of the Interior and Agriculture from conditioning any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement (hereinafter "permit") on the transfer of a private party's state water right to the United States. S. 1230 would also prohibit the Secretaries of the Interior and Agriculture from requiring any water user to apply for or acquire water rights in the name of the United States under state law as a condition of the issuance, renewal, amendment, or extension of any permit for the use of public lands. Both provisions, included in Section 3 of the bill, aim to prevent the federal government from acquiring a water right under state law for which it would otherwise have to acquire for itself.

While the Department is not aware of any broad program or policy that requires an applicant to transfer or relinquish privately held water rights to the federal government as a condition of a permit for the use of public lands, we will be conducting further analysis to determine scenarios where this may have occurred. We would like to work with the sponsor and the Committee to ensure that Section 3 has no bearing on voluntary, mutually beneficial water-sharing or water-use agreements between the federal government and private water rights holders, such as rangeland improvements, conservation easements administered by the U.S. Fish and Wildlife Service, or

partnerships to allow the use of groundwater on public lands for recreational use. The Department supports the goals of this provision, and looks forward to working with the sponsor and Committee to make additional revisions to the bill to ensure that both private property rights and public resources are protected.

The Department looks forward to working with the sponsor and this Committee to ensure Section 3(3) of the bill does not conflict with existing statutory authority pertaining to the management of public lands, and to ensure federal public land managers are not prohibited from carrying out their congressionally mandated mission of managing the use of public lands when those public lands are used in conjunction with the exercise of state-acquired water rights. Additionally, the Department would like to ensure that Section 3(3) does not interfere or impact Indian water rights. We also understand the concern among some water rights holders that absent legislation, public land managers may have the ability to severely limit the use of a state acquired water right. We look forward to working with you to ensure the proper balance between these two co-equal interests.

Section 4 of S. 1230 requires the Secretary of Agriculture and Interior to recognize the long-standing authority of states to manage and allocate water resources, and to coordinate with states to ensure that federal actions are consistent with, and impose no greater restriction or regulatory requirement than applicable state water law allows for purposes recognized by state law. Section 4 also prohibits the Secretary of Agriculture and Interior from adversely affecting states' permitting for the beneficial use of water and adjudicating water rights, adversely affecting any definition established by a state with respect to the term ''beneficial use'', ''priority of water rights'', or ''terms of use", or asserting any connection between surface and groundwater that is inconsistent with a state's recognition of such connection.

The Department also notes that Section 4(2)(B) may limit public land manager's ability to rely upon the best available science to determine the hydrologic nexus between groundwater and surface water, which could have an adverse impact on public lands. We look forward to working with the sponsor and the Committee to ensure this provision does not harm groundwater-dependent resources on public lands.

The Department appreciates the savings clause in Section 5, which recognizes the importance of Bureau of Reclamation contracts, the Endangered Species Act, Federal Power Act, and state-acquired water rights owned by the United States. We particularly appreciate the recognition of the unique role of federally reserved Indian water rights, which will allow the Department to continue pursuing the settlement of Indian water rights disputes in order to break down barriers to social and economic programs for Tribes and help create conditions that improve water resources management by providing certainty as to the rights of all water users who are parties to the dispute. The Department also recommends subsections 5(a), 5(d), and 5(f) be amended to

delete the word “existing”, in order to ensure existing and future Interior authorities and federal reserved water rights are protected by the savings clause.

The Department notes that Title VII of HR 23, the *Gaining Responsibility on Water Act of 2017*, which passed the House of Representatives on July 12th, addressed many of the elements we raised in our testimony today.

Conclusion

The Department recognizes the interest in re-enforcing the state’s authority over water allocation. The Department also recognizes that the federal government retains the right and obligation to manage federal lands under the Constitution. This right and obligation includes the authority to both reserve water rights and mitigate against the impacts of the exercise of privately held water rights on public lands. Congress, on the other hand, is charged with directing the Executive Branch’s implementation of those rights and obligations. As such, we look forward to working with you on this bill to affirm the Department’s commitment to private water rights, while maintaining our responsibility to manage public lands for the benefit of all Americans.