

Statement for the Record
U.S. Department of the Interior
Before the
House Committee on Natural Resources
Subcommittee on Water, Wildlife, and Fisheries

H.R. 7544, the Water Rights Protection Act

July 9, 2024

Thank you for the opportunity to provide the views of the Department of the Interior (Department) on H.R. 7544, the Water Rights Protection Act. H.R. 7544 threatens the federal government's longstanding authority to manage federal lands and associated water resources, uphold our trust responsibility to 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 strongly opposes H.R. 7544. The Department recognizes that H.R. 7544 may also impact the Department of Agriculture, though our comments are limited to Department concerns.

Background

The federal government has long complied with state law in acquiring water rights to support federal programs and land management activities. The United States also holds water rights under federal law in accordance with its right to regulate federal property, including lands and water, under Article IV, Section 3 of the Constitution, which grants the United States the authority to reserve water rights for its reservations and its property. Similarly, Article I, Section 8 of the Constitution granted the United States the power to regulate commerce with Tribes, which courts have cited, along with the treaty power found in Article II, Section 2, as authority to reserve Tribal water rights.

H.R. 7544

H.R. 7544 prohibits federal land management agencies from conditioning the approval of any permit, lease, or other use agreement on: 1) the transfer of water rights directly to the United States; 2) the application for or acquisition of water rights in the name of the United States; 3) limiting the date, time, quantity, location of diversion or pumping, or place of use of water rights beyond any applicable limitations under state water law; or 4) the modification of the terms and conditions of groundwater withdrawal, guidance and reporting procedures, or conservation and source protection measures established by a state. The bill also includes several provisions regarding policy development and planning that pertain to water rights.

Analysis

As an initial matter, H.R. 7544 would jeopardize the Department's ability to protect the lands and resources it is entrusted to manage on behalf of the American people and the Tribes to whom we owe a trust responsibility. For example, the Department is concerned that the bill could lead to

conflict between federal permittees and other users of Department-managed lands where agreements between federal land managers and their permittees are conditioned on assurances that water will continue to be available for other users on-site, as well as for the purposes of federal reservations. These conflicts could hinder ongoing water use in a time when many communities are experiencing significant drought-related hardship, potentially tying up established practices in extensive and wasteful litigation.

In addition, the bill 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 or create uncertainty for parties voluntarily entering into agreements with the Department or its bureaus with respect to water rights in order to protect state, federal, Tribal, or third-party interests. For example, H.R. 7544 could create ambiguity for the Bureau of Reclamation (BOR) as we work with parties who acquire a state-based water right to support land, wildlife, and recreational activities on BOR-managed lands. The legislation, as currently written, could limit the BOR's ability to appropriately manage and include necessary controls for such partnerships and protect the interest of the United States and those of the public land.

Moreover, H.R. 7544 would preclude Departmental bureaus from protecting property interests or resource values as mandated by Congress. For example, the legislation would prohibit the National Park Service (NPS) from exercising its authority to perfect water rights in the name of the United States for waters diverted from or used on lands managed by the NPS, including operations associated with NPS concessioners, lessors, or permittees. The requirement that all water rights on NPS-managed lands be held in the name of the United States, which is grounded, in part, on the potential damage and disruption that privately held water rights could cause to park resources and operations, particularly if the private right holder sought to change key provisions of a water right such as the point of diversion, place of use, or the beneficial use to which the water is put. Furthermore, this requirement safeguards the inchoate federal reserved water rights associated with all water resources on NPS lands, which constitute federal property, from being impermissibly disposed of without express Congressional authorization.

The bill would also hinder the U.S. Fish and Wildlife Service's (FWS) implementation of the National Wildlife Refuge Administration Act to protect water rights acquired for national wildlife refuges, waterfowl production areas, and national fish hatcheries. The FWS works closely with its partners in state governments to balance the needs of states to maximize beneficial water utilization with federal mandates to consider impacts on wildlife and habitat. H.R. 7544 could hinder the FWS' ability to accept title to water rights in the name of the United States as mitigation to offset new depletions. Without these tools and partnerships in place, the critical balance of water availability for many native fish populations that federal, state, and Tribal agencies work to conserve and recover could be negatively impacted. More broadly, this could impact the ability of the FWS to meet its mission to manage public lands and conserve wildlife and habitat.

H.R. 7544 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. The BLM holds water rights acquired under both state and federal law to ensure that water is available for the public, BLM permittees, wildlife habitat, and other public land resources. Under the Federal Land Policy and Management Act, the BLM has the authority to require terms and conditions on public land use authorizations to minimize damage to natural, scenic, and cultural resources, including fish and wildlife habitat and other water-related resources. H.R. 7544 could undermine cooperative arrangements with ranchers and local communities where the BLM frequently partners with public land users through collaborative agreements to plan, finance, and develop water resources. The 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, including dual use water rights to support both stockwatering by BLM permittees and water use by wildlife, including big game species. The legislation would jeopardize the BLM's ability to manage water resources on public lands collaboratively with its permittees.

In terms of groundwater, the bill could prevent the Department from protecting groundwater-dependent surface resources, such as hot springs, caves, seeps, pools, springs, and hanging gardens, from damage caused by groundwater depletion. For example, section 3(2)(A) of the bill precludes Departmental managers from "assert[ing] any connection between surface water and groundwater that is inconsistent with such a connection recognized by state water law." Initially, the intent of this provision, its potential scope, and the context in which it would apply is unclear. Further, the best available hydrological science clearly recognizes the connection between groundwater and surface water, regardless of whether state law has explicitly recognized this connection. This provision may prevent the Department from using the best available science, with potentially disastrous results for many sites on federal lands that are treasured by the public for their ecological, recreational, aesthetic, and scientific values, as well as for Tribal Nations that rely on these sites for their cultural, religious, and economic wellbeing. Additionally, although the United States generally defers to the state processes and adjudications when it comes to water issues, these sections may unduly burden the Department and threaten the protection of federal property.

The bill could also create significant problems in the context of federal reserved water rights, which arise and exist independently upon state law. 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 a Tribal 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 and that the doctrine represents an exception to Congress' deference to state water law in other areas. 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 Tribes; protect national parks, wilderness areas, wild and scenic rivers, or wildlife refuges, migratory birds, and other federal trust 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 Tribal Nations.

The Department notes that some states allow for unregulated groundwater use and provide no protection for groundwater-dependent resources. However, numerous federal and state courts, including the United States Supreme Court, as well as federal legislation, have recognized that federal reserved water rights may also be satisfied from groundwater, and this bill could negatively affect not only currently recognized rights, but future efforts to confirm such rights through adjudication or settlement. Undermining the Department's ability to manage groundwater resources could lead to significant damages to the public lands and the values they serve.

Additionally, section 3(1)(B) of H.R. 7544 would require the Department to "coordinate with the [s]tates to ensure that *any* rule, policy, directive, management plan, or similar federal action is consistent with, and imposes no greater restriction or regulatory requirement, than applicable [s]tate water law" (emphasis added). This clause has the potential to impose onerous new obligations on the Department's bureaus, as most of the specified actions already involve procedures for robust public and governmental participation and input. Moreover, this provision could ultimately prevent bureaus from implementing beneficial uses of water that are not recognized under state water law, even when those uses are squarely within the Department's mandate under federal law. For example, some states do not have statutes that recognize instream flow or water level protection as a beneficial use of water, and requiring federal agencies to coordinate their management plans with these state policies could prevent the NPS, FWS, and BLM and other bureaus from taking land management actions to protect habitat for special status species. In addition, section 3(2)(B) includes a sweeping prohibition on taking "any action that adversely affects" water rights granted by a state, a state's authority over water rights, or specified state definitions related to water rights. This provision would likely increase conflict between the Department and other adjacent water users and interfere with legitimate federal water management activities, including conflicts with federal reserved water.

The Department also notes that under section 13(c) of the Wild and Scenic Rivers Act, a federal reserved water right is created for each river segment included as part of the National Wild and Scenic Rivers System at the time of designation. This reservation is for the amount of water necessary to protect and enhance river values, including free-flow, water quality, and outstandingly remarkable values. As currently drafted, H.R. 7544 could undermine the

Department's ability to manage wild, scenic, and recreational river designations for the benefit and enjoyment of present and future generations.

Finally, while the Department appreciates the Sponsor's inclusion of a variety of savings clauses that aim to limit the bill's effects – and its potentially significant unintended consequences – we are concerned that the language of some of these provisions directly contradicts other parts of the bill. This ambiguity could lead to future litigation and uncertainty.

Conclusion

We appreciate the opportunity to present the Department's views on H.R. 7544. 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 and federal trust species. For these reasons, the Department strongly opposes this bill.