

**STATEMENT OF
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U.S. DEPARTMENT OF AGRICULTURE
BEFORE THE
SENATE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
SUBCOMMITTEE ON WATER AND POWER
CONCERNING
S. 2902: WESTERN WATER SUPPLY AND PLANNING ENHANCEMENT ACT
AND
S. 2524: BOLTS DITCH ACCESS AND USE ACT**

MAY 17, 2016

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to present the views of the U.S. Department of Agriculture (USDA) regarding S. 2902, Western Water Supply and Planning Enhancement Act and S. 2524, Bolts Ditch Access and Use Act. I am Leslie Weldon, Deputy Chief for the National Forest System (NFS), USDA Forest Service.

S. 2902, Title II – Protecting Existing Water Rights

Water on National Forest System (NFS) lands is important for many reasons, including fish and wildlife habitat, public recreation, and providing a clean and plentiful supply of water for downstream beneficial uses. Today, water from national forests and grasslands contributes to the economic and ecological vitality of rural and urban communities across the nation, and those lands supply more than 60 million Americans with clean drinking water.¹

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

¹ <http://www.fs.fed.us/publications/policy-analysis/water.pdf>.

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.

USDA has not had time to fully analyze the effect of this bill. USDA recognizes the fundamental role of States to adjudicate water rights under state law. However, based on an initial review, the bill appears to restrict USDA's ability to protect water resources. USDA maintains its opposition to provisions in any bill that would prohibit the Secretary of Agriculture from regulating uses of NFS lands, or denying authorizations for uses of NFS lands, because these prohibitions have potential to adversely affect water resources on those lands. It is USDA's position that the existing statutory framework protects privately-held water rights in balance with the ability of the Forest Service to protect water resources. An example of the Forest Service work with stakeholders within this framework is the recent publication of final directives for ski areas operating on NFS lands under term special use permits.

For the last 30 years, the Forest Service has required ownership by the United States, either solely or in narrow circumstances jointly with the permit holder, of water rights developed on NFS lands to support operation of ski areas in prior appropriation doctrine states. This policy was motivated by the concern that if water rights used to support ski area operations are severed from a ski area—for example, are sold for other purposes—the Forest Service would lose the ability to offer the area to the public for skiing.

On June 23, 2014, the Forest Service published a notice of a proposed directive in the *Federal Register* to add riparian and prior appropriation doctrine water clauses for ski area permits to the Forest Service's Directive System. The final clauses, published in the *Federal Register* on

December 30, 2015, were the result of extensive public input, including input from the ski industry and a wide range of other water rights holders.

The final directive contains two ski area water clauses, one for eastern States that follow the riparian doctrine for water rights and one for western States that follow the prior appropriation doctrine for water rights. Under a riparian doctrine system, water rights are appurtenant to the land, whereas under a prior appropriation doctrine system, water rights may be severed from the land. Most ski areas on NFS lands are in western states that adhere to the prior appropriation doctrine.

The final directive does not require that ski area water rights be acquired in the name of the United States. Instead, the final directive focuses on assuring sufficiency of water to operate ski areas on NFS lands. This modified approach for ski area permits was determined to be appropriate given the characteristics of ski area water rights and ski areas. Unlike water rights diverted and used on NFS lands by holders of other types of authorizations, ski area water rights may involve long-term capital expenditures. In western States like Colorado and New Mexico, holders of ski area permits may have to purchase senior water rights at considerable expense to meet current requirements for snowmaking to maintain viability. Holders of ski area permits need to show the value of these water rights as business assets, particularly during refinancing or sale of a ski area. The value of these water rights is commensurate with the significant investment in privately owned improvements at ski areas. These investments were recognized by Congress in enactment of the National Forest Ski Area Permit Act, which authorizes permit terms of up to 40 years. 16 U.S.C. 497b(b)(1).

In addition to these financial issues, the land ownership patterns at ski areas—particularly the larger ones—often involve a mix of NFS and private lands inside and outside the ski area permit boundary, which makes it difficult to implement a policy of sole Federal ownership for ski area water rights. Much of the development at ski areas is on private land at the base of the mountains. As a result, water diverted and used on NFS lands in the ski area permit boundary is sometimes used on private land, either inside or outside the permit boundary.

With respect to sufficiency of water for ski area operations, the final directive includes a definition for the phrase, “sufficient quantity of water to operate the ski area,” and clarifies when and how the holder must demonstrate sufficiency of water to operate the permitted ski area and new ski area water facilities; addresses availability of Federally owned ski area water rights during the permit term; and addresses availability of holder-owned ski area water rights during the permit term and upon permit revocation or termination.

At this time, ski industry representatives have indicated support for the final directive, and members of Congress have indicated appreciation for the agency’s efforts to work collaboratively on this solution. It is USDA’s position that additional legislation is not necessary to ensure protection of privately-owned water rights.

USDA has not had adequate time to analyze the effects of the bill on Forest Service groundwater policies. However, since the Forest Service published its proposed groundwater directive for notice and comment on May 6, 2014, the Agency has heard from several States and other parties who are concerned about the intent of and language in the proposal. By the end of the comment period, the Agency had received 260 comments from elected officials, States, Tribes, organizations, and individuals from across the country. 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 has heard these concerns and stopped work on the proposed groundwater directive, and the Agency will not move forward with our original proposal. Rather, we have committed to engaging with States, Tribes, and citizens to fully understand concerns and work collaboratively to address them before any future actions or proposals would result. Should the Forest Service choose to move forward with a new proposed directive in the future, it would only be after engaging with States and making sure that the Agency thoroughly understands their concerns in order to address them. The Forest Service continues to consider improvements to direction to Agency staff on groundwater to maintain its stewardship responsibilities in a consistent, credible, and transparent manner.

S. 2902, Title I Subtitle B—Protecting Critical Water Supply Watersheds

USDA has not had adequate time to analyze the effects of this subtitle but upon initial review opposes NEPA provisions that are beyond the scope of Farm Bill and HFRA authorities. As a general matter, the Forest Service welcomes legislation that incentivizes collaboration and expands the toolset we can use to complete critical work on our nation's forests, without overriding environmental laws.

While we support efforts to provide tools to support improved forest management, capacity constraints due to the present approach to budgeting for wildfire continue to hinder further efforts to improve the health and resiliency of the nation's forests. In fiscal year 1995, the Forest Service spent 16 percent of its budget on firefighting. Today the agency spends more than half of its budget in fire management activities and has seen a corresponding decline in non-fire staffing of 39 percent since 1998. Notwithstanding these challenges, through collaboration, the Forest Service has consistently increased both the number of acres treated annually to improve watershed resilience and timber production—increasing timber harvest by 18 percent since 2008.

The frequency and intensity of wildfire, the rising cost of assets needed to deploy against the spread of wildfire, and the way that fire suppression is paid for constrain the agency's capacity to realize additional gains through efficiencies and partnerships alone. The most important action Congress can make now in advancing the pace and scale of forest restoration is to fix the fire funding problem.

The health of the national forests and the communities we serve are our shared priority. The Forest Service is accelerating restoration and management of the national forests through innovative approaches and increased collaboration, though it is clear that more work needs to be done, and we welcome practical legislation that provides for expedient and responsible efficiencies in the execution of that work.

USDA defers to Department of Interior on provisions that most directly affect their agencies.

S. 2524 Bolts Ditch Access and Use Act

S. 2524 seeks to resolve issues associated with the use and maintenance of Bolts Ditch near the Town of Minturn, Colorado. The headgate and approximately 450 lineal feet of the ditch are located within the Holy Cross Wilderness on the White River National Forest. The United States opposed two water rights application cases associated with this ditch in 2006 and 2007.

Subsequently, the United States and the applicants reached a stipulated agreement and settlement in both cases; where it was agreed that the point of diversion would be removed from the Holy Cross Wilderness unless (1) the point of diversion in the Holy Cross Wilderness is specifically authorized by the President, (2) the Holy Cross Wilderness boundary is altered to exclude the point of diversion from the Wilderness area, or (3) the point of diversion is confirmed by Congress to be specifically included as a part of the authorization of the Homestake Reservoir Project within the Holy Cross Wilderness Area.

S. 2524 would direct the Secretary of Agriculture to issue a special use permit to the Town of Minturn authorizing non-motorized access to use and perform routine maintenance on the Bolts Ditch headgate and 450 lineal feet of Bolts Ditch in accordance with US Forest Service wilderness regulation. This bill does not authorize new construction or reconstruction.

S. 2524 has the support of Eagle County, the Colorado River District, and local and national wilderness advocacy organizations.

The Department does not oppose S. 2524.

This concludes my remarks. I would be happy to answer any questions. Thank you for the opportunity to testify.