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"

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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

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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.

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)

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.

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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).

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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

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

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.