

## WATER RIGHTS PROTECTION ACT

MARCH 4, 2014.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HASTINGS of Washington, from the Committee on Natural Resources, submitted the following

### R E P O R T

together with

### DISSENTING VIEWS

[To accompany H.R. 3189]

[Including cost estimate of the Congressional Budget Office]

The Committee on Natural Resources, to whom was referred the bill (H.R. 3189) to prohibit the conditioning of any permit, lease, or other use agreement on the transfer, relinquishment, or other impairment of any water right to the United States by the Secretaries of the Interior and Agriculture, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Strike all after the enacting clause and insert the following:

#### SECTION 1. SHORT TITLE.

This Act may be cited as the “Water Rights Protection Act”.

#### SEC. 2. TREATMENT OF WATER RIGHTS.

The Secretary of the Interior and the Secretary of Agriculture—

(1) shall not condition the issuance, renewal, amendment, or extension of any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on the transfer of any water right directly to the United States, or any impairment of title, in whole or in part, granted or otherwise recognized under State law, by Federal or State adjudication, decree, or other judgment, or pursuant to any interstate water compact; and

(2) shall not require any water user to apply for or acquire a water right in the name of the United States under State law as a condition of the issuance, renewal, amendment, or extension of any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement.

**SEC. 3. DEFINITION.**

For purposes of this Act, the term “water right” means any surface, groundwater, or storage use filed, permitted, certificated, confirmed, decreed, adjudicated, or otherwise recognized by a judicial proceeding or by the State in which the user acquires possession of the water or puts it to beneficial use.

**SEC. 4. IMPACT ON EXISTING AUTHORITY.**

Nothing in this Act limits or expands any existing authority of the Secretaries to condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on Federal lands subject to their respective jurisdictions.

Amend the title so as to read:

A bill to prohibit the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretaries of the Interior and Agriculture.

## PURPOSE OF THE BILL

The purpose of H.R. 3189 as amended is to prohibit the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretaries of the Interior and Agriculture.

## BACKGROUND AND NEED FOR LEGISLATION

Each western state has its own system of water law that governs public and private water rights within its borders. All western states have adopted some form of the prior appropriation doctrine, or “first in time, first in right,” regarding surface water and many have, to some degree, integrated this approach into their system of ground water law. Under prior appropriation, water rights are obtained by diverting water for “beneficial use,” which can include domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, agriculture, recreation, fish and wildlife, depending on state law. The water right is the amount of water that is diverted and put to beneficial use. Eastern states normally use riparian systems of law, under which rights to use water are generally tied to lands adjacent to waterways. Western states adopted prior appropriation since incentive was needed for the development and judicious use of water rights from sources often far away from their point of use. This allowed for the ownership of water rights without the need to own the land in direct proximity to a waterway. The settlement of the West and the development of water rights have allowed water users to invest in farming and ranching operations, domestic uses, recreational opportunities, energy development, conservation, and industrial uses. Appropriated waters are also a major component of most metropolitan water supplies in the West.

Western states have developed water laws that work best for them, largely free from federal interference for more than a century. As the West was settled, a fairly uniform set of laws, customs, and judicial decisions based on beneficial use was established. The federal government has acquiesced to the western territories, later states, to control, manage, and allocate water. That important principle of federalism has been confirmed by the U.S. Supreme Court as recently as June of 2013, in *Tarrant Regional Water District v. Hermann*, 133 S.Ct. 2120, 2132 (June 13, 2013), the “power to control . . . public uses of water is an essential attribute of [state] sovereignty.”

Pursuant to the McCarran Amendment enacted in 1952, the United States has waived its sovereign immunity when sued in a water rights dispute, and barred the United States from objecting to the application of state law to such a proceeding. This landmark law put in place a framework under which the federal government validates its state granted water rights in the same fashion as non-federal water rights holders.

Earlier federal attempts to erode the state water rights of federal land permittees resulted in agencies receiving clear and significant opposition. In the 1990s Congress commissioned a Federal Water Rights Task Force in response to the federal use of permitting processes to reduce state-allocated water rights held by the city of Boulder, Colorado and by certain agricultural interests in Arizona. The report produced by the Task Force found that federal acquisition of water for secondary purposes (beyond reserved water rights) must be obtained and exercised in accordance with state and federal law and that the federal government had exceeded its legal authority in failing to do so. Report of the Federal Water Rights Task Force (August 25, 1997).

Undermining this longstanding framework upsets the foundation of western municipal, agriculture, recreation, business, environmental, and local communities' water supplies. Protection of Western water supplies and the state law that makes that end possible have been supported by generations of Western elected officials on a bipartisan basis.

Contrary to this longstanding precedent, recent federal actions and directives are undermining the historic benefits of Western water law. Specifically, federal land management agencies, including the U.S. Forest Service have demanded the transfer of water rights recognized under state law directly to the United States as a condition of permit issuance or renewal.

The Forest Service and other federal land management agencies authorize recreational, agricultural, and other non-federal water users to operate on federal lands through the use of special-use permits. Such permits do not confer water rights on permit holders, but merely govern the terms of use for the federal land. Water rights arising within or outside of the permit area must be acquired in accordance with state law and paid for, developed, and maintained at the expense of the water user. Many water rights holders use these private water rights for activities critical to their operations, such as snowmaking in the case of ski areas and stock watering and irrigation in the case of farm and ranch operations. Additionally, these rights are often used as collateral to secure financing for maintenance, expansion, and to supply nearby communities.

Despite the legal limitations of these land use arrangements with respect to water rights, the Forest Service issued an interim directive in 2011 for ski area special use permits which included a clause requiring applicant ski areas to transfer privately held water rights to the United States as a permit condition. The directive also required that water rights arising on Forest Service lands off-site be transferred to the United States in the event that the permit expires or is terminated. In 2012, the Forest Service issued an amended national water clause with similar requirements. Certain municipal permits, grazing permits and other agricultural

land use arrangements have also included conditions requiring the transfer of state-recognized water rights to the United States on a piecemeal basis in recent years.

Witnesses at an October 10, 2013, Water and Power Subcommittee hearing on H.R. 3189 testified that these actions would: (1) inhibit water users by limiting access to financing for maintenance and development of facilities; (2) potentially result in U.S. government diversion of water currently held by non-federal entities to off-permit locations, prohibiting the continuation of beneficial use; (3) violate state water law of prior appropriation; and (4) pose an immediate threat to Western economies which rely on the availability of water for snowmaking at ski areas, stock watering and irrigation, and municipal use. Furthermore, these actions likely constitute a taking under the Fifth Amendment to the United States Constitution for which just compensation would otherwise need to be paid. Many courts have recognized the compensable property nature of a water right if taken by the government.

The purpose for the new clause in both the case of ski areas and farm and ranch operations, as expressed by the Administration, is to ensure that water remains at the location of use to perpetuate its current purpose. The Obama Administration's concern was and continues to be that some water users will sell their water rights and those sales will result in the diversion of waters away from federal lands. To date, no such sales and diversions have been documented. Additionally, the permits and land use arrangements in question have not included provisions to ensure that the federal government will protect the right for its current use, nor have such permits guaranteed that those water rights will not be diverted away by the government for an entirely different use. As such, this federal policy has the potential to exacerbate the very problem it purports to solve. The dangers of this significant departure from precedent are clearly noted in the Western Governors' Association (WGA) Resolution 11-7 and the WGA's November 14, 2013, letter to Chairman Hastings, both appended to this report. In their letter to Chairman Hastings, the WGA and Western States Water Council state that "WGA and WSWC have long opposed federal agency directives that would adversely affect or interfere with states' primary and exclusive authority over water rights administration and allocation. The purpose of H.R. 3189 appears to be consistent with our support for federal deference to state water law."

H.R. 3189 has been advanced to counter harmful federal policies, provide certainty for water users, and to maintain the longstanding federal deference to state water law. In doing so, the legislation grants no new rights to any party, nor does it in any way infringe on existing rights of individuals, states, or the federal government.

#### SECTION BY SECTION ANALYSIS

##### *Section 1. Short title*

This Act may be cited as the "The Water Rights Protection Act."

##### *Section 2. Treatment of water rights*

Section 2, as amended, prohibits the Secretaries of the Interior and Agriculture from conditioning the issuance, renewal, amendment, or extension of any permit, approval, license, lease, allot-

ment, easement, right-of-way, or other land use or occupancy agreement on the transfer of any water right directly to the United States, or any impairment of title, in whole or in part, granted or otherwise recognized under State law, by Federal or State adjudication, decree, or other judgment, or pursuant to any interstate water compact.

The purpose of this prohibition is to prevent federal land management agencies from using these processes to require a non-federal water user to transfer state-recognized water rights directly to the United States. This prohibition is limited by Section 4 which provides that any other existing authorities, that the Secretaries of the Interior and Agriculture may have to otherwise condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement remain unaffected by the legislation. Other federal land management authority to condition or otherwise agree on conditions of federal land use, including contractual voluntary changes in water use and carrying out authorized projects affecting water use, is outside the scope of this Act.

Section 2, as amended, also prohibits 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, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement. Similar to the prohibition mentioned above, the purpose of this provision is to prevent the federal government from using the named processes to acquire a water right under state law for which it would otherwise have to acquire and pay for itself.

Section 3 protects states' definitions of the term "water right" and includes any water right recognized under state law.

#### COMMITTEE ACTION

H.R. 3189 was introduced on September 26, 2013, by Congressman Scott R. Tipton (R-CO). The bill was referred to the Committee on Natural Resources and within the Committee to the Subcommittee on Water and Power. The bill was also referred to the Committee on Agriculture. On October 10, 2013, the Subcommittee held a hearing on the bill. On November 14, 2013, the Natural Resources Committee met to consider the bill. The Subcommittee on Water and Power was discharged by unanimous consent. Congressman Tipton offered an amendment designated .036 to the bill; the amendment was adopted by voice vote. No further amendments were offered to the bill, and the bill, as amended, was then adopted and ordered favorably reported to the House of Representatives by a record vote of 19 to 14, as follows:

**Committee on Natural Resources**

U.S. House of Representatives

113th Congress

Date: November 14, 2013

Recorded Vote #: 2

Meeting on / Amendment on: H.R. 3189 - To adopt and favorably report the bill to the House, as amended, by a vote of 19 yeas and 14 nays.

MEMBERS	Yes	No	Pres	MEMBERS	Yes	No	Pres
<b>Mr. Hastings, WA, Chairman</b>	X			<b>Mr. Duncan of SC</b>	X		
<i>Mr. Defazio, OR, Ranking</i>		X		<i>Mr. Cardenas, CA</i>		X	
<b>Mr. Young, AK</b>				<b>Mr. Tipton, CO</b>	X		
<i>Mr. Faleomavaega, AS</i>				<i>Mr. Horsford, NV</i>	X		
<b>Mr. Gohmert, TX</b>				<b>Mr. Gosar, AZ</b>			
<i>Mr. Pallone, NJ</i>				<i>Mr. Huffman, CA</i>			
<b>Mr. Bishop, UT</b>	X			<b>Mr. Labrador, ID</b>	X		
<i>Mrs. Napolitano, CA</i>		X		<i>Mr. Ruiz, CA</i>		X	
<b>Mr. Lamborn, CO</b>	X			<b>Mr. Southerland, FL</b>	X		
<i>Mr. Holt, NJ</i>		X		<i>Ms. Shea-Porter, NH</i>		X	
<b>Mr. Wittman, VA</b>				<b>Mr. Flores, TX</b>	X		
<i>Mr. Grijalva, AZ</i>		X		<i>Mr. Lowenthal, CA</i>		X	
<b>Mr. Broun, GA</b>	X			<b>Mr. Runyan, NJ</b>			
<i>Ms. Bordallo, GU</i>		X		<i>Mr. Garcia, FL</i>			
<b>Mr. Fleming, LA</b>	X			<b>Mr. Amodei, NV</b>			
<i>Mr. Costa, CA</i>				<i>Mr. Cartwright, PA</i>		X	
<b>Mr. McClintock, CA</b>	X			<b>Mr. Mullin, OK</b>	X		
<i>Mr. Sablan, CNMI</i>		X		<b>Mr. Stewart, UT</b>	X		
<b>Mr. Thompson, PA</b>	X			<b>Mr. Daines, MT</b>	X		
<i>Ms. Tsongas, MA</i>		X		<b>Mr. Cramer, ND</b>			
<b>Ms. Lummis, WY</b>	X			<b>Mr. LaMalfa, CA</b>	X		
<i>Mr. Pierluisi, PR</i>		X		<b>Mr. Smith, MO</b>	X		
<b>Mr. Benishek, MI</b>				<i>Vacancy</i>			
<i>Ms. Hanabusa, HI</i>		X					
				<b>TOTALS</b>	19	14	

## COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Natural Resources' oversight findings and recommendations are reflected in the body of this report.

## COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(2)(B) of that Rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

*H.R. 3189—Water Rights Protection Act*

H.R. 3189 would prevent federal agencies from requiring certain entities to relinquish their water rights to the United States in order to use public lands. Because CBO expects that enacting the bill would not affect the number of users of public lands or the amount of receipts received by federal agencies for the use of those lands, we estimate that enacting the bill would have no impact on the federal budget. Enacting H.R. 3189 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 3189 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Jeff LaFave. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

2. Section 308(a) of Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures. Because CBO expects that enacting the bill would not affect the number of users of public lands or the amount of receipts received by federal agencies for the use of those lands, it estimates that enacting the bill would have no impact on the federal budget.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill as amended is to prohibit the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretaries of the Interior and Agriculture.

EARMARK STATEMENT

This bill does not contain any Congressional earmarks, limited tax benefits, or limited tariff benefits as defined under clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives.

COMPLIANCE WITH PUBLIC LAW 104-4

This bill contains no unfunded mandates.

COMPLIANCE WITH H. RES. 5

Directed Rule Making. The Chairman does not believe that this bill directs any executive branch official to conduct any specific rule-making proceedings.

Duplication of Existing Programs. This bill does not establish or reauthorize a program of the federal government known to be duplicative of another program. Such program was not included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139 or identified in the most recent Catalog of Federal Domestic Assistance published pursuant to the Federal Program Information Act (Public Law 95-220, as amended by Public Law 98-169) as relating to other programs.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

## DISSENTING VIEWS

H.R. 3189 seeks to address a narrow water rights dispute between the Forest Service and the National Ski Areas Association, but is written so broadly that it could negatively impact renewal of Bureau of Reclamation water contracts, National Park System management, mandatory conditioning requirements for Federal Energy Regulatory Commission hydropower relicenses, and grazing on public lands. Because of these harmful impacts on other federal activities beyond the intended scope of this legislation, and a reversal by the Forest Service on their water rights position, we oppose the legislation.

The current debate on water rights centers on the United States Forest Service's (Forest Service) issuance of a new directive in 2011. Interim Directive Number 2709.11–2011–3 requires ski area permit holders to transfer water rights secured by areas operating on public land to the federal government.

The ski areas argue that the 2011 directive violated Colorado water law and the Colorado constitution. Water rights are a huge financial asset for ski resorts. Vail Resorts reports water rights as intangible assets valued at \$18.3 million. The Forest Service is concerned that the value of these water rights would lead permit holders to sell the water, leaving the Forest Service with no water to manage the land.

This conflict led to a U.S. District Court lawsuit against the Forest Service, filed by the National Ski Areas Association (NSAA). In December 2012, Judge William Martinez ruled in favor of the NSAA, but not on the substantive water law issue. Instead, Martinez said the Forest Service had failed to follow federal government policies on the formation of administrative procedures. The Court ordered the Forest Service to withdraw the directive. The Forest Service is currently going through a public comment process and reevaluating the 2011 directive. On November 13, 2013, the Forest Service announced a revision to their water rights position, specifically stating that the Forest Service can meet their land management objectives “without requiring the transfer of privately owned water rights to the Government.” Therefore the conflict this legislation seeks to resolve no longer exists and this legislation is unnecessary.

Yet H.R. 3189 goes above and beyond the disagreement between the Forest Service and the Ski Resorts, and overreaches to apply to all actions that require a permit on federal lands. This includes the ability to facilitate the exchange of water rights, assessed at fair market value, from being included as part of a voluntary land exchange. There is also concern about the ability to impose bypass flow requirements for environmental protection, as outlined in testimony submitted by the U.S. Forest Service. This has clear implications on projects like the Conowingo Dam on the Susquehanna

River, a key component to the restoration efforts in the Chesapeake Bay, and is currently in the Federal Energy Regulatory Commission relicensing process.

H.R. 3189 also runs counter to National Park Service Management Practice 4.6.2, which specifies that all rights to the use of water diverted from or used on federal lands within the national park system by the United States or its concessioners, lessors, or permittees will be perfected in the name of the United States. H.R. 3189 would also prohibit the renewal of water contracts for the Bureau of Reclamation's Central Valley Project.

The Committee has received numerous letters in opposition to the legislation, including letters from Grand County, Summit County, and Eagle County in Colorado, who oppose the legislation due to its potential impacts on bypass flows. The Committee has also received testimony in opposition from the National Forest Service and the Department of the Interior. The Committee also received a letter signed by nearly 70 conservation Groups including: American Rivers, National Audubon Society, National Parks Conservation Association, American Whitewater, Sierra Club, and the Chesapeake Bay Foundation in opposition to this bill.

This legislation creates more conflict than it solves and should be rejected by the House.

PETER A. DEFazio,  
*Ranking Member,*  
*Committee on Natural Resources.*  
GRACE F. NAPOLITANO,  
*Ranking Member,*  
*Subcommittee on Water and Power.*

## EXCHANGE OF LETTERS

**U.S. House of Representatives**  
**Committee on Agriculture**  
 Room 1301, Longworth House Office Building  
 Washington, DC 20515-6001

(202) 225-2171  
 (202) 225-0917 FAX

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 RANKING MEMBER  
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 MCKELIE LILIAN GRISHAM, NEW MEXICO  
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The Honorable Doc Hastings  
 Chairman  
 Committee on Natural Resources  
 1324 Longworth House Office Building  
 Washington, D. C. 20515

Dear Chairman Hastings:

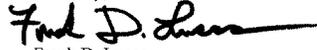
Thank you for the opportunity to review the relevant provisions of the text of H.R. 3189, the Water Rights Protection Act. As you are aware, the bill was primarily referred to the Committee on Natural Resources, while the Agriculture Committee received an additional referral.

I recognize and appreciate your desire to bring this legislation before the House in an expeditious manner and, accordingly, I agree to discharge H.R. 3189 from further consideration by the Committee on Agriculture. I do so with the understanding that by discharging the bill, the Committee on Agriculture does not waive any future jurisdictional claim on this or similar matters. Further, the Committee on Agriculture reserves the right to seek the appointment of conferees, if it should become necessary.

I ask that you insert a copy of our exchange of letters into both the Congressional Record and the Committee Report during consideration of this measure on the House floor.

Thank you for your courtesy in this matter and I look forward to continued cooperation between our respective committees.

Sincerely,

  
 Frank D. Lucas  
 Chairman

cc: The Honorable John A. Boehner, Speaker  
 The Honorable Peter DeFazio  
 The Honorable Collin C. Peterson  
 The Honorable Thomas J. Wickham, Parliamentarian

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TODD YOUNG  
 CHIEF OF STAFF

**U.S. House of Representatives**  
**Committee on Natural Resources**  
 Washington, DC 20515

February 26, 2014

PETER A. DEFazio, OR  
 RANKING DEMOCRATIC MEMBER  
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 KATHERINE CLARK, MA

FENNY DOGGE  
 DEMOCRATIC STAFF DIRECTOR

The Honorable Frank D. Lucas  
 Chairman  
 Committee on Agriculture  
 1301 Longworth House Office Building  
 Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter regarding H.R. 3189, the Water Rights Protection Act. As you know, the Committee on Natural Resources ordered reported the bill on November 14, 2013. I appreciate your support in bringing this legislation before the House of Representatives, and accordingly, understand that the Committee on Agriculture will forego action on the bill.

The Committee on Natural Resources concurs with the mutual understanding that by foregoing consideration of H.R. 3189 at this time, the Committee on Agriculture does not waive any jurisdiction over the subject matter contained in this or similar legislation. In addition, should a conference on the bill be necessary, I would support your request to have the Committee on Agriculture represented on the conference committee. Finally, I would be pleased to include your letter and this response in the bill report filed by the Committee on Natural Resources, as well as in the *Congressional Record* during floor consideration, to memorialize our understanding.

Thank you for your cooperation.

Sincerely,  
  
 Doc Hastings  
 Chairman

cc: The Honorable John A. Boehner, Speaker  
 The Honorable Peter DeFazio  
 The Honorable Collin C. Peterson  
 The Honorable Thomas J. Wickham, Parliamentarian

## APPENDIX



**Western Governors' Association  
Policy Resolution 11-7**

*Water Resource Management in the West*

**A. BACKGROUND**

1. In the arid West, water is a precious resource that must be managed with sensitivity to social, environmental and economic values and needs. Clean, reliable water supplies are essential for communities throughout the West and the Nation to maintain or improve their citizens' quality of life. Strong state and national economies require sufficient supplies of good quality water, which in turn depend on protection of water supply sources and the environment and adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West.
2. Challenges are mounting. Supplies are nearly fully allocated in many basins across the West. The cost to maintain and repair aging infrastructure is increasing. Demands for population, industry, energy, the environment and recreation are increasing. And we face greater variability in terms of future water supply.
3. States have the pivotal role in allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. Western Governors, through their Association and its affiliate, the Western States Water Council, have worked for decades to improve resource management and to secure reliable, clean water for their citizens. The WGA and WSWC reports titled *Water Needs and Strategies for a Sustainable Future* (2006, 2008, and 2010) provide a road map for water resource management in the West.
4. Partnerships are critical to sound water resource management. Federal agencies have a role in Western resource management, and collaboration between the states and federal agencies is essential. The Western Governors appreciate the efforts of the federal government to collaborate with Western states through the Western Federal Agency Support Team (WestFAST). Tribal governments and Western states also share common water resource management challenges, and the WGA and WSWC have a long and productive partnership working with tribes to resolve water rights claims and promote economic development on and off the reservation. Local water utilities and water users, recreation and conservation interests, and private citizens must also be engaged in the effort to manage water resources in the West.

**B. GOVERNORS' POLICY STATEMENT**

Water Resource Information

Western Governors encourage continued investment in the nation's *water measurement and monitoring data networks* and the development of information services that promote

collaboration between the research and management communities to ensure relevant information is developed and shared with decision-makers. Basic information on the status, trends and projections of our water resources is essential to sound water management.

1. **Basic Water Data:** Western Governors support several federal programs that are particularly critical in this regard, including but not limited to the USGS Cooperative Water Program and National Streamflow Information System, the NRCS Snow Survey and Water Supply Forecasting Program, and the NASA Landsat Program with its thermal infrared sensor (TIRS). Western Governors are concerned about declines in federal spending for these and other programs that provide important water supply information and believe that such programs should be fully funded by Congress and implemented by the federal agencies. Moreover, a general lack of comprehensive and coordinated programs for measuring and monitoring water use at all levels of government contributes to unacceptable uncertainty on the demand side of the equation, and Western Governors support recent federal efforts to address this need. They also support federal efforts to coordinate water data gathering and information programs across multiple agencies.
2. **Forecasts and Models:** Western Governors call on the federal government to work with Western states to develop tools and models that better enable the synthesis, visualization and evaluation of water-related data. This includes the development of climate models that provide useful information for state water resource managers, utilities and decision-makers in the Western states. Western Governors recommend the National Oceanic and Atmospheric Administration take the lead in improving forecasts on multiple geographic and temporal scales.
3. **Information Services:** Western Governors encourage federal agencies to partner with states in the gathering, coordination and effective dissemination of water-related data between the federal government and states. The National Integrated Drought Information System (NIDIS) is a successful model of state-federal collaboration in the development of information services. Western Governors support the development of other important information services, designed in conjunction with the states, including a national climate service that would incorporate and coordinate existing climate and water data collection and analysis programs and services. They further support collaborative management and adaptation programs, such as the Regional Integrated Sciences and Assessments.

#### Water Resource Planning

Western Governors believe solutions to water resources challenges require an integrated approach and greater partnership among state, tribal, local and federal agencies. Water resource planning should consider collectively the full range of water resource needs; develop from the bottom up effective solutions that are complementary rather than conflicting; and provide direction for specific solutions and the most appropriate entities to implement them based primarily on a watershed approach.

4. **State Integrated Water Resource Planning:** Western Governors support *integrated water resource management* and encourage the development of comprehensive water

plans with state leadership and federal assistance. Plans should be developed in cooperation with tribes, federal agencies, water utilities, conservation and recreation groups, and private citizens. Specifically, plans should:

- a. Identify and prioritize anticipated future infrastructure needs for water resources;
  - b. Identify necessary studies, data and projects;
  - c. Projections of future water needs; and
  - d. Be used to develop national water policies and priorities that align federal agency support to states and that inform decision making regarding regional water issues. Specific federal programs, such as the Bureau of Reclamation Basin Studies and USGS Water Census, should carefully consider state water planning efforts and complement and support state water plans and processes, rather than supplant state water plans.
5. **Water and Growth:** In order to better integrate water and land use planning, states should promote policies that facilitate cooperation between water managers and local planning agencies in making decisions about new growth.
  6. **Local Watershed Planning:** Western Governors encourage federal agencies and Congress to provide funding, shared personnel and other resources. States should offer technical and financial support for watershed groups dealing with local water issues associated with water quality, growth and land management and ensure these groups are sufficiently empowered to deal effectively with these issues.
  7. **Drought Planning:** Western Governors believe a comprehensive, integrated response to drought emergencies, including mitigation planning, is critical to the social, environmental and economic well-being of the West.
    - a. Governors support a comprehensive national policy that promotes a coordinated and integrated approach to future drought, including improved forecasting and monitoring, drought preparedness and planning, and efficient delivery of drought programs.
    - b. Governors encourage states to work with federal agencies and local communities to develop proactive drought preparedness and contingency plans.
    - c. Governors recommend the continued development of the NIDIS program, particularly with respect to implementation of regional drought early warning systems.
  8. **Climate Planning:** Western Governors recognize the significant potential impacts of climate variability and change on water supplies. Potential changes may include declines in precipitation and runoff, increases in severe weather events and storms, changes in the timing of water availability, and increases in water demands. Western Governors urge Congress and the Administration to work closely with states and other resource managers to improve predictive and adaptive capabilities for climate change and related impacts at regional scales. Federal programs should be responsive to the research priorities and resource needs of state water managers as they pertain to climate change, including the NOAA Climate Service, DOI Landscape Conservation Cooperatives, U.S. Geological Survey's Climate Science Centers, and the National Climate Assessment.

9. **Energy Development:** Western Governors recognize that energy development and electricity generation may be a significant driver of future water demands. Western Governors recommend increased coordination across the energy and water management communities and support on-going work to assess the interconnection of energy and water through the Regional Transmission Expansion Planning Project for the Western interconnection and similar efforts.
10. **Intergovernmental Cooperation:** Western Governors recognize the important role of federal agencies in supporting sound water resource management in the Western states. Governors appreciate the efforts of federal agencies to coordinate water-related activities with the Western states through the ‘Western States Federal Agency Support Team’ (WestFAST) and recommend the continuation of this key state-federal partnership.

#### Water Resource Solutions

Western Governors recognize that there is no “silver bullet” solution to water resource challenges and support a mix of efficient and cost-effective strategies that account for the full range of water supply and environmental needs.

11. **Infrastructure:** Western Governors support investment in water supply and water quality infrastructure. Infrastructure investments are essential to our nation’s continued economic prosperity and environmental improvements, and they assist state and local entities in meeting federally mandated standards. Infrastructure investment is particularly critical now, as much of the water infrastructure that has served the West for decades is aging and in dire need of repair. Specifically:
  - a. As the economy recovers, all levels of government should be encouraged to increase their investment in water infrastructure and adopt adequate life-cycle asset management practices that include pricing policies, project prioritization and sufficient revenues to cover the costs of service.
  - b. To help states address water infrastructure needs, Congress should provide stable and continuing federal appropriations, increased by a construction inflation index, to the Clean Water Act and Safe Drinking Water Act State Revolving Funds. Further, Congress should increase appropriations from the Reclamation Fund for authorized purposes to match average annual fund receipts. Congress should pass the Corps of Engineer’s Water Resource Development Act (WRDA) legislation on a regular schedule and increase funding levels so all projects and studies authorized in WRDA can be completed in a timely manner. Congress also should consider facilitating greater investment in water infrastructure, such as through an infrastructure bank or water trust fund.
  - c. Congress should remove the state volume caps for private activity bonds used for water and wastewater projects, provide guaranteed tax-exempt status for bonds issued by state or local agencies to finance water infrastructure, provide loan guarantees, and otherwise support and encourage alternatives to direct federal investment of limited general funds.

- d. States should encourage public-private partnerships that promote investment in water infrastructure and consider mechanisms that would reduce financing costs, such as bond insurance, risk pooling, credit enhancements, and revolving water funds.
  - e. Infrastructure planning and permitting guidelines, rules and regulations should be coordinated, streamlined and sufficiently flexible to 1) allow for timely decision-making in the design, financing and construction of needed infrastructure, 2) account for regional differences, 3) balance economic and environmental considerations, and 4) minimize the cost of compliance.
  - f. Capital budgeting and asset management principles should be used to determine funding priorities, based on long-term sustainability and not annual incremental spending choices. It should be accompanied by dedicated sources of funding with appropriate financing, cost-sharing, pricing and cost recovery policies.
12. **Conservation/Efficiency:** Western Governors encourage adoption of strategies to make existing water supplies go further, including the use of water conservation, water reuse and recycling, desalination and reclamation of brackish waters, and reductions in per capita water use. The Governors encourage investment in research into promising water-saving strategies.
13. **Innovative Water Sharing:** Western Governors recognize the potential benefits of market-based water transfers, and that the predominant water use in the West is agriculture, but they are concerned about maintaining the important cultural, economic, and environmental benefits of agricultural lands and food production. Western Governors believe states should identify and promote innovative ways to allow water transfers from agricultural to other uses (including urban, energy and environmental) while avoiding or mitigating damages to agricultural economies and communities.
14. **Indian Water Settlements:** Western Governors support negotiated settlements of Indian land and water rights disputes in order to meet the nation's obligations to tribes while providing increased certainty for all Western water users. Negotiated settlements are flexible, promote sound management practices, provide a basis for partnerships between Indian and non-Indian communities, and save millions of dollars by avoiding prolonged and costly litigation. Western Governors urge the Administration to support its longstanding policy in favor of Indian land and water settlements that have a strong federal commitment to meaningful federal contributions that recognize the trust obligations of the United States government. Congress should also ensure that any land or water settlement, once authorized and approved by the President, will be funded and implemented in a timely manner without a corresponding offset to some other tribe or essential Interior program.
15. **Watershed Protection and Ecological Resilience:** Western Governors urge increased collaboration between water users and federal agencies in protecting clean water supplies recognizing the importance of high-value watersheds and natural features (such as wetlands and forests) that provide ecological services, including stormwater and flood mitigation, water quality protection and groundwater recharge.

16. **Recreational and Ecological Values:** Western Governors believe states should strive to maintain ecological services, recreational amenities and species needs when managing and developing water resources. States and federal agencies should coordinate efforts to avoid the listing of water-dependent species under the Endangered Species Act. When ESA listings cannot be avoided, parties should promote the use of existing state tools, such as state in-stream flow protections to conserve and recover species.

C. **GOVERNORS' MANAGEMENT DIRECTIVE**

1. This resolution is to be posted on the Western Governors' Association Web site.
2. The Western Governors' Association and the Western States Water Council should continue to develop coordinated positions on specific water resource issues on behalf of Western states and work to communicate these positions to Congress and federal agencies.
3. Western Governors direct the Western Governors' Association and the Western States Water Council to:
  - a. Update information and compile a report on Western state water resources infrastructure financing authorities, funding sources, policies and programs.
  - b. Work with the USGS, EPA, NRCS, and other federal agencies responsible for water-related data collection, to explore the development of a consistent, systematic, state-led approach to collecting and sharing information about water supply, demand and management options that inform state water supply planning.
  - c. Develop an agreement with the National Oceanic and Atmospheric Association on the delivery of climate-related information to inform water management (and other resource and management) decisions, ensuring that new services meet the needs of states and other on-the-ground resource managers.
  - d. Conduct a study of water transfers in the Western United States with a focus on developing a tool box of institutional and management strategies that states can employ as appropriate.
  - e. Examine the relationship between future energy development and water supply; identify the implications of water supply for the electric grid; and recommend policies or programs to facilitate sustainable energy development in the context of economy-wide water availability, working through the Regional Transmission Expansion Planning project.
  - f. Continue to work with the Ad Hoc Group on Indian Water Rights for purposes of advancing negotiated settlements of Indian land and water rights disputes.
  - g. Collaborate on an update to the *Water Needs and Strategies Report* for 2012 that would include a shared vision for water that recognizes the important role of state leadership and highlights the need for continued investment in water resource planning and management throughout the West and the Nation.



November 14, 2013

Honorable Doc Hastings  
Chairman  
House Natural Resources Committee  
1324 Longworth House Office Building  
Washington, D.C. 20515

Re: Water Rights Protection Act – H.R. 3189

Dear Chairman Hastings:

On behalf of the Western Governors' Association (WGA) and the Western States Water Council (WSWC), we are writing to express our appreciation of your Committee's consideration of the Water Rights Protection Act (H.R. 3189).

As the Western Governors have stated in their Policy Resolution 11-7, *Water Resource Management in the West*, "States have the pivotal role in allocating, administering, protecting and developing water resources." WGA and the WSWC have long opposed federal agency directives that would adversely affect or interfere with the states' primary and exclusive authority over water rights administration and allocation.

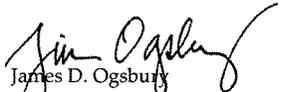
The purpose of H.R. 3189 appears to be consistent with our support for federal deference to state water law. We would note, however, that as this issue has most recently arisen in the context of ski area permits and their renewal, we are evaluating the broader implications beyond U.S. Forest Service ski area permits. That said, states employ varying approaches to determine when the federal government may or may not hold a water right. Some states allow federal agencies to hold a water right individually or jointly with a water right permittee or allotment holder. In many cases, these water rights are constitutionally protected private property rights that cannot be taken without just compensation.

WGA and the Water Council are carrying out a multi-stakeholder initiative with state and federal partners, including the U.S. Forest Service, to evaluate ways to improve the effective resolution of federal non-tribal water right claims and meet federal needs for water within state law.

Honorable Doc Hastings  
November 14, 2013  
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Thank you for your consideration of the priorities of Western Governors and their states.

Sincerely,

  
James D. Ogsbury  
Executive Director  
Western Governors' Association

  
Tony Willardson  
Executive Director  
Western States Water Council

cc: The Honorable Tom McClintock, Chairman, Subcommittee on Water and Power  
The Honorable Grace Napolitano, Ranking Member, Subcommittee on Water and Power

Enclosure

*Identical letter sent to Honorable Peter DeFazio, Ranking Member, House Natural Resources Committee*

