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Congress of the United States
House of Representatives
Washington, DC 20515–0603

October 27, 2011

The Honorable Tom Vilsack
USDA Secretary
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

I have heard concerns from constituents with permits to use and occupy National Forest System lands, including ski areas and grazing interests, that the Forest Service is requiring the transfer of ownership of privately held water rights to the name of the United States as a permit condition. I have concerns with this requirement and the policies that underlie it, particularly to the extent that the requirement applies to waters originating off of the special permit area, in the case of ski areas, and to the extent that such water rights predate the creation of the Forest Service, in the case of grazing permits.

Water rights established under state law are property rights for purposes of the Fifth Amendment to the United States Constitution. Congress has not delegated to the Forest Service the authority to require permittees to transfer ownership of water rights to the United States as a permit condition.[1] Specifically, the Report of the Federal Water Rights Task Force created pursuant to Section 389(D)(3) of P.L. 104-127 expressly concluded that:

> "Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing water supply or transfer their water rights to the United States as a condition of the grant or renewal of federal permits."

Likewise, the Property Clause does not give the agency the authority to use permitting conditions to obtain federal ownership of water rights that have been developed or acquired by private parties. In the absence of such authority, the agency cannot demand

[1] Federal statutes do not delegate such authority to the Forest Service, including the 1897 Organic Act, §505 of FLPMA, or NFMA (16 U.S.C. §1604(i)). In fact, FLPMA and NFMA provide for the protection of valid existing rights and FLPMA requires that water is to be allocated in accordance with water rights established under state law.

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such a transfer of ownership without just compensation. Rather than unlawfully taking property from private entities, the agency must acquire and exercise water rights in priority in accordance with state laws.

It has been a long-standing policy of the Department and the Forest Service to ensure that private property rights, including water rights, will be recognized and protected in the course of special use permitting decisions for water supply facilities. Secretary Madigan and Secretary Glickman provided assurances to Congress in the 1990s to recognize and respect the role of the States in water allocation and administration, as did Under-Secretary Rey in 2005. I have serious concerns that the agency intends to depart from this longstanding policy by virtue of its recent permitting decisions and related policies. Because of the significant percentage of water that originates on National Forest System lands in the West, such a change in policy would pose a threat to the current system of state allocation and administration of water rights.

My constituents have presented excellent arguments against the federal government's actions to take ownership of their water rights. First, these private entities have developed their water rights at great expense and effort. In the case of ski areas, resort owners have invested hundreds of millions of dollars in acquiring water rights to support their operations and those with grazing interests have also expended considerable sums to acquire water rights for ranching. Furthermore, they have been excellent stewards of these resources. These permittees have the expertise, intimate familiarity, staffing and resources necessary to maintain and protect these water rights.

Moreover, these permittees have voiced valid concerns that if their water rights are required to be owned by the United States, the ski areas and the ranchers will have no guarantee that the U.S. will continue to use the water for the purposes for which it was developed. For example, as owners, the agency could decide to change the use of the water and apply it for the protection of species or aesthetic purposes or any other number of purposes other than for snowmaking or stock watering purposes. Even if the agency desired to maintain the water rights for existing purposes, potential lawsuits could challenge the current use for other applications. The permittee then has no way of protecting its significant investment and would lack any certainty that the water will be applied for the benefit of their business or operation in the future. The assertion by the Forest Service that use permits will maintain the priority of the permit holder's primary use of the water is of little value against a potential future agency directive requiring a contrary use. The uncertainty generated by this arrangement is unacceptable for businesses, especially when there is the likelihood that it comes about not as a result of any fault of the permittee, but instead as a result of shifting political winds. The federal government's interference with these property interests and the operations that they support simply cannot be justified on legal or practical grounds.

I request that the agency refrain from interfering in such private property rights in the future, and that the agency review its current permit clauses and policies in light of the concerns and interests identified here. Please respond in writing at your earliest convenience to articulate the manner in which the Department will take action to ensure that the interests of constituents will be protected and state laws regarding water rights will be honored.

Sincerely,

Scott Tipton
Member of Congress