Testimony of the National Ski Areas Association, the Eagle River Water & Sanitation District and the Upper Eagle Regional Water Authority to the House Natural Resources Committee's Subcommittee on Water and Power concerning the Water Rights Protection Act (H.R. 3189)
Prepared by Glenn Porzak, Water Attorney
October 10, 2013

Testimony

Thank you for the opportunity to testify today in support of H.R. 3189 on behalf of the National Ski Areas Association (NSAA), the Eagle River Water and Sanitation District (District) and the Upper Eagle Regional Water Authority (Authority). The NSAA has 121 member ski areas that operate on National Forest System lands under a special use permit from the U.S. Forest Service. These public land resorts accommodate the majority of skier visits in the U.S. and are located in 13 states. The ski industry generates $12.2 billion in economic activity annually. The District and Authority collectively provide municipal water service to over 60,000 people from Vail to Wolcott. This area spans the districts of Congressmen Polis and Tipton in Colorado. The District and Authority are the second largest municipal water provider on Colorado's western slope.

Collectively, ski areas have invested hundreds of millions of dollars on water rights to support and enhance their operations. Water is crucial to ski area operations and ski area water rights are considered valuable assets to ski area owners. Water is crucial to future growth of ski areas, and that future growth directly impacts the rural economies associated with ski areas. Ski areas are major employers in rural economies, employing 160,000 people, and help drive job creation in rural and mountain economies. The same is true for municipal water providers; in particular, those that provide water service to the resort communities. They have invested hundreds of millions of dollars on their water rights, and those water rights are essential to meeting their water service obligations to many thousands of people.

This bill responds to recent Forest Service attempts to implement permit conditions that require the transfer of privately and publically held water rights on National Forest system lands to the federal government as a permit condition. There is no compensation for these mandated water right transfers despite the fact that the ski areas and municipal providers have invested millions of dollars in developing these water rights. The Forest Service has issued directives to this effect that apply to not only the ski industry, but all other special use permit holders on Forest System lands, including municipal water providers, recreation residences, resorts, marinas and other users. By issuing these directives, the Forest Service has not only violated the 5th Amendment to the U.S. Constitution by taking property without paying compensation, it has attempted to use its permitting authority to circumvent long established federal and state water laws. The

Water Rights Protection Act protects these privately and publically held water rights, prohibits federal takings, and upholds state water law by:

- Prohibiting agencies from implementing a permit condition that requires the transfer of water rights to the federal government in order to receive or renew a permit for the use of land;

- Prohibiting the secretary of the Interior and the Secretary of Agriculture from requiring water users to acquire water rights for the United States, rather than for the water user themselves;

- Upholding longstanding federal deference to state water law.

This bill does not create new law as Congress has not delegated authority to the Forest Service to use its federal land use power to seize water rights owned by non-federal entities. Specifically, none of the governing federal statutes delegate such authority to the Forest Service, including the Organic Administration Act of 1897 (16 U.S.C. § 475, 481, & 526), § 505 of the Federal Land Policy and Management Act of 1976 ("FLPMA") (43 U.S.C. § 1765), NFMA (16 U.S.C. § 1604(i)), or the Ski Area Permit Act of 1986 (16 U.S.C. § 497b). 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. *See* § 701(g) and (h) of FLPMA (43 U.S.C. § 1701, note re: Savings Provisions, Pub.L. 94-579); § 505 of FLPMA (43 U.S.C. § 1765); and NFMA, 16 U.S.C. § 1604(i).

In 1996, Congress created a Federal Water Rights Task Force, P.L. 104-127 § 389(d)(3), in response to a controversy in Colorado over the attempt by the Forest Service to require permit holders to relinquish part of their water supply for secondary National Forest purposes as a permit condition. In its August 25, 1997 Report, the Federal Water Rights Task Force 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. . . ." The Task Force further concluded that "[u]nless Congress explicitly granted to the Forest Service the authority to use permitting authority to require bypass flows or the transfer of title to the United States, the Forest Service must respect and protect non-federal water rights in its planning and decisions, and it must attain National Forest purposes through the acquisition and exercise of federal water rights in priority." (Part VI, Paragraph 1).

The Task Force also stated that the Forest Service must recognize that:

> water rights established under State law are property rights for purposes of the Fifth Amendment to the United States Constitution [and that] because Congress severed water from the public lands and allowed third parties to obtain vested rights in and to the continued use of water derived from public lands absent an explicit grant of authority by Congress, the authority of the Forest Service derived from the Property Clause of the United States Constitution and land management statutes does not include the ability to use land management authority to reallocate or otherwise obtain for federal use, without the payment of just compensation, water that has been appropriated by or on behalf of non-federal parties.
> (Part VII B, Paragraph 2).

For the same reasons detailed by the Task Force Report, the Forest Service's efforts to gain control over water rights are invalid because they exceed the Forest Service's legal authority and the implementation would result in an unlawful taking of property without just compensation in violation of the Fifth Amendment of the United States Constitution. Thus, H.R.3189 complies with and is supported by both federal constitutional and statutory law.