

On May 18, the House Natural Resources Subcommittee on Water, Power, and Oceans held a legislative hearing on two bills to increase federal transparency, safeguard private and state water rights, and provide certainty to water and power users. Representative Paul Gosar (R-AZ) introduced the Western Area Power Administration Transparency Act (H.R. 2371), which would establish a pilot project to increase the transparency of the Western Area Power Administration's (WAPA) costs, rates, and other financial operational dealings for utility ratepayers and taxpayers.

Representative Scott Tipton (R-CO) introduced a discussion draft of the Water Rights Protection Act (bill number unassigned) intended to protect state water law and private property rights from future federal takings. It would prohibit the Departments of the Interior and Agriculture from conditioning any permit, lease, or other use agreement on the transfer of any water right to the U.S. Tipton noted that federal attempts over several decades to manipulate the federal processes "to circumvent long-established state water law and hijack privately-held water rights sounded the alarm for all non-federal water users that rely on these water rights for their livelihood. The Water Rights Protection Act is commonsense legislation that provides certainty by upholding longstanding federal deference to state water law." Subcommittee Chairman Doug Lamborn (R-CO) said, "Private water rights holders should not live in fear of the federal government coming after them."

Executive Director Jim Ogsbury, Western Governors' Association, noted in his testimony on the Tipton bill that, "Nowhere is the need for substantive consultation between states and the federal government more critical than in the water arena." Consultation requires each federal agency to have a clear and accountable process to provide each state with early, meaningful, and substantive input in the development of regulatory policies with federalism implications. That process involves communicating with the governor and any state and local representatives the governor designates.

Ogsbury provided examples of the Forest Service's proposed groundwater directive and ski area water rights, the EPA and Corps' Clean Water Rule expanding jurisdiction over waters of the United States, and the Corps' proposed water supply rule affecting natural flows through federal reservoirs. "Certain previously proposed rules, regulations, and directives have threatened to disrupt the traditional balance of state and federal power over water management and protection, and preempt state authority." Congressional intent to preempt state law should be clear, and only where there is express delegation of Constitutional authority to the federal government. Otherwise, state authority over its water resources should be presumed sovereign. "While states have primary authority over their water resources generally, their authority over groundwater management and allocation is even more extensive and has not been expressly preempted by federal legislation." He emphasized that state authority is the cornerstone of effective water management in the West, and that states are in the best position to understand their own water laws, local hydrology, and citizen needs. "Federal efforts to assume greater authority over water jeopardize the distinct advantages of on-the-ground resource management."

Randy Parker, Utah Farm Bureau, testified about the uncertainty federal agencies are creating for ranchers, grazing rights, and livestock water rights. "The U.S. Forest Service (FS) and the Bureau of Land Management (BLM) have been systematically challenging state sovereignty and historic privately held water rights on the public lands.... The growing conflict in states like Utah, Nevada and Idaho where the federal agencies require an ownership interest in water located on public lands is adversely affecting critical water development, water maintenance efforts and even frustrating range improvement projects valuable for livestock, wildlife including sage grouse and the overall ecosystem." Parker discussed the history of livestock grazing rights, ownership of public lands, and grazing statistics over time. He provided examples of Congressional and court acknowledgments of state sovereignty over water rights, with details about FS and BLM policies attempting to circumvent that sovereignty.

Christopher Treese, Colorado River Water Conservation District, said, "Nearly all of the water used in our district and, in fact, in Colorado and the West, originates on or flows across federal lands. Accordingly, a constructive, working relationship with federal land management agencies is absolutely necessary for the sustainable use of western water. Recent efforts by federal agencies to force transfer of ownership of water rights as a condition of agency permitting is contrary to both federal and state law and ultimately counterproductive to the cooperative relationship necessary for the stewardship of the arid West's scarce water resources."

Treese's testimony focused on new bypass flow requirements for federal permits renewals or the reissuance of permits for existing infrastructure, providing some examples. "Such requirements may require expensive retrofits of existing facilities and can also result in water users effectively losing a significant portion of their historical water supplies. This can have the effect of reallocating water from long-established private as well as public rights to federal purposes. Furthermore, the Forest Service has often done so in a manner that is wholly inconsistent with the adjudication and administration of federal and non-federal water rights by the states. As such, water that is required by new permit conditions to be bypassed past existing structures cannot be administered by states to ensure the intended, flow-related benefits are actually accomplished. A bypass flow requirement placed on a special use permit, easement, or right-of-way does not create a legal water right in Colorado nor, to my knowledge, any other Western state. Consequently, the bypassed water is too often simply available for diversion by the next downstream junior water right holder."

Vanessa Ray-Hodge, former Senior Counselor to the Solicitor at the Department of the Interior, expressed concerns about the proposed Water Rights Protection Act. She said it has the potential to complicate and impede the Indian water rights settlement process, which has generally benefitted both tribes and states. The Department of the Interior's ability to take legal and policy positions on the nature of a tribe's state-based water rights is "critical to the United States' ability to fulfill and honor its trust responsibilities and special commitments to Indian tribes." Because the tribe's water rights are held in trust, any limitation on the Secretary of the Interior with respect to his ability to quantify, settle, protect, or enforce those rights impacts the ability of the tribes to do the same. Despite the efforts to protect all existing legal rights to water in Section 5 of the proposed bill, Section 2 defines "water right" in terms of beneficial use, but Indian reserved water rights are exempt from appropriation and beneficial use requirements. The limitations imposed by Section 3 would limit the authority of the Secretary of the Interior to protect and preserve Indian reserved water rights from conflicting state water rights, including state groundwater practices. She noted that it could also be interpreted to constrain the Secretary's ability to approve or participate in water settlements, which invariably involve compromise and may include the transfer of state water rights to the United States for the benefit of the tribe. "In addition, Indian water settlements sometimes depend on the ability of the Secretary and Indian tribes to limit or condition the use of state based water rights (surface and/or groundwater) by non-Indians. In exchange, Indian tribes agree to subordinate their legally senior water rights to protect all current non-Indian uses in existence at the time of the settlement (commonly referred to as grandfather provisions). But Sections 3 and 4 of the bill could be construed to prohibit the Secretary and Indian tribes from negotiating or taking positions that would conflict with or require state based water rights to be limited in any manner."

Dennis Sullivan, Western Area Power Administration, noted that WAPA is committed to transparency, and that the proposed legislation is consistent with WAPA's efforts over the past three years to proactively address customers' reasonable concerns about rates, their annual budget, and gaining access to the information that informs WAPA's planning and operations. Some of those concerns arose over organizational changes, shifting budgets, and targeted investments that resulted in increased efficiencies and improved compliance with standards and laws. "Some of our customers may not agree with the changes that we have made. I believe it is, in part, because we did not do a good enough job communicating early and sufficiently." WAPA has worked to improve the communication gaps, making data available, and entering Memoranda of Understanding to discuss financial information with customer groups. Customers have commented that they are seeing improvements in how WAPA engages with them on budget issues. "I am eager to improve and develop the systems necessary to support the sustainability of the pilot program outlined in the proposed legislation. We are committed to sharing information openly and honestly and providing a mechanism for feedback. As an organization, we are accountable for delivering on our mission and responsible for the stewardship of our program and resources for all of our region's customers."

Patrick Ledger, Arizona Electric Power Cooperative, acknowledged WAPA's efforts, but noted that the meetings and information presented "lack granularity" that would enable them to in turn answer their own customers' questions about rate increases. "H.R. 2371 would require Western to provide detailed accounting for expenditures, capital costs, and staffing costs on a regional basis and include the Western headquarters office. In particular, the legislation would require a breakdown of these costs on a functional and budgetary level so that the power and transmission customers can assess how Western is executing its budget authority and how those expenses are showing up in rates. Further, the legislation would require Western to document the magnitude of these changes so that customers can track year to year changes." While all utilities are facing cost increases due to environmental laws and other responsibilities, Ledger said that WAPA's hiring of 52 employees to meet obligations that the local utilities are meeting with one or two employees does not sit well, particularly when local utilities have to eliminate staff positions to make up for the 32% unexplained increase in WAPA rates over 5 years.