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Before the U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Water and Power

Hearing on S. 593, the Bureau of Reclamation Transparency Act; S. 982, the Water Rights Protection Act; S. 1305, A bill to amend the Colorado River Storage Act to authorize the use of the active capacity of the Fontenelle Reservoir; S. 1365, a bill to authorize the Secretary of Interior to use designated funding to pay for construction of authorized rural water projects; S. 1291, to authorize early repayment of obligations to the Bureau of Reclamation within the Northport Irrigation District in the State of Nebraska; S. 1552, to authorize construction of the Dry Red Water Rural Water and Musselshell Rural Water Projects; and S. 1533, to authorize the Secretary of the Interior to coordinate Federal and State permitting processes related to the construction of new surface water storage projects on lands under the jurisdiction of the Secretary of the Interior and the Secretary of Agriculture and to designate the Bureau of Reclamation as the lead agency for permit processing, and for other purposes

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Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity extended to me by the Subcommittee to provide my views on S. 982, the "Water Rights Protection Act."

I am Adam Schempp, Senior Attorney at the Environmental Law Institute ("ELI"). I also am the Director of ELI's Western Water Program. While my testimony is intended in part to advance ELI's educational mission, the views presented here are my own, and do not necessarily reflect the views of ELI's Board of Directors or its members. I will start by explaining the role of the Environmental Law Institute before turning to an analysis of S. 982.

The Environmental Law Institute

Founded in 1969 and based in Washington, DC, ELI is a highly respected non-partisan non-governmental organization that does not litigate or lobby. Our primary mission is to provide the highest quality educational materials, publications, research, and training in environment, energy, and natural resources law and management. ELI seeks "to make law work for people, places, and the planet," and our institutional vision calls for "a healthy environment, prosperous economies, and vibrant communities founded on the rule of law."

The Institute's staff includes lawyers as well as scientists, and we have worked throughout the United States and around the world. We deliver impartial analysis to opinion makers, including government officials, environmental and business leaders, academics, members of the environmental bar, and journalists. ELI is a clearinghouse and a town hall, providing common ground for debate on important environmental issues. Our flagship publication, the *Environmental Law Reporter*, is the most cited legal journal of its kind. ELI has trained over 50,000 lawyers and managers as well as 2,000 judges from 25 countries in basic and advanced environmental law and practice. Graduates of ELI's Judicial Education programs are working on environmental problems all over the world.

The subject matter of S. 982 touches on several core aspects of ELI's mission and priorities. We have deep institutional expertise in the management of water and federal lands, and ELI is committed to the U.S. Constitutional foundations on which our environmental law framework stands. And at the heart of ELI's mission is a desire to make environmental law work—to ensure that laws can be implemented successfully in the real world. To this end, ELI works closely with a wide range of institutions and stakeholders—and especially with states and municipalities, which are often on the front lines of environmental protection. We also promote robust enforcement of the law.

Analysis of S. 982

Senate Bill S. 982 appears to address some of the concerns that prompted it, including the effect on private rights to water from the Forest Service's 2011 Interim Directive that sought to require ski areas operating on public land to transfer their water rights to the federal government. But the bill would introduce into federal law some broad and ambiguous language, which, along with some internal inconsistencies, could make its potential impact sweeping. At the very least, the bill could prove challenging for federal agencies to implement and courts to interpret.

Section 3 of the bill would prohibit the Secretaries of the Interior and Agriculture from conditioning (or even from "withholding") permits, licenses, leases, approvals, allotments, and other land use or occupancy agreements not only on transfers to the United States (as in the prior H.R. 3189, passed by the House of Representatives in 2014), but also on uncertain terms such as "limitation or encumbrance," or "other impairment" of any water right. The multiple uses for which these agencies manage lands and the environmental laws that apply, however, still remain (See Section 5(a)). Thus if a proposed surface use activity might be acceptable, but would produce incompatible impacts on other federal resources if water is used in a certain way, the federal agency might be inclined not to enter into the agreement at all. Hence, a potentially unintended consequence of S. 982 could be fewer land use or occupancy agreements.

Senate Bill S. 982 adds a prohibition against "withhold[ing], in whole or in part," land use or occupancy agreements. If "withhold" is interpreted to mean "not issuing the land use or occupancy agreement," the Secretaries of the Interior and Agriculture could not deny any permit or application solely because of the potential impact of the resulting use of a water right. They could neither condition the use of water nor deny the use of land to ensure compliance with their other federally mandated obligations.

Thus, either the legislation may lead to fewer land use or occupancy agreements or it would circumscribe the ability of the Secretaries to protect against adverse water impacts from land use or occupancy agreements.

Section 3 of S. 982 lacks specificity in its restrictions. A "limitation" on a water right is not a term of art and could be interpreted very broadly, leading to disputes between applicants and the federal land management agencies, which might provoke delay in permit issuance and even litigation over whether a proposed permit or license condition is actually a "limitation" or not.

Ambiguity is also present in the bill's prohibition on "assert[ing] jurisdiction over….impacts on groundwater," as used in Section 3, Subsection (3). Controls of surface uses and their impacts on groundwater can be very important in managing federal resources. Consider, for example, provisions in permits that are intended to protect springs, seeps, or cave resources on national park lands. State laws vary substantially on how (or even if) surface impacts to groundwater are addressed. The proposed bill language could leave federal agencies without sufficient authority to act, or create ambiguity in their authority.

Section 3, subsection 3 also introduces a constitutional ambiguity by stating that federal agencies are bound (in the exercise of federal authority) not only by state laws and regulations, but also by state "policies" concerning groundwater use or protection. This, in effect, would give state agencies or officials the ability to trump federal law on land management by issuing a policy or multiple conflicting policies (enacted by no legislative body) that would be prospectively adopted by Congress in this bill.

Senate Bill S. 982 also could benefit from further clarity in Section 5, the savings clauses. Subsection (d) reads, "Nothing in this Act limits or expands any existing or claimed reserved water rights of the Federal Government on land administered by the Secretary of the Interior or the Secretary of Agriculture." The term "existing" clearly refers to reserved water rights already

established at the time of the bill's passage. The term "claimed" is unclear as to its temporal meaning. If it is interpreted to mean reserved water rights already claimed at the time of the bill's passage, there are no protections in this bill for future assertions of reserved water rights. The addition of "or future" to the sentence would provide more clarity in meaning.

Section 5 of S. 982 includes the statement:

> Nothing in this Act limits or expands any existing legally recognized authority of the Secretary of the Interior or the Secretary of Agriculture to issue, grant, or condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement on Federal land subject to the jurisdiction of the Secretary of the Interior or the Secretary of Agriculture, respectively.

On its face, this savings clause either contradicts Section 3 of the bill, particularly Subsection (1), or demonstrates that said portion of the bill is unnecessary. If the Secretaries of the Interior and Agriculture have existing authority "to issue, grant, or condition any permit, approval, license, lease, allotment, easement, right-of-way, or other land use or occupancy agreement," then Subsection 3(1) is trumped by this savings clause. If the Secretaries do not have that authority, then Subsection 3(1) is superfluous. Balancing this savings clause with Subsection 3(1) requires placing great emphasis on the phrase "legally recognized," which is not clear. The arguments regarding the authority of the Secretaries of the Interior and Agriculture to condition land use agreements on the handling of water rights need not be reproduced here, but that critical aspect of this issue should not be resolved in such a vague manner.

Yet another potentially significant matter is the intent and meaning of Subsection 4(b), regarding the effect on state water rights. The subsection begins with: "In carrying out this Act, the Secretary of the Interior and the Secretary of Agriculture shall not take any action that adversely affects (1) any water rights granted by a State…" The phrase "In carrying out this Act" appears to be limiting the scope of this prohibition, but it is unclear how carrying out the legislation could adversely affect a water right. The bulk of S. 982 (Section 3) concerns what the Secretaries of the Interior and Agriculture are prohibited from doing. Hence, the Subsection appears to be either redundant or nonsensical. If the intent of Subsection 4(b) is to ensure that the Secretaries of the Interior and Agriculture do not affect water rights when refraining from acting in the ways prohibited by Section 3, then that should be more clearly stated. If, however, "In carrying out this Act" is read more broadly, encompassing the activities generally addressed in this bill (such as issuing permits), the implications of Subsection 4(b) are not only sweeping but also make much of the preceding bill language unnecessary.

In law and its implementation, the balance between federal purpose and water rights is challenging, controversial, and above all, delicate. S. 982, by introducing new and ambiguous terms, and by coupling that with sweeping savings clauses in Section 5, may in fact achieve primarily disequilibrium of that balance resulting in delay, confusion, and litigation.