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COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

Hearing On
"The Clean Water Restoration Act Of 2007"
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Mr. Chairman and members of the Committee, my name is Robert Trout. I have been asked by Congressman Salazar to appear before you today to discuss the perspective of certain agricultural interests in the State of Colorado, which I believe are representative of concerns shared by many agricultural producers in the west. I do not appear on behalf of the State of Colorado or its agencies or instrumentalities. Nor will I tackle the constitutional issues raised by the bill, which will be addressed in a different panel.

I have over thirty-two years of experience dealing with water resources allocation and water quality issues in the west, representing public and private clients in resolving conflicts over water quality and quantity. I currently represent the Northern Colorado Water Conservancy District, which, along with the U.S. Bureau of Reclamation, operates the Colorado-Big Thompson Project in Colorado. The Colorado-Big Thompson Project is one of the largest suppliers of water for agricultural irrigation in Colorado. As an initial matter, I wish to make it abundantly clear that I do not appear before you today to oppose efforts to improve and protect the quality of the waters of the United States. Nor do I oppose efforts to improve the definition of the natural systems over which the federal government intends to assert jurisdiction for purposes of protecting our nation's waters, so as to avoid needless conflicts over the scope of that jurisdiction. It is certainly in the interest of all responsible organizations and individuals in this country to support efforts to see that the quality of our nation's waters is restored and protected.

For over a century, agriculture in the western United States has depended, in significant part, on the use of water for irrigation purposes. This remains true today. In fact, irrigation is

becoming more prevalent throughout the United States, even in areas that had traditionally relied solely upon rainfall to grow crops. In the western United States, agricultural water supplies were obtained first by diversion from surface streams into a ditch or canal, and then from the ditch or canal into a lateral and from the lateral onto the farm field where the water was spread by various techniques that generally are referred to as flood irrigation. In more recent times, the use of sprinkler systems has become more prevalent, as has reliance on ground water pumped from high capacity wells, either as a sole source of supply or to supplement the surface water diversions.

In the State of Colorado, as well as in a number of other western states, the waters of surface streams, together with the tributary groundwater, have always been the property of the public subject to the right of its citizens to appropriate those waters for beneficial use, including agriculture. The right to appropriate the unappropriated waters of the State of Colorado for beneficial use is enshrined in our State's Constitution, Art. XVI, Sec. 5. Once water has been appropriated for a beneficial use, such as irrigation, the right to divert water under a specific priority date is considered to be a private property right. These rights are determined in state adjudication proceedings and state officials administer water rights in accordance with the priority dates in their decrees, but so long as the water is used for the decreed beneficial purpose without waste, there is no further state regulation until the water has served its beneficial purpose for irrigation.

A variety of methodologies are used to apply these waters efficiently for irrigation, including the impoundment of waters diverted from the streams in small off-channel reservoirs

from which an adequate head of water can be obtained to efficiently irrigate a field or from which water may be pumped for application through sprinklers. These privately constructed facilities located entirely on private land traditionally have been considered to be the property of the farmer. Colorado water quality statutes recognize this very important distinction. Instead of trying to define what constitutes waters of the state in terms of various physical features, the relatively simple definition contained in Colorado's Water Quality Control Act declares that all surface and underground waters that are contained in or flow through the state constitute the waters of the state, and then excludes waters that are subject to appropriation until the beneficial use and treatment have been completed. *See* C.R.S. § 25-8-103(19). Modifications to the Clean Water Act's jurisdictional scope will affect the viability of this definition, however, because state regulation of water quality must be consistent with federal standards.

Let me give you some examples of the problems created by the definition of waters of the United States contained in the proposed bill. First, the term "wet meadows" describes agricultural fields that exist throughout Congressman Salazar's district, the State of Colorado, and most of the Mountain West. "Wet meadows" are irrigated hayfields or pastures. They are wet for the very reason that the adjoining alfalfa field, potato field, or corn field is wet – because the agriculturalist operating the property has diverted water by way of ditches or wells and applied it to that tract of land to produce hay or forage. These "wet meadows" are not considered waters of the state; they are private agricultural properties being irrigated with water that has been reduced to private possession. The practice of flood irrigating meadows is particularly prevalent in areas where streamflows are dependent upon snowmelt and snowmelt runoff and where supplies are available for only a very short duration of time. The common

practice is to divert water when it's available, create a wet meadow environment that will produce a hay or forage crop, then allow the meadow to dry later in the year so that a harvest can occur. This is the practice in the fields of Congressman Salazar, his neighbors, and his constituents. Wet meadows, created through lawful agricultural practices should not be included in your definition.

Second, the broad definition of "wetlands," without any limitation, encompasses the numerous small wetlands created not by natural processes, but rather by leakage from irrigation facilities and practices. While they possess all of the appearances of a wetland, their existence is entirely dependent on the maintenance of the agricultural practice. If the particular agricultural practice is changed, the wetland environment will be eliminated. For example, irrigation ditches always seep and leak. If seepage from an irrigation ditch has occurred for several years, it is entirely possible for wetland plant communities to develop in the seepage area. Should the owner of the irrigation ditch wish to improve the efficiency of the ditch through canal lining or other practices, the wetland itself could be eliminated, but the definition in the current language implies that the wetland would be subject to the regulatory authority of federal officials. A simple modification to the definition of wetland to include only naturally occurring wetlands would eliminate that conflict.

Finally, I would also suggest that the term "all impoundments of the foregoing" contained in the definition of waters of the United States would cover a variety of private water management structures used by agriculture throughout the West. Presumably included within that phrase would be off-channel irrigation reservoirs constructed for purpose of managing

irrigation water supplies prior to their distribution on farm fields; stock ponds built and maintained for purposes of watering livestock; terracing that is done throughout the western United States for purposes of capturing precipitation and holding the water for a sufficient period of time to permit it to seep into the ground; dead level flood irrigated fields constructed with berms around the fields and then entirely flooded as a means of efficient and uniform irrigation; and corrugated or channel irrigated fields where water is introduced into the field and maintained between constructed ridges for purposes of securing more efficient and uniform irrigation. All of these practices involve the impoundment of water, but they are the result of the appropriation of water that has been removed from natural streams for the purpose of applying it to beneficial use. These facilities and the water within them are the result of private farming practices on private land, not publicly accessible facilities. All of these facilities should be excluded from the definitions in this bill.

I recognize that the treatment or status of various structures that manage and control the flow of water vary from state to state, but the committee needs to be aware of the direct conflict between the treatment of water diverted for agricultural use in the State of Colorado and the proposed definition for waters of the United States. If the committee adopts the definition as written, it will be proposing to regulate waters which have been diverted under a constitutionally recognized private property right in the State of Colorado and are subject to the use and disposition by the owner. The water in these agricultural facilities should not be considered waters of United States, and in fact are not considered waters of the State of Colorado. Clarifying the definition of waters of the United States may well serve the interests of all of us in light of the confusion that is apparent after the *Rapanos* decision. However, creation of an

overbroad definition can only create additional misunderstandings and litigation, which would not serve the important interests of protecting and preserving our nation's waters. Thank you very much for the opportunity to speak to you today.