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October 2, 2014

Groundwater Directive Comments
USDA Forest Service
Attn: Elizabeth Berger — WFWARP
201 14th St. SW
Washington, D.C. 20250

Re: FS-2014-0001- Proposed Directive on Groundwater Resource
Management, Forest Service Manual 2560

Dear Ms. Berger:

The U.S. Forest Service (hereafter USFS or Service) has issued a proposed directive on groundwater resource management (*79 FR 25815, May 6, 2014*). This draft directive, published for public comment, is proposed for addition to the USFS Manual 2560. Because this directive impacts state authority to manage water, the Western Governors' Association (WGA) submits the following comments.

The USFS states that the directive is needed in order to “establish a consistent approach for addressing both surface and groundwater issues that appropriately protects water resources, recognizes existing water uses, and responds to the growing societal need for high-quality water supplies” (*79 FR 25815*).

STATEMENT OF INTEREST:

The WGA represents the Governors of 19 Western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the Western United States.

Clean water is essential to strong economies and quality of life, as the Western Governors recognize in their Policy Resolution 2014-04, [Water Quality in the West](#). Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.

States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the

management of their water resources and are best suited to speak to the unique nature of Western water law and hydrology.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS:

The Western Governors sent a letter to US Secretary of Agriculture Tom Vilsack on July 2 with several questions regarding the proposed directive.¹ As stated in that letter, our initial review of the proposed directive leads us to believe that this measure could have significant implications for our states and our groundwater resources.

WGA thanks Secretary Vilsack for his response to this letter, dated August 29. We are also sincerely grateful for the additional extension of the comment period so that the Western Governors are able to provide these detailed comments on the proposed directive. We understand that the Forest Service manages a significant portion of land in western states, on behalf of the United States, and that what occurs on this land can, in some instances, have a significant impact on water resources.

Recognition of the States' Exclusive Authority over Groundwater Management

Well over a century ago, Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. Moreover, the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over groundwater, finding that following the Desert Land Act of 1877 “. . . all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states”

Congress' clear intent that the states should have authority over groundwater, as affirmed by the U.S. Supreme Court, is distorted by the proposed directive in multiple ways. The proposed directive could be construed to assert USFS ownership of state groundwater through use of the phrase “NFS groundwater resources” throughout the document. It goes on to identify states merely as “potentially affected parties” and only recognizes states as “having responsibilities” for water resources within their boundaries. This vague and insufficient acknowledgement of the states' authority over groundwater is also evident in Section 2560.02-1, which states that an objective of the proposed directive is to “manage groundwater underlying NFS lands cooperatively with states.” This language misleadingly suggests that the USFS has equal authority with the states over groundwater management, which it does not.

¹ Incorporated by reference: Western Governors' letter to Sec. Tom Vilsack, dated July 2, 2014.
http://www.westgov.org/component/docman/doc_download/1821-usfs-groundwater?Itemid=

→ **Potential for Special Use Authorizations to Supersede State Authority**

States hold the authority to issue water rights, a fact recognized by the USFS in the proposed directive. However, the Western Governors are concerned that the proposed directive will lead the USFS to make decisions and place stipulations on proposed actions on NFS lands based on the quantity of water withdrawn with a state-issued water right; that is, a quantity that the state has authorized for diversion and depletion. Specific provisions include (emphasis added in all instances):

- Section 2560.03-4-a: Consider the effects of proposed actions on groundwater quantity, quality, and timing prior to approving a proposed use or implementing a Forest Service activity;
- Section 2561-2: Prior to implementation or approval, assess the potential for proposed Forest Service projects, approvals, and authorizations to affect the groundwater resources of NFS lands. If there is a high probability for substantial impact to NFS groundwater resources, including its quality, quantity, and timing, evaluate those potential impacts in a manner appropriate to the scope and scale of the proposal and consistent with this chapter; and
- Section 2562.1-3: When issuing or reissuing an authorization or approving modification of an authorized use, require implementation of water conservation strategies to limit total water withdrawals from NFS lands (FSM 2541.21h) deemed appropriate by the authorized officer, depending on the type of authorized use; existing administrative and other authorized uses in the area; the physical characteristics of the setting; and other relevant factors. If the holder of the authorization consents, amend the authorization to include this requirement.

These portions of the proposed directive assume that the Service has some type of authority over the management of groundwater, which it does not. The proposed directive should clearly state that state-issued water rights for allocations of water must be recognized. The USFS does not have the authority to limit the amount of withdrawals authorized by a state. Limiting the quantity of groundwater withdrawals through special use authorizations would, in effect, amount to superseding states' authority to issue water rights.

→ **Connectivity of Surface Water and Groundwater**

Another troubling concern in the proposed directive is the Service's rebuttable presumption that surface water and groundwater are hydraulically connected, regardless of whether state law treats these resources separately (Sections 2560.03-2 and 2561-1). The directive should defer to the laws of individual states in recognition of their authority over water management. Moreover, if groundwater and surface water are

assumed to be hydraulically connected, there is the potential for misinterpretation of the directive to mean the Service's newly asserted management of groundwater resources should extend to surface water. To be clear, the states have the authority to manage both groundwater and surface water, and the USFS should fully recognize this in its proposed directive.

Legal Basis for the Proposed Directive

Aside from the question of state authority, the proposed directive raises other legal questions.

The proposed directive states that the assertion of reserved rights to surface water and groundwater should be consistent with the purposes of the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act. In *United States v. New Mexico*, 438 U.S. 696 (1978), the U.S. Supreme Court denied USFS claims to reserved rights for fish, wildlife and recreation uses. Rather, the Court found that the Organic Act limits reserved rights to those necessary to meet the primary purposes of the Act—the conservation of favorable water flows and the production of timber—and that other secondary needs must be met by obtaining appropriation rights from the state.

Given the Supreme Court's ruling, specific language in Section 2567 (Item 3) of the proposed directive is troubling and confusing. This section states that, when filing groundwater use claims during state water rights adjudications and administrative proceedings, Forest Service employees should "[a]pply Federal reserved water rights (the Reservation or Winters doctrine) to groundwater (*emphasis added*) as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act."

The prospect of federal agencies claiming reserved rights to surface water is already a contentious affair, but suggesting the agency can assert such claims to groundwater is even more so. Reserved water rights have always been limited to surface water, and while there has been a long-standing debate as to whether they apply to groundwater, no federal court has extended the doctrine to groundwater.

Nevertheless, states and federal agencies have worked together to craft mutually acceptable and innovative solutions to address federal water needs, including federal needs for groundwater. These types of negotiated outcomes accommodate federal interests and needs and should be considered, recognizing the absence of any USFS reserved water rights authority for secondary purposes. The directive should require the USFS to work with state water right administrative agencies to address federal interests and needs without asserting any reserved right claims to groundwater.

Questionable Need for Proposed Directive

In the *Federal Register* notice for the proposed directive, the Service argues that there is "a need to establish a consistent approach for addressing both surface and groundwater issues" (79 FR

25815). In separate communications, Service officials have declared a need to bring all of the USFS regions in line with varying groundwater directives into a single consistent framework. However, just one region – Region 3 (encompassing Arizona and New Mexico) – addresses groundwater in its existing directives.

Questionable Ability and Need to Implement Proposed Directive

The proposed directive requires USFS employees to consider groundwater in a variety of new situations. Yet, as acknowledged in a “Frequently Asked Questions” document provided by the Service on the proposed directive, USFS has just four dedicated groundwater specialists within its current staff to implement the proposed directive ([Key and Common Questions and Answers: Proposed Groundwater Directive FSM 2560](#), Question 41). This document also contemplates hiring a contractor with groundwater expertise, “if circumstances require it.” Given the pressing needs of (and limited budget for) the Service’s existing responsibilities, the Western Governors encourage the agency to direct its resources to existing programs.

Additionally, the proposed directive creates regulatory duplication and overlap. As the South Dakota Department of Environment and Natural Resources stated in its July 31 submission on the proposed directive:

The Forest Service is now directed to do research and groundwater evaluations and assessments through this proposal. This is commonly what the US Geological Survey and Environmental Protection Agency do. It is not only a redundancy of responsibilities, it is doubling expenditures of these activities in an already overextended and unbalanced federal budget.

Adjacent Lands

The proposed directive also requires USFS officials to evaluate water right applications “on adjacent lands that could adversely affect NFS groundwater resources” (Sections 2560.03-6-f and 2560.04h-5). Such actions outside the boundaries of NFS lands exceed the limits of the agency’s authority. It is inappropriate for the USFS to extend its administrative reach to lands it does not manage.

Land Exchanges

The USFS creates a new requirement in the proposed directive for “an appropriate assessment of potential groundwater availability . . . as part of the appraisal process when water availability may be of significance on NFS lands proposed for a land exchange” (Section 2560.03-11). As the Western Governors have stated in a letter supporting legislation to facilitate state-federal land exchanges,

The burdensomeness and complexity of federal land exchange processes often prevent the completion of sensible and mutually beneficial

exchanges, even on a government-to-government basis. Consequently, state lands remain locked in federal conservation areas, and states are deprived the economic benefit of land grants that were made to fund education and other purposes.²

Adding a new requirement to an already arduous process will create further challenges for the process of approving economically beneficial land exchanges. Furthermore, the proposed directive does not specify what the threshold of “significance” is that would warrant a groundwater availability assessment, nor does it speak to which specific factors will be evaluated or how they may be weighted in the consideration of a transaction. The Service should clarify these points before adding a new barrier to the land exchange process.

Lack of State Consultation

The USFS did not reach out to WGA or any state agencies of which WGA staff is aware in advance of developing and publishing the proposed directive. When asked about state consultation on a stakeholder conference call on May 20, 2014, the USFS indicated that they had consulted with states when the Proposed Directive was first considered several years ago, a time when many of the current Western Governors had not yet been elected and many different employees were working within the Service and the state agencies.

The USFS asserts that the proposed directive does not trigger the state consultation requirements under E.O. 13132 on federalism. However, the USFS has initiated tribal consultation pursuant to E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. States, as the exclusive authority for groundwater management, deserve at least the same level of consultation as tribes.

Waiting until the public comment period to solicit state input, as the USFS has done in this instance and others, does not allow for meaningful consideration of the states’ perspectives. States should have been consulted much earlier in the development of this directive, especially given the number of years the agency has spent preparing this proposal.

Context: Other Water-Related Proposed Directives from USFS

The USFS has published two other proposed directives for public comment: one regarding best management practices for water quality and one on ski area water rights. An assumption underlying all three proposed directives is that the Service has an obligation to extend regulation of water resources beyond current state and federal efforts. As the Service has

² Incorporated by reference: Western Governors’ letter to Rep. Rob Bishop, dated June 19, 2014, in support of the Advancing Conservation Education Act of 2014.

http://www.westgov.org/component/docman/doc_download/1817-bishop-land-exchange-legislation?Itemid=

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written in a “Frequently Asked Questions” document for the proposed directive on groundwater,³

There is a clear need for the Forest Service, in continued cooperation with the states and tribes, to take an active role in comprehensively managing the human activities that potentially affect water resources on National Forest System lands.

WGA is sensitive to the potential for this “comprehensive management” to venture into the realm of new regulatory authority for the Forest Service.

WGA urges the Forest Service to consult with states in a meaningful way prior to proposing future directives or rules. This proposed directive, like many other proposals from the USFS and other federal agencies, was developed without any state consultation of which WGA is aware. True consultation with the states will help the Service identify and avoid conflicts regarding proposed directives and rules. We invite the USFS to work through WGA, the Western States Water Council, and individual states to facilitate dialogue on ways to improve this (and any future) proposed directive.

WGA appreciates the opportunity to submit comments on this proposed directive.

Respectfully submitted,



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WGA Chairman



John Kitznaber, M.D.
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WGA Vice Chairman

³ “Key and Common Questions and Answers – Proposed Groundwater Directive FSM 2560” - http://www.fs.fed.us/geology/Proposed%20Groundwater%20Policy_QA_6_30_14.pdf