

**HEARING TO REVIEW THE U.S. FOREST
SERVICE'S PROPOSED GROUNDWATER
DIRECTIVE**

HEARING
BEFORE THE
SUBCOMMITTEE ON CONSERVATION, ENERGY,
AND FORESTRY
OF THE
COMMITTEE ON AGRICULTURE
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS

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HEARING TO REVIEW THE U.S. FOREST SERVICE'S PROPOSED GROUNDWATER DIRECTIVE

WEDNESDAY, SEPTEMBER 10, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CONSERVATION, ENERGY, AND FORESTRY,
COMMITTEE ON AGRICULTURE,
Washington, D.C.

The Subcommittee met, pursuant to call, at 10:06 a.m., in Room 1300 of the Longworth House Office Building, Hon. Glenn Thompson [Chairman of the Subcommittee] presiding.

Members present: Representatives Thompson, Rogers, Gibbs, Tipton, Crawford, Noem, Benishek, McAllister, Walz, Kuster, Nolan, Schrader, and DelBene.

Staff present: Caleb Crosswhite, Nicole Scott, Patricia Straughn, Tamara Hinton, John Konya, Lisa Shelton, Robert L. Larew, Evan Jurkovich, and Riley Pagett.

OPENING STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA

The CHAIRMAN. Okay, everybody. Welcome. This hearing of the Subcommittee on Conservation, Energy, and Forestry to review the U.S. Forest Service's proposed Groundwater Directive, will come to order.

Once again, good morning. I want to welcome everyone to this hearing of the Conservation, Energy, and Forestry Subcommittee to review the Forest Service's proposed Groundwater Directive. And while the topic of water management is absolutely critically important for all Americans, it is especially so for our farmers, our ranchers in rural communities who live off the land. As an example, water management is of critical importance to western Members of this Committee, given the scarce supplies that we have seen in recent years.

Now, among the Forest Service's multiple-use mission, it is essential to note that the two principal reasons specifically articulated within the Weeks Act behind the creation of our National Forest System was to regulate the flow of navigable streams or for the production of timber.

In May, USDA issued for public comment a Proposed Directive relating to the management of groundwater, non-navigable streams, in our National Forest System. The proposal outlines the Forest Service's justification for this policy and provides detailed instruction for field staff in managing groundwater resources. The

proposal lays out the scope of acceptable groundwater uses and establishes new processes and procedures for special use authorizations that involve access to and withdrawal of groundwater resources.

Now, I along with other Members of the Subcommittee, have heard concerns from forestry and agriculture groups about the scope, lack of clarity, and potential impacts if this Directive were to be adopted as currently proposed. We have heard concerns that the Directive could result in less management on the National Forest System, more litigation, potential preclusion of private water rights, and increased permitting requirements for activities in the National Forest System.

For many Americans around the country that rely on National Forest lands, these possibilities are beyond comprehension. Several groups have questioned the legal justification used by the Forest Service in putting forth this proposal. Multiple groups have suggested that the Proposed Directive usurps the existing authority of states to manage groundwater. There is a wide range of management challenges affecting the health of the National Forests including a lack of much-needed timber harvesting which significantly contributes to ever-increasing problems of wildfires and invasive species.

Now, I remain concerned that this Directive would create more problems than it proclaims to solve and will further undermine the ability of the agency to carry out its management responsibilities. Now, I am pleased that the Forest Service has extended—I am very appreciative that the Forest Service has extended the comment period for another month to allow more time for interested groups to weigh in on this proposal, and we have before us expert testimony on this complicated topic, and I thank them all for being here. And I want to welcome back Chief Tidwell who has appeared before this Subcommittee on a number of occasions and thank him for his service in the United States Forest Service and to our country.

I have enjoyed our working relationship over the last few years and look forward to continue to work together to find ways to improve the health, the economic productivity, and recreational opportunities within the National Forest System, and we look forward to the Chief's testimony in offering the agency's perspective about how this Directive came about and why the agency believes that this Directive is necessary, and fundamentally how the Forest Service believes it has actually the legal authority to take this unprecedented move.

We will also hear from a second panel of witnesses who will share with us their views on this proposal and any concerns they wish to offer publicly, and this hearing is an opportunity for Members of the Subcommittee to learn about this sometimes complicated topic and engage our panel of witnesses.

[The prepared statement of Mr. Thompson follows:]

PREPARED STATEMENT OF HON. GLENN THOMPSON, A REPRESENTATIVE IN CONGRESS
FROM PENNSYLVANIA

Good morning. I want to welcome everyone to this hearing of the Conservation, Energy, and Forestry Subcommittee to review the Forest Service's proposed Groundwater Directive.

While the topic of water management is critically important for all Americans—it is especially so for our farmers, ranchers, and rural communities who live off the land.

As an example, water management is of critical importance to the western Members of this Committee, given the scare supplies we've seen in recent years.

Among the Forest Service's multiple-use mission, it's essential to note that one of the principal reasons behind the creation of our National Forest System was to promote the health and proper maintenance of watersheds.

In May, USDA issued for public comment a proposed directive relating to the management of groundwater in our National Forest System.

The proposal outlines the Forest Service's justification for this policy and provides detailed instruction for field staff in managing groundwater resources.

The proposal lays out the scope of acceptable groundwater uses, and establishes new processes and procedures for special use authorizations that involve access to and withdrawal of groundwater resources.

I, along with other Members of this Subcommittee, have heard concerns from forestry and agricultural groups about the scope, lack of clarity, and potential impacts if this directive were to be adopted as currently proposed.

We have heard concerns that the directive could result in less management on the National Forest System, more litigation, potential preclusion of private water rights, and increased permitting requirements for activities on the National Forest System.

For many Americans around the country who rely on National Forest lands, these possibilities are beyond comprehension.

Several groups have questioned the legal justification used by the Forest Service in putting forth this proposal.

Multiple groups have suggested that the proposed directive usurps the existing authority of states to manage groundwater.

There is a wide range of management challenges affecting the health of the National Forest System, including a lack of much needed timber harvesting, which significantly contributes the ever increasing problem of wildfires.

I remain concerned that this directive would create more problems than it proclaims to solve, and will further undermine the ability of the agency to carry out its management responsibilities.

I am pleased that the Forest Service has extended the comment period for another month to allow more time for interested groups to weigh in on this proposal.

We have before us expert testimony on this complicated topic and I thank them all for being here.

I want to welcome back Chief Tidwell, who has appeared before this Subcommittee on a number of occasions.

I've enjoyed our working relationship over the last few years and look forward to continuing to work together to find ways to improve the health, economic productivity, and recreational opportunities within the National Forest System.

We look forward to the Chief's testimony offering the agency's perspective about how this directive came about and why the agency believes this directive is necessary.

We will also hear from a second panel of witnesses who will share with us their views on this proposal and any concerns they wish to offer publicly.

This hearing is an opportunity for Members of the Subcommittee to learn about this sometimes complicated topic and engage our panel of witnesses.

I now recognize my friend, the Ranking Member, for his opening statement.

The CHAIRMAN. And I now recognize my friend serving for this hearing at this point as the acting Ranking Member for his opening statement, Mr. Schrader.

**STATEMENT OF HON. KURT SCHRADER, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF OREGON**

Mr. SCHRADER. Thank you, Mr. Chairman. I appreciate it. I appreciate our panel and Chief Tidwell for being here to answer some of our concerns. I hope that we will get a better understanding of why the Forest Service is approaching groundwater issues.

The biggest concern many of us have is the budget itself. Forest Service budget itself seems always under siege. Wildfires consume an ever-increasing amount of it. The ability to actually manage our

Forests is in question at this point in time. So I am very concerned about taking on a whole other initiative, no matter how well-intended. Where we are going to get the resources? So with that, I am looking forward to the hearing, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. Let us welcome the first witness to the table, our only witness for this first panel, Mr. Thomas Tidwell, Chief of the United States Forest Service, U.S. Department of Agriculture here in Washington, certainly no stranger to this Committee, and welcome back, Chief. I really appreciate you being here so that we could have this hearing and have this discussion. So Chief Tidwell, please begin whenever you are ready.

STATEMENT OF THOMAS L. TIDWELL, CHIEF, U.S. FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.

Mr. TIDWELL. Okay. Mr. Chairman, Members of the Subcommittee, thank you for the opportunity to be here today to discuss our proposed internal Directive on how to deal with groundwater and the issues that resolve around that.

Mr. Chairman, as you mentioned, this concept of healthy watersheds, clean and abundant water, was one of the foundational reasons for the National Forests. They exist today to secure the favorable conditions of water flow for the multiple uses and the benefits to sustain our economies and also maintain the communities across the nation today.

Without a clear and publicly vetted agency direction, our agency decision makers have a very poor defensible position to be in when it comes to evaluating proposals that may impact groundwater. These are our proposals, things that we have to act on. And if we don't have a more systematic approach, this is going to continue to lead to more public concern, more controversy, and more lawsuits as the public expects and demands more from management of the public lands.

So in May of this year, we put out our proposed Groundwater Directive to provide a consistent and systematic approach to evaluate and monitor the effects to groundwater from Forest Service proposed activities. Now, we have extended the comment period so that we especially have more time to be able to sit down with the states and be able to discuss with them some of the concerns that they have already expressed.

But I need to clarify a few key points of this proposal. This Directive is not new authority. The Directive only clarifies our existing agency authorities and provides a consistent and systematic approach to evaluate the effects on groundwater from new proposals on National Forest System land. It is not a new regulation. We did put the notice in the *Federal Register* because that is the format that we are used to. It is what our stakeholders are really used to, and so that is why we use the *Federal Register*.

It does not infringe on the states' authority, nor do we infer that the Proposed Directive extends to the appropriation of water. Although the term *managed groundwater* was used frequently in the draft, we specifically mean to inventory and evaluate the data and

to be able to monitor the effects of uses on the National Forests and Grasslands.

Now, part of our Proposed Directive is to be able to strengthen our cooperation with other government entities, states, and other Federal agencies when there is a proposal that is adjacent to National Forests that we believe may affect the groundwater on the National Forest. We will comment on it if there is a process, but it is just a comment. This does not infer that we have any authority beyond the National Forest System lands. But if there is an activity that we feel may impact the groundwater under the National Forests, may impact water uses on the National Forest, we will comment to the entity that is going to make the decision.

The Groundwater Directive does not impose any new restrictions on mineral or oil/gas development. Our Proposed Directives do not change the existing situation of what we currently do when it comes to making decisions about minerals management and oil and gas development.

The Proposed Directive does assume that groundwater and surface water are hydrologically connected unless it has been demonstrated otherwise. This assumption is based on what we believe is well-developed, scientific understanding but also recognize that this is not always going to be the case, and when it is not, that is a good thing. We identify that and we can move on. I do want to point out that this is the approach that many of the states also recognize—this interconnectivity. This Proposed Directive does not change the existing authorities of the states to allocate water and has no bearing on state law for purpose of use allocation.

Mr. Chairman, Members of the Subcommittee, I understand that water is a contentious issue. Our intention here with this Proposed Directive is to make it a little less so by having a consistent, systematic transparent approach. I believe we will be better partners with the states to ensure that the public continues to benefit from abundant, clean water, but also we will be in a better position to defend our decisions as we see more and more challenges coming from the courts.

We look forward to reviewing all of the input that has been received on this proposal and already have heard ways to be able to clarify and improve the Directive. Once we evaluated all the comments, we will determine the path forward in the content of the final Directive.

This concludes my oral remarks, and I will be happy to answer any of your questions.

[The prepared statement of Mr. Tidwell follows:]

PREPARED STATEMENT OF THOMAS L. TIDWELL, CHIEF, U.S. FOREST SERVICE, U.S.
DEPARTMENT OF AGRICULTURE, WASHINGTON, D.C.

Chairman Thompson, Ranking Member Walz, and Members of the Subcommittee, thank you for the opportunity to provide perspective on the role of the U.S. Department of Agriculture (USDA) in the stewardship of water resources on National Forest System (NFS) lands.

Congress authorized the Forest Service to administer National Forest System (NFS) lands and to manage the many uses of those lands, including uses that have the potential to affect water resources. Congress directed the Forest Service to manage NFS lands to secure favorable conditions of water flow (Organic Administration Act of 1897), for navigable stream protection (Weeks Law of 1911), and to mitigate

floods, conserve surface and subsurface moisture, and protect watersheds (Bankhead-Jones Act of 1935).

In addition, Congress has provided subsequent direction to the Forest Service regarding water, watersheds, and the management of those resources in a number of statutes, including the Multiple-Use Sustained-Yield Act of 1960, the National Forest Management Act of 1976, and the Federal Land Policy and Management Act of 1976. To implement these and other authorities, the Forest Service has discretion over the “formulation, direction, and execution of Forest Service policies, programs, and activities (36 CFR 200.1(b)).” This is done in part through the issuance and revision of *Forest Service Manuals* and *Handbooks* (together termed “directives”) that guide internal agency operations (7 CFR 2.7).

Water on NFS lands is important for many reasons, including resource stewardship, domestic use, and public recreation. Today, water from National Forests and Grasslands contributes to the economic and ecological vitality of rural and urban communities across the nation, and those lands supply more than 60 million Americans with clean drinking water.¹ NFS lands alone provide 18 percent of the nation’s freshwater, and over ½ the freshwater in the West.²

Groundwater plays a critical role in providing that freshwater, serving as a reservoir supplying cold, clean water to springs, streams, and wetlands, as well as water for human uses. Activities on National Forests and Grasslands can impact the surface water, source water drinking areas, and groundwater reserves for that water, including major aquifers (United States Geological Survey Principal Aquifers) such as: the Valley and Ridge aquifers in West Virginia, Virginia, Tennessee, North Carolina, South Carolina, Georgia, and Alabama; the Ozark Plateaus aquifer system in Missouri and Arkansas; and the Colorado Plateaus aquifers in Utah, Colorado, Arizona, and New Mexico.

Through comments on specific proposed Forest Service decisions, and through other avenues, the public has increasingly indicated that it expects the Forest Service to review and address potential impacts to groundwater resources as part of the analysis it performs to support its decisions and actions. Many court decisions have indicated that the Forest Service has a legal obligation to do so. Recent examples include lawsuits in the States of Idaho and Oregon claiming that the Forest Service conducted inadequate analysis of the potential impacts to groundwater from proposed activities and a court remand requiring the Forest Service to enhance its groundwater analysis.

The Forest Service currently desires to be more consistent in evaluating the potential effects to groundwater from the multiple surface uses of NFS lands and the role that groundwater plays in ecosystem function on NFS land. Likewise, we would like to be more consistent in evaluating proposals for activities on NFS lands that could impact groundwater resources and that require Forest Service authorization. The Forest Service plans to develop a framework to comprehensively evaluate watersheds and water resources in order to carry out its responsibilities to administer the NFS.

On May 6 of this year, the Forest Service published for public comment a proposed directive on groundwater that will help the Forest Service to establish a more consistent approach to evaluating and monitoring the effects on groundwater from actions on NFS lands.³ The proposed directive does not specifically authorize or prohibit any uses, and is not an expansion of authority. Rather, it provides a framework that would allow the Forest Service to clarify existing policy and better meet existing requirements in a more consistent way across the National Forest System. Specifically, it would:

- Create a more consistent approach for gathering information about groundwater systems that influence and are influenced by surface uses on NFS land and for evaluating the potential effects on groundwater resources of proposed activities and uses on NFS lands;
- Bolster the ability of Forest Service land managers to make informed and legally defensible decisions, with a more complete understanding of the potential impacts for activities on NFS lands to and from groundwater;
- Support management and authorization of various multiple uses by better allowing the Forest Service to meet its statutory responsibility to fully analyze and disclose the potential impacts of uses or activities; and

¹ <http://www.fs.fed.us/publications/policy-analysis/water.pdf>.

² www.fs.fed.us/pnw/pubs/pnw_gtr812.pdf.

³ 79 Fed. Reg. 25815.

- Emphasize cooperation with State, Tribal and local agencies and compliance with their applicable requirements.

The Forest Service recognizes and specifically acknowledges in the proposed directives the role of states in the allocation of water use and protection of water quality. The proposed directive would not infringe on the states' authority, nor would it impose requirements on private landowners. The proposed directive does not change the long-standing relationship between the Forest Service and states and Tribes on water. The Forest Service currently evaluates effects on groundwater and surface water resources of activities on NFS lands by working closely with state and Tribal agencies that have the responsibility for the allocation and protection of water resources, and the Forest Service will continue to do so in the future.

The purpose of the proposed directive on groundwater is to clarify existing authorities and responsibilities and provide greater consistency and accountability in how the Forest Service carries out these obligations. By improving the agency's ability to understand groundwater resources and manage activities on NFS lands, the proposed directive would make the agency a better and more consistent partner to states, Tribes, and project proponents, as well as to the downstream communities that depend on NFS lands for their drinking water. By restoring and maintaining healthy watersheds, the Forest Service helps sustain these vital water resources upon which communities depend.

The Groundwater Directive does not impose new restrictions on any uses, including oil and gas and other mineral development. The Groundwater Directive defers to existing *Forest Service Manual* Direction (*Minerals and Geology Management*—Chapter 2800) which contains the Forest Service procedures for approving minerals activities on NFS lands. States also have their own procedures for approving minerals activities within the state.

Proposals to access federally-owned minerals on NFS lands require approval from both the state and the Federal Government. The same is true for proposals to access water on NFS lands. Access and occupancy of NFS land is authorized and managed through our permit processes. The proposed Groundwater Directive does not change that; it just makes it clearer how the Forest Service plans to carry out that responsibility so the agency can be more systematic and predictable for applicants, state and local agencies, other users of water, and the public.

The proposed directive would provide transparent and consistent direction for evaluating proposed Forest Service activities affecting groundwater resources on NFS lands and for quantifying the nature and extent of large groundwater withdrawals. It would also clarify responsibilities for groundwater resource management at each level of the Forest Service.

Through this proposed directive, the Forest Service would be better positioned to respond to changing conditions, such as drought, climate change, land use changes and needs for additional water supplies, in an informed manner, while sustaining the health and productivity of NFS lands and meeting new societal demands for resources in a responsible way. Our goal is improve the quality and consistency of our approach to understanding groundwater resources on National Forest System lands and to better incorporate consideration of those resources to inform agency decision-making. Establishing a consistent framework for evaluating groundwater resources will also help to ensure that the Forest Service's decisions are well informed and can withstand legal challenge.

The proposed Groundwater Directive was published in the *Federal Register* on May 6, 2014. Because of the widespread interest in this proposal and our desire for active public input and feedback, the original comment period was extended from August 4, 2014 until October 3, 2014, to allow more time to hear from states, Tribes, individuals, and groups.

The agency looks forward to reviewing all the input received on this important proposal. Once we have evaluated the comments, we will determine the path forward and the content of a final directive. This concludes my testimony, and I would be happy to answer any questions.

The CHAIRMAN. Thank you, Chief Tidwell. The chair would like to remind Members that they will be recognized for questioning in order of seniority for Members who are present at the start of the hearing, and after that, Members will be recognized in order of their arrival. And I appreciate Members' understanding. I am going to defer—I will take the final position for questioning. So at this point I am pleased to recognize the gentleman from Ohio, Mr. Gibbs, for 5 minutes.

Mr. GIBBS. Thank you, Mr. Chairman. Thank you, Chief Tidwell, for coming in. My question, I won't get into the legality if the Forest Service has the legal authority under the Weeks Act, but my concern is I want to do a scenario. Say I am an adjacent landowner to Forest land property, and I am looking to develop a shale oil and gas production. And we have to go down through the water aquifer which the water aquifer runs through Forest land, okay? The water aquifer typically—well, in my area of the country—maximum depth is 300'—150' to 300'. The shale exploration in my area is 4,000' to 6,000', and I represent the only connection that the shale and gas production has to the water aquifer, which would be that conduit, that borehole. As long as we meet all the requirements that we are doing triple-casing, triple-cementing, seal that off so it is not the conduit for the rest of the saltwater and stuff to come up and pollute the aquifer or coming down from the surface. Now, if the Forest Service is concerned about groundwater, my concern is are they going to say, "Well, you can't do oil and gas exploration because there is a possibility,"—even though in my opinion it is almost 100 percent remote contaminating that groundwater—I mean the aquifer, if it is done right—"that aquifer flows into Forest land." You know, under this Directive we can stop you from doing that. And so can you expound on what I am trying to say here?

Mr. TIDWELL. Our Directive and our current authority—it has got to stop. What it does is to disclose the potential effects, and if there are opportunities to mitigate the impact of those effects, to be able to pursue what is available under our authorities and the current law if it is an operation that is off the National Forest. All we will ever do is comment, and if the state, whoever is the authorizing entity, have a process to receive comments, we will send in a comment. But we have no authority off Forest Service land.

For the other question, if there isn't this interconnectivity, that is a good thing. There are definitely places where there is separation between what is occurring on the surface use from the groundwater, and we will document that.

Mr. GIBBS. Well, I guess in the scenario I was laying out, the interconnectivity would be the aquifer flows underneath my property and the Forest land property. And so there is where you could—and so if the Forest Service has a Directive to say—let us just say in the future they have a policy, we are not going to allow—we are not going to do any mineral exploration or extraction on Forest land property and now the aquifer flows through the neighboring property, so we are going to fight you to stop that. That is I guess my concern. And I would say there isn't really interconnectivity other than that aquifer, and we are just going down through the aquifer and we are meeting all the requirements to protect that aquifer. I am just concerned about the expansion in the future, the Forest Service using this ability to expand.

Now, I guess to follow through on that, what is the position of the Forest Service now on—let us say we are doing directional drilling on the shale, and they want to go under you guys, and the Forest Service obviously has to sign a lease to do that. What is the Forest Service's position on that now? Are they allowing exploration on those instances where the well is not on their property but signed leases to allow directional drilling under their property?

Mr. TIDWELL. If the area of the National Forest is leased, we work with the leaseholder to be able to mitigate the impacts. They can access the oil and gas resource and we have many examples throughout the country where we have oil and gas operations that have been in place for decades. We have also been able to mitigate impacts also on groundwater.

A lot of this we have already been doing. What we find is we have this inconsistent approach where one Forest is dealing with it one way, another Forest is addressing it another way, and then we get challenged in court. We have had a couple cases out West where—these challenges were on mining proposals. The court said, “Forest Service, you did not evaluate the effects of this proposal on groundwater.” It didn’t say you have to stop it, but the court was very clear. “Forest Service, you need to evaluate what are going to be the impacts and to be able to disclose those.” When it is a Forest Service decision, and we have an opportunity to mitigate the effects, that is what we want to work on because that is what this is about. It is not about allocation of the water. But if there is a chance for us to mitigate the impacts by working together and which we commonly do with many proponents already, that is what this is about. It helps to put us in a more defensible position so that—we are driving how our process works *versus* having individual courts direct us about how to deal with this.

Mr. GIBBS. My time has expired, but I just want to—just a quick comment is I am just concerned about the private property rights adjacent to Forest lands and how that is all affected, and I essentially just want to see this rule coming out of the Army Corps of Engineers and the EPA and the jurisdictional expansion of the waters of the United States that is the fullness of my rationale here. Thank you, Chief.

The CHAIRMAN. Thank you. The gentleman’s time has expired. I now recognize Mr. Schrader for 5 minutes.

Mr. SCHRADER. Thank you, Mr. Chairman. I appreciate the line of questioning that Representative Gibbs had, being thoughtful about how we approach this, and just because you are drilling through a certain aquifer, does that mean that it is going to be regulated or cause some problems, even if there is no contamination?

Along those lines then, what is the thought of the Forest Service in terms of using good science to evaluate whether a groundwater resource is being impacted? I assume there will be testing, and if there is contamination, then and only then would there be a regulation issued. Are there certain agencies that tend to just issue blanket regulations on the off-chance that something might occur as opposed to dealing with data? What is your inclination, Chief?

Mr. TIDWELL. No. There would be no blanket regulation or anything like that. This is going to be on a case-by-case basis based on the science, and when there is a potential to impact the quality or quantity of groundwater, we need to evaluate that and be able to share that with the public. And if there are opportunities to mitigate it within our authorities, yes, we are going to always work to be able to pursue that. If it means a different way, a different location of the extraction for instance, we are going to work on that. If it is dealing with large mining operations to be able to look

at ways to be able to mitigate that as much as we can within the authorities—

Mr. SCHRADER. But that would be—

Mr. TIDWELL.—we will do that.

Mr. SCHRADER. What you would do would be based on a problem you have identified as opposed to a potential one?

Mr. TIDWELL. Yes.

Mr. SCHRADER. Okay.

Mr. TIDWELL. Once again, this proposal is about having a consistent approach to evaluate and monitor the effects.

Mr. SCHRADER. So a little line of questioning here. The resources for the agency are limited, and while I think this is an extremely important area for us to discuss with you, there is another one that is definitely a problem and that is the wildfire issue, out West in particular, but we see it wherever lightning strikes. The wildfire issue is sucking the life out of the Forest Service budget. It is my understanding that up to 70 percent of the Forest Service budget used to be for managing National Forest lands, letting contracts, good forest health, all sorts of projects that we used to be able to do. Now, my understanding, Chief, is it is down to only 30 percent.

There is a bill out there, a bipartisan bill in both the Senate and the House. Senators Wyden and Crapo, myself, and Representative Simpson are trying to treat these horrific wildfires, the few, the one percent of the wildfires that are out of control and cataclysmic, as disasters, just like we do: the flooding issues, hurricane issues, all that and trying to restore your ability to keep your budget under control for the most part. It wouldn't have any added cost. It would impact the disaster budget just like any disaster would with no added cost according to the Congressional Budget Office.

Don't you think it would be wise to prioritize the wildfire aspect of this budget to try and give you the resources you need? If you had to choose between the groundwater issue and the wildfire issue, which is more important right now for your budget, sir?

Mr. TIDWELL. Well, if I had the flexibility to choose, there is no question to resolve this issue around wildfire costs. Congressman, I cannot thank you enough for your leadership, to put forward the bipartisan legislation, and I extend that appreciation to the Chairman and almost every Member of this Subcommittee about your support to be able to solve that problem.

There is just no question that conditions have changed on the lands over the last decade plus, and the cost of fires continue to go up. We will do whatever it takes to be able to suppress those where we need to, but at the same time it has had a really detrimental impact on the agency's ability to manage, and as the Chairman mentioned in his opening remarks, the need for us to do more to be able to restore the health of our Forests, the resiliency of our Forests. So there is no question that is a much more pressing issue.

This Proposed Directive, our intent with this was to actually reduce some of the problems that we see coming: the potential for a court direction that, in some cases, could force us to do more than we really need to. That is what the purpose of this is, actually to take this issue off the table but at the same time allow us to really focus on what is really a much more important, pressing issue for us to be dealing with.

Mr. SCHRADER. Very good. Thank you, and I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. I now recognize the gentleman from Arkansas, Mr. Crawford, for 5 minutes.

Mr. CRAWFORD. Thank you, Mr. Chairman, and Chief, I appreciate you being here today. USFS has claimed through the comment period the public has indicated that it expects the USFS to review potential impacts to groundwater resources. In your opinion, does review also mean manage?

Mr. TIDWELL. Once again, when we talk about manage, we are referring to doing the inventory and monitor the effects of our activities on groundwater. It is to be able to disclose those, and when we are authorizing a surface use, if there is something that can be done to mitigate the impact on groundwater from our decision, we want to be able to disclose what those impacts are, and then pursue ways to mitigate that. And when there are no effects—and that is just as important as anything—to be able to disclose that because we are often challenged, especially when it comes to some mining proposals and oil and gas proposals. We get challenged that effects of this proposal are going to have more effects than we are disclosing, and because we don't have a systematic approach, it puts us in a more difficult position to be able to say, "Well, Your Honor, we have this approach and we have taken these steps to be able to evaluate. We have done inventory. We have been working with the states to understand the relationship here. And based on our outcome of this, we feel that this proposal has no effect." That is just as important or more so than in those cases where we have the opportunity to be able to mitigate the surface use in a way that has less of an impact on groundwater.

Mr. CRAWFORD. Okay. I am curious about the comment period. Where have the majority of the comments during the comment period come from or was it—is there a particular group or a particular region or association or anything that were particularly or especially represented?

Mr. TIDWELL. Well, we have received comments from states across the country. There has definitely been more from the western states than maybe the eastern states, and we have received comments from all sides of this issue, everything from that we should stop this, the states can handle this issue to you don't need to do anything to Forest Service as it carries out authorities, you need to place more requirements, *et cetera*, into this.

We tried to be very clear that this is not a rule. It is not a regulation. It is our internal direction that we issue so that we take a consistent approach to evaluate this. There is no question on the comments that there are some things that we need to change in here to clarify the intent. I mean, that is one of the things that we have heard loud and clear. We have had some good comments. We have had good discussion, that we need to clarify it. And I go back to that one term *manage* that we recognize without any question. We need to clarify that because with some interpretation of the word *manage*, it means more than what we intended. That is definitely one of the first things that we are going to be working on.

Mr. CRAWFORD. Okay. Did you get any comments during the public comment period from any Federal agencies?

Mr. TIDWELL. I would have to go back to check on that with the group. We still have an open comment period, but I am not aware of any at this point. But I am sure there is probably going to be some.

Mr. CRAWFORD. Is it pretty commonplace for other Federal agencies to weigh in in public comment period?

Mr. TIDWELL. It often is, depending on what the issue is for us to receive comments.

Mr. CRAWFORD. Do they get greater consideration than a private citizen in your opinion?

Mr. TIDWELL. They get the same consideration of all of the comments that come in, whether it is from the states or from individuals. We look at all of them as a way to be able to move forward with this, to be able to clarify this, and at the same time to make sure that we have a direction that can be followed and understandable.

Mr. CRAWFORD. You mentioned just a second ago in responding that this was an internal Directive, and you said that we issued this. Can you define *we*? Can you be a little more specific?

Mr. TIDWELL. It is the U.S. Forest Service.

Mr. CRAWFORD. Okay. Is there an individual that directed this? Was it you or was it a collective effort or—

Mr. TIDWELL. This is mine. This is something we have actually been working on for quite a few years, recognizing that there was a need to have a consistent approach. It wasn't as pressing as it is today because in the past we hadn't had as much interest through litigation as we have seen recently. And so it is something we have been working on for several years to be able to put this forward.

Mr. CRAWFORD. Several meaning what, 3, 4, 5?

Mr. TIDWELL. I think some of our folks have probably been working on this, thinking about this for probably more like 6 or 7 years.

Mr. CRAWFORD. Okay. All right. Thank you, Chief. I appreciate it. I yield back.

The CHAIRMAN. I thank the gentleman for yielding back, and now we are going to recognize the gentlelady from Washington, Ms. DelBene, for 5 minutes.

Ms. DELBENE. Thank you, Mr. Chairman, and thank you, Chief, for being here with us today.

I want to quickly go back to a little bit of the question that Congressman Schrader had brought up with respect to wildfires, and I just wanted to get a quick update from you kind of what the state is right now of wildfires on Federal lands and what you are seeing.

Mr. TIDWELL. Well, Congresswoman, just a few weeks ago, we were in a place where we had over 20,000 firefighters out, and we were close to being in a position where we would not have enough resources to respond to anymore new fires. Fortunately, we had a very favorable weather pattern move in, especially through your state. Through the Northwest, it has really moderated the fire season to the point where today we are in very good shape except the State of California where the fires in northern California just topped over 100,000 acres yesterday and some other Forest there in the Sierras. So the situation has moderated.

A few weeks ago I sent out the direction for us once again to stop activity so that we could prepare to transfer funds from other program areas to be able to fund suppression. Now with this moderation, we are now looking at having to change that direction because we probably won't have to transfer anywhere near what we thought we would have to. At the same time, it has had an impact for a few weeks on our programs, and here I am now having to call up my Regional Foresters and say, "Okay, now with this favorable weather, what can we possibly get done over the next 2 weeks here, 3 weeks in September?"

It has been very fortunate, but at the same time it has been a problematic fire season, especially as you know in your state with the hundreds of homes that have been lost there from those fires. It is just another pressing issue. Once again, I just appreciate everyone's support to be able to find a solution to this issue so that we would no longer be faced with this disruptive practice of having to stop operations to transfer money.

Ms. DELBENE. Yes. I have heard that there have been challenges with OMB and how fire funding is allocated. Has progress been made there?

Mr. TIDWELL. I think we are working very well with OMB. They understand the problem. They have been very supportive of finding a solution. It was in the President's Budget Request for this year, recognizing we needed to have a different approach to dealing with some of the large fires, and that is why the proposal—it is in the President's budget—merits or tracks very well with the introduced legislation to recognize that one to two percent of these fires need to be viewed as a natural disaster and that we should be able to access emergency funding to be able to pay for those, where the 98 to 99 percent of fires every year will still be paid for within our budget, just like it has been in the past. This would eliminate the need to transfer money. So OMB has been very supportive to be able to work with us and be able to talk to folks, to explain about how this would actually work with the recognition that this problem, over the years, has just gotten to the point that it has really impacted our ability to carry out our mission and be able to restore these lands and also provide for all the services that the public expects.

Ms. DELBENE. Let me move back to the groundwater issue, and I wondered, are Tribes and states treated equally in your Directive?

Mr. TIDWELL. We do an additional consultation with the Tribes on all of our proposals. We work very closely with the states. We coordinate, we sit down and work with them. We do the same thing with Tribes, but we also have an additional formal consultation that we get to work with, for our tribal entities.

Ms. DELBENE. Okay. Thank you very much for your feedback. I appreciate it. I yield back, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady for yielding back. I now recognize the gentlelady from South Dakota, Mrs. Noem, for 5 minutes.

Mrs. NOEM. Thank you, Mr. Chairman. Hi, Chief Tidwell. Thank you so much for being here today, and I appreciate all the help that you have given me in South Dakota, with the Black Hills and deal-

ing with the pine beetle epidemic that has gone on, and I know that you have a lot of wildfires and situations across the country you are dealing with.

But this new Directive does have me really concerned, and I have a letter here in front of me from the South Dakota Department of Environment and Natural Resources, and I want to tell you some of the concerns that they have. They are strongly opposed to this new Directive. They cite lack of authority, at the Forest Service, as one of the reasons for this Directive. They believe it would expand the agency's responsibilities with no Congressional oversight or deference to state water laws.

I want to read a few of the other concerns that they have in their letter. Redundancy that would come forward as the Forest Service taking part in these new actions in evaluating water quality. Also they believe that delays and burdens to the state permitting processes, that there is a lack of scientific basis for groundwater ecosystems, a lack of due process, and the one that probably concerns me the most is the lack of state input.

One of the things that they brought out in their letter that does concern me quite a bit and that you actually talked about earlier in your testimony is that you came forward with this Directive or that this is a result of lawsuits that you faced in the past where you were found deficient in how you evaluated water quality throughout the process. I believe that from what I am interpreting the new Directive to say is that you believe that that means you need to mitigate the effects of what the activities are that you are taking. When you say *mitigate* and *manage*, that that means taking action on your part to deal with groundwater and groundwater quality, that you don't have the authority to do so. And throughout this process, there is no timeframe listed within the Directive that would constrain you to making that evaluation process go forward. There is nothing that says you are going to consult with any of the state agencies who have always been responsible for monitoring these water quality issues. You could potentially burden these state agencies by questioning every single water permit that is adjacent to or on Forest Service land.

You could see why this would alarm everybody who has been in charge of this process in the past when you suddenly, through a Directive, claim jurisdiction over something that you have never been able to do before.

How would you anticipate dealing with some of these concerns that some of these state agencies and people that live in these areas have raised?

Mr. TIDWELL. Congresswoman, first of all, one of the reasons we extended the comment period is to have additional time to be able to sit down, primarily with the states, to be able to hear their concerns directly and be able to discuss this. And as I have already stated, we recognize that based on the comments that we received on this Proposed Directive that there are some things we need to clarify, and we need to make it very clear especially when we talk about manage. It is talking about evaluating inventory of those effects. It has nothing to do with the allocation of water. And so we need to find ways to make that clear so that folks fully understand that.

Of course we want to work with the states, and in almost all of our states, we work very closely with them. If the states are pulling this information together already and they can share it with us so that as we make our decision, we can include that in our analysis. That is very, very helpful. Ideally, this will actually make us a better partner with the states so that we will have a predictable process of the information that we need to be able to evaluate the effects, to be able to disclose those if there are effects or not, include that in our analysis, and then be able to go forward with implementing the project.

When we talk about mitigating, it is to mitigate where we have the authority with the surface occupancy. It is not about the water. It is about the responsibility that if we are authorizing an activity and if there are some things that we can do to mitigate the effects, whether it is on affecting the quality of groundwater, it is not only something that we are required to do, it is something that I would think, from what we have heard, the public wants us to do that. But if we don't know, that is where we have been really challenged. In some situations we do not have a good process in place and we have not pulled the information together. We haven't reached out to the states to ask them because our Forests haven't had the direction to say, "Okay, how are we supposed to deal with this?"

We have been all over the board on this, and that is what has created the need to have this consistent approach. And yes, there are some additional court challenges that we are having to deal with, and that isn't the only reason for this. But it is definitely one of the benefits that will come out of this that will put us in a more defensible position.

Mrs. NOEM. I am out of time. Thank you.

The CHAIRMAN. At this time I am pleased to recognize the gentlelady from New Hampshire for 5 minutes.

Ms. KUSTER. Thank you very much, Mr. Chairman, and thank you, Chief Tidwell, and all of the witnesses here today.

Forestry is a very big deal in New Hampshire. It plays a key role in the economy of our north country, providing timber for builders, pulp for paper mills, and fuel to heat and power our homes and businesses. We in the Granite State know that a thriving, responsible timber industry is vital, not only to the economic health of our state but to the health and longevity of our beautiful forests. We are pretty fortunate that folks understand this balance. Though I frequently hear from the timber community about a number of challenges facing them, I have not heard from them about this Groundwater Directive.

But what I do hear about, if I could take just a minute, is the reference that you made to fires in the West, and I want to be supportive of my colleagues. Actually, my brother lives in a very small town, Twisp, Washington, that they spent an entire month in fear that they would lose a beautiful home that he built and everything that his family has worked for.

The challenge for us back East is when your budget is taken over by the wildfires, we have delays in the Forest Service's ability to effectively manage the National Forests and meet the timber harvest goals. I have been hearing from a number of my constituents in the timber and forestry sector about the problem in meeting our

timber harvest goals because they can't get the Forester out to approve the cut.

If you would comment on that, and if there is anything that we could do to be supportive so that you have sufficient funding for the fires and supporting our timber industry.

Mr. TIDWELL. Your point that the fires out West and the cost of dealing with the suppression does also affect our eastern Forests because when we need to stop operations, delay operations, postpone operations to be able to transfer money, it impacts everyone. You have seen it in your state, and often Congress has been great to repay the money, usually within the next 3 to 6 months. That is very helpful. But we lose out on that field season, and in the case like in your state right now, this is the prime field season for folks to be out there prepping the timber sale, doing the surveys that need to be done for this coming winter's work and also for next year.

So when we slow down and have to stop operations, especially in this time of year, it really has the most effect on next year's work. And that is why we just need to find a solution to be able to stop this disruptive practice, and once again, I just can't thank everyone enough for the recognition and your support of this bipartisan, bicameral approach to be able to resolve this once and for all. Congress tried to resolve this once with the FLAME Act. This is not a new issue. That didn't quite work out as intended. We believe that this is a better proposal. It would actually solve this and allow us to be more proactive, and that is the other benefit of this is that it potentially would allow us to be able to invest more in the restoration, restoring our Forests, restoring the Forest health, and put us in a better position so that we reduce the threat to communities, reduce the threat to your brother. I was up in his community this summer. I talked to the folks up there about how difficult a year they were having. That is the benefit.

This proposal would help all of us, help every state in the System. I just really appreciate how everybody has worked on this. I know it is not an easy issue, but it is definitely one that would be very helpful if we could get resolved.

Ms. KUSTER. Great. You can count on my support, and thank you. I yield back. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentlelady for yielding back. I now recognize the gentleman from Colorado, Mr. Tipton, for 5 minutes.

Mr. TIPTON. Thank you, Mr. Chairman. Chief Tidwell, thank you for taking the time to be here. One of the concerns that we have, and I know you are well-aware of this. Out of the State of Colorado, we are a headwaters state. Most of our water obviously originates on Federal land. We have the complexity that that water coming off perhaps Forest Service land may flow through private land, on the BLM land, maybe even back onto Forest Service land, so it is a very complex issue.

I know our state is always appreciated and in fact, demands that the State Law 1876 when we were incorporated, as with other western states, that water is a private property right. We have state law. We have a priority-based system that we expect to be respected. And the concern I would like to bring up, given the Groundwater Directive that we are seeing out of the Forest Service,

when we couple this with the EPA waters of the United States, we are seeing effectively, in my opinion, the biggest water grab in American history in terms of our ability to be able to grow our communities, to be able to protect the interests of the State of Colorado. We have a pretty good track record of being able to manage that.

What concerns me, Chief, and I would like you to be able to speak to is in the *Forest Service Manual* it states your employees claim water rights for water used by permittees, contractors, and others to carry out activities related to multiple-use objectives. This is in the manual. We now see the Forest Service groundwater management directive, and it seems to me that this literally doubles down on the policy to be able to obtain water rights in the name of the United States. But at this current time, this is massive groundwater management policy that you are trying to put forward.

So given the scope of this overall policy, combined with the Directive to obtain water rights under applicable state law for groundwater and groundwater-dependent service of water needed by the Forest Service, doesn't this effectively give the regional Forest Service staff and the agency approval to go after any water right rising off of Forest Service lands that they deem necessary to carry out the broad objectives of the manual?

Mr. TIDWELL. This proposed internal Directive does not infer anything into water rights, does not infringe on the states' responsibility, their authority to allocate water. What this is about is to evaluate and monitor the effects of our actions on groundwater, and if there is an opportunity to mitigate adverse effects, then we have the responsibility to be able to pursue that with the surface occupancy where we do have the authority.

When it comes to the multiple uses, for decades we have had a policy in place where the best assurance we could provide the public that multiple use would continue is that when water is required for that multiple-use activity, the water would be held for the public. There have been questions, and some of the policies that we have had in place going back to the mid-1980s and that we have worked with, like with the ski areas back in the 1980s to put a term and condition on their permits in place that work very well, had no adverse impact on any ski areas. In 2004, I personally worked with National Ski Area Association to modify that clause so that it would work for everyone. We thought we had it done. Then a few years later, we find that once again, it wasn't in compliance with all state laws so we sat down again to be able to modify that. And now we are to a point where we are proposing a way to just keep the water tied to the use. It is to protect the public and it is——

Mr. TIPTON. But it does it kind of concern you, though, Chief, when we are pursuing these policies? There is a threat, and one thing you did not speak to is respect for the state laws. There is case history for this throughout the western United States. You weren't speaking to that, but when we are talking about ski area permits, there is nothing in your policy that protects actually the ski areas. You still speak in those broad, general terms in terms of some of the agreement that is coming out. And that is why we

introduced and passed through the House with bipartisan support the Protecting Our Water Rights Act.

Mr. TIDWELL. Without any question, we respect the states' authority on water rights. That is one of the reasons that we sat down to change the clause that we had in those permits, and when you think about protecting the ski area, if water is necessary for a use, and without that water that use can't occur, that's a concern for the public. We authorize for any activity on National Forests for the benefit of the public. If the public can't benefit from that activity without having the water, we feel that the water should somehow be tied to the use, and if at all possible be available for future uses.

So whether something happens with a ski area, whether it is no longer financially possible to operate, that is something we of course would sit down and work with them. But in cases where if there is a foreclosure, for instance, and the financial institution needs to dissolve all the assets, it eliminates the opportunity for the public to ever enjoy skiing on that area again.

This is what we work very closely on is to find ways to work with our partners, our proponents of these activities, to find a way to provide the public assurances that when we permit an activity, that we want to be able to maintain that for as long as it is viably possible. That has been our approach on water.

On the groundwater, again, it is not new authority. It is a consistent approach so that we are a more predictable partner with our states, that we can be a better partner with the states, work with them, and have the information to be able to answer the questions when we get challenged as to what is the effect of groundwater, and of the Forest Service, on your proposed activity? We have to be able to answer that. If not, especially based on the last couple of court cases, we are going to go back and have to redo the analysis.

Mr. TIPTON. But with respect, it is important to note that not one ski area has ever sold off its water. We had that conversation, and you agreed with us on that. And there is real concern from the farm and ranch community that we are now seeing the Federal Government not only trying to be able to control the water above but now below the ground, and this is going to have a real impact, I believe negatively, potentially on our communities. So I yield back.

Mr. TIDWELL. And Congressman, to my knowledge, ever since we have had the water clause in our ski area permits going back to the mid-1980s, I am not familiar of any situation where there has been a financial impact. And yes, I am not aware of any ski areas selling off their water. But I also don't know that because of that clause, maybe it prevented it. It would be interesting to look at some of the foreclosures that occurred, some of the bankruptcies that occurred over the years with ski areas to just see.

The point is that we have worked very closely with the ski areas, and we will continue to work with them to be able to find a way that we can provide the assurances to the public that the use will continue *versus* being in a position that the day when the water is worth more, has more value, than the operation of the ski area, that the water would be sold off or used for a different purpose.

Then the public loses out. And at the end of a 40 year term permit, if the decision is for the ski area not to go forward, well, then that is a good time to have that discussion.

The CHAIRMAN. The gentleman's time has expired. I now recognize the gentleman from Minnesota, Mr. Nolan, for 5 minutes.

Mr. NOLAN. Thank you, Chairman Thompson. Real quickly I wanted to commend you, Mr. Chairman, for calling this hearing and suggest that we should have more of these. You know, there is a great deal of concern about the long-eared bat, gypsy moths, emerald ash bores, pine beetles. It would be nice to hear more about the harvest on our Federal lands and the timber sales and the percentage that are being harvested, the biomass boiler rules that are under consideration. Others have brought up wildfire funding and programmatic environmental impact statements. There is such a wide range of things that we need to start working on and dealing with here.

With that in mind, I would like to, Chief Tidwell, commend Brenda Halter who is your supervisor up in northeastern Minnesota. She does a wonderful job and is to be commended particularly for her attention to the mixed use of Federal lands including mining up in Minnesota's Iron Range. I want to commend you as well for being here and being so forthright in selecting the Christmas tree from the Chippewa National Forest. I intend to be out there to help cut that tree down and escort it to Washington. Having said that, I want you to know my wife and I have planted over 100,000 in our lifetime, so we don't apologize to anybody for cutting a beautiful one down and bringing it to our capitol.

With regard to groundwater, my first and primary concern is whether or not this rule will in any way damage the Pierian Spring that exists along Highway 6 between the town of Outing and Remer, Minnesota. There I go, misspeaking again. The Pierian Spring was the fountain of knowledge, and we have been drinking from that one out in Minnesota for over 100 years now. It is right along the highway there, and if you haven't tasted of it, I suggest you do, and perhaps it would be a good idea for all the Members of Congress to go out and take a taste of that spring. It is the one they say where drink deep or taste not because there, shallow draughts can intoxicate the brain. What I meant to say was the artesian spring which is in that spot. I never drive by without taking an opportunity to take a sip out of it.

But forgive me for going off on some tangents here. I just couldn't resist. I do have a couple questions with regard to groundwater, and I will just quickly throw them out there. One, does this in any way affect the mining operations that we find in the Upper Peninsula and the Iron Range of Minnesota? Is this Directive in any way related to the waters of the United States rule that was recently considered here? Does it treat livestock water in any way differently than snow ski area water? And are the Tribes in the states treated equally in this Directive? I know there are a whole bunch of questions. Take whichever one you want in the time we have and see if you can give us some answers here. Thank you.

Mr. TIDWELL. Well, I will start with the waters of the United States. You know, this is our internal Directive to carry out our au-

thority. There is really no connection with the EPA, their proposed rule.

On grazing, it doesn't make any changes from what we are currently doing. You know, permittees apply through the state for their water rights. If they have a well and they have to close that well, they follow through with the states' requirements on that.

On mining, there is no additional regulations or anything put into place. It just provides a more consistent approach. In your state, there are a couple of examples on the PolyMet proposal. We are working together with the State of Minnesota, D&R, and others to be able to do the analysis on the effects of groundwater from that proposal so that the state has the information to make their decision and we have the information to make our decision. On another proposal in your state with Twin Meadows, that proponent, even though it is very early in the stage, they recognize the concern around this. We have authorized the drilling of some deep wells in the area that they are proposing to mine so that they can collect the information to be able to understand how their project could potentially affect groundwater. And so there is a case where two proponents on two different proposals recognize that this is a question that needs to be addressed, and either the state needs the information or in this case, the Forest Service. So by working together, this is the best scenario so that we both have it. We have the same information. We can both use the same information to make our decisions.

Mr. NOLAN. Thank you, Mr. Chairman. Thank you, Chief Tidwell, for the great job you are doing over there at Forest Service.

The CHAIRMAN. I thank the gentleman, and I now am pleased to recognize the gentleman from Michigan, Mr. Benishek, for 5 minutes.

Mr. BENISHEK. Thank you, Mr. Chairman. Thank you, Chief Tidwell, for being here this morning. I have a couple of issues that I want brought up, and frankly, my concern is that you are having a tough job doing the job you have already, and to me this is adding more to your work list. The procedure works now as I understand it, the Forest Service works with the state as an interested party and when the state develops its groundwater regulations and stuff.

So I don't see why this internal Directive is needed since you already have input. And a couple of things had come to me in your testimony. You cited the Weeks Act as giving the Forest Service authority to mitigate floods and conserve water and surface and subsurface moisture. So what are the examples of mitigate? I mean, what does that mean? How is that not happening now with your conversations within the various states?

Mr. TIDWELL. Well, an example of mitigation, if there is a surface occupancy of the National Forest that is being proposed, and it is going to have some effect on the quality of groundwater, if there are things that we can put into place whether—

Mr. BENISHEK. Give me an example. Give me some examples by what you mean, mitigate.

Mr. TIDWELL. Okay. As far as where the disturbed area is going to be, if it is going to be on top of a spring *versus* moving it away

from that spring to put it over in another place so that that spring—

Mr. BENISHEK. That would not be addressed by the procedures that are in place now?

Mr. TIDWELL. Exactly. The only difference here is to have a consistent approach.

Mr. BENISHEK. I don't see that people can build on top of a spring right now.

Mr. TIDWELL. That is one example. Another example is that—referring to—

Mr. BENISHEK. That is not an example that works, though, Chief.

Mr. TIDWELL. Okay. So with the mining proposal, the proposals in Minnesota, we are working with the proponents in the state to evaluate the impacts of groundwater. We had a couple situations out West in two other states where we had a mining proposal, and we didn't do that. The court then directed us and said, "No, Forest Service. Stop. Do not authorize that. Go back and do the analysis."

Mr. BENISHEK. But don't you usually participate with the states? That is more of a—to me, that is more of an oversight area for you rather changing the way you do things. It is just that you didn't do what should have been done already.

Mr. TIDWELL. But our employees benefit from having direction in their manual about what is their responsibility—how do they do this—so that we have a consistent approach.

Mr. BENISHEK. I understand that, Mr. Tidwell.

Mr. TIDWELL. And that is—

Mr. BENISHEK. What I am—

Mr. TIDWELL.—the difference—

Mr. BENISHEK.—concerned about—

Mr. TIDWELL.—we are trying to make.

Mr. BENISHEK.—is the fact that, when we give the Federal Government more authority to do things, then they tend to override the local concerns because we are seeing this in the Natural Resources Committee with this Endangered Species Act. Several states out West put together a plan in conjunction with the Fish and Wildlife Service, worked with them for a long time to develop a plan for this prairie chicken. And then all of a sudden, the Fish and Wildlife, after approving the plan and all that, changed their minds at the last minute and disapproved all that. And I just don't like giving more Federal authority. I mean, you are already in the process of working with the states. Why isn't that good enough?

Mr. TIDWELL. Because we don't do it consistently across the—

Mr. BENISHEK. That is not a problem with the law. That is a problem with your agency. And I am saying that this is a problem with taking on more jobs.

Mr. TIDWELL. Well, that is why this is an internal directive to the agency—to have a systematic, consistent approach so that we are better partners with the states so that we do a better job to cooperate with the states based on the examples I have given and then also in places where we have not done this.

And so it is difficult with everything that we have on our plates, for our land managers to be able to understand, okay, when it comes to groundwater, what do we need to do?

Mr. BENISHEK. Let me just ask one more question. In your written testimony it says through comments on specific proposed Forest Service decisions and through other avenues the public has increasingly indicated it expects the Forest Service to review and address the potential impacts on groundwater. What other avenues are you talking about?

Mr. TIDWELL. For instance, if there is a proposal that is adjacent to a National Forest and it has the potential to maybe impact groundwater on National Forests, the opportunity we have to be able to submit a comment to that entity who is regulating that authority.

Mr. BENISHEK. It says comment through other avenues the public has increasingly indicated. So what other avenues does the public have to comment on your decisions besides the comment period we are talking about?

Mr. TIDWELL. So on the Proposed Directive, when we actually would then go to use this and evaluate it on a project, the public also has the opportunity to comment on that.

Mr. BENISHEK. Well, it doesn't seem like you are answering the question, but I am out of time. Thank you.

The CHAIRMAN. The gentleman yields back. I now recognize the Ranking Member from Minnesota, Mr. Walz, for 5 minutes.

Mr. WALZ. Well, I thank the Chairman, and thank you for indulging me to be at a markup on VA. Chief, thank you for being here. I appreciate your work and your agency's work, and I think you are hearing it here. We know you have a lot on your plate. We know you have to multi-task on a lot of things.

Something I would say, though, is we are the Subcommittee on Conservation, Energy, and Forestry. We have not held a hearing on wildfires since 2010. During that time, 25.7 million acres have burned, and over 200,000 incidents have burned. I might mention to the gentleman in Colorado, the Hayman and Missionary Ridge fires together cost \$380 million for suppression and direct cost to those. Those are real things that really happened, that are happening now, and I do not disregard the importance of every issue we talk about here. But we must prioritize. We must move things forward. When I hear you say and I hear Secretary Vilsack come to me 9 weeks ago and say you have to do something because it is impacting our budget across the board and how it impacts southern Minnesota. You just told us that a more predictable budgeting measure is the weather for you, when a weather turned a favorable direction. That was more predictable than the actual budget.

I would just like to ask, let us have a hearing on forestry, too. I think we could probably all agree. We can do this one, we can do that, we can address some of these issues. The questions are valid. There are concerns that are being expressed. I will have to say, I have not heard groundwater concerns from my people, but it doesn't mean they are not important. And I understand water issues are regional. While an issue in California, I had an abundance of water in my district. But as a nation, these issues can't be done, and I would also, as someone who grew up in western Nebraska knows, that as Colorado's water rights goes, so goes Nebraska's water rights. And they end up in court. Kansas just received

a lot of money a while back because of that from the State of Colorado.

These are issues that must be discussed federally. They must include inter-agency collaboration. They must include the ability of us to be able to express this. But I am deeply concerned that not enough foresight was given. Secretaries and chiefs of the Forest Service came to us over 2½ months ago and said let us do something different on wildfires and get it going, and we have sat silent. That is unacceptable, and I want you and your agency to know, it is not for the lack of you telling us, that we have heard you on it.

My question to you is, Chief, can you help me a little more specifically? This helps me when I go home and talk to people. Secretary Vilsack was able to help me out and understand. On these budgeting shifts, tell me what it means. If the wildfire season had not shrunk to these eight major fires you are fighting now, if we had had 16 to 20, how would that have impacted other operations? What would that look like at Superior National Forest or Chippewa or things like that?

Mr. TIDWELL. On your Forests, we would have had to stop many of the operations during the month of September. For instance, folks that are out doing surveys, preparing for projects, prepping for timber sales, that would actually be implemented in the winter, that work would stop. That is what we had to do in previous years. This year looked like we were headed there again, and now with the favorable weather, we are doing almost an about-face. I was talking to our folks yesterday that now it looks like we are going to be okay or just have a minor transfer we are going to have to do, and so what can we get done—

Mr. WALZ. Did they stop? Did they start pulling those things back? Because those things can't happen in a Minnesota winter if—

Mr. TIDWELL. Yes—

Mr. WALZ.—work was put off.

Mr. TIDWELL.—they did. I sent out the direction to be prepared with a list of steps that we needed to take to be able to stop or we had the option to defer, and for the most part, we deferred these projects. But we lose that field season, and then thus, we are not able to get the work done this coming winter and especially in your state where we are able to do a lot of the special timber harvesting in winter.

Mr. WALZ. Could you help us understand, and I think this is a fair critique of this, of saying, "Okay, we were going to budget and we gave you the money, and then you didn't use it." I think there is legitimate fear of some people saying would that money have come back? What does it mean when you are talking about and Secretary Vilsack is talking about emergency funding, tell us how that can protect taxpayer dollars while making budgeting more predictable for you.

Mr. TIDWELL. If we don't use the funding for fire suppression, it is still available. It is available for the Appropriations Committee to appropriate it the following year. But we do not spend it. We cannot spend it on anything else. So if we have it, then it allows us to be able to carry out the direction of Congress when they pass a budget, and that is the direction we take very seriously. We are

not able to carry that out the last 6 weeks or so of the year because we have had to transfer money. It just creates this disruption. It doesn't cost anything more. It is just as I have mentioned, Congress has been very responsive to pay the money back 3 to 6 months later. And so we just lose that field season, we postpone projects, and we can't ever make up that time because can only—

Mr. WALZ. It makes—

Mr. TIDWELL.—get so much work done in a 12 month period.

Mr. WALZ. So is it safe to say it makes you much more inefficient?

Mr. TIDWELL. Yes.

Mr. WALZ. Okay. I yield back.

The CHAIRMAN. I thank the Ranking Member for his questions and for yielding back, and now I am pleased to recognize the gentleman from Alabama, Mr. Rogers, for 5 minutes.

Mr. ROGERS. Thank you, Mr. Chairman. In your testimony you referenced major aquifers. What is the difference between a major aquifer and a minor aquifer and how does the Proposed Directive affect both?

Mr. TIDWELL. Well, when we talk about a major aquifer, these are more of the large collections of water that usually are much deeper but not always much deeper *versus* more of a minor aquifer. Often, our surface activities are probably going to have a greater potential impact on more of these minor aquifers that are closer to the surface than maybe a deep aquifer, but at the same time, those are the things that we have to be able to understand and be able to disclose. Often we get challenged that, "Okay, your activity is going to affect the quality of the groundwater, and I get my drinking water out of that." It is essential for us to be able to show that, "No, what we are proposing here is not going to have any affect or, if it is, we disclose that." And if there is an opportunity to be able to work within our authorities to be able to mitigate the effects, then we need to be able to do that. But much of this issue is about not knowing, and so when we can disclose what the effects are or that there are no effects, it puts us in a better position to be able to implement the action, and it is actually reassurance to the public. And yes, we want to work closely with the states, and in many cases, that is exactly what happens so that we do this together. This is information the states need to be able to make their decisions, and it is the information that we need to be able to make ours.

Mr. ROGERS. Let me ask this. Under the Directive, could the Forest Service reduce access to a water right if a proposed activity might adversely affect the National Forest Service groundwater resources?

Mr. TIDWELL. It could change the access point if there was a need to mitigate the impact, and by doing that, by changing the access point, that could happen. That happens now.

Mr. ROGERS. Okay, so there is nothing different then?

Mr. TIDWELL. There is nothing different except this would be a consistent approach so that the proponent in your state is going to be treated the same way the proponent would be in Colorado or in Pennsylvania. That is the difference that we are talking about.

Mr. ROGERS. The Forest Service has claimed through the comment period that the public has indicated it expects the Forest Service to review potential impacts to the groundwater services. In your opinion, does the word *review* also mean to manage?

Mr. TIDWELL. Both terms mean to evaluate the effects and in some cases, to monitor the activity. When we talk about manage, we talk about—

Mr. ROGERS. Well, you all used the word *review*. I used the word *manage*. So I am wondering if you see them as the same thing.

Mr. TIDWELL. What it comes down to is inventory, evaluate, and monitor, and that is one of the points that I mentioned earlier that we use the term *manage* multiple places in the draft Directive. We received many comments on that, but that is not a clear term. It means different things, and it can be. That is one of the things we definitely are going to work with the states to be able to be very specific on what that means so that folks don't think that it is managing, like when it comes to allocation of water. That is not what this is about.

Mr. ROGERS. Where did the majority of the comments during the comment period come from? Were they specific regions of the country, associations, or what?

Mr. TIDWELL. Probably the majority of them are from the West. We have had a lot of comments from states, comments from user groups, some comments from environmental groups, conservation groups. But we have had a lot of comments from our states. It is one of the reasons why we wanted to extend the comment period, so we would have additional time to actually sit down and say, "Okay, we received your initial comment. Now we want to talk about it." So we make sure we understand and see—so we know what we need to do to clarify this. The intent of this is to be a better partner with our states. This is something we need to work very closely together on, and we want to make sure whatever it takes that we clarify that this does not infringe on the states' responsibility, the states' authorities in any way.

Mr. ROGERS. Thank you very much. My time has expired. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman. Chief, I take the last 5 minutes here, so I really appreciate you being here and your candid responses. I think you are a great partner to work with for the health of the United States Forests and what that means for Forest health and quite frankly, our rural communities in particular. So thank you for that.

And normally, we are on the same page. We are not on this one. You know, your goal—I think your goal is admirable, but it is not the Forest Service's role, my perspective. I think the Forest Service has interest. There is no doubt about it, but you clearly do not have authority. The primary authority is the states, and that is based on 100 years of legislation, including the Clean Water Act that establishes the federalism model of which the states' authority for water and the Weeks Act which clearly talks about navigable waterways, that makes sure the regulation flow, nothing about groundwater and new case law that has been as far as the Supreme Court on this issue.

And so I really see a very weak case which means you go forward with this, you are going to get peppered with what you always get peppered with which is more lawsuits which is going to drain more money out of management of our Forests in a healthy way. I really encourage you to reconsider as these final comments come in because I think it is going to make your job tougher and almost where this will go from a litigation perspective. You know, the case law defines and upholds the states' sovereignty, and I would argue that the separation of water of states in terms of surface and groundwater is an important part of the checks and balances, especially in western states where the Forest Service, "owns so much surface". This is actually one of the few checks and balances the western states have in terms of having the groundwater authority which forces the Forest Service—we don't always get great chiefs like you, but you know, it forces the Forest Service to be a collaborative partner with our states. I think this is one of those checks and balances that does that.

Now, my first question is straightforward. I am pretty sure I know how you are going to answer this, but I can't help but ask because it looks like a taking. Is this not a taking, when instead the Forest Service should be working on improving the collaboration with the authority that has primacy on this issue, which is the states?

Mr. TIDWELL. No, it is not. It, once again, does not infringe on the states' authority when it comes to allocation of water and water rights in any way.

What this is about is that when we are considering an activity on the National Forest, if it has the potential to affect groundwater, we need to evaluate what those effects are, disclose that to the public so that we understand. For instance, if there is a proposal that would be a large extraction, and based on the analysis that it will de-water all these springs that are higher up in the watershed, de-water this stream, people that have water rights up there are going to be impacted.

It may be that we have no discretion on the activity, say if it is for mining, for instance, we are somewhat limited there. But we need to be able to disclose that. This is the information that the states want. I think this is the information the public wants.

The CHAIRMAN. Well, you have been peeking at my questions, Chief. That was perfect because I agree that somebody needs to be concerned with that, but the primacy needs to come from the authority that has responsibility over the groundwater.

So my question has been—because you are speculating. You gave me a what-if. We don't make policy based on speculation because we could sit here and I could get a doomsday proposal from every Member of what could go wrong. We need to deal with data and science.

So my question for you is what data demonstrates that there has been significant harm, and that is the term that is important, *significant*. There are anecdotal things that may occur from time to time, but I mean really consistent and significant harm to warrant this Directive. Have the states that have authority and responsibility for groundwater clearly, by law—and you have acknowledged that and I appreciate it. I mean, we are just talking about how do

we work together, and I just want to put the states at the point of the spear *versus* the Forest Service because legally, that is the way it needs to be. But there needs to be collaboration between the two. Have the states that have authority and responsibility for groundwater filed complaints or lawsuits regarding contamination of groundwater from Forest Service surface use? Because that is what this comes down to. Your whole argument is based about “what if.”

Mr. TIDWELL. I am not aware of anywhere a state has filed a lawsuit. I am aware of where other parties have filed lawsuits when we did—

The CHAIRMAN. Well, we all know about the third-party environmental organizations—

Mr. TIDWELL. Correct.

The CHAIRMAN.—that makes your life difficult and make our Forests unhealthy, and I would argue the negative consequences that we have seen is a result of—and this is just my opinion. I am not speaking for other Members. The wildfires, because of timbering reduction, limitations we have seen because of various regulatory—waters of the United States is going to do that. Endangered Species Act has certainly done that in the western states. You know, those are all good laws but have been improperly administered over years in a bipartisan, negative way, in both Administrations and both parties.

And so it is interesting you tell me you are not aware of any. And please go back and check with the staff because I know what it is like. Most of my good information comes from my staff. So if your staff have records of lawsuits that have been filed or complaints from states, then it would be good to know about because if there is none, then there is not a need for this Directive. I understand that you have stated that mostly through court challenges—threats. Let us call it what it is, threats to the Forest Service. Then God bless you for living and working with those that you have to deal with. You talked about what I call threats. You have stated that the variability among the Forests and the lack of a systematic approach has been what has been challenged.

Now, I would argue, and my question for you, is it not appropriate and defensible given the clear law, the case law, the legislative record, the legal status of state authority over non-navigable and groundwater which has responsibility of the states. If that is done by a state authority, unfortunately that is the world you work in. You are going to have to be flexible and not have a cookie-cutter approach which you are trying to do with this Directive. You are going to have to be able to come to the table and have a candid conversation. Now, you can do that in an efficient way, maybe working with coalitions of states obviously, and I think there is a—we are going to hear one of our witnesses who is from Western States Water Council that represents multiple states. But that is my question.

And my next question is the fact that we don't have a systematic approach, isn't that appropriate and defensible given the legal status of state authority over non-navigable and groundwater?

Mr. TIDWELL. Mr. Chairman, the courts have disagreed with that, and the point that we have never had a state sue us—

The CHAIRMAN. Well, which point, though? Every court case including the Supreme Court I see clearly reinforces states' rights and states' authorities when it comes to non-navigable and ground-water.

Mr. TIDWELL. Yes. I would be glad to provide the lawsuits that we have received when we didn't—

The CHAIRMAN. Well, I know the lawsuits. The threats. And those are threats.

Mr. TIDWELL. Well—yes.

The CHAIRMAN. Those are not legal findings.

Mr. TIDWELL. Well, but we get sued and the project gets stopped—

The CHAIRMAN. I understand. It happens to the world—

Mr. TIDWELL.—because we haven't evaluated the—

The CHAIRMAN.—and it frustrates me—

Mr. TIDWELL.—impact.

The CHAIRMAN.—as much as it does you. But that does not dictate law. Threats should not dictate good public policy. I know the world you work in, and I am—I respect you and I know how tough your job is. But we are lawmakers, and we take our authority under Article I of the Constitution very seriously of writing laws and enacting laws, and we really—the threats of lawsuit should not dictate public policy.

Mr. TIDWELL. In this case we work very closely with the states. I will check to see if a state has ever filed a suit about—

The CHAIRMAN. I appreciate it.

Mr. TIDWELL.—our activities. But I would be surprised because we work together on that, and for most of our projects, the state has a decision they are making, like on a mining proposal. They have a decision to make. We have a decision to make. We often make those decisions together, but in these last couple cases, it has been the Forest Service that has been taken to court because the judge found that we were not following the law, carrying out our responsibility to be able to evaluate—

The CHAIRMAN. And I would argue—

Mr. TIDWELL.—the impact from—

The CHAIRMAN.—that that judge is completely out of order in terms of the law.

Mr. TIDWELL. Well—

The CHAIRMAN. All the arguments you have provided, when you read those—and I read your testimony. When you look at the wording there, it is very clear. It talks about the regulation of the flow of navigable waters, and I appreciate the difficult situation that you are in. You know, there is no doubt about it.

A specific question, I always have to answer back home. The question was I have heard from some of my constituents who, obviously produce oil and gas, and I appreciate that you have talked about that, how it wouldn't interfere. I am concerned that it actually opens up more nuisance lawsuits which I will get to. But in the Allegheny National Forest, the fears that this Directive appears to be another effort by the Forest Service to manage access to private mineral estates. Can you assure me and this Subcommittee that the Forest Service has no intention to circumvent the clear message and the rulings of the *Minard Run* decision or

use this Directive in any way to control access to private oil, gas, and mineral estates? As you know, in the Allegheny where, I don't know where we are at, 90 percent subsurface rights are all privately held. That is the way my predecessors determined to do that or deny access of the rightful owners.

Mr. TIDWELL. We will continue of course to follow the *Minard Run* decision, just like we follow all court direction. But an example there on Allegheny is that the Forest employees are working very well with the oil and gas proponents about cooperating together about when they are looking at a need to access in-groundwater, about where the location is of where they should put the well? If there is an opportunity to be able to mitigate some potential impacts of that through the location, we are working cooperatively like that.

We feel that is the approach that we are taking in your state on the Allegheny National Forest. Once again, there are a lot of places where this is working well. And I want to make sure as we move forward that this is a very clear Directive and it is something that the states can understand and be able to see that we can be a more predictable partner with them because often on these decisions, especially the ones where we get challenged on, we are often both making a decision. The state has their decision to make, we have ours. And so we use the same information. And yes, there are going to be cases where we are going to have to maybe do more than what the state feels they need to do but recognizing that if we don't, we are not going to be able to move forward with the project.

The CHAIRMAN. Chief, I think the unintended consequence which we are going to see is you have a System that requires a lot of work because you are doing it Forest by Forest and state by state right now. I think you are creating more work and more harm, and you are going to ruin those relationships because you are going to try to create—you talked about a systematic approach. That is a cookie cutter from Washington and impose that on different states and different Forests that have different geological formations and different water subsurface groundwater issues. And I just think bad things are going to happen.

Isn't the approach better what you do currently—and I want to congratulate you on that—with the State of Montana? Montana and the Forest Service have the compact. Isn't that a better approach of increasing communications, collaboration, of really looking at it so that the state, that authority can let you know if your surface activity is negatively impairing the groundwater, which it doesn't seem like there is any cases for that. But it just seems like a good model.

Mr. TIDWELL. The case in Montana is a good model. I think the MOU we have in Colorado is a good model. It lays out our responsibilities and how we do this. Ideally, we probably need something like an MOU with every state to be able to clarify how we are going to be working together. But the challenge that we have here is that in some states, Montana, places like Colorado, Minnesota. I can go through a long list where we are doing what we need to do. But then there are other states, and I will use the last couple court cases in Idaho and Washington, where we didn't. And so the proponent is the one that gets impacted by this, and we can have

the discussion that maybe the court shouldn't be involved as much as they are, but they are.

This is an opportunity for us to be in a better position. The thing that I worry about is having someone else direct us to what we need to do *versus* being able to sit down. And your point about we need to look at this state by state because in certain states, water issues are different. The aquifers are different. The geology is very different. That is what we work out with the state. But our employees need to have the basic understanding that yes, you need to evaluate, monitor what affects the groundwater. And right now, we don't have anything. Even if they have done what they feel is an adequate job, the court says, "Well, we don't think it is adequate," *versus* if we have a consistent, systematic approach that has been publicly vetted, had the input from most of the states in it, it is going to put us in a better position, better partner with the states and also be in a more defensible position.

The intent of this really to be a better partner and make this less contentious.

The CHAIRMAN. Yes.

Mr. TIDWELL. That is our intent, Mr. Chairman.

The CHAIRMAN. Well—and—

Mr. TIDWELL. And I know we have a lot of work to do on it.

The CHAIRMAN. I know, and Chief, I appreciate your time and I appreciate your leadership on this area. I guess I am not as optimistic that these groups that are bringing these lawsuits are going to be satisfied with what you are doing when it is done. I think they are just going to find other targets related to this.

Thank you so much for taking the time out of what I know is a very busy schedule. I know the full—speaking on behalf of the entire Committee, we really appreciate your leadership and appreciate you being here, how accessible you are to each of us individually and the Committee as a whole.

Mr. TIDWELL. Well, Mr. Chairman, you and the Subcommittee, thank you for having the opportunity to come up here and to have the time to really have the dialogue and the discussion. I really appreciate it. I appreciate you giving us the time to have this today. Thank you.

The CHAIRMAN. My pleasure. Thank you very much.

At this point, I would like to welcome our second panel of witnesses to the table. Mr. Tony Willardson, Executive Director of the Western States Water Council from Murray, Utah. Mr. Scott Verhines?

Mr. VERHINES. Verhines.

The CHAIRMAN. Verhines. I only had two choices. I picked the wrong one. Sorry. New Mexico State Engineer from Santa Fe, New Mexico, and for purposes of the third introduction, I am pleased to yield to the gentleman from Colorado.

Mr. TIPTON. Thank you, Mr. Chairman, and it is truly a pleasure of mine to have the privilege to be able to introduce a friend and also a constituent out of my district, Don Shawcroft. He is representing our farm and ranch community in this panel. He is the owner of John B. Shawcroft Ranch in the San Luis Valley in South Central Colorado. In addition to running his cattle operation, Mr. Shawcroft serves as President for the Colorado Farm Bureau.

In his capacity of the Colorado Farm Bureau President, Mr. Shawcroft also serves on the Board of Directors of the Southern Farm Bureau Casualty Insurance Company as well as on that of the Farm Bureau Bank and the American Farm Bureau Insurance Services and the American Ag Insurance Company. So he is a busy guy.

So Mr. Shawcroft, Don, it is a pleasure to have you here.

Mr. SHAWCROFT. Thank you. I appreciate that introduction.

The CHAIRMAN. Once again, thank you to all the witnesses for being here. We are looking forward to your testimony. Just know that we have your written testimony as a part of the record that all Members have received. And so we will proceed with 5 minutes of verbal testimony. I am pleased to recognize, once again, Mr. Willardson for 5 minutes.

STATEMENT OF ANTHONY G. WILLARDSON, EXECUTIVE DIRECTOR, WESTERN STATES WATER COUNCIL, MURRAY, UT

Mr. WILLARDSON. Thank you, Mr. Chairman, and Members of the Subcommittee for the opportunity to testify. The Council is a nonpartisan government entity that advises western governors on water policy issues, and our members are appointed by the governors, Mr. Verhines being a representative of Governor Susana Martinez. My remarks are based on the Council's positions which are attached to my testimony, as well as a letter from Governor John Hickenlooper who was then chair of the Western Governors' Association to Secretary Vilsack opposing a number of questions regarding the Directive. The governors observed that the states are the exclusive authority for allocating, protecting, and developing their groundwater resources and also recognize, given their initial review, that the Directive leads them to believe that this measure could have significant implications for our states and our groundwater resources.

Secretary Vilsack recently responded to that letter and offered an open invitation to meet with the governors, and we also look forward to working with the Forest Service to be more fully engaged in a dialogue, a dialogue that has not yet taken place.

I would also point out that appended to my testimony a comment submitted by seven of our states which included South Dakota, Washington, and others that are represented here on the Committee.

The Forest Service should have consulted with us, and we actually believe that the Executive Order 13132 requires that consultation on matters that respect federalism. It has also been pointed out earlier that they did consult with the Tribes, but there was no process directly to consult with the states, and we believe that that needs to be done.

You have already mentioned and we have talked about the Supreme Court decisions and also the Acts of Congress including the Desert Land Act of 1877 that recognizes the states' exclusive authority over groundwater. The Council is concerned that the Forest Service could put conditions on the exercise of private property rights which many water rights are on in the West. And we agree that they have no authority to limit how we might allocate those resources, but they can have an impact on how those are actually

exercised. And there has been little information presented on what is the problem? What is it that the Forest Service is trying to address? I point out that actually we ran some information and found in Oregon there are some 230 groundwater wells that pump more than 35 gallons per minute. Is that an issue in Oregon? We don't know.

But one of the other concerns is that given the presumptive connection between surface and groundwater that is put in the Directive, in Oregon there are over 18,000 surface water rights. I think it would be helpful to know those numbers for many of the other states.

In addition, there are restrictions or it talks about possible restrictions on injection wells. We use those for groundwater recharge on conservation which could affect the exercise of rights and requiring the special use permits.

And in this area, the State Administrators have the authority to consider the Forest Service's interest and the Forest Service's needs and for the most part also have a public interest requirement that they can take into consideration. The Forest Service has the right to participate in these administrative processes.

One of the big issues for us is going to be the language in the Directive that directs the Forest Service to claim Federal reserve water rights to groundwater. We do not believe that there is any Federal statute, nor is there any Federal court case that has ever recognized a Federal reserve right to groundwater, and in fact, in the *United States v. New Mexico*, the Supreme Court in 1978 strictly limited the authority or the implied reserved rights to surface waters the minimum amount needed for the primary purposes of the National Forest which were forest production and maintenance of flows which I think is talking about watershed protection because many of us depend on those watersheds in the West for our water resources. And the court specifically denied any implied reserved right for fish and wildlife or recreation uses.

We appreciate the Forest Service, the challenges that they have to address. We look forward to a dialogue with them, but we do not believe that this is primarily their responsibility. It is the responsibility of the states, and we appreciate your oversight of this action and oppose any assertion of Federal ownership interest in groundwater. And I appreciate again the opportunity to testify.

[The prepared statement of Mr. Willardson follows:]

PREPARED STATEMENT OF ANTHONY G. WILLARDSON, EXECUTIVE DIRECTOR,
WESTERN STATES WATER COUNCIL, MURRAY, UT

On behalf of the Western States Water Council, a nonpartisan government entity created by western governors to advise them on water policy issues, I am here to express the concerns of the Council regarding the U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management, published in the *Federal Register* for public comment on May 6. My testimony is based on Council Position No. 340—State Primacy over Groundwater (attached), as well as WGA Policy Resolution 2014-03 on Water Resources Management in the West, and a July 2nd letter to USDA Secretary Tom Vilsack from Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors' Association (also attached). The latter states: "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."

In an August 29th letter, shortly before the close of the originally published comment period, Secretary Vilsack responded to a number of questions raised by the

Governors and the Western Governors' Association, which is considering the Secretary's explanations and plans to comment prior to the newly extended deadline of October 3rd. The Council and WGA continue to work closely together on this issue, and reiterate, as stated in the Governors' letter that: "States are the exclusive authority for allocating, administering, protecting and developing groundwater resources, and they are primarily responsible for water supply planning within their boundaries."

We request that the USFS seek an authentic dialogue with the states to achieve appropriate policies that reflect both the legal division of power and the on-the-ground realities of the West. USFS should have consulted with the states before publishing the proposed directive, and should now seek substantive engagement with the states in order to define and remedy any perceived deficiencies or inconsistencies. The directive may be well intentioned, but the problems that it is designed to address are not apparent, nor is the protection of groundwater a primary USFS responsibility.

I. State Primacy Over Surface Water and Groundwater

The Congress and the U.S. Supreme Court have consistently recognized that states have primary authority and responsibility for the appropriation, allocation, development, conservation and protection of the surface water and groundwater resources. Congress has recognized states as the sole authority over groundwater since the Desert Land Act of 1877. Moreover, the Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over the allocation, administration, protection, and control of the non-navigable waters located within their borders.

While the proposed directive identifies states as "potentially affected parties" and recognizes states as having responsibilities for water resources within their boundaries, it does not adequately acknowledge the primary and exclusive nature of these responsibilities. Further, the proposed directive does not explain how it will ensure that it will not infringe upon state allocation and administration of water rights and uses for both surface water and groundwater. Consequently, the Council is concerned that the proposed directive could conflict with state water management and water rights administration.

First, the Council is concerned that the proposed directive will require the implementation of certain conditions and limitations as part of the approval or renewal of special use permits that may interfere with the exercise of state issued water rights. Such requirements may create a significant burden on existing surface water and groundwater right holders who need the special use permits to exercise their water rights and could limit or hinder the exercise of current and future rights as permitted by the states. For example, proposed conservation requirements could limit the full exercise of certain water rights. The proposal would also require special use permit holders to meter and report their groundwater use, which could be expensive and may run contrary to the laws of some states. Restrictions placed on injection wells, already regulated by state and Federal laws, could affect groundwater recharge projects. These are just a few examples.

There is little information presented on the extent of groundwater use on USFS lands and the needs the directive is intended to address. Consequently, additional work is needed before adoption of the directive to better understand its implications for myriad projects and activities to ensure that the proposal does not impair the exercise of existing and prospective state granted water rights. The USFS should work with the state authorities, and state expertise and resources could help define the problem areas within the directive.

Second, the directive would require the USFS to evaluate all water rights applications on National Forest System (NFS) lands, as well as applications on adjacent lands that could adversely affect groundwater resources the USFS asserts are NFS groundwater resources. As any other landowner or water user, USFS has the right to participate in state administrative processes to ensure that USFS interests are represented. USFS may also condition activities on National Forest lands and permit land surface disturbances. However, to the extent that the directive purports to interfere with or limit the exercise of state granted groundwater rights and state water use permitting authorities on USFS lands, and particularly pertaining to uses on non-USFS property, the proposed directive is beyond the scope of the agency's authority. The directive's requirement could also impose an unnecessary burden on USFS staff and other resources, as state water right administrators not only have exclusive water use permitting authority, but also have the expertise to evaluate any and all impacts on water resources and water users. The directive raises the possibility of USFS actions interfering with the exercise of valid pre-existing property rights to the use of state waters. It is inappropriate for the USFS to attempt

to extend its administrative reach to waters and adjacent lands over which it has no authority.

Third, the proposal's rebuttable presumption that surface water and groundwater are hydraulically connected raises another set of questions, including the standard and methods that may be used to rebut this presumption. In fact, groundwater and surface waters may or may not be hydrologically connected requiring extensive and expensive geohydrologic analyses, which the USFS is ill equipped to undertake on a large scale. Further, the management of groundwater and rights to the use of groundwater varies by state and is as much a legal question as it is a scientific question of connectivity. Moreover, if the USFS presumes to have authority to regulate groundwater uses, then their rebuttable presumption of a connection to surface water sources could lead to an unwarranted and contentious assertion of authority over surface water uses as well, which the U.S. Supreme Court has clearly rebuffed.

II. Legal Basis of the Proposed Directive

The Council has a number of questions about the legal basis for the proposed directive. While the proposal cites various Federal statutes that it describes as directing or authorizing water or watershed management on NFS lands, it contains very little discussion or analysis of how these provisions specifically authorize the activities contemplated in the proposed directive. The proposal also does not address the limits of the USFS' legal authority regarding water resources.

Instead of supporting the proposed directive's activities, many of the authorities cited in the proposal support a more limited scope for USFS water management activities. For instance, none of the cited statutes mention groundwater specifically and many are primarily limited to the surface estate. Moreover, 16 U.S. Code Section 481 specifically provides that: "All waters within the boundaries of National Forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the state wherein such National Forests are situated"

The Council is particularly troubled by language in the directive that would require application of the reserved water rights doctrine to groundwater. As noted in the Council's attached position, the U.S. Supreme Court has recognized Federal reserved rights to surface water, but no Federal statute has addressed, nor has any Federal court recognized, any Federal property or other rights related to groundwater. Except as otherwise recognized under state water law, the Council opposes any assertion of a Federal ownership interest in groundwater or efforts to otherwise diminish the primary and exclusive authority of states over groundwater.

It is also important to note that the U.S. Supreme Court narrowly interpreted the Organic Act, which the USFS cites as one of the legal justifications for the proposal, in *United States v. New Mexico*, 438 U.S. 696 (1978). Namely, the Court denied USFS claims to implied reserved surface water rights claims for fish, wildlife, and recreation uses and found that reserved rights made pursuant to the Act were limited to the minimum amount of water necessary to satisfy "primary purposes" of the National Forest reservation, such as the conservation of favorable surface water flows and the production of timber. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. Similarly, the Court's other decisions regarding the reserved water rights doctrine have generally narrowed its scope by imposing "primary purpose" and "minimal needs" requirements. The proposal must ensure that it complies with the limits the Court has placed upon the recognition and exercise of implied Federal reserved water rights.

Further, the assertion of reserved water rights in state general water rights adjudications and administrative proceedings can be contentious, time-consuming, costly, and counterproductive, often resulting in outcomes that do not adequately provide for Federal needs. For this reason, different states and Federal agencies have worked together to craft mutually acceptable and innovative solutions to address Federal water needs. The State of Montana and USFS have entered into a compact that recognizes and resolves such needs. These types of negotiated outcomes are often much more capable of accommodating Federal interests and needs and should be considered before asserting any reserved rights claims. At a minimum, the directive should require the USFS to consider alternatives to asserting reserved water rights claims, including those made in general state water rights adjudications and administrative proceedings.

III. The Lack of State Consultation

The Council is especially concerned by the lack of state consultation in the development of the proposed directive and its assertion that it will not have substantial direct effects on the states, on the relationship between the Federal Government and the states, and the distribution of powers between the various levels of govern-

ment. WSWC Position No. 371 (attached) notes that E.O. 13132 requires Federal agencies to “have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications”

As declared by the governors, the directive has the potential to significantly impact the states and their groundwater resources. Any Federal action that involves the possible infringement on state water rights and the assertion of reserved water rights claims has, on its face, the ability to significantly impact state granted private property and water use rights, their administration, and state water management and water supply planning.

It is particularly perplexing that the USFS deems it necessary to consult with Tribes under Executive Order 13175, but has determined that the states do not warrant similar consultation under Executive Order 13132. It is difficult to understand how the USFS will be able to carry out this proposal in coordination with the states, as the directive proposes, without robust and meaningful consultation with the states. Moreover, waiting until the public comment period to solicit state input, as the USFS has done in this instance, is dismissive and counterproductive. Timely and substantive discussions could have led to improvements in the directive before being proposed, recognized and incorporated state’s authorities and values, and avoided or minimized conflicts. The states should have been consulted much earlier in the development of this directive, especially given that it has apparently been under discussion for years.

IV. Conclusion

The Council appreciates the opportunity to testify and express our concerns with the proposed directive. Secretary Vilsack’s letter to the Governors includes an invitation to meet and discuss the directive. The Council encourages such a dialogue before the USFS takes any further action on this proposal. The Council is also ready to participate in a dialogue with the USFS to address questions and concerns raised herein regarding the proposed directive, as well as those raised by our member states in their comments, some of which have already been submitted and are attached to this testimony. Given the extension recently granted, some of these states may choose to supplement their comments before the new deadline. (Separately attached for the record are comments provided USFS from Alaska, Idaho, Nevada, North Dakota, South Dakota, Washington and Wyoming.)

Thank you for your oversight efforts. We ask for your careful consideration of our concerns and those of our member states. We look forward to further dialogue with the USFS regarding this proposal, and hope the USFS will appropriately defer to the authority of the states to manage their groundwater and surface waters, as recognized by the Congress and the Supreme Court.

ATTACHMENT 1

Position No. 340

Position of the Western States Water Council on State Primacy Over Groundwater

Washington, D.C.

March 15, 2012

Whereas, groundwater is a critically important natural resource that is vital to the economy and environment of the arid West;

Whereas, the Desert Land Act of 1877 and the United States Supreme Court in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) recognize states have exclusive authority over the allocation and administration of rights to the use of the groundwater within their borders and states and their political subdivisions are primarily responsible for the protection, control and management of the resource;

Whereas, the Congress has created and the U.S. Supreme Court has recognized Federal reserved rights to surface water, but no Federal statute has addressed nor Federal court recognized any Federal property or other rights related to groundwater; and

Whereas, the regulatory reach of Federal statutes and regulations, including but not limited to the Clean Water Act, Endangered Species Act, National Environmental Policy Act, Reclamation Act of 1902, Safe Drinking Water Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, were never intended to infringe upon state ownership or control over groundwater; and

Whereas, States recognize the importance of effective groundwater management and are in the best position to protect groundwater quality and allow for the orderly and rational allocation and administration of the resource through state laws and regulations that are specific to their individual circumstances; and

Whereas, the conditions affecting groundwater supplies, demands, and impairments vary considerably across the West and within individual states; and

Whereas, Federal efforts to exert control over or ownership interests related to groundwater or otherwise infringe upon or supersede state groundwater management are contrary to Federal law and threaten effective groundwater management and protection; and

Whereas, nothing stated in this position is intended to apply to the interpretation or application of any interstate compact.

Now Therefore Be It Resolved, states have exclusive authority over the allocation and administration of rights to the use of the groundwater located within their borders and are primarily responsible for allocating, protecting, managing and otherwise controlling the resource; and

Be It Further Resolved, that the Western States Water Council opposes any and all efforts that would establish a Federal ownership interest in groundwater or diminish the primary and exclusive authority of states over groundwater.*

ATTACHMENT 2

Position No. 371

Resolution of the Western States Water Council Regarding Water-Related Federal Rules, Regulations, Directives, Orders and Policies

Helena, Montana

August 11, 2014

Whereas, Presidential Executive Order 13132, issued on August 4, 1999, requires Federal agencies to “have an accountable process to ensure meaningful and timely input by state and local officials in the development of regulatory policies that have federalism implications . . .”; and

Whereas, an increasing number of Federal regulatory initiatives and directives are being proposed that threaten principles of federalism, an appropriate balance of responsibilities, and the authority of the states to govern the appropriation, allocation, protection, conservation, development and management of the waters within their borders; and

Whereas, taking such actions goes beyond the intent of the applicable laws; and

Whereas, a number of these recent proposals have been made with little substantive consultation with state governments; and

Whereas, a Western Federal Agency Support Team (WestFAST) now comprised of twelve water-related Federal agencies was created pursuant to a recommendation of the Western Governors’ Association and Western States Water Council to foster cooperation and collaboration between the Federal agencies and states and state agencies in addressing water resource needs; and

Whereas, State consultation should take place early in the policy development process, with the states as partners in the development of policies; and

Whereas, Federal agencies have inappropriately dismissed the need to apply this requirement to their rulemaking processes and procedures; and

Whereas, water quantity regulation and management are the prerogatives of states, and water rights are private property, protected and regulated under state law;

Now Therefore Be It Resolved, that nothing in any Federal rule, regulation, directive, order or policy should affect, erode, or interfere with the lawful government and role of the respective states relating to: (a) the appropriation and allocation of water from any and all sources within their borders; and/or (b) the withdrawal, control, use, or distribution of water; and/or (c) affect or interfere with any interstate compact, decree or negotiated water rights agreement; and/or (d) application, development and/or implementation of rules, laws, and regulations related to water.

Be It Further Resolved, that Federal agencies with water related responsibilities fully recognize and follow the requirements of Executive Order 13132 by estab-

* (See also Position No. 337).

lishing and implementing appropriate procedures and processes for substantively consulting with states, their Governors, as elected by the people, and their appointed representatives, such as the Western States Water Council, on the implications of their proposals and fully recognize and defer to states' prerogatives.

ATTACHMENT 3

July 2, 2014

Hon. TOM VILSACK,
Secretary of Agriculture,
 U.S. Department of Agriculture,
 Washington, D.C.

Dear Secretary Vilsack:

Western Governors are concerned by the United States Forest Service's (USFS) recently released *Proposed Directive on Groundwater Resource Management* (hereafter "Proposed Directive"). As you know, states are the exclusive authority for allocating, administering, protecting and developing groundwater resources, and they are primarily responsible for water supply planning within their boundaries.

Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The United States Supreme Court reiterated the exclusive nature of state authority in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

Despite that legal and historical underpinning, the Proposed Directive only identifies states as "potentially affected parties," and asserts that the USFS's proposed actions would "not have substantial direct effects on the states." 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.

For this Proposed Directive—as well as the Proposed Directives for National Best Management Practices for Water Quality Protection on National Forest System Lands—USFS should seek authentic partnership with the states to achieve appropriate policies that reflect both the legal division of power and the on-the-ground realities of the region.

We respectfully request your responses to the attached questions to help us better understand the rationale behind this new proposal.

Sincerely,



JOHN HICKENLOOPER
 Governor, State of Colorado,
 Chairman, WGA;



BRIAN SANDOVAL,
 Governor, State of Nevada,
 Vice Chairman, WGA.

WESTERN GOVERNORS' ASSOCIATION QUESTIONS REGARDING PROPOSED UNITED STATES
 FOREST SERVICE (USFS) WATER QUALITY-RELATED DIRECTIVES

Proposed Directive on Groundwater Resource Management

Legal Basis for USFS Action:

Well over a century ago, Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. The United States Supreme Court reiterated the exclusive nature of state authority in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), recognizing that states have exclusive say over the allocation, administration, protection and control of groundwater within their borders.

- What is the legal basis for U.S. Department of Agriculture (USDA)/USFS assertion of federal authority in the context of the Proposed Directive? What does the USDA/USFS recognize as the limits of federal authority?
- The Proposed Directive 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 as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act" (emphasis added).

- What is the legal basis for these claims?
- When and how will USFS assert reserved water rights claims to groundwater?
- 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 the 1978 case *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.
 - How does the Proposed Directive work within the legal framework required by the Court?
 - Given the Supreme Court’s finding, how does the Organic Act authorize USFS reserved rights to groundwater here?

State Authority:

- Given the Federal statutory grant of state authority over groundwater and U.S. Supreme Court case law discussed above:
 - What will “cooperatively managing groundwater with states” mean in practice?
 - How will the Department ensure that the Proposed Directive will not infringe upon, abrogate, or in any way interfere with states’ exclusive authority to allocate and administer rights to the use of groundwater as well as the states’ primary responsibility to protect, manage, and otherwise control water resources within their borders?
 - Do the new considerations for groundwater under USFS’ existing special use authorizations amount to a permit for groundwater use? If (as stated) groundwater and surface water are assumed to be hydraulically connected, could this special use authorization for groundwater amount to water rights permitting of both groundwater and surface water? Will there be an increase in regulatory responsibilities for states and water users? What will the new requirements for monitoring and mitigation entail?
- The Proposed Directive asserts that it does not trigger the requirements of E.O. 13132 on federalism—that it would not impose compliance costs on states or have substantial direct effects on states or the distribution of power.
 - Given the changes this directive would make in the ways state-managed waters are permitted, why do USDA and USFS believe this action would not trigger E.O. 13132?

Scientific Assumptions and Definitions:

- How will definitions be established for the Proposed Directive? Particularly regarding the definition of “groundwater-dependent ecosystems,” states should be able to weigh in with information regarding the unique hydrology within certain areas.
- The Proposed Directive would require the Forest Service to, “[a]ssume that there is a hydrological connection between groundwater and surface water, regardless of whether state law addresses these water resources separately, unless a hydrogeological evaluation using site-specific data indicates otherwise.” The *Federal Register* notice for the Directive further states that, “this assumption is consistent with scientific understanding of the role and importance of groundwater in the planet’s hydrological cycle.” Yet without citing specific scientific evidence for specific areas, the assumption of connectivity opens new waters to permitting without sound evidence that takes site-specific considerations into account.
 - What quantifiable science does USFS depend upon to justify this broad assertion of Federal authority?

Application to Existing Permitted Uses:

- How will the Proposed Directive apply to existing, permitted activities on USFS lands? How will it affect existing uses that rely on state-based water rights?

Nexus to Forest Planning Rule:

- How is this Proposed Directive related to the Forest Planning Rule?

Process Concerns:

- Given the Proposed Directive’s potential impacts on states and stakeholders, why was this new policy released as a Proposed Directive rather than a rule?
- Why were states—the exclusive authorities over groundwater management—not consulted during USDA/USFS’ development of this Proposed Directive?

Proposed Directives for National Best Management Practices for Water Quality Protection on National Forest System Lands:

- How do the proposed BMP Directives relate to *NEDC v. Brown*, litigation overturned by the U.S. Supreme Court which would have identified forest roads as subject to permitting under the Clean Water Act (CWA)?
- How will the Proposed Best Management Practices (BMP) Directives relate back to the recent proposed rule regarding the scope of waters protected under the CWA and the related study on *Connectivity of Streams and Wetlands to Downstream Waters* from the Environmental Protection Agency’s Scientific Advisory Board?
- What are the implications of using these BMP Directives as USFS’ primary requirements to meet water quality standards?
- Will these become the basis for future regulatory action impacting specific activities on USFS lands (for example, energy production, mining, or grazing)?
- What is the legal basis of asserting that USFS needs to institute BMP Directives to “[maintain] water resource integrity?”

ATTACHMENT 4

August 29, 2014

TOM TIDWELL, *Chief*,
 JAMES M. PEÑA, *Associate Deputy Chief*,
 U.S. Forest Service
 Washington D.C.

RE: USFS Directive on Groundwater Resources Proposed FSM 2560

Dear Chief Tidwell and Associate Deputy Chief Peña:

These comments are hereby submitted on behalf of the State of Alaska (Alaska). The Alaska Department of Natural Resources (ADNR) has the statutory authority and responsibility for management of water use on all lands within the state, public or private. ADNR also works with the Alaska Departments of Environmental Conservation, Fish and Game and Law for the protection of all water in Alaska.¹ Alaska finds these proposed directives to be duplicative of existing state programs; to have the potential for vetoing state decisions; and, perhaps most disturbing, to assume that states are not adequately performing their roles in regulating groundwater.

As a member of the Western Governors’ Association (WGA) and Western States Water Council (WSWC), Alaska is already part of the group of western states who have questioned this directive (see WGA Letter to Secretary Vilsack dated July 14, 2014 signed by Governors Hickenlooper and Sandoval), and was part of the recent discussions with Associate Deputy Chief Peña at the July 14–18 WSWC meeting in Helena, MT. These comments are in further response to USFS’s request for comments, and Chief Peña’s personal request for more detailed response from member states.

Chief Peña noted in his presentation on July 17 that this Directive was (1) not intended to impact use of water and, rather, was to be related to activities on USFS land; (2) was not related to EPA’s waters of the U.S. initiative; (3) would not be related to private land; and (4) that the USFS should consult state agencies. He further stated that the USFS was looking at the Multiple Use Act of 1960 and was not trying to manage allocation, rather the USFS was trying to manage uses which

¹The Alaska Department of Natural Resources, the Alaska Department of Environmental Conservation and Alaska Department of Fish and Game provided feedback and support for this response.

impact water. He also noted that the USFS just wanted to be treated equal to any other landowner.²

If that was what the detail in the directive and the *Federal Register* summary stated, Alaska would have little dispute with the USFS proposal. However, that is not the case. To quote from the *Federal Register* Summary, “The Forest Service proposes to amend its internal Agency directives for Watershed and Air Management to establish direction for *management of groundwater resources* on National Forest System (NFS) lands as an integral component of watershed management” . . . “This proposed Groundwater Directive represents a change in Forest Service’s national policy on *water management*”. The Forest Service recognizes that states and tribes *also have responsibilities* for water resources within their boundaries and that *management of groundwater* needs to be conducted cooperatively with the states and tribes to be successful.” (Italics added) These statements are not aligned with Chief Peña’s statements, and in fact are contrary to Congressional acts and Court decisions. It is widely acknowledged that the states have primary authority and responsibility for appropriation and use of surface and groundwater within their borders. Further, it should be noted that the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*³ that states have *exclusive authority* over the allocation, administration, protection, and control of *the groundwater* located within their borders. In Alaska, these policies are strengthened by our Constitution in Article 8, § 2–5, & 13,⁴ which established water as a common use resource subject to appropriation and use under the prior appropriation doctrine. The Alaska Legislature further defined the management and use of water and delegated the responsibility to uphold these water use policies to the Alaska Department of Natural Resources (ADNR) by the Alaska Water Use Act, AS 46.15. In short, it is Alaska who has primary and/or exclusive jurisdiction over water resources, and in this role it is the state who would collaborate with the USFS, not the opposite as opined in the proposed directive.

Alaska is a large state with six regions and five temperate zones, ranging from an arctic environment in northern Alaska, to sub-arctic in southcentral, to a mid-latitude oceanic climate in Southeast Alaska. It covers 663,267 square miles, or 424.49 million acres, of which only 22 million acres are USFS managed land.⁵ Alaska’s portion of all USFS managed land (192.8 million acres) is the largest of any state, and not only quite different within the state, vastly different than many USFS lands throughout the continental U.S. Each state, especially Alaska, has unique circumstances within its borders, and unique expertise within the state government to manage these diverse lands and waters. Yet, the Forest Service directive attempts to make a broad general policy which must be used everywhere, notwithstanding these differences. The following specific issues should be noted.

(1) Jurisdiction

(a) In spite of the U.S. Forest Service’s pronouncements that the proposed directive will not impinge on the state’s authority to manage and allocate the use of water resources that each state owns throughout (including on and under Federal lands) the state’s borders, the proposed directive contains wording that effectively says just the opposite. See section 2560.04, paragraph 6 on page 17 of the draft manual that states it is the responsi-

²David W. Schade, MPA, ADNR/DMLW Water Resources Section Chief notes of comments made by Associate Deputy Chief Peña to WSWC at the Council Committee Meetings July 17, 2014 in Helena, MT.

³295 U.S. 142 (1935).

⁴**§ 2. General Authority:** The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and waters, for the maximum benefit of its people.

§ 3. Common Use: Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

§ 4. Sustained Yield: Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the state shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

§ 5. Facilities and Improvements: The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

§ 13. Water Rights: All surface and subsurface waters reserved to the people for common use, except mineral and medicinal waters, are subject to appropriation. Priority of appropriation shall give prior right. Except for public water supply, an appropriation of water shall be limited to stated purposes and subject to preferences among beneficial uses, concurrent or otherwise, as prescribed by law, and to the general reservation of fish and wildlife.

⁵http://www.fs.fed.us/land/staff/lar/2007/TABLE_4.htm.

bility of forest and grassland supervisors to coordinate and implement agreements with Federal, **state**, and local agencies . . . for **management** . . . of groundwater resources. Also Section 2560.03—Policy, paragraph 6.a. (on Cooperation with Other Governmental Entities) states: “**Manage** groundwater quantity and quality on NFS lands **in cooperation with appropriate state agencies** and, if appropriate, EPA.”

(b) The proposed directive speaks in terms of requiring applicants to also get a state issued water right for a proposed project.

The proposed directive language doesn’t recognize that a state may issue temporary water use authorizations. These authorizations may be the more appropriate type of water use approval and the choice of the state, especially if they choose to grant a short term approval of the water use. Further, additional or different water quality authorizations or permits may be required.

(c) The proposed directive doesn’t confine its requirements to just evaluating potential impacts to groundwater/surface water, but also requires an applicant’s proposal (for water withdrawals) to the U.S. Forest Service to identify the beneficial uses of the water (see section 2563.3, paragraph 2.a. on page 30 of the draft manual).

If the U.S. Forest Service is requiring a statement of the beneficial use of the proposed water use, it is injecting itself into the state’s jurisdiction to determine what constitutes a beneficial use of the water that is owned by the state.

(d) The proposed directive requires all new *and reissued* written authorizations the Forest Service issues to contain terms requiring the authorization holder to provide to the Forest Service all groundwater monitoring data **and information** collected in compliance with applicable local, state, or other Federal requirements (see section 2561, paragraph 3 on page 23 of the draft manual).

This doesn’t make any exception for information that may be granted proprietary and confidential status under state law. This is further indication of an attempt to manage the use of groundwater. This also places a significant and unnecessary reporting burden upon applicants.

(e) Although the Forest Service documents refer to working with project applicants to come up with mitigation measures that would allow a project to be approved in spite of perceived groundwater/surface water impacts, section 2563.4, paragraph 6 on page 32 of the draft manual specifically states that “the authorized officer shall deny the application if NFS groundwater resources would be compromised, **despite mitigation**, if the proposed use were authorized . . .”

This amounts to proposing a Federal veto power over a state’s decision to issue a water right (for a project on *or near* Forest Service System lands) to allocate the use of the water that is owned by the state. The statement further seems to suggest Forest Service ownership of groundwater resources within the boundaries of Forest Service administered lands which is fundamentally NOT true.

(f) The proposed directive requires an applicant’s proposal to identify existing water withdrawals in the vicinity of the proposed project to allow for evaluation of its potential to adversely affect NFS water resources and facilities **and neighboring non-NFS water supplies** (see section 2563.3, paragraph 2.e. on page 31 of the draft manual).

It appears from this wording that the U.S. Forest Service is injecting itself into the state’s jurisdiction to determine if a proposed new water use will affect existing water right holders, even those existing water right holders not located on Forest Service System lands.

(g) The proposed directive attempts to require notifying the U.S. Forest Service (and thus invoking the proposed Federal oversight and potential Federal veto of proposed groundwater/surface water uses) of water use applications to the state in situations where the state may not have otherwise felt the need to notify the U.S. Forest Service (*e.g.*, where the proposed project is outside of but near Forest Service System lands).

As noted earlier, Alaska asserts that the USFS has no jurisdiction over the management and use of groundwater. Alaska also asserts that it has primary jurisdiction over the management of surface waters. The Forest Service states that by implementing the proposed directive it will not be interfering with the state water

right issuance process, and thus implying that the FS will not be usurping state jurisdiction over water use allocation. However, even if the proposed directive is not based on any new Federal authority, or in fact a new interpretation of existing authority, in practice, the USFS proposed changes can, and likely will, change what was effectively an exclusive state process for allocating the use of water within each state's borders into a process of concurrent Federal and state oversight and allocation of water (surface and subsurface water) within and near Forest Service System lands. Further, Alaska unequivocally rejects the USFS attempt to manage groundwater under lands near USFS boundaries.

(2) Hydrological connection assumed

(a) The proposed directive mandates that groundwater and surface water be assumed to be the same source of water (assume a hydrological connection exists at every proposed project site) regardless of whether state law addresses these water resources separately (see section 2561, paragraph 1 on page 22 of the draft Manual) and this assumption prevails unless a hydrological evaluation using site-specific data indicates otherwise.

Alaska does not agree that any assumptions should be made regarding connectivity, and further asserts that it is the state who leads this review as part of its inherent right to manage water resources. It will be problematic and far reaching if, without any direction or authority, the USFS attempts to require a project proponent to bear the cost of the hydrological evaluation. The assumption that groundwater and surface water are hydrologically connected at every proposed project site doesn't give any consideration to the physical and technical aspects of the hydro-geology as currently understood. For example, the depth of proposed groundwater withdrawal or injection is not even mentioned, and thus doesn't incorporate any discussion about different aquifer layers separated by impervious geologic layers, such as routinely found in Alaska.

(3) Forest Service permit process "inadequate"

(a) The Forest Service states that it hasn't in the past adequately evaluated potential groundwater impacts from its own projects or for other project applicants to which it grants authorizations, and thus the proposed directive will be the basis of a consistent Federal assessment process to evaluate potential groundwater quantity and quality impacts.

Alaska believes that current USFS groundwater planning guides are more than adequate. Further, the USFS only has to look to its current groundwater planning documents to see the fallacy of the argument that a new directive is needed to adequately evaluate potential groundwater impacts. USFS "Technical Guide to Managing Ground Water Resources" (FS-881 May 2007) is a 281 page document which gives clear guidance to staff on the framework of hydrogeologic principles, methods of investigation and for managing groundwater resources. This manual clearly outlines the USFS role as the land manager and also appropriately acknowledges the state's role as the groundwater use regulator. This manual does what the new Directive is purported to be doing.

Alaska also believes that in Alaska the USFS does and will continue to have a role in the water right or water authorization process as the land manager.⁶ They also may have secondary jurisdictions as related to some water issues, so Alaska looks to the USFS for their approval on issues such as possessory interests, and also seeks USFS input as to permit conditions to be placed on state issued water use permits and authorizations (in the same manner that the Alaska Department of Fish and Game or Alaska Department of Environmental Conservation are consulted). If the USFS changed the proposed directive to require USFS field staff to utilize state water law and permitting processes to achieve their land management objectives and to cooperate and coordinate with each state, this directive would likely meet the goals as stated by Chief Peña, and in the latest expanded question and answer paper.

(4) USFS staffing/expertise inadequate

(a) The expanded set of questions and answers notes: "The Forest Service currently has four dedicated groundwater specialists that provide technical support to the National Forest and Grasslands with the potential to add more. In addition, there are a number of other specialists across the agency

⁶The Alaska Department of Natural Resources has worked with the USFS on projects located within the Chugach National Forest and the Tongass National Forest. For example, see the collaboration on the Kensington and Greens Creek mines in Southeast Alaska.

with training or experience in groundwater. If circumstances require it, a forest or grassland can contract the services of a qualified groundwater specialist. Finally, the Forest Service has ongoing training and technical resources to assist employees across the agency understand and address groundwater issues.”

The states all have a much larger number of technical staff trained in the fields of hydrology and water management. It is unrealistic to think that the USFS is going to get increased Federal funding in a time of budget deficits for staff to perform a function which is primarily, and at times exclusively, the jurisdiction of the states. In reality, this will likely have the effect of either cursory review by the USFS staff, or lengthy delays in the processing of USFS special use permits. Further, it would make more sense for the USFS to consider the state experts’ opinions as a primary resource, instead of considering the need for “contract services”.

(b) The definition of “groundwater dependent ecosystems” in section 2560.05 includes areas of cave & karst systems. Several factors make it imperative that individual National Forests have latitude within the directive to adapt it to local conditions.

Some of the most productive timber lands in the Tongass National Forest are within the extensive karst areas of the forest. To meet the requirement of the Tongass Timber Reform to “seek to meet the demand” for timber supply and support the region’s economic structure, the proposed regulations must allow Tongass National Forest managers to apply local expertise when considering forest management activities on karst topography.

I again reiterate that the state’s reading of the plain language in the Directive *does not* correspond with Chief Peña’s answers given in response to the pointed questions from the public, states and other stakeholders. The U.S. Forest Service’s proposed Groundwater Directive is akin to the Forest Service requiring a person with a state issued driver’s license who wants to drive on or even near Forest Service System lands to also pass a U.S. Forest Service administered driver’s test and be issued a Federal driver’s license before being allowed to operate their vehicle on or near Forest Service System land.

The proposed directive effectively implements a redundant layer of government regulation over the allocation and use of state owned water resources (both groundwater and surface water, because of the assumption built into the proposed directive that groundwater and surface water are everywhere hydrologically connected unless proven otherwise), and effectively gives the Federal Government a veto power over state decisions to issue a water right for projects on or even near Forest Service System lands.

If the USFS does not accept that its current groundwater planning guides are adequate and thus continues to pursue establishment of the proposed directive, then Alaska respectfully requests that the USFS convene a working group of state and tribal water use managers to assist in developing a new draft directive. It is my belief that a directive can be written which will fully meet the needs of the USFS as articulated by Chief Peña and the USFS in its numerous explanation documents. Alaska offers to assist with this endeavor.

Sincerely,



BRENT W. GOODRUM,
Director.

CC: Groundwater Directive Comments,
USDA Forest Service, Attn: ELIZABETH BERGER,
WFWARP, 201 14th Street, SW.,
Washington, D.C. 20250;
Honorable TOM VILSACK,
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Honorable SEAN PARNELL,
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ATTACHMENT 5

September 3, 2014

Groundwater Directive Comments,
 USDA Forest Service,
 Attn: ELIZABETH BERGER—WFW ARP,
 Washington, D.C.

RE: State of Idaho's Comments on Proposed Directive on Groundwater Resource
 Management, Forest Service Manual 2560

Ms. Berger:

The State of Idaho ("state") submits the following comments on the United States Forest Service ("USFS") Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560 ("Directive").

Groundwater within Idaho is a public resource that is subject to control and regulation by the state. The Idaho Constitution provides that use of the waters of Idaho is a public use subject to regulation and control by the state. Idaho Const. Art. XV §§ 1 and 3. No person or entity may use the public waters of the State of Idaho without first having obtained a valid water right to use the water. I.C. §§ 42-201, 42-202, 42-203A, 42-204, 42-219. The Director of the Idaho Department of Water Resources is charged with administering all surface and groundwater within Idaho according to the prior appropriation doctrine. I.C. §§ 42-602, 42-607.

The USFS may hold Federal reserved or state-based water rights, but it does not own all groundwater underlying National Forest lands. Any USFS claim to the groundwater resources of the State of Idaho must either be established under state law or determined through a general stream adjudication. The Snake River Basin Adjudication ("SRBA") and the Coeur d'Alene-Spokane River Basin Adjudication ("CSRBA") are general stream adjudications in Idaho. The McCarran Amendment (42 U.S.C. § 666) requires Federal Government participation in these general stream adjudications. Any USFS claim to the groundwater resources of the State of Idaho has been or will be determined in these general stream adjudications or through the state administrative process. The USFS' water rights are subject to state administration in priority with all other water rights.

The USFS is governed by the Organic Administration Act ("Organic Act"). 16 U.S.C.A. §§ 473-475, 477-482, 551. The Organic Act establishes the purposes of the National Forest System: "No National Forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber . . ." 16 U.S.C.A. § 475. The Multiple Use Sustained Yield Act ("MUSYA") provides: "[T]he National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C.A. § 528. The MUSYA, however, merely supplemented the primary purposes of watershed preservation and timber supply. *U.S. v. New Mexico*, 438 U.S. 696, 708 (1978). The purpose of the National Forests is not water management, but the protection of watersheds for use by downstream users by preventing erosion through land use management practices such as preserving trees and underbrush. USFS limitation or prevention of downstream water use and control of state water resources was not contemplated by the USFS' Organic statutes.

The Directive is based on the false premise that the USFS is empowered to manage all groundwater resources that underlie National Forest lands. The Organic Act

does not empower the USFS to manage groundwater resources nor reverse Congress' historic policy of deference to state water law. The USFS may manage its own water rights and may claim injury via state processes if it believes those water rights are being injured, but it is not empowered to manage or otherwise regulate the use of groundwater resources within the State of Idaho. The following portions of the Directive unlawfully assert that the USFS may preempt the state's authority to allocate and administer groundwater underlying National Forest lands:

Provision	State of Idaho's Concern
2560.02.1 "To manage groundwater underlying NFS lands cooperatively with states and Territories . . . and Tribes to promote long-term maintenance or restoration of groundwater systems and their groundwater-dependent ecosystems . . ."	The meaning of "manage" and "cooperatively" are unclear. The state is solely responsible for administering, allocating, and distributing the public water of Idaho.
2560.03.1 "Focus Forest Service groundwater resource management on those portions of the groundwater system that if depleted or contaminated would have an adverse effect on surface resources or present or future uses of groundwater."	The meaning of "Forest Service groundwater resource" is unclear. The USFS may hold water rights, but it does not own all groundwater underlying National Forest lands. Groundwater is a public water of the State of Idaho. The meaning of "management" is unclear. The state is solely responsible for administering, allocating, and distributing the public water of Idaho.
2560.03.2 " Manage surface water and groundwater resources as hydraulically interconnected . . . unless it can be demonstrated otherwise."	The meaning of "manage" is unclear. The state is solely responsible for administering, allocating, and distributing the public water of Idaho.
2560.03.3 "Evaluate and manage the surface water-groundwater hydrological system . . ."	The meaning of "manage" is unclear. The state is solely responsible for administering, allocating, and distributing the public water of Idaho.
2560.03.4.d " Require monitoring and mitigation appropriate to the scale and nature of potential effects . . . when authorizing a proposed use or Forest Service activity that has a significant potential to adversely affect NFS groundwater resources. "	The USFS does not have authority to unilaterally require mitigation for groundwater depletions. The state is solely responsible for administering, regulating, and distributing all water rights in Idaho and for determining injury to a water right. The meaning of "NFS groundwater resources" is unclear. The USFS may hold water rights, but it does not own all groundwater underlying National Forest lands. Groundwater is a public water of the State of Idaho.

Provision	State of Idaho's Concern
2560.03.6.a “ Manage groundwater quantity and quality on NFS lands in cooperation with appropriate state agencies”	The meaning of “manage” is unclear. The state is solely responsible for administering, allocating, and distributing the public water of Idaho. The USFS does not have authority to control the water quantity or water quality requirements for water rights in Idaho. The state is responsible for administering, regulating, and distributing all water rights in Idaho and for determining injury to a water right.
2560.03.6.d “ Manage wellhead protection areas, source water protection areas, and critical aquifer protection areas that are designated pursuant to the . . . SDWA . . . or state equivalent.”	The meaning of “manage” is unclear. The state is solely responsible for administering, allocating, and distributing the public water of Idaho.
2560.03.6.e “ Require written authorization holders operating on NFS lands to obtain water rights in compliance with applicable state law, FSM 2540, and the terms and conditions of their authorization. ”	The state controls the terms and conditions that may be placed on a water right. If the USFS wants certain conditions to be placed on a water right issued under state law, it must participate in the state water right process.
2560.03.8.a “ Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water utilized for all public drinking water systems that withdraw groundwater from NFS lands and that are classified as community water systems under the SDWA.”	The term “corresponding written authorization of the quantity of water utilized” is unclear. To the extent this means a state-issued water right, the state controls the terms and conditions that may be placed on a water right. If the USFS wants certain conditions to be placed on a water right issued under state law, it must participate in the applicable state water right process.
2560.03.8.b “ Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water utilized for all groundwater withdrawals from high-capacity wells located on NFS lands”	The term “corresponding written authorization of the quantity of water utilized” is unclear. To the extent this means a state-issued water right, the state controls the terms and conditions that may be placed on a water right. If the USFS wants certain conditions to be placed on a water right issued under state law, it must participate in the applicable state water right process.

Provision	State of Idaho's Concern
2560.03.8.c “ Require measurement and reporting to the Forest Service in the corresponding written authorization of the quantity of water injected for those large water-injection wells located on NFS lands that open into a geological formation containing fresh water”	The term “corresponding written authorization of the quantity of water utilized” is unclear. To the extent this means a state-issued water right, the state controls the terms and conditions that may be placed on a water right. If the USFS wants certain conditions to be placed on a water right issued under state law, it must participate in the applicable state water right process.
2560.04h.9 “Appropriately address adverse impacts on groundwater resources from proposed and authorized activities such as by modifying the activities or adopting mitigation strategies. ”	The state is responsible for administering, regulating, and distributing all water rights in Idaho. To the extent the USFS believes its water rights are being injured by existing authorized water use on National Forest lands, it should seek administration of its water right through the applicable state process.
2561.2 “ groundwater resources of NFS lands . . . NFS groundwater resources ”	The meaning of “NFS groundwater resources” is unclear. The USFS may hold water rights, but it does not own all groundwater underlying National Forest lands. Groundwater is a public water of the State of Idaho.
2561.22.2 “ Require or recommend, as appropriate, that . . . applicable State agencies appropriate lease terms , design modification, and approval conditions, as applicable, to protect NFS groundwater resources ”	The USFS cannot require that a state agency use certain lease terms, design modifications, or approval conditions.
2561.25.4 “Provide to the authorizing entity recommendations or requirements , as appropriate, to protect NFS water resources , including whether the water produced from geothermal resource operations should be allowed to discharge into surface drainages.”	The meaning of “NFS groundwater resources” is unclear. The USFS may hold water rights, but it does not own all groundwater underlying National Forest lands. Groundwater is a public water of the State of Idaho. To the extent the state is the authorizing entity in these matters, the USFS cannot require it take certain actions.
2562.1 “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”	The state is solely responsible for administering, regulating, and distributing all water rights in Idaho. To the extent the USFS believes its water rights are being injured by existing authorized water use on National Forest lands, it must seek administration of its water right through the applicable state processes.

Provision	State of Idaho's Concern
<p>2563.7.2 “Ensure that all new and re-issued authorizations . . . provide for modification of their terms and conditions at the sole discretion of the authorized officer . . . to prevent the authorized groundwater withdrawals or injections from significantly reducing the quantity or unacceptably modifying the quality of surface or groundwater resources on NFS lands.”</p>	<p>The meaning of “NFS groundwater resources” is unclear. The USFS may hold water rights, but it does not own all groundwater underlying National Forest lands. Groundwater is a public water of the State of Idaho.</p> <p>The state is solely responsible for administering, allocating, and distributing the public water of Idaho. To the extent the USFS believes its water rights are being injured by existing authorized water use on National Forest lands, it must seek administration of its water right through the applicable state processes.</p>
<p>2563.8.4 “If monitoring detects insufficiency of mitigation measures or additional or unforeseen adverse impacts on NFS water resources from groundwater withdrawals or injections . . . [a]dd monitoring or mitigation measures, change or limit the activities authorized, modify the holder’s operations, or otherwise modify the terms and conditions of the authorizations if deemed necessary . . . to prevent the authorized groundwater withdrawals or injections from significantly reducing the quantity or unacceptably modifying the quality of surface or groundwater resources on NFS lands.”</p>	<p>The meanings of “NFS groundwater resources” and “groundwater resources on NFS lands” are unclear. The USFS may hold water rights, but it does not own all groundwater underlying National Forest lands. Groundwater is a public water of the State of Idaho.</p> <p>The state is responsible for administering, regulating, and distributing all water rights in Idaho. To the extent the USFS believes its water rights are being injured by existing authorized groundwater use on National Forest lands, it must seek administration of its water right through the applicable state processes.</p>

Congress and the courts have consistently recognized the authority of states to manage, control, and administer water within each state’s boundaries. State administration of water should not be encumbered with a parallel, duplicative, shadow administration of water by the USFS.

In summary, I urge the USFS to abandon this Directive and work within state law to address its concerns regarding groundwater resources issues in Idaho.

Sincerely,



GARY SPACKMAN,
 Director,
 Idaho Department of Water Resources.

CC:

STEPHEN GOODSON,
 CALLY YOUNGER,
 CLIVE STRONG,
 GARRICK BAXTER,
 SHELLEY KEEN.

Ms. ELIZABETH BERGER,
 U.S. Forest Service,
 WFWART, 201 14th Street S.W.,
 Washington, D.C.

RE: Proposed USFS Directive on Groundwater Resource Management, Forest Service Manual 2560

Dear Ms. Berger:

Thank you for the opportunity to comment on the Groundwater Directives proposed in Forest Service Manual (FSM) 2500 Chapter 2600, published in Vol. 79, No. 87 of the *Federal Register*.

Groundwater resources in North Dakota are *Waters of the State*, as defined in Article XI of the State Constitution, and are appropriated for the beneficial use under Chapter 61–04 of North Dakota Century Code and Article 89–03 of North Dakota State Administrative Code, under the administration and authority of the State Engineer.

Insofar as the United States Forest Service (USFS) may consider its land management authority to imply a right of ownership or control of the groundwater beneath federally owned lands, it will be in conflict with state authority defined under the North Dakota State Constitution and under State Century Code which reserves all water as “*Waters of the State*” to be held and appropriated for the beneficial use of its citizens. The USFS Directive must be consistent with North Dakota State law regarding water use jurisdiction, and must be modified to work within and be consistent with state law regarding water ownership and rights of beneficial use where necessary. Please consider the following concerns and appended explanatory comments.

1. Remove assertions of Federal authority over groundwater. The authority cited under Directive No. 2560.01 establishing a Federal mandate for watershed management to protect and improve water resources for multiple uses and improvement of navigable streams, cannot be construed as Federal ownership of groundwater. Watershed management is a land management practice for control of the movement and quality of runoff to streams. It does not constitute a Federal authority over groundwater beneath the land surface, which is a *Water of the State*. Compliance with state law, as cited in several sections of the Directive, must be based on a clear understanding of the primacy of state jurisdiction over the allocation of its waters.

2. Remove Reserved Water Right Claims to groundwater. USFS proposed directives should remove Directive No. 2567.3, which outlines a strategy to “*Apply reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water.*” In this statement USFS is proposing to employ reserved rights intended to allow Federal facilities to achieve their purposes (water needs in National Parks, etc.) in an expansive manner to create a Federal control over the waters themselves. Groundwater has never been included as a Federal reserved water right. To claim control over water-table elevations on USFS lands as a Federal reserve right would constitute a serious encroachment on state groundwater authority, and a clear attempt at Federal overreach. USFS is reminded that it has no authority over groundwater. Groundwater is *Water of the State*, and its appropriation and protection are under state authority. USFS authorities are related to land use. The state would oppose any attempts at establishing a Federal Reserve Water Rights for purpose of limiting or federally regulating groundwater use.

3. Remove the presumption of connectivity in Directive 2561.I. Whenever groundwater/surface-water connections are important factors they should be determined with due diligence (ref. appended Comment I.a).

4. USFS cannot change state water appropriation law for its own purposes. In North Dakota a water right requires a point of diversion, and cannot be obtained for a natural flow, a spring, a water-table elevation or other natural outlet. Directive No. 2560.03.6.e should be modified as follows to accommodate state law: “*Obtain water rights UNDER when applicable under state law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM 2540).*” This issue, and hydrologic reasoning supporting the state position, is discussed more fully in appended (ref. appended Comment 1.b).

5. USFS should not misconstrue its rights and prerogatives as managers of Federal lands as inclusive of authority over groundwater. Directive No. 2560.03.6.f, which directs USFS to “*evaluate all state applications for water rights on USFS lands and neighboring lands . . . and identify any potential injury,*” should be implemented with recognition that water table elevations are not normally protected under state law, which is permissive of beneficial use. USFS has

the right of every land manager to be a party of record to water permits affecting its interests and to defend its interests. Much of the U.S. Forest Service Directive Chapter 2560 pertaining to ground-water resource management on USFS lands is consistent with existing developed and long-standing North Dakota State programs in water appropriation, water quality management, and the associated regulatory and data acquisition and data management programs. Insofar as the Service is using its authority, rights and prerogatives as land managers to regulate the construction and operation of points of diversion on its lands it is not in conflict with state jurisdictions. Moreover, USFS has the right to examine, advocate and defend its interests with respect to state appropriation of its waters in the same manner as any other landowner. Directives requiring plans and documentation for proposed uses (No. 2363), monitoring of pumping (Directive No. 2564), cleanup of contaminated groundwater (Directive No. 2565), collaborative strategies for sustaining groundwater uses (No. 2568), and for cooperative monitoring of groundwater (No. 6 and No. 8 of Directive No. 2363) contain concepts that are consistent with current state law, policy and practice and are reasonable land management prerogatives of land managers if carried out by state authority. These are discussed more fully in appended Comments 2.c-f.

However, *Waters of the State* are allocated under state law. The protection of a water table elevation is not considered a right under state law, it is evaluated under public interest considerations in the permit process, and the value of the specific water-table resource must be “weighed and balanced” against other public interest considerations. USFS priorities will not be given primacy simply because it is a Federal Government agency. This issue, and hydrologic reasoning supporting the state position, is discussed more fully in appended Comment 1.b.

6. Maintain flexibility with public and private beneficial use. Directive No. 2563.3.1, which directs managers to “*Deny proposals to construct wells on or pipelines across NFS lands which can reasonably be accommodated on non-NFS lands and which the proponent is proposing to construct on NFS lands because they afford a lower cost and less restrictive location than non-NFS lands (FSM No. 2703.2) . . .*” is unreasonable and should be modified (ref. appended Comment 1.c).

In Conclusion, USFS has repeatedly and appropriately recognized the importance of state water appropriation law in obtaining water permits in its directives. It should also recognize the permissive nature of state law in granting those permits within state priorities, particularly in relation to water use on non-Federal lands neighboring USFS managed lands. Many of the priorities presented in the USFS Groundwater Resource Management Directives for USFS managed lands can be implemented cooperatively within the framework of state law. State authorities have a willingness to work with groundwater issues of concern to USFS. However, it is of the utmost importance that USFS recognize that groundwater management and appropriation is a state jurisdiction and that the waters themselves are *Waters of the State*. USFS should work within the framework and limitations of the state legal process in pursuing its objectives.

Respectfully,



TODD SANDO, P.E.,
State Engineer.

COMMENTS

Proposed USFS Directive on Groundwater Resource Management

1. While the USFS directives frequently stress compliance with state law, several elements of the proposed directives are problematic and appear to be in conflict with the North Dakota State Constitution and state law under which all waters are Waters of the State to be appropriated for the beneficial use of its citizens, and therefore under state authority.

(a) Directive No. 2561.1 directing land managers to: “*Assume that there is a hydrological connection between groundwater and surface water, regardless of whether state law addresses these water resources separately, unless a hydrogeological evaluation using site-specific data indicates otherwise,*” employs a value judgment rather than a hydrologic principle, which amounts to a policy of “rebuttable presumption against use.” Groundwater is a Water of the State, and a permit for its use would not be denied unless a substantial impact on a resource of major importance is indicated with due diligence—not an assumption. The assumption of connectivity should be removed.

(b) Directive No. 2563.3.6.e. “*Obtain water rights under applicable state law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM No. 2540)*” may be problematic in principle, in that North Dakota cannot grant a water right for a natural flow, a water table elevation, or a groundwater contribution to a spring or other natural outlet. A North Dakota State water right must have a point of diversion. The State Engineer will consider the impact on surface-water depletions as part of evaluating a water permit affecting downstream permitted beneficial uses, or protection of local surface water levels (under “public interest”) in case of a major resource (such as the Chase Lake Refuge, which has very high value for wildlife habitat). However, state law is permissive of “beneficial use,” and except in the case of a demonstrable high value, the state does not treat surface water exposures of aquifers as a protected priority over pumping diversions for beneficial use—for reasons explained below.

Much of North Dakota’s freshwater supply for municipal, domestic, industrial and agricultural use is diverted from shallow glacial aquifers, many of which discharge to gaining streams, others of which comprise closed depression hydrologic systems. Diversion through pumping must be recovered from river discharges, or frequently by lowering of water tables (which include surface exposures) through which evapotranspiration is recovered. This hydrologic principle is known as “developmental decline.” In addition, water tables (and surficial exposures) in the North-Central Plains are strongly affected by climatic trends, which vary from extreme natural depletion during multi-decadal droughts to large-scale land flooding during the peaks of cyclical wet periods, such as those prevailing since 1993 in North Dakota. Aquifer sustainability within these systems is defined by periods of partial depletion, followed by periods of replenishment—often occurring quickly in large rainfall or snowmelt events. To establish a policy by which water-table exposures are given primary protection over other uses would be to render the freshwater supplies unusable under most circumstances and, if protected water elevations were established under wet conditions, would furthermore give regulatory protection to flooding of agricultural lands during the wettest phases of the climatic cycles. For this reason, the state does not protect an inefficient (shallow or inadequate) capture system, and hence does not protect a water table surface, except where the exceptional value of a surface-water body can be demonstrated under “public interest.” Within the current system there are inherent limitations on wetland depletions: For example depletions of seeps and springs below levels required for downstream prior appropriators’ beneficial use in affected rivers and streams to reasonably acquire their water is not allowed under state water law and is considered in the hydrologic analysis of the water permit process. Similarly, groundwater depletions in closed depression areas of the Central Dakota Aquifer Complex are limited by irrigable land constraints. However, USFS cannot assume controlling authority over the decision of the ND State Engineer, which weighs and balances the public interest in all applications.

(c) Directive No. 2563.3.1, which directs managers to “*Deny proposals to construct wells on or pipelines across NFS lands which can reasonably be accommodated on non-NFS lands and which the proponent is proposing to construct on NFS lands because they afford a lower cost and less restrictive location than non-NFS lands (FSM 2703.2)*” is unreasonably stated. Furthermore, it contrasts with Directive No. 2560.7.c, which directs managers to “*Encourage the use of water sources located off NFS lands when the water use is largely or entirely off NFS lands, unless the applicant is a public water supplier and the proposed source is located in a designated municipal supply watershed for that supplier (FSM No. 2542)*.” Directive No. 2560.7.c, as cited, aligns much better with provisions of ND State law pertaining to water use and the public interest. Under NDCC 61–01–04, “*The United States, or any person, corporation, limited liability company, or association may exercise the right of eminent domain to acquire for public use any property or rights existing when found necessary for application of water to beneficial use.*” Under ND State law land control may not be used to impair water access and use in projects involving the public interest. However, the cost-benefit prohibition in relation to private interests, as stated, is extreme. To unnecessarily cause private parties, industrial or agricultural uses to incur additional costs in obtaining water access or infrastructure when harm is minimal would be irresponsible. It is suggested that the underlined portion be deleted, and that it be specified that benefits of access will be weighed against land use impact.

2. Several provisions of the Policy Directive which employ land use practices for the purpose of surface-water quality and maintenance are substantially within the authority of USFS and managers of federally owned lands, but they are not absolute. The USFS is, in most cases, entitled to exercise control or limitation of points of diversion constructed on its lands through provisions of lease or contract agreements with its tenants. USFS is also entitled to represent and defend its interests as a party of record in the state water permit process, both on its own lands and on neighboring lands; and to receive any of the pertinent data or information obtained and used for water regulation by the state. In the execution of these land-owner rights, the directives need to distinguish between Federal land ownership rights and state authority over groundwater use and control. Examples include:

(a) Provisions of Directive No. 2363 requiring plan submittal and documentation for new wells on USFS lands are reasonable and within the rights of a land owner. Moreover, the right to limit or deny infrastructure construction for private use would, under most conditions, be within the rights of the USFS.

(b) Directive 6.f. “Evaluate all applications to states for water rights on NFS lands and applications for water rights on adjacent lands that could adversely affect NFS groundwater resources, and identify any potential injury to those resources” is within the right of any party under state law. The USFS is entitled to be notified of any water permit applications within 1 mile of its lands, or within twelve miles of its public water systems. Furthermore, USFS may request to be a party of record to any water permit application it considers may affect its management priorities. USFS should be aware, however, that while it has a right to present and defend its interests, and while they will be investigated as part of the permit process, USFS priorities will not necessarily be more highly weighted than those of the applicants and other parties, simply because USFS is a Federal entity. Impediments to water permit requests must be deemed evident and not theoretical, and must be substantial *versus* the applicants interests.

(c) Directives for cooperative monitoring of groundwater resources with state agencies and universities (Directive No. 6 and No. 8) are not in variance with current state efforts, for which more water levels in more than 4,000 monitoring wells are measured monthly or quarterly, and water chemistry is measured approximately every 5 years, and more frequently as needed. Also the State Health Department samples for pesticides and other organic contaminants in vulnerable aquifers, including those under USFS managed lands) every 5 years. All State Water Commission data is available for the USFS, and anyone else, in a web based data delivery system. Furthermore, the State Engineer maintains an active ongoing groundwater exploratory and investigative program, and cooperative investigative efforts with USFS concerning vital issues is not out of the question, depending on the circumstances. The State Engineer is open to addressing USFS issues.

(d) Directive No. 2564 requiring “Measuring And Reporting Volume Of Extracted Or Injected Water” is met by current state use requirements. All permitted use is reported at least annually (in some cases real time telemetric data is required), and available for USFS examination. Injected water is regulated by the ND Health Department.

(e) Directive No. 2565 requiring “Cleanup Of Contaminated Groundwater,” and Directive No. 2563 requiring “Source Water Protection” are currently provided under the state authority of the ND Health Department.

(f) Directive No. 2568 requiring “Strategies For Sustaining Groundwater Resources”, through collaborative local state, Federal and Tribal efforts to sustain the availability and usability of groundwater over the long term; encouraging conjunctive uses (like artificial recharge), and water transfer when necessary are completely in line with state “sustainable use” policy and a highly developed water use and monitoring program that has been developed by the state over many years.

ATTACHMENT 7

SKIP CANFIELD via e-mail,
Nevada State Clearinghouse,
State Land Use Planning Agency.

Re: *USFS Proposed Directive on Groundwater Resources*

On behalf of the Division of Water Resources, Office of the State Engineer, I write to express our concerns with the U.S. Forest Service’s Proposed Directive on Groundwater Resource Management Forest Service Manual 2560 (Directive), which

was published in the *Federal Register* for public comment on May 6, 2014. We believe there are many problems with the Directive and offer the following discussion which is intended to broadly address Nevada's concerns.

I. The Proposed Directive Is Founded Upon Questionable Legal Authority

We question the legal basis by which the USFS asserts it has authority for the actions proposed in the Directive. The Directive provides a lengthy recitation of statutes, Executive Orders and regulations, which it asserts provide it with the authority to "manage" groundwater; however, our review of those citations of authority do not support the USFS' position, nor does the Directive contain analysis of how these cited authorities specifically authorize the activities set forth in the Directive. While many of the authorities stress the need to protect water resources and direct the USFS to do through secondary activities which may be within the purview of the USFS, none of the authorities provide the USFS with water rights in groundwater or with any direct authority to "manage" groundwater. We provide but a few examples below.

The *Organic Administration Act of 1897* does not contain the basic authority for water management, but rather "defined the purposes for which National Forests in the future could be reserved; and it provided the charter for forest management and economic uses with the forests." *U.S. v. New Mexico*, 438 U.S. 696 (1978). Congress in the Organic Administration Act provided that "No National Forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . ." *Id.* at 706–707. National Forests were reserved for only two purposes—to conserve the water flows (through the preservation of forest cover) and to furnish a continuous supply of timber for the people. *Ibid.*

The objects for which the forest reservations should be made are the protection of the forest growth against destruction by fire and ax, and **preservation of forest conditions** upon which water conditions and water flow are dependent. *Id.* at 708 (emphasis added).

This Act does not provide the USFS with the authority to manage groundwater. Its authority is to manage the forest, which provides watershed protection by forest coverage.

Weeks Act—The Directive indicates this Act authorizes the Secretary of Agriculture to acquire forested, cut-over, or denuded lands in the watersheds of navigable streams as necessary to regulate the flow of navigable streams. This Act does not provide authority for the USFS to assert it manages groundwater.

Multiple-Use—Sustained-Yield Act (MUSYA)—The Directive indicates that this Act provides that watershed protection is one of the five co-equal purposes for which USFS lands were established and are to be administered. This is a misstatement of law and fact to assert that this Act provides authority to "manage" groundwater. While the Act provides that it is the policy that National Forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes, the Act also declares that these purposes are supplemental to the purposes for which National Forests were established under the Organic Administration Act of 1897. The U.S. Supreme Court in the case of *U.S. v. New Mexico*, 438 U.S. 696 (1978) specifically held that although the MUSYA broadened the purposes for which National Forests had previously been administered, the reserved water rights of the United States in unappropriated appurtenant water had not been expanded beyond that necessary to preserve timber or to secure favorable water flows in the National Forests. The MUSYA does not provide the USFS with the authority to "manage" groundwater and did not expand any potential implied Federal reserved right claim to include groundwater. The implied reserved rights doctrine "is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas. Without legislative history to the contrary, the Court concluded that Congress did not intend in enacting the Multiple-Use Sustained Yield Act of 1960 to reserve water for the *secondary* purposes established." *Id.* at 715.

Federal Land Policy and Management Act—The Directive indicates that this Act authorizes the issuance of rights-of-way for water diversion, including wells, on USFS lands and, in doing so, it is instructed to require the protection of the environment. This Act instructs the USFS to protect the environment, but that does not extend to it the right to "manage" groundwater.

Forest Service Directives (FSM 2540 and FSH 2509.1)—The Directive indicates that these directives establish procedures for complying with Federal policy and state water law and procedures for management of watersheds on USFS lands that

serve as a source of municipal water supplies. These directives go to the heart of the matter, that being, other than water rights that may be recognized under the implied Federal reserved rights doctrine, the USFS has no authority to manage the groundwater resources under USFS lands, and that management is the responsibility of the states.

As can be seen by a limited review of the authorities cited for the Directive, they are based on false premises. The same problem can be seen with every single authority cited in the Directive, and there is simply no authority for the USFS to do what it proposes through the Directive.

II. Primary Authority and Responsibility for Groundwater Administration Belongs to States

The USFS is not responsible for, and has no authority over groundwater management. Rather, the states are entrusted with the responsibility of administering and managing groundwater resources. The USFS already has the right to participate as an applicant or protestant on water right applications for the use of groundwater on the USFS lands. It can apply for water rights itself for uses not covered under implied Federal reserved water rights, but the objective set forth in FSM 2560-2, "to manage groundwater underlying USFS lands cooperatively with states and Territories and Tribes" misstates the law and proper role of the USFS. Groundwater resources are not USFS resources, despite that they may be located under USFS lands.

In 1935, the United States Supreme Court in the case of *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) interpreted three Acts—the Mining Act of 1866, 1870 amendment to Mining Act and Desert Land Act of 1877—and held these three Acts effectively severed all waters upon the public domain from the land itself. The Court held that the three Acts indicate Congressional intent to defer to state water law. It held that the first two Acts confirmed that the water laws in western states would determine rights in non-navigable water on public land and that the Desert Land Act of 1877 effectively severed all water upon the public domain from the land itself. The Court held that all water on the public domain is *public juris* [public right], and is *subject to the plenary control of the designated states*.

These three Acts serve as the basis for the general rule that water rights on public land must be acquired under state law and that the states manage the groundwater on public lands. It is of great concern to us that the USFS in its Directive states that a number of Federal statutes direct or authorize water management on National Forest System lands. We believe this is a misstatement of the law, and thus the Directive in many instances, stands in direct contradiction to state law.

Inasmuch as "management" is synonymous with affirmative acts to control, handle, direct, regulate, take charge of or guide, we believe that any "management" activity the Directive purports to authorize to the USFS will directly infringe on and/or will erode the plenary control of water resources by the states as announced by the U.S. Supreme Court. The Directive itself recognizes that the USFS has the right to participate in state appropriative or adjudicative proceedings; however, now the USFS seeks to improperly insert itself into the role of the states under the guise of "cooperative" management with the states.

What's more, Section 2560.03.7(c) provides that the USFS will encourage the use of water sources located off USFS lands when the water use is largely or entirely off USFS lands, unless the applicant is a public water supplier and the proposed source is located in a designated municipal supply watershed for that supplier (FSM 2542). Although this section does not appear to directly attempt to usurp state authority, it is nonetheless troubling that the USFS would advance a general position against having points of diversion on USFS land when the place of use is off USFS land, except for municipal suppliers. The water resources belong to the citizens of Nevada and Nevada rejects any broad-based policy of the USFS to block non-municipal suppliers from appropriating groundwater on USFS lands.

III. The Proposed Directive Tramples State Law and Places an Increased Burden on Water Applicants and Users

Section 2560.03.2—Water Resource Connectivity. The Directive indicates that all surface water and groundwater resources will be presumed to be hydraulically interconnected, and should be considered as interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information. Nevada does not assume that there is a single source unless proven otherwise. Therefore, this provision is contrary to Nevada law. Moreover, the policy appears to *expressly* recognize that some states treat it as different sources, but the Directive disregards that fact. This may be important in light of the fact that the

Federal Register indicates that after adoption of the Directive, all state and local laws and regulations that conflict with the directive or that impede its full implementation would be preempted. Nevada believes there has been no express or even implied preemption of state law. If it came to pass that Nevada were forced to adopt a presumption of hydraulic connectivity, it would prove problematic due to the fact that it will place additional burdens on water right applicants to *disprove* this presumption, including determining what standards and methods will be used to rebut the presumption.

Also, this broad treatment as a single source appears contradicted by other portions of the Directive where USFS wants to treat them as different sources for its own purposes. For example, Section 2560.03.7(b) provides that “[s]ince groundwater sources generally have more stable water quality and quantity than surface water sources, favor development of suitable and available groundwater sources rather than surface water sources for drinking water at Forest Service administrative and recreational sites (FSM 7420).” Here, the USFS wants to treat surface water and groundwater separately for its own interests, which is contrary to the broad policy it already indicated which would be to treat them as one source. In short, the Directive is internally inconsistent.

IV. Responsibility for Groundwater Management Still Resides With the States, Despite the Directive’s Attempt To Create Managerial and Policymaking Roles Within the Directive

Section 2560.04—Responsibility. This section instructs specific offices and directors to formulate, maintain, and train regarding groundwater policy and procedures. Nevada is very concerned that those policies and training be based in settled law and fact and the Directive, as written, is not either. For example, Section 2567 subsection 3—Legal Considerations in Managing Groundwater Resources instructs USFS personnel to apply state law when filing groundwater claims during a state water rights adjudication and administrative proceedings. However, it further instructs them to file claims under the implied Federal reserved rights doctrine (*Winters*) to groundwater 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 Directive instructs USFS personnel to assert claims to groundwater which is not a settled question of law.

Section 2560.04(f)(1) instructs Regional Foresters to develop agreements as needed with states, Tribes, other Federal agencies, and private entities to investigate and assess USFS groundwater resources. Nevada Revised Statute § 532.170 provides that the State Engineer, for and on behalf of the State of Nevada, is authorized to enter into agreements with the United States Geological Survey, the United States Soil Conservation Service, and any state agency, subdivision or institution having jurisdiction in such matters, for cooperation in making stream measurements, undergroundwater studies, snow surveys, or any investigations related to the development and use of the water resources of Nevada. The State Engineer has no authority to enter into agreements with the USFS for this purpose.

Many of the other subsections in the Responsibility Section raise concern. For example, subsection 2560.04(f)(3) instructs the USFS to develop standards for the use, conservation and protection of USFS groundwater resources. It is the states that develop the standards for use of groundwater, not the USFS and these groundwater resources are not USFS resources. Subsection 2560.04(f)(5) instructs the USFS to ensure that training on groundwater resource management is available to regional and forest staff and ensure that qualified groundwater personnel are available to address groundwater issues, including authorization of appropriate groundwater uses, in the region. It is the states that have the authority to authorize appropriate groundwater uses and the USFS should ensure that training addresses matters factually and legally within the USFS jurisdiction.

Subsection 2560.04(5) instructs that all applications for water rights under state water law on USFS or adjacent lands should be evaluated for the potential to affect USFS groundwater resources. Here again, the Directive keeps repeating that the groundwater under the USFS lands is USFS water and this is again a misstatement of the law and the facts.

Subsection 2560.04(6) instructs the USFS to coordinate and implement agreements with Federal, state, and local agencies, Tribes, and other interested parties for management and restoration of groundwater resources. Again, “management” of groundwater resources is used broadly, where USFS does not have authority to manage over the jurisdiction of the state.

Consideration of Groundwater Resources in Forest Service Project, Approvals and Authorizations

Subsection 2561.21—Locatable Mineral Mining. This section instructs that the USFS can apply terms and conditions for the reasonable use of groundwater for locatable minerals operations. Reasonable use of either surface or groundwater in connection with locatable mining must be authorized in an approved mining Plan of Operations. The *Federal Register* described this section as only clarifying that allowing use of groundwater for mining is a discretionary action to be addressed through authorization in the mining Plan of Operations. It is not the jurisdiction of the USFS to condition the use of groundwater; the use of the groundwater is under the jurisdiction of the state. The USFS may have jurisdiction on how that water may be used on the land, but does not have jurisdiction over the appropriation of said groundwater.

V. The USFS Failed To Consult the States in Promulgating the Proposed Directive

Section 2560.03.6—Policy. This section indicates that the USFS should manage groundwater quantity on USFS lands in cooperation with appropriate state agencies, but in (6)(c) admits that others have the authority to regulate the resource and in (6)(e) that the USFS must obtain rights for many of its activities under state law. The authority for the management of groundwater rests with the states and is not done “cooperatively” with the USFS. As already stated above, the USFS’ rights extend to participating in the state process for acquisition and use of water as an applicant or protestant, but it goes too far to say that the USFS has jurisdiction or any role as a manager of groundwater resources.

We are troubled by the lack of state consultation in the development of the Directive. The Directive asserts that it will not have substantial direct effects on the states, on the relationship between the Federal Government and the states, and the distribution of powers between the various levels of government, which would require compliance with the state consultation criteria set forth in Executive Order 13132. However, as amply demonstrated above, we believe the Directive implicates serious federalism concerns and significantly impacts the states by infringing on state water rights. The assertion of implied Federal reserved water rights to groundwater has the ability to significantly impact state water rights and state water management. We find it disturbing that the USFS found it significant enough to consult with the Tribes under Executive Order 13175, but determined that the states do not warrant similar consultation under Executive Order 13132. The lack of consultation by the USFS is particularly poignant in light of Section 3 of that Order, which states in pertinent part that “the national government shall grant the states the maximum administrative discretion possible. Intrusive Federal oversight of state administration is neither necessary nor desirable.” Waiting until the public comment period to solicit state input does not allow for meaningful consideration of Nevada’s views and concerns.

VI. Conclusion

We could provide additional examples of specific sections that raise many of the same concerns. We request that the USFS abandon this attempt to wrest control of groundwater management from Nevada through the proposed Directive. Alternatively, at a minimum, we request the USFS consult with Nevada and other western states before taking further action on the Directive in order to address the foregoing concerns and deficiencies. Thank you for your consideration of our concerns.

Sincerely,

JASON KING, P.E.,
State Engineer.

ATTACHMENT 8

July 31, 2014

Groundwater Directive Comments,
USDA Forest Service,
Attn: ELIZABETH BERGER—WFWARP,
Washington, D.C.

Dear Ms. Berger:

Thank you for the opportunity to comment on the USDA Forest Service’s Proposed Directive on Groundwater Resource Management. The Department of Environment and Natural Resources Water Rights Program is the state agency responsible for

regulating the use of water, including groundwater, in South Dakota. Water use in the state has been regulated since statehood, with water law updates in 1907, 1955, and 1983. South Dakota is an appropriate right state.

South Dakota strongly opposes the USDA Forest Service's Proposed Directive and requests USDA Forest Service withdraw the proposed directive for the following reasons:

1. **Lack of authority**—The implementation of this proposed directive expands the authority of a Federal agency with no Congressional authorization and without regard or deference to state water laws. The proposed directive states the Forest Service will cooperatively manage resources with states and others with common responsibilities, yet **the Forest Service has no authorized responsibility to manage groundwater**. Rather, the directive mandates the Forest Service to insert the agency into groundwater issues on Forest Service and non-Forest Service land, effectively circumventing state processes. This is contrary to Federal court decisions, which have never recognized a Federal reserved water right to groundwater.

2. **Redundancy**—The proposed directive contains a number of regulatory redundancies, requiring the Forest Service to conduct and provide oversight of activities regulated by other Federal, state, and local entities and for which the Forest Service has no regulatory authority. The proposed directive also requires additional scientific personnel to conduct projects that are the responsibility of other Federal and state agencies. For example, the Forest Service is now directed to do research and groundwater evaluations and assessments through this proposal. This is commonly what the U.S. 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 over-extended and unbalanced Federal budget.

It is stated several times that all authorized Forest Service activities and uses must be in compliance with applicable Federal, state, or local standards. This is appropriate. **The proposed directive could be shortened to this statement because all of the issues can be addressed by this one simple statement, since the Forest Service has no authority itself in the matters listed.**

3. **Unnecessary delays in and burdensome to state permit process**—The proposed directive requires the Forest Service to evaluate all state water right applications on and adjacent to Forest Service lands. In South Dakota, there is a state regulatory process in which the Forest Service can intervene by petition in a water right application. **The Forest Service can participate in the process of any water right application by becoming a party to a contested case hearing.** There is concern, however, that the Forest Service will unnecessarily burden the state agency by questioning every permit on or near Forest Service land. This is especially concerning because the Forest Service believes all groundwater and surface water is hydraulically connected, and groundwater resources in South Dakota, especially those underlying Forest Service land in the Black Hills, are extensive in size. **The Forest Service needs to allow the state to do their job for which they have statutory authority and not disrupt water use appropriation for which the Forest Service has no statutory authority.**

4. **No scientific basis for "groundwater ecosystems" assumptions**—Assuming all surface water and groundwater is connected as defined by "groundwater ecosystems" is simply not scientifically based. The proposed directive makes this across the board assumption and places the burden of proof on states and users of water. **The proposed directive should not include the requirement to consider all groundwater and surface water connected.**

5. **No time restrictions or due process clauses**—There are many items in the proposed directive requiring the Forest Service to independently assess and evaluate groundwater use and impacts to Forest Service resources, conduct research of groundwater, and issue new and renew existing special use permits, which may involve groundwater use. However, there are no time constraints that the Forest Service is required to act and make a final decision. There are also no due process options for permit applicants. Delays to projects and plans by the water users could be devastating during water shortages and financially burdensome for applicants. **The proposed directive must include time limits for Forest Service reviews and other activities. It should also include a process through which an applicant can appeal any final Forest Service decision.**

6. No state input—The Forest Service has not sufficiently engaged states in its development of the Groundwater Directive. The process your agency has pursued ignores the required state consultation criteria established in Executive Order 13132. This Order specifically directs Federal agencies to act in strict accordance with governing law and to only preempt state law where there is clear evidence that Congress intended such preemption. The Order also requires Federal agencies to consult with states to determine whether Federal objectives can be obtained by other means in instances, such as this, where there is significant uncertainty as to whether national action is authorized or appropriate. Waiting until a public comment period to solicit state input ignores states' primary water management responsibilities and does not allow for meaningful state input, including consideration of alternative ways of meeting Federal objectives. **The proposed directive should be withdrawn until such time as the above issues can be resolved with the input of state agencies with the authority to regulate groundwater use.**

In closing, any policies that assert Federal authority over groundwater within Federal lands will have substantial direct effects on state water rights, on the relationship between the Federal Government and the states, and the distribution of power and responsibilities among the various levels of government. In particular, such an assertion will infringe upon our state's water management activities and our water laws governing water use rights. Moreover, we reiterate that the Forest Service does not have authority to preempt state water laws related to water supply or water rights. Existing law and policy clearly establish that water supply and water rights are state and local issues.

We urge the USDA Forest Service to withdraw the proposed Groundwater Directive.

Sincerely,



STEVEN M. PIRNER,
Secretary,

CC:

South Dakota Attorney General's Office;
SHAUN McGRATH, Region 8 EPA, Denver;
Western States Water Council.

ATTACHMENT 9

August 19, 2014

ELIZABETH BERGER,
WFWARP,
Washington, D.C.

Re: Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560 (RIN 0596-AC51)

Dear Ms. Berger:

The Washington State Department of Ecology (Ecology) submits these comments in the interest of role clarity, and to extend an offer of cooperation regarding the Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560.

A tenet of western states water law is that states have primary authority regarding water allocation decisions within their boundaries. Historically, Congress has given substantial deference to states over decisions to allocate and assign property rights to surface and groundwaters within their borders.

Ecology understands the Forest Service has a legitimate interest in ensuring that these resources are managed in a manner that supports the purposes for which its Federal lands are managed. As discussed below, Ecology believes this will best be accomplished by engaging with respective states directly to share your concerns and identify opportunities for information and data sharing. Many of the Forest Service concerns can be addressed by engaging in existing state water right permitting and water resource planning processes, and Ecology would welcome the Forest Service's comments with respect to proposed water appropriations that affect Forest Service resources. There are approximately 400 pending applications for new water rights

for locations within National Forests in Washington State, as well as more than 7,500 existing water right certificates, permits, and claims.

Ecology is the agency created to administer Washington State's Water Management Program, including its comprehensive water quality and water rights programs, and to present the views and recommendations of the state regarding any Federal license or permit relating thereto at any proceeding, negotiation, or hearing in such regard conducted by the Federal Government, Wash. Rev. Code 90.48.260; Wash. Rev. Code 43.21A.020; Wash. Rev. Code 43.27A.090; Wash. Rev. Code 90.03.010; Wash. Rev. Code 90.54.010; Wash. Rev. Code 90.58.010; 16 U.S.C. § 803(a); and 16 U.S.C. § 821. Ecology has the responsibility to issue Section 401 certifications under the Clean Water Act. *See* Wash. Rev. Code 90.48.260. Ecology also has the responsibility for issuing National Pollution Discharge Elimination System (NPDES) permits, certifying compliance with the Coastal Zone Management Act (CZMA), and enforcing the state Shoreline Management Act (SMA). Moreover, Ecology has statutory responsibilities in the matters of environmental review and coordination pursuant to the State Environmental Policy Act (SEPA), Wash. Rev. Code 86.16.010 *et seq.*

Groundwater Quality

The State of Washington has the authority to prevent pollution of waters of the state including groundwater through the Water Pollution Control Act, Wash. Rev. Code 90.48. The Act established authority for the state to adopt groundwater quality standards, in addition to water quality standards for fresh and marine waters. In addition, Ecology can require permits for discharges-to-ground (in the context of groundwater) so that they do not pollute waters of the state. Typical activities that are regulated include permits to discharge industrial wastewater or stormwater to ground and registration of Underground Injection Control wells (dry wells, large septic systems, and aquifer injection remediation wells). Likely activities on Forest Service lands would include mines, stormwater dry wells, and wastewater treatment systems that discharge to ground. The Forest Service and Ecology's Toxic Cleanup Program also cooperate on toxic cleanup sites such as the Holden Mine in the context of contaminated groundwater.

Water Resources/Water Rights

The State of Washington enacted its Groundwater Code in 1945, Wash. Rev. Code 90.44. The Groundwater Code established a groundwater water right permitting system to be applied in conjunction with the existing surface water right permitting system, Wash. Rev. Code 90.03. The Groundwater Code also establishes that certain withdrawals are exempt from the water right permitting system. Typical permit-exempt uses found within Forest Service boundaries are small withdrawals associated with domestic and seasonal residences, which may use up to 5,000 gallons per day. In addition, groundwater for stockwatering may be used without limitation, provided the water is not simply wasted. Other common uses include withdrawals associated with Forest Service facilities, campgrounds, water supply, and hydropower electric projects.

In addition, the State Legislature has directed Ecology to implement the Columbia River Water Management Act, Wash. Rev. Code 90.90. The purpose of this 2006 Legislation is to develop new water supplies "to meet the economic and community development needs of people and the instream flow needs of fish." The legislation directs Ecology to "aggressively pursue" the development of water supplies. This plan will include reservoir improvements to provide water supply to the Yakima River basin for fish, communities, and agriculture. These reservoirs have been in place and in use for many years as part of the United States Bureau of Reclamations' Yakima Irrigation Project authorized by Congress in 1905. As a member of the Yakima Basin Integrated Plan Workgroup it is our expectation that the U.S. Forest Service serve as a supportive and collaborative partner to implement this vital, innovative, and broadly supported water management plan, including already approved projects that will provide water for fish and habitat.

Shared Interest in the Management of Groundwater Resources

Because we share an interest in protecting groundwater resources, it is incumbent upon the Forest Service and Ecology to collaborate in a manner that assures adequate review and oversight, while avoiding wasteful duplication of effort and over-regulation of water users. Like other states with water right permitting systems, Washington State has considerable expertise and experience in assessing the impacts of groundwater withdrawal proposals. Ecology believes that the Forest Service would benefit from consultation with the state water resources program to better understand how it can complement existing state processes without duplicating them.

The potential areas of cooperation include:

- (1) Communicating with each other regarding our respective review processes for actions with potential groundwater impacts, including process timing, key milestones, decision documents, and opportunities for each party to participate and comment.
- (2) Considering joint pre-proposal meetings with applicants and other interested parties regarding projects that would affect groundwater resources on Forest Service land.
- (3) Sharing information regarding existing groundwater data (*e.g.*, state well log and water right databases, identification of water rights located on Federal land, and available groundwater quality data) and discussing opportunities for data sharing.
- (4) Cooperating on studies to characterize groundwater water resources (including water quality) and impacts from actions undertaken on Federal land.
- (5) Exploring opportunities to ensure that state and Federal regulators do not place contradictory study and monitoring requirements on groundwater permit holders.
- (6) Including state water right and water resources experts in training of Forest Service staff regarding the management of groundwater.

These forms of cooperation may be anticipated in Section 2560.03(6) of the proposed directive. We support this expression of cooperation.

Ecology appreciates this opportunity to provide our views on the proposed Groundwater Directive. If you have any questions or comments regarding these comments, please contact Stephan Bernath of our Water Quality Program at stephen.bernath@ecy.wa.gov or Jeff Marti of the Water Resources Program at jeff.marti@ecy.wa.gov. Thank you.

Sincerely,



MAIA D. BELLON,
Director.

ATTACHMENT 10

September 3, 2014

Groundwater Directive,
Comments. USDA Forest Service,
Attn: ELIZABETH BERGER,
WFWART,
Washington, D.C.

Re: Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560

Dear Ms. Berger:

The Wyoming State Engineer's Office (WSEO) appreciates the opportunity to comment on the Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560. This Proposed Directive was published in the *Federal Register*, Vol. 79, No. 87 on Tuesday, May 6, 2014.

The WSEO is responsible for the administration, regulation, and adjudication of surface and groundwater rights in Wyoming, both of which lay under the ownership and control of the state. Wyoming's Constitution unambiguously addresses ownership of Wyoming's water: "The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." Wyo. Const. art. 8 § 1; See also Wyo. Stat. Ann. § 41-3-101 (stating that water is always the property of the state). The United States has approved Wyoming's constitutional declaration of water ownership. See *Farm Inv. Co. v. Carpenter*, 61 P. 258, 264 (1900).

Wyoming holds title to water in a sovereign capacity as representative of all the people for the purpose of guaranteeing that the common rights of all are equally protected. Wyo. Const. art. 1 § 31: *Merrill v. Bishop*, 287 P.2d 620, 625 (Wyo. 1955); See also *Farm Inv. Co.*, 61 P. at 265. Wyoming constitutional and statutory provisions charge the Board of Control and the State Engineer with the supervision of the waters of the state and of their appropriation, distribution, and diversion. Wyo. Const. art. 8 §§ 2, 5; See, *e.g.*, Wyo. Stat. Ann. §§ 41-4-502 through -511. The need

for the state to control the use of its limited and precious water resources compelled Wyoming's declaration of water ownership, and its history of water law and water administration that has since developed.

The purpose of these comments is to provide a response to this Proposed Directive in regards to our concerns related to administration and regulation of Wyoming water rights and the Federal overreach into areas not authorized by Federal law nor comporting with Executive Orders.

Background

The United States Forest Service (USFS) asserts that its Proposed Directive is intended to add Federal management responsibilities for groundwater on USFS lands. It changes the Forest Service's national policy on water management and challenges Wyoming's authority over groundwater within our borders, including Wyoming's primacy in appropriation, allocation, and development of groundwater. We disagree with the USFS claim that the Proposed Directive does not harm state rights. The assumptions, definitions, and new permitting considerations contemplated under the Proposed Directive materially interfere with Wyoming's authority over surface and groundwater, and will negatively impact the state's water users.

Concerns

The Proposed Directive contains policy excursions for which we find no authority, and proposes USFS roles that interfere with Wyoming's management of its groundwater resource.

1. *Authority for Groundwater Management and Rights.* The USFS fails to cite any Federal statute or court decision which provides for or describes its authority to manage groundwater because there is no such explicit authority under Federal law. After reviewing all the authority citations provided in Section 2560.01, we find none that provide explicit authority over groundwater.

In Section 2567, the Proposed Directive appears to assert Federal reserved rights to groundwater. Specifically, in subsection 2, it states "Apply Federal reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act." Wyoming's position is that the USFS does not have Federal authority over groundwater, nor does it have a general, Federal reserved right to groundwater established in Wyoming. There is no ability to "apply" Federal reserved water rights by any method other than Congressional action, as a result of U.S. Supreme Court or McCarren Amendment decisions, or through properly approved agreement with the State of Wyoming. It certainly cannot occur through simple assertion or application, as this Proposed Directive appears to do.

2. *Hydraulic Connectivity.* Section 2560.03(2) of the Proposed Directive states that surface and groundwater shall be considered a single hydraulically interconnected resource, unless it can be demonstrated that they are not. The Proposed Directive reiterates this position in Section 2561(1). Under Wyoming law, the burden lies with the USFS to prove a hydraulic connection sufficient to warrant conjunctive administration, not with individual appropriators to prove non-connection as the Proposed Directive appears to assert. In many cases, groundwater is not meaningfully connected to surface water, but regardless Wyoming's presumption of non-connection is superior. This is not to concede that there is even a legal basis for a debate on this subject, since Wyoming water law controls the permitting, adjudication, and regulation of surface and groundwater rights on USFS lands within the state.

By way of example, in July 2013 the State Engineer issued a permanent order covering water rights within the Horse Creek Basin in Goshen County. The order covers both groundwater wells and surface water diversions. Prior to the order, surface water appropriators complained that junior priority groundwater wells were causing surface water depletions in the Horse Creek Basin. As per Wyoming Statute §41-3-916, in situations where undergroundwaters and surface waters are so interconnected as to constitute one source of supply, a single correlated schedule of priorities related to whole common water supply may be established. To analyze the existence of a sufficient groundwater/surface water relationship (impact of adjacent groundwater wells on surface water streams), the State Engineer's Office contracted a technical study to determine the connectivity or the two sources of supply. The study confirmed the necessary connected relationship between groundwater wells and surface water and therefore the two could be regulated under a single schedule of priorities. This example demonstrates how our statutes guide the State Engineer when regulating

ground and surface waters as a single source. The USFS proposes to assert hydraulic connection of groundwater and surface water without conducting a study, and pushes that responsibility (to reverse that presumption) on our appropriators. Establishing connectivity within a basin between groundwater wells and surface water provides a means for the State Engineer to regulate and administer water rights under the doctrine of appropriation. Absent that authority, we fail to see why the USFS would make such a presumption unless it was somehow to interfere or affect future water right permitting actions.

At a minimum, absent site specific analysis establishing interconnectedness satisfying state law, we request that the USFS incorporate into the Proposed Directive language which states that the USFS will recognize and respect the laws of the state within which it is operating.

3. *Adjacent Lands.* In Section 2560.03(6f), the Proposed Directive seeks to give the USFS an administrative and approval role on all applications on adjacent lands regarding groundwater resources. Under subparagraph (4d) and (5), the USFS appears to insert itself in groundwater permitting on and off forest lands. The Directive furthermore uses the term “adjacent” which is not defined in the Directive. Groundwater permitting decisions are a state function, not a USFS role, even on USFS lands. This section further seeks to provide a groundwater permit review and evaluation role for the USFS, without any indication or what may come from such review or evaluation, under what timeframe it might occur, or any standard of review.

The Snake and Salt River Basin of western Wyoming is an example. Recent river basin planning work by the Wyoming Water Development Office (WWDO) indicates Federal ownership of 2.95 million acres out of a total 3.27 million acres of land in the basin. At 90 percent ownership by the Federal Government in the basin (over ½ of which is USFS), it is conceivable that the USFS would deem the other ten percent state and private ownership along inhabited river bottom land as “adjacent,” potentially having impact on “groundwater dependent ecosystems” (in which groundwater originates on and from USFS land). Under these definitions, proposals for new water uses on downstream state and private surface could be viewed as a potential cause of injury to forest values. To illustrate how Wyoming has recognized Federal interests in groundwater, Wyoming Statute § 41–3–930(b) specifies that applications for permits to appropriate groundwater within fifteen miles of the boundary of Yellowstone National Park, shall be accompanied by a written report containing necessary information to show that the proposed development will not impair or produce an injurious effect on the groundwater system located within the boundaries of the Park. However, the Wyoming Legislature has recognized no similar consideration for other National Park Service lands, or any other Federal lands, in Wyoming.

4. *Conflict with recent Memorandum of Understanding.* In January 2012, the USFS and the State of Wyoming entered into a Memorandum of Understanding (MOU) that runs through calendar year 2016. In this MOU, the USFS agreed to recognize and respect the laws and Constitution of the State of Wyoming and to honor permitting practices that applied equally to the United States and to water right applications by Wyoming citizens. The Proposed Directive, creating a Federal reach into an area where states have been recognized as the exclusive entity for water right permitting and administration, would conflict with the recent MOU in the following ways:

- a. The MOU says nothing about Federal reserved water rights.
- b. The MOU says nothing about the USFS commenting on applications on “adjacent” lands.
- c. The MOU has a 30 day window for USFS comment only. The Proposed Directive has no timeframe for, or standard of, review.
- d. The MOU provides for a courtesy notice for time-limited applications. The Proposed Directive makes no mention of time-limited uses of water.
- e. The MOU is silent on any presumed connection between groundwater and surface water.
- f. The MOU places certain requirements on the USFS prior to abandonment or changes of water rights. The Proposed Directive is silent on the role of the USFS regarding changes to or abandonment of water rights.

5. *The Proposed Directive puts an undue burden on Wyoming water users.* From the proposed required measurement and reporting of produced groundwater

(paragraph 2563.3(2a) of the directive), to the possible hydrogeologic studies needed to show that an aquifer is not connected to surface waters (paragraph 2561(1) of the directive). Wyoming appropriators will be faced with a new slate of obligations and costs for water use on these public lands.

The USFS has also indicated that they have no intention to usurp the state role in water rights permitting or management, and see the Proposed Directive as only assuring they are treated in a manner consistent with other landowners. It is important to remember that not only is the USFS already treated the same as other landowners when it applies for permits to appropriate water, or when it satisfies statutory standing requirements for protest or other contested case procedures, it is immune from condemnation actions to which private landowners are not when access to water is concerned Wyo. Const. art. 1. §32). In this regard, the USFS is already in a more favorable position when acquiring or influencing water use facilities than is the typical Wyoming landowner.

Examples of where we believe the Proposed Directive does impact the State Engineer's water right permitting authorities:

- a. USFS insertion into the permitting process itself where it possesses no right or standing under state law. See section 2560.04h. It is unknown what role the USFS intends to play as it determines impact or injury from water right application review, when only the SEO, Board of Control, or state courts have authority to make an injury determination.
- b. USFS intends to assert itself without a recognized right. By inserting itself in the "adjacent land" review process and otherwise, and through less-than-fully prescribed application of the definitions of "groundwater dependent ecosystems" and "sustainable use," it is clear that the USFS intends to assert itself and influence state-permitted water right decisions within and beyond the reach of Forest Service boundaries regardless of whether or not it holds valid water rights.

6. *Groundwater dependent ecosystems.* Further, regarding the treatment of "groundwater dependent ecosystems," it is unclear what authority the USFS asserts in protecting such systems or whether or not attempts will be made to tie private surface water or groundwater use proposals on adjacent lands back to forest land by defining and extending such an ecosystem to and through adjacent lands.

7. *The Proposed Directive was created without state consultation.* By noticing the State of Wyoming along with the general public in the May 6 release, the USFS denied the state an important consultative role in a document which apparently has been in the works for 8 years. The State of Wyoming is more than a simple stakeholder—we follow a system of water laws under which the Federal agencies are water users like anyone else. Treating the state as a simple commenter on Federal directives ignores the state's primary authority as recognized by the President under Executive Order 13132, by Congress dating from the 1800s including the McCarran Amendment (relied upon by the states since 1952), and by the United States Supreme Court. This action unacceptably diminishes Wyoming's sovereign role.

We encourage the USFS to retract the Proposed Directive especially where concerns exist about the conflict with Wyoming's authority in the permitting, administration and regulation of water rights. Thank you for the opportunity to comment on the Proposed Directives.

Sincerely,



PATRICK T. TYRRELL,
Wyoming State Engineer.

CC:

The Honorable MICHAEL B. ENZI, U.S. Senate;
The Honorable JOHN BARRASSO, U.S. Senate;
The Honorable CYNTHIA LUMMIS, U.S. House of Representatives;
NATHAN BRACKEN, Western States Water Council;
CHRIS BROWN, Attorney General's Office.

The CHAIRMAN. Thank you, Mr. Willardson. Now I recognize Mr. Shawcroft for 5 minutes.

**STATEMENT OF DON SHAWCROFT, PRESIDENT, COLORADO
FARM BUREAU, CENTENNIAL, CO**

Mr. SHAWCROFT. Thank you, Chairman Thompson, Ranking Member Walz, Representative Tipton, and other Members of the Subcommittee. Thank you for holding this hearing.

I am Don Shawcroft, a fourth-generation rancher from the San Luis Valley of South Central Colorado. I am President of the Colorado Farm Bureau, as mentioned, and a Member of the Board of Directors of the American Farm Bureau Federation, the nation's largest agricultural organization.

We have a strong interest in maintaining the longstanding working relationship between Federal land management agencies and public land ranchers. The proposed Forest Service Groundwater Directive is one of critical concern for farmers and ranchers, particularly those in the West where public land grazing is a vital component of rural economies. As a matter of law and process, this appears to be an effort by the Administration to grant itself unprecedented control over waters of the states and ultimately, greater control over the natural resources in the West.

It is no secret that the Forest Service has long sought to expand Federal ownership of water rights in the western United States, and in recent years has repeatedly attempted to circumvent state water rights and appropriation laws. There is no provision in Federal law authorizing or permitting the Forest Service to compel owners of lawfully acquired water rights to surrender those rights to the United States.

The Farm Bureau's opposition of the Proposed Directive is based on the government's lack of legal authority to regulate groundwater. The Directive's attempt to expand Federal authority through an interconnectivity clause and its authorization of action is in violation of the takings clause of the United States Constitution.

Despite the Forest Service citing the Organic Act and the Weeks Act to justify the Directive, the Forest Service does not have the authority to approve or disapprove uses of waters which are granted under state water.

Inexplicably, the Forest Service also points to the Clean Water Act as a source of legal authority for the Directive. There is no explanation of how the Clean Water Act applies to this Directive or how sections 303, 401, 402, or 404 of the Clean Water Act provide any legal authority to the Forest Service to regulate groundwater. The Groundwater Directive proposes a new standard of interconnectivity by proposing to "manage surface water and groundwater resources as hydrologically interconnected and consider them interconnected in all planning and evaluation activities." This presumption implies that the agency has authority to manage, monitor, and mitigate water resources on all National Forest Service lands. Further, the Directive expands the Forest Service regulatory scope of groundwater resources to a watershed-wide scale including both Forest Service lands and adjacent lands and private lands.

The Forest Service's attempt to use controversial Clean Water Act terminology, such as *hydrologic connection*, to establish its authority over water rights is misplaced and unlawful. In fact, the Supreme Court specifically rejected the, "any hydrological connec-

tion approach” to Federal jurisdiction in the *Rapanos* decision. While publicly, the Forest Service claims the Directive would not infringe on the states’ authority, nor impose requirements on private landowners, the facts speak otherwise. The Directive specifically states that the agency is: “to evaluate all applications to states for water rights on National Forest lands and application for water rights on adjacent lands that could adversely affect National Forest Service groundwater resources and identify potential injury to those resources.” This language dangerously attempts to expand Federal authority in approving state-granted water rights. This assumption of Federal authority violates Federal and state statutes and will ultimately upset water allocation systems and private property rights on which western economies have been built. With the exception of certain federally reserved rights, the states own and manage water within their jurisdictions. Farm Bureau supports the present system of appropriated water rights through state law and opposes any Federal preemption of state water law.

Last, the Directive would authorize actions that would violate the takings clause of the United States Constitution. Under the Forest Service terms and conditions, the agency will now be able to require holders of water rights with permitted activities on System lands to comply with the water clause and to hold their water rights jointly with the United States. Further, there is no reference in the Directive to the government’s obligations to pay just compensation for the surrender to the government of privately held water rights, legally adjudicated by the state. Water rights as property rights cannot be taken without just compensation and due process of law. Through statute and years of well-established case law, states have developed a system that fairly appropriate often scarce water resources to users. Because water is the lifeblood of all farm and ranch operations, we are concerned that the Federal Government continues to grossly and willfully ignore the established system of water rights, even after continued assurances it would respect them.

On behalf of Farm Bureau and tens of thousands of farmers and ranchers in the West who depend on state-granted water rights, I want to thank you again for addressing this important issue and ask for your help in influencing and urging the Forest Service to withdraw this Directive. I will be pleased to respond to questions from Members of the Committee. Thank you.

[The prepared statement of Mr. Shawcroft follows:]

PREPARED STATEMENT OF DON SHAWCROFT, PRESIDENT, COLORADO FARM BUREAU,
CENTENNIAL, CO

Chairman Thompson, Ranking Member Walz, Members of the Subcommittee, thank you for holding this hearing. My name is Don Shawcroft. I am a rancher from the San Luis Valley in Colorado. I am President of the Colorado Farm Bureau and also serve as a board member of the American Farm Bureau Federation, the nation’s largest agricultural organization representing farmers and ranchers who produce virtually every agricultural product grown or raised commercially in the United States. Farm Bureau has a strong interest in ensuring that the longstanding relationship between Federal land management agencies and public land ranchers is maintained, and I am pleased to offer this testimony this morning on behalf of our organization.

The subject of today’s hearing is one of critical importance for farmers and ranchers, particularly those in the west where public land grazing is a vital component

of rural economies and where it provides tremendous opportunities for American ranchers. Public benefits provided by science-based grazing management include thriving, sustainable rangelands, quality watersheds, productive wildlife habitat, viable rural economies, reduction of wildfire hazards, and tax base support for critical public services. The proposed Groundwater Resource Management Directive (Directive) has raised substantial concerns for two reasons. Number one, as a matter of law and process, it appears to be an effort by the USDA Forest Service (Forest Service) to grant itself, through an administrative proceeding, more authority than it has been granted by Congress.

Should it succeed in this attempt, an agency of the Federal Government would gain unprecedented control over waters of the states through a purely administrative action, thus giving the Forest Service greater control over the natural resources in the West. Second, on substantive grounds, if this directive were to become effective, we believe it holds the potential to significantly—and detrimentally—impact the livelihood of farmers and ranchers.

In recent years the Forest Service repeatedly has attempted to circumvent state water rights and appropriation laws. There is no provision in Federal law authorizing or permitting the Forest Service or the Bureau of Land Management to compel owners of lawfully acquired water rights to surrender those rights or to acquire them in the name of the United States.

U.S. farmers play a significant role in feeding seven billion people in our world today and contribute to the financial well-being of our country. Farm Bureau has identified a number of specific concerns related to the formalization of the proposed directive that would specifically impact landowners, farmers and ranchers. We are urging the Forest Service to withdraw the proposed groundwater resource management directive and hope the efforts of your Committee will help us in this respect.

Ongoing Conflict in Colorado

It is no secret that the Forest Service has long sought to expand Federal ownership of water rights in the western United States. In an August 15, 2008, Intermountain Region briefing paper addressing applications, permits or certificates filed by the United States for stock water, the agency claimed, “It is the policy of the Intermountain Region that livestock water rights used on National Forest grazing allotments should be held in the name of the United States to provide continued support for public land livestock grazing programs.” Further, another Intermountain Region guidance document dated August 29, 2008, states, “The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting these claims, it is not known whether or not these claims will be recognized as water rights.” During a Subcommittee on National Parks, Forests and Public Lands hearing on March 12, 2012, the Forest Service testified, “The Forest Service believes water sources used to water permitted livestock on Federal land are integral to the land where the livestock grazing occurs; therefore, the United States should hold the water rights for current and future grazing.” Last, the Forest Service recently proposed new policy to be included in the U.S. Forest Service manual concerning ski area water rights. This proposal, which is currently under consideration by the agency, would direct the Forest Service to require the transfer of privately held water rights to the Federal Government as a condition of a permit’s renewal.

These conflicts have placed Colorado at the center of the ongoing conflict over water rights with the Federal Government. Once the Forest Service began putting pressure on Colorado ski resorts to sign over water rights in exchange for receiving special use permits, it was only a matter of time before agriculture appeared in the cross-hairs of the Forest Service as well.

While the agency contends that the new ski area permit condition will not require the transfer of water rights, the facts speak otherwise. Forest Service manual 2441.32 (Possessory Interests), which is currently being enforced, instructs the agency to continue to claim the water rights of permittees. Specifically, section 2541.32 of the 2007 Forest Service Water Uses and Development Manual directs:

“Claim possessory interest in water rights in the name of the United States for water uses on National Forest System lands as follows:

1. Claim water rights for water used directly by the Forest Service and by the general public on the National Forest System.
2. Claim water rights for water used by permittees, contractors, and other authorized users of the National Forest System, to carry out activities related to multiple use objectives. Make these claims if both water use and water development are on the National Forest System and one or more of the following situations exists:

- a. National Forest management alternatives or efficiency will be limited if another party holds the water right.
- b. Forest Service programs or activities will continue after the current permittee, contractors or other authorized user discontinues operations.”¹

Documents obtained from the Forest Service website concerning *Ski Area Permit and the Water Rights Clause* state, “Clauses in special use permits specify the terms and conditions with which the permit holder must comply, and a permittee’s failure to abide by them can be cause for suspension or revocation of the permit.” If the USFS is willing to say one thing and do another on the requirement of transfer of water rights for the ski areas, how long will it be before special use permits for grazing will also contain the requirement to sign over water rights? Moreover, will future non-compliance in the relinquishment of water rights to the government be used by the Forest Service as a tool to reduce grazing on public lands?

AFBF and Colorado Farm Bureau see these Forest Service actions as another example of Federal overreach and a violation of private property rights. To this end, we strongly support legislation introduced by Representative Scott Tipton (H.R. 3189), which passed the House of Representatives on March 3, 2014. This legislation would ensure those who hold water rights yet utilize Federal lands through BLM or Forest Service permits that their lawfully acquired rights will not be abridged and that Federal agencies may not unlawfully use the permit process to acquire rights they do not currently possess. Most importantly, that legislation does not abridge *anyone’s* rights—those of individuals, the states or the Federal Government. It is simply a reaffirmation of longstanding Federal policy. We are hopeful that the Senate will take up and pass this important legislation.

Concurrently, the State of Colorado has worked to advance two pieces of legislation, H.B. 13–1009 and H.B. 14–1028,² that would have prevented the Federal Government from obtaining water rights through coercion and placed restrictions on the Federal Government if it did obtain water rights. Unlike many other western states, the Colorado water courts adjudicate water rights in the first instance without any administrative, water rights permitting system, resulting in much water rights litigation.³ The mere fact that a state would move in an attempt to prevent the Forest Service from completing its action should show that the Forest Service’s actions are concerning.

At the same time that the agency sought to take water rights from Federal ski area permit holders, the Forest Service introduced its proposed Groundwater Directive in the Federal Register on July 31, 2014. While Forest Service Chief Tom Tidwell claimed, “The goal is to improve the quality and consistency of our approach to understanding groundwater resources on National Forest System lands, and to better incorporate consideration of those resources to inform agency decision-making,” it conveniently included a number of the same provisions aimed at transferring privately held water rights to the Federal Government and greatly expanding its regulatory control of groundwater, which is controlled by the states.

Lack of Legal Authority

One of our primary criticisms of the proposed Groundwater Directive is that the agency lacks legal authority to regulate groundwater in the manner proposed by the Forest Service. The Organic Administration Act of 1897 (Organic Act) vests the Forest Service with the authority to manage surface waters under certain circumstances. The statute provides no authority for management of groundwater. Nor does the Multiple-Use Sustained-Yield Act of 1960 (MUSYA) provide the agency with authority over groundwater. That statute merely provides “that watershed protection is one of five co-equal purposes for which the NFS lands were established and are to be administered.” 2560.01(1)(f). See *United States v. New Mexico*, 438 U.S. 696, 713 (1978).

The Forest Service cites several statutes, including the Organic Act, the Weeks Act and MUSYA, to frame its expansive regulatory view in seeking authority to manage groundwater. The agency incorrectly interprets the purposes for which water is reserved as a provision of the Organic Act. The Organic Act simply authorizes the Forest Service to manage the land, vegetation and surface uses. The Act does not provide authority to manage or dispose of the groundwater or surface waters of the states based on the agency declared “connectivity.”

¹ <http://tipton.house.gov/press-release/tipton-forest-service-waging-multiple-assaults-water-rights>.

² <http://www.leg.state.co.us/CLICS/CLICS2014A/csl.nsf/BillFoldersAll?OpenFrameSet>.

³ <http://www.justice.gov/enrd/3245.htm>.

The Weeks Act states, “The Secretary of Agriculture is hereby authorized and directed to examine, locate, and purchase such forested, cut-over, or denuded lands within the watersheds of navigable streams as in his judgment may be necessary to the regulation of the flow of navigable streams or for the production of timber.” 16 U.S.C. § 515. The Forest Service inappropriately attempts to use this reference of “navigable streams” to include regulation of groundwater, which is not referenced in the Weeks Act.

The United States Supreme Court has gone to great lengths to bring clarity to the scope of the Organic Act’s determination that Federal authority extends only to prudent management for surface water resources. In *United States v. New Mexico*, the Court defined prudent management to:

- (1) “secure favorable water flows for private and public uses under state law,” and
- (2) “furnish a continuous supply of timber for the people.”

The agency authority is narrowed to proper management of the surface to achieve the specific purpose of the Organic Act—not the direct management of the groundwater and agency-declared interconnected surface waters. MUSYA does not expand the reserved water rights of the United States. *United States v. New Mexico*, 438 U.S. 696, 713 (1978). Additionally, the court denied the Forest Service’s instream flow claim for fish, wildlife and recreation uses. Specifically, the court denied the claim on the grounds that reserved water rights for National Forest lands established under the Forest Service’s Organic Act of 1897 are limited to the minimum amount of water necessary to satisfy the primary purposes of the Organic Act—conservation of favorable water flows and the production of timber—and were not available to satisfy the claimed instream flow uses.⁴

Inexplicably, the Forest Service also points to the Clean Water Act as a source of legal authority and direction for the directive. 2560.01 There is no explanation of how the Clean Water Act applies to this directive or how sections 303, 401, 402 or 404 of the Clean Water Act (cited in the directive) provide any legal authority to the Forest Service to regulate groundwater. The Clean Water Act does not even grant the Federal Government jurisdiction over groundwater. At a minimum, Federal agencies must provide a modicum of justification for any claim of legal authority, particularly when the Forest Service has no authority whatsoever to implement the Clean Water Act.

Expansion of Federal Authority through Interconnectivity Clause

The directive proposed a new standard of interconnectivity [2560.03(2)] by proposing to “manage surface water and groundwater resources as hydraulically interconnected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise using site-specific information.” Presuming that all groundwater and surface waters are interconnected implies the agency has authority to manage, monitor and mitigate water resources on all NFS lands. This assumption of Federal authority violates Federal and state statutes and will ultimately upset water allocation systems and private property rights on which western economies have been built. In an era of limited Federal budgets, this attempt to expand the reach of the agency into individual and state activities is particularly inappropriate.

Whether or not water is “connected” is not the sole, or even most critical, factor for asserting regulatory authority. The Forest Service’s attempt to use extremely controversial Clean Water Act terminology such as any “hydrological connection” to establish its authority over water rights is totally misplaced and unlawful. In fact, the Supreme Court specifically rejected the “any hydrological connection” approach to Federal jurisdiction. *Rapanos et ux., v. United States* 547 U.S. 715 (2006).

Further, the directive expands current Forest Service regulatory scope of groundwater resources to a watershed-wide scale, including both Forest Service lands and adjacent non-Federal lands. Specifically, the new policy states the agency will, “evaluate and manage the surface-groundwater hydrological system on an appropriate spatial scale, taking into account surface water and groundwater watersheds, which may or may not be identical and relevant aquifer systems,” and “evaluate all applications to states for water rights on NFS lands and applications for water rights on adjacent lands that could adversely affect NFS groundwater resources, and identify any potential injury to those resources or Forest Service water rights under applicable state procedures (FSM 2541).” This is an unprecedented attempt to expand Federal authority in approving state-granted water rights.

⁴<http://www.justice.gov/enrd/3245.htm>.

With the exception of federally reserved rights that are specifically set out either in statute or recognized by the courts, the states own and manage the water within their jurisdictions. The manner in which states regulate water rights differs substantially, particularly between western states, where the appropriation doctrine is common, and eastern states where the riparian system is in more general use. Farm Bureau supports the present system of appropriation of water rights through state law and opposes any Federal violation or preemption of state water law. Water rights as property rights cannot be taken without compensation and due process of law. There is no legal or policy basis for the Forest Service to insert itself in this regulatory arena by attempting to use the permitting process to circumvent state water law or force existing water rights holders to relinquish their rights.

Without clear Congressional authorization, Federal agencies may not use their administrative authority to “alter the Federal-state framework by permitting Federal encroachment upon traditional state power.” In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

Although *SWANCC* was decided in the context of the Clean Water Act, the legal principle is the same: Federal agencies must have clear Congressional direction before altering the balance of Federal and state authorities. The Forest Service has none here. It is clear that by proposing to manage the groundwater resources and interconnected surface waters within the states on a massive watershed basis, the Forest Service’s proposed directive exceeds the agency’s statutory authority and seeks to redefine the Federal-state framework. The manner in which the directives insert the Forest Service in the evaluation of “all applications to states for water rights on NFS lands and applications for water rights on adjacent lands” (FSM 2560.03(6)(f)), contravenes this federally established system of deferral to the states. The Forest Service cannot and should not act where Congressional authority has not been granted to it.

Constitutional Takings Violation

The directive would authorize actions that would violate the takings clause of the United States Constitution. The 5th Amendment provides protections for citizens from government takings of private property without just compensation. The directive provides that the Forest Service would be required to “obtain water rights under applicable state law for groundwater and groundwater-dependent surface water needed by the Forest Service (FSM 2540)” and “[Require] written authorization holders operating on NFS lands to obtain water rights in compliance with applicable state law, FSM 2540, and the terms and conditions of their authorization.”

Requiring written authorization for permitted uses including livestock grazing on NFS lands provides a vehicle for the agency to obtain water rights based on the permittee’s agreement to comply with the “terms and conditions of the conditional use authorization.” Under the Forest Service’s terms and conditions [FSM 2541.32], the agency will now be able to require holders of water rights with permitted activities on system lands to comply with the water clause and to hold their water rights “jointly” with the United States. Further, there is no reference in the directive to the government’s obligation to pay just compensation for the surrender to the government of privately held water rights legally adjudicated by the state.

We believe in the American private, competitive enterprise system in which property is privately owned, privately managed and operated for profit and individual satisfaction. Any action by government that diminishes an owner’s right to use his property constitutes a taking of that owner’s property. We oppose any government entity taking private property by adverse possession without just compensation.

Through statute and years of well-established case law, states have developed systems to fairly appropriate often scarce water resources to users. Because water is the lifeblood for all farm and ranch operations, we are outraged that the Federal Government continues to grossly and willfully ignore the established system of water rights, even after continued assurances it would respect them.

On behalf of Farm Bureau and tens of thousands of farmers and ranchers in the west who depend on our water rights, I want to thank you again for inviting us to testify on this important issue. I will be pleased to respond to questions from Members of the Committee.

The CHAIRMAN. Thank you, Mr. Shawcroft. Now I am pleased to welcome our third and final panelist for this hearing. Mr. Verhines, go ahead, sir. You have 5 minutes.

**STATEMENT OF SCOTT A. VERHINES, P.E., NEW MEXICO STATE
ENGINEER, SANTA FE, NM**

Mr. VERHINES. Good morning, Chairman Thompson, Members of the Committee. Thank you for the invitation to testify here today. As the State Engineer, I hope to provide you with one western state's perspective on this issue as the senior water management official in New Mexico.

In the business of water administration in the West, our words and the terminologies we use have meaning, and the context in which they are used is important. They can raise red flags as the Proposed Directive has done here with our agency in our state.

My overarching concern simply put is that the Forest Service lacks the authority to manage New Mexico's groundwater or to place any conditions on the exercise of private property rights to the use of groundwater established under New Mexico law. Under New Mexico law, the State Engineer is charged with the supervision of all waters, including groundwater within the boundaries of the state and the measurement, appropriation, and distribution thereof, responsibilities we take very seriously and we do all day, every day. Consequently, we will engage directly on any apparent assertion of new authority by another agency over groundwater or over private holders of groundwater rights developed under state law.

The Proposed Directive begins with the stated objective to manage groundwater underlying NFS lands cooperatively with the states, suggesting that the Service has equal authority with the states to manage groundwater. None of the statutes or other authorities cited in the Proposed Directive provides such authority.

The term *NFS groundwater resources* repeated frequently throughout the Proposed Directive is ambiguous. It could refer to groundwater rights that the Forest Service may hold or suggest all state groundwater resources beneath Forest Service lands.

The Forest Service also lacks any authority to regulate the diversion and use of groundwater or to impose conditions on the exercise of rights to use groundwater developed under New Mexico law. While the Forest Service does have the authority to include conditions to protect Federal resources in special use permits governing the use of Federal lands, New Mexico's groundwater is not such a resource.

Any Proposed Directive should state unequivocally that all rights to the diversion and use of groundwater established under state law are private property rights that must be recognized by the Forest Service and may not be restricted or limited by provisions in any special use permit by the Service. The Service also has no authority over the process by which any state issues groundwater rights, and the Service therefore may not dictate how the New Mexico water permitting process proceeds or when it begins. New Mexico system of water rights administration provides water right owners with certainty upon which they can make appropriate technical and financial decisions. Under New Mexico water law, once a water right is established by beneficial use, it can only be lost by common-law abandonment, statutory forfeiture, or failure to comply with permit conditions. The adjudication or permitting of water rights under New Mexico law affords the Service full oppor-

tunity to challenge the nature and extent of groundwater rights that originate within National Forest lands.

As a pertinent example, and we are dealing with this one today, the Village of Ruidoso, New Mexico, is already experiencing an attempt by the Forest Service to limit the amount of water they may divert under existing groundwater rights for wells located within National Forest lands. The village is currently in the process of renewing its special use permit for municipal wells within the Lincoln National Forest. The Service has proposed to dramatically cut back the quantity of water that the village may divert and use in order to protect aquatic habitats, streamside recreational uses, and other water uses that are not recognized as part of the Lincoln National Forest Federal reserve water right.

I am particularly concerned about the Proposed Directive's instruction to Forest Service officials to assert claims for Federal reserve water rights to groundwater in state water rights' adjudications and administrative proceedings. To our knowledge, no Federal court has ever recognized a Federal reserved right to groundwater.

I urge the Service to work with my office to establish or obtain under New Mexico State water law whatever groundwater rights are necessary to support the Service's activities.

While we can appreciate the Forest Service's interest in the protection of groundwater resources, for over 5 decades New Mexico has developed an exclusive and a comprehensive administrative process to conjunctively manage our state's surface water and groundwater.

In conclusion, in the business of water administration in the West, our words and terminologies have meaning, and they are a very important meaning and they have potential consequences. I urge the Forest Service to withdraw the Proposed Directive and to address through New Mexico State water law the Service's interest in protecting groundwater resources within our state. Mr. Chairman, thank you for the opportunity to be here today.

[The prepared statement of Mr. Verhines follows:]

PREPARED STATEMENT OF SCOTT A. VERHINES, P.E., NEW MEXICO STATE ENGINEER,
SANTA FE, NM

Thank you for the opportunity to testify today regarding the U.S. Forest Service's Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560, published on May 6th in the *Federal Register*. As the New Mexico State Engineer, I am able to provide you with our perspective as the state's top water management official on this proposed directive.

My principal concern regarding the Proposed Directive is that the United States Forest Service lacks authority to manage New Mexico's groundwater or to place any conditions on the exercise of property rights to the use of groundwater established under New Mexico law. Under well-settled Federal and state law, the State of New Mexico has primary and exclusive authority over all groundwater within New Mexico's borders. Our state Legislature has delegated to the State Engineer the authority to implement the New Mexico law of prior appropriation for the state's waters, including groundwater. Nevertheless, despite New Mexico's long-standing primacy over groundwater within the state, the Proposed Directive appears to be based on the mistaken premise that the Forest Service has authority to manage groundwater and purports to allow Forest Service officials to impose conditions or otherwise limit the exercise of state-based water rights on Forest Service lands within New Mexico.

The 1877 Desert Lands Act severed all non-navigable waters in the public domain from the land itself and left those waters to the control of the territories and states for appropriation for beneficial use. The U.S. Supreme Court in the 1935 *California*

Oregon Power Co. case confirmed that after the 1877 Act all non-navigable waters, including groundwater, were subject to the plenary control of the territories and their successor states. Federal law has been clear for nearly a century that the states have primary and exclusive authority over the allocation, administration, and development of all groundwater within their borders.

The New Mexico water code declares all undergroundwater within the state to belong to the public and to be subject to appropriation for beneficial use. NMSA 1978, § 72-12-1 (2003). Our Supreme Court has ruled that the State of New Mexico owns all surface water and groundwater within its boundaries:

All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use The state as owner of water has the right to prescribe how it may be used.

State ex rel. Erickson v. McLean, 62 N.M. 264, 271, 308 P.2d 983, 987 (1957); see also *Holquin v. Elephant Butte Irrigation Dist.*, 91 N.M. 398, 402, 575 P.2d 88, 92 (1977) (“[W]ater belongs to the state which authorizes its use. The use may be acquired but there is no ownership in the corpus of the water”); *Tri-State Generation and Transmission Ass’n, Inc. v. D’Antonio*, 2012-NMSC-039, ¶ 14 (“a water right is a limited usufructuary right”).

Under New Mexico law, the State Engineer is charged with the supervision of all waters, including groundwater, within the boundaries of the state, and the measurement, appropriation, and distribution thereof. NMSA 1978, § 72-2-1 (1982). The State Engineer seeks to judiciously and consistently manage the state’s surface and groundwater resources and administer the rights to use those resources. The State Engineer administers water rights based upon Federal and state court decrees, permits and licenses issued by the State Engineer, and declarations of water rights filed with the State Engineer. As the state official to whom the New Mexico Legislature has delegated broad authority over New Mexico’s water, including groundwater beneath Federal lands, the State Engineer has a particular interest in any apparent assertion of new authority by the Forest Service over New Mexico groundwater or over private holders of groundwater rights developed under state law.

The Proposed Directive begins with the stated objective “[t]o manage groundwater underlying NFS lands cooperatively with states” Section 2560.02(1). This statement suggests that the Forest Service has equal authority with the states to manage groundwater. In actuality, the Forest Service lacks any authority to manage groundwater, let alone authority co-equal with that of the states. None of the statutes or other authorities cited in Section 2560.01 provides such authority.

The term “NFS groundwater resources,” repeated frequently throughout the Proposed Directive (see, e.g., §§ 2560.02(2) and (3); 2561(2)), demonstrates the ambiguity and confusion of authority underlying the Directive. This term is not defined. It could refer to groundwater rights that the Forest Service may hold, or to all state groundwater resources beneath Forest Service lands. This confusion is caused by the possessive modifier “NFS,” which incorrectly implies Forest Service ownership of or authority to manage groundwater underlying Forest Service lands. This, of course, is directly contrary to the recognition by Congress and the Supreme Court that the states own and have exclusive authority to manage and regulate all groundwater within their borders. Unless the Forest Service obtains a right to divert and use New Mexico groundwater under state law, it has no right to use or claim any ownership interest in the groundwater resources underlying Forest Service lands in New Mexico simply by virtue of its ownership of those lands. As a result, the term “NFS groundwater resources” should be specifically defined to include only those groundwater resources in which the Forest Service has obtained a legal interest under state water law.

The Forest Service also lacks any authority to regulate the diversion and use of groundwater or to impose conditions on the exercise of rights to use groundwater developed under New Mexico law. Nonetheless, the Proposed Directive appears based on the assumption that the Forest Service has such authority. For example, Section 2562.1(3) directs Forest Service officials, when issuing or reissuing an authorization, to require implementation of water conservation strategies to limit total water withdrawals as deemed appropriate by the authorized officer. In addition, the Proposed Directive asserts that the Forest Service has the continuing authority to impose conditions on the exercise of state law-based groundwater rights developed on Forest Service lands. Specifically, Section 2563.7(2) directs that any new or re-issued authorization involving a groundwater well provide for modification of the authorization at the sole discretion of the authorized officer if deemed necessary to

prevent groundwater withdrawals from significantly reducing the quantity of surface or groundwater on NFS lands.

These provisions would interfere with the ability of water right owners to exercise the property rights to the use of groundwater that they have established under New Mexico law. While the Forest Service has the authority to include conditions to protect Federal resources in special use permits governing the use of Federal lands, New Mexico's groundwater is not such a resource. The assertion in the Proposed Directive of continuing authority for the Forest Service to reevaluate and impose additional restrictions on the exercise of New Mexico groundwater rights threatens to undermine the finality of water rights decisions made by the courts and the State Engineer by requiring water right owners to continue to submit to the Forest Service in order to exercise those property rights. The Proposed Directive should state unequivocally that all rights to the diversion and use of groundwater established under state law are property rights that must be recognized by the Forest Service and may not be restricted or limited by provisions in any special use permit issued by the Service.

New Mexico's system of water rights administration provides water right owners with certainty upon which they can make appropriate financial decisions. Under New Mexico water law, once a water right is established by beneficial use it can only be lost by common law abandonment, statutory forfeiture, or failure to comply with permit conditions. Contrary to Federal and state law, the Proposed Directive attempts to give the Forest Service the power through its periodic special use permitting process to modify or even cancel the ability of a groundwater right owner to exercise their property right. Under the Proposed Directive, the right to continue to divert and use groundwater would be dependent not just upon beneficial use, but also upon periodic review by Forest Service officials. This would create instability and uncertainty that would be unacceptable for New Mexico and its groundwater rights owners.

Provisions such as Sections 2562.1(3) and 2563.7(2) also would interfere with the State Engineer's exclusive authority to administer property rights to New Mexico groundwater. Policy directives, especially those that seek to impose additional administrative processes relating to groundwater, have a direct impact on the State Engineer's administration and management of water within New Mexico. The Proposed Directive attempts to establish an additional layer of administrative oversight over groundwater that would duplicate parts of the State Engineer's existing comprehensive system of administration for groundwater rights. This would generate uncertainty and confusion and undermine New Mexico's primary and exclusive authority over groundwater.

Section 2563.2(1) provides: "[w]hen a state-issued water right or one or more state or local approvals are needed for a water development, the process for securing state water permits, licenses, registrations, certificates, or rights should proceed concurrently with the Forest Service process for authorizing use and occupancy of NFS lands for a water development." The Forest Service has no authority over the process by which any state issues groundwater rights, and the Service may not dictate when the New Mexico water permitting process begins or how it proceeds.

The adjudication or permitting of water rights under New Mexico law affords the Forest Service the full opportunity to challenge the nature and extent of groundwater rights that originate within National Forest lands. The water right determinations that have been made by the adjudication courts or by final determinations of the State Engineer are final, and can only be modified by reopening the appropriate court proceedings or the State Engineer's administrative process. The Proposed Directive would impermissibly undermine the finality of water rights determinations made under New Mexico law.

New Mexico is already experiencing an attempt by the Forest Service to limit the amount of water that a municipality may divert under existing groundwater rights for wells located within National Forest lands. The Village of Ruidoso, New Mexico is currently in the process of renewing its special use permit for municipal wells within the Lincoln National Forest. The Forest Service has proposed additional pumping restrictions that would dramatically cut back the quantity of water that the Village could divert and use under its existing groundwater rights. The Service has proposed these new restrictions in order to protect aquatic habitat, streamside recreational uses, and other water uses that are not recognized as part of Lincoln National Forest's Federal reserved water right. This attempt to impose new limitations on the quantity of water rights that were previously adjudicated by the courts and permitted by the State Engineer threatens the finality of those judgments and decisions, and undermines my authority to administer water rights within New Mexico.

Finally, I am also particularly concerned about the Proposed Directive's instruction to Forest Service officials to assert claims for Federal reserved water rights to groundwater in state water rights adjudications and administrative proceedings. No Federal court has ever recognized a Federal reserved right to groundwater. For the Forest Service to begin asserting such claims now would be especially controversial and highly disruptive to New Mexico's long-running efforts to conclude the adjudication of water rights within the state. I urge the Service to work with my office to establish or obtain under New Mexico state water law whatever groundwater rights are necessary to support the Service's activities.

While New Mexico appreciates the interest of the Forest Service in the protection of groundwater resources, over the past half century New Mexico has developed an exclusive and comprehensive administrative process to conjunctively manage our state's surface water and groundwater. All groundwater within the state is subject to the State Engineer's jurisdiction and administrative process. New Mexico has been a leader among the western states in the prevention of increased depletions to stream flows caused by groundwater withdrawals. My decisions regarding the administration of groundwater across the state are guided by the technical expertise of our team of highly respected hydrologists employed by our agency's Hydrology Bureau.

In conclusion, I urge the Forest Service to withdraw the Proposed Directive and to address through New Mexico state water law the Service's interest in protecting groundwater resources within New Mexico. Thank you for the opportunity to present this testimony to the Committee.

The CHAIRMAN. Well, thank you very much. Thank you to all the witnesses. I guess I will recognize myself first. I am very appreciative of the Members of the Subcommittee. We had a good turnout for this hearing. I think that shows the interest, the intensity of the interest. Also I know that we have rather intense schedules here. So the fact that we did have a majority, large majority of Members on both sides at this hearing is very much appreciated.

Mr. Verhines, I want to start with you. Just a couple of questions for each of our three witnesses. As a state official, how do you suggest that the United States Forest Service would work in better cooperation with the states?

Mr. VERHINES. Mr. Chairman, thank you for that question. We have a lot of interaction with the Forest Service around New Mexico over a wide variety of water and watershed health issues, much of which you have talked about this morning. The wildfires have been devastating in New Mexico over many years. I think as I suggested in my testimony is that we have great opportunity to work on issues. Within the state's water law process, there is ample opportunity for the Forest Service to interact with other water right holders. We have a process in place to do that. We have ongoing meetings and dialogue. I think a Memorandum of Agreement, Memorandum of Understanding that came up earlier in the testimony today is a great opportunity for us to get on a similar page.

The CHAIRMAN. Very good. Now, you represent a significant portion of—let me see here. Let me go to Mr. Willardson next.

You state in your testimony that the Directive requires special use permit holders to meter and report their groundwater use which may be expensive and could run counter to some state laws. Can you elaborate on the statement, and is this even a feasible or realistic requirement?

Mr. WILLARDSON. Metering wells can cost anything from a few hundred dollars to over a thousand dollars or more, and that is a challenge and many states do not have authority to require that under state law, and we would question the Forest Service's ability to be able to do that as well. I would point out, too, that domestic

wells are exempted in many cases from state requirements. There are other areas and the groundwater law varies by state. But in some areas such as Arizona, the overlying landowner does own the subsurface rights as far as groundwater and can pump groundwater.

So the variation in the state laws between surface and groundwaters is something that is important. It needs to be noted as part of the process and again pointing out that the Forest Service can apply for rights in addition to whatever reserve rights it may have for its primary purposes and that that is an—even that, the assertion of reserve rights is a process that goes through a state adjudication. And that can be very contentious. And if the Forest Service has needs, there are ways to meet those needs. You mentioned already the Montana Compact that looks at in-stream flows and other issues. Specific to groundwater resources, I would provide an example in the State of Utah that involves not the Forest Service but the Park Service in Zion National Park. And one of the features, there are weeping walls from the sandstone that are fed by upstream groundwater. And rather than claim a reserve right, the Park Service working with the state reached an agreement where the state will limit future groundwater development in order to protect the park resources which obviously are important to all of us.

The CHAIRMAN. Thank you. Mr. Shawcroft, you were particularly adamant on the point that the Forest Service does not have the legal authority to move forward with this Directive under the Clean Water Act or any other existing law. In this context, can you discuss some of the key court decisions concerning water use over the past decade or so?

Mr. SHAWCROFT. I think there are certainly the cases that have been decided by the Supreme Court regarding—waters of the United States are reflective of what extension there is trying to be forced as far as Federal jurisdiction over water rights. What concerns me in particular is some of the things that have happened recently regarding the Forest Service and their extension of authority over water rights. A number of years ago the Grand Mason Christian Association, which has a campground in Colorado, had a well that had gone dry. They needed a replacement well. They were forced by the Forest Service as a condition of their special use permit and renewal to place that well in the name of the Forest Service. Similar cases occurred as have been mentioned many times today about the ski resorts. There in fact have been ski resorts in Colorado that as a condition of their renewal of those special use permits again, that they sign that water right over to the Forest Service. This is definitely a tremendous concern, and it appears to me that there is definitely a conflict of vision of what these water rights are.

In the Colorado and certainly in much of the western states as has been mentioned, a water right is a property right. It is a personal property right, and in fact, it is tied to the beneficial use of that water in the State of Colorado. When that beneficial use of that water for that particular beneficial use is no longer employed, used, in that manner, that water right is not then automatically available to be used for some other public good. In Colorado, as I

mentioned in many western states, it is not for the public to decide how that water right is used. Tremendous distinction and tremendous important distinction of the difference between a water right and the water itself, recognizing in the State of Colorado, even the Constitution of the State of Colorado says that the water belongs to the citizens, but the right to put that use to beneficial use and because of the scarcity of water in the West, that being put to beneficial use is incredibly important. That is why we have the prior appropriation doctrine, that those who put that water to use first have the continued first right to put that in use.

I am sorry if that doesn't seem to address exactly the Court decisions, but those Court decisions have come through our water court system in the State of Colorado and certainly in many states to the West.

The CHAIRMAN. Very good. Thank you. Thank you to all three of you, gentlemen. I very much appreciate your taking the time and the difficulty it takes to come to the capital city to provide testimony. I very much appreciate it. I would ask that if Members of the Committee have additional questions that they could forward, if you would consider responding to those, and that would be very much appreciated. And it would—

Mr. SHAWCROFT. We would welcome that opportunity, Mr. Chairman.

The CHAIRMAN.—help us as we continue to provide oversight and look at this. And before we adjourn, I want to thank our witnesses. I also want to take the opportunity to thank Chief Tidwell. I am not surprised but very appreciative of the fact that he stayed for this second panel because I think that is reflective of the Chief's dedication to try to make the right decisions and to get information, we hope new information. So Chief, thank you very much for taking the time to do that. It is greatly appreciated.

Under the rules of the Committee, the record of today's hearing will remain open for 10 calendar days to receive additional material and supplementary written responses from witnesses to any questions posed by a Member. This Subcommittee on Conservation, Energy, and Forestry hearing is now adjourned.

[Whereupon, at 12:01 p.m., the Subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

SUBMITTED QUESTIONS

Questions Submitted by Hon. Glenn Thompson, a Representative in Congress from Pennsylvania

Response from Thomas L. Tidwell, Chief, U.S. Forest Service, U.S. Department of Agriculture

December 17, 2014

Hon. GLENN THOMPSON,
 Chairman,
 Subcommittee on Conservation, Energy, and Forestry, House Committee on Agriculture,
 Washington, D.C.

Dear Chairman Thompson:

Enclosed please find the responses to the questions for the record submitted by the Subcommittee on Conservation, Energy, and Forestry following the September 10, 2014, oversight hearing on "To Review the Forest Service Proposed Groundwater Directive."

If you have any additional questions, please contact Jacqueline Emanuel, Forest Service, Legislative Affairs Specialist at [Redacted] and [Redacted].

Sincerely,



DOUGLAS W. CRANDALL,
 Director, Legislative Affairs.

ATTACHMENT

Question 1. Given the Forest Service statement that this proposed directive would establish new policies and procedures, why didn't the agency propose a regulation using the Administrative Procedure Act rather than this directive? What are the implications of the two approaches?

Answer. See response to *Question 2*.

Question 2. Given the USFS statement that this proposed directive would establish new procedures, and that it appears to impose new requirements on authorization holders, why didn't the agency propose a regulation using the Administrative Procedure Act rather than this directive? What are the implications of the two approaches?

Answer. When an agency such as the Forest Service is establishing its own internal procedures relating to managing public property, the Administrative Procedures Act (APA) does not require the agency to do so through formal regulations. (5 U.S.C. 553(b)(B)). When regulations are not specifically required by the APA or other agency statutes or regulations, the Forest Service has the discretion to develop either directives or regulations. Without a controlling requirement, existing agency regulations (36 CFR 200.4(b)) indicate that the directives system is the appropriate mechanism to provide standards, criteria, and guidelines for Forest Service employees to carry out agency activities. However, the Forest Service has fully complied with the APA for this directive.

The proposed groundwater directive is intended to update internal policies and procedures to result in a more consistent, credible, predictable, and transparent approach to addressing activities and actions that relate to or have a strong likelihood of significantly affecting groundwater resources on National Forest System (NFS) lands. Though the internal policies and procedures have the potential to affect how third parties interact with the agency and could result in additional terms or conditions to potential future authorizations received by third parties, they are primarily structured around improving the agency's own actions that involve or could significantly affect groundwater. Thus, the Forest Service concluded that a directive was the appropriate mechanism.

However, the National Forest Management Act (NFMA) requires that the Secretary of Agriculture provide adequate notice and an opportunity for the public to comment on the formulation of standards, criteria, and guidelines applicable to Forest Service programs (16 U.S.C. 1612(a)). To address NFMA's public notice and comment requirement, the Forest Service has decided to follow APA requirements for informal rulemaking, including publishing a proposed directive in the Federal Reg-

ister for public comment, addressing the relevant comments, and publishing a final directive in the *Federal Register* prior to implementation.

Question 2a. What new or additional requirements does this proposed directive impose on entities seeking special use authorizations on NFS lands?

Answer. The proposed directive does not impose new or additional requirements on entities applying for special use authorizations (SUAs) on NFS lands. Currently, the Forest Service uses the criteria set forth at 36 CFR 251.54 to determine whether or not to accept a proposal for a specified use of National Forest System land. The proposed directive does not change or add to those criteria; however, should the Forest Service choose to do so in the future, the agency would follow established procedures for amending the directive. However, when entities propose uses of NFS land that involve or could significantly affect groundwater, the application of these existing criteria by NFS units around the country could be more consistent. Though the local circumstances vary across the NFS units, the approach to evaluating the requests should be consistent. The proposed directive is intended to ensure a more consistent approach to processing requests for SUAs that may involve or significantly affect groundwater by (1) clarifying the kinds of information NFS staff should gather and review, and (2) recommending an approach to authorizing specific activities once a SUA application has been approved. However, to the extent that NFS units currently apply the existing criteria in an inconsistent manner, the proposed directives may lead to changes in how the units operate.

Question 2b. Will the new requirements for special use authorizations increase the time it takes the USFS to renew or issue new authorizations?

Answer. The majority of currently authorized special uses do not directly involve or significantly affect groundwater. As explained above, the proposed groundwater directive does not change the authorities or responsibilities of Forest Service decision-makers with respect to special use authorizations. Instead, the proposed directive seeks to ensure that NFS units apply existing authorities in a more consistent manner. Existing authorities already require agency decision makers to evaluate and consider the potential effects of a proposed SUA on NFS resources and non-NFS resources, including groundwater. However, NFS units' evaluation and consideration of the potential effects on groundwater could be more consistent. Since the current approach to evaluating groundwater effects could be more consistent, it is difficult to accurately determine whether and how much the proposed directive would increase the time necessary to issue new or renewed authorizations. However, it is also possible that adopting a more consistent approach may actually decrease the time necessary to issue authorizations in many cases.

Question 2c. Will the USFS develop guidance to assist applicants with new requirements?

Answer. The Forest Service currently works with proponents of new or renewed SUAs to understand their proposals and provide guidance regarding the process. The Forest Service will continue this approach of working with proponents under the proposed directive. Since the majority of currently authorized special uses do not directly involve or significantly affect groundwater, the Forest Service does not currently anticipate a need to develop special written guidance for applicants related to this proposed directive.

Question 3. Could the proposed directive impact current practices regarding the discharge of produced water from coalbed methane operations?

Answer. The proposed groundwater directive would not change any of the existing requirements concerning the discharge of produced water from coalbed methane (CBM) or other oil and gas operations on National Forest System lands. Produced water from CBM or other oil and gas operations can be managed in several different ways, including discharge to the ground surface, to holding ponds, to natural channels, to the subsurface through injection wells or infiltration galleries, and evaporation. In general, the discharge of produced water from CBM or other oil and gas operations to surface water or into the subsurface is regulated under the Clean Water Act or the Safe Drinking Water Act, respectively, by states, Tribes, or EPA, depending on the location and whether or not the jurisdiction has been authorized to implement these programs. The discharge may also be separately regulated by states under state statutes.

In addition to any required Clean Water Act or Safe Drinking Water Act authorizations, when an operation accesses leased federally-owned minerals, the Bureau of Land Management must also authorize any discharges to the surface or subsurface on National Forest System lands, with approval from the Forest Service if additional surface disturbance is involved. If the produced water discharge from an operation accessing federally-owned minerals is located on NFS land outside the lease boundary, the Forest Service may need to separately authorize the discharge

and would need to account for potential effects on groundwater resources from the discharge.

When the Forest Service has responsibility to review or issue an authorization for a produced water discharge, the proposed groundwater directive would require the Forest Service to address the potential effects on groundwater resources from the discharge and ensure that the authorization includes a provision for monitoring affected resources. Additionally, when a new authorization would include discharging water to underground injection wells larger than 4", the proposed directive would require the Forest Service to include provisions for metering and reporting the volume of water discharged.

Question 4. Under the directive, could the Forest Service reduce access to a water right if a proposed activity might adversely impact NFS groundwater resources? Does the directive propose changes from current practice?

Answer. The proposed directive does not affect the ownership of valid existing water rights. Under existing authorities, the Forest Service is responsible for managing National Forest System land uses. Water diversion facilities on NFS land require an authorization for the use of NFS land. Under section 505 of the Federal Land Policy Management Act, the Forest Service is required to attach terms and conditions to land use authorizations involving impoundment, storage, transportation, or distribution of water to protect NFS lands and resources, protect lives and property, and a number of other factors. The proposed groundwater directive does not change those existing requirements.

Question 5. You state that the USFS plans to develop a framework to comprehensively evaluate water resources. What is the timeline for these plans, and what do these plans look like?

Answer. Congress directed the Forest Service to manage National Forest System lands to secure favorable conditions of water flow (Organic Administration Act of 1897), for navigable stream protection (Weeks Act of 1911), and to mitigate floods, conserve surface and subsurface moisture, and protect watersheds (Bankhead-Jones Act of 1935). In addition, Congress provided subsequent direction to the agency regarding water, watersheds, and the management of those resources in a number of statutes, including the Multiple-Use Sustained-Yield Act of 1960, the National Forest Management Act of 1976, and the Federal Land Policy and Management Act of 1976.

Water on NFS lands is important for many reasons, including resource stewardship, domestic use, and public recreation. Today, water from National Forests and Grasslands contributes to the economic and ecological vitality of rural and urban communities across the nation, and those lands supply more than 60 million Americans with clean drinking water. NFS lands alone provide 18 percent of the nation's available freshwater, and over 1/2 the freshwater in the West. Congress recognized the importance of these lands and delegated to the Forest Service the critical task of helping to ensure that abundant, clean, freshwater continues to be available from NFS lands into the future. As parts of the country experience prolonged and severe drought, the water resources of NFS lands are as critical as ever to communities, agriculture, and ecosystems.

To address these responsibilities, the Forest Service is working on a comprehensive framework for water. The goal of the framework will be to focus land management on NFS lands towards building resilient ecosystems that protect and sustain water resources on and under those lands and the livelihoods that depend on them. The framework will emphasize the importance of shared responsibilities for the sustainability of these water resources with states, Tribes, and other Federal agencies. The Forest Service will consult with Congress, states, Tribes and interested groups as soon as a working draft is completed.

Question 6. How do you intend to emphasize cooperation and support with the states who push back?

Answer. The proposed groundwater directive emphasizes the importance of cooperation with states. States have broad responsibility for the allocation of water. Many states and Tribes have also been delegated the authority to implement Clean Water Act and Safe Drinking Water Act programs. In addition, many states have other statutes that regulate activities that take place on National Forest System lands, including mining, oil and gas extraction, and remediation of spills and other contamination. The Forest Service has and will continue to respect those authorities. The proposed groundwater directive does not change that relationship.

The proposed groundwater directive is intended to make the Forest Service a better partner with the states and tribes in the characterization, monitoring, and protection of groundwater on NFS lands. Currently, the Forest Service could be more consistent in its responses from unit to unit across the country when its own activi-

ties or those proposed by third parties have the potential to substantially affect groundwater resources on NFS lands. That creates a level of uncertainty for the states, tribes, and project proponents that can result in adverse outcomes for all involved. Differences in local unit interpretations may result in some projects being appealed or litigated resulting in adverse decisions that delay or otherwise adversely affect projects important to the local community. Misunderstanding of requirements may lead to some projects being approved with inadequate safeguards that result in the contamination or disruption of important water resources. The proposed groundwater directive is intended to update internal policies and procedures to result in a more consistent, credible, predictable, and transparent approach to addressing activities and actions that relate to or have a strong likelihood of affecting groundwater resources on National Forest System lands.

The proposed directive explicitly recognizes the role of states in allocating water and states and tribes in regulating water quality. It requires Forest Service decision makers to work cooperatively with those entities. It is the agency intent that nothing in the implementation of our stewardship responsibilities infringes on state and tribal allocation and water quality authorities. The agency will not move forward until we are confident that we have identified and can address the concerns raised through the public comment and tribal consultation processes. The agency will take the time necessary to engage with representatives of states and tribes that have commented on the proposed groundwater directive to make sure we fully understand the nature of their concerns.

The following seven questions were received via an e-mail from Committee Staff for the Subcommittee on Conservation, Energy and Forestry Chairman Glenn Thompson:

Question 7. This directive appears to establish groundwater resource protection as a means to either deny certain activities or to impose certain mitigation measures. Can you provide examples of what is meant by “mitigation”?

Answer. Under section 505 of the Federal Land Policy Management Act, the Forest Service is required to attach terms and conditions to land use authorizations involving impoundment, storage, transportation, or distribution of water to protect NFS lands and resources, protect lives and property, and a number of other factors. The proposed groundwater directive does not change those existing requirements. However, the proposed directive clarifies that appropriate terms and conditions need to be included in authorizations that involve groundwater. Those terms and conditions could include mitigation measures that minimize the potential impacts from the proposal as submitted. Viable potential mitigation measures will depend on the circumstances of each activity, but, for example, could include design changes to include a liner on a proposed storage area to limit the potential of contamination entering the groundwater, adjustment of the location of a proposed well to minimize effects on a wetland, or installation of monitoring equipment to track the impacts from a proposed septic system.

Question 8. What types of new environmental analyses might be required for timber permitting and basic forest management activities?

Answer. Under the National Environmental Policy Act, the Forest Service has the responsibility to assess and disclose the impacts from all of its activities, including timber harvest and other forest management activities, on the quality of the human environment, which includes water resources. The proposed groundwater directive does not change that responsibility. While timber harvesting and other basic forest management activities can have an effect on water resources, the Forest Service has long taken water resources into account in the design of its harvest and other forest management activities and in the required analyses of their potential effects. Therefore, the agency does not anticipate any substantial changes in effects analyses for most timber harvesting and basic forest management activities in response to the proposed directive.

Question 9. What types of new environmental analyses might be required for water wells and pipelines?

Answer. Under the National Environmental Policy Act, the Forest Service has the responsibility to assess and disclose the impacts from all of its activities and those being authorized on National Forest System lands, including for water wells and pipelines, on the quality of the human environment. The proposed groundwater directive does not change that responsibility or require additional analyses.

Question 10. Does the Forest Service have the technical capacity to evaluate these proposals in a timely manner? Specifically in regard to the report that there are only four groundwater scientists employed at the agency? Does that mean that all of the special use authorization applications (or reauthorization applications) need

to go through those four personnel to be evaluated? If the Forest Service needs to use contractors, what would be some of the pros and cons of using them?

Answer. In most cases, trained FS staff on the individual units will have the capacity to evaluate the effects of potential new or renewed authorizations on groundwater resources, using existing and planned technical guidance. In a small subset of situations, the activity or action involved or the physical setting will be sufficiently complex that the local specialist will need the assistance of more highly trained groundwater personnel. The Forest Service currently has five positions dedicated to providing that support across the country. In addition, the Forest Service has the ability to contract for additional expertise when needed to meet particular needs. In those instances, the existing staff personnel can support the local units by assisting with aspects of the contract development and oversight and review of work products. This is a model that the Forest Service has used in other circumstances where highly specialized technical expertise is needed, such as in the case of fossil resources (paleontology) and cave resources (speleology).

Of course, there can be challenges in using contractors to address aspects of the environmental assessment process, but there can also be substantial benefits if implemented appropriately. The Forest Service has utilized contractors to provide groundwater expertise in the past when the situation warranted. The proposed groundwater directive does not change that option. However, the proposed directive may help clarify when additional expertise is needed and the types of analyses that may be needed to be completed during the planning and environmental analysis phases, and help avoid the delays that can result from litigation determining that the analyses completed were inadequate.

Question 11. Under the proposed directive, the Forest Service plans to consider groundwater impacts as part of the process for leasing minerals. How might this impact oil and gas leases?

Answer. The Bureau of Land Management (BLM) issues oil and gas leases for federally-owned minerals on National Forest System lands with the concurrence of the Forest Service. The Forest Service conducts its own leasing analysis before concurring with a BLM leasing decision. Under NEPA, the Forest Service is required to evaluate and disclose the potential effects of reasonable development scenarios on all resources, including groundwater, through the leasing analysis. The proposed groundwater directive does not change that responsibility. The proposed directive also cannot and does not expand the authority of the agency beyond its existing authorities. With a clearer approach to addressing groundwater resources in the context of potential leasing, the Forest Service can be a better partner to BLM and the states and be better positioned to work with proponents and other interested parties to provide for development of the nation's critical energy resources while protecting water resources.

Question 12. Under the directive, could the Forest Service reduce access to a water right if a proposed activity might adversely impact NFS groundwater resources? Does the directive propose changes from current practice?

Answer. The proposed directive does not affect the ownership of valid existing water rights. The proposed groundwater directive does not change existing Forest Service authorities concerning access to state issued water rights on National Forest System land. Access to a state water right on NFS land requires an authorization for the use of the land. Under section 505 of the Federal Land Policy Management Act, the Forest Service is required to attach terms and conditions to land use authorizations involving impoundment, storage, transportation, or distribution of water to protect NFS lands and resources, protect lives and property, and a number of other factors. The proposed groundwater directive does not change those existing requirements.

Question 13. On the same day the groundwater directive was proposed, the Forest Service proposed directives to establish a national system of best management practices (BMPs) and monitoring protocols for water quality protection, and to require their use on NFS lands to meet Clean Water Act mandates. How are the two initiatives related? Which Clean Water Act mandates would be addressed under the proposed BMP directives?

Answer. Both the proposed directive for Groundwater Resource Management (FSM 2560) and the proposed directives for National Best Management Practices (BMPs) for Water Quality Protection on National Forest System lands were published for public comment on the same day. The two directives were developed independently and are not interdependent. However, both proposed directives are intended to update internal Forest Service policies and procedures to provide for more consistent, credible, predictable, and transparent approaches to addressing activities and actions that could affect water resources on NFS lands.

The intent of the current and proposed BMP directives is to carry out one of the Clean Water Act (CWA)'s primary purposes—to maintain the chemical, physical, and biological integrity of the nation's waters. The Forest Service has long had a requirement to implement BMPs to protect water quality in the Forest Service Directives System (Forest Service Manual 2530). The Forest Service has had strong regional and local efforts to implement BMPs for ground-disturbing activities for many years. However, because of the lack of a clear national framework for BMPs, the agency found it difficult to consistently demonstrate effectiveness of BMPs in protecting water quality. This has resulted in some adverse court decisions that forced substantial additional analyses, increased costs, and delayed projects. The 2012 land management planning rule required the agency to put a national system of BMPs in place (36 CFR 219.8(a)(4)), and the proposed BMP directives are intended to position the agency to address that requirement.

Response from Anthony G. Willardson, Executive Director, Western States Water Council

Question 1. What percentage of persons in the U.S. currently holds a special use permit?

Question 1a. What might that percentage look like under the directive?

Question 1b. How difficult would a special use permit be to obtain under the directive?

Answer 1–1b. The Council has no information on the number of persons that hold special use permits, but could provide some data on wells, including location and capacity from water rights information. The additional requirements that the directive would impose could substantially increase the cost of obtaining new permits, maintaining existing permits, or seeking new sources of water off National Forest Lands (NFS) lands. All these actions would reduce the number of permits.

For example, upon the expiration of current special use permits, the directive explicitly requires USFS land managers to consider requiring the removal of facilities, including wells (but possibly surface water diversions as well). This obviously would reduce the number of persons with special use permits, which would be terminated. Removing wells would impose very significant costs on non-Federal parties.

For example, the Arizona Department of Water Resources, Chief Counsel, has stated:

“In Arizona’s comments on the Proposed Directive, we disputed the statement in the *Federal Register* notice that the Proposed Directive was not subject to review by the Office of Management and Budget under E.O. 12866 because we believe the Proposed Directive will adversely affect state and local governments and potentially will have an annual effect of \$100 million or more”

“There are three local governments with a combined population of almost 78,000 people that currently use wells on Forest Service lands. If the special use authorizations associated with wells and pipelines that provide water to these communities are not renewed in the future due to requirements of the Proposed Directive, there will most certainly be adverse impacts to these local governments and those impacts should be considered.”

“In analyzing the regulatory impact of the Proposed Directive, it should be assumed that some existing special use authorizations will not be renewed due to negative impacts to groundwater dependent ecosystems or groundwater resources resulting in the need to drill new wells or construct new pipelines off of Forest Service lands. Based on that assumption and a conservative estimate for new high-capacity well construction of \$200,000, only 500 wells nationwide would need to be replaced to have an annual effect of \$100 million. In Arizona alone, the Department identified 700–800 wells associated with Community Water systems potentially on Forest Service lands plus an unknown number of pipelines.”

Question 2. What additional work could USFS and states do to better communicate their intentions and activity so the public may better understand the real implications of the proposed directive?

Answer. An inventory of wells on NFS lands would be a first step towards evaluating the extent of the implications of the proposed directive. The WSWC has done some very preliminary work towards determining the number of wells on National Forest Service lands. States maintain data on the location of wells that can be cross referenced with NFS boundaries. A more extensive analysis could estimate the capacity of those wells (given the 35 gallon per minute threshold in the directive), the population served and the distance from the external boundaries of NFS lands. All this information would help inform the discussion of the implications of the directive.

Moreover, any survey USFS may have available of resources of concern, such as groundwater dependent ecosystems, would be useful. The rebuttable presumption of a connection between groundwater and surface waters and groundwater dependent ecosystems, could lead to expensive technical hydrogeologic analyses for any well owner with a special use permit to be renewed. Further, any assertion of a Federal reserved right to groundwater to protect such resources would be vigorously opposed by many western states. A more collaborative approach would be for the USFS to enter into an MOU with the individual states (see Wyoming MOU and Montana Compact) to recognize legitimate USFS interest and negotiate an agreement to protect waters.

Question 3. How do state authorities currently evaluate groundwater resources and impacts? In your opinion, is the states' method of evaluation efficient and effective?

Answer. Many western states have modeled groundwater availability and evaluate the impact of existing and proposed uses. Senior water rights are protected from injury from subsequent "junior" appropriations. States require public notice of all water right applications, and anyone with a water right that may be impacted by the proposed use may protest, requiring a public hearing. Moreover most states consider the public interest as part of the evaluation of applications. USFS may represent its interests in this process, and other state forums, should it consider NFS resources threatened. In consideration of such concerns, states usually have the discretion to deny, limit or condition water rights to avoid or mitigate negative impacts. Most states have authority to require metering and reporting of groundwater use, impose conservation measures, including well spacing, limit groundwater withdrawal measured in gallons per minute or acre-feet per year, and otherwise manage and control groundwater uses. The USFS has no such authority. State notice, hearing and public interest requirements, undertaken with water right applications, provide a cost effective evaluation of proposed uses and their impacts. Further, state groundwater availability modeling and general water resources planning authorities and activities evaluate groundwater resources and trends.

ATTACHMENT

October 2, 2014

ELIZABETH BERGER—WFWARP,
Groundwater Directive Comments,
USDA Forest Service,
Washington, D.C.

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 three 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*. (<http://www.westgov.org/policies/301-water/596-water-quality-in-the-west-resolution-uga>) 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 U.S. 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.

➤ **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

¹Incorporated 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=

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*, (http://www.fs.fed.us/geology/Proposed%20Groundwater%20Policy_QA_6_30_14.pdf) 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

²Incorporated 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=

Federal efforts. As the Service has 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,



Hon. BRIAN SANDOVAL,
Governor, State of Nevada,
WGA Chairman;



Hon. JOHN KITZHABER, M.D.,
Governor, State of Oregon,
WGA Vice Chairman.

Response from Don Shawcroft, President, Colorado Farm Bureau

Question 1. Your organization represents many different farmers, ranchers and producers around the state; do you expect this proposed directive to cause any trouble for them as they continue their practices?

Answer. The proposed directive appears to be an effort by the USDA Forest Service to exceed its management authority over waters of the states through administrative actions, thus giving the Forest Service greater control not just over land in my own State of Colorado but over the natural resources of the West generally. It is important to note that the majority of all western water currently allocated, adjudicated and for farmers, ranchers, and other holders of water rights can be and often is used as property collateral to secure loans with a lending institution. The stability of prior appropriation doctrine is part of the structure and underpinning of western state and local economies. Any claim or clouding of the state’s authority to adjudicate or questioning of appropriate beneficial use as defined by the states would create tremendous uncertainty and diminishment of property values. Congress has not given the Forest Service the right to intervene in this important local process. The negative impacts on grazing, timber, recreation and other permitted beneficial uses of national forest system lands and of adjacent and nearby private, non-Federal public and tribal lands can best be avoided by the withdrawal of these directives.

Question 2. You mention that the Organic Administration Act of 1897 vests the USFS with the authority to manage surface waters under certain circumstances. What are those certain circumstances?

Answer. The Directive sites one of the Organic Act’s stated purposes as “. . . securing favorable conditions of water flows.” The Forest Service misconstrues this provision by assuming surface and groundwater resources are a unit unless proven otherwise, and therefore, that management of both resources is necessary to provide favorable conditions of water flows on NFS lands. From this flawed interpretation, the Forest Service then concludes that the Organic Act, through its stated purposes, authorizes the agency to manage groundwater along with surface water in order to secure favorable conditions of water flows.

The Organic Act simply authorizes the Forest Service to manage the land, vegetation and surface uses. The directive fails to discuss or acknowledge state authority to manage water resources or limits to Forest Service water rights until adjudicated by each state. The Act does not provide authority to manage or dispose of the

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.

groundwater or surface waters of the states based on the Directive's declared "connectivity" clause.

Question 3. You also mention the statute provides no authority for management of groundwater. What certain circumstances, if any, should be monitored by the USFS?

Answer. The Organic Act simply authorizes surface management of the land, its vegetation, and surface uses—not the subsurface which includes groundwater resources—in a way to provide favorable conditions of water flows. The United States Supreme Court has gone to great lengths to bring clarity to the scope of the Organic Act's determination that federal authority extends only to prudent management for surface water resources. In *United States v. New Mexico*, the Court defined prudent management to: (1) "secure favorable water flows for private and public uses under state law," and (2) "furnish a continuous supply of timber for the people." The agency authority is narrowed to proper management of the surface to achieve the specific purpose of the Organic Act—not the direct management of the groundwater and agency declared interconnected surface waters. In no circumstances should the Forest Service attempt to regulate and manage subsurface groundwater resources.

Question 4. You state that the USFS's attempt to use Clean Water Act terminology such as any "hydrological connection" to establish authority over water rights is unlawful. How else has the USFS attempted to establish authority over groundwater water rights?

Answer. In terms of the agency's efforts to use the CWA to justify authority over groundwater, Farm Bureau questions why the Forest Service points to the Clean Water Act as a source of legal authority and direction for the Directive. The Directive merely states in two general sentences that the Clean Water Act is a source of legal authority for the Directive. There is no explanation of *how* the Clean Water Act applies to this Directive or how sections 303, 401, 402 or 404 of the Clean Water Act (cited in the Directive) to provide any legal authority to the Forest Service. The Forest Service does not administer any part of the Clean Water Act nor does that statute grant the Forest Service any authorities; administration of the law rests with the Environmental Protection Agency, the U.S. Army Corps of Engineers and, most importantly, the states. As is most pertinent here, the Clean Water Act expressly states that nothing in that law shall "be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. The Forest Service has no authority to infringe on state law regarding groundwater, and clearly the Clean Water Act does not provide such authority. It is absolutely clear that the Clean Water Act does not cover groundwater.

The reference to the Clean Water Act leaves only questions about the Forest Service view of its authority. Is the Forest Service claiming federal jurisdiction over groundwater based on the Clean Water Act (which explicitly does not grant federal jurisdiction over groundwater)? Does the "interconnectivity" clause somehow grant the Forest Service legal authority over groundwater under the Clean Water Act? Is the Forest Service claiming that it needs authority over groundwater to comply with its obligations under the Clean Water Act? If so, the Forest Service must explain that it has obligations and what they are, not just refer to the statute. At a minimum, Federal agencies must provide a modicum of justification for any claim of legal authority, particularly here when the Forest Service has no authority whatsoever to implement the Clean Water Act. The Forest Service's statement of legal authority is so wholly inadequate that it provides Farm Bureau with little information with which to provide construct meaningful comments and therefore it cannot be used as a basis for the Directive.

As included in the written testimony, the Forest Service has been attempting to extort water rights from Federal permittees for some time. In an August 15, 2008, Intermountain Region briefing paper addressing applications, permits or certificates filed by the United States for stock water, the agency claimed, "It is the policy of the Intermountain Region that livestock water rights used on National Forest grazing allotments should be held in the name of the United States to provide continued support for public land livestock grazing programs." Further, another Intermountain Region guidance document dated August 29, 2008, states, "The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting these claims, it is not known whether or not these claims will be recognized as water rights." During a Subcommittee on National Parks, Forests and Public Lands hearing on March 12, 2012, the Forest Service testified, "The Forest Service believes water sources used to water permitted livestock on Federal land are integral to the land where the livestock grazing occurs; therefore, the United States should hold the water rights for current and future grazing."

Specific examples of recent conflicts with the Forest Service of water rights include the following:

Tooele County Utah Grazing Association:

In the spring of 2012, livestock grazing permittees meeting with the local forest managers were confronted by forest land managers seeking a “sub-basin claim” from the state of Utah. Where a sub-basin claim is granted by the Utah Division of Water Rights, changes in use and diversion can be done without state approval. The permittees were asked to sign a “change of use” application which would have allowed the agency greater ease in determining what the use would be, including changing use from livestock water to wildlife, recreation or elsewhere.

When permittees objected, they were told that not complying with the Forest Service request could adversely affect their “turn out”—the release of their sheep and cattle onto their forest allotments.

Tombstone, Arizona:

In this scenario, the Forest Service overfiled on the city’s 25 developed springs and wells located in the Huachuca Mountains. For more than 130 years, Tombstone piped its privately held water rights some 30 miles for use. Even after the Huachuca’s were designated a Federal wilderness area in 1984, Tombstone was allowed to maintain its road and critical access to its springs providing Tombstone with water for culinary needs and maybe more important in this hot, arid place—fire protection and public safety.

Tombstone won the water ownership challenge, but found the agency combative and stonewalling following torrential rains in 2011. After notifying the Forest Service of their need to repair damage as in the past, they were denied access. They sought relief based on the state’s public health, safety and welfare obligations. When the city received authorization to do badly needed repairs they were forbidden from using the previously approved mechanized equipment. As city employees showed up with hand-tools and wheelbarrows—armed forest agents would not allow the “mechanized” wheelbarrows onto the forest administered lands. As of April 24, the Forest Service has allowed Tombstone access to only three of their 25 springs.

Otero County, New Mexico:

In drought-stricken Otero County New Mexico, the Forest Service is blocking rancher’s cattle from accessing long held water and recognized as private property rights under state law. The agency told the ranchers that they merely replaced old barbed wire fences with new, much stronger metal based fences to establish enclosures to protect a “vital wetland habitat.”

Otero County Commissioners issued a “cease and desist” order in an attempt to allow the cattle access to the rancher’s water and to protect the state’s sovereign water rights. The elected county commissioners charged the Forest agents with an illegal action that could ultimately lead to animal cruelty. The county is threatening the arrest of Federal personnel who are keeping the ranchers from their privately held water rights.

Question 5. You mention several times the idea of just compensation for taking private property by adverse possession. Do you or your members have an idea of what just compensation might look like should the USFS proposed directive occur?

Answer. From a historic standpoint, when water transitions from agriculture to M&I (municipal and industrial) use, the water rights with the earliest priority dates have the greatest value. For example a farmer whose family established an 1860 priority date on a local water source would have greater market value than a 1920 water right on the same water source. During times of drought or shortage, the 1860 water right will be delivered while the 1920 right could be excluded from delivery. In more arid portions of the West, the early priority dates have the same impact but the water values are dramatically higher.

In most western states—Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming—all surface water rights are based on the prior appropriation doctrine that allows rights holders to withdraw a certain amount of water from a natural water course for beneficial purposes on land remote from the point of diversion.

Farm Bureau supports valuation and transitioning of water rights in a marketplace by willing seller and willing buyer. In terms of just compensation, the U.S. Constitution requires compensation for government takings, and in many western states, states require compensation for either a taking or a diminishment of value. Valuation of water rights varies based on a number of factors including climate and water availability—water availability in the Pacific Northwest is very different from arid states in the Southwest.

Farm Bureau opposes Federal jurisdictional control being imposed on farmers without just compensation for loss of productive development or sale potential, as provided by the Constitution. Compensation to landowners for reduction in property values should be itemized and taken from the budget of the respective federal agency.

Farm Bureau supports the following:

- (1) The present system of appropriation of water rights through state law and we oppose any Federal domination or pre-emption of state water law or resource distribution formulas;
- (2) Water rights as property rights that cannot be taken without compensation and due process of law;
- (3) Government providing due process and compensation to the exact degree that an owner's right to use and the value of the property has been diminished by government action;
- (4) All levels of government abiding by the Fifth Amendment to the Constitution: "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation;"
- (5) The basis for just compensation being fair market value of the property or the economic loss to the owner or any adjoining landowner whose property is devalued; and
- (6) Compensation for partial takings of the property being based on the reduction in the value of the total property.

*Response from Scott A. Verhines, P.E., New Mexico State Engineer**

Question 1. You represent a significant portion of the western states in the United States. Have your members reached out to you and expressed concern over this directive? Has there been an assessment on how many states will be impacted on such directive

Question 2. You mention that the term "NFS groundwater resources" should be specifically defined to include only those groundwater resources in which the USFS has obtained a legal interest in. Is it possible that the USFS believes they have a legal interest in all groundwater resources? Is that belief reasonable? Why or why not?

Question 3. You state in your written testimony that New Mexico is already experiencing an attempt by the USFS to limit the amount of water that a municipality may divert under existing groundwater rights for wells located within National Forest lands. What types of new environmental analysis might be required for other water wells and even pipelines?

Question 4. Mr. Verhines, can you discuss how this proposed directive will affect groundwater law in New Mexico? How does the Forest Service's assumption about the interconnectedness of surface water and groundwater affect how both are regulated in your state?



* There was no response from the witness by the time this hearing went to press.