WESTERN STATES WATER COUNCIL

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Position #372

October 3, 2014

Tom Tidwell, Chief
U.S. Forest Service
1400 Independence Avenue
Washington D.C. 20250-1111

ATTN: Rob Harper
U.S. Forest Service
WFWARP, 201 14th Street, SW
Washington D.C. 20250

RE: Proposed USFS Directive on Groundwater Resources – Forest Service Manual 2560

Dear Chief Tidwell and Mr. Harper:

On behalf of the Western States Water Council, I am writing to comment on the proposed U.S. Forest Service's (USFS) Proposed Directive on Groundwater Resource Management, published in the Federal Register for public comment on May 6 (FSM 2560). Attached to this letter are more specific comments. We appreciate the recognition of the importance of groundwater and the impact that USFS activities and USFS-permitted surface activities can have on this vital state resource, particularly in the West, where most USFS managed lands are located. Moreover, as any other landowner, we also recognize USFS authority to permit access to federal lands for lawful activities, including water resources development and operation of facilities to exercise state granted water rights.

While perhaps well intended, our member States have serious concerns over the lack of substantive state participation in the development of the directive, especially given that the States have primary, often exclusive authority, over the protection, development and management of waters within their boundaries, including surface waters arising on, and flowing across USFS lands, and groundwater below those lands. Groundwater is a state and not a federal resource. The problems that the directive may be intended to address are not apparent, nor is the protection of groundwater a primary USFS responsibility. Indeed, 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 the allocation, administration, protection, and control of all non-navigable waters located within their borders.

We believe the USFS assertions of broad authority over groundwater and the potential interference with the lawful exercise of state water rights and permitted water uses on National Forest Service (NFS) lands are contrary to over 100 years of deference afforded state water laws by the Congress and the Supreme Court of the United States. Among other things, presumptive claims of any reserved right to groundwater are unsupported by legislation or opinions of the Court. Moreover, such claims are counterproductive and will only involve the USFS in extended litigation. Rather, USFS should partner with States to identify and address USFS needs. The existing compact between the State of Montana and USFS, as well as a Memorandum of

Understanding between USFS and the State of Wyoming, may serve as appropriate options that may be emulated by USFS in other States. The Council and our federal partners have, working through our Western Federal Agency Support Team, also entered into continuing discussion on how best to fulfill legitimate federal water needs within state water law.

The directive to "apply federal reserved water rights to groundwater as well as surface water" is inappropriate and legally unsupportable as none of the USFS cited statutes and authorities mention groundwater, nor establish any basis to manage or allocate waters, nor reserve any federal rights to water. Further, no federal court has ever upheld a reserved right to groundwater. The U.S. Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978) specifically denied USFS claims to implied reserved surface water rights claimed 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 the "primary purposes" of the national forest reservation. These primary purposes include the production of timber and watershed protection to insure favorable surface water flows. Furthermore, the Court found that all other needs were secondary purposes that required state-issued water rights. The proposed directive cannot extend USFS authorities beyond the limits the Court has set. Even where reserved rights are recognized, the Congress has left it up to the States, under the McCarran Amendment, to quantify such rights in general state stream adjudications in state courts.

Limited USFS resources are already overextended, as evidenced by necessary "fire borrowing," requiring careful consideration of national funding priorities. Even if it had the authority, the USFS is ill-equipped to undertake the extensive and costly processes and procedures that would be necessary to implement the directive. Moreover, much of the work the USFS envisions it would undertake or contract out would very likely duplicate existing capabilities of the States and other federal agencies.

Governors John Hickenlooper of Colorado and Brian Sandoval of Nevada, then Chair and Vice Chair of the Western Governors' Association, wrote Secretary Tom Vilsack on July 2nd declaring, "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 reply, Secretary Vilsack replied with an "open invitation to meet and discuss these directives." The WGA and the Council are working closely together on this issue, and we would reiterate, as also stated in the Governors' letter: "States are the exclusive authority for allocating, administering, protecting and developing groundwater resources…." This directive has significant negative federalism implications for the States.

We strongly urge you to take no final action on the directive until there has been an extended and extensive opportunity for USFS to work with our member States, the WGA, and the Council to identify and seek to resolve in a mutually acceptable manner the problems which the directive is intended to address. Notably, the directive mentions required consultation with the tribes, but not the States. We are prepared to enter into a substantive dialogue that would fulfill the requirements of Executive Order 13132 ("E.O.") on Federalism. As stated therein, "One-size-fits-all approaches to public policy problems can inhibit the creation of effective solutions to those problems." Sec. 2(f)

Moreover, the E.O. states: "National action limiting the policymaking discretion of the States shall be taken only where there is constitutional and statutory authority for the action and

the national activity is appropriate in light of the presence of a problem of national significance. Where there are significant uncertainties as to whether national action is authorized or appropriate, agencies shall consult with appropriate State and local officials to determine whether Federal objectives can be attained by other means." Sec. 3(b)

The E.O. continues: "When undertaking to formulate and implement policies that have federalism implications agencies shall…where possible, defer to the States to establish standards; in determining whether to establish uniform national standards, consult with appropriate State and local officials as to the need for national standards and any alternatives that would limit the scope of national standards or otherwise preserve State prerogatives and authority…." Sec. 3(d)

Sec. 6 requires: "Each agency shall 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."

We again request that the USFS enter into an authentic dialogue with the WGA, the Council, and the States towards achieving a mutually acceptable policy that reflects both the constitutional division of power and the on-the-ground realities of the West. The USFS should also recognize that a flexible and consistent state-by-state approach may be a more effective and more feasible way of addressing USFS needs than a national approach that does not account for the significant physical, hydrological, and legal differences that exist between the states. USFS should have consulted extensively with the States before publishing the proposed directive, and should now substantively engage the States, in order to define and remedy any perceived need to "clarify existing responsibilities and provide greater consistency and accountability…."

Thank you for your attention to our concerns, and we look forward to engaging in a productive dialogue with you and other USFS representatives.

Sincerely,

Patrick Tyrrell, Chairman
Western States Water Council

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 standards 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's 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 government. WSWC Position #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

Secretary Vilsack's letter to the Governors includes an invitation to meet and discuss the directive. The Council encourages a substantive dialogue with the States 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.

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 United States Congress and the Supreme Court.

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 establishing 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.