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**Testimony presented before the
House Committee on Agriculture
Subcommittee on Conservation, Energy, & Forestry**

**Regarding the U.S. Forest Service's Proposed Directive on Groundwater Management
USFS – FSM 2560**

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 underground water 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.

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State ex rel. Erickson v. McLean, 62 N.M. 264, 271, 308 P.2d 983, 987 (1957); *see also Holguin 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.

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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 reissued 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

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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.

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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 Propose 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.