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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 Groundwater Directive

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On behalf of the Western States Water Council, a non-partisan 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 #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 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

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.