***Via email:*** ***fsm2500@fs.fed.us*** September 1, 2014

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

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

## I. About

Public Lands Council (PLC), National Cattlemen's Beef Association (NCBA), American Sheep Industry Association (ASI), and Association of National Grasslands (ANG), along with the undersigned state cattle, sheep and grassland affiliates appreciate the opportunity to prepare and submit these comments concerning the Forest Service's proposed directive on groundwater resource management.

From the national to state down to the local level the below signed livestock organizations represent the West's livestock producers. Our organizations are directed and made up of ranchers – representing industry's interests through the legislative and regulatory processes. Our members provide countless benefits to the public; from managing vast areas of federal range, to being economic drivers of the rural West, and providers of food and fiber for the nation and world.

The livestock organizations strive to maintain a stable business environment for ranchers that utilize public lands including strongly advocating for the water, grazing and other private property rights on public lands so that western ranching families may continue their traditions of production and stewardship.

## II. The Forest Service Lacks the Authority to carry out the Proposed Directive:

The Forest Service should withdraw the Groundwater Directive (FSM 2500) because, as explained below, the directive is fundamentally flawed, both legally and as a matter of policy. The Forest Service's proposed directive exceeds the agency's statutory authority, violates state based water law, and would undoubtedly upset a water allocation system on which western economies have been built for over one hundred and fifty years.

### A. Scope of the Proposed Directive

Specifically, the directive requires that "monitoring and mitigation appropriate to the scale and nature of potential effects is conducted, evaluated, and reported when authorizing a proposed use or Forest Service activity that has a significant potential to adversely affect National Forest System (NFS) groundwater resources" and that the Forest Service "[c]onsider the effects of proposed actions on groundwater quantity,

quality, and timing prior to approving a proposed use or implementing a Forest Service Activity." FSM 2560.03(4)(a).

This policy statement assumes: (1) that the Forest Service owns or manages all groundwater found under or near National Forests; and (2) that the Forest Service has the authority to approve or disapprove uses of water by others.

The directive defines the term "groundwater resources" as "[t]he groundwater systems and groundwater dependent ecosystems linked to those systems that are associated with one or more parcels or units of land." FSM 2560.05. When combined with other expansive provisions discussed below, the scope of the groundwater resources assumed by the Forest Service far exceeds the agency's legal interest and regulatory authority.

At the outset of the directive, the Forest Service suggests a limitation on its policy by stating that it "will focus Forest Service groundwater 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." FSM 2560.03(1) (emphasis added). This limitation is eroded in the section immediately following, in which the Forest Service creates a presumption of interconnectivity between groundwater and surface water 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." *Id.* at (2) (emphasis added).

With these provisions, the Forest Service also extends the scope of the directive to surface water as well.

The Forest Service further expands the directive's application to encompass all groundwater resources on a watershed-wide scale, including both Forest Service lands and adjacent lands, by establishing a policy to "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." *Id*. at (3).

Finally, the proposed directive declares the agency will "[e]valuate 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)." *Id.* at (6)(f).

This requirement, when combined with the expansive scope of assumed Forest Service "groundwater resources" and the mitigation and management provisions of the directive, takes the unprecedented step of injecting a federal approval requirement into state-granted water rights for which the Forest Service has no authority.

### B. Proposed Directive Constitutes a Taking Without Just Compensation and Violates State Water Law

The proposed directive appears to authorize activities that would constitute takings without just compensation under the Fifth Amendment to the United States Constitution.

Specifically, the Forest Service would "[r]equire 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." *Id.* at (6)(e). Under these terms, the Forest Service could assert that it has the authority to deny access to any holder of state-granted water rights at its discretion, forcing a water right holder to forgo access and use of their water right without compensation.

Equally troublesome is that the directive incorporates FSM 2541.32 by reference, which requires the Forest Service to "[c]laim possessory interest in water rights in the name of the United States for water uses on National Forest System lands" in a variety of circumstances, all of which violate state water law and which qualify as takings under the Fifth Amendment. FSM 2541.32. Despite this seizure of water rights, no mention of payment of just compensation is made in the proposed groundwater directive or the Forest Service manual it references.

### C. Statutes Cited do not Provide Authority for Proposed Directive

#### 1. The Forest Service Lacks the Reserved Water Rights to Implement the Proposed Directive

The Forest Service primarily relies on several sections of the 1897 Organic Administration Act (Organic Act) (16 U.S.C. §§ 473-475, 477-482, 551) for its expansive view of its authority to manage groundwater. The Forest Service incorrectly interprets the purposes for which water is reserved under the Organic Act. While the Forest Service lists numerous other laws as providing the authority it claims under the directive, these comments do not address each claim of authority individually, as all other authorities listed by the Forest Service are subservient to the principle and scope of reserved water rights and do not provide any authority to derogate the Organic Act, violate state water laws, or take private property rights without just compensation. The Forest Service therefore lacks the authority to implement the proposed directive on groundwater.

The Forest Service relies heavily on one of the Organic Act's stated purposes to ". . .secur[e] favorable conditions of water flows." FSM 2560.01(1)(a). The Forest Service misconstrues this provision by assuming surface and ground water resources are a single unit unless proven otherwise, and therefore, that both resources were reserved and are to be managed to accomplish the purposes of the Organic Act.

The U.S. Supreme Court has extensively discussed the scope of the Organic Act and concluded it extends to prudent management for surface water resources (1) "to secure favorable water flows for private and public uses under state law", and (2) "to furnish a continuous supply of timber for the people." *U.S. v. New Mexico*, 438 U.S. 696, 718 (1978). In other words, the Act intended that watershed protection be accomplished

through proper management of surface areas, not direct management of groundwater resources. *See Cappaert v. United States*, 426 U.S. 128, 141 (1976).

Neither does the Weeks Act support the Forest Service's claim of authority over groundwater resources. The operative Weeks Act language the agency relies on merely states that "[t]he 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. Assuming the Act has any relevance to the proposed directive, the reference to "regulation of the flow of navigable streams" means it relates to surface (i.e., navigable) streams only, not to groundwater.

Except for those situations in which the Forest Service seeks to protect reserved water rights to meet the primary purposes of a reservation, the Forest Service's authority related to ground water underlying National Forest System lands is similar to its limited authority related to wildlife species. The Forest Service acknowledges it does not have the authority to manage wildlife species as a resource. Except for threatened or endangered species, the individual states manage all wildlife species on NFS lands, just as they manage ground and surface water resources.

It has long been accepted, however, that the Forest Service does have an important responsibility in wildlife management through its management of the surface habitat upon which wildlife are dependent. In a similar fashion the Forest Service does have a responsibility to manage the surface estate overlying and critical to the groundwater upon which the latter depends. Significantly however, the Forest Service does not have broad statutory authority to manage (i.e. to dispose of or otherwise regulate) groundwater as a resource.

### 2. The Forest Service Cannot Use Administrative Authority to Create De Facto Reserved Water Rights

Another statute the Forest Service relies upon—the Multiple Use Sustained Yield Act of 1960 (MUSYA), 16 U.S.C. §§ 528 – 531—does not support the agency's purported authority over groundwater. While the Act provides "that watershed protection is one of the five co-equal purposes for which NFS lands were established and are to be administered" (FSM 2560.01(1)(f)), the MUSYA does not expand the reserved water rights of the United States. *U.S. v. New Mexico,* 438 U.S. 696, 713 (1978).

Congress expanded the administrative purposes authorized by the MUSYA, but explicitly made such purposes "supplemental to, but not in derogation of, the purposes for which the national forests were established" under the Organic Act. *Id.* at 714 (citing House of Representatives Report for Multiple Use and Sustained Yield Act of 1960). Because one of the two primary purposes for which NFS lands were reserved under the Organic Act was "to secure favorable water flows for private and public uses under state law," and such waters have been put to beneficial use under state law, managing groundwater resources on and adjacent to Forest Service lands on a watershed-wide

basis in a way that interferes with such use would derogate the purpose for which the national forests were established under the Organic Act. Therefore, such derogation is impermissible under the law.

The federal government cannot divert or otherwise control water for its own uses regardless of the authority cited without a reserved water right or a state-adjudicated water right.

The proposed directive's management scheme would result in diversions and withholdings of water from holders of water rights causing their inability to beneficially use the water under state law, and therefore the subsequent loss of the right. *Andrus v. Charlestone Stone Products,* 436 U.S. 604, 615 (1978). This would have catastrophic effects on agricultural and mining operations, recreational uses, municipal water supplies, and a host of other activities and uses that rely on and are subject to state water law.

The "administration" of groundwater resources suggested by the Forest Service in the proposed directive attempts to create de facto reserved water rights and would end-run the Organic Act, Congress, and the long standing statutory and precedential federal deference to the states on matters of water law. Given the Forest Service's lack of authority to implement the proposed directive, the likely violations of state law, federal law, legal precedent, and the United States Constitution, as well as the disastrous policy implications for agricultural operations and all other water users, the Forest Service should withdraw the proposed directive in its entirety without delay.

### 3. The Clean Water Act Does not Provide the Forest Service the Authority to Manage Groundwater Resources

The language of the Clean Water Act (CWA) (33 U.S.C. § 1251 *et seq.*) and its underlying policies do not provide support for the Forest Service's extension of authority to manage groundwater resources. The scope of the CWA extends to "navigable waters," defined as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Though the precise meaning of the phrase "the waters of the United States" has been disputed in recent years, never has it been suggested that the scope of the CWA extends to the regulation of groundwater. *See e.g. Rapanos v. United States,* 547 U.S. 715 (2006) (holding that the term "navigable waters," as it is used in the CWA, includes only relatively permanent, standing or flowing bodies of water).

In the proposed directive, the Forest Service specifically references several provisions of the CWA in support of its extension of authority to groundwater. FSM 2560.01(1)(j). The cited provisions do not grant any federal agency the authority to manage groundwater, nor do they even mention "groundwater" at all. *See* 33 U.S.C. at §§ 1313, 1341, 1342, 1344.

The CWA does refer to groundwater management in several of its provisions, but nothing in those provisions authorizes the Forest Service to regulate groundwater.

The first way the CWA indirectly influences groundwater management is by making the appropriation of grants to assist the states in implementing pollution control programs contingent upon the state establishing "appropriate devices, methods, systems, and procedures necessary to monitor, and to compile and analyze data on . . . the quality of navigable waters and to the extent practicable, ground waters." *Id*. at § 1256(e)(1). It should be noted that this section does not make the receipt of funding conditional upon improving, protecting, or otherwise managing the quality of groundwater resources; rather, the states are simply responsible for providing data and information related to the quality of groundwater to the Environmental Protection Agency if practicable. *Id.*

The second way the CWA influences groundwater management is found in the statute's provision concerning nonpoint source pollution management. *Id.* at § 1329. This section provides a strong incentive to the states to actually implement procedures designed to manage the quality of their groundwater resources. When making decisions about the distribution of grants to assist the states in implementing their nonpoint source pollution management plans, the Environmental Protection Agency may give priority to states that have implemented programs to protect groundwater. *Id*. at § 1329(h)(5)(D).

The language of this section is significant for two reasons: First, it demonstrates that Congress intended groundwater management be conducted by the individual states; and second, even the EPA recognizes that states are the primary authority over groundwater as evidenced by their proposed definition explicitly excluding groundwater. *Id.*

It is also worth noting at this time that in a recent proposal to modify the meaning of the "the waters of the United States" as it is used in the CWA, the Environmental Protection Agency and U.S. Army Corps of Engineers—the federal agencies which do have regulatory authority under the CWA—acknowledged that subsurface water (i.e., groundwater) is beyond the jurisdictional scope of the CWA. Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22208 (April 21, 2014). It is significant that, despite proposing a rule which would vastly increase the scope of the CWA's regulatory authority, the agencies primarily responsible for carrying out the directives of the CWA believe that the Act does not extend to groundwater.

### 4. The Groundwater Directive Interferes with the System of Federalism Envisioned by the Clean Water Act

Another troublesome aspect of the groundwater directive is its attempted usurpation of state authority.

Congress intended that the statute "recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, [and] to *plan the development and use* . . . of land and water resources." 33 U.S.C. § 1251(a)-(b) (emphasis added). Several of the polices found in the groundwater directive infringe on the authority of the individual states, and are therefore not supported by the CWA.

For example, by requiring that the Forest Service "[e]valuate all applications to States for water rights on NFS lands and applications for water rights on adjacent lands . . . " (FSM 2560.03(6)(f)), issuing water rights is no longer the "primary" responsibility of the states, as pre-approval by the agency is required before water rights can become effective. This requirement of pre-evaluation by the Forest Service also runs afoul of the clearly stated policy that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by [the CWA]," and "nothing in [the CWA] shall be construed to supersede or abrogate rights to quantities of water which have been established by any state." *Id*. at § 1251(g).

Additionally, several of the CWA sections identified by the Forest Service in FSM section 2560.01(1)(j) as "pertinent" to the policies of the groundwater directive further emphasize Congress's intent to defer to the states in managing aspects of water pollution. The section pertaining to Water Quality Standards and Implementation Plans places the onus on the states to develop such standards and plans to implement them. *Id*. at § 1313. The process of certifying that permits to discharge pollutants comply with other applicable CWA sections is also the responsibility of the states. *Id.* at § 1341. Thus, the CWA provisions cited by the Forest Service as sources of authority do not support its expansive view of groundwater management.

Even the Forest Service seems to acknowledge the important role played by the states in the management of groundwater. It emphasizes that "[m]any of these policies and procedures, although new to the Forest Service nationally, are consistent with management and regulatory approaches in many States and localities across the country." Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560, 79 Fed. Reg. 25815, 25816 (May 6, 2014).

The CWA creates strong incentives for the individual states to effectively manage groundwater. Therefore, beginning with the initial adoption of the CWA generally, and increasing with the adoption of the 1987 amendments concerning management of nonpoint source pollution, states have been actively monitoring and managing the quality of groundwater resources. This means that the states can benefit from more than 25 years of active management, during which they have been able to build on their experiences and tailor their efforts to best protect groundwater resources.

Furthermore, Forest Service management of groundwater resources presents serious problems in terms of the CWA requirement of federal agency compliance with existing state and local laws. The statute requires all departments, agencies, and instrumentalities of all branches of the federal government "having jurisdiction over any property or facility, or [] engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants… shall be subject to, and comply with, all Federal, State, interstate, and local requirements… respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity." 33 U.S.C. § 1323. The directive's requirement of Forest Service pre-approval of water rights is contrary to this CWA directive.

In sum, the CWA, in both its plain language and underlying intent, do not support the Forest Service's policies found in the groundwater directive. Further, the proposed directive severely infringes on the authority of the states. The Forest Service cannot rely on the CWA to support its proposed directive.

It is also both unnecessary and unwise for the Forest Service to implement the policies described in the groundwater directive. Groundwater is already being successfully managed by state and local governments to an equal or greater extent than is called for in the groundwater directive. Interfering with existing state-led efforts in favor of increased federal management and control would be to favor national consistency but undermine the more relevant state and local experience. The groundwater directive has the potential to adversely affect the management and quality of groundwater generally. The Forest Service should withdraw the directive.

## III. State Water Law and Appropriated Water Rights:

The livestock organizations support the prudent management of groundwater and surface water resources, but believe that those objectives are best achieved in compliance with existing state and federal laws, and in accordance with the local systems sanctioned by the states and specifically designed to accommodate the unique circumstances and needs of the states.

States have their own system of water law that governs public and private water rights within their borders. All western states have adopted some form of the prior appropriation doctrine (prior appropriation), or "first in time, first in right," regarding surface water and many have, to some degree, integrated this approach into their system of ground water law. H.R. Rep. No. 113-372, at 2 (2014).

Under the prior appropriation doctrine, water rights are obtained by diverting water for "beneficial use", which can include a wide variety of uses such as domestic use, irrigation, stock-watering, manufacturing, mining, hydropower, municipal use, agriculture, recreation, fish and wildlife, among others, depending on state law. The extent of the water right is determined by the amount of water diverted and put to beneficial use.

Eastern states, on the other hand, generally use riparian systems of law, under which rights to use water are tied to land adjacent to waterways. Western states adopted prior appropriation in order to incentivize and promote the development and judicious use of water rights from sources often far away from their point of use. This allowed for the ownership of water rights without the need to own the land in direct proximity to a waterway. *Id.*

The federal government has largely deferred to states on matters of water law for more than a century. As the West was settled, a fairly uniform set of laws, customs, and judicial decisions based on beneficial use was established. The federal government acquiesced to the western territories, later states, to control, manage, and allocate

water. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 & 162 (1935).

Congress recognized the importance of this locally based system and deferred to state laws in a series of acts beginning with the Mining Act of 1866 (30 U.S.C. § 51) and the Mining Act of 1870 (30 U.S.C. § 52), which clarified and reaffirmed that public land disposition for private purposes did not confer water rights. According to the express language of both statutes, such water rights were subject to possession and use according to "local customs and law."

Further, the Desert Land Act of 1877 added that: ". . . all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." 43 U.S.C. § 321. This important principle of federalism has been confirmed by the U.S. Supreme Court as recently as June of last year. *See Tarrant Regional Water District v. Hermann*, 133 S.Ct. 2120, 2132 (2013) (holding that the "power to control … public uses of water is an essential attribute of [state] sovereignty.").

The settlement of the west and the development of water rights have allowed water users to invest in farming and ranching operations, domestic uses, recreational opportunities, energy development, conservation, and industrial uses. Pursuant to the McCarran Amendment enacted in 1952, the United States has waived its sovereign immunity when sued in a water rights dispute, and cannot object to the application of state law to such a proceeding. 43 U.S.C. § 666 (1952).

This landmark law provides a framework under which the federal government validates its federal reserved water rights in the same fashion as non-federal water rights holders. H.R. Rep. No. 113-372, at 2 (2014). Undermining this longstanding framework would upset the foundation of western municipal, agriculture, mining, recreation, business, environmental, and local communities' water supplies. Protection of western water supplies and the state law that makes that end possible have been supported by generations of western elected officials on a bipartisan basis. *Id* at 3.

Attempts to erode this system have resulted in significant congressional opposition. For example, in the 1990s, Congress commissioned a Federal Water Rights Task Force in response to federal use of permitting processes in derogation of state-allocated water rights held by the City of Boulder, CO and by certain agricultural interests in Arizona. The Task Force report found that federal acquisition of water for secondary purposes (those beyond reserved water rights) must be obtained and exercised in accordance with state and federal law and that the federal government had exceeded its legal authority in failing to do so. Report of the Federal Water Rights Task Force (August 25, 1997). The Task Force also emphasized:

> Congress has not delegated to the Forest Service the authority necessary to allow it to require that water users relinquish a part of their existing

> supply or transfer their water rights to the United States as a condition to the grant or renewal of federal permits.

P.L. 104-127 at § 389(d)(3). This conclusion was based on a lengthy analysis of the Organic Act, the MUSYA, the Federal Land Policy and Management Act, the National Forest Service Management Act, and the McCarran Amendment, as well as related case law from the U.S. Supreme Court.

The result of the Task Force's analysis was the determination that the Forest Service lacked any statutory authority to require bypass flows or to seize private water rights as a condition to a special use permit. Moreover, the passage of the McCarran Amendment and Congress' lengthy history of deference to state water law confirmed that the agency must validate reserved its water rights through McCarran proceedings or obtain new ones pursuant to state water laws.

The Forest Service cannot use its permitting authority to circumvent state water law or to force existing water right holders to relinquish their rights, as confirmed by the Task Force Report's second conclusion:

> [T]he Forest Service may not use its permitting authority to reallocate or otherwise obtain water for National Forest purposes from non-federal water rights which have been or will be recognized in McCarran proceedings.

*Id.* Lastly, the Task Force Report concluded that:

> The Forest Service must attain the secondary purposes of the National Forests by obtaining and exercising water rights in accordance with state and federal law and by working with owners of non-federal water rights to achieve National Forest purposes *without interfering with the diversion, storage, and use of water for non-federal purposes*.

*Id.* (emphasis added).

Congress' opposition to federal land management agencies' overreach regarding water resources has not abated since the passage of the aforementioned acts. For example, in March of 2014, the House of Representatives passed H.R. 3189—the Water Rights Protection Act—with bipartisan support to prevent the Forest Service and other land management agencies' use of the permitting and leasing processes to obtain the water rights of non-federal water users. H.R. Rep. No. 113-372, (2014).

This Act was introduced in response to federal land management agencies' heavy handed practice of (1) denying special use permits to water rights holders unless those holders transferred their interests to the United states, without compensation, and (2) requiring that water rights acquired by non-federal entities be acquired in the name of the United States rather than the holder themselves. *Id* at 2. Importantly, both of these practices remain intact through Forest Service

Manual 2540 incorporated by reference in the proposed directive on groundwater.

## IV. The Scope of Federally Reserved Water Rights:

The law of federally reserved water rights was established by the landmark case *Winters v. United States* in 1908. The Supreme Court held that although Congress did not specify a quantity of water for an Indian tribe when establishing a reservation through legislation, the water necessary to carry out the purposes of that reservation was implied at law because, without the necessary water, the purposes of the reservation could not be carried out. *Winters v. United States*, 207 U.S. 564, 576-577 (1908).

The "Winters Doctrine" applies to all classes of federal reservations including national forests. Like all federally-reserved water rights, the amount and scope of water reserved for National Forest System lands is determined by the purposes of the act or executive decree establishing the federal reservation of land. As explained by the Supreme Court in *Cappaert v. United States*, the appropriate measure is "appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation," and that, in designating federal lands, Congress "reserved only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141; *see also U.S. v. New Mexico*, 438 U.S. at 696.

Under the Organic Act, Congress set forth only two purposes for which water is implicitly reserved: (1) "to secure favorable water flows for private and public uses under state law," and (2) "to furnish a continuous supply of timber for the people." *U.S. v. New* Mexico, 438 U.S. at 718. Absent a specific federal reservation of land that includes additional purposes for which water is needed, these are the only purposes for which water is reserved under the Organic Act, which established the vast majority of National Forests to which the proposed groundwater directive would apply. As the Supreme Court stressed in *U.S. v. New Mexico*, if the Organic Act was intended to cover purposes such as the protection of fish and wildlife, and other purposes not stated in the Organic Act, there would be no need for other Acts creating different classes of federal land reservations. *Id.*

The Forest Service does not address how federal management of groundwater resources furthers the purpose of securing favorable water flows for both private and public uses. The proposed groundwater directive would substantially restrict the ability of individuals to access groundwater resources for purposes such as irrigation, therefore restricting access to water flows for private use. Any resource management carried out by the Forest Service must be done according to the terms of the Organic Act and promote the availability of water flows for both public and private uses.

Additionally, the Organic Act provides the Forest Service with the authority to manage only those waters flowing through National Forest System lands, not all waters within the watershed of those flowing through the national forests. Even if one assumes that groundwater management somehow relates to the securing of favorable water flows,

managing all waters within a watershed would still be contrary to the idea that the amount and scope of the reservation is limited by the purposes for which the reservation was established. Nothing in the operative statutes or case law supports the assertion of authority to manage any waters outside areas designated as national forests. The proposed policy to manage groundwater resources on a watershed-wide scale therefore exceeds the Forest Service's Congressional grant of authority and is contrary to Supreme Court precedent interpreting the extent of federally-reserved water rights.

## V. Reserved Water Rights and Groundwater:

Significantly, no court has held that federally reserved rights apply directly to groundwater resources for federal government reservations. Rather, the courts have only upheld regulations impacting groundwater that are narrowly tailored to protect a primary reservation purpose for which surface water is needed, and only when a direct nexus between groundwater activity and surface water impact has been shown with specificity. *Cappaert*, 426 U.S. at 141.

Not only is the *Cappaert* decision silent on whether the Winters Doctrine can be applied directly to groundwater resources, it is also clear that when regulating a groundwater use which impacts reserved surface water, a direct impact must be shown and will not be assumed. *Id*. The Forest Service proposed groundwater directive takes this important principle and turns it on its head by assuming "surface water and groundwater resources as hydraulically interconnected, and considering them interconnected in all planning and evaluation activities, *unless it can be demonstrated otherwise using site-specific information*." FSM at 2560.03 (emphasis added). Not only is this policy directly at odds with the Supreme Court's rationale in *Cappaert*, it would also single handedly assume a reserved water right for the federal government in nearly all waters found in a watershed, both surface and subsurface, in which Forest Service land is situated.

No case law supports the finding that the Organic Act conferred a reserved right to groundwater upon the Forest Service. Indeed, the U.S. Supreme Court has specifically declined to acknowledge such a right for any federal reservation.

## VI. Comments on selected portions of the directive follow:

***2560.03- Policy***

*1. <u>Primary Focus of Groundwater Resource Management</u>. 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.*

**A. Comment:** The 2560.03 Policy statement (above) errs in part in asserting the Forest Service has the authority to manage present or future uses of groundwater, unless the Forest Service has a state adjudicated water right.

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*2. Water Resource Connectivity. 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.*

**B. Comment:** The above statement about water resource connectivity is arbitrary: interconnectedness is a fact that must be determined on a case-by-case basis. *Cappaert*, 426 U.S. at 141. To assume ground and surface waters are always connected places a huge burden on permittees in all circumstances to prove a negative: that there is no connection. Rather, the burden must be on the Forest Service to demonstrate that there is a direct connection.

The agency states that "[s]ince groundwater is an integral component of the hydrological cycle in all watersheds, it is appropriate to include groundwater on NFS lands within an integrated water resources management program." 79 Fed. Reg. at 25816. This statement ignores the limits of the Forest Service's legal authority.

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*3. Scale of Hydrological Resource Management. Evaluate and manage the surface water–groundwater hydrological system on an appropriate spatial scale, taking into account surface water and groundwater watersheds, which may not be identical and relevant aquifer systems.*

**C. Comment:** This statement regarding scale exceeds the Forest Service's authority and reserved rights under the Organic Act and violates the purposes of that law, as well as the states' water laws to which the Organic Act defers on appropriated rights. The Forest Service has no authority over watersheds or parts thereof that are outside National Forests, nor does it have unilateral authority to manage groundwater.

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*4. Effects of Proposals on Groundwater Resources.*

*d. Require that monitoring and mitigation appropriate to the scale and nature of potential effects is conducted, evaluated, and reported when authorizing a proposed use or Forest Service activity that has a significant potential to adversely affect NFS groundwater resources.*

**D. Comment**: This statement seems to assert all groundwater resources are NFS resources, i.e., reserved water rights. This of course is clearly not true and to the degree that the Forest Service intends to apply the proposed directive to any water right obtained under state law it should state so specifically. The Forest Service must apply and compete along with others who assert rights to waters of the US. The Forest Service has no authority to manage groundwater belonging to others, including permit holders.

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*6. Cooperation with Other Governmental Entities.*

*e. Obtain water rights under applicable State law for groundwater and groundwater dependent surface water needed by the Forest Service (FSM 2540). Require written authorization holders operating on NFS lands to obtain water rights in compliance with State law, FSM 2540, and terms and conditions of their authorization.*

**E. Comment:** While the Forest Service appears to make the directive compliant with state law in this section, the Forest Service Manual referenced in the section under which the groundwater directive is to be carried out does the exact opposite by violating state water law, federal court precedent, and the United States Constitution. Specifically, FSM 2540, Section 2541.32 – Possessory Interests, states that it is the policy of the agency to:

*"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."*

This broad sweeping language establishes a policy to extort the state-granted water rights of any water user who seeks to operate on NSF lands if the Forest Service deems that use is "related to multiple use objectives," and in the opinion of the Forest Service, the use and development of that water right affects the management alternatives or efficiency of the Forest Service, or if a given use will continue after its current user discontinues their operations.

Under this broad language, it is difficult to image a use of water on NSF lands to which the federal government would not claim a possessory interest. Not only does this language assume that the reserved rights of the Forest Service are limitless, but this section of the directive also violates the law of western states.

Furthermore, while FSM 2540 remains intact and is referenced in the proposed directive, the effect of the directive would be to implement a massive scale policy of

taking private property rights without compensation. This is a clear violation of the Fifth Amendment to the United States Constitution.

Previous efforts to use the permitting, leasing, and special use processes to coerce water rights from state recognized water rights holders have been met with strong opposition from the public and Congress. On March 13, 2014 the House of Representatives passed H.R. 3189, the Water Rights Protection Act, which is aimed at prohibiting the exact practice the Forest Service doubles down on and expands through its reference to FSM 2540. This approach is untenable enough when applied to surface use, and it is expanded tenfold when applied to groundwater through an automatic presumption of interconnectivity throughout entire watersheds.

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*7. Use of Groundwater.*

*c. 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 2542).*

**F. Comment:** This section would have a catastrophic effect on appropriated water rights granted under state law, and could set in motion a domino effect of water rights conflicts throughout the western United States, threatening local economies, harming farming, ranching, and mining operations, municipal water use, recreational water use, and other uses. The Forest Service has no authority to "encourage the use of water sources off NFS lands when use is largely or entirely off NFS lands" and doing so could jeopardize the livelihoods of those who rely on or may develop businesses that rely on waters originating on NFS lands which provide 18 percent of the Nation's water, and over half the water in the West.[1] FSM 2560.03(7)(c).

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***2560.04h – Forest and Grassland Supervisors***

*It is the responsibility of forest and grassland supervisors to:*

*1. Address in planning documents the long-term protection and sustainable use of groundwater and groundwater-dependent resources on NFS lands. Appropriately protect groundwater resources on NFS lands that are critically important to surface water resources or to natural features, ecosystems, or organisms.*

[1] See *New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs: Oversight Hearing Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 113th Cong. (2014) (written testimony of United States Department of Agriculture) regarding scope of waters originating on NFS lands.

*2. Evaluate the quantity, quality, and probable yields of groundwater resources under their jurisdiction (FSM 2880). Focus efforts on groundwater resources that are now or are reasonably expected to be developed or adversely affected by development.*

**G. Comment:** In item 1 above, the Forest Service improperly assumes that all groundwater underlying NFS lands are federally reserved rights and that the Forest Service has the authority to regulate groundwater. This assumption violates clear precedent defining the scope of reserved rights in *U.S. v. New Mexico.*

In item 2, the directive refers to "…groundwater resources under their jurisdiction" which is not clearly defined in the proposed directive which provides only the broad and vague definition at 2560.05 which seems to suggest all groundwater underlying NFS lands meets the description. FSM 2880 is cited but it only describes the Forest Service's desire to evaluate and inventory groundwater. Groundwater "…under their jurisdiction…" applies only to those water rights adjudicated under state law. The Forest Service should remove this section at a minimum, preferable however is withdraw the directives in their entirety as stated above.

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*5. Evaluate all applications for State water rights on NFS lands and those on adjacent lands with the potential to affect NFS groundwater resources. Identify any injury to NFS water rights and groundwater resources in applicable Federal, State, and local proceedings (FSM 2541).*

**H. Comment:** No law provides the Forest Service with the authority to evaluate applications for state recognized water rights. This provision attempts to usurp state authority and is impermissible under existing statutes and precedent requiring federal deference to state law on matters affecting water allocation. Further, injury is only a relevant term where the Forest Services has reserved and adjudicated a state-issued water right.

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*9. Ensure that the effects on groundwater resources from authorized activities involving groundwater withdrawals are monitored and evaluated. Require that all groundwater monitoring data and information collected in compliance with local, State, or other Federal requirements are provided to the Forest Service by the holder and are included in monitoring and evaluating those effects. Appropriately address adverse impacts on groundwater resources from proposed and authorized activities, such as by modifying the activities or adopting mitigation strategies.*

**I. Comment:** Rather than focus on effects of withdrawals on groundwater, the Forest Service should follow its statutory and regulatory authorities and focus on how groundwater withdrawals would affect surface resources needed for the primary purposes of federally reserved lands. The Forest Service exceeds its authority and/or

simply should not require private parties or "holders" to collect information for the Forest Service. The Forest Service should only implement this directive once it has the resources to do so. Further, the Forest Service should not pull resources from other programs to accomplish this.

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**2560.05- Definitions**

*Groundwater Resources: The groundwater systems and the groundwater-dependent ecosystems linked to those systems that are associated with one or more parcels or units of land.*

**J. Comment:** As stated previously, this definition is highly vague and when read together with the rest of the directive, suggests that the Forest Service assumes a legal interest in and regulatory authority over all groundwater resources, even those resources underlying adjacent lands, any conceivable or indirect impacts to which could, in the sole, unsupported opinion of the Forest Service, now, or at any time in the future, affect surface resources or present or future uses of groundwater. This definition is directly at odds with Supreme Court precedent, the Organic Act, state water law, and the concept of federalism.

*Water Right: A legally recognized usufructuary right to divert, store, or use water for a State-accepted beneficial use that confers no property right or ownership interest in the physical access to the water source across property owned by adjacent or overlying landowners, even when access is needed for the physical withdrawal of the water. Access to the water source occurs pursuant to federal law on federal lands or pursuant to state real property laws on non-federal lands.*

**K. Comment:** The Forest Service's definition of "water right" is inaccurate for several reasons. First, water rights are recognized property rights under both state and federal law and subject to the compensation requirements of the 5th Amendment to the United States Constitution when taken. *Dugan v. Rank*, 372 U.S. 609, 619 (1963). Second, contrary to the proposed definition, water rights frequently include a right of access across property owned by adjacent or overlying landowners.

The Colorado Constitution, for example, provides a private right of condemnation for the holders of water rights for access purposes. Colo. Const. Art. XVI, Section 7. Additionally, the Mining Act of 1866 provides that "[w]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." 30 U.S.C. § 51. In other words, once an individual has obtained a legally-enforceable water right, their ability to possess or exercise it cannot be interfered with by any entity, including the Forest Service.

The Forest Service attempts to advance the general overreaching policy in its proposed directive by adding extraneous and incorrect information about the nature of water rights

as property and incorrectly characterizing the right of access associated with water rights. The incorrect characterization of water rights as not being property combined with the proposed directive's provisions which could lead to diversions of water away from current holders evinces a plan to take property rights or access to them and then claim that compensation is not needed because the Forest Service has determined that water rights are not property.

It does not work this way. The Forest Service does not have the authority to define what is and what is not a water right, nor may it take without compensation that which it has deemed not to be a property right. This effort to erode existing state and federally recognized rights through a definition in a proposed directive is inappropriate and inconsistent with federal and state precedent, statutory law, and the United States Constitution.

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**2561 – CONSIDERATION OF GROUNDWATER RESOURCES IN FOREST SERVICE PROJECTS, APPROVALS, AND AUTHORIZATIONS**

*1. 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. This type of connection means that cross-contamination and reductions in quantity can occur unless natural geological barriers exist or prevention strategies are in place.*

*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.*

*3. Include in all new and reissued written authorizations terms that require the holder to provide to the Forest Service all groundwater monitoring data and information collected in compliance with applicable local, State, or other Federal requirements.*

**L. Comment:** As previously described, item 1 is a far reaching position not supported by law. Generalities in regard to "connectedness" are arbitrary: connectedness must be determined on a case by case basis. *Cappaert*, 426 U.S. at 141. By stating that the assumption of interconnectivity will be made regardless of state law, the Forest Service doesn't even obfuscate their intent to act contrary to local directives. This approach has already been rejected by state agencies, including the State Engineer of Wyoming,

which calls for a presumption of non-connectivity. This presumption is and should be treated as superior to any presumption made by the Forest Service.[2]

Item 2 appears to refer to NEPA based analyses. While it is appropriate for the Forest Service to consider and disclose effects to groundwater under NEPA, NEPA is not a cited source of the agency's authority to carry out the proposed directive, and therefore it should be clarified that any groundwater impact analysis should be done in the context of NEPA, not through a duplicative and unauthorized secondary analysis created by the Forest Service's proposed directive on groundwater.

Furthermore, the Forest Service may not bootstrap the expansive management role it asserts that is not well based in any law to its role regarding groundwater impact analysis under NEPA. Item 3 has broad monitoring and reporting requirements that impose significant new burdens on operators, many of whom may be small businesses. The Forest Service has not demonstrated that it adequately analyzed this economic regulatory burden in drafting this policy, nor again has it clearly explained its legal authority or sound policy reason for this imposition.

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**2563.8 – Monitoring and Mitigation for Water Wells and Water Pipelines**

*1. Ensure that all new and reissued authorizations involving water wells or water pipelines that have a substantial potential to adversely affect NFS groundwater resources are monitored in a manner appropriate to the scale and nature of the potential effects.*

**M. Comment:** Here again by referring to "NFS groundwater resources" the Forest Service appears to be asserting that all groundwater resources under Forest Service managed lands belong to the Forest Service. As addressed throughout these comments, this assertion is incorrect and should be removed.

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**2567 – LEGAL CONSIDERATIONS IN MANAGING GROUNDWATER RESOURCES**

*1. Work cooperatively with appropriate State agencies to ensure that applicable State and Federal water-related laws and regulations are implemented on NFS lands to protect groundwater for such purposes as outdoor recreation, authorized special uses, permitted livestock grazing, and fish and wildlife management. Whenever possible, establish a process for mutual consultation with appropriate State agencies regarding groundwater-related issues on NFS lands.*

[2] *New Federal Schemes to Soak Up Water Authority: Impacts on States, Water Users, Recreation, and Jobs: Oversight Hearing Before the Subcomm. on Water and Power of the H. Comm. on Natural Resources*, 113th Cong. (2014) (written testimony of Patrick Tyrrell, P.E. Wyoming State Engineer).

**N. Comment:** This section continues two faulty assumptions that pervade the groundwater directive; (1) that the Forest Service has reserved rights in all groundwater resources underlying NFS lands, and (2) that the purposes for which those lands were reserved extend beyond protecting surface flows for appropriation under state law and providing a timber supply for the people. While outdoor recreation, authorized special uses, permitted livestock grazing, and fish and wildlife management are all purposes for which NFS lands are to be administered under MUSYA and FLPMA, none of these are purposes for NFS land reservations under the Organic Act, and therefore none of them provide a reserved right in the groundwater underlying NFS lands or the ability to manage such resources.

## VII. Conclusion

The livestock organizations would like to thank the U.S. Forest Service for the opportunity to submit these comments in response to its proposed directive on groundwater management. Unfortunately, many of the policies found in the directive are deeply concerning to us, as they would result in substantial harm to the ranching families across the west. Therefore, for the foregoing reasons, the undersigned livestock associations strongly urge that the Forest Service withdraw its proposed directive on groundwater management without delay.

Sincerely,

Public Lands Council
National Cattlemen's Beef Association
American Sheep Industry Association
Association of National Grasslands
Arizona Cattle Growers' Association
Arizona Wool Producers Association
Colorado Cattlemen's Association
Colorado Wool Growers Association
Idaho Cattle Association
Idaho Wool Growers Association
Montana Public Lands Council
Montana Stockgrowers Association
Nevada Cattlemen's Association
North Dakota Stockmen's Association
Oregon Cattlemen's Association
Oregon Public Lands Council
Southern Arizona Cattlemen's Protective Association
South Dakota Cattlemen's Association
Utah Cattlemen's Association
Washington Cattlemen's Association
Wyoming Stock Growers Association
Wyoming Wool Growers Association