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Honorable Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Secretary Vilsack:

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

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

Despite that legal and historical underpinning, the Proposed Directive only identifies states as "potentially affected parties," and asserts that the USFS's proposed actions would "not have substantial direct effects on the states." Our initial review of the Proposed Directive leads us to believe that this measure could have significant implications for our states and our groundwater resources.

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

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

Sincerely,

John Hickenlooper
Governor, State of Colorado
Chairman, WGA

Brian Sandoval
Governor, State of Nevada
Vice Chairman, WGA

Western Governors' Association
Questions Regarding Proposed United States Forest Service (USFS)
Water Quality-Related Directives

Proposed Directive on Groundwater Resource Management

Legal Basis for USFS Action:

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

- What is the legal basis for U.S. Department of Agriculture (USDA) / USFS assertion of federal authority in the context of the Proposed Directive? What does the USDA / USFS recognize as the limits of federal authority?
- The Proposed Directive states that, when filing groundwater use claims during state water rights adjudications and administrative proceedings, Forest Service employees should "... [a]pply Federal reserved water rights (the Reservation or Winters doctrine) to groundwater as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act" (emphasis added).
 - What is the legal basis for these claims?
 - When and how will USFS assert reserved water rights claims to groundwater?
- The Proposed Directive states that the assertion of reserved rights to surface water and groundwater should be consistent with the purposes of the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act. In the 1978 case *United States v. New Mexico*, 438 U.S. 696 (1978), the U.S. Supreme Court denied USFS claims to reserved rights for fish, wildlife and recreation uses. Rather, the Court found that the Organic Act limits reserved rights to those necessary to meet the primary purposes of the Act – the conservation of favorable water flows and the production of timber – and that other secondary needs must be met by obtaining appropriation rights from the state.
 - How does the Proposed Directive work within the legal framework required by the Court?
 - Given the Supreme Court's finding, how does the Organic Act authorize USFS reserved rights to groundwater here?

State Authority:

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

Scientific Assumptions and Definitions:

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

specific considerations into account.

- What quantifiable science does USFS depend upon to justify this broad assertion of federal authority?

Application to Existing Permitted Uses:

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

Nexus to Forest Planning Rule:

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

Process Concerns

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

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

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