



**UTAH STATE  
WATER DEVELOPMENT COMMISSION  
Utah Legislature**

**Proposed United States Forest Service  
Directive for Groundwater Resource Management  
&  
Proposed Best Management Practices for Water Quality Management**

**Statement of the  
UTAH FARM BUREAU FEDERATION  
July 15, 2014**

Dear Commission Members:

The United States Environmental Protection Agency and Army Corps of Engineers have consistently stated that they are not proposing to regulate the groundwater of the states. Unfortunately, in the United States Forest Service proposed Groundwater Resource Management Directive that is exactly what they are attempting to do! As currently proposed, the Forest Service expands the reach of the federal government into an area that is generally regulated by the states. This is contrary to the long standing federal policy respecting the states in groundwater management and could adversely impact private property rights.

As water has historically been developed in the west, it was for the production of food and fiber. According to the Utah State Engineer, farmers, ranchers and agriculture interests currently own about 82 percent of Utah's developed water. The landscape of the west is changing with growing populations and increased demand for limited water resources. With nearly 70 percent of Utah owned and controlled by the federal government, sovereignty and state control of our water resources is critical to food security, meeting growth demands and future prosperity.

Scarcity of water in the Great Basin and southwest United States led to the development of a system of water allocation that is very different from how water is allocated in regions graced with abundant moisture. Rights to water are based on actual use of the water and continued use for beneficial purposes as determined by state laws. Water rights across the west are treated similar to property rights, even though the water is the property of the citizens of the states. Water rights can be and often are used as collateral on mortgages as well as improvements to land and infrastructure.

The idea of a “riparian” interest in water that appears to be factored into the Forest Service Groundwater Resources Management Directive is not a legally recognized concept in Utah by most western states, holders of water rights and under Utah and western water law.

The arid west was transformed by our pioneer forefathers through the judicious use of the precious water resources. Utah is the nation's second most arid state, second only to Nevada. For our ancestors, protecting and maximizing the use of the water resources was not only important, it was a matter of life and death. Water retains that same level of importance today!

### **CONGRESSIONAL MANDATES** **“Establishing the Sovereign Water Rights of the States”**

The settlers in the arid west developed their own customs, laws and judicial determinations to deal with mining, agriculture, domestic and other competing uses recognizing first in time, first in right. Out of these grew a fairly uniform body of laws and rights across the western states. The federal government as original sovereign and owner of the land and water prior to Congress granting statehood ultimately chose to acquiesce to the territories and later the states on control, management and allocation of water through a series of actions:

#### **Act of July 26, 1866:**

The United States Congress passed the Act of July 26, 1866 [subsequently the Ditch Act of 1866] that became the foundation for what today is referred to “Western Water Law.” The Act recognized the common-law practices that were already in place as settlers made their way to the western territories including Utah. Congress declared:

*“Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected”  
(43 USC Section 661)*

This Act of Congress obligated the federal government to recognize the rights of the individual possessors of water, but as important, recognized “local customs, laws and decisions of state courts.”

#### **The Desert Land Act of 1877:**

*“All surplus water over and above such actual appropriation and use....shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing...”*

#### **The Taylor Grazing Act of 1934:**

*“nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes...”*

### **The McCarran Amendment of 1952:**

Congress established a unified method to allocate the use of water between federal and non-federal users in the McCarran Amendment. (43 USC Section 666) The McCarran Amendment waives the sovereign immunity of the United States for adjudications for all rights to use water.

“waives the sovereign immunity of the United States for adjudications for all rights to use water.”

### **The 1976 Federal Land Policy Management Act:**

“All actions by the Secretary concerned under this act shall be subject to valid existing rights.”

Congress has been explicit in the limits it has established on sovereignty and state’s rights for the United State Forest Service and other land management agencies.

## **OBAMA ADMINISTRATION**

### **“Increasing Federal Command & Control”**

In the public lands states of the American West, there has been a growing distrust of the federal land management agencies as they have imposed greater command and control over the natural resources of the region. The uncertainty of changing attitudes within the agencies often driven by the politics of the day creates economic challenges for farmers, ranchers, businesses, communities and the sovereignty of the western states.

For grazing of livestock that began as the first pioneers entered the Salt Lake Valley in 1847, the lands held in common were utilized in the best interests of the common good. The Multiple Use – Sustained Yield Act of 1960 held to the same important values – Meet and Serve Human Needs!

The production of meat protein from the lands held in common (public lands) provides a value to all Americans, even those who are physically or financially unable to travel to the west. Agency actions have dramatically reduced generation’s old livestock grazing rights (Animal Unit Months - AUMs) with water often cited as the reason. In the trespass case *United States vs. the Estate of Wayne Hage*, grazing rights, livestock water rights and access to the state’s sovereign waters on federal lands came to a boiling point in a Nevada Federal Courtroom in 2012. Nevada Federal District Court Chief Judge Robert C. Jones in a striking and revealing statement said:

*“Anybody of school age or older knows the history of the Forest Service in seeking reductions in AUMs and even the elimination of cattle grazing during the last four decades.”*

The pervasive culture and attitude of the leaders and many employees of the United States Forest Service has become even more confrontational during the Obama Administration. They are seeking to exercise greater control over the System lands that includes reductions in grazing rights, controlling water and challenging access. These detrimental actions are

seemingly without regard for the history, culture and economics as required by federal laws including the Federal Land Policy Management Act.

Some of the aggressive agency actions that imperil property rights, state sovereignty, economic opportunities and Utah jobs are listed below. They are representative of a growing list of regulatory and legal actions that challenge sovereignty, opportunity and hinder economic growth.

### **UNITED STATES FOREST SERVICE “Water - A Troubled History”**

It is important to recognize and remember as one analyzes and deliberates over the proposed United States Forest Service proposed Groundwater Resources Management Directive - these waters originating on System lands are the sovereign water rights of the people of the State of Utah and do not belong to the federal government nor the American people!

#### **Utah Diligence Claims:**

The aggressive posture of the Forest Service in collecting western water rights is highlighted in its filing of 16,000 diligence claims on livestock water rights scattered across the Utah landscape belonging to Utah sheep and cattle ranchers. This decades old strategy was defended by now retired Regional Forester Harv Forsgren who argued “these diligence claims are made on behalf of the United States, which was the owner of the land where livestock grazed prior to statehood and livestock watering took place which action established the federal government’s claim to water rights.”

A “Diligence Right” or “Diligence Claim” under Utah law is a claim to use the surface water where the use was initiated prior to 1903. In 1903, statutory administrative procedures were first enacted in Utah to appropriate water. Prior to 1903, the method for obtaining the right to use water was simply to put the water to beneficial use. To memorialize a diligence claim, the claimant has the burden of proof of the validity of beneficial use prior to 1903. The agency’s argument continues to be that the livestock beneficially use the water in the name of the United States prior to Utah’s statehood. These claims will ultimately require a determination to be made by the State Engineer under the guidance of the Utah Legislature.

#### **Tooele County Utah Grazing Association:**

In the spring of 2012, livestock grazing permittees meeting with the local Forest managers were confronted by Forest land managers seeking a “sub-basin claim” from the state of Utah. Where a sub-basin claim is granted by the Utah Division of Water Rights, changes in use and diversion can be done without state approval. The permittees were asked to sign a “change of use” application which would have allowed the agency greater ease in determining what the use would be, including changing use from livestock water to wildlife, recreation or elsewhere.

When permittees objected, they were told that not complying with the Forest Service request could adversely affect their “turn out” - the release of their sheep and cattle onto their Forest allotments. The agency argued their request was misrepresented.

#### **2004 Forest Service “Water Clause”:**

In 2008 Utah passed the Livestock Water Rights Act to define the water rights of permittees on the federal lands based on the ability to place the state’s water to beneficial use. The Legislature said: “

*“the beneficial user of a livestock watering right is defined as the grazing permit holder for the allotment to which the livestock watering right is appurtenant.”*

The Forest Service filed an ownership claim on all livestock water rights on Forest System lands in Utah claiming they are “the person who owns the grazing permit.”

Using the “water clause” as leverage, the Forest Service pushed the Utah Legislature to amend the Act to include “joint ownership” in livestock water rights as required. The agency argued it was necessary to assure continued water for livestock grazing of Forest lands. Utah did amend the statute to as ‘requested’ providing for a “Certificate of Joint Ownership.” This action and creation of a certificate however did not convey a right of water ownership to the Forest Service because rights are based on the ability to beneficially use the state’s water.

In the Forest Service requirement to hold livestock water, it is important to recognize Utah law provides greater assurance of water remaining on the livestock grazing allotment than any federal agency assurances, including internal policies like the water clause or the proposed Groundwater Resources Management Directive. Utah law states:

*“A livestock water right is appurtenant to the allotment on which the livestock is watered.”*

In 2014 the Utah Legislature deleted reference to the “Certificate of Joint Ownership” based on concerns with the Forest Service water clause and a claim of sole possession if the agency cancels a use permit. The Forest Service “water clause” says:

***“In the event of revocation of this permit, the United States shall succeed to the sole ownership of such joint water rights.”***

It is troubling and offensive to understand that based on an adverse agency action on a permitted activity on System lands, the agency “claims” sole possession of previous “jointly held” private livestock water rights.

This action is a “taking” by the Forest Service without just compensation as protected under the United States Constitution and the Constitution of the state of Utah!

#### **Over-Filing on Historic Water Rights:**

In ***Joyce Livestock Company vs. United States***, the Owyhee County based cattle operation had ownership dating back to 1898 including in-stream stock water rights. The United States over-filed on the Joyce water rights based on a priority date of June 24, 1934 – the date of passage of the Taylor Grazing Act. The United States could not show that Joyce or any of its predecessors were acting as its agents when they acquired or claimed to have acquired the water rights. In 2007, after nearly a decade of legal actions and hundreds of thousands of

dollars in legal costs, the Idaho Supreme Court denied the United States claim and defined the standard of beneficial use. The Idaho Supreme Court said:

*“The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that **because the United States did not actually apply the water to a beneficial use** the District Court did not err in denying its claimed water rights.”*

In 1991 in **Hage vs United States**, the Forest Service and BLM over-filed on the livestock rights established in 1865 that ultimately became a landmark “Constitutional Takings” case that went before the U.S. Court of Federal Claims. The USCFC award of \$4.4 million was appealed to the Federal Court of Appeals for Washington DC where the award was overturned in 2012. While awaiting a decision, the US Forest Service and BLM in 2007 filed suit in Nevada Federal District Court against the estate of Wayne Hage alleging trespass on federal lands. In what could only be called a contentious proceeding, Nevada Federal Judge Robert C. Jones heard testimony from Humbolt-Toiabe Forest Ranger Steve Williams stating that:

*“despite the right (of the Hages) to use the water, there was no right to access it, so someone with water rights but no permit from the US Forest Service would have to **lower a cow out of the air to use the water**, for example, if there were no (agency granted) permit to access it.”*

June 6, 2012 Judge Jones made two very important observations on the Forest Service and livestock grazing policies:

*“... the Forest Service is seeking reductions in AUMs and even the elimination of cattle grazing...”*

*“I find specifically that beginning in the late ‘70s and ‘80s, first, the Forest Service entered into a conspiracy to intentionally deprive the defendants here of their grazing rights, permit rights, preference rights.”*

Both the U.S. Appeals Court and the Nevada District Court were in agreement that there is “**a right of access**” to put livestock water to beneficial use on federal lands. Judge Jones ruling even included an access corridor with grazing rights while beneficially using the state’s waters.

In the **Tombstone, Arizona** scenario, the Forest Service overreach begins with the agency overfiling on the city’s 25 developed springs and wells located in the Huachuca Mountains. For more than 130 years Tombstone piped its privately held water rights some 30 miles for use. Even after the Huachuca’s were designated a federal wilderness area in 1984, Tombstone was allowed to maintain its road and critical access to its springs providing Tombstone with water for culinary needs and maybe more important in this hot, arid place - fire protection and public safety.

Tombstone won the water ownership challenge, but found the agency combative and stonewalling following torrential rains in 2011. After notifying the Forest Service of their need to repair damage as in the past, they were denied access. They sought relief based on the state’s public health, safety and welfare obligations. When the city received authorization to do badly

needed repairs they were forbidden from using the previously approved mechanized equipment. As city employees showed up with hand-tools and wheelbarrows – armed Forest agents would not allow the “mechanized” wheelbarrows onto the Forest administered lands! As of April 24<sup>th</sup>, the Forest Service has allowed Tombstone access to only 3 of their 25 springs.

### **Fencing Cattle From Their Livestock Water Rights:**

In drought stricken Otero County New Mexico, the Forest Service is blocking rancher's cattle from accessing long held water and recognized as private property rights under state law. The agency told the ranchers with thirsty cattle that they merely replaced old barbed wire fences with new, much stronger metal based fences to establish enclosures to protect a “vital wetland habitat.”

Otero County Commissioners issued a “cease and desist” order in an attempt to allow the cattle access to the rancher's water and to protect the state's sovereign water rights. The elected county commissioners charged the Forest agents with an illegal action that could ultimately lead to animal cruelty. The county is threatening the arrest of federal personnel who are keeping the ranchers from their privately held water rights.

### **Intermountain Regional Water Policy:**

National and Intermountain Region Forest Service policies authorize and instruct agency personnel on the “establishment of water rights in the name of the United States” and provide guidance with “State Specific Considerations” outlining the steps to obtain livestock water rights. In an August 15, 2008 Briefing Paper, Regional Forester Harv Forsgren explained the “United States, through the Forest Service, has filed thousands of claims for livestock water on federal lands. The Forest Service in the Intermountain Region has filed on or holds in excess of 38,000 stock water rights...”

The briefing paper continues, “In recent years, ranchers and community leaders have contested ownership of livestock water rights. Some ranchers believe that they should hold the water rights because their livestock actually use the water. Land management agencies, such as the US Forest Service, have argued that water sources used to water livestock on Federal Lands are integral to the land where the livestock grazing occurs, therefore the United States should hold the water rights.” When addressing water development on Forest System lands, the Regional Forester said:

“The Intermountain Region will not invest in livestock water improvements, nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water right is held SOLELY by the livestock owner.”

Restricting the use of private water rights through greater agency control challenges state sovereignty and private property protections under Utah's Constitution.

### **Defacto Water Rights:**

Shrinking livestock grazing rights in Utah have been troublesome for elected officials and livestock ranchers for generations. Following the enactment of the Taylor Grazing Act of 1934

and establishment of Grazing Districts where “chiefly valuable for grazing” was the Congressional mandate the Forest Service and BLM authorized more than 5.5 million AUMs (the amount of forage consumed by a 1,000 pound cow and calf) in Utah.

On June 18, 2014 the Utah Legislature held hearings on why in 2014 there are only 1.6 million AUMs, or a loss of nearly 70% over the past 70 years. Forest Service and BLM representatives asked to justify the dramatic drop and how those cuts affect water rights, access, and rural economics.

As permitted AUMs have been dramatically reduced, there has been a corresponding increase in “suspended” AUMs – or currently obligated grazing rights that are being held by the federal land managers in non-use. Through this process, the federal government has gained unused ranchers livestock water rights – defacto water rights illegally absorbed by the United States without compensation. Along with 340,000 suspended AUMs that continue to languish in non-use even while the state of Utah, ranchers and sportsmen invests tens of millions of dollars in feed for livestock and wildlife habitat without federal agencies increasing livestock grazing. Utah law now requires the State Engineer to maintain a record of Utah livestock water rights to be held in trust until the water rights are re-allocated to legitimate ranching interests.

**UNITED STATES FOREST SERVICE  
GROUNDWATER RESOURCES MANAGEMENT DIRECTIVE  
\*Proposed\***

The Federal Register May 6, 2014, page 25823 states under Regulatory Impact that “USDA has determined this is not a “significant directive.” It continues, “This directive will not have and annual effect of \$100 million or more on the economy, nor would it adversely affect productivity, competition, jobs the environment, public health or safety or State or local governments.”

This statement seems to dismiss very real and widespread economic impacts and under further scrutiny appears to be misleading! The Forest Service has a recognized history of reducing livestock grazing in Utah and across the West based citing water as a major reason. Any reduction of sheep or cattle grazing on System lands impacts real ranching families and western communities. In the arid west and particularly in Utah with 67 percent of the state controlled by federal land managers, there are many counties with 85, 90 and even 95 percent federal lands. The Forest System lands are where winter snows fall and rain accumulates. This high mountain terrain is generally where water flows and springs are recharged for livestock use and captured for use by rural communities.

The ranching families who depend on Forest access for livestock grazing not only generate real economic activity - they pay taxes, fund hospitals, schools and other critical infrastructure across the Utah and Western landscape!

In the event actions reducing livestock stocking rates are taken by the agency for reduced moisture as proposed in the Directive, with as little as 10 or 25 percent cuts in cattle grazing or as dramatic as 50 percent – the economic impact is dramatic. In Southern Utah’s Kane and Garfield Counties for example, with private lands making up only 10 percent and 5 percent of the total county land base respectively, cattle ranching is the foundation economic industry. With



12,500 beef cows, all of which spend some time on Forest lands, if the Forest Service cut 25 percent of the cattle - that would reduce cattle sales by more than \$3 million and cut economic activity by more than \$6 million annually. With a 50 percent cut in cattle grazing those numbers double – more than \$12 million is taken from these rural counties annually until the Forest Service restores AUMs.

Considering these potential grazing cut scenarios under the proposed Groundwater Management Directive in just two rural Utah counties, it doesn't take very many counties with grazing reductions across the west to meet and surpass the USDA dismissed \$100 million mark.

### **Dramatic Forest Service Grazing Cuts:**

The history of the Forest Service and livestock grazing in Utah is striking when the numbers are analyzed. Utah Forest Service permitted AUMs between 1940 and 2012 – the number of sheep and cattle grazing System lands has been dramatically reduced. In 1940, according to Utah State University researchers there were 2,754,586 sheep and cattle grazing AUMs permitted in Utah. In 2012, seventy-two years later, the Forest Service has reduced that number 614,682 AUMs – a reduction of 2,139,904 AUMs or a whopping **78%**!

The history and its economic impact on rural Utah and the state's economy by Forest Service grazing cuts is dramatic. An average sized 500 beef-cow operation grazing on the common lands generates more than \$500,000 in direct sales stimulates more than \$1 million in economic activity. These heavy cuts in grazing AUMs have robbed hundreds of millions of dollars from rural communities and the Utah economy.

The internal obligation of Forest Service employees to implement the agency's Manual, including the proposed Directive, provides an undeniable opportunity to facilitate the agency's historic and recognized attack on western livestock ranching and undermining of longstanding western water rights.

### **Forest Service Directive System:**

The Forest Service Manual contains legal authorities, objectives, policies, responsibilities, instructions and guidance needed on a continuing basis by the Forest Service line officers and primary staff. For Forest Service employees, the agency issues the following warning for not following the agency directives:

“The Manual contains the more significant policy and standards governing Forest Service programs, and thus the consequence of not complying with the Manual is generally more serious...”

The Directive seeks greater authority and control obligating employees to integrate the Forest Service Manual “directives” based on terms like “require,” “report,” “prevent,” and “obtain.” These are “action words” that convey to Forest employees and permitted users there is an obligation of compliance and that there are or will be consequences for “not complying!”

### **Seeking Greater Control of Western Water:**

According to the Utah State Engineer, “for Utah, the Forest System lands are those lands where most of our annual precipitation falls and accumulates as rain and snow...” There is not a definitive study on what percent of Utah precipitation originates on System lands but it “may well be as much as 70 percent.” (See Attachment A)

#### **Forest Service Manual FSM 2500 – Watershed and Air Management Chapter 2560 Groundwater Resource Management (Directive)**

##### **2560.03 Policy:**

2. Water Resource Connectivity: The agency cites they will “manage surface and groundwater resources as hydraulically connected, and consider them interconnected in all planning and evaluation activities, unless it can be demonstrated otherwise...” This is an obvious attempt to expand the agency’s authority. With such a large portion of Utah’s waters originating on System lands, this Directive could impede Utah’s current water uses and future water needs.

It is alarming when the agency seeks jurisdictional control based on “interconnectivity” - surface and groundwater. What are the jurisdictional bounds the Forest Service seeks or can legally exercise based on state’s rights? Utah’s State Engineer expressed concerns about existing diversions and use and the potential for reissuing of permits. He is concerned that the Forest Service may seek and unilaterally establish authority to create restrictions on existing uses under this policy if they decide what they already approved doesn't fit within their new interpretation. And what authority does the policy suggest the agency can exert in not allowing as much use of the water from a source located on System lands as has previously been allowed under state authority and beneficially used under state law. This could create a tremendous frustration and potential legal issues for holder of existing water rights where Utah’s Constitution protects against the government “taking or diminishing value” in private property right.

This proposed new policy creates tremendous uncertainty. What might be the impact of federal dictates on private property rights and what Congress has conveyed as the sovereign waters of the state of Utah?

Utah’s State Engineer expressed concern interpreting the policy and implementing what they think the words in the Directive say. There are existing state authorized with long established rights. The holders of water rights must have assurances that their uses and dependency on those sanctioned uses will continue.

4. Effects of Proposals on Groundwater Resources: (a) The policy seeks “consideration of effects” and “approving a proposed use” which appears to be the agency seeking to establish a permitting process. Permitting the use of water that is clearly the property and authority of the state of Utah is federal regulatory overreach. In addition, the slowdown and costs associated with meeting an additional level of federal review would be unacceptable based on access to and use of private property and the water resources of the state.

(c & d) Policy requiring written authorization, monitoring and mitigation are troubling and suggest the agency is seeking to usurp sovereign states rights while establishing a level of federal supremacy! This policy proposal could have dramatic impacts including delayed use of groundwater and even surface water resources and potential loss of individual property rights based on time requirement for beneficial use and ultimately forfeiture under state law.

(e) "Obtain water rights" as related to this proposed groundwater policy and in the context of a potentially massive watershed basis - portends major federal/state framework conflicts. The scope of the overall Directive and the state policy to obtain water rights "for groundwater and groundwater dependent surface water" could provide regional Forest staff the ability to seek and purchase water rights originating on and even off, if they deem that water necessary to carry out the very broad objective of the Manual. This puts the federal government, at taxpayer expense, in direct competition with municipalities, farmers, ranchers and other businesses for the state's water resources.

#### **2560.04h – Forest and Grasslands Supervisors:**

(5). "Evaluate all applications for state water rights on NFS lands and those adjacent lands with a potential to effect System groundwater resources." This directive seems to challenge or seeks to establish **federal supremacy** over state water rights and where the state's are granting water rights and permitting beneficial use activities under state law. The additional assumption that the federal government has authority to evaluate and influence in any way the use of water related to "adjacent lands" is in direct violation of Utah's Constitution and protection against "taking or diminishing value" of private property rights.

#### **Groundwater Recharge Zones:**

Groundwater recharge zones, located on public or private property, falls under the prevue of Utah Division of Drinking Water. Utah has aggressive state statutes and local ordinances that address the current and future drinking water needs of the citizens of the state. The federal land managers have an obligation under "federalism" to provide state and local authorities full and unfettered access to implement groundwater protection activities on System lands without federal interference to carry out its regulatory mandates.

Actions by the Forest Service to reduce or eliminate livestock grazing based on recharge areas and on riparian areas are outside of federal authority. Addressing water quality and meeting water quality standards is the responsibility of the state. Utah's Strategy for Clean Water has established long standing and successful incentive-based partnership with Utah's farmers and ranchers in place to address non-point sources of water pollution. The EPA Award Winning Program should be utilized on both public and private lands.

**NATIONAL BEST MANAGEMENT PRACTICES (BMPs) FOR WATER QUALITY  
MANAGEMENT ON NATIONAL FOREST SYSTEM LANDS (FS-2014-0003)**

**\*Proposed\***

The Forest Service BMPs for Rangeland Management Activities appears to be an effort by the agency through rules, regulations and implementation of the Manual and Handbook to exercise greater control over the natural resources of the Western Public Lands States through administrative actions beyond what was intended by Congress.

Mandating broad national standards that seem to impose “one size fits all” federal oversight at the state, forest or watershed level over non-point source water quality creates conflicts with state regulatory functions and restricts much needed flexibility in this geographically diverse area.

There are major public benefits from science-based grazing management on the public lands including thriving, sustainable rangelands, healthy watersheds, productive wildlife, viable and sustainable rural communities, reduction of wildfire risks and a stronger local tax base supporting critical public services.

**Forest Service Manual (FSM 2500)  
Handbook (FSH 2509.01)**

**Rangeland Management Activities:**

In reviewing the Forest Service BMPs in the Technical Guide there are a number of questions and concerns that arise.

There are a number of references to the planning process where riparian and aquatic systems are listed as considerations for agency actions on a site by site basis. This appears to establish a Forest Service on the ground regulatory process for implementing the Groundwater Resources Management Plan (FS-2014-0001) without authority from Congress.

The Forest Service Groundwater Resource Management Directive declares that groundwater and surface waters are interconnected that for the first time establishes federal supremacy over the state’s groundwater and by “connectivity” federal authority over surface waters flowing from System lands. This action of seeking greater authority and control over waters flowing from System lands is clearly in violation of the intent as well as historic actions of the Congress.

**Range-1. Rangeland Management Planning**

On page 82 of the Technical Guide practices cited including “Validate land management plan grazing suitability” and “Consider the ecological potential of riparian and aquatic system when determining AZM desired conditions” provides the potential for the United States to challenge historic livestock water rights and use of the sovereign waters of the state without the Forest Service having the ability to beneficially use the water. The BMPs are designed to overlay federal authority and obligations while potentially usurping the state’s regulations that grant water rights, beneficial use and the state’s primacy in water quality. This action is problematic

for the long term economic viability of the state's livestock industry. Additionally, federal actions that would take or diminish private water rights violate Utah's Constitutional "takings clause."

The waters that originate upon and flow from the Forest System lands are the sovereign rights Utah that Congress granted through various acts including the Ditch Act, Taylor Grazing Act, McCarran Amendment and even the Federal Land Policy Management Act (FLPMA). The Forest Service overlaying Directives, Manual and/or the BMP Technical Guide establishes broad new authorities and is federal overreach into the sovereign rights of the states!

As a part of Rangeland Management Planning, the Forest Service not only has an obligation to NEPA, as stated in the proposed BMPs, but to FLPMA. In this regard, two critical obligations should be pointed out. First, the statutory obligation to honor state and local planning processes. The state of Utah and the counties have established land use planning processes and master plans. Both of these include the important contribution that agriculture and livestock grazing on the public lands plays in its contribution to the state and local economies. Additionally, FLPMA requires the agency to consider the culture, history and economic impacts of their decisions as applies to public lands ranching in the west. These should be stated and required to be considered within the Technical Guide and proposed BMPs before any site specific agency actions are implemented. Both of these Congressional Acts require federal agencies to recognize the important contribution that agriculture and livestock ranching on public lands plays in state and local economies.

#### Range-2. Rangeland Permit Administration:

On page 83 of the Technical Guide specific to Rangeland Permit Administration, the Forest Service again has noted the "watershed" management basis and relationship with water flows, water quality, riparian and other considerations. They provide potential agency justification for determinations and management decisions that could adversely impact multiple use activities as mandated by Congress - specifically livestock grazing. For Utah and states across the west, the Forest Service has a history of reducing and eliminating livestock grazing AUMs. As noted, Utah has witnessed a 78% reduction in grazing AUMs since 1940 (2.7 million to 614,000).

Uncertainty is elevated for ranchers based BMPs on page 83 terminology related to practices. Certainty is critical in any business operation and decision-making, including public lands ranching. The Forest Service has proposed adding in the agency's decision making process "Professional Judgment." This language allows a high level of ambiguity and potential broad interpretation related to on the ground decision making. This term greatly increases the uncertainty permittees will face regarding grazing determinations and access to public lands.

Utah is a rangeland state with 45 million acres categorized and grazing lands. The federal government manages 33 million acres or 73% of the total. Utah agriculture's foundation based on livestock with animal agriculture - approaching 70% of our farm gate sales. For livestock ranching to be viable in Utah, it is critical to have access to public lands, a reasonable regulatory relationship and certainty.

Several terms and definitions create confusion, ambiguity and uncertainty for livestock producers and require further explanation:

- Monitoring Water Quality – Do these BMP's seek to establish a new level of federal regulations that overlays on the state's primacy, sovereignty and delegated responsibility.
- Designated Beneficial Uses of Water – Currently, the states establish the rights and responsibilities under beneficial use doctrine and first in time, first in right. Does the Forest Service seek to establish its own beneficial use criteria to be overlaid over the sovereign rights of the states?
- Wildlife – Wildlife are the property of the states and falls within the purview of the state's wildlife management agencies. Is the Forest Service seeking new authority and the responsibility to manage the wildlife on System lands? Utah has been actively working with ranchers to determine where wildlife are located and in what numbers to minimize adverse impacts on livestock grazing. The Forest Service could jeopardize this long history of working toward mutual agreements on where, when and how many wildlife will be on the landscape. Management of wildlife is clearly not a decision for any federal agency personnel.
- Recreational Livestock – What is a "recreational livestock"?

These terms and the opportunity for agency professional judgments increases uncertainty for livestock ranchers and the rural communities they support.

Page 84 discusses the practice of the agency "resting" grazing permits. Certainly in the west, the need for periodic rest of the grazing resource is a necessary consideration. The Forest Service, with the large number of cut AUMs in Utah and across the west, should consider providing alternative grazing allotments while resting an allotment to provide greater certainty to ranchers and communities.

"Modify, cancel or suspend" part or in whole the permit as needed to ensure proper use of the grazing land and to protect water quality is another BMP reference to potentially reduce grazing opportunities - critical to economically viable ranching operations.

Throughout the National Core BMP Technical Guide there are line after line, practice after practice references to reducing or eliminating livestock grazing from the System lands. The state of Utah, ranchers and sportsmen have established a critical partnership this is focused on improving Utah's rangeland resource. Tens of millions of dollars have been invested to address critical wildlife habitat issues and to ramp up available food for livestock and wildlife. Range improvements like Pinyon-Juniper removals help both water quality and quantity.

These actions have improved habitat on federal, state and private lands in an effort to increase the numbers of both livestock and wildlife. Does the Forest Service BMPs recognized the potential for improved grazing conditions and more food for livestock and wildlife? Utah State Law specifically calls for returning livestock grazing AUMs before increasing wildlife numbers.

Utah Law States:

Title 63J Chapter 4 Section 401

Chapter 4 (Governor's Office of Management and Budget) Section 401 (Planning duties of the planning coordinator and office)

*(6) The state planning coordinator shall recognize and promote the following principles when preparing any policies, plans, programs, processes, or desired outcomes relating to federal lands and natural resources on federal lands pursuant to this section:*

*(m) (i) land management plans, programs, and initiatives should provide that the amount of domestic livestock forage, expressed in animal unit months, for permitted, active use as well as the wildlife forage included in that amount, be no less than the maximum number of animal unit months sustainable by range conditions in grazing allotments and districts, based on an on-the-ground and scientific analysis; (ii) the state opposes the relinquishment or retirement of grazing animal unit months in favor of conservation, wildlife, and other uses;*

*(iii) (A) the state favors the best management practices that are jointly sponsored by cattlemen's, sportsmen's, and wildlife management groups such as chaining, logging, seeding, burning, and other direct soil and vegetation prescriptions that are demonstrated to restore forest and rangeland health, increase forage, and improve watersheds in grazing districts and allotments for the mutual benefit of domestic livestock and wildlife;*

*(B) when practices described in Subsection (6)(m)(iii)(A) increase a grazing allotment's forage beyond the total permitted forage use that was allocated to that allotment in the last federal land use plan or allotment management plan still in existence as of January 1, 2005, a reasonable and fair portion of the increase in forage beyond the previously allocated total permitted use should be allocated to wildlife as recommended by a joint, evenly balanced committee of livestock and wildlife representatives that is appointed and constituted by the governor for that purpose;*

*(C) the state favors quickly and effectively adjusting wildlife population goals and population census numbers in response to variations in the amount of available forage caused by drought or other climatic adjustments, and state agencies responsible for managing wildlife population goals and population census numbers will give due regard to both the needs of the livestock industry and the need to prevent the decline of species to a point where listing under the terms of the Endangered Species Act when making such adjustments;*

*(viii) policies, plans, programs, and initiatives related to vegetation management should recognize and uphold the preference for domestic grazing over alternate forage uses in established grazing districts while upholding management practices that optimize and expand forage for grazing and wildlife in conjunction with state wildlife management plans and programs in order to provide maximum available forage for all uses; and*

*(ix) in established grazing districts, animal unit months that have been reduced due to rangeland health concerns should be restored to livestock when rangeland conditions improve, and should not be converted to wildlife use.*

It is important for the federal-state-private partnership on these lands held in common to recognize investments and improvements and increase livestock grazing AUMs in compliance with Utah Law to return some of Utah's more than two million lost Forest System AUMs.

### Range-3. Rangeland Improvements

Several questions arise related to the development and maintenance of rangeland improvements. Specifically, FSM 2240 states that rangeland improvements can be the responsibility of either the permittee or the agency. The improvements made and paid for by permittees on System lands should be the property of the permittee.

Use of federal funds derived from grazing fees and used for rangeland improvements should be restricted to System lands that are grazed by domestic livestock. The Forest Service should provide certainty and incentives for optimum private investments in habitat and rangeland improvements. As stated above, Utah Law states permitted livestock grazing should be increased as rangelands are improved and forage is increased reinstating cancelled or suspended grazing AUMs before wildlife populations are increased.

Ranchers developing widely dispersed livestock water rights across Forest System lands provides two immediate results – water for consumptive and non-consumptive wildlife populations and critical control of undergrowth, noxious weeds and invasive species that can provide the fuel for catastrophic wildfires.

### **Limits on Forest Service Regulatory Authority:**

Without clear Congressional authorization, federal agencies may not use their administrative authority to “alter the federal-state framework by permitting federal encroachment upon traditional state power.” In *Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers* the U.S. Supreme Court established limits on regulatory reach and Congressional intent.

*“Where an administrative interpretation of a statute invokes the outer limits of Congress’s power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. **This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon traditional state power. Unless Congress conveys its purpose clearly, it is not deemed to have significantly changed the federal-state balance.**”*

### **Congressional Oversight:**

The Congress of the United States not only has the right, but has the obligation to determine the reach of federal regulatory agencies. The Farm Bureau calls on Congress to maintain the historic federal/state framework as it relates to the sovereign waters of the states. This relationship is critically important based on the difference in between eastern and western states and the source of available water supply. (See Attachment B)

If you have any comments or questions, please contact:

Randy N. Parker, CEO  
Utah Farm Bureau Federation  
9865 South State Street  
Sandy, UT 84070

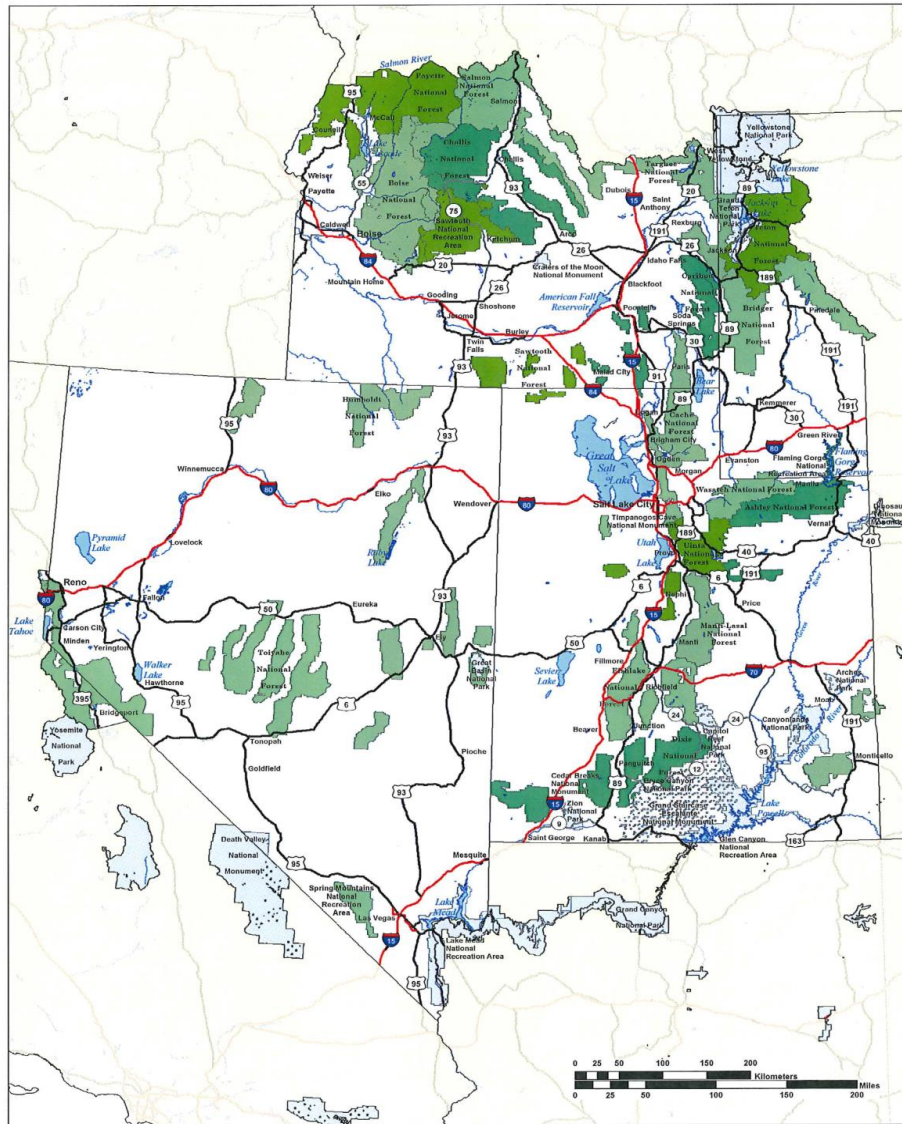
Tel: 801.233.3040





## U.S. Forest Service

### Importance of National Forest System Lands in the Intermountain West Water Supply

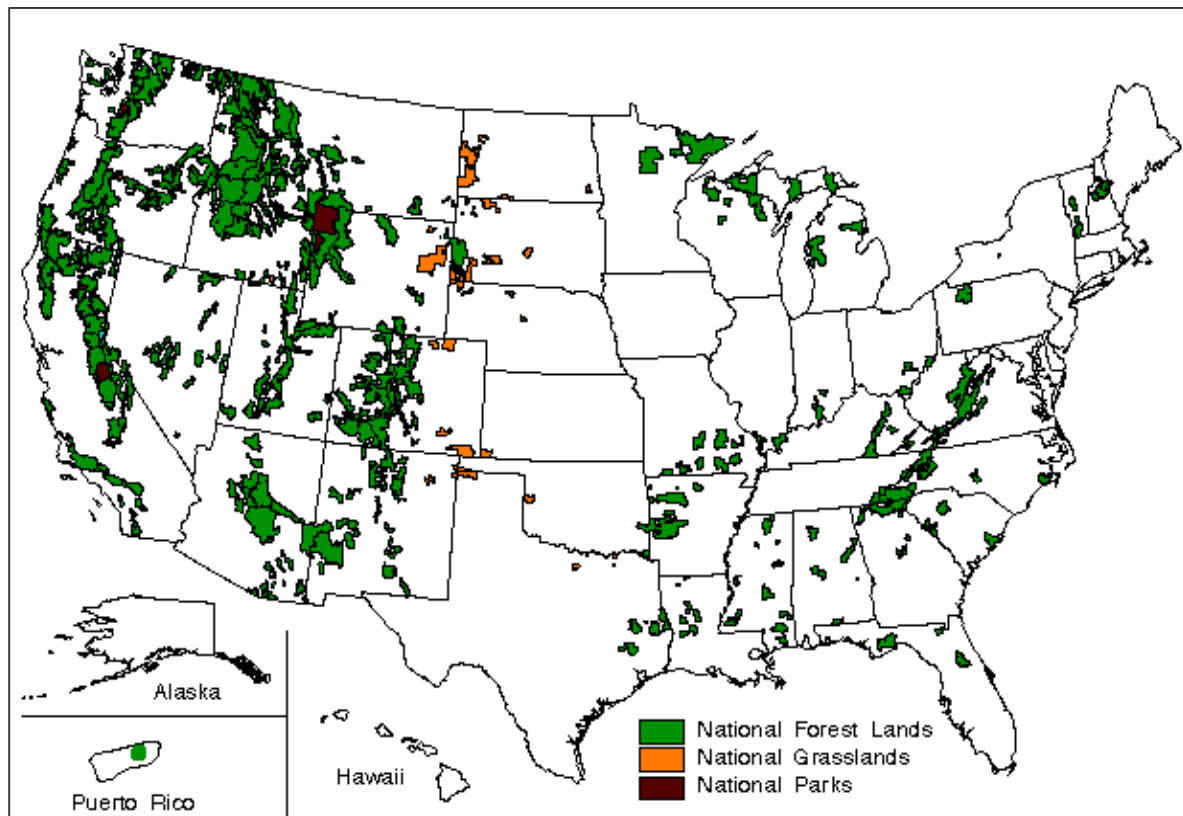


*According to the Utah State Engineer, as much as 70 percent of Utah's available water supply originates on Forest System lands.*



## U.S. Forest Service

### Importance of National Forest System Lands in the U.S. Continental Water Supply



*National Forest System Lands are the largest single source of water in the continental United States, over 14% of available supply.*

*Water originating on National Forest System Lands provides a much greater portion of the water supply in the western public lands than those east of Denver Colorado – possibly 50%.*