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July 23, 2014

Thomas L. Tidwell, Chief, United States Forest Service

Chief Tidwell,

On July 15, 2014, the Utah Water Development Commission (Commission) met to discuss the *Proposed Directive on Groundwater Resource Management* issued by the U.S. Forest Service. The Commission meeting was an open and recorded meeting. Chris Iverson, Deputy Regional Forester, and Kathryn Conant, Director, Lands and Minerals, both with U.S. Forest Service Region 4, addressed the Commission on the proposed directive. In response to the explanation by the Region 4 officials, the WDC received comments from:

- Michael Styler, Executive Director, Utah Department of Natural Resources
- Steven Clyde, Clyde Snow and Sessions
- Kent Jones, Utah State Water Engineer
- Randy Parker, CEO, Utah Farm Bureau Federation
- John Loomis, General Manager, Snowbasin Ski Resort
- Ed Bowler, Chair, Washington County Water Conservancy District

After the listed presentations and commission discussion, a motion was made requesting that the Commission cochairs send a letter to the U.S. Forest Service outlining the Commission's concerns and requesting the Forest Service to withdraw the proposed Directive on Groundwater Resource Management. The vote on the motion was unanimous in the affirmative with legislators from both parties and both legislative chambers in full support. Members of the Commission who are not elected legislators also supported the motion and requested that their names be added in support. The members of the Utah State Water Development Commission jointly add our voices to the voices of the Western Congressional Caucus and other organizations that strongly oppose this regulatory taking of a state resource.

Commission Members Supporting the Motion

Legislators:

Sen. Margaret Dayton, Senate Chair
Rep. Keith Grover, House Chair
Sen. David P. Hinkins
Sen. Scott K. Jenkins
Sen. Kevin T. Van Tassell
Rep. Joel K. Briscoe
Rep. Susan Duckworth
Rep. Kay L. McIff
Rep. Michael E. Noel

Other Commission Members:

Mr. Joseph Paulick, Board of Water Resources
Mr. David Ure, Agricultural Production Representative
Mr. Tage Flint, Weber River District
Mr. Dallin Jensen, Salt Lake District
Ms. Voneene Jorgensen, Bear River District
Mr. Warren Peterson, Lower Sevier River District
Mr. Gene Shawcroft, Provo River District

The following commentary outlines many of our concerns and explains why we urge the withdrawal of the proposed directive:

The United States Forest Service published a Federal Register notice on May 6, 2014, regarding a proposed directive on Groundwater Management for inclusion in the Forest Service Manual, Section 2560. The Forest Service Manual is an internal policy document used to inform and direct Forest Service (FS) personnel in their decision-making process. Specifically it will require consideration of groundwater resources in agency activities, approvals and authorizations, and encourage source protection and water conservation. Some of the stated objectives may be laudable on their face; the concern is not so much with the stated objectives, but the ramifications of their implementation.

The FS Directive starts with the false premise that the FS has any authority from Congress to insinuate itself in the management, allocation and use of water resources. It simply does not. Congress, in passing the Desert Land Act of 1877, effectively severed all water resources from the public domain, and gave exclusive jurisdiction for the allocation and management of water resources to the several States. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935). Therefore, the federal government and its various agencies have no role in the allocation and management of water resources regardless of where the headwaters are located.

The FS has only limited federal reserved water rights, and those rights are tied to the primary purpose for which the NFS lands were withdrawn. The reserved water rights doctrine was first announced in the *Winters v. U.S.*, 207 U.S. 564 (1908), in the context of water rights reserved for use by Native American tribes in the establishments of reservations. Reserved water rights were later extended to other reservations of the public domain. *Arizona v. California*, 373 U.S. 546 (1963). The reserved water rights doctrine provides that when the federal government makes a reservation of federal land, it impliedly reserves sufficient water to fulfill the primary purposes of the reservation. *U.S. v. New Mexico*, 438 U.S. 696 (1978). The “primary purpose,” is to be determined by a narrow interpretation of enabling legislation that set aside or reserved the federal land. *Cappaert v. United States*, 426 U.S. 128 (1976).

In the specific context of reserved water rights for NFS land, the Court in *U.S v. New Mexico*, held that in reserving lands for the National Forest, the 1897 Organic Act limits water reservations to the primary purpose of securing favorable conditions of water flows and furnishing a continuous supply of timber. The Court further refined the reserved rights doctrine by holding that there is no implied reservation of water for mere secondary purposes or those uses for which the agency wishes it had water. For these secondary purposes, the federal agency is required and directed to appropriate water under State law just like any other water user. *U.S. v. New Mexico*, 438 U.S. at 702.

Accordingly, if the FS wants water for maintenance of instream flows, for aesthetics, to facilitate recreation or even to maintain a wet meadow area (groundwater dependent ecosystem) it must appropriate water under state law. The FS has unsuccessfully tried to find ways around this decision; most recently in the Ski Area Directive where it attempted to force the actual transfer of water rights by ski area operators to the FS, without compensation, as a condition to granting or renewing SUP's for the operation of ski areas on NFS lands. Unfortunately, this new Directive seems to be nothing more than yet another clever attempt to circumvent the Court and create a new class of reserved rights.

While acknowledging that the States and Tribes have a role in water management, the FS mistakenly believes that it has a co-equal role in managing the use water. This simply is not the case. The FS has no Congressional authority in this regard, and even a cursory review of the statutes and executive orders cited in the Directive confirms that no such authority exists. However, this Directive may well put the FS in a position where it can impose its will on appropriators by conditioning the issuance or renewal of a SUP on how a water user will use her State appropriated water right. For example, an appropriator may need a SUP to drill a well on NFS lands under a State approved water right and to run a pipeline from the well to adjacent private lands where the water will be used. If the FS thinks the diversion of water from the well might harm a groundwater-dependent ecosystem, such as a wet meadow, it might condition the issuance of the SUP on the appropriator reducing the quantity of water she can divert under the approved water right to protect this perceived interest. Any water exacted in this fashion would have no priority, would be free from State appropriation or control and in essence would create a new class of federal water right that is outside and independent from the appropriation doctrine.

It should be remembered that a water user must meet a number of conditions to gain State Engineer approval for a water rights application. State appropriated water rights are only approved if the use of water does not interfere with another appropriator's vested water right. In addition, the use of water must be technically and economically feasible, it must not unreasonably affect the natural stream environment, or be detrimental to the public welfare. This Directive implies that the FS, through the imposition of conditions on the issuance or renewal of a SUP, has the ability to address all of these issues, and in doing so potentially over-ride State water allocation decisions where these issues will have already been addressed. Such an approach by the FS flies in the face of decades of federal deference to State water law. Accordingly, the new Directive is not as benign as described in the promotional information that has been put forth by the FS.

The new Directive also seeks to involve the FS in issues of water quality regulation, which again it has no statutory authority or responsibility for. The Clean Water Act principally governs federal water quality regulation, and jurisdiction is with the EPA and is often delegated to the States for enforcement. The FS has no role in this at all. The same is true regarding the implementation and enforcement of drinking water standards, or standards for the design, construction and/or abandonment of wells, or well-head protection zones, source water protection zones, critical aquifer protection areas all of which are regulated under the Safe Drinking Water Act and similar State laws and regulations. There is simply no need or reason for the FS to duplicate and complicate these functions with the attendant costs and delays to the public.

Further, the FS has ample opportunity to be involved in water allocation decisions under existing State law. As an interested party, the FS can protest any water right application on grounds of interference if its water rights might be adversely impacted by a proposed diversion and use of water. The FS can also protest an application if it believes that proposed diversion and use of water would unreasonably affect the natural stream environment or would be detrimental to the public welfare, and can seek judicial review of State Engineer decisions. The State Engineer's administrative process is the appropriate forum for legitimate FS concerns to be addressed. There simply is no authority or any demonstrable need for the FS to impose these largely redundant policies and procedures on the management and use of groundwater.

The FS should withdraw this proposed Directive.

Finally, we have attached three other documents that are relevant to the proposed directive. These documents provide additional detail of the Commission's specific concerns and give information that supports the Commission's motion.

Thank you for your consideration.

Sincerely,

Sen. Margaret Dayton,
Senate Chair
State Water Development Commission

Rep. Keith Grover,
House Chair
State Water Development Commission

CC: Members of the State Water Development Commission
Governor Gary R. Herbert
Sen. Orrin Hatch
Sen. Mike Lee
Rep. Rob Bishop
Rep. Jason Chaffetz
Rep. Jim Matheson
Rep. Chris Stewart
Troy R. Thompson, PG, Acting National Groundwater Program Leader/ Groundwater Team
Lead, U.S. Forest Service
Legislative Management Committee