
April 17, 2018

Honorable John Barrasso
Chairman
Committee on Environment and Public Works
U.S. Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Honorable Thomas Carper
Ranking Member
Committee on Environment and Public Works
U.S. Senate
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

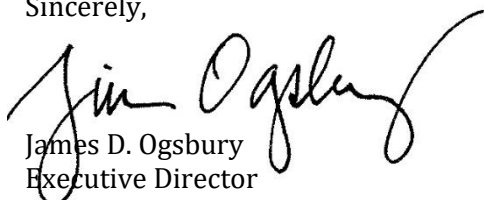
In advance of the Committee's April 18, 2018 oversight hearing, "The Appropriate Role of States and the Federal Government in Protecting Groundwater," attached please find the following items expressing states' legal authority over groundwater resources:

- Western Governors' Association (WGA) Policy Resolution [2015-08](#), *Water Resource Management in the West*;
- WGA Policy Resolution [2017-04](#), *Water Quality in the West*;
- WGA's July 2, 2014 [letter](#) to the U.S. Department of Agriculture re. Concerns about USFS Proposed Directive on Groundwater Resource Management;
- WGA's October 2, 2014 [letter](#) to the U.S. Forest Service re. FS-2014-0001- Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560; and
- WGA's May 18, 2017 testimony before the U.S. House of Representatives Committee on Natural Resources, Subcommittee on Water, Power, and Oceans: Legislative Hearing on H.R. 2371 and Water Rights Protection Act Discussion Draft.

On behalf of the Western Governors, I respectfully request that these materials be included in the permanent record of the hearing, as they articulate the Governors' policy positions on this important issue. Additionally, WGA is preparing written comments to submit to the Environmental Protection Agency (EPA) in response to its February 20, 2018 [Request for Comment](#) regarding the Clean Water Act's application to pollutant discharges into groundwater. These comments will be shared with the Committee as soon as they have been submitted.

Please contact me if you have any questions or require further information. In the meantime, with warm regards and best wishes, I am

Sincerely,



James D. Ogsbury
Executive Director

Attachments



**Western Governors' Association
Policy Resolution 2015 - 08**

Water Resource Management in the West

A. BACKGROUND

1. Water is a crucial resource for communities, industries, habitats, farms, and Western states. Clean, reliable water supplies are essential to maintain and improve quality of life. The scarce nature of water in much of the West makes it particularly important to our states.
2. States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of Western water law and hydrology.
3. Many communities in the West anticipate challenges in meeting future water demands. Supplies are nearly fully allocated in many basins across the West, and increased demand from population growth, economic development, and extreme weather and fire events places added stress on those limited water resources. Sustainability of our natural resources, specifically water, is imperative to the foundations upon which the West was developed. Growth and development can only continue upon our recognition of continued state stewardship of our unique resources and corresponding responsibilities.
4. Strong state, regional and national economies require reliable deliveries of good-quality water, which in turn depend on adequate infrastructure for water and wastewater. Investments in water infrastructure also provide jobs and a foundation for long-term economic growth in communities throughout the West. Repairs to aging infrastructure are costly and often subject to postponement.
5. Western Governors recognize the essential role of partnership with federal agencies in Western water management and hope to continue the tradition of collaboration between the states and federal agencies.
6. Tribal governments and Western states also share common water resource management challenges. The Western Governors Association and Western States Water Council have had a long and productive partnership with tribes, working to resolve water rights claims.

B. GOVERNORS' POLICY STATEMENT

1. **State Primacy in Water Management:** As the preeminent authority on water management within their boundaries, states have the right to develop, use, control and distribute the surface water and groundwater located within their boundaries, subject to international treaties and interstate agreements and judicial decrees.

- a. **Federal Recognition of State Authority:** The federal government has long recognized the right to use water as determined under the laws of the various states; Western Governors value their partnerships with federal agencies as they operate under this established legal framework.

While the Western Governors acknowledge the important role of federal laws such as the Clean Water Act, the Endangered Species Act and the Safe Drinking Water Act, nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states' primacy over the allocation and administration of their water resources.

Reauthorization of the Water Resources Reform & Development Act, proposed federal surplus water rulemakings, and/or storage reallocation studies should recognize and defer to the states' legal right to allocate, develop, use, control, and distribute their waters, including but not limited to state storage and use requirements.

- b. **Managing State Waters for Environmental Purposes:** States and federal agencies should coordinate efforts to avoid, to the extent possible, the listing of water-dependent species under the Endangered Species Act (ESA). When ESA listings cannot be avoided, parties should promote the use of existing state tools, such as state conservation plans and in-stream flow protections, to conserve and recover species.
2. **Infrastructure Needs:** Aging infrastructure for existing water and wastewater facilities and the need for additional water projects cannot be ignored. Infrastructure investments are essential to our nation's continued economic prosperity and environmental protection, and they assist states in meeting federally-mandated standards.
 - a. **Federal Support for Infrastructure Investment:** Congress should provide adequate support for the Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) State Revolving Funds. Further, Congress should fully utilize the receipts accruing to the Reclamation Fund for their intended purpose in the continuing conservation, development and wise use of western resources to meet Western water-related

needs, including the construction of Congressionally-authorized Bureau of Reclamation rural water projects and facilities that are part of a Congressionally-authorized Indian water rights settlement.

Congress should reauthorize Water Resources Reform & Development Act (WRRDA) legislation on a regular schedule and appropriate funding so all projects and studies authorized in WRRDA can be completed in a timely manner.

Congress also should consider facilitating greater investment in water infrastructure, utilizing such tools as loan guarantees, revolving funds, infrastructure banks and water trust funds.

Capital budgeting and asset management principles should be used to determine funding priorities based on long-term sustainability and not annual incremental spending choices. It should be accompanied by dedicated sources of funding with appropriate financing, cost-sharing, pricing and cost recovery policies.

- b. **Alternatives to Direct Federal Investment:** Federal and state policymakers should also consider other tools to promote investment in water infrastructure and reduce financing costs, including: public-private partnerships; bond insurance; risk pooling; and credit enhancements.

Congress should remove the state volume caps for private activity bonds used for water and wastewater projects, provide guaranteed tax-exempt status for bonds issued by state or local agencies to finance water infrastructure, provide loan guarantees, and otherwise support and encourage alternatives to direct federal investment of limited general funds.

- c. **Hydropower:** Congress and the Administration should authorize and implement appropriate hydropower projects and programs through efficient permitting processes that enhance renewable electric generation capacity and promote economic development, while ensuring protection of important environmental resources and indigenous people's rights.
- d. **Infrastructure Planning and Permitting:** Infrastructure planning and permitting guidelines, rules and regulations should be coordinated, streamlined and sufficiently flexible to: 1) allow for timely decision-making in the design, financing and construction of needed infrastructure; 2) account for regional differences; 3) balance economic and environmental considerations; and 4) minimize the cost of compliance.

- 3. **Western States Require Innovative and Integrated Water Management.** Western Governors believe effective solutions to water resource challenges require an integrated

approach among states and with federal, tribal and local partners. Federal investments should assist states in implementing state water plans designed to provide water for municipal, rural, agricultural, industrial and habitat needs, and should provide financial and technical support for development of watershed and river basin water management plans when requested by states.

Integrated water management planning should also account for flood control, water quality protection, and regional water supply systems. Water resource planning must occur within a framework that preserves states' authority to manage water through policies which recognize state law and the financial, environmental and social values of the water resource to citizens of the western states today and in the future.

- a. **Water Transfers:** Western Governors recognize the potential benefits of market-based water transfers, meaning voluntary sales or leases of water rights. The Governors support water transfers that avoid or mitigate damages to agricultural economies and communities while preventing injury to other water rights, water quality and the environment.
- b. **Energy Development:** Western Governors recognize that energy development and electricity generation may create new water demands. Western Governors recommend increased coordination across the energy and water management communities, and support ongoing work to assess the interconnection of energy and water through the Regional Transmission Expansion Planning Project for the Western interconnection and similar efforts.
- c. **Conservation and Efficiency:** Because of diminished water resources and declining and inconsistent snowpack, Western Governors encourage adoption of strategies to sustain water resources and extend existing water supplies further through water conservation, water reuse and recycling, desalination and reclamation of brackish waters, and reductions in *per capita* water use. The Governors encourage the use of and research into promising water-saving strategies.
- d. **Local Watershed Planning:** Western Governors encourage federal agencies and Congress to provide resources such as technical support to states and local watershed groups. States may empower these watershed groups to address local water issues associated with water quality, growth and land management to complement state water needs.
- e. **Intergovernmental Collaboration and Conflict Resolution:** Western Governors support the negotiated settlement of interstate water disputes, Indian and Hawaiian water rights claims, and other federal water needs and claims, the settlement of which are in the best interest of Western states.

- f. **State-Federal Coordination:** Western Governors recognize the important role of federal agencies in advancing sound water resource management in the Western states. Governors appreciate the efforts of federal agencies to coordinate water-related activities, particularly through the Western States Water Council, and support the continuation of these key state-federal partnerships.
- 4. **Western States Need Reliable Water Resource Information:** Basic information on the status, trends and projections of water resource availability is essential to sound water management.
 - a. **Basic Water Data:** Western Governors support the U.S. Geological Survey's Cooperative Water Program and National Streamflow Information Program (NSIP), the Natural Resources Conservation Service's Snow Survey and Water Supply Forecasting Program, the National Oceanic and Atmospheric Administration's (NOAA) weather and hydrology-related data collection, monitoring, and drought information programs, and the National Aeronautics and Space Administration's National Land Imaging (Landsat) Program with its thermal infrared sensor. Western Governors support federal efforts to coordinate water data gathering and information programs across multiple agencies.
 - b. **Extreme Weather Events Planning:** Western Governors recognize the significant potential impacts of extreme weather events and variability in water supplies. Western Governors urge Congress and the Administration to work closely with states and other resource managers to improve predictive and adaptive capabilities for extreme weather variability and related impacts. We specifically urge the federal government to place a priority on improving the sub-seasonal and seasonal precipitation forecasting capabilities that could support water management decision-making.
 - c. **Water Data Exchange:** The Western Governors' Association and the Western States Water Council have worked together to create the Water Data Exchange, an online portal that will enable states to share their water data with each other, federal agencies, and the public via a common platform. The Governors encourage the use of state water data in planning for both the public and private sectors.
- 5. **Drought Preparedness and Response:** As exceptional levels of drought persist across the West, Governors are leading on drought preparedness and response through the Western Governors' Drought Forum. The Drought Forum provides a framework for leaders from states, businesses, non-profits, communities, research organizations and federal agencies to share best practices and identify policy options for drought management. The Governors have identified several areas in need of additional attention from Drought Forum partners, including:

- a. **Data and Analysis:** Basic data on snowpack, streamflow and soil moisture is essential to understanding drought. Though a great deal of information already exists, enhanced drought data collection and real-time analysis at a higher resolution is essential. Governors support state and federal efforts to maintain adequate collection of drought and water data, enhance data networks where appropriate, and facilitate better use of existing information.

The Governors appreciate the collaborative efforts on drought provided through NOAA's National Weather Service River Forecast Centers and Weather Forecast Offices, and the Office of Atmospheric Research's labs and programs, such as the National Integrated Drought Information System (NIDIS).

- b. **Produced, Reused and Brackish Water:** Technology exists to use produced, reused, recycled and brackish water—sources traditionally considered to be marginal or wastewater. Adoption of this technology has been limited by inadequate data, regulatory obstacles, financial barriers, public attitudes and logistical uncertainties. Governors support regulatory streamlining and policy options to encourage use of produced, brackish, and re-used water where appropriate.
- c. **Forest Health and Soil Stewardship:** Better land management practices for forests and farmland may help improve availability and soil moisture retention. Wildfires can cause sediment runoff in water systems, leading to problems for reservoir management and water quality. Governors support policies and practices that encourage healthy and resilient forests and soils in order to make the most of existing water supplies.
- d. **Water Use Efficiency and Conservation:** Public awareness of drought has directed increasing attention to water conservation strategies, both in-home and on-farm. Governors encourage municipal, industrial and agricultural water conservation strategies as drought management strategy.
- e. **Infrastructure and Investment:** Water infrastructure to store and convey water is crucial to drought management, but maintenance and expansion of that infrastructure is often difficult to fund. Governors support efforts to make the most of existing infrastructure, while seeking creative solutions to add more infrastructure with limited resources.
- f. **Working within Institutional Frameworks to Manage Drought:** Legal frameworks and regulatory regimes can sometimes limit the ability of state, local and federal agencies to respond quickly to drought conditions. Governors believe that

innovative, flexible policy solutions, such as streamlined processing of temporary water transfers, should be considered when managing drought.

- g. **Communication and Collaboration:** Communication among state officials, federal agency representatives, water providers, agricultural users and citizens is a crucial component of effective drought response. The Western Governors' Drought Forum will continue to provide a framework for sharing best practices through its online resource library, informational webinars, and strategy-sharing meetings for the duration of this resolution.

C. **GOVERNORS' MANAGEMENT DIRECTIVE**

1. The Governors direct the WGA staff, where appropriate, to work with Congressional committees of jurisdiction and the Executive Branch to achieve the objectives of this resolution including funding, subject to the appropriation process, based on a prioritization of needs.
2. Furthermore, the Governors direct WGA staff to develop, as appropriate and timely, detailed annual work plans to advance the policy positions and goals contained in this resolution. Those work plans shall be presented to, and approved by, Western Governors prior to implementation. WGA staff shall keep the Governors informed, on a regular basis, of their progress in implementing approved annual work plans.

Western Governors enact new policy resolutions and amend existing resolutions on a bi-annual basis. Please consult westgov.org/policies for the most current copy of a resolution and a list of all current WGA policy resolutions.



WESTERN
GOVERNORS'
ASSOCIATION

Western Governors' Association Policy Resolution 2017-04

Water Quality in the West

A. BACKGROUND

1. Clean water is essential to strong economies and quality of life. In most of the West, water is a scarce resource that must be managed with sensitivity to social, environmental, and economic values and needs. Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.
2. States have federally-recognized authority to manage and allocate water within their boundaries. The Clean Water Act (CWA) Section 101(g) expressly says that "the authority of each state to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act."
3. States and the Environmental Protection Agency (EPA) work together as co-regulators under the CWA and the Safe Drinking Water Act (SDWA). The U.S. Congress has provided for, by statute, the authority for states to obtain approval to implement certain federal program responsibilities. When a state has been approved to implement a program and the state is meeting minimum program requirements, the role of federal agencies like EPA should be funding, technical assistance and research support. States should be free to develop, implement and enforce those requirements using an approach that makes sense in their specific jurisdiction, subject to the minimum requirements of the federal acts.
4. The CWA was last reauthorized in 1987; attempts to reauthorize the Act since then have failed. Current federal regulations, guidance and programs pertaining to the CWA do not always recognize the specific conditions and needs of most of the West, where water is scarce and even wastewater becomes a valuable resource to both humans and the environment. The West includes a variety of waters; small ephemeral washes, large perennial rivers, effluent-dependent streams, and wild, scenic rivers. In addition to natural rivers, streams and lakes, there are numerous man-made reservoirs, waterways and water conveyance structures. States need more flexibility to determine how to best manage these varying resources.

B. GOVERNORS' POLICY STATEMENT

Clean Water Act (CWA)

1. **State Authority and Implementation of CWA:** States have jurisdiction over water resource allocation decisions and are responsible for how to balance state water resource needs within CWA objectives. New regulations, rulemaking, and guidance should recognize this state authority.
 - a) **CWA Jurisdiction:** Western Governors urge EPA and the Corps to engage the states as co-regulators and ensure that state water managers have a robust and meaningful voice in the development of any rule regarding CWA jurisdiction, particularly in the early stages of development before irreversible momentum precludes effective state participation.
 - b) **Total Maximum Daily Loads (TMDLs)/Adaptive Management:** States should have the flexibility to adopt water quality standards and set total maximum daily loads (TMDLs) that are tailored to the specific characteristics of Western water bodies, including variances for unique state and local conditions.
 - c) **Anti-degradation:** CWA Section 303 gives states the primary responsibility to establish water quality standards (WQS) subject to EPA oversight. Given the states' primary role in establishing WQS, EPA should directly involve the states in the rulemaking process for any proposed changes to its existing regulations. Before imposing new anti-degradation policies or implementation requirements, EPA should document the need for new requirements and strive to ensure that new requirements do not interfere with sound existing practices.
 - d) **Groundwater:** States have exclusive authority over the allocation and administration of rights to use groundwater located within their borders and are primarily responsible for allocating, protecting, managing, and otherwise controlling the resource. The regulatory reach of the CWA was not intended to, and should not, be applied to the management and protection of groundwater resources. The federal government should not develop a groundwater quality strategy; instead, it must recognize and respect state primacy, reflect a true state-federal partnership, and comply with current federal statutory authorities.
2. **Permitting:** Actions taken by EPA in its CWA permitting processes should not impinge upon state authority over water management or the states' responsibility to implement CWA provisions.
 - a) **State Water Quality Certification:** Section 401 of the CWA requires applicants for a federal license to secure state certification that potential discharges from their activities will not violate state water quality standards. Section 401 of the CWA is

operating as it should and states' mandatory conditioning authority should be retained without amendment.

- b) **General Permits:** Reauthorization of the CWA must reconcile the continuing administrative need for general permits with their site-specific permitting requirements under the CWA. EPA should promulgate rules and guidance that better support the use of general permits where it is more effective to permit groups of dischargers rather than individual dischargers.
 - c) **Water Transfers:** Water transfers that do not involve the addition of a pollutant have not been subject to the permitting requirements of the CWA's National Pollutant Discharge Elimination System (NPDES). States already have authority to address the water quality issues associated with transfers. Western Governors believe that transporting water through constructed conveyances to supply beneficial uses should not trigger NPDES permit requirements simply because the source and receiving water contain different chemical concentrations and physical constituents. Western Governors generally support EPA's current water transfers rule, which exempts water transfers between waters of the United States from NPDES permitting requirements.
 - d) **Pesticides:** Western Governors generally support the primary role of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in regulating agriculture and public health related pesticide applications to waters of the U.S. and will seek state-based solutions that complement rather than duplicate FIFRA in protecting water supplies.
3. **Nonpoint Source Pollution:** Nonpoint source pollution requires state watershed-oriented water quality management plans, and federal agencies should collaborate with states to carry out the objectives of these plans. The CWA should not supersede other ongoing federal, state and local nonpoint source programs. Federal water policies must recognize that state programs enhanced by federal efforts could provide a firm foundation for a national nonpoint source policy that maintains the non-regulatory and voluntary nature of the program. In general, the use of point source solutions to control nonpoint source pollution is also ill-advised.
- a) **Forest Roads:** Stormwater runoff from forest roads has been managed as a nonpoint source of pollution under EPA regulation and state law since enactment of the CWA. Western Governors support solutions that are consistent with the long-established treatment of forest roads as nonpoint sources, provided that forest roads are treated equally across ownership within each state.
 - b) **Nutrient Pollution:** Nitrogen and phosphorus (nutrient) pollution is a significant cause of water quality impairment across the nation, and continued cooperation between states and EPA is needed. However, nutrients produced by non-point

sources fall outside of NPDES jurisdiction and should not be treated like other pollutants that have clear and consistent thresholds over a broad range of aquatic systems and conditions.

States should be allowed sufficient flexibility to utilize their own incentives and authorities to establish standards and control strategies to address nutrient pollution, rather than being forced to abide by one-size-fits-all federal numeric criteria. Successful tools currently in use by states include best management practices, nutrient trading, controlling other water quality parameters, and other innovative approaches.

4. **CWA Reauthorization:** The Western Governors support reauthorization of the CWA, provided that it recognizes the unique hydrology and legal framework in Western states. Further, any CWA reauthorization should include a new statement of purpose to encourage the reuse of treated wastewater to reduce water pollution and efficiently manage water resources.
5. **Good Samaritan Legislation:** Congress should enact a program to protect volunteering remediating parties who conduct authorized remediation of abandoned hardrock mines from becoming legally responsible under the CWA and/or the Comprehensive Environmental Response, Compensation, and Liability Act for any continuing discharges after completion of a remediation project, provided that the remediating party – or “Good Samaritan” – does not otherwise have liability for that abandoned mine or inactive mine site.
6. **Stormwater (Wet Weather) Pollution:** In the West, stormwater discharges to ephemeral streams in arid regions pose substantially different environmental risks than do the same discharges to perennial surface waters. The Western Governors emphasize the importance of state primacy in water management, including management of ephemeral streams. State water agencies are well-equipped to provide tailored approaches that reflect the unique management needs of ephemeral streams.
7. **State-Tribal Coordination:** Western Governors endorse government-to-government cooperation among the states, tribes and EPA in support of effective and consistent CWA implementation. While retaining the ability of the Governors to take a leadership role in coordination with the tribes, EPA should promote effective consultation, coordination, and dispute resolution among the governments, with emphasis on lands where tribes have treatment-as-state status under Section 518 of the CWA.

Safe Drinking Water Act (SDWA)

8. **Federal Assistance in Meeting SDWA Standards:** Western Governors believe that the SDWA and its standards for drinking water contaminants have been instrumental in ensuring safe drinking water supplies for the nation. It is essential that the federal government, through EPA, provide adequate support to the states and water systems to meet federal requirements. Assistance is particularly needed for small and rural systems, which often lack the resources needed to comply with federal treatment standards.
9. **Drinking Water Standards:** Contaminants such as arsenic, chromium, perchlorate and fluoride often occur naturally in the West. Western Governors support EPA technical assistance and research to improve both the efficiency and affordability of treatment technologies for these contaminants. In any drinking water standards that the EPA may revise or propose for these and other contaminants, including disinfection byproducts, EPA should consider the disproportionate impact that such standards may have on Western states and give special consideration to feasible technology based on the resources and needs of smaller water systems.
10. **Risk Assessments:** Analysis of the costs of treatment for drinking water contaminants should carefully determine the total costs of capital improvements, operation and maintenance when determining feasible technology that can be applied by small systems. These costs should be balanced against the anticipated human health benefits before implementing or revising drinking water standards.
11. **Emerging Contaminants/Pharmaceuticals:** The possible health and environmental impacts of emerging contaminants and pharmaceuticals are of concern to Western Governors. Although states have existing authorities to address possible risks associated with emerging contaminants and pharmaceuticals, there is a need for more reliable science showing impacts on human health as more information regarding these contaminants becomes available.
12. **Hydraulic Fracturing:** States currently employ a range of effective programmatic elements and regulations to ensure that hydraulic fracturing does not impair water quality, including but not limited to requirements pertaining to well permitting, well construction, the handling of exploration and production waste fluids, the closure of wells, and the abandonment of well sites.

Federal efforts to study the potential impacts of hydraulic fracturing on water quality should leverage state knowledge, expertise, policies, and regulations. Such efforts should also be limited in scope, based upon sound science, and driven by the states. Western Governors oppose efforts that would diminish the primary and exclusive authority of states over the allocation of water resources necessary for hydraulic fracturing.

Compliance with Federal Water Quality and Drinking Water Requirements

13. **State Revolving Funds:** Western Governors support EPA's Clean Water State Revolving Fund (SRF) and Drinking Water SRF as important tools that help states and local communities address related water infrastructure needs and comply with federal water quality and drinking water requirements. Western Governors also urge Congress and the Administration to ensure that the SRF Programs provide greater flexibility and fewer restrictions on state SRF management.
14. **Restoring and Maintaining Lakes and Healthy Watersheds:** Historically, the Section 314 Clean Lakes Program and the Section 319 Nonpoint Source Management Program provided states with critical tools to restore and maintain water quality in lakes and watersheds. Western Governors urge the Administration and Congress to support these programs. Such support should not come at the expense of other federal watershed protection programs.
15. **EPA Support and Technical Assistance:** The federal government through EPA should provide states and local entities with adequate support and technical assistance to help them comply with federal water quality and drinking water requirements. EPA should also collaborate with and allow states to identify and establish priority areas, timelines, and focus on programs that provide the largest public health and environmental benefits.
16. **EPA Grant Funding for Primary Service: Rural Water Programs:** Some rural communities still lack basic water and sanitary services needed to assure safe, secure sources of water for drinking and other domestic needs. Adequate federal support, including but not limited to the Rural Utilities Service programs of the Department of Agriculture and State Revolving Funds through EPA, are necessary to augment state resources.

Water Quality Monitoring and Data Collection

17. **Water Data Needs:** Western water management is highly dependent upon the availability of data regarding both the quality and quantity of surface and ground waters. EPA should provide support to the states in developing innovative monitoring and assessment methods, including making use of biological assessments, sensors and remote sensing, as well as demonstrating the value to the states of the national probabilistic aquatic resource surveys.

C. GOVERNORS' MANAGEMENT DIRECTIVE

1. The Governors direct WGA staff to work with Congressional committees of jurisdiction, the Executive Branch, and other entities, where appropriate, to achieve the objectives of this resolution.
2. Furthermore, the Governors direct WGA staff to consult with the Staff Advisory Council regarding its efforts to realize the objectives of this resolution and to keep the Governors apprised of its progress in this regard.

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WESTERN GOVERNORS' ASSOCIATION

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July 2, 2014

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?"



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October 2, 2014

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

Re: FS-2014-0001- Proposed Directive on Groundwater Resource
Management, Forest Service Manual 2560

Dear Ms. Berger:

The U.S. Forest Service (hereafter USFS or Service) has issued a proposed directive on groundwater resource management (*79 FR 25815, May 6, 2014*). This draft directive, published for public comment, is proposed for addition to the USFS Manual 2560. Because this directive impacts state authority to manage water, the Western Governors' Association (WGA) submits the following comments.

The USFS states that the directive is needed in order to "establish a consistent approach for addressing both surface and groundwater issues that appropriately protects water resources, recognizes existing water uses, and responds to the growing societal need for high-quality water supplies" (*79 FR 25815*).

STATEMENT OF INTEREST:

The WGA represents the Governors of 19 Western states and 3 U.S.-flag islands. The association is an instrument of the Governors for bipartisan policy development, information exchange and collective action on issues of critical importance to the Western United States.

Clean water is essential to strong economies and quality of life, as the Western Governors recognize in their Policy Resolution 2014-04, [Water Quality in the West](#). Because of their unique understanding of these needs, states are in the best position to manage the water within their borders.

States are the primary authority for allocating, administering, protecting, and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the

management of their water resources and are best suited to speak to the unique nature of Western water law and hydrology.

WESTERN GOVERNORS' ANALYSIS AND RECOMMENDATIONS:

The Western Governors sent a letter to US Secretary of Agriculture Tom Vilsack on July 2 with several questions regarding the proposed directive.¹ As stated in that letter, 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.

WGA thanks Secretary Vilsack for his response to this letter, dated August 29. We are also sincerely grateful for the additional extension of the comment period so that the Western Governors are able to provide these detailed comments on the proposed directive. We understand that the Forest Service manages a significant portion of land in western states, on behalf of the United States, and that what occurs on this land can, in some instances, have a significant impact on water resources.

Recognition of the States' Exclusive Authority over Groundwater Management

Well over a century ago, Congress recognized states as the sole authority over groundwater in the Desert Land Act of 1877. Moreover, the U.S. Supreme Court held in *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that states have exclusive authority over groundwater, finding that following the Desert Land Act of 1877 “. . . all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states”

Congress' clear intent that the states should have authority over groundwater, as affirmed by the U.S. Supreme Court, is distorted by the proposed directive in multiple ways. The proposed directive could be construed to assert USFS ownership of state groundwater through use of the phrase “NFS groundwater resources” throughout the document. It goes on to identify states merely as “potentially affected parties” and only recognizes states as “having responsibilities” for water resources within their boundaries. This vague and insufficient acknowledgement of the states' authority over groundwater is also evident in Section 2560.02-1, which states that an objective of the proposed directive is to “manage groundwater underlying NFS lands cooperatively with states.” This language misleadingly suggests that the USFS has equal authority with the states over groundwater management, which it does not.

¹ Incorporated by reference: Western Governors' letter to Sec. Tom Vilsack, dated July 2, 2014.
http://www.westgov.org/component/docman/doc_download/1821-usfs-groundwater?Itemid=

→Potential for Special Use Authorizations to Supersede State Authority

States hold the authority to issue water rights, a fact recognized by the USFS in the proposed directive. However, the Western Governors are concerned that the proposed directive will lead the USFS to make decisions and place stipulations on proposed actions on NFS lands based on the quantity of water withdrawn with a state-issued water right; that is, a quantity that the state has authorized for diversion and depletion. Specific provisions include (emphasis added in all instances):

- Section 2560.03-4-a: Consider the effects of proposed actions on groundwater quantity, quality, and timing prior to approving a proposed use or implementing a Forest Service activity;
- Section 2561-2: 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; and
- Section 2562.1-3: When issuing or reissuing an authorization or approving modification of an authorized use, require implementation of water conservation strategies to limit total water withdrawals from NFS lands (FSM 2541.21h) deemed appropriate by the authorized officer, depending on the type of authorized use; existing administrative and other authorized uses in the area; the physical characteristics of the setting; and other relevant factors. If the holder of the authorization consents, amend the authorization to include this requirement.

These portions of the proposed directive assume that the Service has some type of authority over the management of groundwater, which it does not. The proposed directive should clearly state that state-issued water rights for allocations of water must be recognized. The USFS does not have the authority to limit the amount of withdrawals authorized by a state. Limiting the quantity of groundwater withdrawals through special use authorizations would, in effect, amount to superseding states' authority to issue water rights.

→ Connectivity of Surface Water and Groundwater

Another troubling concern in the proposed directive is the Service's rebuttable presumption that surface water and groundwater are hydraulically connected, regardless of whether state law treats these resources separately (Sections 2560.03-2 and 2561-1). The directive should defer to the laws of individual states in recognition of their authority over water management. Moreover, if groundwater and surface water are

assumed to be hydraulically connected, there is the potential for misinterpretation of the directive to mean the Service's newly asserted management of groundwater resources should extend to surface water. To be clear, the states have the authority to manage both groundwater and surface water, and the USFS should fully recognize this in its proposed directive.

Legal Basis for the Proposed Directive

Aside from the question of state authority, the proposed directive raises other legal questions.

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 *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.

Given the Supreme Court's ruling, specific language in Section 2567 (Item 3) of the proposed directive is troubling and confusing. This section 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 (*emphasis added*) as well as surface water to meet Federal purposes under the Organic Administration Act, the Wild and Scenic Rivers Act, and the Wilderness Act."

The prospect of federal agencies claiming reserved rights to surface water is already a contentious affair, but suggesting the agency can assert such claims to groundwater is even more so. Reserved water rights have always been limited to surface water, and while there has been a long-standing debate as to whether they apply to groundwater, no federal court has extended the doctrine to groundwater.

Nevertheless, states and federal agencies have worked together to craft mutually acceptable and innovative solutions to address federal water needs, including federal needs for groundwater. These types of negotiated outcomes accommodate federal interests and needs and should be considered, recognizing the absence of any USFS reserved water rights authority for secondary purposes. The directive should require the USFS to work with state water right administrative agencies to address federal interests and needs without asserting any reserved right claims to groundwater.

Questionable Need for Proposed Directive

In the *Federal Register* notice for the proposed directive, the Service argues that there is "a need to establish a consistent approach for addressing both surface and groundwater issues" (79 FR

25815). In separate communications, Service officials have declared a need to bring all of the USFS regions in line with varying groundwater directives into a single consistent framework. However, just one region – Region 3 (encompassing Arizona and New Mexico) – addresses groundwater in its existing directives.

Questionable Ability and Need to Implement Proposed Directive

The proposed directive requires USFS employees to consider groundwater in a variety of new situations. Yet, as acknowledged in a “Frequently Asked Questions” document provided by the Service on the proposed directive, USFS has just four dedicated groundwater specialists within its current staff to implement the proposed directive ([*Key and Common Questions and Answers: Proposed Groundwater Directive FSM 2560*](#), Question 41). This document also contemplates hiring a contractor with groundwater expertise, “if circumstances require it.” Given the pressing needs of (and limited budget for) the Service’s existing responsibilities, the Western Governors encourage the agency to direct its resources to existing programs.

Additionally, the proposed directive creates regulatory duplication and overlap. As the South Dakota Department of Environment and Natural Resources stated in its July 31 submission on the proposed directive:

The Forest Service is now directed to do research and groundwater evaluations and assessments through this proposal. This is commonly what the US Geological Survey and Environmental Protection Agency do. It is not only a redundancy of responsibilities, it is doubling expenditures of these activities in an already overextended and unbalanced federal budget.

Adjacent Lands

The proposed directive also requires USFS officials to evaluate water right applications “on adjacent lands that could adversely affect NFS groundwater resources” (Sections 2560.03-6-f and 2560.04h-5). Such actions outside the boundaries of NFS lands exceed the limits of the agency’s authority. It is inappropriate for the USFS to extend its administrative reach to lands it does not manage.

Land Exchanges

The USFS creates a new requirement in the proposed directive for “an appropriate assessment of potential groundwater availability . . . as part of the appraisal process when water availability may be of significance on NFS lands proposed for a land exchange” (Section 2560.03-11). As the Western Governors have stated in a letter supporting legislation to facilitate state-federal land exchanges,

The burdensomeness and complexity of federal land exchange processes often prevent the completion of sensible and mutually beneficial

exchanges, even on a government-to-government basis. Consequently, state lands remain locked in federal conservation areas, and states are deprived the economic benefit of land grants that were made to fund education and other purposes.²

Adding a new requirement to an already arduous process will create further challenges for the process of approving economically beneficial land exchanges. Furthermore, the proposed directive does not specify what the threshold of “significance” is that would warrant a groundwater availability assessment, nor does it speak to which specific factors will be evaluated or how they may be weighted in the consideration of a transaction. The Service should clarify these points before adding a new barrier to the land exchange process.

Lack of State Consultation

The USFS did not reach out to WGA or any state agencies of which WGA staff is aware in advance of developing and publishing the proposed directive. When asked about state consultation on a stakeholder conference call on May 20, 2014, the USFS indicated that they had consulted with states when the Proposed Directive was first considered several years ago, a time when many of the current Western Governors had not yet been elected and many different employees were working within the Service and the state agencies.

The USFS asserts that the proposed directive does not trigger the state consultation requirements under E.O. 13132 on federalism. However, the USFS has initiated tribal consultation pursuant to E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. States, as the exclusive authority for groundwater management, deserve at least the same level of consultation as tribes.

Waiting until the public comment period to solicit state input, as the USFS has done in this instance and others, does not allow for meaningful consideration of the states’ perspectives. States should have been consulted much earlier in the development of this directive, especially given the number of years the agency has spent preparing this proposal.

Context: Other Water-Related Proposed Directives from USFS

The USFS has published two other proposed directives for public comment: one regarding best management practices for water quality and one on ski area water rights. An assumption underlying all three proposed directives is that the Service has an obligation to extend regulation of water resources beyond current state and federal efforts. As the Service has

² Incorporated by reference: Western Governors’ letter to Rep. Rob Bishop, dated June 19, 2014, in support of the Advancing Conservation Education Act of 2014.

http://www.westgov.org/component/docman/doc_download/1817-bishop-land-exchange-legislation?Itemid=

written in a “Frequently Asked Questions” document for the proposed directive on groundwater,³

There is a clear need for the Forest Service, in continued cooperation with the states and tribes, to take an active role in comprehensively managing the human activities that potentially affect water resources on National Forest System lands.

WGA is sensitive to the potential for this “comprehensive management” to venture into the realm of new regulatory authority for the Forest Service.

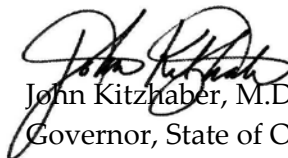
WGA urges the Forest Service to consult with states in a meaningful way prior to proposing future directives or rules. This proposed directive, like many other proposals from the USFS and other federal agencies, was developed without any state consultation of which WGA is aware. True consultation with the states will help the Service identify and avoid conflicts regarding proposed directives and rules. We invite the USFS to work through WGA, the Western States Water Council, and individual states to facilitate dialogue on ways to improve this (and any future) proposed directive.

WGA appreciates the opportunity to submit comments on this proposed directive.

Respectfully submitted,



Brian Sandoval
Governor, State of Nevada
WGA Chairman



John Kitzhaber, M.D.
Governor, State of Oregon
WGA Vice Chairman

³ “Key and Common Questions and Answers – Proposed Groundwater Directive FSM 2560” - http://www.fs.fed.us/geology/Proposed%20Groundwater%20Policy_QA_6_30_14.pdf

**Testimony of James D. Ogsbury, Executive Director
Western Governors' Association**

**Before the U.S. House of Representatives
Committee on Natural Resources
Subcommittee on Water, Power, and Oceans**

**Legislative Hearing on H.R. 2371 and Water Rights Protection Act Discussion Draft
May 18, 2017**

Chairman Lamborn, Ranking Member Huffman, and Members of the Subcommittee, the Western Governors' Association (WGA) appreciates the opportunity to provide written testimony addressing states' rights to manage and allocate their water resources. WGA is an independent organization representing the Governors of 19 western states and 3 U.S.-flag islands. The Association is an instrument of the Governors for bipartisan policy development, information-sharing, and collective action on issues of critical importance to the western United States. The Governors appreciate the opportunity to provide background testimony relevant to the Subcommittee's work on water resources policy.

Water is a precious resource everywhere but especially in the arid West. Water regimes are different in the West – our hydrology and the legal structures governing water rights and usage are distinct from the rest of the nation. The Western Governors have adopted a policy resolution (WGA Policy Resolution 2015-08, *Water Resource Management in the West*) that articulates a fundamental fact and principle recognized by both Congress and the United States Supreme Court:

States are the primary authority for allocating, administering, protecting and developing water resources, and they are primarily responsible for water supply planning within their boundaries. States have the ultimate say in the management of their water resources and are best suited to speak to the unique nature of western water law and hydrology.

The Governors' statement is the starting point of WGA's work on water policy and should be the starting point of any federal action on water as well. In recent years, however, several federal regulatory proposals have inadequately recognized state authority over water. In WGA Policy Resolution 2015-08, *Water Resource Management in the West*, Western Governors assert:

The federal government has long recognized the right to use water as determined under the laws of the various states; Western Governors value their partnerships with federal agencies as they operate under this established legal framework. While the Western Governors acknowledge the important role of

federal laws such as the Clean Water Act, the Endangered Species Act and the Safe Drinking Water Act, nothing in any act of Congress or Executive Branch regulatory action should be construed as affecting or intending to affect states' primacy over the allocation and administration of their water resources.

Nowhere is the need for substantive consultation between states and the federal government more critical than in the water arena. WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, states that:

Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governor as the top elected official of the state and other representatives of state and local governments as he or she may designate – with *early, meaningful* and *substantive* input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning.

Certain previously proposed rules, regulations, and directives have threatened to disrupt the traditional balance of state and federal power over water management and protection, and preempt state water resource authority. Western Governors have consistently communicated concerns regarding the preemption of, and interference with, state water authority to federal agencies through public comments. WGA Policy Resolution 2017-01, *Building a Stronger State-Federal Relationship*, states that:

In the absence of Constitutional delegation of authority to the federal government, state authority should be presumed sovereign. Accordingly, federal departments and agencies should, to the extent permitted by law, construe, in regulations and otherwise, a federal statute to preempt state law only when the statute contains an express preemption provision or there is some other firm evidence compelling the conclusion that Congress intended preemption of state law, consistent with established judicial precedent.

While states have primary authority over their water resources generally, their authority over groundwater management and allocation is even more extensive and has not been expressly preempted by federal legislation. WGA Policy Resolution 2015-08, *Water Resource Management in the West*, affirms that:

States have exclusive authority over the allocation and administration of rights to use groundwater located within their borders...The federal government should not develop a groundwater quality strategy; instead, it must recognize and

respect state primacy, reflect a true state-federal partnership, and comply with current federal statutory authorities.

Western Governors communicated their concerns regarding a previously proposed Directive on Groundwater Resource Management, issued by the U.S. Forest Service (USFS), which included language that could have been construed to assert USFS ownership of state groundwater and lead USFS employees to make decisions regarding special use permits based on the amount of water withdrawn under a state-issued water right (79 FR 25815, May 6, 2014). Additionally, the proposed Directive instructed USFS employees to assume that surface water and groundwater are hydraulically connected, regardless of whether state laws treats these resources as separate. This assumption disregarded long-standing state laws and conflated separate authorities over groundwater and surface water.

Another previous proposal of USFS threatening states' primary authority over water resources involved an addition to the agency's handbook regarding ski area water rights (79 FR 35513, June 23, 2014). As the Western Governors stated in their formal comments on the proposal, some of the proposed language appeared to be an agency effort to utilize special use authorization as a means by which to manage water use and water rights on National Forest System lands and to add a layer of federal regulatory oversight to state-managed water rights systems. On December 30, 2015, USFS issued a modified directive that does not provide for ski area water rights to be acquired in the name of the United States; instead, the final directive focuses on sufficiency of water to operate ski areas on NFS lands.

The 2015 Clean Water Rule, promulgated by the Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers (USACE), prompted Western Governors to submit comments expressing various process-related, as well as substantive, concerns. The Rule, which is the subject of agency review under an Executive Order dated February 28, 2017 (and currently stayed by the U.S. Court of Appeals for the Sixth Circuit), would create ambiguity in defining the jurisdictional bounds of the Clean Water Act (CWA). While the Rule exempts groundwater from its scope, a "shallow subsurface flow connection" – a term the Rule fails to define – could establish jurisdiction over isolated surface waters. Additionally, EPA's Scientific Advisory Board (SAB) report on the connectivity of waters indicated support for using connectivity as a scientific basis for even broader CWA jurisdiction than was asserted under the Rule. Furthermore, no state representatives participated in the SAB review of EPA's connectivity report. Accordingly, the review was deprived of the regulatory expertise, scientific resources, and on-the-ground knowledge possessed by state professionals. The EPA and USACE have recently begun renewed efforts to enact a rule that clarifies which water bodies fall under CWA jurisdiction. WGA, as well as individual states, have been approached by the agencies in order to seek their concerns and viewpoints. Western Governors applaud this outreach and look forward to a robust and ongoing dialogue between the states and federal agencies in the development of a new rule.

In December 2016, USACE proposed a Rule seeking to preempt states' primary authority over waters impounded in USACE reservoirs. Western Governors submitted comments in response to the proposed Rule expressing concerns that: (i) federalism implications were not properly evaluated and discussed by the agency with the states; (ii) states were required to relinquish their primary authority over historic natural flows in the rivers, which was never contemplated by the applicable federal statutes under which USACE was developing the Rule; and (iii) the proposed Rule improperly denied access to divert and appropriate natural flows under state water law.

In conclusion, state authority is the cornerstone of effective water management in the West. This is not simply a matter of precedent; states are best situated to understand their own unique legal frameworks, local hydrology and citizen needs. Federal efforts to assume greater authority over water jeopardize the distinct advantages of on-the-ground resource management. Congress and the Supreme Court have squarely and repeatedly affirmed state authority over water through a litany of court opinions and statutes commanding federal deference to the states with respect to water management and allocation. Western Governors are committed to the preservation and responsible exercise of that authority. We welcome the opportunity to partner with the Subcommittee and federal agencies to maintain states' authority over their water resources.