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USDA Forest Service  
Attn: Elizabeth Berger – WFWARP  
201 14<sup>th</sup> Street SW  
Washington, DC 20250

RE: Proposed Directive on Groundwater Resource Management, FS Manual 2560

Dear Ms. Berger:

The Western States Land Commissioners Association (WSLCA) appreciates the opportunity to comment on the *Proposed Directive on Groundwater Resource Management*, Forest Service Manual 2560 (hereafter “Proposed Directive”). WSLCA's membership collectively represents the nation's second largest landowner. Our members consist of 23 states which together manage over 440 million acres of land, mineral properties, and land beneath navigable waterways. So, we appreciate your desire as a landowner to understand the resources on your land and how to responsibly use and develop those resources. However, in the attempt to clarify existing authorities, the Proposed Directive appears to overstep legal rights and underestimate the cost and impact to other stakeholders.

#### WSLCA member responsibilities and composition

As mentioned, the WSLCA member states manage hundreds of millions of acres that were granted to states as a condition of statehood to be maintained in perpetuity either to support general public values or specific institutions such as K-12 public education. The trust mandate related to income generation for public institutions requires these lands be put to their highest and best use to attain the maximum revenue possible for beneficiaries. The WSLCA also consists of affiliate organizations that support the trust land mission and represent land holding or leasing interests of responsible business and industry who help develop or conserve, as appropriate, these lands to meet their highest potential. Together we represent a significant economic engine. The systematic allocation of sections granted to states created a checker board pattern of ownership that remains clearly visible today. As our neighbors in the communities across the West, Forest Service management regimes impact state and private lands, alike. Our concern for the Proposed Directive is certain interpretation of long-standing states rights, the open-ended language and what appear to be unfunded planning

demands that may negatively impact our ability to achieve our public trust and state trust land missions.

### Concerns with the Proposed Directive

#### 1. Treatment of Potential Groundwater Resources in Land Exchange

During the August 5, 2014 webinar discussing the Proposed Directive, Forest Service representatives were asked to describe the assessment process that would be used for land exchange transactions.

##### **2560.03 – Policy**

11. Land Valuation and Groundwater. Require that an appropriate assessment of potential groundwater availability be conducted by qualified groundwater personnel as part of the appraisal process when water availability may be of significance on NFS lands proposed for a land exchange

WSLCA members have considerable interest in this potential impact due to most states citing protracted and costly land exchange experience with the Forest Service. Often, there is need for repeat appraisals because of the excruciatingly slow pace with which the agency moves through some 69 steps in a land exchange transaction. Now, yet another study will be added to the mire of red tape and one that appears predicated on the hypothetical development of groundwater resources. What specifically will be analyzed and how will it be valued?

Assigning and receiving value for undeveloped resources, whether it is ground water, minerals, or solar potential is unusual and problematic. Most states have land exchange laws that mandate equal value transactions for property in its current condition. Hypothetical valuation as suggested must be noted as an exception in any appraisal report and any attributed value would be subject to a number of risks associated with development. Most units of government could not engage in such a risk premium. The Uniform Standards of Professional Appraisal Practice (USPAP) already prescribe the form, function and methods of professional appraisal. We feel this section of the Proposed Directive may serve to further stymie practical efforts of the states and the federal government to work through sensible land exchange proposals that could significantly benefit both entities missions.

#### 2. The Proposed Directive creates a presumption that groundwater and surface water are inextricably connected.

##### **2560.03 – Policy**

2. Water Resource Connectivity. Manage surface water and groundwater resources as hydraulically interconnected, and consider them interconnected in all planning and evaluation

activities, unless it can be demonstrated otherwise using site-specific information.

### **2561 – Consideration of Groundwater Resources in FOREST SERVICE Projects, Approvals, and Authorizations**

1. Assume that there is a hydrological connection between groundwater and surface water, regardless of whether State law addresses these water resources separately, unless a hydrogeological evaluation using site-specific data indicates otherwise. This type of connection means that cross-contamination and reductions in quantity can occur unless natural geological barriers exist or prevention strategies are in place.

There is no scientific evidence cited in the Proposed Directive to support the connectivity theory. The provision disregards state processes and places the burden of proof on the landowner/user to disprove what has yet to be a proven condition. Furthermore, the Proposed Directive assumption is contrary to most state water right laws. This premise also assumes that all groundwater under Forest Service surface ownership is Forest Service water only.

The Proposed Directive should strike the connectivity presumption because it is unproven, promotes a confrontational posture and is contrary to most state water rights laws that treat surface and groundwater rights distinctly different.

3. The Proposed Directive requires staff to dedicate time and money in new studies and training.

Several sections of the Proposed Directive compel staff to perform what appear to be new duties, like to “inventory connections between the groundwater and surface water resources”, to “develop a research program to address groundwater issues” and to “ensure that training on groundwater resource management is available to regional and forest staff.” During the August 5, 2014 webinar, it was disclosed that the Forest Service has only about six (6) staff located in Washington, DC that would be technically qualified to perform some of the new requirements. Barring staff availability, contract services would be used to perform the work. This suggests the Forest Service is ill-equipped to take on what is prescribed in revised policy. What will suffer as a result of this new priority to get staff trained and studies conducted?

Western states are devastated each year due to the impacts of wildland fire. The largely unmanaged and overstocked condition of federal forests jeopardizes the earnings capacity of state trust land forests and contributes to hundreds of millions in annual state firefighting costs. Engaging time and effort to managing known federal forest conditions and resources seems a higher priority at this time.

#### 4. Application/Permit Reviews

The Proposed Directive seeks to assert, through cooperative agreements, a joint review requirement over all State water right applications and water usage plans that could impact adjacent federal lands. States alone hold exclusive authority over groundwater management within their borders. The suggested process creates the possibility that state trust land lessees or permittees would be required to submit to an additional federal review. Such unnecessary and overreaching requirement would likely increase transaction times and potentially jeopardize state trust land revenues if the possibility that activities in proximity to federal lands will not be approved.

The Proposed Directive should not suggest an unlimited ability to oversee a state permitting process.

#### Summation

The WSLCA appreciates the opportunity to comment on the Proposed Directive. The trust lands that we administer across the West provide nearly \$3 billion dollars in annual revenue to beneficiaries. Some of the concepts in the Proposed Directive have significant impact on the revenue generating capacity of the states. Therefore, we respectfully request the Forest Service suspend adoption of the Proposed Directive until such time as these matters can be adequately explored and remedies identified in a comprehensive manner by all stakeholders and respecting all existing state laws.

Sincerely,



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