



**UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON WATER AND POWER**

**“New Federal Schemes to Soak up Water Authority: Impacts of States,
Water Users, and Jobs.”**

**Statement of the
UTAH FARM BUREAU FEDERATION**

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Chief Executive Officer
June 24, 2014**

Mr. Chairman and Subcommittee Members:

The Utah Farm Bureau Federation is the largest general farm and ranch organization in the state of Utah representing more than 28,000 member families. We represent a significant number of livestock producers who use the federal lands for sheep and cattle grazing. Livestock ranching is an important part of the historic, cultural and economic fabric of the state of Utah and is a major contributor to the state’s economy. In the second most arid state in the nation, water was and continues to be of critical importance.

Utah’s food and agriculture sector contributes to the state’s economic health and well-being generating billions of dollars in economic activity and providing jobs to tens of thousands of Utah citizens. Utah farm gate sales in 2013 exceeded \$1.7 billion and according to Utah State University the economic ripple effect is dramatic. Forward and backward linkages to industries like transportation, processing, packaging and determined food and agriculture are the catalyst for \$17.5 billion in economic activity, or about 14 percent of the state GDP providing nearly 80,000 jobs.

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 own and control 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, growth and future prosperity.

Utah Farm Bureau delegates in November 2013 adopted policy that calls on the federal government to “not claim ownership of water developed on federal land.” In addition, Farm Bureau policy calls for “state control of water rights, stock water rights to be held by the individual grazing permittee and protection against federal encroachment on state waters.”

HISTORY

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 by most western states, holders of western water rights and under 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 ACTIONS “Establishing 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.

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.

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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 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 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 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 jobs are listed below. They are representative of a growing list of regulatory and legal actions that challenge 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.

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. 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 ownership to the Forest Service because rights are based on the ability to beneficially use the state’s 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 in the Forest Service Water Clause and a claim of sole possession. The 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 consider that through an adverse agency action on a permitted activity on System lands, the agency “claims” sole possession of previous jointly held private water rights.

It is a government taking without just compensation!

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 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 24th, the Forest Service has allowed Tombstone access to only 3 of their 25 springs.

Fencing Cattle From Their Water:

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.

**UNITED STATES FOREST SERVICE
Proposed Groundwater Resources Management Directive**

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 an 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 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.

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. The heavy cuts in grazing AUMs has robbed hundreds of millions of dollars from rural communities

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, “in Utah the Forest Service lands are those lands where most of our annual precipitation falls and accumulates as 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)

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.

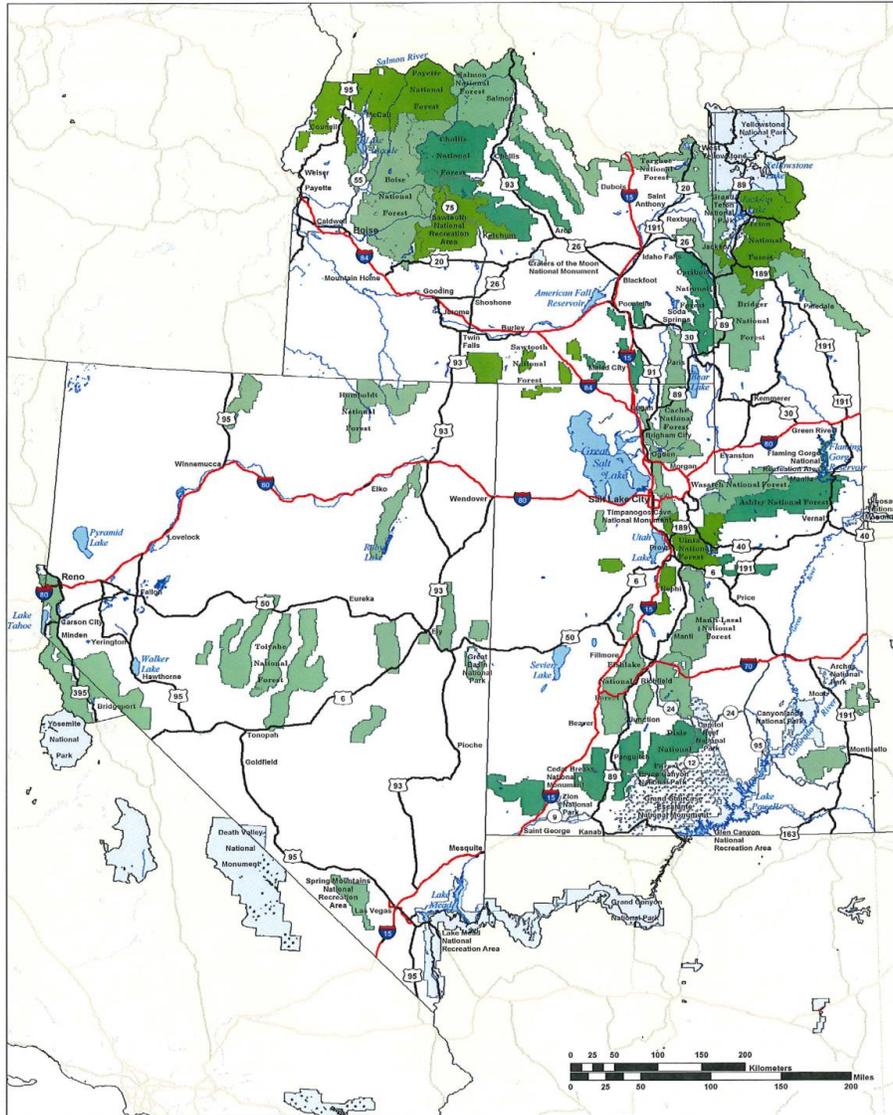
Congressional Oversight:

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)



U.S. Forest Service

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

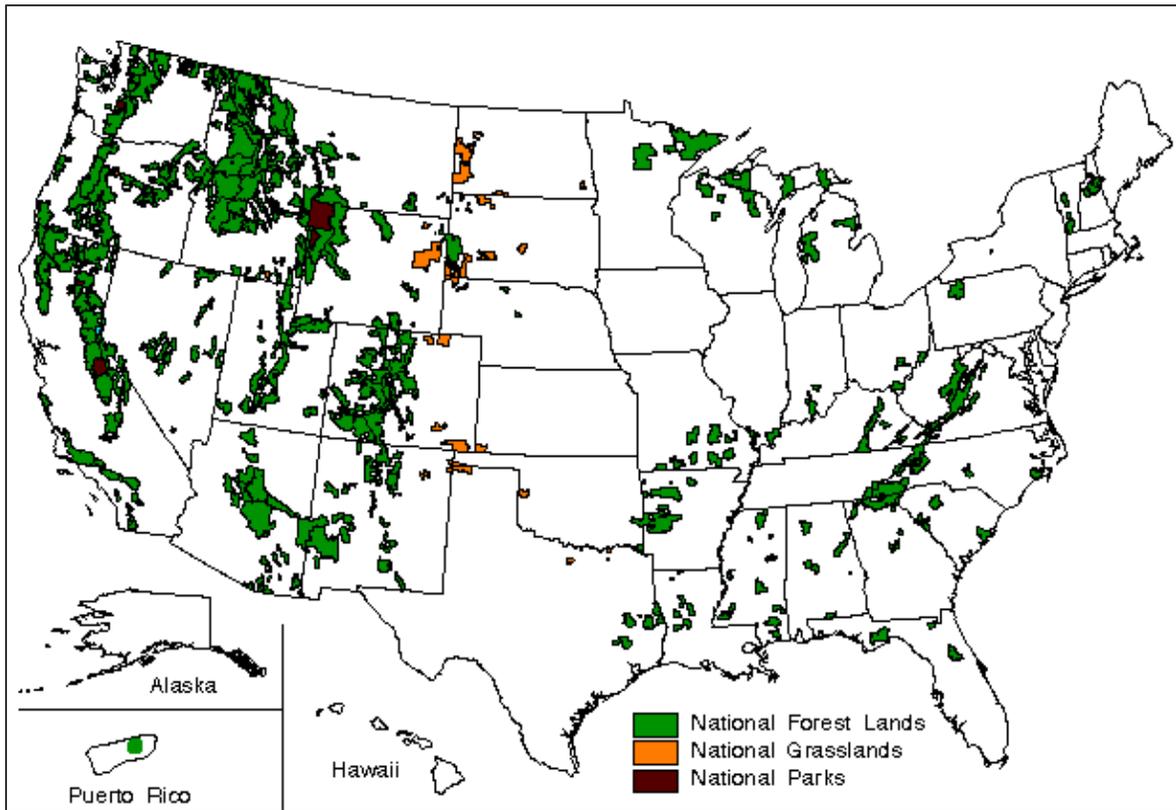


According to the Utah State Engineer, as much as 70 percent of Utah's available water supply originates on Forest System lands.



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 greater portion of the water supply in the western public lands than those east of Denver Colorado.