

**United States House of Representatives Committee on Natural Resources
Subcommittee on Water, Power, and Oceans**

**Testimony of James D. Ogsbury, Executive Director
Western Governors' Association
April 14, 2015**

Mr. Chairman and members of the Subcommittee, I sincerely appreciate your invitation to testify today on behalf of the Western Governors' Association (WGA). My name is James D. Ogsbury and I am the Association's Executive Director. WGA is an independent, non-partisan organization representing the Governors of 19 western states and 3 U.S.-flag islands. I am honored to share the with the Subcommittee perspective of the Western Governors regarding recent federal water-related regulatory proposals.

Water is a precious resource everywhere but especially in the West, where arid conditions—currently exacerbated by drought in many states—mean that water is particularly prized. Water is different in the West: our hydrology and legal structures governing water rights and usage are distinct from other parts of the nation.

The Western Governors have a policy resolution that directly speaks to water resource management.¹ In that resolution, the Governors reiterate a fact 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 basis of all of WGA's work on water. The resolution is based on the prior appropriation doctrine, the foundation of western water law under which states are the authority to issue rights for water use. The premises of prior appropriation and state authority should be the starting point of any federal regulatory action on water as well. In recent years, however, several regulatory proposals from the federal agencies have inadequately recognized state authority.

I will share perspectives from the Governors on each of the proposed regulatory directives and rules under consideration today, but my primary point will be the same for all three issues: federal agencies must recognize state authority in water management. Again quoting from the Governors' policy resolution, "nothing in any ... regulatory action should be construed as ... intending to affect states' primacy over the allocation and administration of their water

¹ Western Governors' Association. Policy Resolution 2014-03, *Water Resource Management in the West*. 2014. <<http://www.westgov.org/policies/301-water/597-water-resource-management-in-the-west-resolution-wga>>.



resources.” Therein lies the key concern underlying all of the pending federal regulations relating to water: they inadequately recognize the simple fact that states have the authority and competency to manage water resources.

Groundwater

In formal comments to the U.S. Forest Service (Forest Service or USFS) regarding the agency’s proposed directive on groundwater resource management, the Western Governors identified several concerns with the directive and requested meaningful consultation with the states. I am pleased to tell you that the Forest Service is, indeed, engaging in an active conversation with western water resource managers at this time. WGA applauds that effort. I hope that the discussions occurring now will serve as a model for federal-state consultation before proposals are issued in the future.

If the Forest Service issues a revised groundwater proposal, WGA urges the agency to fully recognize and defer to the states’ management authority. As the Governors stated in their formal comments to USFS, the proposed directive could be construed to assert USFS ownership of state groundwater through use of the phrase “National Forest System (NFS) groundwater resources” throughout the document.² This vague and insufficient acknowledgement of the states’ authority over groundwater is also evident in the stated objective of the proposed directive, which is to “manage groundwater underlying NFS lands cooperatively with states.”³ This language misleadingly suggests that the USFS has equal authority with the states over groundwater management, which it does not.⁴

The Governors also expressed concern that the proposed directive would lead USFS employees to make decisions regarding special use permits based on the amount of water withdrawn with a state issued water right; that is, a quantity that the state has already authorized for diversion and depletion.⁵ The proposal calls on USFS employees to consider the effects of proposed

² Western Governors’ Association. “Comments on FS-2014-0001- Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560.” Formal comments to USDA Forest Service. 2 Oct. 2014. <<http://www.westgov.org/letters-testimony/342-water/803-comments-usfs-groundwater-proposed-directive>>.

³ Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560. 79 FR 25815. 6 May 2014. See Section 2560.02-01 of draft available from U.S. Forest Service <<http://www.fs.fed.us/geology/groundwater.html>>.

⁴ The proposed directive on groundwater references Forest Service Manual 2540 (FSM) which claims that “groundwater as well as surface water is included” in the federal reserved water rights recognized in *Winters v. U.S.*, 207 U.S. 564 (1908) (FSM 2541.01, September 4, 2007). The *Winters* doctrine acknowledges federal reserved rights to water to secure adequate flows (as required by the Organic Act), but *Winters* has never been recognized as applicable to groundwater by any federal appellate court. The Forest Service Manual language regarding groundwater was never available for public comment and thus was never challenged in a formal comment period.

⁵ Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560. 79 FR 25815. 6 May 2014. See Sections 2560.03-4-a, 2561-2, and 2562.1-3 of draft available from U.S. Forest Service <<http://www.fs.fed.us/geology/groundwater.html>>.



actions on groundwater quantity and to require conservation strategies to limit total water withdrawals before issuing special use authorizations. While these provisions are surely well-intentioned, they ignore the fundamental concept of the states' authority to determine how much groundwater can be withdrawn within their boundaries.

Moreover, the proposed directive instructs employees to assume that surface water and groundwater are hydraulically connected, regardless of whether state law treats these resources separately.⁶ Not only does this disregard individual states' law, it also creates potential for misinterpretation of the directive to mean that the USFS holds management authority for both groundwater and, by extension, the surface water to which it assumes to be hydraulically connected.

The Forest Service has been made well aware of these concerns through comments from the Western Governors' Association, the Western States Water Council—an organization for state water managers—and through individual comments from states. The agency has responded with an offer to discuss our concerns and is currently engaged in such discussions with members of the Western States Water Council. WGA encourages that dialogue to proceed and we hope that if a revised directive is issued, that state authority will serve as the cornerstone of the document.

Despite these productive conversations, WGA believes it is important to reiterate the point that states are the sole management authority for groundwater. In 2012, federal trustees asserted claims for damages to groundwater in a natural resource damage case in New Mexico.⁷ This action was unprecedented, as the federal government does not inherently own groundwater to damage. Congress has created federal reserved rights to surface water, but no federal statute or federal appellate court has extended those rights to groundwater. The federal trustees' legal position thus challenged the western states' exclusive management of the groundwater resources within their respective boundaries.

These damage claims demonstrate a history of federal attempts to lay claim to a resource that Congress has recognized—and the Supreme Court has affirmed—belongs to the states. It is because of this history that I believe it is important to speak to you today on behalf of the Western Governors. While I am hopeful about the outlook for a productive relationship with the USFS on the groundwater directive, other issues remain—and continue to arise—that would challenge state authority over water resources. I ask the Subcommittee to help the Western Governors protect this long-standing authority.

⁶ Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560. 79 FR 25815. 6 May 2014. See Sections 2560.03-2 and 2561.1 of draft available from U.S. Forest Service <<http://www.fs.fed.us/geology/groundwater.html>>.

⁷ The Chevron Questa Mine site (formerly known as the Molycorp, Inc. site) is undergoing remediation per the Comprehensive Environmental Response, Compensation, and Liability Act. The Western Governors' Association issued a letter expressing concerns about the trustees' claims on May 25, 2012. Twelve members of the Council of Western Attorneys General also issued a letter dated March 7, 2012. Both letters are available from WGA staff.



Ski Area Water Rights

Another proposal from the Forest Service that could be construed as challenging state authority is a proposed addition to the agency's employee handbook regarding ski area water rights. As the Governors stated in their formal comments on the proposal, some language within the proposed ski area directive appears to be an effort by USFS to utilize special use authorization as a means to manage water use and water rights on NFS lands.⁸ Any such effort must be consistent with underlying state law regarding the acquisition and transfer of water rights.

Certain terms within the proposed directive are undefined, creating ambiguity for states and permittees. For instance, the clause requires water right holders to obtain advance written approval from the USFS before water rights can be divided, transferred, or modified if such action will "adversely affect" the availability of those rights to support operation of the ski area.⁹ The term "adversely affect" is not defined, nor does the paragraph explain who makes this determination. Regardless of its precise meaning, the overall intent of the directive is apparent: to add a layer of federal regulatory oversight to state-managed water right systems on NFS lands.

Waters of the United States

While the proposed rule from the Environmental Protection Agency (EPA) and Army Corps of Engineers (Corps) to redefine the jurisdiction of the Clean Water Act (CWA) is meant to clarify the scope of the regulation, the current proposal has, instead, created new points of ambiguity. One point lacking clarity is the matter of connectivity. The proposed rule would allow "shallow subsurface flow connection" – a term it does not define – to establish jurisdiction between surface waters. While groundwater itself is not included in the rule, the document needs measures to reiterate that groundwater is indeed solely the purview of the states.

As the Western States Water Council noted in its comments on the proposed rule, the preamble of the document explicitly states that "nothing...would cause the shallow subsurface connections themselves to become jurisdictional."¹⁰ However, the preamble will not be published once the rule is codified. Without this clarifying statement, confusion could arise regarding the jurisdictional status of subsurface water.

⁸ Western Governors' Association. "Comments on FS_FRDOC_0001-1886 – Ski Area Water Rights on NFS Lands." Formal comments to USDA Forest Service. 21 Aug. 2014. <<http://www.westgov.org/letters-testimony/299-letters-testimony-2014/774-comments-wga-weighs-in-on-forest-service-ski-area-water-rights>>.

⁹ Proposed directive on Ski Area Water Rights on National Forest System Lands. 79 FR 35513. 23 June 2014. See paragraph F-4-b of draft available from U.S. Forest Service <<http://www.fs.fed.us/specialuses/>>.

¹⁰ Western States Water Council. "Attention – Docket ID No. EPA-HQ-OW-2011-0880" (Definition of 'Waters of the United States' Under the Clean Water Act). Formal comments to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). 15 Oct. 2014. <<http://www.westernstateswater.org/wp-content/uploads/2012/10/Combined-CWA-WOTUS-Rule-Document-Final-101514.pdf>>. These comments were incorporated by reference into the Western Governors' Association's comments. The comments reference: Definition of "Waters of the United States" Under the Clean Water Act. 79 FR 22269, pg. 22210. 21 Apr. 2014 (to be codified at 40 CFR Part 230.3).



Furthermore, the EPA's Scientific Advisory Board report on the connectivity of water indicated support for using connectivity as a scientific basis for even broader CWA jurisdiction than what is now suggested under the proposed rule. Though that recommendation will not necessarily change the content of the final rule, the implications are troubling. Legal authority and precedent are at the core of the question of federal jurisdiction under the CWA. Both laws and hydrology vary from state to state. As the Governors stated in their formal comments on the proposed rule, the best policy when considering the intersection of science and law is one that allows for regional flexibility and acknowledges the role of state experts who live with — and intimately understand — the issue at hand.¹¹

It is worth noting that the SAB panel for the review of the EPA water body connectivity report included no state representatives.¹² The report was therefore developed without the regulatory expertise, scientific resources and on-the-ground knowledge possessed by state professionals. EPA inadequately recognized the role of the states in forming its SAB panel. Likewise, the agency's reasoning that its proposed rule is needed to ensure protection of waters that we all value inadequately recognizes the role of the states in ensuring water quality.

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 having on-the-ground resource management.

Even though legal precedent is not the only justification for state water management, it is one of the most powerful mechanisms Governors have to maintain their authority. Congress and the Supreme Court are squarely on the side of the states. That management authority is something that Western Governors intend to fight for vehemently and vocally. We welcome the opportunity to partner with the Subcommittee to maintain the states' authority on water.

¹¹ Western Governors' Association. "Comments on Docket ID No. EPA-HQ-OW-2011-0880 – Definition of 'Waters of the United States' Under the Clean Water Act." Formal comments to EPA and the Corps. 14 Nov. 2014. <<http://www.westgov.org/letters-testimony/342-water/837-comments-governors-submit-comments-on-definition-of-waters-of-the-united-states-under-the-clean-water-act>>.

¹² EPA. "Members of the Panel for the Review of the EPA Water Body Connectivity Report." Accessed 17 Oct. 2014. <<http://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalSubCommitteeRosters?OpenView&committee=BOARD&subcommittee=Panel%20for%20the%20Review%20of%20the%20EPA%20Water%20Body%20Connectivity%20Report>>.

