PACIFIC LEGAL FOUNDATION

October 3, 2014

Groundwater Directive Comments
United States Department of Agriculture
Mr. Rob Harper – WFWARP
201 14th Street S.W.
Washington, D.C. 20250

VIA ELECTRONIC MAIL
fsm2500@fs.fed.us

Re: Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560
79 Fed. Reg. 25,815 (May 6, 2014); 79 Fed. Reg. 52,628 (September 4, 2014)

Dear Mr. Harper:

Pacific Legal Foundation (PLF) is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing thousands of supporters nationwide who believe in limited government, property rights, and free enterprise. For 40 years PLF has been litigating in support of individuals' rights to make reasonable use of their private property, free from unwarranted government interference. *Sackett v. E.P.A.*, 566 U.S. ___, 132 S. Ct. 1367 (2012); *Rapanos v. United States*, 547 U.S. 715 (2006); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

These comments are submitted in response to the Unites States Forest Service (Forest Service)'s notice in the Federal Register on May 6, 2014, 79 Fed. Reg. 25,815. That notice states that the Forest Service is soliciting public input on a proposed groundwater management directive which will become Chapter 2560 of the Forest Service Manual.

PLF offers the following comments, and reserves the right to submit additional comments in the future.

PLF questions the need for the Forest Service to develop any policy relating to groundwater management, to the extent the policy has the effect of limiting the incidents of ownership of any privately held water rights under state law. Any rulemaking or adoption of a final policy on this

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subject must clearly state (1) the legal basis for the Forest Service to claim any property interest in groundwater (whether produced on National Forest lands or not) that is not used by the Forest Service itself, and (2) any legal justification of the Forest Service in exacting water rights from its permit holders.

Water Rights Are Transferable Interests in Real Property Under State Law

Water rights are real property interests arising under state law in all of the Western States in which the United States Forest Service issues grazing and other permits and written authorizations. Generally speaking, groundwater rights established under state law in the Western States are property rights to which due process rights under the Fifth Amendment to the United States Constitution attach. *See, e.g., City of Santa Maria v. Adam*, 211 Cal. App. 4th 266, 278-79 (2012) (describing California law of groundwater rights); *cf. Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 225 Cal. App. 3d 548, 563-64 (1990) (riparian or pre-1914 water right owner has a vested property right in the reasonable use of that right).

Courts that have examined the question have consistently held that the federal government does not acquire water rights under state law when private parties appropriate water from federal lands. This remains true when the appropriator is acting under a federal permit allowing use of federal land. *See, e.g., Joyce Livestock Co. v. United States*, 156 P.3d 502, 508, 519 (Idaho 2007). Nor do federal agencies acquire the right to regulate the use or disposition of privately held water rights. The regulation of privately held appropriative rights has been left to the states by Congress.

Congress and the federal courts have repeatedly and clearly directed the Forest Service to comply with state water law in any effort to obtain water rights for ancillary purposes of National Forests. *United States v. New Mexico*, 438 U.S. 696, 702 (1978) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.") (footnote omitted). Grazing and other productive uses involving exercise of groundwater rights are among the secondary purposes of the National Forests. *Id.* at 713-15 (outdoor recreation and other forest purposes under the Multiple Use Sustained Yield Act are secondary purposes). These authorities similarly limit the Forest Service's authority to demand the transfer of private groundwater rights to the agency, or otherwise condition the use or disposition of water rights.

As interests in property, water rights are protected against taking by the federal government without just compensation under the Fifth Amendment to the United States Constitution. *Casitas Municipal Water Dist. v. United States*, 708 F.3d 1340, 1354 (Fed. Cir. 2013) (citing *United States v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 100 (1986)). If the Forest Service were to demand transfer or surrender of groundwater rights held by its permit holders outside of the permitting

process, it would undoubtably be taking property for which the Constitution requires compensation. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994).

The Proposed Groundwater Resource Management Directive Circumvents State Water Law and Imposes Unconstitutional Conditions on Permit Holders

Forest Service Manual (FSM) 2541.32 directs the agency to claim title to water rights that properly belong to permit holders, including holders of grazing permits, under state law as discussed above, and FSM 2541.33 directs protests to claims to these same rights by the permit holders who actually own them. FSM 2541.35 directs that permits contain provisions that purport to limit or deny the water rights of permit holders.

Provisions of the proposed Groundwater Resource Management Directive extend these provisions of FSM 2540 to groundwater rights. Proposed FSM 2560.03.6.e. states the policy of the agency to require permit holders to comply with the above provisions of FSM 2541, including transferring title to water rights to the Forest Service through state application processes and provisions in permits. Proposed FSM 2560.04f.2 directs Regional Foresters to require provisions in permits that would transfer title to groundwater rights to the Forest Service, and allows Regional Foresters to impose such permit terms as a condition of permit issuance or renewal.

Such permit conditions would be unconstitutional exactions of property rights, in violation of the Takings Clause of the Fifth Amendment of the United States Constitution.[1] Exactions taken in the permitting process must have an essential nexus with the purported legitimate interest which the government seeks to further, and must be roughly proportional to the impact of the project based on a case specific analysis. *Nollan v. California Coastal Commission*, 483 U.S. at 837; *Dolan v. City of Tigard*, 512 U.S. at 386, 391.

The Forest Service has not satisfied *Nollan*'s requirement to establish an essential nexus between the operation of any activity for which the Service issues permits and the private ownership of water rights by the permit holder. There is no harm to the public or to the property caused by the permit holder owning groundwater rights associated with grazing or any other purposes.

The Forest Service would also be unable to meet the requirement set forth in *Dolan* that it demonstrate that any exaction of interests in groundwater rights in permitting processes is roughly proportional to the impact of the permitted activity, based on a case specific analysis. The

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[1] This observation applies equally to the application of FSM 2541 to surface water rights, including any effort to require permit holders to convey or surrender surface water rights as a condition of permit approval or renewal. *See generally* Pacific Legal Foundation's August 22, 2014, comment letter to United States Forest Service on proposed ski area water rights permit clause.

universally applicable policy and directive to claim private citizens' water rights, through adjudications and/or permit applications, is the antithesis of a case specific analysis.

This open-ended direction to claim title to or restrict the exercise of groundwater rights violates the congressionally established policy of federal agency deference to state water law, in both substance and procedure. *United States v. New Mexico*, 438 U.S. at 702 ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law.") (footnote omitted). The Forest Service has no power to take the place of state regulators in administering private water rights arising under state law, or to violate the separation of powers by usurping the authority of state (or federal) courts which have issued water right decrees.

Conclusion

Based on the foregoing observations, PLF encourages the Forest Service to avail itself of existing state processes to address any legitimate interest it has in groundwater rights and groundwater resources associated with the National Forests, and to dispense with the adoption of the proposed Ground Water Resources Management Directive.

Thank you for considering our views on this subject. If you have any questions or require additional information, please feel free to contact Tony François of Pacific Legal Foundation by telephone at (916) 419-7111 or by electronic mail at tfrancois@pacificlegal.org.

Sincerely,

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