Subject: Unified Watershed Policy comments
Sender: sklundt /INTERNET (sklundt@beef.org)
Attached Date: 05/24/00 10:21
Priority: normal
Sensitivity: normal
Importance: normal

218

Part 1

FROM: sklundt / INTERNET
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TO: cleanwater / wo, caet-slc

Part 2

ARPA MESSAGE HEADER

Part 3

<<Watershed policy comments.doc>>

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Part 4

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MAY 25 2000

May 22, 2000

USDA-Forest Service
Content Analysis Enterprise Team
Attn: UFP, Building 2, Suite 295
5500 Amelia Earhart Drive
Salt Lake City, UT 84116

Dear Sir or Madam:

The Public Lands Council (''PLC'') and the National Cattlemen's Beef Association (''NCBA'') hereby submit the following comments on the ''Unified Federal Policy for Ensuring a Watershed Approach to Federal Land and Resource Management,'' publishe at 65 FR 8833 through 65 FR 8839. The Public Lands Council is a non-profit organiza- tion representing over 27,000 federal grazing permittees. PLC membership consists of state organizations representing individual cow-calf producers. The National Cattlemen Beef Association is the trade association for America's one million cattle farmers and ra nchers. NCBA is a consumer-focused, producer-directed organization representing the largest segment of the nation's food and fiber industry. PLC and NCBA membership in clude stakeholders of interests in lands managed by the Bureau of Land Management (''BLM'') and the United States Forest Service (''USFS'').

Our members are family farmers and ranchers along with state and regional affiliates, a with a vested interest in protecting the environment. These members rely upon and uti- lize federal forage to sustain livestock through the federal grazing permit system. In tu the permit system of the USFS and BLM allows farmers and ranchers to support their families and communities. Thus, our members have an important stake in the watershe policy proposed by the listed federal agencies.

We are very aware of our responsibilities as permittees under the BLM and USFS sys- tems. For instance, if a permittee is not in compliance with his grazing permit, no matt what the reason, the agency may cancel, suspend or modify his permit. Without grazin privileges under the permit system, many ranchers and farmers would not survive. Therefore, compliance with environmental mandates associated with grazing privileges forces permittees to be environmentally responsible.

Our membership is very concerned that the proposed watershed policy is not authorizec by Congress. As written, this proposed policy will likely have detrimental impacts on c members' grazing operations as well as indirect impacts on local businesses and public opinion. We are also very concerned that watershed protection is not the primary objec tive of the controlling land use statutes. Watershed protection is not found in the Feder Land Policy Management Act, Public Range Improvement Act or the Multiple Use

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However, the proposed policy is not without its benefits. One such benefit is the degree of collaboration envisioned. The agencies will discover more productive cooperation with agreements rather than with rules and penalties. Another is the ambition by the ag ncies to use sound science in establishing this policy. With sound science, the agencies will find that many watersheds are in ideal condition. These watersheds will not warrar protection but only a program that maintains the quality of the watershed.

Our members sincerely hope that the agencies will consider the following comments. A too often our members have commented on proposed regulations and policies only to have our concerns largely ignored. As a result, we have often had to turn to litigation ir order to protect our interests. The agencies would do themselves and the public a great service by addressing our concerns in the comment phase rather than in a courtroom.

In the notice of the proposed watershed policy, the agencies requested comments on six specific subjects. We will comment on those specific areas, submit general comments and offer comments on our other concerns and ideas.

## I. Right Approach

### A. Congress

The most important dynamic absent from this proposed policy is our nation's chief law making body, the United States Congress. Congress has an extensive amount of power when it comes to federal land and water regulation. Most of this power derives from th United States Constitution. One source of this power is the Property Clause of the U.S. Constitution: ''The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States.'' U.S. Const. art. IV, ? 3 cl. 2.

The Property Clause is the most commonly cited source of power for federal reservatio of water. *See e.g.* United States v. Rio Grande Dam & Irrigation, 174 U.S. 690 (1899) (dictum) and Cappaert v. United States, 426 U.S. 128, 238 (1976). The Property Clause of the Constitution grants power to Congress to reserve water for use on public lands. This is called the 'reserved rights doctrine.' The reserved rights doctrine was created to insure that public lands and Indian lands set aside by the government for a specific purpose would have adequate water to fulfill that purpose. Thus, Congress exercises its power to reserve waters whenever it sets aside land for purposes that require water. *See* Arizona v. California, 373 U.S. 546 (1963).

Congress also has power to regulate water under the Commerce Clause. Under the Con titution, Congress has power ''to regulate commerce...among the several states, and wit Indian Tribes.'' U.S. Const. art. IV, ? 3 cl. 2. The application of Congress' Commerce

Clause power to regulate waters and activities affecting waters, now indisputably broad is reflected in the most pervasive and controlling water statute of our time - the Clean Water Act. We are now in a regulatory scheme where the focus is not on interstate commerce or navigable waters but on the exercise of ''jurisdiction over the nation's waters to the maximum permissible under the Commerce Clause.'' Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.D.C. 1975).

Another power of Congress to control water is found in Article, Section 8, of the U.S. Constitution. This clause grants Congress the power to declare war, levy taxes and appropriate money to provide for the common defense of the United States. *See e.g.* Ashwander v. TVA, 297 U.S. 288 (1936). Then there is Congress's power to appropriate money and provide for the general welfare, also a recognized method of federal control over waters. U.S. Const. art. I, ? 8, cl. 1.

This power came into play in one of the largest basin-wide development projects. In United States v. Gerlach Livestock Co., the court ruled that ''Congress has a substantiv power to tax and appropriate for the general welfare, limited only by the requirement th it shall be exercised for the common benefit as distinguished from some mere local purpose. Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation, and other internal improvement, is now as clear and ample as its power to accomplish the same results indirectly through resort to strained interpretation of the power over navigation.'' 339 U.S. 725, 738 (1950). *See also* Unite States v. Butler, 297 U.S. 1, (1936).

The Constitution also provides for treaties; treaties which can control local waters. U.S Const. art. II, ? 2, cl. 2. Treaty obligations of the United States give the federal government an additional basis for authorizing regulations and works of improvements on international waterways. *See* Arizona v. California, 283 U.S. 423 (1931). Once the federal government enters into a treaty with another nation it is the ''Supreme Law of tl Land'' under the Constitution. U.S. Const. art. VI, cl. 2.

Congress and the federal government can take the water rights by exercising the government's eminent domain power. This requires paying just compensation to persor holding water rights established by state law, since those rights constitute property. Th Fifth Amendment protects such an individual's right stating, ''nor shall private property be taken for public use, without just compensation.'' U.S. Const. amend. V.

As one can see, Congress has extensive authority of federal lands and the water within those federal lands. Before these agencies reach the point of promulgating rules associated with this proposed policy, the BLM and USFS should consult with Congress. Congress enacted the Clean Water Act, the very Act these agencies rely upon in formulating this unified watershed policy.

## B. States

The majority of western states follow the prior appropriation doctrine which creates wa rights based on beneficial use. The earliest user owns a right to use the quantity of wat that has been continuously diverted. This right is superior to all subsequent users, even that user is the federal government. Each water user is ranked according to when the be eficial use began, a process called adjudication. However, if the federal government reserves federal lands for a specific purpose prior to other uses, the federal government possesses the superior right. The federal government obtains a water right on the date c the statute, executive order, agreement or treaty setting aside the land for the special us Private rights existing on a surface or underground water source prior to the reservation are superior to the reserved rights of the federal government.

Despite extensive congressional power over water in the West, water allocation is strict the states' responsibility. Courts have often cited an established federal policy of deferring to state water law. See California v. United States, 438 U.S. 645 (1978). The Supreme Court has relied on the policy of deferring to state water law in defining the limits of the reserved rights doctrine, United States v. New Mexico, 438 U.S. 696 (197 Similarly, the policy might influence a court to find that state regulation should prevail it places a relatively insubstantial burden on federal programs or policies. Only when a federal program or congressional mandate is frustrated is state law preempted; state law must be complied with as far as possible.

Congress also recognized states' authority over water in the Clean Water Act. 33 U.S.C ? 1251(g). This section of the CWA reserves powers to the states to allocate water, re- cognizes existing water rights and forces federal agencies to cooperate with states when dealing with water resources. Under the CWA, the states are shouldered with the respo sibility of dealing with nonpoint source pollution. One court recognized this by stating, "the [CWA] contains no mechanism for direct federal regulation of nonpoint source pollution. But the Act's legislative history makes clear that this omission was due not t Congress' concern for state autonomy, but simply to its recognition that the control of nonpoint source pollution was so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use that its uniform federal regulation was v tually impossible." Shanty Town Ltd. Partnership v. EPA, 843 F.2d 782 (4th Cir. (Md) (1988) *citing* 117 Cong. Rec. 38825 (1971) (Sen. Muskie). *See also* United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) ("It is clear from the legislativ history [that] Congress would have regulated so-called nonpoint sources if a workable method could have been derived."); Oregon Natural Desert Association v. Dombeck, 15 F.3d 945, 951 (9th Cir. 1998) *cert. denied* 120 U.S. 397 (1999) ("...certification under 1341 is not required for grazing permits or other federal licenses that may cause polluti solely from nonpoint sources.").

Congress and the courts recognize the role states play in water allocation, control and regulation. These agencies should leave the matter of nonpoint source pollution to the states as directed by Congress and as interpreted by the judicial system. Who better to know the circumstances within a state than the state itself?

## C. Water Rights

Before implementing this policy, the agencies should determine the extent of private water rights that may be affected by the proposed watershed policy. Many of these wat rights predate the reservation of federal land, whether the land is reserved for a national forest, monument, grassland or BLM. In order for the watershed policy to work, the ag ncies must know the extent of what is involved. We are not saying the agencies should adjudicate every water right in every watershed. Many of these adjudications have al- ready been conducted. These adjudications can take years, often extending over a ten- year period. All western states have procedures in place for adjudicating competing water interests in a watershed, division or basin. Each state agency has recorded these rights and before this policy moves forward the agencies must consult with each state water agency in order to ascertain the extent of private water rights on federal waters- heds. Otherwise, the agencies' unified watershed policy could lead to a negative impact on these water rights and result in a Takings claim under the Fifth Amendment or some other legal consequence.

## D. Economic Implications

In addition to determining the impact of this policy on water rights, the agency should conduct an economic analysis of the proposed unified watershed policy. The costs as- sociated with this policy could impact or eliminate jobs, recreation opportunities, economic development and the livelihoods and economic interests of those who rely on federal lands (i.e. grazing, recreation, mining, timber and oil and gas). Moreover, the agencies are required to identify the potential economic impact of proposed and final rules on small entities that will be subject to the rule's requirements. Regulatory Flex- ibility Act (''RFA''), 5 U.S.C. ?? 601-612, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act (''SBREFA''), (codified at 5 U.S.C. ?? 601-612 (1994 & Supp. II 1996)). These analyses are not required if the agency ''certifies that t rule will not, if promulgated, have a significant economic impact on a substantial numb of small entities.'' Id. ?605(b).

Under the unified watershed policy proposal, the agencies will ''develop science-based total maximum daily loads (TMDLs).'' 65 Fed. Reg. at 8838. According to an EPA document, cases studies of the costs associated with implementing TMDLs ranged from $4,039 to $1,023,531. TMDLs addressing only one type of source (i.e. point or nonpoi tended to be less expensive ($47,211 average cost) rather than those addressing both types ($486,260). 1996, EPA841-R-96-001; http://www.epa.gov/OWOW/tmdl/tmdlcstt.html. Multiplying the EPA's own TMDL cc estimates with those of the estimated number of watersheds (roughly 20,000) the costs will range from $80 million to $20 billion. The low estimate is an extremely conserva- tive estimate while the high end is also conservative. The fact remains that the costs wi be exceedingly high and result in a significant economic impact. Therefore, the mandat of SBEFRA apply. Why hasn't the agency conducted such an analysis?

Perhaps the agencies are trying to avoid this task by arguing that the unified watershed policy is not a rule and therefore not binding. However, ''[i]f an agency acts as if a document issued at headquarters is controlling in the field, it if treats the document in tl same manner as it treats a legislative rule, if it bases enforcement actions on the *policie* or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with terms of the document, then the agency's document is for all practical purposes 'binding. Appalachian Power Co., v. EPA, 2000 WL 336911, *4 (D.C. Cir.)) (emphasis added).

## II. Content

Under this policy, the agencies appear to mischaracterize the condition of many watersheds, while ignoring the necessity of sound science and other key factors such as costs, statutory authority and regional and local effects of this policy. Therefore, the content ( this plan should include an emphasis on the utilization of sound science before any implementation of any program, a cost evaluation, statutory authority behind this policy a the impacts on states and counties. The content of the policy should also include the amount of funding, and its source, for each state to address nonpoint source pollution. Also, each agency's role needs to be outlined with established boundaries of jurisdictior and control. State agencies should maintain the primary responsibility for this watershe policy. Federal agencies should only act as partner without effect of law. Only when tl scenario is satisfied will this policy be successful. Otherwise, a forceful policy could keep stakeholders, landowners and private citizens from practicing sound land management.

The content of this policy should also include flexible and site-specific approaches to watershed management. Any program instituted under this policy must remain consiste with these approaches. For instance, certain communities and their watersheds possess interdependent relationships and, if recognized, can be capitalized upon to solve any water quality problems. If a watershed consists predominantly of ranchers, then the pra tical expertise of these ranchers should be used to identify and support improved ranchi or agricultural practices suitable for that area. If this type of practice is utilized for this approach the policy will be more acceptable to ranchers, the local community and to the general public. Local farmers and ranchers should also be called upon for their technic assistance in formulating best management practices.

The proposed policy should also include an assessment or analysis of this policy with other ongoing agency initiatives. In other words, how will this policy affect other agen proposals such as the roadless initiative, roadless policy, forest planning and management, transportation, grazing permit renewals, NEPA documentation, local and regional environmental assessments and environmental impact statements such as the Sierra Nevada Framework, Great Basin Restoration Initiative, and the Interior Columbi Basin Ecosystem Management Project. Currently, there is a multitude of agency proposals in various stages of completion. The agencies must determine how this polic will intertwine with these other agency proposals.

The agencies should also include a process for removing watersheds from special protection designations. Circumstances may occur which will result in achieving all management goals of the watershed recovery program. Also, situations may arise when a watershed may be classified in error. The agencies need to formulate a process where these situations can be addressed and alter the program from one of improvement to one of monitoring or maintenance. Furthermore, we oppose any classification of watershed which may result in a classification scheme similar to what we now see in the Endangered Species Act.

Finally, the content of the policy should include the criteria discussed in Section VI below.

## III. Coordination

Perhaps the best way for the agencies to achieve optimal coordination is to leave the management up to the states. Avoiding a regulatory or management scheme to further a federal agenda is the worst possible method of moving forward. Joining states as a partner, particularly with financing, is the most practical manner for using this policy.

The federal agencies could act as data collectors and leave the decision making to the states. The federal agencies should avoid placing use restrictions on landowners adjacent to federal lands. Federal agencies should also avoid creating new criteria arising out of federal planning processes (see above section). And, most importantly, the federal agencies should leave the assessment of nonpoint source pollution to the states.

## IV. Partnerships

The best method for establishing partnerships is to determine the users of the watershed and the nature of the use. Once this step is achieved, the federal and state agencies must engage a collaborative approach with these users. A voluntary, rather than mandatory approach is far better for achieving results. Garnering support from the watershed users is essential and the agency should not impose this policy on users as a regulatory scheme.

Another way to establish partnerships is to develop an incentive-based program. Local users will be more likely to cooperate with the agencies when there is some personal or business related benefit. Perhaps something like a property tax rebate or some type of point system where "points" can be traded for other regulatory options.

## V. Tribal Consultation

Our only comment is here to let Tribes determine what is best for the each Tribe.

## VI. Criteria

Our members have considered and established several criteria for selecting watersheds for protection designation. These criteria include cost, water rights and private property economic reliance and implications, prevalent and historic use, number of stakeholders, nature of stakeholders' interests, and state agency programs or efforts in the area.

### A. Cost

Cost should be an important factor amongst the criteria for identifying watersheds. The costs should include the cost to the state and federal agencies implementing any watershed protection activity as well as costs to the stakeholders. If the stakeholders are respc sible for the majority of the cost resulting from this policy, a cooperative program must be instigated. Otherwise, there may not be any effort on the behalf of the affected stakeholders to participate in the program. Perhaps a step-by-step program may be implemented to spread the cost over a number of years rather than up front. Whatever the result, the determination of cost and the funding source must be in place before designa ting any watershed for protection.

### B. Water Rights/Private Property

First and foremost, before a watershed protection program can be established, the exten of water rights and the affect of this proposed policy on private property must be evaluated. As mentioned above, many private water rights exist on federal land. These are real property rights with a monetary value and recognized under state water law. Tl responsible agencies must determine the extent of these water rights and the impact this policy will have on private water rights before implementing this policy.

There is also a possibility that this proposal may affect water rights on private land. Watersheds do not exist on federal land only. Watersheds can extend for miles and spread over several states. The agency must be wary of this fact and take heed of private property interests. If the agency attempts to impose this policy on areas outside federal lands, the agency <u>must</u> obtain cooperation from those within the target area.

### C. Economic Reliance and Implications

Another important criterion in the watershed approach is the economic reliance of the s keholders and communities upon the federal lands within the watershed area. How important is the federal land to the local community? Is it important to the local community for tax basis? Are there ongoing economic activities (grazing, mining, timber, recreation, etc.) that will be affected by this approach? The agency must be careful to not infringe on these activities too harshly. Otherwise, stakeholders may have to resc to litigation in order to protect their interests.

### D. Prevalent or Historic Use

Certain federal lands have been designated for specific uses. One such example is the classification of rangelands as grazing districts. In many parts of the rural West, grazin is the prevalent use of federal lands. A significant portion of these lands has little aestl tic or recreation value and is devoid of other valuable interests such as minerals or oil a gas. Therefore, grazing is usually the most viable economic and often only use of these federal lands. Nonetheless, these lands will fall within the proposed watershed policy. Grazing has been an ongoing activity in many of these areas for over a hundred years. Many ranching families have utilized these areas for generations. Thus, the responsible agency should consider the historic or prevalent uses of these lands when implementing this policy.

### E. Number of Stakeholders

In addition to historic uses, the agency should consider the number of stakeholders, that is, how many people or businesses will be affected by this policy. In the current land management regulatory scheme, there are two estates - the surface and subsurface. On occasion, grazing permittees must share access with subsurface interests such as mining or oil and gas. Ranchers utilize the surface while miners explore for minerals or oilmen drill for oil. The same applies to recreation enthusiasts. The higher the number of ranchers, miners, oilmen, recreationists or loggers, the more important the federal land an its economic value. The agency must assess this quantity and garner cooperation from these interests.

### F. Nature of Stakeholders' Interests

Not only is the number of stakeholders important but the nature of the interest is equally important. For instance, is a mining company in the final stage of permitting before expanding or opening a new mine? Is a timber contract in the final stages? Where is a grazing permittee in terms of rotation or permit renewal? How much money has been e tended in obtaining a mining permit or timber contract? These are just some of the interests that will undoubtedly be affected by this proposed policy. The agency must be careful not to disturb these ongoing activities. That is, the agency must not create additional risks or burdens to these stakeholders with this policy.

### G. State Agency Programs or Efforts

The final criterion in designating watersheds arises out of state agencies. Many states have conservation or cooperative programs in place that address some of the concerns enumerated in the proposed watershed policy. The federal agencies should work hand-hand with these agencies so as to not disturb current efforts. The only role here is to enhance these efforts.

We offer these comments in the hope that the agencies will consider and address all our concerns.

Sincerely,

Michael Byrne
Chair, Federal Lands Committee
Council

Keith Winter
President, Public Lands

national cattlemen's beef association

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# FAX COVER SHEET

To USDA-FOREST SERVICE, CONTENT ENTERPRISE TEAM

Recipient's Fax Number

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From NCBA/PLC

Date 5-24-00

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The majority of western states follow the prior appropriation doctrine which creates water rights based on beneficial use. The earliest user owns a right to use the quantity of water that has been continuously diverted. This right is superior to all subsequent users, even if that user is the federal government. Each water user is ranked according to when the beneficial use began, a process called adjudication. However, if the federal government reserves federal lands for a specific purpose prior to other uses, the federal government possesses the superior right. The federal government obtains a water right on the date of the statute, executive order, agreement or treaty setting aside the land for the special use. Private rights existing on a surface or underground water source prior to the reservation are superior to the reserved rights of the federal government.

Despite extensive congressional power over water in the West, water allocation is strictly the states' responsibility. Courts have often cited an established federal policy of deferring to state water law. See California v. United States, 438 U.S. 645 (1978). The Supreme Court has relied on the policy of deferring to state water law in defining the limits of the reserved rights doctrine, United States v. New Mexico, 438 U.S. 696 (1978). Similarly, the policy might influence a court to find that state regulation should prevail if it places a relatively insubstantial burden on federal programs or policies. Only when a federal program or congressional mandate is frustrated is state law preempted; state law must be complied with as far as possible.

Congress also recognized states' authority over water in the Clean Water Act. 33 U.S.C. § 1251(g). This section of the CWA reserves powers to the states to allocate water, recognizes existing water rights and forces federal agencies to cooperate with states when dealing with water resources. Under the CWA, the states are shouldered with the responsibility of dealing with nonpoint source pollution. One court recognized this by stating, "the [CWA] contains no mechanism for direct federal regulation of nonpoint source pollution. But the Act's legislative history makes clear that this omission was due not to Congress' concern for state autonomy, but simply to its recognition that the control of nonpoint source pollution was so dependent on such site-specific factors as topography, soil structure, rainfall, vegetation, and land use that its uniform federal regulation was virtually impossible." Shanty Town Ltd. Partnership v. EPA, 843 F.2d 782 (4th Cir. (Md)) (1988) *citing* 117 Cong. Rec. 38825 (1971) (Sen. Muskie). *See also* United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) ("It is clear from the legislative history [that] Congress would have regulated so-called nonpoint sources if a workable method could have been derived."); Oregon Natural Desert Association v. Dombeck, 151 F.3d 945, 951 (9th Cir. 1998) *cert. denied* 120 U.S. 397 (1999) ("...certification under 1341 is not required for grazing permits or other federal licenses that may cause pollution solely from nonpoint sources.").

Congress and the courts recognize the role states play in water allocation, control and regulation. These agencies should leave the matter of nonpoint source pollution to the states as directed by Congress and as interpreted by the judicial system. Who better to know the circumstances within a state than the state itself?

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### C. Water Rights

Before implementing this policy, the agencies should determine the extent of private water rights that may be affected by the proposed watershed policy. Many of these water rights predate the reservation of federal land, whether the land is reserved for a national forest, monument, grassland or BLM. In order for the watershed policy to work, the agencies must know the extent of what is involved. We are not saying the agencies should adjudicate every water right in every watershed. Many of these adjudications have already been conducted. These adjudications can take years, often extending over a ten-year period. All western states have procedures in place for adjudicating competing water interests in a watershed, division or basin. Each state agency has recorded these rights and before this policy moves forward the agencies must consult with each state water agency in order to ascertain the extent of private water rights on federal watersheds. Otherwise, the agencies' unified watershed policy could lead to a negative impact on these water rights and result in a Takings claim under the Fifth Amendment or some other legal consequence.

### D. Economic Implications

In addition to determining the impact of this policy on water rights, the agency should conduct an economic analysis of the proposed unified watershed policy. The costs associated with this policy could impact or eliminate jobs, recreation opportunities, economic development and the livelihoods and economic interests of those who rely on federal lands (i.e. grazing, recreation, mining, timber and oil and gas). Moreover, the agencies are required to identify the potential economic impact of proposed and final rules on small entities that will be subject to the rule's requirements. Regulatory Flexibility Act ("RFA"), 5 U.S.C. §§ 601-612, as amended in 1996 by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), (codified at 5 U.S.C. §§ 601-612 (1994 & Supp. II 1996)). These analyses are not required if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." Id. §605(b).

Under the unified watershed policy proposal, the agencies will "develop science-based total maximum daily loads (TMDLs)." 65 Fed. Reg. at 8838. According to an EPA document, cases studies of the costs associated with implementing TMDLs ranged from $4,039 to $1,023,531. TMDLs addressing only one type of source (i.e. point or nonpoint) tended to be less expensive ($47,211 average cost) rather than those addressing both types ($486,260). 1996, EPA841-R-96-001; http://www.epa.gov/OWOW/tmdl/tmdlcstt.html. Multiplying the EPA's own TMDL cost estimates with those of the estimated number of watersheds (roughly 20,000) the costs will range from $80 million to $20 billion. The low estimate is an extremely conservative estimate while the high end is also conservative. The fact remains that the costs will be exceedingly high and result in a significant economic impact. Therefore, the mandates of SBEFRA apply. Why hasn't the agency conducted such an analysis?

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Perhaps the agencies are trying to avoid this task by arguing that the unified watershed policy is not a rule and therefore not binding. However, "[i]f an agency acts as if a document issued at headquarters is controlling in the field, it if treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the *policies* or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with terms of the document, then the agency's document is for all practical purposes 'binding.'" Appalachian Power Co., v. EPA, 2000 WL 336911, *4 (D.C. Cir.)) (emphasis added).

## II. Content

Under this policy, the agencies appear to mischaracterize the condition of many watersheds, while ignoring the necessity of sound science and other key factors such as costs, statutory authority and regional and local effects of this policy. Therefore, the content of this plan should include an emphasis on the utilization of sound science before any implementation of any program, a cost evaluation, statutory authority behind this policy and the impacts on states and counties. The content of the policy should also include the amount of funding, and its source, for each state to address nonpoint source pollution. Also, each agency's role needs to be outlined with established boundaries of jurisdiction and control. State agencies should maintain the primary responsibility for this watershed policy. Federal agencies should only act as partner without effect of law. Only when this scenario is satisfied will this policy be successful. Otherwise, a forceful policy could keep stakeholders, landowners and private citizens from practicing sound land management.

The content of this policy should also include flexible and site-specific approaches to watershed management. Any program instituted under this policy must remain consistent with these approaches. For instance, certain communities and their watersheds possess interdependent relationships and, if recognized, can be capitalized upon to solve any water quality problems. If a watershed consists predominantly of ranchers, then the practical expertise of these ranchers should be used to identify and support improved ranching or agricultural practices suitable for that area. If this type of practice is utilized for this approach the policy will be more acceptable to ranchers, the local community and to the general public. Local farmers and ranchers should also be called upon for their technical assistance in formulating best management practices.

The proposed policy should also include an assessment or analysis of this policy with other ongoing agency initiatives. In other words, how will this policy affect other agency proposals such as the roadless initiative, roadless policy, forest planning and management, transportation, grazing permit renewals, NEPA documentation, local and regional environmental assessments and environmental impact statements such as the Sierra Nevada Framework, Great Basin Restoration Initiative, and the Interior Columbia Basin Ecosystem Management Project. Currently, there is a multitude of agency proposals in various stages of completion. The agencies must determine how this policy will intertwine with these other agency proposals.

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The agencies should also include a process for removing watersheds from special protection designations. Circumstances may occur which will result in achieving all management goals of the watershed recovery program. Also, situations may arise where a watershed may be classified in error. The agencies need to formulate a process where these situations can be addressed and alter the program from one of improvement to one of monitoring or maintenance. Furthermore, we oppose any classification of watersheds, which may result in a classification scheme similar to what we now see in the Endangered Species Act.

Finally, the content of the policy should include the criteria discussed in Section VI below.

**III. Coordination**

Perhaps the best way for the agencies to achieve optimal coordination is to leave the management up to the states. Avoiding a regulatory or management scheme to further a federal agenda is the worst possible method of moving forward. Joining states as a partner, particularly with financing, is the most practical manner for using this policy.

The federal agencies could act as data collectors and leave the decision making to the states. The federal agencies should avoid placing use restrictions on landowners adjacent to federal lands. Federal agencies should also avoid creating new criteria arising out of federal planning processes (see above section). And, most importantly, the federal agencies should leave the assessment of nonpoint source pollution to the states.

**IV. Partnerships**

The best method for establishing partnerships is to determine the users of the watershed and the nature of the use. Once this step is achieved, the federal and state agencies must engage a collaborative approach with these users. A voluntary, rather than mandatory approach is far better for achieving results. Garnering support from the watershed users is essential and the agency should not impose this policy on users as a regulatory scheme.

Another way to establish partnerships is to develop an incentive-based program. Local users will be more likely to cooperate with the agencies when there is some personal or business related benefit. Perhaps something like a property tax rebate or some type of point system where "points" can be traded for other regulatory options.

**V. Tribal Consultation**

Our only comment is here to let Tribes determine what is best for the each Tribe.

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## VI. Criteria

Our members have considered and established several criteria for selecting watersheds for protection designation. These criteria include cost, water rights and private property, economic reliance and implications, prevalent and historic use, number of stakeholders, nature of stakeholders' interests, and state agency programs or efforts in the area.

### A. Cost

Cost should be an important factor amongst the criteria for identifying watersheds. These costs should include the cost to the state and federal agencies implementing any watershed protection activity as well as costs to the stakeholders. If the stakeholders are responsible for the majority of the cost resulting from this policy, a cooperative program must be instigated. Otherwise, there may not be any effort on the behalf of the affected stakeholders to participate in the program. Perhaps a step-by-step program may be implemented to spread the cost over a number of years rather than up front. Whatever the result, the determination of cost and the funding source must be in place before designating any watershed for protection.

### B. Water Rights/Private Property

First and foremost, before a watershed protection program can be established, the extent of water rights and the affect of this proposed policy on private property must be evaluated. As mentioned above, many private water rights exist on federal land. These are real property rights with a monetary value and recognized under state water law. The responsible agencies must determine the extent of these water rights and the impact this policy will have on private water rights before implementing this policy.

There is also a possibility that this proposal may affect water rights on private land. Watersheds do not exist on federal land only. Watersheds can extend for miles and spread over several states. The agency must be wary of this fact and take heed of private property interests. If the agency attempts to impose this policy on areas outside federal lands, the agency <u>must</u> obtain cooperation from those within the target area.

### C. Economic Reliance and Implications

Another important criterion in the watershed approach is the economic reliance of the stakeholders and communities upon the federal lands within the watershed area. How important is the federal land to the local community? Is it important to the local community for tax basis? Are there ongoing economic activities (grazing, mining, timber, recreation, etc.) that will be affected by this approach? The agency must be careful to not infringe on these activities too harshly. Otherwise, stakeholders may have to resort to litigation in order to protect their interests.

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### D. Prevalent or Historic Use

Certain federal lands have been designated for specific uses. One such example is the classification of rangelands as grazing districts. In many parts of the rural West, grazing is the prevalent use of federal lands. A significant portion of these lands has little aesthetic or recreation value and is devoid of other valuable interests such as minerals or oil and gas. Therefore, grazing is usually the most viable economic and often only use of these federal lands. Nonetheless, these lands will fall within the proposed watershed policy. Grazing has been an ongoing activity in many of these areas for over a hundred years. Many ranching families have utilized these areas for generations. Thus, the responsible agency should consider the historic or prevalent uses of these lands when implementing this policy.

### E. Number of Stakeholders

In addition to historic uses, the agency should consider the number of stakeholders, that is, how many people or businesses will be affected by this policy. In the current land management regulatory scheme, there are two estates – the surface and subsurface. On occasion, grazing permittees must share access with subsurface interests such as mining or oil and gas. Ranchers utilize the surface while miners explore for minerals or oilmen drill for oil. The same applies to recreation enthusiasts. The higher the number of ranchers, miners, oilmen, recreationists or loggers, the more important the federal land and its economic value. The agency must assess this quantity and garner cooperation from all these interests.

### F. Nature of Stakeholders' Interests

Not only is the number of stakeholders important but the nature of the interest is equally important. For instance, is a mining company in the final stage of permitting before expanding or opening a new mine? Is a timber contract in the final stages? Where is a grazing permittee in terms of rotation or permit renewal? How much money has been extended in obtaining a mining permit or timber contract? These are just some of the interests that will undoubtedly be affected by this proposed policy. The agency must be careful not to disturb these ongoing activities. That is, the agency must not create additional risks or burdens to these stakeholders with this policy.

### G. State Agency Programs or Efforts

The final criterion in designating watersheds arises out of state agencies. Many states have conservation or cooperative programs in place that address some of the concerns enumerated in the proposed watershed policy. The federal agencies should work hand-in-hand with these agencies so as to not disturb current efforts. The only role here is to enhance these efforts.

We offer these comments in the hope that the agencies will consider and address all our concerns.

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Sincerely,

Michael Byrne
Chair, Federal Lands Committee

Keith Winter
President, Public Lands Council