



Committee on Natural Resources U.S. House of Representatives

Chairman Doc Hastings

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CONTACT: [Press Office](#)
202-226-9019

Witnesses Highlight the Importance of Water Rights For Job Creation & Economic Growth and Local Control

WASHINGTON, D.C. – Today, the House Natural Resources Subcommittee on Water and Power held an oversight hearing entitled “*Federal Impediments to Water Rights, Job Creation and Recreation: A Local Perspective.*” The hearing examined growing federal intrusion that costs American jobs and threatens to divert water supplies away from agricultural, recreational, and municipal water use. The hearing focused on federal laws and recent Obama Administration actions, like the Blueways Order, designed to undermine state water law and locally-driven watershed protections and recreation.

“There have been a torrent of complaints from multiple Western States of federal laws and federal officials usurping long-established water rights in a manner that threatens entire sectors of their economies including agriculture, ranching, tourism, and municipal water supplies. We’ve heard of a pattern of conduct by federal agencies that seems abusive, high-handed and contrary to the proper role of the government as envisioned by the Founders. This pattern evinces a design to assert federal control over the water resources traditionally reserved to the states under a time-honored doctrine that recognizes and protects the property rights of water users,” said Subcommittee Chairman Tom McClintock (CA-04).

House Republican Members Rob Bishop (UT), Cynthia Lummis (WY), Scott Tipton (CO) and Doug LaMalfa (CA) also actively participated in the hearing.

Randy N. Parker, Utah Farm Bureau Federation’s Chief Executive Officer, testified before the Subcommittee on the importance of state water rights. “*Utah is the nation’s second most arid state, second only to Nevada. For our predecessors, protecting and maximizing the use of water resources was not only important, it was a matter of life and death.*” Parker said that over time, the federal government’s precedent of letting states govern their own water rights took a dramatic change of course. “*Federal agents ignored or openly repudiated the principles of prior appropriation and sovereign water rights that had been in place since the settlement of the American west.*” In defending state water rights, Parker called on Congress to “*allow Utah and other western public lands to determine the use of their natural resources including water which are in the best interest of the citizens of the state.*”

The ski industry, which generates \$12.2 billion of economic activity annually, is also feeling the negative impacts of the federal government's water rights overreach. **Geraldine Link**, **National Ski Areas Association's Director of Public Policy**, addressed *"how draconian water clauses that require transfer of ownership of water rights negatively affect a ski area's bottom line – and ultimately jobs in rural economies."* Link also noted the Forest Service's policy that takes water from private parties will *"not sustain ski areas and rural economies. It will stifle the growth and expansion that help fuel job creation in rural and mountain economies."* Concluding her testimony, Link issued a clear message to the Federal government saying *"stop trying to take away our water rights."*

Litigation stemming from the Endangered Species Act (ESA) has also undermined state water rights. **William E. West Jr.**, **General Manager of the Guadalupe-Blanco River Authority of Texas (GBRA)**, said that his agency has been *"forced, by the simple filing of a citizens' suit under the ESA, to spend an enormous portion of its available resources to defend the water rights it holds that are needed to develop new supplies."* He added that *"the State's water resources must be shared for many uses, including population growth, agricultural productivity, environmental needs, and economic development."*

Russell Boardman, **Conservation District Supervisor from the Shoshone Conservation District in Wyoming**, stressed the importance of local conservation efforts when comparing to the Interior Secretarial Order on Blueways. *"Our conservation district, along with the 33 other districts in Wyoming have taken our leadership roles and responsibilities for local natural resource conservation efforts very seriously, especially as it pertains to watershed restoration and protection. If there is a commitment to grassroots conservation then local efforts should be supported, rather than trumped by Secretarial (Federal) edict."*

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NaturalResources.house.gov



*Kenec Forest Service
Tina Gowen, 9:00 Wednesday
Water Rights*

A subbasin claim compiles all of the individual livestock and wildlife claims by the Forest Service within a subbasin area. It is based on the existing individual livestock and wildlife Forest Service claims and does not add any additional water use that has not been used by the Forest Service. The amount of water for the subbasin claim is based on the optimum amount of water for livestock and wildlife, which cannot exceed historic high use levels, but is sufficient for current and projected use.

Why are we pursuing the Sub-Basin Claim?

By filing a subbasin claim, the USFS would have one water claim for all livestock and wildlife uses of water within the subbasin area. After the subbasin claim is approved, no change applications for livestock or wildlife uses will need to be filed with the Utah Division of Water Rights and will not be required for any future changes to the location of livestock or wildlife watering sites.

Why is the Sub-basin Claim in the permittee's and our best interest?

The subbasin claim is in the Forest Service interest because it reduces the paperwork and cost for applying for change applications anytime there is a change in location of a water development or quantity of water used for livestock. It is in the permittee's interest because it reduces the time it takes to make changes to livestock water developments on-the-ground. It is in the Utah Division of Water Rights interest because it reduces their paperwork and allows them to have a clear record of how much water use is in the subbasin.

Why do they need to sign off on the Claim?

In compliance with current state law, changes to existing water rights held by the United States require the consent of the permittee in order for the change to be approved.

What instrument are they signing off on? (Agreement, Contract, Water Right, etc.)

It is a short form titled "State of Grazing Permit Holder", that states that the permittee agrees with the changes sought by the United States in their Application and request that the State Engineer consider the change.

John Mann

538-7405

Ken Jones 538-7371

Boyd Clayton 538-7390

Renee Barjornie cell: 801-376-6246
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May 10th @ 10:00

George Garcia - District Ranger

Ann Gardner - LDS church 801-765-9114

NEWS RELEASE

For Immediate Release

Contact: (202) 205-1005

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US Forest Service announces public meetings on ski area water rights

WASHINGTON, April 11, 2013 – U.S. Forest Service Chief Tom Tidwell today announced a series of meetings in Colorado, Utah and California that will focus on the development of a ski area water rights clause impacting ski facility operations on national forests.

“Skiing is an important recreational activity on our nation’s forests and greatly contributes to the economy of resort communities,” said Tidwell. “The water used by ski areas for snowmaking and other activities is essential to sustain the long-term future of the communities. The Forest Service welcomes input from the ski areas, the communities and the public as to how water rights should be managed in order to ensure long-term benefits.”

Currently, the Forest Service policy keeps water with the land and allows ski resorts to use water from nearby streams and lakes for snow-making during times when snowfall fails to provide enough cover for ski runs. The agency has maintained that by keeping the water with the land, the ski industry will remain vibrant while mountain communities will have abundant water supplies into the future.

The announced meetings are open to the public and will seek input regarding how to best meet the needs of surrounding communities and ski areas. The open forums are scheduled in Denver on April 16, Salt Lake City on April 17, and Lake Tahoe, Calif., on April 18. Forest Service leaders and technical experts from Washington, D.C., as well as from local and regional offices will be on-hand to take public comments and provide additional information on the water rights issue.

The Forest Service has long enjoyed a beneficial relationship with the ski industry, which boosts state and local economies and provides healthy playgrounds for people. In Colorado, for example, roughly \$1.5 billion flow into the local and state economy from downhill skiers and snowboarders. Nearly half the downhill skiing capacity in the U.S. is on national forests with about 27 million people visiting those areas annually.

The announced public meetings are predicated on the agency's need to update a clause on the ski area special use permits, which it did in 2011 and 2012. The clauses were challenged in federal court, and a U.S. District Court judge determined the clauses were a legislative rather than an interpretive rule, which means that the agency is required to provide public notice and comment before issuing a final clause. The judge did not comment on the substance of the clause as written.

There will be an additional opportunity to comment later on a proposed clause.

The mission of the U.S. Forest Service is to sustain the health, diversity and productivity of the nation's forests and grasslands to meet the needs of present and future generations. The agency manages 193 million acres of public land, provides assistance to state and private landowners and maintains the largest forestry research organization in the world. Public lands the Forest Service manages contribute more than \$13 billion to the economy each year through visitor spending alone. Those same lands provide 20 percent of the nation's clean water supply, a value estimated at \$27 billion per year. The agency also has either a direct or indirect role in stewardship of about 80 percent of the 850 million forested acres within the U.S., of which 100 million acres are urban forests where most Americans live.

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Forest
Service

Intermountain Region

324 25th Street
Ogden, UT 84401

File Code: 2540
Route To:

Date: August 29, 2008

Subject: Authorizing and Expending Federal Funds for Livestock Water Developments
To: Forest Supervisors

The Intermountain Region manages livestock grazing allotments in six states. Each State has unique livestock water right laws that often cause confusion for Forest Service (FS) employees, as well as for grazing permittees. This letter is intended to provide guidance on how to conduct activities associated with livestock water rights and to assess whether agency funds can be expended for construction or reconstruction of livestock water developments on National Forest System land.

It is FS policy (FSM 2541.03 & FSM 2541.32) to obtain and maintain water rights needed for National Forest purposes under State and Federal law in the name of the United States. Livestock grazing, by its nature, requires water. Sustainable livestock grazing is a valid and important use of National Forest System lands. Approximately 70 percent of those lands within the Intermountain Region are within livestock allotments. To ensure the continued viability of the federal grazing program, the United States, through the FS, has secured thousands of livestock water rights on federal lands pursuant to State law. The United States cannot obtain livestock water rights via Federal law. Therefore, compliance with the State law process is mandatory. Any new livestock water use must be secured legally before the use begins.

In addition, it is Intermountain Region policy (R-4 FSM 2241) that the FS must have a water right on a source before funds are expended on the ground or construction begins on any livestock water development or facility as defined in the regulations (36 CFR 222.9(b)(2)). 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 a livestock owner. In some cases a permittee may hold a dual or joint livestock water right within the Forest Service. Such rights would not preclude the United States from expending funds for an improvement as it is applied to the water right held by the United States.

Each State has a process for obtaining and maintaining water rights. The appropriate process involves application and approval for specific elements of a water right. These result in issuance of permits, licenses or certificates, and decrees. In order to determine if a water right exists on a specific source, the FS should consult State water right records. Each State has an online database that can be used. Forests can also consult the FS state water right coordinator for their State to determine the status of a particular water right.

In recent years, ranchers and community leaders have challenged State laws pertaining to 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 have asserted



that they permit the livestock to water on public lands and should therefore hold the water rights. Courts and Legislatures have reached varied conclusions. As a result, there are unique situations

Forest Supervisors

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in each State that must be taken into consideration when managing a grazing program and the water rights associated with that activity.

Enclosed is a two page summary of unique State-specific considerations and the types of water rights that must be obtained and maintained in order to expend funds on livestock water developments.

I encourage you to share this information with your permittees and our interest in the continued viability of the federal grazing program

Please contact Darren Knuteson, Region 4 Water Rights Program Manager, at (801) 625-5829 or Rick Forsman, Region 4 Range Management Program Manager, at (801) 625-5598 if you have questions regarding water rights or range management.

/s/ Cathy Beaty for
HARV FORSGREN
Regional Forester

Enclosure

cc: Darren Knuteson
Jamie Gough
Richard T Forsman
William LeVere
Brent L Larson
Jeanne Evenden

L:JEVENDEN:cbh:8/20/08

LIVESTOCK WATER RIGHTS

There are several steps that are required under State law in order to obtain a livestock water right. There is the application phase, permit phase, and the perfection phase (License/Certificate) and, in some instances, a decreed right through an adjudication.

- The application phase is where an entity requests permission to divert water. The application may be protested by other interested parties. Once the application is approved, then the respective State agency issues a permit.
- The permit allows the water user to go out and "build the facility." The time period granted to build is usually 5 years. The permit holder must notify the State that the development is complete.
- The perfection phase takes place when the State verifies that the applicant has in fact put the water to beneficial use and issues a license or certificate. Beneficial use is the measure, extent, and limit of water use.
- A decreed right is a documented water use that was included in a general stream adjudication and the use was granted by the respective State court system. The United States may claim water rights for livestock use based on historic use of the water. Until a court issues a decree accepting these claims, it is not known whether or not these claims will be recognized as water rights.

STATE SPECIFIC CONSIDERATIONS

UTAH: A new statute concerning livestock water rights was enacted in Utah in 2008. House Bill 208 enacted U.C.A. 73-3-31 to provide that only a beneficial user of water may acquire livestock water rights on public land. "Beneficial user" is defined as the person who owns the grazing permit.

The Regional Forester has submitted a grazing permit for each active allotment in Utah to the State Engineer and shown that the FS is the owner of the permit. In return, the State Engineer has issued nearly 500 livestock water use certificates to the FS for these allotments. These certificates are NOT water rights. They only clarify that the FS can apply for water rights as the owner of the grazing permit, and is therefore recognized as the beneficial user as required by the new law. Permittees may also apply for and receive livestock water use certificates based on the grazing permit. In such cases, any activity involving water rights will require consultation and agreement with the permittee.¹

Both a valid water right (i.e. diligence claim², permit, certificated water right or decree) and a current livestock water use certificate must be in place before the FS can expend funds on any livestock water development. Forests should consult with the RO to verify that both are in place.

¹ Should any vacant allotment be authorized for livestock use, a livestock water use certificate should immediately be obtained from the State of Utah. Forests should consult with the Regional Office on procedures for obtaining the certificate.

² A diligence claim is a use of water that predates the statutory laws that were passed in the state dealing with the allocation of water. That date is 1903.

NEVADA: In 2003, legislation (Senate Bill 76) was passed in Nevada which precludes the Nevada State Engineer from approving any new applications filed by the United States for livestock water use (NRS 533.040 & NRS 533.503).

The FS may only expend funds on livestock water developments if there is an existing certificate or decree in the name of the United States.

IDAHO: There have been several court cases in Idaho resulting in settlements or court decisions allowing livestock operators to hold water rights on NFS land. These instances are unique to particular allotments and do not dictate activity in the rest of the state. To determine which allotments are affected by these settlements contact the Idaho State Water Rights Coordinator.

The FS may only expend funds on livestock water developments if there is a permit, license or decree in the name of the United States.

WYOMING: Wyoming has never recognized a pre-statutory water use. All water rights are obtained through the State law appropriation process. Once the application is approved, it becomes a permit. Once the permit is perfected, it becomes a license. The license is then forwarded to the Board of Control and each individual water right is adjudicated on a case-by-case basis.

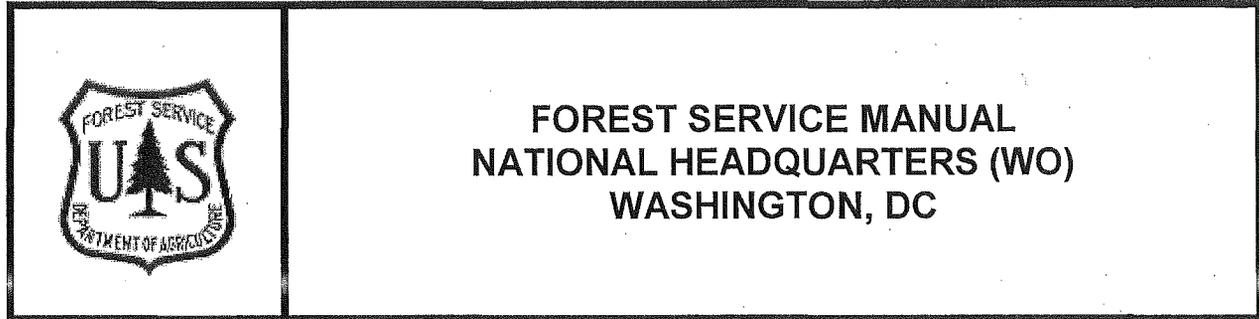
The FS may only expend funds on livestock water developments if there is a permit, license or decree in the name of the United States.

CALIFORNIA: Water use initiated prior to December 19, 1914, does not require a permit but is limited to the quantity of water used in 1914. There is also a provision to specifically obtain a stock pond certificate in California. Use of water adjacent to a water body is considered a riparian right. In order to register a riparian use with the state, a water user must file a "Statement of Water Diversion."

The FS may only expend funds on livestock water developments as long as there is a documented pre-1914 use, permit, certificate, stock pond certificate, a riparian right statement of water diversion, or a decree in the name of the United States.

COLORADO: Because some projects take a long time to complete, an applicant for a water right who has taken the first steps to appropriate water for beneficial use may obtain a "conditional" water right with a definite priority. In order to maintain a conditional water right, an applicant must demonstrate to the Water Court reasonable diligence in perfecting the appropriation every 6 years from the date the decree is awarded. To change the conditional decree to an "absolute" water right, an applicant must demonstrate to the Water Court that the water has been put to beneficial use. The water right may then become absolute with the conditionally decreed priority date.

The FS may only expend funds on livestock water developments as long as there is a conditional or an absolute water right in the name of the United States.



FSM 2500 - WATERSHED AND AIR MANAGEMENT
CHAPTER 2540 - WATER USES AND DEVELOPMENT

Amendment No.: 2500-2007-1

Effective Date: September 4, 2007

Duration: This amendment is effective until superseded or removed.

Approved: CORBIN L. NEWMAN
Acting Deputy Chief

Date Approved: 08/28/2007

Posting Instructions: Amendments are numbered consecutively by title and calendar year. Post by document; remove the entire document and replace it with this amendment. Retain this transmittal as the first page(s) of this document. The last amendment to this title was 2500-2004-1 to 2520.

New Document	2540	20 Pages
Superseded Document(s) by Issuance Number and Effective Date	2540 (Amendment 2500-90-1, 06/01/1990)	16 Pages

Digest:

Converts the format and style of this chapter to the FSM template using the agency's current corporate word processing software. Makes minor typographical and technical corrections throughout the chapter.

2542.05 - Simplifies the definition of public water systems that can participate in a municipal supply watershed agreement to agree with the definition in the Safe Drinking Water Act, as amended, and FSM 7420, Drinking Water.

**FSM 2500 - WATERSHED AND AIR MANAGEMENT
CHAPTER 2540 - WATER USES AND DEVELOPMENT**

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2541 - NATIONAL FOREST SYSTEM WATER RIGHTS

2541.01 - Authority

Federal law (Acts of July 26, 1866, and July 9, 1870) protects possessors and owners of rights to water for mining, agriculture, manufacturing or other purposes. The water rights protected are those vested and accrued by priority of possession, and recognized and acknowledged by local customs, laws and court decisions. Subsequent laws and legal decisions specifically affecting National Forest System water rights and uses include:

1. The Desert Land Act. The Desert Land Act of March 3, 1877 (19 U.S.C. 377), as amended (43 U.S.C. 321), permits public appropriation of unappropriated nonnavigable waters on the public domain in the 13 states to which it pertains. In a 1935 ruling, the Supreme Court held that the Act authorizes public acquisition of such water rights by following procedures prescribed by state law (California and Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 143). However, in 1955 the Supreme Court held that the Desert Land Act does not apply to lands reserved from the public domain (Federal Power Commission v. Oregon, 349 U.S. 935).
2. The Organic Administration Act. Basic authority for watershed management is in the Organic Administration Act of June 4, 1897 (30 Stat. 34, as amended, 16 U.S.C. 475). It states the securing of favorable water flow to be a purpose for establishing National Forests. The Act allows all waters within National Forest boundaries to be used for domestic, mining or irrigation purposes under the laws of the states wherein the National Forests are situated, or under United States laws, rules and regulations. A 1982 Colorado Supreme Court ruling (United States of America v. City and County of Denver, 656 P. 2d1) clarified that the 1897 Act grants only a permissive right to use waters within the National Forest.
3. Judicial Doctrine. The Supreme Court established federal reserved water rights in 1908 (Winters v. United States, 207 U.S. 568). Key provisions of the decision, known as the Winter Doctrine, and subsequent modifying rulings are:
 - a. The United States government implicitly reserves the amount of water needed for reservation purposes.
 - b. Only the amount of water needed for reservation purposes is reserved.
 - c. Groundwater as well as surface water is included.
 - d. The Multiple-Use Sustained-Yield Act does not allow additional retroactive reservation of water.

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- e. Federal reserved water rights, unlike state water rights, are not lost by nonuse and may provide for future needs. The priority date is the date of withdrawal of the reservation.
4. General Exchange Act. The General Exchange Act of March 20, 1922 (42 Stat. 465), as amended (16 U.S.C. 485, 486), provides authority for accepting title to lands within National Forests in exchange for National Forest lands reserved from the public domain. Lands acquired under this act or under other authorities related to the purchase, exchange, or donation of lands added to the National Forest System, do not have reserved status for purposes of claiming water under the reservation principle. This includes nonreserved lands acquired by another Federal agency and subsequently transferred to Forest Service jurisdiction. Such acquired lands may, however, carry with them water rights established under state laws, depending upon the laws and facts involved in each transaction.
5. Organic Act of 1944. A provision of this act (16 U.S.C. 526) authorizes appropriations for Forest Service investigation, establishment, purchase and protection of water rights needed or beneficial for Forest Service administration and public use.
6. McCarran Amendment. This 1952 act (43 U.S.C. 666) allows the United States to be joined as a defendant in lawsuits to:
- a. Adjudicate rights to use river system or other waters.
 - b. Administer such rights if the United States is owner or in the process of acquiring rights.

A 1971 Supreme Court ruling (United States v. District Court in and for the County of Eagle, Supra 1971) subjects all United States water rights to general state adjudication regardless of whether the rights are claimed under federal or state law.

2541.02 - Objective

To obtain water needed for the National Forest System, in accord with legal authority and with due consideration for the needs of other water users.

2541.03 - Policy

1. Rely on the reservation doctrine if the land was reserved from the public domain and for the reservation purposes identified in documents or legislation.
2. Obtain water rights under state law if the reservation doctrine does not apply.

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3. Purchase essential water rights not otherwise available.
4. Use water needed for National Forest purposes efficiently, and in water-scarce areas, frugally.

2541.04 - Responsibility

2541.04a - Chief

The Chief shall:

1. Develop policies, programs, and procedures for obtaining water needed for National Forest System purposes.
2. Develop and maintain liaison and cooperative relationships with others concerned with water use on National Forest System lands.
3. Maintain liaison with the Comptroller General's office and Justice Department.
4. Approve participation in adjudication.

2541.04b - Regional Foresters

Regional Foresters shall:

1. Notify states of existing and foreseeable water use under Federal authorities.
2. Obtain water rights according to state procedures when Federal authorities do not apply.
3. Purchase water rights as needed.
4. Review and approve water needs analyses.
5. Participate in adjudications.
6. Provide technical guidance, assistance, and training to forests.
7. Maintain liaison with others, at Regional levels, who are concerned with water use on National Forest System lands.

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8. Annually update the Regional water uses and needs inventory. See chapter 10, FSH 2509.17, Water Uses, Rights, and Requirements System (WURR).
9. Ensure compatible instructions for perfecting water rights when more than one Region must deal with a single state.

2541.04c - Forest Supervisors

Forest Supervisors shall:

1. Prepare and update water uses and needs inventories.
2. Prepare water use notifications, water rights applications, and analyses of water needs.

2541.1 - Determining Water Rights and Needs

The right to use the amount of water needed to manage the National Forest System is provided under authority of Federal laws (sec. 2541.01), or under state law. Determine specific amounts required when claiming water rights under the reservation doctrine, applying for water under state laws or purchasing water rights. Identify specific uses, sources and quantities of water needed. Water rights asserted under the Federal reserved rights doctrine may provide for present and foreseeable future uses.

2541.11 - Inventory and Records Maintenance

The Forest Service Water Uses, Requirements and Rights (WURR) system provides a uniform data file for recording and storing information needed to properly manage water uses and rights. File design and data elements definitions are described in FSH 2509.17, chapter 10, Water Information Management System Handbook. Use WURR and other files such as Landownership Status and Land Use Reporting that form the Landownership Management System (LOMS) (FSM 5490) to track current status of existing water rights and other interests in water. Prepare and maintain inventory records to show (1) valid water rights of private parties on National Forest System lands (2) water rights of the United States including nature of rights such as reserved, riparian, appropriative and so forth; and (3) foreseeable National Forest water requirements. Prepare a map record of water uses keyed to WURR.

2541.12 - Instream and Standing Water Requirements

Determine the amount of water needed for instream and standing water purposes, particularly for the following:

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1. Adjudications. To be certain of meeting public obligations, establish Forest Service claims for instream flows and standing water during state or Federal court proceedings to adjudicate claims.
2. Land Management Planning. Many management objectives are dependent upon certain water flow and lake-level conditions. Determine the amount and location of water needed to meet management objectives.
3. Water Development Projects. Examine instream flow and standing water level needs, and establish requirements whenever a diversion or impoundment threatens to alter existing flows or levels.

Determine quantities of water needed to maintain instream flows for recreation, fish and wildlife and other uses, as well as activities and uses associated with timber production and securing favorable conditions of water flow.

2541.2 - Establishing Rights to Water

2541.21 - Claims Under the Reservation Doctrine

1. Use the Organic Administration Act of 1897 authority to claim reserved water rights for consumptive or nonconsumptive needs on reserved lands directly related to securing favorable conditions of water flow or to furnish a continuous supply of timber. Claim the following:
 - a. Domestic water needed for Ranger Stations, fire stations, work centers, housing, and other facilities constructed and maintained for administering National Forest System programs for watershed protection and timber production.
 - b. Water needed for fire protection and control.
 - c. Water needed for constructing and maintaining access roads for timber production and watershed protection activities.
 - d. Water needed for irrigation of tree nurseries, seed orchards, and other facilities devoted primarily to the supply of timber or watershed protection.
 - e. Water needed for maintaining Forest Service riding and packstock used in the administration of the National Forest System timber resources and for watershed protection.
 - f. Water needed in connection with special uses where the user is engaged in activities carried out for watershed protection or timber production on the National Forest System.

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g. Water needed in the form of instream flows sufficient to maintain the stability of stream channels for favorable conditions of waterflow and protection against the loss of productive timber lands adjacent to the stream channels. This includes the volume and timing of flows required for adequate sediment transport, maintenance of streambank stability and proper management of riparian vegetation. A procedure for such quantification is located in FSH 2509.17, chapter 30.

2. Other reservation authorities. Claims for reserved rights may be based on purposes authorized by legislation such as the Multiple-Use Sustained-Yield Act of 1960, the Wild and Scenic Rivers Act (82 Stat. 917, 16 U.S.C. 12771 et seq.) or the Wilderness Act (P.L. 88-577, as amended, 16 U.S.C. 1131 et seq.). Because of the legal complexities involved in water rights under these statutes, do not make such claims without prior consultation with the Chief and the Office of the General Counsel.

2541.21a - Priority Date

- a. Claim the date of reservation for rights claimed under the Organic Administration Act of 1897.
- b. Claim the effective date of legislative enactment or executive action authority for rights claimed under other authorities.

2541.21b - Former Public Domain Lands in Question

Apply the reservation doctrine to withdrawn lands reverted to the United States if title never passed from the United States.

2541.21c - Other Reservation Lands

Seek advice from the Office of General Counsel in cases involving former Indian, Military, or other reservation lands. The applicability of water rights and the effective date is dependent on what is acquired and on whether the same or similar use is continued on reserved lands.

2541.21d - Rights Acquired by Others Prior to Withdrawal

Determine the location of diversions and amounts appropriated by others prior to land withdrawal from the public domain. Water rights acquired by private parties prior to establishment of the reservation are senior to those of the Forest Service. Do not claim reserved rights if waters were fully and validly appropriated by others prior to withdrawal.

2541.21e - Limitations

Do not claim reserved rights on lands acquired by other methods and authorities, such as exchanges, gifts, or purchases.

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2541.21f - Notification to States of Water Uses for Reservation Purposes

Inform states of existing and foreseeable water uses needed to carry out the purposes of the reservation. Report both surface and subsurface water uses.

1. Reportable Reserved Rights. Report water uses that consume water to protect and improve the use and productivity of the National Forest System. Do not report evaporation and seepage losses from natural lakes and streams, or water depletions resulting from the temporary water retarding effect of erosion control activities. Claims for reserved water rights for reportable uses and needs may be made only when such uses can be specifically identified as necessary for carrying out the purpose of a reservation. Examples of reportable needs include:

- a. Water impoundments or developments for improvement of the availability of water for wildlife or domestic livestock. Evaporation resulting from such impoundments or developments is reportable.
- b. Water diverted from its source for irrigation of pastures, nurseries, or meadows.
- c. Administrative site water supplies.
- d. Developed water for recreation area use.
- e. Developed water for logging camps.
- f. Water required for developed special uses, such as resorts, summer homes, and cow camps.
- g. Initial filling of conservation pools designed for permanent recreation, fish, or wildlife use in public or privately financed water storage reservoirs.
- h. Initial filling of impoundments developed specifically for recreation, fish, and wildlife habitat.
- i. Flow necessary for fish habitat protection, such as streamflow or lake-level requirements to maintain fish life, including fish ladders and regulated-flow spawning channels, when diversions exist or are anticipated and would result in less than acceptable flows.
- j. Water required for maintenance of streamflows and lake-levels for recreation, water quality, scenic, or esthetic purposes.

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2541.21g - Notification Procedures

Develop notification procedures jointly with the states. Consult with the Office of General Counsel on questions of proper notice and jurisdiction.

2541.21h - Analyzing Water Needs

Base decisions to initiate or expand water use on needs identified in land and resource management planning. Plan, design, and operate new developments for efficient water use.

2541.22 - Securing Water Rights for Nonreserved Waters

Secure water rights in accordance with state laws for water needed on acquired lands, and on reserved lands if the reservation doctrine or other Federal law does not apply to the uses involved.

2541.22a - Quantifying Water Needs Under State Law

Quantify total water requirements for rights to be acquired. Take into account any seepage, evaporation, and transmission needs and losses associated with the water use.

2541.22b - Application for Appropriative Water Rights

File all applications to appropriate water in the name of the United States. Assert the date water was put to beneficial use as the priority date.

2541.22c - Payment of State Fees

Pay state fees required to secure water right provided the fees are clearly not a tax or license. Payments to states for securing water rights under state law may be made by the Forest Service from any benefiting function. Refer questionable filing fees to the Washington Office.

2541.3 - Protecting Water Rights

2541.31 - Protecting Instream Flows

Notify states of instream flow needs by: (a) filing protests of application for water rights if the exercise of such rights would adversely affect National Forest resources or water rights of the United States, (b) asserting claims to water rights under Federal law insofar as applicable, and (c) filing for water rights under state law where these uses are recognized. In those states that recognize instream flows, but require that related water rights be held in the name of the state (or some state agency), work with the appropriate agency to obtain and protect the needed water flows.

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Notify the Chief or the Office of General Counsel if the appropriate procedure for protecting needed instream flows is difficult to determine.

Where water rights for instream flows cannot be established, use other methods and authorities to ensure the necessary level of protection. Such methods include: (1) special-use permits or easements and (2) agreements and memorandums of understanding.

2541.32 - Possessory Interests

Claim possessory interest in water rights in the name of the United States for water uses on National Forest System lands as follows:

1. Claim water rights for water used directly by the Forest Service and by the general public on the National Forest System.
2. Claim water rights for water used by permittees, contractors, and other authorized users of the National Forest System, to carry out activities related to multiple use objectives. Make these claims if both water use and water development are on the National Forest System and one or more of the following situations exists:
 - a. National Forest management alternatives or efficiency will be limited if another party holds the water right.
 - b. Forest Service programs or activities will continue after the current permittee, contractors or other authorized user discontinues operations.

2541.33 - Protesting Claims by National Forest Users

Protest water rights applications made by users if the water right should be held by the United States.

2541.34 - Water Rights and Uses for Other Purposes

Evaluate projected water requirements of uses of National Forest System lands for purposes such as hotels, power developments, and transmission lines not directly related to Forest Service programs. Assess environmental effects of the use before authorizing the use. If the projected water requirements conflict with existing or potential Forest Service uses and rights or will adversely affect National Forest resources, the potential permittee must seek alternative water sources on develop mitigation plans acceptable to the Forest Service.

The establishment of a water right on National Forest System land does not limit the Regional Forester's authority to regulate land use and occupancy, nor to prevent injury to property of the United States. Although a permittee may make beneficial use of water on National Forest System land, the Regional Forester retains the authority to determine management actions needed to comply with rules and regulations for land use and occupancy.

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2541.35 - Special-Use Authorizations for Water Developments

Special-use authorizations that involve water storage, transmission, or diversion facilities on National Forest System lands (FSM 2729) authorize occupancy of the land only for the specific development purpose. In no case does the United States necessarily relinquish any water right it may have, or waive the right to use such water. Include stipulations in the authorizing documents to ensure the quantities of water needed to fulfill purposes of the National Forest and for environmental needs will be maintained instream. Clearly inform the permittee that the authorization does not confer any legal right to the use of the water, nor does it provide a basis for acquiring such a right as against the United States (FSM 2782 and 2783.12).

2541.36 - Participation in State Court Adjudication

The water rights of the United States, both reserved and acquired rights, are subject to adjudication proceedings in state courts.

The United States must be served under the McCarran Amendment (sec. 2541.01) to become a party of a state adjudication. Proper service on the United States is accomplished by the service of written notice and/or complaint upon the local United States Attorney with a copy of such notice/complaint being sent to the Attorney General of the United States. If the Department of Agriculture or the Forest Service are named parties, then notice/complaint should also be served upon the Department or Service, though this is not required by the Act. When the United States becomes a party to an adjudication in a state court, or if the United States should be joined as a party defendant in the suit, the Department of Justice, through the Office of General Counsel in Washington or through Regional Counsel, may request information as to Forest Service interest in the use of water within or tributary to the areas named in the adjudication proceedings. The affected Region shall prepare and submit to the appropriate Regional Office of the General Counsel, a tabulation in triplicate of existing and foreseeable National Forest water uses and rights claimed both under the reservation doctrine and by the Forest Service under state laws. Maps should be submitted in duplicate showing details as required by the Office of the General Counsel.

Refer initial questions on adjudication proceedings to the Washington Office for advice from the Office of the General Counsel. Once an adjudication is under way, it may be that coordination will be effected through the field offices. Although the Justice Department usually becomes involved in a case only after the United States becomes a party to the adjudication, keep the Justice Department informed, through legal counsel, of measures needed or taken to protect the Government's interests and claims to water rights.

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2541.37 - Protests to Water Rights Applications of Others

Private parties sometimes apply under state law for water rights for water that is in use or may be needed for future use for National Forest purposes under the reservation doctrine. Such applications made for authority to divert, impede, or impound water, may be for waters arising on the National Forest, or for waters either upstream or downstream from a National Forest.

If granting of a water right will conflict with current or future National Forest reservation uses or needs, submit a statement informing the state agency responsible for water rights, that issuing such water rights would conflict with those uses of the United States for National Forest purposes. Make this statement only if granting a water right would adversely affect the present or foreseeable future uses. If states were notified of uses on reserved lands by the Forest Service notification process, a reminder statement will be sufficient (some states have a form available for this purpose). If the rights of the Forest Service have been adjudicated or otherwise finally determined under law, any protests will be guided by such determinations.

The Regions shall provide the state water rights agency with any information essential for proper consideration of applications. Seek advice of the regional attorney or the attorney in charge when protests are made to water right applications which may adversely affect waters reserved for National Forest purposes or in any proceedings where the water rights of the United States will be considered.

2541.4 - Managing Water Rights

Manage water rights to ensure these valuable United States properties are not lost.

Reserved water rights cannot be lost for nonuse. However, they can be made ineffectual if associated water sources are diverted, polluted, impounded, or otherwise made unavailable or unusable. Be alert to any proposal that will adversely affect water supplies needed to carry out purposes of reserved lands. Make appropriate protests concerning any such proposals.

Study and become familiar with specific state water right laws. Water rights obtained under state law, whether appropriated, acquired by assignment of a deed to land, or acquired by separate purchase or exchange of water rights, may be subject to loss if not exercised in accordance with state water laws. State laws often differ regarding the bases of grounds for possible forfeiture of a right to water use. Maximum allowable periods of nonuse and restrictions on changes in purpose or point of diversion or use may vary. In managing appropriated water rights and other interests in water acquired under state law:

1. Maintain water rights in accordance with state forfeiture or abandonment laws and regulations. Apply the water to the purposes and in the manner specified in the water right permit, license, or decree. This includes the amount, time, and designated place of diversion and use.

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2. Maintain in operable condition, all diversions, impoundments, or other facilities required to exercise the associated water right.

If it becomes necessary for the proper management of National Forest System resources to convert a use of water, secured under state water right, to a water use not adequately recognized and protected under state law, consult with the Washington Office and the Office of the General Counsel as to how adequate protection can be obtained.

2541.41 - Verification of Water Use

Verify that each water use authorized by a state water right is used according to provisions of the law of the state in which the use occurs. Comply, and verify compliance with all provisions of permits, licenses, or decrees. Make on-the-ground inspections when necessary where a diversion, impoundment, or other facility is required to exercise the water right.

Verify the existence of water rights on lands or waters to be acquired before taking land adjustment actions. Include documentation that verifies:

1. The water right(s) to be acquired are recognized by the state and areas described by the party from whom they would be acquired. Verify the priority date and the authorized amount, season, period of use, and purpose of use.
2. All state requirements for exercise of the right have been met. Ensure that the water right is not subject to a declaration of forfeiture or abandonment by the state under provisions of state law due to nonuse, unauthorized changes in type of use, place of diversion or use, or other reasons.
3. The water right(s), as described and as recognized under state law, will satisfactorily serve the present and future foreseeable needs of the Forest Service.

2541.42 - Purchase and Exchange of Water Rights

Acquire water rights needed for National Forest uses through purchase or exchange when waters are fully appropriated and Federal rights are not applicable. Follow these procedures:

1. Include purchase costs for water rights in special use fees when such purchases are made specifically to support the permitted use.
2. Secure any appurtenant water rights with lands acquired by exchange.
3. Follow state procedures for changes in water rights, such as place of use, ownership, or purpose of use. As set forth in 2541.4, if state law impedes or precludes the changes required for the proper management of National Forest System resources, consult with the Washington Office and the Office of the General Counsel.

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2542 - MUNICIPAL SUPPLY WATERSHEDS

2542.02 - Objective

To manage National Forest System (NFS) lands for multiple-uses by balancing present and future resource use with domestic water supply needs.

2542.03 - Policy

Identify watersheds providing the principal source of community water during land management planning. Develop prescriptions on a case-by-case basis to ensure desired multiple-use outputs while recognizing domestic water supply needs. Encourage municipalities to provide adequate and appropriate water treatment. Do not rely on management practices to provide pure drinking water. Use only proven techniques in management prescriptions for municipal supply watersheds. Determine increased costs of any unusually restrictive practices required to meet state-approved Best Management Practices for protection of surface water; identify any revenue losses from applying such restrictions. Compute the amount of payment that may be necessary to reimburse the United States for such losses in accordance with 36 CFR 251.9. Consider formal agreements under 36 CFR 251.9 only when intensified multiple-use management fails to meet the needs of the water user.

2542.04 - Responsibility

2542.04a - Chief

The Chief shall approve and execute formal agreements that restrict the use of National Forest lands in municipal supply watersheds.

2542.04b - Washington Office, Director, Watershed, Fish, Wildlife, Air and Rare Plants

The Staff Director shall maintain a National inventory of municipal supply watersheds.

2542.04c - Regional Foresters

Regional Foresters shall:

1. Maintain a regional inventory of municipal supply watersheds.
2. Review proposed restrictions that exceed coordinating requirements in Forest plans. Direct Forest Supervisors to develop formal agreements if proposed restrictions are found necessary.

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2542.04d - Forest Supervisors

Forest Supervisors shall:

1. Maintain a Forest inventory of municipal supply watersheds.
2. Develop and coordinate measures necessary for management of municipal supply watersheds in the Forest Plan (FSM 1920).
3. Develop formal agreements for municipal supply watersheds.
4. Inform the public of restrictions in municipal supply watersheds.
5. Post restricted municipal supply watersheds.
6. Maintain case folders for municipal supply watersheds.

2542.05 - Definition

Municipal Supply Watershed. A watershed that serves a public water system as defined in the Safe Drinking Water Act of 1974, as amended (42 U.S.C. §§ 300f, et seq.); or as defined in state safe drinking water statutes or regulations.

2542.1 - Municipal Supply Watershed Planning

Evaluate the following in Forest Planning where municipal supply watersheds are an issue or concern:

1. Existing water resource conditions as determined by a hydrologic investigation (FSM 2530).
2. Current uses, values, and management requirements for other National Forest resources.
3. Projection of use in the watershed under multiple-use management practices.
4. Current and proposed handling and treatment of water by the municipality, or other water user, after water is diverted from the municipal supply watershed.
5. An incremental analysis of costs and benefits for alternative land management objectives. Include interests of the municipality in such an analysis.
6. The financial ability of the municipality to provide complete water treatment.

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7. The extent that use within the watershed can be regulated. Include such factors as percent of National Forest land within the watershed, accessibility, private land development, and mining activity.
8. Adjustments of normal multiple-use management practices required to meet municipal water supply needs.
9. Economic effects of modifying normal management practices. Include estimates of added cost for intensified management and loss of net annual revenues that would have been derived from resources withheld from management.

2542.11 - Requirements in Forest Land Management Plans

Show municipal supply watersheds as special management areas in Forest plans when management intensity and timing differs from other areas. Forest plans shall include:

1. A statement of objectives for managing the water resources on and flowing from the watershed. Include quality, quantity, and timing criteria for the water resource.
2. A display showing the proportion of total streamflow used for municipal purposes, the location and size of the municipal supply watershed and associated reservoirs, and the type and amount of permitted public use at water-supply reservoirs.
3. Guidelines for protection, management, use, and development, together with coordinating requirements for other uses and activities within the watershed.
4. Guidelines for monitoring uses, activities, and water quality characteristics that may be affected by Forest management activities.
5. An assessment of the contribution that should be made by the water-user toward management efforts, including such activities as operating a water-quality monitoring system and patrols needed to enforce any use restrictions.

2542.2 - Administration of Municipal Supply Watersheds

2542.21 - Notices of Restrictions

Inform the public of use restrictions imposed on municipal supply watersheds and reasons for restrictions. Include use restriction clauses in all permits, leases, or other documents authorizing use within the watershed. Designate restricted municipal supply watersheds on maps prepared for public use (sec. 2542.11).

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2542.22 - Boundary Posting

Post boundaries at points of entry for municipal supply watersheds closed to public use, or with restrictions on use.

2542.23 - Case Folders

Maintain case folders in Ranger and Supervisor Offices for municipal supply watersheds in accordance with the provisions of the Records Management Handbook (FSH 6209.11).

2542.24 - Monitoring

Monitor use and activities on municipal supply watershed according to Forest Plans (sec. 2542.1).

2542.3 - Inventory of Municipal Supply Watersheds

Maintain up-to-date inventories of all municipal supply watersheds. Include the following information.

1. The standardized watershed code (sec. 2513.2).
2. Region, forest, and district, in standard numeric codes.
3. State and county in standard numeric codes.
4. The source name of the water used.
5. User type.
6. Population group.
7. Amount of water withdrawn.
8. Percent of total annual flow withdrawn.
9. Water treatment.
10. Other sources of water available to the user.
11. Percent of the total water used that originates on National Forest System land.
12. Acres of National Forest within the source watershed.
13. Name of user.

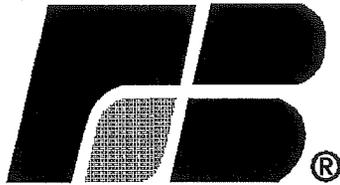
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14. Acres of land administered by the user group within the source watershed.
15. Total acres of the source watershed.
16. Date that any formal agreement was signed.
17. Date of latest amendment to any formal agreement.
18. Physical location of the original of any formal agreement.
19. Basic authority used to designate or identify a municipal watershed.
20. Basic authority used to enter into an agreement between the Forest Service and a user.
21. Other uses of the source area watershed and any constraints placed on multiple-use management.
22. Any contingency plans developed to address emergency situations.

2542.4 - Formal Agreements for Management of Municipal Supply Watersheds

Develop formal agreements when needed to protect water supplies. Include the following in agreements developed under 36 CFR 251.9:

1. The kind of land uses allowed in the watershed.
2. Necessary restrictions and protective measures in the watershed.
3. Needed assistance in the enforcement of restrictions.
4. The nature of payments to compensate the United States for revenue losses resulting from restrictions.



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

“Federal Impediments to Water Rights, Job Creation and Recreation”

Statement of the

UTAH FARM BUREAU FEDERATION

**Randy N. Parker
Chief Executive Officer
April 25, 2013**

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 27,000 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 major contributor to the state's economy. In the second most arid state in the nation, water was and is our limiting factor.

Utah food and agriculture contributes to the state's economic health and provides jobs to thousands of our citizens. Utah farm gate sales in 2012 exceeded \$1.6 billion. Utah State University analyzed the 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, and provides employment for more than 70,000 Utahns.

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 west-wide and Utah is one of the fastest growing states in the nation. 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 production and security, growth and our economic future.

Utah Farm Bureau delegates in November 2012 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 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 predecessors, protecting and maximizing the use of the water resources was not only important, it was a matter of life and death.

The timeless quote attributed to Mark Twain, "Whiskey is for drinking, water is for fighting over," vividly describes the reality of water in the west whether protecting one's water from an eager neighbor who takes his irrigation water-turn earlier than prescribed or federal agents who have identified a course of action that challenges water ownership and the sovereignty of state water laws.

The United States Congress passed the Act of July 26, 1866 [subsequently the Mining 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 in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but when ever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (43 USC 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."

Western water law or the "doctrine of prior appropriation" governs the use of water in many of the states in the west. The fundamental principle embodied in the doctrine of prior appropriation is that while no one may own the publicly owned resource, persons, corporations or municipalities have the right to put the water to beneficial use any defined by state law. For purposes of beneficial use, the allocation of right rests in the principle of "first in time, first in right." The first person to use the water is the senior appropriator and later users are junior

appropriators. In Utah, and across the arid west, this principle protects the senior water right priority for this scarce and valuable resource.

To put the water to beneficial use, the appropriator makes application to the state to divert that right in water from its natural course. Beneficial uses are determined by state legislatures generally including livestock watering, irrigation for crops, domestic and municipal use, mining and industrial uses.

The rights of the states to govern water has been recognized by generations of federal land management agencies as well and the United States Congress.

FOREST SERVICE ESTABLISHED:

In 1907, Gifford Pinchot, "father" of the United States Forest Service (USFS) and the First Chief Forester explicitly reassured western interests in the agency's "use book" noting that water is the sovereign right of the state. Pinchot declared, "***The creation of the National Forest has no effect whatever on the laws which govern the appropriation of water. This is a matter governed entirely by State and Territorial law.***"

BUREAU OF LAND MANAGEMENT ESTABLISHED:

On July 28, 1934, Congress passed the Taylor Grazing Act, establishing what is now known as the Bureau of Land Management (BLM). Again recognizing the Act of 1866 and common law use of the water resources, grazing permits were issued based on past use "to those within or near a district who are land owners engaged in the livestock business, bona fide occupants or settlers or owners of water or water rights,..." Further, the Taylor Grazing Act stated, "***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...***"

ABANDONMENT OF THE HISTORIC OBLIGATION

With passage of the Federal Land Policy Management Act (FLPMA) in 1976, the historic relationship between federal agencies, state and local governments and grazing permittees took a dramatic change of course. The US Forest Service and the Bureau of Land Management began a resource management planning process for grazing allotments. As part of the new Congressional authority granted the federal land management agencies, the USFS and BLM began to administratively formulate new grazing and water policies. FLPMA now required agency permission. Holders of livestock water rights who needed to develop or maintain a water impoundment or structure on Forest land was now required to apply for and obtain a special use permit from the FS. Permits to water rights last a prescribed term. The FS may or may not re-issue the permit and may impose different conditions.

This exercise of greater authority by agency personnel ushered in an era of conflict and distrust of the USFS and BLM. The federal agents ignored or openly repudiated the principles of prior appropriation and sovereign water rights that had been in place since settlement of the American West.

When conflicts arose, the courts generally upheld the United States right to control, regulate and even revoke the ability to use its land for the purpose of accessing state appropriated water rights!

In a letter dated June 29, 1984, Robert H. Tracy, Director of Watershed and Air Management for the US Forest Service stated nine reasons why his agency needed to control the water and why stock water rights should remain on the land rather than with the ranchers holding the grazing permits. This quantifies a transition by the USFS toward a more hostile course of action as the federal agency deals with the following generations of the western settlers.

Confrontation between federal land managers and livestock grazing interests became a part of doing business for permittees. Mostly, those with sheep and cattle grazing permits capitulated to the force of the federal agents and the courts. Cuts in grazing permits and the federal agencies accumulating suspended use grazing permits became common place in Utah and across the west.

Most permittees, but not all, heeded the warning that to fight the federal government is futile. Few had the financial resources to engage in what the federal agencies assured livestock permittees would be a costly and protracted legal battle. The ranchers were and continue to be at a decided disadvantage to the tax-payer funded deep federal pockets and army of agency lawyers they would meet at trial.

A pattern has emerged out of the federal land management agencies that disregards, ignores or even displays disdain for what the First Chief Forester and the Taylor Grazing Act specifically cites and recognizes as a sovereign right of the states.

INTERMOUNTAIN REGION – U.S. FOREST SERVICE Authorization of Western Water Grab

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 have provided guidance and "State Specific Considerations" outlining the steps to obtain a livestock water right.

Historic commitments and statutory obligations have been set aside for decades. Forest personnel have been filing on water rights and making diligence claims in Utah for the past 50 years. The arrogance to honoring state water sovereignty is outlined in the United States Code (Title 16, Chapter 2 National Forests, Subchapter I Establishment and Administration, Section 526 Establishment and Protection of Water Rights) provides guidance on the agency's willingness to challenge sovereign water rights in the western states:

"There are authorized to be appropriated for expenditure by the Forest Service such sums as may be necessary for the investigation and establishment of water rights, including the purchase thereof or of lands or interests in lands or rights-of-way for use and protection of water rights necessary or beneficial in connection with the administration and public use of the national forests".

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 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."

Intermountain Regional Forester Forsgren in agency guidance issued on August 29, 2008 referenced USFS policy (FSM 2541.03 and FSM 2541.32) and directed his personnel as follows:

"...obtain and maintain water rights as needed for Forest Service purposes under State and Federal law in the name of the United States. Livestock grazing, by its nature requires water. Sustainable livestock grazing is a valid and important use of National Forest System lands. Approximately 70 percent of those lands with the Intermountain Region are within livestock allotments. To ensure the continued viability of the federal livestock grazing program, the United States, through the Forest Service, has secured thousands of livestock water rights on federal lands pursuant to State law. The United States cannot obtain livestock water rights via Federal law..."

*The Intermountain Region of the U.S. Forest Service includes Utah, Nevada, Southern Idaho and Western Colorado

UTAH:

Recognizing the need to protect the state's water and to protect proven livestock water rights on federal land, ranching interests sought help from the Utah Legislature. In 2008, House Bill 208, Livestock Water Rights Act was passed by the Utah Legislature. The legislation was designed to recognize grazing permittee's water rights while protecting the state's water as appurtenant to the land. (Utah Code Title 73 Chapter 3 Section 31) Water Right for Watering Livestock on Public Land states:

"A livestock water right is appurtenant to the allotment on which the livestock is watered."

The most compelling argument that the FS must insure the availability of livestock water for a viable federal grazing program was addressed by Utah policymakers.

The conflict for the FS came in two parts in Subsection (5) that authorized the Utah State Engineer to issue a certificate of livestock water right only to a defined beneficial user and abandoned or forfeited livestock water rights would be held by the state of Utah:

- 1) *"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."*

2) *"...be held by the Utah State Department of Agriculture and Food (UDAF)."*

The State Engineer manages beneficial use of the state's water. UDAF, as livestock water rights custodial, can manage inventoried rights for livestock permittees to assure the state livestock water use policy on federal lands is in harmony with FS and BLM grazing mandates.

However, the state inadvertently defined "beneficial user" as the *"person that owns the grazing permit"* without specifying who owns the livestock necessary to put the livestock water right to beneficial use!

The Regional Forester jumped on the legislature's error and broad definition of permit ownership arguing they are the person that owns the grazing permit.

The Regional Forester has submitted a grazing permit for each active allotments in the state of Utah to the State Engineer and ***shown that the USFS is the owner of the permit.*** The State Engineer has issued nearly 500 livestock water certificates to the USFS for these allotments. The Regional Forester recognized these certificates are not water rights, but notes in the August 29th guidance that, "Until a court issues a decree accepting these claims, it is not know whether or not these claims will be recognized as water rights." It appears the USFS has already teed up a legal challenge to state sovereign water rights seeking to change livestock water certificates into US Forest Service water rights.

New Intermountain Region FS Guidance – August 29, 2008:

Citing Intermountain Region policy (R-4 FSM 2241) proclaiming that the FS must have a water right on a source before funds are expended on the ground or construction begins on any livestock water development or facility as defined in regulations (36 CFR 222.9(b)(2)).

The Regional Forester issues a prohibition to livestock water rights with private funds if the water right is solely owned!

Guidance states: "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."

As an outcome of the state issuing livestock water certificates, the FS threatened the state that without the United States being able to hold an ownership interest in the livestock water, they would be unable (or unwilling) to allow livestock permittees with livestock water rights to access, develop or maintain the water on federal lands.

Following the threats by Regional Forester Forsgren, in 2009 the Utah Livestock Water Rights law was amended as follows:

"On or after May 12, 2009, a livestock watering right may only be acquired by a public land agency jointly with the beneficial user."

The 2009 action also amended out of the law the state's obligation to hold vacated livestock water rights at the Utah Department of Agriculture and Food.

The USFS now has state law allowing joint ownership of a Utah Livestock Water Certificate.

Tooele County Grazing Association:

In the Spring of 2012, livestock grazing permittees meeting with the local Forest managers were confronted with a packet of information related to the FS 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 FS to determine 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 FS request could adversely affect their "turn out" or the release of sheep and cattle onto Forest allotments.

Utah Farm Bureau was concerned that the permittees were being blackmailed into actions undermining their proven state water rights. A meeting was held on May 11, 2012 in Tooele County that included grazing permittees, Forest personnel, Utah State Engineer, County Commissioners and state and local Farm Bureau leaders.

When confronted with the charge of blackmailing permittees into signing the change of use applications, the Forest agents objected and said they had not engaged in such action. The permittees countered "yes they did" and pointed out specifically one of the Forest employees. The retort by the Forest employee - "well you must have misunderstood!"

A follow up meeting was held August 28, 2012 the Farm Bureau Center in Sandy which included ranching interests, Intermountain Forester Harv Forsgren, Kathleen Clarke the Governor's Public Lands Coordinator, Kent Jones Utah State Engineer, Leonard Blackham Utah Commissioner of Agriculture, Leland Hogan President of the Utah Farm Bureau and Randy Parker, Farm Bureau CEO.

Forsgren noted that what the Forest was asking the permittees to agree to joint ownership as provided in the 2009 amended Utah Livestock Water Rights law - not to sign a change of use application.

As part of the broader understanding of Utah water law, the Utah State Engineer led a discussion and provided background on Utah water diligence claims, forfeiture and the impacts of ongoing actions by the US Forest Service.

Diligence Claims:

The United States Forest Service has 16,000 livestock water rights and claims for livestock water rights covering all Forest administered grazing allotments in Utah.

For more than one-half century, the US Forest Service has been filing diligence claims on Forest administered lands. These diligence claims being filed by the federal agency pre-date the 1903 water legislature and also pre-date the 1905 establishment of the US Forest Service. Mr. Forsgren said "the diligence claims are made on behalf of the United States, which was the owner of the land where the livestock grazed and livestock watering took place and that action

established the federal government's water rights. Currently, the USFS administers the land under the Organic Act and other federal laws, and therefore is the appropriate agency to file water rights claims on behalf of the United States. However, the water right was established under State law, and is being claimed by the United States under State law."

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.

Forfeiture:

Because water in Utah is considered a scarce and valuable public resource, Utah's laws have been designed to encourage full responsible development of water supplies and to discourage efforts to speculate in or monopolize the resource. As a result of this approach, it has been believed necessary to assure that those who acquire rights to use Utah's water actually place it to beneficial use. Although the statute has changed since first adopted in 1903, the current law states as follows in Utah Code Section 73-1-4:

"When an appropriator or the appropriator's successor in interest abandons or ceases to use all or a portion of a water right for a period of seven years, the water right or the unused portion of that water right is subject to forfeiture in accordance with Subsection (2)(c). . ."

Utah forfeiture laws, in the instance of livestock water rights, provides an interesting dilemma and potential for confrontation between livestock interests that proved up on the water right based on the state's constitutional method and the claims of the land management agency.

Access:

Recognizing the federal government controls 67 percent of Utah, USFS and BLM state administrative personnel including the Regional Forester, BLM State Director or even in the district offices maintain dramatic control. FS agents have the ability to control allotment access, determine if there will be use of the permittee's livestock water right, establish the numbers of sheep and cattle utilizing the water and ultimately determine the ability of the rancher to put the public's water resource to beneficial use.

It seems ironic that the USFS has the ability to manage the land and access to the water that could adversely impact permittees and their ability to put their livestock water rights to beneficial use. With thousands of diligence claims pending, thousands of certificates of joint ownership filed and the reality that if the agency exercises unrighteous dominion – where water rights are forfeited based on agency actions - what rancher will ever file for livestock water rights on Forest lands?

This scenario appears to offer the federal land management agencies the opportunity for an orderly transition of Utah water rights

Fundamental Question:

Legally can the US Forest Service or even BLM, under the state's constitutional method, validate a claim on Utah water where the agency did not and does not own the livestock putting the water to beneficial use while only claiming an ownership interest in the land?

Forsgren warned that "this is a 'slippery slope,' that has led to the Nevada conundrum and hopes this is not the fact that will be taken in Utah."

2013 Utah Legislative Action:

Utah State Representative Ken Ivory authored H.J.R. 14 A Joint Resolution on Water Rights that declares that the actions and claims of the United States Forest Service are undermining Utah's state sovereignty and that based on the state's obligation to protect, preserve and defend the health, safety and welfare of its citizens the state must maintain jurisdiction over the water resources of this state. In addition, Representative Ivory sponsored H.R. 166 to amend the Utah Livestock Water Rights on Public Lands statute.

The H.J.R 14 states among other things:

- Beneficial use is defined as domestic use, irrigation, stock watering, manufacturing, mining, hydropower, municipal use, aquaculture, recreation, fish and wildlife, among others.
- The Intermountain Forester will not invest in water improvements, nor will the agency allow improvements to be constructed or reconstructed with private funds where the right is held solely by the livestock owner.
- All improvements in developing, redeveloping or maintaining a livestock permittees' water rights are all claimed as the property of the United States.
- Through the use of pressure tactics, the USFS has coerced livestock permittees into signing certificates of joint ownership or change of use applications.
- Looking to expand federal interests and control in Utah, the USFS has filed more than 16,000 water rights claims of ownership on livestock water rights.
- Claims based on control of the public lands do not constitute the application of the water to beneficial use under Utah's constitutional method of appropriation and beneficial use.
- In the central Utah community of Scipio, the USFS used its diligence claim filings on use by nineteenth century settlers and then used the filings, and the threat of protracted litigation, to dispossess direct descendants of the settlers from their legitimate water rights.

H.R. 166 Water Rights Amendments authorized:

- A beneficial user, meaning a livestock permittee, the right to access and improve an allotment as necessary for the beneficial user to beneficially use, develop, and maintain the beneficial user's water right appurtenant to the allotment.
- A study of the state's jurisdiction over water rights including conflicts between local interests and the federal government and to determine what actions would be needed to maintain and defend state jurisdiction over water rights.

NEVADA:

In 2003, the State of Nevada passed Senate Bill 76. The bill precludes the Nevada State Engineer from approving any new applications, permits or certificates filed by the United States for stock water.

NRS 533.503 (1) The State Engineer shall not issue a permit to appropriate water for the purpose of watering livestock unless:

(a) The applicant for the permit is legally entitled to place the livestock on the lands for which the permit is sought

The USFS stated in its August 2008 briefing paper, "Since current Nevada livestock water right law does not allow the FS to acquire any new livestock water rights on National Forest System lands, this is causing difficulties for the FS because our policy requires that a livestock water right be held in the name of the United States of America before we can invest federal funds in livestock water developments.

Since Intermountain Region policy also states, "nor will the agency authorize water improvements to be constructed or reconstructed with private funds where the water rights held solely by a livestock owner."

It is clear that under the current policy conflicts between the land management agency and the state of Nevada – there is in effect no new water development on federal land in a state where 86 percent of the land is owned and controlled by the federal government.

ARIZONA

Tombstone Arizona illustrates the level to which the USFS can hold local interests hostage. Tombstone, for more than 130 years has piped its water from the Huachuca Mountains 30 miles away. Even after the Huachuca's were designated a federal wilderness area in 1984, Tombstone was allowed to maintain its road and access to its springs providing Tombstone with water for culinary needs and maybe as important fire protection and public safety.

In 2011, torrential rains destroyed the city's pipes and infrastructure supplying water from mountain springs and wells they developed in the nearby Huachuca Mountains. Tombstone notified the USFS they needed to repair the damage as they had in the past. The FS challenged Tombstone's ownership right to the water. After documenting their water ownership, Tombstone sought relief from the onerous federal regulations and FS oversight based on the state's public health, safety and welfare obligations.

When the FS finally gave the authorization, the federal agents established a new standard for the repair work by the city. They had previously been able to make repairs with machinery. Tombstone was forbidden from using any mechanized equipment to make the repairs.

With only shovels, picks and wheelbarrows to remove debris and repair broken water pipes, the mayor of Tombstone and city crews started into the FS administered "wilderness area." They were met by armed Forest Service agents demanding no "mechanized equipment" (wheelbarrows) could be taken up on the mountain.

In a year of severe drought and dramatic heat, even for the desert southwest, the city of Tombstone was at risk because of over-zealous federal bureaucrats and an uncaring government bureaucracy.

CASE LAW

A summary of federal and state case law that establishes important livestock water rights related to ranchers legal rights to access water located on federal land and defining who can put livestock water rights to beneficial use based on state definitions:

Attachment A - *Wayne Hage vs. United States*

Attachment B - *Joyce Livestock Company vs. United States*

RECOMMENDATIONS

- 1) Congress must act to recognize the historic and statutory obligation of honoring the sanctity of sovereign state water rights.
- 2) Federal agencies must honor state courts in water matters, including the state defined methods of beneficial use and the doctrine of prior appropriation or first in time, first in right.
- 3) Federal agencies must not use adverse management of the federal lands, specifically related to grazing, access, development and maintenance of water to gain control of water located on federal lands through abuse of the state's water forfeiture laws.
- 4) The United States must not disrupt the business of livestock grazing critical to the history, culture and local economies using the judicial system and protracted, costly litigation to emotionally or financially break the holder of livestock water rights on federal lands.
- 5) The federal government must develop a working relationship with the states - state engineers and policymakers - to forge an understanding whereby state water law and the needs of the federal land managers are complimentary.
- 6) Congress must act to allow Utah and other western public lands states to determine the use of their natural resources - including water - which are in the best interest of the citizens of the state and its future, as is the case with states across the nation.

This concludes my prepared testimony.
Thank you.

ATTACHMENTS

Attachment A

Wayne Hage vs. United States

Federal agents in the early 1980s began to over-file on Wayne Hage's livestock water rights and reducing the permitted number of cattle allowed to graze on the public lands including in Nevada's Monitor Valley. The water rights were tied directly to the original users and established in 1965 and subsequently maintained by their successors.

In a landmark "Constitutional takings" case filed in the U.S. Court of Federal Claims (USCFC) in 1991, *Hage vs. United States*, the court had to deal with question of property and ownership and the nature of vested and certificated water rights, easements, rights of way, forage harvest on federal lands and improvements to the grazing allotments. Did the Hage's and other permittees by association have rights associated with cattle harvesting forage on their government grazing allotments and beneficially using the state's water originating on federal lands or were the ranchers merely serfs, grazing at the whim of the U.S. government?

The Hage taking case went to trial in 1998 to determine property interests. In 2004, a second trial was commenced to determine which property had been taken and its value. Chief Judge Loren E. Smith ultimately awarded a \$4.4 million judgment against the federal government.

To challenge the USCFC decision and seeking an adverse ruling against Hage in an effort to undermine the Smith decision, the USFS and BLM in 2007 filed in Federal District Court against the estate of Wayne Hage alleging trespass on federal lands. In the 2012 trial in Nevada Federal District Court, Chief Judge Robert C. Jones presided. Jones had to recess the Reno proceedings to allow the Hage family to attend the Federal Circuit Court of Appeals hearing in Washington D.C. which was reviewing the takings case and USCFC judgment. The Appeals Court three judge panel initially overturned portions of the Smith decision and financial judgment citing the claims were not ripe. But they expressly did agree that the Hage's have "an access right" to their waters on the federal lands.

When Jones reconvened the Hage trial in Reno and issued his finding, it was an historic decision:

- Congress intended to protect the ranchers' preexisting rights by issuing grazing preferences only to established ranchers who could prove historical use of the range and ownership of the water rights under local law and custom.
- Based on the evidence, the Hage's were awarded a forage right one-half mile around and adjacent to all historic livestock water rights and warned the federal agency that the livestock could not be found in trespass in those areas.
- In witness credibility finding, Intermountain Regional Forester Harv Forsgren was found to be lying to the court. In his bench ruling Jones stated: "The most pervasive testimony of anybody was Mr. Forsgren. I asked him, has there been a decline in the region or district in AUMs (permitted animal unit months grazing). He said he didn't know. He was prevaricating. His answer speaks volumes about his intent and his directives to Mr. Williams." 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..."

Attachments

Page 2

- Humboldt-Toiyabe forest ranger Steve Williams was found in contempt of court and guilty of witness intimidation.
- Tonopah BLM manager Tom Seley as found in contempt of court and guilty of witness intimidation. In addition, he was guilty of having intent to destroy the Hage's property and business interests.
- Williams and Seley were held personally liable for damages exceeding \$33,000.

Chief Federal District Court Judge Robert C. Jones, June 6, 2012, *U.S. vs. The Estate of Wayne Hage and Wayne N. Hage* stated regarding his findings at trial:

"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."

As the wheels of justice turned ever so slowly for Wayne Hage and his heirs in the takings case filed in 1991, the 2008 U.S. Court of Federal Claims award was ultimately overturned July 26, 2012 by the U.S. Court of Federal Appeals in Washington D.C.

The taking case in the Appeals Court pivoted on the FS action requiring that Hage maintain 28 miles of ditches through Nevada's rugged terrain with only hand tools. The lower court found the restriction prevented Hage from beneficially using his water. The Appeals Court disagree.

In another part of the ruling, the Appeals Court found that even though the FS fenced Hage's cattle off a critical watering spring, this was not a physical taking because the fences were up for only five years and some of the water flowed out of the fenced area where Hage could access the water.

The Appeals Court rationalized its reversal by determining that since Hage could use some of the water, the FS action did not result in a physical taking of the water right.

Of concern with the Appeals Court ruling, it appears the federal government can fence off any private citizen's water right that resides on federal lands in any jurisdiction – and to take whatever they want without paying compensation as prescribed by the U.S. Constitution.

**Harv Forsgren, following the Judge Jones witness credibility finding has retired from the United States Forest Service.*

Attachment B

Joyce Livestock vs. United States

Idaho Supreme Court 2007 Opinion No. 23

In the 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 – passage of the Taylor Grazing Act. A special master recommended the water right claimed by the United States be granted. District Court said the special master erred and that the agency lacked the necessary intent. District Court determined that Joyce needed to show evidence that they believed they had acquired such water rights in their grazing permit applications. The United States could not show that Joyce or any of its predecessors were acting as its agents when they acquired water rights. As required, Joyce made application for grazing rights under the Taylor Grazing Act on April 26, 1935. The District Court awarded Joyce water rights with a priority date of April 26, 1935.

Upon appeal, the Idaho Supreme Court upheld the District Court ruling that Joyce had acquired a water right on federal land for watering stock for the following reasons:

- 1) An appropriator can obtain a water right in non-navigable waters located on federal lands.
- 2) Under the constitutional method, an appropriator could obtain a water right for stock watering without diverting the water from the water source.
- 3) Joyce predecessors obtained water rights on federal land for stock watering simply by applying the water to beneficial use through watering their livestock in the springs, creeks and rivers on the range they used for forage.
- 4) The water rights that the ranchers obtained by watering their livestock on federal land were appurtenant to their patented properties.
- 5) A water right appurtenant to real property is conveyed with the real property unless expressly reserved or the parties clearly intended that the conveyance not include the water right.

As related to priority dates, the Idaho Supreme Court said the District Court erred in its analysis and remanded for a redetermination of priority dates. Specifically, the High Court said that the Joyce water priority date must be based on their earlier application of the water to beneficial use by grazing livestock.

In closing, the Idaho Supreme Court considered on appeal the in-stream water rights for stock watering claimed by the United States based on ownership and control of the land and the Taylor Grazing Act management obligation. They concluded:

“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.”

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H.J.R. 14 Enrolled

1

JOINT RESOLUTION ON WATER RIGHTS

2

2013 GENERAL SESSION

3

STATE OF UTAH

4

Chief Sponsor: Ken Ivory

5

Senate Sponsor: Evan J. Vickers

6

7 **LONG TITLE**

8 **General Description:**

9 This joint resolution of the Legislature declares that claims of the United States Forest
10 Service on state waters originating on public lands undermine state sovereignty and
11 demand action by the state of Utah to protect its sovereign, recognized ownership and
12 rights, and calls on state, county, and local governments to protect, preserve, and

defend

13 the health, safety, and welfare of the citizens of the state of Utah by defending and

14 maintaining jurisdiction over the water resources of this state.

15 **Highlighted Provisions:**

16 This resolution:

17 . affirms the rights established in the Utah Constitution related to citizens' water
18 rights and Utah's sovereign ownership and control over its water;

19 . declares that the actions related to claims of the United States Forest Service on
20 state waters originating on public lands undermine state sovereignty, and demand
21 action by the state of Utah to protect its sovereign, recognized ownership and rights
22 on behalf of the citizens of Utah; and

23 . calls on state, county, and local governments to protect, preserve, and defend
their

24 jurisdictional and constitutional obligation to protect the health, safety, and welfare
25 of the citizens of the state of Utah, particularly in defending and maintaining
26 jurisdiction over the water resources of this state.

27 **Special Clauses:**

28 None

29

30 *Be it resolved by the Legislature of the state of Utah:*

31 WHEREAS, water is essential to life, health, safety, and welfare, especially in Utah
and
32 throughout the West;

33 WHEREAS, in its Patient Protection and Affordable Care Act decision released June
34 28, 2012, the United States Supreme Court reaffirmed that jurisdiction over matters that
35 "concern the lives, liberties, and properties of the people" are "possessed by the States
but not
36 the Federal Government";

37 WHEREAS, in the exercise of its jurisdiction over water resources within the state,
the
38 state of Utah has long established the recognition of water rights to "first in time" users
of the
39 water who can demonstrate the ability to put the water to "beneficial use";

40 WHEREAS, in short, "beneficial use" means water use that includes domestic use,
41 irrigation, stock watering, manufacturing, mining, hydropower, municipal use,
aquaculture,
42 recreation, and fish and wildlife, among others;

43 WHEREAS, in disregard for and disrespect of the long-established state jurisdiction
44 over water resources, the federal government, principally by and through the United

States
45 Forest Service (USFS), has engaged in a persistent pattern and course of conduct to

exert
46 control and influence over water resources within the state and throughout the West;

47 WHEREAS, various federal agencies are acting to negatively impact the water

48 resources of Utah and other western states by unilaterally and substantially reducing the
 49 number of grazing permits and severely restricting timber harvesting;
 50 WHEREAS, these federal policies, which overly restrict timber harvesting and
 grazing,
 51 build up dangerous wildfire fuel loads and result in inordinate water absorption for
 unhealthy
 52 vegetation densities;
 53 WHEREAS, these federal agencies are also threatening to not renew often long-held
 54 grazing permits unless the permittee signs a water right change application over to the
 federal
 55 agency, closing roads and access to water resources, diminishing water recreation
 56 opportunities, and imposing onerous permit requirements;
 57 WHEREAS, some specific examples of the disregard for and disrespect of state

58 jurisdiction over water resources by federal agencies include:
 59 1. In the spring of 2012, agents of the USFS coerced Tooele County livestock
 60 producers to sign change applications on private livestock water rights under
 compulsion of
 61 prohibiting the livestock producers from turning out their cattle onto their Forest Service
 62 allotment if the producers did not comply with the federal agency demand.
 63 2. Near Scipio, the USFS based its diligence claim filings on use by nineteenth
 century
 64 settlers and then used the filings, and the threat of protracted litigation, to dispossess
 direct
 65 descendants of the settlers from their legitimate water rights.
 66 3. For many years, the United States Forest Service and the Bureau of Land
 67 Management actively sought to reduce or eliminate the livestock and watering rights of a
 68 Nevada rancher. This action resulted in protracted litigation before United States District
 69 Court Judge Robert C. Jones, which concluded in the 2012 criminal convictions of two
 public
 70 servants employed by the USFS and the Bureau of Land Management. Both public
 servants
 71 were found guilty of contempt of court and witness intimidation charges. At trial, the
 regional
 72 forester in charge of Utah was found to have lied to the court when asked about the
 agency's
 73 antigrazing plan, which sought to eliminate cattle grazing on public lands.
 74 4. From 2011 to the present, federal agents have barred city of Tombstone officials
 75 from accessing their water resources established in the Huachuca Mountains as early
 as 1881,
 76 which were washed out by monsoon rains on the heels of devastating wildfires
 exacerbated by
 77 unmitigated fuel loads. Local officials were at first denied access to repair their water

lines, but
78 were then allowed by USFS agents to only use "horses and hand tools" to ascend the
mountain
79 on foot in an obviously futile attempt to restore their water services. In attempting to
ascend
80 the road they had used for decades to repair their water resources with modern
machinery,
81 Tombstone officials were met by armed Forest Service agents and turned back at the
threat of
82 arrest and confiscation of expensive, rented heavy machinery. The city of Tombstone is
now
83 engaged in protracted litigation with the federal government over its water resources and
has
84 been reduced to using arsenic-laced wells that lack the pressure and capacity to
withstand any
85 serious fire danger to the wooden town in the middle of a desert in the middle of a
drought.

86 5. The United States Forest Service filed suit in Idaho against the Joyce Livestock
87 Company, arguing the livestock water rights were the property of the United States,
based on
88 federal ownership and control of the public lands coupled with the Bureau of Land
89 Management's oversight of the public lands under the Taylor Grazing Act. Through
protracted
90 litigation, the Joyce Livestock Company proved its water rights to have been in place
since
91 1898. The district court found no evidence that the United States had appropriated any
water
92 by grazing livestock. Upon appeal, in Joyce Livestock Company vs. United States, the
Idaho
93 Supreme Court unanimously held that the United States did not actually apply the water
to
94 beneficial use under the constitutional method of appropriation and, therefore, had no
water
95 right.
96 6. USFS efforts to exert control over the water rights of Colorado's ski industry were
97 recently delayed on procedural grounds in a lawsuit brought by the ski industry. The
USFS,
98 through a new policy clause in the land use permitting process, seeks to require ski
industry
99 interests to provide joint ownership of state water rights, relinquish water rights held
jointly
100 with the federal government if the use permit is terminated, and grant "limited" power of

101 attorney to the United States to execute documents pertaining to jointly held water
rights with

102 the promise that the ski industry will waive any claim against the United States for
103 compensation of water rights lost as a result of the new permit language.

104 WHEREAS, John Dickinson, one of the Founding Fathers of this nation, warned, "It
105 will be their own faults, if the several states suffer the federal sovereignty to interfere in

the

106 things of their respective jurisdictions";

107 WHEREAS, the United States Supreme Court also highlighted a vital role of states'
108 authority in relation to protecting the liberty and property of their citizens by curbing

federal

109 government overreach, stating, "The Independent power of the States also serves as a
check on

110 the power of the Federal Government: 'By denying any one government complete
jurisdiction

111 over all the concerns of public life, federalism protects the liberty of the individual from
112 arbitrary power";

113 WHEREAS, in its recent Patient Protection and Affordable Care Act decision, the

114 United States Supreme Court further admonished states of their jurisdiction to protect
matters

115 of health, safety, and welfare, such as the critical life-sustaining issue of water in the
West,

116 stating, "Our cases refer to this general power of governing, possessed by the States
but not by

117 the Federal Government, as the 'police power.' . . . Because the police power is
controlled by

118 50 different states instead of one national sovereign, the facets of governing that touch
on

119 citizens' daily lives are normally administered by smaller governments closer to the
governed.

120 The Framers thus ensured that powers which 'in the ordinary course of affairs, concern
the

121 lives, liberties, and properties of the people' were held by governments more local and
more

122 accountable than a distant federal bureaucracy";

123 WHEREAS, after recounting these fundamental principles and the states' inherent
124 powers as "separate and independent sovereigns," the United States Supreme Court

125 admonished, "In the typical case we look to the States to defend their prerogatives by

adopting

126 'the simple expedient of not yielding' to federal blandishments when they do not want to

127 embrace the federal policies as their own. The States are separate and independent
sovereigns.

128 Sometimes they have to act like it";
 129 WHEREAS, the USFS Intermountain Region Guidance Document states that the
 130 federal government will not invest in livestock water improvements, "nor," according to
 the
 131 Intermountain Region Director, "will the agency authorize water improvements to be
 132 constructed or reconstructed with private funds where the right is held solely by the
 livestock
 133 owner";
 134 WHEREAS, when the USFS allows improvements, including developing,
 135 redeveloping, and maintaining a livestock permittee's water rights, all improvements
 are
 136 claimed as the property of the United States, even when the investments are made by
 individual
 137 livestock permittees to allow the permittees to put their livestock watering rights to
 beneficial
 138 use as prescribed under state law;
 139 WHEREAS, the USFS has used pressure tactics to gain control of livestock water
 rights
 140 by seeking change applications from the permittees or joint ownership in water with the
 federal
 141 agency;

142 WHEREAS, the USFS has threatened to not allow livestock permittees onto its
 Forest
 143 Service grazing allotments until permittees comply with the request;
 144 WHEREAS, pre-existing water rights for livestock permittees on federal lands are
 145 protected in both the 1934 Taylor Grazing Act and the 1976 Federal Land Policy and
 146 Management Act;
 147 WHEREAS, these actions by federal agencies infringe on recognized state
 jurisdiction
 148 and sovereignty, state law, and water rights established through historic livestock
 watering on
 149 public lands, and Utah's beneficial use doctrine;
 150 WHEREAS, it is the apparent intention of the federal government to further expand
 its
 151 water holdings in the West, including Utah, through the USFS as provided in 16 U.S.C.
 Sec.
 152 526, which states, "There are authorized to be appropriated for expenditure by the
 Forest
 153 Service such sums as may be necessary for the investigation and establishment of
 water rights,
 154 including the purchase thereof or of lands or interests in lands or rights-of-way for use
 and

155 protection of water rights necessary or beneficial in connection with the administration
 and
 156 public use of the national forests";
 157 WHEREAS, the United States, by and through its various agencies and
 departments,
 158 appears intent upon undermining, or at the very least disregarding, state sovereignty
 and
 159 jurisdiction over water rights and resources, as outlined in the USFS Intermountain
 Region
 160 Guidance Document, which states, "until the court issues a decree accepting these
 claims, it is
 161 not known whether these claims will be recognized as water rights";
 162 WHEREAS, in seeking to expand the federal government's interest in the Utah
 water
 163 rights portfolio and exert greater control over the natural resources of the state, the
 USFS has
 164 filed more than 16,000 water rights claims of ownership on livestock watering rights
 located
 165 across the state;
 166 WHEREAS, water rights claimed by the United States, based on its control of public
 167 lands, coupled with the Bureau of Land Management's comprehensive management of
 public
 168 lands under the Taylor Grazing Act, do not constitute the application of the water right
 to
 169 beneficial use under Utah's constitutional method of water appropriation and beneficial
 use;

170 WHEREAS, these waters are the property of the citizens of the state of Utah under
 its
 171 constitution, and the control falls under the stewardship and jurisdiction of the Utah
 State
 172 Legislature;
 173 WHEREAS, it is recognized and understood that the United States cannot obtain
 174 sovereign water rights, nor can it obtain historic livestock water rights established on
 public
 175 lands, through federal laws;
 176 WHEREAS, the consequence of allowing the federal government to exceed its
 177 authority over water rights is clearly illustrated by the great difficulty in getting the
 federal
 178 government to acknowledge its encroachment and relinquish its hold on that which the
 states
 179 should have by right;
 180 WHEREAS, it is the sovereign right of the state of Utah, the second most arid state

in

181 the nation, to exercise its obligation to protect the scarce water resources within its
borders for

182 the health, safety, and welfare of its citizens; and

183 WHEREAS, to do otherwise would be an abrogation of the Legislature's
constitutional

184 responsibility and obligation on behalf of the citizens of Utah, would weaken state
authority,

185 and would relinquish to the federal government more control over the water, natural
resources,

186 and lands contained within the borders of Utah:

187 NOW, THEREFORE, BE IT RESOLVED, that the Legislature of the state of Utah

188 affirms the rights established in the Utah Constitution related to the citizens' water and
Utah's

189 sovereign ownership, jurisdiction, and control over its water.

190 BE IT FURTHER RESOLVED that the Legislature of the state of Utah declares that

191 the actions related to United States Forest Service claims on state waters originating
on public

192 lands undermines state sovereignty and jurisdiction and demands action by the state of
Utah to

193 protect its sovereign, recognized water ownership and rights on behalf of the citizens of
Utah.

194 BE IT FURTHER RESOLVED that the Legislature of the state of Utah calls on state,

195 county, and local governments to protect, preserve, and defend their jurisdiction and
exercise

196 their constitutional obligation to protect the health, safety, and welfare of the citizens of
the

197 state of Utah, particularly in defending and maintaining jurisdiction over the water
resources of

198 this state.

199 BE IT FURTHER RESOLVED that a copy of this resolution be sent to the United

200 States Department of the Interior, the United States Forest Service, the United States

201 Department of Agriculture, the Bureau of Land Management, the Utah Department of
Natural

202 Resources, each county commission in the state of Utah, each municipality in the state
of Utah,

203 and the members of Utah's congressional delegation.

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1

WATER RIGHTS AMENDMENTS

2

2013 GENERAL SESSION

3

STATE OF UTAH

4

Chief Sponsor: Ken Ivory

5

Senate Sponsor: Evan J. Vickers

6

7 LONG TITLE**8 General Description:**

9 This bill amends provisions relating to water rights used for watering livestock on
 10 public land and claims to surface or underground water not already represented, and
 11 requires the Department of Natural Resources to complete a study.

12 Highlighted Provisions:

13 This bill:

14 . allows a person who holds a grazing permit from a public land agency to access

and

- 15 improve the permitted grazing area as necessary to beneficially use, develop, and
 16 maintain the person's water right that is appurtenant to the grazing area;
 17 . requires the state engineer to provide copies of claims to water not already
 18 represented that are filed by the federal government to the Natural Resources,
 19 Agriculture, and Environment Interim Committee;
 20 . requires the Department of Natural Resources to study the state's jurisdiction over
 21 water rights and report to the Natural Resources, Agriculture, and Environment
 22 Interim Committee; and
 23 . makes technical changes.

24 **Money Appropriated in this Bill:**

25 None

26 **Other Special Clauses:**

27 This bill provides a repeal date.

28 **Utah Code Sections Affected:**

29 AMENDS:

30 **73-3-31**, as last amended by Laws of Utah 2009, Chapter 285

31 **73-5-13**, as last amended by Laws of Utah 2001, Chapter 136

32 **Uncodified Material Affected:**

33 ENACTS UNCODIFIED MATERIAL

34

35 *Be it enacted by the Legislature of the state of Utah:*

36 Section 1. Section **73-3-31** is amended to read:

37 **73-3-31. Water right for watering livestock on public land.**

38 (1) As used in this section:

39 (a) "Acquire" means to gain the right to use water through obtaining:

40 (i) an approved application to appropriate water; or

41 (ii) a perfected water right.

42 (b) "Allotment" means a designated area of public land available for livestock grazing.

43 (c) (i) "Beneficial user" means the person that has the right to use the grazing permit.

44 (ii) "Beneficial user" does not mean the public land agency issuing the grazing permit.

45 (d) "Grazing permit" means a document authorizing livestock to graze on an

allotment.

46 (e) "Livestock" means a domestic animal raised or kept for profit or personal use.

47 (f) "Livestock watering right" means a right for:

48 (i) livestock to consume water:

49 (A) directly from the water source located on public land; or

50 (B) from an impoundment located on public land into which the water is diverted; and

51 (ii) associated uses of water related to the raising and care of livestock on public

land.

52 (g) (i) "Public land" means land owned or managed by the United States or the state.

53 (ii) "Public land" does not mean land owned by:

- 54 (A) the Division of Wildlife Resources;
- 55 (B) the School and Institutional Trust Lands Administration; or
- 56 (C) the Division of Parks and Recreation.
- 57 (h) "Public land agency" means the agency that owns or manages the public land.

58 (2) On or after May 12, 2009, a livestock watering right may only be acquired by a
 59 public land agency jointly with a beneficial user.

60 (3) The state engineer may not approve a change application under Section 73-3-3
 for a 61 livestock watering right without the consent of the beneficial user.

62 (4) A beneficial user may file a nonuse application under Section 73-1-4 on a
 livestock 63 watering right or a portion of a livestock watering right that the beneficial user puts to
 64 beneficial use.

65 (5) A livestock watering right is appurtenant to the allotment on which the livestock is
 66 watered.

67 (6) (a) (i) A beneficial user or a public land agency may file a request with the state
 68 engineer for a livestock water use certificate.

69 (ii) The state engineer shall:

70 (A) provide the livestock water use certificate application form on the Internet; and

71 (B) allow electronic submission of the livestock water use certificate application.

72 (b) The state engineer shall grant a livestock water use certificate to:

73 (i) a beneficial user if the beneficial user:

74 (A) demonstrates that the beneficial user has a right to use a grazing permit for the
 75 allotment to which the livestock watering right is appurtenant; and

76 (B) pays the fee set in accordance with Section 73-2-14; and

77 (ii) the public land agency if the public land agency:

78 (A) (I) demonstrates that the public land agency owns a livestock watering right; or

79 (II) issues a grazing permit for the allotment to which the livestock watering right is
 80 appurtenant; and

81 (B) pays the fee set in accordance with Section 73-2-14.

82 (c) A livestock water use certificate is valid as long as the livestock watering right is:

83 (i) put to beneficial use within a seven-year time period; or

84 (ii) subject to a nonuse application approved under Section 73-1-4 .

85 (7) A beneficial user may access or improve an allotment as necessary for the

86 beneficial user to beneficially use, develop, and maintain the beneficial user's water right
 87 appurtenant to the allotment.

88 Section 2. Section **73-5-13** is amended to read:

89 **73-5-13. Claim to surface or underground water not otherwise represented --**

90 **Information required -- Corrections -- Filing -- Investigation -- Publication --**

Judicial

91 **action to determine validity -- Rules.**

92 (1) (a) All claimants to the right to the use of water, including both surface and
93 underground, whose rights are not represented by certificates of appropriation issued by
the

94 state engineer, by applications filed with the state engineer, by court decrees, or by
notice of
95 claim filed pursuant to law, shall submit the claim to the state engineer.

96 (b) Subsections (2) through (7) shall only apply to claims submitted to the state
97 engineer pursuant to this section after May 4, 1997.

98 (2) (a) Each claim submitted under this section shall be verified under oath by the
99 claimant or the claimant's duly appointed representative and submitted on forms
furnished by

100 the state engineer setting forth any information the state engineer requires, including:

101 (i) the name and post office address of the person making the claim;

102 (ii) the quantity of water claimed in acre-feet or rate of flow in second-feet, or both,
103 where appropriate;

104 (iii) the source of supply;

105 (iv) the priority date of the right;

106 (v) the location of the point of diversion with reference to a United States land
survey

107 corner;

108 (vi) the place of use;

109 (vii) the nature and extent of use;

110 (viii) the time during which the water has been used each year; and

111 (ix) the date when the water was first used.

112 (b) The claim shall also include the following information verified under oath by a
113 registered engineer or land surveyor:

114 (i) measurements of the amount of water diverted;

115 (ii) a statement that the quantity of water claimed either in acre-feet or cubic feet per
116 second is consistent with the beneficial use claimed and the supply which the source is
capable

117 of producing; and

118 (iii) a map showing the original diversion and conveyance works and where the
water

119 was placed to beneficial use, including irrigated lands, if irrigation is the claimed
beneficial

120 use.

121 (c) The state engineer may require additional information as necessary to evaluate
any

122 claim including:

123 (i) affidavits setting forth facts of which the affiant has personal knowledge;

124 (ii) authenticated or historic photographs, plat or survey maps, or surveyors' notes;

125 (iii) authenticated copies of original diaries, personal histories, or other historical
 126 documents which document the claimed use of water; and
 127 (iv) other relevant records on file with any county recorder's, surveyor's, or
 assessor's
 128 office.
 129 (3) (a) A claim may be corrected by submitting to the state engineer a verified
 130 corrected claim designated as such and bearing the same number as the original
 claim.
 131 (b) No fee shall be charged for submitting a corrected claim.
 132 (4) (a) ~~Upon submission by a claimant of~~ When a claimant submits a claim that is
 133 acceptably complete under Subsection (2) and ~~[the deposit of money by a claimant]~~
deposits
 134 money with the state engineer sufficient to pay the expenses of conducting a field
 investigation
 135 and publishing a notice of the claim, the state engineer shall:
 136 (i) file the claim;
 137 (ii) endorse the date of its receipt;
 138 (iii) assign the claim a water right number; ~~[and]~~
 139 (iv) publish a notice of the claim following the same procedures as provided in
 Section
 140 73-3-6 [-]; and
 141 (v) if the claimant is the federal government or a federal agency, provide a copy of
the

 142 claim to the members of the Natural Resources, Agriculture, and Environment Interim
 143 Committee.
 144 (b) Any claim not acceptably complete under Subsection (2) shall be returned to the
 145 claimant.
 146 (c) The acceptance of any claim filed under this section by the state engineer may
 not
 147 be considered to be an adjudication by the state engineer of the validity of the claimed
 water
 148 right.
 149 (5) (a) The state engineer shall:
 150 (i) conduct a field investigation of each claim filed; and
 151 (ii) prepare a report of the investigation.
 152 (b) The report of the investigation shall:
 153 (i) become part of the file on the claim; and
 154 (ii) be admissible in any administrative or judicial proceeding on the validity of the
 155 claim.
 156 (6) (a) Any person who may be damaged by a diversion and use of water as
 described
 157 in a claim submitted pursuant to this section may file an action in district court to

determine the

158 validity of the claim, whether or not the claim has been accepted for filing by the state
159 engineer.

160 (b) Venue for the action shall be in the county in which the point of diversion listed in
161 the claim is located, or in a county where the place of use, or some part of it, is located.

162 (c) The action shall be brought against the claimant to the use of water or the
claimant's

163 successor in interest.

164 (d) In any action brought to determine the validity of a claim to the use of water
under

165 this section, the claimant shall have the initial burden of proof as to the validity of the
claimed

166 right.

167 (e) Any person filing an action challenging the validity of a claim to the use of water
168 under this section shall notify the state engineer of the pendency of the action in a

manner
169 prescribed by the state engineer. Upon receipt of the notice, the state engineer may

take no

170 action on any change or exchange applications founded on the claim that is the subject
of the
171 pending litigation, until the court adjudicates the matter.

172 (f) Upon the entering of any final order or decree in any judicial action to determine
the

173 validity of a claim under this section, the prevailing party shall file a certified copy of the
order

174 or decree with the state engineer, which shall become part of the state engineer's file
on the

175 claim.

176 (7) The state engineer may make rules consistent with this section specifying
177 information required to be included in a claim and claim procedures.

178 **Section 3. Department of Natural Resources study of issues related to the
state's**

179 **jurisdiction over water rights.**

180 *The Department of Natural Resources shall:*

181 (1) conduct a study of the state's jurisdiction over water rights, including:

182 (a) conflicts between the state, state agencies, political subdivisions, or citizens of
the

183 state and the federal government relating to water issues; and

184 (b) actions necessary for the state to take in order to maintain and defend its
185 jurisdiction over water rights;

186 (2) draft recommended legislation to address the studied issues; and

187 (3) report the study and recommended legislation to the Natural Resources,

- 188 *Agriculture, and Environment Interim Committee before November 30, 2013.*
- 189 **Section 4. Repeal date.**
- 190 *Section 3, Department of Natural Resources study of issues related to the state's*
- 191 *jurisdiction over water rights, is repealed on November 30, 2013.*

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