UTAH’S LIVESTOCK WATERING ACT OF 2008: WILL THE AMENDED LEGISLATION AVOID THE LITIGATION STAMPEDE?

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I. INTRODUCTION

Water has always been a contentious issue in the West, and when it comes to livestock grazing, it is well understood that “he who control[s] the water control[s] the range.” Livestock owners depend on the water found on the public land where their livestock graze. Naturally, they want to protect these water sources from government interference. The Livestock Watering Rights Act of 2008 (“the Act”) was intended to grant greater protection from federal agencies on public grazing land and ensure the future of ranching in Utah. However, after the Act’s passage, it became apparent that it impacted the federal agencies that Utah livestock owners depend upon for cooperation, and cooperation between land management agencies and livestock owners is often necessary for successful management of these grazing allotments on federal land. HB 256 is legislation that amends the Act and was aimed to resolve the dispute it caused. In the proceedings involving HB 256’s passage, Senator Stowell stated “Last year we did some legislation that had some flaws in it. This bill fixes it.”

This article addresses the problems Senator Stowell referred to in the Act and whether the new legislation, HB 256 actually resolves those problems. The Act granted rights to livestock owners that defied water appropriation law in the West. It also appeared to use a misreading of case law of the West to create laws without precedent. Some of the questions the Act left in its wake included: Who is actually the beneficial user of the water under the Act? Does a grazing permit entitle its holders to property rights to federal land? Can the Federal Government legally be excluded from the water appropriation process? Does the Act do what its supporters hoped it would do?

It was clear that if the Act remained unchanged, it would have created much worse legal problems with Utah livestock watering rights than anyone anticipated. But whether HB 256 will help to resolve the problems that the Act created is still unknown.

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2 UTAH CODE ANN. § 73-3-31(2008).
3 H.R. 256, 2009 Leg., 58th Sess. (Utah 2009) (this bill was substituted by H.R. 256 Substitute, 2009 Leg., 58th Sess. (Utah 2009).
II. BACKGROUND

The hostilities that exist between western livestock owners, conservation groups, and the government are not new. However, the discussion became more heated after the adoption of the Federal Land Policy Management Act (FLPMA) of 1976.\(^5\) FLPMA marked a change in the federal government’s policy concerning federally owned lands from one of “disposal” to “retention.”\(^6\) Many of the Western States including Montana, Idaho, Wyoming, Utah, Colorado, New Mexico and Arizona, were worried that such a shift could undermine their uses of the natural resources on the federal lands within the state; uses that these states had come to rely upon. Therefore, Congress made a deal with the Western States. Essentially, the Western states agreed to a “retention” policy if “the Federal Government would manage the [lands] under multiple use/sustained yield principles, protect valid existing rights, limit wilderness review and consider the needs and concerns of adjacent communities when formulating land use plans.”\(^7\) With those rights, the protection of the “existing right” of water use on federal land became an issue and the nature of that right has since been litigated in Western states such as Nevada, Idaho, and New Mexico.\(^8\)

In response to litigation in Idaho and Nevada dealing with water rights of livestock owners who graze cattle on federal lands,\(^9\) Representative Mike Noel who represents Utah’s 73rd District, introduced HB 208 (which became the Livestock Watering Rights Act of 2008). The Utah Legislature intended the Act to avoid similar litigation in Utah through its creation, saving both the time and money of the livestock owners and governmental entities.\(^10\) Many livestock owners in Utah supported the Act because they believed that the federal government is continually seeking to obtain more water rights, often tied to water used for their ranching operations, which is then put to uses other than livestock grazing.\(^11\) Livestock owners feared the federal government could claim that livestock owners were contributing to overgrazing or watershed damage, and revoke the grazing permits of livestock owners. In so doing, the livestock grazers feared the federal government would also eliminate their water rights, by converting them to ecological uses. Without water rights and grazing permits, livestock owners would be unable to legally graze the livestock from which they make a living. This notion animates livestock owners who believe that grazing lands in Utah and other parts

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\(^8\) See, e.g., Colvin Cattle Co., Inc. v. United States, 67 Fed.Cl. 568 (Fed.Cl. 2005); Diamond Bar Cattle Co. v. U.S., 168 F.3d 1209, 1211 (10th Cir. 1999); Hage v. United States, 51 Fed.Cl. 570 (Fed.Cl. 2002).
\(^9\) Interview with Mike Noel, Utah State Representative, District 73, in Salt Lake City, Utah (Oct, 8, 2008).
\(^10\) Id.
\(^11\) Id.
of the West are gradually disappearing. Therefore, the livestock owners expected that the Act would grant them a greater voice over their water rights.

The drafters of the Act apparently intended to curb the disappearance of rangelands by creating restrictions on who could obtain new water rights and to create a more stringent change process for water rights to help slow the trend of disappearing rangeland. The Act’s supporters also said it would grant livestock owners a stronger foothold in the grazing land by creating a statutory provision that created a limited-forage right that is appurtenant to the water right.\textsuperscript{12}

Government agencies responded with a series of legal opinions revealing several problems the Act created. There were three major flaws found with the Act. First was its definition of beneficial user,\textsuperscript{13} second was the Act’s intent to restrict the acquisition of new water rights to livestock owners,\textsuperscript{14} and third was the forage right it granted as being appurtenant to the water right acquired.\textsuperscript{15} Each of these problems will be discussed in the following sections.

A. Who is the Beneficial User?

The Act provided that “only a beneficial user may acquire a livestock watering right.”\textsuperscript{16} The Act defines the beneficial user as the “person who owns the grazing permit.”\textsuperscript{17} In United States v. Fuller,\textsuperscript{18} the Supreme Court established grazing permits created under the Taylor Grazing Act were not only revocable by the government, but also “shall not create any right, title, interest, or estate in or to the lands.”\textsuperscript{19} Some federal agencies reasoned that with the permit, the livestock owners purchased the right to graze on the land, but the permit itself is owned by the government.\textsuperscript{20} Accordingly, under at least one federal agency’s interpretation of the definition of “beneficial user” in the Act, the only entity capable of acquiring a livestock watering right is the federal government.\textsuperscript{21} Rights associated with ownership of forage permits are often confused with ownership of the land. This may have led to some of the disagreements over the definition of who “owns” the permit. The permittee has certain rights under the permit: It can be sold, leased, or pledged as collateral for a loan. Although the federal government technically owns the permit, the permittee owns the revocable usufructuary rights it represents, even though the permittee does not have “an interest in the land.”

\begin{flushright}
\textsuperscript{12} See id.
\textsuperscript{13} UTAH CODE ANN. § 73-3-31(1)(c) (2008).
\textsuperscript{14} UTAH CODE ANN. § 73-3-31(2).
\textsuperscript{15} UTAH CODE ANN. § 73-3-31(4)(b).
\textsuperscript{16} UTAH CODE ANN. § 73-3-31(2).
\textsuperscript{17} UTAH CODE ANN. § 73-3-31(1)(c). (emphasis added).
\textsuperscript{18} 409 U.S. 488 (1973).
\textsuperscript{19} Id. at 489.
\textsuperscript{20} Interview with Kenneth Paur, Attorney, Office of General Counsel, Forest Service, Region 4 (Intermountain Region) Department of Agriculture, in Salt Lake City, Utah (Oct, 10, 2008).
\textsuperscript{21} Id.
HB 256 attempted to clarify this confusion by changing the word “owns” to the “person that has the right to use the grazing permit,” or in other words to the livestock owners.22

B. Who May Acquire a Livestock Watering Right Under the New Law?

The Act states: “On or after May 5, 2008, only a beneficial user may acquire a livestock watering right.”23 As mentioned, the definition of “beneficial user” is interpreted in one of three ways: (1) the beneficial user is the private livestock owner, as intended by the Act’s sponsors: (2) the beneficial user is the federal government under the legal definition of the owners of a livestock grazing permit: or (3) both the private livestock owner and the federal government simultaneously act as beneficial users.24

If the beneficial user is the livestock owner, the Act limits acquisition of new water rights on public rangeland to livestock owners holding a valid forage permit, effectively precluding federal government ownership. This interpretation limits the federal government in acquiring new water rights. Although this may be consistent with the bill’s intent, it raises troubling questions regarding the defensibility of the Act’s provisions limiting federal water right ownership.25 Although state law governs water rights, the Supreme Court of the United States ruled that “the United States would acquire water in the same manner as any other public or private appropriator.”26 Although some states have attempted to exclude the federal government from purchasing water rights, such efforts are rarely upheld.27

C. Can a Forage Right be Appurtenant to a Water Right?

The Livestock Watering Rights Act also raised the question of whether a forage right could be granted appurtenant to the water right. The Act states that “[a] forage right is appurtenant to a livestock watering right.”28 The Act defines “forage right” as “a right for livestock to forage within 50 feet of a water source.”29 The 50-foot forage right appears to have been adopted directly from the ruling in Hage v. United States.30 In Hage, the livestock owner alleged that the suspension of his livestock grazing permit prevented him from utilizing his state-granted water right, resulting in a taking without just compensation.31 The unique facts of the case made this argument compelling because the U.S. Forest Service not only prevented Mr. Hage from grazing on federal lands, but denied his requests to enter
upon federal land to divert water to a place of use on nearby non-federal land. 32 This effectively prevented Mr. Hage from putting his water to a beneficial use, making it vulnerable to statutory forfeiture for non-use. The court of claims, cited Federal Claim Court precedent finding “that the [Respondent] ranch may have lost value by virtue of losing the grazing lease is of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest.”33 The court of claims ultimately found that Hage’s water right included a right to access the water on the federal land, although they made it clear that this did not include a forage right.34

In Colvin Cattle Co. v. United States, the court focused on 5th Amendment takings, noting that the livestock owners’ “water rights do not confer a compensable right to graze on federal lands and that its grazing lease does not create a contractually enforceable right against the government.”35 In Diamond Bar Cattle Co. v. United States, federal control was reiterated over grazing lands despite privately owned water rights.36

D. The Difference Between a Livestock Watering Right and a Livestock Water Use Certificate

In Utah, livestock watering rights refer to the right beneficial users have to use the water for their livestock.37 The term “livestock water use certificate” was introduced, but not defined, in 2008 with passage of the Act. There was broad agreement on the well-established definition of the “livestock watering right” but the new term, “livestock water use certificate” created disagreement as to its purpose and meaning. At least one federal agency interpreted the livestock water use certificate to be something that “gave the certificate holder the right to veto a change application for an existing livestock watering right by withholding consent.”38

Other agencies interpreted “livestock water use certificate” to be a piece of paper stating a person was a beneficial user of the water.39 However, if the beneficial user was determined as the “owner” of the permit (the federal government) it was unresolved as to whether the State Engineer should grant the certificates to the federal land management agencies or grant the certificate to the

32 Id.
34 Hage, 82 Fed. Cl. at 210.
36 168 F.3d 1209, 1211(10th Cir. 1999).
37 UTAH CODE ANN. § 73-3-31(1)(g).
38 Letter from Harv Forsgren, Regional Forester, U.S. Forest Service, to Mr. Jerry Olds, State Engineer, Utah Division of Water Rights (May, 1, 2008) (on file with author).
39 Interview with Larry Lichhardt, Bureau of Land Management, Utah Office, in Salt Lake City, Utah (Oct, 10, 2008).
individual livestock owners.\textsuperscript{40} To resolve the conflict, the State Engineer grants certificates to both parties, resulting in joint ownership of the water right. This means that while both parties have an interest in the water, they also have power to deny any changes to the water that the other side proposes.\textsuperscript{41} Where legislative bodies attempt to address an issue but where their intent is not clear, agencies are generally afforded some discretion in ascertaining the legislature’s intent.\textsuperscript{42} HB 256 will make the practice of granting jointly held water rights legitimate.\textsuperscript{43}

Because of the confusion created by the phrase “livestock water use certificate,” HB 256 was intended to eliminate these certificates. On day forty-five of the Utah Senate Floor Debate, Senator Stowell stated “from henceforth there won’t be water use certificates, but there will be water rights based on beneficial use.”\textsuperscript{44} However, the spectre of “livestock water use certificates” may rise again because the term remains in HB 256, although it is not defined anywhere in the bill. Furthermore, when Representative Noel spoke to the bill in the Utah House Floor Debate, he inferred that the livestock water use certificates still exist. He stated:

This bill is a carryover from last year’s livestock watering bill where we allowed the actual permittees on federal land to acquire a certificate of use as the beneficial user. It’s appropriate and applicable to state law that the beneficial user is the one that actually should have the permit in their name. However, due to prior adjudications and court decrees, several federal land management agencies have the water rights in their names. So what we did is allowed the user to get a certificate of use; an application. We made it simpler this year and put that on the internet so that they can pick up that application whenever there is a change, or motion, or filing before the state engineer that would change that water right. The certificated user, i.e., the livestock owner can come in and state his claim and either his approval or protest to that change in use.\textsuperscript{45}

E. Scope of the Livestock Watering Rights Act

Under section (2) of the Utah Code, “[o]n or after May 5, 2008, only a beneficial user may acquire a livestock watering right.” The Act also states that:

\begin{itemize}
  \item \textsuperscript{40} Id.
  \item \textsuperscript{41} Id.
  \item \textsuperscript{42} See Chevron v. Natural Resource Defense Counsel, 467 U.S. 837, 863-64 (1982). (Setting forth the test that determines whether an agency’s interpretation of its own statutory mandate should be granted deference).
  \item \textsuperscript{43} H.R. 256, 2009 Leg., 58th Sess. (Utah 2009).
\end{itemize}
“The state engineer may not approve a change application for a livestock watering right without the consent of the beneficial user.”

It appears the Act applies only to new water rights and to requests for changes in existing water rights. However, the Act, even if only applied in these circumstances, raises important questions.

The majority of cases where livestock grazers on public lands wish to acquire a new water right concern diligence claims to water that have not yet been filed with the State Engineer. A diligence claim may be established if the individual using the water can trace water use through their predecessors in interest to an individual that began using the water prior to 1903. The majority of diligence cases are filed by federal agencies, often because of the high cost associated with researching the chain of title necessary to obtain the water right by these means. Also, whereas the U.S. government need only show proof of their own use of the water prior to 1903, livestock owners often have a longer chain of owners to track. Therefore, even if livestock owners have the means to research the chain of use, they may not be able to successfully do so.

Even when use dating to 1903 can be demonstrated, the information required for a diligence claim can be difficult to prove. The claim requires specific information such as the amount of water claimed, the nature and extent of use, and the date when the water was first used in order for the claim to be established. Because these are claims to water that has been in use prior to 1903, individuals having such information may be no longer available. This may be one reason so many livestock owners fail to file diligence claims to the water they use. Another may be that since a permit is required to graze livestock on public lands, less complicated means are available to exclude unauthorized stock watering.

One reason why the Act complicated these claims was because the possibility of joint ownership it created may have allowed the federal government to file diligence claims alongside the claims filed by livestock owners. But the claims were not restricted to new water rights. One question the Act raised is whether the government could veto a livestock owner’s application to change or transfer all or a portion of the water right used to graze water on public land. If the beneficial user is both the grazing permittee and the federal government, the latter would have tremendous leverage in influencing water rights transfers and changes.

HB 256 attempts to remedy this ambiguity by redefining “beneficial user” and by stating that “[o]n or after May 12, 2009, a livestock watering right may only be acquired by a public land agency jointly with a beneficial user.” However, there are two ways to read this clause. It can either be interpreted to mean that all water rights must be issued jointly, or as was likely intended by HB 256’s sponsors, that public agencies can never obtain sole possession of a livestock watering right. The first interpretation may be better in the sense that it avoids the potential equal

47 Interview with Larry Lichthardt, Bureau of Land Management, Utah Office, in Salt Lake City, Utah (Oct, 10, 2008).
protection challenge. However, this article will focus on the interpretation that under the new law, public agencies can never obtain sole possession of a livestock watering right.

III. ANALYSIS

A. The Definition of Beneficial User

The “beneficial user” normally refers to the person who puts water to a beneficial use, not the land owner. Therefore, the beneficial user is not necessarily the legal owner. The Act causes confusion because it automatically makes the lease owner the “beneficial user,” whether or not the lease owner grazes livestock.

Utah recognizes livestock watering as a beneficial use. The Act defines “beneficial user” as “the person that owns the grazing permit.” The legislative record somewhat clarifies its intended definition. Mike Noel, one of the Act’s sponsors, made a motion to amend the Act on Feb, 27, 2008, day 38 of the 2008 General Legislative Session, and stated:

This bill resulted from a Supreme Court decision in the Idaho Supreme Court that dealt with livestock watering rights, specifically on public land, which provided that only a beneficial user may acquire livestock watering rights on public lands. What this bill does is essentially gives the state engineer the opportunity to provide in certain circumstances a permit; a certificate of water use or also have the permittee be able to hold these water rights.

In speaking about the bill, Representative Noel mentioned the permittee as holding the water rights. Although he did not clarify who the beneficial user was, another one of the Act’s sponsors, Senator Dennis Stowell, clarified the definition on day 45 of the 2008 General Legislative Session. Upon making a motion for the bill’s passage, he stated:

This bill is patterned after what happened in Idaho. In Idaho they passed a similar bill that went to the Supreme Court and was upheld and we want to do the same thing. What this bill does is a person who owns a [grazing] permit and there’s a water right associated with it can apply to the Utah State Engineer and receive a livestock watering right. . . It has to have a forage right appurtenant to a livestock watering right. If he does, the beneficial user may file a request with the state engineer for a livestock water use certificate. The state engineer shall grant a livestock water use certificate if the beneficial user demonstrates the beneficial

51 Id.
user owns a grazing permit for the allotment to which the livestock watering right is appurtenant and pays the fee. If he ceases to be the beneficial user, the livestock watering right acquired will go to the department of Agriculture and Food.53

In this description of the bill, Senator Stowell stated that the beneficial user was a “person who owns a grazing permit.”54 It seems clear that the intent of “beneficial user” refers to private livestock owners who have a grazing permit. The amended definition in HB 256 confirms this.55

Senator Stowell states that this ruling was based on an Idaho statute. However, Representative Noel states that the ruling is from Idaho’s Supreme Court and provides that only a beneficial user may acquire livestock watering rights on public lands. There is a discrepancy in the legislative record because Representative Noel referred to case law, while Senator Stowell referred to a statute.56 This discrepancy most likely reflects a simple misstatement on Senator Stowell’s part, as examination of Idaho law reveals no such legislation. The statute in Idaho most closely resembling the Utah Act is IDAHO CODE ANN. § 42-113 (2008) which deals with in-stream and other water use for livestock. The statute speaks of the department of water rights’ responsibility to “impose such reasonable conditions as are necessary to protect prior downstream water rights for in-stream livestock use, and . . . shall recognize and protect water rights for in-stream livestock use, according to priority, as they do water rights for other purposes.”57

The Idaho statute makes no reference to the beneficial user of the water as being the owner of a grazing permit or that the beneficial user is the only person capable of acquiring a water right. The closest the Idaho statute gets to Livestock Watering Rights Act is section 4, where it states “[n]o change in use of any water right used for watering livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.”58 While this directly correlates to with the Utah Act’s discussion of change applications, the Idaho statute does not regulate acquisition of water rights.

Regarding beneficial use, § 42-114 also states that “[a]ny permit issued for the watering of domestic livestock shall be issued to the person or association of persons making application therefor and the watering of domestic livestock by the person or association of persons to whom the permit was issued shall be deemed a

54 Id.
56 E-mail from Emily Brown, Associate General Counsel, Office of Legislative Research and General Counsel, to Erik Brinkerhoff (Oct. 15, 2008, 14:29 MST). Emily Brown, one of the Act’s writers, indicated that the Act was based on Idaho case law, not statute. She stated that the Act was based on Joyce Livestock Co. v. United States, 156 P.3d 502 (Idaho 2007).
58 IDAHO CODE ANN. § 42-113(4).
beneficial use of the water." This means that the livestock water permit shall be
issued to the person using the water and that livestock watering is recognized as a
beneficial use in Idaho. It mentions nothing about the beneficial user as the holder
of a grazing permit; an element which was unique to the Utah Act.

B. The Bill’s Intent to Limit the Federal Government’s Acquisition of Livestock
Water Rights

The Livestock Watering Rights Act’s definition of beneficial user is not its
only flaw, and may not be its worst. The Act sought to limit acquisition of new
water rights to private livestock owners, and thereby exclude the federal
government from doing so. HB 256 reiterates this intent by stating that a livestock
watering right may only be acquired by a public land agency jointly with a
beneficial user. However, there is no similar restriction for individuals seeking to
obtain a livestock watering right. The amended legislation, HB 256, also grants
the beneficial user (now defined as the holders of the grazing permits) the ability to
protect themselves through the filing of nonuse applications. However, no such
protection is available to public land agencies which, even if joint holders of
livestock watering rights, depend on the beneficial user to file for non-use. Absent
the ability to file for non-use, public land managers may not be able to protect
themselves from statutory forfeiture for non-use. Therefore, although HB 256
may have legitimized the process that was adopted by the State Engineer’s office
in response to the Act, it may still not be appropriate for the state to limit the U.S.
government from acquiring water rights in this manner. The unequal treatment of
federal land management agencies may raise a potential equal protection
challenge.

A case from Nevada illustrates the questions raised when a state attempts to
treat the federal government differently than individuals with respect to water
rights. In State v. Morros, the BLM applied for and received a water right from
the Nevada State Engineer under state law for fishery and public recreation
purposes for Blue Lake. The state argued that the federal government did not
own wildlife or livestock and therefore could not put the water to a beneficial use.
The state also argued that it was against the public interest to allow a federal
agency to acquire a water right to the water of Blue Lake.

The Supreme Court of Nevada, held that “[t]he proposed new water sources
are dedicated to providing water to livestock and wildlife. These are beneficial
uses of water. Nevada law and longstanding custom recognize stock watering as a

60 H.R. 256, 2009 Leg., 58th Sess. (Utah 2009).
61 Id.
62 Id.
64 Id. at 265.
65 Id. at 265-66.
The State Supreme Court found in favor of the federal government, in part because of the role the federal government plays in improving the federal grazing.

[T]he United States acts in its proprietary capacity as a landowner when federal agencies seek to appropriate water under state law for livestock and wildlife watering. Although the United States does not own the livestock and wildlife, it owns the land on which the water is to be put to beneficial use. In addition, the United States benefits as a landowner from the development of new water sources on federal land.

The court also stated that the United States is recognized as a “person” under appropriation laws of Nevada. The court declared that:

The district court correctly stated that the United States ‘is to be treated as a person…it is not to be feared, given preferential treatment and certainly not discriminated against.’ . . . [A]pplications by United States agencies to appropriate water for application to beneficial use pursuant to their land management functions must be treated on an equal basis with applications by private landowners. Although the United States owns no livestock and does not “own” wildlife, it owns land and may appropriate the water for application to beneficial uses on its land.

A few years after Morros, in 1995, Nevada passed a statute (very similar to Utah’s Act) providing “that permits to appropriate water for livestock purposes on public lands can only be issued to those ‘legally entitled to place livestock on public lands.’” The Attorney General of Nevada advised the state engineer that this meant the state could no longer grant permits to the BLM, and nine pending BLM applications were denied. When the United States challenged this, the Supreme Court reversed, finding that the statute allowed for federal agencies to issue grazing permits to themselves in order to meet the statutory requirement and that this would involve an unnecessary step. Therefore, in order to be consistent with the court’s holding, the statute was amended to read that the applicant must have a “legal or proprietary interest in the livestock.”

The U.S. government acts in a proprietary capacity in the management of federal grazing lands in Utah. Because they own the land, they benefit from the improvement of the water sources found on the land. Federal agencies have an

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66 Id.
67 Id. at 268-29.
68 Id.
69 Id.
70 NEV. REV. STAT. § 533.503 (2008).
72 Id.
73 Id. at 58.
extensive history of being involved with water improvement projects dealing with water rights owned by private livestock owners. This relationship has helped many livestock owners complete improvement projects they could not have done otherwise.\(^74\)

As with private livestock owners, the permit applications the federal government submits can either be approved or rejected by the state engineer. It is the duty of the State Engineer to determine under the statutory language whether or not to approve these permits. Although water may be unavailable after the federal government gains control over its use, this is the nature of the appropriation system and the U.S. cannot be discriminated against for this reason. Like Nevada, Utah has historically treated the U.S. as it would other appropriators, and the state, as well as the private livestock owners, have gained from this arrangement.

Rather than correct the potential problem inherent in the Act, HB 256 more clearly outlines its intent to favor the cattle grazers over the public land management agencies. Therefore, rather than advancing the precedent of treating public land management agencies as persons interested in obtaining a water right, HB 256 marks a different direction; one where acquisition of water rights is more difficult for the federal government.

C. A Forage Right Appurtenant to the Acquired Water Right

The Livestock Watering Rights Act states: “A forage right is appurtenant to a livestock watering right.”\(^75\) There is no historical basis for granting a forage right appurtenant to a water right.\(^76\) Fortunately, HB 256 eliminates this provision of the Act.\(^77\) However, the legal implications of granting a forage right appurtenant to a water right warrant discussion.

By making the forage right appurtenant to the water right involved, the Act attempts to create a better position for livestock owners who wanted to file a takings claim against the U.S. It does so by stating that “if a person ceases to be a beneficial user, the livestock watering right acquired under subsection (2) or the livestock water use certificate granted under subsection (5) transfers to the Department of Agriculture and Food.”\(^78\) Therefore, under the Act, the federal government may not have been able to revoke a grazing permit without a legitimate concern of a takings claim being raised, because revocation of a grazing right would cause the permittee to cease being a beneficial user, and the water right would transfer to the Department of Agriculture and Food. Ironically, in attempting to protect ranchers, the Act creates potential liability for the state, virtually guaranteeing that the state will be joined in any lawsuit involving title to

\(^{74}\) Interview with Larry Lichthardt, Bureau of Land Management, Utah Office, in Salt Lake City, Utah (Oct, 10, 2008).
\(^{75}\) UTAH CODE ANN. § 73-3-31(4)(b)(2008).
\(^{77}\) H.R. 256, 2009 Leg., 58th Sess. (Utah 2009).
\(^{78}\) UTAH CODE ANN. § 73-3-31(6)(a)(2008).
One of the cases that informed the Act is *Hage v. United States* where the court determined that:

Either plaintiffs’ access to and use of their vested water rights is totally dependent upon the issuance of a federal grazing permit, in which case there has not been a taking; or plaintiffs’ right to use and access the water is a true vested right, not a mere illusory one, and therefore not totally dependent on the issuance of a federal grazing permit. If the latter is the case and the United States denies plaintiffs access to and use of their water, then a taking has occurred.

This language is key because the taking determination hinges on the question of whether access to the water rights is tied to the grazing permit, which is revocable, or is an independent right.

Another problem arose due to the fact that *Hage* was used as a guideline for the 50 foot forage right. The state, in granting a water right, cannot grant a right to use the federal land for grazing. The state simply cannot convey rights it does not possess. The court in *Hage* determined that the plaintiffs did have a right to access the water, but made it very clear that the plaintiffs did “not have property rights in the surface estate or in the grazing permits.” The court stated that “[t]he most, they may have a right to go on to the land to access the water in which they have a vested right.”

There is no language that refers to a “forage right.” The court cited *Gardner v. Stager* to emphasize a recent ruling in Nevada that reiterated “grazing rights are not appurtenant to such water rights.”

The Idaho case from which the Act was partially designed is *Joyce Livestock Company v. United States.* *Joyce Livestock* was a partnership that owned land in Owyhee County, Idaho and applied for stock watering rights on the adjacent public land. One of the issues on appeal was whether the water rights obtained by livestock owners were “appurtenant to their patented properties.” The Supreme Court of Idaho quoted the district court when it said: “It can reasonably be concluded that both the rangeland as well as the water right benefitted the livestock owners patented property.” The court then cites the argument of the U.S., which was that “an instream stock water right appropriated on a public grazing allotment has no physical relationship to base property and cannot be an appurtenance to it in

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80 *Hage* v. United States, 42 Fed.Cl. 249, 251 (1998). (Noting the issues to be addressed by the parties on remand).
81 *Hage*, 51 Fed.Cl. at 592.
82 Id. at 591.
85 Id. at 505.
86 Id. at 513.
87 Id.
any recognized sense." 88 The Idaho Supreme Court countered this argument by saying “We have not held, however, that appurtenance is dependant upon a ‘physical relationship’ as contended by the United States.” 89 The court explained a case between two private parties where the issue was whether a water access easement was still valid after the land changed hands even though the easement was not expressly made within the property deed. 90 The court reasoned that by analogy, the same laws that apply to private easements should apply to federal land. 91

Courts encounter this problem in determining how to grant the cattle owners access to the water without allowing the cattle to eat the grass surrounding the water source. A court in New Mexico addressed this issue. In Walker v. United States, the plaintiffs claimed that cancellation of their grazing permit resulted in the loss of the economically viable use of their ranch. 92 The Walker’s owned a forty-acre ranch in southwestern New Mexico which was the base property for two grazing allotments on the Gila National Forest. 93 After receiving reports of sick and dying cattle, the Forest Service conducted a series of inspection and determined that drought and overgrazing were causing damage to the allotments and that the cattle had to be removed incrementally. 94 The Walkers questioned the Forest Service’s authority to remove the cattle and failed to remove them from the allotments. 95 In response, the Forest Service cancelled their permits, although the Walkers continued to graze their cattle for some time. 96 The Walkers eventually removed the cattle but filed a claim in the United States Court of Federal Claims, arguing that revoking the permits “resulted in the loss of ‘water, forage, and

88 Id.
89 Id.
91 Joyce Livestock Co., 156 P.3d at 513-14. The court stated that by understanding the terms “appurtenant” and “in gross,” the water access easement becomes clear. The Court Stated:

The definitions of “appurtenant” and “in gross” further make it clear that the easement is appurtenant. The primary distinction between an easement in gross and an easement appurtenant is that in the latter there is, and in the former there is not, a dominant estate to which the easement is attached. An easement in gross is merely a personal interest in the land of another, whereas an easement appurtenant is an interest which is annexed to the possession of the dominant tenement and passes with it. An appurtenant easement must bear some relation to the use of the dominant estate and is incapable of existence separate from it; any attempted severance from the dominant estate must fail. The easement in the Butler Springs area is a beneficial and useful adjunct of the cattle ranch, and it would be of little use apart from the operations of the ranch. Moreover, in case of doubt, the weight of authority holds that the easement should be presumed appurtenant.

Joyce Livestock Co., 156 P.3d at 514.
93 Id. at 884.
94 Id.
95 Id.
96 Id. at 885.
grazing’ rights based on New Mexico state law, depriving them of all economically viable use of the ranch.”97 The Supreme Court of New Mexico noted that they were not determining whether the Walkers actually had a valid water right, but rather focused on whether the State of New Mexico recognizes a “limited forage right for livestock implicit in a vested water right historically used for stock watering[.]”98

In determining this question, the court looked to the New Mexico statutes concerning access to water easements that occur on private land and applied the same logic to public lands. The court found that:

[A] right-of-way over private property for the use of a water right is limited to “storage or conveyance” of the water. If an easement over private land is so limited under New Mexico law, an easement over public lands should not be interpreted more broadly. Thus, while the Walkers might, at least in theory, have the right to move their water to their cattle, it is outside the scope of any statutory right-of-way to move cattle to the water, and incidentally have them graze along the way.99

While the court agreed that the doctrine of prior appropriation often requires water to be transported from one place to another and that a physical connection to the land is not necessary in order for the right to exist, it found that “the laws of New Mexico do not support the Walker’s claim to a forage right on federal lands is implicit in their right-of-way for the maintenance and enjoyment of a vested water right.”100

Another New Mexico case, Diamond Bar Cattle Company v. United States, firmly establishes that forage rights, controlled by the federal government, cannot be included as appurtenant to water rights that are governed by the state.101 Similar to the situation in Walker, Diamond Bar Cattle Company asserted a claim that the U.S. Forest Service could not interfere with their water rights. The court held otherwise, stating, “[a]s early as 1915, the New Mexico Supreme Court rejected the proposition that what is now § 19-3-13 created, or was intended to create, a property right in land in the public domain superior or equal to the federal government’s right in such land.”102 The court cited an Idaho case, Omaechevarria v. Idaho,103 to make its conclusion clear. In Omaechevarria, the Idaho court said “Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used.”104 The New Mexico court went on to say:

97 Id.
98 Id.
99 Id. at 896.
100 Id.
101 Diamond Bar Cattle Co. v. United States, 168 F.3d 1209, 1210 (10th Cir. 1999).
102 Id. at 1213.
104 Id. at 352.
This principle categorically refutes plaintiffs’ assertions that their predecessors obtained a vested water right that included a right to graze public lands. Any grazing of cattle on public lands by plaintiffs’ predecessors was permitted by an implied license, which is merely a ‘personal privilege to do some particular act or series of acts on land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor.’105

Therefore, not only does the Act oppose federal law concerning grazing rights, it opposes the established water law in the states of New Mexico, Idaho, and Nevada which all show that a forage right, which is controlled by the federal government, cannot be appurtenant to a water right.

D. The Fallout after the Act’s Passage

Some individuals within public land management agencies perceived the Act as a hostile measure designed to complicate and delay changes to water rights on public grazing land. Other individuals within the agencies viewed it as a well meaning, but poorly written Act that complicated water issues where there were other more direct routes that would have given both sides what they wanted.

Both the U.S. Forest Service and Bureau of Land Management in Utah and in Nevada conveyed their disapproval of the Act and similar actions with a series of letters to the Division of Water Rights which stated that the Act potentially created private ownership of federal land and that the federal agencies could not invest in rangeland improvement projects if this was the case.106

Unfortunately, livestock owners often depend on assistance from the federal government in completing such rangeland improvement projects.107 Therefore, in the wake of the Act, livestock owners faced the unintended consequence of forfeiting the help they traditionally received from the federal government in rangeland improvement projects.108

E. A More Direct Solution to the Problem

Before the Act was passed, one of the major concerns of livestock owners was that the federal government would change the nature of use of the water they use for their livestock. Therefore, instead of requiring new water use certificates that

105 Diamond Bar Cattle Co., 168 F.3d 1209, at 1212.
106 Letter from Harv Forsgren, Regional Forester, U.S. Forest Service, to Mr. Jerry Olds, State Engineer, Utah Division of Water Rights (May 1, 2008) (on file with author).
108 Letter from Harv Forsgren, Regional Forester, U.S. Forest Service, to Mr. John Solum, Program Specialist, Department of Natural Resources, Division of Water Rights (September 25, 2008) (on file with author).
hinge on the ambiguous definition of “beneficial user,” it would have been easier to design a statute that guaranteed livestock grazers a role in any change to water rights upon which they depend.

Idaho has already done this with § 42-113(4) which reads: “No change in use of any water right used for watering livestock, whether proposed under this section or section 42-222, Idaho Code, shall be made or allowed without the consent of the permittee in the federal grazing allotment, if any, in which the water right is used for the watering of livestock.”

Utah also has another statute, UTAH CODE ANN. § 73-3-3, that governs change applications to water. This statute could easily be amended to contain a section similar to the one in Idaho. It provides that a person who is entitled to the water may change the purpose of use of the water if he obtains the required approval from the state engineer. UTAH CODE ANN. § 73-3-3 could be amended so that federal agencies cannot change the purpose of use of livestock watering rights to another purpose without the approval of the livestock owner who uses the same water. This could be a viable alternative if the Act, even in its amended form, proves to be too problematic.

IV. CONCLUSION

It is unclear whether the Act was a well meaning, but poorly constructed document or a carefully crafted, but overreaching attempt to secure more rights for livestock owners than would have been possible by amending existing legislation. Fortunately, HB 256 will likely solve many of the legal problems caused by the Act. Perhaps more importantly, the amended legislation has led to greater cooperation between the public land management agencies and the supporters of the original Act. HB 256 may have prevented many lawsuits the Act would have left in its wake. It has perhaps prevented further isolation and estrangement between Utah’s cattle grazing community and public land management agencies. However, HB 256 still has some substantial legal questions that have yet to be worked out. All parties involved need to keep an eye on how the Livestock Watering Act of 2008 will play out so that the raging torrent of litigation HB 256 was intended to prevent can be avoided in the future.