



WATER DEVELOPMENT COMMISSION

Utah Farm Bureau Federation
Randy N. Parker, CEO
July 12, 2016

ISSUES

- Waters of the United States (WOTUS)
- Water Rights Protection Act (WRPA)
- Utah Livestock Water Rights and State Sovereignty

WOTUS

Legislative Remedy?



Army Corps of Engineers

- Memo to EPA - April 24, 2015
- the rule is “inconsistent with SWANCA and Rapanos. This assertion of Clean Water Act jurisdiction over millions of acres of isolated waters...undermines the legal and scientific credibility of the rule.”



Army Corps of Engineers

- Memo to EPA – May 15, 2015

“these documents contain **numerous inappropriate assumptions with no connection to the data** provided, misapplied data, analytical deficiencies and logical inconsistencies.”

Congressional Bills 114th Congress

S.J. Res. 22 Enrolled Bill (ENR)

S.J.Res.22

One Hundred Fourteenth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Monday,
the fourth day of January, two thousand and sixteen

Joint Resolution

Providing for congressional disapproval under chapter 8 of title 5,
United States Code, of the rule submitted by the Corps of Engineers and
the Environmental Protection Agency relating to the **definition of**
``waters of the United States'' under the Federal Water Pollution Control Act.

Resolved by the Senate and House of Representatives of the United
States of America in Congress assembled, That Congress disapproves the
rule submitted by the Corps of Engineers and the Environmental
Protection Agency relating to ``Clean Water Rule: Definition of `Waters
of the United States''' (80 Fed. Reg. 37054; June 29, 2015),

and such rule shall have no force or effect.

Speaker of the House of Representatives.

Vice President of the United States

and President of the Senate

CONGRESSIONAL VOTES



Senate: 53 – 44

House: 253 - 166

PRESIDENT'S VETO MESSAGE

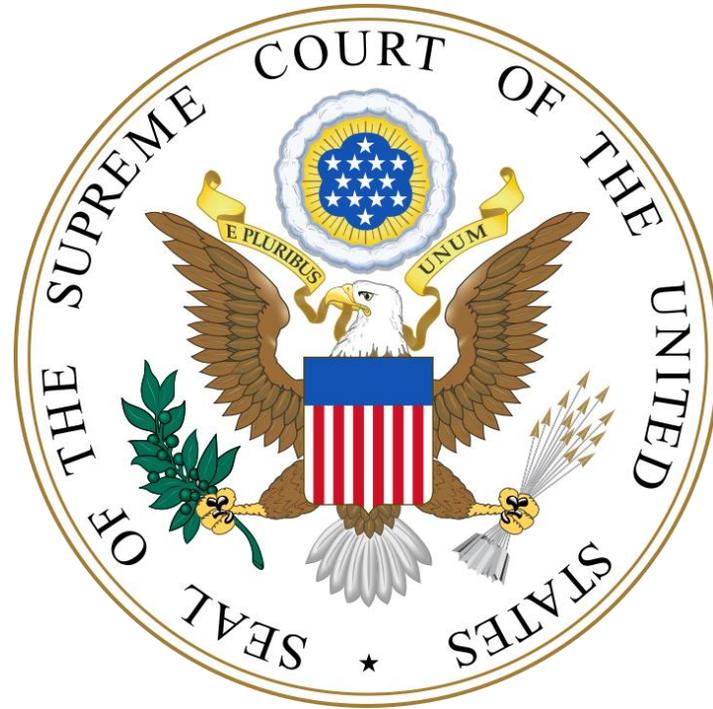
JANUARY 20, 2016



I am returning herewith without my approval S.J. Res. 22, a resolution that would nullify a rule issued by the Environmental Protection Agency and the Department of the Army to clarify the jurisdictional boundaries of the Clean Water Act. **The rule, which is a product of extensive public involvement and years of work**, is critical to our efforts to protect the Nation's waters and keep them clean; is responsive to calls for rulemaking from the Congress, industry, and community stakeholders; and is consistent with decisions of the United States Supreme Court.

We must protect the waters that are vital for the health of our communities and the success of our businesses, agriculture, and energy development. As I have noted before, too many of our waters have been left vulnerable. Pollution from upstream sources ends up in the rivers, lakes, reservoirs, and coastal waters near which most Americans live and on which they depend for their drinking water, recreation, and economic development. Clarifying the scope of the Clean Water Act helps to protect these resources and safeguard public health. Because this resolution seeks to block the progress represented by this rule and deny businesses and communities the **regulatory certainty and clarity** needed to invest in projects that rely on clean water, I cannot support it. I am therefore vetoing this resolution.

LEGAL REMEDY?



THE COURTS



- The **6th Circuit Court of Appeals** decided it has jurisdiction to hear the challenge to the WOTUS rule.
- Farm Bureau and others are considering whether to ask the U.S. Supreme Court to review the jurisdiction issue, but no decision has been made yet.
- **EPA has filed a motion to dismiss the Farm Bureau challenge** in District Court for the Southern District of Texas (5th Circuit)— because the case is being heard in the 6th Circuit.
- We oppose dismissal.
- **Farm Bureau wants the case to begin in district court**, not court of appeals.
- Both the 10th and 11th Circuits are also considering whether courts of appeals, or district courts, should first hear the case.

UTAH



On June 30, nine states including Utah, filed a legal challenge in the U.S. District Court for the Southern District of Georgia, (**11th Circuit Court of Appeals**) alleging the “Waters of the United States” or WOTUS Rule exceeds the Congress’s Commerce Clause authority and violates the Tenth Amendment of the United States Constitution.

While We're Waiting for the Courts

2017 Appropriations Bills

U.S. SENATE BILL CONTAINS RIDER BLOCKING WOTUS



Committee of Interior-Environment Appropriations / Mr. Lee

The fiscal 2017 Interior-Environment spending bill approved by the Senate Appropriations Committee contains a **rider blocking the “Water of the U.S.” (WOTUS) rule**, also referred to as the Clean Water Act rule.

The WOTUS Provision would **prevent the EPA from enforcing the rule in the event the court stays are lifted.**

US House of Representatives

Committee on Appropriations / Mr. Stewart



Mr. CALVERT, from the Committee on Appropriations, reported the following bill; which was committed to the Committee of the Whole House on the State of the Union and ordered to be printed A BILL Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2017, and for other purposes.

SEC. 427.

- **None of the funds made available in this Act or any other Act** for any fiscal year may be used to develop, adopt, implement, administer, or enforce any change to the regulations and guidance in effect on October 1, 2012, pertaining to the definition of waters under the jurisdiction of the Federal Water Pollution Control Date Nov 24 2008 Act (33 U.S.C. 1251, et seq.), including the provisions of the rules dated November 13, 1986, and August 25, 1993, relating to said jurisdiction, and the guidance documents dated January 15, 2003, and December 2, 2008, relating to said jurisdiction.

WATER RIGHTS PROTECTION ACT

114TH CONGRESS

S. 982 Barrasso with Hatch (Scheduled for hearing – Western Drought Relief Act of 2016)

H.R. 1830 Tipton with Chaffetz, Love and Stewart

- To **prohibit the conditioning** of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretaries of the Interior and Agriculture,
- Require the Secretaries of the Interior and Agriculture to develop water planning instruments **consistent with State law**.

PROTECTING UTAH'S SOVEREIGN WATERS



Utah Livestock Water Rights Act (2008)

- Original Legislation Provided:



- - “The *beneficial user of a livestock watering right is the owner of the livestock grazing permit* for the allotment to which the livestock watering right is appurtenant.”
- - “A livestock water *right is appurtenant to the allotment* on which the livestock is watered.”

Utah Livestock Water Rights Act Amended (2009)

*“The Forest Service claimed ownership of the livestock water rights **“as the rightful owner of the livestock grazing permit.”**”*

*In response, in 2009 the Utah Legislature provided a **“Certificate of Joint Ownership.”**”*

Utah Livestock Water Rights Act Amended (2014)

- Deletes “Certificate of Joint Ownership.”
- Defines a beneficial user meaning a livestock permittee and providing 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.
- Requires 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.

Forest Service Rulemaking – June 2004



- “ any right to divert water from permitted NFS land where the use of water is on the same permitted NFS land shall be applied for and held in the name of the United States and the holder (hereinafter called “joint water rights”)
- In the event of revocation of this permit, the United States shall succeed to sole ownership of such joint water rights.”

FOREST SERVICE MANUAL

- **Section 2541.32**
- “Claim possessory interest in water rights in the name of the United States for water uses on National Forest System lands as follows:
 - “Claim water rights for water used directly by the Forest Service and by the general public on the National Forest System.
 - “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.”



BLM UTAH response to Utah Senate Bill 274

Livestock Water Rights

House Bill 256 (Noel)– enacted in 2009

- New livestock water rights required a joint application between land management agency and grazing permittee
- Defined “beneficial user” as only the grazing permittee
- Livestock water rights are appurtenant to grazing allotments
- “Forage rights” eliminated



Senate Bill 274 (Dayton)– enacted in 2014

- New livestock water rights applications may be filed only by grazing permittees
- Specifically **excludes federal agencies as “beneficial user”**
- Unused livestock water rights may be held in trust by State Engineer
- Federal agencies may not condition grazing permits with water rights conditions – e.g. transfer of water rights or file only in name of fed agency



Effects of senate bill 274



- Took effect May 13, 2014
- **No affect** on existing BLM rights, except for changes
- **No affect** on BLM rights for other uses such as fire, wild horses, recreation, wildlife.
- The permittee consent required for changes to BLM water rights **doesn't** create a permittee interest in right.

HB 256 Applies to only a very small portion of water rights

- SB 274 does not apply to diligence claims, which confirm historic pre-statutory waters (pre-1903 surface water rights and pre-1935 groundwater rights) **United States has filed 16,000 diligence claims!**
- HB 274 does not apply to water user claims in adjudications, if claim is based upon use established prior to May 12, 2009



BLM must have a water right before funding and authorizing Water developments



1. BLM Utah **will not provide funding** for new developments that are not supported by a BLM water right.
2. BLM Utah **will not authorize Cooperative Range Improvement Projects** that are not supported by a BLM water right.

Options for obtaining a water right

Review of BLM Internal Strategy

1. Change application on BLM right in another location
2. Change application on BLM right that doesn't include livestock use
3. Acquire a water right in a land tenure adjustment, then change to livestock use
4. File an application for another beneficial use of the development: wildlife, wild horses, recreation, etc.



IF A CHANGE APPLICATION ISN'T POSSIBLE, WHAT ARE MY Other water right options?

1. **Permittee can elect to deed** part of private right to BLM.
2. If permittee wants to entirely fund a development **where water will be primarily for benefit of private lands**, then BLM **may** issue a right-of-way grant.
3. Field office may seek written exception from USO, if development is necessary for protection of critical resources, such sensitive species or cultural resources.



Other actions necessary to implement instruction memorandum 2015-19



- Regular and careful **review** of applications filed by third parties.
 - Each FO should have designated person review notices on a weekly basis
- Protest **any** individual permittee applications for livestock rights on public lands
 - Permittees may not be aware of new law or new BLM policy
 - Permittees may make incorrect land ownership statements

Why do we protest private applications?



- BLM seeks to hold water rights for grazing allotments into perpetuity. If water rights are in private hands, BLM can't guarantee water availability for future permittees.
- Privately held water rights create an administrative headache if permit is transferred in the future.
- Permittees may attempt to use privately owned water rights to get leverage in allotment management decisions.

State Engineer Decisions Under the Livestock Water Rights Act

- **Examples of Recent Livestock Water Rights Filings:**
 - Matt Wood, Beaver County
 - Commissioner Tammy Pearson, Beaver County

THANK YOU

