

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.

Legislative Review Note
as of 2-22-13 8:53 AM

Office of Legislative Research and General Counsel