

1                   **JOINT RESOLUTION ON WATER RIGHTS ON GRAZING**

2                                   **LANDS**

3   2014 GENERAL SESSION

4   STATE OF UTAH

5                                   **Chief Sponsor: Kevin T. Van Tassell**

6                                   House Sponsor: John G. Mathis

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8   **LONG TITLE**

9   **General Description:**

10           This joint resolution of the Legislature declares sovereign the rights of the state of Utah  
11 and Utah livestock producers to put the state's livestock water rights located on public  
12 lands to beneficial use.

13   **Highlighted Provisions:**

14           This resolution:

- 15           ▶ declares that Utah has a sovereign right to put the state's livestock water rights  
16 located on public lands to beneficial use through development and maintenance;
- 17           ▶ recognizes the right of a livestock owner to access the state's water to put it to  
18 beneficial use, including crossing public land, grazing the livestock as necessary  
19 while livestock drink, and ultimately developing and maintaining watering facilities  
20 on necessary appurtenant public lands to put the state's water to beneficial use; and
- 21           ▶ expresses support for H.R. 3189, the Water Rights Protection Act, to protect state  
22 sovereignty and the water rights of livestock producers.

23   **Special Clauses:**

24           None

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

- 27           WHEREAS, Utah is the second most arid state in the nation;
- 28           WHEREAS, water is essential to the life, health, safety, and welfare of Utah's citizens;
- 29           WHEREAS, Utah has the right to exercise the state's jurisdiction over water resources

30 within the state;

31 WHEREAS, the state of Utah has long established water rights based on the principle  
32 of prior appropriation or "first in time, first in right";

33 WHEREAS, Utah's water users can and have demonstrated the ability to put the water  
34 to beneficial use;

35 WHEREAS, "beneficial use," as defined by Utah law, includes the watering of  
36 livestock on federal lands;

37 WHEREAS, Congress has spoken clearly and often on state water sovereignty,  
38 including:

39 1. The Act of July 26, 1866, subsequently known as the Mining Act or Ditch Act of  
40 1866, which recognized common-law practices of the time, declaring, "Whenever, by priority  
41 or possession, rights to the use of water for mining, agriculture, manufacturing, or other  
42 purposes, have vested and accrued, the same are recognized and acknowledged by the local  
43 customs, laws and decisions of the courts . . ."

44 2. The Desert Land Act of 1877, which recognized, "All surplus water over and above  
45 such actual appropriation and use . . . shall remain and be held free for appropriation and use of  
46 the public for irrigation, mining and manufacturing . . ."

47 3. The Taylor Grazing Act of 1934, which stated, "nothing in this Act shall be  
48 construed or administered in a way to diminish or impair any right to the possession and use of  
49 water for mining, agriculture, manufacturing and other purposes . . ."

50 4. The McCarran Amendment of 1952, which "waives the sovereign immunity of the  
51 United States for adjudications for all rights to use water"

52 5. The 1976 Federal Land Policy and Management Act (FLPMA), which states, "All  
53 actions by the Secretary concerned under this act shall be subject to valid existing rights";

54 WHEREAS, to further underscore congressional intent, the United States Senate and  
55 the United States House of Representatives are considering action through H.R. 3189, the  
56 Water Rights Protection Act, to prohibit the United States Forest Service (USFS) and the  
57 Bureau of Land Management (BLM) from "conditioning any permit, lease or other land use

58 agreement on the transfer, relinquishment or other impairment of any water right";

59 WHEREAS, this legislation would protect livestock water rights and the sovereign  
60 water rights of the states;

61 WHEREAS, federal land management agencies have created ownership uncertainty for  
62 ranchers with water rights on federal lands through over-filing and diligence claims that  
63 challenge ownership on privately held livestock water rights;

64 WHEREAS, federal land management agencies have sought ranchers' approval of  
65 "change of use" applications and agreement to "joint ownership" of livestock water as a  
66 condition of access to their federal grazing allotments;

67 WHEREAS, these federal land management agencies have implemented practices  
68 aimed at reducing or eliminating livestock grazing on federal grazing allotments that have  
69 resulted in lost livestock water rights and de facto federal water claims;

70 WHEREAS, in blatant disregard for the long-established state jurisdiction over the  
71 state's water resources, the federal government, principally by and through the USFS, has  
72 engaged in a persistent pattern and course of conduct to exert control and influence over water  
73 resources within Utah and across the West;

74 WHEREAS, the apparent intention of the federal government is to expand its water  
75 holdings in the western states, including in Utah, in accordance with 16 U.S.C. Sec. 526, which  
76 states, "There are authorized to be appropriated for expenditure by the Forest Service such  
77 sums as may be necessary for the investigation and establishment of water rights, including the  
78 purchase thereof or of lands or interests in lands or rights-of-way for use and protection of  
79 water rights necessary or beneficial in connection with the administration and public use of the  
80 national forests";

81 WHEREAS, federal land management agencies, including USFS and BLM, are  
82 negatively impacting the water resources of Utah and other western states by unilaterally  
83 reducing the number of livestock grazing permits;

84 WHEREAS, this reduction in livestock grazing permits is part of a strategy of resource  
85 control, including control of the state's water resources on federal lands;

86 WHEREAS, federal land management agencies have precluded some of Utah's water  
87 right holders from putting the state's waters to beneficial use by denying access, reducing  
88 livestock rights, and denying holders of water rights from developing or maintaining livestock  
89 water rights associated with grazing permits appurtenant to federal lands;

90 WHEREAS, a USFS Intermountain Region Guidance Document states that the federal  
91 government will not invest in livestock water improvements, "nor," according to 36 C.F.R.  
92 222.9(b)92, "will the agency authorize water improvements to be constructed or reconstructed  
93 with private funds where the rights are held solely by the livestock owner";

94 WHEREAS, in the spring of 2012, agents of the USFS attempted to coerce Tooele  
95 County livestock producers to sign "change" applications or "certificates of joint ownership" on  
96 privately held livestock water rights or face the possibility of not being allowed to "turn out"  
97 cattle to graze their forage rights associated with their USFS grazing allotment;

98 WHEREAS, a USFS Intermountain Region Guidance Document declares "until the  
99 court issues a decree accepting these claims, it is not known whether these claims will be  
100 recognized as water rights";

101 WHEREAS, this document reflects an intention to undermine state water sovereignty;

102 WHEREAS, when USFS allows improvements, including developing, redeveloping,  
103 and maintaining a livestock rancher's water rights, all the improvements are claimed as the  
104 property of the United States, even when it is the livestock owner's investment that enables the  
105 water to be put to beneficial use, as prescribed by state law, and the livestock owner covers all  
106 costs;

107 WHEREAS, court records for the United States District Court for the District of  
108 Nevada indicate that USFS and BLM have actively sought to reduce or eliminate livestock  
109 grazing and watering rights from western public lands, often resulting in protracted litigation;

110 WHEREAS, the litigation includes the 2012 conviction of two public servants  
111 employed by the USFS and BLM for contempt of court and witness intimidation, and the  
112 determination that the regional forester in charge of Utah lied to the court regarding the  
113 agency's antigrazing bias intended to reduce or eliminate livestock grazing on public lands;

114 WHEREAS, Intermountain Region forest service agents testified that the United States  
115 controls all access on federal lands;

116 WHEREAS, this control creates a situation where the only way a rancher could use the  
117 water on the rancher's federal grazing allotment, with its associated livestock water rights,  
118 without USFS approval would be "to lower the cattle out of the air";

119 WHEREAS, in seeking to expand water rights claimed by the United States, the USFS  
120 has filed more than 16,000 diligence claims on Utah water associated with forest grazing  
121 allotments, claiming that livestock were grazing on land that not only belonged to the United  
122 States but whose water rights were established on behalf of the United States prior to Utah's  
123 statehood;

124 WHEREAS, USFS claimed long-held livestock water rights in Idaho, arguing that the  
125 water belonged to the United States based on its ownership and control of the public land;

126 WHEREAS, the Joyce Livestock Company prevailed against the United States in a  
127 unanimous Idaho Supreme Court decision, in which the court held that, under the constitutional  
128 method of appropriation, "the United States did not actually apply the water to beneficial use,"  
129 and therefore had no claim to the livestock water right;

130 WHEREAS, the United States cannot obtain Utah's sovereign water rights, nor can it  
131 obtain long-held livestock water rights established on public lands, through any federal laws;

132 WHEREAS, the United States Supreme Court determined, in *Solid Waste Agency of*  
133 *Northern Cook County v. U.S. Army Corps of Engineers* (531 U.S. 159 (2001)), that the  
134 administrative authority of federal government agencies is limited, declaring "Where an  
135 administrative interpretation of a statute invokes the outer limits of Congress's power, we  
136 expect a clear indication that Congress intended the result . . . Congress does not casually  
137 authorize administrative agencies to interpret statute to push the limit of Congressional  
138 authority. This concern is heightened where the administrative interpretation alters the  
139 federal-state framework by permitting federal encroachment upon traditional state power";

140 WHEREAS, in *United States v. Bass*, 404 U.S. 336, 349 (1971), the United States  
141 Supreme Court stated, "Unless Congress conveys its purpose clearly, it will not be deemed to

142 have significantly changed the federal-state balance";

143 WHEREAS, the development and maintenance of the states dispersed livestock water  
144 rights is important to the health of the ecosystem, to Utah's wildlife populations, and the state's  
145 recreation interests;

146 WHEREAS, water rights are sovereign rights of the state of Utah; and

147 WHEREAS, the state of Utah has the right and obligation to protect this scarce resource  
148 to protect the health, safety, and welfare of its citizens:

149 NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of Utah  
150 declares its sovereign right to put the state's livestock water rights located on public lands to  
151 beneficial use through development and maintenance of the resource.

152 BE IT FURTHER RESOLVED that the Legislature of the state of Utah recognizes the  
153 right of the livestock owner to access the state's water to put it to beneficial use, including  
154 crossing public land, grazing the livestock as necessary while livestock drink, and ultimately  
155 developing and maintaining watering facilities on the necessary appurtenant public lands to put  
156 the state's water to beneficial use.

157 BE IT FURTHER RESOLVED that the Legislature of the state of Utah expresses  
158 support for H.R. 3189, the Water Rights Protection Act, to protect state sovereignty and the  
159 water rights of Utah livestock producers.

160 BE IT FURTHER RESOLVED that a copy of this resolution be sent to the United  
161 States Forest Service, the United States Bureau of Land Management, the Utah Department of  
162 Natural Resources, the Utah Department of Agriculture and Food, each county commission in  
163 the state of Utah, and the members of Utah's congressional delegation.