

Fighting for the U.S. Cattle Producer!



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Full Committee Oversight Hearing on "The Impact of the Administration's Wild Lands Order on Jobs and Economic Growth"

Written Testimony

of the

Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA)

to the

United States House of Representatives, Committee on Natural Resources

Tuesday, March 1, 2011

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The Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF USA) appreciates this opportunity to provide written testimony for the hearing record concerning the Full Committee Oversight Hearing on “The Impact of the Administration’s Wild Lands Order on Jobs and Economic Growth” held by the U.S. House of Representatives Committee on Natural Resources on Tuesday, March 1, 2011.

I. INTRODUCTION

R-CALF USA is a membership-based, national, nonprofit trade association that represents United States farmers and ranchers who raise and sell live cattle. We have thousands of members located in 46 states and our membership consists of seed stock producers (breeders), cow/calf producers, backgrounders, stockers and feeders. The demographics of our membership are reflective of the demographics of the entire U.S. cattle industry, with membership ranging from the largest of cow/calf producers and large feeders to the smallest of cow/calf producers and smaller, farmer-feeders. Our organization’s mission is to ensure the continued profitability and viability for all independent U.S. cattle producers.

The Secretary of the Interior (“Secretary”) in his Order No. 3310, Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management (the “Wild Lands Order”), refers to Bureau of Land Management (“BLM”) lands as public lands.¹ This label suggests that the lands referenced by the Secretary are not subject to vested and accrued stockwater rights and associated easements to graze that were created generations ago and today are held by individual ranchers. R-CALF USA has members who own vested property rights in the stockwater rights and associated easements to graze on some of the very lands the Secretary references as “public lands” and, likely, on some of the lands the Secretary intends to designate as “Wild Lands.”² Congress and the Administration must vigorously protect the stockwater rights and associated easements to graze held by individual ranchers against any effort to diminish or eliminate them under the Secretary’s “Wild Lands” designation.

II. UNITED STATES RANCHERS HAVE VESTED AND ACCRUED WATER RIGHTS AND GRAZING RIGHTS ON LANDS SUBJECT TO THE WILD LANDS ORDER

A. United States Ranchers have Property in Water Rights that Vested and Accrued Under Their Respective State’s Laws and These Property Rights Are Superior to the Interests of the Secretary.

The BLM recognizes it is limited in its ability to reserve water rights for purposes of achieving its view of the public interest. For example, the BLM references the 1978 Supreme Court case *United States of America v. New Mexico (U.S. v. New Mexico)* to explain that water

¹ See Order No. 3310, Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management, Secretary of the Interior, Dec. 22, 2010 (“The Order provides direction to the BLM regarding its obligation to maintain wilderness resource inventories on a regular and continuing basis for public lands under its jurisdiction.”). Emphasis added.

² See *id.* (“Where the BLM concludes that protection of wilderness characteristics is appropriate, the BLM shall designate these lands as “Wild Lands” through land use planning.”).

rights reserved on national forests by BLM apply only to the preservation of timber resources and water flows.³ But, the Supreme Court further explained in *U.S. v. New Mexico* that stockwatering rights on the national forests are rights allocated under state law to individual stockwaterers and are *not* rights allocated by the federal government.⁴ This acknowledgement that the states – not the federal government – allocate water rights to ranchers was additionally reinforced when the Supreme Court stated the federal government had misinterpreted its authority under the Organic Administration Act of 1897:

The United States . . . contends that Congress intended the United States to allocate water to certain private users -- in this case, cattle ranchers -- outside of the structure of state water law. Contemporaneous Acts of Congress, however, preclude this construction of § 481 [30 Stat. 36, as amended, 16 U.S.C. § 481 (1976 ed.)].⁵

This case demonstrates that the Secretary, acting through the BLM, has no right to interfere with the vested stockwatering rights allocated to U.S. ranchers under state water laws.

B. United States Ranchers have Property in Grazing Easements that Arise from their State-Allocated Water Rights and these Property Rights Are Superior to the Interests of the Secretary.

Along with their vested water rights, R-CALF USA members who ranch on lands subject to the Wild Lands Order also have easements to graze their cattle while accessing their stockwater rights. These easements arise from an early, July 26, 1866, Act of Congress (1866 Act).⁶ As explained by former Chairman of the U.S. House of Representatives Natural Resources Committee, Subcommittee on Forests and Forest Health, Helen Chenowith-Hage, who, citing *Omaechevarria v. Idaho* 246 U.S. 343 (1918), stated:

The general right-of-way provision of the 1866 Act became an easement for grazing, the bounds of the easement being determined by the exterior boundaries of the area the grazeir could effectively possess and control.⁷

Section 9 of the 1866 Act ensured that when ranchers' rights to the use of water have vested and accrued under local customs, laws, and the decisions of courts (i.e., state water laws),

³ See Federal Reserved Water Rights, Western States Water Laws, National Science and Technology Center, Bureau of Land Management, available at <http://www.blm.gov/nstc/WaterLaws/fedreservedwater.html>.

⁴ See *United States v. New Mexico*, 438 U.S. 716 (1978) (“The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed, and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree.”). Emphasis added. See also, *id.*, 438 U.S. 717 (“There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.”).

⁵ *Id.*, 438 U.S. 716, fn 23.

⁶ See 39th Cong. Sess. 1, Ch. 262, July 26, 1866.

⁷ Chairman’s Final Report, Hearing on the Jarbidge Road, Elko County, Nevada, 106th Cong. Rec., Extension of Remarks, Oct. 23, 2000, E1885.

the ranchers' vested water rights (and by extension, their rights to grazing easements) "shall be maintained and protected."⁸

Many U.S. ranchers have vested and accrued property rights in the use of the land and water that likely would be adversely affected by the Wild Lands Order. Unfortunately, there already is a growing volume of case law resulting from litigation initiated by ranchers who increasingly must defend themselves against the overreach of federal agencies intent upon depriving these ranchers of their property rights.

The fundamental problem today is that federal agencies are renegeing on the federal government's promise to maintain and protect the vested and accrued property rights allocated generations ago to individual ranchers by the states and with Congress' consent. Alarminglly, this incomprehensible about-face on the part of the federal government has occurred despite Congress' express and repeated promise to continue honoring and respecting the vested and accrued property rights of U.S. ranchers.⁹

Either or both Congress and the Administration could put a stop to this inexplicable government overreach and betrayal by taking steps to maintain and protect the property rights of individual ranchers. But they have not.

III. THE ADMINISTRATION'S WILD LANDS ORDER FURTHER THREATENS PROPERTY RIGHTS HELD BY U.S. RANCHERS

R-CALF USA is deeply concerned that unless immediate corrective action is taken, the effect of the Wild Lands Order will be the extinguishment of vested property rights that have been held by individual ranchers for generations. Such an extinguishment of those ranchers' property rights would adversely affect not only the economic viability of the ranchers themselves, but also, the rural economies of the rancher-supported communities in proximity to lands subject to the Wild Lands Order. This outcome stands in direct conflict with the stated goals of President Barack Obama who has indicated a desire to restore, not dismantle, the economic foundations of Rural America.

A. The Secretary of the Interior Misapprehends the Federal Government's Authority to Restrict U.S. Ranchers' Lawful Property Rights – Their Vested and Accrued Property Right to the Use of the Water and Lands Subject to the Wild Lands Order for Stockwater and Grazing.

Because many individual ranchers have a vested and accrued property right in the use of water and lands subject to the Wild Lands Order for stockwater and grazing, the authority of the Secretary to dictate land-use management decisions on such land must be limited to land-use decisions that do not interfere with the ranchers' continued use and enjoyment of their property

⁸ See 39th Cong. Sess. 1, Ch. 262, July 26, 1866.

⁹ See, e.g., 43 U.S.C. 1701 (a). The Federal Land Policy and Management Act of 1976 as Amended contains a savings clause that maintains and protects prior existing property rights: "Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land-use right or authorization existing on the date of approval of this Act." Emphasis added.

rights. However, the Wild Lands Order is ominously silent regarding the BLM's intent to either protect or extinguish the property rights of U.S. ranchers.

The practical and expected effect of the Wild Lands Order would be to authorize the Secretary to restrict, if not outright deprive, U.S. ranchers of their property right to the continued use of water and land for stockwater and grazing on lands the Secretary would designate as "Wild Lands." Such an outcome would certainly reduce, if not completely destroy, the economic viability of the ranchers that have vested and accrued water rights and grazing rights on lands subject to the Wild Lands Order. Also, it would most certainly reduce, if not completely destroy, the economic viability of the rural communities that are dependent on those ranching families.

IV. CONCLUSION

The Wild Lands Order threatens to harm individual ranchers whose ranching businesses have for generations relied, and which today continue to rely, on the federal government's respect for their vested and accrued property rights to the use of water and lands subject to the Wild Lands Order for stockwater and grazing. The historical trend suggests the federal government is intent upon systematically depriving these ranchers of their property rights. The Wild Lands Order appears to be yet another in a long line of federal government actions that are destroying the economic viability of U.S. ranchers and the rural communities they support.

R-CALF USA urges the U.S. House of Representatives Committee on Natural Resources, Congress as a whole, and the Administration to take immediate steps to nullify the ability of the Secretary to deprive or restrict the property rights of U.S. ranchers under the Wild Lands Order. In addition, we urge Congress and the Administration to immediately reverse the federal government's ongoing efforts to deprive U.S. ranchers of their property rights, reaffirm the federal government's respect for the property rights of U.S. ranchers, and enact legislation to decisively and permanently establish that the role of the federal government is to maintain and protect the property rights of U.S. ranchers.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Bullard", written in a cursive style.

Bill Bullard, CEO
R-CALF USA