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Mr. Chairman, Members of the Committee, Ladies and Gentlemen, my name is Michael Van Zandt. I am a partner in the law firm of Hanson Bridgett. I have represented and am currently representing a number of water right owners in the State of New Mexico. However, today I am not speaking on behalf of any particular client, so my remarks should not be attributed to my clients.

Although I am based in San Francisco, I have been advising on and litigating western water rights since 1980, first as a commissioned legal officer for the United States Air Force, where I advised on water rights in California, Arizona and Utah. After more than 21 years on active duty, I entered private practice and immediately began advising on water rights in the states of California, Nevada, Arizona, Washington, Idaho, and of course New Mexico. In my 32 years of practicing and more than 20 years representing ranchers, farmers, miners, timber harvesters, and other with property rights on federal lands throughout the west, the conflict, tension, and confusion concerning private water rights on federal lands is never more pronounced, profound and protracted.

I would like to address three questions:

1) What are the reasons for the confusion over water rights for livestock owners on federal lands?
2) How have the courts addressed the issue of private stockwatering rights on federal lands?
3) What can this committee and the New Mexico Legislature do to help address the issues associated with stockwatering rights.

WHAT ARE THE REASONS FOR THE CONFUSION OVER STOCKWATER RIGHTS ON FEDERAL LANDS?

Local customs and practices for the use of stockwater began before the Treaty of Guadulupe Hidalgo and the Gadsden Purchase. Bur General Kearny, author of Kearny's code was a wise man and he incorporated Mexican land laws into his code and these concepts were adopted into the treaty and the Gadsden Purchase. One important concept was the idea of a separate estate for surface and minerals, and the separation of water rights from the land.

In 1866, the U.S. Congress passed the Mining Act of July 26, 1866. Section 9 of that act confirmed to the settlers of the west the right to appropriate water rights and to establish ditch rights of way to convey this water on the surveyed or unsurveyed lands of the U.S. The bases for these rights are priority of possession, "First in time, first in right," and the local custom and practice of the area and the decisions of the local courts.

New Mexico has recognized stockwater rights as a beneficial use and a right that was confirmed under the Mining Act of 1866. At the time the Act was passed, the vast majority of federal lands were open for settlement, and under the Homestead Act of 1862, settlers began making entry applications and also began placing water to beneficial use for agriculture, including livestock.

In 1891, the U.S. Congress authorized the reservation of forest lands. To provide structure to the process, the Congress in 1897 passed the Forest Service Organic Act, which gave the President authority to create National Forests to protect the nation's timberlands and watersheds.

The Forest Service was created to oversee the reserved lands and Gifford Pinchot, first head of the Forest Service, created a system for the recognition of prior use in the National Forest for various uses, including livestock grazing, based on historic use of the lands and waters.

The Forest Service established grazing allotments inside the National Forests in New Mexico, with preference grazing rights recognized for those settlers who had grazed livestock historically, owned lands in the forest, or who claimed water rights in the forest.

In the Lincoln National Forest, for example, encompassing the Sacramento Mountains, in 1908, the Superintendent of the Forest listed all livestock users of the forest. There were over 100 users identified who were grazing thousands of head of cattle inside the forest. Under the Mining Act of 1866, all these users had claims to water rights for stockwatering under New Mexico law.

Since these water rights pre-dated 1907, there was no requirement for any filings with the state of New Mexico or the State Engineer. These water rights could be conveyed by deed of contract, again with no notice to the state. As grazing allotments were passed from person to person or were consolidated, water rights were also conveyed to these new owners under the concept of relation back.

In 1934, with passage of the Taylor Grazing Act by the Congress, the United States withdrew vast areas of the west as grazing lands. The Grazing Service, later the Bureau of Land Management, basically followed the same grazing allotment and preference scheme as the Forest Service. And the Taylor Grazing Act provided for protection of existing rights prior to the act, including water rights and ditch rights of way. The grazing allotment system was based on prior historic use, ownership of land and ownership of water rights and preference was given to the historic livestock operations.

In these early years, there was little controversy over water rights or the use of water between the federal agencies and the livestock operators.

But with the passage of the McCarran Amendment in 1955, the federal agencies were drawn, for the first time, into state water rights adjudications. As this committee knows, the State of New Mexico was involved in one of the first and most important cases dealing with adjudication of water rights between a state and a federal agency. In *U.S. v. New Mexico*, 438 U.S. 696 (1978), which involved the Rio Mimbres adjudication, the Forest Service asserted federal reserved water rights uses the Forest Service claimed were expanded after the passage of the Forest Service Organic Act of 1897, including new authority for stockwatering rights. *Id*. At 716.

In the Rio Mimbres adjudication, the Special Master found that federal reserve rights did not include the new forest purposes, and that the specific water rights claimed by the Forest

Service for stockwatering were owned by the livestock owners who had the preference grazing rights in the National Forest. These findings were upheld by the New Mexico District Court, the New Mexico Supreme Court and the United States Supreme Court.

The United States Supreme Court held that stockwatering rights in the National Forest were owned by the livestock owners, who placed them to beneficial use.

The Bureau of Land Management (BLM) refers to the Federal Land Policy Management Act of 1976 (FLPMA) as the BLM's Organic Act. The Congress substantially revised the land laws of the United States in FLPM, repealing many longstanding provisions of the Homestead Act and the Mining Act of 1866. This Act repealed the confirmation of rights for water rights and ditch rights of way on federal lands so that no future rights could be acquired. However, FLPMA contains a provision that specifically reserved existing rights, including water rights and ditch rights of way if they had been established under state law prior to 1976. The reality was and is that most of the water rights on federal lands had already been appropriated by citizens under state law.

Thus, federal agencies were faced with the task of securing water rights under state laws beyond those claimed as federal reserved rights. At the same time federal agencies here in New Mexico have opposed claims for stockwatering rights on federal lands, and have even filed applications to appropriate to the federal government these same rights. The justification for these new appropriations is the shifting missions of the federal agencies to meet environmental goals, especially the Endangered Species Act. Moreover, the Public Range Improvement Act and the Rangeland Reform Act have also caused an increase in claims for water rights by federal agencies.

Now livestock owners and federal agencies are claiming the same water, and federal agencies are attempting to convince state agencies that livestock owners do not own water rights on federal lands. As for the permittees, the federal agencies are requiring the permittees to relinquish their water rights in return for certain approvals under the permits. In some cases, the federal agencies are making the water rights dependent on the continued existence of the permit, so that if the permit is terminated, the water rights must remain. There are also cases where the federal agencies are requiring joint ownership of the water rights in return for special use permit approvals.

So after 1978, federal agencies realized that they must acquire additional water rights under state law. And federal agencies have filed for and received licenses for wildlife and stockwatering rights on federal lands. Now the livestock owners and the federal agencies are competing for the same water. And in some cases we have duplicate filings of applications by federal agencies and livestock claims of rights by declaration under New Mexico law.

HOW HAVE THE COURT ADDRESSED THESE ISSUES?

Courts have predictably wrestled with various issues with regard to water rights on federal lands. But the burning question for any state faced with these issues is why would any state allow one of its most, if not the most important resource, to be managed or controlled by any entity other than the state. As New Mexico looks out over the next 50, 100, 200 years, where will the water come from to support agriculture, industry, and the population centers. And the state must look out as far as possible and secure water rights for the future. As the U.S. Supreme Court stated in U.S. v. New Mexico, the protection of the watershed in the National Forests is for the benefit of the state. "Contemporaneous

administrative regulations of the officials responsible for administering the national forests confirm that the States were to have control of the distribution of water from streams flowing through the forest." *Id*. at 718, n. 24.

One of the first cases dealing with private water rights and uses on federal lands arose in Yosemite National Park in 1911. In the case of *Curtin v. Bensen*, the U.S. Supreme Court held that the federal agency in charge was not authorized to determine the scope and extent of private property rights inside the national park, and if the agency prevented use of claimed rights, the remedy for such deprivation was under the Fifth Amendment's Takings Clause.

Since that case, cases such as *Light, Hunter, Fuller, Colvin* and here in New Mexico, *Walker,* have recognized stockwater rights on federal lands, but not a continuing right to graze. But none of these cases addressed local custom and practice regarding livestock watering. The Walker case was not a water rights case, but rather dealt with the issue of whether there was a right to graze forage on federal lands that was appurtenant to a state water right. The New Mexico Supreme Court reversed two existing cases on this point and ruled there was no forage right connected with a water right.

Surprisingly, there are very few stockwatering rights cases under New Mexico law. This may reflect the lack of conflict or a better understanding of rights amongst livestock owners in New Mexico.

One of the key case, of course was *U.S. v. New Mexico*, where the State of New Mexico fully supported the adjudication of stockwatering rights to the livestock owners on federal lands. This position is supported by New Mexico statutes. A provision that was first passed in 1889 as a territorial law states:

> 19-3-13. [Right to appropriate and stock range on public domain; conditions]
>
> Any person, company or corporation that may appropriate and stock a range upon the public domain of the United States, or otherwise, with cattle shall be deemed to be in possession thereof: provided, that such person, company or corporation shall lawfully possess or occupy, or be the lawful owner or possessor of sufficient living, permanent water upon such range for the proper maintenance of such cattle.

This provision was supported by a companion provision that makes it a misdemeanor to graze cattle on public lands without first having a water right.

> 19-3-15 [Use of public land for range without owning water rights, penaityj
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> Any person, company or corporation violating the provisions of the preceding section [19-3-14 NMSA 1978] shall be guilty of a misdemeanor and punishable by imprisonment in the county jail of the county wherein the offense was committed, for a period not to exceed six months, or by a fine of not less than one hundred dollars [($100)] nor more than one thousand dollars [($1,000)], and such person, company or corporation violating such provisions as aforesaid shall further be liable to any party or parties injured for all damages which such party or parties may sustain; the same to be recoverable by a civil suit. All fines and costs so assessed and all damages which may at any time be awarded shall be and constitute a lien upon such herd of cattle.

HOW CAN THE NEW MEXICO LEGISLATURE HELP?

This Committee and the Legislature can help by restating and clarifying New Mexico law regarding stockwater rights.

1. There should be a specific recognition and confirmation that under New Mexico law going back to Territorial Days, stockwatering rights are recognized as a valid property right under New Mexico law.
2. There should be specific recognition for pre-1907 stockwatering rights with guidance and direction to the State Engineer on how these were established and how livestock owners can provide proof for such rights.
3. There should be a specific recognition of stockwater rights on federal lands based on local custom and practice and decisions of the courts under New Mexico law where such rights are confirmed under the Mining Act of 1866.
4. The Legislature should clarify whether constructed works are necessary to prove a stockwater right, or like 16 other western states the use of the water by the cattle is the act of diversion and no works are necessary.
5. The Legislature should also clarify whether there is an attendant right to graze appurtenant to a water right under New Mexico law, by overruling the Walker case.
6. The Legislature should clarify whether there is a meaningful right of access to water rights, including those on federal lands.
7. The Legislature should clarify whether ditch rights of way established on federal lands are subject only to restrictions for use and maintenance based on state law.