

**COLORADO GENERAL ASSEMBLY**

**HOUSE STATE, VETERANS, AND MILITARY AFFAIRS COMMITTEE**

**H.B. 17-1141 Equal Protection From Federal Employee Personal Attack**

**TESTIMONY ON BEHALF OF  
THE COLORADO CATTLEMEN'S ASSOCIATION**

February 22, 2017 1:30 P.M.

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The Colorado Cattlemen's Association asked this firm to address the legal issues raised in House Bill (H.B.) 17-1141. The proposed legislation would prohibit federal employees from interfering with the rights of range allotment owners, including use, possession, disposal, and defense of grazing allotments on federal land. As written, this proposed legislation violates federal law and long-standing case law and would be unenforceable in either state or federal courts.

As a state law, the first question must be whether the law is intended to apply only to state school sections and private lands or whether it is intended to apply to federal lands managed by the U.S. Department of Agriculture, Forest Service and the Bureau of Land Management (BLM), Department of the Interior. Because the sections in H.B. 17-1141 refer to federal employees, this analysis assumes that the term "range allotment" includes grazing allotments managed by the Forest Service and the BLM.<sup>1</sup> H.B. 17-1141 therefore appears to supersede federal law and due to the federal laws and the underlying provisions in the U.S. Constitution, including the Property Clause and the Supremacy Clause, H.B. 17-1141 is unenforceable.

Congress has used its Property Clause authority as set forth in the U.S. Constitution throughout the history of the United States and particularly to facilitate settlement and development of the western states. Federal laws authorized rights-of-way for railroads and highways, land to settle the West, mining, development of coal, oil and gas, and livestock grazing. Congress also enacted laws to create parks, wildlife refuges, National Forests and designate wilderness areas. More recently, Congress in 1976 adopted a comprehensive organic and planning law for public lands, Federal Land Management and Policy Act (FLPMA), 43 U.S.C. §§1701-1783; and updated land use planning for the National Forest System, National Forest Management Act, 16 U.S.C. §§1600-1614. Several federal laws, including the Taylor Grazing Act, 43 U.S.C. §§315a-315r, Bankhead Jones Farm Tenant Act, 7 U.S.C. §§1010-1013a; Granger Thye Act of 1950, 16 U.S.C. §580i, FLPMA, 43 U.S.C. §§1751-1753, and the Public Rangeland Improvement Act (PRIA), 43 U.S.C. §§1901-1908, apply to livestock grazing and leave little room for state legislation.

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<sup>1</sup> The bill does not define the term range allotment, which is not used in either federal or state law. In Colorado, when the Colorado State Land Board leases state school sections to a rancher for grazing, the lease rights are limited to the right to graze the surface and are subject to the rights of sportsmen and recreationists to use the lease as well. The mineral rights are leased separately for mining or oil and gas development.

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The U.S. Constitution also provides that federal law is binding on the states. From the Supremacy Clause, the federal courts developed a preemption doctrine that gives precedence to federal law when state law conflicts. This doctrine is critical when evaluating state and federal law for the regulation and management of federal land. The preemption doctrine means that when federal law fully occupies the area to be regulated, the conflicting state law gives way. *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). In the *Kleppe* case, New Mexico state law provided for removal of wild horses and the Supreme Court concluded that when Congress enacted the Wild and Free-Roaming Horses and Burros Act, it preempted state law and that Congress had authority to do so under the Property Clause.

Over the past 130 years or so, the Supreme Court has held while there may be limits to the scope of the Property Clause, it has not found them. *Kleppe*, 426 U.S. at 540; *United States v. San Francisco*, 310 U.S. 16, 29 (1940), *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275, 294-295 (1958); *Alabama v. Texas*, 347 U.S. 272, 273 (1954); *Federal Power Comm. v. Idaho Power Co.*, 344 U.S. 17, 21 (1952); *United States v. California*, 332 U.S. 19, 27 (1947); *Gibson v. Chouteau*, 13 Wall 92, 99 (1872).

### Comments on Individual Sections

#### Proposed Section 2(a).

The heart of H.B. 17-1141 presumes that range allotments give rise to property rights in federal lands. This is incorrect.

Under federal law, Congress explicitly provided that a grazing preference right does not give rise to "any right, title, interest, or estate in or to the lands." 43 U.S.C. §315b; 16 U.S.C. §580l.

To the extent that earlier court decisions recognized a legal right to graze, it was not a compensable property right. Congress resolved any doubt as early as 1935 when it enacted the Taylor Grazing Act. Congress extended the same limits to grazing on the National Forests in the Granger-Thye Act of 1950. 16 U.S.C. §580l. The Supreme Court then settled the matter in 1973, when it reversed the decision of the Nevada District Court that a rancher was entitled to compensation when the grazing allotment was canceled and the public land was transferred to the Defense Department. *United States v. Fuller*, 409 U.S. 488, 493 (1973). More recently, the U.S. Supreme Court affirmed the Interior Department's change in grazing rules that converted a grazing preference to a priority, rather than a transferrable right. *Public Lands Council v. Babbitt*, 529 U.S. 728, 742-743 (2000) (noting that the Interior Secretary has long had authority to change grazing or to cancel a grazing permit).

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Most court of claims cases hold that the grazing right is a revocable license and not a compensable right. *Sacramento Grazing Assn. v. United States*, 96 Fed. Cl. 175, 189 (2013). The compensation is limited to the non-federal elements of a ranch such as range improvements and water rights. *Id.* at 190. Thus, a state law asserting that a federal license is a property right contradicts federal law and case decisions and will be unenforceable.

The courts have recognized that private lands, water rights, and range improvements associated with a grazing permit are compensable. If only the grazing permit is canceled, there is no compensation for the lost forage.

**Proposed Section 2(b)** relies on Executive Order 12630 to require agencies to do a takings implications analysis. The Executive Order only applies to recognized property rights and only for regulations, comments on rules, or proposed legislation. The requirement for a takings implication analysis does not apply to agency decisions or actions and would not address unreasonable actions by federal employees or decisionmakers. Therefore Section 2(b) should be deleted entirely.

**Proposed §18-8-410(a)** would protect any range allotment owner. Because rights in an allotment are limited to range improvements and water rights, this section would have limited application. As explained above, the preemption doctrine would make this provision unenforceable.

**Proposed §18-8-410(b)(1)** would provide for compensation for any regulatory taking. Any compensation is limited to water rights and range improvements.

This is not to say that ranchers do not have legal rights, only that they are not property rights that are compensable. At the federal level, they are entitled to fundamental fairness and procedural due process in their dealings with the federal agencies.

As to procedural due process, a rancher on public land managed by BLM is entitled to an administrative hearing when the agency takes adverse action. 43 U.S.C. §315h. While the Administrative Procedure Act provides for procedural due process, 5 U.S.C. §554, the right to an adjudicative hearing depends on laws that apply to a particular agency. The Taylor Grazing Act grants such a hearing. No law governing grazing on National Forest System lands administered by the Forest Service provides for a hearing. The Forest Service has never issued rules to authorizing an evidentiary hearing and recently, the Forest Service curtailed its administrative process to a very limited post-decision review. 36 C.F.R. Part 214 (2013).

**Proposed §18-8-410(b)(2)** would have the effect of limiting or abolishing the doctrine of qualified immunity for federal employees. Under the preemption doctrine, this section is

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probably voidable. In 2005, the U.S. Supreme Court held that BLM employees who admittedly harassed a rancher and engaged in retaliation still enjoyed qualified immunity and could not be personally sued. *Wilkie v. Robbins*, 551 U.S. 537, 554 (2007).

**Proposed §18-8-410(b)(3)** would make federal employees liable for a felony charge for interfering with a range allotment. This section also violates the preemption doctrine and qualified immunity of federal employees.

**Proposed §18-8-410(b)(4)** would give grazing permittees a private right of action against federal employees. There may be some instances when this would not violate the preemption doctrine, for instance if the employee engages in a criminal act, such as stealing livestock. But as noted above, the Supreme Court has greatly expanded the scope of immunity for federal employees and it would not address the problem of federal employees who use their job to abuse or make life more difficult for grazing permittees.