

STATE OF NEVADA

PROOF OF APPROPRIATION OF WATER FOR STOCK WATERING
OR WILDLIFE PURPOSES

(1) Name of claimant.

Cliff and Bertha Gardner - HCR 60 Box 700 - Ruby Valley, NV 89833

(2) Source of water.

Overland Allotment - basins and springs

(3) The water is diverted by.....

Livestock watering, wildlife and irrigation

(4) Water is diverted at the following point(s)....

Waters are diverted by livestock watering and wildlife everywhere within the Overland Allotment along the entire length of Indian Creek, Water Canyon Creek, Lime Kiln Creek, Harrison Creek, Long Hair Smith Creek, Road Canyon Creek, Midway Creeks #1, #2, #3, Hankins Creek, Gardner Creek, Little Hankins Creek, Wilson Creek, Dawley Creek, Mica Creek, Scoville Creek and Spring, Tipton Creek, Dry Creek, Williamson Creek, Jasper Creek, Mayhew Creek, Overland Creek, and at Three Tree Spring, Little Hankins Spring, Fat Charley Springs, #1, #2, #3, #4, #5, #6, Fat Charley Spring Proper, Owl Spring, Crystal Spring, Oscar Theil Spring, Corner Spring, and Dry Hill Spring; as well as, at all points where water is used for irrigation, livestock watering and wildlife purposes on lands owned by Cliff and Bertha Gardner, see Proofs of Appropriation and claims of vested water rights which were submitted to the State Water Engineer's Office under cover letter dated March 25, 1987.

(5) The water is impounded in.... **N/A**

(6) The construction of the ditch or other works was begun....

Diversion began in 1860.

(7) The nature of the claimant's title to the land upon which the source of water and place of use are located is....

Public Domain; and Private Lands.

(8) The claimant's water right was recorded in the office of the County Recorder in...

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(9) The approximate number of animals watered by the claimant during the first year.

Just a few animals were grazed within what was to become the Overland Allotment in 1860. However, as near as we can determine, livestock were being run at full capacity within the Overland Allotment by 1875. See, EXHIBIT A, attached. Wildlife use within the Overland Allotment increased dramatically after settlement; see EXHIBIT A, attached.

The most animals grazed within the Overland Allotment (on average) by the Gardners and their predecessors at any one time, has been 600 animals. The earliest "turn on" date has been April 1st. The last of the livestock are removed on or before Oct. 30th of each year. Use by wildlife, is hard to determine. Records indicate that deer use within the allotment increased from, about 8 to 12 animals around the turn of the century to possibly four or five thousand head within the Overland Allotment at different times of the year in the 1940's to 1960's. Use by other wildlife also increased during this same period, but to a lesser degree. Further information can be found in EXHIBIT A, attached.

The watering was conducted during each of the following months....

Average number of livestock grazed within the Overland Allotment by the Gardners and their predecessors has been:

600	Livestock	May 1	To	July 20
484	Livestock	July 21	To	Aug. 15
334	Livestock	Aug. 16	To	Sept. 1
160	Livestock	Sept. 1	To	Sept. 20
34	Livestock	Sept.21	To	Oct. 20

Wildlife use within the Overland Allotment occurs year long. As many as 1600 Livestock belonging to Cliff and Bertha Gardner or their predecessors have used the waters which arise within the Overland Allotment as they pass over private lands. Watering of livestock on lands irrigated by waters which arise on the Overland Allotment occurs year long.

(10) The approximate number of animals watered by the claimant in subsequent years was as follows: (If water was not used, or used in reduced quantity at any time, full information as to causes and duration of non-use should be given.)

With regards to the history of use by livestock on the Overland Allotment, see, EXHIBIT B, attached - AFFIDAVIT OF CLIFF GARDNER, dated November, 28 1995.

Livestock use of water on the Gardners private lands has remained fairly consistent since settlement. Use by wildlife can fluctuate from year to year and from season to season.

(11) The amount of water which has been necessary to be diverted for this purpose has been....

We estimate that the Gardner's livestock have consumed as much as 84,000 gallons , or 187.15 cubic feet a year when grazing the Overland Allotment; and that, on average, water consumption by livestock on Cliff and Bertha Gardner's private lands is triple the amount used on the Overland Allotment.

(12) The works are located at....

Beneficial use and diversion of water for stock watering and wildlife occurs within the following 40-acre subdivisions:

Within the Harrison Pass, Lime Kiln, Indian Creek Unit of the Dawley Creek Allotment (which is a part of the overall, or original Overland Allotment);

Sections 1, 2, 11, 12, 13, 14, 15, 24, 25, 26, 34, 35, and 36, Township 28 North, Range 57 East, MDB&M.

Sections 7, 17, 18, 19,30, and 31, Township 28 North, Range 58 East, MDB&M.

Within the Gardner Seeding, (Formally under the jurisdiction of the Bureau of Land Management, jurisdiction of this grazing unit was transferred to the Forest Service in 1986);

Sections 17, 19, 20, 30, 29, 31 and 32, Township 28 North, Range 58 East, MDB&M.

Within the Road Canyon Allotment (which is a part of the overall, or original Overland Allotment);

Section 36, Township 29 North, Range 57 East, MDB&M.

Sections 1 and 12, Township 28 North, Range 57 East, MDB&M.

Sections 29, 31 and 32, Township 29 North, Range 58 East, MDB&M.

Sections 4, 5, 6, 7, 8, 9, 17 and 18, Township 28 North, Range 58 East, MDB&M.

Within the Dawley/Hankins Unit of the Dawley Creek Allotment (which is a part of the overall, or original Overland Allotment);

Sections 12, 13, 24, 25, and 36, Township 29 North, Range 57 East, MDB&M.

Sections 3, 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 28, 29, 30 and 31, Township 29 North, Range 58 East, MDB&M.

Mayhew Allotment (which is a part of the overall, or original Overland Allotment);

Sections 3, 4, 5 and 6, Township 29 North, Range 58 East, MDB&M.

Sections 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, Township 30 North, Range 58 East, MDB&M.

Overland Allotment (which is now a part of the overall, or original Overland Allotment);

Sections 8, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29, Township 30 North, Range 58 East, MDB&M.

Note: The extent of use within each subdivision is limited to that area which lies within the boundaries of each of the Allotments or Units, as are indicated on the maps which accompany this Proof.

Remarks....

This Proof of Appropriation is hereby made a part of, and is supplemental to, those Proofs of Appropriation and claims of vested water rights which were submitted to the State Water Engineer's office under cover letter dated March 25, 1987.

It is the intent of claimants, Cliff and Bertha Gardner, that it be understood that when said waters, which derive from Lime Kiln Creek, Harrison Pass Creek, Gardner Creek, Hankins Creek, Little Hankins Creek, Wilson Creek, Dawley Creek, Mika Creek, Scoville Creek, Tipton Creek, Dry Creek, Jasper Creek, Williamson Creek, Mayhew Creek and Overland Creek are not used within the Overland Allotment for livestock watering purposes by claimants Cliff and Bertha Gardner or other vested water rights holders for irrigation and livestock watering purposes, that such waters are used for irrigation, wildlife, and livestock watering purposes on private lands which are owned by claimants, Cliff and Bertha Gardner, as is provided for by law.

The undersigned, being first duly sworn, deposes and says that the facts relative to the appropriation of water by Cliff and Bertha Gardner are full and correct to the best of his knowledge and belief.

Cliff & Bertha Gardner

Claimant

By Cliff Gardner

HCR 60 Box 700

Ruby Valley, NV 89833

Telephone No. 775-779-2234



Subscribed and sworn to before me this 30th day of August, 2004.

Carla L. Wilson

Notary Public in and for the County of Elko

My commission expires Feb 6, 2008

HISTORY OF APPROPRIATION OF WATER
WITHIN THE OVERLAND ALLOTMENT AND ON PRIVATE LANDS
IN SOUTH RUBY VALLEY, NEVADA

In the Book, Nevada's Northeast Frontier, the authors wrote:

In 1858, with the opening of the Overland Trail, Ruby Valley became a favorite holding ground for cattle taken over this route. In 1857-1858 the U.S. Army expedition into Utah led to the establishment of Camp Floyd. The freighting firm of Russell, Majors and Waddell (originators of the Pony Express in 1860) were given army contract to transport supplies from Fort Leavenworth, Kansas to Utah. In addition to army goods the Company moved a large herd of beef to Camp Floyd, on September 20 1859, they trailed 3500 head of their best oxen held at Camp Floyd, Utah, to Ruby Valley, Nevada, where they were to be wintered and then sold in California the following spring.

In 1871 Andrew C. Dibble participated in a cattle drive of speculative stock purchased by Col. Myers. He was part of a group engaged to drive 3000 steers that had originated in the Texas Panhandle to Salina, Kansas, and from there to Salt Lake City. On reaching Salt Lake, Dibble learned 700 of them had been purchased by a Ruby Valley and Pioche outfit known as Wines and Montgomery. Three of the men decided to push on with the 700 head for Ruby Valley. ...In mid April of 1872 they left Utah, driving in a southwesterly direction to skirt the Great Salt Lake Desert, and after three days reached Fish Springs at the south end of the desert. From Fish Springs they pushed northwesterly in easy drives, passing near the north ends of the Deep Creek and Antelope Ranges and to the south of the Goshute, crossing a creek not far from the town of Currie. In 1872 there were no settlers in the north end of Ruby Valley, but to the south ranchers had taken up lands and established cattle herds. The area around Secret Pass and Pole Canyon was clear, although some cattle belonging to Clover Valley ranchers ranged there in the summer. They turned the 700 head loose on the lush grass of Pole Canyon area, while they made their camp in Secret Valley.

...Although 3,000 cattle existed in Ruby Valley in 1872, there were no fences and no winter feeding of livestock until after the hard winter of 1889-90. By 1889, 13,000 cattle ranged the valley, and were reduced to about 6,000 by winter losses. ...In 1905 Utah and Idaho transient sheep moved into Ruby Valley until 30,000 head grazed on valley range. Up to 1900 very few sheep ran on the eastern slope of the Rubys. Although In 1900 Ira D. Wines sold his lease and range rights in Overland and Colonel Moore Canyon to a sheepman from Ely who proceeded to take everything from Overland Pass north to Colonel Moore Canyon. The valley ranches protested to keep him out of their range, sheepmen continued in the area. In 1904, Tom Short, another rancher, leased his range to sheepmen and this brought on trouble that almost resulted

in gun play. In 1906, Frank Gedney, a young Elko attorney and owner of a Ruby Valley ranch, called a meeting of his neighbors to find ways of protecting cattle interests. They petitioned U.S. Chief Forester Pinchot asking for advice on procedure to create a forest reserve. E.E. Lutts, Bill Gardner, Albert Myers, Billy Griswold, Jube Wright and F.S. Gedney signed the petition. ...On Nov. 5, 1906, in response to the cattlemen's petition and Reed's investigation, the President of the United States signed a bill creating the Ruby Mountain and Independence Forest Reserve, later consolidated into the Humboldt National Forest.

The first people to begin ranching in the Harrison Pass/ Dawley creek area of Ruby Valley were the Egans, the Dawleys, Harrisons, Scovilles, and the Williamsons. The first homestead established in Ruby Valley was that taken up by Howard Egan Jr. in 1859. Howard Egan was 18 years old when he built a cabin on the south side of Hankins Creek, right where the 7 H Ranch headquarters are today. Records show that Thomas Harrison recorded his first claim in 1862 (below Harrison pass). Later, Gay Dawley sold his holdings to Thomas Harrison - Harrison's sold to Bill Gardner, and so on. Of course, a good many other people were involved in taking up lands which have become part of the livestock operations that exist today. However, most did not stay long, and sold their places to the ranching families mentioned above.

Sometime in the 1940's, the Forest Service began calling the area of the Ruby Mountains where we have traditionally run our cattle the Overland Allotment. The Overland Allotment for the most part has included all the lands which lay between the private land in the valley and the top of the mountain, from the ridge on the south side of Indian Creek to the top of the ridge on the North side of Overland Canyon. During the 1970's, the Overland Allotment was fenced and divided into several use areas, thus, the Dawley Creek Allotment, the Gardner Seeding, the Mayhew Allotment, and now, a much smaller Overland Allotment.

Bill Gardner was my Grandfather. Robert Harrison was Bill Gardner's brother in law. Andrew Dibble, who is mentioned above, was my mother's Grandfather. Bill Gardner's son, Walter S. Gardner was my father. The ranch that my wife and I now own is the old Harrison or Dawley Ranch. We also own much of the old Jasper or Williamson Ranch. During the early history of grazing under the management by the U.S Forest Service and B.L.M., the government (BLM and Forest Service) recognized 2,524 animal months (a.u.m.'s) use for these two ranches. However, average annual use by we Gardners in more recent years has been 1600 a.u.m.'s, plus another 176 a.u.m.'s for the Gardner Seeding. Historically, in south Ruby Valley, cattle were turned out on the foothills in April or May, depending on how far along the grass was. In the 1960's the government had us moved back to where we did not turn out until the 1st of June. Later, the government allowed us to turn out from the 1st to the 15th of May, which seemed to be about right. Generally, a large number of animals would be turned out in the Spring, but then, as the foothills "dried up", a good many of the cattle would be moved to other areas such as, to "the flat" or to the Ruby Lake Refuge. And then again, as the cattle would leave the higher elevation country during the summer we would put them on private land for the remainder of the summer. So when fall came, very few were left on the mountain - maybe, fifty or so, by the 1st of October.

Cliff and Bertha Gardner, claim beneficial use of water for livestock watering and irrigation on waters that arise within the Overland Allotment based on the above stated history, beginning in 1865.

PROOF OF APPROPRIATION OF WATER FOR WILDLIFE PURPOSES

Historical and scientific information indicate that wildlife numbers increased dramatically following settlement. Grazing and haying increases succulence of forbs and grasses by interrupting and delaying maturation. Haying and grazing stimulates tender new growth that is higher in crude protein and lower in crude fiber than mature tissue. Invertebrate production and rodent activity also improve when meadows are hayed or grazed. Sage grouse, curlew, willet, ibis, egret, heron, redwing, yellow-headed and brewers blackbirds, bobolink, sand hill cranes, meadowlark, ravens, gulls, geese and a wide variety of ducks and a host of other water related birds are all attracted to native meadow and pasture lands which are hayed or grazed on a yearly basis.

Larger animals, such as deer, antelope and elk also benefit when brows and mountain meadows are grazed. In 1960, C.F. Martinson, found that bitterbrush plants protected for 9 years produced 71% less than those that were browsed annually. In 1979, Paul Tueller and Jerald Tower, completed a study wherein it was shown that protection from browsing can cause "stagnation" to occur as early as the second year after an enclosure is established. Nonuse of bitterbrush resulted in an average reduction in production of 70%. Ten years of protection from grazing black sage resulted in a 65% reduction in site productivity. For big sage or mountain sage, the figure was 36%.

Grazing of riparian areas is also beneficial. Native willow and wild rose, like grass when not grazed, become overgrown and decadent, which lead to loss of understory and diversity of plant species along creeks and streams. Livestock grazing and browsing aids in reducing decadent canopy cover which allows the sun's rays to reach plants that otherwise are deprived of sunlight.

The need for agriculture producers to control predators has also had a great impact on wildlife, in that it has helped to establish a balance between predators and pray. If there had been no need for the settlers to find ways of protecting their flocks from coyotes, bobcats, badgers, skunks and all the various avian predators it would be doubtful if there would have been the political and financial support for the sheepmen to keep the numbers of predators down as they did during the late 1800's and early 1900's.

By the turn of the century every country store across America was selling reasonably priced 22 caliber rifles. Stevens, Winchester, Savage, Marlin and Remington were making 22 rifles that sold for \$1.98 to \$7.00 a piece, depending on make and model. Every boy, white and Indian, along with their fathers and many of their sisters were controlling predators. By the 1920's large numbers of men in every community were trapping during the winter months. School boys too, had trap lines that they tended going and coming from school. Coyotes, bobcats, badgers, skunks and weasels, nearly all fur-

bearers were fair game. Crows, and magpies and chicken-hawks were shot on sight. Then in 1912 there was a major outbreak of rabies in central Nevada. So bad was the epidemic, that rural families had to keep their children and dogs locked up or fenced in. By 1914 the rabies epidemic had spread to nearly all the Western States. It became a national health problem. In July of 1916, Senator Key Pittman of Nevada sponsored a bill in Congress to appropriate \$125,000.00 for rabies control. In the 1930's toxins (primarily strychnine) and airplanes were being used to control predators. The results were phenomenal. Coyotes, skunks, crows and other predators became few while deer herds exploded. In many areas sage chickens could be harvested "by the gunny sack full". Ducks and other waterfowl clouded the skies and song birds were everywhere.

The Gardners fear that should the State game department establish claims for vested water rights for wildlife their next step will be a demand that they have priority use over irrigation - which would be a grave mistake - for benefits to wildlife on irrigated meadows, pasture lands and even rangeland when coupled with grazing and haying practices is critically important. Even on years when there is plenty of water for irrigation as well as for flooding the Franklin Lake marsh lands, it is not uncommon to see many more wildlife on private lands (both meadow lands and marsh lands) than on the lands owned by the State.

Wildlife have, since the time the valley was settled, been a beneficial use of water by the Gardners and their predecessors, for monetary gain, recreation and aesthetic purposes.

Cliff and Bertha Gardner claim beneficial use of water on both the public lands (Overland Allotment) for wildlife and recreation, where they and their predecessors have traditionally grazed, as well as on their privately owned land, whereon, in both instances, wildlife use has increased so dramatically since settlement.

FURTHER AFFIANT SAYETH NAUGHT.



STATE OF NEVADA

COUNTY OF ELKO

SUBSCRIBED AND SWORN TO BEFORE ME ON THIS 30th DAY OF August 2004.

By: 

NOTARY PUBLIC IN AND FOR ELKO COUNTY, NEVADA



EXHIBIT B

AFFIDAVIT OF CLIFF GARDNER

STATE OF NEVADA)
) ss.
COUNTY OF ELKO)

CLIFF GARDNER, being duly sworn on oath and under penalty of perjury, does hereby swear or affirm that the assertions of this affidavit are true.

1. Affiant finds evidence indicating the following.

Affiant believes the first major move on the part of certain Forest personnel to intentionally and systematically remove traditional livestock use from National Forest Lands began in 1986. It was that year that the Forest Service completed it's first Land and Resource Management Plan (LRMP) for the Toiyabe National Forest. And late that Summer the Forest people told permittees Lavar Young, Tony and Beulah Testolin, and Wes and Mary Parsons they had to remove their cattle early for the protection of riparian habitat.

When the permittees asked, by what authority the Forest personnel had to make such demands, they were told that the newly adopted LRMP required that utilization levels be established for each allotment, and once 45 to 55 percent of the feed had been utilized on riparian areas, all livestock must be removed from the allotment.

I was then serving as Vice President of Nevada Farm Bureau so was asked to attend a meeting that October with the effected families. This was the beginning of a long period of education for me. I had been concerned by the attitudes of some agency personnel prior to that time but had no idea what we would be facing over the next 10 years.

The reason for great concern over utilization standards is the effect such standards have on a permittee's use of his allotment. Cattle or sheep, like children at the dinner table, will eat the best first. Cattle by nature will eat nearly all of the available feed on any riparian area before attempting the less palatable feed elsewhere. This is particularly true in late season when vegetation has matured on the uplands. Consequently, in most instances, before livestock even began to utilize upland vegetation, 50 percent of the feed (grass) is removed from the riparian areas. Therefore, by implementing the standards and guidelines as mentioned above, agency personnel have effectively eliminated the use of 80 to 90 percent of most allotments. Correspondence between Cliff and Forest employees (See Document 27) confirms the truth of this assessment. It also points up the fact that the agency people are blatantly going forward with policy they know will force permittees from their allotments without attempting any kind of social economic assessment even though they know it is required by Congress.

A year later, Kent Howard, Bob Dickenson and myself were appointed by the Nevada Cattlemen's Association to serve as a special advisory committee to the Forest Service to look into the Austin conflict. On October 23, 1987 we three committee members met with two of the permittees and Forest officials at the Austin Forest Service office. After going over prior records we made a tour of the allotment.

We found the allotment to be in average condition with a great deal of potential for range improvement. We also learned there had been an allotment management plan signed in 1971 which called for the chaining and seeding of 9,600 acres, 15 miles of pipeline, and 16 spring reconstructions. We learned that none of the seedings were ever completed and only 2.5 miles of pipeline were installed.

We learned also that between 1926 and 1983, average use in the allotment had been 3,781 AUMs. This level of use did not seem unreasonable to us since the allotment contained a total of 53,000 acres - which when you divide the 3,781 AUMs into the 53,000 acres, comes to 14 acres per AUM - quite conservative when considering that most mountain ranges of the same type and quality average 8 acres per AUM. (See Document 31, data cited pertaining to past use and proposed improvements)

Within our report we wrote: "To use a utilization standard on the riparian areas of an allotment, as is now being practiced, as a means of determining the amount of grazing allowed in the entire allotment is unacceptable to our way of thinking. It is our opinion that every livestock permittee on public lands could well be facing grazing reductions of from 50% to 90% if this criterion is used universally." (See Document 28, Special Committee Report)

A year later we met again with Forest officials at Wes and Mary Parsons' Willow Creek Ranch. This time there were over 40 people in attendance representing ranching, the University of Nevada, the Forest Service and the Nevada Department of Agriculture. Again we stressed that such actions would not improve the resource situation but would put these people out of business. But again we had no influence on the Forest people. They went right ahead with their agendas. (See second report from our committee, Document 29)

In the interim, I had occasion to attend a BLM meeting in Ely, Nevada concerning proposed grazing cuts for the protection of winter fat, or white sage. This meeting was also another learning experience for me. During the meeting Dr. Wilkins (M.D.) gained the floor and explained the unfairness of what the BLM was trying to achieve. Dr. Wilkins said that he had grown up in Pioche, a small town south of Ely, and had enjoyed hunting all of his life.

Dr. Wilkin explained that Pinion and Juniper trees had, since the turn of the century, more than doubled in the state of Nevada, and that in the Ely/Pioche area they had increased ten fold in

places. It was Dr. Wilkin's belief, that if BLM personnel were sincere in wanting to improve the range as they said, they should be taking measures to reduce the pinion/juniper throughout the area rather than curtailing livestock grazing.

This testimony caught my attention. When I thought of the Toiyabe situation - of all the seedings that the Forest Service could have put in, and had agreed to, and all the pinion and juniper there was on the Parsons' allotment that could be removed for the benefit of nearly every value, it came home to me as never before, just as it has many times since as I've watched BLM and Forest Service personnel put forth adverse policy, that these people are not nearly as interested in enhancing resources as they are in putting the people off the land. (For information on just how destructive pinion/juniper growth is, see Document 30)

THE BARRIER REPORT

In 1986 a group of fifteen Forest Service GS-9, 11, and 12 personnel convened for the purpose of, as they termed it "to identify "existing barriers to effective range management". During the meeting there were 28 "barriers" identified and recommended solutions developed.

The resulting document came to be known as the "Barrier Report", and for myself, it spelled out the future direction and the intent of the leadership within the Forest Service.

Although the language of the "Barrier Report" is somewhat camouflaged, the intent is clear enough. In listing the various "barriers to effective range management", it is stated on page 4:

BARRIER 5: ADVERSE ACTIONS ON PERMITS ARE PERCEIVED TO BE MORE DIFFICULT THAN NECESSARY DUE TO LOCAL POLITICS INFLUENCING RESOURCE DECISIONS (AT SO AND DISTRICT LEVEL); MANAGEMENT REQUIRES "OVERKILL" ON DATA TO SUPPORT ACTION (SO & RO); FEAR OF LACK OF SUPPORT AT HIGHER LEVELS (SO, RO, WO); AND THE NEGATIVE CONNOTATION OF APPEALS AND LITIGATION AT ALL LEVELS.

Solution: a. Conduct outreach efforts to all interests in a decision (orchestrate decisions); during preliminary project planning, identify politically sensitive issues, and plan actions to create or take advantage of politically sensitive issues, and plan actions to create or take advantage of opportunities to constructively resolve the issues. (DISTRICT, SO)

b. Data and documentation (quantity and quality) should be dictated by the level of risk and sensitivity of each action and need to be assessed and

agreed upon at the earliest point by all levels involved.
(DISTRICT, SO. RO.)

c. Management needs to more readily accept the professional judgment of the resource managers. (RO)

d. Have more information gathering tours for RO and WO staff, to "look at" problems, not "look for" problems.

e. Management should encourage taking reasonable risks, by adding the requirement as a performance element, and through further delegation of authority. (DISTRICT, SO. RO.)

f. Increase information about the results of appeals and the reasons for the appeal decision made. (BY LEVEL WHERE DECISION MADE. WO ESTABLISH DIRECTION FOR THE INFORMATION FLOW PROCESS)

g. Recognition at all levels that changes in management emphasis, LMP's etc., will result in appeals, litigation, and congressionals and that these are a natural, appropriate refinement process for our decisions. (WO should reinforce this)

h. Increase information and education activities to Congress, user groups, and other agencies on the impacts of current laws and emerging issues. (ALL LEVELS)

BARRIER 6: TRADITIONAL ATTITUDE OF CONGRESS, ADVISORY BOARDS, PERMITTEES, AND OURSELVES THAT ADDITIONAL RANGE IMPROVEMENTS WILL AVOID ADVERSE ACTIONS.

BARRIER 6, explains why the Forest Service discontinued putting in range improvements back in the 1980's. It also explains why the Forest Service people did not follow through with their agreement with the Parsons, Testolins and Youngs to complete range improvements. Obviously their goal was to encourage adverse actions, not to relieve conflict through range improvements. They even go so far as to indicate that the attitude of Congress is wrong in looking to range improvements as a means of relieving conflict.

BARRIER 7: CURRENT GRAZING FEES ARE BARRIERS TO EFFECTIVE RANGE MANAGEMENT DUE TO RESTRICTING THE AMOUNT OF RBF AND CP FUNDS; CREATE CONTROVERSY WITH OTHER USER GROUPS AND AGENCIES; PROMOTE MISCONCEPTION BY CONGRESS AND LIVESTOCK ORGANIZATIONS THAT CURRENT (LOW) FEES ARE THE MOST EFFICIENT WAY TO CONTRIBUTE TO IMPROVED RANGE CONDITION, ENCOURAGE PRIVATE INVESTMENT, AND DISCOURAGE OVERGRAZING AND TRESPASSING; APPEAL TO LIVESTOCK USERS,

OTHER USERS, AND OURSELVES, THAT ECOSYSTEM MANAGEMENT IS NOT THE PRIMARY EMPHASIS AND DIRECTION AND, PROMOTE MISCONCEPTION OF CONGRESS AND OURSELVES THAT THEY ARE FUNDING A DEFICIT PROGRAM DECREASING IN PRIORITY RATHER THAN ONE THAT IS ACTUALLY DOING INTEGRATED RESOURCE MANAGEMENT.

Solution: a. Bring the grazing fee in line with the new emphasis and direction by setting it at fair market value. (WO. CONGRESS)

The thing that is so wrong with this process is that it's Forest personnel that are developing law, not Congress or the people as is intended under our system of government. Not once in the entire document is there reference made to interpreting the intent of Congressional legislation. And yet they blatantly advocate increased "adverse action" and encourage "orchestrating decisions"; and suggest "encouraging taking risk, by adding it as a performance element, through further delegation of authority"; and state there "be recognition...that changes in management... will result in appeals, litigation, and congressionals and that these are natural, appropriate..."

I ask, how could agency personnel be more arrogant? They are actually advocating that actions be taken that will lead to increased confrontation and litigation. And the way they mention again and again of the need to "Bring the grazing fee in line... by setting it at fair market value." They know as well as we permittees do that it is already costing ranchers more to run on the public lands than it costs people to run on private pasture. There can only be one motive for these kinds of actions, and that is to make it so expensive for we permittees to operate on public lands that we can not survive. (For solid data confirming the fact that it does cost ranchers more to operate on public lands than it would if they were purchasing private pasture see Documents 79, 80, 81, 82 & 83)

Other suggested policy found within the "Barrier Report" that caught my attention is as follows:

On page 8:

"PUTTING AND/OR LEAVING "STAGNANT", INEXPERIENCED, POORLY TRAINED, AND/OR UNQUALIFIED PERSONNEL IN SENSITIVE RANGE POSITIONS."

They certainly have accomplished this goal - for over the last nine years it seems that every position has been filled by the most aggressive people available within the agencies.

And on page 9:

"providing training in litigation process..."

And on page 13:

"REQUIREMENTS FOR BASE PROPERTY, ESCROW MORTGAGE WAIVER, LIVESTOCK OWNERSHIP, AND NON-USE FOR PERSONAL PREFERENCE ARE BARRIERS TO EFFECTIVE MANAGEMENT.

Solution: f. Require that grazing permits revert back to the FS when a permittee no longer desires to operate on NFS lands. DO NOT ALLOW TRANSFERS.

"WE LACK THE OPPORTUNITY TO IMPLEMENT ALTERNATIVE GRAZING PROGRAMS WHEN THE PERMITS TRANSFER (I.E., BID SYSTEMS)."

(See Document 32, a copy of the Barrier Report itself)

SO WHAT HAS HAPPENED NOW THAT NINE YEARS HAVE PASSED SINCE THE BARRIER REPORT WAS WRITTEN AND THE FIRST UTILIZATION STANDARDS WERE IMPOSED ON THE TOIYABE?

The best example showing the effect of the above described policy is the actual permit reductions that have occurred on the Toiyabe National Forest.

On June 8, 1995 Tonopah Ranger, Michael Valdes sent out a public scoping document asking for public input as to whether or not he, should renew ten year grazing permits on six remaining allotments situated on the Monitor Range, the Toquima Range, and the Eastern side of the Toiyabe Mountains.

Interestingly, these six allotments (involving four permittees) are the only active allotments left in that entire area that once supported thirty or more permittees. That's how bad it is. Only six allotments out of 33 are still active - with all of such abandonment, or reduction, occurring in just the last five or six years.

To give you an idea of why so many people are being forced to abandon their permits, consider what has happened to the Clifford family.

Not so many years ago, the Cliffords had a permit to run 1,000 head of cattle on the Forest, both Winter and Summer. And now, after years of taking cut, after cut, after cut, they are only being allowed 10 head in the Spring, 31 head during the Summer, and 24 head during the Winter. (See Document 33, cover letter to public scoping document and map)

Direct cuts are not the only means by which permittees' use is reduced or eliminated. The RO Ranch is a good example.

In 1991 during mid grazing season, Forest personnel began demanding that the Wilmans either ride to keep their cattle off the

riparian areas or remove their cattle altogether. Not having any other place to go with their cattle, the Wilmans tried keeping the cattle off the riparian areas using extra riders, but soon found it impossible.

But when they tried to remove their cattle altogether they found they had another problem. The Forest personnel were threatening to cancel all or a portion of their permit if any stray animals were left on an allotment. The Wilmans did everything they could to comply; they put out extra riders; they flew the mountains so they could better locate their cattle, but still found it extremely difficult, if not impossible, to find and remove all their cattle. About the only thing they did accomplish was to confirm what most old time residents already know - that in open range country where there is a lot of rough terrain and brush you can never get all the cattle off a mountain by riding, You have to wait until the cattle are ready to come off themselves, or as the old timers would say, "wait until the snows drive them home".

Meanwhile the Wilmans began keeping cost records and when it was found that it was costing them over 35 dollars an AUM to run on the Forest under these new demands (when the fair market value for running cattle on private land was only 10 dollars per AUM), they abandoned use of their allotments and filed suit in the U.S. Court of Claims.

Forest personnel argue that there are more than six active permits left in the above discussed area. But what they are not telling is that many of the owners, such as the Wilmans who have either been forced to sell their cattle or are operating without the use of their allotments, will not, because of current Forest policy, have their permits officially canceled until this Fall, after three years of non use. So, as far as the Forest Service is concerned, these are still active permits.

Forest personnel will also tell you that there is one other traditional permit still active on the East side of the Toiyabe Mountains - which is true. The reason that we have not mentioned this other permittee is because of his situation. It seems that there are certain permittees that the Forest Service favors. Whether it is for the purpose of having an example that they can refer to "as someone who is a good operator" or "someone who is cooperative" I am not sure. We do know that in these instances certain permittees get nearly everything they want.

As an example, in the instance mentioned above, the permittee had traditionally run 220 cattle for ninety days, yet this last year he was allowed 400 cattle for a longer season - much of such use being taken on areas where other people were operating no more than three years ago.

I am convinced that once the rest of us are gone it will only be a matter of time until the favored permittees will have their

traditional permits canceled as well, for once a traditional permit has been canceled or abandoned, any cloud of title is removed in favor of the United States.

For the purpose of further explanation, note that the map above mentioned, identified as Document 33, covers basically all of three mountain ranges, the Toiyabe, the Toquima, and the Monitor, whereas the area of discussion, referenced in the above paragraphs, was of all of the Monitor Range, all of the Toquima Range, and the Eastern half of the Toiyabe Range. On the West side of the Toiyabe Mountains there are seven additional permittees remaining, all of whom have experienced reductions in use since 1986, most to the tune of 50 percent or more.

For a historical perspective of all three mountain ranges, see Document 34, a report to the Forester dated November 20, 1907, wherein acting Ranger, Mark Woodruff submitted a list of 50 users recommended to receive permits. Today, in the same area only 11 permittees remain. It is my guess that unless something dramatic happens within the next few months, these last permittees holding traditional use permits will also be gone. (See Document 35, comments of Ranger Tony Valdes as quoted in the Elko Free Press)

EVIDENCE THAT THE FOREST SERVICE AND BLM PEOPLE INTEND TO GAIN CONTROL OF PERMITTEES WATER RIGHTS

In November of 1984 there was a report completed by the Surveys and Investigations Staff, titled *A REPORT TO THE COMMITTEE ON APPROPRIATIONS U.S. HOUSE OF REPRESENTATIVES on the WATER POLICY OF THE BUREAU OF LAND MANAGEMENT RELATING TO THE GRAZING MANAGEMENT PROGRAM*

In the opening statement of the report it is stated:

"To utilize the public rangelands as specified by Congress, it is essential that the Bureau of Land Management (BLM) have the use and control of the water on its lands. In recent years, however, BLM has encouraged private individuals to file for water rights on stockwater developments on public lands. Private ownership of these rights has negative implications for multiple use of public lands because it allows a single-use interest, i.e., livestock grazing, to control the use of the water."

In that same year the USDA Forest Service Watershed and Air Management Staff, also came out with a similar document titled, *Development of Forest Service Water Rights Policy Relating to Grazing - An Overview*.

On page 11, under SUMMARY for the section titled *Management Implications*, it is stated:

"The Forest Service believes it is essential for water rights to remain with the land, rather than with individual permittees. This provides the flexibility necessary for management of the National Forests and grasslands in the public interest, regardless of who the permittee may be. It is for this reason that all water rights applications by other parties are protested where the water use might curtail or result in less efficient Forest Service management."

On March 21, 1995, the Elko County Grazing Task Force sent a FOIA request, to R.M. "Jim" Nelson, Supervisor of the Toiyabe National Forest asking for, among other things, a list of all water filings, including claims of vested rights submitted to the state Water Engineer for the Toiyabe National Forest.

In response, Mr. Nelson supplied a list of 640 Forest Service filings for water rights, of which there were 390 filings for stockwater, most of which were claims of vested rights. (See Documents 36 & 37)

Employees of the Bureau of Land Management are also taking action to gain control of stockwater. In 1990 the State Director of the BLM for Nevada established policy requiring that permittees sign over half their water rights before the BLM will approve applications for water developments.

These policies raise serious questions. In *United States v. New Mexico* (438 U.S. 696 1978) the U.S. Supreme Court confirmed the New Mexico District Court decision that "...any water rights arising from cattle grazing by permittees on the forest should be adjudicated to the permittee under the law of prior appropriation and not to the United States."

The Court said, "The United States contends that, since Congress clearly foresaw stockwatering on national forest, 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."

On June 6, 1995, Cliff and Bertha Gardner sent FOIA requests to both the Forest Service and the BLM, asking for all documents disclosing written delegation of authority orders authorizing federal officers, agents or employees to file for stockwater rights under state law. The agencies in their letters of response supplied no documents even referencing "stockwater".

There is no question what the agency people have in mind, once grazing permits are canceled or abandoned, water rights will automatically go to the next party of application, which will be

the Forest Service or Bureau of Land Management - which policy appears to be in direct conflict to the position of the United States Supreme Court.

And what of the clear mandate of Congress as outlined in the Taylor Grazing Act "to stabilize the livestock industry dependent upon the public range"?

When permittees are being forced to abandon their permits, is such action helping to stabilize the livestock industry?

And what of the mandate set forth in the Multiple Use and Sustained Yield Act - of "achieving and maintaining in perpetuity a high-level annual or regular output of renewable resources"?

Are the agency people maintaining a high-level of output by putting people out of business?

DISINFORMATION ON THE PART OF FEDERAL EMPLOYEES

Quite naturally, because of all the adverse action by Forest personnel, there is a good deal of controversy throughout the West which has caught the attention of the media. This has presented opportunity for those who want to see the traditional livestock operator removed from the range.

In the March 1995 issue of *Fly Rod & Reel*, the Supervisor of the Toiyabe National Forest, R.M. "Jim" Nelson, was quoted as follows:

"We could have another Waco out here," says Nelson "Some of these guys are talking about killing us. If the counties did have this land, they'd hammer the hell out of it, and the public wouldn't have access, much less anything else. Riparian areas are the arteries of the planet and they're getting destroyed all over the West. *We're just not going to let that keep happening.* We've had an ecology team working on riparian for the last five field seasons, and we're getting the science behind us to really support what we're trying to do." (See Document 38)

For Mr. Nelson to say these things publicly is terribly wrong for two reasons. First of all, a man in his position should be striving to tone down controversy. He should not be creating it. And second, he should not be making allegations that are destructive of people's character and detrimental to livelihoods when he has no data to support what he is saying. The reason that I know that Mr. Nelson does not have scientific support for his actions and allegations is because I have copies of studies completed by the Forest Service itself that show that grazing is not destructive to riparian areas.

Beginning in the mid 1970's there was a series of studies completed on the Starkey Experimental Station in Eastern Oregon. (See Document 39, the *Meadow Creek Study Publications*)

Over a period of about 12 years, graduate students and scientists measured the effects of cattle grazing on every riparian value imaginable. They applied rest rotation grazing, season long grazing, short duration grazing, deferred rotation, and non use. They monitored and determined effects on soil compaction, infiltration rates, streambank erosion, sediment loads, streambank cutting, biological content of the water itself, numbers of steelhead trout redds per mile, impacts on streamside vegetation, and total production. And when it was all said and done, they found very little, if any, adverse effects from grazing.

In fact, there was much indication of the importance of livestock grazing. On page 34 of the document it is stated:

"With the exception of short-duration, high-intensity grazing, all other grazing systems produced almost twice as much herbage as the ungrazed plots. With vegetation responding this dramatically to grazing treatment and the objective being improvement of biomass production in the riparian area, it appeared that this can best be accelerated with grazing instead of protection."

"In this study, productivity of riparian zone and floodplain vegetation was rapidly enhanced when no more than 70 percent of the herbage was removed annually. And in the floodplain, vegetative production was accelerated with grazing."

The 70 percent utilization figure used in the above discussion provides opportunity for me to call attention to the fact that while Forest personnel in Nevada are demanding removal of livestock from riparian areas whenever 45 to 55 percent of the feed has been utilized, their own studies completed on the Starkey Experimental Station indicate that riparian area values improve rapidly at 70 percent utilization.

Forest personnel may argue that there is other data available than that which was compiled at the Starkey Experimental Station, but such is not born out in their own discussions. On pages 24, 41 and 57 of the Study Publication itself, it is stated, that (1) "The literature of range management is essentially devoid of information specific to the management of riparian zones." That, (2) "Unfortunately, there is little direct scientific information available on the relationship between livestock management and watershed science." and (3) that, "The eastern Oregon study is the most comprehensive of its kind in the United States."

Other information favorable to livestock grazing, found within the document is as follows:

On page 56 it is stated:

"...degradation during Spring discharge along ungrazed streambanks was significantly greater than degradation occurring along grazed streambanks."

On page 58 it is stated:

"None of the grazing systems affected the quality of Meadow Creek's water as defined by the water quality standards of the Environmental Protection Agency."

On page 112, comment is made to the fact that in that instance:

"Forage utilization was 75% on meadows but only 10% on uplands."

These figures, indicating that 75% of the forage was utilized on the meadows while only 10% occurred on the uplands also supports the argument we have been making - that whenever Forest personnel demand that permittees remove their livestock from an allotment when only 45 to 55 percent of the feed has been taken on the riparian areas, they are, in effect, excluding the permittee from using 80 to 90 percent of the available feed within his allotment. (See Document 27, written discussion between Ranger Mont E. Lewis and Cliff Gardner on details of this issue)

On pages 158 and 159 of the Starkey Experimental Station Study Publication there is a copy of an article written by Gale Chambers. In relating the experience of the two men most involved in the study, it is stated:

"Both Bryant and Bunkhouse shudder at the thought of fencing mile after mile of streambank. They shudder because they have fenced mile after mile only to see snow, ice and elements tear those fences out - and they have some sort of idea concerning cost and maintenance. Moreover, they didn't get enough results to justify costs."

This statement is also revealing; for over the last several years the agencies have gone all out in some areas to fence mile after mile of creekbottom, forcing the respective permittees into maintaining the extra fence and developing new water sources, which is one more example of adverse action destructive to livestock interests.

On page 55, it is stated:

"Streambank erosional patterns have been studied for 3 years... Livestock grazing use at the rate of 3.2 ha./AUM - 8 acres/AUM has not accelerated streambank degradation on Meadow Creek."

The figure of 8 acres per AUM as brought out in the discussion above also supports our arguments. In assessing average carrying capacity on Nevada's mountain ranges (looking at numbers of cattle run on several allotments) I have found that the average carrying capacity on Forest lands is 8 acres per AUM.

Interestingly in Nevada, when we seed brushland to crested wheat grass, it is generally accepted the seeded land will, when established, produce at a rate of about 4 acres per AUM. Which takes us back to the earliest discussion involving the Parsons, the Testolins and the Youngs. In that particular instance, the average use being taken was only at the rate of 14 acres per AUM, yet Forest personnel were demanding a reduction in use.

With this information in mind, consider what the media is being told. In the March 1995 issue of *Fly Rod & Reel* mentioned earlier, Ted Williams, wrote:

"District Ranger Dave Grider - one of Nelson's equally resolute understudies - figures this cold, fragile desert country can safely support about one cow per square mile."

Then Mr. Williams goes on to state:

"Standing between aspen-clad Table Mountain [a part of the Monitor Range] and the bald Toquima Range, Grider and I looked out over 25 miles of Monitor Valley. Now, where Great Basin wild rye once lapped the stirrups of the pioneers, dust devils dance over a dead sea of purple sage." (See Document 38)

The thing that makes this statement so irresponsible is the way it denies the truth. It is generally recognized that Jedediah Smith was the first white man to cross through the Great Basin to the Central Valley of California. After crossing into California via a southern route near today's Las Vegas in 1826, Smith then trapped his way North into the Central Valley.

Smith had agreed to meet his two trapping partners, David Jackson and William Sublet, the following June for rendezvous in Cache Valley, so in June of 1827, Smith took two of his best men and set out up the American River of the Sierra Nevadas and across central Nevada to keep his commitment.

By following his diary, most historians believe Smith and his men came out of the mountains just south of Walker Lake, and very likely passed through Nevada near the present towns of Manhattan, Belmont and Current. If that is true, then he and his two men must have passed through the Monitor Valley very close to where Mr. Grider and Mr. Williams were standing when they had their discussion. Interestingly, this is how Jedediah Smith described that country after passing through it in 1827:

After traveling 22 days from the east side of Mount Joseph, [Sierras] I struck the Southwest corner of the Great Salt Lake, traveling over a country completely barren and destitute of game, We frequently traveled without water, sometimes for two days, over sandy deserts where there was no sign of vegetation and when we found water in some of the rocky hills we most generally found Indians who appeared the most miserable of the human race. When we arrived at the Salt Lake, we had but one horse and one mule remaining, which were so feeble and poor that they could scarcely carry the little camp equipage which I had along. The balance of my horses I was compelled to eat." (See page 2 of Document 45)

AGENCY PERSONNEL HAVE LONG BEEN SUCCESSFUL IN THEIR ATTEMPT TO CONVINCING THE AMERICAN PEOPLE THAT ALL WILL BE DESTROYED IF NOT PROTECTED BY REGULATORY AGENCIES

Disinformation concerning the condition of the range has been a factor with the BLM and Forest Service since their inception. (See Document 40, Secretary's Report to the President, 1936) (See also, Document 41. Document 41 is a summary of a study titled "The Nevada Plots", wherein 19 exclosures were monitored from 1938 through 1988 determining no improvement in resource condition as a consequence of 50 years of non use)

Resource management agencies have a lot to gain by continually raising questions of resource destruction. As long as the public remains convinced there are serious resource problems many goals are met, including, increased budgets, increasing land acquisition and greater control over resources. (See Documents 42, 43, & 44)

In the late 1960's and early 1970's I began to notice more and more often, that a great deal of what I was reading and hearing concerning the destruction of wildlife habitat by private interests did not correlate with what I was seeing on the ground. During those years I would quiz many of the wildlife biologists and range scientists I came in contact with, trying to better understand what these people were trying to accomplish. I also began collecting and reviewing all the studies they would give me supporting their allegations, but still I found few answers. The more I looked the more I began to question the true motive behind much of what these people were doing.

By 1988 I was becoming alarmed. It appeared to me that if the agency people were to continue their present course they would be putting many of us out of business. It was then that I began an even more intense study of the issue. What I found was what I had suspected - the agency people did not have data supportive of their propaganda.

One of the greatest falsehoods of modern environmentalism is the assumption that all was optimum in its pristine condition - that before white man came the grass was tall and there was wildlife everywhere. Nothing could be further from the truth.

My research shows that livestock grazing and private enterprise are the greatest things that have ever happened to, and for, the resources of Western America. Before white man came, the west was no more than a wasteland, with little grass and even less wildlife. Family ranching has done more to enhance resource health and productiveness during the last 100 years than any other factor. The development of thousands upon thousands of acres of meadow lands has benefited wildlife in a manner that cannot be fully expressed. Grazing impacts on range lands and riparian areas has played an irreplaceable part in enhancing all involved resources. Predator control, implemented primarily for and at the expense of the sheep industry, has been paramount in the great abundance of wildlife we have all enjoyed during these last 50 to 60 years. All across the west, wherever sheep are run, we find greater numbers of wildlife. Whenever grazed areas are compared to ungrazed areas we find more plant diversity, insect production, animal species, health and vigor in the grazed areas.

This is not just idle talk. We have researched the issue thoroughly and have produced documents in support of our claims - and have, because of its importance to this case, included the most important of such in the form of exhibits.

It is our belief that a great mistake is made each time public lands issues are argued under the assumption that grazing is harmful, and that today's rangeland conditions are inferior to that of the past - for when doing so, it is nearly impossible for an issue to be resolved in favor of the resource user.

Therefore I have included the following:

Three documents - testimony to the fact that all was not optimum prior to the coming of white man - titled *Mountain Men, A Summary of the Earliest Recorded Western Exploration - The Truth About Wolves In Alaska, Testimony By Concerned Alaskans - The Plight Of The Desert Tortoise, A Surrogate For Social Change.* (Documents 45, 46 & 47)

Two documents - testimony to the fact that it has been primarily predator control that led to the great abundance of wildlife enjoyed in the 1940's 50's and 60's - titled *True Effects of Predator Control, A Collection of testimony - A History Of Predator Control In The Harney Basin Of Southeastern Oregon.* (Documents 48 & 49)

Three documents - two studies and an article describing benefits of grazing to resource values - *Observations on the Prehistory And Ecology Of Grazing In California*, a paper by Stephen

W. Edwards, Research Associate, Museum of Paleontology, University of California, Berkeley - *Studies Show Grazing Stimulates Range Plants*, by Dr. Paul Tueller, Professor of Range Science, University of Nevada, Reno - *A Rangers Reflections*, by J. W. Hart, Oregon rancher and one time manager of Mitchells Cavens State Park in California. (Documents 50, 51 & 52)

Two documents - research documenting historical rangeland composition - *Expedition Of 1805*, by Jack Taylor, professor of range science at Montana State University - *Presettlement Vegetation In The Sage-Grass Areas Of The Intermountain West*, by Thomas R. Vale, assistant professor, Department of Geography, University of Wisconsin. (Documents 53 & 54)

The assumption that resources are always better managed when regulated, or brought under governmental control is not supported by experience or historical fact. Free enterprise, free markets, and absolute protection of property rights has proven to be the best means of accomplishing ideal stewardship of resources. See the following testimony:

Two documents - *The Mirage of Sustainable Development*, by Thomas DiLorenzo, professor of economics, Selinger School of Business and Management - *Land Of The Free*, an article by Lee Pitts, Editor of the Livestock Market Digest. (Documents 55 & 56)

We need not look to other nations to assess the destruction by agency management. We have plenty of examples right here in the United States. See the following:

Four documents - *This Dying Ground*, as article by Lee Pitts, Editor Livestock Market Digest - *Yellowstone's "Natural Regulation" Policy*, by Dr. Charles E. Key, PH.D. - *National Park Syndrome*, by Steve Rich, registered educator in Holistic Resource Management - *Wetlands Destruction*, information compiled by Cliff Gardner and Susie Hammond. (Documents 57, 58, 59 and 60)

AFFIANT PRESENTS THE FOLLOWING HISTORICAL BACKGROUND OF THE DAWLEY CREEK ALLOTMENT

The first people to start running livestock in our area were the Egans, the Dawleys, and the Harrisons. The first homestead established in Ruby Valley was that taken up by Howard Egan Jr. in 1859. Howard Egan was 18 years old when he built his cabin about ~~a 1/4 mile south of~~ where the 7H outbuildings are now located. The records show that Thomas Harrison recorded his first claim in 1864.

My Great Grandfather settled in North Ruby Valley (Secret Valley) in 1872. Later two of his sons William J. and Alex Gardner also took up land there. In 1902, my Grandfather William J. "Bill" Gardner sold his interest to his brother Alex and bought the ranch where we now live from Robert Harrison. Later in 1914 he purchased

the 7H Ranch. With both of these purchased came a right to run livestock on the mountain.

Of course, in those days the country was pretty-much all open. Even after the Forest Service was established, up until 1952 there were no fences dividing various sections of the Forest. When the Mound Valley people rode their side of the mountain in the Fall the Gardners rode with them.

Most of the work horses used during Summer months for haying purposes were turned loose on the "Flat" during Fall and Winter, and were gathered in late Spring. Most of the saddle horses on the other hand were turned out during Summer, and were gathered in September when Fall riding began. (The "Flat" is that country that makes up most the valley floor and low lying mountains that lay East of the ranches)

The ranchers of the Valley also ran cattle on the "Flat". Later in the 1940's these lands came under the management of the Grazing Service, the predecessor to the Bureau of Land Management.

In about 1918 the Bank talked my Grandfather into going into the sheep business. They said there was a lot more money in sheep - so he converted his cow use on the mountain to sheep use. He ran sheep on the mountain until the depression put him out of the sheep business in 1930. He then converted his use back to cattle.

The 1920's and 30's were tough times. First the rabbits "got thick" - then the country was hit with drought - and with the drought came grasshoppers. Then came the depression, accompanied by the outbreak of several diseases - the scabies, brucellosis, and swampfever. Like many others, the Gardners went broke during the depression. In fact, they went more than broke - for they owed over a 100 thousand dollars at a time when their ranch was worth no more than 5 to 10 thousand dollars. The only reason that the Bank did not foreclose on the Gardners was because of the ranch's complete loss of value. In time the Gardners regained their ability to service their debt.

It's interesting that the agency people make such an issue of overgrazing, yet fail to acknowledge destruction of vegetation by natural phenomenon. My Dad said he could remember going with his father "campending" across on the east side of the Valley when the jackrabbits were so thick "it seemed like there were two rabbits for every sagebrush". He related how the rabbits had so destroyed the vegetation above ground they were digging down around the crowns of the brush in order to get something to eat.

Such an occurrence is not rare. Irene Walther said that in 1958, rabbits were so bad in the lower Lamoille Valley that they killed a crested wheat seeding of theirs. "There were so many rabbits, they dug the roots right out of the ground. "We had to go back in and reseed the field."

The problem with jackrabbits is their population never remains constant. There is either a "jillion of them" or almost none at all. But when they do increase, which can take no more than a year or two, they can destroy a tremendous amount of vegetation in a very short time. If you ever have an opportunity to be in an area that has been

heavily impacted by jackrabbits, get out of your car and take a close look at the grass and sagebrush. What you will find is a lot of stems of grass and brush scattered all over the ground.

What jackrabbits do is bite off a stem of grass or brush but only eat a very small part of it, and then they go about biting off another and another. Consequently they destroy a great deal more vegetation than they eat. And when the majority of usable vegetation has been destroyed above ground, they then start in on the crowns of the plants. Over the years I have seen complete stands of white sage disappear during heavy rabbit infestations.

Dad also talked a lot of the grasshopper infestations that occurred in the 1920's. He said that "for three or four years, about the only hay they put up was enough to feed the saddle and work horses". He said the grasshoppers were so thick during some of those years there were places where they "cleaned the meadows off as slick as a board". The only thing they didn't eat was the wiregrass, everything else was gone".

Willis Packer, who spent most of his life in the Independence Valley, north of Elko told me of almost identical circumstances. Willis said "there were times that you couldn't drive a team of horses the grasshoppers were so thick". He said the grasshoppers would fly up, hitting the horses in the face in such mass that the horses just refused to move.

Then in the 1930's came the Mormon crickets. And of course they not only destroyed the grass, they ate nearly everything else as well. The way it was explained to me by my father and mother, my Uncle Raymond, and Frank Temoke, the crickets would come in waves, climbing every bush and tree, eating every leaf as they went. The way Frank Temoke told it, the crickets would climb the trees as they came to them, dozens at a time, eating as they went and when they would reach the tip of a branch, they would just fall to the ground and keep right on, all traveling in the same direction. Frank said that "about the only thing the crickets didn't eat was the sage brush".

When a close look is taken it's not hard to understand why there was so little useable feed in the West prior to settlement. Everything was against it. Take wildfire as an example. Wildfire can be one of the most destructive things that can happen to a rangeland. Unfortunately most wild fires occur during the hottest and driest time of the year, in mid-Summer, with such intensity that the heat kills the most important vegetation. Consequently, when the white man began suppressing wildfire in the late 1800's bitterbrush and most species of bunchgrass began to increase. That's why mule deer have done so well in the recent past. The white man, with his predator control and range management created a near perfect climate for deer. (See Document 61, supportive information on range destruction by insects and jackrabbits)

In 1936 my Grandfather died leaving the management of the ranch to his sons. In 1948 my Uncle Raymond and my Father bought the ranch from the remainder of the family - with Raymond taking ownership of the 7H ranch and my Father taking ownership of the Dawley Ranch - with both ranches retaining a portion of the original permitted use on the Forest.

In 1952, Raymond and Walter Gardner entered into a cooperative agreement with the BLM and Forest Service for the "Gardner Seeding". The project encompassed fencing the area between Indian Creek and Harrison pass and seeding 1000 acres to crested wheatgrass.

This project also effectively divided the Gardner's use from the Duvals use to the South. That same year, Howard McQueary, Len Wines, and Bob Connolly (wanting to stop "Pinto" Smith's cattle from drifting North) build a fence on the ridge dividing Mayhew Canyon from Jasper Creek. The fence is still in use today.

At about this same time, Raymond Gardner traded for and fenced most of the lands laying below the County road between Road Canyon and Short Creek (approximately 160 acres).

Then in 1957 the Gardners entered into a second agreement with the BLM and Forest Service for the "Harrison seeding", whereby Raymond and Walter Gardner built a fence along the County road between Short Creek and Harrison Pass. The BLM then seeded the resulting enclosed land (approximately 470 acres) to crested wheatgrass.

Consequently there were roughly 1600 acres fenced separate from the original area considered to be the Forest allotment between 1952 and 1957 - yet no AUMs were ever subtracted from the Forest allotment proper. (Instead AUMs allocated to these seeded areas were always subtracted from that use that was allocated to the BLM lands located on the "Flat".)

Then in 1968, when the BLM went through its adjudication process, they (meaning the employees of the BLM) assigned additional AUMs to the BLM lands that lay within the Forest allotment.

In addition to these actions that caused over-allocation, in 1956 the Forest Service people took it upon themselves to build a fence along the ridge line on the top of the mountain, dividing the West side of the mountain from the East side of the mountain, thus dividing our allotment from that use allocated on the West side of the mountain. This action served to further over-obligate use in our allotment since prior to that time there had always been 60 or 70 head of Gardner cattle that summered on the West slope of the mountain each year.

I graduated from high school in 1957.

In 1960 my parents, Walter and Kay Gardner made me a partner in the ranch. That same year we purchased the adjoining Albert "Pinto" Smith ranch. (The Smith Ranch adjoined us to the North)

Included with the Smith Ranch was a FS permitted right to run 276 cattle on the mountain season long. That 276 head right plus the 333 head right belonging to my parents allowed us to turn out 609 head of cattle each Spring. (See Document 62)

During those years we ran our cattle in the following manner. We would put 609 cattle on the Forest Service & BLM lands on the first of June (at that time there were small parcels of land along the foothills recognized as BLM lands)

Then on July 20th to 25th we would gather 125 head of cattle from the foothills (those that did not work their way up to higher elevations) and take them to the Ruby Lake Refuge where both Raymond and Walter Gardner had a permit for 1600 AUMs.

In addition to that early removal of the 125 head, we would remove more cattle as they came down from the high country during Summer - until the last of the cattle came off in mid to late October.

Effective use during those years was approximately:

609	Cattle	June	1	to	July	20	1015	AUMs
484	Cattle	July	21	to	Aug.	15	403	AUMs
334	Cattle	Aug.	16	to	Sept.	1	167	AUMs
160	Cattle	Sept	1	to	Sept.	20	106	AUMs
34	Cattle	Sept.	21	to	Oct.	20	34	AUMs

The average use during those years was 1712 AUMs.

During this period the BLM and Forest Service people were recognizing our use as being 159 AUMs for the BLM lands within the allotment and 2,365 AUMs for the Forest Service lands within the overland allotment - for a total of 2,524 AUMs, (See Document 63)

In 1968, my Uncle leased his ranch with option by buy. From that time forward the 7H Ranch began changing hands every two or three years. Many of the new owners did not understand the history of the Overland Allotment and believed that they should be able to run the total number of AUMs indicated in the original allocation. This caused problems. Therefor in 1972 we encouraged the Forest Service to issue a reduction in use - soon after we, meaning the 7H and ourselves, agreed to a 30 percent cut in use. Thereafter our permitted use was recognized as being 1610 AUMs on the Forest and 159 AUMs on intermingled BLM lands.

When knowledge of rest rotation grazing came to Elko County in 1970, I made a point of attending one of the courses put on by Gus Harmey. Gus Harmey was then, and still is, considered the Guru of rest rotation grazing. Soon after obtaining that knowledge we began dividing our use area of the Overland Allotment into pastures. We then instigated a rest rotation system.

The general idea behind rest rotation grazing is; after dividing an allotment into four pastures, one pasture is to be rested each year, one is to be used early, one is to be used mid season, and one is to be used in late season. The theory being that by grazing in this manner, plants would be provided rest, opportunity for seed production and opportunity for new plant establishment, while traditional levels of grazing would continue.

Learning the theory behind rest rotation grazing and experimenting with its application was a very good experience for me for I learned a good deal about the needs of plants and wildlife. However, as time went on I found that there were other ways of meeting the same goals that fit our particular situation better.

During this period we built numerous fences to accommodate controlled grazing. Before we had finished, we had divided the higher elevation canyons into three separate pastures, and the low elevation country into three pastures which enabled us to begin running our cattle separate from the 7H.

With the exception of the fence between Harrison Pass Canyon and Long Haired Smith Canyon we ranchers built all the fences and furnished approximately 40% of the material.

In 1983 we officially divided the Overland Allotment into individual or private allotments. (See Document 64) (There were five permittees operating within the Overland Allotment at that time) An allotment management plan was adopted the following year.

By then I had learned that using the low elevation pastures as late as we were was not working. The bulk of the feed produced on the low elevation pastures was cheat grass, and by the 1st of June or later, at which time we were turning our cattle out, 80 to 90 percent of the feed was too dry and unpalatable for effective use.

With this in mind I suggested a different method of use. I suggested that for a short period of time, for 5 years, that we use each pasture every other year rather than two years out of three, but that we enter earlier, sometime between the 1st and the 10th of May so as to make better use of cheat grass. By using the pastures in this manner I felt that we could realize as much or more use as we had been under the current system and hopefully by resting the pastures every other year we could achieve a more rapid increase in perennial grasses within the allotment. This proposal then became the chief feature of the 1984 Allotment Management Plan. (See pages 3 and 4 of document 65) (Increasing the percent of perennial grass within a plant community was a major goal of the FS at that time)

It is important to note that the manner of use, as it was written into the plan, was to be tentative - for five years only - (See pages 3 and 4 of the Allotment Management Plan itself, Document 65) I call attention to this fact because this is one of the main points of disagreement that has arisen between the Forest personnel and myself - they claim that the manner of use as it was written into the agreement was to be permanent.

Anyway, we ran our cattle in the manner called for in the Allotment Management Plan, making minor changes from year to year until 1987.

By 1987 I had become convinced that we were using our high elevation pastures too late in season, with too few cattle. By the 1st of July much of the feed on the lower portion of the pasture was too dry for effective livestock use.

I was also beginning to realize that we could not afford to go on running so few cattle on the mountain. We had the same fixed cost of riding and salting regardless of whether we put 50 or 250 head of cattle into a pasture. In addition, we were required to maintain our share of the fence whether we used a pasture or not. It was obvious we would need to restore at least a portion of our original use if we wanted our Forest use to remain economically viable.

We were also learning that because the feed on the uplands was more mature in late season it was less palatable - and since it was less palatable, it was causing our cattle to concentrate on the riparian areas more than they had previously.

I was also noticing that we were losing plant diversity in the meadow areas along the creeks and in the draws. When the feed was not used on rest years the wildlife were avoiding the meadows. It was obvious they preferred grazed meadows over ungrazed meadows. Therefore I made the suggestion that we use our upper elevation pastures earlier so as to be out by early July. That way, the meadows would have time to green up, the new growth would be more beneficial to sage grouse and other wildlife, and the cattle would make more efficient use of the cheat grass. (See Document 66, letter to Tom Shore making those suggestions. See also Document 68, science confirming the fact that sage grouse prefer grazed meadows over ungrazed meadows)

In addition I made the request that the Forest Service and NDOW people monitor the riparian areas in order to determine if my observations were correct. (See again Document 66)

Again, my suggestion was accepted and the Forest people did agree to monitor. (See Document 67) And again I understood that we were to return to our original level of use after three or four years. No monitoring was ever done by either the Forest people nor the wildlife people. But then in 1991 when we indicated that we wanted to increase our use somewhat the Forest people said no, "before we can allow you to do that we would have to evaluate such a suggestion, and we simply do not have time to do that". (See Document 73)

Up until then we had a good working relationship with agency personnel. (See Documents 69) But as planning processes went forward and we assessed the attitudes and actions of those Forest personnel we came in contact with, we became more and more apprehensive (See Document 71) even though they tried to lead us to believe otherwise. (See Document 70)

Then in the Spring of 1991 we received two letters, one dated April 10th signed by both John Inman, Supervisor of the Humboldt National Forest and R. M. "Jim Nelson, Supervisor of the Toiyabe National Forest, and the other dated May 9th, signed by Mont Lewis, informing us of their decision to administratively amend our permit

to comply with the Forest Land and Resource Management Plan standards and guidelines. (See Documents 15 and 16)

Although I did not understand at the time, in effect what the Forest people were doing was setting forth policy making Land and Resource Management Plans the governing documents over all resource management. And too, they were setting forth policy whereby they could change the terms and conditions of grazing permits and allotment management plans at will, without seeking permittee approval.

You see, up until that time, it was the policy of the Forest Service and BLM, before they made any changes in an allotment management plan or the terms or conditions of a grazing permit they had to sit down with the permittee and try to negotiate the change they wanted, and only in the event that the agency had absolute proof that resource damage was occurring, and the rancher could not be talked into a change would they issue a decision amending the terms or conditions of a grazing permits or allotment management plan without permittee approval.

It was also in 1991 that the Forest people denied my request that we be allowed to return to our pre 1984 level of grazing use.

WE SEE THREE AREAS OF MAJOR CONFLICT:

FIRST: We believe that federal officials acted without authority when they chose to administratively amend our grazing permit without first entering into a process of careful and considered consultation, cooperation, and coordination.

Provision for consultation, cooperation and coordination is provided for in the Public Rangelands Improvement Act (PRIA) of 1979. It is stated in Sec. 8 of PRIA, that Sec. 402 (d) of 43 U.S.C. 1752 (FLPMA) is to be amended to read as follows:

"(d) All permits and leases for domestic livestock grazing issued pursuant to this section may incorporate and allotment management plan developed by the Secretary concerned... If the Secretary concerned elects to develop an allotment management plan for a given area, he shall do so in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved."

Webster's Collegiate Dictionary defines **consultation** as an: Act of consulting or conferring; a council or conference.

Webster's Collegiate Dictionary defines **cooperation** as: Collective action, as in industry, for mutual profit or common benefit.

Blacks Law Dictionary defines **coordinate** as: Equal, of the same order, rank, degree or importance; not subordinate. Empire Ins. C. of Texas v. Cooper, Tex. Civ. App., 138 S.W. 2d 159, 164.

When changing the terms and conditions of our permit beginning in 1991, at no time did Forest Service personnel pursue a process resembling careful and considered consultation, cooperation and coordination with permittees Cliff and Bertha Gardner.

SECOND: We believe that Forest personnel acted unlawfully when they adopted policy making the Land and Resource Management Plan (LRMP) the governing document for resource management.

As previously discussed in my affidavit, both the Forest and Rangeland Renewable Resources Planning Act of 1974 and the National Forest Management Act of 1976 state; "Any revision in present or future permits, contracts and other instruments made pursuant to this section shall be subject to valid existing rights."

BLM and Forest Service Regulations also confirm that plan implementation is subject to valid existing rights. BLM regulation 43 CFR 1610.4-3 (b) reads:

"...District and Area Manager shall take appropriate measures, subject to valid existing rights, to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved plan or amendment within a reasonable period of time."
(Underline added)

Forest Service regulation 36 CFR 219.10 (e) reads:

"As soon as practicable after approval of the plan, the Forest Supervisor shall ensure that, subject to valid existing rights all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan." (Underline added)

In addition, it is clear that resource management plans were never intended to be governing documents, taking precedence over existing law. If such were the case it would put Forest personnel in a position where they could arbitrarily establish any policy they should choose without answering to anyone. It is our belief that the original intent of the Acts mentioned above were for Land and Resource Management plans to act as a general guide for future activities, as is indicated in Forest Service Handbook (FSH), WO AMENDMENT 1909.12-92-1, which reads:

"The forest plan is a strategy for managing the forest."

* * *

"The plan is part of the 50 year framework for long-range resource planning established by the Forest and Rangeland Renewable Resources Planning Act (RPA). As such, it established general direction for a period of time, usually between 10 and 15 Years." (underline added)

* * *

"First, the outputs proposed by the plan are projections or targets." (See Document 72)

In addition, we believe that Forest people are misrepresenting the intent of the Forest and Rangeland Renewable Resources Planning Act and the National Forest Management Act when they state that grazing permits must include land and resource management plan standards and guidelines. (See Documents 15, 16 & 22)

What Sec. 6. (c) of both the Forest and Rangeland Renewable Resources Planning Act and the National Forest Management Act say is "The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after enactment of this subsection and shall attempt to complete such incorporation for all such units by no later than September 30, 1995."

These Acts say that the standards and guidelines of the Acts will be incorporated into land and resource management plans. They do not say that the standards and guidelines of the land and resource management plan must be incorporated within grazing permits or contracts. There is a big difference.

THIRD: It is our belief that Forest personnel exercised a breach of contract by not allowing us to return to our original level of grazing use as was agreed to in the 1984 Allotment Management Plan.

In the Fall of 1991 I made a request that we be allowed to return to our original level of grazing use as was intended in the 1984 Allotment Management Plan. (See Document 73) We had accomplished our goal of increasing the frequency of perennial grasses within our high elevation pastures. In fact it appeared we had gone too far. We were beginning to lose plant vigore because of the decadence of many plants, including those within the plant communities of riparian areas.

PERMITTEES, CLIFF AND BERTHA GARDNER WERE FORCED TO ACT OUT OF NECESSITY

There were many reasons for our decision to turn our cattle onto the Forest Reserve without a permit in 1994. But more than anything, we did it to protect ourselves from wildfire. Never in our lives have we been faced with the danger of wildfire as we have been these last three years.

Originally when Mont Lewis told us that it would be required that we rest the burned area for two years after the Dawley Creek Fire we thought there would be no problem. But then in the Fall of 1993, when we had seen how much the feed had grown that Summer, we became alarmed. Dry weeds and cheat grass stood from eighteen inches to two feet tall everywhere within the lower pastures of our allotment - and with the prospect of more fuel accumulation the following year the threat was eminent.

We tried to talk the Forest Service people into sitting down with us. I told them what might happen if we didn't graze in 1994. I called Mont Lewis twice in October asking him to sit down with us. I wrote him three letters. We sent copies, or took copies of most of our correspondence to the District office in Elko. The Forest people knew what our concerns were. But when you're dealing with people that want you off the Forest anyway, what can you do? (See Document 74, actual correspondence)

It was not just the threat of wildfire that forced our decision. We knew it was only a matter of time until the agency people were going to find an excuse to cancel our permit - with all the things Mont was demanding - the new utilization standards; the demand that every last animal be in the right place at the right time; shifting other people's fence responsibility to us; the demand that we keep the fences up to impossible standards; then stating that we would have our permits canceled in whole or in part if we were found to be out of compliance. We couldn't survive all their new terms and conditions and they knew it.

That's why they were imposing all the new terms and conditions on our permit. They weren't trying to get along with us. They were crowding us in every way they could. They wanted to find an excuse to cancel our permit. The best example was Mont's refusal to allow us to graze the county right-of-way in 1994. Grazing the right-of-way would have harmed absolutely nothing, and was the best possible way we had of protecting ourselves from wildfire. Mont had said in a letter dated Sept. 11, 1992 that we could graze areas not burned in the Dawley Creek fire. (See Document 75) The right-of-way had not burned, and neither had three small parcels fenced separate from the primary allotment, yet in 1994 Mont said no, "You will not graze any of your allotment." And when I asked him if that meant the right-of-way too, he said, "If the right-of-way is within the Mica Allotment, it too is closed to grazing in 1994."

It was this act more than any other that convinced me that there was no possible way that we were going to be able to work with these people.

Explanation: In 1971 we fenced the County right-of-way separate from the allotment. Included within that right-of-way is a small parcel of Forest Service land that lies just below the road to which the Forest Service has assigned AUMs. By having the road fenced separate from the allotment, we have been able to accomplish

two things. First we have been able to keep the cattle off of the road and out of harms way during the normal grazing period - which benefits both the public and ourselves. And second, by having the right-of-way fenced separate we can concentrate our cattle in the right-of-way for two or three days each year so that they will graze off the Summer's growth of weeds and grass. In that way the right-of-way doubles as a fire break for the protection of the main part of the ranch.

In fact, it has been because of our ability to graze the right-of-way that we have felt comfortable with resting 50 percent of the low range each year, beginning in 1972. We believe that a large part of the reason that the fire did not jump the road during the Dawley Creek Fire in 1992 was because the right-of-way had been grazed that Summer.

Someone might ask; What is the difference between resting one of the low lying units every other year and the Forest peoples requirement for two years of rest after a fire? I would have to answer that there is a good deal of difference. With two years rest, there is two years accumulation of fuel, with the first's being much more flammable than the second's. In addition, if there is flexibility in management, and you experience an above average growth year, you have the option of putting out just enough cattle so as to reduce the vegetation around the perimeter of the pasture. In fact, that was all we were asking Mont for in 1994 - that we be allowed to put out just enough cattle to reduce the fuel load along the fencelines, but he said no. "There will be no grazing anywhere in the allotment, not even in the right-of-way."

Understanding that we would have our permit canceled if we turned cattle into the right-of-way, regardless of what else we did, was part of the reason for our decision to put cattle out in the two pastures adjoining the road. It was obvious we were not going to hurt the new grasses that had been planted. We couldn't have, for all we intended to do was to take light use in order to knock down the tumble weeds that had blown up against the fences, and besides, quite often, when you feed off annual grasses such as cheat grass, it gives new plants a better chance for survival. I remember visiting with Gus Harmey a number of years ago, and him explaining that in many cases it is beneficial to graze new seedlings. As he explained it, new seedlings have very shallow roots - maybe only 1 1/2 to 2 inches deep, consequently they are vulnerable, for it is the top one or two inches of soil that dries out first; but with grazing, two things occur, first the bulk of the larger plants and weeds are removed, creating less demand for available soil moisture, and second, the seedling itself, by being cropped somewhat, demands less moisture thus increasing its own chance for survival.

A number of people have asked why we did not go through the appeals process. The reason we did not was because of our previous experience. After nine years of involvement in public lands issues

we are convinced that the appeals process is a major part of the problem. Sure, Joe Fallini and Wayne Hage have won a couple of lawsuits by going through the appeals process but that didn't solve their problems. The day they got home from court they found themselves faced with four or five more issues just as bad or worse than the first.

The agency people are not going to let anyone get away with challenging them. That's why ranchers today are so afraid of going to court. They know it's a losing proposition. The average court battle can take up to ten years and cost as much or more than the ranch is worth. In reality there is not a rancher in the country that can survive the present situation and the agency people know it. That's why they're so arrogant. They know that if they can't regulate us out of business they'll defeat us via long drawn out court battles.

I have had two different ranchers tell me, that when they told their BLM Area Managers they had no choice but to go to court, the Area Managers just laughed at them. One of the managers said, "Why I can keep you in court for twenty years." This is the agency attitude. They know, and we know, that in the end there is no way that an average rancher can win by going through the appeals process.

It was for these reasons that Bertha and I decided, if we were to go court it would be for the purpose of establishing recognition for our possessory rights. If we don't have tenure, which is all that a property right is, we don't have anything. If our use does not qualify as one of those "valid existing rights" as is referred to in all of the various Acts passed by Congress pertaining to public lands management, then we are all through.

Besides, we know this fight is not just over the use of the public lands, it is a fight for control of all resources, including our private lands.

It is no secret that the government is acquiring as much land as they possibly can. And in our situation, it has been publicly announced that they want to complete the purchases of all lands at Franklin Lake, (See Document 76) and since we own the largest remaining portion of Franklin Lake (purchases have already been made involving ranches both North and South of our ranch) our's is the ranch they want most.

It's also known that many Forest people support the acquisition. Tom Shore told me that "the land acquisitions of Franklin Lake were the best thing that could happen to Ruby Valley". Mont Lewis was there with us when Tom Shore made the statement. It's no secret that the agencies are working in collusion to bring as much land as possible into government ownership. And they are being successful. Reports indicate that

since 1964 federal land ownership has increased by 3.7 million acres in the State of Nevada alone. (See Document 77)

We have other concerns as well. One of them being the fear that we could experience a reduction in irrigation water if grazing is discontinued. You see, the meadow lands that make up the heart of our ranching operation are completely dependent on the waters that flow from the Wilson Creek, Tipton Creek, and Dawley Creek watersheds - all of which are covered to a large degree with heavy stands of quaking aspen, chokecherry and wild rose.

We know from experience that if grazing is eliminated on the mountain, there will be an increase in woody vegetation. It's already happening. Because of reduced livestock use over the last eight to ten years, we are already seeing many of the small meadows and open areas being taken over by quaking aspen. That is one of the reasons we have been wanting to return to pre-1984 grazing levels.

The fact that increased woody vegetation often results in decreased water flows is not a new science. In 1976 the United States Department of Agriculture published a report titled, *FOREST AND WATER: effects of forest management on floods, sedimentation, and water supply*. At the beginning of the report it is stated:

"...in 1909 the first forest watershed study in the United States was started at Wagon Wheel Gap, Colorado... In the early 1930's. the U.S. Forest Service started additional research at the San Dimas Experimental Forest in southern California, the Sierra Ancha Experimental Forest in central Arizona, and the Coweeta Hydrologic Laboratory in western North Carolina... By 1970 almost 2,000 papers had been published describing results of research on watershed management."

Principle findings pertinent to this discussion can be found on pages 50 and 51 where it is stated:

"Brushland has been converted to grassland range in California to increase water yield and forage production. Differences in water yield may be chiefly a matter of rooting depth, since the shallower rooting grass transpires less moisture than trees... Root depth was the key to difference in water use between trees and grass in western Colorado. Quaking aspen used 19 inches of water, spruce 15, and grass 9 inches during the growing season... In Arizona, conversion of brush to grass increased streamflow from small watersheds by one-third... In another Arizona study, conversion from chaparral to grass increased water discharge by four times... (See Document 78)

We know there have been no studies completed in South Ruby Valley showing that the lack of grazing would result in reduced water production. But that's the problem. The National Environmental Policy Act (NEPA) requires analysis of proposed actions and disclosure of possible consequences. In this particular case, Forest personnel have failed to adequately assess all possible impacts to the physical and socio-economic environment.

We are also reminded that one of the two primary reasons for the creation of Forest Reserves, as stated in the Organic Administrations Act, is for the purpose of securing continuous water flows.

Another concern is our ability to survive financially. Ranching is not something you can put on hold until these kinds of issues are settled. There are creditors to pay. There are taxes. The ranch infrastructure must be maintained. You don't get in or out of ranching anytime you want. It takes years to put a ranching operation together. Ranches are developed over a long period of time - in our case, more than three generations. You can't just sell off a portion of a herd and then have it again when you need it. In ranching everything has to be done right or you'll soon find yourself out of business.

Sure, we could have reduced the size of our cow herd and refrained from grazing our allotment, but how would that have affected our ranching operation, a business that historically has rarely averaged more than a 2 percent return on investment. How is a family supposed to survive by running fewer animals when you know that the same fixed costs will continue? It can't be done.

And what of the costs of the court battle itself? Can an average ranching family afford such cost while experiencing a loss of production? In our particular situation, the only way we can proceed is by going further and further in debt. In other words, we are being forced to spend the value of our ranch in our efforts to protect it.

COST OF COMPLIANCE

For years agency people have carried on a near constant campaign, claiming that ranchers are being subsidized via cheap grazing fees, yet every study that I have seen indicates that when all costs are taken into consideration, ranchers are paying far too much to run livestock on the public lands already.

This is why I have included as part of this affidavit Documents 79 through 83. These summaries of studies not only verify the fact that ranchers are paying far too much to graze public lands, but they also reflect the effect overregulation is having on those cost. The best example is Document 79.

Document 79 is a summary of a study that was completed in 1993 involving Colorado State University, the University of Idaho, New Mexico State University, the University of Wyoming, Ron DeVibiss of the USDA Forest Service, and Don Waite, Ron Appel, Tim Heisler and Gerald Stoebig of the Bureau of Land Management

In that study it was found that when all costs of running livestock on public lands were taken into consideration, 34 percent of all cattle producers and 60 percent of all sheep producers operating on BLM administered lands, and 62 percent of cattle producers and 92 percent of all sheep producers operating on Forest Service administered lands were paying more to operate on public lands than were those who were purchasing private pasture.

It was found that, on an average, livestock producers operating under today's conditions (1992) should be paying no more than 16 cents an AUM to operate on public lands. The major reason being ever increasing cost of compliance. As an example, according to Dr. Allen Torell of the New Mexico State University, non-fee costs of operating on public lands in 1966 were 16 percent higher than they were on private lands. But in 1992, non-fee costs of operating on public lands had risen to where they were 60% higher than they were on private lands.

On our own operation we find that our non-fee costs have averaged about \$5,420.00 a year for the period when we were averaging 375 AUMs use each year - which amounts to about \$14.45 an AUM.

One of our reasons for wanting to return to pre-1984 levels of use was to spread our fixed costs over more units, thereby reducing our cost of operation. As an example, if we were allowed to use 850 AUMs rather than 375 AUMs, our non-fee cost would be around \$7.66 an AUM.

If we take over the maintenance of the "Crest fence", as the Forest people were demanding before they canceled our permit (which would be a fence reconstruction project each year rather than a maintenance project) we project that our non-fee cost would have then been approximately \$17.12 an AUM (assuming that our use would be 375 AUMs a year).

If we began riding for every last stray each time we moved our cattle, or when we pulled them off the Forest as the Forest people are now demanding, who knows how much it would cost to run on the forest - perhaps \$30 to \$35 an AUM, as was the case at the RO Ranch.

Average cost for private pasture in Elko County in 1995 was \$10.00 per AUM (\$8.00 for yearlings and \$12.00 for cows with calves). We pastured 60 head of bulls during the Summer for \$12.50 an AUM. The reason we received an over market premium was because

bulls consume more feed than cows or yearlings. We also stood all medical cost.

All in all we have certain responsibilities, to our creditors, to our community, and to ourselves to protect the economic viability of our ranching operation. We are also responsible for the resources that we manage, whether they are on private lands or public lands. This fact is often ignored when these kinds of issues are addressed. We have never abused any resource. Every resource value on our allotment is in better condition today than it was when my Great Grandparents entered the Valley in 1872.

No one in this world cares more about Ruby Valley or has a bigger stake in its future than we do. We cannot sit idly by while others destroy all that they love and cherish. And that's exactly what the government agents are doing today. They are destroying our valley and all that we love and cherish. Quite simply, all we are doing is trying to stop them.

For documentation confirming our fear that there was and is great danger from threat of wildfire, see three affidavits identified as Document 84. See also Document 85, fire occurrences in 1994.

For a detailed account of the Dawley Creek fire see Document 86, affidavit of Cliff Gardner.

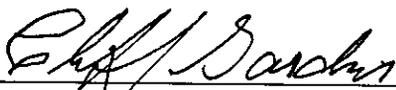
For a more detailed preview of correspondence between Cliff Gardner and Mont E. Lewis during the time when Cliff was asking Mont to reconsider his decisions see Document 74, actual copies of correspondence.

For copies of those letters wherein Mont Lewis outlines all new terms and conditions, and threatens permit action, which may include suspension and/or the cancellation of all or part of a Term Grazing Permit for non compliance, see Document 87.

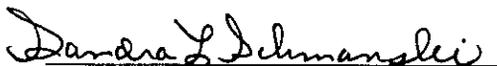
For documentation confirming that Forest officials are in fact, canceling peoples permits in whole or in part when cattle are found outside of their assigned areas see Document 88.

FURTHER AFFIANT SAYETH NAUGHT.

Subscribed and sworn
before me this 23th
day of November, 1995.



CLIFF GARDNER



Notary Public

