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OFFICE OF ATTORNEY GENERAL  
DEPUTY ATTORNEY GENERAL

UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

CAROL C. FITZGERALD  
CLERK

BY \_\_\_\_\_  
DEPUTY

JOHN ESPIL SHEEP CO., INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
BRUCE BABBITT, et al., )  
 )  
Defendants. )

No. CV-N-94-172-DWH

DEFENDANTS' PRE-TRIAL  
MEMORANDUM

HEARING: May 9, 1994 2 p.m.

SHIRLEY SMITH  
Assistant United States Attorney

KATHRYN E. LANDRETH  
United States Attorney  
100 West Liberty, Suite 600  
Reno, NV 89501  
(702) 784-5438

SUSAN V. COOK  
Environment & Natural Resources Div.  
Department of Justice  
P. O. Box 663  
Washington, D.C. 20044-0663  
(202) 272-6667 FAX 272-5775

Attorneys for Defendant

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## INTRODUCTION

1           In the ideal world according to a rancher, any number  
2 of cattle could graze the open range freely without restriction.  
3 In the ideal world according to wildlife advocates, wild horses  
4 and burros would graze freely, their numbers allowed to fluctuate  
5 naturally. In the ideal world according to environmentalists,  
6 plants would be protected and allowed to flourish, streams would  
7 run clear, free from sedimentation caused from erosion, fisheries  
8 would not be threatened by temperature increases caused by  
9 insufficient plant cover, and wildlife would have abundant food  
10 and cover.

11           But the public lands do not belong to any one special  
12 interest group, and Congress has given to BLM in this case the  
13 difficult task of balancing the needs of the rangeland resources  
14 with the desires of the different special interests. It is BLM's  
15 actions in attempting to balance competing interests in rangeland  
16 resources, while being the stewards of the public lands, that has  
17 led to the instant litigation.

18           The Court has stated that this hearing shall be limited  
19 to "the issue of whether the Bureau of Land Management followed  
20 the applicable requirements, including but not limited to 43  
21 C.F.R. § [4110.3-3(c)] and § 4130.6-3, in making and giving full  
22 force and effect to its February 28, 1994 decision." Minute  
23 Order, March 28, 1994.

24           BLM has the duty to manage livestock grazing on the  
25 public lands under the principle of multiple use. 43 C.F.R. §  
26

1 4100.0-8; see Argument I (Legal Background), infra at 19. BLM is  
2 required to take action to close all or part of an allotment to  
3 protect range resources if it determines that soil, vegetation or  
4 other resources require "temporary protection" because of  
5 conditions such as drought, fire, flood, or insects. 43 C.F.R. §  
6 4110.3-3(c). One of those "conditions" is overgrazing. See  
7 Argument IIA (Temporary Protection), infra at 23. In addition,  
8 when, as here, monitoring shows grazing is causing an  
9 unacceptable level of utilization<sup>1</sup> BLM is required to reduce  
10 authorized grazing use where necessary to maintain or improve  
11 rangeland productivity. 43 C.F.R. § 4110.3-2(b); see Argument  
12 IIB (Maintain or Improve Productivity), infra at 25.

13 If closing all or part of the allotment would require  
14 modification of a grazing permit, BLM may do so after "careful  
15 and considered consultation, cooperation and coordination" with  
16 the permittee and other affected interests. 43 C.F.R. § 4130.6-  
17 3. See Argument III (Consultation), infra at 25. And, if  
18 closing all or part of the allotment would require a modification  
19 of authorized grazing use, BLM is required to issue a full force  
20 and effect decision. 43 C.F.R. §§ 4110.3-3(c), 4160.3(c); see  
21 Argument IV (Decision), infra at 29.

22 Thus, in this memorandum we focus on whether BLM found  
23 it necessary to act to protect range resources (§ 4110.3-3(c))

---

24 <sup>1</sup> "Utilization" means the percentage of forage that has  
25 been consumed by livestock during a specified period and the  
26 livestock grazing utilization pattern on the allotment. 43  
C.F.R. § 4100.0-5. Utilization is synonymous with use.



(Argument IIA). In addition, we examine whether BLM found it  
1 necessary to reduce active grazing use<sup>2</sup> to maintain or improve  
2 rangeland productivity (§ 4110.3-2(b)) (Argument IIB). We review  
3 the substantial consultation efforts made by the agency (Argument  
4 III). Finally, we discuss the mandatory requirement of a full  
5 force and effect decision when a modification of authorized  
6 grazing use for temporary protection of resources occurs  
7 (Argument IV). Throughout our discussion, we establish the  
8 agency's adherence to applicable law, regulation and procedure.

9 We note that the issue is not whether plaintiff's  
10 experts agrees with BLM's experts, or whether plaintiff's experts  
11 things BLM's experts were correct. R.T. 2, 37-38.<sup>3</sup>

12 The standard of review under the Administrative  
13 Procedure Act, 5 U.S.C. §§ 702-706, provides that agency action  
14 should be overturned only if it is arbitrary, capricious, an  
15 abuse of discretion, or otherwise not in accordance with the law.  
16 The Ninth Circuit has held that the standard of review is highly  
17 deferential: "[t]he court may not set aside agency action as  
18 arbitrary or capricious unless there is no rational basis for the  
19 action." Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th  
20 Cir. 1986); Marsh v. Oregon Natural Resources Council, 490 U.S.  
21 360, 376 (1989). This standard is a narrow one whereby "[t]he  
22 court is not empowered to substitute its judgment for that of the

23  
24 <sup>2</sup> Active grazing use means the current authorized livestock  
grazing use.

25 <sup>3</sup> "R.T." refers to the Transcript of the Motion for  
26 Temporary Restraining Order in this case, heard March 28, 1994.

1 agency". Citizens To Preserve Overton Park, 401 U.S. 402, 416  
2 (1971). The court is not to determine whether it would make an  
3 administrative decision differently; the scope of review is very  
4 narrow. Perkins v. Bergland, 608 F.2d 803, 807 (1979). An  
5 agency's determination is entitled to deference, particularly, as  
6 here, the subject matter of the decision concerns a scientific or  
7 technical issue within the special expertise of the agency.  
8 United States v. Clark, 454 U.S. 555, 565 (1982); National  
9 Cattlemen's Ass'n v. EPA, 773 F.2d 268, 271 (10th Cir. 1985);  
10 Petrou Fisheries, Inc. v. I.C.C., 727 F.2d 542, 545 (5th Cir.  
11 1984). On those occasions where plaintiff's scientific experts  
12 express conflicting views with agency scientific experts, the  
13 agency is entitled to rely on the reasonable opinions of its own  
14 qualified experts. Marsh v. Oregon Natural Resources Society,  
15 490 U.S. at 377.

16 That determination is to be based on the administrative  
17 record<sup>4</sup> that was before the agency. Florida Power & Light Co. v.  
18 Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138,  
19 142 (1973). If the decision is not sustainable on the  
20 administrative record when subjected to this standard of review,  
21 the court must remand the matter to the agency for further  
22 consideration. Vermont Yankee Nuclear Power Corp. v. Natural

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23  
24 <sup>4</sup> Because of the rapid pace with which this litigation has  
25 progressed, the agency has not filed a complete administrative  
26 record. With this Memorandum, defendants submit documents from  
the Administrative Record relevant to the specific issue  
identified by the court as the subject of this bench trial.

Resources Defense Council, Inc., 435 U.S. 519, 549 (1978); Camp v. Pitts, 411 U.S. at 143.

Before we turn to our analysis of the applicable law, regulation and procedure, we first discuss the background of the Bureau's resource management efforts on the Twin Peaks Allotment.

#### BACKGROUND

The Twin Peaks Allotment is located approximately 25 miles east of Susanville, California, and 20 miles west of Gerlach, Nevada.<sup>5/</sup> The allotment lies in both California and Nevada and contains a total of 408,935 acres. Of that, 380,140 acres is public land administered by the BLM's Susanville District, Eagle Lake Resource Area. Also located within the allotment are 28,795 acres of privately-owned land, of which only 6,440 acres, or less than 2%, is owned by plaintiff. Twin Peaks was created in 1983, and is one of a total of 28 allotments within the East Lassen Project Area.

The East Lassen Project Area occupies over one million acres of the Great Basin and Modoc Plateau ecosystem in eastern Lassen County and a small portion of Modoc County, California, and western Washoe County, Nevada. The area provides habitat for mule deer and pronghorn antelope, supports California's largest herd of wild horses, contains a small but expanding wild burro

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<sup>5/</sup> The factual statements in this Memorandum are supported by the declarations filed with defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction and/or by exhibits where specifically referenced.

1 population, and provides forage for domestic livestock grazing of  
2 both cattle and sheep.

3 Cal Neva Management Framework Plan

4           Grazing on the allotment is governed by a tiered land  
5 use planning documents. Broad, programmatic guidance is set  
6 forth in the Cal Neva Management Framework Plan (MFP) (August 3,  
7 1982)<sup>6/</sup> which sets forth management objectives, goals, land use  
8 decisions, and standards and guidelines for management of  
9 wildlife habitat, riparian area, livestock grazing, and other  
10 rangeland resources. It covers the Cal Neva Planning Unit, which  
11 consists of 642,000 acres of public land within the East Lassen  
12 Project Area. Broad land use guidance over the Cal Neva Planning  
13 Unit is also found in the Rangeland Program Summary and the  
14 Grazing Environmental Impact Statement (EIS) and accompanying  
15 Record of Decision (August 9, 1982).

16           It is required that BLM's management actions be in  
17 conformance with land use plan objectives. 43 C.F.R. § 4100.0-8.  
18 The MFP gives particular consideration to the improvement of  
19 riparian, wetland and meadow habitat, and the protection of  
20 wildlife and watershed values. It sets livestock grazing use  
21 limitations, also called utilization levels, of 40 to 60% and  
22 includes provisions for monitoring the allotment condition and  
23 making whatever changes in seasons of use, livestock numbers, or  
24 grazing seasons might be required. The plan calls for grazing

---

25 <sup>6/</sup> Presently, BLM's land use plans are called Resource  
26 Management Plans. Previously, they were called Management  
Framework Plans.

1 areas to receive a minimum of one growing season of rest for each  
2 year's use.

3 Twin Peaks Allotment Management Plan, March 1985

4 More specific objectives and the actions necessary to  
5 implement the MFP are found in the Twin Peaks Allotment  
6 Management Plan (AMP). Ex. 29. An AMP is a site-specific land  
7 planning document which specifies those on-the-ground actions  
8 necessary to bring a particular allotment into compliance with  
9 the land use plan (here, the Cal Neva Management Framework Plan).  
10 Generally, an AMP prescribes the manner in which livestock  
11 operations will be conducted, specifies any necessary  
12 improvements, and accounts for the multiple resource values which  
13 the agency must consider.

14 The Grazing Permit

15 The most narrow and site-specific document is the  
16 grazing permit. Each person who desires to graze on the public  
17 lands must obtain a permit from the appropriate federal agency,  
18 here the BLM. The agency may include in grazing permits whatever  
19 terms and conditions it "deems appropriate and consistent with  
20 the governing law," and may "cancel, suspend, or modify a grazing  
21 permit . . . , in whole or in part, pursuant to the terms and  
22 conditions thereof." 43 U.S.C. § 1752; 43 C.F.R. § 4130.6.

23 Prior to the February 1994 decision, all portions of  
24 the allotment were open to livestock grazing for varying periods  
25 of time. Plaintiff's cattle were permitted to graze from 3/1  
26 through 12/31 of each calendar year. The February 28, 1994

Decision modified plaintiff's<sup>7/</sup> grazing use on the allotment by prescribing the timing (season), duration, and intensity of livestock use in specific subdivisions of the allotment. The authorized number of Animal Unit Months (AUM)<sup>8/</sup> were reduced to approximately those actually used in 1993.

Wildlife Concerns

Observation in 1986 and 1987 of mule deer in poor condition raised concern for species health.<sup>9/</sup> In response, in June, 1987, a BLM Technical Review Team including the plaintiff began studying the problem and determined that a revision of the Twin Peaks AMP and related grazing practices would improve wildlife habitat conditions.

Then, in March 1989, the two allotment permittees, the Nevada Division of Wildlife, California Department of Fish and Game, and the BLM agreed to form a committee to review the management of the Twin Peaks Allotment in general, and the AMP in particular. The state wildlife agencies had expressed concern that the existing AMP did not adequately protect wildlife habitat and was in need of revision. In May, 1990, a summary of the

---

<sup>7/</sup> The permit modification as applied to plaintiff Espil Sheep Company was enjoined on March 28, 1994. The permit modification as to permittee Laver Ranches continues in full force and effect.

<sup>8/</sup> "AUM" refers to the amount of forage necessary for the sustenance of one cow or its equivalent for a period of one month. 43 C.F.R. § 4100.0-5.

<sup>9/</sup> The prediction of deer death loss came true in the winter of 1988, when approximately 1,200 deer died.

committee's work was released, but was never operationalized.

1 Environmental Assessment

2           Because of the complexity of management issues and  
3 diverse values involving the Twin Peaks Allotment, the BLM  
4 decided in November, 1991 to prepare an Environmental Assessment  
5 (EA) to disclose and analyze the environmental issues and grazing  
6 refinements on the allotment. Of particular concern was  
7 initiating recovery and improvement of riparian resources, and  
8 assuring that grazing practices more actively take into account  
9 the timing of livestock use in relation to the growth phenology  
10 of plants. Emphasis was to be placed on multiple use management  
11 efforts as well as seeking means to reduce adverse impacts of  
12 livestock grazing on vegetation, including mule deer and wildlife  
13 habitat. BLM proposed to make more timely livestock grazing  
14 adjustments to meet the multiple use goals and objectives of the  
15 Cal Neva Management Framework Plan, and avoid resource  
16 deterioration.

17 BLM-Permittee Range Management Agreement and Decision, March 1992

18           In order to effect the necessary changes identified  
19 through the EA process, BLM and the permittees reached a  
20 documented agreement which amended the AMP to make it more  
21 responsive to wildlife habitat and vegetative concerns. Because  
22 BLM found that vegetation and wildlife resources on the allotment  
23 required immediate temporary protection, the agreement was  
24 implemented as a full force and effect decision. Ex. 27.

1 As part of this agreement, the allotment was divided  
2 into subunits for purposes of livestock grazing, with specified  
3 numbers permitted on particular subunits at set times. The  
4 agreement also discussed existing monitoring procedures and  
5 established further monitoring "refinements".

6 Two-Year Monitoring Plan Developed

7 In coordination with this Decision, a "Two Year Action  
8 Plan for Monitoring Wildlife and Livestock Affecting Wildlife  
9 Habitat" was developed. Ex. 28. A draft of the plan was  
10 provided to permittees and other affected interests on April 10,  
11 1992 for their review and comment, and field visits were  
12 scheduled. The Plan includes three major elements:  
13 Inventory/Monitoring, Compliance Checks, and Consultation and  
14 Coordination.

15 Since then, BLM has collected monitoring data, which in  
16 turn is provided to permittees and affected interests through  
17 various updates and reports. Information collected as a result  
18 of this monitoring effort was used in formulating the challenged  
19 February 1994 Decision.

20 Drought Required Early Removal of Cattle in September, 1992

21 The drought, which had affected California and Nevada  
22 for several years, continued into 1992. In July, BLM met with  
23 the permittees in an attempt to develop short term actions to  
24 deal with the severe drought conditions on the allotment. BLM  
25 was unable to reach agreement with the permittees as to the  
26 actions to be taken, and in September, 1992, issued a full force



1 and effect decision ordering early removal of cattle from the  
2 allotment in order to provide temporary protection to vegetative  
3 resources.

4 Although the permittees initially appealed, the matter  
5 was ultimately settled. In the February 10, 1994 settlement, the  
6 parties agreed to utilization measurement procedures and BLM  
7 agreed to consider a number of alternatives if utilization  
8 exceeded specified levels. Among the alternatives was herding<sup>10/</sup>  
9 away from the riparian areas, the removal of "excess" wild horses  
and burros<sup>11/</sup>, and the fencing of riparian areas.

10 July 1993 Stipulation Settling Wildlife Interests' Appeals

11 An appeal to the BLM-permittee March 1992 Rangeland  
12 Agreement and Decision was filed by a variety of affected  
13 interests, including the California Department of Fish and Game  
14 and the Nevada Division of Wildlife, who expressed concern that  
15 the Decision did not sufficiently protect wildlife and vegetative  
16 resources, and that there was, and could continue to be, serious  
17 resource deterioration on the allotment. These appeals were  
18 settled in a stipulation which provided that BLM would adopt an  
19 integrated management plan, with environmental documentation,  
20 which would supersede the AMP. Ex. 25. Until that occurred,  
21 BLM agreed it would evaluate livestock grazing annually based on

22  
23 <sup>10/</sup> Herding would not appear to be a realistic alternative given  
24 Brent Espil's statement that he did not consider herding to be an  
option for their operation. Ex. 24.

25 <sup>11/</sup> A December 1992 Decision was issued to reduce the number of  
26 wild horses and burros on the allotment, and gathering was  
conducted in August, 1993.

1 the terms and conditions set forth in the agreement. Among those  
2 conditions were utilization levels of 40 to 60% and a prohibition  
3 on livestock grazing in Lower Smoke Creek in 1994. No cattle  
4 were to be permitted on the allotment before April 15. Finally,  
5 BLM agreed that the annual grazing use adjustments would be  
6 implemented by the issuance of a full force and effect decision  
7 by February 1 of each year. A copy of the settlement agreement  
8 was furnished to Alan Schroeder, attorney for Intervenor Espil  
9 Sheep Company, in July, 1993. Thus, plaintiff was on clear  
10 notice as of July, 1993, that his grazing privilege would be  
11 adjusted annually, and that the adjustment would be implemented  
12 by a full force and effect decision.

13 Consultation with Plaintiff Prior to the February 1994 Decision

14 On January 7, 1994, a letter was mailed to the  
15 permittees, including John Espil, and other affected interests on  
16 the Twin Peaks Allotment which bore the heading:

17 INVITATION FOR CONSULTATION ON ALLOTMENT MANAGEMENT PLAN AND  
18 GRAZING TERMS AND CONDITIONS FOR THE TWIN PEAKS ALLOTMENT

19 The letter stated:

20 You are invited to attend a meeting for the purpose of  
21 consultation and coordination on modification of an  
22 allotment management plan (AMP) for the Twin Peaks Allotment  
23 . . . . This consultation meeting will also meet the intent  
24 of regulatory requirement for modification of terms and  
25 conditions of a permit under 43 C.F.R. 4130.6-3. (Emphasis  
26 added.)

27 The letter stated that BLM was considering modifying  
28 both the AMP and grazing permits on the Twin Peaks Allotment. It  
29 identified BLM's reasons for its action:

BLM's examination of monitoring information . . . has indicated that some (not all) of the short term management objectives for the allotment [established in the March 1992 decision] have not been met, or have not made satisfactory progress toward achievement. . . .

The letter indicated that the interim terms and conditions established in the March 1992 Decision had not been successful in accomplishing the management objectives. The letter also noted that the BLM had found the AMP to be out of date and containing inappropriate guidance, specifically as pertains to riparian habitat.

On January 18, the BLM again wrote the Twin Peaks permittees and affected interests a letter enclosing a Twin Peaks Allotment Evaluation Summary. Ex. 21. This Summary contained 17 pages of text, charts and data which analyzed the observed resource impacts on the allotment during 1992 and 1993 as compared to the short-term management objectives which had been established as a result of the March 1992 Decision and accompanying EA. The Summary noted that three objectives had not been met:

- 1) Utilization information<sup>12/</sup> indicated that streambank riparian vegetation in Buffalo, Parsnip and Smoke Creek was overgrazed in 1992 and 1993, i.e., utilization exceeded 40%.
- 2) Utilization information indicated that key plant species

---

<sup>12/</sup> Utilization levels are determined by using the Key Forage Plant Method, as defined in BLM Technical Reference 4400-3, and may be supplemented by clipping and weighing and/or stubble height measurements.

1 in wetland riparian habitats were overgrazed in 1992 and  
2 1993, i.e., utilization exceeded 40%.

3 3) Utilization information indicated that key mountain  
4 browse and grass species in upland habitats was overgrazed  
5 in 1992, and marginal in 1993.

6 Summary (Ex. 21) at 7-8.

7 As a result of these findings based on BLM monitoring  
8 activities, BLM's January 18 Evaluation Summary recommended the  
9 following changes to grazing use on the allotment:

10 1) Division of the allotment into subdivisions;

11 2) The cattle grazing period, which previously was from  
12 March 1 to Dec 31 of each year, was shortened. Grazing on  
13 some subdivisions would not begin before April 15, which  
14 would give vegetation a chance to become firmly established  
15 in the spring. There would be no grazing during the hot,  
16 dry summer months (July-September) when cattle have a  
17 tendency to overgraze in riparian areas.

18 3) Cattle stocking levels were to be decreased to those  
19 levels which monitoring results showed could be supported.

20 4) The numbers of wild horses permitted on the allotment  
21 would be decreased.<sup>13/</sup>

22 4) The class of livestock be changed from cow-calf to  
23 steers, who tend to graze a greater distance from water.

---

24 <sup>13/</sup> BLM determined that livestock contributed approximately 46%  
25 of utilization in the north pasture and 59% in the south pasture.  
26 Wild horses and burros contributed approximately 54% in the north  
pasture and 41% in the south pasture. Summary at 8.

1 In the January 18 Summary, BLM set forth with specificity the  
2 proposed changes in plaintiff's grazing permit which would be  
3 required in 1994. Ex. 21 (Summary at 10-11).

4 On January 20, Carolyn Espil, accompanied by her range  
5 consultant Bob Schweigert spent the entire day at the BLM office  
6 reviewing data and information concerning the Twin Peaks  
7 Allotment.<sup>14/</sup> Ex. 20. They were given the right to inspect  
8 and/or copies of all data, maps, etc., that were available.

9 The Consultation Meeting on January 21 was attended by  
10 a variety of interests including plaintiff, its attorneys, and  
11 permittee Laver Ranches. The purpose of the meeting was to  
12 discuss the results of utilization monitoring that had been  
13 completed during 1992 and 1993, the proposed changes to the  
14 Allotment Management Plan, and the proposed terms and conditions  
15 that would be applied to the Espil and Laver Ranches grazing  
16 permits for the 1994 grazing season.

17 On January 26, Brent Espil met with two BLM Range  
18 Conservationists to discuss the grazing permit and the need for  
19 maintenance of range improvements prior to grazing in 1994. Ex.  
20 17.

21 On February 3, Espil's Range Consultant Bob Schweigert  
22 called BLM, requesting a copy of an internal BLM "report"  
23 concerning riparian functional assessment for the Eagle Lake  
24 Resource Area. The one-page "report", along with background

25 <sup>14/</sup> Not all data was available for their review that day because  
26 their visit was unscheduled -- a surprise to BLM.

1 material, was made available to Carolyn Espil the next day. Ex.  
2 16.

3 On February 7, Carolyn Espil called requesting copies  
4 of utilization information, and was told a copy would be made for  
5 her to pick up. At that time, BLM requested a copy of data  
6 collected by one of Espil's experts, but was told the data was  
7 presently unavailable.

8 On February 11, 1994, John Espil visited BLM offices  
9 requesting his grazing preference statement -- a statement of the  
10 cattle he would be allowed to graze in 1994 to give his banker.  
11 At that time he was again informed that there would be changes in  
12 his 1994 grazing permit. BLM discussed with Espil the planned  
13 grazing system, and he was given a map of the allotment showing  
14 sensitive riparian areas and the proposed subdivisions. At that  
15 time, BLM expressed a desire to meet further with Espil to  
16 discuss his 1994 grazing authorization. Ex. 13.

17 On February 14 and 15, BLM contacted Carolyn Espil to  
18 arrange an appointment; they were told John Espil was not  
19 available.

20 On February 15, BLM wrote John Espil a letter which  
21 acknowledged the February 11 request. In that letter, BLM  
22 specifically advised Espil that a new grazing decision relevant  
23 to his permit would be issued, effective March 1, 1994. Such a  
24 statement made clear that, just like the two previous decisions  
25 affecting the Twin Peaks Allotment, the new decision would be a  
26 full force and effect decision. Until the decision was issued,

1 Espil was advised that he was not authorized to release cattle  
2 onto the allotment. Ex. 12.

3 Also on February 15, BLM contacted Brent Espil, who  
4 expressed his willingness to meet in the near future. At that  
5 time, BLM and Espil discussed grazing permit matters. Ex. 13.

6 On February 16, attorney Alan Schroeder contacted BLM  
7 in a letter which suggested that BLM had no authority to modify  
8 Espil's permit. The letter stated that Espil intended to  
9 continue grazing under the previous permit conditions and would  
10 be turning cattle out onto the allotment on March 1. Ex. 11.

11 On February 20, Brent Espil called BLM about the  
12 possibility of meeting on February 23 to discuss Focus Group work  
13 and the plan for 1994 grazing use. Espil stated he would call  
14 BLM to set up a time, but never did so. Ex. 13.

15 On February 22, Schroeder wrote BLM, again challenging  
16 the ability of BLM to modify Espil's permit. Ex. 10. In that  
17 letter, Schroeder acknowledged BLM's statement that it intended  
18 to modify grazing use effective March 1, 1994. As an attorney,  
19 Schroeder clearly was aware that the only way to accomplish that  
20 was by the issuance of a full force and effect decision.

21 In a second letter dated February 22, Schroeder again  
22 challenged the BLM, arguing that there had been no "consultation  
23 and coordination" with regard to deferring the commencement of  
24 the 1994 grazing season. Ex. 8. Of course, such a statement  
25 overlooked the fact that BLM's January 18 letter and Summary  
26 clearly provided for an April, not March, turn out date.

1 That same date, BLM responded to Schroeder's letter,  
2 reiterating that there would be a new grazing decision for the  
3 1994 grazing season with a new turn out date based on range  
4 readiness, probably in early April. Ex. 9.

5 On February 24, BLM participated in a Focus Group  
6 meeting to discuss long-term strategies for the allotment. Brent  
7 and John Espil were present, but expressed no urgency in meeting  
8 with BLM concerning their 1994 grazing use. Ex. 13.

9 On February 25, BLM met informally with Bob Schweigert,  
10 Espil's Range Consultant. Ex. 13. There was a short discussion  
11 about the grazing decision that was expected to be issued later  
12 that day. That afternoon, when it became apparent that the  
13 decision would not be completed that date, BLM called the Espil  
14 Ranch, and spoke with Bob Schweigert. Schweigert was told that  
15 the decision would not provide for March use. That same day,  
16 Brent Espil wrote BLM advising the Bureau that if no new grazing  
17 decision was received by midnight, February 28, grazing would  
18 begin as authorized by the existing permit. Ex. 7.

19 February 28, 1994 Final Evaluation Summary and Decision

20 On February 28, the BLM released the revised 1992-1993  
21 Evaluation Summary for the Twin Peaks Allotment. Ex. 5. This  
22 document was a compilation of monitoring data and other resource  
23 information on the Twin Peaks Allotment and incorporated changes  
24 based on input received from consultation. The majority of the  
25 data contained in this document had been previously released to  
26 the Espils. The document noted there had not been adequate



1 riparian area improvement -- there continued to be extreme  
2 utilization of riparian vegetation, and excessive trampling in  
3 riparian areas. BLM also noted that continuing cattle use at the  
4 observed levels would contribute to vegetation deterioration and  
5 irreparable damage.

6 Based on the information discussed in the Evaluation,  
7 BLM modified grazing use on the allotment in the manner initially  
8 explained in its January 18 letter and Evaluation Summary.

9 Specifically, the February 28, 1992 decision:

- 10 1. Reaffirmed the division of the allotment into  
11 subdivisions.
- 12 2. Prescribed timing (season), duration, and intensity of  
13 livestock use in each subdivision.
- 14 3. Provided clearly stated, measurable, short term  
15 management objectives.
- 16 4. Established the terms and conditions necessary to  
17 provide the mechanism for implementation.

18 On March 11, plaintiff filed its complaint, seeking a  
19 temporary restraining order and preliminary injunction against  
20 defendants, staying the application of the February 1994  
21 Decision. On March 28, the request for a preliminary injunction  
22 was granted.

## 23 ARGUMENT

### 24 I. LEGAL BACKGROUND

25 The Supreme Court has repeatedly instructed that  
26 although the public lands may be used by private persons for

1 grazing, it does "not confer any vested right". Light v. United  
2 States, 220 U.S. 523, 535 (1911), citing Buford v. Houtz, 133  
3 U.S. 320, 326 (1890). Private use of the lands occurs only by  
4 virtue of an "implied license" (id.), a consent which the United  
5 States may recall at any time. "[T]he public lands of the nation  
6 are held in trust for the people of the whole country." Light v.  
7 United States, 220 U.S. at 535, citing United States v. Trinidad  
8 Coal Co., 137 U.S. 160 (1890); Omaechevarria v. Idaho, 246 U.S.  
9 343, 352 (1918).

10 For much of the 19th century, federal lands were used  
11 as an incentive to encourage development in the western United  
12 States. With the creation of the national forests beginning in  
13 1891, Congress withdrew its tacit consent for members of the  
14 public to graze its lands, and gave to the Department of the  
15 Interior the authority to regulate grazing on national forest  
16 lands. United States v. Grimaud, 220 U.S. 506, 521 (1911).  
17 Beginning in 1897, the Secretary of the Interior began limiting  
18 grazing on the forest reserves and, in 1901, began a permit  
19 system. The Taylor Grazing Act of 1934, 43 U.S.C. § 315,  
20 authorized Interior to issue permits on their public lands.

21 The modern statutes under which grazing is regulated  
22 put conditions on the exercise of this authority but otherwise  
23 confirm and expand it. In the Multiple Use Sustained Yield Act  
24 of 1960, Congress sought to assure that public lands would be  
25 utilized for broader purposes. Use of the range for grazing was  
26 only one of the purposes, along with recreation, timber,

1 watershed and wildlife and fish. 16 U.S.C. §§ 528, 531(a); 43  
2 C.F.R. § 4100.0-8.

3 The Federal Land Policy and Management Act of 1976  
4 (FLPMA), 43 U.S.C. §§ 1701-1784, provides for the regulation of  
5 grazing through term grazing permits and the development of  
6 allotment management plans (AMPs). AMPs are developed in  
7 consultation with the permittees, and prescribe the manner in  
8 which livestock operations are to be conducted. 43 U.S.C. §  
9 1702(k). All AMPs must be produced in the context of the overall  
10 multiple use objectives of the lands as determined by the agency.

11 Id. FLPMA gives the Secretary of the Interior broad discretion  
12 to modify the numbers of livestock grazing and set limits on  
13 seasonal use of grazing lands. 43 U.S.C. § 1752; see also  
14 Perkins v. Bergland, 608 F.2d at 805.<sup>15/</sup> Superimposed on the  
15 permit and the AMP, is a system of larger-scale land use plans  
16 called Resource Management Plans which provide broad, management  
17 direction. 43 U.S.C. § 1712; 43 C.F.R. § 1601.0-5(k). FLPMA  
18 reaffirms the principle that the public lands be managed for  
19 multiple use, that is, the management of the lands and their  
20 resource values so that they are utilized in the combination that  
21 will best meet the present and future needs of the American  
22 people. 43 U.S.C. §§ 1712(c)(1), 1732(a), 1702(c).

23 The Public Rangelands Improvement Act of 1978 (PRIA),  
24 92 Stat. 1803, 43 U.S.C. §§ 1752-53, 1901-08, 16 U.S.C. §

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25 <sup>15/</sup> The rule that a grazing permit confers no vested rights was  
26 not altered by FLPMA. 43 U.S.C. § 1752(h); H.R. Rep. No. 1163,  
94th Cong., 2d Sess. 12.

1 1333(b), amending FLPMA, sought to establish a long-term program  
2 to improve the condition of the public rangelands. Congress  
3 found and declared in Section 2(1) that:

4 vast segments of the public rangelands are producing less  
5 than their potential for livestock, wildlife habitat,  
6 recreation, forage, and water and soil conservation  
7 benefits, and for that reason are in an unsatisfactory  
8 condition. (43 U.S.C. § 1901 (emphasis added).)

9 The Senate noted in its report that (emphasis  
10 supplied):

11 Much of the poor condition of the public rangelands is a  
12 legacy of the virtually unregulated grazing which occurred  
13 in the West beginning with the Spanish and continuing until  
14 the passage of the Taylor Grazing Act in 1934. That Act  
15 marked the first major effort to control grazing on the  
16 public domain and it came about as a result of the  
17 disastrous conditions of the range existing at that time.  
18 Although the Taylor Grazing Act has been relatively  
19 successful, after 40 years, the range is still in a  
20 deteriorating state and further congressional initiatives  
21 are necessary in order to restore a viable ecological system  
22 that benefits both range users and the wildlife habitat.  
23 [1978 U.S. Code Cong. & Admin. News 4069, 4070]<sup>16/</sup>

24 FLPMA, as amended by PRIA, requires, as pertinent here,  
25 that AMP's be developed or modified "in careful and considered  
26 consultation, cooperation and coordination" with the lessees,  
27 permittees, and landowners involved, as well as states having  
28 lands within the area to be covered by the AMP. 43 U.S.C. §  
29 1752(d).

## 30 II. BLM'S MODIFICATION OF PLAINTIFF'S AUTHORIZED GRAZING USE

31 \_\_\_\_\_  
32 <sup>16/</sup> An informative discussion of livestock grazing management by  
33 the BLM can be found in Grazing Management on the Public Lands:  
34 Opening the Process to Public Participation, 36 Univ. Wy. Law  
35 Rev. 571 (1991).  
36

1 Although the AMP and the grazing permit specify many of  
2 the terms and conditions necessary to ensure proper management of  
3 livestock grazing, in reality many management decisions are  
4 examined and made on an annual basis. This is consonant with  
5 BLM's duty to periodically review the grazing permit to determine  
6 if changes need to be made. 43 C.F.R. § 4110.3. Changes are to  
7 be supported by monitoring<sup>17/</sup>, as evidenced by rangeland studies  
8 conducted over time, unless the change is necessary (1) to comply  
9 with the applicable land use plan, or (2) to manage, maintain, or  
10 improve rangeland productivity. Id. Thus, although grazing  
11 permits are commonly referred to as having a term of ten years,  
12 they are not a blank check guarantee that grazing numbers or  
13 period of use will not change.

14 When BLM determines that the allotment in its current  
15 condition cannot support the permitted number or length of  
16 grazing, BLM is required to modify grazing use on the allotment  
17 accordingly. N.R.D.C. v. Hodel, 618 F.Supp. 848, 869 (E.D. Cal.  
18 1985).

19 A. Temporary Protection of Range Resources

20 BLM is required to take action to close all or part of  
21 an allotment to protect range resources if it determines that  
22 soil, vegetation or other resources require "temporary  
23 protection":

24 <sup>17/</sup> Monitoring is defined as the periodic observation and  
25 orderly collection of data to evaluate: (1) Effects of management  
26 actions; and (2) Effectiveness of actions in meeting management  
objectives. 43 C.F.R. § 4100.0-5.

1 When the authorized officer determines that the soil,  
2 vegetation, or other resources on the public lands require  
3 temporary protection because of conditions such as drought,  
4 fire, flood, or insect infestation, after consultation with  
5 affected permittees or lessees and other affected interests,  
6 action shall be taken to close allotments or portions of  
7 allotments to grazing by any kind of livestock or to modify  
8 authorized grazing use. Notices of closure and decisions  
9 requiring modification of authorized grazing use shall be  
10 issued as final decision which are placed in full force and  
11 effect under § 4160.3(c) of this title. 43 C.F.R. § 4110.3-  
12 3(c).

13 Further, use of this section is not limited to the  
14 enumerated conditions. As was noted in the preamble to the Rule  
15 which appeared in the Federal Register:

16 Comments received on the proposed regulation at § 4110.3-  
17 3(c) recommended that overgrazing be included as one of the  
18 causes which would require temporary closure of allotments  
19 or portions of allotments to grazing, or to modify the  
20 grazing use. The Department of Interior has concluded that  
21 the proposed language is adequate in that the paragraph  
22 applies to unusual and unexpected circumstances and  
23 conditions on the public lands and is not limited to the  
24 examples cited. 49 Fed. Reg. 6444 (Feb. 21, 1984) (emphasis  
25 added).

26 Thus, BLM has the duty to adjust grazing use on an allotment  
whenever necessary to protect any of the rangeland resources.  
And, if such a decision results in the closure of the allotment  
or modification of authorized grazing use in a permit, than the  
decision MUST be implemented as a full force and effect decision,  
according to the regulation. See Argument IV, below.

Here, BLM specifically found that the grazing practices  
in its February 1994 Decision were necessary "to provide  
temporary protection to vegetative and wildlife resources,  
including riparian areas, pending development of the integrated  
management plan." Ex. 6, (p.2) (emphasis added).

1 B. Modification of Grazing to Maintain Resource  
2 Productivity

3 In the alternative, when, as here, monitoring shows  
4 grazing is causing an unacceptable level of utilization BLM is  
5 required to reduce active grazing use if such is necessary to  
6 maintain or improve rangeland productivity. 43 C.F.R. § 4110.3-  
7 2(b).

8 III. BLM ENGAGED IN CONSULTATION AS REQUIRED

9 FLPMA, as amended by PRIA, requires, as pertinent here,  
10 that AMP's be developed or modified "in careful and considered  
11 consultation, cooperation and coordination" with the lessees,  
12 permittees, and landowners involved, as well as states having  
13 lands within the area to be covered by the AMP. 43 U.S.C. §  
14 1752(d). BLM has extended the mandate of PRIA, and required  
15 consultation with permittee and other affected interests before  
16 the majority of action involving AMPs, allotments, or grazing  
17 permits.

18 As pertinent here, if BLM has determined that  
19 authorized (in a permit) grazing use must be modified, its  
20 regulations permit BLM to do so only after "careful and  
21 considered consultation, cooperation and coordination" with the  
22 permittee and other affected interests. 43 C.F.R. § 4130.6-3.  
23 "Consultation, cooperation and coordination" is defined as an  
24 "interactive process for seeking advice, agreement or interchange  
25 of opinions on issues, plans or management actions" from other  
26 agencies, affected permittee(s) landowners and other affected  
interests. 43 C.F.R. § 4100.0-5.

1 Here, a review of the agency's repeated interaction  
2 with plaintiff makes clear that the requirements of this section  
3 have been more than satisfied. See supra at 11-19, Plaintiff  
4 was advised at the time of the March 1992 Decision that the  
5 agency was undertaking a two year monitoring plan. Ex. 2 (p. 5);  
6 Ex. 28. Plaintiff participated in its development and was  
7 advised that the results of the monitoring could be used, along  
8 with a Desired Stocking Rate Formula (which was given in the  
9 March 1992 Decision) to determine proper grazing use on the  
10 allotment. Ex. 27 (p. 5-6). In September, 1992, plaintiff was  
11 informed that the results of the 1992 monitoring studies  
12 indicated excessive utilization of vegetation and damage to  
13 riparian areas. Ex. 26 (p. 3). For the reason, and the added  
14 effect of the drought, the allotment was closed to grazing with a  
15 full force and effect Decision in September, 1992. Ex. 26.

16 Monitoring of the allotment continued. Meanwhile, the  
17 appeal of the state wildlife agencies to BLM's March 1992  
18 Decision was settled. Ex. 25. In that settlement, BLM agreed to  
19 do that which it is required to do under its regulations. BLM  
20 agreed to reviewing grazing usage of the allotment annually. Id.  
21 at 2. It reaffirmed the utilization levels set forth in the  
22 March 1992 Decision, and agreed that cattle would be removed from  
23 the allotment when the utilization limits are exceeded. Id. at  
24 3. BLM affirmed that the livestock turn-out date would be based  
25 on its assessment of range conditions, and asserted that the  
26 appropriate cattle turn-out date should be no earlier than April



1 15. Id. at 5. Finally, and most significantly, BLM stated that  
2 its future grazing decisions within the scope of the agreement --  
3 decisions obviously based on issues of resource protection and  
4 compliance with land use plan objectives -- would be full force  
5 and effect decisions. Id. at 6. A copy of this Stipulation was  
6 mailed to Alan Schroeder as attorney for Intervenor John Espil  
7 Sheep Company, Inc., and Laver Ranches. So, since July, 1993,  
8 plaintiff has been on notice that BLM intended to base the  
9 livestock turn-out date on range conditions, that BLM believed a  
10 date earlier than April 15 was not appropriate, and that BLM  
11 intended to issue its decision as a full force and effect  
12 decision.

13 Furthermore, on January 7, 1994 BLM mailed an  
14 "Invitation for Consultation" to plaintiff which formally advised  
15 plaintiff that BLM was considering modifying the terms and  
16 conditions of its grazing permit. Ex. 22. On January 18, BLM  
17 mailed out a "Twin peaks Allotment Evaluation Summary" which  
18 contained detailed data and information on the results of BLM's  
19 monitoring, the conclusions BLM had reached, the details of BLM's  
20 proposed modification of plaintiff's permit. Ex. 21.

21 Undoubtedly in response to this information, on January  
22 20 representatives of plaintiff visited BLM for one entire day to  
23 review and obtain copies of BLM data and information. Ex. 20.  
24 Then, on January 21, BLM held a day-long consultation meeting in  
25 which the permittees and other affected interests could discuss  
26 anything and everything they desired about BLM's proposed course

of action. At the meeting, BLM distributed a simplified chart analysis of its proposed actions for discussion purposes. Ex. 23.

Thereafter, throughout February, representatives of plaintiff visited or called BLM offices, seeking and receiving information concerning BLM's proposed action. See, e.g., exs. 12, 13, 15, 16, 17. The tenor of the communications, including the involvement of plaintiff's legal counsel, made it clear that all understood BLM intended to issue a full force and effect decision (see, e.g., exs. 16, 8, 9, 10), and BLM repeatedly stated that its decision would be effective with the spring grazing season, which customarily begins in March.<sup>18/</sup>

Thus, plaintiff cannot honestly claim surprise by the issuance of the BLM February 1994 decision. Although plaintiff may have wished a different decision, and although plaintiff's attorney may have felt that his declarations and threats would have secured a different result, there is no basis in the record for concluding that plaintiff did not know (a) his grazing permit and schedule were going to be modified; (b) that he would not be able to turn out cattle before April 1; (c) that the decision was going to be issued in late February; and (d) that it would be a full force and effect decision. The law requires no more.

#### IV. BLM PROPERLY ISSUED A FULL FORCE AND EFFECT DECISION

---

<sup>18/</sup> It should be remembered that BLM's 1992 grazing season decision, also a full force and effect decision, was not issued until March 6, 1992. Ex. 27.

1 If the effect of a BLM decision is to modify grazing  
2 use for purposes of temporary resource protection, BLM  
3 regulations require that the decision be given full force and  
4 effect pursuant to § 4160.3(c). 43 C.F.R. § 4110.3-3(c). Under  
5 section 4160.3(c), a decision modifying authorized grazing use  
6 may be placed in full force and effect "in an emergency to stop  
7 resource deterioration." In this case, the 1992 and 1993  
8 monitoring data showed that riparian and other vegetative areas  
9 were being utilized at a level higher than that permitted by the  
10 March 1992 Grazing Decision, the AMP, and the MFP. While it had  
11 been hoped that after early closure of the allotment in  
12 September, 1992, there would have been sufficient vegetative  
13 recovery, the monitoring data did not support that conclusion.  
14 In such a situation, modification of authorized grazing use is  
15 required. 43 C.F.R. § 4130.6. If the change in use is in excess  
16 of 10%, regulations provide that it shall be implemented over a  
17 five year period. 43 C.F.R. § 4110.3-3. Thus, when the  
18 regulations provide for a full, force and effect decision in  
19 cases of "emergency", they are referring to situations where  
20 sufficient resource damage is occurring to prevent BLM from  
21 taking five years to implement the change in authorized grazing  
22 use.

23 Here, plaintiff was alerted to BLM's concern that  
24 further modification in authorized grazing use was necessary  
25 beginning early in conversations, and formally in writing on  
26 January 7, 1994. Ex. 22. Plaintiff was notified specifically

1 concerning the grazing modifications that BLM was considering on  
2 January 18. Ex. 21. And, with two previous full force and  
3 effect decisions on this allotment (Exs. 26, 27), a third such  
4 decision could hardly be considered a surprise.

5 CONCLUSION

6 For the foregoing reasons, defendants respectfully  
7 request that the preliminary injunction be dissolved.

8 Dated: May 3, 1994.

9 Respectfully submitted,

10 SHIRLEY SMITH  
11 Assistant United States Attorney

12 KATHRYN E. LANDRETH  
13 United States Attorney  
14 100 West Liberty, Suite 600  
15 Reno, NV 89501  
16 (702) 784-5438

17 

18 SUSAN V. COOK  
19 Environment & Natural Resources Div.  
20 Department of Justice  
21 P. O. Box 663  
22 Washington, D.C. 20044-0663  
23 (202) 272-6667 FAX 272-5775

24 Attorneys for Defendant  
25  
26

CERTIFICATE OF SERVICE

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JOHN ESPIL SHEEP CO., INC.,	)	CV-N-94-172-DWH
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
BRUCE BABBITT, et al.,	)	
	)	
Defendants.	)	
	)	

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the District of Nevada and is a person of such age and discretion as to be competent to serve papers.

That on May 4, 1994, a copy of the attached DEFENDANTS' PRE-TRIAL MEMORANDUM was served by Susan V. Cook, Esquire, from the Environment and Natural Resources Division of the Department of Justice in Washington, D.C., by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known addresses, and by depositing said envelope and contents in the United States mail at an authorized depository.

Addressee(s):

c/o Robert Schweigert  
Inter Mountain Range Consultants  
304 Railroad Street  
Winnemucca, Nevada 89445

  
\_\_\_\_\_  
SHIRLEY SMITH  
Assistant United States Attorney

STATE OF NEVADA  
OFFICE OF THE ATTORNEY GENERAL

3-22-94

MEMORANDUM

TO: Cathy Barcomb, Director  
Commission on the Preservation of Wild Horses

DATE: March 22, 1994

FROM: C. Wayne Howle  
Deputy Attorney General

*CWH*

*Twin Peaks  
Allot*

SUBJECT: Espil Sheep Co., v. Bruce Babbitt, et al.

---

Attached are copies of the following documents for your information:

1. Order Regarding Motion for Preliminary Injunction signed by the Judge 3/16/94.
2. Verified Petition for Permission to Practice in this Case only by Attorney not admitted to the Bar of this Court. (William F. Schroeder)
3. Designation of Resident Attorney Admitted to the Bar of this Court and Consent thereto.
4. Verified Petition for Permission to Practice in this Case only by Attorney not admitted to the Bar of this Court. (W. Alan Schroeder)
5. Copies of Summons issued to: Kathryn E. Landreth, U.S. Attorney for the District of Nevada; United State of America, U.S. Attorney General; Bruce Babbitt, Michael Dombeck, Director, BLM; Ed Hastey, State Director, BLM - California State Office; Herrick E. Hanks, District Mgr., BLM - Susanville District; Linda D. Hansen, Eagle Lake Resource Area Mgr., BLM
6. Complaint

CWH/pw

Attachment



3-21-94

RECEIVED

FILED

MAR 21 1994

MAR 16 1994

OFFICE OF ATTORNEY GENERAL  
DEPUTY ATTORNEY GENERAL

CLERK, U. S. DISTRICT COURT  
DISTRICT OF NEVADA

DEPUTY

UNITED STATES DISTRICT COURT U.S. ATTORNEY, Reno, Nev.

DISTRICT OF NEVADA

MAR 17 1994

RECEIVED

JOHN BSPIL SHEEP CO., INC.,

CV-N-94-172-DWH

Plaintiff,

vs.

ORDER REGARDING MOTION  
FOR PRELIMINARY INJUNCTION

BRUCE BABBIT, in his official  
capacity as Secretary, United  
States Department of the  
Interior, et al.,

Defendants.

IT IS ORDERED that the plaintiff and the defendants shall appear on Monday, the 28th day of March, 1994, at 10:00 o'clock a. m., in Courtroom Number 3, at Reno, Nevada, for a hearing on the motion for preliminary injunction that was filed with this Court on March 16, 1994.

IT IS FURTHER ORDERED, that the plaintiff shall have to and including Thursday, the 17th day of March, 1994, within which to serve upon defendants all documents that are presently on file in this action, together with a copy of this order.

IT IS FURTHER ORDERED, that the defendants shall have to and including Wednesday, the 23rd day of March, 1994, 4:00 o'clock

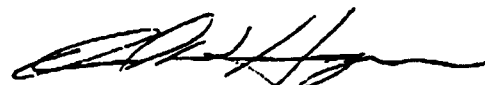
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p.m., within which to file and serve any brief, affidavits or other evidence in opposition to the motion for preliminary injunction.

IT IS FURTHER ORDERED, that plaintiff shall have to and including Friday, the 25th day of March, 1994, 4:00 o'clock p.m., within which to file and serve a final reply brief, affidavits or other evidence in support of the motion for preliminary injunction.

Each side will be allowed twenty (20) minutes for oral argument.

DATED: This 16th day of March, 1994.

  
UNITED STATES DISTRICT JUDGE



RECEIVED

MAR 21 1994

U.S. ATTORNEY, Reno, Nev.

OFFICE OF THE ATTORNEY GENERAL  
DEPUTY ATTORNEY GENERAL

MAR 17 1994  
RECEIVED

BY \_\_\_\_\_

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

CV-N- - - - 94-172-DW1

JOHN ESPIL SHEEP CO., INC., )

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

\_\_\_\_\_ )

Plaintiff(s), )

vs. )

BRUCE BABBITT, in his official )

capacity as SECRETARY, UNITED )

STATES DEPARTMENT OF THE )

INTERIOR, et. al., )

Defendant(s). )

\_\_\_\_\_ )

Case No. \_\_\_\_\_

VERIFIED PETITION FOR PERMISSION  
TO PRACTICE IN THIS CASE ONLY BY  
ATTORNEY NOT ADMITTED TO THE BAR  
OF THIS COURT.

(Filing Fee: \$35.00)

WILLIAM F. SCHROEDER \_\_\_\_\_, Petitioner, respectfully  
represents to the Court:

That petitioner resides at 1575 Hwy. 20-26 \_\_\_\_\_,  
Street Address

Vale \_\_\_\_\_, Malheur \_\_\_\_\_,  
City County

Oregon \_\_\_\_\_, 97918, 503, 473-2859 \_\_\_\_\_,  
State Zip Code Area Code Telephone Number

CAUTION: DO NOT REVISE OR RETYPE THIS FORM

1 That petitioner is an attorney at law and a member of the law  
2 firm of WILLIAM F. SCHROEDER PC  
3 with offices at P.O. Box 220, "A" Street East at Glenn,  
4 Street Address  
5 Vale, Malheur  
6 Oregon, 97918, 503, 473-3141  
7 State Zip Code Area Code Telephone Number

8 That petitioner has been retained personally or as a member of  
9 the law firm by JOHN ESPIL SHEEP CO., INC.  
10 to provide legal representation in connection with the above  
11 entitled case now pending before this Court:

12 That since April 19, 1951, petitioner has been  
13 and presently is a member in good standing of the bar of the highest  
14 Court of the State of Oregon where petitioner  
15 regularly practices law;

16 That petitioner was admitted to practice before the following  
17 United States District Courts, United States Circuit Courts of  
18 Appeal, ~~the Supreme Court of the United States~~ and Courts of other  
19 States on the dates indicated for each, and that petitioner is  
20 presently a member in good standing of the bars of said Courts.

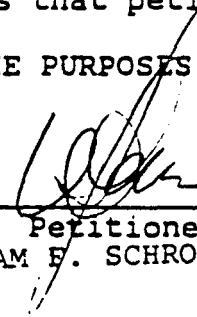
	<u>Date Admitted</u>
<u>Illinois State Bar</u>	<u>01/09/50</u>
<u>United States Dist. Court - Dist. of Oregon</u>	<u>11/05/51</u>
<u>Ninth Circuit Court of Appeals</u>	<u>01/27/76</u>
<u> </u>	<u> </u>
<u> </u>	<u> </u>
<u> </u>	<u> </u>

1 That no disciplinary proceedings are presently pending nor have  
2 disciplinary proceedings ever been instituted against petitioner,  
3 nor has any license, certificate or privilege to appear and practice  
4 before any judicial or regulatory administrative body ever been  
5 suspended or revoked; that neither by resignation, withdrawal, or  
6 otherwise, has petitioner terminated or attempted to terminate  
7 petitioner's office as an attorney in order to avoid disciplinary  
8 or disbarment proceedings. (Give particulars if ever disciplined  
9 or if disciplinary proceedings are pending.):

10 None

11  
12  
13 That petitioner is a member in good standing of the following  
14 Bar Associations: Illinois State Bar; Oregon State Bar;  
15 American Bar Association.  
16


17  
18 That petitioner respectfully prays that petitioner be admitted  
19 to practice before this Court FOR THE PURPOSES OF THIS CASE ONLY.

20  
21   
22 \_\_\_\_\_  
23 Petitioner's Signature  
24 WILLIAM F. SCHROEDER  
25  
26

1 STATE OF IDAHO )  
2 COUNTY OF ADA )


3 WILLIAM F. SCHROEDER, Petitioner, being  
4 first duly sworn, deposes and says:

5 That the foregoing statements are true.

6  
7  
8   
9 \_\_\_\_\_  
10 Petitioner's Signature  
11 WILLIAM F. SCHROEDER

12 Subscribed and sworn to before me this  
13 15th day of February, 1994.

(SEAL)

14   
15 \_\_\_\_\_  
16 Notary Public ~~or clerk of court~~ for IDAHO

17 APPROVED:

18 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

19 \_\_\_\_\_  
20 CAROL C. FITZGERALD  
21 CLERK, U.S. DISTRICT COURT  
22  
23  
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25  
26



CONSENT OF DESIGNEE

The undersigned hereby consents to serve as associate resident Nevada counsel in this case and agrees that he is responsible for being counsel upon whom all documents and other papers issued out of this Court shall be served, and that he is responsible to transmit copies of all documents and other papers served upon or received by him to the counsel of record who has submitted the Verified Petition for Permission to Practice in this Case Only by Attorney Not Admitted to the Bar of this Court and to keep such counsel informed as to the status of this case.

  
Designated Resident Nevada Counsel  
LAURA A. SCHROEDER

APPOINTMENT OF DESIGNATED RESIDENT NEVADA COUNSEL

The undersigned party(ies) appoints LAURA A. SCHROEDER  
as ~~his/her~~ their Designated Resident Nevada Counsel in this case.

  
WILLIAM F. SCHROEDER

APPROVED:

DATED: \_\_\_\_\_, 19\_\_\_\_.

CAROL C. FITZGERALD, CLERK

By: \_\_\_\_\_  
Deputy Clerk

RECEIVED

MAR 21 1994

U.S. ATTORNEY, Reno, Nev.

OFFICE OF ATTORNEY GENERAL  
CLERK OF ATTORNEY GENERAL

MAR 17 1994  
RECEIVED

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

JOHN ESPIL SHEEP CO., INC.,

CV-N-94-172-DWH

Case No. \_\_\_\_\_

Plaintiff(s),

vs.

BRUCE BABBITT, in his official

capacity as SECRETARY, UNITED

STATES DEPARTMENT OF THE

INTERIOR, et. al.,

Defendant(s).

VERIFIED PETITION FOR PERMISSION  
TO PRACTICE IN THIS CASE ONLY BY  
ATTORNEY NOT ADMITTED TO THE BAR  
OF THIS COURT.

(Filing Fee: \$35.00)

W. ALAN SCHROEDER, Petitioner, respectfully

represents to the Court:

That petitioner resides at 2608 East Bergeson Street,  
Street Address

Boise, Ada  
City County

Idaho, 83706, 208, 345-1009  
State Zip Code Area Code Telephone Number

CAUTION: DO NOT REVISE OR RETYPE THIS FORM

1 That petitioner is an attorney at law and a member of the law  
2 firm of SCHROEDER & LEZAMIZ LAW OFFICES

3 with offices at P.O. Box 267, 447 West Myrtle Street,  
4 Street Address

5 Boise Ada  
6 City County

7 Idaho 83701 208 384-1627  
8 State Zip Code Area Code Telephone Number

9 That petitioner has been retained personally or as a member of  
10 the law firm by JOHN ESPIL SHEEP CO., INC.

11 to provide legal representation in connection with the above  
12 entitled case now pending before this Court:

13 That since April 19, 1990, petitioner has been  
14 and presently is a member in good standing of the bar of the highest  
15 Court of the State of Idaho where petitioner  
16 regularly practices law;

17 That petitioner was admitted to practice before the following  
18 United States District Courts, United States Circuit Courts of  
19 Appeal, ~~the Supreme Court of the United States~~ and Courts of other  
20 States on the dates indicated for each, and that petitioner is  
21 presently a member in good standing of the bars of said Courts.

	<u>Date Admitted</u>
<u>Washington State Bar</u>	<u>11/12/86</u>
<u>United States Dist. Court-Western Dist. of WA</u>	<u>09/25/87</u>
<u>United States Dist. Court-District of Idaho</u>	<u>04/19/90</u>
<u>Ninth Circuit Court of Appeals</u>	<u>07/16/90</u>
<u></u>	<u></u>
<u></u>	<u></u>

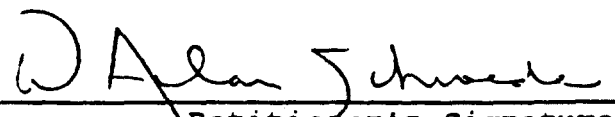


1 That no disciplinary proceedings are presently pending nor have  
2 disciplinary proceedings ever been instituted against petitioner,  
3 nor has any license, certificate or privilege to appear and practice  
4 before any judicial or regulatory administrative body ever been  
5 suspended or revoked; that neither by resignation, withdrawal, or  
6 otherwise, has petitioner terminated or attempted to terminate  
7 petitioner's office as an attorney in order to avoid disciplinary  
8 or disbarment proceedings. (Give particulars if ever disciplined  
9 or if disciplinary proceedings are pending.):

None

10  
11  
12  
13 That petitioner is a member in good standing of the following  
14 Bar Associations: Washington State Bar; Idaho State Bar;  
15 American Bar Association.

16  
17  
18 That petitioner respectfully prays that petitioner be admitted  
19 to practice before this Court FOR THE PURPOSES OF THIS CASE ONLY.

20 

21 Petitioner's Signature  
22 W. ALAN SCHROEDER

23 . . . . .  
24 . . . . .  
25 . . . . .  
26 . . . . .

1 STATE OF IDAHO )

2 COUNTY OF ADA )

3 W. ALAN SCHROEDER, Petitioner, being

4 first duly sworn, deposes and says:

5 That the foregoing statements are true.

6  
7  
8  
9

*W. Alan Schroeder*

Petitioner's Signature  
W. ALAN SCHROEDER

10 Subscribed and sworn to before me this

11 15th day of February, 1994.

(SEAL)

12 *Blaine Anderson*

13 Notary Public ~~or Clerk of Court~~ for IDAHO

14 APPROVED:

15 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

16  
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19 CAROL C. FITZGERALD  
CLERK, U.S. DISTRICT COURT

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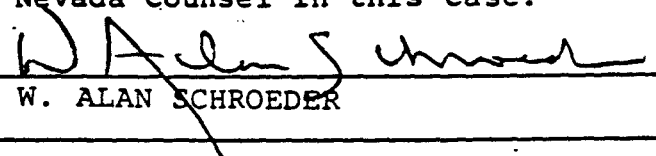
CONSENT OF DESIGNEE

The undersigned hereby consents to serve as associate resident Nevada counsel in this case and agrees that he is responsible for being counsel upon whom all documents and other papers issued out of this Court shall be served, and that he is responsible to transmit copies of all documents and other papers served upon or received by him to the counsel of record who has submitted the Verified Petition for Permission to Practice in this Case Only by Attorney Not Admitted to the Bar of this Court and to keep such counsel informed as to the status of this case.

  
Designated Resident Nevada Counsel  
LAURA A. SCHROEDER

APPOINTMENT OF DESIGNATED RESIDENT NEVADA COUNSEL

The undersigned party(ies) appoints LAURA A. SCHROEDER  
as ~~XXXXXX~~/their Designated Resident Nevada Counsel in this case.

  
W. ALAN SCHROEDER  
\_\_\_\_\_  
\_\_\_\_\_

APPROVED:

DATED: \_\_\_\_\_, 19\_\_\_\_.

CAROL C. FITZGERALD, CLERK

By: \_\_\_\_\_  
Deputy Clerk

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MAR 21 1994

U.S. ATTORNEY GENERAL  
U.S. ATTORNEY GENERAL

U.S. ATTORNEY, Reno, Nev.

MAR 17 1994  
RECEIVED

1 W. Alan Schroeder, Esq.  
P.O. Box 267  
2 Boise, ID 83701.  
208/384-1627  
3 W.F. Schroeder, Esq.  
P.O. Box 220  
4 Vale, OR 97918.  
Laura A. Schroeder, Esq.  
5 P.O. Box 2556  
Fallon, NV 89407  
6 702/423-7774.

7 Lawyers for Plaintiff

8 UNITED STATES DISTRICT COURT

9 DISTRICT OF NEVADA

10 John Espil Sheep Co., Inc., )  
11 )  
Plaintiff, )  
12 )  
v. )  
13 )  
Bruce Babbitt, in his official )  
14 capacity as Secretary, United )  
States Department of the )  
15 Interior; et al. )  
16 )  
Defendants. )

No. CV-N-94-172-DWH

CERTIFICATE REQUIRED  
BY LOCAL RULE 135-5

17 The undersigned, counsel of record for Plaintiff, certifies  
18 that the following have an interest in the outcome of this case:

19 1. The Plaintiff, John Espil Sheep Co., Inc., is a Nevada  
20 Corporation. The Shareholders of the corporation are Peggy Joyce  
21 Espil, Thomas M. and Jeanne Espil, Brent and Victoria Espil, and  
22 John R. and Carolyn R. Espil. The President of the corporation  
23 is John R. Espil. The Vice Presidents are Peggy Joyce Espil and  
24 Brent Espil. The Secretary/Treasurer is Thomas M. Espil. This  
25 entity and these individuals have a direct interest in the  
26 outcome of this litigation.

27  
28 CERTIFICATE REQUIRED BY LOCAL RULE 135-5 - Page 1

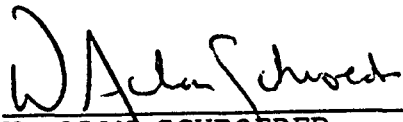
1           2.    Laver Ranch, Limited Partnership: The General Partners  
2 are Ron Laver, Nancy Satica, and Faye Laver. The Limited  
3 Partners are Clifford Laver and Gary Laver. This entity and  
4 these individuals have a direct interest in the outcome of this  
5 litigation.

6           3.    Every livestock permittee who owns and holds a Grazing  
7 Permit to graze livestock within the Susanville Grazing District.  
8 These entities and/or these individuals may have an interest in  
9 the outcome of this litigation.

10           These representations are made to enable judges of the Court  
11 to evaluate possible refusal. If the Court wishes to have more  
12 specificity regarding (3), please advise, and I will supplement  
13 this certificate.

14           Attorney of Record for Plaintiff.

15           Dated this 15th day of March, 1994.

16  
17             
18           \_\_\_\_\_  
19           W. ALAN SCHROEDER  
20           a lawyer for Plaintiff  
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# United States District Court

MAR 21 1994

FOR THE DISTRICT OF NEVADA

OFFICE OF ATTORNEY GENERAL  
DEPT. OF ATTORNEY GENERAL

JOHN ESPIL SHEEP CO., INC.,

Plaintiffs,

## SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

**CV-N-----94-172-DW**

*Served on U.S. Attorney  
3-11-94*

Defendants.

TO: (Name and Address of Defendant)

Kathryn E. Landreth  
United States Attorney  
for the District of Nevada  
Northern Division  
100 W. Liberty Street, Suite 600  
Reno, NV 89501

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exciisiv: of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK

DATE

*Gymre Black*  
BY DEPUTY CLERK

11

# United States District Court

FOR THE DISTRICT OF NEVADA

JOHN ESPIL SHEEP CO., INC.,

Plaintiffs,

v.

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

Defendants.

TO: (Name and Address of Defendant)

United States of America  
U.S. Attorney General  
Department of Justice  
Washington, DC 20530

## SUMMONS IN A CIVIL ACTION

CASE NUMBER:

CV-N-----94-172-DW<sup>4</sup>

*Served on U.S. Attorney  
3-11-94*

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK

DATE

 JAE BLACK

BY DEPUTY CLERK

# United States District Court

FOR THE DISTRICT OF NEVADA

JOHN ESPIL SHEEP CO., INC.,

Plaintiffs,

SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

**CV-N- - - -94-172-DW4**

Defendants.

TO: (Name and Address of Defendant)

Bruce Babbitt, Secretary  
United States Department of the Interior  
Main Interior  
1849 "C" Street NW  
Washington, DC 20240

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK

DATE

SEAL  
JAIME BLACK

BY DEPUTY CLERK



# United States District Court

FOR THE DISTRICT OF NEVADA

JOHN ESPIL SHEEP CO., INC.,

## SUMMONS IN A CIVIL ACTION

Plaintiffs,

v.

CASE NUMBER:

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

CV-N- - - -94-172-DW.1

Defendants.

TO: (Name and Address of Defendant)

Michael Dombeck, Director  
Bureau of Land Management  
U.S. Department of the Interior  
Room 5660, Main Interior Building  
18th and C Streets, NW  
Washington, DC 20240

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK



DATE

BY DEPUTY CLERK

# United States District Court

FOR THE DISTRICT OF NEVADA

JOHN ESPIL SHEEP CO., INC.,

Plaintiffs,

v.

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

Defendants.

## SUMMONS IN A CIVIL ACTION

CASE NUMBER:

**CV-N-----94-172-DWH**

TO: (Name and Address of Defendant)

Ed Hastey  
State Director  
Bureau of Land Management  
California State Office  
2800 Cottage Way, Room E-2845  
Sacramento, CA 95825

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exciusiv; of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK

JAIME BEAK

DATE

BY DEPUTY CLERK

# United States District Court

FOR THE DISTRICT OF NEVADA

JOHN ESPIL SHEEP CO., INC.,

Plaintiffs,

SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

**CV-N-----94-172-DW7**

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

Defendants.

TO: (Name and Address of Defendant)

Herrick E. Hanks, District Manager  
Bureau of Land Management  
Susanville District  
705 Hall Street  
P.O. Box 1090  
Susanville, CA 96130-3730

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exciusiv; of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK

DATE



BY DEPUTY CLERK

# United States District Court

FOR THE DISTRICT OF NEVADA

JOHN ESPIL SHEEP CO., INC.,

Plaintiffs,

SUMMONS IN A CIVIL ACTION

v.

CASE NUMBER:

BRUCE BABBITT, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, et. al.,

**CV-N-----94-172-DW**

Defendants.

TO: (Name and Address of Defendant)

Linda D. Hansen, Eagle Lake Resource Area Manager  
Bureau of Land Management  
Eagle Lake Resource Area  
705 Hall Street  
Susanville, CA 96130

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

LAURA A. SCHROEDER  
P.O. Box 2556  
Fallon, NV 89407

WILLIAM F. SCHROEDER  
P.O. Box 220  
Vale, OR 97918

W. ALAN SCHROEDER  
P.O. Box 267  
Boise, ID 83701

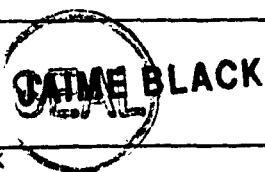
an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exciusiv; of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CAROL C. FITZGERALD, CLERK

MAR 11 1994

CLERK

DATE



BY DEPUTY CLERK