

9-05-97

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**RECEIVED**

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6 lawyer for Proposed intervenor.

**OFFICE OF ATTORNEY GENERAL  
DEPUTY ATTORNEY GENERAL**

7 UNITED STATES DEPARTMENT OF INTERIOR  
8 OFFICE OF HEARINGS AND APPEALS  
9 HEARINGS DIVISION

*Twin Peaks  
Alloy*

10 California Department of ) CA-02-95-01  
11 Fish & Game, )  
12 ) )  
13 Appellant, ) Appeal from the Area  
14 v. ) Manager's Letter  
15 Bureau of Land Management, ) dated February 1, 1995,  
16 ) Eagle Lake Resource Area,  
17 ) Susanville District,  
18 ) California.  
19 Respondent, )  
20 )  
21 John Espil Sheep Co., Inc., )  
22 )  
23 Proposed Intervenor. )

18 Commission for the Preservation ) CA-02-95-02  
19 of Wild Horses, )  
20 ) )  
21 Appellant, ) Appeal from the Area  
22 v. ) Manager's Letter  
23 ) dated February 1, 1995,  
24 ) Eagle Lake Resource Area,  
25 Bureau of Land Management, ) Susanville District,  
26 ) California.  
27 Respondent, )  
28 )  
29 John Espil Sheep Co., Inc., )  
30 )  
31 Proposed Intervenor. )

1 \_\_\_\_\_ )  
2 Nevada Department of Wildlife, )

CA-02-95-03

3 Appellant, )

) Appeal from the Area  
) Manager's Letter

4 v. )

) dated February 1, 1995,  
) Eagle Lake Resource Area,  
) Susanville District,  
) California.

5 Bureau of Land Management, )

6 Respondent, )

7 John Espil Sheep Co., Inc., )

8 Proposed Intervenor. )  
9 \_\_\_\_\_ )

10 Wild Horse Organization )  
11 Assistance, )

CA-02-95-04

11 Appellant, )

) Appeal from the Area  
) Manager's Letter

12 v. )

) dated February 1, 1995,  
) Eagle Lake Resource Area,  
) Susanville District,  
) California.

13 Bureau of Land Management, )

14 Respondent, )

15 John Espil Sheep Co., Inc., )

16 Proposed Intervenor. )  
17 \_\_\_\_\_ )

18 **PROPOSED INTERVENOR'S REPLY.**

19 JOHN ESPIL SHEEP CO., INC. (Proposed intervenor) hereby  
20 replies to the "Opposition to Motion to Dismiss" filed by C.  
21 Wayne Howle of the Office of the Attorney General on behalf of  
22 Nevada Division of Wildlife and Commission for the Preservation  
23 of Wildhorses (hereinafter referred to as "State of Nevada").

24 **I. Motion to Intervene and Consolidate not disputed.**

25 The State of Nevada does not object to Proposed intervenor's  
26 motions to intervene and consolidate, so Proposed intervenor  
27 submits that such motions should be granted.

28 Proposed Intervenor's Motions - Page 2

1 II. Motion to Dismiss should be granted.

2 Ignoring the jurisdictional implications, the State of  
3 Nevada suggests that Proposed intervenor's motion to dismiss  
4 should not be granted because

5 (1) it "was not a party to or in privity  
6 with a party to the prior proceedings", and  
7 thereby is not bound by the rules of res  
8 judicata; and/or,

9 (2) it was not included in the settlement  
10 matters between BLM and Proposed intervenor,  
11 and thereby the settlement was "improper",  
12 citing Nevada Division of Wildlife et al. v.  
13 Bureau of Land Management and Tuleadad  
14 Grazing Association, 138 IBLA 382 (1997).

15 However, these suggestions are without merit.

16 **A. Background.**

17 The State of Nevada is wrong in its statement as to  
18 "Background" that "(1) Appellants were not a party to the  
19 litigation between BLM and Espil; and (2) the agreement between  
20 BLM and Espil was neither ratified by, nor incorporated in, the  
21 court's order dismissing the action."

22 As to (1), the State of Nevada was a party to the  
23 litigation. This litigation arose within the USDI-OHA, and  
24 involved appeals filed by the State of Nevada from a BLM Decision  
25 dated February 28, 1994. See CA-02-94-03 (NDOW), CA-02-94-06  
26 (Comm. for WH). These appeals were subsequently resolved when a  
27 "Request to Set Aside (2/28/94) Decision and Remand" was filed  
28 and served upon the State of Nevada in those causes based upon  
the Federal Court Order/Settlement. The State of Nevada, as a  
party, did not object or complain about said Request, nor  
appealed the subsequent Order by the Hearings Division which  
Proposed Intervenor's Motions - Page 3

1 granted the relief requested. See Exhibits "C" and "D" attached  
2 to Proposed intervenor's Motions. The State of Nevada thereby  
3 was, in fact, a party to the litigation between BLM and Espil.

4 As to (2), the Federal Court Order signed by U.S. District  
5 Court Judge David W. Hagen on January 19, 1995, specifically  
6 stated, "IT IS SO ORDERED" to a stipulation between BLM and Espil  
7 which stated "In consideration of the attached Agreement dated  
8 January 19, 1995 ...". See Exhibit "B" attached to Proposed  
9 intervenor's Motions. The Federal Court thereby did, in fact,  
10 ratify or incorporate the settlement into its dismissal Order.

11 **B. Jurisdiction.**

12 Proposed intervenor continues to suggest that USDI-Office of  
13 Hearings & Appeals does not have jurisdiction either because this  
14 matter was approved by the Federal Court or no appealable  
15 decision was issued by BLM.

16 **C. Res judicata is applicable to preclude the State of  
17 Nevada's claims.**

18 The State of Nevada cites a variety of precedent regarding  
19 the purported application of the doctrine of issue preclusion.  
20 However, this doctrine, as it applies to USDI-OHA, is expressed  
21 in Fred H. Gagon et al., 134 IBLA 368, 370 (1996), which stated:

22 "The doctrine of res judicata generally  
23 precludes a party from raising an issue  
24 relevant or related to a claim ruled upon in  
25 a prior judgment between the parties because  
26 the claim has been merged in the judgment  
27 and, hence, no longer exists. ... The  
28 principle ... has been applicable to  
administrative proceedings when an  
administrative agency, acting in a quasi-  
judicial capacity, resolves disputed issues  
of fact properly before it which the parties  
have had an adequate opportunity to

1 litigate. ... As a general rule, the  
2 administrative counterpart of the principle  
3 of res judicata--the doctrine of  
4 administrative finality--precludes  
5 reconsideration of a decision of any agency  
6 official when a party, or his predecessor-  
7 in-interest, had an opportunity to obtain  
8 review within the Department and the final  
9 administrative decision of the Department  
10 was adverse to the claimant."

11 In the present case, it is impossible for the State of  
12 Nevada to suggest that it was not given "an adequate opportunity  
13 to litigate" the BLM Decision dated 2/28/94 or the Settlement  
14 which resolved said decision for the simple reason that the State  
15 of Nevada appealed said decision, received notice of the request  
16 to set aside said decision predicated upon the Settlement, did  
17 nothing in-response to said notice, and never appealed the  
18 subsequent Order by the Department which granted the requested  
19 relief. Clearly, the State of Nevada had "an opportunity to  
20 obtain review within the Department" and did nothing. Wherefore,  
21 the State of Nevada is barred from re-litigating all the issue(s)  
22 in the BLM Decision dated 2/24/97 and the Settlement upon which  
23 it was resolved before the USDI-OHA.

24 **D. The BLM has no affirmative duty to include all affected  
25 interests in settlement matters.**

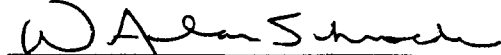
26 The State of Nevada is wrong in its interpretation of the  
27 holding in Nevada Division of Wildlife et al. v. Bureau of Land  
28 Management and Tuledad Grazing Association, 138 IBLA 382 (1997).  
29 Tuledad does not stand for the proposition, as suggested by the  
30 State of Nevada, that BLM has an "affirmative duty ... to include  
31 all affected interests in settlement of matters". Instead,  
32 Tuledad stands for the proposition that the Hearings Division  
33 Proposed Intervenor's Motions - Page 5

1 should grant motions to intervene sooner, than later, so  
2 intervenors affected by the pending activity can be heard and  
3 activity involved in the pending activity (including settlement),  
4 especially where the intervenor makes a showing that the pending  
5 activity will adversely impact and prejudice the intervenor. In  
6 Tuledad, the need to be heard by the Association was essential  
7 because prior to the time of the hearing, the appellants and BLM  
8 were making and/or had made a secret deal which was going to  
9 adversely impact the Association. The Association was thereby  
10 zealously and continuously advocating for intervenor status to  
11 stop the secret deal and to show the prejudice of the secret  
12 deal. However, all of this advocacy was to no avail before the  
13 Hearings Division, until the Association appealed to the Board,  
14 and obtained its requested relief to reverse the Hearings  
15 Division Orders.

16 In the present case, the facts are substantially and  
17 fundamentally different from those in Tuledad. First, at no time  
18 did Proposed intervenor or BLM refuse or prevent the State of  
19 Nevada from participating in the Federal Court matter or in  
20 settlement discussions. Second, at no time did the State of  
21 Nevada seek to intervene or participate in the Federal Court  
22 matter or in settlement discussions. Third, at no time did the  
23 State of Nevada contest, appeal, or otherwise complain about the  
24 settlement in or to the Federal Court(s). Fourth, and most  
25 importantly, at no time did the State of Nevada contest, object,  
26 appeal, or otherwise complain to the USDI-Office of Hearings &  
27 Appeals about the settlement after being duly served with BLM's  
28 Proposed Intervenor's Motions - Page 6

1 "Request to Set Aside Decision and Remand", which was predicated  
2 upon the settlement, or about the subsequent Order by the  
3 Hearings Division. See Exhibits "C" and "D" attached to Proposed  
4 intervenor's Motion dated July 29, 1997. Had the State of Nevada  
5 truly had a legitimate complaint in the settlement, it would at  
6 the very least objected to the "Request to Set Aside Decision and  
7 Remand", and because it did not, it is forever barred from  
8 litigating or re-litigating all the issues involved in the BLM  
9 Decision dated 2/28/94 and the settlement. 43 CFR 4.470(d).

10 September 2, 1997.

11 

12 W. Alan Schroeder  
13 lawyer for Proposed intervenor.  
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THIRD  
PAGES

1 DAVID NAWI  
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2 Pacific Southwest Region  
BURTON J. STANLEY  
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Office of the Regional Solicitor  
4 U.S. Department of the Interior  
2800 Cottage Way, Rm. E-2753  
5 Sacramento, CA 95825  
Telephone: (916) 979-2154

6 Attorney for Respondent  
7

8 UNITED STATES DEPARTMENT OF THE INTERIOR  
OFFICE OF HEARINGS AND APPEALS  
9 HEARINGS DIVISION

10 JOHN ESPIL SHEEP COMPANY, INC., ) CA 2-94-07

11 Appellants. )

12 v. )

13 BUREAU OF LAND MANAGEMENT, )

14 Respondent. )

15 CALIFORNIA DEPARTMENT OF FISH ) CA 2-94-02  
16 AND GAME, )

17 Appellants. )

18 v. )

19 BUREAU OF LAND MANAGEMENT, )

20 Respondent. )

21 NEVADA DEPARTMENT OF FISH AND GAME, ) CA 2-94-03  
22 )

23 Appellants. )

24 v. )

25 BUREAU OF LAND MANAGEMENT, )

26 Respondent. )

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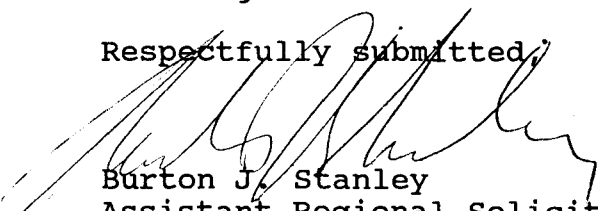
1	CALIFORNIA CATTLEMEN'S ASSOCIATION,	)	CA 2-94-04
2	Appellants.	)	
3	v.	)	
4	BUREAU OF LAND MANAGEMENT,	)	
5	Respondent.	)	
6	_____		
7	WILD HORSE ORGANIZATION ASSISTANCE,	)	CA 2-94-05
8	Appellants.	)	
9	v.	)	
10	BUREAU OF LAND MANAGEMENT,	)	
11	Respondent.	)	
12	_____		
13	COMMISSION FOR THE PRESERVATION OF WILD HORSES,	)	CA 2-94-06
14	Appellants.	)	
15	v.	)	
16	BUREAU OF LAND MANAGEMENT,	)	
17	Respondent.	)	
18	_____		
19	LAVER RANCHES	)	CA 2-94-08
20	Appellants.	)	
21	v.	)	
22	BUREAU OF LAND MANAGEMENT,	)	
23	Respondent.	)	
24	_____		
25	CALIFORNIA WOOL GROWERS ASSOCIATION,	)	CA 2-94-09
26	Appellants.	)	
27	v.	)	
28	BUREAU OF LAND MANAGEMENT,	)	
	Respondent.	)	
	_____		

1	WESTERN RANGE ASSOCIATION,	)	CA 2-94-10
2	Appellants.	)	
3	v.	)	
4	BUREAU OF LAND MANAGEMENT,	)	
5	Respondent.	)	
6	<hr/>		
7	LASSEN COUNTY BOARD OF SUPERVISORS,	)	CA 2-94-11
8	Appellants.	)	
9	v.	)	
10	BUREAU OF LAND MANAGEMENT,	)	
11	Respondent.	)	
12	<hr/>		

**REQUEST TO SET ASIDE DECISION AND REMAND**

Respondent respectfully requests that its Decision dated February 28, 1994, which is the subject of these appeals, be set aside and vacated. Respondent has entered into a Court ordered settlement, approved by the Justice Department, concerning the Decision at issue herein. For information of the parties, a copy of the Court's order and settlement agreement are attached.

Respectfully submitted,



Burton J. Stanley  
Assistant Regional Solicitor  
Attorney for Respondent

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CAROL C. FITZGERALD  
CLERK  
BY [Signature]  
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RECEIVED  
AND FILED  
UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

No. CV-N-94-172-DWH

STIPULATION  
FRCP 41 (a)(1)(ii)

In consideration of the attached Agreement dated January 19, 1995, Plaintiff moves pursuant to FRCP 41 (a)(1)(ii) to dismiss without prejudice Plaintiff's Complaint. It is agreed that this dismissal shall not operate as an adjudication upon the merits of the case filed by Plaintiff. Defendants have no objection to the granting of this motion.

Dated January 19, 1995.

[Signature]  
W. Alan Schroeder  
Attorney for Plaintiff

[Signature]  
Susan V. Cook  
Attorney for Defendants

IT IS SO ORDERED.

[Signature]  
DAVID W. HAGEN  
UNITED STATES DISTRICT COURT JUDGE

ENTERED & SERVED

JAN 24 1995

DATED: January 19, 1995

CLERK, U.S. DISTRICT COURT  
DISTRICT OF NEVADA  
BY [Signature] DEPUTY

## AGREEMENT

I. The Bureau of Land Management (BLM) ratifies the Grazing Permit of John Espil Sheep Co., Inc. (Espil), dated May 15, 1990, as modified by the "Agreement Concerning the Twin Peaks Allotment Management Plan" dated March 6, 1992, and as further modified by the "Stipulation" dated February 10, 1994.

II. BLM and Espil agree to the following special terms and conditions for the 1995 grazing season:

1. Lower Smoke Creek:
  - a. Cattle turn out date is March 1, 1995, provided that soil moisture condition is such that the soils are sufficiently firm to prevent "punching" of soils on a significant portion of the area as determined by BLM in consultation with Espil.
  - b. Cattle will be removed by May 1.
  - c. Cattle use will not exceed 400 AUM's (If the turn out date is later than March 1, more cattle can be put into the area for the shorter time).
2. Other Spring Turn Out Areas:

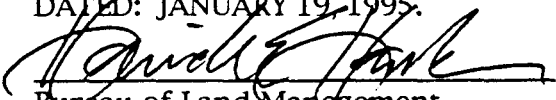
On those areas selected by Espil and BLM for spring turn out of cattle, the turn out date is March 1, 1995, provided that:

  - a. soil moisture condition is such that the soils are sufficiently firm to prevent "punching" of soils on a significant portion of the area as determined by BLM in consultation with Espil, and
  - b. provided that at least 40% of the residual forage from 1994 is available, as determined by BLM in consultation with Espil.
3. South Fork of Parsnip Wash:
  - a. The BLM will construct a fenced enclosure during the 1995 grazing season in a portion of the riparian area already identified and flagged on the ground. Once this enclosure is constructed, cattle will be excluded from the enclosed area during the balance of the 1995 grazing season.
  - b. The allowable utilization is 60% for the riparian area outside the enclosed area.
4. Riparian Projects:

BLM will provide a timeline on or before March 1, 1995 for the implementation of the riparian projects as identified in the Espil letter to Linda Hansen (BLM), dated December 15, 1994.
5. BLM and Espil agree to meet, including any interested affected interest, to consult, cooperate, and coordinate the development of an annual plan of operation and subject to the provisions of 43 CFR Part 4100, which include the administrative/judicial remedies.
6. Nothing in this agreement is to be construed as superseding the requirements of 43 CFR Part 4100.

III. This replaces and supersedes the Final Decision of the Bureau of Land Management (Susanville District) dated February 28, 1994, relating to the Twin Peaks Allotment.

DATED: JANUARY 19, 1995.

  
Bureau of Land Management

 Pres.  
John Espil Sheep Co., Inc.

**BUREAU OF LAND MANAGEMENT  
EAGLE LAKE RESOURCE AREA**

**NOTICE CONCERNING TWIN PEAKS ALLOTMENT**

January 30, 1995

On January 19, 1995, in consideration of an Agreement reached between John Espil Sheep Company and the Bureau of Land Management, the U.S District Court for Nevada dismissed the lawsuit brought by the Espil Sheep Company against the U. S. Department of the Interior. The suit concerned a Grazing Decision issued by the Bureau of Land Management for the 1994 grazing season.

Copies of the Court Order and the Agreement are enclosed. The Agreement calls for Terms 1, 2, 3 and 5 to be made part of the Espil Sheep Company's grazing permit by adding these terms and conditions to the Company's 1995 grazing authorization.

Term and condition 5 requires BLM and Espil Sheep Company to involve "...any interested affected interest to consult, cooperate, and coordinate the development of an annual plan of operation..." for grazing in 1995.

Under the terms of the Agreement, the BLM will replace the 1994 Grazing Decision and add the above referenced special terms and conditions to the Espil Sheep Company's grazing permit.

This agreement is the result of a series of events that began with consultation meeting of affected interests held in Susanville on December 20, 1994. All affected interests were invited to this meeting. At this meeting, participants agreed that a small "core group" of affected interests should meet to discuss interim grazing practices for the 1995 season. Specifically, they were to review data, identify areas of concern, and concur on solutions. The group would then report to the larger body of Twin Peaks affected interests.

On January 13, this core group, consisting of a representative from BLM, Espil Sheep Company, Nevada Department of Wildlife, California Department of Fish and Game, and the Nevada Commission for the Preservation of Wild Horses met to develop a strategy for grazing management of the allotment in 1995.

Twin Peaks Notice  
Page Two

This strategy is not yet finalized, however, it does propose the construction of several projects designed to improve livestock control and protect specific riparian areas within the allotment. These projects are referenced in Term 4 of the above mentioned agreement. Accordingly, BLM is proceeding with initial project development work which includes environmental analysis in compliance with the National Environmental Policy Act (NEPA). You will be receiving by separate mail a package of maps and descriptions of the proposed projects. We invite your comments on the proposals.

### **TWIN PEAKS PLANNING MEETING SET**

BLM believes it imperative that the core group continue its work in the development of the annual plan of operation for Twin Peaks Allotment in 1995. We want to have this plan completed before the March 1 livestock turnout. To that end, another core group meeting will be held (INSERT DATE, TIME AND LOCATION) to enable the group to work on formulating the annual plan of operation. All affected interests will be invited to attend and participate.

BLM will continue to keep all affected interests informed of the activities of this core group. If you have any questions or concerns please do not hesitate to call Eagle Lake Resource Area Manager Linda Hansen at (916) 257-0456.

We believe the agreement reached for 1995 sets the stage for all parties to work together to manage the land in ways that will provide for healthy natural resources. We must focus our collaborative effort on the balanced and sustainable use and protection of these resources.

1 CERTIFICATE OF SERVICE

2 The original of the foregoing "Request To Set Aside Decision  
3 and Remand" was sent via Certified Mail-Return Receipt Requested,  
4 on February 10, 1995, to:

5 Office of Hearings and Appeals  
6 Hearings Division  
7 6432 Federal Building  
8 Salt Lake City, UT 84138

8 Copies of the foregoing "Request To Set Aside Decision and  
9 Remand" were sent via "Certified Mail-Return Receipt Requested"  
10 on February 10, 1995, to:

11 Wayne Howle, Esq.  
12 Deputy Attorney General  
13 State of Nevada  
14 208 North Fall Street  
15 Carson City, Nevada 89710

14 Mark J. Urban, Esq.  
15 Attorney General's Office  
16 1515 K Street  
17 P.O. Box 944255  
18 Sacramento, California 94244-2550

17 W. Alan Schroeder, Esq.  
18 Schroeder & Lezamiz Law Offices  
19 P.O. Box 267  
20 Boise, Idaho 83701

20 William Schroeder, Esq.  
21 P.O. Box 220  
22 Vale, Oregon 97918

22 Stu Brown, President  
23 California Cattlemen's Association  
24 1221 H Street  
25 Sacramento, California 95814-1910

24 Dawn Y. Lappin, Director  
25 Wild Horse Organized Assistance  
26 P.O. Box 555  
27 Reno, Nevada 89504

27 Catherine Barcomb, Executive Director  
28 Commission for the Preservation  
of Wild Horses  
255 W. Moana Lane, Suite 207A  
Reno, Nevada 89509



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Jay B. Wilson, Exec. Vice President  
California Wool Growers Association  
1221 H Street, Suite 101  
Sacramento, CA 95814-1910

Larry Garro, Executive Director  
Western Range Association  
6060 Sunrise Vista Dr., Suite 2400  
Citrus Heights, CA 95610

Messrs. Lyle L. Lough and Jean Loubet  
Lassen County Board of Supervisors  
707 Nevada Street  
Susanville, CA 96130

A copy of the foregoing "Request to Set Aside Decision and Remand" was sent via regular mail on February 10, 1995, to:

State Director  
Bureau of Land Management  
2800 Cottage Way  
Sacramento, CA 95825

I certify that the foregoing is true under penalty of perjury.

Executed this 10th day of February, 1995 at Sacramento, California.

  
Barbara L. Johnson