

United States
Department of
Agriculture

Forest
Service

Stanislaus National Forest
19777 Greenley Road
Sonora, CA 95370-5909
(209) 532-3671
FAX: (209) 533-1890
TTY/TDD: (209) 533-0765

File Code: 2360
Date: November 2, 1995

Fibreboard Corporation
Attn: Don McAleenan
2121 No. California Blvd, Suite 560
Walnut Creek, CA 94596

CERTIFIED
RETURN RECEIPT REQUESTED

Re: Deer Creek ARPA
Case No. 3956268 - 5300

Dear Mr. McAleenan:

This letter will serve as my Notice of Assessment of Civil Penalty under the Archaeological Resources Protection Act for damage that occurred to Archaeological Site CA-TUO-1378 on November 22, 1993.

I have carefully reviewed the case report prepared for this incident, the statements made by Wilber Black, Joe Martin, John Romena, and Dick Pland at our meeting of December 8, 1994, statements and observations of the field visit to the site by Mike Albrecht, John Romena, Wilber Black, Art Smith and Glenn Gottschall on January 27, 1995, and your Petition for Relief, including the signed statement by Wilber Black. This information has led me to conclude that you are responsible for damage to archaeological site CA-TUO-1378 in the Deer Creek area. The damage occurred when you took action in excess of your authority under timber sale contract #057320 and without a permit issued under the Archaeological Resources Protection Act. Specifically you used an area outside of the approved landing site to deck logs from the Deer Creek Timber sale. The area used was part of an archaeological site and the actions damaged the site.

I base my conclusion on the following facts brought forth during the course of the investigation.

1) On November 2, 1993 Forest Service Timber Sale Administrator Tom Brown and Forest Service Archaeologist Kathleen Coulter met with logging operator foreman Wilber Black on the Deer Creek Multi-product Sale to discuss the methods and restrictions under which the approximately 101 thousand board feet of additional dead timber could be removed without damaging Archaeological Site CA-TUO-1378. During that meeting Tom Brown flagged the skid trail from the trees to be harvested to the landing location and flagged the boundaries of the landing. The flagged limits of the archaeological site were also pointed out and it was specifically stated that all activities would take place outside of the site. These flag lines were discussed with and understood by Mr. Black.

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EPA 3010-108-112021



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In addition to flagging the boundaries of the landing, discussions were held regarding use of the access road. It was specifically required that log trucks would turn around outside of the archaeological site boundary and back along the unimproved road to the landing where they would be loaded.

2) On November 22 and 23, 1993 logging of the timber occurred. Although Sale Administrator Brown was on site on the 22nd he was concentrating his efforts on the felling operation and did not visit the landing area until the 23rd. Upon arriving at the site Mr. Brown observed that the logs had been skidded to the landing and decked. Approximately one half of the log deck extended beyond the agreed upon and flagged boundary of the landing and into the archaeological site.

3) In your Petition for Relief, which contains a signed statement by Mr. Black you state that the landing was not flagged, and that Mr. Brown and Ms. Coulter gave their permission to utilize a portion of the archaeological site to load the trucks. Verbal statements by Mr. Black indicate that since he felt he had permission to use the site for loading he could deck logs in that area also.

Mr. Brown states emphatically, that he did in fact flag the boundaries of the landing with Mr. Black on November 2, 1993, and to the best of his knowledge those flags were still in place on November 22, 1993.

When I personally visited the area it was apparent to me that there was a good portion of the eastern part of the approved landing area that had not been utilized for decking logs, and could have been. It appeared to me that at least as much area as was impacted inside of the archaeological site was available inside the identified landing but was not utilized.

Under the authority granted to me as Federal land manager by 36 Code of Federal Regulations 296.16, I have determined the amount of the civil penalty which you are assessed is \$77,684.

The basis for determining this penalty is:

1) The cost of restoration and repair of the site. 2) The cost to recover the archaeological value.

The original notice of violation dated November 25, 1994 estimated a penalty amount of \$340,000. This was based on an estimated cost to excavate the entire 120 cubic meters of area that was disturbed in order to recover the archaeological value. Since that time further archaeological consultation has allowed me to determine that to recover the archaeological value as defined in 36 CFR 296.14(a) we need only to sample a portion of the site. This substantially reduced the cost, to make the maximum amount of the penalty \$116,278.

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36 CFR 296.16(b) allows me, as the Federal land manager, to assess a penalty amount less than the maximum amount of the penalty. In reaching the final civil penalty amount of \$77,684 I considered the following mitigating circumstances:

1) I do not believe that Mr. Black, acting on behalf of Joe Martin Logging and Trucking, for Fibreboard Corporation, willfully committed this violation. Although a finding of intent is not necessary for imposition of the full amount of the archaeological value, I have decided to reduce the amount of the penalty by \$20,000.

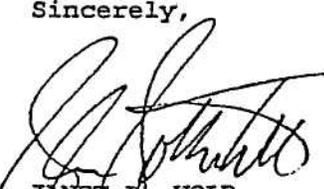
2) Our records show that this area was damaged by use as a log landing during the Birthday Timber Sale in 1978. We estimate that this previous damage could have reduced the amount of information we could have recovered from this site by approximately 15%. I have decided to reduce the final civil penalty amount by \$18,604.

Payment of this penalty is due within 45 days of service of this notice unless you decide to appeal my decision.

In accordance with a Memorandum of Agreement between the Department of Agriculture and the Department of the Interior for implementing administrative procedures under the Archaeological Resources Protection Act you may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, U.S. Department of the Interior 4015 Wilson Boulevard, Arlington, Virginia 22203-1923 within 45 days of service of this notice. Your request should include a copy of the Notice of Violation and the Notice of Assessment as well as the relief sought and your basis for challenging the facts alleged by the Department of Agriculture. You should also include your preference as to the date and place for a hearing. A copy of the request should be served upon the Office of General Counsel USDA personally or by certified or registered mail (return receipt requested) at 33 New Montgomery Street, 17th floor, San Francisco, California 94105-4511. You have the right to seek judicial review of any final administrative decision assessing a civil penalty.

Failure to deliver a written request for a hearing within 45 days of the service of this notice of assessment shall be deemed a waiver of the right to a hearing.

Sincerely,


JANET L. WOLD
Forest Supervisor

cc: OGC
John Romena

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SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (the "Agreement") is entered into as of _____, 1996, by and between the following: The United States Department of Agriculture - Forest Service ("FS"), Joe Martin Logging & Trucking Inc. and Joe Martin ("Martin"), and Fibreboard Corporation ("Fibreboard"). (Referred to collectively as "the Parties").

RECITALS

a. The FS, USDA issued a Notice of Violation on November 25, 1994 against Fibreboard and Martin alleging \$340,000 in damages to an archaeological site (CA-TUO-1378) on the Mi-Wok Ranger District in the Stanislaus National Forest occurring during the course of alleged unauthorized construction of a log landing and the opening of a haul road to that landing. The specific location of the site is Township 2 North, Range 16 East, along the Deer Creek drainage on the Deer Creek Timber Sale, Tuolumne County, California. The Notice alleges a violation of the Archaeological Resources Protection Act of 1979 (16 USC 470 aa, et seq.) and 36 CFR 296.4(a).

b. Fibreboard and Martin submitted a Petition for Relief in letter form to the F.S. on March 9, 1995, disputing the allegations in the Notice of Violation.

c. The F.S. issued a Notice of Assessment of Civil Penalty on November 2, 1995.

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d. On December 13, 1995, Fibreboard and Martin submitted a request for a hearing in connection with their appeal of the Notice of Assessment of Civil Penalty, and as of the date of the Settlement Agreement, no hearing date has been set.

e. The parties refer to this dispute as "Deer Creek ARPA" (Case No. 3956268-5300).

f. In order to avoid ongoing expense in litigating the matter and in order to resolve the undulying dispute, the Parties have reached a settlement of the Deer Creek ARPA which is set forth in the Agreement.

AGREEMENT

In consideration of the foregoing recitals, and the promises, warranties and agreement set forth below, the Parties agree that:

1. Payment by Fibreboard and Martin. Subject to the terms and conditions set forth below, Fibreboard and Martin will pay to the F.S. a total of Fifty Eight Thousand Dollars (\$58,000) (the "Settlement Amount"). Payment will be made by check issued to Stanislaus National Forest, within ten (10) days after Fibreboard and Martin receive the Agreement, properly executed on behalf of the F.S.

2. Release. The F.S. for itself and its assigns, employees, representatives, counsel and all others claiming by or through it, does hereby agree to release, acquit, and forever discharge Fibreboard and Martin from any and all claims, demands, damages, actions, cause of action, losses, expenses, and claims for relief of every kind and nature, whether in law or in equity, whether direct or indirect, whether by assignment or otherwise, whether under federal law or the law of any state, known or unknown, existing, claimed to exist, or which can ever hereafter arise, which relate in any manner to Deer Creek ARPA violations which were the subject of the Notice of Violation, the ("Released Claims").

a. The Released Claims apply to Fibreboard and Martin's past, present, and future representatives, including but not limited to employees, officers, directors, agents,

subsidiaries, divisions, shareholders, successors in interest, predecessors in interest, assigns, attorneys and insurers.

b. The F.S., having been advised by counsel, expressly intends to and does hereby agree that the Released Claims include, without limitation, all claims against Fibreboard and Martin relating to the Released Claims, which exist as of the date the F.S. executes the Agreement, including those which it does not know of or suspect to exist (whether through ignorance, oversight, error, negligence, or otherwise) and which, if known, would materially affect its decision to enter into the Agreement. The F.S. further agrees that it has accepted the release given by Fibreboard and Martin and payment of the Settlement Amount as a complete compromise as to Fibreboard and Martin of matters involving disputed issues of law and fact relating to the Released Claims. The release is effective upon payment of Settlement Amount.

c. The Parties expressly waive and relinquish all rights and benefits that each has or may have had under Section 1542 of the California Civil Code, or any similar applicable Federal law, which provides as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release,

which it known by him must have materially
affected his settlement with the debtor."

3. Dismissal. The F.S. agrees that promptly upon receipt of the Settlement Amount it will dismiss the Released Claims as against Fibreboard and Martin, with prejudice and so inform:

Administrative Law Judge James H. Hefferman
Office of Hearings and Appeals
U.S. Department of the Interior
6432 Federal Building
Salt Lake City, Utah 84138

to whom this case was assigned on December 14, 1995 by James P. Terry, Deputy Director of the United States Department of the Interior, Office of Hearings and Appeals. (See Exhibit A "Notice of Assignment"). Fibreboard and Martin agree to dismiss their Petition for Relief with prejudice.

4. Denial of Liability. Fibreboard and Martin deny that they are liable to the F.S. on any of the claims. By entering into the Agreement, Fibreboard and Martin shall not be deemed to have waived their position that they are not liable. Neither the Agreement, nor any of its provisions, nor any underlying acts, including payment of the Settlement Amount, may be construed, or offered or received into evidence, as an admission by Fibreboard or Martin of any fault, wrongdoing or liability whatsoever. This paragraph is expressly intended to survive (i) any failure to complete the Agreement, (ii) any subsequent interpretation of the Agreement; or (iii) any breach of the Agreement.

5. General Provisions.

a. The Agreement contains the entire agreement of the Parties and supersedes and replaces all prior negotiations, proposed and actual agreements, written or oral, between the Parties.

b. There have been no inducements or representations upon which the Agreement has been entered into, except as set forth in the Agreement.

c. The Agreement may be executed in counterparts and may be modified only by a written instrument, signed by the Parties or their successors in interest.

d. The F.S. represents and warrants that as of the date its representative executed the Agreement, it has made no assignment of any rights or claims which might be released under the Agreement. The F.S. agrees that, following execution of the Agreement, it will make no assignment of the Agreement or any rights thereunder, including without limitation, the right to payment.

e. The F.S. represents and warrants that there are no liens against Fibreboard or Martin or against the proceeds of this settlement which arise out of, or are connected in any way to the Released Claims.

f. The Agreement shall be construed as if the Parties jointly prepared it any uncertainty or ambiguity shall not be interpreted against any one Party.

g. Any inaccuracies or omissions in the Recitals to the Agreement do not, in any way, affect the validity or enforceability of the Agreement.

h. The Parties represent and warrant that those who have executed the Agreement are fully authorized to act for and to bind each of the Parties to the Agreement.

i. The Agreement shall be binding upon and inure to the benefit of the parties and their respective executors, heirs, successors, assigns, and representatives.

j. The Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, and all of which shall be deemed to be one and the same document.

WHEREAS THE PARTIES HAVE BEEN ADVISED BY THEIR RESPECTIVE COUNSEL, GARY P. DAMBACHER ON BEHALF OF MARTIN, DONALD F. MCALEENAN ON BEHALF OF FIBREBOARD AND MARCIA ABRAMS ON BEHALF OF THE F.S., AND THE RESPECTIVE PARTIES HAVE READ AND FULLY UNDERSTAND THE TERMS OF THIS AGREEMENT AND HAVE EXECUTED THIS AGREEMENT AND RELEASE MEMORIALIZING THAT IT IS THE RESULT OF GOOD FAITH AND ARMS LENGTH NEGOTIATIONS.

NOTICE OF VIOLATION

UNDER THE ARCHAEOLOGICAL RESOURCES PROTECTION ACT OF 1979
(16 U.S.C. 470AA-11)

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Notice To: Nye County Board of Commissioners
Mr. Richard Carver, Chairman
101 Radar Road, Tonopah, NV 89049

Federal Land Management Agency: USDA - Forest Service
Intermountain Region
Humboldt-Toiyabe National Forest
Tonopah Ranger District

Federal Land Manager: R.M. "Jim" Nelson, Forest Supervisor

Violation: Excavation, removal, and/or damage of archaeological resources
located on National Forest System lands in Violation of 36 CFR
296.(a).

Notice is given that on July 4, 1994, while he may or may not have been acting in official capacity for the County of Nye, Nevada, Mr. Richard Carver operated a Caterpillar Bulldozer owned by Nye County, for the purpose of improving the Jefferson Canyon Road FDR #110, located in Sec. 13 of T. 10 N., R. 44 1/2 E., Mt. Diablo Meridian. As a result of Mr. Richard Carver's actions, Mr. Carver damaged or destroyed archaeological artifacts on Federal lands administered by the U.S. Department of Agriculture, Forest Service, Humboldt-Toiyabe National Forest, Tonopah Ranger District. (See attached Affidavit dated July 6, 1994, by Richard Carver).

The damages are detailed in the following enclosed document:

1. "Assessment of Archaeological Value and Cost of Restoration and Repair for Damaged Sites in Jefferson Canyon, Tonopah Ranger District", Dee F. Green, Archaeologist.

A penalty will be assessed against Nye County, Nevada, for violation of 36 CFR 296.4(a) in accordance with 36 CFR 296.15. The proposed penalty is \$82,855.76, for archaeological value and cost of restoration and repair.

You have the following rights:

1. You may seek informal discussions with the Federal Land Manager named in this notice to propose mitigation of the assessed damage.
2. You may file a petition for relief with the Federal Land Manager under the Code of Federal Regulations, 36 CFR 296.15(d) within 45 days of receipt of this notice.

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- 3. You may take no action and await my Notice of Assessment.
- 4. Upon receipt of the Notice of Assessment you will have 45 days to request a hearing in accordance with 36 CFR 296.15(g).
- 5. You may accept, in writing, or by payment, the proposed penalty. Acceptance of the proposed penalty shall be deemed a waiver of the notice of assessment and to the right to request a hearing under 36 CFR 296.15(g).
- 6. You may seek judicial review of any final administrative decision as defined in 36 CFR 296.15(h) assessing a civil penalty.

Failure to meet any deadlines set forth in regulations at 36 CFR 296 (copy enclosed) may constitute a waiver of rights. All communication directed to the Federal Land Manager shall be submitted to:

R.M. "Jim" Nelson
 Humboldt-Toiyabe National Forest
 1200 Franklin Way
 Sparks, NV 89431

Melissa J. Sawallach, fms
 R.M. "Jim" Nelson, Forest Supervisor
 Humboldt-Toiyabe National Forest

August 17, 1997
 Date

Enclosures (3)

Affidavit by Richard Carver, July 3, 1994
 36 CFR 296
 Assessment of Archaeological Value and Cost of Restoration and Repair for Damaged Sites in Jefferson Canyon, by Dee F. Green, PhD

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ASSESSMENT OF ARCHAEOLOGICAL VALUE AND COST OF RESTORATION AND REPAIR FOR DAMAGED SITES IN JEFFERSON Canyon TONOPAH RANGER DISTRICT

INTRODUCTION

On July 4, 1994 Nye County Commissioner Richard Carver used a County owned D-7 Cat to excavate National Forest System land in Jefferson Canyon in the Alta Toquima Range of the Tonopah Ranger District, Toiyabe National Forest, Nevada.

This document reports damage, created by Mr. Carver's bulldozing activities, to historic and pre-historic archaeological resources. These acts are prohibited by Section 6(a) of the Archaeological Resources Protection Act (ARPA) (16 USC 470ee) which states, "No person may excavate, remove, damage, or otherwise alter or deface...any archaeological resources..". Mr. Carver's bulldozing activities are in specific violation of the "excavate," "damage," "alter," and "deface" prohibitions of the act.

This report is concerned with the civil portion of the Act entitled, "Civil Penalties SECTION 7" specifically, "Any person who violates any prohibition contained in an applicable regulation...may be assessed a civil penalty by the Federal land manager concerned" (16 USC 470ff(a)(1)).

Section 7 also provides that, "the amount of such penalty shall be determined under regulations promulgated pursuant to this Act, taking into account...

- (A) the archaeological or commercial value of the archaeological resource involved, and
- (B) the cost of restoration and repair of the resource and the archaeological site involved."

Regulations promulgated under the Act (36 CFR Part 296) provide, under Section 16 Civil Penalty Amounts, that, "...amount of penalty shall be the full cost of restoration and repair of archaeological

resource damage plus the archaeological or commercial value of archaeological resources destroyed or not recovered."

This report assesses the "archaeological value" and the "cost of restoration and repair" to portions of pre-historic Site 1479 and the historic Jefferson Canyon Town Site both located in Jefferson Canyon. It was decided to forego assessment of the commercial value of the artifacts as that value is incidental.

The resources of concern are located in Township 10 North, Range 44 ½ East, Section 13, Mt. Diablo Meridian.

Jefferson Canyon flows westward from the uplands of the Alta Toquima range. These mountains are part of the Basin and Range Province of Nevada which are characterized by generally north-south ranges of high mountains surrounded by flat basins. The higher elevations consist of mixed conifer forests which give way to pinon-juniper scrub forests at lower elevations and finally to open sage and scrub on the lower flanks and valleys.

Perennial streams such as that which flows in Jefferson Canyon are the dominant water sources in basin and range country along with occasional springs and seeps. Except for the very high elevations, which can receive considerable snow pack in the winter, and along stream courses the landscape is generally arid. Summers are hot and dry and winters cool with snowfall often extending into the valleys.

In prehistoric times the area was occupied by small bands of hunter/gatherers who occupied the land in frequently shifting small campsites and only occupied the higher elevations during the summer months. In historic times the native populations were replaced which resulted in a shift in settlement pattern to permanent small villages and towns with some isolated but continuously occupied ranches.

The Jefferson Canyon environment serves as the backdrop on which both the prehistoric and historic past was played out. The canyon's archaeological record is of primary importance in helping us understand and appreciate the differing ways in which two groups of people have adjusted to this part of the world.

BACKGROUND

Professional archaeologist Dr. Dee F. Green was assigned to the case and first visited the area damaged on July 22, 1994 in the company of District Ranger David Greider and District Archaeologist Arlene Benson. Greider showed him the entire length of the bulldozer activity from where the machine was unloaded to the end of the work performed. Green determined that the bulldozer had damaged both historic and pre-historic archaeological resources. He also examined the evidence which had already been collected from the damaged resources. This examination was done in the presence of case agent Charlie Vaughn.

Green also visited the damaged resources on the 26-28 of July 1994 for the purpose of emergency repair and to perform the damage assessments.

SITE DAMAGE ASSESSMENT PROCEDURES

ARPA established "archeological value" and "cost of restoration and repair" as the assessments which need to be calculated for establishing the amount of the civil penalty. Guidance is provided by the Uniform Regulations. This section of the report addresses the procedures used for making the assessment for each of the two classes of archaeological resource, the Historic Jefferson Canyon Town Site and the pre-historic Site 1479.

Archaeological Value

Value of the information

Archaeological value is established by the Uniform Regulations to be, "the value of the information

associated with the archaeological resource" (299.14(a)). Archaeology is a scientific discipline whose purpose is to understand and explain human behavior in either the recent or pre-historic past. This discipline is equipped with a series of tools (theories, methods, techniques) which can be applied to any location where there is evidence of past human behavior. Normally these tools are applied to one or more of the following analytical units.

- **Artifacts.** Artifacts are tools or implements made or modified by human behavior. They consist of anything from the simplest stone tool made by a prehistoric hunter to a modern space shuttle capable of orbiting the earth.
- **Ecofacts.** Ecofacts are the plant, animal, and mineral resources to which some human use or endeavor has been applied, but which are not normally classified as artifacts. For example, pollen grains from plants or charcoal from a man made fire pit.
- **Features.** Combinations of artifacts and/or ecofacts which have been combined in some fashion by man to form a recognizable unit which can be studied are termed features. For example, an historic or pre-historic fire pit consisting of a human constructed rock alignment within which may be found discarded or lost artifacts and/or ecofacts such as charcoal or animal bone.
- **Sites.** Combinations of any of the above which are associated in such a fashion as to be recognizable geographic units. Such sites vary from small areas no more than a few feet square to large cities which may be many square miles in extent.

When analyzing any of the above units, archaeologists are concerned primarily, although not exclusively, with three kinds of information.

- 1). That information provided by the analysis of the unit itself, i.e. the measurements of the artifact, feature, or site; the species identity of a pollen grain,

plant, or animal bone.

2). That information provided by the relationships between and among the analysis units.

3). The number of analysis units available.

It is the characteristics of the analysis units and the relationships of the analysis units that provide interpretive power. That is, information value in an archaeological resource (site) consists not in the possession of the analysis units *per se* but in the number of such units, their characteristics, and above all their relationships with other units.

Thus, any activity which causes loss of analysis unit(s), damage to an analysis unit(s), or removes any analysis unit(s) from its/their associated space (location) relative to any other analysis unit(s) causes a loss of scientific information, thereby damaging the resource.

Appraisal of the Information Costs

Value of the information is, "appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but are not limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential" (Uniform regulations 296.1(a)).

Organization of archaeological work normally follows that outlined by the regulations in the paragraph cited above.

Preparing a Research design. Research designs are prepared to guide the investigation such that relevant questions with regard to the past are asked. Retrieval of information is best accomplished when one knows the following.

- What, if anything, is already known about the human behavior thought to be represented at the location.
- What question(s) remain to be studied that could possibly be answered by the data available from the location.

- What models, if any, are already available for investigating the question(s).
- What resources (data recovery, analyses, etc.) are liable to be needed in order to obtain information from the location.
- How should the field work and analysis proceed to obtain the information sought.

The above tasks are normally performed by a professional archaeologist (Principal Investigator) with a PhD degree or a very experienced MA professional and are explained in a written document which is made available prior to any field work or analysis being conducted and then published with the final report (see below).

Conducting field work. Field work is conducted using standard techniques to insure proper and reliable data recovery and may include, but are not limited to the following.

- Accurate mapping of surface locations to identify the provenience of any analysis units and their relationships to each other.
- Selection of areas which are subsurface tested in order to expose more analysis units which may contain scientific information. Such locations are excavated with horizontal and vertical controls and with care in order to insure that the integrity of the analysis units and their relationships to other analysis units are not lost.
- Accurate mapping and recording (location, notes, photography, etc.) of all analysis units uncovered by the excavations conducted.
- Specialized treatments of certain analysis units to prevent contamination or other loss. For example C14 and pollen.

Field work is under the overall supervision of the Principal Investigator with the majority of the work conducted by a trained crew chief with one or more assistants.

Carrying out laboratory analysis. Laboratory analysis usually consists of, but is not limited to, the following procedures.

- Cataloguing and preparing specimens which may be either:

analyzed in regular facilities available to the Principal Investigator and staff

or

sent to a laboratory where specialized equipment is needed to perform the analysis such as C14, pollen, or x-ray fluorescence to source obsidian.

- Making observations about an analytical unit such as an artifact which may include, but are not limited to, measurements, materials, manufacturing technique, microscopic examination, drawing or sketching, photography, etc.
- Computing and/or plotting the frequencies, distances, and other factors relating to the relationships between and among the analytical units recovered.

Laboratory analysis is under the overall supervision of the Principal Investigator with the majority of the work conducted by trained laboratory technicians.

Preparing reports. Reports are normally prepared as follows.

- Technical reports such as those prepared by laboratories doing pollen or C14 analysis.
- A final report containing the following:
 - 1) the research design as noted above;
 - 2) conducting and results of the field work
 - 3) conducting and results of laboratory analysis
 - 4) technical reports for special analysis labs
 - 5) summary and conclusions

which embody the information learned
6) references cited.

The final report is prepared by, or under the immediate direction of the Principal Investigator.

COST OF RESTORATION AND REPAIR

Cost of restoration and repair is established by the uniform Regulations to be, "the sum of the cost already incurred for emergency restoration and repair work, plus those costs projected to be necessary to complete restoration and repair..." (296.14(c)).

Emergency Restoration and Repair

Emergency restoration and repair occurs when the loss of scientific information may be immanent and cannot be postponed for a longer period of time. Factors in assessing the need for emergency measures include inclement weather, further depredation, contamination, erosion etc.

Complete Restoration and Repair

Under this section the regulations list eight (8) categories which may be considered. For purposes of this incident only categories 3, 6, and 8 apply. These categories are.

- Ground contour reconstruction and surface stabilization (196.14(c)(3)).
- Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved (295.14(c)(6)).
- Preparation of reports relating to any of the above activities (296.14(c)(8)).

COMPUTING COSTS

Government Rates

Personnel costs are computed using the FY'94 General Schedule for the Federal Government since that is the year in which the damage occurred. GS Levels are those of the writer and staff who would be used if the work was being performed in 1994. The daily rates are as follows:

GS9/10 Supervisory Archaeologist	178.00
GS7/1 Archaeologist	96.64
GS5/1 Historian	78.00
GS5/1 Archaeological Technician	78.00
GS3/1 Archaeological Technician	62.08
GS3/1 Typist	62.08

Special analysis costs (pollen, obsidian hydration, Carbon 14 dating) are computed at the 1994 prices for lowest bidder. Vehicle costs are computed using 1994 rates and based on mileage from the Supervisor's Office in Sparks, Nevada where the archaeological expertise exists for conducting the work. The mileage is for round trips rather than weekend stays in Tonoapah because the mileage is less expensive. Supply costs are based on 1994 prices for expendable items. No charges are included for use of specialized equipment such as cameras, laser surveyor, Global Positioning System Instrument. The overhead rate is that established for the Tonopah Ranger District for Fiscal Year 1994 and includes such items as office space, duplication, hiring, and computer facilities.

RESOURCES VIOLATED

Two archaeological resources were excavated, damaged, altered, and defaced. Portions of pre-historic Site 1479 and portions of the Historic Jefferson Canyon Historic Mining Site both suffered scientific loss due to the bulldozing activity.

Pre-historic Site 1479

This site is located on the first two terraces and intervening slope above the stream on the south side of Jefferson Canyon. The site was recorded

in 1980 and described as an "open lithic scatter with pottery, groundstone, and a few historic artifacts." When Green visited the site in 1994 he did not observe any pottery although the other classes of artifacts were present.

Gatecliff, Humboldt, Elko, and Rosegate projectile points were all observed by Green among the evidence collected from the site. This dates the site to at least 1300 B.C. (Thomas 1981:Figure 2). The site seems to have been either a field camp or an area where plant and animal resources were gathered and/or processed. Evidence for a base camp such as rock rings, are not evident on the surface of the site although such evidence could be buried or could have been destroyed by the bulldozing activity.

Sites such as this contain important scientific information related to the behaviors associated with pre-historic hunting and gathering. Issues of interest include how the site fits into the nomadic settlement pattern of pre-historic Great Basin populations, for example is the site a short term camp occupied for a few weeks while resources in the area were exploited and then abandoned? Or was the site a "passing through" location when a band overnighted on their way to a summer camp in the higher elevations?

Other questions of interest involve trade and movement of lithic resource material. The site contains both obsidian and various chert and/or chalcedony artifacts. Where are the sources of these materials? They are not present in the vicinity of the site so they must have been imported and subsequently lost or discarded. Were these artifacts manufactured by the site's occupants who travel to the sources to obtain the raw materials or were they traded?

Under the assumption that the site contained pottery as originally reported, were those ceramics made locally or imported? If imported from how far away and what might have been the relationships between the manufacturers and the people who left the material at Site 1479.

The above paragraphs outline only three of several topics which could be explored at this important site located between the lower foothills and the higher altitudes of the Alta Toquima Range.

Additional background information on the pre-

history of the areas is available in Thomas 1983a, 1983b, 1988 and Thomas and McKee 1974.

Damage

Damage to pre-historic Site 1479 occurred when the bulldozer left the road and excavated a new road across the site causing damage, alteration and defacement as well. The area excavated was 211 feet long and 8 feet wide for a total of 1688 square feet.

For purposes of controlling the relationships among surface occurring analysis units a base datum is established from which all measurements are taken. For sub-surface analysis units a standard square is excavated in controlled levels. For purposes of this exercise we will figure a 3X3 foot square with 3 inch levels.

Given that 1688 square feet were disturbed there are a possible 188 3X3 foot squares which could be excavated. Charging for the excavation of every square is unreasonable since in the normal course of excavating a site such as this, many excavation units would not be placed in the disturbed locations. Sampling the area disturbed is considered adequate for recovering the information available under archaeological value.

In this case we have selected sample size of 20% which I consider the absolute minimum necessary for adequate data recovery on a site of this size and artifact density. Thus 38 3X3 units would need excavation to an average of three levels given that the bulldozing varied from surface disturbance at the entry point of the site to more than a foot where the cut went down the slope. Again, this is a most conservative strategy.

The field costs portion of the budget are based on the above figures and encompass surface mapping, sub-surface excavation, and recording the information. The laboratory costs are based on the anticipated recovery of analytical units and the time required to process and analyze them.

Figures for costs of restoration and repair include processing the backdirt created by the bulldozing activities.

Emergency restoration and repair consisted of the removal of specimens which might have been taken by the public given that the site was impacted

by Mr. Carver's activities when numerous members of the general public were present.

Jefferson Canyon Historic Mining Site

Silver was discovered in Jefferson Canyon in 1866 with additional discoveries in 1871. A boom town began to develop along the canyon bottom on the first and second terraces above the stream. By 1874 the Jefferson Canyon town site contained a post office, 3 stores, hotels, a school, a Wells Fargo office, and other "necessary establishments" see Carlson (1974:145), Hall (1981:56-57), and Lincoln (1923:171-172).

In addition to the townsite itself numerous adits, tailings, camps and other historic features were scattered over the landscape for several square miles.

In 1874 a road was built over the Alta Toquima Range connecting the Jefferson Canyon area with Monitor Valley on the east side of the range. This historic road was used for stagecoach and commercial haulage traffic coming from the east. Portions of the road were washed out by a flood in 1983.

The Jefferson Canyon historic site is an important historic resource for understanding the history of silver mining not only in the state of Nevada but especially in Nye county. There is an interesting architectural sequence with structures still standing from the 1874 wooden cabins and stores to later period stone structures.

Although most of the commercially valuable artifacts have been collected there is still a wealth of information in broken bottles, various cans and other artifacts which could reveal much about the kinds of goods imported. Such information would shed light not only on the economics of the town (what could they afford to import) but on the tastes and preferences of the inhabitants as well.

There is also a wealth of intrasite settlement information. The location of the main town, numerous outlying structures, various mines, mills, and adits are all constructed in a narrow canyon landscape with the critical water source running down the bottom. The whole complex holds information which is of interest not only to archaeologists, but to historians and geographers as well.

In addition, the site is undoubtedly eligible for the National Register of Historic Places most certainly at the local level and probably at the state if not the national level as well.

Given the quantity and quality of the remaining structures and artifacts at the site there is good potential for restoration and recreation opportunities provided the site can be protected from the kinds of damage reported here.

Damage

Damage to historic resources in Jefferson Canyon occurred at four locations.

- Location #1 is located in the townsite itself and was caused by the bulldozer leaving the road and driving over a number of artifacts causing damage, alteration, and defacement. The bulldozer activity was 43 feet long and 8 feet wide for a total of 344 square feet of disturbance.
- Location #2 is located in the townsite itself and was caused by the bulldozer excavating a new section of road through the archaeological resource, causing artifact damage and alteration, and excavating a fire pit causing damage and altering the feature and exposing it to contamination. The bulldozer activity was an average of 150 feet long and 10 feet wide for a total of 1500 square feet of disturbance.
- Location #3 is located upstream from the townsite in the vicinity of a mine shaft. The damage was caused by the bulldozer excavating a cut in the archaeological resource resulting in damage to and altering of the resource. The bulldozer activity was 33 feet long and 15 feet wide for a total of 495 square feet of disturbance.
- Location #4 is located upstream from the townsite and occurred along the historic road itself where the bulldozer cut into a bank beside the road and deposited the fill on the roadbed itself causing alteration and defacement to the resource. The

bulldozer activity was 210 feet long and 8 feet wide for a total of 1680 square feet of disturbance.

Since this location might be considered as falling under a RS2477 road it is removed from further consideration.

Total disturbance to archaeological resources on the three historic locations was 2339 square feet.

For purposes of controlling the relationships among surface occurring analysis units a base datum is established from which all measurements are taken. For sub-surface analysis units a standard square is excavated in controlled levels. For purposes of this exercise we will figure a 3X3 foot square with 3 inch levels.

Location 1. Given that 344 square feet were disturbed there are a possible 38 3X3 foot units which could be excavated. Charging for the excavation of every unit is unreasonable since in the normal course of excavating a site as large as the Jefferson Canyon Historic Townsite many excavation units would not normally be placed in the disturbed locations.

Sampling the areas disturbed is considered adequate for recovering the information available under archaeological value. In this case we have selected a small sample size of 10% which I consider the minimum necessary for adequate data recovery. Thus 4 3X3 units would need excavation one level deep given the disturbance caused by the treads of the bulldozer.

The field costs portion of the budget are based on the above figures and encompass surface mapping, sub-surface excavation, and recording the information. The laboratory costs are based on the anticipated recovery of analytical units and the time required to process and analyze them.

Location 2. Given that 1500 square feet were disturbed there are a possible 167 foot squares which could be excavated. Using our 10% sample figure results in 17 units for excavation.

Figures for the cost of restoration and repair include processing the backdirt created by the bulldozing activities in anticipation of the recovery of artifacts now contained in that backdirt.

Emergency restoration and repair consisted of the removal of charcoal from the exposed fire pit in order to obtain a Carbon 14 date before the entire fire pit was lost or contaminated.

All other considerations are computed as in Location 1 above.

Location 3. Given that 495 square feet were disturbed there are a possible 55 squares which could be excavated. Using our 10% sampling figure results in 6 units for excavation.

All other considerations are computed as in Location 1 above.

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Archaeological Resources Protection Act Uniform Regulations: Protection of Archaeological Resources. Department of Agriculture - 36 CFR Part 295.

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1981 "How to classify the Projectile Points of Monitor Valley Nevada." *Journal of California and Great Basin Anthropology*. Vol 3, No. 1, pp. 7-43.

1983a "The Archaeology of Monitor Valley: 1. Epistemology." *Anthropological Papers of the American Museum of Natural History*. 58(1): 1-94.

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1974 "An Aboriginal rock alignment in the Toiyabe Range, central Nevada." *American Museum Novitates* 2534: 17pp.

Respectfully submitted,



 DEE F. Green, Ph D.
 Archaeologist

BUDGET: PRE-HISTORIC SITE 1479

ARCHAEOLOGICAL VALUE

Preparing a Research Design (see page 3) \$ 1,780.00

Personnel

1 - GS9 - Supervisory Archaeologist 10 days @ \$178 per day \$ 1,780.00

Conducting Field Work (see page 3) \$13,280.48

Personnel

1 - GS9 - Supervisor Archaeologist 28 days @\$178 per day \$ 4,984.00

1 - GS5 - Archaeological Technician 56 days @\$78 per day 4,368.00

1 - GS3 - Archaeological Technician 56 days @\$62.08 per day 3,476.48

Sub Total \$12,828.48

Vehicle & Supplies

1 - 4X4 pickup 560 miles @.45 per mile \$ 252.00

Film and developing, stakes, specimen bags, etc. 200.00

Sub Total \$ 452.00

Carrying Out Laboratory Analysis (see page 4) \$ 2,004.00

Personnel

1 - GS9 - Supervisory Archaeologist 3 days @\$178 per day \$ 534.00

1 - GS5 - Archaeological Technician 10 days @\$78 per day 780.00

Sub Total \$ 1,314.00

Special Analysis

12 - Pollen samples @\$20 per sample \$ 240.00

10 - Obsidian Hydration dates @\$20 per sample 200.00

10 - Obsidian sourcing @\$25 per sample 250.00

Sub total \$ 690.00

Preparing Reports (see page 4) \$ 3,850.40

Personnel

1 - GS9 - Supervisory Archaeologist 10 days @\$178 per day \$1,780.00

1 - GS7 - Archaeologist 15 days @\$96.64 per day 1,449.60

1 - GS3 - Typist 10 days @\$62.08 per day 620.80

TOTAL ARCHAEOLOGICAL VALUE \$20,914.88

BUDGET: PRE-HISTORIC SITE 1479 CONTINUED**COST OF RESTORATION AND REPAIR**

Emergency Restoration and Repair (see page 4) \$ 457.93

Personnel

Arlene Benson, Archaeologist 13 hours @\$19.78 per hour \$ 257.14
David Grider, District Ranger 9 hours @\$22.31 per hour 200.79

Examination and Analysis of Information (see page 4) \$ 3,130.72

Personnel

1 - GS9 - Supervisory Archaeologist 5 days @ \$178 per day \$ 890.00
1 - GS7 - Archaeologist 3 days @\$96.64 per day 289.92
1 - GS5 - Archaeological Technician 10 days @\$78.00 per day 780.00
1 - GS3 - Archaeological Technician 10 days @ \$62.08 per day 620.80
Sub Total \$ 2,580.72

Vehicles and Supplies

1 - 4X4 Pickup 1000 miles @\$45 \$ 450.00
Film and developing, stake, specimen bags etc. 100.00
Sub Total 550.00

Preparation of Reports (see page 4) \$ 1,586.96

Personnel

1 - GS9 - Supervisory Archaeologist 5 days @\$178 per day \$ 890.00
1 - GS7 - Archaeologist 4 days @\$96.64 per day 386.56
1 - GS3 - Typist 5 days @\$62.08 per day 310.40
Sub Total \$ 1,586.96

TOTAL COST OF RESTORATION AND REPAIR \$ 5,175.61

**TOTAL ARCHAEOLOGICAL VALUE AND
COST OF RESTORATION AND REPAIR \$26,090.49**

Overhead @27% (see page 5) \$ 7,044.43

TOTAL COST FOR PRE-HISTORIC SITE 1479 \$33,134.92

BUDGET: JEFFERSON CANYON HISTORIC SITE**LOCATION #1 ARCHAEOLOGICAL VALUE**

Preparing a Research Design* (see page 3) \$ 3,229.60

Personnel

1 - GS9 - Supervisory Archaeologist 10 days @\$178 per day \$ 1,780.00
 1 - GS5 - Historian 15 days @\$96.64 per day 1,449.60

Conducting Field Work (see page 3) \$ 7,131.20

Personnel

1 - GS9 - Supervisor Archaeologist 10 days @\$178 per day \$ 1,780.00
 1 - GS5 - Archaeological Technician 15 days @\$78 per day 1,170.00
 1 - GS3 - Archaeological Technician 15 days @\$62.08 per day 931.20
 Sub Total \$ 3,881.20

Vehicle* & Supplies

1 - 4X4 pickup 7000 miles @.45 per mile \$ 3,150.00
 Film and developing, stakes, specimen bags, etc. 100.00
 Sub Total \$ 3,250.00

Carrying Out Laboratory Analysis (see page 4) \$ 590.00

Personnel

1 - GS9 - Supervisory Archaeologist 1 days @\$178 per day \$ 178.00
 1 - GS5 - Archaeological Technician 4 days @\$78 per day 312.00

Special Analysis

5 - Pollen samples @\$20 per sample \$ 100.00

Preparing Reports (see page 4) \$ 2,108.16

Personnel

1 - GS9 - Supervisory Archaeologist 5 days @\$178 per day \$ 890.00
 1 - GS7 - Archaeologist 6 days @\$96.64 per day 579.84
 1 - GS5 - Historian 5 days @\$68 per day 390.00
 1 - GS3 - Typist 4 days @\$62.08 per day 248.32

TOTAL ARCHAEOLOGICAL VALUE \$13,058.96

BUDGET: JEFERSON CANYON HISTORIC SITE CONTINUED**LOCATION #1 COST OF RESTORATION AND REPAIR****Examination and Analysis of Information (see page 4)****\$ 2,396.12****Personnel**

1 - GS9 - Supervisory Archaeologist 3 days @ \$178 per day	\$ 534.00
1 - GS7 - Archaeologist 1 days @\$96.64 per day	96.64
1 - GS5 - Archaeological Technician 6 days @\$78 per day	468.00
1 - GS3 - Archaeological Technician 6 days @\$62.08 per day	372.48
Sub Total	\$ 1,471.12

Vehicles and Supplies

1 - 4X4 Pickup 2000 miles @\$45	\$ 900.00
Film and developing, stake, specimen bags etc.	25.00
Sub Total	925.00

Preparation of Reports (see page 4)**\$ 789.36****Personnel**

1 - GS9 - Supervisory Archaeologist 3 days @\$178 per day	\$ 534.00
1 - GS7 - Archaeologist 2 days @\$96.64 per day	193.28
1 - GS3 - Typist 1 days @\$62.08 per day	62.08

TOTAL COST OF RESTORATION AND REPAIR**\$ 3,185.48****TOTAL ARCHAEOLOGICAL VALUE AND
COST OF RESTORATION AND REPAIR****\$16,244.44****Overhead @27% (see page 5)****\$ 4,386.00****TOTAL COST FOR LOCATION #1****\$20,630.44**

*The research design and vehicular costs are one time items and therefore are not repeated in computing costs for Locations 2 and 3.

BUDGET: JEFFERSON CANYON HISTORIC SITE**LOCATION #2 ARCHAEOLOGICAL VALUE**

Conducting Field Work (see page 3) \$ 6,082.40

Personnel

1 - GS9 - Supervisor Archaeologist 10 days @\$178 per day	\$ 1,780.00
1 - GS5 - Archaeological Technician 30 days @\$78 per day	2,340.00
1 - GS3 - Archaeological Technician 30 days @\$62.08 per day	1,862.40
Sub Total	\$ 5,982.40

Supplies

Film and developing, stakes, specimen bags, etc.	100.00
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Carrying Out Laboratory Analysis (see page 4) \$ 944.00

Personnel

1 - GS9 - Supervisory Archaeologist 2 days @\$178 per day	\$ 356.00
1 - GS5 - Archaeological Technician 6 days @\$78 per day	468.00

Special Analysis

6 - Pollen samples @\$20 per sample	\$ 120.00
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Preparing Reports (see page 4) \$ 3,483.52

Personnel

1 - GS9 - Supervisory Archaeologist 8 days @\$178 per day	\$ 1,424.00
1 - GS7 - Archaeologist 11 days @\$96.64 per day	1,063.04
1 - GS5 - Historian 8 days @\$68 per day	624.00
1 - GS3 - Typist 6 days @\$62.08 per day	372.48

TOTAL ARCHAEOLOGICAL VALUE \$10,509.92

BUDGET: JEFERSON CANYON HISTORIC SITE CONTINUED

LOCATION #2 COST OF RESTORATION AND REPAIR

Emergency Restoration and Repair (see page 4) \$ 189.77

Personnel

1 - GS9 - Supervisory Archaeologist 1 hour @22.25 per hour \$ 22.25
 1 - GS5 - Archaeological Technician 1 hour @\$9.76 per hour 9.76
 1 - GS3 - Archaeological Technician 1 hour @\$7.76 per hour 7.76
 Sub Total \$ 39.77

Special Analysis

1 - Carbon 14 sample @\$150 \$ 150.00

Examination and Analysis of Information (see page 4) \$ 1,770.76

Personnel

1 - GS9 - Supervisory Archaeologist 4 days @ \$178 per day \$ 712.00
 1 - GS7 - Archaeologist 2 days @\$96.64 per day 193.28
 1 - GS5 - Archaeological Technician 6 days @\$78 per day 468.00
 1 - GS3 - Archaeological Technician 6 days @\$62.08 per day 372.48
 Sub Total \$ 1,745.76

Supplies

Film and developing, stake, specimen bags etc. 25.00

Preparation of Reports (see page 4) \$ 1,126.08

Personnel

1 - GS9 - Supervisory Archaeologist 4 days @\$178 per day \$ 712.00
 1 - GS7 - Archaeologist 3 days @\$96.64 per day 289.92
 1 - GS3 - Typist 2 days @\$62.08 per day 124.16

TOTAL COST OF RESTORATION AND REPAIR \$ 3,086.61

TOTAL ARCHAEOLOGICAL VALUE AND COST OF RESTORATION AND REPAIR \$13,596.53

Overhead @27% (see page 5) \$ 3,671.06

TOTAL COST FOR LOCATION 2 \$17,267.59

BUDGET: JEFFERSON CANYON HISTORIC SITE

LOCATION #3 ARCHAEOLOGICAL VALUE

Conducting Field Work (see page 3) \$ 4,681.60

Personnel

1 - GS9 - Supervisor Archaeologist 10 days @\$178 per day \$ 1,780.00
 1 - GS5 - Archaeological Technician 20 days @\$78 per day 1,560.00
 1 - GS3 - Archaeological Technician 20days @\$62.08 per day 1,241.60
Sub Total \$ 4,581.60

Supplies

Film and developing, stakes, specimen bags, etc. 100.00

Carrying Out Laboratory Analysis (see page 4) \$ 590.00

Personnel

1 - GS9 - Supervisory Archaeologist 1 days @\$178 per day \$ 178.00
 1 - GS5 - Archaeological Technician 4 days @\$78 per day 312.00

Special Analysis

5 - Pollen samples @\$20 per sample \$ 100.00

Preparing Reports (see page 4) \$ 2,108.16

Personnel

1 - GS9 - Supervisory Archaeologist 5 days @\$178 per day \$ 890.00
 1 - GS7 - Archaeologist 6 days @\$96.64 per day 579.84
 1 - GS5 - Historian 5 days @\$68 per day 390.00
 1 - GS3 - Typist 4 days @\$62.08 per day 248.32

TOTAL ARCHAEOLOGICAL VALUE \$ 7,379.76

BUDGET: JEFERSON CANYON HISTORIC SITE CONTINUED

LOCATION #3 COST OF RESTORATION AND REPAIR

Examination and Analysis of Information (see page 4) \$ 1,318.12

Personnel

1 - GS9 - Supervisory Archaeologist 2 days @ \$178 per day	\$ 356.00
1 - GS7 - Archaeologist 1 days @\$96.64 per day	96.64
1 - GS5 - Archaeological Technician 6 days @\$78 per day	468.00
1 - GS3 - Archaeological Technician 6 days @62.08 per day	372.48
Sub Total	\$ 1,293.12

Supplies

Film and developing, stake, specimen bags etc.	25.00
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Preparation of Reports (see page 4) \$ 611.36

Personnel

1 - GS9 - Supervisory Archaeologist 2 days @\$178 per day	\$ 356.00
1 - GS7 - Archaeologist 2 days @\$96.64 per day	193.28
1 - GS3 - Typist 1 days @\$62.08 per day	62.08

TOTAL COST OF RESTORATION AND REPAIR \$ 1,929.48

TOTAL ARCHAEOLOGICAL VALUE AND COST OF RESTORATION AND REPAIR \$ 9,309.24

Overhead @27% (see page 5) \$ 2,513.49

TOTAL COST FOR LOCATION #3 \$11,822.73

TOTAL FOR HISTORIC LOCATIONS

TOTAL FOR LOCATION #1		\$20,630.44
TOTAL FOR LOCATION #2		\$17,267.59
TOTAL FOR LOCATION #3		\$11,822.73
TOTAL FOR JEFFERSON CANYON HISTORIC SITE		\$49,720.76
TOTAL FOR BOTH PRE-HISTORIC AND HISTORIC SITES		
PRE-HISTORIC SITE	\$33,134.92	
HISTORIC LOCATIONS	49,720.76	
TOTAL		\$82,855.68

Agreement for Addressing Archaeological Resources in Nye County, Nevada

This Agreement is entered into this 23rd day of December, 1997, by Nye County, Nevada (hereinafter "County") and the United States Department of Agriculture – Forest Service, Humboldt-Toiyabe National Forests (hereinafter "Forest Service") within the context of the "Tri-Party Framework for Interactions to Address Public Land Issues in Nye County, Nevada, 1996" (hereinafter "Tri-Party Framework"). Both parties are sometimes referred to in this Agreement collectively as "the Parties".

I. RECITALS

- A. The County and the Forest Service, as signatories to the Tri-Party Framework, have mutual interests in resolving issues pertinent to public land management in Nye County, Nevada, including archaeological resources.
- B. The Parties have discussed concerns about protection of archaeological resources and public access in Jefferson Canyon, Nye County, Nevada, and have agreed to the conditions set forth below.

II. AGREEMENT

- 1. The County will work with the Forest Service to provide for maintenance of Jefferson Canyon Road through the Prehistoric Site #1479 and the Jefferson City Historical District (hereinafter "Historical District"), while protecting the integrity of heritage resources in these areas.
 - a. The Forest Service will determine, at its cost, what additional information important to the prehistory of the area remains to be gathered at Prehistoric Site #1479, and will identify methodology appropriate for gathering such information.

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- b. The County will contract, at its cost, with a Forest Service approved archaeologist to complete a significance evaluation, and assess whether Prehistoric Site #1479 is eligible for the National Register of Historic Places, using the Forest Service methodology.
 - c. The County will contract, at its cost, with a Forest Service approved archaeologist to conduct an archival search in federal, state, and county repositories for historic documents and maps relating to the Historical District, and conduct field work to determine what features have been recorded and whether the Forest Service considers the recordation to be consistent with current standards.
 - d. The County will contract, at its cost, with a Forest Service approved archaeologist to complete a significance evaluation, including development of an historic context, and assess whether the Historical District is eligible for the National Register of Historic Places.
2. The County will, at its cost, conduct stabilization work of the cut-bank at Location #2.
 3. The Parties will complete items 1(a)-(d) and 2 by September 30, 1998.

III. GENERAL PROVISIONS

4. In furtherance of achieving a more cooperative working relationship for the interpretation, protection, and restoration of archaeological resources in the Jefferson City Historical District, the County and Forest Service may enter into a "Preservation Partnership" by means of the Tri-Party Framework. Objectives of the Partnership may include: (a) assess whether elements are contributing or noncontributing; (b) nominate the 117-acre Historical District to the National Register of Historic Places as a National Register District; (c) develop a management plan for the Historical District, to include specific management activities, such as: stabilizing slopes, using rock walls and other appropriate methods;

constructing parking spaces in appropriate places; providing signing or other interpretive materials; developing interpretive/walking trails; providing for fire prevention/protection; planting native species of plants; stabilizing some of the existing structures; conducting oral histories of area residents; reclaiming some of the exploration roads; and developing a monitoring program; and (d) seek and secure funding and support, through grants, archaeology field schools, passport-in-time projects, and the addition of partners, to conduct partnership activities.

5. In furtherance of achieving a more cooperative working relationship for providing continued access using Jefferson Canyon Road, the County and Forest Service may enter into a road management protocol by means of the Tri-Party Framework. Such a protocol could address issues such as jurisdiction; scope of road rights-of-way; procedures for adjusting road alignments; the appropriate amount, type, and scheduling of maintenance; improvements to the stream and spring crossings; and periodic assessment of the adequacy of access to the Historical District.
6. Nothing in this Agreement shall be construed or interpreted as terminating or modifying any valid lease, permit, patent, claimed right-of-way, or other land use permit or authorization existing on the date this Agreement becomes effective. All commitments, work, or other obligations herein described will be conducted in full compliance with applicable laws and regulations.
7. The Parties represent and warrant that those who have executed this Agreement are fully authorized to act for and bind each of the Parties to the Agreement. The Parties further represent that each have been advised by their respective counsel and have read and fully understand the terms of this Agreement. The Parties enter into this agreement in good faith.

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives on the dates so indicated.

FOR NYE COUNTY, NEVADA

Ira "Red" Copass
Ira "Red" Copass, County Commissioner

Date: 12-30-97

Cameron McRae
Cameron McRae, County Commissioner

Date: 12-30-97

Robert Davis
Robert Davis, County Commissioner

Date: 12-30-97

Robert Revert
Robert Revert, Vice-Chairman

Date: 12-30-97

Richard Carver
Richard Carver, Chairman

Date: 12-30-97

FOR THE FOREST SERVICE

Michael A. "Tony" Valdes
Michael A. "Tony" Valdes
Tonopah District Ranger

Date: 12/30/97

Monica J. Schwalbach
Monica J. Schwalbach
Assistant Forest Supervisor

Date: 12/30/97

R.M. "Jim" Nelson
R.M. "Jim" Nelson, Forest Supervisor

Date: 12/30/97

IN RE: NOTICE OF VIOLATION AGAINST)
NYE COUNTY, NEVADA, UNDER THE)
ARCHAEOLOGICAL RESOURCES)
PROTECTION ACT 16 U.S.C. 470AA et seq.)

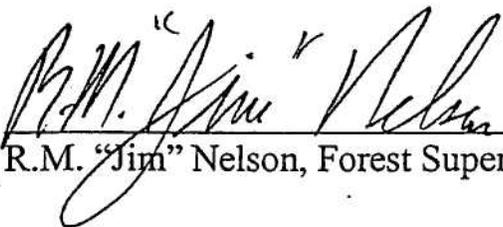
DISMISSAL

1. On August 17, 1997, R.M. "Jim" Nelson, Forest Supervisor for the U.S. Forest Service, Humboldt-Toiyabe National Forests, issued a Notice of Violation under the Archaeological Resources Protection Act to the Nye County Board of Commissioners (hereinafter "Board") and Mr. Richard Carver alleging that on July 4, 1994, Mr. Carver operated a Caterpillar bulldozer owned by Nye County, on or near Jefferson Canyon Road (FDR #110) and, in doing so, damaged or destroyed archaeological resources on Federal lands administered by the Forest Service. A description of the damages is set forth in an "Assessment of Archaeological Value and Cost of Restoration and Repair for Damaged Sites in Jefferson Canyon, Tonopah Ranger District", by Dee F. Green, Forest Service Archaeologist. A penalty of eighty-two thousand, eight hundred fifty five dollars and seventy-six cents (\$82,855.76) was proposed under the Notice of Violation.
2. On October 9, 1997, the Board requested the scheduling of informal discussions regarding the Notice of Violation, for the purpose of seeking resolution of the Notice of Violation. On October 14, 1997, Mr. Nelson granted the request for informal discussions and gave the Board and representatives of the Forest Service sixty (60) days in which to reach a settlement agreement within the informal discussion process. Nye County staff and Forest Service officials worked together during those sixty days to develop a proposed agreement to resolve the issues pertinent to the Notice of Violation. During that time, the Board requested, and Mr. Nelson granted, a withdrawal of Mr. Carver as a named respondent to the Notice of Violation.
3. On December 16, 1997, Forest Service officials met with the Board at a County Commission meeting to discuss final resolution of the matter. The Board voted (5-0) to approve the proposed agreement, provided that

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the Forest Service dismiss its Notice of Violation under ARPA against Nye County.

4. The proposed agreement, entitled "Agreement for Addressing Archaeological Resources in Nye County, Nevada" (hereinafter "Agreement") has subsequently been integrated into the "Tri-Party Framework for Interactions to Address Public Land Issues in Nye County, Nevada". As such, the Board has made a commitment with the Forest Service to implement all the conditions of the Agreement, in accordance with the Tri-Party Framework, of which both the County and the Forest Service are signatories.
5. The Forest Service acknowledges the County's willingness to assume responsibility for addressing archaeological resource protection in Jefferson Canyon, as evidenced by the Board's unanimous vote on December 16, 1997 in support of the Agreement, as amended. Therefore, in light of the Agreement, the Forest Service withdraws the Notice of Violation, and the Parties, in accordance with 36 C.F.R. 296.15 (4), waive their rights to pursue a Notice of Assessment or to request a hearing.

By: 
R.M. "Jim" Nelson, Forest Supervisor

Date: 12/30/97

000703

920 F.Supp. 1108
26 Env'tl. L. Rep. 21,285
(Cite as: 920 F.Supp. 1108)

UNITED STATES of America, Plaintiff,
v.
NYE COUNTY, NEVADA, et al., Defendants.

No. CV-S-95-232-LDG (RJJ).

United States District Court,
D. Nevada.

March 28, 1996.

United States sought declaratory judgment that it owns and has authority to manage disputed public lands within county and that county resolution establishing right of way across federal public lands was preempted by federal law. On United States' motion for summary judgment, the District Court, George, Chief Judge, held that: (1) United States alleged justiciable case or controversy; (2) title to dry federal public lands within county did not pass under equal footing doctrine to State of Nevada upon its admission to statehood; (3) county's concession as to federal government's authority was insufficient to moot question created by county's conduct or to make meaningless declaration that federal and local governments have concurrent jurisdiction of public lands; (4) government's suit was not appropriate vehicle to define broad boundaries between local and federal jurisdiction over public land in county; and (5) resolution declaring all public travel corridors in county as county public roads violated supremacy clause to extent it applied to roads and other corridors for which no valid right-of-way existed under federal law.

Motion granted.

[1] FEDERAL CIVIL PROCEDURE k2470.1

170Ak2470.1

"Material fact" for summary judgment is one that affects outcome of litigation and is required to prove basic element of claim. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

[2] FEDERAL CIVIL PROCEDURE k2543

170Ak2543

In determining whether material fact is in genuine dispute, for summary judgment purposes, court construes evidence before it in light most favorable to opposing party.

[3] DECLARATORY JUDGMENT k209

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118Ak209

United States alleged justiciable case or controversy in action against county for declaration of ownership and authority to manage lands in county, though county denied claiming adverse title to any public land within county and alleged that State of Nevada no longer claimed title to public lands, where Nevada enacted statutes claiming ownership, creating adverse legal interest to United States' assertion of ownership, county denied that United States had any legal interest in managing public lands, and, in reopening road, county strayed from right-of-way and performed work on national forest land, disturbing land and damaging flora; United States sought to resolve challenges by establishing that it has lawful claim of ownership to, and authority to manage, public lands.

[4] FEDERAL COURTS k13.25

170Bk13.25

State's enactment of statutes claiming ownership of lands is sufficient to create adverse legal interest to United States' claim of ownership, establishing justiciable case or controversy.

[5] DECLARATORY JUDGMENT k209

118Ak209

County succeeded in its efforts to create justiciable controversy and concrete interest in public lands in action by United States for declaratory judgment that it owned and had authority to manage public lands within county, where, in reopening road, county disturbed national forest land and damaged flora outside of right-of-way; it has demonstrated that it will continue to refuse to acknowledge United States' claim of ownership, and to act upon that refusal.

[6] STATES k8.1

360k8.1

Title to federal public lands within county that were not submerged by navigable or tidal waters did not pass under equal footing doctrine to State of Nevada upon its admission to statehood, as attribute of local sovereignty; title to dry land was unaffected by creation of new state.

[7] STATES k8.1

360k8.1

"Equal footing doctrine" ensures that each state shares those attributes essential to its equality in dignity and power with other states.

[8] PUBLIC LANDS k7

317k7

Broad power granted by Property Clause to retain and regulate land owned by United States necessarily includes power to own regulated public lands. U.S.C.A. Const. Art. 4, § 3, cl. 2.

[9] DECLARATORY JUDGMENT k209

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County's concession as to federal government's authority over public land in county was insufficient to moot question created by county's conduct in reopening county road through national forest or to make meaningless declaration that federal and local governments have concurrent jurisdiction of public lands; declaration that federal government has power to manage and regulate public lands

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within county will resolve dispute initiated by county despite clear law to contrary.

[10] DECLARATORY JUDGMENT k209

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Federal government's suit for declaration that local and federal governments have concurrent jurisdiction of public lands was not appropriate vehicle to define broad boundaries between local and federal jurisdiction over public land in county, where suit did not arise over dispute as to relative line between federal and local jurisdiction, but because county disputed existence of any federal jurisdiction.

[11] COUNTIES k21.5

104k21.5

County's resolution declaring all public travel corridors in county as county public roads was not mere statement of opinion, but law creating legal rights, obligations and duties, where county relied upon resolution to reopen road within national forest; thus, resolution violated Supremacy Clause to extent it applied to roads and other corridors for which no valid right-of-way existed under federal law. U.S.C.A. Const. Art. 6, cl. 2.

[11] HIGHWAYS k25

200k25

County's resolution declaring all public travel corridors in county as county public roads was not mere statement of opinion, but law creating legal rights, obligations and duties, where county relied upon resolution to reopen road within national forest; thus, resolution violated Supremacy Clause to extent it applied to roads and other corridors for which no valid right-of-way existed under federal law. U.S.C.A. Const. Art. 6, cl. 2.

*1109 Lois J. Schiffer, Peter D. Coppelman, K. Jack Haugrud, Caroline M. Zander, Allison B. Rumsey, Margo D. Miller, Environment & Natural Resources Division, U.S. Department of Justice, Washington, DC, Kathryn Landreth, United States Attorney, Blaine T. Welsh, Assistant United States Attorney, Las Vegas, Nevada, for U.S.

Robert S. Beckett, Nye County District Attorney, Tonopah, NV, Roger J. Marzulla, Akim, Gump, Strauss, Hauer & Feld, L.L.P., Washington, DC, for Nye County, Nevada.

AMENDED ORDER

GEORGE, Chief Judge.

Plaintiff United States of America renews its motion for partial summary judgment (# 87) (Plaintiff's Renewed Motion) on Counts I and IV of its complaint. In its complaint, the United States alleges that it owns and has authority to manage certain public lands within Nye County. By statute, Defendant State of Nevada claimed ownership of this public land in 1979. In late 1993, Defendant Nye County passed Resolution 93-48, declaring that Nevada owns the disputed public lands in Nye County and that only the state and the county have authority to manage the land. At the same time, Nye County passed Resolution 93-49 asserting that, with limited exceptions, Nye County owns the rights-of-way for all roads and corridors crossing the public lands. Importantly, Nye County acted

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upon its denial that the United States owns and has authority to *1110 manage the public lands. On July 4, 1994, Nye County reopened the Jefferson Canyon Road, straying from the right-of-way onto national forest land, ignoring an order of a forest service agent to stop. Following this action, a Nye County Commissioner filed an affidavit against the federal officer, stating that the officer lacked any jurisdiction. In Count I, the United States seeks a declaration that it owns and has authority to manage the disputed public lands within Nye County, Nevada. Pursuant to Count IV, the United States seeks a declaration that Resolution 93-49 is preempted to the extent it purports to apply to roads and corridors for which no valid right-of-way exists. As Nevada and Nye County have filed their oppositions (88, 94), this matter is submitted for consideration. The court also requested and received supplemental memoranda, and heard oral arguments.

This court has jurisdiction pursuant to 28 U.S.C. § 1345, as the United States is the plaintiff in this action. Venue is appropriate pursuant to 28 U.S.C. § 1391(b), as the claims arise from alleged actions taken or threatened within this District.

Motion for Summary Judgment

[1][2] Summary judgment disposes of those claims or defenses in which the moving party has shown (1) the absence of genuine issues as to the material facts, and (2) that the court may grant judgment as a matter of law. Fed.R.Civ.Pro. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). A material fact is one that affects the outcome of the litigation: a fact required to prove a basic element of a claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir.1982). The lack of evidence supporting a fact essential to an element of a claim, or the submission of evidence precluding that fact, "necessarily renders all other facts immaterial." *Id.*, at 323, 106 S.Ct. at 2552. In determining whether a material fact is in genuine dispute, the court construes the evidence before it "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970).

Background

On February 2, 1848, following the Mexican American War and pursuant to the Treaty of Guadalupe Hidalgo, 9 Stat. 922, Mexico ceded lands, including the area comprising present day Nevada, to the United States. On March 21, 1864, the United States Congress enacted the Nevada Enabling Act, 13 Stat. 30 (1864), authorizing a convention to draft a state constitution for ratification by the residents of the Nevada Territory. As a condition of statehood, the Nevada Enabling Act required that the convention adopt an ordinance agreeing and declaring that Nevada would "forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States." *Id.*, at § 4. In July 1864, the convention adopted the Nevada State Constitution and passed the Ordinance of the Constitution disclaiming all right and title to unappropriated public lands. The President of the United States, Abraham Lincoln, then proclaimed Nevada admitted to the Union on October 31, 1864. See 13 Stat. 749.

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Presently, the United States asserts ownership of nearly 87% of the lands in Nevada. In Nye County, the United States' assertion of ownership increases to nearly 93% of the lands. These federal lands include portions of the Humboldt and Toiyabe National Forests (administered by the Forest Service, Department of Agriculture), a portion of the Death Valley National Monument, a large part of the Nellis Air Force Range (Department of Defense), most of the Nevada Test Site (Department of Energy), and the Ash Meadows National Wildlife Refuge. The remaining federal lands are public lands administered by the Bureau of Land Management, Department of the Interior, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701. The FLPMA formally ended the policy of transferring federal lands to private ownership and adopted a policy of retention of these lands by the federal government.

*1111 In 1979, and in response to enactment of the FLPMA, Nevada enacted a series of statutes declaring ownership of and control and jurisdiction over all "public lands" within Nevada. Nev.Rev.Stat. §§ 321.596-321.599. As used in these statutes, "public lands" excludes land located in congressionally authorized national parks and monuments, national forests, wildlife refuges, lands acquired by the consent of the legislature, and lands controlled by the Department of Defense and the Department of Energy.

Nye County is a political subdivision of the State of Nevada, administered by an elected Board of Commissioners. Nye County has claimed that the United States does not own and that it lacks authority to manage public lands within its exterior boundary. See, June 7, 1994 Letter from Nye County Board of Commissioners, Exhibit C to Plaintiff's Renewed Motion. In claiming that the public lands belong to Nevada, however, Nye County asserts that Nevada owns more land than Nevada itself has claimed by statute. For example, while Nevada does not claim ownership of the national forests, Nye County has asserted that Nevada owns the lands managed by the Department of Agriculture, which manages the national forests. See ¶ 1 & 9 on Pages 2 and 4 of November 23, 1993 Letter From Richard Carver, incorporated by reference in Nye County Resolution 93-48, submitted as Exhibit A to Plaintiff's Renewed Motion. Rather, Nye County excludes, from the public lands, only the land ceded by Nevada to the federal government for post offices and federal buildings, and the land within the Nevada Test Site. [FN1] *Id.*, at pages 2-3 of the November 23, 1993 Letter From Richard Carver, Exhibit A; June 7, 1994 Letter from Nye County Board of Commissioners, Exhibit C to Plaintiff's Renewed Motion.

FN1. It is unclear whether Nye County also claims Nevada owns the land within the Nellis Air Force Range.

In addition to passing Resolution 93-48 declaring that Nevada owns all public lands, Nye County passed Resolution 93-49. This resolution declared that "all ways, pathways, trails, roads, country highways, and similar travel corridors across public lands in Nye County, Nevada, whether established and maintained by usage or mechanical means, whether passable by foot, beast of burden, carts or wagons, or motorized vehicles of each and every sort, whether currently passable or impassable, that was [sic] established in the past, present, or may be established in the future, on public lands in Nye County, are hereby declared Nye County Public Roads." The resolution further declared that "All rights of way ... across public lands that are declared Nye County Public Roads are the property of Nye County as trustee for public users thereof." [FN2]

FN2. Nye County excluded all roads across private lands, state highways 160, 361, 372, 373, 374, 375, 376, 377, 378, 379, and 844, and federal highways 6 and 95.

In June 1994, Nye County, through Commissioner Richard Carver, the Vice- Chairman of the Nye County Board of Commissioners who acted with authority for and on behalf of Nye County, [FN3] declared that the Jefferson Canyon Road in the Toiyabe National Forest was a Nye County Public Road. June 9, 1994, Letter to Tonopah District Ranger David Grider, Exhibit D to Plaintiff's Renewed Motion. As the Jefferson Canyon road had been washed out in 1983, this letter further notified the district ranger that Nye County Board of Commissioners intended to reopen and maintain the road. On July 4, 1994, Commissioner Carver accomplished the intent of the Board by using a county-owned bulldozer to reopen the Jefferson Canyon Road. Significantly, the United States has offered uncontroverted evidence establishing that, in grading the road, Commissioner Carver strayed from any possible right-of-way onto national forest land. [FN4] After Commissioner *1112 Carver strayed from the right-of-way, Forest Service Special Agent Dave Young stood directly in the path of the bulldozer and displayed a sign ordering the Commissioner to stop. Although Young continued to display the sign while the bulldozer was on national forest land, Commissioner Carver did not stop his activities. On July 6, 1994, Commissioner Carver filed an affidavit with the County Sheriff requesting criminal charges be brought against Young and another Forest Service employee. The Commissioner asserted that the Forest Service employees lacked any jurisdiction in Jefferson Canyon, which is clearly within the bounds of the Toiyabe National Forest. The County Sheriff forwarded the affidavit to the Nye County District Attorney, who has not yet acted upon the request for criminal prosecution.

FN3. Nye County did not offer any evidence or argument suggesting that Commissioner Carver lacked authority and was not acting on behalf of Nye County as to the actions taken by him that the court recounts in this decision.

FN4. At arguments March 7, 1996, counsel for Nye County asserted that the County did dispute whether Commissioner Carver left the right-of-way. However, the record does not support this assertion. The United States has submitted into the record the affidavits of David Grider and David Young. In his affidavit, Grider states that he was present at and witnessed the re-opening of the Jefferson County road. He further states that, in re-opening the road, Commissioner Carver operated the county bulldozer "obviously outside the original roadway." Likewise, Young witnessed the re-opening. He states in his affidavit that he ordered Commissioner Carver to stop his efforts only after the Commissioner "reached a point well up the hill from the stream bottom which I believed was beyond any possible original road alignment." Although the United States filed the affidavits early in this litigation, in June 1995, Nye County has not offered any evidence or submitted any affidavits or declarations disputing this evidence that Commissioner Carver strayed from the Jefferson County road right-of-way in his efforts to re-open the road.

In August 1994, Nye County informed the Bureau of Land Management by letter that the BLM could not enforce its Final Multiple Use Decisions for the Razorback and Montezuma Grazing Allotments because the BLM has not provided proof of ownership of the public lands or proof of constitutional jurisdiction. August 2, 1994, Letter from to Tonopah Resource Area Manager Ted

Angle from Nye County Board of Commissioners, Exhibit F to Plaintiff's Renewed Motion.

In August 1994, Nye County, again acting through Commissioner Carver, informed the Forest Service that the San Juan and Cottonwood Canyon Roads, which were previously closed by the Forest Service and which are located in the Toiyabe National Forest, were Nye County Public Roads. August 22, 1994 Letter to Austin District Ranger Dayle Flanigan, Exhibit H to Plaintiff's Renewed Motion. In October 1994, the Nye County Board of Commissioners voted to reopen the San Juan and Cottonwood Canyon Roads. Exhibit I to Plaintiff's Renewed Motion. On October 15, Commissioner Carver again used a county-owned equipment to reopen San Juan Road.

The United States brought this suit against Nye County. Following briefing and arguments on cross-motions for partial summary judgment as to Counts I and IV, this court required the parties to file supplemental briefs on the issue whether the State of Nevada asserts ownership of the public lands within Nye County. In response, the United States moved to amend its complaint to join Nevada as a Defendant. The court granted leave and permitted the parties to renew their motions for summary judgment, allowing Nevada to file briefs stating its position. The United States filed the renewed motion presently before the court, and Nye County and Nevada have filed oppositions. Nye County did not renew its cross-motion for summary judgment. This court requested and received supplemental memoranda and heard oral arguments.

Ownership and Management of Public Lands

Case or Controversy

[3][4] In Count I, the United States seeks a declaration that it owns and has authority to manage the public lands in Nye County. Nye County argues that the United States has not alleged a case or controversy since Nye County has not claimed an adverse title to any public lands within Nye County and Nevada no longer claims title to the public lands. The argument fails for several, obvious reasons. First, Nevada concedes that, by statutes enacted in 1979, it claims ownership of some of the lands in question. Nevada's enactment of statutes claiming ownership is sufficient to create an adverse legal interest to the United States' assertion of ownership. See *United States v. Oregon*, 295 U.S. 1, 26, 55 S.Ct. 610, 620, 79 L.Ed. 1267 (1935). This is particularly true where, as in the present matter, a political subdivision of Nevada has relied upon that adverse legal *1113 position to take actions opposing the United States' asserted title. While Nevada now concedes that its statutory claim is legally untenable, that concession does not moot the question of whether it claims ownership of the public lands. Rather, the concession is tantamount to a consent that judgment should be entered in favor of the United States. Thus, the United States has alleged a controversy concerning the validity of its claim of ownership.

Second, Nye County ignores that, in Count I, the United States seeks not only a declaration as to the ownership of the public lands, but also seeks a declaration whether the United States has the authority to manage the public lands. As Nye County recognizes in its opposition, a "controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937). Nye County's legal interest arises from its denial that the United States has any legal interest in

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managing the public lands. The United States claims and has acted as if it does have a legal interest in managing those lands. As these interests of Nye County and the United States are adverse, the United States has alleged a justiciable case.

Third, Nye County's argument mis-characterizes the United States' claim against Nye County as one seeking quiet title. Having reviewed the complaint and the undisputed actions of Nye County, the court finds that the claim is also analogous to an action in trespass. Rather than seeking damages as in a typical trespass action, the United States seeks a declaration that will preclude future trespasses in the context of Nye County's past trespass. Nye County's claim is that their legal interest in this property, that is, their interest in managing the property, results not only from the superior claim of the State to ownership of the public lands, but that the United States lacks any legal interest in the land that would limit or affect Nye County's authority to manage the land. Thus, Nye County's actions are valid only if the United States does not own or have authority to manage the public lands.

Finally, the parties have acted upon their alleged legal interests. Indeed, Nye County has challenged the United States' claim of ownership and jurisdiction to lands located within the national forests, lands to which even Nevada does not claim ownership. On July 4, 1994, Nye County reopened a road located within a national forest. As noted before, it is undisputed that, in reopening the road, Nye County strayed from the right-of-way and performed work on national forest land, disturbing the land and damaging the flora. An employee of the United States acted to stop Nye County from damaging the national forest land, ordering Nye County to stop its actions. Nye County has also challenged the jurisdiction of BLM over certain grazing allotments, threatening lawsuits for enforcement of federal action within those allotments. As Nye County acknowledges, the United States now seeks to resolve these challenges by establishing that it has a lawful claim of ownership to, and the authority to manage, the public lands. By considering the questions raised by Nye County's actions and entering a declaration, this court can resolve the disputed legal relationship of the parties to the extent of determining whether the United States owns and has authority to manage the lands. Accordingly, the United States has stated a justiciable case or controversy.

Concrete Injury

[5] Nye County next argues that the United States has failed to show that the controversy is "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257 (1972). The argument is not well taken. On July 4, 1994, Nye County reopened the Jefferson Canyon Road. The United States has offered uncontroverted evidence that during the reopening of the Jefferson Canyon Road, Nye County disturbed land and damaged flora outside of the right-of-way and within national forest land. As Commissioner Carver stated during the October 4, 1994, meeting of the Nye County Board of Commissioners, the purpose of opening the Jefferson Canyon road was to require the United States to take Nye County *1114 to court. Throughout the record, Nye County has demonstrated that it will continue to refuse to acknowledge the United States claim of ownership, and to act upon that refusal. Indeed, Nye County's intent has been to intensify its dispute with the United States until the federal government sought judicial intervention. As Nye County has succeeded in its efforts, by the above actions, to create a justiciable controversy and a concrete injury, the United States can obtain judgment if warranted by the facts and the law.

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Ownership of the Public Lands within Nye County

The parties do not dispute that, prior to Nevada's statehood, the United States held title to the public lands within the territory that was to become Nevada. Nye County argues that it does not assert a claim of title to public lands, Nye County Opposition at 4, and thus its authority to manage public lands derives from and is limited to the claim of title by the State of Nevada. By statute, Nevada has claimed title to all public lands within Nevada, and thus within Nye County, excluding land located in congressionally authorized national parks and monuments, national forests, wildlife refuges, lands acquired by the consent of the legislature, and lands controlled by the Department of Defense and the Department of Energy. Nev.Rev.Stat. §§ 321.596-321.599. Although Nye County has claimed that Nevada also owns certain of these excluded lands, it has not offered any argument suggesting that Nevada has made that claim. Accordingly, there is no dispute that the United States owns the lands within the national parks and monuments, the national forests, the wildlife refuges, the lands acquired by the consent of the legislatures, and the lands controlled by the Department of Defense and the Department of Energy. The remaining question that this court must decide is whether title to the remaining public land within Nye County passed to Nevada. The court concludes that title did not pass to Nevada, but remains within the United States.

As noted earlier, while Nevada has statutorily claimed the public lands within Nye County, it now concedes that this claim is constitutionally untenable. While this concession is tantamount to a consent to judgment, the court also concludes that the statutory claim is unsupported, unconstitutional, and fails as a matter of law.

Equal Footing Doctrine

[6][7] In claiming ownership of the public lands within its outer boundaries, the Nevada legislature asserted that title to the unappropriated lands passed from the federal to the state government under the equal footing doctrine. Nev.Rev.Stat. § 321.596(2). "The equal footing doctrine ensures that each state shares 'those attributes essential to its equality in dignity and power with other states.'" Nevada v. Watkins, 914 F.2d 1545, 1555 (9th Cir.1990). According to findings embodied in Nevada's statute, Nevada asserts that the original states obtained ownership of the unappropriated dry land as an attribute of their sovereignty at the time of the Revolution. Since Nevada was admitted on an equal footing to the original thirteen states, title to all unappropriated lands necessarily transferred from the federal to the state government as an attribute of local sovereignty. [FN5]

FN5. The court notes that the reasoning of the Nevada legislature apparently requires a conclusion that Nevada gained title to all unappropriated lands. As noted, it also appears that Nevada claims title to only a portion of those lands. Given that Nevada's claims fail as a matter of law, the court will not speculate whether Nevada could claim title to only a portion of the lands that were unappropriated at the time of statehood, or the effect such a partial claim would have on title to the remaining lands.

The Supreme Court has long recognized that certain types of property-- specifically lands submerged by navigable or tidal waters--must pass to the states as a circumstance of sovereignty.

Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty *1115 itself. For that reason, upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce.

United States v. Oregon, 295 U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267 (1935). The question before this court, however, is not whether the lands submerged by navigable waters passed to the states pursuant to the equal footing doctrine, but whether the dry lands also passed to the states pursuant to the equal footing doctrine.

In deciding this question, the court finds that *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 108 S.Ct. 791, 98 L.Ed.2d 877 (1988), provides excellent instruction. In that matter, the Supreme Court reaffirmed that lands submerged under tidal waters passed to the states as an attribute of sovereignty. More important to the present case, however, is the Court's recognition that the determination of which lands pass to the states derives from the Supreme Court's understanding and interpretation both as to English common law regarding royal ownership of public trust lands and the rights of the original states to those lands. *Id.*, at 478, 108 S.Ct. at 796. As such, it is the decisions and interpretations of the Supreme Court concerning the rights of the states to dry lands upon admission that are the appropriate guides to which this court must look. The actual state of the English common law at the time of the revolution, while instructive, is not controlling. Rather, this court is controlled by the Supreme Court's understanding and interpretation of that common law.

For example, in *Phillips*, the Supreme Court noted that it "has consistently interpreted the common law as providing that the lands beneath waters under tidal influence were given States upon their admission into the Union." *Id.*, (emphasis added). This tidal test for determining state ownership does not require navigability-in-fact. *Id.* In recognition of the thousands of miles of non-tidal, navigable waters on the American continent, the Supreme Court extended the test for determining state ownership to include non-tidal waters that were navigable-in-fact. *Id.*, at 479, 108 S.Ct. at 798-97. "[T]his rule represents the American decision to depart from what it understood to be the English rule limiting Crown ownership to the soil under tidal waters." *Id.*, (emphasis added). Thus, states do not gain title to lands submerged by waters that are navigable-in-fact because the original thirteen states gained those lands at the time of the revolution. The original states could not have gained title to these lands as an attribute of sovereignty since this American rule was not developed until after the revolution. Instead, all states gained title to lands submerged by navigable waters because the Supreme Court decided that this was an appropriate extension of what it understood to be the English rule of sovereign rights to submerged lands.

Briefly looking to the Supreme Court's decisions indicates that it has held that tidal and navigable waters pass to the states because it understood that, under the English common law, the sovereign owned these lands as a public trust. This public trust doctrine was first developed in *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842). Recognizing that the powers and attributes of sovereignty had vested in New Jersey, the court found that, "the people of New Jersey

have exercised and enjoyed the rights of fishery for shell-fish and floating fish, as a common and undoubted right..." Id. 41 U.S. (16 Pet.) at 417 (emphasis added). Accordingly, the Court held that New Jersey, and each of the original thirteen states, gained "absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Id. at 410 (emphasis added).

The Court extended this holding to the new states in *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 11 L.Ed. 565 (1845). At issue in *Pollard's Lessee* was whether, subsequent to Alabama's admission, the federal government could transfer title to lands that had been submerged by navigable waters at the time of statehood. Citing *Martin v. Waddell's Lessee* for the proposition that the original thirteen states owned the submerged lands for common use in their character as sovereigns, the Court held that Alabama was also entitled to this attribute of sovereignty. Id., 44 U.S. (3 How.) at 229. As this attribute of sovereignty, and its concomitant title to the submerged lands, transferred to the new states upon their admission, the federal government could not subsequently transfer the underlying title to the submerged lands. As in *Martin v. Waddell's Lessee*, the Court's conclusion arose from its interpretation of the public trust imposed on the sovereign, a trust requiring the sovereign to hold the navigable waters and submerged lands open for public access.

In sum, these cases identify a coherent principle set forth by the Supreme Court that this court must acknowledge. Specifically, the attribute of sovereignty that is so identified with title to submerged lands, the attribute of sovereignty that passed to the original thirteen states, is the public trust to these lands. Not only were these lands to be held for the common good, but title to these lands resided in the sovereign so that the sovereign could ensure that the people continued to hold and have access to the lands. In contrast, the court is unaware of any Supreme Court decision holding that the original thirteen states gained title to the dry lands as a public trust, that is, to hold in common for all people. Rather, states could and did pass ownership of the unappropriated dry lands to private individuals to the exclusion of the people in common.

At least as important as this general principle underlying the Supreme Court's decisions, however, is that the Supreme Court has held that title to lands that are not submerged navigable-in-fact or tidal waters, including dry and fast lands, did not pass to the states upon admission. In addition to holding that "if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new state," *United States v. Oregon*, 295 U.S. at 14, 55 S.Ct. at 615, the Supreme Court expressly held that title to dry lands does not pass to states upon admission in *Scott v. Lattig*, 227 U.S. 229, 33 S.Ct. 242, 57 L.Ed. 490 (1913). The facts of *Scott* closely parallel *Pollard's Lessee*. *Scott* was an action to quiet title to certain land in Idaho. As in *Pollard's Lessee*, the plaintiffs' claim of ownership in *Scott* required a finding that title to the land in question, specifically an island on the Idaho side of the Snake River, passed to Idaho upon statehood. If the title transferred to the state upon admission, state law would govern the disposal of the island just as it governed disposal of the bed of the navigable Snake River. Pursuant to state law, title to the island was a littoral right of the plaintiffs' ownership of properties on the shore of the river. And as in *Pollard's Lessee*, the defendant's claim of title required a finding that the title to the island remained in the federal government following statehood. The defendant asserted that, subsequent to Idaho's statehood, he had perfected title from the federal government to him under the

federal homestead law.

Noting that the Snake River is navigable, the Supreme Court recognized that title to the bed of Snake River had passed to the state upon admission since "lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty." *Id.*, at 242, 33 S.Ct. at 244. As such, Idaho law governed the question whether ownership of the shore lands included a right to the bed of the Snake River. The Court, however, rejected the notion that Idaho law also governed ownership of title to the island, instead finding that title remained in the federal government.

But the island, which we have seen was in existence when Idaho became a state, was not part of the stream or land under the water, and therefore its ownership did not pass to the state, or come within the disposing influence of its laws. On the contrary, although surrounded by the waters of the river and widely separated from the shore, it was fast dry land, and therefore remained the property of the United States and subject to disposal under its laws, as did the island which was in controversy in *Mission Rock Co. v. United States*, 48 C.C.A. 641, 109 Fed. 763, 769, 770, and *United States v. Mission Rock *1117 Co.*, 189 U.S. 391, 47 L.Ed. 865, 23 Sup.Ct.Rep. 606. *Id.*, at 244, 33 S.Ct. at 244.

It is, of course, beyond dispute that the dry lands within Nye County are further removed from navigable waters than the island at issue in *Scott*. As in *Scott*, the dry lands within Nye County are neither submerged by navigable nor tidal waters. Nye County has failed to offer any evidence suggesting that, at the time of statehood, the dry lands within Nye County were submerged by navigable or tidal waters. The Supreme Court has not held that the ownership of dry lands, or lands submerged by non-navigable and non-tidal waters, was an attribute of the original thirteen states' sovereignty. Rather, it has held that these lands do not pass to states upon admission. In sum, the entire weight of the Supreme Court's decisions requires a finding that title to the federal public lands within Nye County did not pass to the State of Nevada upon its admission pursuant to the equal footing doctrine.

Lack of Constitutional Authority or Power to Own Lands

Another legal theory upon which the Nevada legislature asserts ownership of public lands in its findings is that the federal government lacks either an express or necessarily implied power to retain public lands. See Nev.Rev.Stat. § 321.596(4) & (6). This theory was rejected by the Supreme Court, which has held that the Property Clause, Art IV, § 3 of the Constitution, vests such power in the federal Government. Elucidating upon the Property Clause, the Court has noted, "[t]he term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation..." *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537, 10 L.Ed. 573 (1840). The Court then declined the invitation to construe the phrase 'dispose of,' to "vest in Congress the power only to sell, and not to lease such lands." *Id.*, 39 U.S. (14 Pet.) at 538. Rather, the Court continued, "[t]he disposal must be left to the discretion of Congress."

[8] More recently, the Supreme Court reaffirmed the broad power of the federal government to

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retain and regulate public lands in *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976). In that matter, the Court stated that "while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Id.*, at 539, 96 S.Ct. at 2291 (citing *United States v. San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940)). Given this interpretation, the court must conclude that such a broad power to regulate land owned by the United States necessarily includes the power to own the regulated public lands.

Authority to Manage the Public Lands

Prior to this suit, Nye County denied that the United States had any authority to manage the public lands within its boundaries. See Nye County Resolution 93-48, Exhibit A to Plaintiff's Renewed Motion. All parties, including Nye County, now agree with the Supreme Court that

[a]bsent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

Kleppe, 426 U.S. at 543, 96 S.Ct. at 2293. See Plaintiff's Renewed Motion at p. 43; Nevada's Opposition at 12; Nye County's Opposition at 10.

[9] Nye County argues, however, that merely recognizing that the local and federal governments have concurrent jurisdiction of public lands is virtually meaningless. The court would tend to agree but for Nye County's actions establishing that, prior to this suit, Nye County refused to acknowledge the holding of *Kleppe*. Those actions indicate that, as to Nye County, a declaration is required to establish that the federal government *1118 has jurisdiction over the public lands. For example, Commissioner Carver, acting in his official capacity, filed an affidavit to support a criminal complaint against the forest service employees, alleging that they lacked any jurisdiction at a location within the boundaries of a congressionally- established national forest. On another occasion, the Nye County Board of Commissioners required the BLM to offer proof that the federal government owns and has authority to manage public lands. At the Jefferson Canyon road reopening, Commissioner Carver drove the county bulldozer outside of the right- of-way, damaging plant-life, disrupting the national forest, and ignoring the direct order of a federal employee to stop. That Nye County now voluntarily concedes that the federal government has authority over this land is insufficient to moot a question created by Nye County's conduct, although the court will consider the concession as tantamount to a consent to judgment. Accordingly, a declaration that the federal government has power to manage and regulate the public lands within Nye County, just as it has power to regulate the public lands within New Mexico, will not be meaningless. Rather, it will resolve a dispute initiated by Nye County despite clear law to the contrary.

[10] The court tends to agree with Nye County and Nevada that the present suit is not the appropriate vehicle to define the broad boundaries between local and federal jurisdiction over the public land in Nye County. Like the Supreme Court, this court will decline "to decide important questions regarding 'the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case,' or in the absence of 'an adequate and full-bodied record.'" *Kleppe*, 426 U.S. at 546, 96 S.Ct. at 2295 (citations omitted). This limitation, however,

does not preclude this court from deciding the question raised by Nye County's actions. This suit did not arise over a dispute as to the relative line between federal and local jurisdiction, but arose because Nye County disputed the existence of any federal jurisdiction. Accordingly, this court's only determination is that absent consent or cession Nevada undoubtedly retains jurisdiction over federal lands within Nye County, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

To the extent Nye County's remaining arguments--under the equal footing doctrine, the Guarantee Clause, and the transfer of core state functions--seek to define the constitutional boundary of jurisdiction over the public lands, the arguments are raised outside the context of an immediate and concrete case. To the extent Nye County raises these arguments to suggest that the federal government lacks any jurisdiction, the arguments are refuted by Nye County's own concession that such jurisdiction exists pursuant to the Property Clause. Accordingly, the court will not consider the remaining arguments and, to the extent set forth above, partial summary judgment is granted as to Count I.

Constitutionality of Resolution 93-49

[11] In Count IV, the United States seeks a declaration that Nye County Resolution 93-49 is unconstitutional and preempted to the extent it applies to roads and other corridors for which no valid right-of-way exists under federal law. Nye County opposes the claim, asserting that Resolution 93-49 is nothing more than a statement of opinion by the Board of Commissioners of Nye County, creating neither legal rights, duties, nor obligations. As nothing more than a statement of opinion, the County asserts the resolution is protected speech under the First Amendment. The federal government counters that Nevada has recognized that counties can act by either ordinance or resolution, and that Nye County has acted by resolution in this instance.

Nye County concedes, and Nevada and amici Eureka and White Pine Counties concur, "that counties in Nevada can and do act or legislate by way of motions, orders, resolutions and ordinances." Nye County Supplemental Brief at 4. Nye County further concedes that Nevada has not made distinct the differences in "the legal effects of ordinances and resolutions." *Id.*, at 5. Nevertheless, *1119 Nye County urges this court to find that Nevada would distinguish resolutions as pertaining to administrative matters concerning specific actions while ordinances pertain to laws of general application.

The distinction urged by Nye County does not withstand scrutiny in light of Nevada statutory and case law. Nevada recognizes that counties can enact legislation of general applicability by resolution. "When a municipal council is given power to legislate in regard to a particular subject matter, and the statute is silent as to the mode in which the power shall be exercised, an enactment by the municipal council is valid whether it is in the form of an ordinance or resolution." *Blanding v. City of Las Vegas*, 52 Nev. 52, 75, 280 P. 644 (1929) (citations omitted). As to the decision to regulate by ordinance or resolution, "it is within the discretionary powers of the governing municipal board to balance [the] public and private interests against each other in determining the proper course and method of regulation." *Primm v. City of Reno*, 70 Nev. 7, 14, 252 P.2d 835 (1953). The Nevada

legislature has identified, and the parties have pointed out, actions that counties may take only by ordinance and those that can be taken only by resolution. Nye County, however, has failed to identify any statute requiring that the action purportedly taken in Resolution 93-49 could be accomplished only by ordinance. Accordingly, it was within the discretion of Nye County to act by resolution rather than by ordinance as to Resolution 93-49.

Although Nye County now asserts that Resolution 93-49 created neither legal rights, duties nor obligations, Nye County plainly intended that the resolution would have the effect of law. As an attempt to formally express the opinion or will of the Board of Commissioners, the resolution offers only an example of poor writing. Other than its title, the resolution does not use any language suggesting it is an opinion, view, idea, or belief, but employs language attempting to create a legal right of Nye County in public roads. It declares all ways, trails, roads, and highways on public lands in Nye County to be Nye County Public Roads, declares the rights-of-way for these Nye County Public Roads to be the property of Nye County, requires that the width of all roads be as established by other ordinances, ratifies historic practice as a method of establishing roads, and precludes any action against Nye County or its officers for damage suffered on unmaintained roads. And other than the last sentence indicating an ordinance would follow, the resolution lacks any language of future intent or will.

Neither is the subject of the resolution simply an alteration of administrative rules, a censure, a vote of thanks, or a note of recognition, or an expression of intent to take future actions. Rather, the subject of Resolution 93-49 is one of general applicability, declaring County ownership of existing federally recognized rights-of-way and declaring County ownership of new rights-of-way that are not federally recognized.

In addition, Nye County has relied upon Resolution 93-49 in its chosen field of battle: the reopening of roads. On July 4, 1994, Commissioner Carver used a County-owned bulldozer to reopen Jefferson Canyon road within the national forest. A month prior to the reopening, Commissioner Carver, apparently on behalf of Nye County, informed the forest service: "As you know, on December 7, 1993 the Board adopted Resolution # 93-49 which declares certain public travel corridors across public lands within Nye County as Nye County roads. Jefferson Canyon Road is one of the roads considered to be a Nye County public road." [FN6] June 9, 1994, Letter to Tonopah District Ranger David Grider, Exhibit D to Plaintiff's Renewed Motion. This statement and Commissioner Carver's later actions to reopen the road on behalf of the County strongly show that the County did not intend Resolution 93-49 to be merely a statement of opinion.

FN6. The court notes that Commissioner Carver also suggested that Jefferson Canyon road was an RS 2477 right-of-way. This suggestion, however, does not negate Commissioner Carver's reliance upon Resolution 93-49 as a source of law and as having created legal rights in Nye County.

Similarly, the County reopened San Juan Canyon road, also within a national forest, in October 1994. Commissioner Carver again used a County-owned bulldozer to accomplish *1120 the reopening. Prior to the reopening, on August 22, 1994, Commissioner Carver sent a letter to the forest service again indicating that both the San Juan and Cottonwood Canyon roads were "Nye

County owned public roads in accordance with Nye County Resolution # 93-49." August 22, 1994 Letter to Austin District Ranger Dayle Flanigan, Exhibit H to Plaintiff's Renewed Motion. Again, this statement and the County's subsequent action in reopening the road show that County intended Resolution 93-49 to establish legal rights in the San Juan Canyon road, rather than simply state Nye County's opinion. Viewed as to the totality of circumstances, the court finds that Nye County did not pass Resolution 93-49 as a mere statement of opinion, but enacted the resolution as a law creating legal rights, obligations and duties.

Nye County further asserts that relief cannot be granted to the United States because the relief sought is over broad. Nye County argues that, pursuant to *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), this court cannot declare a valid enactment to be invalid merely because certain applications of the enactment may be invalid. Rather, the courts should determine the validity of the resolution as it is applied to particular cases as they arise.

In *Euclid*, the Supreme Court stated that "[t]he inclusion of a reasonable margin, to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." *Id.*, at 388-389, 47 S.Ct. at 118. In the present matter, and contrary to Nye County's assertions, the United States is not seeking to place upon Resolution 93-49 a stamp of invalidity in its entirety. Rather, the United States seeks a declaration that the resolution is invalid only to the extent that it applies to roads for which no valid rights-of-way exist under federal law. The United States concedes that the resolution does not violate the Supremacy Clause to the extent it applies to roads for which a valid right-of-way exists under federal law. In addition, it is beyond reasonable dispute that the resolution's inclusion of roads for which no valid right-of-way exists is not a reasonable margin necessary to insure effective enforcement. At no time in this litigation has Nye County offered any argument that it can declare or establish rights-of-way across federal public lands that are not recognized by federal law without violating the Supremacy Clause. Neither has Nye County offered any argument that the obvious overbreadth of the inclusion of alleged rights-of-way was a reasonable margin to insure effective enforcement. Rather, only the federal government has offered argument concerning the validity of the resolution as it pertains to rights-of-way that are not recognized by the federal government. The United States has shown that it has enacted a comprehensive right-of-way regulation, generally allowing new rights-of-way to be granted only under Title V of the FLPMA. 43 U.S.C. §§ 1761-1771. In short, Resolution 93-49 does violate the Supremacy Clause to the extent that it applies to roads and other corridors for which no valid right-of-way exists under federal law. Therefore, for good cause shown,

IT IS ORDERED that Plaintiff United States of America's Renewed Motion for Summary Judgment (# 87) is GRANTED as to Count I and as to Count IV;

IT IS DECLARED that, as set forth in this Court's decision, the United States owns and has the power and authority to manage and administer the unappropriated public lands and National Forest System lands within Nye County, Nevada.

IT IS FURTHER DECLARED that Nye County Resolution 93-49 is invalid and unenforceable to the extent, and only to the extent, it applies to ways, pathways, trails, roads, county highways, and similar public travel corridors across public lands in Nye County, Nevada, for which no valid right-of-way exists or is recognized under federal law.

OFFICE OF THE GENERAL COUNSEL
UNITED STATES DEPARTMENT OF AGRICULTURE
507 25th Street, Room 205
Ogden, Utah 84401

May 21, 1999

David Tarler
Archaeology and Ethnography Program
National Park Service
1849 C. St., N.W.
Suite NC 210 (mail stop 2275)
Washington, D.C. 20240

RE: United States v. Weldon Branch

Dear David:

I am pleased to forward information to you regarding the matter of Weldon Branch, which was finally settled through mediation. ARPA violations and an action for timber trespass were released in exchange for payment of \$35,000. Of that amount, approximately \$24,000 will be used for recovery, restoration and repair of a damaged archaeological site. The site is recorded as PY-399 in the King Hill area, Council Ranger District, Payette National Forest.

Briefly, the facts in this are as follows. Weldon Branch, owner of an inholding on the Council Ranger District, Payette National Forest, purchased a small timber sale on NFS lands adjacent to his private property in 1991. Because archaeological resources were located in the area of the sale, the sale with Branch was canceled. Branch was advised of these circumstances when the sale was canceled. On or about July 1, 1993, the Payette National Forest Archaeologist discovered a newly bladed road through the prehistoric archaeological site. An investigation revealed damage to archaeological resources along the bladed two-track (a non Forest System road or trail) which was used to haul timber. The road blading occurred for 1000 feet and was 9 feet wide. Depths of blading varied from 1-2 inches to 1.5 feet. A damage assessment completed pursuant to the Archaeological Resources Protection Act (ARPA) totaled the damage at \$39,685.80¹. During an interview, Weldon Branch admitted conducting the road blading with a bulldozer on or about June 16, 1993, in order to facilitate his logging prior to advising the Forest Service or obtaining any permit for road maintenance. The Council District Ranger erroneously granted an after the fact road use permit to Branch around July 2, 1993. Upon discovery of this error, the permit was promptly revoked.

A short time later the Forest Service discovered that Branch's logging activities had encroached upon National Forest System Lands, felling and removing timber in trespass. In the course of the timber theft investigation, additional damage to archaeological resources was discovered in a nearby area, referred to as the "spring site" where private logging activities had further damaged NFS Lands and archaeological resources. Secondary damage was expected to take place in the future at both sites due to their newly exposed and unprotected status. The damage assessment for the "spring site" totaled \$60,693.00. A third damage incident was documented as well, which resulted from vehicle use near the newly bladed road (Branch was eventually released from responsibility for damages to other sites).

¹ Eventually, three separate damage assessments were done, referred to as violations #1, #2, and #3. Although confusing, the assessments were done consecutively, as the damage incidents were discovered separately. The settlement is for violation #1, road blading.

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May 21, 1999

David Tarler, NPS, Archaeology and Ethnography Program

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An evaluation of the damages caused by the timber trespass revealed that 36,087 board feet or 36.087 mbf of timber was cut in trespass from NFS lands. Of that volume, 22.567 mbf was removed from NFS lands and sold by Branch for \$ 11,695.42 (the stumpage value of that timber was \$10,459.48), and 13.520 mbf, with a stumpage value of \$10,254.27 was left on NFS lands. There were several unauthorized landings as well as skid roads constructed on NFS lands. Other damages, including reforestation and brush disposal costs as well as removal of illegal landings was calculated at \$3,932.00. Total damages, without penalty or interest, resulting from timber trespass were \$24,645.75.

Branch was indicted and would have been criminally prosecuted for both the timber trespass and the ARPA violation, but administrative difficulties at the US Attorney's Office in Idaho caused the matters to be dismissed before trial. The agency pursued civil remedies for both ARPA damages and timber trespass separately. After the Forest Service issued its Notice of Assessment, Branch requested a hearing. The matter was assigned in June of 1997 to an ALJ in the Department of Interior, Office of Hearings and Appeals, but no action occurred since the assignment. Because of the nearing statute of limitations on filing a timber trespass action in District Court in Idaho, settlement negotiations were proposed and the parties (Branch, the US and his insurance company) agreed to mediation.

The mediation session was held on April 28, 1999, at the US Attorney's Office in Idaho. Pursuant to the settlement (copy attached), Branch's logger, Jay Langer, who was charged as a co-offender, will be released from liability for the incident. As stated earlier, an amount representing the profit made by Branch on the sale of illegally removed NFS timber (\$11,695.42) will be remitted to the Department of the Treasury, and the remainder of the settlement funds will be used for recovery, restoration and repair to the damaged archaeological site. The highest of commendations must be given to Forest Service Law Enforcement Officer Rob Bryant and Archaeologist Larry Kingsbury for their exemplary work on this case. I am enclosing, for your use and review, the following

1. Archaeological Resource Damage Assessment Violation # 1(also Ex. 10, RoI)
2. Report of Investigation Narrative and Exhibits
3. Notice of Violation to Weldon Branch
4. Petition for Relief
5. Notice of Assessment
6. Request for Hearing

A lot of the enclosed information, particularly from the Report of Investigation and Exhibits, may be ancillary, but you can feel free to read the materials, perhaps they will be of interest to you. Please contact me, however, if you would like to duplicate or distribute any of those materials.

Feel free to contact me at (801) 625-5443 if you have any questions or would like to discuss this case.

Sincerely,


Elise Foster, Attorney

cc: Bryant & Kingsbury, Payette National Forest

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NOTICE OF VIOLATION

Under the Archaeological Resources Protection Act of 1979
(16 U.S.C. 470aa-11)

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Notice To: Weldon Branch
3621 N. Crane Road
HCR 70 Box 2390
Midvale, ID 83645

Federal Land Management Agency: USDA - Forest Service
Intermountain Region
Payette National Forest
Council Ranger District

Federal Land Manager: David F. Alexander, Forest Supervisor

Violation: Excavation, removal, and/or damage of archaeological resources
located on National Forest System lands in violation of
36 CFR 296.4(a).

source
Notice is given that in or about June and July 1993, while blading a road in
Sec. 25 of T. 14 N., R. 1 E., Boise Meridian, you damaged or destroyed
archaeological artifacts on Federal lands administered by the U.S. Department
of Agriculture, Forest Service, Payette National Forest, Council Ranger
District.

Soon after the above described road blading operation, you contracted with Jay
Langer, Logging Contractor, to conduct logging operations in the area. The
logging operations resulted in additional archaeological resource damage or
destruction on the above described Federal lands. The damages are detailed in
the following enclosed documents:

1. "Archaeological Resource Damage Assessment on the Council District,
King Hill Prehistoric Early Man Site PY-399 (10AM141), Cultural Resource
Management Program, Payette National Forest, Lawrence A. Kingsbury, Forest
Archaeologist & Historian, July 10, 1993, ARPA Violation #1." ✱
2. "Archaeological Resource Damage Assessment on the Council District,
King Hill Prehistoric Early Man Site PY-399 (10AM141), Third Incident of
Archaeological Resource Damage (Associated with First Party Resource
Damage), Cultural Resource Management Program, Payette National Forest,
Lawrence A. Kingsbury, Forest Archaeologist & Historian, July 24, 1993,
ARPA Violation #3." ✱

A penalty will be assessed against you for violation of 36 CFR 296.4(a) in
accordance with 36 CFR 296.15. The proposed penalty is \$100,378.80, for
archaeological value and cost of restoration and repair.

✱ recommend 1 damage assessment, OK to Hemize
Separate instances of damage

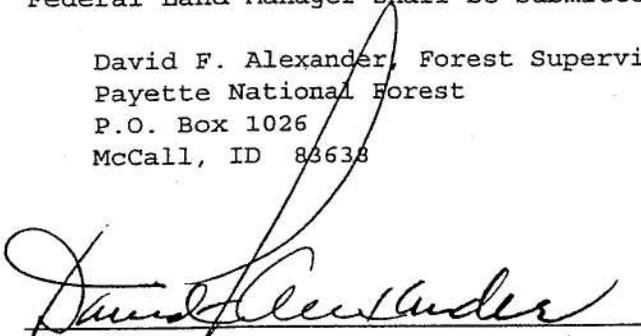
000722

You have the following rights:

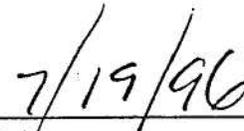
1. You may seek informal discussions with the Federal Land Manager named in this notice to propose mitigation of the assessed damage.
2. You may file a petition for relief with the Federal Land Manager under Code of Federal Regulations, 36 CFR 296.15(d) within 45 days of receipt of this notice.
3. You may take no action and await my Notice of Assessment.
4. Upon receipt of the Notice of Assessment you will have 45 days to request a hearing in accordance with 36 CFR 296.15(g).
5. You may accept, in writing or by payment, the proposed penalty. Acceptance of the proposed penalty shall be deemed a waiver of the notice of assessment and of the right to request a hearing under 36 CFR 296.15(g).
6. You may seek judicial review of any final administrative decision as defined in 36 CFR 296.15(h) assessing a civil penalty.

Failure to meet any deadlines set forth in regulations at 36 CFR 296 (copy enclosed) may constitute a waiver of rights. All communication directed to the Federal Land Manager shall be submitted to:

David F. Alexander, Forest Supervisor
Payette National Forest
P.O. Box 1026
McCall, ID 83638



DAVID F. ALEXANDER, Forest Supervisor
Payette National Forest



Date

Enclosures (3)

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Schroeder & Lezamiz
Law Offices
447 West Myrtle
Post Office Box 267
Boise, Idaho 83701-0267

JOHN T. SCHROEDER
MARGARET M. LEZAMIZ
ALAN SCHROEDER

Admitted in Idaho & Washington

ELAINE E. ANDERSON
Certified Lawyer's Assistant

TELEPHONE (208) 384-1627
TELECOPY (208) 384-1831

August 30, 1996

CERTIFIED MAIL, RETURN RECEIPT REQUESTED:

David F. Alexander, Forest Supervisor
Payette National Forest
P.O. Box 1026
McCall, Idaho 83638

Re: PETITION FOR RELIEF from a Notice of Violation issued to Weldon Branch under the Archaeological Resources Protection Act of 1979.

Dear Mr. Alexander:

We write this PETITION FOR RELIEF for Weldon Branch in response to a Notice of Violation (NOV) dated July 19, 1996.

INTRODUCTION. The NOV claims damage by Branch to "archaeological artifacts". However, Branch damaged nothing. The damage to the claimed archaeological site where the artifacts were found was previously damaged by the Forest Service and others over a 92-year period.

The recorded movement and jumbling of the site began in 1904, when an applicant for a Patent dug a 10 by 24 inch ditch. This jumbling continued through tramping and punching of the site by livestock and wildlife, and through repeated seeding, plowing, driving, and digging of the site by vehicles and heavy equipment.

Moreover, the Forest Service authorized the activity committed by Branch. Although after-the-fact, the Forest Service issued a Road Permit to "blad(e) and shap(e)" the road. The Forest Service also made representation, upon which Branch relied, that no authorization was necessary for his blading an existing, improved road to allow the safe and efficient movement of log trucks from his private land to a sawmill.

The NOV fails to recognize these events over the last 92-years. Instead, the NOV proposes to assess \$100,378.80 upon Branch for the damage previously caused by the Forest Service and others before and after the passage of the ARPA.

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It is not just, fair, or credible to conclude that Branch caused the damage. Branch therefore requests that you conclude that no violation has occurred and that no penalty be assessed. If you are inclined to find a violation, Branch requests that you remit any penalty because the acts were not willfully committed and because the proposed penalty is excessive punishment under the circumstances.

LEGAL AND FACTUAL BASIS FOR REQUESTED RELIEF. The NOV proposes to assess a penalty for 2 violations within the claimed site. The first relates to Branch blading a portion of an existing, improved road across public land which provided the access to Branch's private land. The second relates to other activities near a spring site not on public land, but on private land.

Each of these violations are groundless. The facts which support this conclusion are expressed within affidavits of Weldon E. Branch, Harold L. Byrd, Elvin O. Craig, Clifford L. Johnson, Archie D. Perkins, Francis Milford Potter, and Albin F. Veselka, which are attached to this Petition. The law which support this conclusion is outlined below in three separate sections: I. Both Sites, II. Road Site, and III. Spring Site.

I. Both Sites.

(A) Doctrine of Laches.

The Forest Service is barred from pursuing this NOV under the Doctrine of Laches. see San Carlos Irrigation & Drainage District v. United States, 23 Cl. Ct. 276 (1991); Park v. United States, 10 Cl. Ct. 790 (1986). The acts or omissions which exculpate Branch did not necessarily occur 3-years ago, but occurred over a 92-year period. Many people have died which used the road and which entered the land Branch owns, such as, R.W. Lowry, Euclid Martin, Otho M. Smith, Jim Murphy, Clarence Brady, Irish Brady, Milton W. Branch, and many others. These people could have offered direct evidence as to the existence, condition, use, and improvement of the road within the claimed archaeological site, which has been forever lost. The Forest Service should be prohibited from benefiting from its delay.

(B) Vague.

The Forest Service is barred from pursuing this NOV, because the notice provided is vague. The NOV claims that Branch "damaged or destroyed archaeological artifacts on Federal lands". However, the notice fails to identify (1) what, if any, "artifacts" were "damaged or destroyed", and (2) the precise location the claimed damaged artifacts were found.

II. The road site.

(A) No evidence Branch caused any damage.

36 CFR 296.4(a) (7/1/95) provides that:

"(N)o person may ... damage ... any archaeological resource located on public lands ... unless such activity is pursuant to a permit issued under 296.8 or exempted by 296.5(b)".

(1) Although Branch bladed a portion of an existing, improved road, the NOV proffers only that some claimed artifacts were found. The NOV is void of any evidence that these artifacts were damaged.

(2) Although Branch bladed a portion of an existing, improved road, no evidence exists that he caused the damage to the artifacts. The recorded movement and jumbling where the claimed artifacts were found spans 92-years. The affidavits show repeated manipulation of the site prior to Branch's activity in 1993: (a) In 1904, an applicant for a Patent dug a 12 by 24 inch ditch; (b) Since about 1917, the Forest Service authorized grazing; (c) In the late 1950s, Clarence & Irish Brady improved the road by a bulldozer, removing soil, rocks, and other debris in the road's right-of-way; (d) In 1966, the Forest Service directed the construction of ponds; (e) In 1966, the Forest Service directed the construction of water bars in the road; (f) In about 1966, the Forest Service directed the plowing and seeding adjacent to and on the road; (g) In the late 1960s or early 1970s, the road was again bladed, water barred, and seeded; (h) In the late 1960s or early 1970s, the road was again bladed and water barred; (i) In the early 1980s, the Forest Service maintained and improved the existing water bars. The preponderance of this evidence shows that the damage occurred prior to 1993.

(B) The road activity was authorized.

36 CFR 296.5(b) provides that:

"Exceptions: (1) No permit shall be required under this part for any person conducting activities on the public lands under other permits ... or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those

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PETITION FOR RELIEF

August 30, 1996

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activities might incidentally result in the disturbance of archaeological resources."

(1) On or about June 21, 1993, Branch bladed a portion of an existing, improved road to provide a safe and efficient means to haul timber from his land to a sawmill. On July 2, 1993, the Forest Service authorized this activity, issuing Branch a Road Permit which allowed the use, "(b)lading and shaping of the roadway". Branch did only what was authorized and well within technical specifications of the Road Permit.

(2) The Forest Service is estopped from claiming that Branch was not authorized to blade a portion of the existing, improved road. The Forest Service issued a Road Permit. The Forest Service allowed for years the use of the road. The Forest Service made representations to Branch that nothing was required of him to blade a portion of an existing, improved road to provide an efficient and safe travel for log trucks.

(3) Branch was entitled to use and maintain the road, because the road is an appurtenance to his land.

Branch bladed a portion of an existing, improved road. The road is commonly known as the "Smith Ridge Road"; because a man named Otho M. Smith homesteaded land in the area. Until 1960s, the road provided the exclusive access to this land.

The Smith homestead was surrounded by the Weiser Forest Reserve, which was established on May 25, 1905. Proclamation No. 561, 34 Stat. 3055 (May 25, 1905). The Forest Service authorized and did not "protest" the existence of the homestead, because pursuant to the Act of June 11, 1906, the Secretary of Agriculture concluded that the land was chiefly valuable for agriculture, could be occupied for agricultural purposes without injury to the forest reserve, and was not needed for public purposes. See Act of June 11, 1906, 34 Stat. 233, 16 U.S.C. 506; repealed by Act of October 23, 1962, 76 Stat. 1157. The General Land Office granted a Patent to Otho M. Smith to the 120 acres on October 17, 1919. Branch is the successors in interest.

The entitlement to the use of the road was conveyed in the Smith Patent. The Patent stated:

"TO HAVE AND TO HOLD the said tract of Land with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever" (emphasis supplied).

Consistent with that conveyance, the road has been lawfully used and maintained.

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The Modern Law of Deeds to Real Property, Natelson, Robert G., Little, Brown and Company (1992), at pgs. 211-212, states:

Whatever is appurtenant to a described parcel of land passes with the land without any need to state that the conveyance includes appurtenances, for "the incident follows the principal." Although many lawyers think of the term "appurtenances" as encompassing improvements and other things physically attached to land, that is not its technical or traditional meaning. Appurtenances are the incorporeal hereditaments - easements, profits, and rents - that pass with the land and render its use feasible or convenient. In the absence of wording to the contrary, a conveyance of a possessory interest automatically conveys the easements, profits, and rents that serve it (emphasis supplied).

Natelson also states on page 96:

The Grantor or his agent usually prepares the deed and presents it to the grantee for acceptance. Human nature being what it is, the deed is more likely to reflect agreed terms beneficial to the grantor than terms beneficial to the grantee. Thus, the court usually assumes that the grantor has taken care of himself and that the grantee's rights may be latent in alternative constructions. Moreover, the grantee may not be on actual notice of the meaning the grantor imported into ambiguous phrases. For these reasons, if other methods of construction have failed, the courts hold that the language of the deed, being the language of the grantor, is construed more strongly against him.

See United States v. 9,947.71 Acres of Land, etc., 220 F.Supp. 328, 331 (D.NV.1963) where the District Court held that owners of valid mining claims had a compensable property interest in roads constructed over public domain to provide access to claims, and were entitled to just compensation. In so holding, the court stated:

"If the builders of such roads to property surrounded by the public domain had only a right thereto revocable at the will of the government, and had no property right to maintain and use them after the roads were once built, the rights granted for development

PETITION FOR RELIEF

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and settlement of the public domain, whether for mining, homesteading, townsite, mill sites, lumbering, or other uses, would have been a delusion and a cruel and empty vision, inasmuch as the claim would be lost by loss of access, as well as the investment therein, which in many cases of mines required large sums of money, before a return could be had."

In the present situation, the patent from the United States to Branch's predecessor gave him an easement through the Forest Reserve to his land. It is inconceivable to believe that the Forest Service, now approximately 78 years later, has issued a NOV against Branch for conduct which the United States previously, continuously, and expressly permitted. The United States must not be allowed to evade the express conveyances and promises that it has made to its citizenry many years ago.

(4) Branch was entitled to use and maintain the road, because the road is a RS 2477 right-of-way (ie. public road).

The Act of July 26, 1866, Section 8, authorized the construction of roads over public land not reserved for public use. Act of July 26, 1866, section 8; 14 Stat. 251; later codified at 43 U.S.C. 932; repealed by the F.L.P.M.A. of 1976, but not to be construed as terminating any preexisting express or implied rights of ingress or egress under the U.S. Mining Laws. 43 U.S.C. 1769. This Act provided the cornerstone for legitimizing numerous roads to be and previously constructed upon the public lands.

In the present situation, people settled the area in the 1800s. Records show that a Patent applicant enter public land on the road and constructed a ditch on and near the road in 1904, prior to the establishment of the Forest Reserve. Records also show entry upon the land now owned by Branch in 1914, and the authorization of livestock grazing in 1917. This evidence suggests that the construction of the road and the settlement upon Branch's land pre-dates the Forest Reserve.

Moreover, on June 9, 1993, Branch complied with the requirements of Idaho Code 40-204A to acknowledge the public road status (attached). This acknowledgment was recognized on August 19, 1996, by the Adams County Board of Commissioners (attached).

(C) The site is no longer of archaeological interest.

36 CFR 296.3(a)(5) (7/1/95) provides that:

"The Federal land manager may determine that certain material remains, in specified areas under the Federal land manager's jurisdiction,

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and under specified circumstances, are ... no longer of archaeological interest".

Assuming damage by Branch, he requests that no penalty be imposed. The site has been repeatedly moved and jumbled by others prior to the acts committed in June 1993. Fairness requires that you conclude that the bladed area is no longer of "archaeological interest". Branch should not be asked to carry the financial burden for acts committed in the past by Forest Service and others.

(D) Damages are calculated incorrectly.

Assuming damage by Branch, the blading occurred over a 9' by 210' by 1' area. Using Forest Service cost figures, the damages due should be approximately \$15,000, not \$39,685.80.

(E) Damages should be remitted.

36 CFR 296.16(b) (7/1/95) provides that:

"Determination of penalty amount, mitigation, and remission. The Federal land manager may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty. ...

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors: ...

(v) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances."

Assuming damage by Branch, he requests that you remit any penalty. The site has been repeatedly moved and jumbled by others prior to the acts innocently committed in June 1993. Branch should not be asked to carry any financial burden for the acts committed in the past by the Forest Service and others.

II. Spring site.

(A) No evidence Branch caused any damage.

36 CFR 296.4(a) (7/1/95) provides that:

"(N)o person may ... damage ... any archaeological resource located on public lands ... unless such activity is pursuant to a permit issued under 296.8 or exempted by 296.5(b)".

Although Branch bladed an area near a spring site, NOV proffers only that some claimed artifacts were found. The NOV is void of any evidence that these artifacts were damaged, or that Branch caused the damage.

(B) No jurisdiction.

36 CFR 296.4(a) (7/1/95) provides that:

"(N)o person may ... damage ... any archaeological resource located on public lands" (emphasis supplied).

In the present situation, on or about June 21, 1993, Branch wanted to develop a spring located on his land for stockwatering and potential domestic purposes to facilitate his farm and ranch business. He used his Cat to blade an area to a spring, but the Cat did not cut the ground or create any berms of soil in the spring area. The blade removed the brush and other surface debris so he could access the spring with the necessary equipment and facilities to develop the spring source. This blading activity occurred exclusively on his private land.

The record shows that this blading near the spring site exclusively occurred on land owned by Branch. A diagram prepared by the Forest Service illustrates that the "ROAD" work occurred on private land, not public land.

(C) Branch not liable for actions of an independent contractor.

A person is not vicariously liable for the acts of an independent contractor. E.g. McCormick v. Nobel Drilling Corp., 608 F.2d 169, 174-175 (5th Cir. 1979). Moreover, penalty statutes are strictly construed to not impose liability on persons who do not clearly come within the terms of the statute. 36 Am.Jur.2d Forfeitures and Penalties, Section 81. "Nowhere does the ARPA indicate that under its provisions contractors should be held liable for the acts of their subcontractors." EEL River Sawmills,

Inc., et al. v. United States of America, ARPA 90-1, ARPA 90-2
(USDI-OHA, August 10, 1992).

In the present situation, in May 1993, Branch contracted with a Jay Langer to cut, skid, and haul timber on his private land, not public land. Branch agreed to pay \$100/thousand board feet and pay the haulers. Mr. Langer agreed to provide the expertise and to be responsible for and in control of means to complete the cut, skid, and loading of the timber, which included the supervision of his employees.

In mid-June 1993, Mr. Langer moved his employees and his equipment to the Branch property to begin satisfying the requirements of the contract. He continued this operation without the supervision of Branch.

During this activity, Mr. Langer and/or individuals under his supervision and control crossed onto public land. They cut trees, skidded trees, and otherwise disturbed the ground on the public land side of the spring area. This activity is claimed to have damaged archaeological artifacts, but Branch can not be held liable for these actions, because they were conducted by Mr. Langer, an independent contractor.

(D) Damages are calculated incorrectly.

Assuming damage by Branch, the blading occurred over a 10' by 50' by .5' area. Using Forest Service cost figures, the damages due should be approximately \$2,000, not \$60,693.00.

Additionally, the cost associated with development of the spring site on private land is moot. The spring has been developed, and the water is piped to a trough approximately 40 feet away from the spring site.

(E) Damages should be remitted.

36 CFR 296.16(b) (7/1/95) provides that:

"Determination of penalty amount, mitigation, and remission. The Federal land manager may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty. ...

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors: ...

PETITION FOR RELIEF

August 30, 1996

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(v) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances."

Assuming damage by Branch, he requests that you remit any penalty. The spring site is on private land, not public land. Branch's activity was limited to the spring site area. Any adverse activity off of the private land occurred by others and was innocently committed. The activity on public land was only incidental. The site on public land has been stabilized and protected by the trees and brush activity of Mr. Langer. The spring site on private land has been stabilized and protected through development. Branch should not be asked to carry the financial burden for the acts innocently committed by others.

REQUEST FOR HEARING. Although not required in a Petition, Branch requests a hearing before an Administrative Law Judge of the USDI-Office of Hearings & Appeals should a Notice of Assessment be issued. MOU between USDA and USDI dated 12/7/87 & 2/10/88; 36 CFR 296.15(g) (7/1/95).

REQUEST FOR INFORMATION. You are proposing to impose a significant penalty upon Branch. If you intend to issue a Notice of Assessment, fairness requires that he be permitted to copy and to review all information which purports to support or exculpate the NOV and Notice of Assessment. Branch therefore requests that the Forest Service provide the following:

- (1) Application for Patent to the Branch property in Section 25 filed by R.W. Lowry in about 1914. Application for Patent to the Branch property in Section 25 filed by Euclid Martin in about 1915.
- (2) Any applications for Patent to the Branch property in Section 25 filed by other entrymen between 1890 and 1914.
- (3) Forest Service Boundary Survey, including any maps and notes, completed between 1905 and 1940.
- (4) Forest Service Grazing Permits issued by the Forest Service between 1905 and 1920. Any notes, memorandums, or letters indicating the existence of grazing upon the area now known as the Indian Mountain Allotment prior to 1905.

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(5) Mark Arnold. 1981 Cultural Resource Management Site Inventory Form. Dog Creek Timber Sale. Typescript. Color copies of any photographs.

(6) Lewis R. Binford. 1980 Willow Smoke and Dog's Tails: Hunter-Gatherer Settlement Systems and Archaeological Site Formation. American Antiquity 45(1):4-20.

(7) Any notes, memorandums, letters, photographs, or diagrams recorded on the claimed site in 1975, 7/31/91, 8/5/91, 8/19/91, 5/15/92, and 1993. Please provide color copies of any color photographs.

If you have any questions regarding this request, please call.

REQUEST FOR FIELD INSPECTION. Prior to the issuance a Notice of Assessment, Branch requests an opportunity to meet on-the-ground with the Forest Service's archaeologist(s) to review the claimed archaeological site.

REQUESTED RELIEF - CONCLUSION. Branch requests that you conclude that no violation has occurred [36 CFR 296.15(e)(3) (7/1/95)] and that no penalty be assessed [36 CFR 296.15(d) (7/1/95)]. If you are inclined to find a violation, Branch requests that you remit any penalty because the acts were not willfully committed and because the proposed \$100,378.80 penalty is excessive punishment under the circumstances. 36 CFR 296.16(b)(1) (7/1/95).

Very truly yours,

SCHROEDER & LEZAMIZ

By W. Alan Schroeder
W. Alan Schroeder

WELDON BRANCH

By Weldon E. Branch
Weldon Branch

Enclosures: (1) Road Filing; (2) Adams County letter; (3) Affidavit of Weldon E. Branch; (4) Affidavit of Harold L. Byrd; (5) Affidavit of Elvin O. Craig; (6) Affidavit of Clifford L. Johnson; (7) Affidavit of Archie D. Perkins; (8) Affidavit of Francis Milford Potter; and (9) Affidavit of Albin F. Veselka.

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UNITED STATES
DEPARTMENT OF
AGRICULTURE

Forest
Service

Payette
National
Forest

P.O.Box 1026
McCall, ID 83638
(208) 634-0700

Date:

CERTIFIED-RETURN RECEIPT REQUESTED

W. Alan Schroeder
Schroeder & Lezamiz
447 West Myrtle
P.O. Box 267
Boise, ID 83701-0267

NOTICE OF ASSESSMENT

Dear Mr. Schroeder:

After an investigation and after considering the facts you brought forth in your petition for relief, it has been determined that your client, Weldon Branch, is responsible for damage, alteration, or other disturbance of archeological site PY-399 on the Payette National Forest. The incident occurred when Mr. Branch took action without a permit or contract, that is: On or about June and July, 1993, Branch used his bulldozer to blade and shape an unimproved two track trail, never previously dozed. Branch conducted this activity on Federal lands administered by the U.S. Forest Service without first having obtained any permit. Furthermore, Branch proceeded to conduct logging operations in conjunction with Jay Langer. The logging, in addition to having been a timber trespass in itself, caused further damage to the archeological resource. Both of the above-described activities are violations of the Archaeological Resources Protection Act, 16 U.S.C. 470aa et seq., 36 CFR 296.4.

During the course of the investigation, the Agency concluded that two violations of ARPA occurred, and that your client was the sole violator with regard to ARPA violation #1. In fact, your client Mr. Branch admitted conducting the road blading activities himself. It was determined that Mr. Branch used his CAT D6D bulldozer to blade and shape a previously unimproved two-track. This activity damaged the archeological site known as PY-399, by unearthing, displacing, and disturbing thousands of archaeological artifacts at the site. We concluded that Branch and Langer are jointly responsible for damages associated with ARPA violation #3. Your client is not assessed penalties associated with ARPA violation #2.

We have fully reviewed your Petition for Relief in accordance with 36 CFR 296.15. The items raised in the petition provide neither an excuse for nor a defense to the penalty assessed as a result of Mr. Branch's violations. Specifically:

000735 AS RECEIVED
5-12-97

Notice of Assessment
RE: Weldon Branch

A. Laches is not applicable to the facts in this matter. The penalties sought here are administrative remedies, provided for by law, and were commenced within the statute of limitations.

B. The agency's Archeological Report, a copy of which was provided to you, fully describe the site and the findings which support our conclusions. Contrary to your claim that the location of the violation is not identified, the Notice of Violation includes a legal description of the location of the site.

C. The ARPA states "No person may excavate, remove, damage or otherwise alter or deface or attempt... any archeological resource located on public lands..." 16 U.S.C. 470. An archeological resource is "any material remains of human life or activities....of archeological interest" 36 CFR . You are incorrect to assert that the statute only prohibits damage to individual artifacts. Site alteration itself constitutes damage to the resource. Evidence of individual artifact damage is not necessary to establish a violation of ARPA.

D. The road-blading done by your client was not conducted pursuant to any valid permit. Furthermore, none of the purported evidence you submit gives Branch a right to bulldoze public land.

E. While you correctly cite 36 CFR 296.3(a)(5), the land manager has made no determination that the site involved is no longer of archeological significance. In fact, PY 399 is a site of major archeological significance.

F. Damages proposed in the Notice of Violation were calculated correctly pursuant to the ARPA uniform regulations which state that the value "shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation." Scientific information retrieval costs are specified as including but not limited to "...the costs of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential." (See 36 CFR 296.14).

G. Your request that damages for ARPA Violation #1 be remitted is denied. As stated above, we find no evidence sufficient to mitigate the finding that Mr. Branch acted in violation of ARPA on June , 1993, and that the maximum penalty under 36 CFR 296.16(a)(1) should be assessed.

H. ARPA Violation # 3, "Spring Site" . The damage referenced in the archeological report for this violation occurred on public land which is adjacent to private property near the spring site. It is simply not true that all logging activity near the spring occurred on private land. As you should know, your client has been billed for taking timber in trespass as a result of this incident.

I. While you assert that Mr. Langer was operating as an independent contractor, it is clear that in fact Mr. Langer was working under Branch's supervision and direction.

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Notice of Assessment
RE: Weldon Branch

Pursuant to 36 CFR 296.16(b)(1)(vii), the penalty amount for violation #3 has been reevaluated based in part upon mitigating evidence presented in your petition.

I have determined the total amount of the penalty to be \$ 66,858.80, which includes:

The cost of data recovery for portions of the prehistoric site damaged by the bulldozing of the historic two track, a length of 1000 feet and a width of between 9 and 10 feet previously described in Damage Assessment, ARPA Violation #1, July 10, 1993
.....\$37,035.80

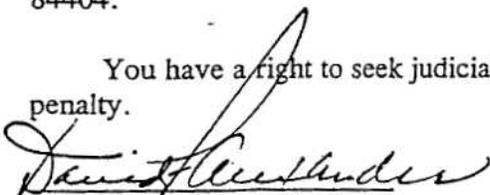
The cost of modified, minimal archeological site mitigation, including removal of tree limbs and slash from site, processing two piles of displaced archeological materials and the development of spring source to prevent further damage to the site, as described in Second Archeological Resource Damage Assessment, (ARPA Violation #3)
.....\$29,823.00

^{*}The revised damage assessment and restoration costs assessed for site #3 reflect the Forest's estimate of the minimum recommended land management strategy which will assure correction of the present condition of the site and protection of the archeological resource from further damage. The revised estimate does not include the same level of intense archeological mitigation. The administrative costs will be absorbed by the agency.

In accordance with a Memorandum of Agreement between the Forest Service and the Department of the Interior for implementing administrative procedures under the Archeological Resources Protection Act, you may file a written, dated request for a hearing with the Hearing Division, Office of Hearings and Appeals, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203-1954, within 45 days of service of this Notice of Assessment. You should enclose a copy of the Notice of Violation previously sent to you and a copy of this Notice of Assessment. Your request will state the relief requested and your basis for challenging the facts alleged by the Forest Service. You should also include your preferences as to the place and date for a hearing.

A copy of the request for a hearing should be served upon the Office of General Counsel personally or by registered or certified mail, return receipt requested, at 507 25th Street, Room 205, Ogden, UT 84404.

You have a right to seek judicial review of any final administrative decision assessing a civil penalty.


David Alexander, Forest Supervisor

* - revising damage assessment
not recommended.

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COPY

CANTRILL, SKINNER, SULLIVAN & KING
ATTORNEYS AND COUNSELORS AT LAW

DAVID W. CANTRILL
GARDNER W. SKINNER, JR.
WILLIS E. SULLIVAN, III
JOHN L. KING
ROBERT O. LEWIS
FRANK P. KOTYK
TYRA H. STUBBS
CLINTON O. CASEY

1423 TYRELL LANE P.O. BOX 359
BOISE, IDAHO 83701

TELEPHONE
(208) 344-8

FACSIMILE
(208) 345-7212

June 17, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hearing Division
Office of Hearings and Appeals
Department of the Interior
4015 Wilson Boulevard
Arlington, Virginia 22203-1954

Re: REQUEST FOR HEARING
Weldon Branch
3621 N. Crane Road
HCR 70, Box 2390
Midvale, ID 83645

Federal Land Management Agency: USDA - Forest Service
Intermountain Region
Payette National Forest
Council Ranger District

Dear Madams/Sirs:

Weldon Branch was served with a Notice of Violation under the Archaeological Resource Protection Act of 1979 (16 U.S.C. 470 aa-ll) dated July 19, 1996. Mr. Branch filed a Petition for Relief from the Notice of Violation dated August 30, 1996. An undated Notice of Assessment was received by Mr. Branch's attorney, Alan Schroeder on May 12, 1997. Copies of all three documents are enclosed. Mr. Branch's petition for relief, and all arguments set forth therein are incorporated as part of this request for hearing.

Weldon Branch does not agree with the Forest Service's application of the law, and allegations of fact. Pursuant to 36 C.F.R. §296.15 (g) (1) Weldon Branch hereby requests a hearing with the Office of Hearings and Appeals, Department of Interior.

FACTS AND BACKGROUND

Weldon Branch is an Idaho landowner of property surrounded by Payette National Forest land. Access to Mr. Branch's property is via a road (Smith Ridge Road) which traverses Payette National Forest Property. On or about May 1993, Mr. Branch reached an

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REQUEST FOR HEARING

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agreement with a local timber contractor, Jay Langer. The parties agreed that Mr. Langer would cut, skid and load the timber for \$95.00 per thousand feet. Mr. Branch understood that Mr. Langer would be responsible for and in control of the cutting, skidding and loading of the timber. Mr. Branch later modified the amount payable to Mr. Langer to \$100.00 per thousand in order to pay timber haulers.

In preparing for Mr. Langer's timber operation, Mr. Branch met with Dan Perez, a Forest Service employee on May 10, 1993. They met to discuss Branch's private timber sale. At that time, the Forest Service was informed that Mr. Branch had contracted the cutting of some of his timber, and that he intended to use the Smith Ridge roadway which crossed the Forest Service land in order to haul the timber. Mr. Perez did not express any concern for this activity. In fact in a follow-up telephone call with Mr. Perez, he again expressed no concern for the timber cutting activity. Prior to the cutting, the Forest Service never expressed any need for Mr. Branch to purchase a special permit.

In mid-June 1993, Jay Langer moved his employees and his equipment to Mr. Branch's private land. Mr. Langer began cutting and skidding timber under his own supervision and direction.

On June 19, 1993, Mr. Branch moved his CAT up to Smith Ridge Road and parked it. Mr. Branch felt that for safety reasons water bars in that roadway needed to be smoothed out to allow passage of loaded 18 wheel logging trucks.

On or about June 21, 1993, Mr. Branch bladed isolated portions of Smith Ridge Road to provide for safe travel. When he arrived at the water bar in the roadway within what is now claimed by the Forest Service to be the Archaeological site (PY399), Mr. Branch found that a vehicle had been stuck in mud near the water bar and it appeared as if equipment had been used to pull it out. Mr. Branch did not have any knowledge of this activity and he did not participate in it in any way.

After grading down the water bars in the road, Mr. Branch moved his CAT over to the spring site which is located on the western portion of his property. This site is also within what is now claimed by the Forest Service as archaeological site (PY399). Again, Mr. Branch used his CAT to blade an area to the spring. The blading did not create any berms of soil or cut the ground. Mr. Branch simply used the blade to remove brush and other surface debris so he could access the spring with necessary equipment and facility to develop the same. All of Mr. Branch's blading activity at the spring site occurred exclusively on his private land.

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REQUEST FOR HEARING

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On or about July 1, 1993, Mr. Langer called Mr. Branch at home. Mr. Langer told Mr. Branch that the Forest Service now wanted a road permit to haul logs down Smith Ridge Road across the Forest Service land. Mr. Langer asked who should get the permit, and Mr. Branch said that he would. On July 1, 1993, Mr. Branch called the Forest Service and requested a road permit. The next day, Mr. Branch went to the Forest Service office and picked up the permit. Between July 2 and July 20, 1993, Mr. Branch did not have any contact with the Forest Service or Mr. Langer regarding any concerns or problems. On or about July 21, 1993, a District Ranger told Mr. Langer and Mr. Branch to suspend use of the roadway. Mr. Branch respected this verbal request.

USFS ALLEGATIONS

The Forest Service now claims that Weldon Branch is responsible for damage, alteration or other disturbance of archaeological site PY-399 on the Payette National Forest. The Forest Service claims that without a permit, Mr. Branch used a bulldozer to blade and shape an unimproved two track trail, never previously dozed (Smith Ridge Road). Further, the Forest Service asserts that Mr. Branch proceeded to conduct logging operations in conjunction with Jay Langer. The Forest Service asserts that this logging caused further damage to the same archaeological resource. They assert violations of the Archaeological Resource Protection Act, 16 U.S.C. 470aa, et seq. 36 C.F.R. 296.4.

Pursuant to their investigation of this archaeological site, the Forest Service asserts three separate violations of the ARPA. As numbered by the Forest Service, violation number 1 is asserted for Mr. Branch's blading of the water bars in Smith Ridge Road which crosses the Forest Service land to his private property. According to the notice of assessment, the Forest Service seeks a total penalty for violation number 1 in the amount of \$37,035.80 against Mr. Branch only.

Violation number 2 asserts that damage was done to the archaeological resource when a piece of equipment was used to pull another vehicle out of mud within the archaeological site. This violation is asserted against the independent contractor, Jay Langer only.

Violation number 3 is asserted against both Jay Langer and Weldon Branch for Branch's grading and Langer's skidding of logs over land at the spring site. The amount sought for this violation is \$29,823.00. The total assessment against Weldon Branch therefore amounts to \$66,858.80.

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BRANCH'S CHALLENGES ON APPEAL
VIOLATION NUMBER 1

The USFS charges that Mr. Branch used his bulldozer to blade and shape an unimproved two-track trail, never previously dozed. In fact, Smith Ridge Road where the June 1993 grading was conducted had been dozed on numerous occasions. The facts are that this roadway was actually graded by Mr. Branch himself in 1966, when he was directed to install the water bars by then Forest Service employee Archie Perkins. What's more, in the late 1960's or early 1970's this roadway was again graded to flatten water bars to accommodate logging trucks. The berms were then reconstructed. Evidence further shows that the water bars were later graded and reconstructed for another timber sale. In fact, evidence shows that the U. S. Forest Service reconstructed the water bars themselves in the 1980's and made them deeper and higher. These facts show that the exact location on Smith Ridge Road where violation number 1 is asserted has been disturbed on numerous occasions through previous blading and grading. The factual allegation that this area was never previously dozed is unfounded.

The USFS further alleges that Mr. Branch's grading of Smith Ridge Road was done without a permit. Mr. Branch asserts that the USFS should be equitably estopped from asserting lack of permit against Mr. Branch. For equitable estoppel to be available, Mr. Branch must show concealment of a material fact with actual or constructive knowledge of the truth; that Mr. Branch did not know or could not discover the truth; that the concealment was made with the intent that it be relied upon; and that Mr. Branch relied and acted upon the concealment to his prejudice. Knutson v. Agee, 128 Idaho 776, 918 P.2d 1221 (1996). See also, U.S. v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); Cert. Denied 99 S.Ct. 2838, 442 U.S. 917; 61 L.Ed. 2d 284.

The USFS should be estopped to now assert a claim against Mr. Branch for lack of a permit based on the fact that in preparing for the timber sale in June of 1993, and prior to grading the water bars, Mr. Branch met with Dan Perez, a Forest Service Employee. On May 10, 1993, Mr. Branch and Mr. Perez met to discuss the private timber sale. At that meeting, Mr. Branch told the USFS that he had contracted the cutting of some timber on his land, and that he intended to use the Smith Ridge Road, which he now knows, crosses the archaeological site, to haul the timber. At the time, Mr. Branch had no knowledge of the archaeological site. Mr. Perez and the USFS did not express any concern for Mr. Branch's planned activity, and during a follow-up telephone call on May 14, 1993, continued to express no concern. Prior to Mr. Branch's actions which created the assessment for violation number 1, the USFS never indicated that a road permit was required. The USFS thus concealed from Mr. Branch the fact an archaeological site existed and that a

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permit apparently was required and Mr. Branch relied upon this concealment.

Mr. Branch's claim for estoppel is further supported by the fact that as soon as the USFS did indicate that a road permit was required, which was after the June 21, 1993, grading in question, Mr. Branch immediately applied to the USFS for a permit and the same was granted. Mr. Branch learned on July 1, 1993, that a road permit was required, and on July 2, 1993, he picked up the permit from the USFS, which had been filled out and signed by the District Ranger. The permit authorized the use, as well as, the "blading and shaping of the roadway". This permit made no mention of the archaeological site in question, nor did it place any restrictions on Mr. Branch. Under these facts, Mr. Branch asserts that the U. S. Forest Service should now be estopped from asserting a lack of permit allegation.

MR. BRANCH'S ACTIVITIES FALL UNDER AN
EXCEPTION TO THE PERMIT REQUIREMENT OF THE ARPA

The USDA Notice of Assessment asserts that Mr. Branch took action without a permit or contract. No contract for the excavation existed. However, no permit was required for his activities.

36 C.F.R. §296.4(a) provides that:

No person may excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or indian lands unless such activity is pursuant to a permit issued under §296.8 or exempted by §296.5(b) of this part.

§296.5(b) provides:

Exceptions: (1) No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. . . . 36 C.F.R. §296, 5(b)(1)

It is undisputed that Mr. Branch graded Smith Ridge Road to remove water bars so that 18 wheel logging trucks could travel the road safely. His activities were exclusively for purposes other

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than the excavation or removal or archaeological resources. What's more, his general earth moving excavation was conducted under authorization of the USFS as explained above. In this regard, under the express language of the ARPA, no permit was required for the activities conducted by Mr. Branch. The allegation that a violation occurred due to Mr. Branch conducting work without a permit is unfounded.

MR. BRANCH HAD A RIGHT TO GRADE THE ROADWAY, AND UNDER THE SAVINGS PROVISION OF THE ARPA THE ACT CAN NOT BE CONSTRUED TO REPEAL HIS RIGHT

It is undisputed that Mr. Branch is being charged in Violation Number 1 of blading a portion of an existing roadway known as the "Smith Ridge Road". This road is known as the Smith Ridge Road because a man named Otho M. Smith homesteaded the land in the area. The Smith homestead was surrounded by the Weiser Forest Reserve, which was established on May 25, 1905. The Forest Service authorized and did not protest the existence of the homestead, because pursuant to the Act of June 11, 1906, the Secretary of Agriculture concluded that the land was chiefly valuable for agriculture, could be occupied for agricultural purposes without injury to the forest reserve, and was not needed for public purposes. See, Act of June 11, 1906, 34 Stat. 233, 16 U.S.C. 506; repealed by Act of October 23, 1962, 76 Stat. 1157.

The General Land Office granted a patent to Otho M. Smith to the 120 acres which Mr. Branch currently owns on October 17, 1919. Mr. Branch is a successor-in-interest. Entitlement to the use of the roadway in question was conveyed in the Smith Patent. The patent stated:

To have and to hold the said tract of land with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever.
(Emphasis added)

Thus, the patent from the United States to which Mr. Branch is the successor-in-interest gave him an easement through the forest reserve to his land. Under 16 U.S.C.S. §470KK(a) nothing in the ARPA "shall be construed to repeal, modify or impose additional restrictions on the activities permitted under existing laws and authorities relating to mining, mineral leasing, reclamation and other multiple uses of the public lands." 36 C.F.R. §296.1(b). Mr. Branch had a right to use the Smith Ridge Road and the ARPA cannot now be used to modify or impose additional restrictions on his usage.

THE FOREST SERVICE IS BARRED UNDER THE DOCTRINE OF LACHES

The Forest Service is barred from pursuing its penalty against Mr. Branch under the doctrine of laches. See, San Carlos Irrigation and Drainage District v. United States, 23 Cl. Ct. 276 (1991); Park v. United States, 10 Cl.Ct. 790 (1986). The site damage for which the Forest Service currently seeks this penalty occurred over a 92 year period. Many people have died who used the road such as R. W. Lowry, Euclid Martin, Otho M. Smith, Jim Murphy, Clarence Brady, Irish Brady, Milton W. Branch and many others. These people are not now available to offer evidence as to the use, condition and improvements of Smith Ridge Road within the claimed archaeological site. The Forest Service should be prohibited from benefiting from its delay in assessing this penalty.

**REASONABLE NOTICE OF THE CLAIMED VIOLATION WAS NOT
PROVIDED BY THE USFS**

The Forest Service is barred from pursuing this assessment because the notice as provided is vague. An agency has the duty to give reasonable notice of a violation. The notice provided to Mr. Branch is void of any description or definition of the term "damaged or destroyed". The notice fails to identify (1) what, if any, "artifacts" were "damaged or destroyed", and (2) the precise location that the claimed damaged artifacts were found.

Mr. Branch graded a portion of an existed, improved road. The Forest Service now asserts that some claimed artifacts were found. Their notice is void of any evidence that these artifacts were damaged by Mr. Branch. As explained above, this site was subject to grading, plowing and livestock grazing for 92 years. There is no evidence that the claimed damage was the result of Mr. Branch's activities.

**IF A PENALTY IS ASSESSED AGAINST MR. BRANCH FOR
VIOLATION NUMBER 1, THE AMOUNT OF THE PENALTY
SHOULD BE REMITTED.**

If the hearing division determines that the facts of this case warrant a conclusion that a violation has occurred, the penalty amount should be determined in accordance with 36 CFR §296.16, 36 CFR §296.15(4).

The act provides that the maximum amount of the penalty shall be the full cost of the restoration and repair of the archaeological resource damage plus the archaeological or commercial value of the resources destroyed or not recovered. 36 CFR §296.16(a)(1).

Most importantly in this case, the penalty amount assessment may be mitigated by a determination that Mr. Branch did not wilfully commit the violation. 36 CFR §296.16(b)(1)(v).

The facts in this case show that Mr. Branch was actually employed by the USFS to grade Smith Ridge Road in the exact area where violation number 1 is now alleged, on numerous previous occasions throughout the years. He was not aware of a law prohibiting his grading in June, 1993. The facts in this case show that Mr. Branch certainly did not wilfully commit an ARPA violation by grading out the water berm in the area of this prehistoric site. Mitigation is therefore warranted.

Mitigation of any penalty is further directed by the ARPA where the proposed penalty constitutes excessive punishment under the circumstances, and where other mitigating circumstances exist. 36 CFR §296.16(b)(1)(VI) and (VII).

The facts of this case show that over time, prior to June 1993, this archaeological site was graded on numerous occasions, was plowed and seeded with grass, endured digging and building of ponds, and was subject to livestock grazing. All of these activities were conducted pursuant to Forest Service approval. Under these and other circumstances, any civil penalty assessed against Mr. Branch for his activities in grading Smith Ridge Road for safe passage of the logging trucks must be greatly remitted.

CHALLENGES ON APPEAL VIOLATION NUMBER 3.

The undated Notice of Assessment sent to Mr. Branch indicates that Mr. Branch is not being assessed any penalty as a result of alleged violation number 2 as numbered by the USFS. Violation number 2 arises as a result of the alleged removal of a vehicle which was apparently stuck in mud adjacent to Smith Ridge Road within the archaeological site.

Violation Number 3 is asserted against Mr. Branch and his independent timber contractor, Jay Langer. This assessment is based on an allegation that Mr. Branch graded an area contained within the same archaeological resource called the spring site. In addition, this violation asserts that timber was cut on USFS land and that work performed in removing this timber further disturbed the archaeological site.

MISAPPLICATION OF LAW AND FACTS WITH VIOLATION #3

Mr. Branch asserts that all disturbance on the Federal land surrounding the spring site for which a penalty is sought was the result solely of activity of Jay Langer, the independent timber

contractor. Mr. Branch did not grade the Federal land. He did remove brush with his CAT from his own private land.

**THE ARPA DOES NOT APPLY TO ACTIVITIES CONDUCTED ON
MR. BRANCH'S PRIVATE PROPERTY**

The Archaeological Resource Protection Act only applies to activities on public or indian land not privately owned property. 16 U.S.C.S. §470KK(c). Mr. Branch's grading to remove brush at the spring site was conducted entirely on private land. This activity is not subject to the ARPA. 36 C.F.R. §296.1(a). Some tree removal by Jay Langer was allegedly conducted on Forest Service Land adjoining the spring site. Mr. Branch is not liable for the acts of an independent contractor.

MR. BRANCH IS NOT LIABLE FOR THE ACTIONS OF JAY LANGER

Even assuming that damage did occur to the spring site, and it was on public land, under Idaho law, a principal is not liable for the torts of his independent contractor. Gnelting v. Idaho Asphalt Supply and Salt Creek, 97.10 ICAR 433 (Id. Ct. App. 1997). See also, Restatement 2nd of Torts, §409 (1965). Of course, the general rule of nonliability is inapplicable when the principal actually retains control of the manner, means or method of performance of the work undertaken by the independent contractor. Vickers v. Hanover Construction Co., 125 Idaho 832, 875 P.2d 929 (1994); Restatement 2nd of Torts §414, (1965).

It is undisputed that Jay Langer was an independent contractor hired to remove timber from Mr. Branch's property. Mr. Branch did not retain control of the manner, means or method employed by Mr. Langer to remove the timber from his land. Mr. Branch certainly did not direct Mr. Langer to remove any timber from the Forest Service land. In fact, when Mr. Branch learned that some logging had allegedly been done on the Forest Service land by Mr. Langer, those logs were left on the Forest Service land.

Under these circumstances, and under Idaho law, Mr. Branch is not liable for the activity of Jay Langer, and no penalty can be assessed against Mr. Branch for Violation number 3.

IF A PENALTY IS ASSESSED, THE AMOUNT SHOULD BE MITIGATED

As with Violation Number 1, if a violation is assessed for #3, the amount of the penalty should be mitigated or remitted pursuant to 36 C.F.R. §296.16(b)(1)(V), (VI) and (VII). Here again, it is undisputed that Mr. Branch did not wilfully commit any ARPA violation, and any penalty under Violation Number 3 is excessive punishment under the circumstances. What's more, the independent timber contractor, Jay Langer was operating without any control

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being retained by Mr. Branch over his manner, means or method of operation. If the Hearing Division somehow determines that the rule of nonliability for an independent contractor is somehow unwarranted, the fact that there existed an independent contractor agreement is certainly appropriate for mitigation in reaching a fair and expeditious assessment.

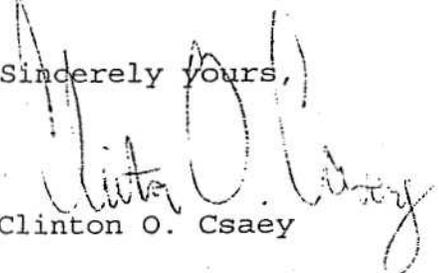
CONCLUSION

Weldon Branch respectfully asserts that he did not violate the ARPA as alleged by the USFS. If a violation is found, Mr. Branch respectfully requests that the amount of any penalty be reduced from that currently assessed based on all of the mitigating circumstances set forth above.

Mr. Branch reserves his right to assert additional defenses to the allegations of the USDA as discovered.

Weldon Branch hereby also respectfully requests that the hearing in this matter be held at a hearing office as close in proximity to Boise, Idaho as possible. A copy of this request for hearing is served upon the office of General Counsel by Certified Mail, return receipt requested at 507 25th Street, Room 205, Ogden, Utah 84404.

Sincerely yours,


Clinton O. Csaey

COC/ge

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SETTLEMENT AGREEMENT

PARTIES

This Settlement Agreement ("Agreement") is made between the United States of America ("United States") and Weldon E. Branch of 3621 N. Crane Road, HCR 70 Box 2390, Midvale, Idaho 83645.

PREAMBLE

WHEREAS, based upon an investigation by the U.S. Forest Service, the United States believes that Weldon E. Branch has civil liability for timber trespass (Forest Service Incident No. 3228372) and archeological damage (ARPA Incident No. 3228369) on Forest Service land in the Payette National Forest stemming from activities conducted and/or authorized by Weldon E. Branch between May 1, 1993, and July 31, 1993;

WHEREAS, Weldon E. Branch denies any liability in connection with the alleged timber trespass and archeological damage referenced above; and,

WHEREAS, the parties mutually desire to resolve the alleged timber trespass and archeological damage matters without resort to litigation;

NOW, THEREFORE, in consideration of the mutually negotiated promises, covenants and obligations in this Agreement, the parties agree as follows:

TERMS OF AGREEMENT

1. For good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties agree that Weldon E. Branch will pay to the United States immediately upon execution of this Agreement the sum of Thirty Five Thousand Dollars (\$35,000). Such payment shall be made by certified or cashier's check made payable to "United

States Department of Justice" and delivered to the Financial Litigation Unit, United States Attorney's Office, District of Idaho, Box 32, Boise, Idaho 83707-9990.

2. Weldon E. Branch further agrees that during the pendency of archaeological work and damage mitigation at the archaeological site located on and around the non-Forest System road referred to as King Hill Road, Dog Ridge Road or Smith Ridge Road, Weldon E. Branch, his heirs, executors, administrators or assigns, will refrain from use of said road in the area of the archaeological work. The aforementioned archaeological recovery and mitigation is projected to occur for approximately 60 days sometime between May and September of 2000 or 2001.

Weldon E. Branch will ~~continue~~ to have access to his property via FDR #0222. ^{DURING THE 60-DAY ... PERIOD,} The Forest Service shall erect a temporary fence or take other reasonable measures to exclude livestock from the archaeological work site, ^{BUT "REASONABLE MEASURES" SHALL NOT BE THE TEMPORARY CLOSURE}

3. In consideration for payment of the settlement amount stated in paragraph 1 and the promises contained in paragraph 2 above, the United States releases Weldon E. Branch and his logging contractor, Jay Langer, as well as their guardians, heirs, executors, administrators, and assigns, from any civil or administrative monetary claim which the United States has or may have for or stemming from the above-referenced timber trespass and archeological damage. ^{OF LIVESTOCK GRAZING TO FEDERALTY PERMITTED LIVESTOCK} Accordingly, the United States will execute and file with the Department of Interior, Office of Hearings and Appeals, such documents as shall be necessary to cause administrative actions ARPA 97-2 and ARPA 97-3 to be dismissed with prejudice.

4. The United States Forest Service agrees to waive any and all grazing permit action, adverse or otherwise, that may be or could have been taken as a result of the incidents that gave rise to this settlement.

5. This Agreement shall bind all heirs, executors, administrators, assigns, or successors-in-interest of the United States and Weldon E. Branch.

6. This Agreement is executed in duplicate originals, and each shall be of the same force and effect at law as an original.

7. Each person who signs this Agreement in a representative capacity warrants that he or she is duly authorized to do so.

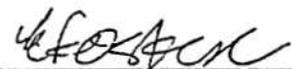
UNITED STATES OF AMERICA

BETTY H. RICHARDSON
United States Attorney
District of Idaho

Dated: 4/30/99


ALAN G. BURROW
Assistant United States Attorney
Box 32
Boise, Idaho 83707
208/334-1211

Dated: 5-3-99


ELISE FOSTER
Attorney
Office of General Counsel
U.S. Dept. of Agriculture
507 25th Street, Room 205
Ogden, Utah 84401
801/625-5443

WELDON E. BRANCH

Dated: 5/15-99

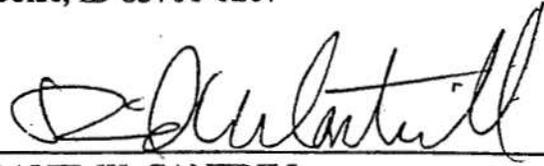

WELDON E. BRANCH
3621 N. Crane Road
HCR 70 Box 2390
Midvale, Idaho 83645

Dated: 5-6-99



W. ALAN SCHROEDER
Counsel for Weldon E. Branch
Schroeder & Lezamiz Law Offices
447 West Myrtle
P.O. Box 267
Boise, ID 83701-0267

Dated: 5/18/99



DAVID W. CANTRILL
Counsel for Weldon E. Branch
Cantrill, Skinner, Sullivan & King
1423 Tyrell Lane
P.O. Box 359
Boise, ID 83701