

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE  
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4 UNITED STATES OF AMERICA, :  
5 Plaintiff, : No. 2:07-CV-1154-RCJ-VCF  
6 -vs- : August 31, 2012  
7 ESTATE OF E. WAYNE HAGE, et : Reno, Nevada  
8 al., :  
9 Defendants. :  
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11 TRANSCRIPT OF ORDER to CAUSE SHOW  
12

13 APPEARANCES:

14 FOR THE PLAINTIFF: STEPHEN BARTELL, ANNA STIMMEL and  
15 CHARLES SHOCKEY  
16 Assistant United States Attorneys  
Washington, D.C.

17 FOR STEVEN WILLIAMS MARTIN WIENER  
18 AND THOMAS SELEY: Attorney at Law  
Reno, Nevada

19  
20 FOR DEFENDANT ESTATE MARK POLLOT  
21 OF E. WAYNE HAGE Attorney at Law  
Boise, Idaho

22 FOR DEFENDANT WAYNE IN PROPRIA PERSONA  
23 HAGE:

24 Reported by: Margaret E. Griener, CCR #3, RDR  
25 Official Reporter  
400 South Virginia Street  
Reno, Nevada 89501

1 RENO, NEVADA, FRIDAY, AUGUST 31, 2012, 9:18 A.M.

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3  
4 THE COURT: Good morning. Thank you. Please be  
5 seated.

6 Appearances this morning, please.

7 MR. WIENER: Good morning, your Honor. Marty  
8 Wiener here on behalf of Tom Seley and Steve Williams.

9 THE COURT: Mr. Wiener.

10 MR. SHOCKEY: Good morning, your Honor. Charles  
11 Shockey, Department of Justice, for the United States.

12 MR. BARTELL: Good morning, your Honor. Stephen  
13 Bartell on behalf of the United States.

14 MS. STIMMEL: Good morning, your Honor. Anna  
15 Stimmel on behalf of the United States.

16 MR. POLLOT: Good morning, your Honor. Mark  
17 Pollot on behalf of the Estate of E. Wayne Hage.

18 MR. HAGE: Good morning, your Honor. Wayne N.  
19 Hage on behalf of Wayne N. Hage.

20 THE COURT: Thank you.

21 (Discussion held off the record.)

22 THE COURT: Thank you very much.

23 All right. Let's continue.

24 Do you have any further witnesses?

25 MR. POLLOT: No, your Honor.

1 THE COURT: Thank you.

2 You may proceed.

3 MR. SHOCKEY: Thank you, your Honor. The United  
4 States calls Marc Pointel.

5 THE COURT: Thank you, sir. Please be seated.  
6 Well, don't be seated. Madam Clerk, will swear you in.

7 M A R C A. P O I N T E L,  
8 called as a witness on behalf of the Government,  
9 was sworn and testified as follows:

9 THE CLERK: Thank you. Please be seated.

10 Please state your name for the record.

11 THE WITNESS: Marc A. Pointel, Marc with a C,  
12 Pointel, P-o-i-n-t-e-l.

13 THE CLERK: And the city and state you reside  
14 in.

15 THE WITNESS: Tonopah, Nevada.

16 THE CLERK: Thank you.

17 DIRECT EXAMINATION

18 BY MR. SHOCKEY:

19 Q Good morning, Mr. Pointel. You testified at the trial in  
20 the underlying trespass action in this case, didn't you?

21 A Yes, sir.

22 Q Please refresh for the Court, and everyone else, a brief  
23 description of what your position is with the BLM Tonopah  
24 field office.

25 A My basic responsibility is the administration of the

1 grazing with the Bureau of Land Management Tonopah field  
2 office, which includes monitoring and basically basic grazing  
3 administration.

4 Q Have you reviewed the Court's show cause order listed as  
5 docket 335-1?

6 A Yes, I have.

7 Q Are you personally familiar with any of the details  
8 listed in that court order relating to BLM actions with regard  
9 to count B which pertains to Mr. Seley's authorization of Gary  
10 Snow's temporary nonrenewable grazing use?

11 A Yes, I am.

12 Q What about count C which pertains to Mr. Seley's issuance  
13 of trespass notices and trespass decisions to certain ranchers  
14 who are not listed defendants in this case?

15 A Yes, I am.

16 Q And, finally, what about count D, are you familiar with  
17 the allegations there pertaining to Mr. Seley's solicitation  
18 of applications for a grazing preference for the Ralston  
19 Allotment?

20 A Yes, I am.

21 Q Are you familiar with the Ralston and the Monitor  
22 Allotments?

23 A Yes. I've done quite a bit of monitoring on it, and also  
24 I have recreated in the -- hiking in the San Antone Mountains.

25 Q Give us a little bit better sense for what your

1 responsibilities are on behalf of BLM in conducting  
2 monitoring.

3 A Well, the monitoring data that we collect is to  
4 determine -- the resource evaluation to determine the health  
5 of the range.

6 Q And what kind of information do you look at? How do  
7 you go about making --

8 A Well, we --

9 Q -- that determination?

10 A -- look at trend data, cover data, gap data, utilization  
11 data and the like.

12 Q And these all pertain primarily to livestock grazing?

13 A They pertain to the -- in relationship to livestock  
14 grazing, but it's to evaluate the overall rangeland health of  
15 the allotment which include not only the livestock but the  
16 wildlife, the soil resources, the hydrology, the whole total  
17 ecosystem of that particular area.

18 Q Do you have any personal knowledge of Mr. Snow's  
19 temporary nonrenewable grazing application and authorization  
20 for the years 2007 to 2008?

21 A Yes, I do.

22 Q And for the sake of simplicity, I will attempt to call  
23 those simply TNRs for the rest of our discussion.

24 A Yes.

25 Q Do you have any personal knowledge of Mr. Snow's TNR

1 application and authorization for 2008 to 2009?

2 A Yes, I do.

3 Q Could we bring up the court docket 335-1 which is the  
4 show cause order? And I think -- could we have that done  
5 through our laptop? Thank you.

6 A Would you be able to enlarge that? My eyesight is not as  
7 good as it could be.

8 Q At some point, I can --

9 A Okay. Thank you very much.

10 Q We'll work on it.

11 A Okay.

12 Q I'm going to ask you, Mr. Pointel, to take a look at page  
13 3 and continuing on to the next page. This is the discussion  
14 of count B of the contempt citation.

15 A Yes.

16 Q And I'm going to ask -- were you present in court on  
17 Monday morning of this week when the Court read through this  
18 entire document?

19 A I believe I was.

20 Q Okay. Well, I'm not going to ask you to read anything  
21 out loud, but if you could just take a moment and look on page  
22 3 through the listing of the specific details that pertain to  
23 count B and, in particular, the water sources that are listed.

24 A And that would be line 13 down? Is that correct?

25 Q It actually begins, I believe, up on line 7 with the

1 reference to the Pine Creek Well location.

2 A Yes. There are several --

3 Q Well, just before you --

4 A Excuse me.

5 Q -- begin to -- just take a moment and look through this  
6 page, continuing on to the next page --

7 A Okay.

8 Q -- so you'll be familiar with the general subject of  
9 what's in the document.

10 A Okay. Next page, please.

11 Q And continuing down to line 10.

12 A Thank you.

13 Q Are you familiar with the particular water sources,  
14 springs and wells and the like that are listed in this  
15 document?

16 A Yes, I am.

17 Q Do you know whether any of the water sources that are  
18 identified in this show cause order are located outside of the  
19 pastures where Mr. Snow was authorized to graze?

20 A Yes, there are several of them.

21 Q And which of these locations might be located in -- or  
22 what are -- are there other pastures besides the ones in which  
23 Mr. Snow is authorized to graze?

24 A Yes, there are. There are four pastures in the Ralston  
25 Allotment.

1 Q Okay. I'm going to ask if we have a copy of the map  
2 exhibit which we have labeled 1371 -- this is a new exhibit,  
3 your Honor -- map of water sources named in the show cause  
4 order.

5 Can you take a look at that Exhibit 1371 and tell  
6 me, Mr. Pointel, did you prepare this map?

7 A Yes, I prepared this map using the Geographical  
8 Information System and the data that we have in our database,  
9 and it's basically the Ralston Allotment.

10 Q All right. Could you give the Court a brief description  
11 of what are some of the principal geographic figures that are  
12 noted on this map.

13 A Okay. This is basically the Ralston Allotment. The  
14 exterior thicker line which is in purple and red is the  
15 perimeter of the Ralston Allotment.

16 The Ralston Allotment is divided into four pastures.  
17 The north pasture is called the Baxter Pasture. The west --  
18 the west side is called the West Pasture, the smallest  
19 pasture, which is east of the West Pasture is called the  
20 Thunder Mountain Pasture, and the most southern pasture is the  
21 South Pasture.

22 Now, the -- these pastures are mostly fenced. One  
23 of the things I should note is that between the South Pasture  
24 and the Thunder and West Pasture, highway -- US Highway 6  
25 transects the Ralston Allotment.



1                   And then if you look at approximately on the  
2 northwest portion, which isn't clear but which divides the  
3 Baxter Pasture and the Thunder Mountain Pasture and the West  
4 Pasture, there's a highway which is Nevada Highway 376.

5       Q    Okay. Mr. Pointel, have you marked on this map, in  
6 preparing it, the water sources listed in the Court's show  
7 cause order for count B?

8       A    Yes, I have.

9       Q    And --

10      A    The -- oh, excuse me.

11      Q    Go ahead.

12      A    Okay. These are marked basically with the -- I guess  
13 squares -- green squares and red triangles and yellow -- if  
14 you could enlarge it from there, I could better describe the  
15 symbol on that, please -- and on the unknown symbol, which is  
16 in yellow.

17      Q    Now, what's the significance of the green squares, the  
18 red triangles, and the yellow marking?

19      A    Those are the range improvements that are located within  
20 the TNR authorized from 2007 to 2008 and 2008 to 2009.

21      Q    Now, you have a notation on the map for the green square  
22 as functional. What does functional mean?

23      A    Functional means that they're able to pump water out of  
24 the range improvement.

25      Q    What does the red triangle listed as nonfunctional

1 indicate?

2 A The nonfunctional is that basically the range improvement  
3 is not functioning, and basically they have a difficulty in  
4 pumping water, or it's not up to par.

5 Q And for the unknown, this indicates, I assume, you didn't  
6 have information to make a determination?

7 A The range improvement project report was difficult to  
8 assess if that was functioning or not. The --

9 Q The --

10 A Excuse me.

11 Q Go ahead.

12 A The asterisks, the red asterisks, are marked in Baxter  
13 Pasture and Thunder Mountain Pasture. Those areas were  
14 nonauthorized between 2007 and 2008 and 2008 and 2009.

15 Q Now, I know that we have gone through several different  
16 iterations of this map in the last several days, and we have  
17 provided several different versions to counsel for the  
18 defendants as well as the Court.

19 Is the map that we have here, labeled Exhibit 1371,  
20 is that the most current map that you have prepared?

21 A Yes, it is.

22 Q And to your knowledge and information, is it accurate as  
23 depicted?

24 A As accurate as the data that we have.

25 Q Are there any additional clarifications or corrections

1 that you feel you need to make to enable all of us to  
2 understand what this map represents?

3 A Yes. One thing I didn't cover is the hatch marks, the  
4 hatch marks where the authorized pastures in 2007-2008 and  
5 2008-2009.

6 The South Pasture was basically authorized in  
7 2007-2008. The -- excuse me, the South Pasture. The West  
8 Pasture and the South Pasture were authorized in 2008 and  
9 2009.

10 Q Does Exhibit 1371 accurately portray the location of  
11 pastures and water sources for the Ralston Allotment?

12 A Yes, I -- yes, I believe so.

13 Q Does it also accurately portray the pastures that were  
14 included in the TNRs issued to Gary Snow for the years 2007-8  
15 and 2008-9?

16 A I believe so.

17 MR. SHOCKEY: Your Honor, I would move to admit  
18 this map as an exhibit.

19 THE COURT: Without objection, yes, please.

20 (Government's Exhibit 1371 received in  
21 evidence.)

21 BY MR. SHOCKEY:

22 Q Now, what was the purpose for you preparing this map,  
23 Mr. Pointel?

24 A The purpose of preparing the map was to show where TNR  
25 was authorized during those years of 2007-2008, 2008-2009.

1 Q In other words, the TNR did not authorize Snow to use the  
2 entire allotment but only certain pastures?

3 A That is correct.

4 Q Okay. Which pastures in the Ralston Allotment was  
5 Mr. Snow authorized to graze? You may have just listed this,  
6 but let's just focus on the first one, 2007 and '8.

7 A The South Pasture.

8 Q And let me -- can we bring up Exhibit 1356.

9 Okay. And this -- has this been admitted before, or  
10 is this an exhibit that -- this is an exhibit? All right.

11 Mr. Pointel, can you look at this document. Are you  
12 familiar with this document? Have you seen it before?

13 A Yes, it is in our records.

14 Q And what is that, if you could describe for the Court.

15 A It's the notice of final decision. It's an authorization  
16 for temporary nonrenewable for the -- from October -- could  
17 you enlarge it a little bit, please? I'm sorry.

18 It's the South Pasture of the Ralston Allotment from  
19 October 25th, 2007, for 500 head of livestock from  
20 October 15th, 2008, to May 10, 2009, and the West Pasture of  
21 the Ralston Allotment from April 14, 2008, for 100 head of  
22 livestock from November 1st, 2008, to May 15, 2009.

23 Q And can we flip through until we find the signature page  
24 on this document, please. Go back one. Okay.

25 Mr. Pointel, looking at page 9 of this exhibit, do

1 you see a signature typed in at the bottom?

2 A Yes, it's Mr. Thomas J. Seley.

3 Q And is this the final version of that notice of decision  
4 that was issued on October 24th, 2008?

5 A Yes, it is.

6 MR. SHOCKEY: Okay. I would move to admit  
7 Exhibit 1356, your Honor.

8 THE COURT: That may be admitted.

9 (Government's Exhibit 1356 received in  
10 evidence.)

10 THE COURT: Could I see the top part, please.

11 MR. SHOCKEY: Of page 1?

12 THE COURT: Yeah. And then I just need to go  
13 down. Okay. Next page, please.

14 So this is in response to both a TNR grazing  
15 application and a ten-year grazing permit application, the  
16 Ralston Allotment --

17 MR. SHOCKEY: Where are you looking --

18 THE COURT: -- of Colvin and Sons?

19 MR. SHOCKEY: Your Honor, where on page 2 are  
20 you looking --

21 THE COURT: That was towards the top, first full  
22 paragraph, "Background, the Ralston Allotment is a vacant  
23 allotment."

24 MR. SHOCKEY: Can you mark that, please, the top  
25 of page 2.

1 THE COURT: Okay.

2 "... 1989, set the annual unit months within  
3 the Ralston Allotment at 10,727 AUMs. Prior to 1989  
4 the preference for the Ralston Allotment was 14,695  
5 AUMs. The proposed TNR is well under the preference  
6 of 10,727 AUMs."

7 Final decision is 10,727. Comparison of Preference  
8 Under the Final Decision and Proposed TNR, proposed TNR is  
9 only a portion of that, 4501.

10 Okay. Western Watersheds. Go ahead. Next one,  
11 please. I'm sorry. Back one page. Back one page.

12 Protest -- no back one page. And then forward one  
13 page. I'm sorry. Protest received in 2008. Protest.

14 "... not applicable because the area is not  
15 dominated by sagebrush, there are no riparian areas  
16 in the pastures" ....

17 The allotment has not burned since the area was  
18 settled and not invaded by cheatgrass. The TNR is well under  
19 the prior preference of 45,695 AUMs, and the Ralston Allotment  
20 is in very good ecological condition.

21 And the next page, please.

22 Pasture. Pasture.

23 And next page, please.

24 Bulls will not be authorized, of course. But we  
25 read previously Mr. Snow was not asking for bulls in that TNR.

1 There's a table for allocation of livestock numbers per  
2 pasture.

3 Next page, please.

4 Proper use levels at 55 percent, livestock moved to  
5 new area prior to attaining maximum allowable utilization  
6 level of 50 percent.

7 Livestock will not be allowed to concentrate at any  
8 water haul sites.

9 MR. SHOCKEY: Your Honor, I don't mean to  
10 interrupt, but I just want to note that we will have some  
11 additional maps that will note the location of the water haul  
12 sites if that would be --

13 THE COURT: Right. I'm just going through --

14 MR. SHOCKEY: Certainly.

15 THE COURT: -- you'll notice, to discern  
16 Mr. Seley's intent to impair or take water rights from the  
17 defendants here. That's what I'm going through it for.

18 Of course, he already admitted on the record and for  
19 the record in the trial which you were not here for, he  
20 admitted that he knew that Snow's cattle would be using water  
21 rights of the defendants.

22 But what I'm trying to look for now is any evidence  
23 in this notice of his concern or lack of concern for that  
24 issue.

25 Temporary water haul sites will be used to

1 distribute livestock on the Ralston Allotment; and request for  
2 temporary water haul sites will be made to the authorizing  
3 officer; haul sites removed when no longer required or  
4 authorized.

5 Next page, please.

6 Must have those -- those haul sites must have a  
7 cultural clearance before the placement of the temporary  
8 waters haul.

9 Haul sites removed if utilization levels reach  
10 maximum.

11 Haul sites will not be placed next to or adjacent to  
12 range improvement projects, and range improvement projects  
13 will not be used for watering livestock or other activities.

14 The West Pasture has not been grazed since 2006, and  
15 the available forage during the proposed grazing period is  
16 adequate.

17 The applicant is under a grazing management plan  
18 developed in cooperation with the BLM in which every year a  
19 certain area within a pasture is not grazed or rested. The  
20 allotment is not grazed at full preference so as not to exceed  
21 utilization levels.

22 Next page.

23 Next page, please.

24 Next page, please.

25 Thank you. Go ahead.



1 BY MR. SHOCKEY:

2 Q If I could -- I would turn to page 4 of the document,  
3 please, and ask, Mr. Pointel, with reference to that chart,  
4 can you identify the pastures that the TNR authorized Mr. Snow  
5 to graze in 2008 and 2009?

6 A The pastures that were authorized in 2008-2009 was the  
7 South Pasture and the West Pasture.

8 Q Would it be possible for a cow in the West Pasture or the  
9 South Pasture to have access to waters that are located  
10 outside of those pastures?

11 And could we pull back the map of 1571, please, put  
12 that back up.

13 Did you get the question, Mr. Pointel?

14 A Yes, I did. I'm waiting for the map to -- okay.

15 Between these -- the Baxter Pasture and the West  
16 Pasture and the Thunder Mountain Pasture there is a  
17 right-of-way fence. As I mentioned before, there is Nevada  
18 Highway 376 that splits those pastures.

19 Now, on the northwest corner of the West Pasture,  
20 there is an allotment boundary fence between the San Antone  
21 and Ralston Allotment. If I -- if you would like me to point  
22 it -- can I touch the screen to show or not?

23 Q Yes, that would help.

24 A Okay. Right here (indicating). Sorry.

25 Q And where you just marked in blue indicates what?

1       A     That is a boundary fence between the San Antone Allotment  
2 and the Ralston Allotment.

3                 And this right here, if I may use my finger here  
4 (indicating), apology for the not straight line, but this is a  
5 highway right-of-way fence that's basically a fence on both  
6 sides of Nevada Highway 376.

7                 There was another fence in the south right here  
8 (indicating), and that basically is north of US Highway 6.

9       Q     Okay. And that last -- just for clarification, that last  
10 marking you made is a horizontal line between the West Pasture  
11 and the South Pasture; is that correct?

12       A     That is correct. It is a fence -- right-of-way fence.

13                 And then right on the west side is basically a  
14 topographical barrier of -- called the San Antonio range. It  
15 is not a fence except a few spots. Livestock can go through  
16 on the -- to the other allotment. There are gaps in the  
17 mountain range, but it offers a natural topographic barrier  
18 for most of the places.

19       Q     Now, a moment ago, as the Court was looking through and  
20 identifying certain provisions within Document 1356, the  
21 notice of final decision, if we could bring that back up,  
22 please.

23                 One -- let's see if I can refer you to page 5 of  
24 that document. Page 5 of document 1356. These are -- what  
25 is -- what does this page represent, Mr. Pointel?

1 A The terms and conditions for a temporary nonrenewable to  
2 be authorized to graze on the Ralston Allotment.

3 Q Are terms and conditions required, mandatory elements of  
4 the TNR?

5 A Yes, they are.

6 Q Do you have any personal knowledge of a term and  
7 condition placed on Mr. Snow's grazing pertaining to the  
8 hauling of water?

9 A Yes.

10 Q And what is that?

11 A That he was supposed to contact the authorized officer  
12 and make an appointment with our office, and then the  
13 authorized officer then would assign one of the staff persons  
14 to make an appointment with Mr. Gary Snow to go out and a  
15 locate water haul sites.

16 Q Who is the authorized officer?

17 A Mr. Thomas Seley.

18 Q And who is the person, if anyone, that he designated to  
19 meet with Mr. Snow?

20 A For the water haul sites it could have been variable. I  
21 did go out with Mr. Gary Snow to GPS some of the water haul  
22 sites.

23 Q Okay. One of the other provisions -- I believe it's on  
24 page 6, the next page, please. If I could refer you to  
25 paragraphs 15 and 16. Do these -- you're familiar with these

1 terms and conditions as well?

2 A Yes, I am.

3 Q And what does paragraph 15 mean to you? What -- let me  
4 restate that. What did BLM intend by including this term and  
5 condition in the permit?

6 A That no water haul sites would be placed or adjacent to  
7 any range improvement projects on the Ralston Allotment.

8 Q And by range improvement projects, you're referring to  
9 what?

10 A The ones that were formally authorized, cooperative  
11 agreements and permits.

12 Q Would those include some of the wells or other facilities  
13 that Mr. Hage and others may have installed --

14 A Yes.

15 Q -- on the allotment?

16 And paragraph 16, if you could just describe your  
17 understanding of what that term and condition requires.

18 A It -- basically it says the range improvement project on  
19 the Ralston Allotment will not be used for watering livestock  
20 or other activities, that Mr. Gary Snow was not authorized to  
21 use any other waters than the ones in the water haul sites --  
22 the water hauls.

23 MR. SHOCKEY: Could we bring up Exhibit 1354,  
24 please. And this, I believe, is another new exhibit,  
25 your Honor.

1 BY MR. SHOCKEY:

2 Q Do you recognize this document, Mr. Pointel?

3 A Yes, it is in our record.

4 Q And what is it?

5 A It's basically the authorized officer requested Mr. Gary  
6 Snow to send a letter to affirm that if that particular --  
7 this particular area of concern. So he wrote this letter that  
8 says to whom it may concern.

9 MR. POLLOT: Objection, your Honor, hearsay.

10 THE COURT: It's hearsay if I care about the  
11 truth, and I don't.

12 MR. POLLOT: Okay.

13 THE COURT: Mr. Snow isn't here. I'm certainly  
14 not going to take it as evidence that Mr. Snow used or didn't  
15 use water on the South Ralston Allotment.

16 But to the extent that it shows what Mr. Seley was  
17 aware of or requesting, it's relevant, and I'll overrule it.

18 MR. POLLOT: Thank you.

19 THE WITNESS: Would you like me to read the  
20 statement again?

21 MR. SHOCKEY: Yes. Well --

22 THE COURT: It may be admitted.

23 MR. SHOCKEY: Okay. Thank you, your Honor.

24 (Government's Exhibit 1354 received in  
25 evidence.)

///

1 BY MR. SHOCKEY:

2 Q Do you know why -- do you have any idea why Mr. Snow  
3 wrote this letter to the authorized officer, to Mr. Seley?

4 A Mr. Gary Snow wanted to affirm the terms and conditions  
5 that were on his temporary nonrenewable authorization.

6 Q Could we have Exhibit 1372, which is another map, please.

7 And do you recognize this document, Mr. Pointel?

8 A Yes, I do.

9 Q What is it?

10 A It's basically the same map as before except it shows the  
11 water haul sites authorized by the authorized officer in  
12 relationship to the former range improvement projects.

13 Q And if I'm looking at the caption over on the right side  
14 of the legend correctly, it says TNR 2007 to 2009. So does  
15 this map reflect water haul sites for both of the seasons for  
16 the Snow TNR?

17 A Yes, it does.

18 Q How did you go about preparing this map?

19 A The GPS data, Global Positioning System, was in the --  
20 the data was in our database, and so I just brought forth and  
21 called forth that data to appear on the map.

22 Q Is -- to the best of your knowledge, is Exhibit 1372 an  
23 accurate depiction of the geographic features on the Ralston  
24 Allotment?

25 A Yes, it is.

1 Q Does it accurately reflect the location of authorized  
2 water haul sites for the Gary Snow TNR authorization?

3 A Yes, based on the data that we have in our system, it  
4 does.

5 Q Are there any other corrections or clarifications that  
6 you feel you need to make with regard to this map?

7 A I do not.

8 MR. SHOCKEY: Your Honor, I move to admit  
9 Exhibit 1372.

10 MR. POLLOT: No objection.

11 THE COURT: That may be admitted.

12 (Government's Exhibit 1372 received in  
13 evidence.)

14 BY MR. SHOCKEY:

15 Q If I could ask one question, Mr. Pointel. You referred a  
16 moment ago to the Highway 6 fence. Could you -- is that also  
17 depicted on 1372?

18 A You can't really see the US Highway 6. If I may touch  
19 the screen?

20 Q Yes.

21 A Okay. Basically this little concentrated area is  
22 Tonopah, Nevada. So if you take this line across here, right  
23 here (indicating), it's a highway fence. It's on both sides.

24 Q And does that highway fence extend for the entire length  
25 of the northern boundary of the South Pasture?

A Yes, it does.

1 Q Okay. Thank you. I would like next to bring up  
2 Exhibit 1373 and again ask Mr. Pointel to tell me if you can  
3 identify what this document is.

4 A Yes. It's the same map, except this shows circles. The  
5 central part or the centroid point is where the water haul  
6 site is located.

7 Q So how did you go about preparing this map and depicting  
8 those circles?

9 A Okay. The -- what you use in GIS is a buffer, and you  
10 put what the buffer size is. This is a mile buffer around the  
11 centroid part where the water haul site is. This is to show a  
12 mile distance in radius from the central point of the water  
13 haul.

14 Q And what's the purpose of showing a mile radius?

15 A It was to -- basically to show how far the distance is  
16 from the former range improvements.

17 Q Is this map, 1370 --

18 THE COURT: Just by way of -- I'm sorry to  
19 interrupt, but just by way of reminding myself, the terms and  
20 conditions required that the salt lick be placed one mile from  
21 those water haul sites?

22 THE WITNESS: I believe so -- I believe so, your  
23 Honor.

24 THE COURT: Okay.

25 ///



1 BY MR. SHOCKEY:

2 Q Is 1373 an accurate depiction of the water haul sites for  
3 the Snow TNR showing the one-mile radius under each?

4 A I believe it is.

5 Q Is -- are there any other clarifications or corrections  
6 you need to make with regard to the information depicted on  
7 this map?

8 A Not at all.

9 MR. SHOCKEY: I move to admit 1373, your Honor.

10 MR. POLLOT: No objection.

11 THE COURT: That may be admitted.

12 (Plaintiff's Exhibit 1373 received in  
13 evidence.)

14 BY MR. SHOCKEY:

15 Q Now, your map shows water haul sites for Mr. Snow, and I  
16 think you testified before, but I ask you to verify, was he  
17 required to haul water onto this allotment, or was that  
18 optional?

19 A No, he was required to haul water.

20 Q Okay. We, I believe, had looked before through most of  
21 the terms and conditions listed in the Notice of Final  
22 Decision, Exhibit 1376, and I think we've already looked at  
23 the key ones, and the Court has focused in on a number of them  
24 so I won't spend any more time on that.

25 If we could pull back the first map, 1371, please.

Mr. Pointel, looking at this map depicting the water

1 sources in the West and South Pasture, are most of these water  
2 sources wells?

3 A Yes, they are.

4 Q Do you know if these wells can be turned on and off?

5 A Yes, they can.

6 Q And who would do that?

7 A The -- basically any permittee. If a permittee had a  
8 well that was -- needed some mechanical system and outside  
9 power source to make those mechanical devices functional, you  
10 would have to go and bring basically some type of fuel to --  
11 for the mechanical device to function. So he would turn it on  
12 and off.

13 Q Do you know if any of these wells are automatic?

14 A Could you clarify automatic, please?

15 Q Well, I believe Mr. Hage testified yesterday -- I can't  
16 recall precisely, but I -- he was discussing the process of  
17 turning the wells on and off, and I don't recall whether he  
18 said any of them had automatic switches or anything like that.

19 But do you -- if you -- do you know whether they  
20 are?

21 A Some of them are not, and I believe there's one that has  
22 a windmill.

23 Q Do you know whether any TNR use was authorized on the  
24 Ralston Allotment before Mr. Seley arrived in Tonopah as the  
25 field office manager in 2007?

1 A Yes, I believe there were authorized TNRs before  
2 Mr. Seley came.

3 Q Do you know when TNR use on this allotment began?

4 A I believe it was in 1997 when it started.

5 Q So when -- and do you know if it continued on a regular  
6 basis after 1997?

7 A Yes, up to -- 2009 was the last time it was authorized as  
8 TNR.

9 Q So when Mr. Seley approved the authorization to Mr. Snow  
10 in 2007, that was not a new action that was being instituted  
11 for the first time?

12 A It was not.

13 Q It's fair to say it's a continuation of prior TNR  
14 authorization?

15 A That is correct.

16 Q Do you know whether any TNR use was authorized back in  
17 the 1990s during the time period when the takings litigation  
18 of Mr. Hage and Mr. Hage's father was ongoing?

19 A I believe that the temporary nonrenewable authorizations  
20 started in 1997.

21 Q Mr. Pointel, are you aware of any court orders that have  
22 been issued that would prohibit or enjoin the BLM from  
23 authorizing TNR use on this allotment?

24 A I have never received any guidance or any instructional  
25 memorandum or anything of that sort to do so.

1 Q Do you know whether BLM solicited, requested, that  
2 Mr. Snow submit TNR applications?

3 A I have no record of that, or any record in our files as  
4 such.

5 Q How -- can anyone apply for a TNR?

6 THE COURT: It wasn't quite a complete answer to  
7 his --

8 THE WITNESS: Oh, excuse me.

9 THE COURT: -- question, sir. He's asked do you  
10 know.

11 THE WITNESS: No, I do not know.

12 THE COURT: You're not aware of any solicitation  
13 to Mr. Snow?

14 THE WITNESS: No, I am not.

15 MR. SHOCKEY: With -- your Honor, if I may?

16 THE COURT: Oral or written, sir.

17 THE WITNESS: Oral or written, sir.

18 MR. SHOCKEY: And, your Honor --

19 THE WITNESS: Your Honor. Excuse me.

20 MR. SHOCKEY: -- that question was with respect  
21 to the TNR authorization separate and apart from the other  
22 solicitation issue.

23 BY MR. SHOCKEY:

24 Q Can anyone apply for a TNR?

25 A Anyone can apply for a TNR.

1 Q So, in 2007, did the Bureau receive a TNR application  
2 from Mr. Snow?

3 A We did.

4 Q And again in 2008?

5 A We did.

6 Q Did anyone else apply for TNR authorization on this  
7 allotment in 2008?

8 A I can't remember.

9 Q Do you know if Mr. Tom Colvin applied?

10 A I know that he protested the decision, but I can't  
11 remember if he applied or not. I believe he did.

12 Q What happens when the BLM receives a TNR application?

13 A It is submitted to the authorized officer. The  
14 authorized officer has to do three actions, he has to  
15 consider -- he can't just throw the paperwork away.

16 One, he can ask the TNR to be processed  
17 administratively; two, he can reject it, but it has to be  
18 processed administratively, or he can modify it according to  
19 the resource needs.

20 Q If a TNR is authorized, is that an appealable decision?

21 A It is. There's an appeal provision in the document.

22 Q Do you know if anyone has, in 2007 or 2008, appealed the  
23 grant of the TNR to Mr. Snow?

24 A 2000 -- which year?

25 Q Either 2000 -- anywhere between --

1 A Okay.

2 Q -- 2007 and 2009?

3 A 2008, 2009, the decision was first protested and then  
4 appealed by Colvin and Son and also by Western Watersheds  
5 Projects.

6 Q Do you know whether any effort was made during those two  
7 years to determine whether the range for the Ralston Allotment  
8 could sustain TNR grazing?

9 A I went out in 2008 and did a monitoring analysis and  
10 survey of it.

11 Q What did that determine?

12 A It determined that there was adequate forage to --  
13 without damaging the resources during that period of the TNR.

14 Q Do you know whether Mr. Snow has applied for TNR grazing  
15 authorization after 2009?

16 A He did.

17 Q And has he been authorized to use TNR on this allotment  
18 since 2009?

19 A No, he did not.

20 Q Why?

21 A Because of the increased number of unauthorized  
22 livestock. We were concerned that adding an additional 500  
23 head of livestock could have substantial effect on the  
24 resources.

25 Q And when was that concern made by BLM?

1       A     It was expressed in a letter, due to the increased number  
2 of authorized livestock on the South Pasture of the Ralston  
3 Allotment that we would like for Mr. Gary Snow to withdraw his  
4 application.

5       Q     Could we get Exhibit No. 48, which was admitted at trial,  
6 please.

7                 Mr. Pointel, can I ask you to look at Exhibit 48 and  
8 tell me if you recognize this document.

9       A     Yes, I do.

10       Q     And describe for the Court what it is, please.

11       A     It is basically informing Mr. Gary Snow that he will not  
12 be authorized for temporary nonrenewable grazing use during  
13 your proposed grazing period.

14                 Excuse me. The data records single use basically  
15 utilization at all key areas, both pastures, however, the area  
16 in the vicinity and south of the Tonopah Airport has been  
17 continually grazed in the same area year after year by  
18 trespassing livestock without allowing rest on the grazed  
19 vegetation.

20                 Baxter Springs also needs rest, especially on the  
21 winter fat plant community. This confirms our preliminary  
22 telephone discussions on the grazing capacity on the two  
23 pastures.

24       Q     Okay. The last sentence of that letter from Mr. Seley to  
25 Mr. Snow says that Mr. Snow may contact Marc Pointel --

1 A Right.

2 Q -- if he -- or Mr. Seley if he has questions. Did  
3 Mr. Snow ever contact you about this issue?

4 A Yes, he did.

5 Q What did he say?

6 A We discussed the situation, and he agreed to basically  
7 withdraw his application.

8 Q We've been talking about TNR use authorized by Mr. Seley  
9 on behalf of BLM. I want to switch to a different topic now,  
10 and that pertains to trespass decisions and demands for  
11 payment.

12 THE COURT: Could I interrupt --

13 MR. SHOCKEY: Yes.

14 THE COURT: -- just for a moment?

15 MR. SHOCKEY: Sure.

16 THE COURT: I have to indulge myself. I want  
17 to -- relative to this statement,

18 "It is anticipated that trespassers will  
19 increase their livestock numbers during the grazing  
20 period, and the proposed TNR cannot support both  
21 activities without an increase in the livestock  
22 impact on vegetation."

23 And really what I'm asking, sir, is, you know,  
24 whether this is just a pretextual excuse, recognizing you had  
25 a problem with current litigation, or is it a real statement



1 of decision?

2 And so I'll indulge myself. There was an editorial  
3 in the Review-Journal -- no, a letter -- comment from Senator  
4 Rhoads -- you're acquainted with Senator Rhoads of the State  
5 of Nevada?

6 THE WITNESS: I'm not, sir.

7 THE COURT: Oh, okay. And he wrote an  
8 editorial -- and I'm not citing this for any evidentiary  
9 value, I'm actually citing it just to test your reaction, sir,  
10 and Mr. Seley's reaction --

11 THE WITNESS: Yes.

12 THE COURT: -- quite frankly.

13 And the -- and his comment was -- it was directed  
14 towards the BLM, and he was suggesting that the BLM ought to  
15 bring, quote/unquote, the cattle back. He wasn't very  
16 clear -- and it was just his opinion. He wasn't very clear  
17 whether he was really just talking to eastern Nevada or  
18 central Nevada or both.

19 But his reaction was that with an increase in  
20 lightning and storm-related fires across the Midwest, let  
21 alone Nevada, and with the increased levels of cheatgrass,  
22 that the BLM should consider allowing more cattle grazing in  
23 order to defeat those problems.

24 What is your response to that kind of a comment? Is  
25 there a need to decrease the cheatgrass or allow cattle

1 grazing to solve not only the fire problem but also the  
2 utilization levels and levels of cheatgrass? Or is there no  
3 such problem?

4 THE WITNESS: There are problems in central  
5 Nevada and northern Nevada, your Honor. When I'm talking  
6 about central Nevada, I'm talking the whole part of the state.

7 THE COURT: Right down the middle.

8 THE WITNESS: There are areas in -- certainly in  
9 the Battle Mountain area, Winnemucca area, Elko area where  
10 this fire cycle is now cheatgrass dominant on many surface  
11 areas of the public lands.

12 THE COURT: Right.

13 THE WITNESS: These -- we have kind of lost  
14 almost a war on cheatgrass. To win the war we have to  
15 basically do a lot of investments to convert it back to what  
16 was the original range.

17 THE COURT: By spraying or --

18 THE WITNESS: By --

19 THE COURT: Weed B Gon products, or by grazing?

20 THE WITNESS: There's several things. We can do  
21 reseeding in certain areas. We can do chemical treatment, of  
22 course, of cheatgrass, and livestock can be used as a tool to  
23 control the cheatgrass in certain times of the year,  
24 your Honor.

25 THE COURT: Now, you're the expert, of course,

1 in the field office there. This is Mr. Seley's letter. But  
2 did this reason for denial come from you or from Mr. Seley?

3 THE WITNESS: I went out to take a look and did  
4 a cursory review. And basically each unit of land has a  
5 certain carrying capacity. So it was to apply a conservative  
6 approach to resource management. It was my recommendation to  
7 Mr. Seley to not -- to consider not authorizing the TNR.

8 THE COURT: And what was the reason for your --  
9 your recommendation? Your recommendation?

10 THE WITNESS: Yes, your Honor. My  
11 recommendation is because the livestock unauthorized numbers  
12 were increasing substantially, and adding the additional  
13 numbers, based on my professional opinion and doing a cursory  
14 review on the ground, was that it was going to stress the  
15 resources --

16 THE COURT: Okay.

17 THE WITNESS: -- and cause a certain damage.

18 If I may add, your Honor, one thing, is that  
19 cheatgrass in our area is not as big of a problem. We do have  
20 a lot of cheatgrass when we have a high precipitation event.

21 THE COURT: Right.

22 THE WITNESS: But when we have normal years of  
23 precipitation, and obviously we have drought, there's very  
24 little cheatgrass. So the cheatgrass is really for us  
25 dependent on the weather that we have. Some years it's very

1 prolific; some years it's not.

2 Our studies show that cheatgrass goes -- the grass  
3 goes up and down, almost from zero percent to 90 percent on  
4 some of the data. So --

5 THE COURT: And did you put your recommendation  
6 to Mr. Seley in writing?

7 THE WITNESS: No, it was a verbal communication.

8 THE COURT: Okay. And were there any -- in your  
9 verbal communication, were there any other reasons you  
10 recommended denial?

11 THE WITNESS: No, your Honor. Mine is from a  
12 resource perspective.

13 THE COURT: Okay. Thank you.

14 BY MR. SHOCKEY:

15 Q Mr. Pointel, in your discussion with the Court regarding  
16 cheatgrass, is cheatgrass a problem in the Ralston Allotment  
17 at this time?

18 A No, it really isn't at this time, except if we have high  
19 precipitation years, and it depends when the precipitation  
20 comes. So there's a lot of factors. But overall, our area  
21 has not had the fire cycles that we have in northern Nevada.

22 Q Okay. Before we turn to this next topic, there was one  
23 last point I wanted to clarify.

24 This is on -- I don't think we need to pull it back  
25 up, but Exhibit 1356 is the final decision listing the terms

1 and conditions, and the Court asked you a question about salt  
2 licks.

3 Term and condition number 7 states, quote:

4 "Salt blocks will be placed more than one  
5 mile from water developments."

6 Does that -- do you -- you're familiar with that  
7 term and condition?

8 A Yes.

9 Q And does that mean the salt blocks have to be placed also  
10 one mile farther from any water haul site that Mr. Snow would  
11 use?

12 A Yes.

13 Q In addition to any existing water development on the  
14 allotment?

15 A That is correct.

16 Q All right. If we could turn over -- we're moving along  
17 pretty well here. Just a few more quick topics.

18 I'm going to ask you a couple of questions about  
19 some trespass decisions and demands for payment.

20 A Uh-huh.

21 Q First, Exhibit 2168. And these next three documents, I  
22 believe, were all admitted at the trial.

23 If you could take a look at that and tell me if you  
24 can identify what this document is --

25 A Yes.

1 Q -- from the cover page.

2 A Yes. It's a trespass decision, demand for payment.

3 Q And to whom?

4 A To Mr. Durk Pearson --

5 Q Okay.

6 A -- and -- excuse me, and Sandy Shaw.

7 Q Okay. And then if we could also take a look at 2067.

8 What is that document?

9 A This is a trespass decision and demand for payment.

10 Q Dated?

11 A November 9th, 2009.

12 Q Okay. And, finally, Exhibit 2064. Just identify that,  
13 please.

14 A Trespass decision and demand for payment.

15 Q To whom?

16 A To R.R.L. and L.M. Kretschmer.

17 Q Dated?

18 A November 6, 2009.

19 Q Have you seen these documents before?

20 A Yes. It is in our records.

21 Q Do you know if these trespass decisions are appealable  
22 decisions?

23 A Yes, in any decision that the office will issue or the  
24 BLM will issue, there is usually an appeal provision in that  
25 document.

1 Q Do you know if any of these three decisions were  
2 appealed?

3 A I believe they were not.

4 Q And if I could ask about one more document, Exhibit 2080.  
5 And please identify this, if you can.

6 A Trespass decision, demand for payment.

7 Q To?

8 A To Mr. Ray J. Jensen and --

9 Q Dated --

10 A -- James L. Jensen.

11 Q What's the date?

12 A December 23rd, 2009.

13 Q And have you seen this document before?

14 A Yes, it is in our records.

15 Q And is that also an appealable decision?

16 A It is an appealable decision.

17 Q Do you know whether an appeal was ever taken from this  
18 decision?

19 A Yes, an appeal was done on this decision.

20 Q Okay. And could we pull up Exhibit 2152, please. Can  
21 you identify that document. This was admitted at trial, also.

22 A Yes. This is the Office of Hearings and Appeal rendering  
23 a decision regarding the appeal of Raymond J. Jensen.

24 Q Did your -- have you seen this document before, this  
25 order?

1 A Yes, I have, it's in our records.

2 Q Okay. And do you know if the Tonopah field office  
3 generally was aware of the Jensen IBLA decision?

4 A Yes. I prepared the appeal documentation.

5 Q I'd ask you now to -- I don't think we need to actually  
6 pull it up, but I'm going to ask you a question about count D  
7 of the Court's show cause order.

8 The Court stated -- well, maybe we better go ahead  
9 and pull that, if we can.

10 Okay. There is -- I'm looking for a reference to  
11 the Silver King. Okay. Yeah. I believe it's in the middle  
12 of that page, lines 13 through 16. If you could take a look  
13 at that, and tell me if you're familiar with that language.

14 A Okay. Yes.

15 Q You're familiar with the Silver King -- is it an  
16 allotment? Is that the correct term?

17 A It is.

18 Q Okay. Do you know if BLM has ever alleged any trespass  
19 in the Silver King Allotment?

20 A Not at all.

21 Q Do you know if there are any water sources on the Silver  
22 King Allotment?

23 A As I know of, there is no water source on the Silver King  
24 Allotment.

25 Q So to the best of your knowledge, would the Estate of



1 E. Wayne Hage own any water rights within the Silver King  
2 Allotment?

3 A I believe there's no water rights associated with the  
4 Silver King Allotment.

5 Q Okay. Could we have Exhibit 2693, please.

6 Your Honor, this was admitted at trial as well.

7 Mr. Pointel, can you look at that, and tell me what  
8 this letter is.

9 A Yes. This letter is to notify that the Tonopah field  
10 office is soliciting applications for the new grazing  
11 preference and a ten-year permit for the Ralston Allotment.

12 Q And what's the date of this letter?

13 A November 8, 2011.

14 Q And do you know who signed this letter?

15 A Mr. Thomas J. Seley, I believe.

16 Q Can we just look down to see the signature page, make  
17 sure that's right? Okay.

18 Back on page 1.

19 Does this letter -- I think -- I believe it's in  
20 paragraph number 4. Does the letter have any discussion about  
21 water in connection with this solicitation?

22 A The first sentence of the fourth paragraph:

23 "One of the requirements of the terms and  
24 conditions is that the selectee will have to haul  
25 water unless water rights are secured."

1 Q This -- so you're familiar with this letter --

2 A Yes.

3 Q -- the so-called solicitation letter?

4 A Yes, I am.

5 Q Do you know, has BLM continued to process -- did BLM  
6 receive any solicitation responses or applications in response  
7 to this letter?

8 A Yes, they did.

9 Q And what is BLM doing now with those responses, those  
10 applications?

11 A They are -- we sent a letter to the applicant saying that  
12 we would not process their application.

13 Q And do you know when that letter was sent?

14 A In 2012.

15 Q Do you know -- can you identify, more specifically, when?

16 A After we were directed from -- the oral direction from  
17 the Court to -- not to proceed anymore.

18 Q So at this time BLM is not processing any applications?

19 A Absolutely.

20 MR. SHOCKEY: I have no more questions. Thank  
21 you.

22 THE WITNESS: Thank you.

23 THE COURT: Thank you.

24 MR. POLLOT: We both do. Mr. Hage will go  
25 first, your Honor.

1 THE COURT: Yes, please.

2 CROSS-EXAMINATION

3 BY MR. HAGE:

4 Q Good morning, Mr. Pointel.

5 A Good morning, Mr. Hage.

6 Q That last subject that we're talking about, the November  
7 8th, 2011 solicitation, I believe you said in there -- in that  
8 letter, a person would have to haul water unless they were  
9 able to secure water rights. Is that a fair representation?

10 A I believe that's what the letter said, yeah.

11 Q And you were in the courtroom yesterday; is that correct?

12 A Yes, I was.

13 Q And did you see the letter from Gary Snow to Mr. Seley  
14 saying that he was going to file on all the waters in the  
15 Monitor and Ralston Valley?

16 A Yes, I believe I did.

17 Q And are you aware that subsequently, after this  
18 solicitation, that Mr. Snow did, in fact, file on 22 water  
19 rights in Ralston Valley?

20 A I was -- became aware of it through the authorized  
21 officer that he had applied for all those water rights.

22 Q If I recall correctly, I believe you just testified that  
23 there was no solicitation to Mr. Snow by Mr. Seley of any  
24 temporary nonrenewable permits prior to this solicitation that  
25 we just talked about; is that correct?

1 A That is correct. It is not our intention to solicit any  
2 TNR.

3 Q Mr. Pointel, can I show you what has been marked as  
4 Defendants' Exhibit 2783.

5 And, your Honor, this has not been admitted, 2783.

6 Mr. Pointel, I am showing you an exhibit, a letter  
7 to Mr. Snow from Mr. Seley. Can you quickly just review that  
8 document, please.

9 A Yes.

10 Q Are you at all familiar with this letter?

11 A Yes, a little bit.

12 Q And how is it that you're familiar with this letter?

13 A I believe Mr. Gary Snow called me and wanted to know  
14 about the status of the allotment.

15 MR. HAGE: Your Honor, I'd like to offer  
16 Defendants' Exhibit 2783.

17 MR. SHOCKEY: No objection.

18 THE COURT: That may be admitted.

19 (Defendants' Exhibit 2783 received in  
20 evidence.)

20 BY MR. HAGE:

21 Q Mr. Pointel, I would like to direct your attention to the  
22 second paragraph, I believe it would be the third sentence,  
23 starting with "the allotment."

24 A Yes.

25 Q Can you please read that.

1 A Yes.

2 "The allotment is available under temporary  
3 nonrenewable grazing on a first-come, first-served  
4 basis."

5 Q And continue with the next sentence, please.

6 A "Our office does not advertise available animal  
7 unit months under TNR, and the responsibility lies  
8 with the individual to request such information from  
9 our office."

10 Q And then Mr. Seley is directing Mr. Snow to contact you  
11 if you -- if he had further questions; is that correct?

12 A That is correct, yes.

13 Q Is it still your position that there was no solicitation  
14 of a temporary nonrenewable?

15 A Yes, it is.

16 Q So this letter, in your opinion, was not a solicitation?

17 A The permittee -- well, excuse me, not the permittee, but  
18 anyone can ask questions of us, is there any TNR available.

19 They initiate the telephone call with us, and we are  
20 going to give them the information that is available, but we  
21 don't go out and contact individual applicants saying, oh,  
22 this is available for TNR.

23 Q Okay. So, in other words, you're not actively  
24 advertising, but if they ask you, you're more than welcome to  
25 say, oh, yeah, it's vacant and go ahead and apply?

1 A Well, we give them the facts as part of the customer  
2 service. We don't -- I don't call applicant A or B or C and  
3 tell them this is available.

4 We have had actually a lot of calls about the  
5 Ralston Allotment, and I gave them the facts.

6 Q Mr. Pointel, on the notice of the proposed decision that  
7 was before us earlier, do you recall the language in there  
8 that if the utilization around a temporary water haul site  
9 reached a radius of three miles, then the water haul site  
10 would have to be either discontinued or moved?

11 A Was it -- first of all, I believe it was not the proposed  
12 but the final?

13 Q Oh, sorry, sir. You're probably -- yeah, I think you're  
14 correct on that.

15 A And I would have to take a look, again, at the terms and  
16 conditions, if I may.

17 Q And, Mr. Pointel, this exhibit is 1356.

18 MR. SHOCKEY: Your Honor, the copy I gave  
19 Mr. Hage has a number of yellow highlightings. I don't think  
20 there's anything disruptive, but if you want to get a clean  
21 copy, we can just pull --

22 THE COURT: This is --

23 MR. SHOCKEY: -- it up here.

24 THE COURT: -- already admitted, 1356?

25 MR. SHOCKEY: Yes.

1 THE COURT: Without the --

2 MR. SHOCKEY: Without the highlighting.

3 THE COURT: He may use that. I'll ignore the  
4 highlighting, of course.

5 BY MR. HAGE:

6 Q Mr. Pointel, I believe it's point number 14 towards the  
7 top of that page.

8 A Yes.

9 Q Is that where it states that the utilization or the  
10 temporary water haul site would be moved if there was  
11 utilization of -- within a three-mile radius?

12 A Yes.

13 Q Is it generally expected that the cattle then placed  
14 there would go three miles?

15 A Not necessarily.

16 Q And why is that?

17 A We put that because sometimes in the past the applicant  
18 had few water haul sites, and the livestock concentrated in  
19 those areas, and so that's why we put this particular  
20 three-mile radius in there. It's for the forage, not  
21 necessarily for the waterhole.

22 Q Okay. So, in other words, is it fair to say that three  
23 miles around that water haul site is the forage that is  
24 expected to be utilized?

25 A Partially.

1 Q And why partially?

2 A Livestock can go more than three miles radius.

3 Q And the salt licks are supposed to be placed one mile  
4 from the water source; is that correct?

5 A That is correct, yeah.

6 Q And so it's -- I'm assuming it's obviously expected of  
7 the livestock to at least travel one mile in order just to get  
8 to the salt lick?

9 A They will travel several miles, yes.

10 Q Mr. Pointel, I'm going to show you a portion of the map  
11 marked Exhibit 1373. You can see that, sir?

12 A Yes.

13 Q This was a map drawn by you; correct?

14 A I didn't draw it, it's -- it's from the GIS system.

15 Q Made it, I'm sorry.

16 A Yes.

17 Q But it's your creation?

18 A Yes, it is.

19 Q And the map that we're looking at has some red dots with  
20 a blue circle and a red ring around them, and is that a  
21 one-mile buffer?

22 A It is.

23 Q Looking at your map, it looks like the one-mile buffer  
24 does touch one, two, maybe three water sources owned by the  
25 Hages.



1 A Yes.

2 Q And, in fact, is over the top of one water source  
3 completely; is that correct?

4 A That is correct.

5 Q If you extended that out three miles, would you expect to  
6 take in a bunch more water sources owned by the Hages?

7 A Yes.

8 Q So this map is not representative of the forage  
9 utilization areas that Mr. Snow's cattle would be expected to  
10 be seen in; is that correct?

11 A That is correct.

12 Q And, in fact, it is a far greater area than what's  
13 depicted on this map?

14 A From what point?

15 Q Is it -- in other words, this map -- it's a far greater  
16 area than depicted on this map of what the forage utilization  
17 would be for Mr. Snow's cattle?

18 A That is correct.

19 Q Mr. Pointel, you were talking about the fences between  
20 some of these pastures -- I'll put the exhibit back up here --  
21 and you were talking about fences on highways?

22 A Yes.

23 Q Are you aware if there are any -- are you aware if there  
24 are any underpasses under -- allowing livestock to go under  
25 those highways?

1 A Yes, there are.

2 Q Do you know approximately how many?

3 A No, I couldn't tell you.

4 Q And it was not -- I believe it was stated that Mr. Snow  
5 or any recipient of a temporary nonrenewable permit, one of  
6 the conditions was they could not use any improvements owned  
7 by another person; is that correct?

8 A That is correct.

9 Q That didn't prevent the owner from using those range  
10 improvements, though, did it?

11 A I can't speak for that.

12 Q In the language, the word adjacent to a range improvement  
13 was used. Can you tell me, what is the meaning of adjacent?

14 A No, I can't. I can't.

15 Q So there's no definition of what -- if adjacent was two  
16 feet away or ten feet away.

17 And for clarification, that was in context of the  
18 water haul site cannot be adjacent to a range improvement?

19 A I believe it was decided to put the water haul sites as  
20 far away as possible from the range improvements.

21 Q Did you actually go out and see where the water haul  
22 sites were --

23 A I --

24 Q -- after they were --

25 A Oh, excuse me.

1 Q I'm sorry. Maybe I wasn't clear.

2 Did you actually go back and confirm where the water  
3 haul sites were?

4 A I GPSed only a few of the water haul sites, and Mr. Gary  
5 Snow had a map of the water haul sites.

6 Q Oh, so he put some of them in by himself?

7 A No, no, no. We were given -- we gave him the map and the  
8 location. He came out with us. And then we produced a map  
9 for him for the water hauls.

10 Q Okay. So in some of the water hauls, then, he went out  
11 and took the map and placed the water haul site? Is that a  
12 fair assumption?

13 A He went out with us, variable staff. I only did a few  
14 GPS locations for him, and then he marked it with a flag or  
15 some type of maybe small post or something like that for the  
16 location of those water haul sites.

17 Q And do you know -- did you go back and confirm -- let me  
18 ask you first, who were the other staff that marked some of  
19 these water haul sites?

20 A Staff that came -- that came before me and were there and  
21 have left.

22 Q Okay. Did you go back and confirm that the water haul  
23 sites were actually in the proper location?

24 A The range technician did.

25 Q And who would that have been?

1 A Mr. Jim Diez, who is retired.

2 Q Retired as of when?

3 A I think it was July or August of this year.

4 Q Okay. He testified earlier, and when he testified in the  
5 main trial he was employed by the BLM. That's the reason for  
6 the question.

7 A Yes.

8 Q I wasn't aware.

9 A Okay.

10 Q So it's possible that the -- let's move on.

11 You wouldn't be aware, then, if, in fact, some of  
12 those water haul sites had been moved very close to some range  
13 improvements such as wells then?

14 A No, I would not. We instructed Gary Snow to strictly put  
15 those where they were.

16 Q And if he moved them, would that be on him?

17 A Yes, it would be.

18 Q You mentioned the monitoring of the range, the range  
19 conditions and whatnot.

20 A Yes.

21 Q Are you aware of what the current range condition of  
22 Ralston Valley is?

23 A Not the current ecological site conditions. There was a  
24 survey done back in the '80s, but we have not resurveyed it at  
25 the present time.

1 Q If it -- okay. Maybe I'm not understanding. Is the --  
2 you say in the '80s it was surveyed --

3 A The --

4 Q -- or what the range condition was?

5 A The ecological site conditions were done, I believe, in  
6 the 1980s when the soil survey was being conducted at the same  
7 time.

8 Q Okay. And that --

9 THE COURT: I'm sorry for the interruption.

10 THE WITNESS: Yeah.

11 THE COURT: When you say -- does that include  
12 the utilization levels?

13 THE WITNESS: No, your Honor. When they do a  
14 soil survey, they look at -- let me go back first.

15 An ecological site is the highest expression a plant  
16 can produce based on the formation of the soil, geological  
17 condition, topographic features, and the soils and climate and  
18 those factors.

19 MR. SHOCKEY: Your Honor, could we ask the  
20 witness to get a little bit closer to the microphone.

21 THE WITNESS: Oh, excuse me. Excuse me.

22 That produces what they call an ecological site, and  
23 basically --

24 THE COURT: You're talking basically about the  
25 spacing between the plants?

1 THE WITNESS: The spacing, the kinds and  
2 amounts, the production.

3 THE COURT: No, I was just confused by your  
4 answer. You've done utilization surveys --

5 THE WITNESS: Correct.

6 THE COURT: -- many times since the '80s, I  
7 would think.

8 THE WITNESS: Yes, your Honor.

9 THE COURT: You do them every year?

10 THE WITNESS: No, your Honor, we don't do them  
11 every year because we have many allotments to --

12 THE COURT: Sure.

13 THE WITNESS: -- go. So it --

14 THE COURT: When was the last one you did for  
15 Ralston and Monitor?

16 THE WITNESS: To a -- actual -- where I took  
17 actual data, 2008.

18 THE COURT: 2008?

19 THE WITNESS: Right.

20 THE COURT: And what was the condition at that  
21 time?

22 THE WITNESS: The utilization levels show that  
23 it was negligible. It's zero to five percent for the areas  
24 that were planned to be grazed.

25 THE COURT: Utilization use?

1 THE WITNESS: Yes.

2 THE COURT: In other words, they were full  
3 height, normal expected height, without graze diminishment?

4 THE WITNESS: Correct, your Honor.

5 THE COURT: And when was the one prior to that?

6 THE WITNESS: Prior to that, I would have to  
7 take a look, your Honor. I don't remember because I took the  
8 responsibility in 2007. So I couldn't really tell you which  
9 date was the last one.

10 THE COURT: So you don't know when the last one  
11 was, and you don't know what the utilization levels were in  
12 the prior one?

13 THE WITNESS: Without looking at the data, I  
14 couldn't tell you, your Honor.

15 THE COURT: But you just got through telling me  
16 that you recommended denial of the '09 permit to Snow to  
17 Mr. Seley because you were concerned that with the increasing  
18 levels of unauthorized cattle, the utilization levels would be  
19 exceeded.

20 THE WITNESS: That is correct, your Honor.

21 THE COURT: What did you base that  
22 recommendation on?

23 THE WITNESS: I did a cursory review.

24 THE COURT: What does that mean? You drove out  
25 there?

1                   THE WITNESS: I drove out there, hiked through  
2 the area, and then noted -- I made notes. I didn't take  
3 official forms and all that, but I made note under vegetation,  
4 your Honor.

5                   THE COURT: So when did you walk through or  
6 drive through relative to that recommendation to Mr. Seley?

7                   THE WITNESS: In 2009, the spring of 2009,  
8 your Honor.

9                   THE COURT: And you made note of utilization  
10 levels?

11                  THE WITNESS: Yes, I did, your Honor.

12                  THE COURT: You didn't take a survey, but you  
13 made note?

14                  THE WITNESS: Right.

15                  THE COURT: Did you put this in writing or  
16 written in your notes?

17                  THE WITNESS: It was in my notes, your Honor,  
18 just --

19                  THE COURT: And do you recall sitting here,  
20 sir -- what was the overall impression of the utilization  
21 level? Was it at zero or was it at 50 percent?

22                  THE WITNESS: It was approaching 50 percent in  
23 certain areas, your Honor.

24                  THE COURT: So you made a very summary  
25 utilization review in spring of '09, and it was approaching



1 50 percent.

2 THE WITNESS: Correct, your Honor.

3 THE COURT: And did you put that in your written  
4 notes, sir?

5 THE WITNESS: I put that in just the cursory  
6 notes, your Honor.

7 THE COURT: And do you still have those notes?

8 THE WITNESS: I would have to take a look. I  
9 probably have it someplace, your Honor.

10 THE COURT: You keep them in a file?

11 THE WITNESS: Well, I keep them on my personal  
12 files, your Honor.

13 THE COURT: Well, they're official files, but  
14 they're your files. I mean, it's not your paper --

15 THE WITNESS: No --

16 THE COURT: -- it's the government's paper.

17 THE WITNESS: -- it is the government's paper,  
18 yes, your Honor.

19 THE COURT: And you say that there is a note  
20 there somewhere that says approaching 50 percent utilization.

21 THE WITNESS: Yes, your Honor.

22 THE COURT: And you put that in writing.

23 THE WITNESS: Yes, I did.

24 THE COURT: Okay. Go ahead. I'm sorry.

25 THE WITNESS: Could you repeat the question,

1 please? Thank you.

2 MR. HAGE: We're probably beyond that now. I'll  
3 just go to another question.

4 BY MR. HAGE:

5 Q Oh, actually, yes, I do remember my question. And my  
6 question is, do you know what the range condition is currently  
7 in Ralston Valley?

8 A No, because I haven't done the total analysis on it.

9 Q Total analysis. Have you done a partial analysis?

10 A I haven't analyzed the data yet. I went out this year in  
11 the spring and did collect data, but I have not done the  
12 analysis yet.

13 THE COURT: Well, you can tell us what it is,  
14 though, sir. You have impressions.

15 THE WITNESS: Okay. Based on my impression,  
16 there is a departure from the potential natural community.

17 BY MR. HAGE:

18 Q Okay. Can you explain what the departure from the  
19 natural community is? What is natural community first?

20 A The natural community is the highest expression of a  
21 plant community in -- based on the ecological site.

22 Q And what would that be, what plant community?

23 A Well, it varies according to -- there's a lot of plant  
24 communities. Do you want me to give you a specific example?

25 Q If you would, please.

1 A Okay. We have a plant community, I believe, that has  
2 four-wing -- do I need to tell the Latin names on those or  
3 not?

4 Q No, common is great.

5 A Okay. Winter fat and Indian rice grass. These  
6 communities have the highest expression at PN -- potential  
7 natural communities, which is PNC.

8 These communities then -- you take a look at the  
9 data that you collect, and you see how far it's departed from  
10 the potential, and that gives you an ecological rating.

11 Q Okay. And how do you determine the potential?

12 A The potential, you do basically production, and basically  
13 you note -- also you do an ocular estimate by doing the  
14 percent by weight.

15 Q Okay. And ocular means you're just looking at grass or  
16 looking --

17 A Well, I look at the total -- excuse me. I look at the  
18 total component.

19 Q Like somebody driving down the road, you're just looking?

20 A No, I never do that, Mr. Hage.

21 Q Okay. I don't know.

22 A I go out and actually hike through the area. I take my  
23 pack and go out in the area and take a half-mile transect,  
24 one-mile transect, several-hundred-foot transect to look at  
25 the plant community, and then I note the percent by weight of

1 each species and then compare it to what the ecological site  
2 description is and how far it has departed from that.

3 So is it early seral, which is zero to 25 percent of  
4 the potential, mid seral, 26 to --

5 THE COURT: When you say zero to 25 percent, you  
6 mean depletion?

7 THE WITNESS: No, departure from the  
8 ecological -- the PNC, your Honor.

9 THE COURT: So either reduction in height of the  
10 plants and/or distance between plants? In other words, when  
11 you say zero to 25 percent, you don't mean zero percent at  
12 ground level it's nonexistent.

13 THE WITNESS: No.

14 THE COURT: You mean zero percent from the PNC.

15 THE WITNESS: Right. It's the kinds and amounts  
16 of species, your Honor. Am I explaining --

17 THE COURT: No, you're not.

18 THE WITNESS: Okay. Let me -- perhaps I can  
19 give an example, your Honor.

20 Let's say that --

21 THE COURT: Well, let's use a specific example.  
22 Rice grass. When you -- you hiked through this area this  
23 year?

24 THE WITNESS: Yes, I did.

25 THE COURT: And what was your general

1 observation of the rice grass?

2 THE WITNESS: Let's say that I'm on a specific  
3 site where part of the PNC Indian rice grass is the dominant  
4 grass. Let's say it's composed of up to 50 percent of the PNC  
5 composition.

6 Then I go out and do a percent by weight and take a  
7 look at how much is supposed to be there and how much there is  
8 there.

9 THE COURT: Okay. Now, I'm not asking if, by  
10 way of hypothetical, I'm asking actual. What was your  
11 observation in the Ralston Allotment regarding rice grass in  
12 those areas where it was a majority community?

13 THE WITNESS: We found that there was a level of  
14 departure for from PNC, your Honor.

15 THE COURT: Why?

16 THE WITNESS: It was either mid seral mostly  
17 to -- it appeared to be mid seral.

18 THE COURT: Which would be from what to what?

19 THE WITNESS: From 50 -- it would be 25 to  
20 50 percent, your Honor.

21 THE COURT: So 25 percent less than PNC down to  
22 50 percent?

23 THE WITNESS: Correct, your Honor.

24 THE COURT: Okay. And what's the other strains  
25 that you mentioned?

1 THE WITNESS: The other ones would be winter  
2 fat.

3 THE COURT: Uh-huh. How about winter fat?

4 THE WITNESS: Winter fat we've also found a  
5 departure from the potential, your Honor.

6 THE COURT: And what was your overall average  
7 observation --

8 THE WITNESS: That --

9 THE COURT: -- as the departure?

10 THE WITNESS: I think -- I believe it was still  
11 in mid seral, your Honor.

12 THE COURT: Mid seral, 25 percent down to  
13 50 percent less than PNC?

14 THE WITNESS: Correct, your Honor.

15 THE COURT: And what's another strain?

16 THE WITNESS: Four-wing. Now, I can't remember  
17 on some sites if four-wing is a dominant species or  
18 subdominant species, so -- but we found also a departure from  
19 PNC.

20 THE COURT: Uh-huh. And to what level?

21 THE WITNESS: I would say late -- mid seral,  
22 excuse me.

23 THE COURT: Uh-huh. 25 percent down to  
24 50 percent?

25 THE WITNESS: Right.

1 THE COURT: And what other strains --

2 THE WITNESS: Those are --

3 THE COURT: -- are prominent?

4 THE WITNESS: -- the dominant species we would  
5 look at, your Honor, the four --

6 THE COURT: Can you think of any other strains  
7 that you would look at?

8 THE WITNESS: On different sites I would look  
9 at, for instance, if it's a sagebrush site, for instance, it's  
10 a black sagebrush site --

11 THE COURT: Right.

12 THE WITNESS: -- which is -- normally in those  
13 sites the ecological site description says that PNC, the --  
14 it's about -- the ratio is about 50 to -- 50 shrubs, 50  
15 grasses. I didn't do any surveys in those yet.

16 THE COURT: Okay. And you have no impressions?

17 THE WITNESS: No, not yet, your Honor.

18 THE COURT: Any other strains for which you have  
19 an impression?

20 THE WITNESS: We found that there was in -- on  
21 the silty loam soils, that there was a substantial increase of  
22 halogeten. Halogeten was introduced in I believe the '20s or  
23 '30s in Nevada as a reclamation plant for mining.

24 It is a plant from southeast Asia that has the  
25 ability to convert the chemistry of the soil to high salinity

1 and kill everything around it. It's a very slow process, but  
2 it's a high-pyrning species --

3 THE COURT: So you're delighted when has high  
4 utilization to elimination?

5 THE WITNESS: Actually that is -- the cattle can  
6 graze that, but it is poisonous to sheep, and so it is very  
7 detrimental plant to the native species, your Honor. There's  
8 no way they --

9 THE COURT: Okay.

10 THE WITNESS: -- can compete with --

11 THE COURT: Any other major strains that -- for  
12 which you had observations?

13 THE WITNESS: No, I didn't -- that was my limit  
14 so far, your Honor.

15 THE COURT: Okay. Thank you.

16 THE WITNESS: You're welcome.

17 BY MR. HAGE:

18 Q Out of those strains that you've made observations about,  
19 what portion of the plant -- entire plant community on the  
20 Ralston Allotment, what portion is that?

21 THE COURT: So observations of the entire  
22 allotment, what were the observations? Five percent,  
23 ten percent? In other words, what was your sampling, sir?

24 THE WITNESS: Oh, my sampling, if I may show on  
25 the map --



1 THE COURT: Sure.

2 THE WITNESS: -- if that's possible. I sampled  
3 right in here (indicating). Excuse me. It's this area right  
4 here (indicating) near the --

5 THE COURT: West Pasture.

6 THE WITNESS: -- the West Pasture. I sampled  
7 right in here (indicating).

8 THE COURT: Thunder Mountain Pasture.

9 THE WITNESS: Thunder Mountain, and here on  
10 Thunder Mountain, and I sampled in here (indicating), here,  
11 and I believe in here (indicating), area right in there.

12 THE COURT: Okay. Thank you.

13 BY MR. HAGE:

14 Q Okay. So those were the -- what you referred to the  
15 certain areas of utilization that you sampled?

16 A I did more than utilization -- no. Excuse me. Could I  
17 have clarification? Which year are you talking about, this  
18 year or --

19 Q The 2008, first.

20 A Oh, oh, excuse me. The 2008 was in here --

21 Q Let me clear the screen for you, sir.

22 A Okay. Thank you.

23 Q There you go, sir.

24 A Okay. In here and in here (indicating).

25 MR. SHOCKEY: Your Honor, could we ask the

1 witness to describe --

2 THE COURT: Yes, please.

3 MR. SHOCKEY: -- the particular pastures --

4 THE COURT: So that the record is complete,  
5 you're marking a --

6 THE WITNESS: Oh, excuse me, your Honor.

7 THE COURT: -- circle around the word South  
8 Pasture, and you're marking the eastern portion, and you're  
9 marking a circle in the northwest corner section of South  
10 Pasture, west portion?

11 THE WITNESS: Right. And I went in -- and the  
12 West Pasture would be -- mostly the eastern part of the West  
13 Pasture would have been in here (indicating).

14 THE COURT: Okay.

15 THE WITNESS: Okay.

16 BY MR. HAGE:

17 Q So when you did these samples, would you hike for several  
18 miles out through the brush and get samples, or do you pick  
19 one point, drive down, pick another point? How is that done?

20 A We have -- some of it we have established plots on the  
21 allotment. So I would go to the plot and then do my transect  
22 from the plot.

23 Other areas we do not have plots, but I would go  
24 anyway to take a look at it. Basically my transect could  
25 involve up to a thousand feet to basically half a mile or to a

1 mile. Basically the only way to -- there's not that many  
2 roads in the Ralston Allotment, so you just have to go and  
3 walk.

4 Q Are you aware of a common terminology given to plants  
5 when they die off or start to die off called wolfing?

6 A Yes, I am.

7 Q Okay. Had you -- have you previously seen wolfing plants  
8 out there?

9 A Yes, I have.

10 Q Is the trend of wolfing plants going up or down, do you  
11 know?

12 A Sometimes it would be considered down; sometimes it can  
13 be considered static.

14 Q Considered what?

15 A Static.

16 Q Stagnant?

17 A No, static, s-t --

18 Q Oh, static.

19 A Yeah.

20 Q Okay. The other question then, these -- the -- are you  
21 aware that if a plant is not grazed for a certain period of  
22 time that it will actually become wolfed?

23 A It can, depending on the species of plant.

24 Q These plots that you are talking about, are they fenced  
25 plots?

1 A They're not.

2 Q They're not fenced?

3 A They are not fenced.

4 Q Are you aware of any fenced plots or enclosures on the  
5 Ralston Allotment?

6 A Yes, I am.

7 Q And do you use those to collect data in?

8 A Sometimes I will do comparisons. We do have cages out  
9 there, or we used to.

10 Q Okay. What is the object of the plot that is fenced off?

11 A It was established to compare the grazed and ungrazed,  
12 basically, communities.

13 Q And so you wouldn't expect the -- or would you expect the  
14 plants to be the same if you have excellent -- or let me back  
15 up. That's a pretty poor question.

16 What do you expect to see between the ungrazed and  
17 the grazed plants?

18 A Over time?

19 Q Yes. In other words, for good range management what do  
20 you expect to see between the ungrazed and the grazed plants?

21 A In the enclosure?

22 Q Inside the enclosure compared to outside the enclosure.

23 A Okay. What we have seen is, of course, more production  
24 inside the enclosure, more diversity of plants, higher level  
25 of basically shrubs, and basically what we have seen, also, is

1 the -- more formation of a soil crust, and we've seen a better  
2 proportion of shrubs to grasses.

3 Q Outside the --

4 A Inside the enclosure.

5 Q Oh, inside?

6 A Inside, yeah.

7 Q Okay.

8 A Outside it depends on how it's grazed. Sometimes it's  
9 very similar and sometimes it's not. So it depends on the  
10 level of grazing and the impact of grazing.

11 Q In your overall opinion, what is the condition of the  
12 entire Ralston Allotment, averaging everything out? What is  
13 the condition of that allotment today?

14 A I would say that it's in the mid seral range.

15 Q The mid what?

16 A Mid seral.

17 Q Seral.

18 A Seral, s-e-r-a-l.

19 Q And in dumb cowboy language, can you please explain what  
20 that is.

21 A It's the -- it has to do -- it's actually defined in  
22 ecology as a stage in the succession of a plant community.

23 So let's say that you would have bare ground, and  
24 then you would have pioneering species, and then these  
25 pioneering species, then, would be replaced by other

1 pioneering species, and then other species, until it reaches  
2 the PNC level.

3           Those stages are called seral stages. They're  
4 intermediate stages until the plant community reaches PNC.

5 Q   Okay. I don't think that's what I was asking for.

6 A   Okay.

7 Q   That's over my head anyway.

8           But so the general range condition, is it good, bad,  
9 ugly?

10 A   It's mid seral.

11 Q   So it's not good and it's not bad?

12 A   It's -- if you look at -- if you look at the PNC as  
13 100 percent, okay, then the mid seral would be between 25 to  
14 50 percent.

15 Q   So, in other words, if the historical numbers are 14,000  
16 whatever AUMs, how many cattle would you recommend?

17 A   Well, until I can calculate the current carrying  
18 capacity, I would go with a conservative number at the  
19 beginning until I can give you this is what the carrying  
20 capacity based on the ecological site conditions at that time.

21 Q   And you're currently collecting data for -- to determine  
22 what, say, this next winter's carrying capacity would be?

23 A   Not presently, but --

24 Q   You did mention data was collected. That's why I asked  
25 you.

1 A Right. But I have not done the analysis of it yet.

2 Q Okay. But the data is already collected?

3 A On part of the allotment, not the entire allotment.

4 Q What part of the allotment?

5 A May I show on the map?

6 Q Oh, yes, please.

7 A Okay. I collected data in here, which is the Thunder  
8 Mountain Pasture on the east side. I collected data in the  
9 South Pasture, north -- approximately the northwest pasture, I  
10 believe up to down -- from here to down to approximately here  
11 (indicating). I would have to take a look closer.

12 And then I collected data, I believe, in here, right  
13 in here (indicating), which is the north central portion of  
14 the South Pasture.

15 Q Okay. Sir, now if you were to determine numbers of  
16 carrying capacity for this winter, are these -- is this the  
17 data that you would use?

18 A I -- if I was asked to do so, yes.

19 Q Okay. And that data, was it collected about  
20 approximately what time of the year?

21 A I believe I went there late May, June.

22 Q Okay. Are you aware if there's been any precipitation or  
23 moisture, thunder showers hitting that Ralston Valley range  
24 since then?

25 A Yes.

1 Q Would you say it's a lot, a little?

2 A I haven't gone out yet, so I can't really determine.  
3 Prior to the rains, the vegetation showed on the grass that  
4 approximately 10 to 20 percent had completed their life cycle,  
5 and -- which means from the initial growth to seed dispersion  
6 stage, which is normal to have that during a drought period.

7 This is -- basically the grasses that are -- have  
8 benefitted from the extra moisture is regrowth from the  
9 initial growth. It is not the life cycle of the plant. The  
10 life cycle of the plants were completed by then.

11 This is regrowth. Regrowth is necessary -- is an  
12 important part of the grass because this is where most of the  
13 photo -- a lot of photosynthetic activity will occur for  
14 storage of the carbohydrates to initiate growth for next year.

15 Q I actually have been out there --

16 A Okay.

17 Q -- quite a bit. I am aware of what the range conditions  
18 are.

19 The question is if -- would you go out there again,  
20 and would your data change if you saw that that range was  
21 actually in excellent or super excellent condition?

22 MR. SHOCKEY: Objection, your Honor. That's  
23 purely hypothetical speculation.

24 THE COURT: Overruled.

25 THE WITNESS: Well, I would have to go out, but



1 just having grasses that are very tall doesn't tell you the  
2 health of the range. It just is a visual aspect.

3 You have to take a look at the whole component of  
4 the ground -- of the ecological site. You have to look at  
5 cover data. You have to look at what the trend of the plant  
6 community is doing over time.

7 There's just one -- one study in time does not give  
8 you the results that you're going to see over time. That's my  
9 personal opinion.

10 BY MR. HAGE:

11 Q Okay. One more question on this subject then. If --  
12 maybe it's not going to be one more, but anyway the  
13 question -- if there's -- for some reason -- let's say there's  
14 a ton of grass out there right now, more than we've seen for  
15 years and years and years, and it's big, pretty tall green  
16 grass, and if it doesn't get grazed, is there a threat of a  
17 fire out there?

18 A The probability of a fire in the Ralston Allotment based  
19 on the -- what we've -- the records, and based on the shrubs  
20 evidence of any past fires, because sometimes the shrubs will  
21 show past fires, there hasn't been a fire, as I know of, in  
22 the Ralston Allotment.

23 It could be possible that there has been a fire in  
24 the piñon juniper areas, which I did fire suppression there in  
25 the San Antonio Mountains. But that wasn't the piñon juniper.

1 Q Does the fact that the Ralston Allotment has not burned  
2 give you an indication that it's probably in pretty good  
3 health?

4 A Sometimes, depending on the time of the year, and if not  
5 repeated fires, fire can be very beneficial to the grasses.

6 Q Would it burn out the shrubs, though?

7 A It could burn out the shrubs, but it depends on the level  
8 of severity of the fire.

9 Q Moving on. The alleged numbers -- as stated, there was  
10 grazing. The reason for the decision was because the cattle  
11 were -- or alleged trespassing cattle were increasing in  
12 numbers. What were the alleged numbers?

13 A According to the records, it was about 800-plus  
14 unauthorized livestock.

15 Q Okay. So there is an allegation of 800, and then  
16 Mr. Snow wanted to bring in how many cattle, approximately?

17 A I would have to take a look, but it was 500 head of  
18 livestock.

19 Q And are you aware of the number in the last permit that  
20 was issued to the Hages on that allotment?

21 A No, I can't remember the numbers.

22 Q But we do know the number of AUMs for the -- I think it  
23 was 14,000 was the adjudicated preference. Does that sound  
24 correct to you?

25 A If you say so.

1 Q Does -- we were talking about the mechanism appealing to  
2 the -- appealing a trespass decision by the BLM. In other  
3 words, the BLM has a trespass decision issued against somebody  
4 and the BLM has a mechanism for appeal. Do you recall that?

5 A Yes. There's always an appeal provision with a decision.

6 Q Okay. Is there several avenues to appeal? Can you  
7 appeal to just the IBLA court, or can you appeal to any court  
8 you want to?

9 A No, it has to be appealed through the office of hearings.

10 Q So is there a mechanism, then, to appeal directly to a  
11 U.S. District Court?

12 A Normally you have to exhaust your appeal procedure  
13 through the IBLA system, Interior Board of Land Appeals,  
14 excuse me.

15 Q And is it also BLM policy, then, that you would have to  
16 exhaust that same administrative process even though there's  
17 ongoing litigation in the U.S. District Court?

18 A I -- that you would have to ask another person. The only  
19 thing I'm familiar with is that there's an appeal provision in  
20 the decision.

21 Q Mr. Pointel, do you know if the general livestock numbers  
22 spread out over BLM permits, say across the whole state, is a  
23 general trend downwards, upwards, or the same?

24 A Oh, I can't speak for the whole state.

25 Q And what about in the area that you're familiar with in

1 central Nevada? And if you know -- if you don't know, you  
2 don't know.

3 But I'm talking about from the BLM first came in  
4 there in 1951, in other words, the Taylor Grazing Act with the  
5 formation of the N6 grazing area, the BLM did not enter that  
6 area until 1951, so I just want the numbers from 1951 to the  
7 present. Is the general numbers a downhill trend, an uphill  
8 trend or just a --

9 A I really can't tell you without looking at the numbers.  
10 I've never done the research on it.

11 Q If I -- let me show you Exhibit 563.

12 This was an exhibit that was not admitted or even  
13 offered in the previous trial.

14 And I'll represent to you I have no idea what the  
15 origin of the information on this exhibit is. This was  
16 provided to us from the United States in discovery.

17 My question to you, is this an accurate  
18 representation, or do you know, of the general trend of AUM  
19 numbers?

20 MR. SHOCKEY: Objection, your Honor. This  
21 witness has testified he has no familiarity with the  
22 information. It's way beyond the scope of direct, and he's  
23 indicated he simply hasn't reviewed it or is not familiar with  
24 this information.

25 THE COURT: Overruled. It came from the

1 government.

2 We still need to know, Mr. Hage -- apparently it  
3 pertains to the BLM. We still need to know the source.

4 BY MR. HAGE:

5 Q Mr. Pointel, are you familiar with what source this came  
6 from?

7 A I have never seen this graph before.

8 THE COURT: So the important question, sir,  
9 is --

10 THE WITNESS: Yes.

11 THE COURT: -- this graph represents a downward  
12 trend?

13 THE WITNESS: It appears to be so, your Honor.

14 THE COURT: Are you familiar with that trend?

15 THE WITNESS: For the BLM lands, from 1953 to  
16 2009, your Honor, absolutely not.

17 THE COURT: Are you familiar with any trends  
18 during the time you've been there?

19 THE WITNESS: Yes, not the trend, your Honor, I  
20 know that we've adjusted animal unit months based on the  
21 rangeland health.

22 THE COURT: And has that been static, or has it  
23 been upward or downward?

24 Think carefully about your answer, Mr. Pointel.  
25 This answer didn't particularly help Mr. Forsgren's testimony.

1 THE WITNESS: I believe --

2 THE COURT: His disclaimer of knowledge was  
3 totally unimpressive to me. So think carefully, please --

4 THE WITNESS: Yes.

5 THE COURT: -- when you answer.

6 Are you aware of trends --

7 THE WITNESS: Not for the whole BLM, your Honor.

8 THE COURT: Sure.

9 THE WITNESS: For --

10 THE COURT: How about in the area where you are?

11 THE WITNESS: There has been adjustments in the  
12 animal unit months through decisions, your Honor.

13 THE COURT: Sure. Variances upwards and  
14 downwards over the years?

15 THE WITNESS: Yeah. I --

16 THE COURT: That's what you're talking about?

17 THE WITNESS: Right.

18 THE COURT: No trends upward or downward or  
19 static?

20 THE WITNESS: Your Honor, without looking at all  
21 the decisions, to give an accurate statement --

22 THE COURT: I'm not asking for an accurate, I'm  
23 asking for your impressions.

24 THE WITNESS: Oh, my impressions, there was --  
25 there has been a general decrease in the animal unit months.

1 THE COURT: Significant or substantial?

2 THE WITNESS: I really can't really tell you,  
3 your Honor. I know there's been -- the best of my knowledge  
4 is that there's been a decrease in the animal unit months.

5 THE COURT: So you can't tell me -- and what  
6 period of time are you talking about?

7 THE WITNESS: I've been at the office since  
8 1992.

9 THE COURT: And you were there prior --  
10 previously where were you?

11 THE WITNESS: I was in the Natural Resources  
12 Conservation Service in the state of Washington, your Honor.

13 THE COURT: Okay. And '92 on, a general trend  
14 downward. One percent? Two percent? Twenty? Fifty percent?

15 THE WITNESS: I would have to look at each  
16 individual --

17 THE COURT: Sure.

18 THE WITNESS: -- decision, your Honor, to give  
19 really an accurate percentage.

20 THE COURT: You have no general impressions?

21 THE WITNESS: No. I know that it's been --  
22 general impression I can give you, your Honor, there's been  
23 decrease in animal unit months based on the -- the monitoring  
24 data.

25 THE COURT: Thank you.

1 BY MR. HAGE:

2 Q Mr. Pointel, on the -- on your map you had, I believe,  
3 some water sources labeled as functional, some not functional,  
4 and some you just don't know; is that correct?

5 A That is correct.

6 Q How did you obtain that data?

7 A It was from the rangeland -- excuse me, from the range  
8 improvement project report.

9 Q And when was that report done?

10 A I believe it was done around 2008.

11 Q That was several years ago then?

12 A Yes, it was, yeah.

13 Q You were -- did you ever confirm any of those findings?

14 A No, I didn't.

15 Q That was just the sample -- the data that was handed to  
16 you and you used again?

17 A Right. That is correct.

18 Q So you wouldn't have any idea whether one labelled as  
19 nonfunctional would actually be functional or not?

20 A That is correct.

21 THE COURT: You need to move it along, Mr. Hage.

22 BY MR. HAGE:

23 Q Oh, Mr. Pointel, there is not an authorization in the  
24 2007, 2008, 2009 timeframe for the Baxter Springs -- I think  
25 you guys call it the Baxter Springs Pasture?



1 A Yes.

2 Q Is there -- can you tell me, is there any reason why  
3 there was not a grazing authorization there in that timeframe?

4 A It is basically the decision of the applicant to submit  
5 his grazing application. We don't have the decision-making  
6 power on what the applicant will submit.

7 Q And was there previously temporary nonrenewables in that  
8 Baxter Pasture?

9 A Prior to 2007?

10 Q Yes, prior to.

11 A I believe there was.

12 Q And do you know who those were issued to?

13 A I think there was two parties involved.

14 Q And the two parties are?

15 A I believe, to the best of my recollection, was Stone  
16 Cabin Partnership and Mr. Gary Snow.

17 Q And does the same hold true with the Thunder Mountain  
18 Pasture? Were there previously TNRs in that area?

19 A I believe there was.

20 MR. HAGE: Thank you, Mr. Pointel.

21 THE COURT: Thank you.

22 THE WITNESS: Your Honor, can I take a break? I  
23 have to go to the bathroom.

24 THE COURT: Yes, please. Let's recess for five  
25 minutes, and then we'll continue.

1 THE WITNESS: Thank you.

2 THE COURT: Thank you.

3 (A recess was taken.)

4 THE COURT: Thank you. Please be seated.

5 You may continue.

6 CROSS-EXAMINATION

7 BY MR. POLLOT:

8 Q Good morning, Mr. Pointel.

9 A Good morning.

10 Q I will try to be very brief and hopefully try not cover  
11 ground that we have already covered.

12 I'm showing you, sir, what was marked as  
13 Exhibit 1374 from which you testified earlier. Do you  
14 recognize this?

15 A Yes.

16 Q Okay. I actually am not going to go through this in  
17 detail. I just have a quick question on this.

18 Does this map reflect every water source as to which  
19 the Estate of E. Wayne Hage owns water rights?

20 MR. SHOCKEY: Objection. Actually, your Honor,  
21 we did not introduce this exhibit.

22 THE COURT: Did he testify from it?

23 MR. SHOCKEY: No. 1371, 2 and 3, but not 4.

24 MR. POLLOT: Okay. Well, let me offer this one  
25 for admission, the United State's map.

1 THE COURT: That may be admitted.

2 (Government's Exhibit 1374 received in  
3 evidence.)

4 BY MR. POLLOT:

5 Q Okay. Now, sir, this map -- again, I'm just using it to  
6 ask a fairly simple question. Does this map -- have you seen  
7 this map before?

8 A Yes, I have.

9 Q Okay. And is this map similar to the maps that you did  
10 see and testify from?

11 A Yes.

12 Q Okay. And the water sources identified on this map, are  
13 they identified on the other maps from which you did testify?

14 A I believe they are.

15 Q Okay. Does this map or any of the other maps reflect all  
16 of the water sources as to which the Hage Estate owns or may  
17 own water rights in those areas?

18 A These are the maps for the show cause order.

19 Q Okay. So my question to you, sir, is are these water  
20 sites that were depicted on these maps all of the water sites  
21 in the Ralston Allotment that are at issue?

22 A No.

23 Q You don't know?

24 A No. Not all the range improvements that are related to  
25 Mr. Hage are on this map.

Q And are you considering water sources range improvements?

1 A Yes.

2 Q Okay. Thank you, sir.

3 A Not all -- excuse me. Not all of them are water sources.

4 Q If it's a stream, unless it's been dug out and turned  
5 into a ditch, that's not a range improvement?

6 A Right. But like a fence could be a range improvement, a  
7 cattle guard could also be a range improvement.

8 Q Okay. Again, my question goes simply to the waters that  
9 you --

10 A Right.

11 Q Okay. So they're not all reflected on these maps?

12 A That is correct.

13 Q Now, actually, I had a number of questions to ask you  
14 about livestock behavior. I think I can boil those down now  
15 and based on your testimony.

16 Is my understanding of your testimony correct, sir,  
17 that you have testified that cows will wander --

18 A Affirmative.

19 Q -- on their own?

20 And they may wander more than a mile?

21 A That is true.

22 Q And more than three miles?

23 A That is true.

24 Q Okay. In fact, may wander substantially more than three  
25 miles; is that correct?

1 A That is true.

2 Q And are -- is livestock -- and if you know, I'm sure  
3 you're not holding yourself out as a rancher. But if you  
4 know, are you aware of whether cows are opportunistic when it  
5 comes to water?

6 A They have a great ability to smell water from a far  
7 distance.

8 Q And wherever they are, if there's water here and they're  
9 thirsty, they'll put their head down and drink; is that  
10 correct?

11 A That is a definite possibility.

12 Q Based on your knowledge and experience, sir, do they --  
13 is there any practical way to keep a cow from drinking  
14 wherever it feels like as long as there's water?

15 A Except through herding.

16 Q And even then, if the cow comes across a water source  
17 while he's moseying along, he wants to drink from it, he will,  
18 correct?

19 A Yes, he can -- the cow can act very stubbornly.

20 Q Okay. Now, you did testify that you were relying on  
21 the -- I can't remember exactly what you called it, the  
22 improvement survey to determine or to list down on your maps  
23 here whether these improvements were functional or  
24 nonfunctional.

25 A That is correct.

1 Q And I even believe you used terms like not up to par and  
2 so forth. What does the term functional mean to you?

3 A Functional means that the range improvement, let's take a  
4 source of water, is producing water.

5 Q And nonfunctional means it produces absolutely no water?

6 A No. It may produce water, but it's -- there's no  
7 structure to put it in there or there's no facilities. It's  
8 just a water source.

9 Q So, in fact, you may have something listed on here that  
10 is listed as not being functional, and yet there may be  
11 sufficient water for a cow to drink from that?

12 A That is a possibility.

13 Q Okay. What did not up to par mean?

14 A Well, not up to par -- not up to the engineering  
15 standards that we have --

16 Q Engineering --

17 A -- for range improvement --

18 Q -- standards that the BLM has?

19 A Yes.

20 Q And, again, that does not mean that it is not producing  
21 water?

22 A No.

23 Q Or not capable of producing water?

24 A That is correct.

25 Q In fact, it might even be producing water in substantial

1 amounts?

2 A It could.

3 Q Okay. Do you have a copy of that report that you rely on  
4 with you?

5 A I do not.

6 Q Okay. And, also, I know Mr. Hage asked you this  
7 question, I'm going to ask it in slightly more detail.

8 When you have a water source that's identified here  
9 as nonfunctional, it's quite possible that the rancher, or  
10 whoever owns that water source out there, could come in the  
11 very next day, put in new spark plugs, bring the can of gas in  
12 and make it functional again; is that correct?

13 A Absolutely.

14 Q In fact, were you in this courtroom yesterday when  
15 Mr. Hage was testifying?

16 A Yes, I was.

17 Q And did you hear his testimony that he ordinarily would  
18 go down to the Ralston Allotment, for example, and turn on his  
19 water pumps down there so that his cattle would have water?

20 A I believe I remember that.

21 Q And did you hear his testimony when he said that prior to  
22 the time Mr. Snow had his livestock out there, he would only  
23 have to go down maybe once every three days? Did you hear  
24 that?

25 A Yes, sir, I remember that.

1 Q Okay. And did you hear his testimony in which he said  
2 that he now had to go down whenever Mr. Snow had his livestock  
3 on there and turn that pump on every other day?

4 A Yes, I think I remember that.

5 Q Why would he have to do that in your understanding?

6 A For maintenance.

7 Q Would it be your understanding -- well, did you hear  
8 Mr. Hage's testimony that the reason he had to do that is  
9 because Mr. Snow's cattle were also using water, and in order  
10 to ensure that his cattle had enough water, it turned out he  
11 had to go down there every other day? Did you hear that  
12 testimony?

13 A Yes, I did.

14 Q Okay. Now, the conditions that you imposed on the  
15 temporary nonrenewable permits included a condition that the  
16 livestock would not be allowed to congregate in any water haul  
17 site; is that correct?

18 A That is correct.

19 Q And how would Mr. Snow accomplish that? I'm assuming BLM  
20 was not going to go down there and do it for him.

21 A No. He -- I can't speak for Mr. Snow.

22 Q Well, how might he do that?

23 A How might he do that? Well, he might be filling certain  
24 water troughs at a certain time and then filling up other  
25 water troughs at a certain time.



1 Q And that would, of course, force the cattle to move if  
2 they wanted to drink?

3 A It would force them to move, yes.

4 Q Could he control the direction in which they would move?

5 A He told me he could.

6 Q Was he going to be out there with them 24 hours a day?

7 A He had a ranch hand that was there.

8 Q All the time? If you know. Do you know?

9 A I can't remember -- I can't remember. But he told me he  
10 had a ranch hand down there.

11 Q Okay. But as a practical matter, once they leave that  
12 water source, there's nothing to prevent them to come across a  
13 water source that is not a haul site, is there?

14 A Yes, true.

15 Q Okay. In fact, requiring them to disperse certainly adds  
16 to the probability they're going to use the water source and  
17 not a haul site, doesn't it?

18 A It's a possibility.

19 Q Now, I know you were asked a similar question. My  
20 question is slightly different.

21 What efforts did BLM take to monitor Mr. Snow's, or  
22 any other TNR holder's, compliance with the conditions and  
23 terms of the TNR?

24 A Oh, it's basically the range technician will go out --

25 Q On a set --

1 A -- and do the monitor --

2 Q -- schedule?

3 A Random schedule.

4 Q Do you know personally how often this -- these conditions  
5 were being monitored while Mr. Snow was down there?

6 A No, I do not.

7 Q Did Mr. Seley himself ever go out?

8 A That -- I don't keep Mr. Seley's schedule, so I couldn't  
9 tell you.

10 Q You never accompanied him on any trips out there or he  
11 never said to you, by the way, I'm going to go out and look at  
12 the Ralston Allotment?

13 A Well, he might mention it to me just as a side --

14 Q Sure.

15 A -- note.

16 Q Other than, you know, the -- occasionally sending  
17 somebody out there to look at the area on some kind of a  
18 random schedule or including conditions in the permit, are you  
19 aware whether Mr. Seley took or ordered anyone else to take  
20 steps to ensure that the Hage waters and improvements were not  
21 being used by Mr. Snow?

22 A The principal responsibility was to the range  
23 technicians.

24 Q Well, in the light of the fact that Mr. Seley testified  
25 that he knew that cows could not really be kept from using

1 Mr. Hage's sources, that they were simply going to -- if they  
2 were out there and they came across the Hage water source and  
3 they were thirsty, they were --

4 THE COURT: Be brief --

5 MR. POLLOT: -- going to use it--

6 THE COURT: -- counsel. We've been over --

7 MR. POLLOT: Okay.

8 THE COURT: -- this 25 times.

9 MR. POLLOT: All right. Sorry, your Honor. I  
10 apologize.

11 THE COURT: I also remind you, I'm not going  
12 beyond today.

13 MR. POLLOT: I understand, your Honor. I don't  
14 want to either.

15 THE COURT: I'm cautioning both sides. I'm  
16 going to rule today one way or the other, and so it will be  
17 with or without your closing arguments. So I let all of you  
18 know that you're treading on your own closing argument time.

19 MR. POLLOT: Thank you, your Honor.

20 BY MR. POLLOT:

21 Q You were also asked about whether or not you considered a  
22 new temporary nonrenewable permit, whether that was simply a  
23 continuation of existing permits, and I believe your answer  
24 was yes.

25 If that's the case, what does the nonrenewable mean

1 in TNR?

2 A It cannot exceed one year of authorization.

3 Q Okay. So you can renew it, it's just considered a  
4 brand-new permit?

5 A It's considered a brand-new authorization.

6 Q Okay. Now, I do want to -- you did testify, by the  
7 way -- just to kind of set my inquiry up, you testified,  
8 again, as far as temporary nonrenewable permits, BLM doesn't  
9 solicit those?

10 A Affirmative.

11 Q Orally or in writing?

12 A Orally or in writing.

13 Q Or in any fashion?

14 A Or in any fashion.

15 Q Okay. I want to show you what has been marked as  
16 Exhibit 48. This was put up by the United States earlier.

17 THE COURT: Already in evidence or no?

18 MR. POLLOT: I believe it's in evidence. But if  
19 not, I so move.

20 THE COURT: Okay.

21 MR. SHOCKEY: Your Honor, I believe that's in  
22 evidence from the trial.

23 THE COURT: Thank you.

24 BY MR. POLLOT:

25 Q Okay. I would like to direct your attention, sir, to --

1 well, let me zoom in for a second. Do you recognize this?

2 A Yes.

3 Q Okay. I draw your attention to the next to the last  
4 sentence in this letter above Mr. Seley's signature stamp.

5 A Uh-huh.

6 Q Can you read that?

7 A Yes. I believe it starts with "we"?

8 Q Right.

9 A Is that -- okay. "We" --

10 Q And then the -- it -- "We request you withdraw your  
11 grazing application."

12 So that wasn't the denial, it was a request;  
13 correct?

14 A That was a request.

15 Q What does the next sentence say?

16 A It says,

17 "Please consider submitting another grazing  
18 application for the east portion of the South Pasture  
19 and the west portion for 2010-2011."

20 Q Does that seem like a neutral statement to you?

21 A It --

22 Q Such as you may reapply in the future or anything like  
23 that?

24 A Well, when the grazing application is denied, the  
25 applicant will ask, well, do I have another option, and it

1 says we explained the other option.

2 Q Okay. But he -- this wasn't denied, was it? It was he  
3 asked -- he was asked to withdraw it?

4 A Yes, because if it's not withdraw, then Mr. Seley, or the  
5 authorized officer, has to make a decision --

6 Q And do a lot of paperwork and --

7 A Make a decision to do -- to deny the application which  
8 can be protested and which can be appealed.

9 Q True. But that wasn't my question.

10 This sentence really --

11 THE COURT: Counsel, this --

12 BY MR. POLLOT:

13 Q -- appears to --

14 THE COURT: -- is all argument.

15 MR. POLLOT: Okay. You're right, your Honor.

16 I --

17 THE COURT: I got everything out of here,  
18 including the fact that the data recorded negligible use, zero  
19 to five percent, however, we're worried about trespassing  
20 livestock. So that's why they were denying it. So I've got  
21 all of that.

22 MR. POLLOT: I withdraw the question,  
23 your Honor.

24 BY MR. POLLOT:

25 Q You testified about the decision as to Mr. Ray Jensen --

1 A Yes.

2 Q -- earlier today. Do you recall that?

3 A Yes.

4 Q You were asked whether that decision was appealed, and I  
5 believe you answered yes, correct?

6 A Yes.

7 Q Who appealed that decision?

8 A Mr. Jensen.

9 Q Are you sure?

10 THE COURT: And we've been over that, too,  
11 counsel.

12 MR. POLLOT: Okay.

13 THE COURT: We got it from Mr. Jensen's mouth.

14 MR. POLLOT: Okay. Thank you, sir.

15 BY MR. POLLOT:

16 Q Sir, you -- let's talk very briefly about the letter of  
17 solicitation. Testimony has been that was sent to about 75  
18 different people.

19 Do you know whether any of the people to whom that  
20 letter was sent owned any water rights in the Ralston  
21 Allotment?

22 A No.

23 Q You don't know?

24 A I do not know.

25 Q Okay. Do you know if any of the 75 people to whom they

1 sent that solicitation owned any water -- I mean, excuse me,  
2 owned property adjacent to the Ralston Allotment or close to  
3 the Ralston Allotment?

4 A Close to the allotment, yes.

5 Q Who would those people be?

6 A It would be BTAZ Nevada.

7 Q I mean what persons.

8 A BTAZ Nevada.

9 Q Okay. I'm sorry.

10 A And Colvin and Son.

11 Q Uh-huh.

12 A Stone Cabin Partnership.

13 Q Okay.

14 A That's it.

15 Q Mr. Gary Snow?

16 A No.

17 Q Okay.

18 A As I know of.

19 Q As far as you know?

20 A Yes.

21 Q In order to get a new grazing preference, would you have  
22 to either have a land -- commensurate land, or whatever the  
23 phrase currently is, or a water right?

24 A You would have to have -- you would have to submit with  
25 your application a list of your base property.



1 Q Okay. So base property. What about water rights?

2 A You would have to submit a -- a list of your water rights  
3 if you had water rights, or you could haul water.

4 Q Is it your understanding of the regulations under which  
5 you operate you better have one of those to qualify for a  
6 preference?

7 A Yes.

8 Q Okay. Now, you have testified about your cursory review,  
9 and you talked about it quite a bit, and I don't mean to  
10 belabor it, but I do have a couple of questions for you.

11 When you're saying -- when you went out there in  
12 your cursory review, which I believe you said was in April --

13 A Yes.

14 Q -- you said that utilization, in your opinion, was  
15 approaching 50 percent --

16 A Yes.

17 Q -- is that correct?

18 A Yes.

19 Q Is that 50 percent by weight or 50 by height?

20 A Height-weight measurements.

21 Q Height-weight. You measured --

22 A Well, the thing is, is that you have already established  
23 tables.

24 Q Uh-huh.

25 A And you measure the height of the -- basically of the

1 plant, and you have a -- this chart that's already been done  
2 over many years, and then you measure the height of the  
3 vegetation.

4 Q Okay. This was a cursory review; correct?

5 A Yes.

6 Q And I believe your testimony was it was simply -- you  
7 kind of went out there and you looked. My question for you  
8 is, that means you didn't run transepts?

9 A No, but I walked in the area.

10 Q You walked in the area.

11 A Yes.

12 Q You didn't take clippings?

13 A No.

14 Q You didn't throw them on a scale?

15 A No.

16 Q You didn't compare them to an enclosure or a plot?

17 A Or a cage.

18 Q Okay.

19 A No.

20 Q All right. Now, other than, you know, the heavy-duty  
21 work you've been doing with transepts, after the time you did  
22 all that, have you been up there since, to look at the area?

23 A Yes.

24 Q When?

25 A In 2012.

1 Q When in 2012?

2 A In June and July.

3 Q Okay. Next question, sir, very quickly.

4 When you go out there and you see utilization  
5 approaching, you know, 50 percent, is that predictive in any  
6 way of what to expect to find, you know, when the next grazing  
7 season comes along?

8 A That is one of the factors we look at.

9 Q Okay. This is a winter allotment, isn't it?

10 A I believe it is fall to maybe spring.

11 Q Okay. So you come out there at the end of the year.  
12 That's -- April, you're getting pretty close to the end of  
13 that grazing season?

14 A Well, what we do is we do one before the initial growth  
15 the next spring because that will give how much was utilized,  
16 that level.

17 Q Okay.

18 A And then we will do another one in the spring when the  
19 livestock leave.

20 Q Okay. So when you went out and took your cursory look in  
21 April --

22 A Yeah.

23 Q -- you went back, as I understand it, and you then told  
24 Mr. Seley, you know, this is what I saw; is that correct?

25 A Yes, it is.

1 Q You gave him very little data points on which to decide  
2 the utilization of that area, didn't you? You went out, you  
3 looked, you didn't measure, you didn't weigh, you just took a  
4 peek?

5 A I have 30 years of monitoring experience, so I think I  
6 can look at even a cursory review, given a pretty good  
7 professional assessment.

8 Q Would you be allowed to make a decision to reduce, say,  
9 AUMs permitted based on the cursory examination?

10 A Absolutely not, but I would never use strictly  
11 utilization as one of the factors to reduce any proposed  
12 animal unit. That would be totally preposterous and totally  
13 unprofessional on my part.

14 Q Okay. Well, I'm not accusing you of anything, sir. I'm  
15 just trying to understand.

16 And then, finally, really quick final area. If I  
17 understood correctly from your testimony, the last time a good  
18 really hard look at this area was used in AUMs that were  
19 allowed, I think at one point it was 14,000 and some-odd, and  
20 subsequently at least 10,000, and therefore the report was  
21 that you're well away from, you know, the -- what was  
22 ordinarily allowed out there.

23 Am I correct in understanding that 500 cattle  
24 represent approximately 1400 AUMs? I believe that's what I  
25 saw --

1 A Yeah, I guess -- I guess --

2 Q So putting another five to 800 would increase the burden  
3 out there by 1400 to 1800 AUMs out of 10 to 14,000?

4 THE COURT: It would be 500 times the number of  
5 months during the winter.

6 THE WITNESS: Yeah. I would have to look at it  
7 on paper.

8 BY MR. POLLOT:

9 Q Okay. Those were the factors in which decisions were  
10 made about recommending that Mr. Snow withdraw his  
11 application; correct?

12 A Yes.

13 MR. POLLOT: Okay. I have no further questions,  
14 your Honor.

15 THE COURT: Thank you.

16 REDIRECT EXAMINATION

17 BY MR. SHOCKEY:

18 Q Mr. Pointel, Mr. Hage asked you about -- looking at  
19 Exhibit 1356, the decision -- notice of final decision to Gary  
20 Snow, about paragraph 14, and which says the temporary water  
21 haul sites will be removed if the utilization levels have  
22 reached the maximum allowable use levels within a three-mile  
23 radius.

24 To be clear, I think he asked you about utilization  
25 levels. What's the significance of the maximum allowable

1 level language in that condition?

2 A Well, the thing is we'd like to have the -- normally when  
3 we work the permittees, if they're approaching 50 percent,  
4 it's going to take them quite a bit of time to move them to  
5 another area. So we would -- we would like to have them move  
6 to different areas when it's going to be approaching  
7 50 percent. That's why the maximum.

8 Q Mr. Hage asked you whether the cattle put on by Mr. Snow  
9 might drink water from the Hage water rights.

10 Is there any -- any way to limit the ability of  
11 Mr. Hage's cattle to drink water from the Gary Snow water haul  
12 sites?

13 A I don't think so.

14 Q Even though the Snow cattle were out there under a BLM  
15 permit and the Hage cattle were not?

16 A Yes.

17 Q The -- do you know whether the number of Hage cattle on  
18 the allotment had increased over time during the 2007 to 2009  
19 period when Mr. Snow had his TNR?

20 A Yes.

21 Q So might the increase in the number of Mr. Hage's cattle  
22 be a reason why there was more water being consumed?

23 A That would be a definite possibility.

24 Q There was a question about turning on the water source of  
25 wells. If a water source were off, if it required to be

1 turned on and it had been turned off, am I correct in assuming  
2 there would simply be no water consumed or used at that site?

3 A If it has a mechanical device and it needs an outside  
4 power source.

5 Q Mr. Hage asked you a question about the current  
6 conditions in the carrying capacity.

7 Mr. Snow has had no TNR since May 19 -- May 2009; is  
8 that right?

9 A That is correct.

10 Q So whatever the current conditions may be out there, that  
11 would not pertain to Mr. Snow's use of cattle on the Ralston  
12 Allotment at this time?

13 A That's correct.

14 Q The Court asked you if you had a sense or information or  
15 any testimony to offer in terms of the general trend in  
16 decreasing AUMs, and what was your -- do you recall your  
17 testimony on that point?

18 A My recalled testimony is I believe there was a general  
19 trend of decreased AUMs based on the decisions, but I couldn't  
20 give him -- I couldn't give him a percentage because there's  
21 so many decisions that the BLM has taken that I haven't read  
22 them for several years, so I couldn't really give an  
23 accurate statement.

24 Q Do those decisions reflect an identified policy of BLM,  
25 if you know?

1       A     Well, the decisions are based on -- we do permit  
2 renewals, and there's a decision with the permit renewal.  
3 Based on the rangeland health and monitoring, it will be  
4 determined if the AUMs need to be changed, decreased,  
5 increased, or remain the same. So it all depends on what the  
6 monitoring data will tell us during the analysis process.

7                 And then we have standards and guidelines that were  
8 developed in 1997 and 2008 developed by the Resource Advisory  
9 Council for the Mojave-Southern Great Basin where we have  
10 standards in three areas that we have to meet.

11       Q     So any decisions or recommendations or any analysis that  
12 you would have, is it fair to say, would be based upon  
13 monitoring data?

14       A     Absolutely.

15       Q     There was a question with regard to Exhibit 1374, the  
16 newest map, fourth map, that Mr. Pollot introduced.

17                 He asked if that showed all of the water sources  
18 on -- of the Hages on the Ralston Allotment.

19       A     Yes.

20       Q     And I believe you testified no, your purpose was only to  
21 show the specific ones that the Court had listed in its show  
22 cause order.

23       A     That is correct.

24       Q     Do you know if there are -- I assume there are several  
25 additional Hage water sites or water range improvements other



1 than those that you had listed on that map?

2 A Yes.

3 Q And do you know what those are offhand, or how many of  
4 them there are?

5 A I can't tell you how many there are without looking  
6 at the total --

7 Q Could --

8 A -- map. I know there's -- there were pipelines that  
9 weren't listed in there. There are cattle guards that weren't  
10 listed in there, I believe.

11 Q Is one of them the Frazier Spring Well?

12 A Yes, that is -- Frazier Springs, yeah.

13 Q What about the Pine Creek Well?

14 A Pine Creek Well was listed on there.

15 Q It was? Okay.

16 A Yeah.

17 Q And what about the Highway Well?

18 A Highway Well was not listed on --

19 Q Do you know whether Mr. Hage has a water right for that  
20 well?

21 A I can't remember on that.

22 Q Okay. You were asked by Mr. Pollot is there any way to  
23 prevent cows from wandering.

24 You also testified in response to my question there  
25 are some fences out there. Do the fences keep the cattle from

1 wandering in certain -- from one pasture to others?

2 A Yes.

3 Q Why were there so many water haul sites that were  
4 identified on one of the maps you showed for Mr. Snow to bring  
5 his water? What's the purpose of having, you know, 10 or 15  
6 different water haul sites?

7 A It is really the decision of the applicant on how he  
8 wants to move and manage his livestock. So we try to  
9 accommodate them for --

10 Q By having more water haul sites is there more flexibility  
11 to be able to move the cattle around?

12 A Affirmative.

13 Q The -- you were asked, I believe by Mr. Pollot, about  
14 whether you or BLM or Mr. Seley or anyone actively monitors  
15 the activities of the permittee, Mr. Snow in this case.

16 A Yes.

17 Q And would the same consideration apply to cattle of  
18 Mr. Hage? Do you monitor his cattle, as well, on the  
19 allotment?

20 A The only thing that we really monitor was to count the  
21 unauthorized numbers.

22 Q I asked you a moment ago about, you know, some additional  
23 water sites, and I think you referred to some pipelines. Are  
24 there pipelines in either the West Pasture or the South  
25 Pasture where Mr. Snow had his TNR authorization?

1 A No.

2 MR. SHOCKEY: Okay. I have no further  
3 questions.

4 THE COURT: Okay.

5 Thank you, sir.

6 THE WITNESS: Thank you.

7 THE COURT: That's all. You may step down.

8 (The witness was excused.)

9 THE COURT: We'll recess until 1:15. Is that  
10 enough time, or no?

11 MR. SHOCKEY: It is for the government,  
12 your Honor. If we can just have a preview of --

13 THE COURT: Right. What --

14 MR. SHOCKEY: Did you have a particular amount  
15 of time that you need --

16 THE COURT: Well, maybe I need to set it. How  
17 many witnesses do you have left?

18 MR. SHOCKEY: Oh, no witnesses. We're done.

19 THE COURT: You're done?

20 MR. SHOCKEY: Yes.

21 THE COURT: Do you have any other witnesses?

22 MR. POLLOT: No, your Honor.

23 THE COURT: Okay.

24 MR. POLLOT: Wait a minute. One moment.

25 THE COURT: Terrific.

1 MR. HAGE: Your Honor, do we get a rebuttal  
2 witness?

3 THE COURT: If you -- if you have to rebut  
4 something that was raised in the course of their last witness  
5 or two. Otherwise, no. If you're just going to cover the  
6 same territory, no.

7 MR. HAGE: I don't think we need to, your Honor.

8 THE COURT: Okay. All right.

9 Let's go until 1:30 then. I won't cut you off.  
10 We've got the afternoon. I don't want you to take two hours,  
11 please. I would think one hour per side is plenty, huh?

12 MR. SHOCKEY: Your Honor --

13 THE COURT: No? Maybe not.

14 MR. SHOCKEY: Your Honor, one hour for the  
15 government will be sufficient. I know we have some people  
16 anxious to try to catch some airplanes --

17 THE COURT: You bet.

18 MR. SHOCKEY: -- and try to make every effort to  
19 accommodate them.

20 MR. POLLOT: Your Honor, if I may, would this be  
21 the same as we did at trial? When you say both sides, one  
22 hour combined --

23 THE COURT: Right.

24 MR. POLLOT: -- for them, and one hour combined  
25 for us?

1 THE COURT: Correct.

2 MR. POLLOT: Okay.

3 MR. WIENER: And I would certainly request some  
4 time on behalf of the two individuals who have been charged  
5 with --

6 THE COURT: You bet.

7 MR. WIENER: -- contempt.

8 THE COURT: So do you need more than one hour?  
9 Do you need one and a half hours --

10 MR. WIENER: Well, I don't know how much --

11 THE COURT: -- combined?

12 MR. WIENER: Could you just deal with us  
13 separately, your Honor? I don't know how much Mr. Shockey is  
14 going to say or not say on behalf of the government, and I'll  
15 try to avoid -- I will go after him.

16 THE COURT: Okay. I won't set any limits then.  
17 You can go as long as you want.

18 MR. SHOCKEY: Just so that we're clear, you  
19 identified the burden of being on the defendants, so they will  
20 go first with the closing, I assume?

21 THE COURT: Sounds fine.

22 Okay. Thank you. 1:30.

23 Could I have that exhibit off the camera, please.  
24 Hand that up to, Madam Clerk. Thank you.

25 (The noon recess was taken.)

1 RENO, NEVADA, FRIDAY, AUGUST 31, 2012, 1:37 P.M.

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3  
4 THE COURT: Thank you. Please be seated.  
5 Welcome back.

6 All right. Your closing argument, please.

7 MR. WIENER: Excuse me, your Honor. I have a  
8 couple of preliminary matters, if you wouldn't mind me  
9 addressing.

10 THE COURT: Uh-huh.

11 MR. WIENER: First, there was a document, the  
12 *Alt* decision that was issued by Judge Hicks that your Honor  
13 denied admission of it during--

14 THE COURT: Right. You had argued it, of  
15 course.

16 MR. WIENER: Right. But I ask the Court, based  
17 on judicial notice, to have that marked and admitted as an  
18 exhibit. It's Exhibit 1365. I'll explain what the relevance  
19 was. Your Honor didn't see any relevance at the time.

20 THE COURT: No, because it can simply be  
21 argued -- you want to argue that they were relying on that  
22 decision.

23 MR. WIENER: Correct. So that the decision is  
24 in the record that this would be part of the institutional  
25 knowledge of the --

1           THE COURT: But there's absolutely no testimony  
2 here that they were relying on that decision. What does that  
3 decision hold, by the way?

4           MR. WIENER: It -- well, it holds that even if  
5 there is a written lease agreement that -- a third party who  
6 entrusts cattle to someone without a permit cannot excuse  
7 trespass if the person entrusted with the property -- with the  
8 cattle grazes it on public lands without a permit.

9           So partly it's because of -- it's the institutional  
10 knowledge of the district here -- it came out of the Battle  
11 Mountain District which the Tonopah office is a part of, and  
12 it goes to the specific intent charge that was in the  
13 citation --

14          THE COURT: You, of course, may argue it and  
15 make reference to it. It's persuasive authority. But I will  
16 not let you mark it or admit it. There's absolutely no  
17 evidence of it in the record that they relied on it or  
18 intended to rely on it.

19          Because, you know, a defense to contempt can be I  
20 listened to the advice of my attorney, in which case, of  
21 course, you have to waive the privilege and you have to allow  
22 the parties and the Court to examine the consultation given  
23 and the advice given.

24          You haven't done that here, and you've offered no  
25 evidence that they relied on it, that they read it, that an

1 attorney told them it was applicable and was a basis,  
2 therefore, to go ahead and issue trespass notices. So,  
3 therefore, there's no evidence in the record, and I would  
4 intend to deny it.

5 MR. WIENER: Might I say this, your Honor.

6 THE COURT: Sure.

7 MR. WIENER: Your Honor, is talking about direct  
8 evidence. Circumstantial evidence is also admissible. I  
9 would respectfully suggest that there's circumstantial  
10 evidence --

11 THE COURT: What evidence is that?

12 MR. WIENER: -- that a decision out of this  
13 district court, not your Honor's, but Judge Hicks' --

14 THE COURT: Circumstantial evidence that they  
15 relied is simply the fact that this Court issued a judgment?

16 MR. WIENER: Yes.

17 THE COURT: How would I know if they ever read  
18 it? How do I know that the --

19 MR. WIENER: Well, of course, they did. They  
20 were the litigants. It was --

21 THE COURT: Of course, they did?

22 MR. WIENER: Yes. It was -- it was litigation  
23 over --

24 THE COURT: Overruled. That's not  
25 circumstantial evidence that they ever read it.



1 MR. WIENER: No.

2 THE COURT: Your statement, of course, is not  
3 evidence.

4 MR. WIENER: But I'm saying it involved the  
5 district that -- the Battle Mountain District and which  
6 Tonopah is part of, and certainly everybody within the  
7 district would have known about that holding because it  
8 covered the exact --

9 THE COURT: How about their Aunt Matilda? Do we  
10 know she would have read it?

11 MR. WIENER: If she was a BLM employee in the  
12 Tonopah office, she would have.

13 THE COURT: So it's a valiant argument, but  
14 you're arguing to me that just by virtue of being a BLM  
15 employee therefore I should take an inference that they read  
16 it and relied on it. That's the argument. I think I've  
17 restated it.

18 MR. WIENER: Okay.

19 THE COURT: Denied.

20 MR. WIENER: I have another issue, too.

21 THE COURT: Sure.

22 MR. WIENER: I'm going to renew our motion so  
23 that we don't have take any more time talking about Steven  
24 Williams, the employee of the Forest Service.

25 There was not only --

1 THE COURT: This is a motion to dismiss?

2 MR. WIENER: Yes.

3 THE COURT: I'll decline your opportunity until  
4 the main argument. You may renew it, of course, as part of  
5 that argument.

6 MR. WIENER: During my argument?

7 THE COURT: I'm not going to let you get up  
8 three times, in other words.

9 MR. WIENER: Oh, I see. Well, I thought I could  
10 save you having to hear me for a few more minutes talk about  
11 Steve Williams.

12 All right. I have another issue to bring before  
13 your Honor, too. Your decision was that the potential  
14 sanctions here are that the defendants could be compensated  
15 for damages they suffered as a result of any contempt.

16 THE COURT: Potential remedy.

17 MR. WIENER: Yes.

18 THE COURT: Yeah.

19 MR. WIENER: And if there are no damages that  
20 your Honor can award based on the evidence, then I  
21 respectfully suggest we can abbreviate this proceeding with  
22 all this talk of damages. And, in fact, if there are no  
23 damages flowing from the contempt --

24 THE COURT: I have to deny your motion unless  
25 you can show me case authority that if there's no damage there

1 can be no finding of contempt.

2 MR. WIENER: Well, I could suggest this on  
3 behalf of my clients, Steven Williams and Tom Seley. Their  
4 issue is whether there's going to be consequences.

5 THE COURT: Sure.

6 MR. WIENER: I'm sure you can find -- if you  
7 wish to find them in contempt with no sanctions against them,  
8 I don't have to make my persuasive speech to you later.

9 THE COURT: Well, you still need to. I mean,  
10 you'd need to argue that there are no consequences to them  
11 other than maybe a dollar nominal damage.

12 MR. WIENER: Correct. Well, let me just --

13 THE COURT: I'm not going to impose a penalty,  
14 anyway, I've already said, unless there's an injury.

15 MR. WIENER: May I just -- in going over my  
16 notes of Mr. Hage's testimony --

17 THE COURT: Sure.

18 MR. WIENER: -- he said as to ground A, which  
19 had to do with the filing of the --

20 THE COURT: Now, I'm taking you at your word you  
21 will not reargue this again --

22 MR. WIENER: Well, if I'm wasting --

23 THE COURT: Do you want to argue it now?

24 MR. WIENER: If I'm going to waste my breath  
25 now, I'll save it for later.

1                   THE COURT: Well, you're not wasting your  
2 breath, but I only want you to breathe it once, please. So  
3 argue it now, but don't argue it again.

4                   MR. WIENER: Okay. I'll save it as a beautiful  
5 sandwich, okay? I will sandwich it in between the rest of my  
6 argument.

7                   THE COURT: Right. I think you ought to hear  
8 what --

9                   MR. WIENER: Okay.

10                  THE COURT: -- they have to say first so that  
11 you can respond --

12                  MR. WIENER: Right. I thought --

13                  THE COURT: -- without going out on a limb.

14                  MR. WIENER: I thought I would save them some  
15 argument time, too. Thank you, your Honor.

16                  THE COURT: It was a kind offer.

17                  MR. WIENER: Okay.

18                  THE COURT: All right. Let's proceed, please.

19                         And I remind you that I'm relying both on this  
20 record and the record of all admitted exhibits and testimony  
21 at the trial.

22                         I do need to forewarn you that I may also fold any  
23 findings here back into the findings I make relative to the  
24 ultimate ruling in that case. I have to be very circumspect,  
25 and I will be, because that record, of course, is closed.

1           But I just forewarn you that if it confirms or helps  
2 me better define the remedy in the main case, I may fold back  
3 some of the findings here back into that case without  
4 reopening the record, of course.

5           But I'll let you go ahead.

6           Mr. Pollot.

7           MR. POLLOT: Thank you, your Honor.

8           THE COURT: And the first area you have to hit  
9 on, sir, is the law. I want you to get to the merits, of  
10 course, and tell me the injury and what's caused and the  
11 intent of Messrs. Williams and Seley.

12           But the first question is, as counsel said, you  
13 know, we have five issues, and taking them, for argument's  
14 sake, initially jurisdiction, and jurisdiction over these  
15 issues.

16           The weakest part of this case against these two  
17 alleged contemnors is that it's not alleged against them that  
18 they violated a specific order, it's alleged against them that  
19 they took their conduct in contempt of the Court's  
20 jurisdiction.

21           They and their agencies are the ones who chose this  
22 forum, and they're the ones who presented the issues and  
23 carefully, as they've told us several times, cut out issues of  
24 trespass against third parties. They intended to handle that  
25 administratively if alleged.

1           And if I should find that they did that in contempt  
2 of this Court's jurisdiction; in other words, they did it with  
3 a specific intent not just to regulate Hage but to kill him,  
4 in other words, to destroy him through a number of different  
5 means including trespass notices to those that he did business  
6 with, to destroy his business, to destroy through that means,  
7 as well as other means, like, for example, soliciting water  
8 filings on top of his, they intended to destroy his business,  
9 to destroy the value of his ranch, the patented land, if  
10 that's the finding, is there any authority for this Court to  
11 impose contempt or to find contempt where the charge is  
12 contempt of this Court's jurisdiction, not a specific court.

13           That's the first and, I believe, the biggest hurdle.  
14 Can you address that.

15           MR. POLLOT: Your Honor, I believe that I can.

16           First of all, just to lay a little foundation, I've  
17 spent a considerable amount of time looking at contempt. As  
18 the Court may imagine, I haven't had to deal with this a great  
19 deal. It seems to be fairly rare, at least, in my career to  
20 have run up against it.

21           But if I understand civil contempt properly, the  
22 purpose of civil contempt is remedial. It is to ensure that  
23 those people who have been injured as a result of that  
24 contempt are in some way recompensed for the injuries.

25           And as you know, your Honor, we put a great deal of

1 evidence in on a lot of different kinds of injuries, some of  
2 which the Court has indicated it felt was not proper, some of  
3 which it indicated that, if proven, it would certainly be  
4 proper such as fines paid by -- or fines, penalties, damages  
5 paid to the United States inappropriately could be ordered to  
6 be either refunded and against the contemnors, if they could  
7 not accomplish that, that they, themselves, could do.

8           But I also understand that the second remedial --  
9 the potential remedial component of contempt is injunctive  
10 relief to prevent them from further behaving in such a way.

11           Therefore, the kinds of injuries we attempted to  
12 prove here were both monetary in nature, but also that they,  
13 in fact, were injurious in many other ways, just as much as if  
14 I had taken somebody's car without permission for a joy ride,  
15 decided when I was done to go to a car wash, get it washed,  
16 get the oil changed, have it detailed, buff up the tires,  
17 clean the windshields and replace the crack in that side  
18 window.

19           The car is returned in better shape than it was.  
20 But I've still been injured because my right to control who  
21 used that car has been injured. The damages might not be  
22 much, but I don't believe they would be offset by all of the  
23 nice things that that person had done to my car because it was  
24 an officious intermeddler, you might make the argument, but  
25 I've certainly been injured.

1           Some of the types of injury that the Court has  
2 indicated that it would not feel is appropriate for  
3 recompense, although understanding the Court left that issue  
4 open to a degree, nevertheless were injuries. It was time  
5 spent. It was money spent responding to certain things that  
6 the alleged contemnors had done.

7           Our understanding and the essence of this is exactly  
8 the same as your Honor outlined. The United States chose the  
9 forum. We've heard a great deal of testimony from opposing  
10 counsel about, well, gosh, we have the responsibility to  
11 manage the federal lands, and that responsibility does not go  
12 away unless that -- even in the face of pending litigation.

13           The problem with that, your Honor, is the way  
14 in which they chose to pursue that management and to protect  
15 the federal lands as they see it was to bring the matter  
16 before this Court.

17           In addition, once they started this process, of  
18 course, we, under the Federal Rules of Civil Procedure, had to  
19 provide a list of initial disclosures. That list of initial  
20 disclosures made it clear who the -- at least a large number  
21 of those witnesses would be.

22           Obviously, in the very course of the litigation and  
23 discovery, that list may expand. But from the very beginning,  
24 the United States chose the forum and knew not only that the  
25 Hage Estate and Mr. Hage personally were parties here who they



1 were claiming to be in trespass, they were perfectly aware  
2 that the witnesses on whom Mr. Hage would rely and on whom the  
3 Estate would rely were people doing business with Mr. Hage,  
4 people who were directly or indirectly doing business with the  
5 Estate of E. Wayne Hage.

6           And they knew that these were people were supporters  
7 of the Hage family. They had been supporters of the Hage  
8 family from the time that the -- the -- well, before even the  
9 filing of the takings case before the United States Court of  
10 Federal Claims.

11           When the Court of Federal Claims' decision had been  
12 filed, as we've already found in the main trial in this case,  
13 within four months the United States brought Mr. Hage in front  
14 of this District Court, in fact, prosecuting him for doing  
15 things that Mr. Hage had -- you know, had a right to do.

16           Four months later they indicted him, and it was our  
17 view then, and it remains our view now, that the whole purpose  
18 of this was to try to derail the takings litigation to get  
19 rulings out of this Court that could then be taken to the U.S.  
20 Court of Federal Claims to claim collateral estoppel or  
21 perhaps even *res judicata*, to deplete the resources of the  
22 Estate -- well, of course, at that time it wasn't the Estate,  
23 but the resources of the Hage family and to interfere with  
24 their ability at that time to prosecute their takings case.

25           We believe there is evidence even produced at the

1 main trial that the purpose for the -- part of the purpose, if  
2 not the whole purpose, for the United States bringing the  
3 trespass action was to do precisely the same thing with  
4 respect to the United States Court of Federal Claims.

5           And there was voluminous evidence, I can't cite it  
6 all, before this Court as to the timing of the litigation, the  
7 issues raised. Many of the issues raised in the litigation  
8 before this Court had already been raised before the United  
9 States Court of Federal Claims and had been rejected there  
10 only to be revived before this Court.

11           And this is not, of course, the first time that we  
12 have brought this information to the attention of this Court.  
13 It was done in pleadings.

14           And, in fact, throughout this case the United States  
15 has made motions, raising arguments, having this Court reject  
16 those arguments and those motions, only to turn around and  
17 file another motion that raised exactly the same argument  
18 that, again, the Estate and Mr. Hage were required to protect  
19 their interests to address, once again, the time that they've  
20 already spent a great deal of time and money responding to in  
21 the first instance.

22           Now, that is not a direct point in the contempt, but  
23 it does establish, we believe, a pattern and practice, once  
24 again, of behavior that is aimed at, we think illegitimately,  
25 disadvantaging the Hage family and the individual defendants,

1 the Estate and Mr. Hage, in this case.

2 In fact, when Mr. Hage was asked yesterday about --  
3 about whether -- wasn't it all that the BLM and the Forest  
4 Service -- wasn't it what they were really doing is just doing  
5 business as usual? Mr. Hage's response, after being asked  
6 that question, was no.

7 Prior to the time of the initiation of this lawsuit,  
8 as Mr. Hage testified, primarily what you got, if you got  
9 anything, were trespass notices. There were no decisions and  
10 demands for payment. There were no other items in large part  
11 that were placed out there. There was no placing anybody in  
12 collections.

13 However, in the context of this --

14 THE COURT: Pause just for a moment --

15 MR. POLLOT: Yes, sir.

16 THE COURT: -- and tell me what your  
17 understanding of a trespass notice is.

18 My understanding is it's the initiation of an  
19 administrative proceeding seeking one of two or both remedies.  
20 One is stop trespassing. The other is pay for the trespass,  
21 either at the regular rate or at a penalty rate or something  
22 else.

23 But those are the two remedies that are sought, and  
24 it's the initiation of an administrative proceeding to which  
25 there is, by the way, an immediate liability. It's not -- we

1 don't wait for the billing. There's an immediate liability, I  
2 believe. That's my understanding of the process. Somebody  
3 does have to calculate it and make it part of the billing.  
4 And it's per charts that they use. But, nevertheless, there's  
5 an immediate liability if the trespass notice is correct.

6 This is in contradiction or contraposition to a  
7 misdemeanor at this particular time that's intended to be  
8 brought criminally for trespass. And those are the two ways  
9 that they have to initiate a process.

10 Then, of course, they can file a civil lawsuit  
11 supporting the administrative trespass notice, or they can  
12 file an indictment or information supporting the ticket  
13 process.

14 But those are the two routes. And that's my  
15 understanding of the effect of a notice of trespass.

16 MR. POLLOT: I would have to respectfully  
17 disagree to an extent, your Honor.

18 The trespass notices, I understand -- first of all,  
19 the purpose of the trespass notice is to let you know that the  
20 federal government, or the agency at least, believes you to be  
21 in trespass.

22 And, in fact, I didn't entirely anticipate this  
23 question, so I don't have the United States Court of Federal  
24 Claims transcripts here, but it is my recollection that when  
25 the trespass notices were raised before Judge Smith in that

1 case, Judge Smith's response is, well, those are mere  
2 allegations. And I believe that that is correct. These are  
3 allegations.

4 And the other part of that notice, just as under  
5 common law, if I -- you know, your car were to be at what I  
6 thought was my property --

7 THE COURT: Well, of course, a notice of  
8 trespass is just like an allegation, just like the ticket  
9 that's headed through the criminal process is nothing more  
10 than an allegation. It's an allegation. I agree with you.

11 MR. POLLOT: And a warning --

12 THE COURT: But --

13 MR. POLLOT: -- come get your cattle, or there  
14 may be further consequence.

15 THE COURT: But it does provide an immediate  
16 demand for removal.

17 MR. POLLOT: Yes.

18 THE COURT: And, of course, there is an  
19 immediate liability not just for failure to remove, but also  
20 there's an immediate liability for the trespass noted,  
21 assuming that they can establish the liability.

22 In other words, just like the IRS, before they  
23 assess, they have to serve a notice of intent to assess.

24 MR. POLLOT: Correct.

25 THE COURT: Which goes for 90 days before they

1 can actually assess, with some exceptions.

2           You have rights to appeal. You can go through the  
3 appellate level from audits before you even get to the notice  
4 of intent or -- and even after. You go through appellate  
5 levels. But you have 90 days then to file your complaint  
6 rather than the government going -- proceeding to --  
7 immediately to collection in the tax court.

8           The difference between the two is that with regard  
9 to IRS, once it's assessed, they can collect. They don't need  
10 a court order. Not so here.

11           Here, of course, just like in every other creditor  
12 claim, they must go through an administrative appellate  
13 process, then they must reduce it to judgment before they can  
14 collect.

15           They have the right of offset against your Social  
16 Security, for example, but they cannot go to collection until  
17 they have a judgment.

18           So that's my understanding of the effect of a notice  
19 of assessment. It's an initiation of the administrative  
20 route, as opposed to the criminal route, for an ultimate  
21 finding that you are in trespass; and, of course, a demand  
22 that you remove and a demand that you pay the liability for  
23 the trespass.

24           MR. POLLOT: Well, in fact, your Honor, one of  
25 the reasons for the line of questioning I started down

1 yesterday was to address the situation that if, in fact, that  
2 were true -- and this is immediately where your liability  
3 starts. Now, I think you can make the argument that your  
4 liability starts when the act alleged to be trespass occurs if  
5 they can establish that it was trespass.

6           And I think the Court is correct to a degree that  
7 this initiates whatever process they choose to follow.  
8 Although, I would argue that the decision and demand for  
9 payment is when they start assessing the -- the liability from  
10 that point, and that up to that point the main purpose is to  
11 give you notice that your cattle are out there and give you an  
12 opportunity to remove them.

13           THE COURT: Well, that's not quite correct  
14 because they certainly do assess the liability for the events  
15 before the time of the decision. They assess liability for  
16 the time that you trespass.

17           MR. POLLOT: I'm trying to -- yeah, well, that's  
18 what I'm saying, your Honor, is that's -- but it's not  
19 necessarily assessed in the trespass notice. You don't get  
20 that in the trespass notice.

21           THE COURT: You get a --

22           MR. POLLOT: And this is why I raised the issue  
23 yesterday when -- if you have a trespass notice that has -- we  
24 saw these on -- you know, April, we saw these cattle in May,  
25 we saw these cattle in June, and then they don't send it out

1 to you until June, they have limited your opportunity to even  
2 gather the information necessary to establish whether those  
3 cattle were there.

4 Plus, for want of a better phrase, they're hoarding  
5 their damages and allowing them to pile up to the disadvantage  
6 of, you know, the person alleged to be in contempt.

7 THE COURT: Well, that may make sense. You  
8 know, you're not going to file an administrative proceeding,  
9 maybe not even a notice of trespass, when all you have is a  
10 \$10 trespass, intentional though it may be, of knocking down a  
11 fence post and letting a few cows in.

12 MR. POLLOT: Well, it may be expedient for them,  
13 your Honor, but I'm not sure it's fair for the person alleged  
14 to be in trespass because he's given no opportunity to cure  
15 the trespass.

16 THE COURT: Well, there's the statute of  
17 limitations, of course.

18 MR. POLLOT: Certainly, your Honor.

19 THE COURT: And/or laches.

20 MR. POLLOT: But that is ultimately not how they  
21 decided to proceed in this case, your Honor.

22 How they decided to proceed in this case was to file  
23 a complaint before this Court in which they had alleged that  
24 there were trespasses, where those trespasses occurred and  
25 when they occurred, and asked this Court to make a



1 determination as to whether there was trespass, and  
2 ultimately, if the trespass was found, who was responsible and  
3 for how much. That is what they brought before this Court.

4 THE COURT: Well, answer their argument, then,  
5 that they carefully wrote this complaint, they carefully  
6 carved out trespass which they intended to bring  
7 administratively against all those who were doing business  
8 with Mr. Hage, and those that he had run cattle on, those that  
9 he had noticed them, the big long letters that he wrote for  
10 them and he wrote himself, saying that he was in control, he  
11 had responsibility for those cattle.

12 They carefully wrote this complaint to carve those  
13 people out. They only brought the trespass action and asked  
14 for damages for his branded cattle, even though they were  
15 running amidst and among all of the cattle of those that they  
16 separately trespassed through by virtue of a notice of  
17 trespass.

18 MR. POLLOT: Well, your Honor --

19 THE COURT: So that's what they say, and  
20 therefore there's no contempt here, because there's no  
21 jurisdiction. They never invoked the Court's jurisdiction  
22 over those other parties.

23 MR. POLLOT: Well, first of all, I --  
24 your Honor, I would have to respond I don't think they were  
25 quite so careful as they argue that they were.

1           We have put on evidence that suggests -- doesn't  
2 suggest, it certainly supports our claim that they were as --  
3 even though they may not have -- you know, they were claiming  
4 to be in trespass, cattle who contained brands that were not  
5 Mr. Hage's and yet they were alleged in the complaint, and I  
6 don't have that information in my head in front of me, but  
7 they are in the complaint there.

8           And Mr. Hage has himself testified to the fact that  
9 they were seeking from him a remedy for cattle that he had  
10 leased to third parties.

11           And it is certainly true, your Honor, and it's shown  
12 actually in Exhibit 2756 which was our partial summary of  
13 trespass notices, unauthorized use letters, decisions, demands  
14 for payment, collection letters and some of the responses to  
15 all of those things out there that -- and, like I said, first  
16 of all, this is a partial list. It does not include the  
17 trespass notices, for example, that were sent to Mr. Hage  
18 personally or to his father or the Estate.

19           And Mr. Hage's testimony that the most they did was  
20 to send trespass notices out, and when this Court started  
21 making decisions that were -- and in response to motions and  
22 during arguments and indicating the possibility that the  
23 United States would lose on some of these issues in here, the  
24 pace of issuing trespass notices, decisions, demands for  
25 payment, and so forth, to the third parties began to multiply

1 exponentially. The chart itself shows this.

2 Now, I will note that there are four items on this  
3 chart, on this exhibit --

4 THE COURT: And that chart is --

5 MR. POLLOT: This would be the partial --

6 THE COURT: -- strictly with trespass notices to  
7 third parties?

8 MR. POLLOT: Yes, your Honor.

9 THE COURT: Okay.

10 MR. POLLOT: And actually there are 193 items in  
11 this exhibit. Four of them we have to take out of that  
12 calculation because they're prior to the time of the filing of  
13 this lawsuit, which leaves 189 the vast majority of which were  
14 issued in 2000 -- some in 2008, but mostly in 2009, 2010,  
15 2011, at the time in which these individuals were being  
16 deposed, they were witnesses.

17 In fact, in one circumstance brought to the  
18 attention of this Court during the trial, just a few days  
19 after Mr. Irvin Plank, who was a witness here, Mr. Seley  
20 signed and mailed out another trespass decision and demand for  
21 payment to Mr. Plank out there.

22 And so even to the extent that they may have left  
23 some of these allegations out of the complaint, they opened up  
24 the entire -- I mean, let's face it, your Honor, they sued the  
25 Estate and Mr. Hage. Mr. Hage didn't sue them.

1           Once they sued them -- and, as you recall, the  
2 United States Government argued that at that point sovereign  
3 immunity had kicked in. We had no ability to turn around and  
4 bring a counterclaim or essentially even to address the basic  
5 issues in our defense.

6           The Court found that sovereign immunity did not  
7 apply because it was the United States that chose the forum.  
8 Having chosen the judicial forum in which all of these issues  
9 could be opened up -- maybe they had intended, although I  
10 would disagree on this, to be very careful and to include  
11 Mr. Hage.

12           The reality was they had to understand, when they  
13 even filed the complaint, that we would raise all of these  
14 other issues in our defense, and we did, that we were, in  
15 fact, legally responsible for those cattle, that the Estate --  
16 I say we, I mean the Estate in this case, that the Estate  
17 owned water rights, that a part of those water rights was the  
18 right to the forage adjacent to those water rights, which the  
19 Court --

20           THE COURT: Or as the Federal Circuit has termed  
21 it, access right.

22           MR. POLLOT: Well, they did mention access  
23 rights, as well, your Honor. The --

24           THE COURT: They not only mentioned it, they  
25 affirmed that part of the ruling. They reversed you mostly --

1 for most of the case primarily on the grounds of ripeness.

2 MR. POLLOT: Correct, your Honor, and that did  
3 not disturb the underlying determinations as to what property  
4 rights --

5 THE COURT: The actual taking and regulatory  
6 taking were barred by ripeness. They weren't ripe.

7 But they did affirm, if you will, the finding of  
8 Smith that the -- and the Federal Circuit termed it an access  
9 right. They said we're not reversing that one; in fact, we  
10 agree with it.

11 MR. POLLOT: The United States didn't even  
12 appeal the forage right determination, your Honor. What the  
13 Federal Circuit did, if I recall it correctly -- and just for  
14 the Court's understanding, we -- the Estate is --

15 THE COURT: Is that the same thing as an access  
16 right?

17 MR. POLLOT: I wouldn't -- no, your Honor. I  
18 would say the access right is the easement to access and use  
19 those rights.

20 THE COURT: The water --

21 MR. POLLOT: The Court of Claims found that  
22 there was no grazing right but a forage right.

23 This Court found there was no grazing right but a  
24 forage right. The Federal Circuit did not --

25 THE COURT: So, in other words, there's two

1 kinds of rights attendant to the water right, one is access --

2 MR. POLLOT: Correct.

3 THE COURT: -- and the other is forage? And  
4 you're just simply saying that that wasn't addressed?

5 MR. POLLOT: It wasn't addressed. The United  
6 States didn't appeal it, and, therefore, it was left intact.

7 But whether you consider them two separate rights or  
8 one entire right --

9 THE COURT: The Court of Claims declined to  
10 award any damages for the forage right.

11 MR. POLLOT: For the forage right separately. I  
12 believe your Honor hit it correctly way back when, when the  
13 Court -- you, being the Court, indicated that that was  
14 essentially folded into the value of the water rights found in  
15 the ditch, and this Court independently found a forage right  
16 and a forage right that extended at least a half a mile from  
17 the water source. None of that was touched by the Federal  
18 Circuit's decision.

19 And just to inform the Court, the Estate has  
20 actually brought me into that case and asked me to take over  
21 as lead on the appeal, and we are filing a motion for  
22 reconsideration -- petition for reconsideration,  
23 reconsideration *en banc*.

24 And the Estates of E. Wayne and Jean N. Hage have  
25 also decided that if we get enough satisfaction there, there

1 will be a petition for *certiorari*. So -- just to keep the  
2 Court abreast of what's going on.

3 But to return, your Honor, they chose the forum.  
4 And when they chose the forum, they had to know that we would  
5 raise and did raise, even in the answer to the first -- the  
6 complaint in the first amended complaint, all of these rights  
7 that we assert that the Estate owned, that the Estate had the  
8 right to access and utilize these as a defense to the trespass  
9 case.

10 Because, of course, the essential element of  
11 trespass is that you're somewhere where you have neither  
12 permission nor a legal right to be. And if we had that right,  
13 it's possible that we might be there in violation of some rule  
14 or regulation that requires a permit, but it cannot be  
15 trespass if you have the right.

16 By analogy, your Honor, I may -- I have a piece of  
17 property, as we discussed, I think, in closing argument in the  
18 main case. The United States Supreme Court has said if I own  
19 a piece of property, I have a right to build on that property  
20 which may be subject to reasonable regulation, but, you know,  
21 that building permit, or whatever it may be, is not the  
22 bestowal of a valuable governmental benefit.

23 If I build a house without a permit, I may be in  
24 violation of some ordinance, but I can't be in trespass  
25 because it's my property. I have the right to be there.

1           The United States had to know when they sued us that  
2 we -- us meaning the Estate and Mr. Hage, they had to know  
3 that all of those issues were brought up. And, of course,  
4 when the answer was filed they did know that all of those  
5 issues were now before this Court. Whether they had intended  
6 them to be there or not, there they were.

7           And, furthermore, eventually, of course, we got the  
8 filing of a counterclaim allowed by this Court, objected to by  
9 the United States. The United State's objection was  
10 overruled.

11           They have argued at some length that because the  
12 counterclaim wasn't filed until here why none of those things  
13 really were before the Court, at least from the filing of the  
14 counterclaim back to the beginning of the complaint.

15           But that would be inaccurate, your Honor. They were  
16 there. They just weren't stated as a counterclaim, they were  
17 stated as a defense.

18           The counterclaim did really little more than to  
19 explicate those things, point out to the Court that -- or  
20 allege to the Court that the United States was aware that we  
21 had -- that we, the Estate, had property rights out there, or  
22 at the very least acted with reckless disregard to those.

23           They were intentionally and deliberately interfering  
24 with those rights, asking the Court for a declaration. Now,  
25 they, United States, always wants to argue that that's as far



1 as it went and that this Court, you know, dismissed everything  
2 but the declaratory relief action. Of course, that's not  
3 correct.

4           It was an APA challenge that asked both for a  
5 declaratory relief and for injunctive relief, and if it was  
6 implicit before that those issues were in front of the Court,  
7 it was at a very minimum at that point explicit.

8           And we can see no reasonable argument for the United  
9 States to say that because we tried to limit the issues, once  
10 they invoked the jurisdiction of this Court, we raised our  
11 defenses, all of this was before this Court.

12           I don't think the United States has a valid argument  
13 that having opened the door we couldn't walk through that door  
14 that they provided and put all of these issues before this  
15 Court.

16           It would be unreasonable, in fact, for them to  
17 decide once this -- and the Court itself gave the United  
18 States warning throughout the early stages of this trial and  
19 into the later stages of this trial that it believed it had  
20 the authority to decide these issues; that all of these issues  
21 were before it. And if they didn't know at that time that  
22 this Court considered those issues before it, they certainly  
23 knew by that point, and yet the conduct of which is alleged to  
24 be contemptuous behavior continued.

25           Now, in fact, your Honor, to be very clear on this

1 fact, in Mr. Seley's testimony, the first time around when he  
2 was the witness for the United States, he, in fact, testified  
3 to at least two instances in which he did not pursue  
4 administrative action because this lawsuit was pending.

5 And for that I refer the Court to the transcript  
6 of -- make sure I have the right one here. Okay. Yes.  
7 Transcript page 1714, and this occurred, I believe -- I don't  
8 have the date in front of me, your Honor.

9 But at that point he had testified that with regard  
10 not to improvements built under the cooperative agreements,  
11 which this Court has seen, but to permitted improvements for  
12 which BLM canceled the permitted improvements and instructed  
13 Mr. Hage to go out and -- or the Estate to go out and remove  
14 those improvements, which were not removed, and Mr. -- and I'm  
15 paraphrasing now.

16 He testified that he sent a request to Wayne N. Hage  
17 to remove the improvements which were owned by the Estate, and  
18 that was on lines 3 through 6 of that page, and when he did  
19 not remove them he, quote, could have initialled a trespass  
20 procedure through the lands program for the trespass of  
21 unauthorized structure on public lands, end quote.

22 Now, I don't know whether he used the word  
23 initialled or intended to use initiated, but that's how it is  
24 in the transcript, and then said that he opted not to pursue  
25 that action because, quote -- he could, quote, see no value

1 in -- to anyone involved at that point in time to do that  
2 and -- well, and there's a -- I took an irrelevant section out  
3 there, because of the ongoing case that we do have here.

4 On the very next page of the same transcript, on  
5 lines 13 to 25, that -- he testified that the improvements  
6 that were under the cooperative agreements, he also did not  
7 move administratively to have those improvements taken out  
8 because of the pending litigation.

9 You know, we don't disagree that the United States  
10 may very well have the right to manage its property even  
11 though litigation is pending, but the reality seems to be that  
12 there are a lot of ways to manage that property and to try to  
13 bring people into compliance.

14 And when it alleges that something has happened,  
15 brings it in front of this Court to decide whether it  
16 happened, and then goes off on its own following that to  
17 decide it's going to reach the decision that it put in front  
18 of this Court on its own, determined what the ultimate penalty  
19 should be, and then tries to collect on it, that, we believe,  
20 is, in fact, contemptuous conduct.

21 They knew, they bought it, they opened it, they  
22 invited all of these other issues in before this Court. They  
23 were informed by the Court that the Court considered them to  
24 be in front of them.

25 And, your Honor, let me just take a brief, but

1 related, aside here. It is my understanding that a mistake as  
2 to law by them, or the fact that it -- the Court might be  
3 wrong in determining an issue of law doesn't excuse the  
4 alleged contemnors from contempt.

5           The fact that -- and I know there was not an order  
6 at issue in this contempt, but the clearest example is if this  
7 Court issues an injunction saying the law is such and such,  
8 and, therefore, I'm going to prohibit you from undertaking  
9 this activity, the party against whom that injunction runs has  
10 no ability whatsoever or no right to simply ignore that order  
11 and go ahead and do what they want. Their remedy is to appeal  
12 that decision.

13           In fact, my understanding, the only time that a  
14 contemnor, or alleged contemnor, can ignore a court's order  
15 with impunity is if the court didn't have any kind of  
16 jurisdiction over the subject matter of that lawsuit to begin  
17 with. Then the -- you know, the decision is void and can be  
18 ignored without -- without penalty or without consequences.  
19 But that is not this case.

20           I don't think even the United States can argue that  
21 this Court would not have subject matter jurisdiction over the  
22 issue of was there contempt, and if there was contempt, was  
23 Mr. Hage alone responsible, was Mr. Hage and third parties  
24 responsible, were third parties alone responsible.

25           In fact, to be honest with you -- or to be clear,

1 your Honor -- I don't mean -- I always worry when someone says  
2 I'm going to be honest with you.

3 To be clear about this, the United States itself has  
4 argued that if there was a lease, it doesn't matter. Now, I  
5 would disagree with that. I do believe that the person who is  
6 responsible is Mr. Hage when he had that lease. He's agreed  
7 as much, so I'm not giving anything away here. That is the  
8 position that Mr. Hage has taken.

9 The problem for the United States comes in with the  
10 fact that they say they should both be liable. Even if they  
11 only sent the trespass notices, for example, to Mr. Pearson  
12 and only included cattle with Mr. Pearson's brand on them --  
13 which, by the way, they didn't, they allege that Mr. Hage had  
14 ownership of some of those cattle because the brand that  
15 Mr. Pearson was using actually he had acquired or borrowed  
16 from the Estate and from Mr. Wayne Hage, Sr., I believe. I  
17 don't want to be quoted as to exactly how that occurred.

18 But, nevertheless, it was part of that lawsuit for  
19 that reason, and so Mr. Hage had the ability to say no, no,  
20 no, if he wanted to, those were -- in fact, he did. He  
21 testified those -- I believe he testified those cattle had a  
22 brand on it that had been loaned to Mr. Pearson.

23 So even without intending, the United States  
24 certainly overlapped those issues. But once it said we can  
25 hold them severally or jointly liable for this, because the

1 person who leased them is liable even though Mr. Hage put it  
2 there, Mr. Hage can be liable because he put the cattle there,  
3 all of that was in front of this Court. I don't see how the  
4 United States can avoid that.

5           And certainly once they invited us in, just to cap  
6 up, they opened the door for all of these issues to be here.  
7 Once the Estate made its appearance, started putting in its  
8 defenses and continued to follow through in its briefing,  
9 which, of course, raised these issues even before the  
10 counterclaim, and talked about all these things, the whole  
11 shebang, as my mother might -- used to say, was in front of  
12 this Court. The Court had jurisdiction.

13           We would argue the United States had no ability at  
14 that point to start -- or to follow parallel processes trying  
15 to get a jump on this Court's determination.

16           Your Honor, in my opinion -- or, excuse me, I  
17 shouldn't say that. But it is my view based on my research  
18 and everything else, that it would be just as improper as if  
19 they had filed that lawsuit here, decided, well, you know, we  
20 may not get what we want out of this Court, let me either take  
21 it to another courtroom in this courthouse, or, heck, we'll  
22 take it over to Mexico or we'll take it over to -- to Arizona  
23 and get another court to look at that, and maybe we can get  
24 that other court to come to a decision we like before Judge  
25 Jones comes to a decision we don't like.

1 I'm not -- do you have any further questions on  
2 that, your Honor?

3 THE COURT: Thank you. I'll let you know if I  
4 have questions.

5 MR. POLLOT: Okay. Thank you, your Honor.

6 And I think, your Honor, with that as background up  
7 here, it certainly seems to me that the very -- the chart of  
8 the -- again, I will remind the Court this is a summary, it  
9 doesn't include everything that went out.

10 It shows an accelerating pace against these third  
11 parties as this Court proceeded and as questions were raised  
12 about the ability of the United States to succeed.

13 I'm not suggesting here anywhere along the way that  
14 prior to its preliminarily findings of fact and conclusions of  
15 law this Court ever had a closed mind about everything, but  
16 certainly this Court raised a lot of questions that -- you  
17 know, to the United States about whether or not they had a  
18 valid claim, whether or not they should be sitting down and  
19 settling this case.

20 Again, I'm not suggesting that that meant there was  
21 a prejudgment. But I am suggesting the United States had  
22 indications that things may not go in this court the way they  
23 had hoped they would go in this court, and when I look at the  
24 pattern and practice of what happened as the case progressed,  
25 as the issues tightened, as the preliminary rulings and

1 findings of law and fact began to appear, their behavior  
2 reflected that fact.

3           And, furthermore, your Honor, even if they had some  
4 reason to go ahead and try to do these parallel tracks out  
5 here that could arguably be legitimate, they had to have known  
6 that by doing this to third parties who were named witnesses,  
7 who they themselves had deposed, could have a substantial  
8 impact on whether those people were willing to testify and how  
9 they were willing to testify.

10           Even more importantly, your Honor, if we had any  
11 question at all that that was a motivation for at least  
12 Mr. Steve Williams out there, I think that question was  
13 answered when we received the testimony from Mr. Pearson and  
14 from Mr. Jensen that Mr. Williams showed up on their property  
15 with armed individuals, and there is no legitimate reason that  
16 comes to mind, and certainly none that was offered in this  
17 courtroom, as to why they should do that.

18           Mr. Pearson admittedly testified on his own behalf,  
19 but they certainly didn't provide anyone who could refute what  
20 he said. He has no record of violent behavior. He's not been  
21 arrested. He's not been charged. He certainly has not been  
22 convicted of any kind of violent crime.

23           There was no testimony during the trial, or anywhere  
24 else, that anyone would be fearful of Mr. Pearson.  
25 Nevertheless, they showed up on his doorstep twice when they



1 could very easily have sent by certified letter the notices of  
2 the documents that they wanted to deliver.

3           After all, Mr. Pearson lives in Tonopah. The Forest  
4 Service office exists in Tonopah. It would have taken  
5 virtually no time to get that document, the notice, decision,  
6 demand for payment, whatever it might be, from Mr. Williams to  
7 Mr. Pearson with no discernible delay.

8           They had no reason to believe that they're in any  
9 danger of any harm. Nevertheless, they show up there, and  
10 after Mr. Pearson tells them don't do that anymore, Mr.  
11 Williams then comes in -- comes up, picks up the phone, tells  
12 Mr. Pearson that he has something he must urgently get into  
13 his hands apparently without ever saying what that urgently  
14 was, or saying why he couldn't just simply put it into an  
15 envelope and send it or, for that matter, have a messenger  
16 take it across town, if there is a messenger in Tonopah, I  
17 can't really speak to that out there, and gets angry on the  
18 phone when Mr. Pearson tells him no, without offering any  
19 reason, much less a compelling reason, why he should go  
20 against the instructions that Mr. Pearson had just given him,  
21 don't do that.

22           And, frankly, your Honor, I would submit that  
23 Mr. Williams' behavior is not mitigated by the fact that  
24 Mr. Williams called first.

25           Same thing in a sense with Mr. Jensen, but in a way

1 even worse. It seems to me, your Honor, that if you're  
2 worried about violence -- and, again, all the testimony, all  
3 the evidence is that Mr. Jensen is not a violent man, never  
4 been arrested, never been charged. As far as I know, or  
5 anyone else knows, he's never even appeared in a newspaper  
6 article pretending to be fierce or dangerous.

7 But if I'm coming up on somebody and I have a police  
8 officer, one of the reasons I have a police officer with me,  
9 your Honor, I want the person who is potentially violent to  
10 see that police officer so he knows this would not be a good  
11 time or place to stir up trouble.

12 But as Mr. Jensen testified, Mr. Williams came up  
13 from the front of him, and only, frankly, by good luck did  
14 Mr. Jensen happen to notice that there was a man standing over  
15 here that had not one gun on his hip but two.

16 And I know a lot of police officers, your Honor. I  
17 even used to intern and clerk for the District Attorney's  
18 office in San Diego County. I have personally never seen a  
19 police officer who wore two guns on his hips. Now, I have  
20 known police officers that will have an ankle holster.  
21 They'll carry a backup weapon or whatever. I've never seen  
22 one on his hip.

23 And Mr. Jensen testified that that man was not only  
24 standing there and coming up behind him not in his view, the  
25 man was standing at a slight crouch with his hands near his

1 guns, almost a movie version of a gunslinger getting ready to  
2 whip out his two six-shooters and go to town in High Noon.

3 This was not only disturbing, again, it was  
4 something that he -- there was no reason for him to do, no  
5 legitimate reason that I can see. And my suggestion, sir, is  
6 that the only legitimate inference from the circumstances of  
7 those two events is that they intended to intimidate or to  
8 frighten Mr. Pearson and Mr. Jensen.

9 And the only other inferences, frankly, I could come  
10 up with, your Honor, is that Mr. Williams is a paranoid  
11 individual, and I see no evidence to make such an inference.  
12 I think the Court can only draw one such inference.

13 Now, admittedly, Mr. Williams did not put demands  
14 for payment out there, although I would certainly agree that  
15 they were calculating those. In fact, the settlement  
16 agreement with Mr. Pearson was -- between Mr. Pearson, the BLM  
17 and the United States Forest Service, the Forest Service did  
18 relinquish claims.

19 I would submit, however, that the only reason they  
20 didn't do so was, even according to Mr. Williams -- I believe  
21 it was Mr. Williams' testimony at trial, if an individual has  
22 no permit, they have no administrative way of challenging --  
23 or of controlling that individual's behavior. Their only  
24 option, frankly, is to issue a ticket or to bring a lawsuit.

25 So the BLM obviously is represented in this lawsuit,

1 maybe because it had to. BLM is represented in this lawsuit  
2 probably -- well, simply because it chose to, and, having  
3 chosen, is stuck with its choice.

4 A great deal of the pressure against individuals  
5 from the BLM and Forest Service both come, obviously -- not  
6 merely from, you know, Mr. Williams being accompanied by an  
7 armed individual, it also comes from the sheer volume of the  
8 documents sent to them, the demands made upon them for  
9 increasing amounts of money, sending matters to collection.

10 Your Honor, there's many things that someone may do  
11 legitimately under some circumstances but not under others,  
12 and so it might have been perfectly appropriate. In fact, I  
13 think even this Court indicated at one time they would not  
14 have problems with merely sending a trespass notice to let  
15 somebody know your cattle were out there.

16 The problem came in when they started trying to  
17 solidify it and turn allegations into essentially civil  
18 verdicts by another means when this matter was in front of  
19 this Court.

20 And it is consistent, your Honor, with the findings  
21 of the United States Court of Federal Claims, which we have  
22 discussed in motions and arguments previously, and a finding,  
23 by the way, which was not overturned by the Federal Circuit,  
24 that many of the actions of the Forest Service in that case,  
25 BLM, also, which only came into the case later, were motivated

1 by hostility toward the Hages.

2 Now, that didn't make a difference as to whether or  
3 not a taking had occurred because, of course, a litigant  
4 before the Court of Federal Claims is not allowed to -- to  
5 challenge the validity of the government's action. It must  
6 assume that they could do it and ask for compensation.

7 Judge Smith himself said that it was a taking even  
8 if a public use was not involved, the only difference being  
9 you had to pay them for the time of the taking, and then they  
10 may be required to give it back because it was not for a  
11 public use. Either way it was a taking.

12 Now, the Court did reject the futility argument, and  
13 it's one of the things we'll be arguing before that Court in  
14 our petition, because it focused simply on one small part of  
15 the record, to find that Judge Smith was wrong in determining  
16 that the United States could require hand tools.

17 And part of our response to the United States is --  
18 in that and to the Court when we were asking for rehearing is  
19 the Court of Appeals neglected to consider the entirety of the  
20 facts and circumstances as found by that Court. The standard,  
21 of course, in front of -- is that the trial court is to be  
22 deferred to on findings of fact unless there is no  
23 evidence which a reasonable --

24 THE COURT: They partially deferred to you on  
25 that point. They acknowledged that hand tools would be

1 insufficient to maintain a ditch, but they just simply said  
2 until you file a request for maintenance permit from the  
3 Forest Service, it's not right.

4 MR. POLLOT: Well, that's one of those areas in  
5 which we strongly disagree, your Honor, because the nature of  
6 a right-of-way is such that if I have to get somebody else's  
7 permission, it's not a right-of-way anymore, it's a  
8 permission-a-way, and that is an issue that we're bringing up  
9 in our petition for rehearing, your Honor.

10 But the bottom line was that finding that that  
11 condition would be imposed was based on the finding of, in  
12 large part, acting out of hostility toward the Hages. The  
13 evidence in this case simply reinforces what the Court of  
14 Claims had already determined to be the case.

15 In that case, Judge Smith himself, as he put in his  
16 written decision, put out the vast number of notices, trespass  
17 notices, that they had filed against Hage as evidence that  
18 they were acting out of hostility toward the Hages, that there  
19 had been a long history of conflict.

20 And these things were not intended, frankly, for  
21 their intended legitimate purpose, which was you got cows out  
22 there, you might want to come and get them, but interposed to  
23 harass them and to make their lives more difficult, to cost  
24 them more money, and made other decisions of the same type  
25 such as deciding to tell the Hage family you've got to put

1 cattle on this allotment and then immediately turning around  
2 and ordering them to take them back off the very same  
3 allotment they were put on.

4           And evidence in front of this Court in which  
5 Mr. Hage signed the permit with a little notation on there  
6 that he was reserving his rights -- and the Court is quite  
7 correct, UCC-1-207 really had no application, but it was  
8 nothing more than a layman's attempt to say, yes, I'll sign  
9 it, yes, I'll accept it, but that doesn't mean I'm waiving any  
10 legal rights that I may have, and yet they chose to treat that  
11 as a rejection of that application.

12           When Mr. Hage's attorneys at the time filed a  
13 protest labeled Protest, and then suggested that they had  
14 little faith in the outcome of that process and therefore were  
15 going to continue to pursue their remedy before the U.S. Court  
16 of Federal Claims, the BLM chose at that point to treat that  
17 as something other than a protest. In fact, they decided it  
18 wasn't a protest and proceeded from there.

19           When they decided, for example, as well, to -- to  
20 cancel the improvement permits -- or not the improvement  
21 permits, rather, the cooperative agreements, they canceled  
22 them for reasons having nothing to do with the reasons that  
23 the cooperative agreements said they could be canceled out  
24 there.

25           And even in their own testimony, your Honor, they

1 admitted that these were contracts. They treated them as  
2 contracts. The Court read it, interpreted -- meaning you in  
3 this case, interpreted that contract, and made a legal finding  
4 that this is what it was, this was the contract, these were  
5 the only reasons you could cancel it.

6           These were the only reasons, you know, that it could  
7 affect only the improvements that were built under this, it  
8 couldn't affect anything before, it couldn't affect anything  
9 after, so forth and so on. They knew it was a contract. They  
10 were responsible for the language of it.

11           The language Regarding consolation was clear. The  
12 fact that they chose to use some third element not covered by  
13 the agreement, we submit, is also evidence that this was done  
14 out of the sense of hostility toward the Hages in an attempt  
15 to undermine their property rights and their legitimate  
16 business activities.

17           Even the evidence that we placed on damages in  
18 the -- and, of course, much of this evidence was repeated in  
19 the trial on the merits of this case, showed that Mr. Hage  
20 himself personally, and the Estate through Mr. Hage, who took,  
21 you know, the significant part of the proceeds from his  
22 various business dealings in order to maintain the assets of  
23 the Estate, meet the fixed costs of the Estate, repair and  
24 take care of improvements, all of those things were necessary  
25 for this case to proceed and for the Estate to defend itself



1 and certainly for Mr. Hage to defend himself.

2 And I think there is a strong inference that can be  
3 drawn, not just from any individual action, but from the  
4 universe of actions that was taken by the BLM and the Forest  
5 Service.

6 And this may be a good place to interject,  
7 your Honor, that as we talked about during testimony in this  
8 hearing and was shown by the documents that were introduced in  
9 this hearing and also at trial, that communications between  
10 Mr. Seley and Mr. Williams about what the BLM was doing were  
11 constant.

12 If we go back through all the trespass notices and  
13 such that were listed in this document, the vast majority, if  
14 not all of them, contained a CC to Mr. Steven Williams. Now,  
15 the testimony of the federal officials that were on the stand  
16 in front of this Court, several of them were asked by me if  
17 that was normal, if that was usual. I think we can sum up  
18 their testimony by the word no.

19 There may have been little, you know, changes in  
20 wording, and there may have been, like me, more wordy than  
21 they needed to be and so forth, but there was not one of them  
22 said, oh, yes, we commonly do that. But in the context of  
23 this litigation, this happened frequently, if not invariably.  
24 So there was certainly communication going on between the  
25 parties.

1           There are other actions that were being taken in  
2 terms of volume and timing that strongly suggest that they  
3 were not only working against the Estate and Mr. Wayne N.  
4 Hage, they were doing so in concert and coordination with each  
5 other, at least very certainly with constant knowledge of what  
6 the other was doing out there.

7           This in itself -- and, again, I say one might take  
8 any individual piece of evidence and say, well, I can see how  
9 this can be X. It's when you take it and you add it to Y, Z,  
10 A, B, C, D and E that a pattern emerges that can no longer be  
11 viewed, we submit, as mere coincidence. Coincidence can only  
12 take one so far.

13           And we suggest the weight of evidence at trial which  
14 supported at least a preliminary determination by this Court  
15 that there was a conspiracy beginning in the late 1970s and  
16 the early 1980s to interfere with the Hages' property rights  
17 and their legitimate business activities and did not cease  
18 after this lawsuit was filed. It was continuous, it was  
19 ongoing, and it was damaging both financially and otherwise to  
20 this Court.

21           There have also been suggestions that, gee whiz,  
22 after all, there really can't be contempt here because Judge  
23 Jones is still capable of rendering a judgment in this case,  
24 as if that would in some way or other negate the -- I guess it  
25 should be called the obstruction of justice component of the

1 contempt claim.

2           Your Honor, I -- without meaning to be crude, I  
3 can't really imagine many circumstances that would prevent you  
4 from rendering a judgment that didn't involve a hospital out  
5 there.

6           I don't think whether or not there is contempt is  
7 dependent upon whether or not the contemnor succeeded in their  
8 goal of undermining the decision of the Court.

9           My understanding of contempt is when someone throws  
10 road blocks in the way of the Court to try to prevent a fair  
11 determination of the case, that remains contempt regardless of  
12 whether they succeed in their contempt.

13           The fact that somebody may throw a barrier up across  
14 the road that I own to try to keep me from using it doesn't  
15 become any less wrong, improper, or even illegal, either  
16 civilly or criminally, because I found a way to go around that  
17 barrier. It remains -- it remains contempt.

18           Their argument largely in this hearing seemed to  
19 focus on two broad themes. One of those broad themes seems to  
20 be, well, we can do what we do while this case is in  
21 litigation because, after all, it's our policy to do so.

22           This, of course, would be akin to me saying, well, I  
23 can speed through stoplights and I can go through -- speed  
24 through 35 mile-an-hour zones at 65 miles an hour because,  
25 after all, that's my policy to do so.

1           But we have three branches of government, coequal  
2 branches of government, with overlapping but essentially  
3 separate functions, because each of these branches of  
4 governments is fulfilling a different purposes.

5           The purpose of the judicial branch is to see to it  
6 that the laws are properly interpreted, to ensure that people  
7 who did break the law suffer the consequences or get justice,  
8 and a whole host of other reasons.

9           The United State's job is to administer the laws  
10 faithfully, to execute the laws faithfully, and essentially to  
11 be the executive officer of the country. But even the  
12 executive officer and all those working under him have an  
13 obligation to respect the prerogatives of the other branches  
14 of the government, particularly when they had alternative  
15 means, an alternative forum available to them, and chose to  
16 take the judicial forum instead of their administrative forum.

17           I don't like to be dramatic, but it is an insult to  
18 the judicial system to say, well, now that we're here, we're  
19 not liking the way things are going and, therefore, we're  
20 going to proceed. Even as this case proceeds, we're going to  
21 go ahead and do all the other things that we've -- we could  
22 have done had we not filed this before you.

23           Now, trying to essentially go through these  
24 allegations, the basic counts of the trespass, one by one --  
25 and if I could recall them off the top of my head, obviously

1 the one has to do with the repeated filing of notices, taking  
2 them to collections, trying to proceed along a parallel  
3 administrative track while this Court was dealing with them.

4 Let's -- I won't necessarily take them in the order  
5 that they are there, and if I forget something, your Honor,  
6 it's not because I'm agreeing with the government, it's  
7 because I've accidentally passed over it.

8 Let's start, however, with the solicitation for the  
9 Ralston Allotment.

10 Now, it is quite clear that what they were  
11 soliciting here was not a temporary nonrenewable permit.  
12 Nobody disputes that. What they are actually talking about  
13 doing was, quote, to issue a new presence and, secondly, a  
14 ten-year term grazing permit.

15 Now, that ten-year term grazing permit would have a  
16 tremendous impact obviously upon the Estate of E. Wayne Hage.

17 Once that permit is granted, once that preference is  
18 granted, there's going to be some third parties who now have  
19 some interest in trying to defend that preference, in trying  
20 to defend that new permit against the people who have claimed  
21 the right, have the right, are known to have had the right  
22 until the actions by the BLM, to use that -- to use that  
23 allotment, that those are their water rights, their forage  
24 rights.

25 And most certainly the Estate, which incurred

1 attorney's fees, liability, even if the attorney's fees  
2 haven't been paid yet to me and to Mr. Jack Hoffman, who was  
3 my predecessor in this case and is also local counsel in this  
4 case, the Estate certainly has incurred a burden there.  
5 Frankly, we don't ultimately know what that burden is going to  
6 be until this case is complete.

7           But in addition to that, if -- you know, Mr. Hage  
8 has the right -- or the Estate, I should say, has the right to  
9 that, and we are found to have the right to that, and we are  
10 found that the United States acted improperly in essentially  
11 taking that allotment and taking that preference and taking  
12 those permits away from us such that they can be required to  
13 give them back, even if under the supervision of this Court,  
14 at the very least while this permit is out there, the state of  
15 that allotment is an uncertainty.

16           Placing livestock on there has been one of the ways  
17 in which both Mr. Hage has had an income and the assets and  
18 the needs of the Estate have been taken care of by and through  
19 Mr. Hage in his role as executor.

20           People don't come to utilize that. In fact, we have  
21 all the testimony we need that many people with whom Mr. Hage  
22 was doing business decided to stop doing business with him  
23 because of the actions of the BLM and the Forest Service.  
24 They've testified to this.

25           They've testified that they stopped because of the

1 Forest Service's action and because of the BLM action.  
2 They're not going to be coming back to utilize that even if  
3 those things are undone as long as that -- that allotment is  
4 in legal limbo.

5           And, again, I would use the same analogy as I did  
6 with the car. If you have taken away from me my right to use  
7 what I have, even if the injury financially is minimal,  
8 nevertheless, there is an injury there.

9           The suggestion by the contemnors of the United  
10 States, well, there's not really an injury because, after all,  
11 how have you been injured, well, we've certainly been injured  
12 in a way that I would submit that allows this Court to use as  
13 one of its remedies in this, contempt as an injunction, to  
14 prohibit them from doing that.

15           . It may not be recompensable to Mr. Hage, either  
16 in his individual capacity or the Estate because we're  
17 deprived, at least of some of his services as the executive  
18 for the Estate, because they've kept him tied up fighting  
19 water right applications, objecting to their having -- having  
20 tried to take that Estate out from underneath the -- having,  
21 frankly, to have brought this to the attention of the Court.

22           There was testimony yesterday, your Honor, which I  
23 couldn't really put a witness on to address it, but the  
24 testimony that had been elicited by opposing counsel was that,  
25 well, the Estate and Mr. Hage never even brought that

1 solicitation to the attention of the Court.

2           They decided not -- wisely, I think, decided not to  
3 try to admit the declaration of Mr. Seley, and we didn't seek  
4 its admission either, because it was not the declaration --  
5 the content of the declaration that supported our view, it  
6 was -- that declaration itself was in response to this.

7           And I am quoting now from Document 275 in this case.  
8 This was the response of Defendant Estate of E. Wayne Hage in  
9 opposition to the plaintiff's motion for leave to file an  
10 amended/corrected complaint, and I am reading now from page 8,  
11 the last paragraph beginning at the bottom of the page.

12           "Furthermore, defendants have recently become  
13 aware of new actions by the Bureau of Land  
14 Management, BLM, affecting the Estate's rights on one  
15 of the so-called allotments in question in this case,  
16 the Ralston Allotment. These actions, which are  
17 consistent with the allegations of the counterclaim,  
18 suggest that the delay in adding the allegations of  
19 the amended -- amendment is dilatory as well. They  
20 may be viewed as part of the pattern and practice of  
21 attacking the Estate's property rights.

22           "Specifically BLM has issued an invitation  
23 to approximately 75 parties soliciting applications  
24 from them for permits to graze cattle on the lands in  
25 which the Estate owns forage and water rights, see



1           Exhibit A hereto, even while this case, which will  
2           determine the extent of the forage rights owned by  
3           the Estate, are pending.

4                         "In short, these permits would permit third  
5           parties to, one, graze livestock on forage the rights  
6           to which are owned by the Estate; two, place  
7           livestock within three miles of waters owned by the  
8           Estate in violation of Nevada law; and, three, put  
9           that livestock in the position of using waters to  
10          which the Estate owns the rights."

11                        And then it says see, for example, NRS, and then it  
12          gives a number -- a Nevada Revised Statute citation.

13                        And then completes with,

14                                 "The conditions stated in the BLM's  
15          solicitation requiring any permittee to bring its own  
16          water cannot prevent livestock from using any other  
17          water it finds. These actions will require response  
18          by the Estate unless they are abandoned by plaintiff,  
19          further cutting into the Estate's resources to  
20          protect its interests in this case."

21                        And Exhibit A to this motion -- or, I mean,  
22          opposition to the motion is the letter of solicitation.

23                        The testimony that this was not brought to the  
24          attention of this Court was incorrect. It was brought to the  
25          attention of this Court, and not only brought to the attention

1 of this Court, but even long before -- and this is dated as  
2 being filed on November 21st, 2011. This information was  
3 brought to the attention of this Court. Not only was it  
4 brought months ago, it laid out the exact grounds,  
5 essentially, that this Court placed in its contempt citation  
6 underlying the order to show cause out here.

7 It talks about the injury to the Estate. It talks  
8 about the fact that they will be using the water and the  
9 forage and the easements all of which belong to the Estate of  
10 E. Wayne Hage.

11 We understand the United States may very well be the  
12 servient estate holder. For our purposes, your Honor, we  
13 would submit, frankly, it doesn't matter who the underlying  
14 servient estate holder is. The issue that we raised before  
15 the Court, even in answer to the first amended -- or the first  
16 complaint was these are property rights. They're owned by the  
17 Estate. They're allowed to be there.

18 By putting the solicitation out, they are inviting  
19 other people to come and use forage and water rights and  
20 easements that belong to the Estate and even the category of  
21 damages that we would sustain.

22 So they could hardly come in now in the context of  
23 this proceeding and claim that they didn't know, or they had  
24 no clue that these injuries could result from their actions.

25 We had them put testimony before the Court and

1 evidence before the Court in this case that we tried to get  
2 them to undo what they had done in the spirit of cooperation,  
3 asking them to give us written assurance that they will not  
4 follow through in this while this case was still pending, and  
5 we were refused that.

6           They offered to do something for a specific period  
7 of time. But, of course, we didn't know how long the case  
8 would go, and we would then, once again, be in the very  
9 position that we were before. Please don't do this.

10           Mr. Seley's declaration was added to the reply  
11 brief, to our opposition, in which he basically said we  
12 shouldn't worry about that because, after all, it may take a  
13 long time.

14           And, of course, in Mr. Hage's experience and,  
15 frankly, my own experience with the agency, they move quickly  
16 when they want to and not so quickly when they don't. It was  
17 not a measure of comfort because it was no commitment.

18           If, in fact, they really truly believed they would  
19 take that amount of time, we were puzzled as to why they  
20 wouldn't make a commitment. Their failure to make a  
21 commitment suggests to us -- and there is evidence they failed  
22 to do it.

23           I think the Court can draw an inference from this  
24 that they were bound and determined to go ahead, even when  
25 offered a way out. They only ceased to do the solicitation,

1 as the testimony this morning showed, after this Court  
2 rendered its preliminary findings of fact and conclusions of  
3 law.

4 And all of these things that were done in this  
5 case -- or I should say none of the things that happened in  
6 this case existed in a vacuum.

7 Despite the fact that they say but there wasn't an  
8 order, and trying to draw some equivalent between a person  
9 using his own property, or the property of the Estate, while a  
10 case pending is somehow or other the equivalent of invoking a  
11 legal administrative proceeding against that person, and  
12 therefore Mr. Hage was doing only what the other side was  
13 doing, I think, is an erroneous argument at best.

14 They knew what they were doing, they knew the impact  
15 of it, and they expected, I submit under all the facts and  
16 circumstances before this Court, that they could put an end to  
17 Mr. Hage's resistance.

18 They certainly put an end to Mr. Colvin's resistance  
19 to their activity and put him in a position where he just  
20 wanted out of this case and settled out of this case.

21 And, your Honor, of course, I wasn't part of those  
22 discussions. I was not before this Court at the time. But I  
23 surely read that settlement agreement which puts barriers  
24 around Mr. Colvin 's relationship with Mr. Hage forever more.

25 And I can think, again, of no reason to settle money

1 trespass claims against Mr. Colvin by saying, by the way, you  
2 really can't do much with Mr. Hage anymore, other than to  
3 isolate Mr. Hage from Mr. Colvin.

4           Now, I understand that's not part of this -- of the  
5 acts said to be in contempt, but, again, your Honor, I suggest  
6 it is relevant, and this Court can certainly take notice of  
7 this, it occurred in front of this Court, that that's how it  
8 unfolded, and that Mr. Hage is now -- and Mr. Colvin's  
9 relationship may be very personal, but it very much makes it  
10 impossible for Mr. Hage and Mr. Colvin to do business.

11           The solicitation was not at all harmless,  
12 your Honor. And, by the way, I don't have the letter in front  
13 of me, but I did read the letter that was testified to that a  
14 letter -- or it was brought to the attention of the Court  
15 we've stopped processing these applications.

16           The letter that was sent out to the permittees, said  
17 that the processing of these applications was suspended. You  
18 know, I suspect the reason they did that, and so, if they  
19 should perchance win, they will resume this. But it was not a  
20 program that was terminated, that they will now go back out  
21 and start over again.

22           I don't know whether that's legitimate or it's not,  
23 but I just bring that to the attention of the Court.

24           So it remains a worry. It remains something that  
25 the Estate itself must be prepared to address as it has

1 addressed it so far in this case. So there are both monetary  
2 and nonmonetary injuries there.

3 Now the water rights. We think the evidence before  
4 the Court, and I don't need to belabor it, even in this  
5 hearing alone permits a strong inference by this Court that  
6 those water rights filings were intended to try to take away  
7 the Hages' water rights, water rights that they knew that they  
8 had and, furthermore, that they knew very well they didn't  
9 have stock water rights.

10 This Court, of course, certainly can look at the  
11 Solicitor General's opinion for the Department of the  
12 Interior. This Court can certainly look at the State Water  
13 Engineer's decision out there and determine what those mean.

14 Now, I've read them, your Honor, and I don't agree  
15 with their interpretation of those. I have a special problem  
16 with someone who suggests that the purpose of a Public Water  
17 Reserve 107 is to allow the BLM to provide water to Taylor  
18 Grazing Act permittees, particularly considering that the  
19 Taylor Grazing Act was enacted in 1935 and PWR 107 was  
20 established in 1926.

21 I think we put on substantial evidence at the trial  
22 that shows that those public water reserves did not include in  
23 them a right to stock water. BLM admits it doesn't have  
24 cattle, never has had cattle.

25 Heck, the figures they got for determining how much

1 water they should ask for out there was based on Mr. Snow's  
2 application which, of course, provides a further link, we  
3 submit, between the -- you know, the BLM and Mr. Snow, and  
4 what the motivation of the BLM was in making these water  
5 filings.

6           The motivation in giving the temporary nonrenewable  
7 permits to Mr. Snow, allowing Mr. Snow to use the Hages'  
8 water -- and, your Honor, I submit we should not be impressed  
9 by the fact that those same cows may be drinking water that  
10 Mr. Snow put on those allotments. In fact, if that proves  
11 anything, it proves very well that they knew that cows will  
12 use whatever water sources are out there.

13           And harkening back to my law school days, I would  
14 call Mr. Snow an officious intermeddler in that respect.

15           It reminds me of the time I spent in D.C., and I  
16 would go home along New York Avenue where it turns into the  
17 Baltimore- Washington Parkway, stop at a stoplight in the  
18 middle of the winter, only to have some have guy with a bucket  
19 full of dirty water and squeegee run out, wash my windshield  
20 -- well, sort of wash my windshield, and then put his hand out  
21 expecting me to pay him for a service that I did ask for or a  
22 product I did not ask for.

23           But it certainly ties in. It also ties in with the  
24 testimony heard by this Court from the Forest Service that the  
25 Forest Service believes that it has a right to authorize third

1 parties to use the water rights of another.

2 Now, the Court pressed the witness on that one and  
3 asked whether, in fact, they would require the hauling of  
4 water out there, and was told, well, I guess that could be  
5 done. I've never considered that because, well, I've never  
6 had that situation.

7 But it was strong testimony on the part of the  
8 witness that she believed that she could at any time, because  
9 it would be necessary to manage Forest Service land, allow  
10 third parties to use water rights knowing they belonged to  
11 another.

12 But we submit that that is exactly what Mr. Seley  
13 did, that Mr. -- and Mr. Seley testified -- he knew that  
14 those -- that that livestock would necessarily use water  
15 rights belonging to the Estate of E. Wayne Hage, admitted,  
16 frankly, that there really wasn't anything they could do about  
17 that.

18 And, your Honor, I just cannot see how someone can  
19 say, well, you know, we told them they had to haul water, but  
20 we allowed them to choose water -- where that water was going  
21 to go. And the condition on the permit, of course, said you  
22 can't have it adjacent, but then they don't have any  
23 definition of what adjacent means.

24 They didn't even know where all of the -- or at  
25 least they didn't include in their maps where all of those



1 improvements were. So obviously some of them were of less  
2 interest to the BLM than we submit that they should have been.

3 But, again, it is the totality of the circumstances,  
4 the fact that they did this and they allowed the temporary  
5 nonrenewable permits.

6 And as you know, as was noticed earlier today, they  
7 gave a pretext of, okay, we're going to -- we're going to ask  
8 you, Mr. Snow, to withdraw your application for 2009  
9 because -- or application in 2009 because, well, there may be  
10 an increase in the number of trespassing cattle.

11 Now, they didn't actually testify as to the basis  
12 for why they thought there was going to be an increase or that  
13 that increase was going to be at a certain magnitude out  
14 there. But by their own evidence they put on, there was  
15 plenty of forage and capacity in that range for something well  
16 beyond what was there.

17 The only evidence that Mr. Pointel gave in testimony  
18 was, well, I did basically an informal walk-through. I didn't  
19 clip anything to weigh it, I didn't measure heights, I didn't  
20 go to an enclosure so I could compare them, I just walked  
21 through and I eyeballed them. And his -- excuse me, ocular  
22 measurement, and then testified, well, I have a lot of  
23 experience so I just know.

24 Well, the problem with that argument we see,  
25 your Honor, is that if that were the case, why would they need

1 to run transepts and do clippings and weigh things and do a  
2 thorough evaluation and assessment if they could simply do it  
3 by walking around looking out there, taking a hike, as he put  
4 it, walking around looking at it and saying, oh, no, that's,  
5 you know, approaching 50 percent utilization.

6 And we know they're going to put this much cattle on  
7 there, we know that the condition of the range in the next  
8 year, which apparently was very good in that year, wouldn't be  
9 sufficient to sustain those.

10 We respectfully submit, your Honor, not intending to  
11 impugn the integrity of the witness, that that provided  
12 nothing more than a mere pretext, because by this time this  
13 litigation had heated up, questions had been raised about the  
14 propriety of doing that, and it provided Mr. Seley with a way  
15 of kind of backing off of it with a pretext.

16 But in the same letter he then goes on and -- I'm  
17 sorry, I don't mean to cast aspersions, but I do not believe  
18 the language in that letter that specifically stated we -- I  
19 want to make sure I have it correctly here.

20 "Please consider submitting another grazing  
21 application for the east portion of the South Pasture  
22 and the West Pasture for the 2010-2011 grazing  
23 period."

24 This was not a you-can-try-again-later. In fact, we  
25 would submit the appropriate thing would have been not to

1 include a sentence of any kind like that, "Please withdraw  
2 your application." He then comes along and says, well, can I  
3 submit one another year, they respond to that, they said  
4 that's what they were doing in the prior letter they looked  
5 at, fine. But that's not what this is.

6 Please consider doing this. Now, perhaps they were  
7 sloppy with their language, but the only way I can interpret  
8 this is as a more refined, more subtle, but taken in context  
9 with everything else, invitation to do exactly that, a  
10 solicitation as it were.

11 One indicates one. Another one indicates another  
12 one. A third one indicates another one. But one plus one  
13 plus one doesn't equal one, it equals three.

14 I've done a lot of work in land use context, and  
15 when the exactions or dedications are requested and protested,  
16 there's invariably some member of the deciding board, the  
17 California Coastal Commission, the zoning board, the county  
18 commissioners, the county board of supervisors, that says,  
19 but, sir, it's only \$500.

20 Well, it's not \$500, it's \$500 for this, \$750 for  
21 that, \$2,000 for something else. And to take from -- I hope  
22 I'm not misattributing this, Senator Proxmire, a million here,  
23 a million there, and soon you're talking about real money.

24 Well, an interference with property here, an  
25 interference with property here, an interference with this

1 lawsuit there, sending out increasing numbers of notices,  
2 demands for payments, hoarding them and keeping them until  
3 later, sending them out there, suddenly a person who thought  
4 that he had a \$50 liability that he was trying to address  
5 suddenly has a \$13 -- a \$1,300, a \$500, a \$1,000 things,  
6 starts thinking twice about messing around with the Forest  
7 Service and BLM, especially considering that they had gone to  
8 the BLM in good faith, told the BLM, hey, I no longer have  
9 possession and control of these cattle, I have leased them to  
10 Mr. Hage, he has them, he has assumed full legal  
11 responsibility for them, please go and talk to him, only to  
12 have Mr. Seley, for example, say -- basically toss them off  
13 and refuse to do it.

14           And, in fact, he testified -- let me make sure that  
15 I find it here. On transcript pages 1770 to 1771 at the  
16 trial, when asked whether he had responded by questions from  
17 Mr. E. Wayne Hage or Wayne N. Hage in response to their  
18 trespass notices in which they said show me your authority,  
19 what is the basis for your authority, what is the basis for  
20 your determining a trespass, you are aware that we have the  
21 U.S. Court of Federal Claims in which this issue has been  
22 addressed, subsequently the responses said, well, you  
23 understand there is a trespass case in which these matters are  
24 being addressed.

25           And I specifically asked him whether he had a duty

1 to investigate any of the assertions made by the Hages in  
2 defense to the trespass claim.

3 And, first of all, he stated that he did not respond  
4 to those assertions and he didn't need to respond to those  
5 assertions.

6 Now, he said he talked with his immediate  
7 supervisors. It might have been -- I believe it was Nancy  
8 Zahedi. And he -- you know, as a lawyer, he talked to, you  
9 know, his superiors immediately above him, and then he came to  
10 the conclusion that he did not need to do that.

11 And transcript pages 1773 and 1774 -- and we pause  
12 here for a second because during the examination by opposing  
13 counsel, they constantly asked the question did you show him a  
14 written lease. Well, a lot of times, of course, he couldn't  
15 show them a written lease. It was oral.

16 And even then, when both the -- Mr. Hage and the  
17 person with whom he had a lease both represented to the agency  
18 that there was a lease, their answer was, well, they presented  
19 us with no evidence.

20 Well, I'm not sure what evidence you have of an oral  
21 agreement other than the testimony of the two parties or three  
22 parties or however many parties were part of that, and yet  
23 they treated that as though it made no difference at all.

24 And no wonder. Because Mr. Hage admitted on pages  
25 1773 and 1774 that showing him a lease would have made

1 absolutely no difference in what he did and that he would not  
2 bother to contact the Hages when that third-party said  
3 Mr. Hage has legal possession of the cattle and legal control  
4 of that livestock, please go talk to Mr. Hage, and according  
5 to him, he not only didn't, he didn't have to.

6           Okay. It would seem to me had they been acting in  
7 good faith, they would at least have to tried to contact  
8 Mr. Hage because they were told Mr. Hage had assumed legal  
9 responsibility.

10           Why not go to Mr. Hage. If their real issue here  
11 was let's get the cattle off there and let's -- you know, if  
12 there's any damages, let's get them, why not go to the guy who  
13 has himself already accepted that responsibility and told them  
14 that he has accepted that responsibility.

15           Well, I think the reason really is, of course, if  
16 they go to Mr. Hage and they take care of -- and they deal  
17 with him on that, well, they no longer have any reason to  
18 pursue these third parties.

19           And logically, according to their view of life,  
20 since Mr. Hage didn't have a permit out there, why should it  
21 make a difference whether or not there was a lease? If  
22 Mr. Hage was doing it, he would be the guy to go to.

23           And, let's see, if I may here. Ah, it's here. I  
24 just need to find it. Again, page 1793, Mr. Seley admitted he  
25 wouldn't send decisions and demands for payment to Wayne N.

1 Hage even after being informed that Wayne N. Hage had legal  
2 possession and control of the livestock and -- because there  
3 was no information.

4 And, of course, I would submit that if they come and  
5 tell you you've -- that this was the situation, they had  
6 information. Mr. Hage was aware of this. We have testimony  
7 as to this. Third parties were aware of this.

8 We have testimony that it just simply would not have  
9 made a difference had they bothered to go to Mr. Seley and  
10 shown this stuff.

11 Mr. Seley, in fact, has admitted -- and I'm  
12 paraphrasing and extracting the essence of what he was really  
13 saying was he had no interest in trying to talk to them,  
14 trying to work that out with them.

15 They had a person who was on the hook, willing to be  
16 on the hook, who was willing to -- and has testified  
17 repeatedly that if it's found that he has no rights out there,  
18 he doesn't want to be out there. He wants to be out there  
19 legitimately in pursuance of those rights.

20 Whatever this Court decides is appropriate, he wants  
21 to be out there. He would not do this. And certainly the  
22 Estate would not do this unless they had a legitimate reason  
23 to know.

24 Mr. Seley and Mr. Williams and all those above them  
25 were aware of the takings case. They were all aware Mr. Hage

1 had reasons, legitimate reasons, to believe that he had every  
2 right to be out there.

3 His testimony in this hearing, and also in the trial  
4 out there is that Mr. Hage knew and had an obligation to  
5 protect the interests of the Estate, including against  
6 encroachment by the United States.

7 Nevertheless, knowing that, knowing they had brought  
8 these matters in front of this Court, the trespass notices,  
9 the decisions and demands for payment, all of which could have  
10 been resolved here, had been introduced here, argued here,  
11 evidence put on here, was of no avail.

12 I have to apologize, your Honor. I'm blocking as to  
13 the other elements of the -- of the trespass -- or the  
14 contempt.

15 Additional evidence that they were -- if not  
16 intentionally doing something, they were certainly doing so  
17 with reckless disregard for the rights of the party involved,  
18 and at this point I'm referring to the loosely termed appeal  
19 against Mr. Jensen, and after that I will talk about the  
20 cancellation of the cooperative agreements.

21 Mr. Jensen, as the exhibit that we referred to here,  
22 both at the trial and in this hearing this morning, about  
23 Mr. Jensen's so-called appeal, Mr. Jensen did not appeal. As  
24 the exhibit showed, Mr. Jensen, in fact, said I really can't  
25 respond to your allegations of whether I'm in trespass and who



1 is responsible until you give me certain information. That  
2 was the essence of his letter.

3 Mr. Seley took it upon himself, with or without  
4 consultation with somebody above him -- I submit it doesn't  
5 matter, he took the action, he made the decision there to go  
6 ahead and treat Mr. Jensen's request for additional  
7 information as an appeal.

8 That -- okay. I think you can arguably say that was  
9 okay, although under the circumstances and when you read the  
10 letter, I submit that's not a reasonable interpretation at all  
11 of his letter, and I think it's fairly straightforward.

12 But on top of that, to add insult to injury, they  
13 never notified Mr. Jensen that they were taking an appeal on  
14 his behalf. If they had done that, he would have at least had  
15 an opportunity to step into that proceeding and try to defend  
16 himself. The first he heard about it out there was when he  
17 got notification from the Interior Board of Land Appeals that  
18 he had lost his appeal.

19 I didn't mean to phrase it quite that way, but he  
20 was -- the appeal that he had filed, that he had no idea of,  
21 had been rejected.

22 Now, he was in a position where he has a decision  
23 out there that says he is in trespass with a complete  
24 violation of his due process rights to appear and be heard  
25 and, frankly, a complete denial of their own regulations,

1 right to be out there and to be heard.

2 I should have made a note about what I said I was  
3 going to address next, and I apologize for that.

4 Again, what might be explained away in isolation  
5 cannot be explained away in the entire context of this matter.

6 As much as I hate the word because it's been  
7 overused, I think we all must look at this matter  
8 holistically. We must look at it in its entirety and see the  
9 encompassing and the ultimate shape of it all.

10 I think the Court certainly can look at individual  
11 elements that are so glaring as to show improper intent,  
12 claiming a right that you knew that you did not have,  
13 misinterpreting or misrepresenting what the Court has asked  
14 somebody to do, those kind of things.

15 But to look at the entirety of this thing and to  
16 take it piecemeal to a degree, to use an overused statement,  
17 is like missing the forest for the trees. This one particular  
18 tree may be -- look kind of sickly, but you can pass that off  
19 as an individual problem.

20 But when you glance up and you see that the needles  
21 on all the trees are brown, that there are pine beetle bark  
22 holes in the bark, you realize that it wasn't just, well, one  
23 tree meeting its fate, it is a forest that is being  
24 overwhelmed by what has been put in front of it.

25 It has been repeatedly said that all we're looking

1 for is declaratory relief, and obviously that's to the main  
2 case. But obviously we ask for injunction in the main case,  
3 and we, even more, ask for injunction here.

4 I think it is clear from what has gone on that  
5 without that restraint the United States will continue to do  
6 what they're doing, especially as the urgency and the  
7 immediate impact of this experience fades.

8 Right now, in light of the preliminary findings of  
9 fact and conclusions of law by this Court, some of these  
10 activities have ceased, but they continued through this trial  
11 right up to that point, and I think the evidence shows that,  
12 without restraint, as soon as the immediate trauma of the  
13 contempt hearing and the things that have happened in this  
14 courtroom begins to fade, that there will be a slip back to  
15 old behavior.

16 And, your Honor, I'm not sure how to deal with this.  
17 If the Court had set time limits, then I would have said,  
18 well, I'm going to reserve a certain amount of time to respond  
19 to what the government --

20 THE COURT: You can. It needs to be brief  
21 because of your lengthy opening.

22 MR. POLLOT: I understand, your Honor. So with  
23 that, I think I should be sitting down.

24 THE COURT: Thank you.

25 MR. HAGE: If it will please the Court.

1           Your Honor, these last several days has been  
2 quite -- I don't know how to put the words. It's been quite  
3 interesting.

4           For me, of course, I can, and I believe I have, I've  
5 showed damage. I've showed damage where people doing business  
6 with me have been driven away. I've been lucky to get through  
7 this. I'm glad I have. It hasn't been an easy road, but I  
8 have made it.

9           It's been tough mentally, but what's -- being  
10 financially isolated and driven away, that was where I was  
11 about to lose it, lose my ability to defend. I'm still here,  
12 luckily, and I'm glad I am.

13           Even though I think that's an important part of this  
14 whole proceeding, to me that's not the important part, and I  
15 think actually we've missed it through this whole entire  
16 thing.

17           For us ranchers out there -- and we're not the only  
18 ones, I mean, the citizens of the United States as a whole,  
19 for ranchers especially, from what we've experienced with the  
20 Forest Service and BLM, our last line of defense against them  
21 is the courts.

22           And what we've been seeing here, and I think the  
23 evidence has been very clear, all the guys from Washington and  
24 the regional offices coming in saying, hey, they're not in  
25 contempt of court because we told them to do that stuff, that

1 tells me that maybe they're in contempt of court.

2           The danger is when the court process gets disturbed.  
3 If they can go ahead and beat us up while we're in court over  
4 the very core issue of the case, and the very core issue is do  
5 we have water rights and can we access and beneficially use  
6 those water rights, they're saying, well, we're in court with  
7 you over that, but we're not in court with them over that.

8           Even though the Court might rule that they are your  
9 water rights, we're going to say they can't use them, not even  
10 if you accept the full legal and -- full legal liability of  
11 those animals. We're going to go after them separately, and  
12 we're going to drive your business away from you.

13           And that's -- they were successful sometimes, not  
14 every time because I have some very good friends, and it  
15 hasn't been easy for them to be my friend, but I do appreciate  
16 every single one of them.

17           But the main thing here is not the amount of damages  
18 that I've suffered or the Estate has suffered. What is  
19 important here is the court process. If we lose the court  
20 process, there is nothing standing in between the ranchers and  
21 the tyrannical powers of the BLM and the Forest Service.

22           If we don't have the protection of the courts, we  
23 have the protection of nothing. Our law, our system of  
24 government, is gone. The Court is what matters here, it's the  
25 integrity of the Court.

1           And that's what I would like to see more than  
2 anything else out of this whole process is that the integrity  
3 of the Court, the following of court orders is what's going to  
4 be abided by. I'm going to be held to that standard. I  
5 guarantee you they'll squawk any time they think I step out of  
6 line. Is it wrong for me to squawk if they do?

7           Well, they claim that they're the government. By,  
8 golly, they can manage us even if it takes your rights away.  
9 Well, it seems like to me it's not going both ways.

10           If we don't have the court system, I don't think we  
11 have anything left. I don't think there's a private property  
12 right left on Pine Creek Ranch that would be worth a darn if  
13 the Court was gone, because they have demonstrated that they  
14 will not stop. Even when they're involved in two court cases,  
15 they will not stop.

16           Their complaint -- but they're saying, well, the  
17 other ranchers weren't brought into this case. They're trying  
18 to make that fine line, distinguish between me and the people  
19 I've leased cattle from.

20           However, they failed to point out that in their  
21 complaint they were complaining about me leasing to other  
22 ranchers. That was in the complaint. They were complaining  
23 about it then.

24           They've brought it forth to this Court, and then  
25 they decided -- and the very same property rights that were

1 issued that we were using are in front of this Court, yet they  
2 chose another remedy because they didn't like what was  
3 happening here.

4           The question that I have is why didn't they go for  
5 an injunction? Why didn't they stay in this court, follow  
6 this court process, and file for an injunction against me?  
7 They threatened to, yet they didn't do it.

8           They wanted to go -- they threatened to get an  
9 injunction against me. Heck, it would have been easier to ask  
10 this Court to go for an injunction against me, at least, and  
11 say, okay, well, let him leave his cows there, then at least  
12 he can make a living, somewhat of a living, but let's get rid  
13 of the excess if that's what they were claiming it was.

14           Yet they didn't choose this court, and they had  
15 every opportunity. Everything that they were trying to  
16 accomplish through their other process could have been  
17 accomplished here, yet they didn't do it. They purposely did  
18 not do that.

19           It's the Court's power, not my damages that matters  
20 here. It's the Court's power.

21           And with that I'm going to quit.

22           THE COURT: Thank you, sir.

23           MR. SHOCKEY: Your Honor, we've been going for a  
24 couple of hours. Is it possible to take a brief recess before  
25 we --

1                   THE COURT: Yes. Let's recess. Five,  
2 ten minutes, please.

3                   (A recess was taken.)

4                   THE COURT: Thank you. Please be seated.  
5                   And you may proceed.

6                   MR. SHOCKEY: Thank you, your Honor. Charles  
7 Shockey for the United States.

8                   I wish, in retrospect, I had asked the Court to set  
9 a firm one-hour limit per side.

10                  I will try to address the law, the evidence, and the  
11 contempt citation briskly. Mr. Pollot must have discovered I  
12 have my low blood sugar hour this hour, so I will try to keep  
13 the pace up and move through everything very quickly, but I  
14 will be sure never to offer him a free window wash again when  
15 I see him in D.C.

16                  At the outset, I would like to request an  
17 opportunity -- I would request that the Court issue its  
18 findings and conclusions in preliminary form as it did with  
19 the trial in order to give both sides an opportunity to file a  
20 post-trial brief, and I would like you to hear me out for just  
21 a moment while I explain why I think this is important.

22                  Both sides had anticipated incorrectly, as it turned  
23 out, that we would have a continuance in this hearing. There  
24 was no opportunity for an exchange of witness lists or  
25 exhibits before the hearing.



1           We have had a number of days of testimony with  
2 witnesses continuing through this morning, and given the press  
3 of preparation and the very serious nature of the contempt  
4 charges against Mr. Seley and Mr. Williams, as well as how  
5 those affect the United States and the BLM and the Forest  
6 Service, we feel it is critically important to give us a  
7 chance, both sides, to file a brief where we can really  
8 present our case in the most coherent form possible to assist  
9 the Court.

10           And I think this is especially important because, as  
11 we all discovered a couple of days ago, there is great  
12 potential for misunderstanding or differing interpretations of  
13 some of the language spoken during the context of the hearing,  
14 whether it's by witnesses, by the Court, by counsel, and  
15 having an opportunity to review the exact language in the  
16 transcript and see what was said I think will help steer this  
17 proceeding toward a more equitable and correct conclusion.

18           We are certainly willing to work with Mr. Pollot and  
19 Mr. Hage, who I understand have some constraints on their own  
20 schedules, recognizing the Court's desire to resolve this  
21 expeditiously, but we do make that request.

22           And I would point out one last note that while --  
23 despite the very serious nature of the contempt charges and  
24 the need to get this resolved, I do not see an urgent need to  
25 have a ruling -- final ruling today versus in a couple of

1 weeks from now.

2           The charges have been lodged. The Court has the  
3 ability to craft whatever order and, if it finds contempt,  
4 whatever sanctions it deems appropriate, and that is not going  
5 to go away, and I really think we'll all benefit from having a  
6 more focused opportunity to address the issues.

7           So I would make that request, and if the Court is  
8 inclined to grant that, that certainly could condense my  
9 presentation this afternoon because some of the material I'll  
10 cover, I can save for the brief.

11           THE COURT: I'll deny the request.

12           MR. SHOCKEY: Okay.

13           THE COURT: This case has gone on interminably,  
14 and the parties -- even though I felt no need for additional  
15 briefing after the trial and the Court's ability to express  
16 findings and conclusions on the record there when the matter  
17 was fresh in front of me, and full opportunity for the  
18 attorneys to argue the authorities, having extensively briefed  
19 it in written form prior to the trial, nevertheless, the Court  
20 acceded to your request to brief the issue in the main case.

21           I don't see that need here. There is urgency. The  
22 winter season is approaching us. It's obvious to me that some  
23 rectification, if you will, needs to occur, and, accordingly,  
24 and because you have not persuaded me that there's any need to  
25 further write written briefs after I've read hundreds of pages

1 and gone through hundreds, if not thousands, of pages of  
2 briefs, of course, as well as exhibits, I'm going to decline  
3 your request.

4 MR. SHOCKEY: I would simply note that unlike  
5 the trial setting where we had pretrial briefing, here we have  
6 not had even a pre-hearing briefing.

7 Let me summarize the government's position regarding  
8 this matter, and then I will discuss some of the case law that  
9 I think the Court should be aware of from the government's  
10 perspective before reviewing the evidence and concluding.

11 The government's position is there has not been  
12 contempt by Tom Seley or Steve Williams, either individually  
13 or on behalf of their agencies.

14 As I think everyone recognizes, there was no court  
15 order prior to the Court's oral ruling on June 6th which was  
16 put into written form, and that notice, for the first time,  
17 placed Mr. Seley and Mr. Williams on notice of the specific  
18 actions that placed them at risk of contempt.

19 There has been no opportunity until that court  
20 announced the -- issued the citation for either gentleman to  
21 purge himself from the alleged contempt, particularly because  
22 all of the actions related to past actions, some of which go  
23 back several years ago.

24 All of the actions, moreover, were taken by both  
25 individuals in their official capacity as government agents

1 and not on their own behalf.

2 Senior agency officials have testified in all  
3 respects that they support, endorse and approve the actions  
4 taken by Mr. Seley and Mr. Williams.

5 There has been no violation of the court order at  
6 any time once that June 6th order was issued. So once the  
7 official notice went out to Mr. Seley and Williams, as  
8 Mr. Bartell represented to you yesterday, the -- both agencies  
9 and both those individuals have taken prompt and appropriate  
10 action to ensure compliance with the Court's order, and  
11 there's no evidence that the plaintiffs -- the defendants have  
12 presented to the contrary.

13 Nor do we believe either Mr. Seley or Mr. Williams  
14 or the agencies have taken any action that could fairly be  
15 construed in derogation of the Court's authority or  
16 jurisdiction.

17 We have emphasized throughout, and while Mr. Pollot  
18 is not yet convinced, apparently, we think that the Court does  
19 retain the full authority to address the merits of the  
20 trespass case, which I expect you'll be doing fairly promptly  
21 once the post-trial briefing is completed, and to rule on the  
22 merits of the claims between the United States and the Hages.

23 In fact, Mr. Hage himself yesterday testified he was  
24 sure that that was the case, that the Court had the full  
25 ability to take appropriate action.

1                   Specifically, we don't believe any action by  
2 Mr. Seley or Mr. Williams has prevented or frustrated the  
3 Court's ability to address the propriety of the four public  
4 reserve water right notices that were presented to the Court,  
5 the two temporary nonrenewable permit authorizations issued to  
6 Gary Snow between 2007 and 2009, which have not continued, the  
7 trespass notices to third persons who are not parties before  
8 the Court, and the BLM's solicitation of applications for the  
9 Ralston Allotment, which the testimony has demonstrated and  
10 the evidence has demonstrated, BLM has not taken any further  
11 action on and, in light of the Court's order, clearly will  
12 not.

13                   Even if the Court disagrees, however, and finds that  
14 there was some action or some failure to respect the Court's  
15 authority, we very strongly believe that there was no  
16 nefarious intent as the Court phrased it.

17                   We think that all the action was done properly and  
18 innocently and, notwithstanding the position of Mr. Hage and  
19 Mr. Pollot, we don't believe there was any effort by any  
20 individual to try to undermine what this Court has been doing  
21 in reviewing the underlying case.

22                   As senior BLM and Forest Service officials have  
23 testified at this hearing, the actions were authorized --  
24 actions by Mr. Seley and Mr. Williams were authorized by  
25 statute, by regulation, consistent with agency policy and

1 practice and actions expected of their supervisors that they  
2 continue to implement the grazing and livestock program fairly  
3 on public lands.

4 And, again, even if the Court disagrees with us in  
5 that proposition, there is none of the four actions that you  
6 have identified in the contempt citation that cannot be  
7 addressed through the trespass case. In fact, Mr. Pollot and  
8 Mr. Hage both indicated in their argument today that they felt  
9 an injunction would be appropriate.

10 Well, your Honor, if you find that there's a need to  
11 enjoin the agency action, you have the ability to do that.  
12 But we don't believe that issuing contempt citations or  
13 sanctions against Mr. Seley or Mr. Williams is appropriate or  
14 necessary.

15 And civil -- in light of the fact that there's been  
16 a criminal referral which is currently underway, the fact that  
17 these two individuals could be facing both civil and possibly  
18 criminal contempt actions we think extends far beyond any need  
19 to vindicate the Court's authority. We think you have full  
20 authority to take appropriate action, and the trespass case  
21 will adequately protect the interests of the defendants.

22 And --

23 THE COURT: May I ask, is that a binding  
24 statement, sir?

25 MR. SHOCKEY: A binding statement?

1                   THE COURT: Right. In other words, are you  
2 speaking on behalf -- you represent the government, of course.

3                   MR. SHOCKEY: I do.

4                   THE COURT: Are you speaking on behalf of the  
5 government that the government will -- if I were to include  
6 damages relevant to the injunction, relevant to any injunction  
7 that I enter, you would not be taking the position on appeal  
8 that I'm without jurisdiction to do that because that --  
9 jurisdiction over that would be in the Court of Claims?

10                  MR. SHOCKEY: No, we're not taking that  
11 position.

12                  THE COURT: You're not making that commitment?

13                  MR. SHOCKEY: No. You have -- no.

14                  THE COURT: I note that for the record.

15                  MR. SHOCKEY: We do not believe that any  
16 possible harm has been demonstrated by clear and convincing  
17 evidence in this hearing, particularly with regard to the  
18 public water right and the solicitation issue which we view,  
19 and Mr. Hage seemed to recognize in his testimony yesterday,  
20 was procedural.

21                         We filed some papers with the Court. We sent out  
22 some solicitations. Those papers are out there. They're not  
23 being pursued at this point. And the mere action relating to  
24 those two activities we don't believe can result in any harm  
25 that's identifiable or compensable.

1           With regard to the TNR authorizations for Mr. Snow,  
2 those both involve completed past activities that haven't  
3 continued, as Mr. Hage recognized, over the last three years.

4           And with regard to the trespass notices, where there  
5 was some evidence asserting various damages that Mr. Hage and  
6 then the other individuals claim to have incurred, I'll be  
7 addressing those specifically later. But we believe any claim  
8 for damages should be very limited, and we think, for the most  
9 part, those are not matters that warrant a compensation  
10 through a contempt award.

11           In sum, we don't believe there's a basis for finding  
12 of contempt against Mr. Seley and Mr. Williams, and we don't  
13 believe there has been a showing sufficient to impose coercive  
14 or compensatory sanctions against them.

15           I would like to summarize some of the case law,  
16 particularly in the Ninth Circuit, regarding contempt charges  
17 because this, as you've noted, is not an issue that has been  
18 briefed to this point.

19           If given the opportunity to file a post-hearing  
20 brief, I would address some of these points, along with  
21 others, but I wanted to outline for the Court what we think  
22 are some of the important cases to look at in considering a  
23 contempt charge.

24           In a couple of -- I'm sorry?

25           THE COURT: I'm ready to write.



1 MR. SHOCKEY: Okay. In the case of *Reno Air*  
2 *Racing Association versus McCord*, a citation at 452 F.3d 1126,  
3 the Ninth Circuit in 2006 made clear that a notice of specific  
4 prohibitions was essential with any court order to describe  
5 prohibited conduct with specificity.

6 In that case, the Court of Appeals vacated the  
7 district court's contempt order and sanctions because the  
8 order did not provide requisite details to give notice to the  
9 individuals.

10 The standard for finding of civil contempt is  
11 well-settled in the case law. The moving party, in this case  
12 the Hages, has the burden of showing by clear and convincing  
13 evidence that the contemnors, Mr. Seley and Mr. Williams,  
14 alleged to have committed contempt, that they violated a  
15 specific and definite court order.

16 Now, as the Court has referred to in earlier  
17 comments, we don't have a specific order that you have accused  
18 them of violating, and it is clear, from at least my initial  
19 review of the case law, that the vast majority of cases do  
20 involve violations of court orders. That's the situation in  
21 which contempt most frequently arises.

22 There are few instances that I have been able to  
23 identify so far where the charge is that a party is acting to  
24 undermine the Court's authority, which I gather is the  
25 principal concern here. But I think that the case law does

1 shed some light on the manner in which the Court should review  
2 and expect the defendants to meet their burden.

3 THE COURT: Do you have any case authority  
4 dealing in that particular area that limits or tells us what  
5 the standards are where they're acting in derogation or contra  
6 to the Court's jurisdiction and authority? Do we have any  
7 limits imposed by the cases or instruction?

8 MR. SHOCKEY: There are -- and if you will just  
9 allow me to kind of talk through the cases, I will identify  
10 those and try to, again, keep it brief.

11 THE COURT: Okay.

12 MR. SHOCKEY: So the moving party has the  
13 burden. In case *In re Dyer*, 322 F.3d 1178. The Ninth Circuit  
14 upheld that standard. Several other cases -- I'm reluctant  
15 just to sit here and read off cases, but given the --

16 THE COURT: Well, if they add to the standards  
17 that the Court needs to --

18 MR. SHOCKEY: Those stand for the --

19 THE COURT: -- follow, you should cite them. If  
20 not, if they're just redundant, you don't need to.

21 MR. SHOCKEY: All right. A case, *Gates versus*  
22 *Shinn*, S-h-i-n-n, 98 F.3d at 453, the Ninth Circuit in a 1996  
23 decision established that because judicial contempt is such a  
24 potent weapon, that the decree cannot be too vague to be  
25 understood, and so that the charge given to the individuals

1 must be sufficiently clear so that -- and, in fact, Congress  
2 required that a federal court frame its orders so that those  
3 who must obey them will know what the Court intends to require  
4 and what the Court intends to forbid.

5 THE COURT: So those all deal, of course, with a  
6 case where there's a specific citation of violation of a  
7 prohibitory order.

8 MR. SHOCKEY: Right.

9 THE COURT: What's the standard in the case  
10 where someone is challenging the Court's authority, for  
11 example, they stand up in court and they scream and yell at  
12 the judge. They're not violating a specific prohibition or  
13 court order, but they are challenging the authority of the  
14 Court. That would be the latter type of case.

15 What's the standard in that type of case.

16 MR. SHOCKEY: Your Honor, in -- I did not focus  
17 in the limited time my attention on that issue because that  
18 involves an issue in the presence of the Court, which is a  
19 different situation from what we have here, which I think as  
20 the Court clearly identified. This is a situation where the  
21 alleged contempt occurred outside of the court.

22 THE COURT: What if someone is down in the  
23 foyer, out of the presence of any judge, screams and shouts  
24 and throws inappropriate material on the walls of the foyer in  
25 form of protest, is that not punishable by contempt, even

1     though it's outside the presence of the --

2                   MR. SHOCKEY:  I have not seen any case where  
3     that sort of issue has come up in a contempt charge.  I know  
4     there's one case I did come across that's a little closer to  
5     what I think you're looking for, and let me try to --

6                   THE COURT:  While you're looking for it, the  
7     better example, of course, more analogous to this case, would  
8     be where someone is a party, and the Court announces  
9     decisions, and they walk outside the presence of the Court,  
10    and they state, even for the record, I'm not going to follow  
11    the orders of the Court, the Court is a lunatic.

12                   I'm just trying to hypothecate various scenarios  
13    where they're definitely challenging the authority of the  
14    Court outside the presence of the Court, and they're a party.  
15    Is there no jurisdiction to hold such a person in contempt?

16                   MR. SHOCKEY:  Well, the cases that I am aware of  
17    involve a situation where courts -- I haven't seen a case  
18    where someone has been charged with contempt for those kinds  
19    of activities.

20                   There are a number of cases where parties or their  
21    attorneys have engaged in inappropriate discovery activity and  
22    have refused to turn over documents, and the Court has  
23    concluded that failure to do so undermines the administration  
24    of justice.

25                   THE COURT:  So usually that's brought in the

1 context of 1927, or Rule 11, or a discovery sanction. But  
2 there are cases that say that the authority for that is also  
3 contempt.

4 MR. SHOCKEY: Yes. And although in a number of  
5 those cases where the District Court has found -- made a  
6 finding of contempt, the Court of Appeals, the Ninth Circuit  
7 on many instances, has set aside those findings.

8 But, yes, there is authority for the proposition  
9 that a District Court does have the inherent authority to  
10 enforce its ability to preside --

11 THE COURT: Its jurisdiction as well as its  
12 orders.

13 MR. SHOCKEY: Right.

14 The case is called *Woodley* that I'm looking for.  
15 This is -- in a case called *United States versus Woodley*, 9  
16 F.3d 774, page 782, this was a case where an attorney had been  
17 convicted of tax evasion and mail fraud, and the District  
18 Court, I believe it was Judge Zilly in the Western District of  
19 Washington, imposed discovery sanctions against the  
20 government, and the Court announced that it was intending to  
21 send the government a significant and strong message that it  
22 would not tolerate such misconduct.

23 And so that's a situation where, you know, it wasn't  
24 an attempt to insult the Court, but it was an attempt to  
25 engage in what the District Court determined to be

1 misconduct that undermined the --

2 THE COURT: Another example might --

3 MR. SHOCKEY: -- administration.

4 THE COURT: -- be where a tax court has  
5 jurisdiction or an Article III court has jurisdiction of the  
6 tax issue and the party, the taxpayer, files a lien against  
7 the judge. That might be an example.

8 MR. SHOCKEY: That could be.

9 In the *Woodley* case, the Court of Appeals actually  
10 set aside the finding of contempt and the sanctions because it  
11 found that any possible damage to the Court's authority was  
12 cured by allowing some further depositions.

13 And I would suggest, by analogy here, to the extent  
14 that the Court has identified activities such as --

15 THE COURT: Well, that's a definite standard,  
16 and I agree with it. That's a limitation. In other words, in  
17 civil contempt, the Court needs to give a method for purging  
18 the contempt.

19 MR. SHOCKEY: Correct. Correct. That is one of  
20 the key elements.

21 Probably the leading original case for that  
22 proposition is a Supreme Court opinion from 1911 called  
23 *Gompers, G-o-m-p-e-r-s, versus Buck's Stove & Range Company*, a  
24 case I assume involving Samuel Gompers, a very famous labor  
25 leader in the early part of the 19th century.

1           And the Court reiterated that the fundamental  
2 concept of civil contempt is that the contemnor carries the  
3 key of his prison in his own pocket.

4           In other words, there must be in civil contempt an  
5 ability to take some action to purge the contempt to bring  
6 oneself out of a situation of contempt and back into  
7 compliance with the proper procedures.

8           THE COURT: And I agree with that proposition.  
9 I think there is contempt authority. In the example I last  
10 cited where some -- a party files a lien against the judge, in  
11 essence challenging the jurisdictional authority of the Court,  
12 attempting to -- same as if they walked into my office and  
13 made a bribe attempt, that really is an affront to the Court,  
14 a challenge to the jurisdiction of the Court.

15           But in that case I must give an opportunity to  
16 purge. For example, I must tell the contemnor you will sign  
17 or your attorney will prepare and you will sign a revocation  
18 of the lien. That would be an example.

19           MR. SHOCKEY: Right. And let's just take that  
20 example and that language and apply it for a moment to our  
21 situation here.

22           One of the first items you identified was that  
23 Mr. -- that -- you asserted that Mr. Seley directed the BLM to  
24 file the PWR water rights on top of Hages' water rights, and  
25 that was done during the course of the trial.

1           As I think we all recognized, there's some confusion  
2 and differing opinions and interpretations about exactly what  
3 was said.

4           Regardless of that, if he is to be held liable for  
5 that civil contempt, he has to have an ability to take some  
6 action, and if, in fact, the simple -- the act of filing those  
7 rights was contemptuous, then I suppose he has to be given the  
8 ability to withdraw those.

9           But the example that concerns me a little bit more  
10 is looking at the temporary nonrenewable permits to Gary Snow  
11 in 2007 to 2009. Those were past actions. Mr. Seley did  
12 issue the approvals. We've had a lot of discussion and  
13 evidence and testimony from different people about what the  
14 effect of that was.

15           Regardless, that is an action that was completed in  
16 2009. Unquestionably Mr. Snow has not received any further  
17 TNR since then.

18           So in order for the Court to say Mr. Seley is in  
19 contempt of court because he took those actions, I would have  
20 to construe that as more of a punitive measure because there's  
21 nothing he could do to effectively withdraw the 2000 --

22           THE COURT: I don't see it that way.

23           If, for example, there's a definite identifiable  
24 damage to the other side in well-defined terms, an element of  
25 the purging of contempt would be for the party who is in



1 contempt to purge the contempt by paying it.

2 MR. SHOCKEY: But Mr. Seley did not know that --

3 THE COURT: That's not a punitive measure.

4 MR. SHOCKEY: Mr. Seley did not know until  
5 June 5th, thereabouts, of 2012 that he was alleged to have  
6 been in contempt for actions he took several years ago.

7 If Mr. Hage and the Estate can prove that there's  
8 been a violation, the courts have also made clear that any  
9 compensatory sanctions may be awarded, but they must be  
10 limited to the actual damages and losses suffered as a result  
11 of the contumacy, the contemptuous behavior, and there must be  
12 a causal connection between that loss and the violation of the  
13 Court's order or the contumacious contempt.

14 A case cited for that proposition is *General Signal*  
15 *Corp. versus Donnalco, Inc.*, 787 F.2d 1376, a 1986 Ninth  
16 Circuit ruling.

17 The -- let me give you a -- I don't want to run  
18 through the entire list of cases. I'm sure you're familiar  
19 with many of them. Many of them stand for similar  
20 propositions.

21 But those are the main points to establish, is there  
22 has to be notice. There has to be a standard of clear and  
23 convincing evidence. The burden of proof rests with the party  
24 asserting the contempt, and the sanctions must be limited to  
25 the actual losses or compensation suffered.

1           And civil contempt -- this is actually -- this case  
2 may be a little closer to what we were discussing earlier. In  
3 *United States versus Armstrong*, 781 F.2d 700, Ninth Circuit  
4 1986, the Court said that civil contempt is not appropriate to  
5 punish or vindicate the authority in the face of disrespectful  
6 or contumacious acts, and the Court also must recognize that  
7 the same conduct should result in both civil and criminal  
8 contempt.

9           And I would suggest that's the situation here. The  
10 Court made one finding that there are acts alleged to be in  
11 contempt. You decided that we needed to hold a civil contempt  
12 hearing. You simultaneously referred the same charges to the  
13 U.S. Attorney's office which has been referred to the Central  
14 District of California.

15           So we have a situation where the same action could  
16 result theoretically in both civil and criminal sanctions.  
17 And in those cases, the courts have been pretty uniform in  
18 saying where the punishment could be both civil and criminal,  
19 then the criminal standards should govern.

20           There was --

21           THE COURT: I don't think you can cite any case  
22 for that proposition, that in the civil side of it -- clearly  
23 the cases stand for the proposition that it can be both, both  
24 criminal and civil.

25           It's my understanding that on the civil side of it,

1 we don't go to a criminal contempt standard, that is, beyond a  
2 reasonable doubt.

3 MR. SHOCKEY: That is correct. It's important  
4 because of the standard of proof that is required, which  
5 differs in a civil and criminal context.

6 But let me refer you to perhaps the most notorious  
7 contempt case that the Department of the Interior and  
8 Department of Justice have been involved with.

9 This is a case called *Cobell versus Norton*,  
10 *C-o-b-e-l-l versus Norton*. The citation is 334 F.3d 1128,  
11 particularly discussion of 1145 through 1147. This is a case  
12 out of the District of Columbia Circuit in 2003.

13 And in that case, the District Court held Secretary  
14 of the Interior Norton and others under her authority in civil  
15 contempt for litigation misconduct in failing to comply with  
16 court orders. Litigation --

17 THE COURT: Was that the Indian --

18 MR. SHOCKEY: Yes, it is.

19 THE COURT: -- trust case?

20 MR. SHOCKEY: The very one.

21 THE COURT: Judge --

22 MR. SHOCKEY: Lamberth.

23 THE COURT: -- Lamberth.

24 MR. SHOCKEY: Yes.

25 THE COURT: Is that correct?

1           I listened to him talk on this very subject here  
2 this last spring. I attended the Federal Circuit's  
3 conference.

4           MR. SHOCKEY: He spent a great deal of time on  
5 that case.

6           The District of Columbia overturned his filing of  
7 contempt and noted that by specifying contempt sanctions for  
8 past conduct of the defendants, the Court, in effect, had made  
9 the proceeding criminal because there was nothing that  
10 Secretary Norton or the other Interior Department officials  
11 could do to purge themselves of these past acts.

12           And the Court said in that situation, although the  
13 District Court has characterized the proceeding as civil  
14 contempt, in effect, it was punitive because it was --

15           THE COURT: Well, that's really different.  
16 That's really different. You know, the past acts, of course,  
17 were misappropriation of the -- of the funds and failing to  
18 maintain accounting records. That's really different.

19           What we're talking about here is during the course  
20 of the litigation, taking acts in contravention of the Court's  
21 authority and jurisdiction, and there is a method to purge.  
22 It's twofold.

23           For example, with respect to the trespass notices, I  
24 can order them the way you purge is you strike those, you  
25 rescind them, you pull them back from Treasury, and you strike

1 them and rescind them if it was for a contumacious purpose.

2           The other thing I can tell them is don't repeat it,  
3 and the other thing I can do under all of the authority that I  
4 understand is I can compensate a party that was injured by the  
5 very contumacious conduct during the course of the trial.

6           I agree with you if we're talking about past acts  
7 preceding, which is exactly what Judge Lamberth was faced  
8 with, that is, primarily failure to account and failure -- and  
9 defalcation with respect to the trust funds, he was also  
10 dealing with, I acknowledge, matters dealing with discovery  
11 and maintenance records during the case.

12           MR. SHOCKEY: Yes.

13           THE COURT: And discovery inappropriate conduct.  
14 I appreciate that.

15           But here we're really talking about -- the only  
16 thing I'm talking about, having limited it to the time of the  
17 filing of the complaint forward, the only thing I'm talking  
18 about is action that he took, in essence, to use the  
19 colloquial, kill the other side over jurisdiction, over issues  
20 that I had jurisdiction of. That's what I'm talking about.

21           So I agree with you, if the intent is punishment for  
22 past conduct, that's pursuant to a criminal case. That's why  
23 I referred it.

24           But if it's contumacious conduct for my  
25 jurisdiction, then I have jurisdiction to rectify that, not by

1 punishment, not by saying two days over there, sir, but rather  
2 by instructing them to stop or strike or undo the effect of  
3 any contumacious conduct, and, the Circuit tells me, to order  
4 compensation to the side that was injured because of that  
5 conduct postcomplaint. I think that's the meaning of the case  
6 law.

7 MR. SHOCKEY: Well, let me proceed, if I may, to  
8 focusing on the specific allegations.

9 THE COURT: Please.

10 MR. SHOCKEY: I have still some material to  
11 cover, and I really do want to move through this.

12 The first charge, A, which is the filing of the  
13 public water rights, we -- excuse me one second.

14 THE COURT: Primarily, according to the evidence  
15 so far, this is a charge -- even though I leveled the charge  
16 against both the Forest Service and the BLM agency heads here,  
17 primarily the evidence has been simply demonstration of that  
18 on behalf of BLM.

19 MR. SHOCKEY: That is correct. And we believe  
20 this charge --

21 THE COURT: Other than the cooperation evidence,  
22 that is, it may be that the motivation for doing so came from  
23 Mr. Williams.

24 MR. SHOCKEY: I don't believe that there's been  
25 any evidence before the Court linking Mr. Williams with the

1 filing of the BLM public water reserve rights which occurred  
2 in the context of the -- from the May 22nd hearing through the  
3 June 6th contempt citation. I believe the record shows it was  
4 strictly limited to BLM.

5 Your Honor, during the hearing and in connection  
6 with your -- the questioning and testimony of Sarah Peterson,  
7 there was some discussion and reading of the transcript, I'm  
8 sure you'll recall, and some difference of opinion.

9 I do not -- certainly do not intend to revisit that  
10 discussion, but I do want to bring to the Court's attention  
11 some additional material --

12 THE COURT: Just so that you're fully aware,  
13 after having listened to the evidence, I'm not so upset, nor  
14 was I upset at the time, by virtue of the fact that she filed  
15 a PWR in this court -- I am upset by her later disclaimer of  
16 intent to file it with the State Engineer, I just don't  
17 believe that's true -- so much as I am upset with the fact of  
18 the extent of the claim.

19 To the extent she had simply filed a PWR giving  
20 notice to this Court that there is a reserved water right,  
21 it's for the purpose of protecting against monopolization and  
22 meeting the primary purpose of the reserve, that is, human  
23 consumption and grazing rights, as long as it was limited to  
24 that, I see no problem with it.

25 What really got this Court going was that she was

1 claiming .028, the equivalent of -- was it 400 or 18,000 AUMs?

2 MR. SHOCKEY: I believe it was 400 cattle at  
3 20 gallons a day for a total of 8,000 was the corrected  
4 number --

5 THE COURT: Eight thousand --

6 MR. SHOCKEY: -- eight thousand gallons --

7 THE COURT: Eight thousand AUMs.

8 MR. SHOCKEY: -- of water.

9 THE COURT: Then, of course --

10 MR. SHOCKEY: Your Honor --

11 THE COURT: It also got me excited that it was  
12 listed at 18,000. And in light of her admission at trial,  
13 we've never owned cattle.

14 So at that point in time, it clearly seemed to me  
15 that what they were doing was trying to -- just like they were  
16 trying to do through other avenues, and that's step on their  
17 water rights.

18 MR. SHOCKEY: Your Honor, one correction and one  
19 observation or argument on that point, if I may. The  
20 correction was the 8,000 was gallons per day. That was a  
21 calculation. It was not AUMs.

22 THE COURT: Right.

23 MR. SHOCKEY: But the more important point was  
24 why is BLM filing these claims.

25 And I think -- while I'm certainly not the expert on



1 Nevada water law, I have done work on some adjudication up in  
2 the Yakima Valley in Washington State, and I know that there  
3 are many of these adjudications throughout the west.

4 It is very commonplace for the United States and for  
5 federal agencies to assert and actually, in many cases, to  
6 receive reserved water rights, but they are done not because  
7 BLM owns cattle on its own behalf, they are done so that there  
8 will be a high priority date for the United States in effect  
9 to protect future livestock use.

10 Let me just give you --

11 THE COURT: That's correct. And when there's an  
12 adjudication, of course, you must file those.

13 MR. SHOCKEY: Right.

14 THE COURT: Now or never.

15 MR. SHOCKEY: Right.

16 THE COURT: And I clearly disclaimed any  
17 adjudication of the government's water right as against the  
18 world.

19 I told you clearly that in response to your question  
20 as to whether or not I was adjudicating the government's right  
21 vis-à-vis this claimed defensive water right, I clearly told  
22 them, yes, I have to by nature of the issues involved.

23 But I also, in the same breath, same sentence,  
24 probably about five times, clearly stated I am not  
25 adjudicating your reserved right as against the world.

1 MR. SHOCKEY: Yes. I think we --

2 THE COURT: So what you're citing as a principle  
3 relates to adjudication where the Court, state or federal,  
4 takes jurisdiction over the stream or the source --

5 MR. SHOCKEY: Right.

6 THE COURT: -- as against the entire world.

7 MR. SHOCKEY: Yes. And I would just encourage  
8 the Court, in connection with reviewing this, to look at the  
9 transcript discussion from pages 3344 up through 3350. This  
10 is a different section than the one we looked at the other  
11 day.

12 And it's my understanding of that colloquy between  
13 primarily you and Mr. Bartell that, yes, you did make clear  
14 you were not proposing an adjudication of these claims against  
15 the world, you were -- you were announcing your intent to  
16 adjudicate the claims as between the United States and the  
17 Hages for their water rights.

18 THE COURT: I think it's pretty clear that if I  
19 were to sustain as between these two parties a claim of 8,000  
20 gallons per day on a couple of these sources, or 300 cattle,  
21 that would have put their -- their water right claim, even  
22 though existent and valid, into the nether lands.

23 MR. SHOCKEY: Well, I don't know the details of  
24 that, and, of course, you haven't gotten to the point of  
25 making that adjudication, but --

1                   THE COURT:  And Ms. Peterson made that clear,  
2  too.

3                   MR. SHOCKEY:  Even --

4                   THE COURT:  She told us she wasn't aware of the  
5  total water coming out of the source.  Nevertheless --

6                   MR. SHOCKEY:  Right.

7                   THE COURT:  -- she filed for 400 cattle.

8                   MR. SHOCKEY:  But hypothetically let's just say  
9  Mr. Hage wins the lottery ticket tomorrow for \$50 million.  He  
10 announces to his family, we're leaving Pine Creek Ranch, we're  
11 moving to Hawaii and we're going to live there peacefully the  
12 rest of our lives eating macadamia nuts, we're out of ranching  
13 business, we've got no interest in this water anymore.

14                   In that case, the United States has a compelling  
15 need to assert and to receive the reserved water rights so  
16 that some other livestock grazer or if Mr. Hage's kids say --  
17 come back in a generation and say, Dad, Hawaii stinks, we want  
18 to go back, you know, to Pine Creek Ranch, they can come back  
19 and go through the procedures and --

20                   THE COURT:  Then they clearly --

21                   MR. SHOCKEY:  -- start the ranching again.

22                   THE COURT:  -- should file a petition in state  
23 or federal court for that adjudication.

24                   But no court that I'm aware of in Nevada would say  
25 you may reserve and you have priority for a use for other

1 grazing petitions or permit holders. You have the right to --  
2 to a reserve for domestic purposes. You have a right for your  
3 own grazing, and sufficient to prevent monopolization of the  
4 range, for example, as against wildlife.

5 But you do not have -- according to my understanding  
6 of Nevada water law, you did not have the right to include in  
7 your reserve a competing permit holder's, or sometime in the  
8 future competing permit holder's, grazing right.

9 MR. SHOCKEY: And if you determine that that's  
10 the case, then the response is, United States, your claim is  
11 invalid, the Hages have the water right.

12 But the real question here, why we're here, is not  
13 to decide that water rights question. We are here to decide,  
14 by having Mr. Seley sign those four notices --

15 THE COURT: Right.

16 MR. SHOCKEY: -- if --

17 THE COURT: Whether he had an intent to crush  
18 the other side and subvert the jurisdiction of this Court.

19 MR. SHOCKEY: Correct. And we submit that based  
20 upon the -- you heard Ms. Peterson testify the steps that she  
21 went through in preparing those forms and gathering the  
22 information, which included her analysis and assessment of how  
23 the United States treats public water rights and how it looks  
24 at other sources of legal authority in the west to determine  
25 whether it is appropriate to assert these kind of rights.

1           And it was her conclusion that because these are  
2 property interests not of her or Mr. Seley or the BLM but of  
3 the United States Government, based on President Coolidge's  
4 Executive Order back in 1926, because of that she cannot fail  
5 to assert rights if she believes they should be asserted.

6           And it was our understanding, perhaps incorrect,  
7 certainly different from yours, that what you were telling us  
8 was if you have rights as regards any of the water rights  
9 claims in the Ralston Allotment or vis-a-vis the Hages, now is  
10 the time you must bring those to the Court.

11           So that is why we filed these. It was in no way an  
12 attempt to take the Hages' water right. It was in no way an  
13 attempt to interfere with your jurisdiction.

14           It was an attempt to do what we thought you had  
15 directed us to do and put the matter before you. We thought  
16 we were complying with the Court's directive, not acting in  
17 derogation of it. And if you find we were wrong, you can so  
18 rule.

19           But I do not believe that Mr. Seley can be held in  
20 contempt or that he had any intent to act contemptuously or  
21 interfere with the Court's jurisdiction in regard to those  
22 water right claims.

23           There are a number of -- you know, I don't want to  
24 go through all of the rationale that Ms. Peterson discussed  
25 about her assessment of the Nevada State Engineer and the

1 Idaho and Colorado courts. We think those were all relevant  
2 considerations that affect the intent of the BLM through  
3 Ms. Peterson and through the signature of Mr. Seley in  
4 preparing and submitting those forms.

5 But we don't think that the evidence showing that  
6 Mr. Seley had signed those forms and had some discussions with  
7 Ms. Peterson can support the charge that we were -- that he  
8 was attempting to take away the Hages' water rights by simply  
9 submitting those forms to the Court.

10 And we don't believe that the submission of those  
11 forms resulted in any damage. In fact, it's my recollection  
12 from Mr. Hage's testimony yesterday that he acknowledged that,  
13 that having the forms submitted by themselves didn't damage  
14 him.

15 Of course, if the government were to ultimately  
16 receive some water right award, that would be different. But  
17 that's not where we are now.

18 And, again, we are looking at is there -- even if  
19 the Court does find contempt, the next question is what  
20 damages have resulted from them, and we don't think with  
21 regard to this charge there was anything identifiable.

22 B, charge B was the temporary nonrenewable  
23 authorizations issued to Gary Snow 2007-2008, dealt with  
24 Mr. Seley's involvement and signature.

25 And, again, you indicated in that charge the burden

1 of proof would be on the defendants to show any damage from  
2 that.

3 Mr. Mayberry of the BLM testified and reviewed the  
4 basis for the Bureau of Land Management's authority under  
5 FLPMA to designate lands for grazing and to provide authority  
6 for nonrenewable uses of BLM lands for grazing. He described  
7 the process, how BLM goes through analyzing TNR applications.

8 We also heard testimony from Mr. Pointel this  
9 morning, and others, that anyone can submit one of these  
10 applications, that Mr. Smith [sic] did so. BLM did not give  
11 him any special treatment. They didn't do anything other than  
12 processes request, and in 2007 to 2009, they granted two such  
13 authorizations.

14 And here I guess we get to one of the real  
15 fundamental points of disagreement between ourselves and the  
16 defendants, and that is an issue I need to come back and  
17 address a little bit later, and that is the fact that this  
18 matter was pending in litigation, and has been since 2007,  
19 does that mean that BLM should refrain from taking, in this  
20 case, the administrative action of authorizing and acting on a  
21 TNR application, and, in this case, approving it to Mr. Snow  
22 along with the terms and conditions that we outlined this  
23 morning and reviewed with Mr. Pointel.

24 We don't believe -- and the BLM, including the  
25 acting director, Mr. Pool, and Mr. Mayberry, the regulatory

1 expert, don't believe that there's a basis to hold off on or  
2 suspend issuing those kind of TNRs while the matter is in  
3 litigation, and it really comes down to what we think is the  
4 fundamental -- well, disconnect or, in our view, the problem  
5 with the Plaintiff's attempt to -- the Defendants' attempt to  
6 demonstrate contempt here.

7           If they felt that Mr. Seley, by approving these  
8 TNRs, was acting inappropriately, in derogation of the Court's  
9 authority, unlawfully under his authority, they should have  
10 come in and said, Judge, enjoin them. Stop the BLM from doing  
11 this. There are standards for doing that. The Court has a  
12 process for doing it. We have rules that govern it. We have  
13 case law that says what you have to do to get a preliminary  
14 injunction.

15           But that didn't happen. And I just -- I find it  
16 very difficult to accept the proposition that every time a  
17 case is pending in court that the agency has to cease its  
18 administration of the program absent a court order saying stop  
19 it.

20           And if there's a problem, if we're doing something  
21 wrong, then we should stop. But a party has got to come to us  
22 and come to the Court and make the appropriate demonstration,  
23 and that didn't happen here.

24           You know, the Hages knew -- knew about these TNR  
25 authorizations obviously long before Mr. Seley arrived at the



1 Tonopah field office. We had testimony today, which I think  
2 is uncontested. Mr. Hage testified yesterday that these TNRs  
3 have been in effect for at least ten years. And Mr. Snow has  
4 had a number of them up through 2009.

5           So it was no surprise that these happened. But when  
6 they happened during the course of this litigation as  
7 administrative processes, you know, if the Hages really felt  
8 this is fundamentally wrong, this is interfering with our  
9 rights, this is interfering with the Court's ability to decide  
10 these issues, let them come in and file injunction, and if the  
11 Court agrees, they will order the BLM to stop doing it. But  
12 that didn't happen.

13           And the fact is, since 2009 there haven't been any  
14 other further TNR authorizations issued to Mr. Snow, and any  
15 possible impacts that could have occurred I think are really  
16 quite minimal.

17           There was a lot of discussion about, you know, what  
18 is the impact of having Mr. Snow bring the water haul sites  
19 out and could he be -- his cows drink some of the Hages' water  
20 and could the Hages' drink some of his water. You know,  
21 that -- I think that really goes to the question of damages.

22           As I recall, Mr. Hage said yesterday that he could  
23 not identify or quantify or even affirm for sure that any of  
24 Mr. Hage's cows came over and drank his water.

25           And, in fact, I think the evidence shows that his

1 herd and the cattle under his control had been growing during  
2 this time. So it does not appear to have had any adverse  
3 impact on the herd, and my guess is his cows were probably  
4 drinking more water and maybe some of Mr. Snow's. But that's  
5 neither here nor there.

6 The only question before the Court today is did  
7 Mr. Seley by approving those authorization act in contempt of  
8 this Court's authority, and we don't believe that he did or  
9 that there have been any proof damages from that.

10 C, the trespass notices. Again, Mr. Mayberry, on  
11 behalf of the BLM, testified extensively about the grazing  
12 regulations and why it is that it's important for BLM to  
13 administer the program, to ensure that lawfully permitted  
14 grazers have cattle on public lands, and to ensure that  
15 unauthorized use of the lands is not tolerated and permitted.

16 And Mr. Pool also testified as to the importance of  
17 that from a programatic perspective.

18 BLM, you know, it -- without some kind of written  
19 documentation, it was -- really, we believe, impossible for  
20 BLM, or the Forest Service in this case -- when they go out on  
21 their allotments and they see cattle there, all they have is  
22 the brand. And they pursue the brand. They call the owner or  
23 they contact the owner.

24 Now, we've got a lot of testimony and a lot of  
25 discussion about the various lease arrangements, and Mr. Hage

1 and others said, yes, most of these are oral. We just have an  
2 understanding or a written agreement or a handshake deal.

3 And that -- you know, that -- I accept that that's  
4 the way business works on the range, and it's historical and  
5 customary.

6 But from the perspective of a government agency, we  
7 have to have some kind of regularized system. We cannot --  
8 the government has to be accountable. We can't operate on the  
9 basis of handshake deals where the people don't have a right  
10 to know what's happening.

11 So we have regulations. And those regulations say  
12 if you have a permit and you want to have somebody else lease  
13 cattle to you, that's permissible. Give us the written  
14 agreement, we'll approve it and you can proceed.

15 So, you know, we think there was testimony and some  
16 argument today from Mr. Pollot in particular that, you know,  
17 once Mr. Williams of the Forest Service or once Mr. Seley of  
18 the BLM were informed that they should have backed off and  
19 certainly should not have sent armed agents out to the  
20 locations of certain individuals, the fact of the matter is I  
21 think it's evident, and I think the testimony before the Court  
22 will demonstrate, that that incident that was discussed about  
23 Mr. Williams and the armed law enforcement agent, I believe  
24 that was back in 2008 or 2009.

25 And when he was told don't do this, get off my

1 property, don't come back here with an armed law enforcement  
2 agent, he ceased, and it hasn't happened since. So that  
3 concern I don't think is a legitimate basis for saying these  
4 gentlemen are acting in contempt of the Court's authority.

5 They were doing what their supervisors and what  
6 their regulations told them to do, which was to look for  
7 unauthorized grazing and to take appropriate actions to  
8 enforce them.

9 Now, the issue is -- that Mr. Pollot has raised,  
10 well, we put all of this before the Court. Yes, we put the  
11 issue of unauthorized grazing before the Court. The complaint  
12 was filed in 2007.

13 In 2011, I believe eventually, the Estate, although  
14 not Mr. Hage himself, filed a counterclaim and listed  
15 injunctive as well as declaratory relief.

16 But a counterclaim, just like a complaint is an  
17 allegation. It's not proof. And if there is a basis for,  
18 again, obtaining injunctive relief, they had it well within  
19 their power to do that.

20 If they felt that BLM and the Forest Service must  
21 stop issuing these trespass notices, then they should have  
22 come to the Court and said Judge Jones, Chief Judge Jones,  
23 here's what's going on, here's the evidence, here's the  
24 irreparable injury, here's the public interest, issue an  
25 injunction to stop this, but that hasn't happened.

1           And, again, I don't believe that the government  
2 agencies are required -- and I will give you a couple I think  
3 of pretty telling examples of that in a couple of minutes. I  
4 don't think the government agencies are required to or should  
5 cease to carry out their regulatory responsibilities simply  
6 because a case is in court.

7           There was some discussion of some of the court cases  
8 that had been discussed, the *US versus Alt* case, the IBLA  
9 ruling in the *Jensen* decision.

10           The purpose of citing those and bringing those to  
11 the Court's attention is to demonstrate that at least from the  
12 perspective of Mr. Seley and Mr. Williams and the people they  
13 work with that there was legal authority and support within  
14 the judicial framework and the administrative framework for  
15 continuing to take enforcement actions including issuing  
16 trespass notices for lease agreement situations that had not  
17 gone through the proper review and channel.

18           And because of that, we think both Mr. Seley and  
19 Mr. Williams were acting, again, within the expected and  
20 appropriate authority, certainly not issuing these trespass  
21 notices in an attempt to interfere with this Court's ability  
22 to decide the underlying issues.

23           You are about to issue us a ruling at some point  
24 fairly soon on the underlying merits, and we think if -- you  
25 know, again, if you determine some kind of relief is

1 appropriate, that's the forum to make that ruling, but it's  
2 not to single out, in our view, Mr. Seley and Mr. Williams to  
3 say you are in contempt of this Court.

4           You know, there was a fair amount of discussion of  
5 damages. I think Exhibit 2754A is the summary list of damages  
6 attributable to BLM that Mr. Hage provided, and this was --  
7 had been amended and condensed from the original claim.

8           Important to point out here, again, with respect to  
9 the Forest Service, the Forest Service has not pursued any  
10 kind of collection activity. There have been no moneys paid  
11 to the Forest Service or on account of the Forest Service  
12 trespass notices. So there is no damage claim affiliated with  
13 that.

14           Now, with respect to BLM, as I look at this exhibit,  
15 we see relatively small charges to Mr. McGowan, Chance  
16 Kretschmer, Ray Kretschmer.

17           The biggest single item is Durk Pearson's payment of  
18 \$15,479 for the settlement agreement, and I think the  
19 examination of Mr. Pearson demonstrated that while he felt he  
20 was being compelled or pressured to do this, the fact of the  
21 matter, he was advised by legal counsel, and if he felt that,  
22 you know, I'm not going to do it, it's not appropriate, then,  
23 you know, he shouldn't have signed the settlement agreement.  
24 But, in fact, for whatever reason, he felt it was appropriate,  
25 that matter was resolved.

1           We don't think that the -- those funds should be  
2 disgorged or that Mr. Seley or Mr. Williams -- Mr. Williams  
3 was not involved in this, that Mr. Seley should be held liable  
4 for compensation to Mr. Pearson for Mr. Pearson's voluntarily  
5 entering into a settlement agreement or the attorney's fees  
6 associated with that.

7           The other really big ticket item on this list, of  
8 course, is the \$103,000 associated with the purchase of the  
9 cattle by Mr. Hage from Danny Berg, and we're, I think,  
10 frankly, having a difficult time accepting that as a loss.

11           Because the fact of the matter is, money may have  
12 changed hands. There was a sale of property. Mr. Hage now  
13 owns the cattle that Mr. Berg formerly owned. Mr. Hage now  
14 owns the cows the Mr. -- the calves that Mr. Berg formerly  
15 had.

16           Mr. Berg is no longer paying the AUMs to Mr. Hage,  
17 but the fact of the matter is the same number of cattle exist,  
18 the same number of cows exist. A different person has the  
19 legal control over those and can stand to secure some  
20 financial benefit from the sale and the eventual -- you know,  
21 the production of additional calves.

22           But there is no -- you know, it's in a closed  
23 system. There's no net loss of funding here. There's no  
24 ultimate damage.

25           Now, Mr. Hage, I think to his credit, as a, you

1 know, very ethical businessman says I feel obligated to make  
2 Mr. Berg whole, and I will do so, and I think that's very  
3 admirable and probably why he has so many close business  
4 associates willing to continue to work him.

5 But the fact of the matter is, I don't believe that  
6 that can be attributed -- the fact that Mr. Berg got paid what  
7 everyone admits was top dollar and very good amount for his  
8 cattle, you know, he has come out of this whole, not perhaps  
9 where he wanted to be, but, you know, he's received the money.

10 Mr. Hage has the cattle. He has the asset, the  
11 valuable asset now, and we don't think that that is fairly a  
12 damage claim that can be attributed to the BLM for its  
13 enforcement of the regulations.

14 After all, in the BLM's perspective, neither  
15 gentlemen should have been authorized or should have had their  
16 cattle out on the public lands.

17 I could go on and on on some of this, but let me try  
18 to get to the last point and then wrap up with a couple of  
19 concluding comments.

20 The last ground was the solicitation of the Ralston  
21 Allotment, charge D in the contempt citation.

22 Again, the Court was put on notice during the course  
23 of the trial of testimony about what the BLM had been doing.  
24 The Hages certainly were aware of it. And, once again, if  
25 they felt that the solicitation of this preference by sending



1 out the notification to the 75 individuals, if that was  
2 unlawful or unauthorized, you know, they could have come into  
3 court and said, Judge, stop it, but they didn't do that.

4           The matter -- you know, as a result of decisions by  
5 BLM, they're not pursuing that. They recognize that, you  
6 know, this Court will be continuing -- will be issuing a  
7 determination on the underlying trespass claim, and BLM has  
8 said we're not going to deal with this solicitation issue,  
9 we'll suspend it. It hasn't been formally terminated, but I  
10 think that the evidence before the Court in both the trial and  
11 this hearing shows that that is not going to proceed.

12           And, again, what's happened here is we have BLM  
13 sending out some letters. The Hages -- Mr. Hage takes  
14 exception and expresses the concern or the worry that if this  
15 were to go ahead and some other individual were to get the  
16 preference and perhaps a permit, that he could be harmed, but  
17 it hasn't happened, it's not happening, and there's no damage  
18 associated with the simple act of soliciting interest.

19           And, again, Mr. Mayberry for BLM testified as to the  
20 process and why issuing this kind of solicitation was  
21 authorized under the grazing regulations and explained a  
22 number of reasons why BLM would typically do that sort of  
23 thing.

24           But, again, there has been no approval of any  
25 solicitation. No grazing has ever been authorized as a result

1 of sending out these applications. And we don't believe that  
2 the act can be viewed as one taken in contempt of the Court's  
3 authority or that any damages have resulted from it.

4 I'd like to just make a couple of more general  
5 concluding comments. There were a number of points in  
6 Mr. Pollot's argument that we certainly take very strong  
7 exception to and do not believe fairly reflected the -- what  
8 has transpired over the course of this litigation.

9 But the point I really want to make is we had the  
10 acting director of BLM, Mr. Mike Pool, come here and testify.  
11 He reviewed all the contempt charges. He reviewed the actions  
12 taken by Tom Seley. And his view from the top of the BLM was  
13 that Mr. Seley was act appropriately and consistent with the  
14 agency statutes, regulations and policies.

15 Forest supervisor Jeanne Higgins came here and  
16 testified on behalf of Steve Williams to the same effect.

17 And while Mr. Hage perhaps feels that those senior  
18 BLM and Forest Service officials should be held in contempt, I  
19 don't think that's an appropriate inference to draw.

20 The testimony before the Court was both those  
21 individuals were very concerned that for having their  
22 employees do what the employees were expected to do, what they  
23 were trained to do, what they believed was fully authorized  
24 under their authorities, that they should not be held in  
25 contempt of court for doing their job.

1           Now, in the process of -- Mr. Forsgren of the Forest  
2 Service testified, and the Court made a finding that you found  
3 his testimony lacked credibility. I would respectfully but  
4 emphatically say that I disagree with the Court's assessment,  
5 and ask the Court to reconsider that finding. But if the  
6 Court declines to do so, I simply want to, again, note our  
7 exception to that finding as a matter of the record.

8           But regardless of Mr. Forsgren's testimony, both  
9 Mr. Pool and Ms. Higgins have testified that the actions were  
10 authorized and appropriate and should not be held as  
11 contemptuous of the Court.

12           They also testified that on a very consistent and  
13 regular basis, and there's been no evidence to the contrary,  
14 that BLM and Forest Service comply with the court orders when  
15 they are issued.

16           When this Court issued its order on June 6 and said  
17 stop issuing trespass notices, that immediately went into  
18 effect.

19           If this Court issues some further order in the  
20 trespass case, and if there's some injunctive relief  
21 component, we will, of course, immediately come into  
22 compliance with that. That is the agency policy, and that's  
23 the way we operate.

24           And, again, if the Estate or Mr. Hage felt during  
25 the course of the five-year pendency of this litigation that

1 there was a need to stop some of these interim actions, the  
2 TNRs, the trespass notices, they had the ability and they had  
3 the right to come into this court and say, Judge, enjoin this  
4 action, but they didn't do that.

5           Mr. Pool and Ms. Higgins also testified that neither  
6 agency stops enforcing the federal laws whenever a lawsuit has  
7 been filed, and I would ask the Court to consider the  
8 implications, the serious implications, we believe, of a  
9 finding to the contrary, and let me give you three examples to  
10 try to make this point clear, and then I'm just about done.

11           First, these are hypothetical but have very real  
12 examples that we've had to deal with.

13           Let's assume that a lawsuit is filed challenging a  
14 speeding ticket because the driver thinks that the radar gun  
15 or speed gun is invalid. Or let's assume that someone  
16 challenges -- gets a red-light violation for one of these  
17 camera-mounted cameras on a pole.

18           And they come to court and they say we believe that  
19 the use of these speed guns is inappropriate, ineffective, and  
20 illegal, and these camera-mounted poles violate our  
21 constitutional rights. We sued for declaratory judgment and  
22 injunctive relief to stop this activity.

23           Does the pendency of that lawsuit mean that the  
24 police and the highway patrol have to stop giving tickets and  
25 stop using radar guns and speed guns until a court makes a

1 final ruling on the determination of whether, in fact, there's  
2 been a violation of law by using radar guns or cameras? We  
3 certainly think not, and we also think the officer cannot be  
4 held in contempt for continuing to issue law enforcement  
5 citations in that situation.

6 Second example. Let's assume we have a lawsuit  
7 filed challenging federal or state law enforcement action  
8 against drug dealers. Perhaps the allegation is that the  
9 police department is selectively enforcing the law against a  
10 particular ethnic group, or perhaps that someone has a First  
11 Amendment right to use drugs and for religious purposes.

12 That lawsuit is pending before a federal court and  
13 may take a couple of years before it gets resolved. Does that  
14 mean that the police and the law enforcement and the DEA have  
15 to stop making arrests and enforcing the drug laws until the  
16 Court has determined that, in fact, those procedures are  
17 valid? We think not, and we certainly don't think law  
18 enforcement officials should be held in contempt of court  
19 because they're continuing to take those law enforcement  
20 actions.

21 And, finally, an example a lot closer to home, and  
22 this is the one I really mentioned in my opening argument.  
23 Let's assume we have an environmental group like Western  
24 Watersheds Council which issued a protest in one of these  
25 matters, and the Center for Biological Diversity, filed a

1 lawsuit here in Nevada, and they say, BLM and Forest Service,  
2 you are engaged in a violation of NEPA, FLPMA, the Taylor  
3 Grazing Act, and the Endangered Species Act because you're  
4 allowing grazing to go on on the public lands and you haven't  
5 done adequate environmental review, and you're doing  
6 unmitigated damage to the public lands and you're adversely  
7 affecting endangered species.

8           And guess what, Mr. Hage, because you've got your  
9 cattle out there, you're also in violation of the law. You  
10 are taking endangered species, whether it's the sage grouse or  
11 the desert tortoise or the bighorn sheep, because your cows  
12 are out there damaging the public lands.

13           So we're going to move for an injunction and  
14 declaratory judgment, and we want the Court to set that aside.

15           Well, that lawsuit -- that's the kind of lawsuit we  
16 deal with day in and day out, and the fact that that lawsuit  
17 is filed in Nevada or Idaho or anywhere else does not mean  
18 that BLM and Forest Service have to suspend all grazing, nor  
19 does it mean Mr. Hage has to take his cattle off the public  
20 lands.

21           If CBD and Western Watersheds Council believe that  
22 they can demonstrate that there should be some interim relief,  
23 they come in and they submit their papers to the Court and  
24 they ask the Court to issue a preliminary injunction. But  
25 unless and until they do that, the Forest Service, the BLM,

1 and Mr. Hage are entitled to continue with their activities  
2 throughout the course of that litigation.

3 This Court is established -- and this really goes to  
4 the point Mr. Hage finished up with. This Court is  
5 established and conducts its operations with rules so that all  
6 participants will be treated fairly, will know how we go about  
7 presenting evidence, and will know that we will have an  
8 independent ability to present our arguments to the Court and  
9 get a fair ruling.

10 The Court can expect and demand that participants  
11 before it comply with those procedures.

12 Well, in the -- outside of the court, the BLM and  
13 the Forest Service also have a need to have an orderly  
14 process. They have their regulations, they have their laws,  
15 they have their practices, and the purpose is -- while it may  
16 often be uncomfortable or chafe on the views of particular  
17 ranchers or farmers that don't recognize the laws or think  
18 that BLM and Forest Service are overreaching, those laws and  
19 regulations exist for a reason, and it's to have an  
20 accountable public process, to have regulations so that people  
21 can know if you want to lease your cattle, here's the process  
22 you go through.

23 And if someone like Mr. Hage believes that the  
24 government has overstepped its bounds, or that the regulations  
25 are flawed, he has every right to come into this court and

1 say, Judge, we think BLM has issued a bad regulation or made a  
2 bad decision or a taken some action that's inappropriate or  
3 unlawful, we want to have -- challenge it and set it aside and  
4 enjoin it, and you have certainly the authority and the  
5 ability to review those claims and make appropriate decisions.

6 But BLM and the Forest Service have to have and be  
7 given the ability to manage their public lands as Mr. Pool and  
8 Ms. Higgins and the others have testified is essential.

9 And I -- just on a personal note, let me say, you  
10 know, I've been with the United States Government for most of  
11 my career, for 33 years, and it may sound odd to people in  
12 this court, but I'm actually very proud to be a government  
13 employee and to work for the Department of Justice.

14 I've worked for every United States President since  
15 Richard Nixon in one capacity or another, and I understand the  
16 role of this Court, and I understand the role of the executive  
17 branch.

18 I'm new to this case. I probably know less about  
19 cattle and grazing than every single individual before you  
20 here today. But one thing that has struck me in my week or so  
21 here is the basic courtroom civility between all the  
22 government people and Mr. Hage and all the ranchers.

23 When we're in this context, we're polite to each  
24 other. We may disagree, we may have fundamentally different  
25 views, but we get along and we're here, and we're



1 participating before the Court.

2           At some point, this very longstanding dispute  
3 between the Hages and the government is going to come to an  
4 end. And Mike Pool, I think very persuasively, testified the  
5 importance, from the BLM perspective, of being able to work  
6 with the ranching community and not be seen as enemies like  
7 apparently this has developed in this case.

8           But at some point the litigation is going to be  
9 over, and at some point BLM, the Forest Service and the Hages  
10 and the other ranches are going to have to get along.

11           And just as we may end up at some point standing  
12 shoulder to shoulder with them before the Nevada State  
13 Engineer, at some point we need to get where we can shake  
14 hands outside of this court and not confront one another and  
15 certainly have situations where we don't need to worry about  
16 threats and law enforcement and armed officials and that sort  
17 of thing.

18           So, you know, these are very serious charges that  
19 have been leveled against Mr. Seley and Mr. Williams. And in  
20 conclusion, I would say that, respectfully, we don't believe  
21 that there is any evidence to show that Mr. Seley or  
22 Mr. Williams or their agencies have disrespected the Court's  
23 authority or process.

24           We don't think that any of the four specific actions  
25 they've taken were done with any kind of intent to undermine

1 either the Hages' rights or this Court's authority, and we  
2 would ask the Court to so rule, to set aside the contempt  
3 citation, and to terminate this hearing.

4 Thank you.

5 THE COURT: Thank you so much.

6 MR. WIENER: Your Honor, might I have a brief  
7 rest-room break?

8 THE COURT: Yes, uh-huh, five minutes.

9 MR. WIENER: Thank you.

10 (A recess was taken.)

11 THE COURT: Thank you.

12 MR. WIENER: Good afternoon, your Honor,  
13 counsel. Marty Wiener on behalf of Steve Williams and Tom  
14 Seley.

15 I hope what I say pleases the Court, and more than  
16 that, I hope it persuades the Court that there should be a  
17 finding of no contempt, and that even if contempt is found,  
18 that there are no damages to assess on behalf of the Hages.

19 It's clear that the government and Mr. Seley,  
20 Mr. Williams, take this extremely seriously.

21 Mike Pool, who is the head of the -- the national  
22 director of the Bureau of Land Management, came here to sit in  
23 your court, talk to your Honor on behalf of Mr. Seley and  
24 Mr. Williams while there is drought going on, while there are  
25 wildfires going on, when there are issues involving natural

1 resources in Alaska, and yet he cared enough about this issue,  
2 had enough respect for your Honor and thought this was serious  
3 enough to bring him here to your courtroom in Reno, Nevada.  
4 Nobody here is taking this lightly.

5 It's a huge impact on people when a judge makes an  
6 accusation against an individual. It's even more unusual when  
7 the judge happens to be also the one who is the finder of fact  
8 and is going to make the ultimate decision here.

9 This is a unique situation. Mr. Pool himself said  
10 that in his 37 years in the BLM this is the first time he's  
11 seen or heard of a contempt action against one of his  
12 employees. In this case, it's Mr. Seley.

13 My biggest fear is that your Honor -- you're clearly  
14 intending to make a ruling immediately. My biggest fear is  
15 that you've already made up your mind.

16 I must say in reading the transcripts that occurred  
17 prior to my involvement in this case, it seemed as if you had  
18 formed an opinion that there was wrongdoing toward the Hages  
19 done by the government.

20 THE COURT: That's your accusation, sir.

21 MR. WIENER: Okay. Let's say that it's a --  
22 it's not an accusation, it's a conclusion that I seem to  
23 reach. I just respectfully ask you, your Honor -- I took the  
24 opportunity to go look at what the admonition is that your  
25 Honor gives, according to the Ninth Circuit rules, to jurors

1 each time they leave for a recess.

2 THE COURT: That's your accusation again, and I  
3 appreciate your admonition to the Court about how it  
4 entertains its duties, and I accept your admonition.

5 MR. WIENER: Thank you. So maybe we say it like  
6 this. I am respectfully requesting that you keep an open mind  
7 at least until I sit down, and hopefully some of the things I  
8 say may, I hope, have an impact on what your ultimate decision  
9 is.

10 Before I forget, I would like to comment on  
11 something that Mr. Shockey concluded his argument with. He  
12 had several very interesting hypotheticals having to do with  
13 whether law enforcement has to stop their duties merely  
14 because there's litigation going on.

15 I would suggest a little refinement of that. It  
16 isn't -- we're not here over whether BLM would be allowed to  
17 seek compliance with its regulations against anybody in Nevada  
18 or New Mexico or Arizona. We're here about trying to enforce  
19 compliance with a particular individual.

20 So I would refine his hypothetical and say the  
21 individual suing over the radar gun or suing over the  
22 red-light camera or suing over the right to continue with  
23 controlled substance use, should that be a license for that  
24 individual to speed, to go through red lights, to use drugs,  
25 with no threat, with no effort by law enforcement to make that

1 individual comply, and that's what we're here about.

2           And I was distressed. My personal contact with  
3 Mr. Hage, Mr. Pollot, was very similar to the one mentioned by  
4 Mr. Shockey. These are nice people. They've treated us  
5 nicely. We treat them nicely.

6           We heard Mr. Hage -- besides, he's such a youthful  
7 looking person with such big responsibilities, but he said  
8 something that really rang a bell with me. He said he thought  
9 the BLM and the Forest Service itself should be cited for  
10 contempt.

11           Well, your Honor, he should be cited with contempt  
12 by your Honor, and I think it is unfair and unjust that only  
13 one side of this litigation has been cited for contempt for  
14 continuing their activities during the course of this  
15 litigation.

16           He continued with his trespassing activities. He  
17 had no right granted by this Court to continue to do that, and  
18 yet those who try to enforce his compliance with the rules  
19 were cited for contempt, and he gets a potential reward, a  
20 check that you might order someone to sign and give to him.

21           There's no reciprocal or parallel treatment there.

22           And I'll tell you one other thing. Business as  
23 usual for Mr. Hage was not the same as business as usual for  
24 Tom Seley and Steve Williams.

25           Here is the difference. Business as usual for Tom

1 Seley and Steve Williams was to enforce compliance with the  
2 regulations. Business as usual for Mr. Hage was to break the  
3 rules. He seems to have a claim that he's not required to  
4 follow the rules. And that's what this litigation is about.  
5 It's about grazing rules.

6 He referred on the witness stand to the fact that he  
7 thought the Court of Claims action gave him a right to  
8 continue doing what he was doing.

9 But I read that Court of Claims case, and the Court  
10 of Claims case was not about grazing rights in relation to the  
11 BLM. It was about water, improvements, other aspects of his  
12 management of the family ranch.

13 And so for him to say from the witness stand that he  
14 believed the Court of Claims case gave him a right to continue  
15 to break the grazing rules, that itself I'm respectfully  
16 suggesting, although I like this man, that was contempt. It  
17 was contempt for him not to reveal to you that while he was  
18 testifying he knew that the Federal Circuit had reversed the  
19 Court of Claims decision.

20 Mr. Pollot explained it as, oh, it wasn't a complete  
21 reversal, there was reversal and affirmance and, yeah, there  
22 was vacating and not vacating. But the truth is that every  
23 decision of the Federal Circuit in connection with that  
24 opinion was against Mr. Hage.

25 And so if there was someone who should have been

1 cited here, between someone who enforces the rules during the  
2 pendency of this case and someone who violates the rules  
3 during the pendency of this case, it should have been the rule  
4 violator.

5 And so I'm respectfully submitting to you that that  
6 personally disappoints me. And I also think on behalf of my  
7 clients that enough, that alone is enough of a mitigating  
8 circumstance to either cite Mr. Hage, and then you've got what  
9 I would call fairness, or else dismiss the charges against  
10 Mr. Seley and Mr. Williams.

11 There's a reason why there is no preliminary  
12 injunction in this case, no temporary restraining order  
13 requested by these parties.

14 In order to get a temporary restraining order, you  
15 must prove irreparable harm. Now, irreparable means it can't  
16 repaired. If there was irreparable harm. Your Honor could  
17 not repair it. There is no irreparable harm. There is  
18 nothing that your decision in this case can't repair.

19 If there was irreparable harm, the defendants would  
20 have brought a request for a temporary restraining order.  
21 They don't have the grounds because there's no irreparable  
22 harm, and that's why there was no temporary restraining order  
23 restricting Mr. Seley and Mr. Williams for continuing to do  
24 their job.

25 Why was there no preliminary injunction requested?

1 Well, you need irreparable harm, plus you need likelihood of  
2 success. I guess they thought they couldn't come forward with  
3 evidence of a likelihood of success in this underlying  
4 litigation with you.

5 And if there was no likelihood of success, how does  
6 Mr. Hage think that entitles him to continue trespassing? He  
7 thinks he's won the case, or at least that's the way he acts.  
8 But if he thought he was going to win this case -- and, by the  
9 way, he hasn't won it yet -- in fact, your Honor said you need  
10 to go get a permit, Mr. Hage.

11 So not only didn't he have any expectation of  
12 winning sufficient to ask for a preliminary injunction, but he  
13 didn't win anyway. You said to him he needs a permit. He's  
14 someone who is being rewarded for breaking the rules from the  
15 time this case began.

16 Not only did he have no likelihood of success, there  
17 was no success on his desire to avoid the requirement of  
18 getting a permit. You want to put your cattle on -- or you  
19 want to put a friend's cattle or a neighbor's cattle on  
20 federal land, you need a permit or you're going to be  
21 trespassed.

22 In addition to no temporary restraining order or  
23 preliminary injunction, of course your Honor issued no other  
24 kind of an order, and there are no court rules either that  
25 have been violated.



1           You know, the kind of cases that Mr. Shockey was  
2 talking about are ones where the rules of court are broken. A  
3 man who screams and yells downstairs, or screams and yells in  
4 your presence here, or -- I wouldn't say the lien example,  
5 necessarily, is a violation of a rule of court, but there was  
6 nothing definite, nothing that Mr. Seley or Mr. Williams could  
7 see that would tell them what they were allowed and not  
8 allowed to do at the risk of having your Honor's ire at them  
9 for potential contempt.

10           And Steve Williams in particular, I'm going to renew  
11 the request I made just at the beginning of the afternoon  
12 session here and ask you respectfully, this man should be  
13 excused from this case right now. I would request that you  
14 tell me right now that he is out of it. I don't need to talk  
15 about the Forest Service. I don't need to talk about Steve  
16 Williams.

17           Number one, the motion I made at the beginning was  
18 the lack of notice to him of what he was supposed to have done  
19 wrong.

20           Your contempt citation entirely concerns the BLM.  
21 It doesn't even mention the Forest Service or Mr. Williams.  
22 So on that basis alone he should be excused from this.

23           We surmise maybe what the charges are were that  
24 whatever activities Tom Seley is charged with, we need to  
25 defend that for Steve Williams.

1           You know the PWRs, the filing of PWRs, did he allow  
2 someone to have their cattle roam onto Mr. Hage's water  
3 rights? Did he assess trespass fees against Mr. Hage or  
4 against third parties who are in some kind of relationship  
5 with Mr. Hage and he grazed their cattle?

6           Did they solicit for people to file applications to  
7 be permitted to run cattle on land that had formerly been  
8 Mr. Hage's?

9           So we looked for that to present to your Honor just  
10 on the idea maybe that's what the underlying charges are, and  
11 no evidence came forward about any of that.

12           So even what he wasn't charged with, what Steve  
13 Williams wasn't charged with, even that wasn't proven. And  
14 the burden of proof, as your Honor has stated, and as  
15 Mr. Shockey has told you under the law, is on the defendants  
16 to prove by clear and convincing evidence that contempt was  
17 committed.

18           The best that Mr. Pollot could come up with in his  
19 argument -- and, by the way, he's a very nice man, but you  
20 gave him an impossible task, sir. You gave him the task of  
21 proving that Steve Williams and Tom Seley, by clear and  
22 convincing evidence, had committed contempt by interfering  
23 with your Honor's conduct of this case, interfering with your  
24 jurisdiction over issues before you, that the charged acts in  
25 the citation were committed and had the effect of potentially

1 interfering with your ability to judge this case, that the  
2 acts were done with the specific intent to interfere with your  
3 Honor's jurisdiction and conduct of this case, and that as a  
4 result of that, if all those things were proven, that damages  
5 flowed from it.

6 We can start with the fact that no damages were  
7 proved to have been caused by Steve Williams. So even if  
8 contempt was proven, there's no sanction under the rules that  
9 your Honor set forth, which is this is a civil case and the  
10 sanctions, if any, would be limited to compensation to the  
11 defendants.

12 They don't need compensation for anything Steve  
13 Williams did because Steve Williams didn't do anything that  
14 caused any effect on them. There also hasn't been a word of  
15 evidence that he did anything with the specific intent of  
16 interfering with your Honor.

17 Now, the issue here -- and I've heard some comments  
18 that seem to misstate it, in my opinion -- it's not whether  
19 either of these agencies or Tom Seley or Steve Williams did  
20 anything that was harmful to Mr. Hage. The issue here is if  
21 they did anything harmful to your Honor's jurisdiction over  
22 this case.

23 So even if they wanted to crush Wayne Hage, of which  
24 there's no evidence of that, even if they wanted to crush him  
25 or destroy him or kill him, a couple of words that I've heard

1 so far, if it doesn't affect your Honor's ability to decide  
2 this case, it's as irrelevant as Aunt Matilda.

3 So I'm respectfully submitting he shouldn't have had  
4 to be here. But he has been. And he should be excused as  
5 quickly as possible.

6 In fact, the -- Steve Williams, and me as his  
7 attorney, has been put in the middle of the kind of situation  
8 that America's justice system -- and we've heard Mr. Hage's  
9 respect for that justice system, our court system is all that  
10 stands between him and his great enemy, the Satan of the  
11 United States of America, is this court system.

12 We are not Iran where they say to you -- or China or  
13 North Korea where they say we're accusing you of a crime,  
14 prove your innocence. And the first question, of course, is  
15 what am I supposed to have done? Oh, you know, defend  
16 yourself. If you can't defend yourself, we'll take you out  
17 and shoot you.

18 And no one is saying that your Honor or this Court  
19 is going to shoot Steve Williams, but that's what happens in  
20 Iran and Korea and Red China and all these places that we look  
21 at with horror that there can be a justice system like that.

22 And I'm just reading in the paper today how they're  
23 teaching Mexican judges how to allow a public trial. It's  
24 amazing our neighbor next door doesn't have public trials,  
25 it's decided by behind closed doors by judges.

1           So Steve Williams, did he know what he was accused  
2 of? No. You're accused, sir. Prove your innocence. And the  
3 answer is, what am I accused of? What am I supposed to have  
4 done wrong? How do I prove my innocence?

5           In fairness, your Honor, he should not have been  
6 here, and he should be excused.

7           We heard on behalf of the Forest Service from  
8 Ms. Higgins that one of the first things the Forest Service  
9 does is try to meet with the rancher and find a way to -- how  
10 did they describe that -- visit the permittee to seek to  
11 settle the alleged trespass and to seek cooperation. That's  
12 what he was doing when he went to these ranchers' residences.

13           Why did he bring someone with a gun? Well,  
14 Mr. Pollot, clearly a highly intelligent gentlemen, said he  
15 couldn't think of a reason why someone would have to come with  
16 a gun to these ranchers.

17           Now, first, your Honor, I'm going to say coming with  
18 a gun or coming with an armed companion when you're going to  
19 have a conversation with a rancher about a trespass, that's  
20 not in the citation charging him with contempt, nor Mr. Seley.  
21 It nowhere appears in there.

22           But that's the best that Mr. Pollot could come up  
23 with is how offended people are that they showed up with -- he  
24 came with someone with a gun and he can't figure out why.

25           All I can say is Mr. Pollot must walk into this

1 courthouse with a bag over his head. Does he not see the  
2 rocks, those gigantic boulders between this building and the  
3 street? Does he not see the metal posts in the sidewalks that  
4 are completely surrounding this building?

5 Does he not see the gentlemen at the entrance to the  
6 garage where your Honor parks, I'm sure? Maybe you don't get  
7 to walk in the front door like we do. But there is a man  
8 there with a mirror on a stick to look underneath the car.  
9 What is he looking for? He isn't there to check whether the  
10 drive shaft is functioning, he's there to look for bombs.  
11 Why? Why do we have to have four or five men in blue suits  
12 downstairs before we are allowed in the elevators?

13 Mr. Pollot must be thinking of something else and  
14 looking at something else, because there are people in this  
15 world who think USA is the big Satan, and anybody who  
16 represents that government is also Satan and deserves to have  
17 terrible acts of terrorism done to it.

18 And so to say there's no reason why a man with a  
19 gun --

20 THE COURT: Are you implying, sir, that the  
21 defendants are such persons?

22 MR. WIENER: Oh, of course, not. Of course,  
23 not. But we're not --

24 THE COURT: Then why are you saying that a guard  
25 would be needed to guard Mr. Williams against the defendants?

1 MR. WIENER: Because there are people who  
2 potentially would cause damage, injury --

3 THE COURT: I don't see anything other than an  
4 inference that they are such persons.

5 MR. WIENER: Oh, well --

6 THE COURT: You wouldn't be citing to me the  
7 example simply that somebody in Iran is a terrorist if you  
8 were saying that Mr. Williams needed a guard with a gun to  
9 serve a trespass notice on the defendant or the third parties.

10 MR. WIENER: No. The third -- I'm talking about  
11 the --

12 THE COURT: What I'm asking you to do, sir, is  
13 terminate that particular argument.

14 The only conclusion I can get from it,  
15 inappropriately, in violation of your ethics, is that you're  
16 implying these people, whenever there's an encounter with  
17 them, they must be -- the person must be accompanied by a  
18 guard.

19 MR. WIENER: No.

20 THE COURT: It would be the same thing as me  
21 implying, sir, that you're a threat to me because there are  
22 guards outside this building.

23 MR. WIENER: People are --

24 THE COURT: You wouldn't appreciate it if I were  
25 making that implication --

1 MR. WIENER: Of course not.

2 THE COURT: -- to you, would you?

3 MR. WIENER: Of course, not.

4 THE COURT: Then terminate that argument with  
5 respect to counsel and/or the parties on the other side.

6 MR. WIENER: I'm referring to the third parties.  
7 Are you, too, referring to that, sir?

8 THE COURT: I'm referring to your excuse of  
9 Mr. Williams being accompanied by a guard with a gun.

10 MR. WIENER: Do you consider that a part of the  
11 potential --

12 THE COURT: I'm about to hold you in contempt;  
13 you, Mr. Wiener. If you are not going to obey my command to  
14 stop implying, unless you have evidence to support it, that  
15 these persons must be encountered only by --

16 MR. WIENER: No.

17 THE COURT: -- the accompaniment of a guard with  
18 a gun.

19 MR. WIENER: I agree with you, and I will not  
20 say that. I will not say that. What I will say is that --

21 THE COURT: I'll let you continue then.

22 MR. WIENER: What I would say is it's perfectly  
23 rational for Steve Williams to have someone with him to  
24 discourage any aggressive activity against him and to defend  
25 him if in case --



1           THE COURT: Is there any evidence in this record  
2 that he does that on a regular occasion, that he always serves  
3 personally a trespass notice rather than serving it in the  
4 mail, and whenever he does serve it personally, he serves it  
5 accompanied by a guard with a gun? Any evidence in the  
6 record --

7           MR. WIENER: No --

8           THE COURT: -- to support that?

9           MR. WIENER: No. No. And there's no evidence  
10 to the contrary.

11          THE COURT: Then why should I take an inference  
12 that's normal activity on his part?

13          MR. WIENER: That what's counsel wants you to  
14 believe, and his argument was that doing this was somehow a  
15 personal threat against Mr. Peterson [sic] or a personal  
16 threat against Mr. Jensen.

17                What I'm suggesting is that this is just business as  
18 usual in a world where there's a lot of antagonism and  
19 hostility against representatives of the United States  
20 Government. That's all I'm saying.

21                And so it was not intended in any aggressive way,  
22 and there's no evidence to differ from that. It was intended  
23 to be potentially for self-defense.

24                And if a sheriff came out -- well, the police carry  
25 guns. They don't think I'm going to shoot them or something,

1 but it's a little signal to everybody, don't mess with us,  
2 stay away.

3 So that's all I'm saying, your Honor. Although I  
4 would --

5 THE COURT: And I agree with that.

6 MR. WIENER: Okay. So I'm sorry if I got us off  
7 on a bit of a --

8 THE COURT: Yes. You offended me, and you  
9 offended your own ethics.

10 MR. WIENER: Sorry, your Honor. But I --

11 THE COURT: I will not count it against your  
12 clients.

13 MR. WIENER: I will respectfully say that I also  
14 disagree with Mr. Pollot when he said neither Mr. Pearson nor  
15 Mr. Jensen appeared to have -- you know, present any  
16 justification for having a man come with him who is armed.

17 I don't know whether Mr. Williams ever met  
18 Mr. Jensen. I don't know whether he ran his criminal history.  
19 I don't know whether he knows who lives at his house. I don't  
20 know whether he knows his other family members.

21 But we do know Mr. Pearson got so angry on the stand  
22 that your Honor told him cool off, and so this is a man with  
23 some potential for anger.

24 So my bottom line is, it wasn't charged in the  
25 citation, and therefore I'm respectfully suggesting it

1 shouldn't be something you consider.

2           And so I've talked for too long about something I  
3 didn't want you to think about. I'm sorry.

4           THE COURT: That's right.

5           MR. WIENER: My bad. My bad.

6           THE COURT: I won't hold it against your  
7 clients.

8           MR. WIENER: Are we okay here? Do I need my  
9 toothbrush? No. Okay. All right.

10          THE COURT: As long as you stop making the  
11 inference.

12          MR. WIENER: Moving on, sir, moving on.

13                You know, the undercurrent of this litigation is  
14 that somehow the BLM is evil, and I thought it was quite  
15 interesting, Mike Pool, the Acting Director of the BLM, seemed  
16 very articulate to me. He said we are the stewards of the  
17 land. Every answer that he gave as to, you know, the function  
18 of BLM came around to the health of the land.

19                These are like our doctors, land doctors, and I  
20 don't think they should be accused of being vindictive or  
21 hostile when they're -- you know, I had a little spider in my  
22 bathroom today. I apologized to the spider, but I squashed  
23 him. Why? Because I'm concerned with the health of my  
24 family. Black widows, too. This wasn't a black widow. My  
25 wife gets crazy if she sees a spider.

1           We do things to protect what's close to us and  
2 hopefully don't cause any harm.

3           And that's the ultimate goal of the BLM and the  
4 Forest Service, the health of the land.

5           If I could talk for a moment here about some of the  
6 comments of Mr. Pollot. You know, your Honor began the --

7           THE COURT: Again, I hope you're not carrying  
8 the implication that the defendants are someone to be squashed  
9 like a spider for the health of the land.

10          MR. WIENER: You have a terrific imagination,  
11 your Honor.

12          THE COURT: No. I think you do, Mr. Wiener.

13          MR. WIENER: No. You got me on that one. I've  
14 got to be careful here.

15          THE COURT: Yes, you do.

16          MR. WIENER: Okay. So -- but you asked  
17 Mr. Pollot a question at the very beginning. You said if  
18 there's a -- where is the effect on the Court's jurisdiction  
19 from whatever acts were proven to have been done by Mr. Seley  
20 and Mr. Williams? And he never answered the question.

21           I'm not blaming him. There isn't an answer.  
22 Instead, he started talking about injunctive relief and many  
23 other topics. But he never addressed the question of the  
24 potential effect on the Court and the specific intent of  
25 Mr. Seley or Mr. Williams to affect the Court's jurisdiction.

1 And that's his burden.

2 He cannot merely come in here and demonstrate some  
3 damages and expect them to be awarded because your Honor's  
4 instructions were that -- and it's in accordance with the law,  
5 was that the only damages that are compensable are those  
6 directly resulting from the contempt, and whatever is  
7 resulting from the contempt has to be a direct result of the  
8 charged acts.

9 Here's what I noted from Mr. Hage's testimony. On  
10 ground A, the PWRs. He said there were no damages from the  
11 BLM bringing before you the PWRs that were prepared,  
12 mistakenly perhaps, in response to your Honor's --  
13 misunderstanding about your Honor's statement about what you  
14 intended to do.

15 It was clearly a lively discussion between you and  
16 Mrs. Peterson, if that's the right adjective.

17 And the real issue is why were they brought before  
18 your Honor. But, more importantly, was any damage caused.  
19 Mr. Hage, under oath, said no. So even if there's contempt on  
20 the PWRs, there's no resulting damages.

21 Second, how about the cattle roaming onto his water  
22 rights? He said, after your Honor told him you weren't going  
23 to compensate them for the time or the travel, that there was  
24 no damage he could assess from the cattle roaming onto his  
25 water rights. He couldn't even present anything about the

1 value, if anything, of the water they might have drunk. The  
2 most we have is the gas that it costs to run the pump a little  
3 more frequently than it would have otherwise.

4 On count -- or ground C, the trespass notices.  
5 First, the overriding question here is he conceded, when he  
6 was testifying, that he had no legal obligation to repay the  
7 third parties who were cited and paid for trespass fees after  
8 they had entrusted their cattle to him.

9 Well, with no legal obligation to repay them, all --  
10 and he confessed this, he said I just have a moral obligation.  
11 So maybe they have a moral obligation they felt to repay him  
12 after he gets Judge Jones to give the money to him. We don't  
13 know that either.

14 There isn't a document before you. There isn't any  
15 legal obligation he could point to compelling him to pay these  
16 third parties. The third parties are not part of this lawsuit  
17 in the sense that any loss to them is compensable.

18 And so on the basis that there is no legal  
19 obligation that he has to repay these individuals, he should  
20 not be compensated for that any more than for giving them a  
21 Christmas present that he wasn't obligated to give.

22 Finally, on ground D, the fourth of the four charges  
23 was that he could not point to any injury he suffered from  
24 soliciting others to apply for permits. All he could say is  
25 it took him a little more time out of his busy life, and

1 that's not compensable. So from that one witness alone we  
2 have learned that there are no damages to compensate the  
3 defendants for.

4 I was so much struck by the comments that he felt  
5 harassed by the government. But, you know, tax protesters  
6 feel harassed, too, unless they get some order that during the  
7 litigation involving their case the government is not allowed  
8 to enforce the IRS regulations against them.

9 Your Honor will decide what his rights and  
10 obligations are. But until you do, he is just like everybody  
11 else in connection with his grazing rights.

12 Things might be different on his water rights in  
13 connection with the Court of Claims litigation, but there's  
14 nothing in this case that makes him any different than anybody  
15 else until your Honor issues the decision. And the one  
16 decision you've rendered so far, your preliminary rulings  
17 that's right on the bull's eye, is you, sir, must get a  
18 permit. You're not excused from getting a permit.

19 Excuse me, your Honor. Every piece of paper that I  
20 look at and don't say anything about is -- shortens my  
21 argument.

22 THE COURT: Thank you.

23 MR. WIENER: I thought it was interesting, too,  
24 that there's one area of law I'm aware of that when a lawsuit  
25 or when a litigation begins, there's an automatic stay of any

1 further activity against the litigant, and that's where you  
2 presided for 20 years, in bankruptcy court. But there's no  
3 automatic stay in this case. Perhaps there should be. I  
4 don't know. That's for someone else to decide.

5 But this is not a bankruptcy filing. And there was  
6 nothing -- and notice, that was one of the cases that  
7 Mr. Shockey mentioned, there must be notice to someone accused  
8 of contempt in advance of the charge that told them clearly  
9 what they were allowed and not allowed to do.

10 If I could -- your Honor has an extraordinary memory  
11 for what you say, and if I could, with all due respect, point  
12 to something you said during this -- the course of this trial  
13 that I think bears directly on whether there was some specific  
14 intent to interfere with your Honor's jurisdiction over this  
15 case, or whether there was some nefarious intent in the --  
16 their efforts to enforce compliance by the third parties, by  
17 the defendants with the trespass regulations.

18 On June 6th, page -- I think 4409, you, in  
19 discussing the -- your preliminary findings, said, in  
20 connection with the Forest Service and the BLM, on line 16, I  
21 can utter no finding as to their motivation.

22 So I'm not saying that what your Honor said has to  
23 stand as evidence. But your Honor could find no motivation  
24 that you could point to back on June 6th, and nothing has been  
25 brought forward since then to disprove your conclusion that



1 motivation was a mystery at that point.

2           If I could move to another topic, your Honor, which  
3 is that I think we all recognized in the colloquy you had with  
4 Mr. Shockey that you're well aware of the rules that sort of  
5 set out a different standard, different procedures for a  
6 punitive or punishment kind of sanction rather than one that's  
7 intended to compensate the defendants here.

8           Now, I must respectfully say my recollection of what  
9 you said during my opening statement was that your intention,  
10 if you found contempt, was to order -- and you found resulting  
11 damages, was that you would order Mr. Seley and Mr. Williams  
12 to get their agencies to pay the ordered compensation to the  
13 defendants, but if, for some reason, that doesn't happen,  
14 Mr. Seley and Mr. Williams will have to pay it personally.

15           I'm respectfully submitting to you that a  
16 conditional order like that is still punitive, even if it's  
17 conditioned, because at some point they are at risk of  
18 personally having to pay these gentlemen, or at least pay the  
19 parties.

20           And if the purpose of an order is to compensate the  
21 defendants, then it doesn't matter who writes the check.  
22 You'll order someone, but as long as the check gets to these  
23 parties, compensation is accomplished.

24           But if compensation has to come from either of my  
25 two clients to the exclusion of the government, or if the

1 government chooses not to pay, that's punishment, and so I  
2 respectfully submit that the fact that we didn't have a jury  
3 trial and the fact that so far it appears the standard of  
4 proof here is clear and convincing evidence, I respectfully  
5 submit that it would not be appropriate to order them to  
6 personally pay any ordered compensation regardless of what the  
7 conditions are. That's all I'm going to say.

8 I was struck by an argument Mr. Pollot made that  
9 seemed to be criticizing the BLM for deciding not to submit  
10 any -- or pursue any other administrative remedies against  
11 Mr. Hage at some certain point in the litigation. He seemed  
12 to be blaming them for that. He seemed to be blaming them for  
13 not sending the notices there quickly enough.

14 If I could address specifically, again, ground A and  
15 the individual grounds, the PWRs. The charge against  
16 Mr. Seley was he directed the BLM to make water filings on top  
17 of the defendants' rights with the intent to interfere with  
18 those water rights.

19 And although you didn't specifically say it,  
20 your Honor, the idea would be by interfering with his water  
21 rights, it somehow interfered with your jurisdiction over this  
22 case.

23 So, first, there was zero evidence -- not only  
24 wasn't there clear and convincing evidence, there was no  
25 evidence that Mr. Seley directed this to be done. The only

1 evidence that was presented was that Ms. Peterson felt that  
2 the Court had directed her -- obviously there's a  
3 misunderstanding there, but she got what she believed was  
4 instructions from -- or as a result of what your Honor said on  
5 May 22, and by May 31 -- now, remember, they hadn't filed any  
6 PWRs for 15 years at least, back to the mid '90s.

7           Why would she suddenly burst into action and in nine  
8 days show up with four PWRs when in the previous 20, 25 years  
9 she had only done -- or only had been done by BLM was five.  
10 So five in 25 years, and she produces four in nine days.

11           She's the hydrologist. Do you think with a  
12 misunderstanding about what you said maybe the lawyers might  
13 have misunderstood you?

14           But Tom Seley sitting here, or some other nonlawyer,  
15 would probably have had some similar difficulties  
16 understanding exactly what your intention was.

17           But why, within a nine-day period, would Tom Seley  
18 suddenly decide I'm going to file -- or I'm going to direct  
19 that these PWRs be filed because I want to crush Wayne Hages'  
20 water rights.

21           Not only is that, you know, just pure and utter  
22 speculation, with no basis in fact and no basis in evidence.

23           So the first aspect, the first assertive element of  
24 the accusation that he directed this to be filed not only  
25 wasn't supported by the evidence, but there was zero evidence

1 to say he directed it.

2 Yes, he signed it. She had a -- Ms. Peterson had a  
3 plausible explanation for that. He was the one authorized,  
4 and she wasn't.

5 He didn't write out the paragraph in which the  
6 multiplication was incorrectly done 800 -- or, I'm sorry,  
7 40 -- 200 times 40 equals 1800. He didn't do that. She  
8 testified she did.

9 So there was no proof that he directed the BLM to do  
10 this, and there were really no filings. I guess in a -- you  
11 know, presenting an exhibit to the Court, is that the kind of  
12 filing we were talking about? Presenting it to the Court is  
13 not making it on top of Mr. Hage's water rights.

14 And to think that it was done with an intent to  
15 interfere with his water rights, which were an issue before  
16 your Honor, and that somehow doing it was going to interfere  
17 with your ability to decide, that's also utter speculation.

18 In fact, the evidence from Sarah Peterson was that  
19 her understanding of the instruction from the Court, or the  
20 prediction from the Court of what was going to be done in  
21 the -- in your Honor's decision on these water rights, that's  
22 why the PWRs were presented to the Court.

23 So the positive evidence is that there's an innocent  
24 explanation and there's zero evidence that there's anything  
25 nefarious. And so the burden that's supposed to be carried by

1 the defendants here was not carried. It's their job to prove  
2 that the suspicions that you had were true, and they haven't  
3 done so.

4 And, of course, I'll add the fact that Mr. Hage says  
5 that bringing the PWRs before the Court caused him no injury.

6 On ground B, that these cattle were let out to graze  
7 with the express contemplation that they were going to roam  
8 onto Mr. Hage's water rights.

9 Well, my recollection is that Mr. Seley said, well,  
10 that's certainly a possibility, perhaps a likelihood. But  
11 that isn't evidence that that was why they were placed there,  
12 and that's what your Honor needs in order to support a finding  
13 that there's clear and convincing evidence that those cattle  
14 were placed with the specific intent to graze onto Mr. Hage's  
15 waters, with the specific intent that by grazing on his  
16 waters, that that would interfere with your Honor's  
17 jurisdiction over this case.

18 And I'll remind you, again, your Honor, that my  
19 recollection of Mr. Hage's testimony was that no damages were  
20 suffered by him as a result of that.

21 Now, ground C will take a few more minutes, if you  
22 don't mind, your Honor. It's got to do with the trespass  
23 notices.

24 The first part of your Honor's charge on ground C  
25 that I would like to address is that you said that what needed

1 to be proven by the defendants was that these trespass notices  
2 were given to Mr. Hage and to third parties when Tom Seley  
3 knew there was jurisdiction in this court to decide that  
4 issue.

5 Now, I go back to the fact that your Honor had  
6 before you, up until late in this litigation, a lawsuit filed  
7 by the government, where they were seeking damages and other  
8 injunctive relief against the Hages.

9 There was no claim before this Court that --  
10 alleging that -- in which the defendants allege they were  
11 harmed until they filed their counterclaim, and their  
12 counterclaim was filed May 27, 2011.

13 So their claim that the government was interfering  
14 with their rights by issuing trespass notices was not before  
15 this Court until May 27, 2011. So until that date, there was  
16 no way anybody knew that your Honor had jurisdiction over  
17 complaints by the defendants that they were being wronged.

18 The only issues before the Court before May 27,  
19 2011, were issues that the government was being wronged by  
20 Mr. Hage's activities. And so if there's any assessment of  
21 damages, which I'll address in a minute -- I don't think any  
22 damages have been proved in connection with ground C -- they  
23 would only be allowable for actions after May 27, 2011,  
24 because that's the first time that Tom Seley, or anyone else,  
25 would know that this Court had jurisdiction over claims by the

1 defendants that they had been subjected to wrongdoing.

2 The specific intent issue comes up because that was  
3 your Honor's assignment to the defendants, that they prove  
4 that beyond reasonable doubt.

5 The *Alt* case was one in which Judge Hicks, in a case  
6 out of the Battle Mountain District, which is part of the  
7 district where Tom Seley manages the office in Tonopah,  
8 involving trespass by cattle that had been placed by a third  
9 party with someone who did not have a permit.

10 And that was a case in which there was a written  
11 lease agreement. And Judge Hicks in that case said that's not  
12 enough. You cannot place cattle on public lands, whether  
13 they're yours or someone else's, if you don't have a permit.  
14 Period.

15 But in our case -- and the reason I'm mentioning  
16 this is because that has to be known. There's been certainly  
17 circumstantial evidence that that's widely known that there  
18 was litigation before Judge Hicks -- look at the people who  
19 are here -- because there's litigation involving trespass in  
20 this district, and that it was certainly known by Tom Seley  
21 and was never proved contrary to that by the defendants.

22 And that was their job. Their job was to prove that  
23 Tom Seley acted without any legal basis. And here it was --  
24 now, I'm not saying your Honor has to follow Judge Hick's  
25 decision. It's persuasive. It's not from the Ninth Circuit.

1 But it certainly goes right to the specific intent in issuing  
2 any trespass notices to someone who is in even more in  
3 violation than the -- a rancher in the *Alt* case.

4 That's because in our case not only did Mr. Hage not  
5 have a permit, but he never presented any written agreements,  
6 nor did anybody else, involving -- I mean, involved in the  
7 third parties for whom compensation is claimed.

8 So not only -- so in the *Alt* case there was one  
9 element missing, which is a permitted rancher who is placing  
10 the cattle on the land, given to him in custody by third  
11 parties.

12 In our case, two prerequisites were missing.  
13 Mr. Hage did not have a permit, and there was no written lease  
14 agreement.

15 Why did Mr. Hage not have a permit? Because when  
16 his father passed away, there's a period during which he can  
17 apply to sort of inherit the permit and preference that his  
18 father had, but in the two-year period he didn't do so. We  
19 don't exactly why.

20 THE COURT: The date of the death of Mr. Hage,  
21 Sr., was what, please?

22 MR. HAGE: 2006, June 6th, or June 5th, 2006.

23 MR. WIENER: And so whatever the reason, maybe  
24 it was ideological and he believed he wasn't required to -- or  
25 this was, you know, part of his protest against the



1 government's enforcement of the regulations against him, but  
2 he made a considered decision not to seek a permit or a  
3 preference, and --

4 THE COURT: That's inaccurate, Mr. Wiener.

5 MR. WIENER: I'm sorry?

6 THE COURT: That's inaccurate. He was asked if  
7 he wanted to renew his preference and his permits, and he  
8 signed a form saying yes, I do.

9 MR. WIENER: But then -- my understanding was  
10 somehow that application was not completed, or it was  
11 cancelled --

12 THE COURT: No.

13 MR. WIENER: -- because of a timing.

14 THE COURT: -- he added underneath his signature  
15 consistent with or --

16 MR. POLLOT: All rights reserved.

17 THE COURT: All rights reserved under UCC --

18 MR. POLLOT: 1-207.

19 THE COURT: 1-207. And the Court --and the BLM,  
20 Forest Service construed that as a refusal to apply --

21 MR. WIENER: Okay.

22 THE COURT: -- for the renewal permit.

23 MR. WIENER: All right.

24 THE COURT: I just correct your citation to the  
25 record.

1 MR. WIENER: Okay. Thank you, your Honor.

2 And, in fact, I had a --

3 THE COURT: And that was Hage Senior.

4 MR. WIENER: Thank you, your Honor. I wasn't  
5 present during the trial, and I appreciate your correcting me.

6 And so I think it was Mr. Pearson who said, well,  
7 you know, these agreements aren't really for the leasing of  
8 cattle, it's more for the leasing of pasture and additional  
9 services.

10 But we have here what just looks wrong to me, and I  
11 urge your Honor to take the same perspective on it.

12 If my neighbor's house is vacant, I can't move in  
13 there myself without permission. And if my neighbor's house  
14 is vacant, I can't go find someone and lease the house to  
15 them. I don't have the right. It's my neighbor's house.

16 And Mr. Hage's neighbors are public land,  
17 750,000 acres of it with his 7,000 acres in the midst of that  
18 giant tract, less than one percent of the total land.

19 And so he invited others to pay him with AUMs or  
20 with calves or with services, pay me, I'll put your calves  
21 out -- I'm sorry, I'll put your cows out, I'll put them onto  
22 my neighbor's land, and I'm going to claim that I don't have  
23 to get a permit, and I'm going to claim that I don't have to  
24 pay any trespass fees.

25 And the people he was doing business with knew that.

1 It wasn't a secret to them. And so there was a risk taken  
2 here, and that's a risk of doing business.

3 I didn't follow all of the testimony, but it seemed  
4 to me that there was a claim that -- or evidence that he  
5 earned \$400,000 from the leased cattle, and yet there's only  
6 \$15,000 of trespass fees, or maybe 20, 25 at the most. Boy,  
7 that's a nice cost of doing business. I'd be a rich guy if  
8 that was my overhead in my office.

9 So he took the risk. There were rewards for him,  
10 but there are consequences and obligations.

11 So I don't think it's harassment, nor should  
12 your Honor think it's harassment for the government to bill  
13 the third parties for trespassing when they didn't comply with  
14 the regulations and produce a written agreement, which even if  
15 they produced it wouldn't be sufficient if there wasn't a  
16 permitted rancher who was placing the cattle on the public  
17 land.

18 And nothing in this litigation has changed it until  
19 your Honor on June 6 said Mr. Hage needs to get a permit. So  
20 he even has less rights than he thought he had at the  
21 beginning of the litigation.

22 Now, one of the rights that he had by not being a  
23 permittee -- I'm sorry, one of the obligations that he had was  
24 not to place his associates' cattle into an area where they're  
25 going to get cited for trespass, and he did it.

1           And I would respectfully suggest, your Honor, that  
2 even if there was a written agreement for a lease, if the  
3 intention was that he was going to place these cattle on  
4 public land and the other parties knew he didn't have a  
5 permit, that, at least in contract law, looks like it might be  
6 an illegal contract.

7           It's a contract for him to do something not  
8 violating the law in terms of statutes, but in violation of  
9 the BLM's regulations, perhaps unenforceable. And, of course,  
10 the other ranchers who placed their cattle with him, they  
11 didn't appeal.

12           I've already talked about the Court of Claims case,  
13 so we don't need to handle that.

14           So, your Honor, I'm respectfully submitting there  
15 are no recoverable damages to award Mr. Hage.

16           You know, I was an accounting major in college, and  
17 I listened to the conversation with Mr. Berg about his claim  
18 of how much he lost and the summary that was presented that  
19 said Mr. Hage lost \$103,000 by the purchase of Mr. Berg's  
20 cattle.

21           It was completely nonsensical to me, and I hope your  
22 Honor doesn't attach any importance or veracity to it, because  
23 Mr. Hage now has the cattle. Mr. Berg has \$103,000 with  
24 another 57,000 owed to him. He may not want to have converted  
25 his cattle into cash, but he's got an asset, it's just in a

1 different form.

2 I think, if I recall correctly, your Honor also made  
3 sort of a preliminary type of ruling in this case saying that  
4 you would not award lost profit because it's too problematic  
5 to set it off against whatever award might be given in  
6 connection with the government claim or in connection with any  
7 claims of Mr. Hage.

8 So -- and Mr. Hage himself said I lost nothing, I  
9 don't have any financial loss from having to purchase  
10 Mr. Berg's cattle. So if he has no financial loss, there's no  
11 compensation to give him even if there was contempt.

12 And, of course, as to the other ranchers whose names  
13 and figures showed up on the summary from the defendants, I'm  
14 submitting there's no legal basis to award any money to  
15 Mr. Hage for that because he has no legal obligation to repay  
16 them.

17 On a balance sheet that wouldn't be carried as a  
18 liability. It's a moral obligation. He carries it in his  
19 heart and in his head, but it's not carried on any balance  
20 sheet as an actual debt owed.

21 And, of course, there didn't seem to be any real --  
22 what would be the word here -- any real terrible result from  
23 Mr. Pearson's settlement. He got a \$15,000 bill for  
24 trespassing, and he never filed an appeal, and he never  
25 contested it.

1           And then he got another bill for close to another  
2 \$15,000, but the settlement he made canceled the second  
3 billing. So he only had to pay the bill that he had no  
4 defense to because it was untimely to challenge it any  
5 further.

6           So I'm respectfully submitting to your Honor that  
7 fairness, which appears to be the -- one of the roots of  
8 your Honor's concern about the treatment of Mr. Hage by the  
9 government, but the fairness should go both ways.

10           And the fairness should be that those who work for  
11 the government and try to enforce compliance with the  
12 government's regulations should not be treated more harshly  
13 than those who violated the regulations when they had no legal  
14 right to do so.

15           We know Mr. Hage believes he has the legal right,  
16 but that's for your Honor to decide and hasn't decided yet.  
17 And he's the rule breaker, and they're not.

18           So it's clear that the ranchers who are here believe  
19 that the activities of the Forest Service and the BLM are  
20 contemptible, but that doesn't mean it's contempt. We say, on  
21 the other hand, that it's neither.

22           Mr. Hage acted as if he was saying you can't stop me  
23 because I say I have a right, when what he said to you in his  
24 brief and moving closing statement here was it's the courts  
25 that are necessary to resolve his disputes and disputes of

1 other ranchers with the government.

2 But he basically took the law into his own hands  
3 when he hadn't yet, and perhaps never will be, determined to  
4 be someone who has a legal right to thumb his nose at the  
5 government.

6 So I'm respectfully submitting to your Honor that  
7 the only correct and fair decision, under the facts and under  
8 the law, is that there was no contempt committed by Tom Seley  
9 or Steve Williams, on their own behalf or on behalf of the  
10 government, and that even if there was contempt, there are no  
11 damages to be awarded, and so there should be no sanctions  
12 awarded against either them, the BLM or the Forest Service.

13 Thank you very much.

14 THE COURT: Thank you so much.

15 Reply, please. Brief.

16 MR. POLLOT: I'm going to be extraordinarily  
17 brief, your Honor. Obviously we don't -- I'm sorry. I should  
18 wait.

19 I don't intend to try to do 25 point refutations, I  
20 just want to raise one issue, and it, in a sense, has us a  
21 little puzzled.

22 This Court, in the proceedings when the whole issue  
23 of contempt came up, made it very clear to us that our burden  
24 was to establish that we were injured by the conduct of  
25 Mr. Seley and Mr. Williams.

1           However, the government has consistently said here  
2 that -- and cited authority based on the moving party having  
3 the burden of showing contempt by whatever standard. The  
4 difficulty I have is conceiving of ourselves as the moving  
5 party.

6           Neither Mr. Hage nor the Estate actually made a  
7 motion for contempt, understandably, because usually when  
8 motions for contempt are made by a party, it's because there  
9 was, in fact, an order, the order they believe was violated,  
10 and therefore a motion is brought to the Court saying they're  
11 in violation of the order, your Honor, please do something to  
12 make them comply with the order.

13           So I don't know that we actually do have the burden  
14 of proving there was, in fact, contempt.

15           The reason for my lengthy argument, which I  
16 originally had intended to be a discussion of the evidence  
17 supporting the damage claims, became a longer one because that  
18 question was raised.

19           And so I just want to make it clear that unless the  
20 Court instructs us otherwise, we're not really clear that  
21 the -- showing that there was contempt itself was a burden  
22 that we had to meet. Other than that, your Honor, that's it.

23           THE COURT: Thank you. Mr. Hage? No. Okay.

24           Okay. First, as to the fairness of the tribunal.  
25 Mr. Wiener accuses the Court and its process of being unfair



1 for several reasons. First, he says the judge has already  
2 made up his mind and admonishes me like a judge would to the  
3 jury, that I should reserve judgment until after all the  
4 arguments.

5 But he neglects and overlooks the fact that the  
6 Circuit requires clear notice of citation for the specific  
7 conduct which is charged in the contempt.

8 The fact that I had to stop the proceedings  
9 obviously was evidence that I was offended. But the fact that  
10 I cited the specific instances of contempt in the notice was  
11 pursuant to Circuit order and not evidence that I'm biased or  
12 unfair or having already made up my mind.

13 I reject his suggestion and his admonition, and it  
14 was inappropriate and offensive.

15 Second, he says the process is unfair because there  
16 should be reciprocal treatment. Hages were violating the  
17 rules, why aren't they charged with contempt, but the evidence  
18 is totally to the contrary.

19 Every time Mr. Hage was asked the question, over ten  
20 times, he indicated an absolute willingness to comply with the  
21 orders of this Court. He was asked many times, if the Court  
22 determines that you are in trespass, sir, will you comply?  
23 Yes, I will comply with whatever the Court says that I should  
24 do.

25 Not once did he ever indicate an unwillingness to

1 the comply with the Court's orders or the jurisdiction of the  
2 Court over this case. Therefore, that comment and accusation  
3 is also offensive and inappropriate.

4 As to the bias of the judge. Mr. Seley and  
5 Mr. Williams, I am an unbiased, independent third party. I  
6 don't know you or the other parties from Adam. I don't know  
7 any ranchers in central Nevada. I don't know anybody in  
8 central Nevada. I don't know any ranchers in northern Nevada.

9 I existed my entire life, except military and  
10 schooling, in southern Nevada.

11 We raised Arabians on the desert down there. The  
12 first pony given to me was by a ranger on the Toiyabe Forest  
13 from the wild stock. The only thing I had ever had was a very  
14 high impression of forest rangers.

15 I've had numerous social relationships with BLM  
16 personnel in Nevada and in southern Nevada because they are  
17 ever present and prevalent in the state of Nevada.

18 This is a third-party independent judge that's  
19 judging this case. The only bias that I have, or could be  
20 accused of having, is bias obtained from listening to the  
21 evidence in this case.

22 You saw that partway through the trial I got upset  
23 and had to terminate the process. In the beginning -- and  
24 cite you for contempt.

25 In the beginning of the process, of course, I

1 thought we were only dealing with a seven, eight, \$9,000  
2 problem, trespass notices served on third parties for trespass  
3 of cattle claimed by Mr. Hage to be in his possession and  
4 control.

5           Then as the evidence went on and I heard that this  
6 was really more like a hundred thousand dollar and in excess  
7 of a hundred thousand dollar problem in terms of the total  
8 amount of trespass liability and trespass notices served on  
9 such third parties, when I heard the evidence of the  
10 overfiling of water rights, when I heard the evidence of the  
11 solicitation of others to apply both over the -- any grazing  
12 rights, but especially the water rights of the Hages, then I  
13 got exercised, and I felt that I had to stop the proceeding,  
14 and I appropriately cited the gentlemen for contempt.

15           But, more importantly, the day before I did that, I  
16 notified them that they needed private counsel which was  
17 appropriate.

18           The only bias I have here is from listening to this  
19 evidence. You've had one independent judge tell you, Smith,  
20 already that you were treading on their rights.

21           The Circuit didn't reverse those rulings. The only  
22 thing the Circuit said is their claims are not ripe. In fact,  
23 the Circuit expressly agreed that there is an access right --  
24 they didn't talk about the forage right, but there's an access  
25 right related to these various water rights and ditch rights.

1           You already had one independent judge -- I don't  
2 know how you could claim that judge was biased, sitting back  
3 and living back in Washington, D.C., nor can there be any  
4 claim that this judge is biased or that I've already made up  
5 my mind before I've listened to the evidence.

6           As to this case, this is an unfortunate case. The  
7 BLM and Forest Service have every obligation to enforce the  
8 regulations and to manage the lands and public lands under  
9 their jurisdiction.

10           But they had a problem. The problem was Hage  
11 Senior. In their view, he was a tax protester. He was part  
12 of, quote/unquote, the sage rebellion, and they saw him not  
13 just as a violator of their regulations, they saw him as an  
14 enemy.

15           And I conclude, based upon the evidence and under a  
16 clear and convincing standard, that between themselves and in  
17 cooperative fashion, they determined they had to wipe him out  
18 economically so that he would no longer be an enemy.

19           I'm going to use the colloquial term that  
20 Mr. Pointel used in answer to Mr. Pollot's question. A cow  
21 may be very stubborn. That was in response to Mr. Pollot's  
22 question how do you guarantee that a cow of Mr. Snow's won't  
23 walk upon and drink the water belonging to Mr. Hage.

24           And his response in regard to various alternatives  
25 is a cow may be very stubborn. I think many of you got the

1 subtle double entendre. I know Mr. Bartlett --

2 MR. BARTELL: Bartell.

3 THE COURT: -- Bartell, I apologize, Mr. Bartell  
4 got it. I looked at him, and he smiled, and I smiled, and  
5 that's what Mr. Hage Senior was.

6 Now, you had an obligation, of course, to enforce  
7 your regulations, and you did that for the most part in the  
8 early history with Mr. Hage, and, of course, I'm talking about  
9 your predecessors as well.

10 But when you are encountered with a stubborn cow,  
11 you have various alternatives. One is, as suggested by one of  
12 the witnesses, Mr. Pointel, you can herd it. Another is you  
13 can rope it. Another is you can even hit it with an  
14 electronic poker.

15 I suppose that another alternative is you can shoot  
16 it in the head, but we would all agree that that's  
17 inappropriate and not reasonably responsive.

18 I find by clear and convincing standard that  
19 Mr. Williams' and Mr. Seley's intent was to shoot the cow.  
20 They developed an intent to destroy Mr. Hage Senior.

21 The problem is they carried on that conduct after I  
22 gained jurisdiction of the case having -- then having  
23 submitted it to me.

24 And even after Mr. Hage Senior was deceased, your  
25 reaction to both my jurisdiction and Mr. Hage Junior was

1 absolutely inappropriate, just like as if you had decided to  
2 shoot the cow.

3           Hage Senior was already gone. He was deceased. I  
4 realize he was a thorn in your side. He had objected to the  
5 limitations by the Forest Service and the limitations by the  
6 BLM. He -- in the application to renew, after, of course, the  
7 BLM and Forest Service, thereafter, took extraordinarily  
8 unreasonable responses to his recalcitrance, they first  
9 suspended some of his AUMs, a very substantial part, I think  
10 it was like 25 percent of his AUMs, because he kept the cattle  
11 on the land or was unable to take it off for, what, from  
12 September 17th to October 1st, and then, of course, there were  
13 still cattle noted there at the end of November, 25 percent  
14 suspension of his AUMs for that horrible conduct.

15           Then, of course, they suspended -- they terminated,  
16 what was it, 30 percent, 50 percent -- 30 percent of his AUMs  
17 permanently, totally unresponsive and unreasonable with  
18 respect to the conduct they encountered.

19           What else is evidence of the intent that I'm finding  
20 that they formed?

21           They sought a criminal complaint against Hage  
22 Senior. Mr. Hage Senior was told you have to have a permit to  
23 do the maintenance. Mr. Hage Senior wouldn't comply with  
24 that. I'm sure that frustrated the Forest Service especially.

25           Then he had the temerity to go in and, using big

1 tools, remove some trees from the ditch. The response from  
2 the government, a felony criminal complaint. There was a  
3 conviction, of course, and the Ninth Circuit reversed it. So  
4 they were further frustrated.

5 There's other evidence that they formed that intent.  
6 The armed guards accompanying Mr. Williams, so unreasonably  
7 nonresponsive.

8 He could have put on evidence here that these were  
9 dangerous individuals. I know at the conclusion of the trial  
10 the attorneys for the BLM stood up and said, Judge, are you  
11 authorizing, justifying the contacts to our BLM agents  
12 inappropriate ones, threats? And, of course, I wasn't, and I  
13 made it very clear to the audience in the courtroom such  
14 conduct would not be tolerated.

15 So I assume there's something back there, and you  
16 had every opportunity in this case to show me that, Mr. Jensen  
17 was a bad guy, he threatened me before. He lived in the  
18 middle of the town, it's true, in a trailer park. Maybe that  
19 was part of the threat.

20 Maybe -- what's his name --

21 MR. POLLIT: Pearson? Mr. Pearson?

22 THE COURT: Maybe Mr. Pearson's ponytail was a  
23 threat. Mr. Pearson appeared here as a -- one of the most  
24 educated of the defendants and the third parties that we had  
25 testify.

1           And from what I can tell -- what did he have, a  
2 master's degree? He had written and researched -- at least a  
3 bachelor's, and he had written and researched the subject of  
4 selected breeding.

5           And I assume as an avocation, or even as part of his  
6 occupation in cattle raising, is engaged in that practice for  
7 a specific purpose in desert land where cattle graze for  
8 mitochondrial DNA efficiency, whatever that means. He  
9 probably knows more about that topic than any of us here.

10           He's an educated man. He's a researcher. He has a  
11 ponytail. He lives out in the middle of nowhere. But for  
12 some reason Mr. Williams felt he was a threat.

13           You could have told me why. You could have put on  
14 evidence -- you didn't have to get on the stand, you could  
15 have put on evidence that these gentlemen had threatened your  
16 agents in times past, that's why, but none of that is  
17 forthcoming.

18           So the only inference I can possibly draw is that  
19 Mr. Williams felt threatened because of his own conduct and  
20 what he was engaging in.

21           The water filings on top. Nothing wrong with your  
22 filing here, in light of your understanding that I was  
23 adjudicating at least as between these two parties. Nothing  
24 wrong with your filing notations.

25           Judge, to some extent we have a prior right, and we



1 don't want you to overlook that when you say they have a water  
2 right that serves as their defense to this action. Nothing  
3 wrong with that.

4 But the amazing extent of the water filing is what  
5 shocked me. For 400 cattle? And you remember during the  
6 trial, I asked that very question to the witness. Has BLM  
7 ever owned cattle? Have you ever represented or tried to  
8 represent or thought you had to represent permit applicants  
9 for water rights? No.

10 The solicitation, especially of Snow, which we'll  
11 address in a few minutes, and the encouraging of Snow and  
12 others to use the waters of Hage.

13 One of the most persuasive testimony to me was that  
14 of Mr. Forsgren. I asked him, can you tell me, sir, what the  
15 numbers are, has there been a decline in the AUMs during your  
16 tenure or before. No.

17 And I pressed him. Finally he told me, well, I  
18 think there has been a decline over time.

19 And then I asked him, Mr. Forsgren, regional  
20 manager, Utah, Idaho, Nevada, has there been a decline in your  
21 region, or, more importantly, in this specific district,  
22 Toiyabe, and around central Nevada. Well, I don't know.

23 He's the regional authority. He doesn't know if  
24 there's been a decline? He was prevaricating, wasn't he? And  
25 it speaks volumes about his intent and his directed intent to

1 Mr. Williams.

2 You don't have to be biased from any outside source.  
3 You don't have to have read about this history.

4 If you live anywhere in the midwestern United  
5 States, other than the West Coast or the East Coast, you know  
6 about the range wars. You know about the original fighting  
7 between the sheepmen and the cattlemen as being one of the  
8 primary purposes for the Taylor Grazing Act.

9 The federal government was tired of all of the  
10 suggestions from the local senators and congressmen that the  
11 states are not capable of regulating the problem, we need a  
12 Taylor Grazing Act, a federal statute.

13 You don't have to be above much more than a school  
14 child to know the history of the Forest Service in seeking not  
15 only a reduction in AUMs and cattle throughout the western  
16 United States, especially in Nevada, Utah and Idaho, and even  
17 the elimination of cattle on the forest lands.

18 That's -- and that's been in existence for the last  
19 four or five decades, that's been their policy. Not so much  
20 the BLM, the BLM has learned that in the last two decades.

21 So I'm not talking about any policy that nobody is  
22 aware of, that's secret in a back room. I was asking  
23 Mr. Forsgren, tell me, sir, about the general decline, has  
24 there been a general decline. Oh, no, it's been static.

25 I don't know who, somebody in the audience just

1 laughed, but the record will reflect I just laughed, too.

2 He was lying. I can't rule or find that he's a  
3 liar. I don't know him, again, from Adam. But in this court,  
4 to my question, he was lying.

5 He was also lying when he said -- told me he didn't  
6 know the statistics for one of the districts in his region. I  
7 thought after he gave that answer -- I paused, I thought I  
8 could have heard a pin drop, and you could have, too.

9 He was also lying when he got on here, the stand,  
10 and told me Mr. Williams was just simply acting under his  
11 direction for each of these events in the giving of the  
12 trespass notices.

13 That was a lie, of course. He's a regional head.  
14 He gives general policy direction, that's for sure, to  
15 Ms. Higgins and to Mr. Williams. Is that right? Ms. Higgins  
16 is in that chain of command? But he doesn't give specific  
17 direction.

18 What he does give is the kind of direction contained  
19 in the letter that the government introduced while he was here  
20 on the stand. It was specific direction to his district  
21 directors and rangers, you will ignore the fact that you're  
22 living in a community of neighbors. You will enforce our  
23 policy. That was Mr. Forsgren's answer.

24 So for him to deny that there's such a policy is  
25 nonsense. There's a policy, and we all know it, for the last

1 four and five decades in the Forest Service to reduce, if not  
2 eliminate, cattle on forest lands.

3 Mr. Imler was very truthful. He was respectful. He  
4 knew his role. He was here to defend one of his rangers from  
5 an accusation of contempt, as was Pool.

6 The problem here is that Mr. Seley especially, to a  
7 lesser extent Mr. Williams, decided that they had an arbitrary  
8 cow, a stubborn cow, and the only way they could rid the  
9 frustration, toleration that they'd had to undergo for over a  
10 decade, was to kill the business of Hage.

11 They had to destroy not only Hage and his rights to  
12 bring cattle on the grounds, but his right to contract with  
13 others to bring their cattle on the grounds.

14 They had to stop him in any way possible, criminal  
15 complaint, intimidation of third parties, through the  
16 destruction, really, of the value of his patented lands.

17 Remember, he has a very large base property, using  
18 the terms used in the regulation, 7,000 acres. We had one  
19 witness testify here, and also in the trial, it's out of the  
20 average, normal size of a base property. He had a very big  
21 base property, and it's not just in one piece, its scattered  
22 throughout Monitor and Ralston Valleys, Monitor primarily.

23 So they had a problem, and they were frustrated with  
24 the problem.

25 Now, did they take any action or conduct other than

1 just simply managing their problem or doing what they were  
2 authorized to do? And even if they went out of bounds in  
3 managing the Hage Senior problem. It wasn't the Hage Junior  
4 problem. Remember the old gentlemen died in 2006. He was the  
5 problem. He was a tax protester or a sage rebellion guy.

6 So are they guilty of any contempt of this Court and  
7 its jurisdiction?

8 Well, the first part of that analysis, of course,  
9 return -- and assuming for the sake of argument that there are  
10 five elements here that the Court needs to get through, I  
11 agree that the burden for me in the finding is a burden  
12 equivalent to clear and convincing.

13 The defendants have no burden to show the contempt  
14 by clear and convincing evidence. I have a burden of finding  
15 in exceeding the level of clear and convincing as opposed to  
16 preponderance and certainly less than beyond a reasonable  
17 doubt. That's all the effect that the burden has.

18 But five elements are alleged, one of them  
19 jurisdiction and jurisdiction over the issues. That's the  
20 biggest problem in this case.

21 I might find offensive their conduct in relation to  
22 Hage Senior and then Hage Junior, or the Estate, but that's  
23 neither here nor there. That just enters into the ultimate  
24 ruling in the main case. It doesn't talk about contempt of  
25 the Court.

1           But I start this analysis by reminding you that it  
2 was the government who filed this action. They filed the  
3 civil complaint.

4           As we've learned throughout this trial, they had  
5 several courses for dealing with the stubborn cow. One was  
6 criminal process, criminal felony indictment. Another was  
7 criminal ticketing, misdemeanor. Another is trespass, notice  
8 of trespass, going through the administrative process and then  
9 putting it into a civil court to confirm the trespass and the  
10 damages, number one, and, number two, to get an injunction to  
11 stop it in the future. They did that.

12           Apparently they, in their own consultation and  
13 consultation with their lawyers decided there's no way we're  
14 going to stop this guy short of getting an injunction from a  
15 federal court, like an SEC injunction. We all understand what  
16 that is.

17           So they filed it here. And I raised that question,  
18 and I think Mr. Pollot is correct, and Mr. Hage, too, he  
19 brought it up to my attention, too, this original complaint  
20 alleged against Colvin Cattle and Mr. Hage, the Estate of  
21 Hage, it alleged trespass on their own behalf.

22           But it also, in one of its paragraphs, alleged  
23 trespass by virtue of cattle belonging to others but in the  
24 possession, control and imposition of those parties onto  
25 public lands. That's in the complaint.

1           Now, you chose, of course, to only put on evidence  
2 of Mr. Hage's trespasses. That's your problem. But in the  
3 complaint you sought relief, and you subjected to this Court's  
4 jurisdiction the question of whether there was trespass and a  
5 right to an injunction against trespass, not only by virtue of  
6 cattle owned by Hage or Estate of Hage, but by virtue of  
7 others, too, under the possession and control of Hage. You  
8 submitted that question to this Court.

9           My problem is, and what so offended me during the  
10 course of the trial, then the evidence began to come in, and I  
11 saw that you were proceeding outside this Court to get a  
12 remedy civilly on that same process.

13           So not only had you filed a complaint seeking  
14 declaration of trespass by Hage, Estate of Hage, and any third  
15 parties with cattle under his or their possession, you also  
16 sought a declaration and an injunction stopping him from doing  
17 that.

18           In other words, the injunction, I assume, would  
19 incorporate -- the injunction you requested would incorporate  
20 his obligation to stop putting leased cattle, his term, on the  
21 public lands. You clearly submitted that question to me.

22           So I believe there's jurisdiction. Same way there  
23 would be jurisdiction over a contempt proceeding. If one side  
24 or the other had gone out and using intimidation or with a gun  
25 or with a bribe told a witness you better not testify in this

1 case, whether criminal or civil, if one side or the other --  
2 if Mr. Hage had approached, for example, BLM witnesses or BLM  
3 agents and said you better not testify, you're my neighbor, I  
4 know where you live, he would be here on contempt citation you  
5 can bet.

6           Similarly, if BLM agents are threatening witnesses,  
7 intimidating witnesses, threatening witnesses to stop their  
8 business with Hage, you better not lease any more cattle,  
9 we're holding you liable, was it just a simple threat of  
10 collection? No. They proceeded to collection, of course.  
11 Their threats were not idle.

12           And in one case, very offensive, they threatened one  
13 of the witness's father's allotment. Totally separate and  
14 apart. Your son runs cattle legitimately, at least up to a  
15 certain percentage on your allotment, sir -- the letter was  
16 addressed to him, senior. Your son, we advise you, is a  
17 person not in good standing with the BLM, and your -- his  
18 continued bad standing and his continued grazing on your  
19 allotment threatens your renewal.

20           That's an amazing threat, Mr. Seley, it really is.  
21 It's like serving the trespass notices with a guard at your  
22 side, unless, of course, you have real fear for your safety.  
23 It was inappropriate, and it evidences your intent.

24           So I think I have jurisdiction, same as I would have  
25 jurisdiction for someone trying to intimidate witnesses.



1           And, remember also, one additional ground why I  
2 think I have jurisdiction is we're talking about the same  
3 civil process. Remember they had two courses, a criminal  
4 process and a civil process. You serve a trespass notice,  
5 then ultimately you take it to court to enforce it unless you  
6 have an offset right against their Social Security.

7           You take it to court to get a judgment. That's the  
8 way you collect it. And, of course, I respectfully submit to  
9 you, even before you seize their cattle, you need the judgment  
10 of a court.

11           I know the history of BLM and Forest Service is they  
12 had the right to seize simply after a trespass notice and a  
13 warning. I don't think that's the law. But whether it is or  
14 not, you have a criminal process and a civil process.

15           You had submitted the civil process to this Court.  
16 You invoked this Court's jurisdiction. You got a random draw  
17 of an unbiased judge. I didn't know this case or these  
18 parties before I met you for the first time.

19           And then you went about the process of interfering  
20 with that same civil process by initiating civil process  
21 against the lessors, again using Mr. Hage's term, of the  
22 cattle to Mr. Hage, the same conduct for which you were citing  
23 him in the complaint, maybe not in the proof, but in the  
24 complaint.

25           So that's jurisdiction and jurisdiction over the

1 issues.

2           Number three, the persons committed acts included in  
3 the citations.

4           Number four, proven acts, clear and convincing  
5 evidence standard, with intent to interfere with the  
6 jurisdiction of the Court.

7           There's no requirement that you have an intent to  
8 express contempt for Judge Jones or the United States District  
9 Court. The intent is that you are challenging the  
10 jurisdiction of the Court over the issues that you yourself  
11 have presented to the Court. That's the issue.

12           So it is sufficient if I find that there was an  
13 intent to deprive the Court of jurisdiction by either  
14 intimidation of witnesses, by threats against witnesses, by  
15 threats against other parties, that's enough.

16           I agree 100 percent with both counsel's argument,  
17 that these gentlemen, especially in the absence of any  
18 resolution or order by the Court, had an obligation to  
19 continue to manage the public lands. 10-4. I agree.

20           What you did not have the right to do, where you  
21 crossed the line, the use of a cattle prod, to a gun, was when  
22 you took civil action yourself, where you had already filed  
23 the civil proceeding here in this court in order to kill the  
24 business of Hage, kill his relationship with lessors of  
25 cattle, his term, and ultimately to kill the value of his

1 patented land ranch and of his property rights. You crossed  
2 the line.

3 There needs to be a showing that the person  
4 committed the acts included in the citation.

5 I've already made my finding relative to the intent  
6 of Messrs. Williams and Seley. Let's address the specific  
7 items in the citation.

8 A, Mr. Seley directed the BLM to make water filing  
9 on top of the defendants' water rights. I cite specifically  
10 in the order to show cause Exhibit 1299, 1297, 1298 and 1300,  
11 which each claim 400 cattle, 18,000 gallons per day from those  
12 specific sources.

13 This pertains, of course, only to BLM, and in  
14 response to Mr. Wiener's request, Mr. Williams is discharged  
15 of allegation number A.

16 Quoting, clearly there's an admission by Seley  
17 himself here on the witness stand that there is -- and  
18 Peterson, that are no cattle owned by the BLM, that the sole  
19 purpose for these applications on waters is for use in  
20 conjunction with recipients of its grazing permits, which  
21 under Nevada law is inappropriate, not permitted.

22 In other words, the contempt intent is that he  
23 intends to interfere with water rights which are clearly the  
24 subject of this civil lawsuit and clearly the subject of the  
25 Court of Claims civil lawsuit.

1           Remember, there's no reversal by the Federal Circuit  
2 that they didn't have the water rights vested or adjudicated,  
3 nor is there any ruling that they didn't have the water rights  
4 that they claimed beyond those adjudicated or certificated.

5           There's no ruling by the Federal Circuit that they  
6 don't have an access right attendant to the water rights. In  
7 other words, the contempt intent is that he intends to  
8 interfere with water rights which are clearly the subject of  
9 this civil lawsuit and clearly the subject of the Court of  
10 Claims civil lawsuit.

11           So the contempt is he's intending his agents --  
12 agency -- I don't think him personally -- he's intending his  
13 agency to take over and convert without compensation those  
14 property rights asserted and which are under the express and  
15 sole jurisdiction of this Court in respect of those filings.  
16 That's A. There's clear and convincing evidence that  
17 Mr. Seley so intended.

18           Now, counsel for Mr. Seley says Ms. Peterson  
19 prepared those applications, but Mr. Seley signed them. And  
20 as far as I know, based on Ms. Peterson's testimony, and I so  
21 infer, they had extensive cooperation and discussion about the  
22 need for the filing, the fact that only Mr. Seley could sign  
23 them, that's what Ms. Peterson said, and it was Mr. Seley's  
24 intent that we're talking about, and it's established by clear  
25 and convincing evidence.

1           B, the granting of -- after '07, of course, it  
2 probably occurred even before then, Mr. Snow said in his  
3 letter seven of the last eight years, that was in 2010 or  
4 2011, but the only citation here for civil contempt is on and  
5 after the date of the filing of this lawsuit.

6           Specific citations in the civil contempt citation  
7 are Pine Creek Well, location 1596. The Snow permit required  
8 that he haul in water.

9           But the express oral representation of Mr. Seley  
10 here on the stand in the trial is that he expressly  
11 contemplated in his mind that those cattle would roam onto or  
12 would range onto Hages' waters. Mr. Hage himself testified  
13 that there was use of his waters.

14           Now, the granting of those TNRs, of course, had a  
15 requirement that Mr. Snow not use anybody else's waters, but  
16 Mr. Seley himself contemplated that they would be using Hage  
17 waters.

18           I cited further the Snowbird Spring; Ray's Well,  
19 1594; Black Rock Well, 1662; Lower Salisbury Well, 1663;  
20 Cornell Well, 1664; Thunder Mountain Pasture, including the  
21 statement that others had been permitted but sometime, not  
22 sure of the dates; Well No. 2, 1665; South Pasture, Gary Snow  
23 for '07 and '08 and '08 and -- 2009, Henry's Well, 1666; Well  
24 No. 3, 1671, referring to exhibit numbers, to Gary Snow for  
25 '07 to '08, '08 to '09; Airport Well, 1672, also '07 to '08,

1 '08-09; Silver Creek Well, 1595; Baxter Pasture, again; Snow  
2 and/or Stone Cabin Partnership Snowbird Spring source, 1597;  
3 Ray's Well, 1615; North of Tonopah, Smokey Valley, West  
4 Pasture to Snow Livestock and Grain, again, with the express  
5 intent that, or at least knowledge, that those cattle  
6 authorized in those allotments would range onto Mr. Hage's  
7 waters.

8           Again, burden of proof is upon the defendants here  
9 to show any damage. Spanish Spring Well, we did not have 2691  
10 admitted so I don't think I can include that in the citation.  
11 South Well, South Pasture, San Antone Pass Well, the Graham  
12 Homestead, Graham Well, the Ice House Spring, Upper Salisbury  
13 Spring, and the additional testimony that in most of those  
14 cases the certificate of Hages' water rights are in the range  
15 improvement files in BLM's possession. That's B.

16           Now, defense has offered that only a few of these  
17 are within the areas granted to Mr. Snow on and after '07.

18           But I will find, as we'll note in a minute, that  
19 there was a solicitation between Mr. Seley and Mr. Snow and  
20 others, we want you to not only file applications, we want you  
21 to usurp the water rights of Hage. We'll address that in a  
22 moment. That's under D.

23           So my finding here by clear and convincing evidence,  
24 is that both the Forest Service and BLM sought the application  
25 for TNRs, temporary permits, from others with clear

1 anticipation that they would be using the water rights of  
2 Hage.

3 Now, less so, of course, for the Forest Service.  
4 The BLM, of course, needed other grazing permit holders. They  
5 needed it to manage the range. The grasses or some kinds of  
6 the grasses die if they're not grazed. They aren't renewed as  
7 much. They don't grow as much if they're not grazed. That's  
8 not all of the grasses, but there's evidence of that.

9 The Forest Service, I'm sure, did not care. Their  
10 general policy is we don't want cattle there. If anybody --  
11 if anything is going to graze, it's going to be the elk, which  
12 may be totally appropriate. So to a lesser extent, the Forest  
13 Service for sure, but certainly the BLM.

14 Now, the third one was the most troubling to me, and  
15 finally after extensive evidence on that one, that's when I  
16 stopped the trial.

17 C, the trespass notices that he is issuing, speaking  
18 really of both, to/from '07 on and after the filing of this  
19 lawsuit, and only after the filing of this lawsuit, asserting  
20 trespass against Hage for cattle.

21 But on or after the date that he received notice  
22 that cattle of third parties was under the express oral or  
23 written contractual control of Hage, and for which Hage  
24 acknowledged liability and responsibility, he continued to  
25 pursue trespass notices against those same third parties when

1 he clearly knew that the jurisdiction over that issue was  
2 before this federal court.

3 In that regard, part of section C's trespass notice  
4 citation is Exhibits 2067, McGowan 2073, 2139, 2076, 2140,  
5 2141. Against Kretschmer 2064, 2072, 2074, 2087, 2107, 1596  
6 and 2105, *et cetera*.

7 Continuing in that same vein now, Chance Kretschmer  
8 in Exhibit 2121. Chance and Ray Kretschmer, 2124, and Durk  
9 Pearson, 2050, 2051, 2168, at which time I cut off the  
10 defendants but which, of course, I will not cut you off at the  
11 time of the hearing, and, again, it will be your burden to  
12 show me any damage, dollar for dollar, that you want me to  
13 assess.

14 Nothing wrong with trespass noticing on a continuing  
15 basis, defendants or the third-parties, as is your obligation  
16 to do. But where you submitted the issue to the Court,  
17 including cattle leased and run by Hage, and in light of the  
18 specific finding by this Court that your intent was to destroy  
19 Hages' business, that's the contempt.

20 Instead of relying on this Court for its rulings,  
21 you sought your own methodology to stop them and to destroy  
22 the business, and that was by trespassing those third parties,  
23 collecting from them, threatening them in several different  
24 manners.

25 That was the trespass, and for that, of course, both



1 Mr. Williams and Mr. Seley are found in contempt. We'll  
2 address, of course, the damage in a moment.

3 D was for recent solicitations for the Ralston  
4 Allotment both for preference position and for ten-year  
5 permit. I don't know whether it's by regulation, but we know  
6 that by practice the ten-year permits, other than the TNRs,  
7 annual permits, are only given to those with a preference.

8 And we all read the regulations together in the  
9 trial. The preference can be based on only one of two things.  
10 One, base property, which everybody told me it was in this  
11 case, historically, or, of course, water right.

12 How Mr. Snow, or anybody else, would have base  
13 property is beyond me. They would, of course, have water  
14 right if they applied for it and obtained it from the State of  
15 Nevada.

16 Now, Mr. Williams' excuse -- I'm sorry. I  
17 apologize, Mr. Williams. Mr. Seley's excuse is we didn't  
18 solicit Snow or anybody else. Of course, he did solicit. The  
19 letter is in evidence. He solicited for applications for  
20 preference and ten-year permit.

21 There's also evidence that he had an ongoing  
22 relationship with Snow, that he had a number of conversations  
23 with Snow -- number meaning four, I think Mr. Hage said, four  
24 or five. I'm sure they were more than that over the course of  
25 ten years.

1           And Mr. Seley knew that he had to solve this  
2 problem. Unlike the Forest Service, he needed permit holders.  
3 The TNR was not working.

4           He realized that he could no longer do two TNRs in  
5 light of the litigation. So his solution was let's solicit  
6 another tenure permit holder and thereby give that person the  
7 ability to file water applications with the State Engineer.

8           The Federal Circuit seemed to think, and the  
9 position taken, I'm sure, by the BLM was, that a water right  
10 is limited by use, beneficial use. And what that means is if  
11 they don't have the permission of the Forest Service, BLM, to  
12 graze, they have no legal, legitimate beneficial use, and,  
13 therefore, they should be subject to forfeiture, et cetera, of  
14 their water right.

15           I respectfully submit to you that's just a  
16 misreading of Nevada law. There is clearly cooperation  
17 between BLM and Forest Service and the State Engineer, clear  
18 evidence, during the trial of cooperation. And although the  
19 State Engineer doesn't grant water rights, unless you have a  
20 permit to graze -- Mr. Hage confirmed that with respect to the  
21 Highway Well -- and reciprocally the Forest Service and BLM  
22 won't give grazing rights, typically, unless you have water  
23 rights.

24           The only thing they'll give you is a TNR that's  
25 subject to the limitation that you must bring the water in;

1 not so with a ten-year permit or a preference. Clearly the  
2 only basis for a preference, other than base property, is a  
3 water right.

4 So it was their clear contemplation, Mr. Seley's  
5 clear contemplation, that Mr. Snow, in order -- or anybody,  
6 any of the 74 or 75 that he sent solicitation to ultimately  
7 would have to get a water right from the State Engineer or  
8 would have to buy base property.

9 One of the very revealing letters here is Exhibit 48  
10 to Mr. Snow.

11 "The Tonopah field office will not be  
12 authorizing temporary nonrenewable grazing use in the  
13 Ralston Allotment during your proposed grazing  
14 period, 2009 to '10. Monitoring of the west portion  
15 of the South Pasture in the Baxter Spring Pasture was  
16 conducted in spring 2009."

17 Now, of course, Pointel told us that the actual last  
18 survey was in 1998, the 1990s.

19 MR. POLLOT: Right.

20 THE COURT: But he made ocular summary surveys  
21 of portions since then.

22 And, of course, in justifying their decision here to  
23 Mr. Snow, he says it's true -- he doesn't say it's true,  
24 Mr. Snow, but this is what he says,

25 "The data recorded negligible use, zero to

1           five percent utilization level at all key areas in  
2           both pastures."

3           So contrary to what he got on the stand and told  
4 please, his ocular summary assessment beside the assessment  
5 back in the 1990s, was zero to five percent utilization level,  
6 negligible use. That's what he told me.

7           Now, he also told me, of course, that there's other  
8 considerations, closeness of the plants, the ecological  
9 culture, whether natural grasses are being eliminated by  
10 overuse. I recognize that there's lots of other conditions.

11           But his statement to Mr. Snow was the data recorded  
12 negligible use.

13           "However," Mr. Snow, "the area in the  
14 vicinity and south of the Tonopah Airport has been  
15 continuously grazed in the same area year after year  
16 by trespassing livestock without allowing rest on the  
17 grazed vegetation."

18           Why would he add that as a justification,  
19 nevertheless, however, why would he add that to Mr. Snow  
20 unless he and Mr. Snow had discussed it?

21           Mr. Snow, we're in litigation. The trial court is  
22 going to decide this question. By the way, why don't you go  
23 after a ten-year permit, and why don't you go after the water  
24 rights.

25           Now, we don't have a smoking-gun statement.

1 Mr. Seley didn't get on the stand and say I solicited Mr. Snow  
2 to do that, to get rid of my problem with Hage Senior, by this  
3 time, of course, Hage Senior is gone.

4 But as both counsel said, especially Mr. Wiener,  
5 circumstantial evidence is just as usable and valuable here,  
6 and all of the circumstantial evidence is that Mr. Seley had a  
7 number of conversations with Mr. Snow and others.

8 And, finally, after they determined they could not  
9 allow TNRs because this litigation was proceeding, what did  
10 they do? He solicited preference applications and ten-year  
11 permits which, of course, could only be based upon either a  
12 base property ownership or water rights ownership.

13 So can I not take from that circumstantial evidence  
14 that Mr. Seley's intent was to solicit Snow and others to  
15 delete the water rights, certainly to delete any basis of Hage  
16 in permits or grazing permits or right to a preference, and  
17 that was the wrongful intent and usurpation of this Court's  
18 jurisdiction when I had the issue.

19 So I find as to trespass notices issued and for the  
20 wrongful intent, it is clearly established, as to both  
21 Mr. Williams and Mr. Seley, but as to each in respect of the  
22 specific exhibits contained in the citation.

23 Now, that's really D, the recent solicitations for  
24 the Ralston Allotment with express -- in his mind, express  
25 contemplation that these cattle would be permitted to roam

1 freely onto Hage proven water rights.

2 And I cite in connection with that same  
3 solicitation, then, as part of -- no, as separate -- as part  
4 of D, the prior solicitations are granting of allotment  
5 permits with the express contemplation that they would use  
6 Hage waters to Bud Jones for the Silver King.

7 This would not be during his tenure, and it would  
8 probably be before 2007. If that's the case, it cannot,  
9 should not be part of this citation, Stone Cabin Partnership,  
10 that's as I understand it, before Seley and therefore should  
11 not be part of it.

12 Colvin and Sons before Seley and before this lawsuit  
13 should not be part of the citation.

14 But Snow Grain and livestock, that should be part of  
15 the citation. Those are the four grounds.

16 And, respectively, I find by clear and convincing  
17 evidence that there was contempt in each of those four  
18 instances.

19 What is the damage? Well, one damage -- one remedy,  
20 of course, is just simply the finding of contempt.

21 Part of the remedy, as Mr. Wiener has correctly  
22 suggested, Mr. Shockey has suggested, is -- can be maintained  
23 simply in the lawsuit itself and in the ultimate judgment, and  
24 that's true.

25 I'm the one who -- of course, who invented the

1 remedy in the ultimate lawsuit. The plaintiff sought trespass  
2 and injunction. The defendant sought injunction. I told you  
3 I was not going to grant trespass judgment on, I think, four  
4 or five grounds, and they're all listed in the record, and  
5 they'll be contained in the ultimate order.

6 One of them, for example, was that there wasn't  
7 clear proof that the cattle were spotted anywhere other really  
8 than within 50 feet or one-half mile of the water sources.

9 Another grounds was they had the right to be there  
10 with their cattle, and therefore that's a valid defense to  
11 trespass.

12 So one of the remedies here, of course, is the  
13 remedy I came up with in the ultimate case.

14 The parties, I analogized it on the record before,  
15 were seeking a divorce. Mr. Hage Senior, of course, didn't  
16 even think they were married, but the BLM and Forest Service  
17 thought they were married at one point in time, and they  
18 wanted a divorce. They wanted Mr. Hage Senior out of here.  
19 He was a tax protester, and they wanted a divorce, trespass  
20 and injunction to prohibit him from continuing to occupy the  
21 land, public lands, for bringing his cattle down.

22 Hage Senior Estate and Hage Junior, of course,  
23 wanted a declaration. We're not married, we have no  
24 obligation to permit -- seek permit for grazing, nor does  
25 Forest Service or BLM have the right to limit our rights to

1 graze.

2 Of course, they quickly saw they weren't going to  
3 get that out of me, and they also saw that they weren't going  
4 to get that from Smith.

5 So I came up with the best remedy that I could think  
6 of, especially in an equitable action where both sides were  
7 seeking an injunction, and, that is, you will stay married.

8 You, Mr. Hage -- Junior now, Senior is gone, for  
9 heaven sakes, there's no sense in beating on him anymore. You  
10 have an obligation, Mr. Hage Junior, to comply with federal  
11 regulations and the imposition to the BLM and the Forest  
12 Service to manage these lands. You have to comply with their  
13 regulations, apply for the preference permit and the ten-year  
14 permit.

15 My answer to the other side was you will grant the  
16 permit, and you will do it for this winter season. You will  
17 apply for the permits for this winter season and thereafter,  
18 ten-year period, and they will grant them, and they will grant  
19 them according to their normal management regulations.

20 Initially, the level will be equal to the old  
21 preference. They have the right of discretion, of course, to  
22 reduce them consistent with their management obligations and  
23 their observations of the land and management levels,  
24 including managing it for the wild horses and the elk and  
25 everything else and the recreational users.



1           If they seek a level that's lower than 25 percent of  
2 the preference originally granted, they will either need your  
3 consent, Hage, or they will need this Court's order. They can  
4 do it, but they will need this Court's order unless you  
5 consent.

6           So, in other words, if your present statistics and  
7 survey and scientific surveys indicate a 50 percent of the old  
8 preference base, and you don't agree, they can get me to order  
9 it, but they'll have to ask me.

10           Basically what I told them, it's on the record, is  
11 that I intend to monitor this, I guess as long as I live.  
12 This is the McCoys and the --

13           MR. POLLOT: Hatfields, your Honor.

14           MR. HAGE: Hatfields.

15           THE COURT: Hatfields. Thank you. I am getting  
16 old, and I'm forgetting terms. It's the Hatfields and the  
17 McCoys.

18           And just like a busing injunction, as long as I  
19 live -- when I'm gone, then you won't have to worry about it  
20 anymore, but as long as I'm alive, I'll monitor your marriage.

21           And as I told you, I'm folding all of the evidence  
22 in this trial -- the old trial, into this proceeding, and only  
23 on a circumspect basis will I fold these findings back into  
24 the old one.

25           I've now found, of course, contrary to the initial

1 finding -- I think Mr. Wiener pointed that out to me, that I  
2 was saying nothing about the intent or motivation. I've now  
3 found, of course, that there was a specific intent, a  
4 violative intent, and, therefore, I am going to fold this  
5 finding back into the injunction.

6 I say nothing with respect to Mr. Williams. But,  
7 unfortunately, I'm going to have to put into that injunction  
8 that Mr. Seley can no longer be the administrator in this BLM  
9 district, nor can he supervise the personnel.

10 I have no right to order his firing. But because of  
11 his contumacious conduct and my finding here of his intent, I  
12 am going to make it a part of that injunction that after it  
13 gets settled down, after the permit is granted and the level  
14 determined, that Mr. Seley can no longer be the administrator  
15 in this BLM district. They'll have to transfer him.

16 I don't trust him to be a participant or to manage  
17 the lands in an unbiased fashion.

18 I'm saying nothing about Mr. Williams. I don't  
19 think the evidence or the showing is so strong as to him.  
20 But, unfortunately, I think I'm going to have to fold that  
21 into the injunction.

22 Nor can he supervise anybody in a direct chain of  
23 command that's over this central Nevada area.

24 That's unfortunate, and this case is unfortunate.

25 I've been a 30-year federal employee, too, and taken

1 a federal paycheck. We are the servants of the public. I  
2 don't sit here by God-given right. I have a lifetime tenure  
3 and a lifetime salary, and for that I apologize to the  
4 taxpayers.

5 So I remind myself constantly I'm a public servant.  
6 I have no right to build a kingdom. I don't have the right to  
7 ask Congress every year for more employees. I exist not for  
8 the purpose of the existence of the agency, I exist here in  
9 this position to serve the public, plain and simple.

10 I think for the most part Mr. Seley and Mr. Williams  
11 were operating under that understanding. They're servants to  
12 the public. They serve not only the conservationists and the  
13 recreationists, the hunters, they serve also the operators on  
14 the range, the cattle grazers and the sheep grazers.

15 And whatever their political persuasions or desires  
16 to manage or go beyond management, they have no right as  
17 servants to destroy the property interests of the taxpayer,  
18 and that's where they crossed the line.

19 All I can tell you is it saddens me to have to say  
20 it. I'm very serious about this particular proceeding. I  
21 understand it's serious, and as I said at the beginning, it's  
22 an unfortunate case.

23 Mr. Seley, especially, I'm sorry for the result,  
24 sir. As your counsel said on your behalf, you came rather  
25 late to the realization that this affected personal assets,

1 but I realized that from the outset, at least as to Hages'  
2 assets and property rights.

3 The damage, of course, will not include the 103,000.  
4 That's not an appropriate measure.

5 I am finding that there was specific damage related  
6 to Dan -- the trespass notices on Dan Berg. It's not the  
7 103,000 because you ended up with a \$103,000 worth of cattle.  
8 But what it is, is the lost profit on a continuing basis for  
9 the AUMs.

10 As I roughly calculate it, 100 head of cattle times,  
11 at the time, \$16 per AUM, probably more like, over the period  
12 of time relevant, 17 or \$18 times 12 months, about \$20,000  
13 annually in lost income.

14 I'm not going to -- I agree, and I so find, that  
15 that's a damage caused by the contumacious conduct, but I'm  
16 not going to award it for the reason I already stated.

17 It would be offset, of course, or should have been  
18 offset if there were no battle by the AUMs that you would be  
19 paying to the Forest Service and/or the BLM. There's just no  
20 way I can calculate it.

21 I'm certainly not going to give them damage for the  
22 AUMs they missed over lo these many years, but nor am I going  
23 to give you the profit, unfortunately, that you derived.

24 I'm sorry you've had to suffer the consequence.  
25 Part of that was your own fault.

1           Your father, of course, applied for renewal. It was  
2 rather silly, as I said before, that they interpreted his  
3 application for renewal as nonexistent because he put down on  
4 there subject to UCC whatever section.

5           As I said before, none of us understand what he  
6 meant. I'm sure -- he may not even have understood what he  
7 meant, other than that he was reserving his right to whatever  
8 original right he had free and clear of any permit  
9 requirement.

10           It's unfortunate that they took that as an  
11 interpretation, and they wrongly, therefore, based upon a  
12 finding that he had not applied for renewal, terminated all of  
13 his rights.

14           But, accordingly, I cannot give you -- it's partly  
15 your fault, Mr. Hage Junior, you know, you should have applied  
16 for the preference again and the permits.

17           I'm sure you wanted a declaration out of this Court  
18 that you didn't have to have a permit. But, of course, you're  
19 not going to get it, and it's partly your fault that you have  
20 lost profits because you didn't operate with a permit for  
21 those many years.

22           With respect to McGowan, \$169 trespass notice. May  
23 I have the exhibit, please, that summarizes? That, of course,  
24 is awarded only as to BLM and Mr. Seley.

25           And the way this award works is Mr. Seley and

1 Mr. Williams are instructed, for all of these notices that are  
2 contained in the citation and all of the individuals that were  
3 noted here, you will revoke the trespass notices and you will  
4 pull back from Treasury any collection, and you will  
5 respectfully request, as heads of your agencies in your area,  
6 a repayment of the dollars received.

7 If for any reason your agency tells you, sorry, we  
8 just can't do that, it's water under the bridge, it's too long  
9 since, under law, an appropriation law, we just simply can't  
10 to it, then, of course, you'll stand good for it out of your  
11 own paycheck. So that's the \$169.

12 Kretschmer, the \$92.39, I agree.

13 Ray Kretschmer, the \$1265.96, plus the \$92.39, I  
14 agree, both of those.

15 And, again, this is respectively and separately  
16 Williams and/or Seley according to which agency collected  
17 those moneys.

18 Durk Pearson is a little more problematic. I'm  
19 assessing Durk Pearson's payment of 15,479 settlement  
20 agreement as to both Williams and Seley because the settlement  
21 was in settlement of trespass notice claims and liability  
22 therefor on behalf of both agencies. So that's assessed  
23 against both. And, again, they'll seek from their agencies  
24 request that those moneys be repaid, or, of course, they'll  
25 stand jointly and severally liable for it.

1           Durk Pearson's 11,938.83 I'm also assessing against  
2 both on the rationale and justification that that was shown in  
3 the summary exhibit and the billing as paid and/or due, but  
4 mostly paid by Hage, and, accordingly, I'm assessing that as  
5 well.

6           Wayne N. Hage's request for \$4,500, I'm assessing --  
7 that's attorney's fees paid separately and by separate billing  
8 and engagement to deal with the collection agencies seeking  
9 recovery from these third parties.

10           And the \$550 I'll assess as well, the fees charged  
11 by the State Engineer to file the protests to Mr. Snow's  
12 applications.

13           I'll deny the \$103,000 and everything else on the  
14 summary exhibit.

15           And, of course, the injunction that is part of the  
16 main case will, just as I gave reassurance to Mr. Pearson,  
17 they will not enforce any injunction, they will not be  
18 permitted without my permission to trespass either Hage or  
19 anybody under clear operating control of Hage, any  
20 third-party, quote/unquote, lessors.

21           And, Mr. Hage, I think you need to have your  
22 agreements in writing so that you can show them proof, this  
23 person has given me cattle, it's under my agency and control,  
24 it's right here in written form, and I am liable. You're  
25 submitting yourself to that liability, of course.

1           And you recognize that if you exceed the allotments  
2 that are permitted or exceed them in time period, you may well  
3 owe -- you will owe, not the third parties, either trespass  
4 fees or penalty fees or in excess of time fees, but you will  
5 be able to use leased cattle both for Forest Service and BLM.

6           I realize with respect to Forest Service that's  
7 contrary to their regulation, but because of the wrongful  
8 conduct by Forest Service as well, I'm not going to permit  
9 them to use that basis to disallow Hage cattle.

10           That's especially true because their regulations  
11 also require minimum levels on the permits. I'm sure the  
12 purpose for that is so that they can guarantee to themselves  
13 that minimal AUMs will be on the range so that the needed  
14 grazing will occur.

15           And the regulations and the permits require that  
16 they get permission if they're going to put lower numbers on  
17 the range. Well, that's problematic because if you fault them  
18 or suspend their rights or penalize them in some way because  
19 they don't have enough cattle, and, on the other hand, you  
20 won't let them use leased cattle to fulfill the minimal  
21 requirement, that's problematic as we can all see. So you're  
22 not going to be able to use that basis to defend against  
23 allotment requests.

24           So as I represented to Mr. Pearson, you will not be  
25 able to trespass him without my permission, and you will not



1 enforce against him the settlement agreement provisions that  
2 prohibit him from association or dealing with Mr. Hage.

3 Mr. Jensen, of course, the purgation of the  
4 contempt, as he testified, is, of course, to withdraw from  
5 Treasury the assessments that you've sent there, about \$3,000,  
6 so that he doesn't get it withheld from his Social Security  
7 payments.

8 I think that's all of the individual items of  
9 damage, and I think that's the complete finding.

10 Defendants will -- my findings and conclusions are  
11 here on the record. You won't repeat those. You will simply  
12 provide me with a simple order with a finding of contempt  
13 based upon the record, and a statement of the required action  
14 to purge the contempt by Williams and Seley, respectively.

15 It will say nothing, of course, about Mr. Seley's  
16 ability to preside in that district. That's to be part of the  
17 injunction in the main case.

18 Any clarifications or specific findings sought by  
19 the parties, please.

20 MR. SHOCKEY: Yes, your Honor. I took your last  
21 comment to mean that the defendants will prepare and submit to  
22 the Court --

23 THE COURT: -- a proposed order.

24 MR. SHOCKEY: -- a written --

25 THE COURT: Submit it to you, submit it to the

1 Court. You may comment, of course.

2 MR. SHOCKEY: All right. Is -- you have just  
3 given your -- announced your ruling orally. Is that ruling in  
4 effect now, or will that be in effect once it's transmitted  
5 into the written order?

6 THE COURT: I intend to enter a written order,  
7 final judgment of contempt. That will be the date, the  
8 effective date.

9 MR. SHOCKEY: When that proposed order has been  
10 submitted to you for your consideration.

11 THE COURT: That is correct.

12 MR. SHOCKEY: All right.

13 THE COURT: And you'll have forewarning of it  
14 because it will be submitted to you first.

15 MR. SHOCKEY: Right. If you give me just one  
16 moment to confer.

17 THE COURT: Please.

18 (Discussion held off the record.)

19 MR. SHOCKEY: Your Honor, you repeated the  
20 comment, which I believe was in your earlier ruling to  
21 Mr. Hage, that he will be directed to apply for a permit and  
22 then that the agencies, in turn, will be directed to issue  
23 those permits.

24 THE COURT: And comply with the regulations  
25 other than those regulations that I've excepted.

1           MR. SHOCKEY: Is -- have you established a date  
2 certain, or would you entertain a proposal for a date certain,  
3 either as part of this order or a separate order, the concern  
4 being that if we don't have some date it could be weeks or  
5 months before --

6           THE COURT: Right. You told me that your briefs  
7 are due next Friday. Hopefully very soon thereafter, I can  
8 issue the decision, and the decision draft is already a  
9 hundred pages.

10          MR. SHOCKEY: For the underlying -- the decision  
11 in the underlying case.

12          THE COURT: Right. And, of course, I need your  
13 briefs and your consideration of authorities on the law so  
14 that I can make a final decision. You'll have forewarning.

15                 Did I ask for findings and conclusions? I think I  
16 did.

17          MR. POLLOT: I believe you did.

18          MR. HAGE: Yes.

19          THE COURT: So as part of your brief, of course,  
20 you'll be suggesting finding and conclusions, and, of course,  
21 you can thereafter object.

22                 I'm not giving you the right to file a reply brief,  
23 but you have the right to object to those findings and  
24 conclusions if they're inconsistent with what the Court said  
25 on the transcript, for example.

1 MR. SHOCKEY: Okay.

2 THE COURT: But that's the process, and then I  
3 expect within 30 days, hopefully, it will be ready.

4 MR. SHOCKEY: So that -- within 30 days you  
5 expect to have the -- basically the final judgment and remedy  
6 order in the --

7 THE COURT: Right.

8 MR. SHOCKEY: -- trespass case.

9 THE COURT: Now, there's a problem there, and  
10 that's this winter.

11 I think I have to order you immediately, Mr. Hage,  
12 to apply for the ten-year permit and the preference.

13 MR. HAGE: That's no problem, your Honor.

14 THE COURT: And, of course, after due  
15 consideration and appropriate time for consideration, I've  
16 ordered -- I have to order the BLM and the Forest Service to  
17 grant it.

18 I'm not sure I can ask them until after the entry of  
19 the order to grant a ten-year permit, but to allow the grazing  
20 to start. It starts in October, doesn't it, on the BLM desert  
21 lands?

22 MR. HAGE: On the winter range that is as early  
23 as October, your Honor.

24 THE COURT: Yeah. So we've got that problem to  
25 face, and, of course, then we've got a difficult time of

1 appeal, and I don't want you to waive your appeal rights at  
2 all, but somehow we have to address, on an interim basis, this  
3 winter season.

4 MR. BARTELL: Your Honor, on that point, might  
5 we suggest to the Court that for at least this winter season  
6 that it be a temporary permit? The processing of a ten-permit  
7 is just something the agencies can't do that quickly.

8 THE COURT: Right. I think that makes real  
9 sense. And maybe -- without waiving any appellate rights,  
10 maybe you can agree to some minimum level, Mr. Hage, of  
11 utilization and use. It's not going to be 14,000 AUMs, it's  
12 going to be something far less, more in tune with what was  
13 granted to Mr. Snow.

14 But I assume you can accommodate that in light of  
15 the present level of the herd.

16 MR. HAGE: Your Honor, if I can speak to that  
17 issue, the Ralston Valley right now, the winter country, is as  
18 good as it's looked for 50, 60 years. We've had incredible  
19 monsoons. The feed there is absolutely incredible.

20 THE COURT: That's right. That's your opinion.  
21 And they may agree. They may have some different views.

22 MR. HAGE: If -- I think I can work with counsel  
23 on this, and we can get it solved pretty quickly.

24 THE COURT: Right. Otherwise, I have to enter a  
25 permanent -- or not -- a temporary injunction order, and then

1 you immediately have an appeal, and you'll have a problem with  
2 consolidating a subsequent appeal. So maybe you can work out  
3 a TNR, not a ten-year permit.

4 And then after the date of the decision, you'll file  
5 your permit, you'll be in the process of considering it and  
6 appealing, I assume, and you'll have time to do that.

7 So if you can work out something for this winter  
8 season, that would be very helpful, and it would avoid a  
9 problem of filing two appeals.

10 MR. BARTELL: And, your Honor, again, to seek  
11 clarification. Until you enter your order following the  
12 posttrial briefs, there is not an injunction on the government  
13 to grant the permits; is that correct?

14 THE COURT: To grant a ten-year permit.

15 MR. BARTELL: And for a temporary permit? I  
16 mean, is this --

17 THE COURT: Okay. You tell me. Do I need to  
18 enter an order?

19 MR. BARTELL: Yes, your Honor.

20 THE COURT: Then I will. Give me an order that  
21 requires that they grant a TNR for this first year, and then  
22 in the permanent injunction, give me an order, please -- of  
23 course, I'll be doing the decision, but ultimate judgment and  
24 proposed findings and conclusions for the ten-year preference  
25 and permit.

1           So give me an order in the form of an order for a  
2 TNR for this first year.

3           MR. HAGE:   Okay.   So we're not going to work it  
4 out then?

5           THE COURT:   That's what they're telling us.

6           MR. HAGE:   Okay.

7           MR. SHOCKEY:   And, your Honor, conferring  
8 briefly with Mr. Pollot, he does have a busy week coming up.  
9 Again, next week we will be in touch with them and if we can  
10 get the order that you have directed submitted to you next  
11 week, we will --

12          THE COURT:   Briefs, you mean?

13          MR. SHOCKEY:   -- realistically, I suspect, it  
14 may be the following week -- no, the order --

15          THE COURT:   Oh, contempt order?

16          MR. SHOCKEY:   Yes.

17          THE COURT:   No, that -- I didn't put a  
18 limitation on that.

19          MR. SHOCKEY:   All right.

20          THE COURT:   I appreciate that.

21          MR. POLLOT:   Just for the Court's information,  
22 the posttrial brief in this matter and the petition for  
23 rehearing and rehearing *en banc*, are pretty much due the same  
24 day.   So --

25          THE COURT:   You'll be a busy boy.

1 MR. BARTELL: Your Honor, also, if I may seek a  
2 point of clarification. The parties are filing posttrial  
3 briefs next Friday. The Court's indicated the parties are  
4 also permitted to file proposed findings of fact and  
5 conclusions of law.

6 THE COURT: They are.

7 MR. BARTELL: So the government is -- along with  
8 the posttrial brief, the government is not permitted to submit  
9 proposed findings?

10 THE COURT: No. You're permitted to comment,  
11 ask for additions, deletions, changes to their proposal.

12 MR. BARTELL: And then we would submit those  
13 comments to the Court, I assume?

14 THE COURT: Yes. So you'll get  
15 their proposed along with the brief, and I'll get your brief,  
16 and I'll be writing the decision, they will also submit  
17 proposed findings and conclusions. They'll be submitting them  
18 to you.

19 You've got a week or more to ask the Court to refine  
20 those, change those, note that they're inconsistent with the  
21 oral ruling at the end of the trial, and we'll refine those.

22 My anticipation is that I'll write a lengthy  
23 decision so that you can read a law review article and then  
24 there will also be separate findings and conclusion and  
25 judgment.



1 MR. BARTELL: And, your Honor, again, just so we  
2 don't have to come back to the Court for clarification, you  
3 said we'd have a week or more. Might we have 30 days --

4 THE COURT: No, ten days.

5 MR. BARTELL: -- 15 days? Sorry?

6 THE COURT: Ten days.

7 MR. BARTELL: Ten days. Thank you, your Honor.

8 MR. WIENER: I have a point of clarification on  
9 your order on the contempt, your Honor.

10 The two amounts attributable to Mr. Pearson you said  
11 would be sort of the shared responsibility of both the Forest  
12 Service and the BLM, and then you went on to the \$4,500 in  
13 attorney's fees paid for collection agencies that --

14 THE COURT: Paid to Mr. Pollot for handling the  
15 collection matter against these third parties.

16 MR. WIENER: I see. And --

17 THE COURT: But it was an actual bill and  
18 actually paid by Hage.

19 MR. POLLOT: That's correct, your Honor.

20 MR. WIENER: And none of that was attributable  
21 to the Forest Service, as I recall, or did you --

22 THE COURT: No, that's attributable for both,  
23 because both did trespass notices and were engaged in  
24 collection efforts against third parties.

25 MR. WIENER: And the \$550 for fees charged by

1 the State Engineer?

2 THE COURT: That's relative to Snow, and that's  
3 really just Seley.

4 MR. WIENER: Okay. Finally, I'm not sure I  
5 heard you correctly at the end in discussing the proposed  
6 order that you suggested Mr. Pollot write, and you said, if I  
7 recall correctly, that Steve Williams is not intended to have  
8 the sanction of having his --

9 THE COURT: Right.

10 MR. WIENER: -- work interfered with, but then  
11 you said something about folding it into the injunction. Did  
12 you mean --

13 THE COURT: Right. What I said at the beginning  
14 of the case, I'm folding the entire transcript of the trial  
15 into this proceeding, but only on a very circumspect basis can  
16 I fold this proceeding and evidence back into the main case  
17 because, of course, the evidence on that case is already  
18 closed.

19 MR. WIENER: I understand. It was particular --

20 THE COURT: What I did -- I made an exception,  
21 and what I did fold back in is the evidence that I heard and  
22 the finding that I made that Seley just was incapable of  
23 fairly managing the Hage public lands.

24 MR. WIENER: Did you intend -- well, the reason  
25 I'm asking this, it sounded like you put two ideas together,

1 one was the Steve Williams issue -- are you intending in the  
2 injunction to somehow limit his employment?

3 THE COURT: No.

4 MR. WIENER: Okay. Thank you. That's all.

5 MR. POLLOT: We have nothing, your Honor.

6 MR. HAGE: I do, your Honor. On that 2500, the  
7 2500 was for Mr. Pollot, the only collections that he had to  
8 deal with, but that money was to -- was for BLM collections,  
9 not Forest Service, if that has any difference. I just wanted  
10 to clarify it.

11 THE COURT: It does. There was 2500 and 2,000.

12 MR. HAGE: I'm sorry, 4500.

13 THE COURT: 4500 had strictly to do with BLM?

14 MR. HAGE: The collection agencies, yeah, we  
15 were responding to --

16 THE COURT: Not with regard to the settlement,  
17 for example, of Mr. Pearson with both BLM and Forest Service?  
18 You didn't --

19 MR. POLLOT: But those weren't in collection --  
20 in front of collection agencies, your Honor.

21 THE COURT: Okay.

22 MR. HAGE: Yeah. The collection agencies --

23 THE COURT: And this strictly had to do with  
24 trespass notices from BLM.

25 MR. HAGE: That is correct.

1 MR. POLLOT: Correct.

2 THE COURT: I appreciate you pointing that out.  
3 That should be strictly against Seley.

4 MR. SHOCKEY: Your Honor, this was my first  
5 appearance in District Court in Nevada, and it's been a week  
6 unlike any other I think I can fairly say.

7 But despite the challenging circumstances, I know  
8 everybody appreciates the amount of time you've devoted, and  
9 thank your staff, as well, for their courtesies in helping us.

10 THE COURT: Thank you, Mr. Shockey. I express  
11 the same appreciation to the attorneys and the counsel for  
12 your able presentation here and for your patience, especially  
13 while I was afforded the opportunity to give the findings and  
14 conclusions.

15 Thank you so much.

16 (The proceedings were adjourned.)

17 -o0o-

18

19 I certify that the foregoing is a correct  
20 transcript from the record of proceedings  
in the above-entitled matter.

21 /s/Margaret E. Griener 09/13/2012  
22 Margaret E. Griener, CCR #3, RDR  
Official Reporter

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## I N D E X

GOVERNMENT'S WITNESSES:		PAGE:
POINTEL, Marc A.		
Direct Examination by Mr. Shockey		704
Cross-Examination by Mr. Hage		744
Cross-Examination by Mr. Pollot		783
Redirect Examination by Mr. Shockey		802
GOVERNMENT'S EXHIBITS:	ID	EVIDENCE
1354 - Seley Letter		722
1356 - Notice of Final Decision		714
1371 - Map		712
1372 - Map		724
1373 - Map		726
1374 - Map		784
DEFENDANTS' EXHIBITS:		
2783 - Seley Letter		746
Mr. Pollot's Closing Argument		818
Mr. Hage's Closing Argument		881
Mr. Shockey's Closing Argument		885
Mr. Wiener's Closing Argument		935
Mr. Pollot's Rebuttal Closing Argument		972
Court's Findings and Conclusions		973