

Kit Laney and Sherry Laney
 in care of: HC 30 Box 470
 UNITED STATES POST OFFICE
 Winston, New Mexico state near [87943]

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Robert J. Hark
 CLERK OF DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
 DISTRICT OF NEW MEXICO

Kit Laney and Sherry Laney, real man)
 and woman, sui juris, and real party)
 in interest. On behalf of and in)
 substitution of: DIAMOND BAR)
 CATTLE COMPANY and LANEY)
 CATTLE COMPANY, defunct)
 partnerships,)

Plaintiff(s).)

Case # CIV 96-0437 WPI/JHG

-vs-)

UNITED STATES OF AMERICA,)
 DAN GLICKMAN, ET AL,)

Defendants.)

**LANEYS' AFFIDAVIT OF TRUTH IN SUPPORT OF NOTICE OF
 NON-CONSENT TO REMOVAL OF CATTLE**

Affiants, Kit Laney and Sherry Laney, real man and woman made with flesh and blood, not fictions, sui juris and real parties in interest in this matter, hereinafter "Affiants," in care of HC 30 Box 470, United States Post Office, Winston, New Mexico state, near [87943], being of sound mind, and over the age of twenty-one, reserving all rights, being unschooled in law, and who have no bar attorney and without an attorney, knowingly and willingly Declare and Duly

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Affirm, according to law, in special appearance, that the following statements and facts, in the herein complained of matter(s) and any matter relating to this, are of our own first-hand knowledge, and are the truth, the whole truth, and nothing but the truth, so help us God.

Affiants declare that they own an undisputed, legally and lawfully vested and recorded deeded fee interest for stock water and the incident range for raising livestock on lands within the Diamond Bar and Laney ranches as defined in their deeds filed in the Catron, Grant, and Sierra County Clerks' Offices. The deeds are based on an exhaustive chain of title that proves Affiants' rights were derived and severed into a separate freehold estate from the public lands of the United States in accordance with the Doctrine of Prior Appropriation through the local customs, laws, and decisions of the courts. The U.S. Supreme Court has affirmed that Affiants' vested rights were not part of the reserved rights for which the Gila River Forest Reserve was withdrawn. Affiants' deeded fee interest is therefore not subject to federal jurisdiction for the following reasons:

1. Affiant's vested rights were derived from the public domain (public lands) of the United States beginning in 1883 under the Doctrine of Prior Appropriation in accordance with the local customs, laws, and decisions of the courts. Under local customs, laws, and decisions of the courts. During the Spanish, Mexican, and United States governance, individuals could lawfully appropriate a portion of the common or public lands and put it to some beneficial use.

2. Customs are defined as rules "adopted in practice by the citizens at large.... [T]he courts of justice take notice of [these customs] as rules of right, and as having the force of laws formed and adopted under the authority of the people, [for] as statutes are positive laws enacted by authority of the legislature...[as] representatives of the people...[s]o these unwritten customs...have the force of law under the authority of the people."¹ [emphasis added]

3. Individuals who put their labor to appropriating water and the range for the beneficial use of raising livestock created a private property right. In *Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884), Justice Field defined appropriation as: "a general principle of law, both natural and positive, that where a subject, animate or inanimate, which otherwise could not be brought under the control or use of man, is reduced to such control...by individual labor, a right of property in it is acquired by such labor."

4. In the process of disposing of the public lands, Congress conveyed different estates in the land. The homestead grants conveyed a fee simple estate in which the grantee owned all

¹ Jesse Root, *The Origin of Government and Laws in Connecticut*, 1798, as quoted in Herbert W. Titus, *God's Revelation: Foundation for the Common Law*, *Regent University Law Review*, Vol. 4, Spring, 1993, p. 15 [emphasis added]

the rights Congress could convey. Under the Doctrine of Prior Appropriation, the appropriators secured an estate in the land in the form of a freehold estate (fee interest) for that which was appropriated and put to beneficial use. Title to these rights was not vested by a written instrument or an oral statement by some government official, but by the act of putting the range and water to the beneficial use of raising livestock. This principle was defined as it applied to the appropriative rights of mining by the Department of Interior Board of Land Appeals (IBLA).² The IBLA stated that "It goes almost without saying that ownership in fee simple of a mineral estate is a property right which is protected by Constitutional guarantees, including the Fifth and Fourteenth Amendments thereto." 64 IBLA 27, page 4

5. This principle pertaining to the severance of a separate freehold estate from the public lands was recognized in *Wilcox v. McConnell*, 13 Pet. 496, 512 (1839), wherein the U.S. Supreme Court stated that when the public domain shall "have been once legally appropriated to any purpose, from that moment, the land thus appropriated becomes severed from the mass of public lands." [emphasis added] In *Bardon v. Northern Pac. Ry. Co.*, 12 S.Ct. 856, the U.S. Supreme Court held that "by 'public land,' as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, does not fall within the designation of 'public land.'"

6. The term 'land' may be used interchangeably with 'property;' it may include anything that may be classed as real estate or real property...In its more limited sense, 'land' denotes the quantity and character of the interest or estate which a person may own in land." Black's Law Dictionary, 6th, 877

7. In relation to the appropriative rights associated with mining, the U.S. Supreme Court stated, in *Forbes v. Gracey*, 94 U.S. 313 (1876), that "the moment this ore becomes detached from the soil in which it is embedded, it becomes personal property, the ownership of which is in the man whose labor, capital and skill has discovered and developed the mine, and extracted the ore...It is then free from any lien, claim, or title of the United States, and is rightfully subject to taxation by the State, as any other personal property is." [emphasis added]

² The Department of Interior Board of Land Appeals (IBLA), in an appeal made by Santa Fe Pacific Railroad, IBLA 81-811, 81-1072, 64 IBLA 27, page 2 (1982), ruled that "When the mineral estate is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate. An exception of minerals in a grant of land with a reservation to enter and remove them is valid and, not contrary to public policy. A grantee of minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. Their ownership is attended with all the attributes and incidents peculiar to ownership of land. A grantee of the land other than the minerals, or with the minerals reserved or excepted from the grant, gets title to all of the surface and that part of the subsoil which contains no minerals, and the grantor has a fee simple in the minerals retained by him. 54 Am. Jur. 2d, Mines and Minerals § § 108, 116 (1971). The owner of the mineral estate has, either by the express terms of the conveyance or by necessary implication therefrom, a right of entry or access to the minerals over or through the surface. See *Ross Coal Co. v. Cole*, 249 F.2d 600 (4th Cir. 1957). Further, as stated in 54 Am. Jur. 2d, Mines and Minerals § 210 (1971)." 64 IBLA 27.

8. In the Mining Act of July 26, 1866, 14 Stat. 253, the U.S. Supreme Court recognized the local customs of appropriating water for raising livestock wherein the Court stated “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected.” In *Jennison v. Kirk*, 98 U.S. 453 (1878), the U.S. Supreme Court stated that the purpose of the 1866 Act was to: “give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the Courts and to prevent such rights from being lost on a sale of the lands.”

9. In 1889, the New Mexico Territorial Legislature enacted the Act of 1889, Laws of 1889, ch. 61, § 1, which recognized that the Doctrine of Appropriation applied to range as well as water. The Act stated that “Any person, company or corporation that may appropriate and stock a range upon the public domain of the United States...with cattle shall be deemed to be in possession thereof; provided, that such person; shall...be the lawful owner...of sufficient living, permanent water...for the proper maintenance of such cattle.” The 1889 Act was, in effect, an act of Congress since all actions of the Territorial Legislature had to be submitted to Congress for approval. Act of September 9, 1850, 9 Statutes at Large 446, Chapter 49, Sec. 7.

10. The New Mexico Supreme Court upheld the 1889 Act in *First State Bank of Alamogordo v. McNew*, 33 N. Mex. 414, 422, 269 Pac. 59 (1928), by stating “The land occupied [by McNew] as range was unsurveyed public land. The title of said lands was in the United States. However, W.H. McNew, having appropriated and stocked said [public] range with cattle, and being the owner of permanent water for use upon said range for the maintenance of cattle thereon, had possessory rights in the said public lands, which they could protect as against one forcibly entering thereon without right...It is plain, therefore, that W. H. McNew was in the enjoyment of a property right in land. The Court also ruled that “The water right was, therefore, incident to the range.” The term ‘incident’ “denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the ‘principal.’” *Black’s Law Dictionary*, 6th, 7624.

11. The severed fee interest (estate) for water and range to raise livestock is a “vested” right in property. Vested rights are superior to “valid existing rights.”³ Rights are vested when

³ ‘Valid existing rights’ are distinguished from ‘vested rights’ by degree: they become vested rights when all of the statutory requirements required to pass equitable or legal title have been satisfied [FN4] Compare *Stockley v. United States*, 260 U.S. 532, 544 (1923) with *Wyoming v. United States*, 255 U.S. 499, 501-02 (1921) and *Wirth v. Branson*, 98 U.S. 118, 121 (1879). Thus, ‘valid existing rights’ are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion. 64 IBLA 27, page 5

they “have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person...and which it is right and equitable that the government should recognize and protect...and of which the individual could not be deprived arbitrarily without injustice...Such interests as cannot be interfered with by retrospective laws...”⁴ [emphasis added]

12. Neither Congress, the Courts, nor the Forest Service can deny or extinguish Affiants’ vested property rights without just compensation. In *Rutherford v. Greene’s heirs*, 2 Wheat. 196 (1817), the U.S. Supreme Court ruled that “Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property,...no silent, implied, and constructive repeals, ought ever to be so understood as to *devest a vested right*.” [emphasis added] The Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 988-577, 78 Stat. 890, as amended, states in Sec. 701(h) that, “All actions by the Secretary concerned under this Act [Agriculture or Interior] shall be subject to valid existing rights.” In the *Santa Fe and Pacific Railroad Appeal*, 64 IBLA 27, page 5, the IBLA stated that “It is beyond cavil that ownership of the severed mineral estate in fee simple constitutes a ‘vested right’ which is immune from denial or extinguishment by the exercise of secretarial discretion.” [emphasis added] Affiants’ severed estate (fee interest) is thus a “vested” property right in land. Therefore, as an agency of the Department of Agriculture, the Forest Service has no authority to take actions to deny Affiants the use of their fee interest for raising livestock.

13. In *Hage v. U. S.*, Final Decision, F.Cl. 91-1470L, II.A.3.a, Judge Smith stated that “This court finds that plaintiffs showed by a preponderance of evidence that the plaintiffs and their predecessors appropriated and maintained a vested water right in the following bodies of water in the Southern Monitor Valley...In addition,...the plaintiffs also submitted an exhaustive chain of title which showed that the plaintiffs and their predecessors-in-interest had title to the fee lands where the following springs and creeks are located.” [emphasis added]

14. In the original *Diamond Bar v. U.S.* case, the attorney for the Plaintiffs (Diamond Bar Cattle Company (DBCC) and Lancy Cattle Company (LCC), New Mexico partnerships) failed to dispute the U.S. Attorneys’ pleadings that the Plaintiffs were claiming rights on national forest system lands. The act of not disputing that claim was accepted by the Court as if Plaintiffs agreed with the claim. Therefore, the Court had no alternative but to order Plaintiffs to remove their cattle from national forest system lands.

15. Plaintiffs DBCC and LCC complied with the 1997 ruling of the Tenth Circuit Court of Appeals in *Diamond Bar v. U.S.* by removing their cattle and paying over \$90,000 in fines.

⁴ Black’s Law Dictionary 6th, 1564

16. Affiants, as real people of flesh and blood, not fictions nor partners in DBCC or LCC, are still in compliance with both the 1997 Order and the current Order of the New Mexico Federal District Court because they have no cattle ranging on national forest system lands.

17. On March 28, 2003, DBCC completed a Declaration of Ownership of a fee interest for raising livestock on the lands within the boundaries of the Diamond Bar ranch. This document was then filed in the Catron, Grant, and Sierra County Clerks' Offices. On March 28, 2003, LCC completed a Declaration of Ownership of a fee interest for raising livestock on the lands within the boundaries of the Laney ranch. This document was then filed in the Catron County Clerk's Office.

18. On April 15, 2003, DBCC sold its cattle and associated brands to Affiants as joint owners. These cattle were then placed by Affiants, as individuals and not as partners in DBCC and LCC, on Affiants' fee interest lands within the boundaries of the Diamond Bar ranch. Affiants also leased their fee interest in the Laney Ranch to Alvin Laney.

19. Affiants, in their last official action as the partners of DBCC and LCC, dissolved both companies on August 20, 2003. These companies had been defunct for several months prior to this time.

20. The Tenth Circuit Court in *Diamond Bar v. U.S.* assumed without deciding that Plaintiffs (DBCC and LCC) owned stock watering rights, but that these water rights did not give Plaintiffs any rights to use national forest system lands. Affiants concur with this ruling. Contrary to the assertion of the Courts, Affiants claim no right, title, or interest to any lands or property that was reserved from the unappropriated public lands by the Presidential Proclamation dated March 2, 1899, known as the Gila River Forest Reserve.

21. The Gila River Forest Reserve was a reservation of forested lands to provide "a sustained yield of timber and to improve water flows." The United States Supreme Court, in *U.S. v. New Mexico*, 435 U.S. 696, 98 S.Ct. 3012 (1978), made these purposes clear. In the opinion written by Mr. Justice Rehnquist, it was stated that "The [New Mexico] State District Court held that the United States, in setting aside the Gila National Forest from other public lands, reserved the use of such water 'as may be necessary for the purposes for which [the land was] withdrawn,' but that these purposes did not include recreation, aesthetics, wildlife preservation, or cattle grazing. The United States appealed unsuccessfully to the Supreme Court of New Mexico, *Mimbres Valley Irrigation Co. v. Salopek*, 90 N.M. 410, 564 P.2d 615 (1977) We granted certiorari to consider whether the Supreme Court of New Mexico had applied correct principles of federal law in determining petitioner's reserved rights on the Mimbres. 434 U.S. 1008, 98 S. Ct. 716, 54 L.Ed.2d 750. We now affirm." [emphasis added]

22. In relation to the ownership of water for livestock, the U.S. Supreme Court in *U.S. v. New Mexico* stated "The United States contends that, since Congress clearly foresaw

stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stockwaterers. We agree." [emphasis added]

23. In 1905 Congress gave the Forest Service authority to administer the forest reserves. However, the Forest Service has no administrative authority over that which was not reserved. Cattle grazing was not a purpose for which the Gila River Forest Reserve was withdrawn from other public lands, and the stockwatering rights belong to the individual stockwaterers.

24. Affiants gave Notice to the Forest Service and the Justice Department that they own a deeded fee interest for raising livestock in the lands within the Diamond Bar and Laney ranches. Neither the Forest Service nor the Justice Department have disputed Affiants' deeds. Therefore, as a matter of law, Affiants are the owners of undisputed deeded fee interests that are under state jurisdiction. Anyone who wants to challenge Affiants' title to the fee interest, must do so through a quiet title action in accordance with New Mexico Statutes (NMSA 42-6-1 1978). In *Garland v. Wynn*, 61 US 6, 20 How 6, 15 L. Ed 801, the U.S. Supreme Court stated "The Courts of a state must determine the validity of title to land within the state, even if the title emanates from the United States or if the controversy involves the construction of federal statutes."

25. The limits of federal jurisdiction within the states was the subject of a Congressional Report generated during the Eisenhower Administration in 1957, referred to as the "Eisenhower Report." The report outlines four basic areas of federal jurisdiction within the states: (1) exclusive legislative jurisdiction, (2) concurrent jurisdiction, (3) partial jurisdiction, and (4) proprietary jurisdiction.

26. The courts and the federal agencies continually attempt to assert that the lands owned by the U.S. Government lying within the boundaries of the national forest system lands are under the government's exclusive legislative jurisdiction. However, there is no evidence in the New Mexico legislative proceedings to show that exclusive legislative jurisdiction was ceded by the State of New Mexico in accordance with Article 1, § 8, Clause 17 of the Constitution of the United States of America (see NMSA 1978, 19-2-2 through 19-2-11).

27. Federal jurisdiction over the national forest system lands falls within the category of proprietary jurisdiction. In this category, the U.S. functions as any other land owner within the state, and must depend on local law enforcement to serve warrants, court orders and arrests. For example, in *Woodruff v. Mining Co.*, 18 Fed. 772, the U.S. Supreme Court stated "Upon the admission of California into the Union upon an equal footing with the original States, the sovereignty for all internal municipal purposes and for all purposes, except such purposes and with such powers as are expressly conferred upon the National Government by the Constitution of the United States, passed to the State of California. Thenceforth the only interest of the

CERTIFICATE OF SERVICE

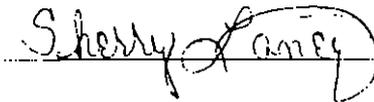
I certify on my own Commercial Liability that I am over the age of 21, and that I caused this PLAINTIFFS' AFFIDAVIT OF TRUTH IN SUPPORT OF NOTICE OF NON-CONSENT TO REMOVAL OF CATTLE, a true, correct, and complete copy, to be hand delivered or sent by United States Mail to the Court and DEFENDANT.

DAVID C. IGLESIAS, ESQUIRE
(a title of nobility)
U.S. ATTORNEY
Jan Elizabeth Mitchell, ESQUIRE
(a title of nobility)
Post Office Box 607
Albuquerque, NM 87102

By:

U.S. Mail
 Hand delivered
 Overnight mail

Dated February 19th day of February, 2004

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