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"Threats, Intimidation and Bullying by Federal Land Managing Agencies" Oversight Hearing
October 29, 2013

Mr. Chairman and Honorable Members of the Committee:

I am Tim Lowry and with my wife, Rosa, and parents, Bill and Nita Lowry, ranch in the Pleasant Valley community of Owyhee County, Idaho. The future of this rural, family ranching community is in jeopardy due to federal government actions, policies, and direction.

On June 6, 1994 a public hearing was held in Boise, Idaho on Secretary of the Interior Bruce Babbitt's proposed Rangeland Reform '94 regulations. In preparation for the hearing, the Natural Resources Committee of Owyhee County carefully studied the proposed regulations and identified the areas that were problematic. In order to get all the points into the hearing record given the short amount of time allowed for testimony, the testimony was divided between over thirty individuals. This strategy worked well except for the fact that three of those testifying were World War II veterans, brothers Don and Gene Davis and my father, who were struck by the sad irony that the hearing on regulations that would undermine their rights was being held on the fiftieth anniversary of D-Day.

These veterans used their allotted time to very movingly explain how fifty years ago from that date they never dreamt a time would come when the greatest threat to their rights would be coming from their own government. I will never forget Gene Davis of Bruneau, Idaho who, with tears running down his face, recounted the names of his Army friends who had died around him on the beach that morning to preserve our rights and liberties.

It is with that thought in mind that I would like to thank the Committee for holding this hearing. I appreciate the fact that you, who represent us, are concerned with abuse of power. The issue of preserving and protecting the individual rights and freedoms of the citizens of the United States is not a partisan issue, but one that is vitally important to us all.

There are several examples of abuse by the BLM that could be the topic of my testimony. I shall relate one of them before detailing my main topic of the attempt of the federal government to usurp state law and steal a private property right – namely, stockwater rights.

In 1984, our family purchased a ranch with a grazing preference right that lay partially within the newly designated North Fork Wilderness Study Area. This allotment is a common use allotment shared with two other permittees – the Stanfords and the Andersons. Approximately one month after purchasing the ranch, a BLM employee told me, off the record, that he wished he had known we were purchasing the ranch so that he could have warned us not to because the grazing allotment in the WSA was targeted in the Boise District BLM Office to "have its head

cut off". I assured him that I was confident that working together we could solve any issues relating to grazing in the WSA.

I was wrong. When some resource concerns were identified by the BLM, we worked with a range consultant to devise a grazing rotation system that would address the resource concerns and also be economically feasible. In order to implement the system, approximately three miles of fence needed to be constructed with a little more than a mile of it in the WSA.

The BLM refused to agree to the fence, citing the WSA as the reason, despite the fact that the Interim Management Policy for the WSA and the Wilderness Act allowed for such improvements. The BLM's solution for the perceived resource issues was to drastically reduce grazing.

After a couple of years of meetings and on-the-ground tours with the permittees, range management experts, Congressional staff personnel, and conservation group representatives, the BLM issued a decision to build the fence. However, the decision to allow us to build the fence contained provisions designed to ensure that the fence would never happen.

The national BLM director had issued a directive that any range improvements in a WSA had to be completed by September 30, 1992 when Congress was expected to act on designating wilderness. The Idaho State Director issued an order that improvements in WSA's in Idaho must be completed by September 30, 1991 in order to ensure that the national directive be met. We received word of the decision allowing us to build the fence the afternoon of September 26, 1991. We were told that the fence had to be completely finished by midnight September 30, 1991 – including the portion not in the WSA. We were also emphatically informed that if the fence was not completely finished, then the entire fence had to be removed. For three men and their wives to build approximately three miles of fence in four days was an impossible task in such rough country and not being able to use motorized vehicles in the WSA portion made it even more impossible. However, neighbors heard of our plight and came from miles away to assist. With the generous help of 32 caring neighbors, the fence was completed by 4:00 p.m., Sunday, September 30, 1991.

On Monday morning, October 1, 1991, a BLM employee called Jeannie Stanford and told her to tell her husband, Mike, and me that we had to stop working on the fence. Jeannie informed him that the fence was completed and that Mike and I were simply gathering up the excess material from the fence line. Jeannie recounted to us that there was a long pause and then he told her to tell us that we could not install the cattle guard because it was considered part of the fence. When Jeannie explained to him again that the fence was done, including the cattle guard, another long pause ensued and then he said he had to tell his supervisor and hung up.

The rotational grazing system was utilized during the 1992 grazing season and monitoring indicated that it was working to meet the resource objectives. However, in 1992 the BLM settled an environmental group's appeal of the fencing decision by agreeing to remove the fence. The fence was removed by the BLM in the Fall of 1992 after only one season's use. Incidentally, Jeannie took pictures of the tire tracks the BLM made in the WSA and of materials they left scattered in it after the fence was removed; illustrating that two sets of rules must apply

regarding what is allowable in a WSA. Our grazing season was subsequently reduced from 3½ months to one month and our AUMs from 666 to 244. The Stanfords and Andersons suffered AUM reductions of the same ratio. Because sound scientifically recognized management tools were denied us, our ranch is greatly devalued and our ability to make a living is a huge challenge.

It was only a few years after receiving this body blow, that the federal government forced us into court and massive debt in an attempt to steal our stockwater rights. The United States objected to our stockwater rights claims that were filed pursuant to the Snake River Basin Adjudication and filed its own stockwater rights claims to the same water.

Before this case was to be heard, the Judge scheduled a settlement meeting between the United States and us to see if the case could be settled without a trial. At that meeting, which was attended by Justice Department attorneys, BLM personnel, and me, the United States insisted that only the United States could hold a water right on federal land and that we must withdraw our claim. I knew that the United States' position was contrary to the Idaho Constitution, Idaho Law, Federal Law, and court decisions, and refused to abandon our vested rights.

When the United States became convinced that we were not going to capitulate, I was told by the United States that we would need to retain an attorney. I was further informed that the United States would pursue the case to the Supreme Court if necessary, that it would become extremely expensive for us, and that we would be wise to consider if the cost would be worth the effort. Knowing that the United States' arguments lacked any basis in law and not willing to give in to the veiled threat of financial ruin, we embarked on a litigation journey that spanned ten years. Of all the ranchers who filed for their stockwater rights when the adjudication began, only one other rancher, Paul Nettleton of Joyce Livestock, continued through to the end. The others settled with the United States rather than risk incurring a huge debt and losing their ranch.

Despite the fact that the legal theories raised by the United States were contrary to the established law and were rejected by the courts at each step, the United States continued to appeal each loss all the way to the Idaho Supreme Court. The Supreme Court upheld the District Court and ruled that the United States could not hold a stockwater right because it was not the entity putting the water to beneficial use. It further ruled that stockwater rights belonged to the grazers who put the water to beneficial use and that the water rights were an appurtenance of the permittee's base property. All of the assertations of riparian rights and other contentions of the United States were utterly dismissed by the Court.

With the appeals and delays obtained by the United States, they managed to extend the litigation ten years and saddle us with attorney fees in excess of eight hundred thousand dollars. Paul Nettleton owes a similar amount. I am convinced that those responsible for pursuing the position that the United States took were intelligent people who were not simply mistaken, but were deliberately attempting to overturn western water law and were sending a message to other claimants that challenging the United States is a costly endeavor. They had to know that water rights are created under state law and confirmed by federal law, including the Mining Act of 1866, Act of 1870, Desert Land Act of 1877, Taylor Grazing Act , and the Federal Land Policy

Management Act. They also had to be aware that courts have consistently held that water rights may be appropriated on federal lands by private parties and that these rights, once acquired, will be afforded all protection. In spite of the clear and unambiguous policies enacted by Congress and the consistent recognition of those policies by the courts, they pursued their illegitimate theories ignoring Congressional policy and Supreme Court decisions.

During the ten year litigation ordeal we were worried about the escalating attorney fees that we could not afford, but we were certain that at a successful conclusion, attorney fees would be awarded under the Equal Access to Justice Act. Unfortunately, the Idaho Supreme Court determined that as a state court, it lacked jurisdiction to apply the EAJA to this case and rejected our EAJA claims. They reached this decision despite the fact that the Nevada Supreme Court, in a similar type of case, awarded attorney fees to the prevailing private party litigant, holding that "it would be an injustice to deprive a prevailing party of attorney fees and costs merely because that party chose litigate in a state court, as specifically authorized by federal statute."

The EAJA clearly provides at 28 U.S.C §2412(b) that "any court having jurisdiction of such action" may award attorney fees and expenses to the prevailing party against the United States. The McCarran Amendment gave jurisdiction to state courts over the United States in water rights adjudications. Therefore, state courts are the "any court having jurisdiction" and thereby should have authorization to award attorney fees under the EAJA.

Because we believed that the Idaho Supreme Court erred in its decision regarding awarding attorney fees, we filed an appeal of that portion of the Supreme Court of Idaho's decision with the Supreme Court of the United States. We had hoped that the United States Supreme Court would take the case in order resolve the conflicting opinions of the Idaho Supreme Court and the Nevada Supreme Court. Unfortunately, they did not take the case, leaving the conflicting opinions intact.

Congress needs to amend the EAJA to clarify that state courts having jurisdiction over the United States in an action are included in the definition of courts in the EAJA. Failure to do so will act as a deterrent to private parties trying to protect their rights against unwarranted and unjustifiable litigation and actions initiated by the federal government. The EAJA was designed to protect the rights of individuals and small businesses in litigation against the United States by leveling the playing field given the extreme disproportionate resources at the disposal of the United States.

Many other instances of abuse could be cited which have led to the present time where a scenario is unfolding in the Owyhee Resource Area of the Boise BLM District that threatens the viability of the family ranches, the economy of Owyhee County, and circumvents provisions of the Owyhee Initiative Agreement which led to designation of wilderness and wild and scenic rivers in Owyhee County. The BLM is under a court order to complete the Environmental Impact Statements on a large number of allotments for the permit renewals by the end of 2013. Although the BLM has known this for several years, they are now at this late date rushing through the process.

This does not allow time for meaningful consultation, cooperation, and coordination with the affected permittees as required. With time rapidly running out, it is questionable if the majority of the decisions will be issued in time for comments, protests, and appeals before the end of 2013. Permittees are wondering how their due process rights are going to be affected. By bunching up all these decisions and issuing them at the last minute, the BLM will effectively negate the science review process of the Owyhee Initiative Agreement which was the foundation for an agreement to designate wilderness and wild and scenic rivers in Owyhee County. There will simply not be enough time or personnel available to perform a science review of all the decisions.

I want to again thank the Committee for holding this hearing. If family ranches are to remain intact, a functioning un-fragmented landscape maintained, the economy of Owyhee County protected, and access for recreationalists preserved, then this broken, dysfunctional land management must be fixed. More importantly, we all have a sacred obligation to not let the sacrifices of Gene Davis' fallen friends be in vain. We must not allow the rights and freedoms they died for to be lost through bureaucratic tyranny.