Drought Effect Evaluation on South Fork Antelope Creek Allotment

Range Users:  John Brookie
             Howard Porter
             B.K. Albus
             Boucher Ranch Inc.

Public Land Management Jurisdiction

Under

Bureau of Land Management
Lewistown District, BLM
Area Office - Glasgow, Montana

Evaluation Made on September 15, 1980

by

Dr. D. E. Rycerst
Range Consultant
Bozeman, Montana 59715
At the request of the State Office Bureau of Land Management, State Director Mike J. Penfold, Billings, Montana, I, Donald E. Ryerson, PhD, Private Range Consultant, Bozeman, Montana, made a cursory evaluation of the South Fork Antelope Creek Allotment on September 15, 1980, with emphasis placed upon effects of the current drought upon the range ecosystem.

I was accompanied on the review of this allotment by personnel from the Lewistown District Office of the Bureau of Land Management which included the following staff: Clair Clark, Soil Scientist and Lawrence Eichhorn, Wildlife Management Biologist; Terrence Wilson, Supervisor Range Conservationist and Charles Pregler, Wildlife Management Biologist of the Valley Resource Area, BLM; Mike Whittington, Hydrologist, State Office BLM. The range users of this allotment, Mr. Howard Porter and Mr. John Brookie were also present throughout the field evaluation.

Route of travel through the allotment (using Official Allotment Map) basically followed the VR-2 Branch Road via VR-50 Reservoir to VR-43 Reservoir and upland range benches to the east of the south fork of Antelope Creek. Specific stops with appropriate photo documentary and comments throughout the route of travel are as follows:

Riparian area in SE 1/4 of section 10:

The drainage bottom while lacking a standing cover of grass, and grass-like vegetation, appears to be relatively stable and does not indicate evidence of active erosion. Woody species encountered along the channel edge include wild rose (Rosa spp.), snowberry (Symphoricarpos spp.), silver sagebrush (Artemisia sana) and occasional plants of rubber rabbitbrush (Chrysothamnus nauseosus). Stability of this drainage bottom is depicted in figure 1 (photos a, b, c).

Cattle are primarily concentrating their grazing in the drainage bottoms throughout the allotment. Grasses in these areas have already been fully utilized including any standing growth from previous years if present and all growth that may have occurred in 1980 as exemplified in figures 1 and 2.

With some recent light showers in the area, western wheatgrass is initiating some new growth which the livestock is seeking out. The new growth is found in slight depressions along the broad drainage bottoms as can be seen in figures 3 and 4.

From a watershed standpoint it is essential to have standing grass vegetation left in the bottom areas to help slow down rate of overland water flow, reduce amount of surface soil particle erosion during any rains that may occur later this fall (1980) and to help protect these areas during any spring run-off in 1981 if this should occur.

From the standpoint of grass vigor for 1981 it is essential to not remove the growth that is now occurring. These grasses are in a
Figure 1: SE 1/4, Sec. 10. Photo "a" shows the drainage bottom in relative stable condition. Banks are sloping and not eroding. Shrub in foreground is wild rose. Grayish colored shrubs are silver sagebrush and big sagebrush (further upslope from drainage bottom). (Ant.1)
Figure 1: SE 1/4, Sec. 10. Photos "D" and "E" show the well grassed waterway in the channel bottom and close utilization of these species. (Ant. 4, 5)
Figure 2: SE 1/4, Sec. 10. Note full utilization of grasses in the drainage bottom which was typical of other drainages observed in the allotment. (Ant. 2)
weakened condition, drawing on carbohydrate reserves in the base of the plant and will not have a chance to make sufficient growth to provide for carbohydrate recharge this late in the growing season. It is also essential that any standing growth that does occur be left in place to protect meristematic tissue at the plant base and immediately below the soil surface from the full effects of rapid diurnal temperature changes during the coming fall and winter. Without any protection many of the plants still alive now may succumb during the coming winter due to excessive dessication and meristematic tissue damage from continued freezing and thawing.

Figure 3: SE 1/4, Sec. 10. Recent fall rains and suitable growing temperatures have created conditions for growth on western wheatgrass. This is primarily occurring only in slight depressions that offer some protection against the wind. (Ant. 11)
Figure 4: SE 1/4, Sec. 10. New growth on western wheatgrass as observed on September 15, 1980. (Ant. 12)

Figure 5: SE 1/4, Sec. 10. Silver sagebrush community in drainage bottom. Note that all of the silver sagebrush plants in this community have been grazed. (Ant. 6)
As mentioned previously, cattle in the allotment are concentrating their grazing in the drainage bottoms. This can be expected; it occurs on all pastures and is accepted by range ecosystem managers. However, because of the existing drought, severely curtailed grass growth on the upland in 1979, greatly reduced standing vegetation from 1979 (drought), the principal source of forage for grazing livestock on the allotment is found in the drainage bottoms and is being provided by various shrubs. Greatest use is being made on silver sagebrush, Nuttall's saltbush (Atriplex nuttallii), greasewood (Sarcobatus vermiculatus) where adapted, rubber rabbitbrush and some use will be made on wild rose and snowberry. Utilization of silver sagebrush is shown in figures 5 and 6. In a normal year, I would not expect to see the amount of use that has occurred on these woody species until much later in fall and on into the winter.

With the use that has already occurred on these shrubs and particularly on the more palatable species, this can have an adverse effect on food availability to any big game animals that winter in the area and on other wildlife species that use these bottoms during the winter.

I have principally used the riparian area in Section 10 to depict conditions observed in the allotment for these types of areas. No particular differences were observed in other drainages. The main drainage bottom of South Fork of Antelope Creek, a much larger drainage was still in a relatively stable condition despite understory grass removal in my
estimation. Since there have been no severe rain storms there has been no significant runoff and, therefore, no erosion as of this data in 1980. However, because of a lack of grass understory in the drainage bottom and further continued grazing pressure on any new growth, these areas will be subjected to a high erosion potential hazard in 1981 or whenever drought conditions break. Some photos from this drainage are shown in figures 7, 8, 9, 10 and 11.

Figures 7 and 8 depict a pothole in the creek bottom which is dry. Both ends were relatively stable. Stability can be rapidly changed with high rates of water movement, since no old growth remains to slow down water velocity (figure 9). Some use was being made on wild rose (figure 10) that had not been observed in Section 10. The silver sagebrush (figure 11) shown was apparently a "favorite" for anything that walked by it. Use on other silver sagebrush plants in the area was similar to that depicted earlier (figures 5 and 6).

Zones of use in relation to available water

Livestock concentration and forage utilization characteristically will be heaviest close to water and gradually decrease as distance from water increases. I have used the VR-50 reservoir and subsequent 1/8 mile increasing increments away from the reservoir to illustrate this. Further, it should be realized that as daytime temperatures decrease as fall progresses, cattle will tend to shift grazing use from drainage bottoms to distances further from water if forage is available.

Because of the drought conditions in 1979 and 1980, usable forage production on the lower footslopes, adjacent to the drainage bottoms and on the upland benches, consists primarily of that produced in 1979. Forage availability on the broad upland benches on the allotment does not exist. These types of areas are preferred by livestock but currently are essentially devoid of any usable forage as characterized by figure 12.

The footslopes leading away from VR-50 reservoir do have some residual standing grasses left from 1979 and anything produced in 1980 not already utilized. These will be the areas that cattle will concentrate on as they may move out of the drainage bottoms as the fall progresses. Because of the nature of these soils, they are highly unstable and subjected to a high erosion potential. The erosion hazard risk will increase if subjected to further fall use through the removal of residual standing grass cover, soil surface disturbance and inadequate litter cover on the soil surface.

Amount of standing vegetation and soil litter should increase with greater distance upslope from water. This is shown through 1/8 mile intervals upslope in figures 12 through 23. Soil series identifications given in photo captions were made by Mr. Clair Clark (Soil Scientist, Lewistown District, ELM) who has had many years of experience on soil survey crews. Soil series identification, characteristics and potential estimates can be obtained from Mr. Clark. I am not a soil survey scientist.
Figure 7: Pothole, South Fork Antelope Creek, Sec. 29 (Ant. 3-7)

Figure 8: Pothole, South Fork Antelope Creek, Sec. 29 (Ant. 3-6)
Figure 9: Drainage channel, South Fork Antelope Creek, Sec. 29 (Ant. 3-8)

Figure 10: South Fork Antelope Creek, Sec. 29. Some use being made on wild rose. (Ant. 3-9)
Figure 11: South Fork Antelope Creek, Sec. 29. "Favorite" silver sagebrush plant. Must be about like a piece of cake. (Ant. 3-10)

Figure 12: Preferred upland grazing area. Note lack of any grazable forage in foreground. Soils identified as Gerdrum clay (Clair Clark). These areas do not respond favorably to grazing management alone. Soils in the background with big sagebrush cover are Thebo clays. Any usable grasses left are in the protection of the big sagebrush. (L.C. 4-7)
Figure 13: VR-50 Reservoir, Sec. 32. Heavy use zone adjacent to reservoir. Note lack of grass cover, lack of growth on big sagebrush and lack of litter. Soils are Gerdrum clay over a clay pan. (Ant. 1-13, 13, 15)
Figure 14: VR-50 Reservoir, Sec. 32. Heavy use zone adjacent to reservoir, same as figure 13 area, but additional views of the area. Lower right photo looking ESE upslope from reservoir to next stop. (Ant. 1-16, 17, 18, 19)
Figure 15: VR-50 Reservoir, Sec. 32. Approximately 1/8 mile upslope from location in figure 13. Note denuded appearance of terrain because of lack of growth of grasses. Lack of growth of big sagebrush is due to drought. Some grass left from previous years due to protection from cactus (lower right). No evidence of grass growth in 1960. (April 14, 1961.)
Figure 16: Same area as Figure 15 (approximately 1/8 mile from reservoir). This picture was taken less than two years after the wetland was cleared to allow for clear range site. Lower photo looking up onto next area (A.M. 1-26-77). Silt due to clay range site and lower clays by itself. Since the watershed protection for 1981, soils are the same. The wetland has been cleared and water has been reduced. Note greater accumulation of old growth from previous years. There needs to be more water in the wetland.
Figure 17: VR-50 Reservoir, Sec. 32. Approximately 1/4 mile upslope from reservoir. Area is a mixture of clayey and shallow to clay range sites. Top left looking back to reservoir, top right looking upslope. Center, any vegetation (grasses) for grazing use would be from previous years. (Ant. 1-31, 32, 36)
Figure 18: VR-50 Reservoir, Sec. 32. Watershed conditions approximately 1/4 mile from reservoir in same area as figure 17. Note look of grass cover and grasses available for use and lack of litter for soil surface protection. (Ant. 1-33, 34, 35)
Figure 19: VR-50 Reservoir, Sec. 32. Approximately 3/8 mile upslope from reservoir. Plant cover is inadequate to provide sufficient protection for soil surface. Note large crack in soil in the lower left photo. Some residual grass is left from previous year but should not be used from watershed standpoint. (Art. 2-5, 6, 8)
Figure 20: VR-50 Reservoir, Sec. 32. Same area as figure 19, approximately 3/8 mile upslope from reservoir. Soils are Thebo clay. Note lack of vigor on big sagebrush, but some increase in litter cover through the area. Bottom photo looking ESE to next stop upslope. (Ant. 7-7, 7-10)
Figure 21: VR-50 Reservoir, Sec. 32. Approximately 1/2 mile upslope from reservoir. Clayey range site, with some seedstalks on grasses from 1979 production. Green needlegrass and thickspike wheatgrass common in the area. Some increase in litter cover but amount is still inadequate for watershed protection. Standing grass needs to be left in place. (Fig. 2-11, 12, 13)
Figure 22: VR-50 Reservoir, Sec. 32. Approximately 1/2 mile upslope from reservoir. Little bluestem (Schizachyrium scoparium) community on Julin clay soils. This is a coarse clay range site underlain by acid shale. Seed stalk production on little bluestem is from past years. Small grass plants between large bunches are also little bluestem (lower right). (Ant. 2-17, 18, 21)
Figure 23: VR-50 Reservoir, Sec. 32. Little bluestem plants showing effect of past use by livestock. The reddish leaves on both plants have been produced in 1980. In fact on the plant to the right a few current seed stalks have been produced this year. These are the types of plants of little bluestem that cattle graze. The plants producing many seed stalks receive very little use. (Ant. 2-11, 80)
Despite the fact that this allotment is under continuous season-long use, I consider it to be in a relatively stable condition in terms of vegetational cover and watershed protection. However, with the severe drought effects evident, the stage is set for rapid deterioration if the present drought continues. Even if the drought breaks in 1981, and if high spring runoff occurs, then soil erosion losses could be high because of the lack of plant and litter cover. This problem can be further intensified by any additional removal of standing grasses through continued use of the allotment in fall 1980.

**RECOMMENDATIONS:**

I strongly urge, in view of the conditions observed on this allotment, that livestock use be terminated this fall as soon as possible. If this can be achieved, then drought recovery can be greatly hastened not only from watershed aspects but also for the benefit of the operators using the allotment.

I strongly urge that the allotment be deferred from grazing use during early spring growth in 1981 if the drought conditions are alleviated. Use should be delayed in my estimation until after flowering of the major grasses occurs. This should be accompanied by a reduced rate of stocking for use during the rest of the grazing period.

If the current drought does not break, then I recommend complete deferment of this allotment until the drought cycle does break.

I also recommend that this allotment be placed under a grazing management system. Most rapid improvement of the allotment from watershed, wildlife and forage production for livestock use (consider economic impact) should be from a rest rotation grazing system. This is indicated by the desirable grass species still present in the protection of big sagebrush plants, waterways in drainage bottoms still having a living grass cover, and overall lack of evidence of accelerated soil losses by water and wind action.
Figure 24: Sec. 29, upland and footslope area looking into South Fork of Antelope Creek. Range sites include clayey, shallow to clay and clay pan sites. Standing grass cover from 1979 and past years.
(Ant. 2-23, 3-1, 2)
Figure 25: VR-43 Reservoir, Sec. 20. Upper footslopes approximately 1½ miles from the reservoir. These are Thebo and Lisam soils highly susceptible to erosion. Remaining grass cover needs to be left for watershed stabilization and to hasten drought recovery. (Ant. 3-12, 15, 15)
Figure 26: Desired watershed protective cover on Thebo and Lisam clays. The existing vegetation and litter cover will provide resistance to overland water flow to greatly reduce movement of surface soil thereby greatly reduce erosion hazard potential. (4-11)
Figure 27: Thebo and Lisam clay soils through this area have a shallow crust on the surface. When the crust is broken extreme high rates of soil loss can occur (left photo). Livestock trampling this time of year and without much litter cover can be highly injurious to these soils. To the right can be seen the amount of soil displaced by a single hoof print. (Ant. 1-24; 4-12)
October 9, 1980

Mr. Augustus Hormay
P. O. Box 245
Berkeley, California 94701


Dear Gus:

I am enclosing a copy of Judge Battin's Findings of Fact and Conclusions of Law in this case. Significantly the judge adopted the expert testimony of Gus Hormay. We are indebted to you for the significant role which you played in helping us successfully protect the individual ranchers.

I am also enclosing a xerox copy of the report which Ryerson prepared on the Brookie/Porter allotment. He prepared a similar report on the Hinsdale Livestock allotment; we were not blessed with a copy of that report. I suspect there was a good reason for the government not to produce that report.

Tactically, we are attempting to determine the appropriate time to compel the government to identify those parts of the respective allotments which are not in an "emergency" condition. Our intent is to use that device when it will have the most impact. The government has not yet determined if it will appeal. Any change in the posture of the case to the benefit of the ranchers will be sent on for your information.

Please give me a call if you feel there is anything for us to do from a scientific standpoint.
Mr. Augustus Hormay
October 9, 1980
Page Two

Again thank you for your help. The education which we received was most enlightening. We were all honored to have a man of your ability and reputation on our side. I firmly believe that was possible simply because we had the right side.

Sincerely,

[Signature]

Donald W. Molloy

sjm

Enclosure
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

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HINSDALE LIVESTOCK COMPANY, EDWIN GERSPACHER, HOWARD PORTER and JOHN BROOKIE, 
Plaintiffs,

-vs-


Defendants.

EDWIN GERSPACHER,

Plaintiff,

-vs-


Defendants.

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CONSOLIDATED CASES
CV-80-157-BLG
CV-80-166-BLG

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

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FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This action came on for hearing Monday, the 29th day of September, 1980, before Chief Judge James F. Battin sitting without a jury. Plaintiffs appeared personally and through their counsel, A. Clifford Edwards and Donald W. Molloy, of Billings, Montana. Defendants appeared personally or through agents and employees, and were represented by counsel, Assistant United States Attorney Robert L. Zimmerman and Assistant United States Solicitor Richard Aldrich. Witnesses were sworn and testimony adduced. Exhibits were marked, identified, and a number of them were admitted into evidence.

The Court, having considered the evidence at hearing, makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiffs have invoked jurisdiction based on the existence of a federal question and couch this action under the Fifth Amendment to the Constitution; the Court finds jurisdiction herein by virtue of 28 U.S.C., Section 1331(a), and the Court finds this is an action against the United States, agencies thereof and officers and employees thereof in their official capacity, so that no jurisdictional amount is required under said section.

2. The Court finds that all plaintiffs are either ranching corporations or individual ranchers in Valley County, Montana.

3. An integral part of plaintiffs' ranching operations in Valley County is the utilization of federal grazing land; further, the grazing allotments each plaintiff is involved with in leasing from the Bureau of Land Management contain, and intermingle, with a significant percentage of each respective plaintiff's privately owned land, either deeded or by other private leasehold interest, with the federal lands, specifically:

   A) Plaintiff Hinsdale Livestock Company
      1) Upper Willow Creek allotment is 24.2% private land
      2) Anderson Ojuel is 33.2% private land
B) Plaintiff Edwin Gerspacher - 20% private land
C) Plaintiff John Brookie and Howard Porter - 12% private land

4. Plaintiffs Gerspacher, Brookie and Porter graze on the federal lands pursuant to yearly permits, while plaintiff Hinsdale Livestock Company permits are issued pursuant to an allotment management plan (AMP) contract that was entered into by and between Hinsdale Livestock Company and the Bureau of Land Management approximately 10 years ago. Said AMP implements and employs a seven pasture rest rotation system, which provides for and allows certain pastures to be totally rested (not grazed at all during each year).

5. The 1980 permit authorizations for the plaintiffs are to expire as follows:
   A) Hinsdale Livestock Company - 30 November 1980
   B) Edwin Gerspacher - 22 October 1980
   C) Howard Porter - 31 October 1980
   D) John Brookie - 31 October 1980

6. Defendant Gary L. Gerth is the Bureau of Land Management Glasgow area manager for, inter alia, Valley County, wherein the plaintiffs' allotments are located.

7. Defendant Terrence E. Wilson is an authorized agent of the Bureau of Land Management working out of the Glasgow area office.

8. Defendant Glenn Friedman is the Bureau of Land Management Lewistown district manager, and that district includes the Glasgow area office.

9. Defendant Mike J. Penfold is the Montana state director for the Bureau of Land Management, his associate director is Kannon Richards, and the Lewistown district and Glasgow area offices are within the directorship and associate directorship, respectively, of the said Penfold and Richards.

10. Between August 29 and September 4, 1980, all plaintiffs were notified, by certified mail issued from the Bureau of Land Management Glasgow area manager, Gary L. Gerth, or his authorized officer, Terrence E. Wilson, that all livestock belonging to the plaintiffs (except Hinsdale Livestock Company)
were to be removed from federal lands by September 10, 1980, and in the case of Hinsdale Livestock Company, said cattle were to be removed from federal lands by September 20, 1980. These letters of notification indicated that if said cattle of plaintiffs were not removed from federal lands by those respective dates then the Bureau of Land Management would hold plaintiffs' cattle in trespass, subject to fines and/or impoundment.

11. The Court finds that the reasons stated by the defendant Bureau of Land Management, by and through the area manager Gary L. Gerth and authorized agent Terrence E. Wilson, for the removal of plaintiffs' cattle from the federal lands were as follows:

A) That the public lands were in an emergency condition.

B) To prevent further damage of the range land resource the cattle were to be immediately removed.

C) That based upon inspections and observations for five weeks prior to the issuance of the letters, and other unnamed information the Bureau of Land Management said was available in their files, that the area manager had determined further livestock grazing would result in severe damage to the range land resource; and

D) The emergency conditions of the public lands, in the area manager's determination, made it necessary to implement the decision to evict plaintiffs' cattle immediately and the area manager cited as authority 43 C.F.R. 4110.3-2 and 4120.3.

12. The area manager of the Bureau of Land Management, Gary L. Gerth, then gave each plaintiff, 30 days to appeal the final decision by filing such appeal in writing with the area manager pursuant to 43 C.F.R. 4160.4 and 4.470.

13. The time stated for appeal to all plaintiffs exceeded the date the area manager set for the removal of cattle (and if said cattle were not removed on that day plaintiffs were subject to fines for trespass and impoundment) by some 20 days.
14. Upon receipt of said letters evicting plaintiffs from federal lands, the plaintiffs appeared before the above Court, in the absence of United States Federal District Judge Paul Hatfield from his bench, and sought a temporary restraining order restraining defendants from enforcing their eviction notices on that same day.

15. Thereafter Judge Paul Hatfield recused himself from the proceedings and this Court assumed jurisdiction and on September 19, 1980, on plaintiffs' motion, extended the temporary restraining order until September 29, 1980, and set said day for hearing on plaintiffs' application for preliminary injunction.

16. On September 17, 1980, the defendant, by and through its area manager, Gary L. Gerth, rescinded its previous eviction notice to plaintiff Edwin Gerspacher and then ordered said Edwin Gerspacher off the federal lands by October 1, 1980, even though plaintiff Edwin Gerspacher already was party plaintiff to the suit which restrained defendants from evicting him from the federal lands.

17. Plaintiff Edwin Gerspacher thereafter brought a separate suit in Cause No. CV-80-166-BLG on September 29, 1980, seeking relief in the form of a preliminary injunction from the letter of eviction he received September 17, 1980, from the defendant rescinding its earlier order against him, but still evicting him by October 1, 1980.

18. Plaintiff Edwin Gerspacher after presenting Cause No. CV-80-166-BLG on September 29, 1980, to the Court then moved to consolidate his cause with CV-80-157-BLG and the court, without objection, consolidated the matters.

19. The data relied on by the defendant in reaching its decision that plaintiffs' cattle must be immediately removed from the public lands in order to prevent severe damage to the range land resource was based primarily on various written materials which defendant and authorized agent Terrence E. Wilson could not specify and on other principles that defendant Terrence E. Wilson testified to the effect that further grazing on the range resource in a year of drought is harmful to the range
resource and makes it more difficult for the resource to recover from a year of drought.

20. These reasons do not create an emergency such as was asserted by the defendant in its letters of eviction to plaintiff; the Court finds this on the basis of expert testimony. These experts are August Hormay, on behalf of the plaintiff, and Dr. Donald Ryerson, on behalf of the defendants. Both witnesses testified that continued grazing of the range resource throughout the balance of plaintiffs' permit seasons this year does not in any way create an emergency to the range land resource.

21. The Defendant, while having authority over many counties in eastern Montana other than Valley, elected only to evict federal land permittees in said Valley County.

22. The range resource will not be severely damaged if livestock of plaintiffs continue to graze on it until the end of the permit seasons. There is no emergency condition on the public lands and the grazing of plaintiffs' livestock on the public range land throughout the balance of their permit season will not damage or harm the resource. Such a finding is based on the testimony of experts, above stated, presented by both the plaintiffs and the defendants.

23. The Court is of the opinion that plaintiffs would suffer severe and irreparable damage and harm if they were forced from the public lands before the expiration of their permit periods for 1980.

24. The Court took judicial notice of Title 43 of the United States Code. 43 U.S.C. § 1701(a)(6) states:

"The Congress declares that it is the policy of the United States that . . . judicial review of public land adjudication decisions be provided by law."

25. The procedure used by the defendant to evict plaintiffs from the federal lands is totally inconsistent with the policy of Congress as embodied in said Title 43 U.S.C. § 1701(a)(6).

26. Plaintiffs have a good likelihood of success on the merits of an administrative appeal of the defendant's decision.
that their cattle must be evicted for the balance of the permit season.

27. The Court is of the opinion that the actions of the defendant as set forth above are arbitrary and capricious in that the decisions were not based on scientific evidence, nor based on any input from plaintiffs involved. The defendants' expert witness, Dr. Donald Ryerson, testified that all of the plaintiffs have been ranching their entire adult lives, were raised ranching, and that they have had the following experience in conducting ranching operations on lands that include the public domain:

A) Gene Etchart (for Hinsdale Livestock Company) - 31 years.
B) Edwin Gerspacher - 52 years.
C) Howard Porter - 28 years.
D) John Brookie - 42 years.

28. These ranchers have experienced many droughts in the areas that are the subject of this lawsuit. Evidence presented at hearing revealed they know how to judge the conditions of the range resource and have acted appropriately in managing their herds in accordance with the conditions of the range resources.

29. The opinion of plaintiffs is that the range resources will not be severely damaged if the reduced number of livestock they now have on the range resources are allowed to remain there the balance of this permit season.

The Court adopts the opinion of Mr. Horman and these ranchers with respect to the condition of the range resource. Testimony has revealed that drought conditions never create an emergency with respect to the range resource, contrary to the opinion of defendant Bureau of Land Management. The appeal right granted plaintiffs was largely without meaning in that had the defendant prevailed, the plaintiffs would have been in trespass with their cattle subject to impoundment some 20 days before their time to appeal even ran.

30. The plaintiffs were deprived of any notion of due process of law with respect to the defendant's decision affecting the allotments plaintiffs lease. Significant portions of
plaintiffs' privately owned and controlled land intermingle with the federal lands. Plaintiffs did not have an opportunity to participate in the decision to evict the livestock from the allotments plaintiffs lease. Tours the defendant conducted in conjunction with the plaintiffs were made subsequent to the Bureau's decision that evictions would be made.

31. The Bureau failed to consider the fact that plaintiffs had all voluntarily reduced their use of the federal lands during this year (ranging from Hinsdale Livestock Company's approximately 25% reduction in authorized use of the allotment, to a rather small reduction in use by plaintiffs Brookie and Porter) prior to any action taken by the Bureau with respect to the federal range land. Regarding Hinsdale Livestock Company, the cost of reducing their use of the allotment was approximately $34,000.00 for relocating cattle that normally would have remained on the allotments this year. As a result, plaintiffs will continue to incur costs of grazing and feeding relocated livestock.

32. The Court finds the defendant is in violation of the contract entered into with plaintiff Hinsdale Livestock Company.

The allotment management plan provides for a rest rotation grazing system with two of seven pastures rested or unused each year.

Plaintiffs have made substantial investments related to the allotment plan covered by the seven pastures in the form of many miles of fence and construction of reservoirs.

The allotment plan, on page 23, states:

There is flexibility in management with this type of system. The rest pasture may be used in the event of... drought... but grazing will return to normal sequence immediately following the deviation. This flexibility is necessary in adjusting to short term climate and vegetative changes... ."

33. The Court is of the opinion that the defendant is in violation of this agreement in that it is now denying plaintiff Hinsdale Livestock Company the opportunity to utilize the rest pastures in this year of proven drought.
34. This allotment management plan described above was signed by Gene Etchart on behalf of Hinsdale Livestock Company and by defendant Gary L. Gerth as hearing manager for defendant in Valley County.

**CONCLUSIONS OF LAW**

1. Each of the above-stated Findings of Fact is hereby restated as a Conclusion of Law.

2. The Court has federal question jurisdiction over the parties and the subject matter of this controversy.

3. The actions of defendant Bureau of Land Management in evicting plaintiffs from the allotments in question are not supported by the evidence and testimony heard by the Court.

4. Plaintiffs were deprived of due process of law by defendants' actions in evicting plaintiffs from the allotments in question, said allotments intermingling federal lands with private lands of plaintiffs.

5. Defendants have denied plaintiffs any meaningful opportunity for administrative appeal of the decision by the defendant evicting plaintiffs from the allotments in question during the balance of the grazing season for 1980.

6. The immediate effect of the defendant's decision to evict plaintiffs from the allotments in question for the balance of the 1980 grazing season is contrary to the policy of Congress expressed in 43 U.S.C. 1701(a)(6) which provides that it is the policy of the United States that judicial review of public land adjudication decisions be provided by law.

7. Plaintiffs will suffer irreparable harm if a preliminary injunction does not issue. Such an injunction should issue enjoining defendants from evicting plaintiffs from the allotments in question pending plaintiffs' pursuit of administrative remedies.

8. The evidence and testimony reveals there is no emergency condition on the range resource in question that requires the immediate removal of the livestock. The Court finds that the defendants will not be harmed by the issuance of a preliminary injunction enjoining defendant from implementing
its decision to immediately evict plaintiffs' livestock from the range resource. Therefore,

IT IS ORDERED that a preliminary injunction be and the same hereby is, granted restraining enforcement of the defendant's orders evicting plaintiffs' livestock from the allotments that are the subject of this lawsuit, said orders dated August 27, September 4, and September 17, respectively.

IT IS FURTHER ORDERED that said preliminary injunction will remain in force and effect until such time as plaintiffs have been given the opportunity to exhaust their administrative remedies.

Done and dated this 3rd day of October, 1980.

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Chief United States District Judge