TESTIMONY AT THE INTERIM COMMITTEE MEETING ON PUBLIC LANDS & NATURAL RESOURCES NOVEMBER 15, 2005

Greetings Chairman Rhoads and members of the committee, my name is O Q Chris Johnson. I am Chairman of the Nevada Committee for Full Statehood and a director on the board of the Nevada Live Stock Association. My home is in Elko.

The issue I bring before the committee today is one which clarifies ownership and provides methods for determining ownership of roads which are believed to have been constructed according to the RS 2477 grant found in the 1866 Mining Law.

The RS 2477 grant is found in Sec. 8 of the 1866 Mining Law and simply says; 'And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for other public uses, is hereby granted.'

There it is complete, in it's simplicity. There are no strings attached, no forms to fill out, nothing to record, just go ahead and build the roads and/or accept the ones that are already in use. One reason I believe it is such a simple statement is due to the fact that the federal government cannot create property in the first instance. Creating property is left up to the states. As soon as a county accepted a road as a valid right of way it became the property of the county and not subject to any federal scrutiny or regulation. Nothing has changed since 1866. County roads are the property of the various counties and federal agencies have no jurisdiction over them. I am going to apply this reasoning to the Jarbidge

South Canyon road a little later.

Three counties in Southern Utah were the focus of some bitter litigation over road ownership. The Southern Utah Wilderness Alliance in league with the Sierra Club sued the BLM and several county commissioners in Southern Utah in an effort to stop the counties from doing perfectly legitimate road maintenance. The case started out in federal district court and didn't go very well for the county commissioners so they appealed to the 10th Circuit Court of Appeals and got a very meaningful decision handed down to them.

In order for the 10th Circuit to render a decision, the clerks did the research which helped the justices formulate the reasons for their decisions. A decision in the 10th Circuit is not binding in Nevada because we come under the 9th Circuit Court. The logical reasoning on which the 10th Circuit decision is based is not contained by boundaries, however, so the same logical reasoning applies in Nevada and that is what I am here to discuss because it deals with Congressional intent to place restrictions on agencies of the federal government. There is no actual conflict between federal law, specifically the RS 2477 grant and state law which settles road ownership matters even though there is no uniformity between states as far as standards are concerned. Quoting from the 10th Circuit decision; when the BLM proposed nationwide standards for roads in 1994 Congress responded by passing a permanent appropriations rider forbidding implementation of those standards absent express authorization from Congress. Congress' decision to perpetuate non-uniform standards provided for the view there is no need for a uniform national rule.

Quoting further; In a memorandum issued shortly after the congressional prohibition, the Secretary of the Interior stated that in light of the prohibition, the BLM could make non-

binding administrative determinations of RS 2477 rights of way where there was a "demonstrated and compelling need; but that those making claims of the existence of valid RS 2477 rights of way continue to have the option of seeking the validity of their claims in court." And now in my words; that means state court not the federal district court because if you will remember we are dealing with property and a state court is the only court qualified to make decisions regarding property.

The BLM and, I assume, the FS, which is on a par with BLM, can make non-binding administrative determinations when it comes to land use planning but those decisions are not binding on the parties.

Questions have arisen by the BLM on the actual formation of an RS 2477 right of way. Whether that right of way had to be fashioned by construction with mechanical equipment or could it have originated as a highway which was formed as the proverbial beaten path. Subsequently the BLM and again, I assume the FS can use their administrative criteria as persuasive arguments as to the legal status of a right of way but the final determination is made from local custom, usage and decisions of a state court. The 10th Circuit concluded that administrative determinations were not entitled to the force of law and so in my opinion courts err if they give deference to those administrative determinations prohibited by Congress. I also believe that counties err when they allow administrative determinations by a federal agency to guide their planning or road work. I consider counties to be autonomous in their rights to provide safe transportation routes for their citizens. That means counties cannot allow any outside interference from federal governmental agencies.

I believe the logical arguments found in the 10th Circuit decision will bear me out. Based on the 10th Circuit decision it seems that gross legal errors were committed by the FS while impeding Elko County from doing routine repairs to the Jarbidge South Canyon road. The FS was instrumental in getting the NV Dept. of Environmental Protection to issue a cease and desist order based on point source contamination of the Jarbidge river. Eventually Elko county was exonerated by Judge Wagner of Lovelock District Court so the NDEP committed an error by issuing that cease and desist order. Then later in the year Gloria Flora managed to have thousands of yards of rubble from the banks along the Jarbidge road heaped onto 900 feet of the South Canyon road beginning at the Pine Creek Campground. After that deed was done she stated there is no road there, there never was a road there and sent Elko County a bill for $420,000.00 for repairs to federal land for damages caused by the Elko County road dept. I believe the actions and the many lies allegedly told by Gloria Flora constitute fraud. I would like to see the Elko County District Attorney review the history of the situation and build a case against the US naming the FS, Gloria Flora and US attorneys who were involved; charging the whole bunch with fraud and seek damages in excess of $500,000.00. There is no statute of limitations on fraud. There were many gross legal errors perpetrated by the US during that period when we analyze their actions basing our opinion on the 10th Circuit Court research and decision.

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In a related matter; the BLM and FS are trying to get favorite roads of OHV users inventoried on their maps so they will have some idea of what people consider roads and trails for their recreational use on the federally managed lands. There is a growing concern regarding irresponsible OHV use by the public and while neither the BLM or FS wants to talk about policing and enforcement, the matter is lingering in the background.

I have a real concern regarding any enforcement policies or programs that may be developed and implemented by federal agencies, which leave out the county sheriff. The county sheriff is the highest law enforcement officer in the state because he is elected by the people. Neither the BLM Rangers or FS Law Enforcement officers have any real law enforcement authority because, in the first place, law enforcement has to be granted by the state legislature. Congress cannot and does not confer law enforcement authority as it is prohibited by FLPMA 76. The agencies who manage the unappropriated lands in Nevada do so as an ordinary proprietor and may according to FLPMA 76 contract law enforcement from a qualified agency like the county sheriff.

What will it take as an incentive to get county sheriffs involved in a program of education and enforcement of policies devoted to the responsible operation of OHVs on the open lands in Nevada? Can we depend on the legislature to issue a resolution or a new statute to create incentives for sheriffs to take an interest in OHV operation in their counties. Sheriffs will say their budgets are already stretched to the maximum and they don't have the personnel or the funds to cover the extra expenses of policing the OHV use in their

counties. Could funds be made available from the state treasury to bolster the county sheriff's budget so his department will be able to afford the extra expense? The main reason I bring this up is because I agree with those who think there is too much irresponsible activity happening on our open lands by the users of ATVs. The proper person to police such activities is the county sheriff not the quasi legal enforcement officers of the federal agencies.

I also believe the state needs to pursue the new legislation, recently passed, which protects archaeological sites and other historic treasures which our state has in abundance. In this operation I once more believe the county sheriff should play a major role in protecting these sites from the ravages of curiosity seekers and souvenir hunters.

I am glad the state legislature has taken an interest in preserving our history since it is pertinent to Nevada and not to the US. Heretofore federal agencies have taken a major role in protecting our artifacts so now they can assist but will not need to take the lead.