



United States	Forest	Humboldt National Forest	2035 Last Chance Road
Department of	Service	Toiyabe National Forest	Elko, Nevada 89801-4808
Agriculture			(702) 738-5171

File Code: 6270-1

Date: June 20, 1995

Cliff Gardner
HCR 60 Box 700
Ruby Valley, NV 89833

CERTIFIED MAIL-RETURN RECEIPT
#P 220 738 068

Dear Mr. Gardner:

This is in response to your June 6 Freedom of Information Act (FOIA) request.

We are enclosing a copy of the following documents in response to items 1 and 2 of your request:

1. Pages 3-5 of Forest Service Manual 2541.

Your request for a copy of Congressional Acts that authorize USDA Forest Service officers, agents or employees to file for water rights is too vague to permit a response. The FOIA requires that requests "reasonably describe" the records being sought [5 U.S.C. 552(a)(3)(A)]. The rationale for this requirement was to prevent the government agencies from becoming full-time investigators on behalf of requesters. Any documents responsive to items 3 and 4 of your request should be available at numerous locations. We suggest you consult your attorney if you require assistance in conducting this research.

Sincerely,


R. M. "JIM" NELSON
Acting Forest Supervisor

Enclosure

cc:
RO, Appeals & Litigation w/enclosures
C.Howell, w/enclosures



2541 - NATIONAL FOREST SYSTEM WATER RIGHTS

2541.01 - Authority. Federal law (Acts of July 26, 1866, and July 9, 1870) protects possessors and owners of rights to water for mining, agriculture, manufacturing or other purposes. The water rights protected are those vested and accrued by priority of possession, and recognized and acknowledged by local customs, laws and court decisions. Subsequent laws and legal decisions specifically affecting National Forest System water rights and uses include:

1. The Desert Land Act. The Desert Land Act of March 3, 1877 (19 U.S.C. 377), as amended (43 U.S.C. 321), permits public appropriation of unappropriated nonnavigable waters on the public domain in the 13 States to which it pertains. In a 1935 ruling, the Supreme Court held that the Act authorizes public acquisition of such water rights by following procedures prescribed by State law (California and Oregon Power Company v. Beaver Portland Cement Company, 295 U.S. 143). However, in 1955 the Supreme Court held that the Desert Land Act does not apply to lands reserved from the public domain (Federal Power Commission v. Oregon, 349 U.S. 935).

2. The Organic Administration Act. Basic authority for watershed management is in the Organic Administration Act of June 4, 1897 (30 Stat. 34, as amended, 16 U.S.C. 475). It states the securing of favorable water flow to be a purpose for establishing National Forests. The Act allows all waters within National Forest boundaries to be used for domestic, mining or irrigation purposes under the laws of the States wherein the National Forests are situated, or under United States laws, rules and regulations. A 1982 Colorado Supreme Court ruling (United States of America v. City and County of Denver, 656 P. 2d1) clarified that the 1897 Act grants only a permissive right to use waters within the National Forest.

3. Judicial Doctrine. The Supreme Court established federal reserved water rights in 1908 (Winters v. United States, 207 U.S. 568). Key provisions of the decision, known as the Winter Doctrine, and subsequent modifying rulings are:

- a. The United States government implicitly reserves the amount of water needed for reservation purposes.
- b. Only the amount of water needed for reservation purposes is reserved.
- c. Groundwater as well as surface water is included.
- d. The Multiple-Use Sustained-Yield Act does not allow additional retroactive reservation of water.
- e. Federal reserved water rights, unlike State water rights, are not lost by nonuse and may provide for future needs. The priority date is the date of withdrawal of the reservation.

4. General Exchange Act. The General Exchange Act of March 20, 1922 (42 Stat. 465), as amended (16 U.S.C. 485, 486), provides authority for accepting title to lands within National Forests in exchange for National

Forest lands reserved from the public domain. Lands acquired under this act or under other authorities related to the purchase, exchange, or donation of lands added to the National Forest System, do not have reserved status for purposes of claiming water under the reservation principle. This includes nonreserved lands acquired by another Federal agency and subsequently transferred to Forest Service jurisdiction. Such acquired lands may, however, carry with them water rights established under state laws, depending upon the laws and facts involved in each transaction.

5. Organic Act of 1944. A provision of this act (16 U.S.C. 526) authorizes appropriations for Forest Service investigation, establishment, purchase and protection of water rights needed or beneficial for Forest Service administration and public use.

6. McCarran Amendment. This 1952 act (43 U.S.C. 666) allows the United States to be joined as a defendant in lawsuits to:

- a. Adjudicate rights to use river system or other waters.
- b. Administer such rights if the United States is owner or in the process of acquiring rights.

A 1971 Supreme Court ruling (United States v. District Court in and for the County of Eagle, Supra 1971) subjects all United States water rights to general State adjudication regardless of whether the rights are claimed under federal or state law.

2541.02 - Objective. To obtain water needed for the National Forest System, in accord with legal authority and with due consideration for the needs of other water users.

2541.03 - Policy

1. Rely on the reservation doctrine if the land was reserved from the public domain and for the reservation purposes identified in documents or legislation.
2. Obtain water rights under State law if the reservation doctrine does not apply.
3. Purchase essential water rights not otherwise available.
4. Use water needed for National Forest purposes efficiently, and in water-scarce areas, frugally.

2541.04 - Responsibility

2541.04a - Chief. The Chief shall:

1. Develop policies, programs, and procedures for obtaining water needed for National Forest System purposes.
2. Develop and maintain liaison and cooperative relationships with others concerned with water use on National Forest System lands.

3. Maintain liaison with the Comptroller General's office and Justice Department.

4. Approve participation in adjudication.

2541.04b - Regional Foresters. Regional Foresters shall:

1. Notify states of existing and foreseeable water use under Federal authorities.

2. Obtain water rights according to state procedures when Federal authorities do not apply.

3. Purchase water rights as needed.

4. Review and approve water needs analyses.

5. Participate in adjudications.

6. Provide technical guidance, assistance, and training to forests.

7. Maintain liaison with others, at Regional levels, who are concerned with water use on National Forest System lands.

8. Annually update the Regional water uses and needs inventory. See chapter 10, FSH 2509.17, Water Uses, Rights, and Requirements System (WURR).

9. Ensure compatible instructions for perfecting water rights when more than one Region must deal with a single State.

2541.04c - Forest Supervisors. Forest Supervisors shall:

1. Prepare and update water uses and needs inventories.

2. Prepare water use notifications, water rights applications, and analyses of water needs.

2541.1 - Determining Water Rights and Needs. The right to use the amount of water needed to manage the National Forest System is provided under authority of Federal laws (sec. 2541.01), or under State law. Determine specific amounts required when claiming water rights under the reservation doctrine, applying for water under State laws or purchasing water rights. Identify specific uses, sources and quantities of water needed. Water rights asserted under the Federal reserved rights doctrine may provide for present and foreseeable future uses.

2541.11 - Inventory and Records Maintenance. The Forest Service Water Uses, Requirements and Rights (WURR) system provides a uniform data file for recording and storing information needed to properly manage water uses and rights. File design and data elements definitions are described in FSH 2509.17, chapter 10, Water Information Management System Handbook. Use WURR and other files such as Landownership Status and Land Use Reporting, that form the Landownership Management System (LOMS) (FSM 5490) to track current status of existing water rights and other interests in water. Prepare and maintain inventory records to show (1)

CLIFF GARDNER
HCR 60 Box 700
RUBY VALLEY, NEVADA 89833

Humboldt National Forest

JUN 6 1995

FREEDOM OF INFORMATION ACT REQUEST

ACTING FOREST SUPERVISOR
USDA, FOREST SERVICE
Humboldt National Forest
2035 Last Chance Road
Elko, Nevada 89801

CONCERNING:

CLIFF GARDNER
HCR 60 Box 700
Ruby Valley, Nevada 89833

Dear Forest Supervisor:

1. This is a request under the Freedom of Information Act, 5 USC 552, 36 CFR 200.5, 7 CFR 1.2 or regulations thereunder. This is our firm promise to pay fees and costs for locating and duplicating the records requested below, ultimately determined in accordance with 36 CFR 200.9 (b).

2. If some of this request is exempt from release, please furnish me with those portions reasonably segregable. I am waiving personal inspection of the requested records.

3. This request pertains to the years 1897 through and including 1993.

4. I am attesting under the penalty of perjury that I am a category A, or commercial distribution requester.

PLEASE EXPEDITE THIS REQUEST.

5. BACKGROUND: Over the last four or more years your office has filed nearly 500 claims for stock water with the Nevada Division of Water Resources. Most of these claims are for a vested right. In *United States v State of New Mexico*, 438 US 696, 57 L Ed 2d 1052, 98 S Ct 3012, Justice Rehnquist in writing the opinion of the Court said:

"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."

It appears to us that these filings by your office run in direct conflict with the above stated position of the United States Supreme Court.

6. Please send me a copy of the complete set of documents disclosing the written delegation of authority order(s), authorizing USDA Forest Service officers, agents or employees to file for stockwater rights under state law.

7. Please send me a copy of the complete set of documents disclosing the written delegation of authority order(s), authorizing USDA Forest Service officers, agents or employees to file for vested rights for stockwatering under state law.

8. Please send me a copy of the complete set of documents constituting those Congressional Acts, or that Congressional Act that authorizes USDA Forest Service officers, agents or employees to file for stockwater rights under state law.

9. Please send me a copy of the complete set of documents constituting those Congressional Acts, or that Congressional Act that authorizes USDA Forest Service officers, agents or employees to claim vested rights for stockwatering under state law.

DATED: This 6 th day of June, 1995

RESPECTFULLY,

Cliff Gardner

CLIFF GARDNER, REQUESTER

I understand the penalties provided in 552a(i)(3) for requesting or obtaining access to records under false pretenses.

Cliff Gardner

CLIFF GARDNER, REQUESTER

NOTARY

BEFORE ME, appeared CLIFF GARDNER known to me or showing positive identification, on this the 6th day of June, 1995, for the purpose of affirming his identity to expedite the matters contained here in.

NOTARY Sandra L Schmanski DATED: 6-6-95

