

THE PRECEDENT IS BEING ESTABLISHED
WHAT WILL RIPARIAN MEAN TO THE USERS OF PUBLIC LANDS

There has been no legal definition of the word riparian. The United States Forest Service is currently trying to use a case to defend their interpretation of riparian. The Forest is trying to use this case to establish the precedent for the entire Forest Service System. Once this precedent is established it would (will) probably be used by the other government agencies.

The case involves the Toiyabe National Forest, Sparks, Nevada, and some of the ranchers who have grazing permits on the Austin Ranger District; Austin, Nevada. The ranchers are: Tony Testolin, Jim Champee, LaVar Young, and Wes Parson, all of Austin, Nevada. There are other ranchers on other Forests that have similar cases pending. An attempt is being made to consolidate these cases with the Austin case. The development of the Austin case follows.

The Forest plan was written and approved by the government in 1984. In the plan it was stated that grazing in riparian areas would be limited to fifty percent of total forage production, and livestock would have to be removed when this limit was reached. The Forest plan did not define what was meant by riparian. Ranchers and other land users did not ask for a clear definition.

Next, three Allotment Management Plans (Tierney Creek C&H, Washington C&H, and Bade Flat C&H) were or are being written for these allotments and are or will be put into effect. During the implementation of some of the plans, what the Forest meant by riparian came out by the actions of the Austin District. The Forest was calling each live stream, intermittent stream, and all water seeps riparian areas in the Allotment Management Plans.

These areas are the water source for the livestock being grazed. When the Forest plan was written the ranchers thought that riparian applied only to the live perennial streams. These permittees felt they could meet the fifty percent loss of use by developing watering sources at the seeps located higher on the hillsides. Thereby shifting the grazing use out of the stream bottoms to the hillsides. Under the Forest interpretation of riparian, even these areas were riparian. The ranchers determined they would not be able to graze cattle when every water source was classified as riparian and subject to the fifty percent use. This action of the Forest will force these ranchers to reduce the size of their herd and therefore their income by at least fifty percent, or force them out of the industry all together. The ranchers contested to exempt some of these areas from the fifty percent use. The ranchers feel that the effects of the Forest's definition would destabilize the agriculture community in the State of Nevada. The affected ranchers are appealing this definition through the Forest appeal system.

It is interesting to note that the stabilization of the resident agriculture community was the reason the National Forest system was established in Nevada. In 1908, the Nevada National Forest was established to stop large migrant bands of sheep from overgrazing the lands needed by the resident ranchers (see the article "Nevada Agriculture: Limitations, Change and Potential" by Terrill J. Kramer).¹ The Nevada National Forest consisted of what is now the Toiyabe and Humboldt National Forest. The rancher is now being forced out of the Forest which was created to help him.

1. Found in the magazine Nevada Public Affairs Review 1986 #1

What the Forest wants to gain by this contest is the use of the water found in these areas. According the article; “Nevada Water Law: A Shift to Riparianism” by Harry W. Swainston.² Nevada decided in 1885 that the first user of the waer has the oldest right. Because of the limited quantity of water in Nevada. The State rejected the doctrine of riparian water rights and used the pure prior appropriation system. A riparian water right to use the water is based primarily on the ownership of the land on which the water originates. Example: if the water originates on the Forest, the Forest has first use and all other uses are subject to the Forest. This takes away or reduces the State’s right to assign water rights to the most beneficial use. The article on “Nevada Water Law” should be read to understand these two types of water use assignment. If the Forest can get the riparian use accepted as a beneficial use under State law, then the Forest would be able to argue that every surface source of water on the National Forest, and all the water coming from the same lands, are for their first use. This is the prime reason why what is meant by riparian areas is so important to all users of Nevada’s water.

One of the riparian water rights is the right to maintain instream flows. This means that another user cannot divert all the water from a spring or creek even if he was the first user of the water. He would also have to stop using the water if there was not enough water to maintain the instream flows. The possible effect of instream flow right alone is great in the State of Nevada. An example: if an individual built a reservoir on a stream to

2. *ibid.*

store and divert water to his property (farm, ranch, mine, homesite, etc.) He would have to use the water stored in his reservoir to maintain the required downstream flows even when there is less than the required amount coming into the same reservoir from upstream.

There now exist laws, rules, and regulations which restrict the land use of riparian lands, both on public and private land. This is the second reason why the definition of riparian is so important. If the Forest gets its way, then these restrictions would apply to every wet spot on Forest land. The following is only a partial list of the things restricted at or near a "Riparian Area."

1. grazing
2. use of the water
3. location of roads of any kind
4. location of ponds
5. location of open pit mines
6. location of mine processing sites
7. discharge from mine processing sites
8. private land that can be put under cultivation
9. areas withdrawn from mineral entry
10. camp sites

Now you can understand why the definition of riparian area is so important to everyone who uses water or the land.

Obtaining water rights was part of my job with the U.S. Forest Service at Austin, Nevada, during the time I worked for the Forest. In 1979, the U.S. Government (U.S.F.S. & B.L.M.) started to apply for water rights in the State of Nevada. This resulted in their efforts becoming tied up in the court system with a good chance of failure. In 1984-1985, I believe that the Forest started to develop the riparian issue to gain the water rights which the Forest has not been able to obtain under the application procedure. I further believe that the remoteness of the

Austin area from public attention is the reason that the government selected this case to use in setting precedence. I quit working for the Forest in late September 1985, partly because I did not agree with the Forest's definition of riparian. I did not want to have anything to do with the adverse effect that this issue is going to have on the agriculture community.

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