Supreme Court of the United States.
Raymond D. YOWELL, Pro Se Petitioner,
v.
Robert ABBEY, Helen Hankins, et. al., Respondents.
No. 13-1049.
January 17, 2014.

On Petition for Writ of Certiorari To The Court of Appeals for the 9th Circuit

Petition for Writ of Certiorari

Raymond D. Yowell, Pro Se, H.C. 30, Box 272, Spring Creek, NV 89815, (775) 744-4381.
***i** Questions Presented

1. The Treaty of Ruby Valley was made between the United States, its citizens, and the Western Shoshone people in 1863. Article 6 of the Treaty provides that the President of the United States would establish a reservation for the Western Shoshone People. In 1941 the South Fork Indian Reservation was established and proclaimed. The proclamation included approximately 10,000 acres of "base" lands together with range, ranges, and range watering rights used in connection with the base lands. The Yowell complaint establishes that his cattle were grazing on the ranges encompassed by the proclamation pursuant to Article 6 of the Treaty. Did the 9th Circuit err in assuming facts not in evidence and finding that Yowell's cattle grazing those ranges were subject to BLM grazing regulations?

2. The 1941 Proclamation established the ranges encompassed by the proclamation as being lands held for the benefit of Indians. 43 C.F.R. § 4100.0-5 specifically exempts lands held for the benefit of Indians from BLM regulations. Did the 9th Circuit err when it concluded that the BLM regulations and management applied to the ranges encompassed by the 1941 Proclamation?

3. Article 6 of the Treaty of Ruby Valley establishes the reason for the creation of the reservation was to make the Western Shoshone People herdsmen and agriculturalists. The 1941 Proclamation clearly identifies range, ranges, and range watering rights ***ii** used in connection with the base lands as included in the reservation. Mr. Yowell is a Western Shoshone Indian living on the South Fork Indian Reservation who is a herdsman and agriculturalist. Is Yowell's Article 6 treaty guaranteed vested right a clearly established federal right?

4. Under the 1924 U.S. Indian Citizenship Act all Indians became citizens of the United States. The 4th, 5th, and 14th Amendments to the United States Constitution apply to Indians as well as any other person within the jurisdiction of the United States of America. Are the 4th Amendment prohibitions against unwarranted seizure of property and the 5th and 14th Amendment guarantees of due process clearly established federal rights held by Yowell?

4. Nevada Revised Statute 565.130 provides that the brand inspectors must be provided with satisfactory evidence of the right to legal possession of the animals before a brand inspection certificate shall be issued. The language of the statute makes it a non-discretionary duty of office. The allegations in the Yowell complaint establish that the brand inspectors violated their duties as established in the Nevada Revised Statutes. Did the 9th Circuit err when they assumed facts not in evidence and held that the duty was discretionary and the State Defendants followed the applicable brand inspection procedures?

5. The instant case comes to this Court from pre-trial motions to dismiss with a limited factual record before the District Court. Based upon this Honorable ***iii** Court's precedent decisions, at the pre-trial stage all factual allegations in the Yowell complaint are to be considered true and any factual disputes must be resolved in favor of the non-moving party (Yowell). Did the 9th Circuit err when it did not consider the factual allegations in the Yowell complaint to be true?

LIST OF PARTIES

Pursuant to Rule 14, (b), the parties to this Case are:

Raymond D. Yowell, Petitioner, appearing Pro Se

v.

Robert Abbey; Helen Hankins; Dept of Treasury, Fin Mgmt Svcs; CBE Group, Inc.; Jim Pitts, James Connelley: Dennis Journigan.

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***2** JURISDICTION

The decision of the Court of Appeal for which certiorari is sought was entered on June 28, 2013. A petition for rehearing was denied on September 26, 2013. Jurisdiction in this Court is proper under 28 U.S.C. § 1254. Jurisdiction in the 9th Circuit Court of Appeals was proper under 28 U.S.C. § 1292(a)(1). This suit was originally brought before the Federal District Court of Nevada under the jurisdiction of 28 U.S.C. §§ 1331.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the rights of Raymond Yowell to be a herdsman and agriculturalist pursuant to the Treaty of Ruby Valley of 1863 and in now an extension of the “Western Shoshone Land Rights” argument..

The Petitioner is an 84 year old Western Shoshone Indian who has resided on the South Fork Indian Reservation from even before its proclamation in 1941 until the present day. Mr. Yowell was forced to file a complaint under 42 U.S.C. § 1983 for the unwarranted seizure and sale of his cattle.

The express purpose of Article 6 of the Treaty of Ruby Valley was to enable the Western Shoshone to become herdsmen and agriculturalists. The proclamation of 1941 establishing the reservation also reserved range, ranges and range watering rights for the express purpose of enabling the Shoshone to become herdsmen.

***3** Mr. Yowell's rights under Article 6 of the Treaty of Ruby Valley are clearly established federal rights. Mr. Yowell's 4th, 5th, and 14th amendment rights are also clearly established federal rights.

Mr. Yowell turned his cattle out to graze on the ranges encompassed by the proclamation from 1964 to 2002 when the BLM seized his cattle under an allegation of trespass.

The BLM alleged jurisdiction over the ranges used by Mr. Yowell, yet never provided any evidence that they had such jurisdiction over the ranges encompassed by the Treaty. The Bureau of Indian Affairs properly holds the jurisdiction over these Indian lands.

The BLM and others acting with the BLM violated the Petitioner's Treaty guaranteed vested rights to be a herdsman and agriculturalist when they interrupted his free use of those ranges and eventually seized his cattle.

The BLM and others acting with the BLM also violated Mr. Yowell's 4th, amendment rights against unreasonable seizures when they seized his cattle pursuant only to regulations which didn't apply to the lands his cattle were grazing upon.

The BLM and others acting with the BLM violated Mr. Yowell's 5th and 14th amendment rights to due process when they seized his cattle (pursuant to regulations that don't apply to Indian lands), ***4** extinguished his ownership interest and sold the cattle without giving Mr. Yowell an opportunity to defend against the underlying basis of the seizure prior to the cattle being sold.

The Federal District Court of Nevada correctly held based upon the allegation in the complaint that the BLM Defendants were liable

for a *Bivens* type action, and that the State Defendants were not entitled to qualified immunity for their actions because their duties were non-discretionary.

The 9th Circuit erred when it reversed and remanded the District Court's ruling. In doing so, the 9th Circuit decided an important federal question in a way that directly conflicts with the decisions of the 7th Circuit Court of Appeals.

The 9th Circuit decision erred because it also decided in a way that conflicts with relevant decisions of this Court.

This Court should grant the Petitioner's writ of certiorari and accept this case accordingly.

STATEMENT OF FACTS AND PROCEDINGS BELOW

In 1861 the Territory of Nevada was created. Excepted out of the boundaries of the Territory were all of the lands belonging to the Indians in the territory.

***5** In 1863, the United States, its citizens and the Western Shoshone Nation entered into a Treaty. This Treaty was known as the Treaty of Ruby Valley and was proclaimed in 1869.

Article 6 of the Treaty of Ruby Valley states: “The said bands agree that whenever the President of the United states shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.”

The Western Shoshone continued to roam about from 1869 until 1936. The Traditional Te-Moak Tribal Council, on Dec. 30, 1936, wrote a letter to John Collier, Commissioner of Indian Affairs in Washington D. C, requesting that the Article 6 provision creating a reservation under the 1863 Treaty be fulfilled.

The United States, in 1937 and 1938, began fulfilling the Article 6 provision of the 1863 Treaty in response to the Te-Moak Traditional Council's letter, by purchasing private ranches on the Upper South Fork of the Humboldt River for a Reservation for the Te-Moak Bands of Western Shoshone Indians of Nevada.

On May 31, 1938, the Constitution for said Bands was adopted by the Te-Moak Bands of ***6** Western Shoshone Indians of Nevada and was signed by Oscar L. Chapman, Assistant Secretary of the Interior. The last paragraphs on page 8 of the Constitution state:

“All rules and regulations heretofore promulgated by the Interior Department or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of the said Constitution and By-laws are hereby declared inapplicable to the Te-Moak Bands of Western Shoshone Indians of Nevada.

“All officers and employees of the Interior Department are ordered to abide by the provisions of the said Constitution and By-laws.”

Article VIII Sec. 2 of the Te-Moak Constitution provides:

“Grazing permits covering tribal land may be issued by the Council, with the approval of the Secretary of the Interior, in the same manner as leases.”

On Dec. 12, 1938, the Corporate Charter of the Te-Moak Bands of Western Shoshone Indians of Nevada was issued by Oscar L. Chapman, Assistant Secretary of the Interior ratified by said Bands.

Finally, on Feb. 8, 1941, the U. S. Federal Proclamation for the said Bands South Fork Indian Reservation proclaiming it as such was issued.

The Proclamation defined the boundaries of the South Fork reservation to be an area encompassing ***7** approximately 9,548 acres. Following the description of the land boundaries, the proclamation states:
“TOGETHER with all range, ranges and range watering rights of every name, nature, kind and description used in connection with the above described premises.”

Raymond Yowell was born in Elko, Nevada in 1929 and lived in Smokey Valley, Nevada and then Elko, Nevada with his relatives until 1937 when the South Fork Indian Reservation was in the process of being created. Mr. Yowell and his family were some of the very first Shoshone to move to what would become the South Fork Reservation.

Mr. Yowell's Te-Moak Bands of Western Shoshone Indians of Nevada enrollment number is actually 00041 making him the 41st person ever enrolled in the Te-Moak tribe.

In 1964 Mr. Yowell began grazing his first cow upon the ranges encompassed by the proclamation. By 2002 he had grown his herd from one original cow to 132 head of cattle, always grazing upon the ranges encompassed by the proclamation.

In the early 1980s, Mr. Yowell and other Shoshone herdsmen after reading and fully comprehending the language of Article 6 of the Treaty, the Te-Moak Constitution and the Proclamation concluded that the ranges they'd been grazing were part of the reservation and were not under the jurisdiction of the Bureau of Land ***8** Management but rather the Bureau of Indian Affairs.

The other Shoshone herdsman at this time quit paying grazing fees to the BLM. Mr. Yowell has never had a grazing permit for the ranges encompassed by the proclamation that his cattle were using since 1964, so he has never paid grazing fees. The Shoshone herdsman began acting and calling themselves Traditional Western Shoshone Cattlemen under Article 6 of the Treaty of Ruby Valley as Mr. Yowell had been operating since 1964.

The BLM repeatedly sent threatening letters to Mr. Yowell from that time on attempting to get him to agree to obtain a grazing permit. Each time Mr. Yowell and the other Traditional Western Shoshone Cattlemen would answer the BLM and ask them when they took title to the ranges he and they were using. The BLM never answered the question to this very day.

In 1987 Mr. Yowell was appointed Chief of the Western Shoshone National Council by the elders and members of the Council. The Chief of the Western Shoshone National Council is a position equal to President of the United States. From 1987 forward, all official communications had by the Western Shoshone National Council were signed by Chief Raymond Yowell. All documents

bearing Chief Raymond Yowell's signature on behalf of the Western Shoshone National Council were made in his official capacity as Chief and not in an individual capacity as a herdsman and agriculturalist. All of the letters ***9** and replies to the BLM's threats were signed simply as Raymond Yowell, denoting him in an individual capacity as a herdsman and agriculturalist.

The BLM repeatedly sent Trespass allegations to Mr. Yowell in the 1990s, alleging once again that his cattle which were on the ranges encompassed by the proclamation were somehow in trespass. Again Mr. Yowell responded not only with a letter similar to his previous responses but copies of the 1787 Northwest Ordinance, the 1834 Trade and Intercourse Act, the Treaty of Guadalupe Hidalgo, the Nevada Territorial Act of 1861, and the Treaty of Ruby Valley as documentation establishing his right to use the range.

In 2002 Mr. Yowell once again turned his cattle out to graze on the historic grazing lands encompassed by the proclamation that he'd used since 1964.

The BLM issued a Notice of Intent to Impound against Mr. Yowell shortly thereafter.

Mr. Yowell met with the Elko County District Attorney, Gary Woodbury, in order to stop the threatened seizure of his cattle from the range. Mr. Woodbury told Yowell that he didn't have direct authority over the Elko County Sheriff, but he would talk with him.

In mid May of 2002, Mr. Yowell and others met with Elko County Sheriff Neal Harris. Mr. Yowell and others talked to the Sheriff about the threatened ***10** seizure, informed the Sheriff that such a seizure would be a violation of the law and asked him to do his duty and stop the seizure unless he was presented with a warrant or court order providing for the seizure. The Sheriff listened to the points made and gave no commitment to Mr. Yowell or the others in attendance.

The BLM, after years of attempting to get Mr. Yowell to obtain a grazing permit for these ranges, finally seized his cattle on May 24, 2002. The BLM seized 88 cows and 48 calves in the seizure. The BLM never presented Mr. Yowell with a warrant or court order providing for the seizure of the livestock.

Present at the seizure were an Elko County Deputy Sheriff, whose name is unknown to Mr. Yowell, James Connelley and Dennis Journigan, both Nevada State Brand Inspectors, Helen Hankins of the BLM, Clint Oke of the BLM (now deceased), and several BLM “Rangers” who blocked Mr. Yowell and others from going down to the temporary corral where Mr. Yowell's cattle were being rounded up and defending Mr. Yowell's property.

Mr. Yowell's cattle were then loaded onto 2 semi-trucks and hauled away right in front of Mr. Yowell who was prevented from stopping the unwarranted seizure. These cattle were hauled over 300 miles to the Palomino Valley BLM holding corrals in Palomino Valley, Nevada.

As the brand inspectors passed where Mr. Yowell was standing, Mr. Yowell stepped up to speak ***11** with them and made them stop their vehicle. Mr. Yowell asked what was going on and Jim Connelley replied that his cattle were being seized and handed him a white copy of a transportation certificate which Connelley and Journigan had issued to the BLM allowing them to transport the cattle out of the grazing district. Mr. Yowell never signed the transportation certificate as required by Nevada law, instead the transportation certificate was signed by Clint Oke, the BLM Assistant District Manager. A closer inspection of the transportation certificate revealed several more violations of Nevada law as well.

A couple of days later, the BLM hand delivered a letter to Mr. Yowell informing him that he needed to pay the BLM over $150,000

before a specific defined date and time (approximately 4 days later at 8:00 a.m. May 31st) or his cattle would be sold at private auction and the BLM would retain the funds. Nowhere in this letter did the BLM present Mr. Yowell an opportunity to contest the underlying basis of the seizure.

Later that same day, Mr. Yowell through a mutual friend contacted attorney Glade Hall out of Reno Nevada, the site of the nearest Federal Courthouse. Mr. Hall filed documents requesting the Court issue a temporary stay blocking the sale of Mr. Yowell's cattle until the legality of the seizure could be determined.

On May 30, 2002 at about 4:30 p.m. Mr Yowell was informed by a phone call from the District Court ***12** that the original judge assigned to his petition had recused himself and that Chief Judge Howard McKibben had been assigned in his place. At approximately 7:30 p.m. that evening, Mr. Yowell received a phone call from Chief Judge McKibben who had previous experience with Mr. Yowell in his official capacity as Chief of the Western Shoshone National Council and had ruled against the Western Shoshone National Council's cases in the past. Judge McKibben asked Mr. Yowell if he was planning to hold the cases made by the Western Shoshone National Council against him. Since it was 7:30 at night and the sale was programmed for 8:00 a.m. the following morning, Mr. Yowell said that he wouldn't because he didn't know how long it would take to assign another judge.

At around 7:00 a.m. on May 31, 2002 Judge McKibben denied the petition by Yowell. Mr. Yowell's cattle were then sold by the BLM, who retained the funds, and subsequently transported the cattle out of state to California and also to Winnemucca, Nevada.

Once again a brand inspection certificate was issued by the Nevada State Brand inspectors and title was extinguished and transferred without the signature of Mr. Yowell.

After the unwarranted seizure and sale of Mr. Yowell's cattle, the BLM continued to send deficiency notices to Mr. Yowell claiming that they were owed over $100,000 because the price they sold the cattle ***13** at was not sufficient to cover the original $150,000+ that the BLM allegedly was owed.

The BLM sold the debt to several private collection agencies, who tried to collect against Mr. Yowell. Mr. Yowell responded to each attempt and returned the bill for error.

In February of 2008, the U.S. Dept. of Treasury, Financial Management Service sent a letter to Mr. Yowell informing him they would start deducting a portion of his Social Security payment for the collection of the alleged debt. Mr. Yowell responded and pointed out that the debt seeking to be collected against him was not a valid debt and that the Treasury would be in error if they started deduction of Social Security funds.

On April 1, 2008 the Dept. of Treasury Financial Management Service started deducting 15% of the total from Mr. Yowell's Social Security Payments and continued to do so until 2012.

In 2008 Mr. Yowell filed a timely claim against the United States BLM in the United States Court of Federal Claims.

The Court of Claims ultimately denied the Yowell claim in October of 2009 reasoning that if the BLM illegally seized the Yowell cattle and sold them, it would not be a taking, but rather a violation of his civil rights. On the other hand, if the BLM did have the right to seize the cattle without a warrant or ***14** court order, then it still wouldn't be a taking, but rather some sort of police action.

On July 21, 2011 Mr. Yowell filed a complaint in the Federal Court for the District of Nevada alleging a violation of his civil rights under 42 U.S.C. § 1983, a *Bivens* type action, and 25 U.S.C. 478 (the Indian Reorganization Act) against the named and unnamed BLM employees who participated in the unwarranted seizure of the Yowell cattle. Also named in the suit were the brand inspectors of the State of Nevada, and the County Sheriff.

Mr. Yowell's complaint was met by multiple defendants' motions for dismissal and summary judgment.

On June 13, 2012, Chief Judge Robert Jones issued an Order denying all of the various Motions to Dismiss and the Motion for Summary Judgment. Judge Jones also issued an injunction stopping the Dept of Treasury from deducting Mr. Yowell's Social Security payment. A motion for reconsideration made by the Defendants was ultimately denied as well.

In July, Mr. Yowell who had been proceeding Pro Se up until this point, met with and retained attorney Julie Cavanaugh-Bill to represent him on a contingency basis.

The State Brand Inspectors filed a notice of appeal on July 10, 2012.

***15** The Federal Defendants filed a notice of appeal on September 25, 2012.

Briefing and argument was made before the 9th Circuit Court of Appeals and on June 28, 2013 the 9th Circuit ruled by unpublished Memorandum. The Memorandum reversed and remanded Judge Jones' Order, and vacated the injunction against the Dept. of Treasury.

A timely petition for rehearing was filed by Mr. Yowell's attorney. The petition was ultimately denied on Sept 26, 2013.

At this time Mr. Yowell's attorney no longer wanted to proceed with the case, and eventually on the 20th of December dissolved the contingency agreement.

Prior to this time, on the 12th of December, 2013, Mr. Yowell submitted a motion for extension of time to Justice Kennedy of this Honorable Court. Justice Kennedy granted an extension of time to and including January 21, 2014 to file this Petition for Writ of Certiorari.

ARGUMENT

1. This Case is in No Way About the “Western Shoshone Land Claim”

Contrary to what has been argued by Mr. Yowell's opponents in this case, the instant case is in ***16** no way about the Western Shoshone Land Claim that was settled in *United States v. Dann,* 470 U.S. 39 (1985). While the Dann case surrounded an issue revolving around the Treaty of Ruby Valley of 1863, the basis of the argument by the Dann sisters was that the Treaty was of Peace and Friendship and did not convey title of the Western Shoshone Lands to the United States. This Honorable Court rejected that argument and found that payment for the lands had occurred.

In the instant case, Mr. Yowell has made no such or similar claim to the Danns. Instead, Mr. Yowell's case surrounds the rights he has under Article 6 of the Treaty of Ruby Valley to become a herdsman and agriculturalist. Pursuant to the terms of the Treaty, Mr. Yowell has resided for nearly his entire life on the reservation created pursuant to Article 6 of the Treaty of Ruby Valley.

As spoken of earlier in the Statement of Facts, Article 6 of the Treaty of Ruby Valley states:

"The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein."

***17** The principles set forth by this Court in *Winters v. United States*, 207 U.S. 564 (1908) confirm that the reservation included everything that was necessary for the purpose of the reservation. The stated purpose of the creation of a reservation pursuant to Article 6 was to enable the Western Shoshone to abandon their roaming life and become herdsman and agriculturalists.

When the United States finally got around to creating the South Fork Indian reservation, the proclamation not only specified a distinct legally described area encompassing 9,548.46 acres, but also goes on to say "TOGETHER with all range, ranges and range watering rights of every name, nature, kind and description used in connection with the above described premises."

The key language in that statement is of course "TOGETHER with" along with "used in connection with the above described premises." Clearly the plain language terms of the proclamation establish that ranges lying *outside* of the base lands of the reservation were among the rights reserved for the use of the Western Shoshone residing in the reservation.

2. All Lands Held in Trust for Indians are Managed by the Bureau of Indian Affairs

All lands held by the United States in trust for the various Indian nations in the United States are managed and controlled by the Bureau of Indian affairs. Because the plain language of the ***18** proclamation established ranges outside of the legally described base lands, those ranges would by matter of law be managed by the Bureau of Indian Affairs and not the Bureau of Land Management.

3. Filing of Complaint and Standard on Pre Trial Motions

It is unfortunate that the Federal District Court of Nevada requires pro se litigants to file a "form" complaint, but those are the rules of the Court. Mr. Yowell's complaint being limited to a form, is of necessity rather simple in its presentation. This cannot be used against him by the Court system. Mr. Yowell's complaint plainly does state however "Throughout his life Mr. Yowell has turned his livestock out to graze on the historic grazing lands associated with the South Fork Indian Reservation."

No trial has been held in this matter, since all actions have taken place on pre trial motions to dismiss and for summary judgment.

As Nevada Federal District Court Chief Judge Robert Jones correctly points out in his Order of June 13, 2012, when confronted with Rule 12(b)(6) motions to dismiss, the court must accept as true all factual allegations in the complaint as well as all reasonable

inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh,* 205 F.3d 1146,1150 n.2 (9th Cir. 2000).

Mr. Yowell's complaint fully establishes that his cattle that were eventually subject to the ***19** unwarranted seizure by the BLM were grazing upon the range, ranges, and range watering rights used in connection with the reservation.

The Yowell complaint plainly states in the Nature of the Case section:

“Throughout his life Mr. Yowell has turned his livestock out to graze on the historic grazing lands associated with the South Fork Indian Reservation…

“…Defendants proceeded to round up (gather) Mr. Yowell's livestock and seize them without a warrant or court order providing for the seizure of Mr. Yowell's livestock only pursuant to a ‘Notice of intent to impound’ issued pursuant to regulations of the BLM which have no authority over the ranges confirmed by the proclamation establishing the South Fork Indian Reservation.”

The 9th Circuit erred when it held that, “no *Bivens* action may lie against federal officials for ‘strictly enforcing rules against trespass or conditions on grazing permits' assuming facts NOT in evidence and presuming that the BLM had jurisdiction over the ranges encompassed by the proclamation. See 9th Circuit Memorandum at 2 pp. 4-5.

The 9th Circuit based its finding erroneously on the *Dann* decision and not on the *Winters* case as it should have given the facts set forth in the Yowell complaint. This Honorable Court should REVERSE the 9th Circuit Decision accordingly as the decision has been decided in a way that directly conflicts with the relevant decisions of this Honorable Court.

***20** 4. The Rights Established by Treaty are Clearly Established Rights.

Article 6 of the Constitution of the United States of America sets forth that treaties are the supreme law of the land and the Judges in every State shall be bound thereby.

As discussed above, the Treaty of Ruby Valley of 1863 was between the United States, its citizens and the Western Shoshone people. The treaty is a rather short document and can fit on one page. But the rights secured both by the Western Shoshone and the United States citizens in that Treaty are by their very nature clearly established rights.

The 9th Circuit Memorandum states: “Yowell fails to show that the Federal Defendants-Appellants caused him to be deprived of a clearly established federal right. As Yowell concedes, the Federal Defendants-Appellants were following BLM regulations when they seized and sold his cattle, and Treasury-FMS regulations when they certified his grazing debt. No court has held that those regulations violate due process.”

a. The Right to be a Herdsman Fully Encompasses the Ability to Graze.

It would defy logic and the reasoning set forth in *Winters* if the Western Shoshone did not have anywhere to graze their cattle once they settled on the reservation. The lands within the legally described boundaries of the South Fork reservation ***21** do not provide enough area for all of the Shoshone residing there to grow hay for their cattle during the winter months and graze through the

summer months. By necessity, the Shoshone cattle must have outside ranges just like all of the other ranchers in Nevada sufficient enough to provide adequate grazing during the summer months. The proclamation of 1941 fully realized and encompassed this condition when it reserved “all range, ranges and range watering rights of every name, nature, kind and description used in connection with the above described premises.”

As with *Winters,* it would be beyond reason to think that when the Shoshone became herdsmen, the stated purpose of Article 6 of the Treaty of Ruby Valley, that the reservation established under Article 6 would not allow them the ability to do so.

The 9th Circuit erred when it relied upon facts not in evidence and implicitly concluded that the BLM regulations applied to the “range, ranges and range watering rights of every name, nature, kind and description used in connection with” the South Fork Indian Reservation.

b. It is Irrelevant Whether or Not the Regulations Have Ever Been Held to Violate Due Process.

In the instant case, the 9th Circuit's reasoning is flawed. The 9th Circuit states that “No court has held that those regulations violate due process”.

***22** As stated above, the error occurred because the 9th Circuit assumed facts not in evidence, namely that the BLM regulations applied to the lands reserved to the Western Shoshone.

While it may be argued that the BLM regulation *when applied correctly* have never been held to be invalid, as the regulations were applied in the Yowell case the regulations are completely invalid on their face.

As stated above, the ranges where Mr. Yowell's cattle were grazing were not lands under the jurisdiction of the Bureau of Land Management, and no amount of blustering and bullying by the BLM could make them so.

The Yowell complaint fully sets forth that Yowell had no duty to comply with the BLM regulations while grazing the ranges encompassed by the proclamation. The violation of Mr. Yowell's due process rights stems not from the procedures set forth by the BLM regulations, but from the fact that the BLM tried to force him to comply with the regulations in the first place. Futhermore, Mr. Yowell was never given an opportunity to defend against the underlying basis of the trespass charges alleged against him by the BLM in any impartial judicial proceeding.

In layman's terms, Mr. Yowell was railroaded through the BLM process by BLM employees, who then took his cattle based upon BLM regulations ***23** none of which applied to the lands which Mr. Yowell was grazing on.

The 9th Circuit's reliance on *Wilkie v. Robbins,* 551 U.S. 537, (2007) is off point for the simple reason that if a BLM employee seeks to enforce BLM regulations upon someone or some thing to which the BLM regulations do not apply, each employee responsible for the overzealous application of the regulations is outside of his authority. When these actions result in actual damage to another's property, they are indeed liable under *Bivens.*

It also must be concluded that anyone attempting to collect on any alleged debt owed by Mr. Yowell is also liable because, for lack of a better term, it's fruit from the poison tree.

5. The Dept of Treasury Financial Management Service was Properly Enjoyned.

Since the BLM regulations have no jurisdiction over the lands where the Yowell cattle were grazing, the BLM cannot legally certify any debt allegedly owed by Mr. Yowell and therefore the Dept. of Treasury FMS should not be allowed to deduct from Mr. Yowell's social security payments until all issues of legality have been decided.

6. The Nevada State Brand Inspectors Do Not Qualify for Qualified Immunity

***24** The 9th Circuit erred when it held that "the State Defendants-Appellants" "actions were discretionary" and "followed the applicable brand inspection procedures…"

Nevada Revised Statute §565.130 reads:

"1. Refusal to issue certificate or permit: Grounds; duty of Department and inspector to prevent unlawful removal of animals.

"The Department or its authorized inspector shall refuse to issue brand inspection clearance certificates or permits to remove animals from a brand inspection district without brand inspection as provided in this chapter, subject to brand inspection under the provisions of this chapter, not bearing brands or brands or marks of legal record in the name of the person claiming lawful possession of and applying for inspection of the animals, until satisfactory evidence of right to legal possession of the animals and shipment or removal from the brand inspection district has been supplied to the Department or its authorized inspector.

"2. The Department and its authorized inspector shall use all due vigilance to prevent the unlawful removal by any person of any animals from any brand inspection district created under the provisions of this chapter."

a. The State Brand Inspectors' Duties Were Not Discretionary.

As one can clearly see from even a quick reading of NRS § 565.130 the words "duty" and "shall" are solely used to describe the actions of the Nevada ***25** Brand Inspectors under § 565.130. The words "duty" and "shall" are not discretionary terms such as "may" or "can" but rather are commands that set forth duties which shall be followed. If the Nevada Brand Inspectors fail to comply with the statutes, then they face liability in the matter.

b. The Nevada Brand Inspectors Failed to Follow the Duties Set Forth in the Statute.

The Yowell Complaint establishes that the Nevada Brand Inspectors, Connelley and Journigan, issued a transportation certificate to the BLM for the transportation of the Yowell cattle from the range to Palomino Valley. The Complaint further establishes that Mr. Yowell did not sign the transportation certificate.

The next question that must be addressed is since the transportation certificate did not bear Mr. Yowell's Signature, under NRS § 565.130, what was the satisfactory evidence of right to legal possession of the animals and shipment or removal from the brand inspection district that was presented to the Brand Inspectors?

It is uncontroverted that there was never a warrant or court order issued providing for the seizure and sale of the Yowell cattle. There was only issued a Notice of Intent to Impound, issued by the BLM. In other words, the BLM said they could take the cattle without any court documents supporting this contention.

***26** As this Honorable Court held in *Miranda v. Arizona*, 384 U.S. 436, "Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them." at 491.

Clearly the mandatory language of the NRS was not followed by the Brand Inspectors and the 9th Circuit's errant finding should be overturned by this Court.

7. The 9th Circuit Decision Conflicts with Relevant Decisions of This Court

In *Soldal v. Cook County, Illinois*, 506 U.S. 56 (1992) this Court was confronted with a 7th Circuit Court of Appeals case quite similar to portions of the Yowell case. In *Soldal* the Cook County Sheriff's department stood by while a seizure of a private party's home occurred. The Cook County argument that the sheriff was just there to prevent a breach of the peace was rejected by a unanimous court.

This Court held:
"As a result of the state action in this case, the Soldals' domicile was not only seized, it literally was carried away, giving new meaning to the term "mobile home." We fail to see how being unceremoniously dispossessed of one's home in the manner alleged to have occurred here can be viewed as anything but a seizure invoking the protection of the Fourth Amendment. Whether the Amendment was in fact violated is, of course, a different question ***27** that requires determining if the seizure was reasonable."

The same is true here. How can the unwarranted seizure of the Yowell cattle be anything but a seizure invoking the protection of the 4th Amendment, and is a question that must be determined at trial before Chief Judge Robert Jones.

The 9th Circuit decision is even contrary to other 9th Circuit decisions which held that regulations must comply with the 4th Amendment. *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), *Calabretta v. Floyd*, 189 F.3d, 808 (9th Cir. 1999)

8. The 9th Circuit Decision Conflicts with the 7th Circuit Court of Appeals on the Same Important Matter.

After this Court's unanimous decision in *Soldal*, the 7th Circuit Court of Appeals changed its thinking accordingly.

In *Porter v. Diblasio*, 93 F.3d 301 (7th Cir. 1996) the Court was faced with a case where horses had been seized by the Dane County Humane Society of Wisconsin. As with the instant case, Porter filed an action under 42 U.S.C. sec. 1983 alleging, among other things, that the defendants terminated his property interest in the horses without due process of law in violation of the Fourteenth Amendment. The district court dismissed the case, finding that Porter's amended complaint failed to state a viable due process claim.

***28** The 7th Circuit reversed the District Court and held that Porter was entitled to a pre-deprivation hearing before the state could terminate his ownership interest in the livestock, and that by not providing Porter with a pre-deprivation hearing, the state had

violated his procedural right to due process.

The 7th Circuit also found that because the only options Porter was given after the seizure had taken place were to “pay the expenses incurred” in order to redeem his animals, or watch them be sold and did not provide Porter with any way to challenge the legality of the seizure, that his substantive due process rights had been violated as well.

These facts are nearly identical to the ones set forth in the Yowell complaint.

The 7th Circuit came to a similar conclusion in *Siebert v. Severino*, 256 F.3d 648 (7th Cir. 2001)

The 9th Circuit decision flatly states the “BLM was not required to provide a pre-deprivation hearing”. This decision is directly in conflict with the decisions of the 7th Circuit Court of Appeals on due process requirements.

As stated above, this Honorable Court held in *Miranda v. Arizona*, 384 U.S. 436, “Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would ***29** abrogate them.” at 491, leading Yowell to conclude that the 7th Circuit is the correct legal analysis.

Mr. Yowell is unable to know whether or not either or both *Porter* or *Siebert* were appealed to this Court and rejected thereby affirming the 7th Circuit decisions in both cases and by default ruling against the 9th Circuit in this case.

I humbly request that this Court accept this Petition and settle the issue accordingly.

CONCLUSION

It is undisputed that the cattle belonging to Mr. Yowell were seized without a warrant or court order providing for the seizure of his livestock. The only justification ever given was an alleged violation of BLM regulations. The BLM regulations have no jurisdiction over the ranges encompassed by the proclamation of 1941. Any action taken on the ranges based upon BLM regulations is therefore unlawful. Mr. Yowell has the right to be a herdsman and to graze his cattle upon the lands reserved for that purpose. Since the BLM and others acting with the BLM interfered with Mr. Yowell's rights, they are liable under 42 U.S.C. § 1983, *Bivens*, and the Indian Reorganization Act of 1934.

The 9th Circuit erred when it decided otherwise, and this Petitioner requests that this Honorable Court grant the Petition for Writ of Certiorari and REVERSE the 9th Circuit decision and enable Mr. Yowell to present witnesses, evidence and testimony ***30** to the District Court in support of his complaint. The petitioner also requests that this Court stop the deduction of his social security payments for the same reasons.

END OF DOCUMENT