

1986

# Milton Oman v. Robert S. Warburton, Utah Livestock Production Credit Association, and John Doe I : Brief of Appellant

Utah Supreme Court

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BRIEF

Priority No. 13 P

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

MILTON :  
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 Plaintiff Appellant, :  
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 v . :  
 :  
 ROBERT S. WARBURTON, :  
 UTAH LIVESTOCK PRODUCTION :  
 CREDIT ASSOCIATION, :  
 and JOHN DOE I, :  
 :  
 Defendants/Respondent :

Case No. 86-0199

860368-CA

BRIEF OF APPELLANT

Appeal from a Judgment of No Cause of Action  
of the Seventh Judicial District Court, Emery County  
Honorable Boyd Bunnell, District Judge

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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MILTON A. OMAN,	:	
Plaintiff/Appellant,	:	
vs.	:	
ROBERT S. Warburton,	:	Case No. 86-0199
UTAH LIVESTOCK PRODUCTION	:	
CREDIT ASSOCIATION,	:	
and JOHN DOE I,	:	
Defendants/Respondent.	:	

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

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MILTON A. OMAN,	:	
Plaintiff/Appellant,	:	
vs.	:	
ROBERT S. WARBURTON,	:	Case No. 86-0199
UTAH LIVESTOCK PRODUCTION	:	
CREDIT ASSOCIATION,	:	
and JOHN DOE I,	:	
Defendants/Respondent.	:	

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BRIEF OF APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the Plaintiff/Appellant Milton A. Oman incurred reliance damages as a result of the breach of the subject Cattle Grazing Agreement by Defendant/Respondent Robert S. Warburton.
2. Whether Defendant/Respondent Robert S. Warburton was unjustly enriched in the amount of the value of the forage

consumed by his cattle, and whether the Plaintiff/Appellant Milton A. Oman is entitled to restitution for the value of the unjust enrichment.

#### STATEMENT OF THE CASE

This action arose out of a Cattle Grazing Agreement entered into on or about September 20, 1982 between the Plaintiff/Appellant herein, Milton A. Oman, and the Defendant/Respondent herein, Robert S. Warburton. Under the terms of the Cattle Grazing Agreement, Robert S. Warburton, among other things, was permitted to place approximately two hundred (200) head of cows and two hundred (200) head of calves upon ranch lands controlled by Milton A. Oman and located in Emery County, Utah.

During October, 1982, Mr. Warburton purchased approximately two hundred (200) head of cows with calves [four hundred (400) head of cattle] and placed them upon the subject ranch lands. The cows and calves were purchased with funds that both Utah Livestock Production Credit Association (hereinafter referred to as "PCA") and Plaintiff had loaned or made available to Defendant. Milton Oman paid to PCA \$55,000.00 that was to be used by Mr. Warburton for part of the purchase price of the cattle. The \$55,000.00 loan is evidenced by a Promissory Note secured with a Mortgage on certain mineral rights owned by Mr. Warburton and his wife. However, the

unpaid balance on such Promissory Note is not included in this lawsuit.

On January 5, 1983, Mr. Warburton notified Mr. Oman and Utah Livestock Production Credit Association that he desired to terminate the Cattle Grazing Agreement. Thereafter, a buyer was located by PCA and Mr. Warburton and the cattle were removed from the ranch during the first part of March, 1983. During the period of time that Mr. Warburton operated his cattle upon Mr. Oman's ranch lands, Mr. Warburton performed no irrigation, nor did he operate any cattle for Mr. Oman which Mr. Oman had anticipated acquiring under the terms of the Cattle Grazing Agreement.

During the Trial, under the First Cause of Action of Plaintiff's Complaint, Mr. Oman contended and presented evidence that in reliance upon entering into the Cattle Grazing Agreement with Mr. Warburton, Mr. Oman did not lease the subject ranch lands to other operators with whom he could have leased such ranch lands, and that the value of the forage on these lands was \$17,850.00 as evidenced by the fact that these same lands were leased for such amount during the winter of 1985-86. Further, under the Third Cause of Action of Plaintiff's Complaint, Mr. Oman contended and presented evidence that Defendant had been unjustly enriched by the value of the forage consumed by Defendant's cattle while upon Plaintiff's ranch lands.



The District Court found that Mr. Warburton breached the Cattle Grazing Agreement by refusing to continue under the terms of the Cattle Grazing Agreement and by selling the cattle herd which destroyed his ability to perform under the Cattle Grazing Agreement. However, the District Court further found that Mr. Oman was not damaged as a result of Defendant's breach of the subject Cattle Grazing Agreement and, further, found that Mr. Warburton had not been unjustly enriched by the value of the forage consumed by Mr. Warburton's cattle while upon Mr. Oman's ranch lands. In addition to finding no cause of action on Mr. Oman's claims against PCA, which finding is not involved in this Appeal, a Judgment of no cause of action was entered in favor of the Defendant Robert S. Warburton and against the Plaintiff Milton A. Oman on Plaintiff's First and Third Causes of Action which are the subject of this Appeal.

#### STATEMENT OF FACTS

1. Plaintiff Milton A. Oman, Plaintiff/Appellant herein, has been involved in cattle ranching practically his entire life. (R. 441). Mr. Oman leases ranch lands in Emery County near the confluence of the Green and San Rafael Rivers (hereinafter referred to as the "San Rafael Ranches") (R. 444), and subleases the grazing rights to these lands to third parties. (R. 449).

2. Robert S. Warburton, Defendant/Respondent herein, is experienced in cattle ranching and managing cattle ranching enterprises (R. 294-300). Mr. Warburton represented to Mr. Oman that Mr. Warburton had been involved in cattle ranching practically his whole life. (R. 443).

3. During July, 1982, Mr. Oman placed an advertisement in the newspaper for the purpose of contracting with a qualified individual to manage a portion of the San Rafael Ranch. (R. 300).

4. On or about July 24, 1982, Mr. Warburton observed the said advertisement and immediately contacted Mr. Oman by telephone. (R. 300). During this telephone conversation, the parties expressed interest in pursuing an agreement and scheduled a meeting at Mr. Oman's office. (R. 301). At that meeting, the parties discussed a prospective agreement under which Mr. Warburton would obtain and operate approximately 100 head of his own cattle on the San Rafael Ranches and, in return, Mr. Warburton would maintain and care for the ranch properties providing irrigation during the appropriate season and managing cattle owned by Mr. Oman should Mr. Oman elect to place cattle upon the ranches. (R. 302).

5. On August 1, 1982, Mr. Oman and Mr. and Mrs. Warburton drove to the San Rafael Ranches where they spent several hours inspecting the ranch lands. (R. 584). Subsequent to this visit and prior to the delivery of the

Cattle Grazing Agreement from Mr. Oman to Mr. Warburton in late August of 1982, Mr. and Mrs. Warburton visited Mr. Oman at Mr. Oman's home on various occasions during which the parties negotiated the terms of the prospective Agreement. (R. 308-309).

6. During mid-August of 1982, Mr. Warburton sought financing for the purchase of cattle which he would own and operate upon the San Rafael Ranches. (R. 315). Pursuant to these efforts, Mr. Warburton contacted Darrell Johnson, then branch manager of the Utah Livestock Production Credit Association, at Mr. Johnson's office in Salt Lake City. (R. 404). Mr. Warburton informed Mr. Johnson of the proposed Agreement between himself and Mr. Oman. (R. 404). Mr. Johnson informed Mr. Warburton that in order for PCA to finance such a purchase, Mr. Warburton would have to provide forty percent (40%) of the purchase price of the cattle as margin money. (R. 405). Subsequent to this discussion, Mr. Oman agreed to advance the forty percent (40%) of the purchase price necessary to secure a loan from PCA to Mr. Warburton. (R. 404).

7. On August 23, 1982, Mr. Warburton again visited the Salt Lake Offices of PCA. On this occasion Mr. Warburton filled out an Application for Range Livestock Loan from PCA. (R. 406, Plaintiff's Exhibit "31").

8. During late August of 1982, Mr. Oman prepared and mailed the Cattle Grazing Agreement to Mr. Warburton.

(R. 310-312, Plaintiff's Exhibit "1"). Mr. Warburton kept the Agreement in his possession until the time that he signed it on or about September 20, 1982, during which time Mr. Warburton studied the Agreement. (R. 310). Also during the latter part of August, 1982, PCA requested that Mr. Oman send them a written statement setting forth the terms of the Agreement between himself and Mr. Warburton. (R. 243).

9. On or about August 31, 1982, PCA received a letter from Mr. Oman wherein Mr. Oman agreed to provide forty percent (40%) of the purchase price of two hundred (200) head of cattle. Repayment to Mr. Oman was not required until the unpaid balance owed by Mr. Warburton to PCA was less than fifty percent (50%) of the cattle owned by Mr. Warburton. (R. 440, Plaintiff's Exhibit "34").

10. On or about September 1, 1982, Mr. and Mrs. Warburton, together with their three children, moved themselves and their belongings to the trailer home located on San Rafael Ranches that had been designated for their use under the Cattle Grazing Agreement. (R. 311).

11. Commencing on or about September 7, 1982, Mr. Oman visited the San Rafael Ranches for two days. During this period, the parties discussed the nature of the operation and Mr. Warburton's responsibilities. Mr. Oman took Mr. Warburton to the area upon the Green River in which Mr. Warburton was to keep his cattle. (R. 312-314).

12. On September 20, 1982, Mr. Warburton signed the Cattle Grazing Agreement that had been delivered to him by Mr. Oman during the latter part of August, 1982. (R. 241, Findings of Fact). Under the terms of the Agreement, Mr. Warburton could keep up to two hundred (200) cattle upon the San Rafael Ranches from the date of purchase until December 31, 1984. The operation of the cattle upon the ranches would be under the direction and control of Mr. Oman, and the expense for managing the cattle would be born by Mr. Warburton, with the exception that Mr. Oman would provide the forage requirements for the cattle at no cost to Mr. Warburton. In consideration for use of the San Rafael Ranches, Mr. Warburton agreed to irrigate certain fields located to the immediate South and Southeast of the ranch headquarters during the appropriate season. In addition, Mr. Warburton agreed to care for up to two hundred (200) head of cattle placed upon the ranches by Mr. Oman should Mr. Oman decide to place such cattle upon the ranches. (R. 312, Plaintiff's Exhibit "1").

13. On or about September 29, 1982, PCA notified Mr. Warburton that his livestock loan had been approved. (R. 410, Plaintiff's Exhibit "33").

14. On October 15, 1982, Mr. Oman delivered his check in the amount of \$55,000.00 to the Salt Lake Offices of PCA, which sum was to be disbursed to Mr. Warburton for the purchase of cattle pursuant to the Cattle Grazing Agreement. (R. 241,

Findings of Fact). Concurrently, Mr. Warburton executed a Promissory Note in favor of Mr. Oman in the amount of \$55,000.00, payable on or before two years from the date of execution with interest of twelve and one-half percent (12-1/2%) per annum thereon. (Plaintiff's Exhibit "7", received in Evidence R. 228).

15. On or about October 22, 1982, Mr. Warburton travelled to Jerome, Idaho with his brother-in-law where he inspected and ultimately purchased approximately 200 cows, 78 calves, and 2 bulls. (R. 325). These cattle were transported via truck to the San Rafael Ranches during the latter part of October. (R. 326-327). Mr. Oman advised Mr. Warburton to place the cattle on the fenced irrigated fields near the ranch headquarters for up to one week in order to allow the cattle to calm down after being transported, after which time the cattle should be placed upon the ranch lands. (R. 456-457).

16. On or about November 29, 1982, Mr. Warburton wrote to Mr. Oman a letter expressing general contentment with the progress of the cattle operation and conditions upon the ranch. (R. 334, Plaintiff's Exhibit "2").

17. On December 10, 1982, Mr. Oman sent to Mr. Warburton a letter requesting that Mr. Warburton execute, notarize, and return the Mortgages that Mr. Oman had delivered to Mr. Warburton on October 20, 1982. (R. 383, Plaintiff's Exhibit "17").

18. On or about December 22, 1982, Mr. Warburton sent to Mr. Oman a letter expressing general contentment with the progress of the cattle operation and conditions upon the ranch. (Plaintiff's Exhibit "3", received into evidence R. 228). With this letter Mr. Warburton returned unsigned the two Mortgages that Mr. Oman sent to Mr. Warburton on October 20, 1982. (Plaintiff's Exhibit "3").

19. On January 5, 1983, Mr. Warburton notified PCA that he desired to terminate the Cattle Grazing Agreement. (R. 242, Findings of Fact). On this occasion Mr. Warburton expressed a desire to sell the cattle and/or have someone move in and operate the cattle. (R. 242, Findings of Fact). Mr. Warburton also called Mr. Oman at Mr. Oman's office on January 5, 1983 and informed Mr. Oman that the Warburtons would not continue to operate under the Cattle Grazing Agreement. (R. 337). Mr. Warburton stated during this conversation that the reason for his repudiation of the Agreement was that he "wasn't able to control [the cattle] and care for them the way they should be cared for..." (R. 341). Mr. Warburton did not, on this or any other occasion, assert that Mr. Oman had in any way failed to comply with the Cattle Grazing Agreement, or otherwise hamper Mr. Warburton's management of the cattle. (R. 461-462).

20. On January 10, 1983, Mr. Warburton visited Mr. Johnson at the PCA office in Salt Lake City and told Mr. Johnson that the Warburtons were unhappy at the ranch and

that Mr. Warburton was unable to control or operate the cattle and wished to terminate the Cattle Grazing Agreement. (R. 415-416).

21. On January 12, 1983, Mr. Johnson visited the San Rafael Ranches and observed Mr. Warburton's cattle. (R. 416). On this occasion Mr. Warburton affirmed his decision to sell the cattle. (R. 345). In response to Mr. Warburton's desire to sell the cattle, Mr. Johnson immediately began looking for buyers for the cattle. (R. 417).

22. Between January 5 and January 16, 1983, Mr. Warburton visited Mr. Oman at Mr. Oman's Salt Lake office and informed Mr. Oman that the Warburtons were unhappy at the ranch and that Mr. Warburton intended to move with his family from the ranch. (R. 463-464).

23. On January 16, 1983, Mr. Oman, Mr. Warburton, and Mr. Johnson met at Mr. Johnson's office in Salt Lake City. During this meeting Mr. Oman requested that Mr. Warburton remain on the ranch to care for the cattle. (R. 419).

24. Prior to January 18, 1983, Mr. Oman informed Jed Christensen, President of PCA, that Mr. Oman intended to file an Agistor's Lien upon the cattle in order to protect his interest in the feed that the cattle had consumed upon Mr. Oman's ranch. (R. 467). Mr. Christensen agreed that Mr. Oman should file the Lien. (R. 467). On January 19, 1983, Mr. Oman filed an Agistor's Lien on the cattle and served



Mr. Warburton and PCA a notice of the Lien. (R. 242, Findings of Fact). The Lien was to secure payment to Mr. Oman of the \$10,000.00 worth of feed that Mr. Warburton's cattle had consumed in the irrigated fields. (R. 501). By the terms of the Lien, a sale of the cattle was scheduled to take place on February 25, 1983. (R. 242, Findings of Fact).

25. On February 18, 1983, PCA filed an action in the Seventh Judicial District Court of Emery County, State of Utah, for the purpose of preventing the proposed Agistor's sale and to foreclose PCA's lien upon the cattle. (R. 243, Findings of Fact).

26. During late February, 1983, Mr. Johnson notified Mr. Warburton that an individual named Gino Foianini might be interested in purchasing the cattle. Subsequently Mr. Warburton contacted Mr. Foianini and arranged for Mr. Foianini to visit the ranch. (R. 366-367). On approximately February 20, 1983, Mr. Foianini visited the San Rafael Ranches where he observed the cattle, offered to purchase the cattle and, upon acceptance by Mr. Warburton, issued a down payment on the purchase price of the cattle. (R. 367-370). Mr. Warburton immediately notified Mr. Johnson that Mr. Foianini had purchased the cattle. (R. 369). Mr. Oman was not notified concerning the sale of the cattle until he visited the ranches on or about March 7, 1983. (R. 396-397).

27. Upon sale of the cattle, PCA deducted from the proceeds the costs of sale, attorney's fees, and balance owed on Mr. Warburton's obligation to PCA. The remaining proceeds from the sale of the cattle in the amount of \$40,767.86 were paid to Mr. Oman. (R. 391, Defendant's Exhibit "24").

28. The cattle were removed from the San Rafael Ranches by Mr. Foianini by March 5, 1983. (R. 374). The Warburtons left the ranch shortly thereafter and the irrigation season commenced approximately one week later. (R. 521).

29. Prior to entering into the Cattle Grazing Agreement with Mr. Warburton, Mr. Oman had been contacted by other ranchers who wanted to lease the same range. However, Mr. Oman did not lease to these other ranchers because of his Agreement with Mr. Warburton. (R. 499-500).

30. Mr. Oman testified that the value of the forage that he had reserved for Mr. Warburton was \$17,850.00 (R. 499), which was the value he could have leased the range, as evidenced by the fact that he leased the very same range for this amount during the winter of 1985-86. (R. 499, 518).

31. Mr. Oman testified that the \$17,850.00 that he could have leased the range for that was reserved for Mr. Warburton did not include the \$10,000.00 in value of forage consumed by Mr. Warburton's cattle as claimed in the Agistor's Lien filed on January 18, 1983. (R. 501-502).

32. Mr. Oman testified that the value of the forage actually consumed by Mr. Warburton's cattle was at least \$10,000.00, based upon a rate of \$15.00 per cow, with calf, per month. (R. 501).

33. Mr. Oman testified that the benefit he was to receive under the Cattle Grazing Agreement was Mr. Warburton operating 200 head of cows for Mr. Oman and irrigating the fields. (R. 511).

34. Mr. Oman testified that the sole benefits that he received from Mr. Warburton for the months that Mr. Warburton was on the ranch was Mr. Warburton's labor in fixing up a chicken coop and putting skirts on a trailer. Mr. Oman estimated that the total time expended by Mr. Warburton would have been three eight-hour days. (R. 514).

35. Prior to Defendant's repudiation of the Cattle Grazing Agreement on January 5, 1983, Mr. Oman made monthly payments of \$480.00 to the Warburtons for living expenses as per the Cattle Grazing Agreement. (R. 513).

## SUMMARY OF ARGUMENT

### POINT I

Plaintiff, in reliance upon entering into the Cattle Grazing Agreement with Defendant, did not lease certain range lands during the winter season 1982-83. It is the Plaintiff's position that he is entitled to reliance damages based upon the value of the forage that was reserved for Defendant's use which was also the value for which Plaintiff could have leased the subject ranch lands.

### POINT II

Under the terms of the Cattle Grazing Agreement entered into between the parties, Defendant placed two hundred (200) head of cows and two hundred (200) head of calves upon Plaintiff's ranch lands for a period of approximately four (4) months. Plaintiff received no benefits under the Cattle Grazing Agreement prior to Defendant's breach. Consequently, Defendant has been unjustly enriched at Plaintiff's expense in the amount of the value of the forage consumed by Defendant's cattle, in which amount Plaintiff is entitled to restitution.

## ARGUMENT

### POINT I

THE TRIAL COURT ERRED IN ITS DETERMINATION THAT PLAINTIFF SUFFERED NO DAMAGES AS A RESULT OF THE DEFENDANT'S BREACH OF THE CATTLE GRAZING AGREEMENT.

The Trial Court in this matter found that the Defendant Robert S. Warburton breached the Cattle Grazing Agreement by refusing to continue under its terms after March, 1983, and further, by selling the cattle at a time which in effect destroyed his ability to perform under the Agreement. However, the Trial Court further found that Plaintiff had failed to establish by a preponderance of the evidence any damage as a result of the breach. (R. 233, Memorandum Decision). In its Memorandum Decision, the Trial Court states:

The Plaintiff received everything he contracted for under the Agreement until such time as the Defendant sold the herd and left the ranch. Plaintiff has presented no evidence of any loss occurring to him after that date and, therefore, the Court concludes that Plaintiff has failed to prove any damage as a result of the breach of the Agreement by the Defendant, Warburton, and, therefore, grants a Judgment of no cause of action on Plaintiff's First Cause against Defendant Warburton. [R. 234, Memorandum Decision.]

The reasoning of the Trial Court, as set forth in its Memorandum Decision, is not supported by the testimony and is contrary to law. The consideration that Mr. Oman was to receive under the Cattle Grazing Agreement was the performance of the obligations of Mr. Warburton to irrigate the farm lands during the irrigating season between March 10 and October 15 of

each year and to operate and care for not more than two hundred (200) head of cattle which Mr. Oman had the right to acquire and place upon the ranch lands under the Cattle Grazing Agreement (Plaintiff's Exhibit "1"). Mr. Oman received none of the bargained for consideration under the Cattle Grazing Agreement.

Moreover, the Trial Court's finding in its Memorandum Decision that: "The Plaintiff received everything he contracted for under the Agreement until such time as the Defendant sold the herd and left the ranch" (R. 234), ignores the fact that the bargained for consideration that the Plaintiff was to receive under the Cattle Grazing Agreement was not to occur until after the time that the breach occurred - when the Defendant was to irrigate the Plaintiff's fields and care for cattle placed upon the ranch by the Plaintiff. The Defendant received the major portion of the benefit he was to receive under the Agreement (i.e. a place to feed and winter his cattle) and then breached before the Plaintiff received the consideration he was to receive under the Agreement.

The Trial Court erroneously determined that because Plaintiff had presented no evidence of any loss occurring after the date of the breach, the Plaintiff had failed to prove any damages as a result of the breach.

Plaintiff's uncontroverted testimony establishes that Plaintiff abstained from leasing his ranch properties in

reliance upon entering into the Cattle Grazing Agreement with the Defendant. (R. 499). Plaintiff's testimony is supported by the fact that Plaintiff leased the property the year prior to 1982-83 (R. 518) and each subsequent year (R. 500-518), and by the fact that because of Plaintiff's commitment under the Cattle Grazing Agreement, Plaintiff rejected offers from individuals who desired to lease the ranch properties during 1982-83. (R. 499-500).

It is axiomatic that a Plaintiff may recover as damages for breach of contract the amount of expenses incurred by the Plaintiff in direct reliance upon the contract, so long as such expenses were within the contemplation of the parties at the time that the contract was made. 22 AmJur 2d, Damages, Section 159. In Ranch Homes, Inc. v. Greater Park City Corporation, 592 P.2d 620 (Utah, 1979), the Utah Supreme Court awarded reliance damages for expenses incurred by an optionee developer in reliance upon an option contract which was subsequently breached by the optionor. The Court held that reliance damages are an appropriate remedy where the expenses incurred by the non-breaching party are "reasonably foreseeable as a necessary consequence of the [contract]." Id. at 624. Where, as in the present case, the expense incurred consists of the consumption of the very property that is the subject of the contract, such expenditure is commonly referred to as an "essential reliance" expense and is, by definition, within the

contemplation of the parties to the contract. Restatement, Second, Contracts, Section 349, Comment b. Defendant was certainly aware that his occupation and use of the Plaintiff's ranch lands precluded Plaintiff from leasing the same ranch lands to other individuals during the 1982-83 season. Defendant knew that Plaintiff regularly leases the ranch lands. (R. 303). As an experienced cattle rancher, Defendant knew that the yearly lease value of Plaintiff's ranches relies almost entirely upon their availability during the winter months. In view of the circumstances of this case, Defendant could not have been unaware of the fact that his breach effectively deprived Plaintiff of the value of the benefit of the subject ranch lands for the 1982-83 season.

The amount of Plaintiff's damages were established at Trial by Plaintiff's uncontroverted testimony that the value of the forage consumed and destroyed by Mr. Warburton's cattle was \$17,850.00. Mr. Oman further supported his opinion as to damage by the fact that the same ranch land was leased for the sum of \$17,850.00 for the winter season 1985-86. (R. 498-499). The Utah Supreme Court has repeatedly accepted historical earnings as a proper means through which to establish contract damages. Winsness v. M. J. Conoco Distributors, 593 P.2d 1303 (Utah, 1979); Gould v. Mountain States Telephone & Telegraph Co., 309 P.2d 802 (Utah, 1957). In Winsness, supra, the subject agreement for the lease of a



service station required the lessee to pay rental based, in part, upon the quantity of fuel sold and to operate the station on a twenty-four hour per day basis. Lessor brought an action against Lessee alleging that Lessee's failure to keep the store open twenty-four hours per day deprived the Lessor of substantial profits under the lease agreement. In determining the amount of Lessor's damage, the Court admitted sales data from years during which the service station was in continual operation.

The subject of certainty of proof as to damages has frequently concerned this Court and most others. While subscribing to the doctrine that a verdict based on "mere speculation" cannot be upheld, we have consistently recognized that some degree of uncertainty is inevitable in damage determinations of the type involved in this suit... Where there is strong evidence of the fact of damage, a defendant should not escape liability because the amount of damage cannot be proved with precision. [Winsness v. M. J. Conoco, 593 P.2d at 1305-06.]

The undisputed evidence establishes that Mr. Oman sustained no less than \$17,850.00 in reliance damages that directly resulted from entering into the Cattle Grazing Agreement with Mr. Warburton, which Agreement the Trial Court found was breached by Mr. Warburton.

Reliance damages consist of the "expenditure or consumption of property in direct and foreseeable reliance upon the contract". 22 AmJur 2d, Damages, Section 46(2). In Ranch Homes, Inc., supra, the Utah Supreme Court eschewed a

formalistic limitation on the type of recoverable reliance damages. The Court's emphasis was entirely upon the reasonableness and foreseeability of the expenditures. In the present case, the Plaintiff's commitment of his ranch properties to performance on the contract was not only reasonable and foreseeable, but was unavoidable under the terms of the contract. To refuse compensation for the losses suffered by Plaintiff in such a case would constitute manifest injustice. The Restatement, Contracts, Second, Section 348, specifically prescribes reliance damages in cases in which potential profits from property have been foregone by the non-breaching party in reliance upon the contract.

If the breach is one that prevents for a period of time the use of property from which profits would have been made, the loss in value to the injured party is based on the profits that he would have made during that period. If those profits cannot be proved with reasonable certainty, two other bases for recovery are possible. One is the fair rental value of the property during the period of delay. [Restatement, Contracts, Second, Section 348, Comment b.]

As a result of entering into the Cattle Grazing Agreement which was subsequently breached by Mr. Warburton, Mr. Oman did not lease the subject ranch and thereby incurred reliance damages of no less than \$17,850.00.

## POINT II

THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS NOT ENTITLED TO RESTITUTION IN THE AMOUNT THE DEFENDANT WAS UNJUSTLY ENRICHED.

Where a defaulting party under a contract has received a material benefit under the contract, the non-breaching party may recover as damages the value of the benefit received by the breaching party in quantum meruit. 22 AmJur 2d, Damages, Section 46(1); Restatement of Contracts, Second, Section 373.

In Young v. Hansen, 218 P.2d 666 (Utah, 1950), the Utah Supreme Court approved restitution to the breaching party under a joint land ownership contract. The Court held that:

"Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment... for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach..." (quoting the Law of Contracts, page 623) [Young v. Hansen, 218 P.2d at 668.]

Although Young is distinguishable from the present case in that in Young the Court approved an award of restitution to the party in breach, there is no principled reason why a non-breaching party should not be entitled to similar relief. The general rule is that the non-breaching party may recover in quantum meruit, and the Utah Supreme Court has strongly implied that it would allow such restitution in an appropriate case.

Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042 (Utah, 1984); Taylor v. E. M. Royle Corp., 264 P.2d 279 (Utah, 1953).

In the present case, the undisputed evidence at Trial established that Defendant made extensive use of the fenced irrigated fields near the Plaintiff's ranch houses and thereby received the value of the forage within those fields. (R. 456-457). At Trial, the Plaintiff testified that the value of the forage consumed by Defendant's cattle was \$10,000.00. (R. 501-502). Defendant offered no contradictory evidence nor did he dispute the accuracy of Plaintiff's estimate, nor did the Trial Court find that Plaintiff's testimony as to the value of the forage was uncertain or erroneous. In deciding Plaintiff's Third Cause of Action, the Trial Court merely found that "there is no evidence that the Defendant was unjustly enriched over and above what he was entitled to receive under the Agreement for the period of time that he was there and for the period of time that he performed under the contract..." (R. 234). The Trial Court failed to consider the fact that the Defendant was unjustly enriched by what he did receive under the contract because he failed to fulfill any of his contractual obligation to Plaintiff. Virtually the entire benefit that Plaintiff was to receive under the contract consisted of Mr. Warburton's obligation to irrigate and to manage Plaintiff's cattle upon the ranches (R. 513), yet

Plaintiff was precluded from receiving either of these benefits by Defendant's untimely breach. When Defendant left the ranches, the irrigating season had not yet begun. (R. 521). Moreover, Defendant's irresolution in carrying through with the Agreement prevented Plaintiff from placing cattle upon the ranch as anticipated in the Cattle Grazing Agreement: "I [Plaintiff] did not dare to [acquire additional cattle] when he showed signs at a very early stage that he was just going to run away." (R. 511).

Since Plaintiff did not receive the benefit that he was to receive under the Agreement, the benefit received by Defendant under the Agreement constituted unjust enrichment. The present case is analogous to J & M Construction, Inc. v. Southam, 38 Utah Advance Reports 7 (Utah, 1986), wherein the Plaintiff agreed to construct an irrigation system on Defendant's property and receive in consideration a "home and lot" of Plaintiff's choice from Defendant's property. Plaintiff completed the irrigation system, but before Plaintiff selected its portion of Defendant's property, all of the homes had been either sold or lost in foreclosure. The Court held that "[D]efendants should not be unjustly enriched by receiving the admitted and accepted benefit of the real property improvements", and ordered restitution to the Plaintiff for the value of the improvements to Defendant's property. Id. at 7.

In the present case, the Defendant received substantial consideration under the Cattle Grazing Agreement during the period of time that his cattle occupied Plaintiff's ranch lands (\$10,000.00 of forage), then breached the Cattle Grazing Agreement before Plaintiff received any consideration under the Agreement. Here, as in J & M Construction, the Defendant received his benefit under the contract and the Plaintiff was deprived of his benefit. Under these circumstances, to allow Defendant to retain the full benefit from Plaintiff's performance under the contract while denying Plaintiff any consideration for his expenditures would violate the fundamental principles of contract law as set forth in Restatement of Contracts, Second, Section 373:

373. Restitution When Other Party Is in Breach

(1) Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.

As set forth above, Plaintiff is entitled to restitution from Defendant in the amount of \$10,000.00 for the value of the forage consumed by Defendant's cattle.

### CONCLUSION


In this case, under the First Cause of Action contained in Plaintiff's Complaint, the uncontroverted evidence presented at the Trial establishes that Plaintiff incurred reliance damages in the amount of \$17,850.00 as the result of entering into the Cattle Grazing Agreement with the Defendant, which Agreement was breached by the Defendant. Additionally, under Plaintiff's Third Cause of Action contained in Plaintiff's Complaint, the uncontroverted evidence presented at the Trial of this matter establishes that Defendant was unjustly enriched in the amount of \$10,000.00, being the value of the forage consumed while Defendant's cattle were upon Plaintiff's ranch lands, and that Plaintiff received no bargained for consideration from the Defendant under the terms of the Cattle Grazing Agreement.

Accordingly, Plaintiff requests that this Honorable Court reverse the Trial Court's Findings and Judgment of no cause of action on Plaintiff's First and Third Causes of Action and remand this case to the District Court for entry of a Judgment of \$17,850.00 in favor of the Plaintiff and against the Defendant Robert S. Warburton under Plaintiff's First Cause of Action, and a Judgment of \$10,000.00 in favor of the Plaintiff and against the Defendant Robert S. Warburton under Plaintiff's Third Cause of Action.

DATED this 3rd day of October, 1986.

Respectfully Submitted,

PERKINS, SCHWOBE & McLACHLAN




MARK C. McLACHLAN

Attorney for  
Plaintiff/Appellant  
Milton A. Oman

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Brief of Appellant Milton A. Oman to Barrie A. Vernon, Attorney for Respondent, at P. O. Box 8000, Salt Lake City, Utah 84108, postage prepaid, this 3rd day of October, 1986.



Mark C. McLachlan



A D D E N D U M    A

MEMORANDUM DECISION  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
JUDGMENT

FEB 26 1986

BRUCE C. FUNK.

By W D

MILTON A. OMAN,	)	MEMORANDUM DECISION
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ROBERT S. WARBURTON, UTAH	)	
LIVESTOCK PRODUCTION CREDIT	)	Civil No. 4356
ASSOCIATION, and JOHN DOE I,	)	
	)	
Defendants.	)	
	)	

The Court finds that the defendant, Warburton, breached the Cattle Grazing Agreement with the plaintiff by refusing to continue under its terms after March 1983, and further, by selling the cattle herd at that time which in effect destroyed his ability to perform under the Agreement.

The Court further finds that the plaintiff has failed to establish by a preponderance of the evidence any damage as a result of the breach. All the evidence presented by the plaintiff as to his damage covered the period of time prior to the sale of the cattle by the defendant, Warburton. None of the evidence established any resulting loss from the breach itself.

Recorded in Judgment Record  
L at Page 668  
 BRUCE C. FUNK, Clerk

Under the Agreement, Warburton was entitled to use the range and forage for his cattle which he did up until the time that the herd was sold. In return, the defendant, Warburton, was to look after the ranch and supervise any cattle of the plaintiff that may be on the ranch and the defendant performed this obligation up until the time that he sold the herd and left the area.

The plaintiff received everything he contracted for under the Agreement until such time as the defendant sold the herd and left the ranch. Plaintiff has presented no evidence of any loss occurring to him after that date and, therefore, the Court concludes that the plaintiff has failed to prove any damage as a result of the breach of the Agreement by the defendant, Warburton, and, therefore, grants a judgment of no cause of action on plaintiff's first cause against defendant Warburton.

Based upon the same findings, that the plaintiff received all that he was entitled to during the period that the defendant was on plaintiff's ranch, and the fact that there is no evidence that the defendant was unjustly enriched over and above what he was entitled to receive under the Agreement for the period of time that he was there and for the period of time that he performed under the contract, the Court further finds that the plaintiff is entitled to no cause of action on the third claim for relief for unjust enrichment.

As to the Fourth Cause of Action, the plaintiff failed to present evidence of damage to the mobile home. The defendant did install a woodburning stove in the mobile home and did cut a hole in the roof for the purpose of installing the exhaust system. However, the plaintiff presented no evidence, other than speculative estimates, as to how much damage resulted from such action. To the contrary, the plaintiff testified that he used and is still using the flu pipe and the hole installed by the defendant, to his own benefit. If the Court is to reach any conclusion at all relative to this matter, the Court would have to conclude that the mobile home has been benefited by such action rather than being damaged.

The Attorney for the defendant, Warburton, is instructed to prepare Findings of Fact and Conclusions of Law and a Decree in accordance with this decision and the previously announced decision of the Court on all causes of action against the defendant, Warburton.

The Attorney for Utah Livestock Production Credit Association is directed to prepare Findings of Fact, Conclusions of Law and a Decree relative to the cause of action against that defendant and submit them for the Court's signature.

DATED this 25<sup>th</sup> day of February, 1986.

  
BOYD BUNNELL, DISTRICT JUDGE

CERTIFICATE OF MAILING

I HEREBY CERTIFY THAT I mailed true and correct copies of the foregoing MEMORANDUM DECISION by depositing the same in the United States Mail, postage prepaid, to the following:

Mark C. McLachlan  
Attorney at Law  
343 South 400 East  
Salt Lake City, Utah 84111

James R. Brown  
JARDINE, LINEBAUGH, BROWN & DUNN  
Attorneys at Law  
370 East South Temple  
Salt Lake City, Utah 84111

Barrie A. Vernon  
Attorney at Law  
Post Office Box 8000  
Salt Lake City, Utah 84108

Dated this 25<sup>th</sup> day of February, 1986.

  
Mavis Wilson, Secretary

MAR 17 1986

BARRIE A. VERNON, USB#3329  
Attorney for Defendant  
Robert S. Warburton  
P.O. Box 8000  
Salt Lake City, Utah 84108  
Telephone: 524-3682

By BRUCE C. FUNK Clerk  
CW Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR  
EMERY COUNTY, STATE OF UTAH

---

MILTON A. OMAN,	)	
Plaintiff,	)	FINDINGS OF FACT AND CONCLUSIONS
	)	OF LAW
vs.	)	
	)	Civil No. 4356
ROBERT S. WARBURTON, UTAH	)	
LIVESTOCK PRODUCTION CREDIT	)	Judge Boyd Bunnell
ASSOCIATION AND JOHN DOE I,	)	
Defendants.	)	

---

This matter having come on for trial on the 7th and the 19th days of February, 1986, before the Honorable Boyd Bunnell sitting without a jury and the plaintiff being present and represented by his counsel Mark C. McLachlan and the defendant Robert S. Warburton being present and represented by his counsel Barrie A. Vernon and defendant Utah Livestock Production Credit Association being present and represented by their counsel James R. Brown and the court having heard testimony on all matters and having rendered a Memorandum Decision and good cause appearing, the court enters, in regard to the defendant Robert S. Warburton, the following:

FINDINGS OF FACT

1. On the First Cause of Action, the court finds that the defendant

Recorded in Judgment Record  
1 at Page 514  
BRUCE C. FUNK, Clerk

Robert S. Warburton entered into a Cattle Grazing Agreement in September, 1982 with the plaintiff and that the defendant breached that Agreement by refusing to continue under its terms after March, 1983, and further, by selling the cattle herd at that time which in effect destroyed defendant's ability to perform under the Agreement. The court further finds that the plaintiff failed to establish by a preponderance of the evidence any damage as a result of the breach by the defendant. The court finds that under the Agreement, Warburton was entitled to use the range and forage for the cattle and that he did so up until the time the cattle were sold. The court finds that Warburton performed his obligation to look after the ranch and cattle until he sold the cattle and left the area and that plaintiff therefore received everything for which he contracted.

2. On the Second Cause of Action, the court finds that Warburton did not misrepresent his experience and qualification in the area of desert management of livestock but that Warburton's statements to plaintiff were of such a general nature that they did not represent false statements or misrepresentation of his experience.

3. On the Third Cause of Action, the court finds that the plaintiff received all that he was entitled to receive during the period of time when Warburton was on his ranch and that plaintiff has failed to show that Warburton was unjustly enriched while he was on the ranch pursuant to the Agreement.

4. On the Fourth Cause of Action, the court finds that plaintiff has failed to present evidence of damage to the mobile home in which Warburton lived. The court finds that, while Warburton did cut a hole in the roof of the home to vent a woodburning stove, plaintiff has presented no evidence as

to how much damage resulted from this act. In fact, the court concludes that the mobile home benefitted from Warburton's action rather than being damaged thereby.

From the foregoing FINDINGS OF FACT the court now makes and enters the following:

CONCLUSIONS OF LAW

1. Defendant Robert S. Warburton is entitled to a judgment of no cause of action against the plaintiff on the First Cause of Action.

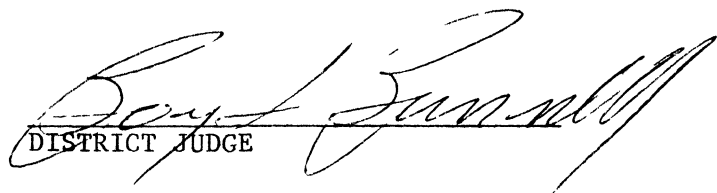
2. Defendant Robert S. Warburton is entitled to a judgment of no cause of action against the plaintiff on the Second Cause of Action.

3. Defendant Robert S. Warburton is entitled to a judgment of no cause of action against the plaintiff on the Third Cause of Action.

4. Defendant Robert S. Warburton is entitled to a judgment of no cause of action against the plaintiff on the Fourth Cause of Action.

DATED this 14 day of March, 1986.

BY THE COURT:

  
DISTRICT JUDGE



MAILING CERTIFICATE

I certify that I have mailed a true and correct copy of the  
attached FINDINGS OF FACT/CONCLUSIONS OF LAW postage prepaid to the  
following:

Mark C. McLachlan, Esq.  
Attorney at Law  
343 South 400 East  
Salt Lake City, Utah 84111

James R. Brown, Esq.  
Attorney at Law  
370 East South Temple  
Salt Lake City, Utah 84111

DATED this 4th day of March, 1986.

  
\_\_\_\_\_  
BARRIE A. VERNON

**FILED**  
IN THE SEVENTH JUDICIAL DISTRICT COURT  
OF UTAH IN AND FOR EMERY CO.

MAR 17 1986

BARRIE A. VERNON, USB#3329  
Attorney for Defendant  
Robert S. Warburton  
P.O. Box 8000  
Salt Lake City, Utah 84108  
Telephone: 524-3682

By BRUCE C. FUNK, Clerk  
CJ Deputy

IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR  
EMERY COUNTY, STATE OF UTAH

ENTERED  
3-25-86

---

MILTON A. OMAN,	)	
Plaintiff,	)	JUDGMENT
vs.	)	Civil No. 4356
ROBERT S. WARBURTON, UTAH	)	Judge Boyd Bunnell
LIVESTOCK PRODUCTION CREDIT	)	
ASSOCIATION AND JOHN DOE I,	)	
Defendants.	)	

---

This matter having come on for trial on the 7th and 19th days of February, 1986, before the Honorable Boyd Bunnell sitting without a jury and the plaintiff being present and represented by his counsel Mark C. McLachlan and the defendant Robert S. Warburton being present and represented by his counsel Barrie A. Vernon and the defendant Utah Livestock Production Credit Association being present and represented by their counsel James R. Brown and the court having heard testimony on all matters and having rendered a Memorandum Decision and having heretofore entered its Findings of Fact and Conclusions of Law and good cause appearing, the court ORDERS, AFJUDGES AND DECREES:

1. On the first cause of action, the court enters no cause of action against the plaintiff and in favor of the defendant Robert S. Warburton.

2. On the second cause of action, the court enters no cause of

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1 at Page 573  
BRUCE C. FUNK, Clerk

Recorded in Judgment Docket  
D at Page 211  
BRUCE C. FUNK, Clerk

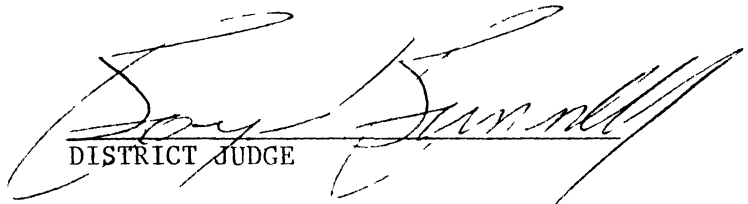
action against the plaintiff and in favor of the defendant Robert S. Warburton.

3. On the third cause of action, the court enters no cause of action against the plaintiff and in favor of the defendant Robert S. Warburton.

4. On the fourth cause of action, the court enters no cause of action against the plaintiff and in favor of the defendant Robert S. Warburton.

DATED this 14<sup>th</sup> day of March, 1986.

BY THE COURT:

  
DISTRICT JUDGE

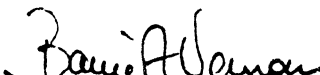
MAILING CERTIFICATE

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attached JUDGMENT postage prepaid to the  
following:

Mark C. McLachlan, Esq.  
Attorney at Law  
343 South 400 East  
Salt Lake City, Utah 84111

James R. Brown, Esq.  
Attorney at Law  
370 East South Temple  
Salt Lake City, Utah 84111

DATED this 4th day of March, 1986.

  
BARRIE A. VERNON

A D D E N D U M    B

CATTLE GRAZING AGREEMENT



CATTLE GRAZING ARRANGEMENT

MILTON A. OMAN and ROBERT WARBURTON, hereinafter referred to as OMAN and WARBURTON respectively, hereby enter into a cattle grazing and ranching operation upon and within the San Rafael Ranches operated by OMAN located along the San Rafael River in eastern Emery County.

OMAN shall lease from WARBURTON not to exceed two hundred (200) head of cattle of any age and size in a condition of good health. WARBURTON may buy these cattle at any place and at any time elected by him, and he shall be permitted to continue to operate them from the time they are purchased until December 31, 1984.

For the reason that WARBURTON is not in a financial condition to buy or to otherwise acquire these cattle, OMAN will advance him the funds to buy the same or will sign the necessary notes and other documents with lending institutions for the purpose of having the necessary monies for the purchase of the said cattle advanced to WARBURTON.

In order to arrange for and to receive the funds for the acquisition of the said cattle, WARBURTON will notify OMAN ten (10) days in advance when and where the funds are to be made available to him for his use. The cattle to be purchased shall not be an exotic breed costing substantially more than running age average quality grade cattle. OMAN may determine whether to use his own funds in the acquisition of the cattle for WARBURTON or to underwrite WARBURTON in procuring funds from regularly established lending institutions engaged in the making of the type of loans involved.

OMAN shall take a mortgage upon the cattle purchased in behalf of WARBURTON whether he buys them with his own funds or whether they are purchased by funds from banking institutions.

Prior to December 31, 1984, WARBURTON may sell such portion of saleable cattle as are in the herd which has prior to that time been acquired for him under the terms hereof, but he shall sell those only upon the prior consent and permission of OMAN.

The said Warburton cattle shall be operated by him within the San Rafael Ranch operated by OMAN, and this operation shall be done under the direction and control of OMAN at all times. The management of the said Warburton cattle shall be at his exclusive and sole cost and expense except that OMAN agrees to furnish to the said cattle their forage requirements which are produced upon his lands. These forage requirements shall be without cost to Warburton. In the event these cattle require supplemental feeding during the said period of time prior to December 31, 1984, then such supplemental feed shall be acquired and fed to the cattle at the sole cost and expense of Warburton; and this feed shall be placed upon the range at such places and in such quantities as OMAN directs.

During the said two (2) year period OMAN reserves the right unto himself to place into the same range with the Warburton cattle not to exceed two hundred (200) cattle of his own, and it shall be Warburton's responsibility to herd and care for these cattle so far as moving them from place to place upon the range prior to December 31, 1984, but Warburton shall have no obligation to furnish supplemental feed to the said cattle.

At the end of 1984 Warburton shall have the right to sell all of his said cattle at such prices as he elects providing they sell for more than the obligation then due and owing upon said cattle. If they are selling for substantially less than the amount owed upon said cattle, then OMAN shall have the right to buy them as his own livestock.

Warburton shall keep OMAN advised in advance by as long a period as is known the date and the places from which it is intended to ship any cattle from the said San Rafael Ranches.

It is understood that the Bureau of Land Management owns and controls the grazing use of a very great percentage of the lands located within the OMAN San Rafael Ranches, and all things done by way of grazing the cattle at different places and times and under different conditions will need to be in accord with their regulations or instructions; and it shall be for Warburton to clear such matter with them at all times.

In view of the fact that much of the cattle grazing in the area involved will be upon Bureau of Land Management lands, it will be necessary that a license or permit be secured periodically from that agency for the operation of the said cattle; and all licenses and permits shall be issued in the name of San Rafael Ranches, and OMAN, alone, shall have authority to approve or to procure any such license.

LIVING QUARTERS. The parties hereto have available to them two (2) large trailer houses. The said house located furthest to the east at the Ranch Headquarters shall be reserved and made available to Warburton for his exclusive use and benefit and for that of his family. He shall be responsible for the payment of any changes he makes in the trailer house assigned for his use; and he may, at his own expense, acquire for his own use such items as will furnish electric power or other lights for his use.

Warburton shall buy and arrange for and pay for all propane and other fuel used by him, including the gasoline for his trucks and cars.

OMAN reserves the other trailer which is located in the said Ranch Headquarter's yard located furthest to the west for his own exclusive use, and no other person shall make any use of said trailer without his consent or permission.

There are irrigated fields located immediately to the south and to the southeast of the Ranch Headquarters and to the west of the creek toward the head of the ditch which furnishes the irrigation waters to all of these ranch lands. OMAN shall be responsible for all of the taxes to said lands and waters and to all items used upon the ranch except the cattle owned by Warburton and the machinery and equipment which Warburton may acquire and use.

The said farm lands or irrigated lands are required to be continually irrigated during the irrigation of each season from about March 10, to October 15. It shall be the complete and absolute and full responsibility of Warburton to irrigate these lands in the proper and husbandlike manner during said term, all to be done at his sole cost and expense. OMAN already has upon the ranch a few head of milk cows which he intends to leave there, and he elects at this time to reserve for their use one of the fields south of



the house or Ranch Headquarters. WARBURTON shall have the full right to milk and use the milk products from these cattle, and he shall also have the right to use the eggs from the chickens which are upon the ranch at this time and which are owned by OMAN. It shall be the responsibility of OMAN, at his sole cost and expense, to furnish the grain and other feed which is supplementally fed to these milk cows and chickens.

All other fields into which crops are planted and which fields are irrigated shall be utilized for or by the OMAN and WARBURTON cattle collectively, if OMAN acquires any cattle, which he may not do. Only cattle covered by this Agreement shall be permitted to graze in these fields and, in the event crops are harvested from these fields, a division of them shall be made with one-half (1/2) to each of the parties hereto at the time of the harvest completion. OMAN possibly contemplates placing birds of a meat-type upon the ranches, and it is possible that he may place mammals of game kind and quality also upon them for this purpose. All of this shall be done in his own discretion and at his own sole cost and expense. WARBURTON shall cooperate to deny any hunting privileges to any person or persons whomsoever who come upon the property and begin engaging in such activity and shall take such steps as to order them from the properties forthwith unless they have come with permission of OMAN.

OMAN also reserves unto himself and for his sole use and benefit all other ranges located in the San Rafael Ranches in the San Rafael Desert located in Emery County and in Wayne County which has a capacity for very substantially greater numbers of cattle than it is intended by this Agreement to be operated by WARBURTON and OMAN. OMAN shall lease cattle from third parties for the use of such other range areas, or he shall allow them to be used only by game or he shall close them to any use of any kind whatsoever all in his sole discretion.

The Ranch Headquarters and the properties located to the north and to the south and east thereof are located behind a gate which OMAN has previously constructed for the purpose of keeping vandals and unwanted persons from coming into these properties.

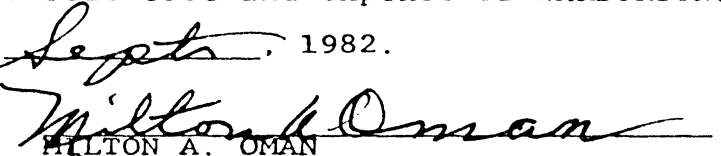
This gate shall be kept locked by WARBURTON and by OMAN at all times whenever there is any likelihood of trespassers endeavoring to come into the property. This gate may be left open for a day or two whenever it seems quite certain that there is no danger of travel by vandals. It is intended by the parties hereto that this ranch shall not be left unattended at any time.

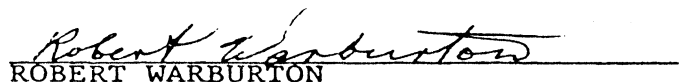
During the term of this Agreement and following the termination thereof at the end of the year 1984 it is entirely possible and is contemplated by the parties that they may enter into some different arrangement for the operation of substantially greater numbers of cattle or of game or of both such species of life, but during the somewhat more than two (2) year period of this term it shall be kept intact.

PAYMENT BY OMAN TO WARBURTON. During the term hereof and beginning September 1, 1982, OMAN shall pay to WARBURTON as living expenses until his cattle are producing enough income for him to earn a going wage Four Hundred Eighty Dollars (\$480.00) per month which shall continue as OMAN obligation until but not beyond December 31, 1984.

Whether the same is correctly spelled out herein or not or at all, it is intended by the parties that the interest and other expenses involved in buying the cattle and in winding up the obligation created by the placing of a mortgage upon said cattle and the release thereof shall be at the sole cost and expense of WARBURTON.

DATED this 20 day of Sept, 1982.

  
MILTON A. OMAN

  
ROBERT WARBURTON