

No. 12-918

In the
Supreme Court of the United States

THE ESTATE OF E. WAYNE HAGE and the
ESTATE OF JEAN N. HAGE,

Petitioners,

v.

UNITED STATES,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION AND THE UNITED STATES
CATTLEMEN'S ASSOCIATION IN SUPPORT
OF PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the owner of water rights under the prior appropriation doctrine has a protected property interest in the right to access and perform ordinary maintenance on ditches that carry his water on vested rights-of-way over federal lands.

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation and United States Cattlemen's Association submit this brief amicus curiae in support of Petitioners the Estates of E. Wayne Hage and Jean Hage (Hage).¹

Pacific Legal Foundation (PLF) was founded almost 40 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court, both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Koontz v. St. Johns River Water Management District* (U.S. Supreme Court No. 11-1447); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and participated as amicus curiae in *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); and

¹ All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Hage's petition.

The United States Cattlemen's Association (USCA) is a membership organization representing independent ranchers from across America and maintains a permanent office in Washington, D.C. to advance the interests of U.S. cattle producers on property rights, marketing, animal health and welfare, international trade, and other issues affecting the U.S. cattle industry. Water rights, and the grazing rights associated with those water rights, are inextricably linked to the economic value of the ranching operation that owns those rights as well as the value of the land the ranch lies on. Any reduction in, or elimination of, those rights will directly and dramatically reduce the value, and threaten the viability, of the ranching operations that own those property rights. USCA takes particular interest in the outcome of this case due to the impact that the Court's decision could have on the viability of the ranching industry.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the protections the Takings Clause provides to water rights. Specifically, Hage's petition for a writ of certiorari asks whether the government must pay just compensation when it interferes with water rights by obstructing the flow of water to the owner's property, then preventing the owner from restoring the water flow.

Hage, a Nevada rancher, owns rights to water in several creeks and springs located on public lands and the associated ditch rights-of-way that transport his water to his ranch for irrigation, stock watering, and domestic purposes. Pet. Cert. App. 38a, 82a-91a. The conflict in this case arose when the U.S. Forest Service's policies and actions caused his ditches to become obstructed by trees and undergrowth as well as roots, silt, and other deposits. *Id.* at 40a, 52a-53a. Despite Hage's common law right to freely access and maintain his ditches, the Forest Service insisted that Hage obtain a special use permit any time he wanted to maintain his ditches. *Id.* at 40a. When he attempted to clear the obstructions without permission, the Forest Service prosecuted him.² *Id.* The agency also installed electric fences to block Hage's cattle from accessing and putting to beneficial use his vested water rights (i.e., the cattle could not drink from springs in which Hage owned stockwater rights). *Id.* at 51a-52a. In total, the government's interference with Hage's water and ditch rights resulted in the loss

² The government unsuccessfully prosecuted Hage for removing invasive trees from his ditch right-of-way. See Pet. Cert. App. 40a; *United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994).

of 17,568 acre feet of water at a fair market value of \$2,854,816.64. Pet. Cert. App. 57a-58a. The Court of Federal Claims determined that the Forest Service's actions resulted in physical and regulatory takings of Hage's water and ditch rights. *Id.* at 51a-56a. But, in an opinion that repudiated the common law right to clear obstructions from a ditch right-of-way, the Federal Circuit reversed the trial court's conclusion that a regulatory taking had occurred. Pet. Cert. App. 10a-13a.

The purpose of this amicus brief is to explain how the Federal Circuit's decision disregards and departs from the common law of water rights and to emphasize the importance of water rights in the western states. Water is essential to civilization. Where water is scarce, a person's water rights are "among the most valuable property rights known to the law." *White v. Farmers' Highline Canal & Reservoir Co.*, 43 P. 1028, 1030 (Colo. 1896). This is particularly true in the arid west where "water means the difference between farm and desert, ranch and wilderness, and even life and death." Pet. Cert. App. 208a; see also Pet. Cert. App. 54a (water is often the most valuable right associated with a western ranch).

The harsh conditions in the West shaped the region's water law. *Willey v. Decker*, 73 P. 210, 216-19 (Wyo. 1903). For over a century, courts from the western states have recognized that water holders have a right to freely access and maintain the flow of their water. This right is essential to a property interest in water because, unlike real property which is made up of a variety of valuable possessory rights, a water right is comprised wholly of the right to use

certain amounts of water for a private purpose.³ *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931). Simply put, if an owner cannot access his water, he cannot use it, and his rights are rendered worthless. Pet. Cert. App. 54a.

The Federal Circuit's repudiation of the right to maintain the water flow creates a conflict which, by itself, warrants certiorari. But the need for this Court's review is heightened by the fact that the lower court adopted an impractical and harmful rule that has the capacity to unsettle the expectations of water owners across the West. This Court's review is necessary to prevent the potential upheaval of water rights.

REASONS TO GRANT THE PETITION FOR WRIT OF CERTIORARI

I

THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH THE COMMON LAW OF WATER RIGHTS IN THE WESTERN STATES

The property interest at issue in this case is a water holder's right to receive a continued flow of water in a volume that is sufficient to put his water rights to beneficial use. As the trial court explained:

³ The water rights at issue in this appeal consist primarily of usufructuary rights, *i.e.*, "the exclusive, independent property right to use of water appropriated according to law from any natural stream[.]" 5 Robert E. Clark, et al., *Waters and Water Rights* 347 (1972) (citing 2 Clesson S. Kinney, *Irrigation and Water Rights* 1314-15 (2d ed. 1912); *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945)).

The Government interfered with [Hage's] expectations by allowing riparian growth to increase upstream and by preventing, through threats, Plaintiffs' access to the areas upstream to clear the obstructions in the water flow. . . . [T]he Forest Service interfered with Plaintiffs' vested water rights by barring necessary maintenance.

Pet. Cert. App. 54a. A water holder's right to a continued flow of water is well-recognized in decisions of this Court. And at common law, that right is understood to entail a correlative right to maintain and clear obstructions from one's ditches, pipes, flumes, and canals where they pass over another person's property.

A. Water Holders Have a Protected Interest in the Continued Flow of Water

Three decisions from this Court recognize that a water holder has a protected property interest in the continued flow of water to his land: *International Paper Co. v. United States*, 282 U.S. at 407; *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 754-55 (1950); and *Dugan v. Rank*, 372 U.S. 609, 625-26 (1963). Together, these cases stand for the rule that a government action or policy that interrupts, diverts, or diminishes the water flow will constitute a taking of water rights. *Dugan*, 372 U.S. at 625; *Gerlach Live Stock*, 339 U.S. at 754-55; *International Paper*, 282 U.S. at 407.

In *International Paper*, the government, during World War I, issued a requisition order that allowed a third party's power plant to draw the whole of a river's

water flow. 282 U.S. at 404-06, 408. At that time, International Paper leased a mill that had a right to use water drawn from the river via a canal. *Id.* at 404-05. Acting under the government's order, the third party power company stopped water from flowing into International Paper's canal, which interrupted International Paper's operation for nearly nine months. *Id.* at 405-06. This Court held that the government's decision to authorize the power company to interrupt the water flow effected a taking: "The petitioner's right was to the use of the water; and when all the water that it used was withdrawn from the petitioner's mill and turned elsewhere by government requisition for the production of power it is hard to see what more the Government could do to take the use." *Id.* at 407.

In *Gerlach Live Stock*, the plaintiffs held water rights to the natural overflow of the San Joaquin River to irrigate their grasslands. 339 U.S. at 729-30. The government, however, built Friant Dam upstream, which impounded and diverted the overflow to other landowners. *Id.* The dam reduced the amount of overflow that reached the plaintiffs' land. *Id.* This Court held that, although unintentional, the government's actions had the effect of confiscating and destroying the plaintiffs' right to put overflow waters to beneficial use. *Id.* at 753. The government's impoundment and diversion of water constituted a taking. *Id.* at 754-55.

This Court revisited the impact of the Friant Dam in *Dugan*, where a different group of downstream landowners argued that the government's storage of water behind the dam left insufficient water in the river to supply their vested water rights. 372 U.S. at

614, 616. Once again, this Court determined that the government's interference with the amount of water available for beneficial use constituted a taking. *Id.* at 625. Important to the questions presented in this case, the Court concluded that the property interest taken was the owners' right "*to the continued flow of water . . . and to its use.*" *Id.* at 625 (emphasis added). That particular property interest is well-recognized in the western states, where water rights consist of "the right to have the water flow so that some portion of it . . . may be reduced to possession and be made the private property of an individual." *See Ronzio v. Denver & R.G.W.R. Co.*, 116 F.3d 604, 606 (10th Cir. 1940) (quoting *Murphy v. Kerr*, 296 F. 536, 541 (D.N.M. 1923) (quoting Samuel C. Wiel, *Water Rights in the Western States* 304 (3d ed. 1911)).

**B. Water Holders Have a Common Law
Right to Maintain Their Ditches to
Assure the Continued Flow of Water**

As a corollary to the right to the continued flow of water, state courts throughout the West recognize that a water holder has a right to go upstream to remove obstacles and maintain the flow of his water reaching his land.

Hage's water rights are vested under laws adopted in the late Nineteenth Century. At that time, our government lauded western settlers for the industry and courage that it took to eke out a living in such hostile conditions as those present in Nevada. *Reno Smelting, Milling & Reduction Works Corp. v. Stevenson*, 21 P. 317, 321 (Nev. 1889) (In most of Nevada "the soil is arid, and unfit for cultivation unless irrigated by waters of running streams."); *see also* 5 Robert E. Clark, et al., *Waters and Water Rights*

40-41 (1972) (water is a scarce resource in the arid region of the western United States); Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. Denv. Water L. Rev. 148, 148 (2001) (Nevada is the driest state in the Nation). The arid conditions in Nevada “impelled settlers[] upon the public lands to resort to the diversion of waters.” *Reno Smelting*, 21 P. at 321 (“Except in a few favored sections, artificial irrigation, for agriculture, is an absolute necessity.”). To encourage settlement and economic development, western courts recognized that “the doctrine of priority of right to water by priority of appropriation . . . arises . . . to the dignity of a distinct usufructuary estate or right of property.” *Id.*

Under the prior appropriation doctrine (also referred to as western water law), a person creates a vested right to water by diverting the water from its natural stream and transporting it by means of a ditch, flume, canal, or pipes to the location where the water is put to beneficial use. *Reno Smelting*, 21 P. at 321; *see also Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (“The property right in the water right is separate and distinct The water right is appurtenant to the land, the owner of which is the appropriator. The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.”). Appropriated water rights give the owner more than a right to use the water; by creating a transportation system to divert and convey water, the water holder “creates a right in the land from which the diversion is made in favor of him having the right.” *Vansickle v. Haines*, 7 Nev. 249, 279 (1872), *overruled on other grounds by Jones v. Adams*, 6 P. 442, 448 (Nev. 1885); *see also* James H. Davenport & Craig Bell,

Governmental Interference With the Use of Water: When Do Unconstitutional Takings Occur?, 9 U. Denv. Water L. Rev. 1, 69 (2005) (“Water rights typically include a right to reasonable access[.]”). An appropriated water right “carries with it the right to go upon the land through which the ditch or flume is conducted, and upon which the dam, by means of which the diversion may be affected, is built, to keep them in repair.” *Vansickle*, 7 Nev. at 279; *see also Reno Smelting*, 21 P. at 321 (Nevada law recognizes that a holder of water rights has a right-of-way through lands of others for the purpose of transporting appropriated water via established ditches and flumes.).

The rule that a prior appropriator has a right to access and maintain the flow of his water through ditch rights-of-way is well-recognized in the western states. In *Ennor v. Raine*, for example, Nevada’s Supreme Court held that a prior appropriator may lawfully enter a neighbor’s upstream property to remove obstructions from the channel in order to maintain the flow of water. 74 P. 1, 2 (Nev. 1903). Other western state courts apply the same rule. *See, e.g., First State Bank of Alamogordo v. McNew*, 269 P. 56, 66 (N.M. 1928) (a holder of vested water rights owns a right of way for the maintenance and enjoyment of the water rights); *Whitmore v. The Pleasant Valley Coal Co.*, 75 P. 748, 749 (Utah 1904) (owner of a ditch right-of-way has the right to enter upon the land to “do all things necessary to maintain, care for, and operate” the ditch); *Helena v. Rogan*, 68 P. 798 (Mont. 1902) (the right to enter upstream property includes the right to have sufficient water flow from the head of the stream or its tributaries into his ditch to meet his appropriated needs); *Natoma Water & Mining Co. v. Hancock*, 35 P. 334, 339 (Cal.

1894) (a holder of 1866 Act rights has the right to enter public lands upstream of his ditch to take actions reasonably necessary to maintain the enjoyment of allocated water rights).

The California Supreme Court's decision in *Ware v. Walker*, 12 P. 475 (Cal. 1886), illustrates how this common law property right operates. Ware appropriated a ditch right-of-way that diverted water from a creek across public lands. Walker later purchased the public lands and would not allow Ware to use his ditch. In response, Ware went further upstream, but still on Walker's land, cleared gravel from the stream bed, and built a new dam and ditch to transport the water to his property. Walker tore down the dam and obstructed the portion of the ditch that ran across Walker's land. Ware filed suit and was granted a permanent injunction barring Walker from interfering with Ware's water rights. California's Supreme Court affirmed the decision, holding that Ware, as the holder of prior appropriated water rights, had "as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant." *Id.* at 477.

**C. The Federal Circuit's Decision
Conflicts With Other Cases Holding
That an Owner of an 1866 Act
Right-of-Way Has a Right to Maintain
His Easement Without Government
Approval**

The fact that Hage's ditches run over federal lands does not extinguish any of the common law property rights he holds in his ditches and water. State and federal courts recognize that the owner of a vested

right-of-way over federal lands has a right to maintain the easement without permission from the federal government. See, e.g., *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 748-49 (10th Cir. 2005) (*SUWA*); *United States v. Garfield Cty.*, 122 F. Supp. 2d 1201, 1253 (D. Utah 2000). Congress confirmed this right when it enacted the Act of July 26, 1866, to recognize that Western settlers held valid property interests in water transportation systems (e.g., ditches, flumes, canals) and highways constructed on public lands.⁴ *Jennison v. Kirk*, 98 U.S. 453, 460 (1878). Specifically, the Act granted settlers a vested property interest—a right-of-way—on which they were entitled to use and maintain their water transportation systems or highways where they ran over public lands.⁵ *Broder v. Water Co.*, 101 U.S. 274, 275 (1879) (The purpose of the 1866 Act was to provide western settlers with “an unequivocal grant of the right of way” over public lands); Samuel C. Wiel, *Water Rights in the Western States* § 96, at 113 (3d ed. 1911) (The purpose of the Act “was to put the contention that the pioneers were

⁴ “An Act Granting the Right-of-way to Ditch and Canal Owners Over the Public Lands and for Other Purposes,” also known as the “Mining Act of 1866,” also known as “Act of July 26, 1866,” ch. 262, 14 Stat. 251, 253 (1866), codified as 43 U.S.C. § 661 (1976), *repealed in part by* Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1784 (1974).

⁵ The right to construct highways on public lands is addressed in Section 8 of the 1866 Act (“the right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”); re-codified in 1873 as section 2477 of the Revised Statutes and re-codified again in 1938 as 43 U.S.C. § 932 (1938). Rights-of-way for highways are often referred to as “R.S. 2477” roads.

trespassers at rest by ‘acknowledging’ that they never were trespassers; that they were upon the lands of right from the beginning.”) (internal citations omitted).

The 1866 Act did not alter the rights or expectations of the region’s water holders. *Murphy*, 296 F. at 542-44 (discussing the nature of the property right in a ditch right-of-way). Any question concerning the validity of a property right or the nature and scope of that right is determined under the state’s common law of property. *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206, 209-10 (1943); *Sierra Club v. Hodel*, 848 F.2d 1068, 1080-81 (10th Cir. 1988), *overruled on other grounds by Village of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992). Thus, the common law rule authorizing water holders to freely access and maintain their ditch rights-of-way applies to both public lands and private lands. *Willey*, 73 P. at 214; *see also Murphy*, 296 F. at 542-44 (discussing the nature of the property right in a ditch right-of-way); *Sylvester v. Imhoff*, 503 P.2d 734, 735 (Wash. 1972) (an owner of 1866 Act ditch right-of-way has “the right to keep and maintain the ditch” where it runs over federal property; this right is valid against all subsequent owners of the lands).

The question presented in this case asks whether a restriction on an owner’s right to freely access and maintain his water flow—in this case, a permit requirement—can give rise to a taking. Generally, the federal government is free to regulate the use of public lands as it sees fit. *See Adams v. United States*, 255 F.3d 787, 795 (9th Cir. 2001) (upholding permit requirement for uses that exceed the traditional use of the right-of-way); *United States v. Vogler*, 859 F.2d 638, 642 (9th Cir. 1988) (government may adopt permit

requirement for transporting heavy equipment on a trail right-of-way). But the government cannot impose a regulation that prohibits or unduly burdens a rightful activity. *Adams*, 255 F.3d at 795; *see also United States v. Maris*, 987 F. Supp. 865, 868 (D. Or. 1997) (government cannot impose a toll on the right to access and use a 1866 Act right-of-way). And the lower courts are split on the question of whether the government can lawfully restrict an owner's right to freely access and maintain a right-of-way through a permit requirement.

The Tenth Circuit holds that the owner does not need to apply for a permit to maintain his right-of-way. *SUWA*, 425 F.3d at 748-49. *SUWA* arose when county roads crews entered public lands managed by the Bureau of Land Management (BLM) and graded 16 roads.⁶ *SUWA*, 425 F.3d at 742. Nine of the roads were within the Grand-Escalante National Monument. *Id.* The counties did not notify BLM in advance, or obtain permits to grade the roads. *Id.* A citizen group, *SUWA*, filed suit, alleging in part that the counties had engaged in unlawful road construction activities on federal lands. *Id.* The counties contended that their activities were lawful because they occurred on rights-of-way vested under the 1866 Act. *Id.* The Tenth Circuit determined that *SUWA*'s claims turned on the scope and nature of property rights vested under the 1866 Act. *Id.* at 746. The court held that the owner of an 1866 Act right-of-way across federal lands does not need to notify the government or obtain permit approval from a federal land management

⁶ *SUWA* concerned rights-of-way for roads over public land, the private appropriation of which was authorized by Section 8 of the 1866 Act (or "R.S. 2477").

agency in order to enter and perform ordinary maintenance on the right-of-way. *Id.* at 748-49 (citing *Garfield Cty.*, 122 F. Supp. 2d at 1253 (reaching the same conclusion)).

In direct conflict with the Tenth Circuit, the Federal Circuit held below that Hage must obtain a federal land use permit every time he needed to access his right-of-way to maintain his water flow. Pet. Cert. App. 10a-13a. According to the Federal Circuit, federal land management agencies have the sole authority to decide whether, when, and subject to what conditions a water holder will be allowed to access his ditches to perform ordinary and necessary maintenance on his water flow. *Id.*

If left unreviewed, the appellate court's decision will have a profound and direct impact on the constitutional rights of water holders. That impact is shown by the very different conclusions of the trial and appellate courts regarding the ripeness of Hage's regulatory takings claim. Applying the common law rule, the trial court determined that Hage's regulatory takings claim was ripe because the Forest Service had appropriated his right to maintain the flow of water in his ditches resulting in a significant reduction in the amount of water flowing to his property. Pet. Cert. App. 183a-84a ("[T]his court finds plaintiffs' claims ripe for review because plaintiffs have alleged real and concrete consequences resulting from current government action."); *id.* at 186a ("Without access to the ditches, plaintiffs argue, they cannot use their water for feeding the cattle and other domestic purposes."). By contrast, the Federal Circuit—refusing to acknowledge the right to maintain one's flow of water—dismissed Hage's claim as unripe because he

had not applied for a permit (which permit could only provide prospective relief; it could not remedy water already lost due to government interference). Pet. Cert. App. 10a-13a. Thus, despite undisturbed findings of fact that the Forest Service had interrupted the flow of water to Hage's property (Pet. Cert. App. 54a), the Federal Circuit reversed the trial court's award of just compensation. Pet. Cert. App. 20a-21a.

This Court's review is necessary to prevent the potential upheaval of water rights throughout the West.

II

THE FEDERAL CIRCUIT'S DECISION RAISES AN IMPORTANT ISSUE BECAUSE IT THREATENS WATER RIGHTS THROUGHOUT THE WESTERN STATES

The consequences of the Federal Circuit's decision are far-reaching. Local, county, and state governments—as well as individuals—rely on rights vested under the 1866 Act to provide essential services, such as drinking water, irrigation, fire suppression, sewer, domestic uses, etc. The value and utility of these rights, however, hinge on the owner's ability to apply the water to a beneficial use. Without that ability, a person's interest in his water is “worthless.” Pet. Cert. App. 102a. So, too, are all of the owner's water-dependent expectations—a faucet will not flow if water does not reach the pipes.

This case provides a good example of the rights and interests threatened by the Federal Circuit's decision. Hage relied on his vested water rights to provide water for livestock, irrigation, and domestic

purposes. Pet. Cert. App. 38a, 158a. Without water, Hage could make no economically viable use of his ranch. *Id.* at 54a. In order to assure that water would continue to flow to his property, it was necessary for Hage to remove the obstructions from his ditches. *Id.* Under the common law rule, Hage had a right to freely access and maintain his ditches without applying for permits from the Forest Service:

[T]here is no requirement under the law to seek permission to maintain an 1866 Ditch. Instead, that right is expressly reserved in the 1866 Act. 43 U.S.C. § 661 The legislative history . . . makes it clear that Congress intended to give those with 1866 Act ditches access to those ditches for construction and maintenance. Anything less might make those same ditches worthless.

Pet. Cert. App. 102a (trial court's Final Opinion: Findings of Fact).

The common law rule is practical and preserves the rights and expectations of property owners. If, for example, a rancher discovers that a tree has fallen across his ditch right-of-way, he can simply throw a chain around the trunk and haul it out of the waterway, immediately restoring the flow of water to his ranch. And by doing so, the rancher can assure that the faucets will continue to flow and the ranch will remain economically viable.

The Federal Circuit's rule, by contrast, is impractical and significantly diminishes the rights and expectations of water holders. Under the Federal Circuit's rule, the rancher who notices that a fallen tree is blocking the water flow cannot remove it.

Instead, the rancher must leave the tree in place, return home, file permit applications with federal agencies, and wait for an administrative decision giving him permission to restore the flow of water—all the while, his taps stop flowing, hayfields dry up, the cattle go thirsty, and the rancher suffers permanent losses of water and water-dependent uses. *Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276, 1294 (Fed. Cir. 2008) (Once the flow of water is diminished, the water is gone, and the water holder’s right to use that water is lost forever). This process must be repeated every time a ditch needs maintenance, forcing owners to suffer interruptions to the flow of water and unnecessarily threatening their livelihoods.

CONCLUSION

A water holder's right to maintain the flow of water to the location of beneficial use is essential to his property interest. If the Federal Circuit's opinion is not reviewed and reversed, the decision could have devastating consequences on thousands of individuals who hold, and rely on, water and ditch rights-of-way throughout the western states.

The petition should be granted.

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Respectfully submitted,

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