No. 12-918

In The
Supreme Court of the United States

ESTATE OF E. WAYNE HAGE
AND 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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the federal agencies can alter the scope of a property interest granted by Congress by sua sponte redefining the scope of the grant or imposing a permitting requirement on the exercise of the rights granted.

2. Whether a federal agency's interference with a person's ability to exercise rights granted by Congress by requiring a permit to exercise those rights, which is not authorized or contemplated by the granting statute, is properly analyzed as a physical taking rather than as a regulatory taking.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and a limited and ethical government. Most MSLF members reside, work, and own property in the western States. Many of these members are descendants or successors in interest to the original homesteaders and miners who risked their time and money to settle and develop the

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

American west. These members trace their property interests to the important federal land grant statutes that were designed to encourage settlement and development of the hostile and immense public domain. *E.g.*, "An act to secure homesteads to actual settlers upon the public domain" 12 Stat. 392-93 (May 20, 1862) ("Homestead Act"); "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes" 14 Stat. 251-53 (July 26, 1866) ("1866 Act"); "The 1870 Placer Act" 16 Stat. 217 (July 9, 1870) ("1870 Act"); "An Act to promote the Development of the mining Resources of the United States" 17 Stat. 91-96 (May 10, 1872) ("General Mining Law"). Since its creation in 1977, MSLF and its attorneys have actively participated in litigation to ensure the proper interpretation and administration of these and other federal land grant statutes. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); *United States v. Locke*, 471 U.S. 84 (1985); *City & County of Denver, By & Through Bd. of Water Comm'rs v. Bergland*, 695 F.2d 465 (10th Cir. 1982); *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988); *United States v. Jenks*, 22 F.3d 1513, 1515 (10th Cir. 1994) ("*Jenks I*"), *on appeal after remand United States v. Jenks*, 129 F.3d 1348 (10th Cir. 1997) ("*Jenks II*"); *Roth v. United States*, 326 F. Supp. 2d 1163 (D. Mont. 2003); *Larson v. Lujan*, 976 F. Supp. 1406 (D. Utah 1992).

This case also involves an egregious example of federal agencies infringing on private property rights and interests. MSLF attorneys have represented

numerous clients against similar overreaching actions by the federal government to ensure the sanctity of private property. *E.g.*, *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986); *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (2001). MSLF has also participated as amicus curiae before this Court in numerous cases involving the proper interpretation and application of the Fifth Amendment. *E.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Kelo v. City of New London*, 545 U.S. 469 (2005); *Wilkie v. Robbins*, 551 U.S. 537 (2007).

The Federal Circuit's decision in this case represents a serious and potentially devastating departure from established law regarding the scope of 1866 Act rights-of-way. Moreover, the decision represents a departure from this Court's precedent regarding physical and regulatory takings. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

Petitioners have been litigating their takings claims for more than 20 years. Between 1991 and 2010 the Court of Federal Claims ("CFC") issued five published opinions regarding Petitioners' claims. As relevant here, the CFC ruled that Petitioners owned

1866 Act ditch rights-of-way. *Hage v. United States*, 51 Fed. Cl. 570, 576-80 (2002) ("*Hage IV*").

After finding that the necessary property interests existed, the CFC analyzed whether the federal government's actions effectuated a taking of those 1866 Act ditch rights-of-way. The federal government argued that the takings claim was not ripe because Petitioners had not applied for a special use permit to perform maintenance on the 1866 Act ditch rights-of-way. The CFC rejected that argument, finding that there is "no requirement under the law to seek permission to maintain an 1866 Ditch," because the right to maintain 1866 Act ditch rights-of-way is expressly conferred by the Act. *Id.* at 585-86. Ultimately, the CFC ruled that the federal government's actions effectuated a compensable taking and awarded Petitioners just compensation for their 1866 Act ditch rights-of-way.

Although the Federal Circuit did not disturb the CFC's ruling that Petitioners owned 1866 Act ditch rights-of-way, it held Petitioners' takings claim for those rights-of-way was not ripe. *Hage v. United States*, 687 F.3d 1281, 1287 (Fed. Cir. 2012). Specifically, the Federal Circuit applied a regulatory takings analysis, and ultimately ruled that Petitioners must first apply for and be denied a special use permit to maintain their ditches for their takings claim to be ripe. *Id.* at 1286-88 (relying on *Williamson Cnty. Reg'l*

Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985)).

SUMMARY OF ARGUMENT

This Court should grant the Petition for two reasons. First, the Federal Circuit's decision is in conflict with decisions from the Ninth and Tenth Circuits. As determined by the Ninth and Tenth Circuits, the right to maintain 1866 Act rights-of-way is inherent in the congressional grant. The Federal Circuit's ruling that 1866 Act ditch right-of-way owners must apply for a special use permit to perform routine maintenance has no basis in law and is in direct conflict with these decisions.

Second, the Federal Circuit also erred in applying a regulatory takings analysis with respect to Petitioners' 1866 Act ditch rights-of-way. The denial of Petitioners' congressionally granted rights to maintain their ditches by the federal government resulted in a "practical ouster," which under this Court's precedent effectuates a physical taking.

ARGUMENT

I. THE FEDERAL CIRCUIT'S RULING THAT AN 1866 ACT RIGHT-OF-WAY OWNER MUST APPLY FOR A SPECIAL USE PERMIT HAS NO BASIS IN LAW AND CONFLICTS WITH DECISIONS FROM THE NINTH AND TENTH CIRCUITS.

A. The Scope Of An 1866 Act Ditch Right-Of-Way Includes The Right To Maintain The Ditch.

The 1866 Act is entitled: "An Act granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for other Purposes," 14 Stat. 251.[2] Of particular relevance here is Section 9 of the 1866 Act, which provides:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs,

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[2] Despite its name, the 1866 Act also extended an invitation to citizens to locate and patent lode claims on federal lands. *See Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.,* 171 U.S. 55, 61-63 (1898); *see generally*, P. Gates, *History of Public Land Law Development* 708-721 (1968) (describing history surrounding the passage of the 1866 Act). The 1870 Act amended the 1866 Act by extending the invitation to placer claims. 16 Stat. 217. In 1872, Congress refined and combined the 1866 and 1870 Acts to form the General Mining Law, 30 U.S.C. § 22 *et seq*. *High Country Citizens Alliance v. Clarke*, 454 F.3d 1177, 1183-85 (10th Cir. 2006).

> laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; *and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed*[.]

43 U.S.C. § 661 (emphasis added). For a right-of-way to vest under this section, the prospective grantee must possess valid water rights under state law and must construct the ditch on unoccupied and unreserved lands. *See Roth*, 326 F. Supp. 2d at 1175. The grant constitutes an easement that extends 50 feet on each side of the ditch. *Hage IV,* at 581. More importantly, like the other grants in the 1866 Act, no permission or authorization from the federal government was required to accept the grant in Section 9. 1 Hutchins, *Water Rights Laws in the Nineteen Western States* 172 (1971) (Section 9 "contained no procedure by which rights could be required from the United States while the lands remained part of the public domain. What it did was take cognizance of the customs and usages that had grown up on the public lands . . . and to make compliance therewith essential to the enjoyment of the Federal grant."); *United States v. 9,947.71 Acres of Land*, 220 F. Supp. 328, 335 (D. Nev. 1963) (explaining that Section 8 of the 1866 Act, which granted a right-of-way for the construction of highways, was a grant *in praesenti*, that became effective upon the construction of a highway, *i.e.*, title to the right-of-way automatically passed from the United States without any further action); 1 *Lindley on Mines* § 55 (1897) (explaining that Section

1 of the 1866 Act granted a "free license" for citizens to extract the minerals from the public domain "untrammeled by government surveillance").

Section 17 of the 1870 Act expanded the influence of Section 9 by explicitly providing:

> [N]one of the rights conferred by sections 5, 8, and 9 of the act of which this is amendatory shall be abrogated by this act; and the same are hereby extended to all public lands affected by this act; and all patents granted . . . shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights.

16 Stat. at 218; *see McFarland v. Alaska Perseverance Mining Co.,* 3 Alaska 308, 323-24 (1907). Although the General Mining Law repealed many sections of the 1866 Act, Section 9, as preserved by the 1870 Act, was protected. 17 Stat. at 94 (providing that the 1870 Act "shall be and remain in full force, except as to the proceeding to obtain a patent"); *McFarland*, 3 Alaska at 324. In fact, the ability to accept the grant in Section 9 of the 1866 Act continued until 1976.

"By 1976, Congress had enacted a tangled array of laws granting rights-of-way across federal lands." *Jenks I*, 22 F.3d at 1515. In an effort to provide an "organic act" for the Bureau of Land Management ("BLM") and to establish a uniform system for the issuance of rights-of-way over federal lands, Congress passed by the Federal Land Policy and Management

Act ("FLPMA"). Pub. L. No. 95-579, 90 Stat. 2743-94 (43 U.S.C. § 1701 *et seq*.). Section 706 of FLPMA repealed over thirty statutes or parts of statutes that granted rights-of-way across federal lands, including the rights-of-way grants in Sections 8 and 9 of the 1866 Act.[3] 90 Stat. at 2793-94. However, FLPMA also contained three savings provisions in Sections 509(a), 701(a), and 701(h) that preserved all 1866 Act rights-of-way (and the scope thereof) existing on the effective date of the Act, *i.e*., October 21, 1976. 43 U.S.C. § 1769(a) ("Nothing in this subchapter shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted, or permitted."); 43 U.S.C. § 1701 note ("Nothing in this Act, or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act."); *id*. ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights.").

Following FLPMA, the BLM issued a policy statement in 1983 providing that it could only require an 1866 Act ditch holder to obtain a federal grant or permit if the holder of the vested water right wanted to "significantly alter the alignment or

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[3] In Section 501(a) of FLPMA, Congress vested the Secretaries of Agriculture and Interior with discretionary authority "to grant, issue, or renew rights of way over [Forest Service and public lands] for . . . roads, trails [and] highways." 43 U.S.C. § 1761(a).

relocate the *existing* facility." *Western Watersheds Project v. Matejko*, 468 F.3d 1099, 1104-05 (9th Cir. 2006) ("*Matejko*") (emphasis in original). Three years later the BLM clarified its position in relation to the 1866 Act rights-of-way by promulgating the following regulation:

> A right-of-way grant issued on or before October 21, 1976, pursuant to then existing statutory authority is covered by the provisions of this part unless administration of this part diminishes or reduces any rights conferred by the grant or the statute under which it was issued, in which event the provision of the grant or the then existing statute shall apply.

43 C.F.R. § 2801.4 (2004). The regulation also provided that:

> Any *substantial deviation in location or authorized use* by the holder during construction, operation or maintenance shall be made only with prior approval of the authorized officer[.]

Id. § 2803.2(b) (2004) (emphasis added). In 2005, the BLM made major amendments to its right-of-way regulations. *See* 70 Fed. Reg. 20,970 (Apr. 22, 2005). Despite these amendments, the BLM preserved the rights conferred under the 1866 Act by providing that right-of-way regulations apply to:

> Grants issued on or before October 21, 1976, under then existing statutory authority, unless application of these regulations would

> diminish or reduce any rights conferred by the original grant or the statute under which it was issued. *Where there would be a diminishment or reduction in any right, the grant or statute applies*.

43 C.F.R. § 2801.6 (2005) (emphasis added). The new regulations also addressed permitting requirements for pre-existing rights-of-way by providing that the holder of the right must seek BLM approval before beginning any activity which "requires a substantial deviation from the grant." *Id.* § 2807.11(b). In explaining the new regulations the BLM was very explicit in providing:

> This final rule therefore reflects longstanding law and BLM's historical practice by clarifying that 1866 Act rights-of-way are not subject to regulation so long as a right-of-way is being operated and maintained in accordance with the scope of the original rights granted. Because rights-of-way under the 1866 Act are perpetual and do not require renewal, no authorization under FLPMA exists or is required in the future. Therefore, unless a right-of-way holder undertakes activities that will result in a substantial deviation in the location of the ditch or canal, or a substantial deviation in the authorized use, *no opportunity exists for BLM to step in and regulate a right-of-way by imposing terms and conditions on the right-of-way's operation and maintenance.* Simply stated, there is no current BLM authorization to which such terms and conditions could be attached.

> Therefore, Title V of FLPMA and BLM's right-of-way regulations do not apply to these rights-of-way.
>
> This does not mean, however, that BLM cannot take action to protect the public lands when a holder of an 1866 Act right-of-way undertakes activities that are inconsistent with the original right-of-way. In such a situation, if the right-of-way holder does not approach BLM for a FLPMA permit authorizing such activities, FLPMA and BLM's trespass regulations provide BLM with the discretion to take an enforcement action against the right-of-way holder.

70 Fed. Reg. at 20,980 (emphasis added); *cf. Jenks I*, 22 F.3d at 1519 (Under Forest Service regulations, Forest Service could not require an inholder to acquire special use permit for access to his inholding if the inholder owned a common law easement for access); *Skranak v. Castenada*, 425 F.3d 1213, 1218-21 (9th Cir. 2005) (Forest Service violated its own regulations by subjecting inholder to permitting requirement without first determining whether inholder had common law right of access); *United States v. Srnsky*, 271 F.3d 595, 603-04 (4th Cir. 2001) (Forest Service special use regulations do not apply to the exercise of common law easement rights); *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 252-54 (3d Cir. 2011), as amended (Mar. 7, 2012) (Forest Service, as surface owner, could not subject owners of outstanding mineral rights to a permitting requirement in order to

exercise their common law easements rights in use of the surface.).

As the foregoing demonstrates, the CFC correctly held that "there is no requirement under the law to seek permission to maintain an 1866 Ditch." *Hage IV,* 51 Fed. Cl. at 585-86. The Federal Circuit's contrary ruling has no basis in law. For this reason alone, this Court should grant the Petition.

B. The Federal Circuit's Ruling Is In Conflict With The Ninth Circuit's Decision In *Matejko*.

In *Matejko*, the Ninth Circuit was asked to decide whether Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1536(a)(2), required the BLM to consult with Secretary of Interior or Secretary of Commerce before owners of 1866 Act ditch rights-of-way could exercise their ditch rights. 468 F.3d at 1102-03. Although the ESA requires consultation when "any action authorized, funded, or carried out by" federal agencies may jeopardize a listed species, or when such action negatively affects the species' habitat, the Ninth Circuit held that "the duty to consult is triggered by affirmative actions; because there was no such "action" here, there was no corresponding duty to consult." *Id.* at 1102.

The plaintiffs in *Matejko* had complained that the BLM's mere recognition of private water rights granted under the 1866 Act was an action that triggered the ESA's consultation requirement. *Id.* at

1109. In its analysis, the Ninth Circuit discussed the nature of 1866 Act ditch rights-of-way grants at length. *Id.* at 1104-07. Critical to the Ninth Circuit's holding was its reliance on the fact that BLM and other federal agencies have no authority to regulate 1866 Act rights-of-way. *Id.* at 1110. The BLM did not make a choice not to "enforce regulatory discretion" as the plaintiff argued, instead, BLM regulations prevented the agency from regulating the 1866 Act rights-of-way in the absence of a "substantial deviation in location or authorized use." *Id.* at 1109 (*citing* 43 C.F.R. § 2803.2(b) (2004)).

In the instant case, the Federal Circuit never specifically addresses Petitioners' argument that federal agencies lack authority to require holders of 1866 Act rights-of-way to seek permits before performing routine maintenance. While the Federal Circuit noted that Petitioners raised this argument, it never discusses why the argument lacks merit. *Hage*, 687 F.3d at 1287. The Federal Circuit's holding that Petitioners' takings claim is unripe incorrectly assumes that the federal agency has authority to impose permitting requirements upon 1866 Act rights-of-way holders. The Ninth Circuit's analysis in *Matejko* makes clear that in passing the 1866 Act, Congress declined to confer such authority on federal agencies. *See Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it. . . . An agency may not confer power upon itself. To permit an agency to expand its power in the face of a

congressional limitation on its jurisdiction would be to grant to the agency power to override Congress"). Therefore, the Federal Circuit's ruling is in error and causes a direct conflict with the Ninth Circuit. This Court should grant the Petition to correct this error.

C. The Federal Circuit's Ruling Is In Conflict With The Tenth Circuit's Decision In *SUWA*.

Although Section 8 of the 1866 Act confers rights-of-way for highways and Section 9 of the 1866 Act confers rights-of-way for ditches and canals, the scope of both grants should be interpreted *in pari materia*. *Cf. Cole v. Ralph*, 252 U.S. 286, 306 (1920) (provisions of the General Mining Law should be interpreted *in pari materia*). The Tenth Circuit has held that holders of rights-of-way stemming from Section 8 of the 1866 Act are not required to seek permits to access and maintain such rights-of-way unless they are making improvements that go beyond routine maintenance. *Southern Utah Wilderness Alliance v. Bureau of Land Mgmt.,* 425 F.3d 735, 745 (10th Cir. 2005) ("*SUWA*"). The Tenth Circuit explained that in promulgating the 1866 Act, Congress did not create an "executive role" for federal agencies. *Id.* Finally, the Tenth Circuit held that courts have primary jurisdiction over questions involving the purpose and scope of rights-of-way, not agencies. *Id.* at 757.

The plaintiffs in *SUWA* had asked the Tenth Circuit to determine the legal status of rights-of-way

conferred under Section 8 of the 1866 Act. *Id.* at 740. In its analysis the Tenth Circuit made several points relevant to the instant case. First, it noted the importance of these rights-of-way in the history of development in the western United States. *Id.* Second, it noted the difference in agency authority over rights-of-way granted pre-FLPMA and those granted post-FLPMA. *Id.* at 740-41. Next, the Tenth Circuit noted FLPMA did nothing to disturb valid existing 1866 Act rights-of-way. *Id.* at 741. Finally, the Tenth Circuit held that federal agencies have no authority to impose permitting requirements on Section 8 rights-of-way holders, unless maintenance of their rights-of-way goes beyond routine maintenance. *Id.* at 745.

Although *SUWA* addresses Section 8 of the 1866 Act, not Section 9, both sections must be read *in pari materia*. The Tenth Circuit's rulings are analogous to the Ninth Circuit's rulings in *Matejko*. Both courts were asked to consider right-of-way grants under the 1866 Act and both Courts reached the same conclusion; namely, that federal agencies lack authority to require holders of Section 8 or Section 9 rights-of-way to seek permits for routine maintenance. *SUWA*, 425 F.3d at 745; *Matejko*, 468 F.3d at 1109.

The 1866 Act played a powerful role in shaping the Western landscape and changes to its enforcement must not be taken lightly. Because the Petitioners attempted only to maintain their 1866 Act rights-of-way for their intended purposes and did not attempt to broaden the purpose of their rights-of-way, the CFC correctly held that "there is no requirement

under the law to seek permission to maintain an 1866 Ditch." *Hage IV,* 51 Fed. Cl. at 585-86. The Federal Circuit's contrary ruling, which conflicts with rulings from the Ninth and Tenth Circuits, will encourage federal agencies to further diminish the scope of federal grants in direct contravention of Congress's intent. Therefore, this Court should grant the Petition to ensure the sanctity of 1866 Act rights-of-way and other federal grants. *See Leo Sheep*, 440 U.S. at 687 (recognizing "the special need for certainty and predictability" with respect to the scope of federal grants).

II. THE FEDERAL AGENCY'S UNLAWFUL ACTION OF REQUIRING PETITIONERS TO APPLY FOR A PERMIT TO PERFORM ROUTINE MAINTENANCE UPON THEIR 1866 ACT RIGHTS-OF-WAY CONSTITUTES A PHYSICAL TAKING.

The Takings Clause provides "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Two different types of takings claims exist; physical takings and regulatory takings. Physical takings occur by: (1) direct government appropriation; (2) physical invasion of private property; or (3) the functional equivalent of a practical ouster. *Lingle v. Chevron U.S.A., Inc.,* 544 U.S. 528, 537 (2005) (*citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992)).

This Court has found physical takings, even in the absence of physical entry to private property,

when government action amounts to "direct and immediate interference with the enjoyment and use of land." *United States v. Causby,* 328 U.S. 256, 266 (1946) (finding that a compensable taking occurred because noise from airplanes flying over plaintiff's land deprived plaintiffs of their ability to raise chickens). A "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." *Lucas*, 505 U.S. at 1017 (*citing San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 652 (1981)). Takings claims "should be assessed with reference to the 'particular circumstances of each case,' and not by resorting to blanket exclusionary rules." *Arkansas Game and Fish Comm'n v. United States,* 133 S.Ct. 511, 521 (2012).

In contrast, regulatory takings may occur "when government actions do not encroach upon or occupy the property, yet still affect and limit its use to such an extent that a taking occurs." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Regulatory takings claims are generally not ripe for judicial review until the entity charged with the taking issues "a final decision regarding the application of the regulations to the property." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186 (1985).

The Federal Circuit erred in applying the regulatory taking's analysis because the Petitioners' takings claim for their 1866 Act ditch rights-of-way constitutes a physical taking. By unlawfully requiring the Petitioners to seek a special use permit to maintain

their 1866 Act rights-of-way, the Forest Service directly and immediately interfered with the Petitioners' use and enjoyment of their ditches, resulting in a physical taking. The Forest Service threatened the Petitioners with criminal prosecution if they attempted to maintain their ditches with anything more than hand tools. *Hage*, 687 F.3d at 1287. Because the Agency lacked authority to require the Petitioners to seek a permit to maintain their 1866 Act rights-of-way, the permitting requirement and threats of prosecution resulted in a total deprivation to Petitioners of any beneficial use of their ditches. The effect on the Petitioners was a practical ouster, because they were prevented from using and maintaining their 1866 Act rights-of-way. Practical ousters are considered physical takings, not regulatory takings. *Lingle,* 544 U.S. at 537.

Regulatory takings exist when the government limits a landowner's ability to use his or her property. The Forest Service did not place a restriction upon the Petitioners which merely limited their ability to use their right-of-way ditches, instead it engaged in behavior that amounted to direct and immediate interference with the Hages' property rights. If federal agencies did have authority to regulate routine maintenance of 1866 Act rights-of-way, then the Federal Circuit's regulatory taking analysis would be proper; however, in the absence of such authority, the Agency's unlawful actions prevented Petitioners from maintaining their right-of-way ditches, resulting in a total deprivation of Petitioners' property rights. This

type of deprivation is a physical taking, not a regulatory taking.

Critical amongst a property owner's bundle of sticks is the right to exclude others from one's property. *See Nollan v. California Coastal Comm'n,* 483 U.S. 825, 831 (1987) (*citing Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 433 (1982)). A necessary counterpart to this right is the right to access one's property. Rights in easements are different than other property rights. The 1866 Act grants only two specific property rights; namely, the rights to use and maintain the easements granted. While the government may restrict some of the rights of fee simple property owners without affecting a taking, *Palazzolo*, 533 U.S. at 616, when its actions directly and immediately interfere with a property owner's use of his or her property rights, the result is a physical taking. *Lucas*, 505 U.S. at 1014.

Here, the actions of the federal agencies prevented Petitioners from exercising their congressionally granted rights. The agencies took away Petitioners' only two property rights, *i.e.*, the rights to use and maintain their ditches. This resulted in a total condemnation of Petitioners' 1866 Act ditches. This result is no different than if the agencies had intentionally dammed or filled the ditches. An option to seek permission to use an easement is not the same as ownership. By imposing such an unlawful permitting requirement upon the Petitioners, the agencies completely extinguished the Petitioners' rights to maintain their ditches. Because the agencies seized

the Petitioners' right to maintain their 1866 Act irrigation ditches and replaced the right with a scheme by which the Petitioners may apply for and may receive a permit to maintain their ditches, the ripeness analysis for the regulatory taking relied upon by the Federal Circuit is inapplicable. *Daniel v. County of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002) (recognizing that a physical takings claim is ripe immediately upon the appropriation or invasion of property).

The Federal Circuit's taking analysis is based upon its erroneous belief that the agencies had authority to impose permitting requirements upon the maintenance of 1866 Act rights-of-way. Because federal agencies have no such authority, the Federal Circuit erred in holding that the Petitioners' takings claim was a regulatory taking. The agencies' actions against the Petitioners constituted a physical taking for which just compensation is due. Therefore, this Court should grant the Petition.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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