No.

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

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Federal Claims ("CFC") entered a judgment in the above-entitled case after nearly 20 years of proceedings, finding Fifth Amendment regulatory and physical takings of ditches and water rights owned by Petitioners pursuant to the Act of July 26, 1866, 43 U.S.C. § 661. The rights of 1866 Act ditch rights-of-way have been matters of intense controversy in recent years.

The Federal Circuit court reversed the Claims Court's findings of regulatory takings on ripeness grounds by holding that Petitioners should have made an application for a maintenance permit, overruling the Claims Court's finding, consistent with *SUWA II* , discussed *infra*, that no permit was legally required. It vacated the Claims Court's findings as to physical takings resulting from the government's fencing off of Hage water sources.

The questions presented are:

1. Whether governmental agency interference with a person's ability to access and beneficially use his vested water right under threat of prosecution, in part by requiring a permit not authorized or contemplated by any statute or regulation and in derogation of the very nature of the property right, is properly analyzed as a per se taking under Loretto v. Teleprompter CATV Corp, 458 U.S. 419(1982), rather than as a regulatory taking under Penn Central Transportation Co. v. New York City, 438 U.S. 104(1978).

2. Whether the Forest Service or Bureau of Land Management can alter the congressional grant or recognition of water rights and rights-of-way pursuant to the Act of July 26, 1866 by administratively redefining the scope and purpose of the easements or by superimposing a special use permitting requirement for their maintenance.

3. Whether the fencing of water sources in which Petitioners had stockwater and other water rights, intended to and which was sufficient to prevent livestock access to the source for at least a period of time, is a physical taking subject to *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982) and *Arkansas Game and Fish Commission v. United States*, 512 U.S. ___ (2012) (slip.op.), without regard to whether some residual amount of water could escape.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

APPELLATE DECISIONS: *Estate of E. Wayne Hage, et al. v. U.S.*, 687 F.3d 1281 (Fed.Cir. 2012).

PUBLISHED COURT OF CLAIMS DECISIONS:

(1) *Hage v. United States*, 35 Fed.Cl. 147 (1996) (*Hage I*).
(2) *Hage v. United States*, 35 Fed.Cl. 737 (1996) (*Hage II*).
(3) *Hage v. United States*, 42 Fed.Cl. 249 (1998) (*Hage III*).
(4) *Hage v. United States*, 51 Fed.Cl. 570 (2002) (*Hage IV*).
(5) *Hage v. United States*, 82 Fed.Cl. 202 (2008) (*Hage V*).
(6) *Wayne Hage v. United States*, 90 Fed.Cl. 388 (2009) (*Hage VI*).
(7) *Hage v. United States*, 93 Fed.Cl. 09 (2010) (*Hage VII*).

JURISDICTION

The decision of the Court of Appeal for which certiorari is sought was entered on July 26, 2012. A combined petition for rehearing and rehearing *en banc* was denied on October 19, 2012. Jurisdiction in this Court is proper under 28 U.S.C. § 1254. Jurisdiction in the United States Court of Federal Claims is conferred by the Tucker Act, 28 U.S.C. § 1491(a)(1). Jurisdiction

before the Court of Appeal for the Federal Circuit is conferred by 28 U.S.C. § 1295(a)(3).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

> "nor shall private property be taken for public use, without just compensation."

Act of July 26, 1866, ch. 262, 14 Stat. 251, R.S. 2477, repealed at 43 U.S.C. § 932, which provides:

> "the right-of-way for the construction of highways across public lands, not reserved for public uses, is hereby granted."

Pursuant to this Court's Rule 14, the federal statutory and regulatory provisions relevant hereto are:

(1) 43 U.S.C. § 661, App. 243a-244a.
(2) 43 U.S.C. §1752(g), App. 243a-244a.
(3) 43 U.S.C. § 1701, App. 246a-253a.
(4) 16 U.S.C. 534, App. 231a.
(5) 43 U.S.C. 1761(c)(2)(A), App. 245a.
(6) 70 Fed. Reg. 20979-80 (Apr. 22, 2005), App. 232a-243a.

STATEMENT

The instant case comes to this Court after nearly 20 years of litigation before the United States Court of Federal Claims. In the course of the proceedings below, the Claims Court was required to address

important issues which have not been previously litigated or have been the sources of significant conflict among courts including, particularly, the property rights of public and private owners of rights-of-way pursuant to the Act of July 26, 1866, 43 U.S.C. § 661, once described by the 10th Circuit Court of Appeal in *Southern Utah Wilderness Alliance v. Bureau of Land Management, et al.*, 425 F.3d 735 (10th Cir. 2005) ("*SUWA II*") as being one of "the more contentious land use issues in the West". *Id.* at 740. The trial court devoted significant judicial resources to this task.

A. BACKGROUND AND FACTS

This case is part of a larger pageant in American history which began in the 1800s when the United States was expanding westward and seeking to encourage individuals and families to move westward in order to settle and economically develop the western lands. In aid of this goal, Congress enacted the Act of July 26, 1866, 43 U.S.C. § 661 ("the 1866 Act"), *inter alia*.

The 1866 Act recognized water rights acquired under state and local laws, customs, and decisions of courts and recognized and provided for, in plain, short language, two types of rights-of-way. Section 9 of the Act, codified at 43 U.S.C. § 661, App. 245a, concerned ditch rights-of-way. Section 8 of the Act recognized and provided for rights-of-way for construction of public highways. Act of July 26, 1866, ch. 262, 14 Stat. 251, R.S. 2477, repealed at 43 U.S.C. § 932. ("[T]he right-of-way for the construction of highways across

public lands, not reserved for public uses, is hereby granted.")

1. Stability of Law and Regulatory Treatment of 1866 Act Rights-of-Way

Questions about the nature of 1866 Act-connected property rights arose early, prompting this Court's intervention. *See*, e.g., *Jennison v. Kirk*, 98 U.S. 453 (1878). This court also found that the 1866 Act was a "*voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, [rather] than the establishment of a new one*." *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879) (emphasis added). This Court recognized that states may determine the rights of an appropriator of water (including conveyance of that water) and how that right interacts with federal rights to water. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950).

These cases settled the dispute over the existence and nature of 1866 Act rights-of-way. Until recently, few serious challenges to the rights of the holders of 1866 Act rights-of-way to maintain them without the further permission of federal agencies were raised, even after the enactment of the Federal Land Policy and Management Act ("FLPMA"). 43 U.S.C. § 1701, *et seq*. FLPMA authorities are subject to and did not extinguish valid, preexisting rights. 43 U.S.C. § 1701, App. 246a-53a; 43 U.S.C. § 1761(c)(2)(A), App. 245a.

2. Departures from Law and Administrative Practice

In recent decades, however, proponents of various new policies, including federal agencies, began to argue for a re-interpretation of the well-established rights of 1866 Act easement and water rights owners. This struggle is amply illustrated by this case. As the Claims Court recognized, this case arose during –

> a time of divergence between the interests of the public and those of the landowners. The common interest in development by both no longer is universally the case. As government seeks to change its policies concerning the purpose and use of public lands, private landowners have a valid claim to preserve their vested rights. Because of historic water law many of those vested rights affect and are affected by government policies. This produces a sometimes emotional conflict between deeply held and cherished values of those who have farmed and ranched for generations and those who wish to change the direction of public policy. This conflict is a drama worthy of a tragic opera with heroic characters . . .

Hage V, 82 Fed.Cl. 202, 205 (2008), App. 36a.

Set below is a very brief summary of the facts determined by the Claims Court. *See*, *Hage V*, 82 Fed.Cl. 202, 205-207 (2008), App. 38a-41a.

3. Petitioners and Pine Creek Ranch

Petitioners purchased the Pine Creek Ranch in 1978. They soon found themselves embroiled in controversy.

The Ranch was established in 1865, well before the existence of national forests and the Taylor Grazing Act. It consists of approximately 7,000 acres of patented land used primarily for grazing cattle. Raising cattle economically in such an arid region requires access to large quantities of land historically used by the ranch and subject to property interests owned by the Hages termed by the Claims Court as "split-estate" rights. *Hage IV*, 51 Fed.Cl. at 573, App. 73a. It also requires access to the limited water supply in the region.

Petitioners own rights-of-way, which are easements on federal land. Many of them were found by the Claims Court to be 1866 Act ditch rights-of-way. These ditches transport water for irrigation, stockwatering and domestic purposes. The details of the specific water rights owned by the Hages – their locations, flows, and the like – as well as which ditches owned by the Hages are 1866 Act ditches, while important to the case as a whole, are not needed to address the questions raised in this Petition. *See Hage V*, 51 Fed.Cl. 570, 578-501, 583-584 (2002), App. 83a-91a, 95a-98a.

4. Factual Summary

After purchasing Pine Creek Ranch, the Hages expended significant resources improving and maintaining the Ranch including construction of range improvements, both on the Hages' patented lands and on the allotments appurtenant to the Ranch.

In 1979, the Forest Service gave the Nevada Department of Wildlife ("NDOW") permission to release nonindigenous elk into the Table Mountain allotment area. Petitioners objected, pointing out that the elk would drink Hage water and consume forage needed for their cattle. Petitioners also informed NDOW that the hunting season for elk overlapped with the cattle grazing period and that the presence of elk impeded the grazing and movement of their livestock. NDOW dismissed these concerns. *Hage V*, 82 Fed.Cl. 206-07, App. 38a-39a. *See*, also, *Hage I*, 35 Fed.Cl. at 154, App. 161a-62a.

With the introduction of elk came numerous problems, including elk hunters tearing down fences and scattering cattle. The overlap between the grazing season and elk hunting season interfered with the Hages' ability to get cattle off Table Mountain at the end of grazing season. The Forest Service fenced off certain meadows and spring sources on the Table Mountain allotment and erected electric fences for the express purpose of excluding Petitioners' cattle from waters owned by Petitioners, as well as from the adjacent forage. *Id.*

The Forest Service began taking frequent actions against the Hages, including actions found to be harassing or based on hostility toward Petitioners. *Hage V*, 82 Fed.Cl. at 212-13 and n.10, App. 55a-56a. For example, in 1983, Petitioners received 40 letters from the Forest Service charging them with various violations. In the same year, the Forest Service paid 70 visits to Petitioners. Following the letters and visits, the Forest Service filed 22 charges against Petitioners. Many of these complaints cited issues of fence maintenance, some of them extremely minor infractions, such as a single loose fence staple. *Hage V*, 82 Fed.Cl. at 206-07, App. 39a-41a. In addition, the Forest Service insisted that Petitioners maintain their 1866 Act ditches and other water sources with nothing other than hand tools absent a permit from the Forest Service, further harassment. *Hage V*, 82 Fed.Cl. at 213 (App. 56a) and n. 10 (App. 67a). It threatened them with prosecution if they maintained their ditches without a permit. *Hage V*, 82 Fed.Cl. at 206, App. 40a.

The result of these actions was the proliferation of willows, other riparian growth, pinions, juniper, and upland vegetation upstream from Petitioners' lands, clogging the canyons. This caused a significant reduction in the water flow to the Hages' irrigated pastures. From water in the Corcoran Creek, for example, Petitioners could irrigate only 20 acres, contrasted with 80 acres in the mid-1990s. A similar proliferation of vegetation and the existence of dozens of dams built by Forest Service-introduced beavers on Barley Creek effectively stopped the flow of water to Petitioners' Haystack fields. When Petitioners purchased the Ranch, Barley Creek ditch irrigated

approximately 1,000 acres of the Haystack fields. The waters in Mosquito Creek, Pine Creek Ditch, and other creeks in which Petitioners have a vested water right showed a sharp decrease in water flow. (*Hage V*, 82 Fed.Cl. at 205, 210, 213-14, App. 40a, 48a-49a, 57a-58a.

As the Court stated in *Hage IV*, the threat of prosecution was no idle threat. The Government instituted a felony prosecution of Mr. Hage for clearing trees around the White Sage Ditch. *Hage V*, 82 Fed. Cl. at 206, App. 40a.

In 1990, the Forest Service determined that Meadow Canyon Allotment had been "overgrazed" despite evidence to the contrary and ordered Petitioners to keep off that area. Meadow Canyon had 25 miles of unfenced boundary with Monitor Valley, and cattle often drifted between the two allotments. With such a large unfenced boundary, it was nearly impossible to keep cattle from wandering onto Meadow Canyon, as the Forest Service could not have been unaware. Nevertheless, in July 1990, the Forest Service ordered Petitioners to remove all cattle from Meadow Canyon by August 10, 1990. *Hage V*, 82 Fed.Cl. 206-207, App. 40a-41a.

In August of that year, the Forest Service took a variety of additional adverse actions against the Hages, to which the Hages responded, seeking to address Forest Service complaints. The Hages attempts were unavailing and, in 1991, the Forest Service twice impounded Petitioners' livestock and sold them, keeping the proceeds of the sale. *Hage V*, 82 Fed.Cl. at 205-207, App. 40a-41a.

B. PROCEEDINGS IN THE UNITED STATES COURT OF FEDERAL C LAIMS.

On September 26, 1991, E. Wayne Hage and Jean N. Hage filed a Complaint in the United States Court of Federal Claims alleging that the Government took compensable property interests in their grazing permits, water rights, ditch rights-of-way, rangeland forage, cattle, and ranch and that were entitled to compensation for improvements they made on public rangelands. *Id*. at 207, App. 41a.

1. *Hage I - Hage III.*

The Complaint was followed by a summary judgment motion from the United States which was granted in part, denying the Hages' claims that the grazing permit itself was a contract which could be breached and a property interest subject to the Fifth Amendment's taking clause. The remainder of the issues were to be tried. *Id*. at 207, App. 41a-42a, citing *Hage II* , 35 Fed.Cl . 147 (1996).

After a two-week trial on the issue of what property was owned by the Hages, the Court issued a preliminary opinion, *Hage III*, 42 Fed.Cl. 249 (1998), App. 130a-138a, intended to "streamline and expedite post-trial briefing." *Hage III*, 42 Fed.Cl. at 249, App. 43a. The Court later rescinded *Hage III* except where it was explicitly upheld in *Hage IV*.

2. *Hage IV*

Hage IV supplanted *Hage III*. App. 69a -129a. The Claims Court made numerous findings as to Hage property. It found, *inter alia*, that the Hages owned vested water rights in various 1866 Act ditches, wells, creeks, and pipelines, as well as waters in the Monitor Valley, Ralston, and McKinney allotments including rights to 1866 Act ditches, stockwaters, and waters flowing from federal lands to Petitioners' patented lands. *Hage IV*, 51 Fed.Cl. at 576-580, App. 83a-99a.

Of great importance to this Petition for Certiorari the court found specifically that the Hages had :

> . . . *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, as explored above, 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.

Hage IV at 585-86, App. 102a. Emphasis added.

Of similar importance, the court specifically held that stockwater rights owned by the Hages could not be taken within the meaning of the Just Compensation Clause based solely on the cancellation of grazing permits. Other actions to impede access to the water were necessary. *Hage V*, 82 Fed.Cl. at 211, App. 50a-

51a; *Hage IV* at 587, n.28, App. 128a. It explicitly found that water rights owners retain a right to access and use their waters, a finding expressly upheld by the Federal Circuit. *Estate of E. Wayne Hage, et al. v. United States*, 687 F.3d 1281, 1289-1290 (Fed.Cir. 2012), App. 15a-16a.

3. *Hage V* and *Hage VI*

The remaining proceedings concerned themselves with which of the Hage water and other rights were taken, how much compensation was due, and what the interest rate should be. Final judgment was issued on August 2, 2010. *Hage* VI, 93 Fed.Cl. 709 (2010), App. 22a-23a. Fifth Amendment just compensation was awarded for the physical and regulatory taking of ditches and water rights and statutory compensation pursuant to 43 U.S.C. § 1752(g) for the cancellation of range improvement agreements .

(a) *Physical Takings*.

The Claims Court specifically found that governmental actions which prevented the Hages from accessing their 1866 Act ditches amounted to a physical taking. Referencing its decision in *Hage IV*, n.13, the court addressed the threat of prosecution *Hage V*, 82 Fed.Cl. at 208, App. 45a, ("[T]his a physical taking claim because plaintiffs argue the government has physically barred them from the land, with the threat of prosecution for trespassing if they enter federal lands to maintain their ditches"). *See*, *Hage IV*, 51 Fed.Cl. n.13, App. 123a.

The Claims Court found that a physical taking also arose when the Respondent fenced streams, ditches, and water sources as to which the Hages had water rights. The fences prevented the Hages from using their water rights, at least while they were in repair. *Hage V*, 51 Fed.Cl. at 208.

> Here, the Government did not only cancel Plaintiffs' grazing permit; it actively prevented them from accessing the water through threat of prosecution for trespassing *and* through the construction of the fences. Clearly, these actions prevented Plaintiffs' access to the water and there was plainly a "physical ouster" which deprived Plaintiffs of the use of their property.

Hage V, *supra*, 82 Fed.Cl. at 211, App. 52a. Emphasis added.

(b) Regulatory Taking.

Noting, however, that "there is no bright line between physical and regulatory takings" (*Hage V*, 81 Fed.Cl. at 208; App. 45a), the Claims Court then went on to analyze some aspects of the Hages' taking claims under the rubric of a "regulatory taking". *Id.*

The Claims Court identified the claims being analyzed as regulatory taking claims as the –

> policies promoted by the Forest Service, including brush to overgrow the stream beds and allowing beavers to establish dams in the upper reaches of streams [which] prevented

> Plaintiffs from accessing and using the water in "the upper reaches of the Hages' grazing lands . . .

and the procedures used by the Forest Service to prevent the Hages from accessing and using the waters to which they had rights and from maintaining their ditches and rights-of-way. *Hage V*, *supra*, 82 Fed.Cl. at 211, App. 45a. As will be seen below, the physical consequences of regulatory policies can give rise to *physical* takings. *Arkansas Game and Fish Commission v. United States*, 512 U.S. ___ (2012) (slip.op.).

In short, the Court held that, even though threats and fencing prevented access, other actions did so likewise.

> However, it was not only threats that kept Plaintiffs from their waters; the Forest Service informed Plaintiffs that only hand tools could be used for ditch maintenance. Defendant counters that Plaintiffs could have applied for a special use permit to perform anything beyond normal maintenance, which would include minor trimming and clearing of vegetation. *See Hage IV*, 51 Fed.Cl. at 584.

Id. App. 55a.

The Court rejected Respondent's ripeness arguments, finding that,

> (1) there was no legal requirement that Petitioners seek permission to maintain their

ditches and rights-of-way in the first instance (*Hage IV* at 585-86, App. 102a);
(2) even if this were not true, application is not required if the application process itself would be so burdensome or unreasonable as to defeat the right altogether (*Hage II*, *supra*, 35 Fed.Cl. at 164); and
(3) in the light of Forest Service hostility and harassment, the doctrine of futility applied to excuse any need that might exist to make an application.

There was no need for the Claims Court to address futility, for reasons discussed below, though its factual findings on the issue were correct.

C. PROCEEDINGS IN THE COURT OF APPEAL.

The Court of Appeal, in a decision issued on July 26, 2012, affirmed in part, reversed in part, and remanded in part, the decision of the Claims Court. A combined petition for rehearing and rehearing *en banc* were denied on October 19, 2012. App. 1a-21a.

In sum, it ruled as follows:

> The Hages' regulatory takings claim and claim for compensation pursuant to 43 U.S.C. § 1752(g) are not ripe, and we therefore vacate the Claims Court's award of damages. To the extent the Hages' claim for a physical taking relies on fences constructed in 1981-1982, this claim is untimely. To the extent the physical takings claim relies on fences constructed in 1988-1990, we reverse because there is no evidence that water was taken that the Hages could have put to beneficial use. Finally, we affirm the Claims Court's holding that the Hages are not entitled to prejudgment interest for any range improvements award because the Hages failed to identify a cognizable property interest. We remand for further proceedings consistent with this opinion.

Estate of Hage v. United States, 697 F.3d 1281, 1292 (2012).

Petitioners do not seek reversal as to the holdings on Petitioners' 43 U.S.C. § 1752(g) claims. They are likely to be mooted by the decisions of the United States District Court in Nevada in a related case, *United States v. Estate of E. Wayne Hage*, *et al.*, Case No.2:07-cv-01154 (2007), a case brought by the United States in 2007.[1] The court therein has indicated

1 Just as Respondent initiated a prosecution of Mr. Hage during the pendency of this case, it also filed *United States v. Hage* during the pendency of this case, alleging livestock trespass by the Estate of E. Wayne Hage, the Estate's executor, Wayne N. Hage, and a third Party, Colvin Cattle Co. The Estate counterclaimed, alleging a pattern and practice of misconduct by the United States intended to and/or having the effect of depriving the Estate of its constitutional rights and improperly interfering with its legitimate business relationships. Much of the same evidence in this case was introduced in Nevada. Trial was held in the spring of 2012 and concluded. A written decision has not yet issued, but among its preliminary findings of fact and conclusions of law at the close of trial, the trial court concluded in its separate findings that the Forest Service and BLM had entered into a conspiracy against the Hages in the late 1970s and early 1980s continuing to the present.

that its final order will include a requirement that the United States reinstate the cooperative agreements it cancelled, which cancellation was the basis for the Petitioners' 43 U.S.C. § 1752(g) claims. Petitioners herein, therefore, will focus their description of the proceedings before the Court of Appeal on the remaining issues.

1. Undisturbed Findings.

It is important to note at least some of what the Court of Appeal did *not* do. It did not disturb the Claims Court's findings as to what water rights and 1866 ditch rights-of-way were established as belonging to the Hages. It did not disturb the court's findings as to the physical dimensions of the rights-of-way or appurtenant rights found to exist.

It likewise did not disturb the trial court's determinations as to the diminution in water flows to Hage patented lands. It left alone the finding that the Hages' livestock were lawfully on the allotments where and when Respondent erected fences and threatened prosecution. It left alone the Claims Court's findings that maintenance of ditches and water sources with hand tools was infeasible. It did not disturb the Claims Court's findings on the diminution of water reaching irrigated lands as a result of the government's actions or the valuation of any of the takings found by the Claims Court.

Transcript of Proceedings, *United States v. Estate of E. Wayne Hage* (Nev. Dist, Case No. No.2:07-cv-01154 (2007)), App. 276a, 282a. These findings are consistent with the Claims Courts findings as to the harassing actions of the Forest Service.

Similarly, it did not reverse the Claims Court's findings of hostility toward and harassment of the Hages. It simply disagreed with the Claims Court's findings that these facts supported a finding of futility regarding application for a special use permit to maintain their ditches and rights-of-way.

Finally, the appellate court did not address the physical ouster findings of the Claims Court based on Respondent's actions *other* than the erection of fences. It did not reverse or vacate any of the Claims Court's findings that threats of prosecution and the like amounted to a physical taking, with or without fences.

All of these findings, and others not disturbed by the Court of Appeal, are as applicable to the determinations of Petitioners property rights and physical takings claims as well as the regulatory takings claims. As a result, the vacating of certain findings by the appellate court does not render the undisturbed factual findings irrelevant to what remains.

2. Regulatory Claims.

The Appellate Court vacated the Claims Court's award of damages on the ground that the regulatory takings claims were not ripe. It began its analysis of the ripeness of the regulatory takings claims by ruling that a final decision on a permit application was needed for ripeness purposes. *Estate of Hage*, *supra*, 687 F.3d at 1286, App. 8a.

The Court next characterized the Claims Court's holding regarding the regulatory taking claims, noted that –

> [t]he Claims Court recognized that rights-of-way that run over federal land may be subject to reasonable regulation, such as requiring special use permits to perform certain ditch maintenance. *Id.* at 212 (citing *Hage v. United States*, 51 Fed.Cl. 570, 584 (2002)). The court concluded, however, that the Hages did not have to apply for a permit since it would "clearly have been futile," and that "[b]ased on the history between the Forest Service and [the Hages], the special use permit requirement for ditch maintenance rises to the level of a prohibition, and is therefore a taking of their property rights." *Id.* at 213.

Estate of Hage, *supra*, 687 F.3d 1286-87, App. 9a.

As noted above, the appellate court disagreed with the Claims Court's conclusion of futility because all prior harassing and hostile conduct involved types of permits other than maintenance permits. ("The Hages fail to explain how disputes concerning their grazing permits would lead the Forest Service to deny them special use permits to maintain their irrigation ditches." *Estate of Hage*, 687 F.3d at 1287-1288, App. 10a. The appellate court's reweighing of the evidence violates *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). However, it need not have reached this issue in the first instance for reasons discussed below.

3. Physical Taking Claims

The Court next turned its attention to the issue of physical takings of ditches and water rights. It explicitly confined its reversal of the physical takings holdings to the findings by the Claims Court that the erection of fences by the United States caused a physical taking. *Id.* at 1289-90, 1292, App. 15a-16a, 20a-21a. It did not reverse the findings of the Claims Court that other actions of the United States amounted to a functional physical ouster as discussed.

The appellate court divided the fence issues into two categories: (1) those fences erected between 1981 and 1982; and (2) those erected subsequently. *Id.* at 1289-90, App. 13a-15a. The Court found claims involving fences in the former category to be barred by the applicable statute of limitations (*id.*), and reversed the finding of takings as to fences covered in the second category, stating that –

> [t]he Hages' claim, however, is flawed because there is no evidence that the government actually took water that they could have put to beneficial use. For example, the Hages do not allege or point to evidence that the fences prevented the water from reaching their land. Likewise, the Hages do not allege that there was insufficient water for their cattle on the allotments or that they could have put more water to use. Because there is no evidence that the government's actions resulted in taking the Hages' water rights, the Claims Court erred in

holding that the construction of fences amounted to a physical taking.

Id. at 1290, App. 16a. This, however, is incorrect.

REASONS FOR GRANTING THE PETITION

A. The Questions Presented Are of Great Public Significance.

A grant of certiorari is appropriate in this case because: (a) the underlying issues are of great public significance; (b) the holdings of the appellate court are in respects both in conflict with the holdings of this court and also create a conflict among circuits; (c) the case raises issues not dealt with by this Court previously.

1. Conflict Among Circuits.

The appellate court's holdings conflict with at least one other circuit by holding that the Hages were required to seek permission from federal agencies before they could maintain their 1866 Act ditches and rights-of-way.

The Claims Court noted that rights-of-way that run over federal land *may* be subject to reasonable regulation, such as requiring special use permits to perform certain ditch maintenance *when necessary* (*Hage IV*, 51 Fed.Cl. at 211-213, App. 99a) (emphasis added). It then found, however, that such a permit is *not* necessary for maintenance of *1866 Act rights-of-way* so long as confined to the scope and purpose of the rights-of-way. *Hage IV*, 51 Fed.Cl. at 585-86, App.

102a. ("[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.")

It also found that the agencies lacked the authority to define or redefine the scope of 1866 Act rights-of-way, i.e. to alter the terms of a federal grant or to decide what constitutes normal maintenance and use. *Id.*, App. 100a-102a, citing this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000).

These decisions by the Claims Court are consistent with the 2005 decision of the United States Court of Appeal for the 10th Circuit in *SUWA II* which found both that no permit was required for access to and maintenance of 1866 Act highway rights-of-way so long the access and maintenance activities are consistent with the purpose and within the scope of the right-of-way (*SUWA II*, *supra*, 425 F.3d at 745), and that courts have primary jurisdiction over such questions (*SUWA II*, *supra*, 425 F.3d at 757). If the right-of-way owner intends to make any "improvements beyond routine maintenance" he must "consult" with BLM. *Id.* at 745.

The appellate court, however, overruled the Claims Court's findings on these issues, holding instead that 1866 Act right-of-way owners must attempt to obtain a permit under *Penn Central* even to merely repair and maintain before litigating. This holding seriously conflicts with *SUWA II* as well as even the agencies' historic practices and understanding of the law with respect to these rights-of-way.

2. Why this Conflict Between the Federal Circuit and the 10th Circuit is of Great Importance.

Many, if not most, of the roads on which the commerce and traffic of the West is carried out are located on what were established as 1866 Act highway rights-of-way.[2] 1866 Act ditch rights-of-way carry water to individual water rights owners, landowners and even communities throughout the West. Undisturbed access to and maintenance of these rights-of-way ensures uninterrupted use of the waters for domestic, commercial and agricultural uses as well as consumptive and other municipal purposes such as fire prevention, firefighting, medical treatment, sewage disposal, and the provision of other vital services. The ability of everyone owning and using waters carried by these rights-of-way – as well as the protection of public health, safety, welfare and commerce within entire communities, counties and states in the West – depend upon clear, stable, and proper interpretation and understanding of the laws governing such rights-of-way.

A conflict between Circuit Courts over 1866 Act rights-of-way such as this is not unusual. For example, Squires notes that –

2 From its enactment in 1866 to its repeal in 1976, R.S. 2477 alone vested tens of thousands of rights-of-way across federal lands in the states and counties, arguably more than five thousand in Utah alone, a probable underestimate. U.S. Dep't of the Interior, *Report to Congress on R.S. 2477: The History and Management of R.S. 2477 Right-of-Way Claims on Federal and Other Lands* 29 (1993). This number does not even begin to include 1866 Act ditch rights-of-way.

> [t]he two circuits that contain the most federal lands within their jurisdictions, the Ninth and Tenth Circuits, have taken markedly different approaches in dealing with the applicability of state law to R.S. 2477 claims . . . Based on current case law, therefore, federal land managers in the Tenth Circuit can expect courts to apply state common law in determining whether counties and states own R.S. 2477 rights-of-way and what they may do on them. Land managers in the Ninth Circuit still cannot be sure whether courts will follow the Tenth Circuit's approach.

Squires, *Federal Regulation of R.S. 2477 Rights-of-Way*, 63 N.Y.U. Ann. Surv. Am. L. 547, 552-553 (2008).

The conflict between the circuits arose because the agencies have abandoned their long-held acknowledgment of the rights of 1866 Act right-of-way holders. They now assert a claim of primary authority to determine who owns such rights-of-way and to determine what may be done within such rights-of-way. They also assert a right to impose permitting requirements that they historically understood they lacked. Acceptance of these assertions by the appellate court in this case places control over western water resources in the hands of the agencies and provides opportunity for agency and third party mischief.

Litigation currently pending between the United States and the City of Tombstone, Arizona, is illustrative. As in *Hage*, the Forest Service is demanding that Tombstone obtain a federal permit to

maintain its 130-year-old water rights-of-way and imposing a hand tool limitation on that maintenance, a requirement inconsistent with historic practice. Emergency Motion of City of Tombstone, *City of Tombstone v. United States, et al.*, (Ninth Circuit Case No. 12-16172), App. 256a.

The ultimate decision as to whether a taking occurred in this case, standing alone, is certainly important to the specific litigants in this case. However, the underlying and necessary preliminary decision here, whether a federal agency has the authority to impose a permitting requirement on the repair and maintenance of 1866 Act rights-of-way to assure the continued flow of water in the case of a ditch, or to move about in the west, in the case of R.S. 2477 rights-of-way, is of critical importance to all. The issue of management of 1866 Act rights-of-way is among "the more contentious land use issues in the West". *Southern Utah Wilderness Alliance v. Bureau of Land Management, et al.*, 425 F.3d 735, 740 (10th Cir. 2005) ("*SUWA II*".)

3. The Conflict Between the 10th Circuit and *Hage*.

The 10th Circuit Court of Appeal was confronted by this change in agency attitudes in *SUWA II*. It emerged after well over 100 years of historic understanding and acceptance of the laws that pertain to 1866 Act rights-of-way by the agencies. As the *SUWA II* court itself noted, the Bureau of Land Management ("BLM") was aware of this limitation on its authority and acted accordingly until recently. *See*,

e.g., *SUWA II*, 425 F.3d at 755-756. *See*, also, 70 Fed.Reg. 20979-80 (Apr. 22, 2005), App. 237a-238a.

> 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.

Id. (emphasis added).

The BLM and the Forest Service seek to break free from their statutory limitations by administrative fiat. *Hage v. United States* is one glaring example of such a departure on the part of the Forest Service. *SUWA II* itself is a glaring example of such a departure by the BLM. *Tombstone v. United States* is an example

of a departure by the Forest Service yet again. These departures have thrown individuals, businesses, and entire states and communities into uncertainty and have created hardship and chaos.

(a) Impacts of Conflict on Right-of-Way Owners and the Public.

In this case, the Forest Service not only engaged in harassing behavior against the Hages, it ignored long accepted law and historic practice described above. It threatened the Hages with prosecution if they did not accede to its demand that the Hages obtain such a permit. The result was an injury to the Hages of millions of dollars for the deprivation of their water rights and the destruction of their ditches. *Hage VII* , 93 Fed.Cl. 709 (2010), App. 22a-23a. These results affect not only the Hages, however. They also affect the economies of the State of Nevada and local communities.

In *City of Tombstone*, *supra*, the Forest Service is attempting to impose a permitting requirement on the City's historic maintenance and repair of its municipal water transport system. If Petitioners are correct it cannot do so, but the attempt is exposing the city to potentially devastating public health and safety catastrophes. The City's attempts to deal with the Forest Service, as of the time of the filing of its Emergency Motion, had extended over nine months and is still not resolved. *See*, App. 255a-56a. Petitioners are not suggesting Tombstone should be

decided by this Court, but include it as an illustration of the problem presented.

(b) Impact on Congressional Interests.

Congress itself is concerned by the attempts of federal agencies to impose their views on 1866 Act rights-of-way. It took action to rein in agency zeal in 1996 appropriations legislation, forbidding the agencies to impose regulations pertaining to the recognition, management, or validity of 1866 Act highway rights-of-way, the issue of highest visibility at the time.

> Sec. 108. No final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.

Pub. L. 104-208, div. A, title I, § 101(d) [title I, § 108], Sept. 30, 1996, 110 Stat. 3009-181, 3009-200. *See*, *also*, *SUWA II*, 425 F.3d at 756-757. Section 108 has not been repealed.

The agencies, however, have not promulgated regulations in defiance of § 108, but have simply asserted that such permits are required and threaten owners with sanctions if their assertions are not accepted.[3] This Court's intervention is thus necessary

3 Neither the Hages nor Tombstone, nor any other party need simply accept an agency's claim of authority. It is "well

to provide a stable and consistent understanding of applicable law involving the rights of 1866 Act right-of-way owners.

B. The Questions Presented Raise Issues Not Addressed by This Court Previously.

Certiorari is appropriate as well because at least some of the issues raised herein have not yet been addressed by this Court. Petitioners respectfully submit that *Loretto v. Teleprompter CATV Corp.*, *supra*, 458 U.S. 419 (1982) rather than *Penn Central*, *supra*, provides the appropriate analytical framework and that the takings are more properly considered *per se* takings.

1. The Regulatory Takings Claims and the Property Rights at Issue Herein

The appellate court's application of *Penn Central Transportation Co.*, *supra*, 438 U.S. 104 (1978), to hold that the regulatory claim was not ripe in this case fails to account for several important factors in a number of ways, particularly by –

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established that anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947). The individual in *Merrill* accepted the government's word when to do so would benefit him, but the same is true when accepting the word of the government official would result in unnecessary burdens and harm. *See*, e.g., *Sackett, et vir. v. Environmental Protection Agency*, Slip Op., 566 U.S. ___ (2012).

(1) Treating as regulatory claims those that were actually physical taking claims. Futility is irrelevant to *per se* takings;

(2) Requiring Petitioner to obtain a permit where no obligation to seek permission exists; if no permit could be required, whether applying for one would be futile is irrelevant;

(3) Focusing on the wrong agency decision and applying the wrong analytical framework to determine whether the taking claims were ripe. The decision to threaten prosecution, i.e., to enforce the asserted power to require a permit, was the final agency action, not the potential outcome of a permit application. This only compounded the problem caused by the appellate court's rejection of the trial court's finding of futility;

(4) Failing to account for both the unique nature of the property interest at issue and the correspondingly unique effect of the governmental interference on that property interest. Together, these four considerations raise questions that have not yet been addressed by this Court. The third and fourth reasons are actually two sides of the same coin. Petitioners will address these issues beginning with the third and fourth reasons.

(a) Nature of the Property Interests.

The Claims Court recognized one property interest that sets this case apart from the average Fifth Amendment taking case. This case is "atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and

flows throughout the year." *Hage IV*, 51 Fed.Cl. at 573, App. 72a. This is not the only property interest involved herein that makes this case atypical. Existing easements do likewise.

In most inverse condemnation cases involving rights-of-way the question is whether the governmental entity involved has *acquired* a new easement, permanent or temporary, from the plaintiff. *See*, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Arkansas Game and Fish Commission, supra,* 512 U.S. ___ (2012) (slip.op.). In *this* case, at least one question is whether *existing* easements owned by Petitioners were taken. This involves very different, and not previously litigated, considerations. These differences are not trivial.

(b) Application of *Penn Central.*

The appellate court cites *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and decisions applying *Penn Central* for the regulatory takings test it adopts and for the proposition that a regulatory taking cannot be found until a permit application has been made and acted upon.

> A final decision is necessary because "[e]valuating whether the regulations effect a taking requires knowing to a reasonable degree of certainty what limitations the agency will, pursuant to regulations, place on the property." Accordingly, "when an agency provides procedures for obtaining a final decision, a takings claim is *unlikely* to be ripe until the property owner complies with those procedures."

Estate of E. Wayne Hage, 687 F.3d at 1286, App. 8a. Internal cites omitted, emphasis added.

Not only did the appellate court overlook important factors not previously addressed by this Court, it misidentified the decision at issue which relates to ripeness, even were ripeness a factor.

Penn Central has its proper application in typical regulatory takings cases which involve properties which may be put to a variety of uses and in which the ultimate question is "what's left for the property owner"? One can arguably answer this question only when the regulation has been as fully applied as it is going to be. Therefore, the *Penn Central* court posited a three part test: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id.* *Penn Central*, 438 U.S. 104, 124 (1978). The trial court addressed all of these issues. *Hage V*, 82 Fed.Cl. at 212, App. 54a-55a. Looking solely at the last factor, the appellate court here reasoned that absent an application on a permit, this analysis could not be held because the impact of the action could not be known. *Estate of E. Wayne Hage*, 687 Fed.3d at 1286.

This case is quantitatively and qualitatively different from that in *Penn Central.* The property in

this instance, the right-of-way for water conveyance, has only one use within its scope, the conveyance of water, just as other rights-of-way are limited. A highway right-of-way is used only for transportation and a driveway easement is used only for access. Property in classic regulatory takings cases might support factories, amusement parks, and residential uses, *inter alia*, but are limited by regulation to only one or a few of these uses. Easements have only their single use. The *only* characteristic that makes them *property* and distinguishes rights-of-way from a mere license or privilege, is that they are *rights*-of-way. By definition, an easement holder requires no permission from some third party to make use of his right-of-way unless there are limiting conditions in the grant itself.

It is this fact that distinguishes the taking in this case from that in *Penn Central* and other regulatory takings cases. When the government acts in other regulatory situations, it does not automatically and inevitably demolish all uses of the property rights involved. In this case, however, Respondent did so the moment it deigned to put its asserted power into practice by, among other things, threatening the Hages with prosecution if they exercised their congressionally-recognized rights.

In fact, the situation faced by the Hages with respect to the ditch rights-of-way in question is far more properly classified as a physical invasion and occupancy case such as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). This is true even though the physical impacts on the Hages' property were the result of, as the Claims Court put it,

regulatory policies. The same was true in *Arkansas Game and Fish Commission*, *supra*, 512 U.S. ___ (2012) (slip.op.) in which no direct action was taken against the landowner. Corps regulatory policies resulted in a physical interference giving rise to a physical taking, even though temporary and intermittent. *See*, also, *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008).

The Claims Court recognized this when it characterized the nature of the taking based on the threat of prosecution (later carried out) as a physical taking, being the functional equivalent of a physical ouster. As the Claims Court pointed out, "there are two categories of per se taking in which a balancing is not necessary." *Hage V*, 82 Fed.Cl. at 208, App. 46a.

> The first encompasses regulations that compel the property owner to suffer a physical invasion of his property. *Lucas*, 505 U.S. at 1015, 112 S.Ct. 2886. When an owner has suffered a destruction of his property through a regulation, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.*, see also *Loretto*, 458 U.S. 419, 435-440, 102 S.Ct. 3164 (1982). The second situation is when the regulation "denies all economically beneficial or productive use of the land." *Id.*

Id., App. 46a.

The "regulatory" taking claims in this case, if they are regulatory rather than physical, involve the

"destruction of Hage property." The instant that an assertion of the claim of power to require permission for the use of that right-of-way from a third party is actually enforced the right-of-way ceases to be a right-of-way and becomes a "permission-of-way."

In short, when the Forest Service turned its potential to destroy the Hages property rights to an actual imposition of its asserted power, it appropriated that property within the meaning of *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), *supra*, and *Loretto*, *supra*. It does not matter one whit whether the permit is granted and it does not matter in the slightest whether it is granted without imposition of the kind, duration, or intensity of use permitted. It is the fact that permission is now required which gives rise to the taking. Once this happens, the impact of the enforcement of the asserted power *on the property interest* is known and known with complete certainty – it is destruction of the right-of-way so long as the power is enforced.

Further, once the United States threatened prosecution, it committed a physical ouster as the Claims Court found, every bit as much as if it had installed a physical barrier or placed guards. In *Loretto*, the court found physical intrusions, however minimal and however important the public purpose, to be a taking *per se*. *Id*. 458 U.S. at 435, 441. It is such a taking because "the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id*. at 435. So too here. The Hages' only strand of ownership, the right to enter onto and to use

and maintain his right-of-way within the scope of the right-of-way has been usurped. Nothing is left to them so long as the interference continues. The threat of prosecution is, for all intents and purposes, a physical ouster, no less so because it came in the form of a written document. It was the equivalent of interposing a gate or fence around the property, or in posting a no trespass sign around the property.

3. Physical Takings by Fences.

The appeal decision concluded that the fencing of the Hages' water sources was not a physical taking because there is no evidence that the government actually took water that the Hages could have put to beneficial use, arguing –

> [f]or example, the Hages do not allege or point to evidence that the fences prevented the water from reaching their land. Likewise, the Hages do not allege that there was insufficient water for their cattle on the allotments or that they could have put more water to use. Because there is no evidence that the government's actions resulted in taking the Hages' water rights, the Claims Court erred in holding that the construction of fences amounted to a physical taking.

Estate of Hage, *supra*, 687 F.3d at 1290, App. 16a.

Most important for this Petition, however, is the fact that this is a physical taking, properly analyzed under *Loretto*, *supra*, 458 U.S. 419 (1982).[4]

As discussed, in *Loretto*, *supra*, physical invasion or occupancy of property is a *per se* taking to the extent of the invasion without regard to the amount of the taking, the impact on the property owner, the importance of the public interest, or even the value taken. *Loretto*, *supra*, 458 U.S. at 435. It does not, therefore, matter whether some small trickle of water escaped from time to time. That can affect only the amount of compensation due. Likewise, it does not matter whether the interference was temporary intermittent rather than permanent and continuous. *See*, *Arkansas Game and Fish Commission v. United States*, 512 U.S. ___ (2012) (slip.op.) at 8-10, 14.

The source of the water, the place of use, and the time of use are integral elements of the water right. If the source and the place of use were fenced off, as the appeal decision conceded, with either the purpose or

4 Petitioners note, however, that in fact the Claims Court made specific and extensive evidence-based findings that, inter alia: (1) water flow to private lands was substantially decreased (Hage V, 82 Fed.Cl. at 205, 210, 213-14, App. 40a, 48a-49a, 57a-58a), thus quantifying the amount of water taken to which an irrigation right existed; (2) the waters could have been put to beneficial use but for the government's actions for agricultural purposes including sale of those rights (id., App. 49a-50a); and (3) the livestock that used the waters were authorized to be present on the allotments at the time (Hage V, 82 Fed.Cl. at 211, App. 52a) and the whole purpose and design of the fences, as already discussed, was to keep them off the water sources. It also overlooks the fact that the Claims Court personally inspected the ranch and could conclude for itself the efficacy of the fences while they stood intact.

the effect of barring Petitioners livestock from waters to which they have a stock watering right and/or preventing them from maintaining the free flow of their water source, then a physical invasion and occupancy arising to the level of a taking occurred to the extent of the interference.

Further, it does not matter that the Hages might have gone elsewhere to find other water for their livestock. This is like suggesting that a person who has two houses has not had one taken when the government fences it off and prevents access to it because he can, after all, go to the other house. As the Claims Court pointed out, the nature of the property interest at issue, atypical of a taking case, is the right of the Hages to use their water where, when, and in the amounts they were entitled to and were prevented from doing so. That right, petitioners submit, cannot be disparaged by pointing out that they might have obtained other water elsewhere.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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United States Court of Appeals for the Federal Circuit

THE ESTATE OF E. WAYNE HAGE AND THE ESTATE OF JEAN N. HAGE,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

2011-5001, -5013

Appeals from the United States Court of Federal Claims in case no. 91-CV-1470, Senior Judge Loren A. Smith.

Decided: July 26, 2012

LYMAN D. BEDFORD, Clausen Law Group, of Pt. Rich-mond, California, argued for plaintiffs-cross appellants. With him on the brief was MICHAEL J. VAN ZANDT, Hanson Bridget LLP, of San Francisco, California.

ELIZABETH ANN PETERSON, Environment and Natural Resources Division, Appellate Section, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With her on the brief was IGNACIA S. MORENO, Assistant Attorney General.

JOSEPH FELLER, Natural Resources Law Clinic, University of Colorado, of Boulder, Colorado, for

amicus curiae, State of Nevada, Department of Wildlife, et al.

BRIAN T. HODGES, Pacific Legal Foundation, of Bellevue, Washington, for amicus curiae Pacific Legal Foundation. With him on the brief was JAMES S. BURLING, of Sacramento, California.

Before LOURIE, LINN, and MOORE, *Circuit Judges*. MOORE, *Circuit Judge*.

E. Wayne Hage and Jean Hage brought an action against the United States, seeking compensation for a Fifth Amendment taking of private property, breach of contract, and range improvements pursuant to 43 U.S.C. § 1752(g). The Court of Federal Claims (Claims Court) awarded compensation for the taking of water rights plus interest from the date of the taking. The Claims Court also awarded compensation for range improvements, but did not award any corresponding pre-judgment interest. For the reasons set forth below, we *affirm-in-part*, *reverse-in-part*, *vacate-in-part*, and *remand* for proceedings consistent with this opinion.

BACKGROUND

In 1978, E. Wayne Hage and Jean Hage acquired a ranching operation in Nevada that occupied approximately 7,000 acres of private land and used approximately 752,000 acres of adjoining federal lands under grazing permits from the Forest Service and the Bureau of Land Management.[1] The Hages' predecessors in interest to the land acquired water rights under Nevada state law in streams and ditches

now located on federal lands. *See* Act of July 26, 1866 (43 U.S.C. § 661).

Shortly after the Hages acquired the ranching operation, disputes arose between the Hages and the government concerning the nature and scope of the Hages' water rights and grazing permits. For example, the Hages objected to the Forest Service allowing the Nevada Department of Wildlife to release non-indigenous elk onto federal land for which the Hages had grazing permits on the ground that the elk reduced the available forage and water. The introduction of the elk caused other problems as well, such as fence damage and scattering of the Hages' cattle on the allotments.

As early as 1978, the Forest Service observed unauthorized grazing by the Hages' cattle, and made several requests that the cattle be moved. J.A. 569. This continued for several years. J.A. 570-73. The Forest Service also notified the Hages of issues relating to fence maintenance pursuant to their grazing permits. J.A. 1022. In 1983, for example, the Hages received approximately forty letters and seventy visits from the Forest Service charging them with various violations related to their grazing permits. *Id.*

In June 1990, the Forest Service informed the Hages of a twenty percent suspension of permitted cattle on their Table Mountain allotment during the 1990 grazing season due to the Hages' lack of livestock control and excess use on the allotment after the permitted grazing season in 1988. J.A. 1249-51. The Forest Service also notified the Hages that they were

required to place a minimum number of cattle on the allotment, and notify the Forest Service prior to placing any cattle on the allotment. J.A. 1246-47. The Hages placed less than the minimum number of cattle on the allotment and failed to notify the Forest Service beforehand. J.A. 1248. The Forest Service notified the Hages of their non-compliance and ordered them to remove the cattle by September 21, 1990, which was after the end of the Hages' permitted season. *Id.* After requesting the Hages to "show cause" why a portion of the remaining permitted cattle should not be suspended due to the repeated violations, the Forest Service canceled some of the remaining permitted cattle rights for two years. J.A. 1249-52, 1254-55.

During the 1990 grazing season, the Forest Service also instructed the Hages to remove all of their permitted cattle from the Meadow Canyon allotment due to over-grazing. J.A. 301. Mr. Hage testified that it was impossible to keep the cattle off Meadow Canyon due to a twenty-five mile largely unfenced boundary between the sur-rounding land and the allotment. J.A. 1040-41. After an administrative appeal to stay this requirement was denied, Mr. Hage tried unsuccessfully to remove the cattle. J.A. 1042. Because of the continued violation, the Forest Service permanently canceled thirty-eight percent of the Hages' permitted cattle rights and suspended all grazing on the Meadow Canyon allotment for five years beginning with the 1991 grazing season. J.A. 373-88. After sending at least two notices of intent to impound cattle found on the Meadow Canyon allotment, J.A. 1256, 1265, the Forest Service eventually impounded the Hages' cattle, J.A. 1260-61, and later sold them, J.A. 367, after the Hages

were unable to pay the costs of the impoundment, J.A. 1045.

Disputes also arose between the Hages and the government concerning maintenance of the Hages' ditch rights of way on federal lands. Shortly after the Hages acquired the ranch, they became aware of the require-ment to take out special use permits to perform ditch maintenance. J.A. 856-57. The Hages asked for and received special use permits until early 1986. J.A. 778, 805-08. The Hages, however, stopped applying for special use permits because they no longer believed they were necessary. J.A. 778, 857-58. Mr. Hage testified that a ranger informed him he no longer needed to apply for a special use permit, and that the Forest Service manual stated the same. J.A. 857, 1028. Even though the Forest Service continued to demand that the Hages apply for a special use permit, J.A. 1029, the Hages performed ditch maintenance without applying for any special use per-mits, J.A. 1029-30.

Around 1990, Mr. Hage hired a woodcutter to clear trees along a ditch right of way on federal land. J.A. 1030. The Forest Service sent Mr. Hage a letter notifying him that "damaging or removing natural features . . . and maintaining improvements without proper authorization are criminal acts, punishable by a up to a $5000 fine and/or 6 months imprisonment." J.A. 1281. The letter also reminded Mr. Hage that the Forest Service previously notified him of the special use requirement. *Id.* Mr. Hage was subsequently prosecuted and convicted for damaging and removing government property (the trees). *United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994). The conviction, however, was overturned on the ground of inadequate

proof of the value of the property damaged and removed. *Id.* at 651.

In 1991, the Hages filed suit against the United States alleging a Fifth Amendment taking of private property, a right to compensation for range improvements pursuant to 43 U.S.C. § 1752(g), and breach of contract. After almost twenty years of litigation, including two trials and several opinions by the Claims Court, the court awarded the Hages compensation for 1) a regulatory taking of their water rights, 2) a physical taking of their water rights, and 3) range improvements under 43 U.S.C. § 1752(g). *Estate of Hage v. United States*, 82 Fed. Cl. 202 (2008) (*Hage V*). The court awarded pre-judgment interest for the takings claims, but did not award pre-judgment interest for the range improvements award. *Estate of Hage v. United States*, No. 91-1470L, slip op. at 5 (Fed. Cl. June 9, 2010). The government appeals each award, including the amount of just compensation awarded, and the Hages cross-appeal for pre-judgment interest on the range improvements award. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

Whether a compensable taking has occurred is a ques-tion of law based on factual underpinnings. *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (citing *Alves v. United States*, 133 F.3d 1454, 1456 (Fed. Cir. 1998)). We review the Claims Court's legal conclusions *de novo* and its fact findings for clear error. *Holland v. United States*, 621 F.3d 1366, 1374 (Fed. Cir. 2010). Whether the Claims Court has jurisdiction is a legal issue reviewed *de novo*. *W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003). The

Claims Court "does not have jurisdiction over claims that are not ripe." *Morris v. United States*, 392 F.3d 1372, 1375 (Fed. Cir. 2004) (citing *Howard W. Heck & Assocs., Inc. v. United States*, 134 F.3d 1468 (Fed. Cir. 1998)).

The Fifth Amendment provides that private property shall not be taken "for public use, without just compensa-tion." U.S. Const. amend. V, cl.4. There are two kinds of takings under the Fifth Amendment: physical takings and regulatory takings. *Washoe Cnty. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014-15 (1992)). A physical taking generally occurs by "a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (citations omitted). A regulatory taking 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) (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922)). These two types of takings are subject to different analyses.

We employ a two-part test to determine whether governmental action constitutes a physical taking without just compensation: 1) we determine "whether the claim-ant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking," and 2) if so, we determine "whether that property interest was 'taken.'" *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (citations omitted). "[W]e do not reach this second step without first identifying a cognizable

property interest." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

Regulatory takings are generally evaluated using the multi-factor test from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The *Penn Central* test involves analyzing: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id.*

A regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). A final decision is necessary because "[e]valuating whether the regulations effect a taking requires knowing to a reason-able degree of certainty what limitations the agency will, pursuant to regulations, place on the property." *Morris v. United States*, 392 F.3d 1372, 1376 (Fed. Cir. 2004) (citing *MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 350-51 (1986)). Accordingly, "when an agency provides procedures for obtaining a final decision, a takings claim is unlikely to be ripe until the property owner complies with those procedures." *Id.* (citing *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999)).

I. Regulatory Taking

The Claims Court held there was a regulatory taking of the Hages' water rights when the Forest Service al-lowed vegetation to accumulate in streams

and prevented the Hages from performing maintenance on the stream channels and ditch rights of way. *Hage V*, 82 Fed. Cl. at 211-13. The Claims Court recognized that rights of way that run over federal land may be subject to reasonable regulation, such as requiring special use permits to per-form certain ditch maintenance. *Id.* at 212 (citing *Hage v. United States*, 51 Fed. Cl. 570, 584 (2002)). The court concluded, however, that the Hages did not have to apply for a permit since it would "clearly have been futile," and that "[b]ased on the history between the Forest Service and [the Hages], the special use permit requirement for ditch maintenance rises to the level of a prohibition, and is therefore a taking of their property rights." *Id.* at 213. The court also found that the Forest Service allowed the Hages to use only hand tools for ditch maintenance and concluded that this "prevented all effective maintenance." *Id.* at 212-13.

The government argues that the Hages' regulatory takings claim is not ripe because the Hages failed to seek a special use permit to maintain their irrigation ditches. Appellant's Br. 32. The government notes that all of the Hages' prior applications were granted, and that the Hages deliberately decided not to apply for a permit, which led to Mr. Hage's prosecution. *Id.* The government argues that the futility exception does not apply since a plaintiff must previously have been denied a permit and there must be evidence that further requests would be treated similarly. Appellant's Reply Br. 9.

The Hages argue that it would have been futile to apply for a permit based on their contentious history with the Forest Service. Cross-Appellants' Br. 22. The

Hages note that the government did not present evidence that a permit would have been granted, or that one was even necessary to maintain an 1866 Act ditch that preexisted the Forest Service. *Id.* They also argue that there is no requirement to seek permission for construction and maintenance of 1866 Act ditches because those rights are "specifically reserved." *Id.* at 29 (citing 43 U.S.C. § 661). Under Nevada law, according to the Hages, an appropriator of water has the "absolute right" to go onto another's land to clear obstructions in the natural channel that interferes with the water. *Id.* at 30. The Hages also argue that the hand tool requirement prevented all effective ditch maintenance. *Id.* at 22.

We hold that the Claims Court erred in holding that the Hages' regulatory takings claim was ripe. While the Hages claim that it would have been futile to apply for a special use permit based on their history with the Forest Service, the majority of the evidence showing disputes between the Hages and the Forest Service related to the Hages' *grazing* permits. The Hages fail to explain how disputes concerning their grazing permits would lead the Forest Service to deny them special use permits to main-tain their irrigation ditches. In fact, these disputes did not prevent the Forest Service from granting the Hages' applications for special use permits. The grazing disputes began in 1978 and continued through the 1990s, *see, e.g.*, J.A. 569-73, 1246-51, but the Forest Service still granted *every special use permit* for which the Hages applied, *see* J.A. 778, 805-08, 856-57. There is no evidence that these disputes would lead the Forest Service to deny special use permits after 1986 (when the Hages unilaterally decided to stop applying). There is also no evidence that

suggests the Hages stopped applying for special use permits be-cause they expected that the Forest Service would deny the permits. Instead, Mr. Hage explained that he stopped applying for special use permits because he no longer believed they were necessary. J.A. 857-58.

Nor does the record support the Hages' contention that disputes regarding ditch maintenance would lead the Forest Service to deny them permits. The only evidence of a dispute concerning ditch maintenance is the letter threatening prosecution of Mr. Hage and the actual prosecution of Mr. Hage. This, however, was a result of Mr. Hage's failure to apply for a special use permit. The letter, for example, states that "maintaining improvements *without proper authorization*" is a criminal act, punishable by fine and/or imprisonment. J.A. 1281 (emphasis added). Although Mr. Hage's conviction was overturned, it was on the basis of inadequate proof of the value of the trees damaged and removed and not because a special use permit was unnecessary. *Seaman*, 18 F.3d at 651. There is no evidence suggesting that the disputes between the Forest Service and the Hages would cause the Forest Service to deny the Hages special use permits to perform ditch maintenance.

We also reject the Hages' contention that the Forest Service limited ditch maintenance to hand tools even with a special use permit, and that as a result, an application for a special use permit to maintain their ditches with heavy equipment would have been futile. Cross-Appellants' Br. 22; Oral Argument at 14:40-14:50, *Estate of Hage v. United States*, No. 2011-5001, -5013 (Fed. Cir. Apr. 3, 2012), *available at*

http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2011-5001.mp3. The record shows that the ditches cannot be maintained effectively using only hand tools, *see, e.g.*, J.A. 985-86, but does not support the Hages' claim that the Forest Service limited ditch maintenance to only hand tools even with a special use permit.

The Hages cite testimony from Mr. Hage describing a conversation with Bob Mason, a Forest Service employee, shortly after he began ditch maintenance in 1978. J.A. 1027; *see also* J.A. 734. Mr. Mason, according to Mr. Hage, explained that a special use permit was required to perform any ditch maintenance. J.A. 1028.

The record supports the government's position that the hand tools requirement only applied in the absence of a special use permit. Until 1986, the Hages obtained special use permits to perform ditch maintenance, which as the Hages explain, could not be accomplished with hand tools. *See* Cross-Appellants' Br. 22-23. If the special use permits were limited to only hand tools, however, the Hages could not have performed ditch maintenance. The record does not explain this inconsistency and does not otherwise support holding that the special use permits limited maintenance to hand tools.

We therefore conclude that the Claims Court erred in holding that applying for a special use permit would have been futile. To the extent the Hages argue that the mere existence of a requirement for a special use permit constitutes a regulatory taking, we disagree. The government may regulate private property; it is only when a regulation "goes too far [that] it will be

recognized as a taking." *Lingle*, 544 U.S. at 537 (quoting *Pa. Coal Co.*, 260 U.S. at 415).

II. Physical Taking

The Hages allege a physical taking of their water rights based on the construction of fences around water sources on federal lands in which they held grazing permits. The Hages' water rights were acquired under Nevada state law, which defines the scope of such rights. *See* 43 U.S.C. § 661. In Nevada, "water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public." Nev. Rev. Stat. § 533.025. Those that hold water rights "do not own or acquire title to water," but "merely enjoy the right to beneficial use." *Desert Irrigation, Ltd. v. Nevada*, 944 P.2d 835, 842 (Nev. 1997) (citing Nev. Rev. Stat. § 533.030). Beneficial use is "the basis, the measure and the limit of the right to the use of water." Nev. Rev. Stat. § 533.035. A water rights holder has no rights to the water beyond what he can put to beneficial use. There-fore, to establish their Fifth Amendment takings claim, the Hages had to prove, *inter alia*, that any water taken could have been put to beneficial use.

The Claims Court held that the construction of fences around certain springs and streams on federal lands amounted to a physical taking of the Hages' water rights during the time period the Hages had grazing permits. *Hage V*, 82 Fed. Cl. at 211. The court reasoned that the construction of fences physically prevented the Hages' cattle from accessing the water during the time in which cattle were still permitted to graze on the allotments. *Id.* The cattle, according to the court, "had the right to water at these streams." *Id.* Although the

record indicates that the government constructed fences in 1981-1982, J.A. 1019-20, and again in 1988-1990, J.A. 1153, the court's opinion does not specify which fences constituted a physical taking. The court did, however, limit this takings claim to the time period when the Hages "still had a grazing permit." *Hage V*, 82 Fed. Cl. at 211.

The government argues that the Hages' physical takings claim relating to the fences constructed in 1981-1982 is time barred because the action allegedly giving rise to a taking occurred more than six years before the complaint was filed. Appellant's Br. 46-47. The government notes that the Hages challenged the government's authority to construct the fences at that time, but that the fences remained. *Id.* at 46 (citing J.A. 1020). The government argues that the fences erected in 1988-1990 could not support a takings award because Mr. Hage testified that they did not exclude cattle from the water sources. *Id.* at 47 n.17 (citing J.A. 1021). The government also argues that "a water right has no 'access' component," and that Congress's recognition of state-law water rights on federal lands "does not include recognition of an 'appurtenant' right to use and occupy federal rangelands for access to the water." *Id.* at 49-50 (citing *Colvin Cattle v. United States*, 468 F.3d 803, 808 (Fed. Cir. 2006)). The government further argues that the Hages failed to prove that they could have put the water allegedly appropriated by the government to beneficial use. *Id.* at 53.

The Hages argue that their claim is not time-barred because fences were erected in 1988-1990, which is within the six-year statute of limitations period. Cross-Appellants' Br. 40. The Hages contend that there is

"ample evidence" in the record to support the court's determination that a physical taking occurred. *Id.* at 41. The Hages claim that "[t]he fact that some of this water may have seeped out beyond the boundaries of the fences is irrelevant." *Id.* The Hages argue that a physical taking occurred when the government erected fences that excluded their cattle from the water sources. *Id.* The Hages admit that the fences erected in 1988-1990 did not prevent access to the water after the elk tore the fences down, but argue that a taking still occurred during the period of time the fences remained. Oral Argument at 21:47-22:25, *Hage*, No. 2011-5001, -5013.

As an initial matter, we agree with the government that any claim based on the fences erected in 1981-1982 is barred by the six-year statute of limitations period, 28 U.S.C. § 2501, because this suit was filed in 1991. We disagree, however, that *Colvin Cattle* means that there is no "access" component to the Hages' water rights. In *Colvin Cattle*, we held that the cancellation of grazing permits on federal land did not amount to a taking of the plaintiff's stockwater rights, because its Nevada "water rights do not have an attendant right to graze." 468 F.3d at 808. We expressly noted, however, that "the govern-ment has not impeded its access to water." *Id.* at 806. *Colvin Cattle* thus stands for the proposition that water rights do not include an attendant right to graze, *id.* at 808, but it does not follow that the government may prevent all access to such water rights.

We agree with the Hages that the government could not prevent them from accessing water to which they owned rights without just compensation. The

govern-ment, for example, could not entirely fence off a water source, such as a lake, and prevent a water rights holder from accessing such water. Assuming the other criteria for a Fifth Amendment taking were met, such fencing could be a taking. The Hages' claim, however, is flawed because there is no evidence that the government actually took water that they could have put to beneficial use. For example, the Hages do not allege or point to evidence that the fences prevented the water from reaching their land. Likewise, the Hages do not allege that there was insufficient water for their cattle on the allotments or that they could have put more water to use. Because there is no evidence that the government's actions resulted in taking the Hages' water rights, the Claims Court erred in holding that the construction of fences amounted to a physical taking.

III. Range Improvements – 43 U.S.C. § 1752(g)

The Hages claim they should receive compensation for range improvements because of the government's actions. By statute, a permittee shall receive "reasonable compensation for the adjusted value, *to be determined by the Secretary concerned*, of his interest in authorized permanent improvements placed or constructed by the permit-tee" on land covered by a grazing permit when the grazing permit is canceled to devote the lands covered by the permit to another public purpose. 43 U.S.C. § 1752(g) (emphasis added). A claim for compensation under § 1752(g) is not ripe unless a claimant requests a determination by the Secretary of the value of its improvements "as required by the statute." *Colvin Cattle*, 468 F.3d at 809.

The Claims Court awarded the Hages compensation for several range improvements on federal lands pursuant to § 1752(g). *Hage V*, 82 Fed. Cl. at 216. The court acknowledged that the Hages did not request a determination by the Secretary concerned of the value of their improvements, but nonetheless awarded compensation.

The court held that the Hages could pursue their claim because there was "no clear procedure" for how they could seek compensation. *Id.* at 214. The court also noted that withholding consideration would impose upon the Hages "the hardship of attempting to determine how they would seek compensation in an appropriate agency" and that their claim would "likely be futile" in light of their history with the Forest Service. *Id.* at 214.

We addressed this issue in *Colvin Cattle*, in which we held that when a claimant "d[oes] not request a determi-nation by the Secretary of the value of its improvements as required by the statute . . . its claim is not ripe for failure to exhaust administrative remedies." 468 F.3d at 809 (citing *Julius Goldman's Egg City v. United States*, 556 F.2d 1096, 1099 (Ct. Cl. 1977)). As in *Colvin Cattle*, the Hages did not request a determination by the Secretary of the value of their improvements. The Hages fault the government for not presenting evidence of procedures to seek such a determination, but the Hages bear the burden of establishing jurisdiction, not the government. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). While the Hages' path to obtaining an agency action was ill-defined, the alleged "hardship of attempting to determine how [the Hages] would seek

compensation in an appropriate agency," *Hage V*, 82 Fed. Cl. at 214, alone is insufficient to render the Hages' claim ripe. The Hages do not argue that they attempted to seek a determination by the Secretary, and without doing so, the Hages' claim for range improvements pursuant to § 1752(g) "is not ripe for failure to exhaust administrative remedies." *See Colvin Cattle*, 468 F.3d at 809. We thus hold that the Claims Court erred in awarding the Hages compensation for range improvements under § 1752(g) because the Hages' claim is not ripe. IV. Pre-Judgment Interest on Range Improvements

The Hages cross-appeal seeking pre-judgment interest on the award for range improvements. Although we hold that the Hages are not entitled to compensation for range improvements under 43 U.S.C. § 1752(g), that does not end our inquiry because the Hages' cross-appeal alleges a Fifth Amendment taking. To establish a Fifth Amend-ment taking, a claimant must identify a cognizable property interest. *Acceptance Ins. Cos.*, 583 F.3d at 854. If the claimant fails to do so, we need not reach the issue of whether any property interest was taken. *Air Pegasus of D.C.*, 424 F.3d at 1213.

The Hages argue that the facts establish that they constructed range improvements, both on their own land and on the allotments for which they held grazing permits. Cross-Appellants' Br. 62. These improvements include wells, pipelines, fences, and roads. *Id.* at 63. The Hages argue that they own the range improvements because they spent considerable time, effort, and financial resources building them. *Id.* at 62-67. The Hages also cite a 2009 decision by the Bureau of Land

Management (BLM), which directed the Hages to remove range improvement projects performed under the permits. Cross-Appellants' Reply Br. 11 (citing J.A. 1456-57).

The mere fact that the Hages constructed and maintained range improvements on federal land does not establish that they own a cognizable property interest in such improvements. The Claims Court noted that the grazing permits stated that "permanent improvements constructed, or existing for use, in conjunction with this permit are the property of the United States Government, unless specifically designated otherwise, or covered by a cooperative agreement." *Hage v. United States*, 35 Fed. Cl. 147, 179 (Fed. Cl. 1996). The Hages failed to show any agreements establishing an ownership interest in the range improvements. Although BLM directed "[t]he removal of the range improvement projects under each Range Improvement Permit," J.A. 1456, it does not follow that the Hages owned a cognizable property interest in range improvements absent any such designation. With regards to cooperative agreements, the BLM decision specifically stated, "Title to the range improvement projects authorized by these Cooperative Agreements is held by the United States as set forth in the applicable regulations and terms contained in these agreements." J.A. 1458. The decision simply gave the Hages 180 days "to salvage all materials owned by the [Hage] Estate." J.A. 1456.

It is the Hages' burden to establish cognizable property interests for the purposes of their takings claims. *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 519 n.12 (Fed. Cir. 2011) (citing *Air Pegasus*

of D.C., 424 F.3d at 1212-13). The Hages have not met their burden because the evidence demonstrates only that they constructed or maintained the improvements on the federal lands, not that they owned title to those improvements. To the contrary, the evidence of record demonstrates that the improvements were the property of the United States government. Without evidence of ownership, the Hages cannot establish a cognizable property interest. To the extent that the Hages argue that they are entitled to a diminution in value for range improvements on their private property stemming from the cancelation of their permits, this argument is without merit. *See Colvin Cattle*, 468 F.3d at 808 ("That the ranch may have lost value by virtue of losing the grazing lease is of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest.") (citing *United States v. Fuller*, 409 U.S. 488, 493 (1973)). We thus affirm the denial of pre-judgment interest for range improvements.

CONCLUSION

The Hages' regulatory takings claim and claim for compensation pursuant to 43 U.S.C. § 1752(g) are not ripe, and we therefore vacate the Claims Court's award of damages. To the extent the Hages' claim for a physical taking relies on fences constructed in 1981-1982, this claim is untimely. To the extent the physical takings claim relies on fences constructed in 1988-1990, we re-verse because there is no evidence that water was taken that the Hages could have put to beneficial use. Finally, we affirm the Claims Court's holding that the Hages are not entitled to pre-judgment interest for

any range improvements award because the Hages failed to identify a cognizable property interest. We remand for further proceedings consistent with this opinion.

AFFIRMED-IN-PART, REVERSED-IN-PART, VACATED-IN-PART, and REMANDED

COSTS

No costs.

Footnote

1 Although many of the interactions relating to the Hages' claims relate only to the Forest Service or Bureau of Land Management, we need not distinguish between them for the purposes of this appeal.

In the United States Court of Federal Claims
Case No. 91-1470L
Filed: August 2, 2010
FOR PUBLICATION

THE ESTATE OF E. WAYNE HAGE
AND THE ESTATE OF JEAN N. HAGE,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Final Damages Award Plus Interest; Joint Submission of Interest Calculations

Lyman D. Bedford and Michael Van Zandt, Hanson Bridgett, LLP, San Francisco, CA, for Plaintiffs.

Bruce K. Trauben, Trial Attorney, Department of Justice, Environmental and Natural Resources Division, Washington, D.C., with whom was Ronald J. Tenpas, Assistant Attorney General, Department of Justice, Washington, D.C., for Defendant.

FINAL JUDGMENT and ORDER

SMITH, Senior Judge:

Pursuant to the Joint Submission of Interest Calculations for the Award of Interest on the Value of Plaintiffs' Water Rights, the Court hereby AWARDS Plaintiffs the total amount of $14,243,542.00. The Clerk

is directed to enter final judgment accordingly and close this case.

It is so ORDERED.
s/ Loren A. Smith
LOREN A. SMITH
SENIOR JUDGE

Case No. 91-1470L
Filed: November 3, 2009
FOR PUBLICATION
In the United States Court of Federal Claims

THE ESTATE OF E. WAYNE HAGE
AND THE ESTATE OF JEAN N. HAGE,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

43 U.S.C. § 1752(g); Regulatory Taking; Fifth Amendment; Motion for Partial Reconsideration; RCFC 59

Lyman D. Bedford and *Michael Van Zandt*, McQuaid, Hanson Bridgett, LLP, San Francisco, CA, for Plaintiffs.

Bruce K. Trauben, Trial Attorney, Department of Justice, Environmental and Natural Resources Division, Washington, D.C., with whom was *Ronald J. Tenpas*, Acting Assistant Attorney General, Department of Justice, Washington, D.C., for Defendant.

Kenneth D. Paur, Assistant Regional Attorney, U.S. Department of Agriculture, Office of the General Counsel, Ogden, UT and *Nancy Zahedi*, Assistant Regional Solicitor, U.S. Department of the Interior,

Office of the Solicitor, Sacremento, CA, Of Counsel for Defendant.

OPINION and ORDER

SMITH, Senior Judge:

On June 6, 2008, the Court issued an Opinion resolving the final remaining issue in this longstanding case: whether the Government's actions amounted to a taking under the Fifth Amendment and, if so, the amount of just compensation due to Plaintiffs. *See Hage v. United States*, 82 Fed. Cl. 202, 203 (2006). In its latest Opinion,1 the Court found that the Government's action was indeed a taking under the Fifth Amendment and awarded Plaintiffs "$2,854,816.20 for the value of their water rights, plus $1,365,615.00 for the value of [range] improvements, for a total award of $4,220,431.20, plus interest from the date of the taking." *Id.* at. 212.

On December 12, 2008, Defendant filed a Motion for Partial Reconsideration on the limited subject of the Court's award of compensation for range improvements under 43 U.S.C. § 1752(g)[2] pursuant to RCFC 59. On January 30, 2009, the Court ordered Plaintiff to respond to the Defendant's Motion, which was received on March 16, 2009 and Defendant's subsequent reply was received on April 3, 2009. After full briefing and oral argument, the Court hereby **DENIES** Defendant's Motion for Partial Reconsideration.

I. STANDARD OF REVIEW

Generally, a Court is given considerable discretion when determining whether to grant relief under RCFC 59. *See, e.g., Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990). To prevail on a motion under RCFC 59, the movant must identify a "manifest error of law, or mistake of fact." *Ammex, Inc. v. United States*, 52 Fed. Cl. 555, 557 (2002), *aff'd*, 384 F.3d 1368 (Fed. Cir. 2004). More specifically, the moving party must show: (1) an intervening change in controlling law; (2) the availability of previously unavailable evidence; or (3) the necessity of granting the motion to prevent manifest unjust. *System Fuels, Inc. v. United States*, 79 Fed. Cl. 182, 184 (2007); *Griswold v. United States*, 61 Fed. Cl. 458, 460-61 (2004). Furthermore, the Court has the duty to balance "the need to bring litigation to an end and the need to render just decisions on the basis of all facts." *Minton v. National Ass'n of Sec. Dealers, Inc.*, 336 F.3d 1373, 1379 (Fed. Cir. 2003) (quoting *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990)).

II. DISCUSSION

In its Motion for Partial Reconsideration, Defendant asks the Court to set aside, or alternatively, to modify the amount of damages awarded to Plaintiffs for range improvements to prevent a manifest injustice to the United States Government. *See* RCFC 59(a)(1)(C). (*See also* Def.'s Mot. for Partial Recons. at ii.) Specifically, Defendant states that:

> [t]here is no evidence that Plaintiffs placed or constructed 238 miles of fencing, 634 miles of

> roads and trials, and 44.7 miles of ditches and pipelines on the lands covered by the grazing permits. At the most, Plaintiffs installed less than five miles of fencing and maintained or replaced less than eight miles of ditches and pipelines. Plaintiffs also built no new roads and trials on the ranch.

(Def.'s Mot. for Partial Recons. at 3-4.) Rather, Defendant claims that the trial record shows that Plaintiffs merely maintained the range improvements and argues that maintenance alone is not sufficient for compensation under 43 U.S.C. § 1752(g). *Id.* Furthermore, Defendant argues that Plaintiffs failed to show "that any of the improvements for which the Court awarded compensation were authorized" under 43 U.S.C. § 1792(g). *Id.* at 14.

Conversely, Plaintiffs ask the Court to deny Defendant's Motion arguing that the motion does not meet the requirements set forth in RCFC 59(a)(1)(A)-(C). Moreover, Plaintiffs contend that "the Defendant has shown absolutely no manifest error of law or mistake of fact, or any extraordinary circumstances which justify relief." (Pls.' Resp. to Def.'s Mot. for Partial Recons. At 7.) With respect to the Defendant's argument that the range improvements made on the ranch were not authorized, Plaintiffs respond by stating that "[t]his argument is completely without merit and is not a proper subject for a motion for reconsideration." *Id.* at 22.

The Court agrees with Plaintiffs' position that Defendant's Motion for Partial Reconsideration is

without merit. Generally, 43 U.S.C. § 1752(g) limits compensation to a permittee or lessee for range improvements that were "placed or constructed" on that lands covered by the permit. However, the Court finds that Plaintiffs offered satisfactory evidence at trial to demonstrate that the compensated range improvements were, in fact, "placed or constructed" by the Hages. *See* 43 U.S.C. § 1752(g); *see also Hage V*, 82 Fed. Cl. at 212.

A. Compensation for Range Improvements

In its Motion, Defendant attempts to distinguish the trial record from the Court's previous Opinion by citing sporadic testimony of Mr. Hage as conclusive evidence of their position regarding the Court's award for range improvements. However, Defendant's argument fails to take into consideration the testimony and expert report of Dr. McIntosh. Instead, Defendant argues that the Court's reliance on Dr. McIntosh's expert designation is misplaced because he did not testify that Plaintiffs "placed or constructed" all of the improvements contained in his report. (Def.'s Mot. For Partial Recons. at 12-14.) However, Defendant failed to rebut Dr. McIntosh's findings during his cross-examination and through direct examination of it own appraiser, Mr. Meiling. In fact, Mr. Meiling testified that the United States had not employed him to evaluate the range improvements.

The record notes:

> MR. VAN ZANDT [Counsel for Plaintiffs]: One last couple of questions here, Mr. Meiling. Do

you understand that there's a separate claim in this case for the range improvements on the allotment?

MR. MEILING: I don't have any knowledge of a separate claim on the range. I wasn't asked to value the range improvements, as you can see in my -

MR. VAN ZANDT: That was not a component of the valuation that you did?

MR. MEILING: No, and you can see that on A1.

MR. VAN ZANDT: But if, in fact, you knew that there was a claim for the range improvements in part of this case, would you expect to have that as part of your assignment, do an evaluation of those?

MR. MEILING: Well, the client can ask me to do whatever they ask me to do. If they want me to value the -

MR. VAN ZANDT: No further questions, Your Honor.

(Trial Tr. 3688:23 - 3689:15.)

Generally, a motion brought under RCFC 59 may not be guised to seek a "second bite at the litigation apple." *Innovair Aviation, Ltd. v. United States*, 83 Fed. Cl. 105, 105 (2008). Thus, the Court finds that the

expert report presented by Dr. McIntosh is uncontroverted and the Court properly relied on the calculations contained therein, as well as Mr. Hage's trial testimony, which the Court found credible under the light of extensive cross-examination.

B. Authorization of Improvements Made by Plaintiffs

Defendant's final argument in its Motion for Partial Reconsideration contends that
"Plaintiffs' grazing permits . . . show that they only were authorized to maintain fences and certain other improvements." (Def.'s Mot. for Partial Recons. at 15.) While Defendant does not dispute that Plaintiffs are in possession of various grazing permits, Defendant argues that:

> 43 U.S.C.§ 1752(g) does not contemplate a permittee or lessee for range improvements that the permittee or lessee merely maintained. Rather, 43 U.S.C. § 1752(g) makes clear that a permittee or lessee only may be compensated for range improvements that he or she 'placed or construct' on the lands covered by the permits.

Id. at 16 (emphasis in original). However, Defendant's argument fails to recognize that the term "maintenance," as described in Plaintiffs' permits, may necessarily include "plac[ing] or construct[ing]," range improvements. The Court finds that Defendant's disjunctive interpretation of Plaintiffs' permits, along with 43 U.S.C.§ 1752(g), is too narrow and cannot be

squared with the language of the statute and the reality of range work and construction. Thus, the Court finds that Defendant's argument lacks merit.

C. Correction of the Court's June 6, 2008 Opinion

In its response to Defendant's Motion for Partial Reconsideration, Plaintiffs note that "no value or compensation was provided by the court for improvements made by Plaintiffs for the 44.7 miles of ditches and pipelines." *See Hage V*, 82 Fed. Cl. at 215. (*See also* Pls.' Resp. to Def.'s Mot. for Partial Recons. at 2.) Appearing that an omission was made in the original Opinion, the Court hereby incorporates the following into its June 6, 2008 opinion on pages 17-18:

3. Ditches and Pipelines

Plaintiffs provided evidence at trial showing that they constructed and extensively maintained approximately 25.5 miles of ditches and 19.2 miles of pipelines on the ranch, or 44.7 miles of ditches and pipelines. Mr. Hage provided the Court with lengthy testimony regarding the extent of maintenance performed on various ditches and pipelines located on the Ranch. Specifically, Mr. Hage testified that when a particular ditch would fill up with "alluvium" and become "crowded densely with pinyon and juniper trees," that it was digging a new ditch was the only method to recover use of the ditch. (Trial Tr. 116:19-118:7 (May 3, 2004).)

The Court finds that the estimated average cost of constructing one mile of ditch or pipeline for

agriculture use in 1991 was approximately $3,900. Applying an adjustment of .85 for an estimated fifteen percent physical deterioration, the Court finds that the value of the ditches to be $84,532. Further, applying an adjustment of .90 for an estimated ten percent deterioration, the Court finds the value of the pipelines to be $67,392. Therefore, the Court finds that the total value of the ditches and pipelines was **$151,924.**

III. CONCLUSION

1. For the reasons set forth in this Opinion, the Court hereby **DENIES** Defendant's Motion for Partial Reconsideration.

2. In light of the omitted section in the Court's June 6, 2008 Opinion, the Court hereby amends its previous Opinion and **AWARDS** Plaintiffs **$2,854,816.20** for the value of their water rights plus **$1,517,539.00** for the value of their improvements, for a total award of **$4,372,355.20**, plus interest from the date of the taking.

3. The Court shall schedule a telephone status conference to discuss the issue of interest calculation with the parties.

It is so ORDERED.

s/Loren A. Smith
LOREN A. SMITH,
Senior Judge

Footnote

1 This matter was filed in this Court on September 26, 1991, and involves a lengthy record including five Opinions: *Hage v. United States*, 35 Fed. Cl. 147 (1996) (*Hage I*); *Hage v. United States*, 35 Fed. Cl. 737 (1996) (*Hage II*); *Hage v. United States*, 42 Fed. Cl. 249 (1998)(*Hage III*); *Hage v. United States*, 51 Fed. Cl. 570 (2002) (*Hage IV*) and; *Hage v. United States*, 82 Fed. Cl. 202 (2006) (*Hage V*).

2 In relevant part, 43 U.S.C. § 1792(g) states that a party is entitled to just compensation of "authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such a permit or lease."

Case No. 91-1470L
Filed: June 6, 2008
FOR PUBLICATION
In the United States Court of Federal Claims

THE ESTATE OF E. WAYNE HAGE
AND THE ESTATE OF JEAN N. HAGE,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

43 U.S.C. § 1752(g); takings; Fifth Amendment; just compensation cattle; vested water rights; 1866 Act Ditches; damages; grazing permit; Beneficial use; Federal Land Policy Management Act.

Lyman Bedford, McQuaid, Bedford & Van Zandt, LLP, San Francisco, CA, for Plaintiffs. *Michael Van Zandt*, of Counsel.

Kathleen Lennon Doster, Department of Justice, Environmental and Natural Resources Division, Washington, D.C., with whom was *Tim Racicot*, Special Assistant to the Assistant Attorney General, Department of Justice, Seattle, WA, for Defendant.

Johanna Wald and *Thomas Lustig*, National Resources Defense Council, San Francisco, for *amici curiae*, National Wildlife Federation, Sierra Club, National Resources Defense Council, Nevada Wildlife Federation, and Nevada Department of Wildlife.

Michael Wolz, Deputy Attorney General, for *amici curiae*, State of Nevada and the State Engineer of Nevada. *Robin Rivett*, Pacific Legal Foundation, for *amicus curiae*, Pacific Legal Foundation. *John Echeverria*, Washington D.C. and *Joseph Feller*, Tempe, AZ, of Counsel.

OPINION

SMITH, Senior Judge:

I. Introduction

This case involves the conflict of two legitimate claims on the public lands. Both claims can be found in the Nation's earliest history. On the one hand there is the Nation's interest in preserving the quality of its lands and exercising its ownership rights as well as getting adequate value for the public from those lands. Early on there was the competing interest of eager citizens and new immigrants in acquiring land to possess, to develop, and to settle in order to feed their families and live in freedom and independence from the feudal overlords who had owned the land they farmed in Europe. This desire for the seemingly limitless land west of the Atlantic coast, captivated virtually everyone, from George Washington to the humblest east coast farmer or landless town dweller.

As the country spread westward toward destiny the course of advancing population, with its farms and ranches, made the land vastly more valuable to the public. At this time the two contending interests were united by a common value, settling and exploiting this

bounteous land for human development. In the West this beneficial harmony faced a harsh natural fact: lack of water. Land without water, assuming no useful minerals, was useless and hence worthless. But with the application of human effort and capital water could be made to flow to some of this land.

Both the public and the would-be landowner again had a common interest in this goal. Since government could not invest the capital needed private individuals were the only source of the capital that could benefit both the public and the landowner. Central to this era was the legal doctrine, still recognized in much of the West, that vested property rights could be obtained in water by using that water and by diverting it from its natural channels to serve beneficial activities like agriculture and ranching, and in some cases mining and municipal uses.

This case deals with a time of divergence between the interests of the public and those of the landowners. The common interest in development by both no longer is universally the case. As government seeks to change its policies concerning the purpose and use of public lands, private landowners have a valid claim to preserve their vested rights. Because of historic water law many of those vested rights affect and are affected by government policies. This produces a sometimes emotional conflict between deeply held and cherished values of those who have farmed and ranched for generations and those who wish to change the direction of public policy. This conflict is a drama worthy of a tragic opera with heroic characters; however, this is a court of law. Its duty is to decide

cases in accordance with the law as that law is received from the cases which bind us, and the statutes, and the Constitution which the Court is bound by its oath to follow.

Plaintiffs, the estate of E. Wayne Hage and the estate of Jean N. Hage, have been the owners of the Pine Creek Ranch ("Ranch") in Nye County, Nevada since 1978. The Pine Creek Ranch is located in central Nevada and consists of approximately 7,000 acres of patented land used primarily for grazing cattle. In 1991, Plaintiffs filed a claim against the United States alleging Constitutional, contractual, and statutory causes of action arising from an alleged suspension and cancellation of permits to graze livestock on federal land. Plaintiffs allege that policies promoted by the Forest Service, combined with the Forest Service actively preventing Plaintiffs from accessing and maintaining their water rights, amounted to a taking of their property as requiring just compensation under the Fifth Amendment.

The Court has published four opinions in this case.1 In this current and final stage of the litigation, the Court must determine whether the Government's actions amounted to a taking as defined by the Fifth Amendment and, if so, what is the amount of just compensation due to Plaintiffs. In addition, the Court must determine whether Plaintiffs are entitled to recover compensation under the Federal Land Policy and Management Act. 43 U.S.C. § 1752(g).

II. Facts

The facts of this case are well-described in the Court's previous four opinions. *See supra* note 1. Briefly, the Pine Creek Ranch, which Plaintiffs purchased in 1978, was established in 1865. To raise cattle economically in such an arid region, Plaintiffs depend upon access to large quantities of land, including federal land, and to the limited water supply in the Toiyabe National Forest. Plaintiffs use ditch rights-of-way, which are easements on federal land, to transport water for irrigation, stock watering and domestic purposes.

After purchasing Pine Creek Ranch, Plaintiffs constructed range improvements, both on the patented lands (the land Plaintiffs own) and on the allotments appurtenant to the Ranch. These improvements included corral and water facilities at the Pine Creek well, drift fences in the Monitor Valley, and a cattle guard in the Mosquito Creek area. Further range improvements included new spring boxes at Ice House Spring and at Frazier Spring. At Steward Spring, Plaintiffs installed a new spring box and three miles of pipeline to a holding tank and trough.

In 1979, after receiving permission from the Forest Service, the Nevada Department of Wildlife released elk into the Table Mountain allotment area of the Toiyabe National Forest. The Forest Service approved the release after conducting two studies to determine the suitability of introducing elk into the area. Plaintiffs objected to the Forest Service's action arguing that the elk drank water and ate forage which belonged to Plaintiffs and were needed for their cattle. Plaintiffs also informed the State of Nevada that the

hunting season for elk overlapped with the cattle grazing period and that the presence of elk impeded the grazing and movement of their livestock. The State of Nevada responded that cattle grazing and hunting on public land "appeared to be reasonably compatible." *Hage II*, 35 Fed. Cl. at 154.

With the introduction of elk on Table Mountain came numerous problems, including elk hunters tearing down fences and scattering cattle. In addition, the overlap between grazing season and elk hunting season interfered with the Hages' ability to get the cattle off Table Mountain at the end of grazing season. Following the introduction of elk, the Forest Service fenced off certain meadows and spring sources on the Table Mountain allotment and erected electric fences which excluded Plaintiffs' cattle from waters owned by Plaintiffs, as well as from the adjacent forage. The fences excluded cattle but allowed elk, who could jump the fences, to access the water.

Relations between the Forest Service and Plaintiffs deteriorated. In 1983, Plaintiffs received 40 letters from the Forest Service charging them with various violations. In the same year, the Forest Service paid 70 visits to Plaintiffs. Following the 40 letters and 70 visits, the Forest Service filed 22 charges against Plaintiffs. Many of these complaints cited issues of fence maintenance, some of them extremely minor infractions. In addition, the Forest Service insisted that Plaintiffs maintain their 1866 Act ditches with nothing other than hand tools.

Willows, other riparian growth, and upland vegetation proliferated upstream from Plaintiffs' lands. As a result of the pinion, juniper, and willows clogging the canyon, Plaintiffs saw a significant reduction in the water flow to their irrigated pastures. From water in the Corcoran Creek, for example, Plaintiffs could irrigate 20 acres, contrasted with 80 acres in the mid-1990s. A proliferation of vegetation and the existence of dozens of beaver dams on Barley Creek has effectively stopped the flow of water to Plaintiffs' Haystack fields. When Plaintiffs purchased the Ranch, Barley Creek ditch irrigated approximately 1,000 acres of the Haystack fields. The waters in Mosquito Creek, Pine Creek Ditch, and other creeks in which Plaintiffs have a vested water right showed a sharp decrease in water flow. The Government threatened to prosecute Plaintiffs for trespassing if they entered federal lands to maintain their ditches. As the Court stated in *Hage IV*, this was clearly no idle threat, as the Government unsuccessfully prosecuted Mr. Hage for clearing trees around the White Sage Ditch. 51 Fed. Cl. at n. 13. The Government stated that Plaintiffs should have applied for a special use permit for permission to cut the trees surrounding their vested water rights.

In 1990, the Forest Service determined that Meadow Canyon Allotment had been "overgrazed" and ordered Plaintiffs to keep off that area. Meadow Canyon had 25 miles of unfenced boundary with Monitor Valley, and cattle often drifted between the two allotments. With such a large unfenced boundary, it was nearly impossible to keep cattle from wandering onto Meadow Canyon. In July 1990, the Forest Service

ordered Plaintiffs to remove all cattle from Meadow Canyon by August 10, 1990. In August of that year, the Forest Service sent Plaintiffs a letter asking them to show cause why 100% of their cattle numbers on the Meadow Canyon Allotment should not be cancelled. Mr. Grider, the district ranger during the time in question, admitted that the Hages did not receive his show cause letter until August 20, 1990, even though the letter gave the Hages six days from August 17, 1990 to comply. The district ranger issued a notice to Plaintiffs in the Fall of 1990 that any cattle found on Meadow Canyon were subject to impoundment. Mr. Hage responded with several letters detailing the problems inherent in keeping cattle off Meadow Canyon and detailing his attempts to prevent cattle from entering.

In 1991, the Forest Service twice impounded Plaintiffs' cattle, and when Plaintiffs were unable to redeem the cattle by paying the costs of impoundment, the cattle were sold by the Forest Service at auction for a total of $39,150.00. The Forest Service kept the proceeds of the sale.

III. Procedural History

Plaintiffs filed a claim in this Court alleging: 1) the Government took compensable property interests in their grazing permit, water rights, ditch rights-of way, rangeland forage, cattle, and ranch; 2) the grazing permit was a contract, which Defendant breached, entitling them to damages; and 3) they are entitled to compensation for improvements they made on public rangeland. *See Hage I*, 35 Fed. Cl. at 150.

In *Hage I*, the Court granted-in-part and denied-in-part the Government's Motion for Summary Judgment. *Id.* The Court held that Plaintiffs' grazing permit was a license, not a contract or a property interest, and hence no damages could be awarded for its revocation. *Id.* at 165 ("It is settled law that grazing permits, though they are of much value to ranchers in the operation of an integrated ranching unit, nevertheless do not constitute property for purposes of the just compensation clause."). However, the Court denied the Government's Motion for Summary Judgment with regard to: 1) whether Plaintiffs had a property interest in foraging rights, water rights, and ditch right-of-ways in the Toiyabe National Forest, *id.* at 171; 2) whether the cancellation of Plaintiffs' permit to graze cattle on Federal lands was done, at least in part, to devote the rangeland to another public purpose, in which case Plaintiffs were entitled to compensation for the improvements they made on the land, *id.* at 178; and 3) whether the Forest Service's impoundment of the Hages' cattle constituted a compensable taking, *id.* at 176.

In *Hage II*, the Court denied the motion of various state and private groups to intervene in the case, but granted them *amici curiae* status so that they could participate in the adjudication process. 35 Fed. Cl. at 739. The State of Nevada, the State Engineer of Nevada, National Wildlife Federation, National Resources Defense Council, Nevada Wildlife Federation, Sierra Club, Nevada Department of Wildlife, and Pacific Legal Foundation were granted status as *amici curiae*. *Id.*

After a two-week trial on the property phase, the Court issued a preliminary opinion that served to "streamline and expedite post-trial briefing." *Hage III*, 42 Fed. Cl. 249. The Court later rescinded its decision in *Hage III* with a final opinion on four issues regarding Plaintiffs' property rights. *Hage IV*, 51 Fed. Cl. at 570. First, the Court again held that Plaintiffs did not have a property interest in grazing permits that could give rise to a taking claim, as a grazing permit is a license, not a irrevocable right. *Id.* at 586-588 ("[Plaintiffs'] fee lands and water rights must be valued independently of any value added by any appurtenant grazing permits or grazing preferences.").

Second, the Court denied Plaintiffs' claim to a 752,000 acre surface estate for grazing, relying on numerous western land statutes going back to the 18th century. *Id.* at 588-592. Third, the Court determined under Nevada law that Plaintiffs had appropriated and maintained vested water rights in various 1866 Act ditches2, wells, creeks, and pipelines, as well as waters in the Monitor Valley[3], Ralston[4], and McKinney allotments[5]. *Id.* at 576-580. These water rights fell into three major categories: 1) 1866 Act ditches[6]; 2) stockwaters; and 3) waters flowing from federal lands to Plaintiffs' patented land. Finally, the Court held that Plaintiffs were entitled to ditch rights-of-way on each side of the 1866 Act Ditches. *Id.* at 581-584.

In 2004, the Court held a two-week trial in Reno, Nevada to determine whether the Government's actions constituted a taking, and if so, what just compensation was due to Plaintiffs. Following the filing of post-trial briefs by Plaintiffs, Defendant, and

amici curiae, the Court heard oral argument. In this fifth and final opinion, the Court will first turn its attention to the taking issue, addressing each category of property identified in *Hage IV*. Then the Court will address Plaintiffs' claim for compensation under 42 U.S.C. § 1752(g).

IV. Taking

A. Legal Standard

The notion of private property is fundamental to the existence of our Nation. It is a fundamental duty of a government to protect, rather than to destroy, personal property. JOHN LOCKE, TWO TREATISES ON GOVERNMENT §§ 124, 201, 222 ("[w]henever the *legislators endeavor to take away, and destroy the Property of the People* . . . they put themselves into a state of War with the People, who are there upon absolved from any further obedience.") (emphasis in original). The Founders of our Nation envisioned personal property as a fundamental right. It is part of the trinity of values underlying in our reverence for "life, liberty, and property." These three ideas are all aspects of the fundamental integrity of each person. As the Supreme Court has stated, "[p]roperty does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

The Fifth Amendment protects citizens by providing that if private property is taken for public use, those

citizens should be justly compensated. U.S. Const. Ament. V. The classic example of a taking requiring just compensation is when "the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878), *see United States v. General Motors Corp.*, 323 U.S. 373 (1945) (holding the Government's occupation of a private warehouse was a taking). A permanent physical occupation constitutes a *per se* taking, "without regard to whether the action achieves an important public benefit or has only a minimal economic impact." *Loretto v. Teleprompter Manhattan CATV Corp.*, 468 U.S. 419 (1982).

This Court already held in *Hage IV* that the Government's actions which physically prevented Plaintiffs from accessing their 1866 Act ditches amounted to a physical taking. 51 Fed. Cl. at n. 13. However, there is no bright line between physical and regulatory takings. Several of Plaintiffs' other claims not previously addressed fall into the category of regulatory taking, such as the requirement of a special use permit for clearing brush and the regulations that led to willow proliferation. Therefore, the Court turns its attention to the legal standard for a regulatory taking.

The Supreme Court has declined to establish any "set formula" for determining when Government regulation is a taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Instead, the Court has focused on "essentially ad hoc, factual

inquiries." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). *Penn Central* provides a multi-factor balancing test for determining when compensation is required for a regulatory taking: 1) the extent to which the regulation has interfered with distinct investment-backed expectations; 2) the character of the governmental action; and 3) the economic impact of the regulation on the claimant. *Id.* at 122.

In addition, there are two categories of *per se* taking in which a balancing is not necessary. "The first encompasses regulations that compel the property owner to suffer a physical invasion of his property." *Lucas*, 505 U.S. at 1015. When an owner has suffered a destruction of his property through a regulation, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Id.*, *see also Loretto*, 468 U.S. 419, 435-440 (1982). The second situation is when the regulation "denies all economically beneficial or productive use of the land." *Id.*

B. The Impoundment of Plaintiffs' Cattle was not a Taking

Plaintiffs seek compensation for the value of their impounded cattle. In July and September of 1991, the Forest Service impounded a total of 105 head, found in trespass on Meadow Canyon. These cattle were in trespass because the Forest Service had decided not to allow grazing on Meadow Canyon and had ordered Plaintiffs to remove all cattle from that allotment by August 10, 1990. Plaintiff had nearly a year in which to

remove the cattle from that area. While the presence of elk hunters may have impeded access of the cattle for a portion of the year, the elk hunting season was confined to a few months and should not have prevented Plaintiffs from removing the cattle within a year. Again, the fact that the cattle were in trespass relates to the Forest Service's decision to not allow grazing on Meadow Canyon, which has no relevance to a Fifth Amendment claim, since the claimed property interest was, in fact, a revocable license and not a property right recognized by case law. As the Forest Service had the authority to determine whether Plaintiffs' cattle were allowed on Meadow Canyon and gave Plaintiffs nearly a year to comply with the decision before impounding the cattle, the impounding of Plaintiffs' cattle was not unlawful. After Plaintiffs were unable to redeem the cattle due to financial difficulties, Defendant sold the cattle at auction for $39,150.00. The Forest Service kept this amount, to cover the costs of impoundment.[7]

Therefore, the Court must **DENY** Plaintiffs' claim for compensation of the value of cattle impounded by the Forest Service.

C. Plaintiffs are not Entitled to Compensation for the "Entire Ranch"

Plaintiffs argue that the Government's actions constituted a taking of the "entire ranch," focusing on the BLM's decision to cancel Plaintiffs' grazing permits and to suspend grazing on certain allotments. P. Post Tr. Brief at 21. This argument must fail in light of the Federal Circuit's decision in *Colvin Cattle Co. v.*

United States, 468 F.3d 803, 808 (2006). As stated previously by this Court, Plaintiffs have no right to compensation based on the loss of their grazing permit.

Further, the Federal Circuit has held, "[t]hat the ranch may have lost value by virtue of losing the grazing lease is of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest." *Id.*; *see also United States v. Fuller*, 409 U.S. 488 (1973).

Therefore, the Court **DENIES** Plaintiffs' claim for compensation for the "entire ranch."[8]

D. Surface Waters Flowing from Federal Land to Patented Lands were Taken

The surface waters which flow from federal land to Plaintiffs' patented lands are a vested water right which the Court recognized in *Hage IV*. *See supra* at 4. Plaintiffs argue that because of the policies and procedures employed by the Government, a portion of the surface waters that should flow to Plaintiffs' patented pastures no longer reach there. P. Post Tr. Reply at 11.

According to Plaintiffs, the proliferation of riparian vegetation, the presence of beaver dams, and the denial of Plaintiffs' access to stream channels for clearing and maintenance purposes led to the reduced water flow. Therefore, Plaintiffs assert a taking and demand just compensation. The Court uses a two-part

inquiry to assess the claims. First, Plaintiffs must show that they could have put the water to beneficial use. Second, Plaintiffs must show that the Government's actions rose to the level of a taking. Extensive evidence has convinced the Court that but for Government actions Plaintiffs would have had the water in which they had a vested right.

1. Beneficial Use

Plaintiffs, under Nevada law, do not own title to the water. Rather, they own the right to use the water, so long as that water is put to a "beneficial use." *See Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059 (Nev. 1997). The Nevada state legislature declared at the beginning of the twentieth century, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." NEV.REV. STAT. § 533.035. Plaintiffs must therefore establish that they could have put the water to beneficial use, for the right to use water cannot be unreasonable or include waste. *See United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983). In addition, the right to use water can be lost by voluntarily abandoning it. *See In re Manse Spring*, 60 Nev. 250 (Nev. 1940).

Plaintiffs offered evidence at trial that the Pine Creek Ranch water rights could have been put to quasi-municipal use. Due to the growing demand for water in the Las Vegas area, Plaintiffs argue that the water could have been sold to the Southern Nevada Water Authority (SNWA) to sustain the growth in that area. However, Defendant countered with evidence that the

SNWA did not consider Ranch waters a viable water resource option because of the significant distance and relatively small quantity of waters available. Plaintiffs also offered evidence that if it were not sold for quasi-municipal use, the water could have been sold for agricultural use for the irrigation of crops or for stockwatering.

As it appears to the Court that the sale for quasi-municipal use is unlikely, the probable and likely use for the surface waters would be for irrigation and other agricultural purposes. The Court finds that Plaintiffs would have put the waters to beneficial use to irrigate their own agricultural pastures, or could have sold the water to others to use for the same purpose, particularly considering the years in question had limited rainfall.

2. Taking of the Ditches

The next step of the analysis is whether the Government's actions rose to the level of a taking, requiring just compensation. Once again this Court turns its attention to the Federal Circuit's holding in *Colvin Cattle*. In order for Plaintiffs' claim to succeed, they must establish a taking of their property that is not related to the cancellation of grazing permits. In that case, the Circuit court held that the BLM's cancellation of a Nevada cattle company's grazing permit on federal land did not constitute a taking of the company's water rights, as the grazing permit was a privilege and not a right. *Colvin Cattle*, 468 F.3d at 807 ("Because Colvin's water rights do not have an attendant right to graze, no governmental action

restricting Colvin's ability to graze on federal land can affect its water right in a manner cognizable under the Fifth Amendment."). In *Colvin*, the government denied access to the allotment for grazing purposes but did not impede access to the water. *Id.* at 806. Plaintiffs must, therefore, show that the Forest Service took actions or established policies, distinct from the decision to cancel Plaintiffs' grazing permit, that constituted a taking under the Fifth Amendment.

It is important to again note the difference between water ownership and real property ownership; water is a usufructuary as opposed to a possessory right. Whereas real property ownership is defined by a right to exclude others from that property, water ownership is defined by the right to access and use that water. Plaintiffs argue that the Government took several actions that precluded their right to access and use their water.

a. Constructing Fences Amounted to a Physical Taking

First, Plaintiffs argue that the Government constructed fences around streams in which Plaintiffs have established a vested water right. These fences prevented Plaintiffs' cattle from accessing water during the time in which cattle were still permitted to graze on the allotments. In *Colvin Cattle Co.*, as previously described, the Federal Circuit held that the cancellation of a grazing permit did not constitute a taking of the plaintiff's water rights. 468 F.3d at 807. However, unlike this case, in *Colvin Cattle* the Government did not prevent the Plaintiff from

accessing their water. *Id.* Here, the Government did not only cancel Plaintiffs' grazing permit; it actively prevented them from accessing the water through threat of prosecution for trespassing and through the construction of the fences. Clearly, these actions prevented Plaintiffs' access to the water and there was plainly a "physical ouster" which deprived Plaintiffs of the use of their property.

Therefore, the Court finds that the Government's construction of fences around the water and streams amounts to a physical taking during the time period in which Plaintiffs' still had a grazing permit and their cattle had the right to water at these streams. Since this pertains only to a limited time period, the Fifth Amendment inquiry does not end here.

b. The Government's Actions Amounted to a Regulatory Taking

Second, Plaintiffs argue that policies promoted by the Forest Service, including permitting brush to overgrow the stream beds and allowing beavers to establish dams in the upper reaches of streams, prevented Plaintiffs from accessing and using the water in the "upper reaches of the Hages' grazing lands." P. Post Tr. Reply at 14. Mr. Hage testified at trial that after 1990, he was only able to irrigate 25% of his land due to reduced waters in Mosquito Creek, Barley creek, and Pine Creek. Tr. 128:21. Spreading and evopotranspiration were also issues. Evapotranspiration represents the water used by plants, and can represent a significant loss of water when plants develop root structure into existing

shallow aquifers or groundwater. Plaintiffs offered evidence at trial that the willow growth in the creeks had gotten so thick that it was difficult to walk across, or even to see in some places, the stream bed. Tr. 917:16. Plaintiffs' expert witness estimated the average historical flow in the seven creeks reaching the Ranch to be 13,000 acre feet. The actual flow at the time of trial was close to 5,000 acre feet, reflecting an 8,000 acre feet diminishment.

In *Ennor v. Raine*, the Supreme Court of Nevada recognized the right of a prior appropriator of water to go onto land upstream belonging to another to clear obstructions in the natural channel that interfere with the flow of water to his point of diversion. 27 Nev. 178 (1903) ("[Plaintiff] was as much entitled to have it flow through the Ennor ranch in the natural channel, and in the ditches used by him or his grantors prior to the location of that place, as through his own lands, and had as much right to remove dams and obstructions on the Ennor ranch to the extent necessary to allow his water to flow for the proper irrigation of his crops as he had to remove dams on his own ranch of obstructions in his own lane or doorway, provided he did so peaceably."). Plaintiffs argue that this case recognizes a right to go "on the upstream area of their grazing lands" to clear any obstructions, including riparian growth and beaver dams. P. Post Tr. Brief at 15. Defendant, on the other hand, incorrectly argues that the case represents a principal that the downstream user has the right only to remove unnatural obstacles placed in the channel by an upstream owner that divert or obstruct the flow of

water. The Government's narrow interpretation is inconsistent with both the case law and logic.

As Plaintiffs are arguing that policies and procedures prevented their access, the Court turns to the *Penn Central* factors to determine whether the Government's actions amounted to a taking. First, Plaintiffs clearly had investment-backed expectations in the water rights as those rights had been purchased along with the Ranch. In an arid region such as central Nevada water is highly valuable and sought after. It gives the land most of the land's value. It is unreasonable to expect that Plaintiffs would even purchase the ranch without the water rights which gave it its value. The Government interfered with their 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. The second factor, the character of the governmental action, is different for the riparian growth policy than for the threats. On one hand, there is no evidence that the policy that led to a proliferation of willows and other growth in the stream bed was malicious in nature. On the other hand, the threats and intimidation that pervaded the relationship between Plaintiffs and the Forest Service interfered with Plaintiffs' vested water rights by barring necessary maintenance. The third factor, the economic impact of the regulation on the claimant, leans decidedly against the Government. The severe reduction in water flow to Plaintiffs' patented lands deprived them of the water they needed for irrigation making the ranch unviable and which they could have sold in the market.

Considering all three factors, the Court finds that the Government's actions had a severe economic impact on Plaintiffs and that the Government's actions rose to the level of a taking.

E. 1866 Act Irrigation Ditches were Taken

Plaintiffs offered evidence that had the Government not prevented their access to their various 1866 Act ditches, the water could have been put to use for agricultural purposes or could have been sold for quasi-municipal use, as discussed above. The Court finds that Plaintiffs could have put the water from their 1866 Act Irrigation Ditches to beneficial use for agricultural purposes. This Court has already held that "[t]he government cannot cancel a grazing permit and then prohibit the plaintiff from accessing the water to redirect it to another place of valid beneficial use. The plaintiffs have a right to go on land and divert the water." *Hage IV*, 51 Fed. Cl. at 584.

Plaintiffs argue that through intimidation, threats, indictment, and conviction[9], the Government prevented them from maintaining their ditches. P. Reply at 14. First, Plaintiffs argue that the threat of prosecution for trespassing on federal land kept Plaintiffs from accessing the ditches for maintenance. However, it was not only threats that kept Plaintiffs from their waters; the Forest Service informed Plaintiffs that only hand tools could be used for ditch maintenance. Defendant counters that Plaintiffs could have applied for a special use permit to perform anything beyond normal maintenance, which would include minor trimming and clearing of vegetation. *See*

Hage IV, hoes could be accomplished with hand tools over thousands of acres. The Court visited many of these ditches and stream courses spread over thousands of acres. With hand tools the task would have taken years or decades and required hundreds of workers.

The Court must again turn to the *Penn Central* factors to inform its regulatory taking analysis.

First, Plaintiffs had a significant investment-backed expectation in the ditches, as these were the primary means for conveyance of water for irrigating the Ranch. The ditches were rights purchased along with the Ranch. Second, Plaintiffs offered ample evidence that the Forest Service had engaged in harassment towards Plaintiffs[10], enough to suggest that the implementation of the hand tools requirement was based solely on hostility to Plaintiffs. Third, the economic impact of this regulation was considerable; it would have been economically impractical for Plaintiffs to hire enough men with hand tools to perform any sort of substantial work clearing the ditches. Plaintiffs had a right to effectively maintain their ditches, including the 50 foot wide rights-of-way on either side of the ditch beds.

Therefore, the Court finds that the Government's actions in both preventing access to the ditches and in limiting the maintenance to the use of hand tools constituted a taking of Plaintiffs' water rights in the 1866 Act ditches that have been previously identified.[11]

V. Just Compensation

Where a taking has occurred, a plaintiff is entitled to just compensation. The fundamental principle of just compensation is reimbursement to the owner, so that he is put in as good a position pecuniarily as if his property had not been taken. *Coast Indian Community v. United States*, 550 F.2d 639, 647 (Ct. Cl. 1977). For purposes of just compensation, the Court must use the fair market value of the property at the time of the taking. *United States v. Miller*, 317 U.S. 369, 373 (1943). This is the amount that a willing buyer would pay a willing seller in an arm's length transaction. *See Shelden v. United States*, 34 Fed. Cl. 355, 365 (1995).

Possibly the most difficult step in the analysis is the amount of just compensation due to Plaintiffs. The amount of water that would have flowed to Plaintiffs' patented lands without the Government's actions must be estimated based on evidence produced at trial regarding the amount of water, in acre feet ("AF"), that would flow in the streams, creeks, wells, and pipelines to which Plaintiffs have established a property right that the Government has taken.

The Nevada State Water Engineer's office adjudicated water rights in Southern Monitor Valley, which lies at the northern end of the Ranch. The State Engineer determined the amount of Plaintiffs' water in Southern Monitor Valley to be 17,520.65 AF. P. Ex. 1136 at 31. In addition, Plaintiffs have established a right in 10 springs12 on other parts of the ranch. Plaintiffs introduced evidence that the ranch springs can be estimated to produce 3 gallons per minute ("gpm") each, so the 10 springs would therefore produce 43,200

gallons per day. As there are 325,851 gallons in one acre foot of water, the 10 springs would produce .13 AF per day, or 47.45 AF per year.

Based on the evidence produced at trial, the Court finds that the total amount of acre feet of water was 17,520.65 AF plus 47.45 AF, for a total of 17,568.1 AF. As the Court previously stated, the probable beneficial use for the water was for agricultural use. The Court finds that the agricultural value of the water on the Pine Creek Ranch was $162.50 per acre foot in 1991, as shown by Plaintiffs' experts.

Thus, multiplying 17,568.1 AF by $162.50, the Court finds that Plaintiffs are entitled to the amount of **$2,854,816.20** for the value of their water rights.

VI. Compensation under 43 U.S.C. § 1752(g)

Plaintiffs argue that they are entitled to compensation under 43 U.S.C. § 1752(g). The Act, in relevant part, provides:

> Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but

not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein.

43 U.S.C. § 1752(g).

First, the Court must address Defendant's contention that Plaintiffs' claim for compensation under this section is not ripe. As the Court noted in *Hage I*, the ripeness doctrine obligates the Court to hear the case if "these plaintiffs will suffer real consequences if the court declines to consider the case." 35 Fed. Cl. at 162. In determining whether a case is ripe, the Court will consider "the hardship of the parties of withholding court consideration" and, second, "the fitness of the issues for judicial decision." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

Defendant argues that Plaintiffs have never applied to the "secretary concerned" for compensation, and thus their claim is not ripe. Defendant points the Court to *Julius Goldman's Egg City v. United States*, 556 F.2d 1096, 1097 (Ct. Cl. 1977). In *Egg City*, the relevant statute required the Secretary to compensate owners of destroyed animals "based upon the fair market value as determined by the Secretary." *Id.* In that case, the court found that the Secretary, not the trial court, should make that determination. However, in *Egg City* there were regulations detailing an appraisal process and outlining how owners of destroyed animals would be compensated. *Id.* at 1098. Plaintiffs point out that in this case, they were not aware of any procedure established by either the Department of Agriculture or the Forest Service to implement the

provisions of 42 U.S.C. § 1752(g). The Forest Service manual simply sets forth a general statement of policy with respect to compensation, but does not establish how parties may seek that compensation.

The Court finds that since there was no clear procedure establishing how Plaintiffs might seek compensation for their range improvements they may pursue their claim in this forum. The issues of range improvements are fit for judicial decision through the evidentiary process, specifically through trial. In addition, withholding the Court's consideration at this point would impose upon Plaintiffs the hardship of attempting to determine how they would seek compensation in an appropriate agency, and considering the history of the Forest Service's relations with them, this claim would likely be futile.[13]

In *Hage I*, the Court stated that to prevail on their claim for compensation under 43 U.S.C. § 1752(g), Plaintiffs must demonstrate first, that defendant "actually cancelled the permit not to enforce the permit terms but rather to have access to the water and allotments for use by the Forest Service, elk, hunters, fishermen, or tourists." 35 Fed. Cl. at 179. Second, Plaintiffs must "demonstrate that such use actually does devote the allotment to another 'public purpose' within the meaning of 43 U.S.C. § 1752(g)." *Id.*

To prove that the land has been dedicated "to another public purpose," Plaintiffs presented evidence that first, the lands in question are clearly no longer being used for grazing. There had not been any authorized

grazing on the Meadow Canyon, Table Mountain, and Monitor Allotments between the cancellation of Plaintiffs' grazing permit and the most recent trial, a period of thirteen years. The Meadow Canyon Allotment has been devoted to wildlife and recreational purposes. At the time of trial, the BLM had approved the applications of third parties for desert entries on the Ralston Allotment, for the purpose of growing irrigated crops there. Except for a temporary grazing permit issued by the Forest Service to a third party rancher, there was no cattle grazing on the McKinney Allotment between 1991 and trial. There has not been simply a cessation of grazing activities on these lands but active efforts to devote the lands to other activities. On the Meadow Canyon Allotment, a mountain bike trail has been constructed. The Court finds that the facts show that Meadow Canyon has been devoted to recreational activities. Further, the Court finds that as there has been no grazing on the Table Mountain Allotment since 1990, the allotment has been devoted to the public purpose of an elk preserve.

Plaintiffs also argue that they are entitled to compensation for both the improvements they constructed and the improvements they purchased along with the Ranch, which their predecessors had constructed. However, this claim goes against the plain language of the statute, which states that compensation is for "authorized permanent improvements placed or constructed *by the permittee*." 43 U.S.C. § 1752(g) (emphasis added). Where a statute is "clear and unambiguous" the Court "must give effect to the unambiguously expressed intent of

Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 290 (1988); *see also Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The Court finds that Plaintiffs are entitled to compensation for the improvements they constructed but not for the improvements constructed by their predecessors.

At trial, Mr. Hage testified to the improvements he made to the Pine Creek Ranch. Tr. 47:23. The improvements included: roads and trails, fences, a new spring box at Ice House Spring; a new ice box and piping system at Frazier's Hill; new piping at Ray's Well; a new spring box at Baxter Spring and Stewart Spring; an underground holding tank and pipeline at Spanish Spring; 1200 feet of piping at Pine Creek Well; new corrals and a loading shoot at Pine Creek Well; 1,000 gallon holding tank at AEC Well a new spring box at Clay Bank; and two water troughs on Upper Airport Pipeline.

The Court finds Plaintiffs are entitled to recover for the following improvements constructed by them: (1) 238 miles of fences, which represents eighty percent of the Ranch's fences; (2) 634 miles of established roads and trails (either built or extensively maintained by Plaintiffs; (3) 44.7 miles of ditches and pipelines; and (4) improvements at Ice House Spring, Frazier's Hill, Baxter Spring, Stewart Spring, Clay Well, Upper Airport Pipeline, and Pine Creek Well.

1. Fences

The evidence introduced at trial shows that there are approximately 298 miles of fences on the Ranch, of

which eighty (80) percent, or 238 miles, were built by Plaintiffs within ten years prior to 1991. The average cost of constructing one mile of four-strand fence in central Nevada in 1991 was $4,000. Applying an adjustment of .95 for an estimated five percent physical deterioration of these newer fences, the Court finds that the replacement cost of the fences built by Plaintiffs was **$904,400.**

2. Roads

There are 634 miles of roads and trails on the Ranch, which range from two-lane graded roads to a horse pack trail. Plaintiffs offered evidence that considering the wide range of equipment, operator and fuel costs, and the amount of work associated with the varying conditions and terrain on the ranch, the average cost of constructing one mile of ranch road or trail, passable by a fourwheel drive pickup truck, is approximately $850 in 1991. Applying an adjustment of .85 for an estimated fifteen percent physical deterioration, the Court finds that the value of the ranch roads and trails was **$458,065**.

3. Improvements to Springs and Wells

Plaintiffs proved that they made improvements on 7 springs during the 10 years prior to 1991.

The average value of physical improvements made to springs is approximately $500 per spring.

Making an adjustment of .9 to consider deterioration at these springs and wells, the Court finds the value of the spring boxes and other improvements to be **$3,150**.

The Court finds that Plaintiffs are entitled to $904,400 for the value of fences, $458,065 for roads and trails, $3,150 for the value of improvements at seven springs and wells, for a total amount of $1,365,615

VII. Conclusion

As the Court stated in *Hage I* and still firmly believes,

> The taking clause was not written to protect merely against frivolous exercises of governmental power, but more precisely to protect against the opposite. Presumably, the political process protects against most frivolous exercises. The protection of the Fifth Amendment is most needed to protect the minority against the exercise of governmental power when the need of government to regulate is greatest, and the desire of the popular majority is strongest. In this way, and in this way only, does the judiciary properly affect policy, and that effect is to adjudicate the limits that the rule of law and a written Constitution impose upon popular government. The existence of property rights, not the judiciary's finding of a "taking," impose these limits.

35 Fed. Cl. at 152.

Following this spirit, as well as the law and the evidence, the Court hereby finds that the Government's actions amount to a taking of Plaintiffs' property with respect to their surface water rights and their 1866 Act ditches. The Court further finds that the Government dedicated Plaintiffs' historical grazing lands to "another public purpose" for the purposes of 43 U.S.C. § 1752(g). Thus, Plaintiffs are hereby

AWARDED $2,854,816,20 for the value of their water rights plus $1,365,615 for the value of their improvements, for a total award of **$ 4,220,431.20**, plus interest from the date of the taking14 and attorney's fees and costs under the Uniform Relocation Act, 42 U.S.C. § 4654(c).

It is so ORDERED.

s/Loren A. Smith
LOREN A. SMITH
SENIOR JUDGE

Footnotes

1 *Hage v. United States*, 35 Fed. Cl. 147 (1996) (*Hage I*); *Hage v. United States*, 35 Fed. Cl. 737 (1996) (*Hage II*); *Hage v. United States*, 42 Fed. Cl. 249 (1998) (*Hage III*); *Hage v. United States*, 51 Fed. Cl. 570, 572 (2002) (*Hage IV*).

2 Andrew's Creek Ditch, Barley Creek Ditch, Borrego Ditches, Combination Pipeline, Corcoran Pipeline, Corcoran Ditch, Meadow Creek Ditch, Pasco or

Tucker Ditch, Pine Creek Irrigating Ditch, Spanish Spring Pipeline, White Sage Irrigation Ditch. *Hage IV*, 51 Fed. Cl. at 583.

3 Andrews Creek, Barley Creek, Combination Springs, Meadow Canyon Creek, Mosquito Creek, Pasco Creek, Pine Creek, Smith Creek, White Sage Ditch. *Hage IV*, 51 Fed. Cl. at 579.

4 AEC Well, Airport Well, Baxter Spring, Black Rock Well, Cornell Well, Frazier Spring, Henry's Well, Humphrey Spring, Pine Creek Well, Ray's Well, Rye Patch Channel, Saulsbury Well, Silver Creek Well, Snow Bird Spring, Spanish Spring, Stewart Spring, Well No. 2, Well No. 3. *Hage IV*, 51 Fed. Cl. at 579.

5 Caine Springs, Cedar Corral Springs, Mud Springs, Perotte Springs. *Hage IV*, 51 Fed. Cl. at 580.

6 Ditches as defined by the 1866 Ditch Rights-of-Way Act ("1866 Act"), 43 U.S.C. § 661.

7 Plaintiffs admitted that "it was established that the sale proceeds of the Hages' impounded cattle were substantially less than the costs of impoundment." P. Post Tr. Brief at 10.

8 Plaintiffs also allege that the Government's cancellation of their grazing permits resulted in a taking of their stockwaters, in which they have established a property right. These stockwaters originate and terminate on federal lands, and are used for cattle watering purposes when the cattle graze on the appurtenant meadows. However, the Federal

Circuit has rejected this argument in *Colvin Cattle*. 468 F.3d at 807. There is no taking of the right to water livestock when a grazing permit is cancelled. Therefore, the Court must **DENY** Plaintiffs' claim for compensation for their stockwaters.

9 *United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994).

10 *See, e.g.* Tr. 292:15-293:5; *see also* Tr. 85:1-89:22.

11 Plaintiffs also have a forage right in 50-foot wide rights-of-way on either side of each 1866 Act ditch. However, it would be economically unfeasible to graze cattle on the 100 foot wide strips while being unable to graze on land beyond that mark. Plaintiffs would have to erect a fence to keep cattle within this location and it is highly unlikely that there would be a willing buyer for the right to graze on that land. Therefore, the Court finds that Plaintiffs' claim for compensation for the taking of the forage in their 1866 Act ditch rights-of-way must be **DENIED**.

12 *See supra* notes 3-5; Combination Springs, Baxter Spring, Humphrey Spring, Snow Bird Spring, Spanish Spring, Stewart Spring, Caine Springs, Cedar Corral Springs, Mud Springs, Perotte Springs.

13 Further, the Court, while not addressing the ripeness issue, has already held that Plaintiffs may proceed with this claim here. *Hage I*, 35 Fed. Cl. at 179.

14 When the government takes an individual's property, the owner "is entitled to interest thereon

sufficient to insure that he is placed in as good of a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." *Kirby Forest Indus. Inc. v. United States*, 467 U.S. 1, 10 (1984); s*ee CCA Associates v. United States*, 75 Fed. Cl. 170, 204 (2007).

No. 91-1470L
(Filed January 29, 2002)
In the United States Court of Federal Claims

THE ESTATE OF E. WAYNE HAGE
AND THE ESTATE OF JEAN N. HAGE,
Plaintiffs,

v.

THE UNITED STATES,
Defendant.

Water Rights; Takings; Jurisdiction; Surface Rights; Grazing Permits; 43 U.S.C. § 661; 43 U.S.C. § 946; 43 U.S.C. § 956; 43 U.S.C. § 959; Ordinance of May 20, 1785; Treaty of Guadalupe-Hidalgo; Desert Lands Act of 1877; Act of 1888, Act of 1890; Creative Act of 1891; Forest Service Organic Act; 43 U.S.C. § 952; 43 U.S.C. § 292; 43 U.S.C. § 315; Nev. Rev. Stat. § 533.505(1)

Lyman D. Bedford and *Michael J. Van Zandt*, McQuaid, Metzler, Bedford & Van Zandt, LLP, of San Francisco, CA, for plaintiffs.

Dorothy R. Burakreis, with whom was*David Shuey*, Environment and Natural Resources Division, U.S. Department of Justice, of Washington, D.C., for defendant.

Eric C. Olson, U.S. Department of Agriculture, and *John Payne,* Regional Office of the Solicitor, U.S.

Department of Interior, of San Francisco, CA, of counsel.

Johanna H. Wald, Natural Resources Defense Council, of San Francisco, CA, and *Professor Joseph Feller*, Arizona State University, of Phoenix, AZ, for *amici curiae* State of Nevada Division of Wildlife, National and Nevada Wildlife Federations, Natural Resources Defense Council, and Sierra Club. *Thomas D. Lustig*, with whom was *Beth Wendel*, of Boulder, CO, for *amicus curiae* National Wildlife Federation.

David Creekman, Deputy Attorney General, State of Nevada, for *amicus curiae* R. Michael Turnipseed, State Engineer of Nevada.

FINAL OPINION: FINDINGS OF FACT

SMITH, Senior Judge.[1]

BACKGROUND

Plaintiffs, E. Wayne Hage and the Estate of Jean N. Hage, are the owners of the Pine Creek Ranch in Nye County, Nevada. In September 1991, plaintiffs filed this claim alleging constitutional, contractual, and statutory causes of action.2 In 1996, the court granted in part and denied in part defendant's Motion for Summary Judgment, holding that plaintiffs should have the opportunity to prove whether they "own property rights in the claimed water, ditch rights-of-way and forage and the scope of those rights." *Hage v. United States*, 35 Fed. Cl. 147, 180 (1996) (hereinafter *Hage I*).

In June 1997, the court granted plaintiffs leave to amend their complaint to include a claim for ownership of the surface estate of approximately 752,000 acres of grazing land on federal allotments. On July 6, 1998, the court stayed defendant's Motion to Dismiss or Alternatively for Partial Summary Judgment addressing the plaintiffs' surface estate claim until after a evidentiary hearing on plaintiffs' property interests.

Plaintiffs' amended complaint alleges a variety of constitutional takings. As in every takings claim, the court must decide: first, do plaintiffs own the property at issue; second, did the government take the property; and if so, what is the "just compensation" due the plaintiffs. The parties have been unable to stipulate to ownership of the property plaintiffs allege defendant took. That necessitated dividing this proceeding into a series of hearings on the different elements of plaintiffs' claims.

This FINAL OPINION: Findings of Fact only addresses the first issue of what property and what water rights plaintiffs owned. The other steps of the takings analysis will be addressed after subsequent proceedings.

In October 1998, the court held a two-week trial to resolve whether plaintiffs own the property at issue. A month after the hearing, the court issued a "Preliminary Opinion" to better focus the parties' post-trial briefing and with the hope of possible settlement. *Hage v. United States*, 42 Fed. Cl. 249 (1998) (hereinafter *Hage III)*. As clearly indicated by

its title, the draft was meant solely as an expression of the court's initial thoughts, similar to the court's practice of making closing comments from the bench. This court issued the Preliminary Opinion "to streamline and expedite posttrial briefing." *Id.* at 250. It was not meant to be interpreted as a final finding of fact, but merely an expression of the court's thinking at the time. After a thorough review of the parties' post-trial briefs and closing arguments, the court now issues this FINAL OPINION defining what property interests the plaintiffs own for purposes of their taking claim.

With the publication of this FINAL OPINION in the property phase of this case, the court's earlier Preliminary Opinion, *Hage III*, is rescinded except as explicitly reaffirmed herein.

INTRODUCTION

The property involved in this case is atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and flows throughout the year. The question the court confronted was whether plaintiff had a right to put to beneficial use the water that traveled through certain ditches.

The court was not called upon to determine the chain of title or actual ownership of a pond or lake, but a right of usage defined by historical practice. The law is relatively clear that if plaintiffs stopped using the water, they lost the right to the continued use of that water. Indeed, plaintiffs merely own the right to use all the water they can put to beneficial use.

The two threshold questions in any takings case are: do plaintiffs "possess a property interest, and if so, what is the proper scope of that interest?" *Store Safe Redlands Assoc. v. United States*, 35 Fed. Cl. 726, 734 (1996). Throughout this case, the government has characterized plaintiffs' claims as questions of law to which no finding of facts are needed. The court rejected this argument in its 1996 summary judgment opinion, *Hage I*, and continues to reject it here.

Plaintiffs' case is based on the accepted theory that Western lands are divided into split estates: the federal government retained the mineral rights, and the ranchers owned various surface rights such as: water usage, rights to forage, ditch and pipeline rights of way protected and recognized under the Act of July 26, 1866, and right of access to the above, in the form of easements and/or rights of way for their livestock across the lands or mineral estates of the United States.

Plaintiffs' amended complaint raises the following claims: first, that the suspension and cancellation of their grazing permits deprived them of their right to graze their cattle; second, that they were deprived of their water rights when the Forest Service cancelled and suspended their grazing permits and diverted and used the water on those allotments; third, that defendant took their property interest in the ditch rights-of-way by forbidding plaintiffs to access the ditches; fourth, that nonindigenous elk consumed forage and drank water reserved for their cattle in violation of their property right; fifth, that when the

Forest Service impounded plaintiffs' cattle, defendant took plaintiffs' personal property; sixth, that by canceling and suspending portions of their grazing permit and interfering with their water rights, ditch rights-of-way, and forage, defendant deprived plaintiffs of all economic use of their ranch; and finally, that they are entitled to compensation for improvements they made to federal rangeland pursuant to 43 U.S.C. § 1752(g).

This opinion focuses on these seven claims solely to the extent that the claim is contingent upon plaintiffs ownership of property. All other issues – whether there was a taking, and if so, what just compensation would be for that taking – are deferred.

Based on the evidence presented at trial and a judicial inspection of much of the property in question, this court finds that plaintiffs have established ownership of substantial vested water rights and many Act of 1866 ditch rights-of-way. The court, however, finds that the plaintiffs have shown no evidence and have no legal support to sustain a viable claim for a property interest in grazing permits or a surface estate.

Therefore, the court grants defendant's Motion to Dismiss with regard to the surface estate and grazing permits.

DISCUSSION

I. JURISDICTION

Pursuant to the Tucker Act:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2001). This court has jurisdiction over takings cases where the plaintiff is seeking compensation rather than possession of the land in question. *See Bourgeois v. United States*, 212 Ct. Cl. 32, 35-36 (1976) (citing *Malone v. Bowdoin*, 369 U.S. 643, 647 n. 8 (1962) and *Carlson & Carlson v. United States*, 208 Cl. Ct. 1022, 1023 (1976)). Because this is a suit for just compensation and not "a suit for possession," it is "within the historical jurisdiction of the court." *Bourgeois*, 212 Ct. Cl. at 35 n.1.

A. This Court has Jurisdiction because this is not an *In Rem* Adjudication

In September 1998, immediately before the October 1998 evidentiary hearing,the Office of the State Engineer of the State of Nevada filed its final Order of Determination in the ongoing adjudication of water rights in the Southern Monitor Valley.[3] Two days later, R. Michael Turnipseed, the State Engineer for Nevada, filed a Petition for Writ of Mandamus or Prohibition to prevent this court from continuing to exercise jurisdiction over the water rights at issue in this matter. The State Engineer argued that under

Nevada law, the filing of the Order of Determination commenced the judicial phase of the state adjudication process, and thereby deprived this court of jurisdiction over the water at issue. *See*NEV.REV.STAT. 533.165 (2001)("The order of determination, when filed with the clerk of the district court as provided in NRS 533.165, shall have the legal effect of a complaint in a civil action.").

The State of Nevada argues that even though the Court of Federal Claims was first in time, Nevada is not prevented from asserting jurisdiction over the water rights adjudication because this court is not proceeding *in rem*. The State further argues that because it has begun *in rem* proceedings, this court should halt its consideration of this case because at bottom the same *res* is at issue. The State, however, misconstrues what the plaintiffs have asked this court to do. Plaintiffs do not seek *in rem* relief from this court. Instead, plaintiffs seek just compensation for the losses they incurred when, they allege, the government took their property. As this court noted in *Hage I*, "a title dispute, as part of a taking claim, traditionally does not prevent jurisdiction in this court, assuming jurisdiction otherwise exists. *See Oak Forest, Inc. v. United States*, 23 Cl. Ct. 90 (1991); *M.R.K. Corp. v. United States*, 15 Ct. Cl. 538 (1988). Moreover, plaintiffs contend that determining title to water is no different than determining title to real property, and the same jurisdictional rules should apply to all forms of property." *Hage I* at 158.

Plaintiffs should not be forced to wait for a determination of whether a taking occurred for Fifth

Amendment purposes while the state proceeding winds its way through the courts. Water determination cases can take decades to reach a conclusion. For example, in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983), the quiet title action began in 1925 but was not decided until 1980, a span of 65 years. That case was the "comprehensive adjudication . . . of the rights of all parties to the Carson's waters," much like the Order of Determination for the Monitor Valley is a comprehensive determination of the water rights for that area. *Id.* at 853.

In the alternative, Nevada argued that the court should, in deference, stay its proceedings until the completion of the judicial phase of the Nevada adjudication.

The Federal Circuit denied Nevada's Petition because Nevada could not show extraordinary relief was necessary since it had known this court was exercising jurisdiction for 30 months. *In re Turnipseed*, 173 F.3d 434, slip op. (Fed. Cir. 1998).

At closing arguments Nevada and the government raised these arguments again. In addition, the government renewed its contention that the court need not make any findings of fact in this matter as all of plaintiffs' claims are questions of law.

The government raised a similar point in its Summary Judgment argument, which this court addressed at length in our 1996 Opinion. *See Hage I* at 159. This court distinguished this case from a water rights

adjudication because stream adjudications are "creatures" of state law which the states are best able to determine.

However, this court can determine whether plaintiffs have *title* to water rights without engaging in a stream adjudication. *See Hage I* at 159, 163.[4] It is also clear that this court can determine title to real property as a preliminary matter when addressing a takings claim. *See e.g.*, *Bourgeois v. United States*, 212 Ct. Cl. 32 (1976) (stating that in a suit seeking compensation, the court is not denied jurisdiction simply because there is a quiet title issue involved in determining compensation); *Yaist v. United States*, 228 Ct. Cl. 281 (1981). "Similarly, this court may determine whether plaintiffs have title to a property interest in water as a preliminary matter before addressing whether that property interest has been taken by the government." *Hage I* at 159.

Nor do the McCarran Amendment[5] or *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), "require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication." *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 569 (1983) *reh'g. denied* 464 U.S. 874 (1983). *See also Hage I* at 160; *Duval Ranching Co. v. Glickman*, 965 F. Supp. 1427 (D. Nev. 1997) (stating that even where there is an ongoing water rights adjudication, "abstention is always discretionary"); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 730 (1996).

B. The Legal Standard in Physical Takings Cases

The Supreme Court has made it clear that a "physical taking occurs when the government's action amounts to a physical occupation or invasion of the property, including the functional equivalent of a 'practical ouster of [the owner's] possession.' *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1878); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). When an owner has suffered a physical invasion of his property, courts have noted that 'no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.' *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)." *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001). First, however, the party seeking compensation must prove they own a compensable property interest. *Avenal v. United States*, 33 Fed. Cl. 778, 785 (1995). This court has divided this case into two stages. In addition to proving that they have a compensable property interest, plaintiffs must show that the Government physically took their property and that that property had compensable value.

The defendant seems to argue that the court should not consider this case because there is no value to any water rights or other property the plaintiffs may have.

Valuation, however, is a later step in the takings analysis. The parties will be entitled to put on evidence at that time. The court would note that plaintiffs did, by the undisputed record, run a cattle

ranch using the water rights in question for some years.

This would seem to indicate positive value. If there was value, and the plaintiffs can by a preponderance of the evidence show what that value was, and that the government's actions amounted to a taking, then the plaintiffs will be entitled to just compensation.

II. WATER RIGHTS

The court has utilized a three step analysis to determine the water rights at issue in this litigation. First, the court determined what the legal standard is for "vested water rights." Second, the court determined which of the claimed water rights are "vested water rights." Finally, the court determined which of those vested water rights qualify as "1866 ditches." Fundamentally, "[w]hile the owner of a water right has a vested interest in that right, the right itself is something less than the full ownership of property because it is a right not to the corpus of the water but to the use of the water." *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 315 (D.C. Ct. App. 1938). We now tend to understand property rights in a more subtle way than in 1938, as evidenced by interests in pension funds, condominiums and numerous financial instruments.

A. Vested Water Rights

The plaintiffs proved they have vested water rights in the ditches, wells, creeks, and pipelines listed below

that cross their land and grazing areas as well as the Monitor Valley, Ralston, and McKinney allotments.

1. Nevada Law Controls where it is not Superceded by Federal Law.

It has long been a principle of water law that state law controls where it is not directly superceded by federal law. Indeed, it "is settled that the states may prescribe police regulations applicable to public land areas, so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments." *McKelvey v. United States*, 260 U.S. 353, 359 (1922); *see e.g. Itcaina v. Marble*, 55 P.2d 625, 630 (Nev. 1936). In addition, in the 1866 Ditch Rights-of-Way Act, 43 U.S.C.A. § 661 (1999), the Reclamation Act of 1902, 43 U.S.C. § 371-390g-8 (2001),[6] and the Taylor Grazing Act of 1934, 43 U.S.C.A. § 315 (1998),7 Congress carefully respected the rights that state law recognized prior to passage of the federal laws.

For example, the Supreme Court recognized that the Reclamation Act "leaves it to the State to say what rights of an appropriator or riparian owner may subsist along with any federal right." *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 736 n. 7 (1950).[8] The Court concluded that Congress "elected to recognize any state-created rights and to take them under its power of eminent domain" with the Reclamation Act. *Id.* at 739. The Nevada Supreme Court, when examining the intersection of Nevada water law and the Taylor Grazing Act, reiterated that where the federal government has not acted, the state may act. *Ansolabehere v. Laborde*, 310 P.2d 842, 845

(Nev. 1957) (Nevada Stockwatering Act of 1925 superceded where it overlaps with the Taylor Grazing Act). Therefore, federal law directs this court to state law to determine whether or not a water right exists.

2. Vested Water Rights Under Nevada Law

Under Nevada law to have a vested water right, the plaintiffs must have the right to "divert water by artificial means for beneficial use from a natural spring or stream." *In re Waters of Duff Creek*, 202 P.2d 535, 537 (Nev. 1949). A vested water right becomes "fixed and established . . . either by actual diversion and application to beneficial use or by appropriation . . . and is a right which is regarded and protected as property." *Id.* Appropriation of the water occurs when actual "acquisition from the government by diversion and use" is made by a party. *Id.* at 538; *see also Walsh v. Wallace*, 67 P. 914, 917 (Nev. 1901) ("To constitute a valid appropriation of water . . . there must be an actual diversion of it, with intent to apply it to a beneficial use, followed by an application to such use in a reasonable time."); *Reno Smelting Works v. Stevenson*, 21 P. 317 (Nev. 1889). Therefore, for an appropriation to occur, "there must co-exist 'the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use'. . . The outward manifestation is most often evidenced by a diversion of the water from its natural source prior to the use; . . . but it also can be evidenced in other ways, for example . . . by watering livestock directly from the source." *Hunter v. United States*, 388 F.2d 148, 153 (S.D. Cal. 1967)(Citations omitted).

The Nevada Supreme Court has recognized that though the manner of acquiring the water from the government may change as the law changes, "the character of" appropriation "remains, as ever, an acquisition of a right to use water from the government." *In re Waters of Duff Creek*, 202 P.2d at 537. Nevertheless, the use of the water cannot include any waste or be unreasonable, *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983), and one who appropriated a right to use the water can lose that right by voluntarily abandoning it. *See In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940).

3. The Hages' Water Rights

The court now turns its attention to whether plaintiffs have proven they acquired vested water rights in any of the claimed water sources. In reaching the following determinations, the court has relied heavily on the evidence presented at trial through expert testimony and exhibits. The parties are to be commended for the quality of the evidence they presented at trial.

a. Monitor Valley Water Rights

As this court noted in its Preliminary Opinion, the court finds the Order of Determination of the Nevada State Engineer9 compelling and "incorporates by reference the findings of ownership contained at pages 130-172 of the State Engineer's report on the Southern Monitor Valley." *Hage III* at 250. This court's conclusions regarding the Southern Monitor Valley, however, are based upon the strength of the Engineer's testimony and report, not on legal

deference, since this factual issue is considered *de novo*. It is also based on this court's own review of the evidence and testimony presented at trial. Plaintiffs introduced the State Engineer's Order of Determination, and then the State Engineer, Mr. R. Michael Turnipseed, testified about the examinations his office made of the sites in question prior to issuing the determination. In addition, the court made a site visit to many of the locations of the streams and ditches in question.

As in every trial, the court must determine what the facts are, often adopting the evidence of one party or the opinion of one expert witness. Due to the specific nature of the property rights at stake, the type of measurements involved in accurately describing water rights, and the court's acknowledgment of the Nevada State Engineer's expertise in mapping such rights, the court incorporates the State Engineer's descriptions of the property for accuracy and clarity.[10]

This court finds that plaintiffs showed by a preponderance of the evidence that the plaintiffs and their predecessors appropriated and maintained a vested water right in the following bodies of water in the Southern Monitor Valley. In addition to certificates of appropriation that were entered into evidence, the plaintiffs also submitted an exhaustive chain of title which showed that the plaintiffs and their predecessors-in-interest had title to the fee lands where the following springs and creeks are located:[11]

- *Andrews Creek*, which was appropriated with a priority date of 1874,[12]

- *Barley Creek*, which was appropriated with priority dates of 1874 and 1915,
- *Combination Springs*, which was appropriated with a priority date of 1866,
- *Meadow Canyon Creek*, which was appropriated with priority dates of 1874 and 1911,
- *Mosquito Creek*, which was appropriated with priority dates of 1874 and 1917,
- *Pasco Creek*, which was appropriated with priority dates of 1869 and 1911,
- *Pine Creek*, which was appropriated with priority dates of 1874 and 1972,
- *Smith Creek*, which was appropriated with a priority date of 1874, and
- *White Sage Ditch*, which was appropriated with a priority date of 1878.

b. Ralston and McKinney Allotments

This court finds that plaintiffs presented evidence at trial that showed by the preponderance of evidence that the plaintiffs and their predecessors appropriated and maintained a vested water right in the following bodies of water on the Ralston and McKinney allotments. In addition to certificates of appropriation that were entered into evidence, the plaintiffs also

submitted an exhaustive chain of title which showed that the plaintiffs and their predecessors-in-interest had title to the fee lands where the following springs and creeks are located.

1. **Ralston Allotments**

The plaintiffs have a vested water right to the following bodies of water in the Ralston allotment based either on the date of appropriation or prior beneficial use of their predecessors-in-interest:

- *AEC Well*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of December 26, 1980.
- *Airport Well*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of March 19, 1981.
- *Baxter Spring*: The state engineer issued a certificate of appropriation to United Cattle and Packing Company, a predecessor in interest of the plaintiffs, with a priority date of October 5, 1917.
- *Black Rock Well*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of July 23, 1982.
- *Cornell Well*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of December 26, 1980.

- *Frazier Spring*: The state engineer issued a certificate of appropriation to United Cattle and Packing Company with a priority date of February 17, 1927.

- *Henry's Well*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of April 27, 1981.

- *Humphrey Spring*: The state engineer issued a certificate of appropriation to United Cattle and Packing Company with a priority date of December 17, 1917.

- *Pine Creek Well*: The state engineer issued a certificate of appropriation to Frank Arcularius with a priority date of January 11, 1950.

- *Ray's Well*: The state engineer issued a certificate of appropriation to United Cattle and Packing Company with a priority date of February 17, 1927.

- *Rye Patch Channel*: The state engineer issued a certificate of appropriation to Frank Arcularius, a predecessor in interest of the plaintiffs, with a priority date of November 12, 1926.

- *Saulsbury Well*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of April 27, 1981.

- *Silver Creek Well*: The state engineer issued a certificate of appropriation to Frank Arcularius with a priority date of February 10, 1950.

- *Snow Bird Spring*: The state engineer issued a certificate of appropriation to United Cattle and Packing Company with a priority date of June 7, 1918.

- *Spanish Spring*: The state engineer issued a certificate of appropriation to United Cattle and Packing Company with a priority date of December 17, 1917.
- *Stewart Spring*: The state engineer issued a certificate of appropriation to Mrs. O. C. Stewart, a predecessor in interest of the plaintiffs, with a priority date of November 25, 1931.

- *Well No. 2*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of December 26, 1980.

- *Well No. 3*: The state engineer issued a certificate of appropriation to plaintiffs with a priority date of December 26, 1980.

2. **McKinney Allotment**

The plaintiffs have a vested water right to the following bodies of water in the McKinney allotment based either on the date of appropriation or prior beneficial use of their predecessors-in-interest:

- *Caine Springs*: The state engineer issued a certificate of appropriation to Mrs. Milo A. Caine, a predecessor in interest of the plaintiffs, with a priority date of October 8, 1919.

- *Cedar Corral Springs*: The state engineer issued a certificate of appropriation to Milo A. Caine with a priority date of February 10, 1920.

- *Mud Springs*: The state engineer issued a certificate of appropriation to Milo A. Caine, a predecessor in interest of the plaintiffs, with a priority date of October 8, 1919.

- *Perotte Springs*: The state engineer issued a certificate of appropriation to Milo A. Caine with a priority date of February 10, 1920.

B. Ditch Rights-of-Way and Forage Rights

Next, the court turns its attention to whether those water rights have accompanying ditch rights-of-way and forage rights. The plaintiffs claim that the government took their property when it prevented them access to their 1866 Act ditches.[13]

1. Determining whether a Ditch Right-of-Way existed.

The court has developed a three-step analysis to determine whether plaintiffs have a ditch right of way. First, the court must determine whether plaintiffs own 1866 Act Ditches. Second, the court must examine the proof submitted for each ditch to determine whether the ditch was established prior to 1907, when

the land the ditches are on became part of the Toiyabe National Forest Reserve. Finally, the court must determine the extent of the right of way.

In its Preliminary Opinion, the court found that the Hages were entitled to ditch rights-of-way equal to 50 feet on each side of the ditches or canals they own under Section 9 of the Act of July 26, 1866, 43 U.S.C. § 661. *See Hage III* at 250-51.

Under a common sense analysis, the court also found "that implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water." *Hage III* at 251.

At trial and in post-trial briefing, the government has opposed the plaintiffs' ownership claims under the Act of 1866 as unripe because plaintiffs failed to seek a regulatory determination that the ditches were subject to the Act and never sought a USFS special maintenance permit when engaged in clearing and cleaning work close to the outer limits of the claimed right-of-way. Alternatively, defendant contended that the right-of-way is much more limited than the scope recognized by the court.

Defendant and *amici* challenged plaintiffs' entitlement to forage rights surrounding the 1866 ditches, arguing that Nevada law does not recognize forage rights as a component of water rights.

Many statutes with similar purposes to the 1866 Act incorporate a consistent 50 foot right-of-way for

ditches. *See* Act of 1891, 43 U.S.C. § 946; Act of 1895, 43 U.S.C. § 956; and Act of 1901, 43 U.S.C. § 959. In addition, there was undisputed testimony at trial about the historic use of these ditches for livestock watering and irrigation. There was also persuasive testimony about the intent of Congress when it passed these acts. Specifically, the United States intended to "respect and protect the historic and customary usage of the range." *See Hage III* at 251. Upon careful consideration of the trial evidence and evaluation of applicable law, the court reaffirms its findings regarding ditch rights-of-way and the forage rights.

2. The 1866 Ditch Rights-of-Way Act

In the Ditch Rights-of-Way Act, Congress chose not to enact detailed dimensions of ditch rights-of-way. Instead, Congress expressly deferred to state and local custom and usage:

> 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, 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 (1866) (emphasis added). Under the 1866 Act, Congress explicitly drafted the statute to

leave local definitions of water and ditch rights in place. The Act's legislative history shows that Congress believed that Western water and easements law generally allowed a right-of way for 50 feet on both sides of a ditch.[14]

The Act of 1866 was introduced in the Thirty-Ninth Congress on March 8, 1866, as "an act granting the right of way to ditch and canal owners in the State of California over public lands." 1866 Cong. Globe 1259. The floor debates in the House and Senate contain a detailed discussion of the 50 foot-long rights of way. The version reported out of the Committee on Mines and Mining by the Chairman and original sponsor, Representative William Higbyof California, provided that under the first section:

> the owners of ditches, flumes, canals, or aqueducts for mining, mechanical, or agricultural purposes, shall have the right of way over the public lands . .. so long as those works are to be used for said purpose. The second section provide[d] that in order to give free access to such canals, flumes, and ditches, for the purpose of repairs and construction, the owners of the same are granted the use and occupation of a strip of land on each side of their respective works three rods[15] in width.

1866 Cong. Globe 3141 (June 13).

The House Committee recommended several amendments to the original language, one of which read: "Amend the second section by striking out the

words 'canals, flumes, and ditches' and inserting in lieu thereof the words 'ditch, flume, canal, or aqueduct,' also by striking out the words 'three rods in width' and inserting 'fifty feet in width.'" 1866 Cong. Globe 3141 (June 13). The House agreed to the amendment, and on Representative Higby's motion the bill was extended to include Nevada and Oregon in addition to California. In his floor remarks, Congressman Higby explained that the 50-foot ditch right-of-way was simply a codification of pertinent state and local law in the Pacific States: "We propose, in the bill as amended, that they shall have the right of way as they now have, respecting at the same time the rights of possession as established by the laws of the State." 1866 Cong. Globe 3141 (June 13).[16] The dimensions used in the House's version of the bill demonstrate Congress understood and accepted the local law and custom when it drafted, debated, and passed the 1866 Act.

At the same time, the amended House version also conditioned the duration of the estate in water and ditch rights on the use of the rights for mining, agricultural, and other purposes specified in the legislation.17 *See* 1866 Cong. Globe 3141 (June 13). Representative Higby likewise confirmed this limitation on the House floor "that the right of way shall be guaranteed by the General Government so long as these ditches, [etc.], shall be used for the purposes named in the bill." *Id.*

In the Senate, Senator William Morris Stewart of Nevada introduced a substitute amendment that removed limitations on titles to mining, water, and ditch rights. *See* 1866 Cong. Globe 3228 (June 18).

Unlike its House counterpart, the Senate bill contained no dimensions for the right of ways; it was ultimately enacted into law. The Senate's Amendment acknowledged the rights recognized under state and local law like the amended House bill. *See, e.g.*, 1866 Cong. Globe 3227 (June 18).18 Because the legislative intent behind the rights-of-way provisions was to honor the scope of property rights as defined by their independent sources, Congress' failure to incorporate the 50-foot limitation did not alter the fifty foot scope.[19]

Defining ditch rights-of-way in a federal statute would be redundant where the statute incorporates the definition of these rights under non-federal law. The legislative intent of incorporation is clear, and therefore, the Act of 1866 must be interpreted to allow for ditch rights-of-way of 50 feet on each side of a ditch.

As the Supreme Court recognized in *Jennison v. Kirk*, 98 U.S. 453 (1878), the purpose of the 1866 Act was to "give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands." *Jennison*, 98 U.S. at 457. *See also Hunter v. United States*, 388 F.2d 148, 151 and n. 6 (1967). The Supreme Court interpreted the Act to say that:

> whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and

> decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, should be 'acknowledged and confirmed.'

Jennison, 98 U.S. at 460. The Supreme Court also held that the 1866 Act was a "voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, [rather] than the establishment of a new one." *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879) (emphasis in original). The Court has also established the principle that states may determine the rights of an appropriator of water and how that right interacts with federal rights to water. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 734 (1950).

3. Establishing a 1866 Act Ditch and Right-of-way.

Plaintiffs must demonstrate that their predecessors-in-interest of the various parcels of land that constitute Pine Creek Ranch (at the time of the alleged taking) established and used the 1866 Act ditches prior to 1907 when the land was removed from the public domain and became part of the Toiyabe National Forest Reserve. *See Hage I* at 161. They must also show that the rights-of-way have been maintained and the ditches have been used since 1907.

Plaintiffs proved that only a subset of their vested water rights actually constitute 1866 Act Ditches. At trial plaintiff presented evidence the court found

persuasive that the following ditches are 1866 Act Ditches:

- *Andrew's Creek Ditch* was built in May 1876 and entered into the survey books of Nye County on June 30, 1876. The defendant admits that the Andrews Creek Ditch is an 1866 Ditch.

- *Barley Creek Ditch* was appropriated to a Hage predecessor in interest by the Nevada State Engineer in 1915 and evidence was presented that the ditch and extension ditch existed prior to 1877.

- *Borrego Ditches*: The easement to this ditch dates to 1866.

- *Combination Pipeline* was built by the BLM in 1965 on an easement from Frank Arcularius. The title records show that the land Mr. Arcularius owned had the vested water rights to all water on the land since 1870, and plaintiffs proved the easement dates back to 1866.

- *Corcoran Ditch* was constructed between 1880 and 1889, with the proof of appropriation filed on September 28, 1912.

- *Meadow Creek Ditch*: The Meadow Canyon Creek and its tributaries have been in the possession of the Hages and their predecessors in interest since at least 1902,

and probably 1868. The Ditch was constructed between 1902 and 1912. While the State Engineer's office recommended that the ditch be considered abandoned on March 8, 1996, the court saw evidence of the ditch during its site visit in 1998.

- *Pasco or Tucker Ditch* was built in 1869 and expanded in 1878.

- *Pine Creek Irrigating Ditch* was built and registered by Mr. E.H. Kincaid, a predecessor-in-interest of the plaintiffs, on April 29, 1876.

- The *Spanish Spring Pipeline* was built in 1959 but plaintiffs' predecessors-in-interest acquired a vested interest to the water in 1870.

- *White Sage Irrigation Ditch* was recorded by the Nye County Clerk at the request of E.H. Kincaid on April 29, 1878, and built that summer.

The White Sage Irrigation Ditch was part of the Certificate of Appropriation granted to the Nye County Land&Livestock Company by the Nevada State Engineer's Office on April 20, 1914.

The defendant argues that only Andrew's Ditch is an 1866 Act Ditch, because none of the others can be definitively proved to be in their original ditch beds. The court examined many of these ditches during a

site visit. The site visits made it clear that the ditches – while maintained by the owners – are subject to floods, wash outs and other forces of nature.[20] Therefore, it would be an unreasonable burden to require the plaintiffs to prove that all the ditches were in their exact points of departures and beds as they were when built in the late 1800s.

The court finds, however, that plaintiffs failed to meet their burden of proof that the following were actually 1866 Act Ditches.

- *Baxter Spring Pipeline*: Plaintiffs claim the pipeline easement dates back to 1870. Nevada State Engineer issued a Certificate of Appropriation to the Hages' predecessor in interest with a date of priority of October 5, 1917. The Pipeline was built in 1956 and extended in 1963.

- *Corcoran Pipeline* was completed in 1965 by a Hage predecessor.

- *Desert Entry Ditch*: Plaintiffs rely on two exhibits the Defendant submitted at trial. Both are applications for Special Use permits: one states that a ditch existed in 1973 and the other states the Hages' intent to maintain it. There is no evidence of when the ditch was created, but plaintiffs claim the easement was created in 1973.

- *Hot Well Ditch*: The easement to this ditch dates to 1968, 61 years after the Toiyabe Forest was reserved from the public domain.

- The *Mount Jefferson Spring and Pipeline* were installed in 1973 by the BLM.

- The *Salisbury Well Pipeline* was created in 1966 at the request of Frank Arcularius.

Thus, the court finds that it must uphold in part and reject in part the plaintiffs' claims to 1866 Act Ditch rights-of-way.

C. Vested Rights-of-Way may be subject to Reasonable Regulation where they run across Federal Land.

Because the Hages' have vested rights of way under the 1866 Act, this court must then address their contention that they are not subject to Forest Service regulations. As the District Court in Nevada recognized, "a vested right-of-way which runs across Forest Service lands is nevertheless subject to reasonable Forest Service regulation, where 'reasonable' regulation is defined as regulation which neither prohibits the ranchers from exercising their vested rights nor limits their exercises of those rights so severely as to amount to a prohibition." *Elko County Bd. of Supervisors v. Glickman*, 909 F. Supp. 759, 764 (D. Nev. 1995). Under the 1866 Act, vested ditch rights-of-way are subject to Forest Service regulations, including the need to obtain special use permits when necessary. *See* 43 U.S.C. § 1761(b)(3)

and Part 2800. According to the defendants, normal maintenance includes minor trimming and clearing of vegetation around the ditches. The defendants argue that any other maintenance can only be done after a special use permit is obtained from the Forest Service. *See* 43 C.F.R. § 2801.1-1.

The government cannot deny plaintiffs access to their vested water rights without providing a way for them to divert that water to another beneficial purpose if one exists. The government cannot cancel a grazing permit and then prohibit the plaintiffs from accessing the water to redirect it to another place of valid beneficial use. The plaintiffs have a right to go onto the land and divert the water.[21]

Whether the requirement of a special use permit to maintain a ditch right-ofway is a taking is a question this court can most appropriately answer in the takings phase of this case, which the court addresses in the Next Steps section of this FINAL OPINION: Findings of Fact.

D. The Forest Service Manual does not have the Force of Law

The government's federal law argument does not squarely resolve the interpretive problems with the statute at issue. Instead, the government directs the court to look at the USFS Manual as an authoritative pronouncement on the scope of the right-of-way easement rather than at the 1866 Act. The government contends that plaintiffs should be denied the 50-foot rights-of-way because Mr. Hage exceeded

the dimensions appropriate for normal, reasonable maintenance as defined under the Manual and the Forest Service practice. This contention must be rejected for the simple reason that the Forest Service Manual does not have the force of law. It can not alter a statutory right.

Indeed, the Supreme Court stated this principle quite clearly a year ago in *Christensen v. Harris County*, 529 U.S. 576 (2000), where the Court stated that

"[i]nterpretations such as those in opinion letters – like interpretations contained in policy statements, *agency manuals*, and enforcement guidelines, all of *which lack the force of law* – do not warrant *Chevron*-style deference." *Christensen*, 529 U.S. at 587 (emphasis added). The Manual was created to guide Forest Service personnel, not to govern private citizens in the exercise of their rights. *See W. Radio Serv. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) ("Manual and Handbook do not have the independent force and effect of law.") [22] Such agency pronouncements on the statutes are merely "'entitled to respect' under [the Supreme Court's] decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the 'power to persuade.'" *Christensen*, 529 U.S. at 587 (citation omitted).

Although the Preliminary Opinion found persuasive the Manual's position that determining the scope of rights-of-way requires a factual inquiry, *see Hage III*, the substantive provisions and Forest Service practices regarding the scope of the rightsof-way work no such persuasive effect. The Forest Service is

without authority to adjudicate title to rights-of-way under the 1866 Act, and maintenance permitting for ditches has no adjudicatory implications for these rights. Permitting decisions by Forest Service rangers in Nevada do not create some kind of ditch common law, as the government implies. The legal questions regarding the scope of the Act of 1866 rights are the province of the judiciary, not the Forest Service field personnel.

The Government emphasizes that plaintiffs did not confirm with the Forest Service that any of the ditches were 1866 Act ditches and did not seek authorization to maintain those ditches. However, there 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 government also argues that a fifty-foot right-of-way on either side of the ditches is unreasonable under the local maintenance and construction practices and the needs of the Hages and their predecessors in interest.

Further, the government argued that the scope of the rights-of-way is a matter of federal law. *See United States v. Oregon*, 295 U.S. 1, 27-28 (1935) and *Adams v. United States*, 3 F.3d 1254, 1260 (9th Cir. 1993). The legislative history, as explored above, 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.[23]

The BLM and Forest Service can attempt to place right-of-way restrictions on ranchers, but it will be next to impossible to enforce those against cattle. Ranchers let cattle drink straight from streams rather than build diversions for pragmatic, economic reasons:

> "[T]he owner cannot make cattle drink; if he built the most expensive pipe conceivable and the most beautiful trough that human ingenuity and skill could produce, for the cattle to drink out of, there would be no way of compelling the cattle to drink out of the trough, instead of out of a puddle made by the overflow from the trough. No doubt it was this consideration which led the hardy and practical live stock men of a half a century ago to adopt the well and widely established custom which the court found to prevail."

Steptoe Livestock Co. v. Gulley, 295 P. 772, 776 (Nev. 1931). While the BLM might commission a genetically engineered cow that will drink only where preprogrammed, until then it is highly unlikely that you will be able to make a cow differentiate between water they can drink because it is on base property and water that it is attached to public land. For centuries, no one has been able to lead the cow without it drinking at will. In a sense, the point of use for the water is the cow's head, which is an extension of the base ranch.

Therefore, for the reasons stated the court upholds in part and denies in part the plaintiffs' claims to three kinds of property: 1) vested water rights in the

Southern Monitor Valley; 2) vested water rights in the Ralston and McKinney allotments; and 3) 1866 Act Ditch rights-of-way.

III. GRAZING PERMITS

The plaintiffs argue that the government took their property when it revoked their grazing permits. This disregards, however, a long line of cases and the Taylor Grazing Act itself, 43 U.S.C. § 315 *et seq.* (1934), which establish the principle that grazing permits are merely a license to use the land rather than an irrevocable right of the permit-holder.

Historically, the public lands of the United States were "free to the people who seek to use them, where they are left open and uninclosed [stet], and no act of government forbids this use." *Buford v. Houtz*, 133 U.S. 320, 326 (1890). *But see Leo Sheep Co. v. United States*, 440 U.S. 668, 686 n. 24. It was, however, also clear that the government's "failure to object . . . did not confer any vested right on the [users], nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes." *Light v. United States*, 220 U.S. 523, 535 (1911).[24]

In *United States v. Fuller*, the Supreme Court held that the Fifth Amendment did not require the government to pay respondent, a large cow-calf rancher, "for that element of value [in his land] based on the use of respondent's fee lands in combination with the Government's permit lands." *United States v. Fuller*, 409 U.S. 488, 493 (1973). While *Fuller* is most

applicable to the takings phase of this case because it directly addresses whether the government has a duty to reimburse grazing permit holders, it establishes that grazing permits are licenses rather than rights. The Federal Circuit extended *Fuller* in *Alves v. United States*, 133 F.3d 1454 (Fed. Cir. 1998). In *Alves* the court held that there is no difference between grazing permits and grazing preferences because neither is a compensable property interest under the Fifth Amendment. *Alves*, 133 F.3d at 1457.

More recently, in *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000), the Supreme Court reaffirmed that the Secretary of the Interior has "consistently reserved the authority to cancel or modify grazing permits." *Public Lands Council*, 529 U.S. at 743. The Court explored the history and purpose of the Taylor Grazing Act.[25] At no time have the grazing permits been recognized as a right but rather a privilege –an opportunity to rent the public range from the government. The Secretary always retained the right to decrease the number of "animal unit months" (AUMs) allocated to each permit – in reality decreasing and increasing the number of stock allowed to range the public land as its condition changed.[26] The rancher plaintiffs in *Public Lands Council* argued that they were harmed by the Secretary's ability to change their permits after they were issued because it would affect their ability to get mortgages and loans. However, the Court said the language of the Act makes it "clear that the ranchers' interest in permit stability cannot be absolute." *Id*. at 741.[27] If hardship is produced, as well it may be, it is for the Congress, and not the Court, to amend the law.

As this trilogy of cases makes clear, the plaintiffs could not hold a valid property interest in the grazing permits.[28] Thus, their fee lands and water rights must be valued independently of any value added by any appurtenant grazing permits or grazing preferences. As this court stated in *Hage I*, "[a]lthough the permit may have value to plaintiffs . . . value itself does not create a compensable property right, no matter how seemingly unjust the consequences to the plaintiffs. *See e.g., United States v. Cox*, 190 F.2d 293, 295 (10th Cir. 1951), *cert. denied* 342 U.S. 867 (1951)." *Hage I* at 169. Indeed, this court recognized in*White Sands Ranchers of New Mexico v. United States*, 14 Cl. Ct. 559 (1988), that plaintiffs had no compensable right to the value that the permit lands contributed to their fee ranches, because the government should not be required to pay for value that it contributed to the ranches. *See White Sands Ranchers*, 14 Cl. Ct. at 566-67.[29]

At closing argument, defendant and *amici* also raised again a quasijurisdictional issue by asserting that the holdings of *United States v. Fuller*, 409 U.S. 488 (1973), and *Alves v. United States*, 133 F.3d 1454 (Fed. Cir. 1998), preclude this court from awarding plaintiffs any damages for any taking of their alleged water rights. Thus, even if plaintiffs were able to prove ownership of the water rights they assert were taken, defendant argues *Fuller* and *Alves* would prevent this court from awarding any compensation. According to defendant, these cases classify the interests plaintiffs allege were taken as "non-compensable" property interests.

Defendant, however, makes too much of *Fuller* and *Alves* for this stage of the proceeding. Defendant's arguments would be more appropriately raised in the takings stage.

While this court believes that plaintiffs present a strong equitable argument with regard to their grazing permits, the case law on this point is clear. Only Congress can create rights out of what now are licensees. Of course, there are rights to procedural due process in any permitting decision. *See Bischoff v. Glickman*, 54 F. Supp. 2d 1226 (D. Wyo. 1999), *aff'd*, 216 F.3d 1086 (2000). *See also Nat'l Wildlife Fed'n v. Cosgriffe*, 21 F. Supp. 2d 1211 (D. Or. 1998). Therefore, the plaintiffs have no compensable right in the land covered by their grazing permits or in the permits themselves.

IV. SURFACE ESTATE

Plaintiffs, relying on a string of federal laws dating from the 18th century, claim a 752,000-acre surface estate for grazing; the acreage essentially encompasses the area of their grazing allotments. Defendant claims there is no such right. While at first glance this claim strikes the court as an attempt by the plaintiffs to revive their claim to a property interest in the rangelands that this court disallowed in its summary judgment order, *see Hage I* at 170, it is somewhat different and requires analysis by the court. Therefore, this court will address each law in its chronological order.

A. Ordinance of May 20, 1785

The first statute on which plaintiffs rely is the Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory of May 20, 1785. The Ordinance directed surveys and divisions of Western lands into townships and established a system by which land within the townships would be sold to the public in the original thirteen states as well as granted to the members of the military in recognition of their service. Plaintiffs argue that the Ordinance stands for the policy of disposing "of the land so that the natural treasure that belonged to the United States could be put to productive use by its citizens . . . . The return benefit to the United States was productivity and economic contribution to the newly emerging communities in which these federal lands were situated." This policy, although clearly implicit in the Ordinance, applies only to township lands, not the range.

Moreover, the Ordinance concerned "the territory ceded by individual [thirteen] states to the United States." The ordinance is inapplicable to Nevada because Nevada was governed by the law of Mexico at the time of the ordinance and would not become a state for 79 years. Thus, this ordinance does not provide support to plaintiffs' claim to a surface estate.

B. Kearney's Code and the Treaty of Guadalupe-Hidalgo

Plaintiffs apparently recognize this jurisdictional problem and contend that the surface estate was properly under the legal regime governing Nevada from the time of its occupation to the Treaty of

Guadalupe-Hidalgo. Plaintiffs argue that the Treaty encompassed the law as recognized by the Kearney Code upon the accession of Nevada by the United States. The Kearney Code came into effect on September 27, 1845, by order of Brigadier General Stephen Watts Kearney.

The United States and Mexico concluded the Treaty of Guadalupe-Hidalgo on February 2, 1848. The Treaty ended the U.S.-Mexican War and enlarged the borders of the United States to include the present states of California, New Mexico, Nevada, Arizona, and Colorado in exchange for 15 million dollars. Upon ratification, the United States began to manage the newly acquired territory both as a sovereign and a proprietor under the Property Clause. *See* U.S. Const. Art. IV, § 3, cl.2 ("Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

A transfer of territory by cession, such as through a Treaty, "confers . . . [only] a derivative title." CHARLES G. FENWICK, INTERNATIONAL LAW 219-220 (1924). Private holdings are not deemed expropriated with changes in sovereignty. Plaintiffs argue that as a matter of law, the United States was bound to recognize possessory rights as property because such rights were recognized under Mexican law. The principle of recognition of preexisting rights is supported by Article VIII of the Treaty, which stipulates respect and protection for Mexican private property coming under the jurisdiction of the United States. 9 Stat. 922, 929.

The California Supreme Court explained that under Mexican law occupation of land for stockraising could create a possessory property right. *See Sunol v. Hepburn*, 1 Cal. 254 (1850). However, the court stated that the mere roaming of cattle and other stock "was too slight a circumstance on which to found a claim to wild, uncultivated and unfenced lands, unless it be also shown . . . that such cattle and horses were restricted by keepers or otherwise within definite boundaries." *Sunol*, 1 Cal. at 262. Even then, occupation required the intent to occupy along with "actual detention" of the thing occupied. *Sunol*, 1 Cal. at 263. The plaintiffs presented no evidence at trial that demonstrated the plaintiffs' predecessors-in-interest had occupation of the land prior to Nevada being purchased by the United States.[30] Neither did they provide evidence which would link Mexican law to their claim for 752,000 acres of public land. Thus, this Treaty does not provide support to plaintiffs' claim to a surface estate.

C. Act of 1866

The plaintiffs next turn their attention to the Act of 1866, which they argue created a system of split-estates. Because this court exhaustively examined it above, we need only restate here that the Act established water rights, but did not include more than a right-of-way to access those water rights. Thus, this act does not provide support to plaintiffs' claim to a surface estate.

D. Desert Lands Act of 1877[31]

The Desert Lands Act encouraged settlement of the West but limited any person's reclamation of the desert to no more than 640 acres. At the same time, the Act reserved water rights to prior appropriators and required all surplus water to be free for others to appropriate and use. However, as the plaintiffs note, they are not claiming fee simple lands under this Act nor do they rely on the Act to establish their grazing allotments. This Act merely shows that Congress limited settlers reclamation to 640 acres, not 752,000 acres.[32] Thus, this act undercuts plaintiffs' claim to a surface
estate.

E. A Trilogy: the Act of 1888,[33] Act of 1890,[34] and the Creative Act of 1891[35]

This trilogy of laws was an extension of the Desert Lands Act and illustrates Congress' efforts to balance recognized prior usage of public lands by private citizens with protecting and taming the vast rangeland of the West. The Act of 1888 reserved desert lands that contained water or the possibility of ditches and waterways from entryand settlement. Congress quickly revoked the law in 1890, because it threatened to shut down all settlement in the desert areas – without water the land was useless.

The Act of 1890 repealed the Act of 1888, reinstated settlers who had claims to the land prior to the Act of 1888, and allowed them to continue to occupy and settle the land. The Creative Act of 1891 clarified the 1890 Act by repealing the pre-emption laws. It also gave the President the authority to create National

Forests from public lands.36 While this series of laws eventually allowed the status quo to exist for settlers who had begun to reclaim the desert lands, nothing in the laws suggests that the settlers could accumulate a surface estate in public land through grazing permits as the plaintiffs claim. Instead, the laws affirm the rights of settlers to maintain their water rights and develop desert parcels of up to 640 acres. Thus, these acts also do not provide support to plaintiffs' claim to a surface estate.

F. Forest Service Organic Administration Act37

The Forest Service Organic Administration Act set the parameters for reserving and establishing National Forests. The purpose of these National Forests was to "improve and protect the forests within their boundaries." 16 U.S.C. § 475.

At the same time, the Act allowed settlers who lived within the boundaries of the Forest Reservations to enter and exit those lands freely. Neither did it prevent them from crossing the Forest Reservations to reach their homes. The Act also specifically outlined the purposes for which water could be used: domestic, mining, milling, and agriculture. The Act did not deprive settlers of any vested water rights once a forest was reserved and allowed them to locate new land for any unperfected claims in the new forest. However, this merely indicates that Congress understood the importance of water rights, not that Congress intended to create split estates in public land as plaintiffs claim.

G. Livestock Reservoir Siting Act[38]

The Livestock Reservoir Siting Act allowed individuals and livestock companies to construct reservoirs on unoccupied public lands for the purpose of watering stock. It also allowed them to fence an area around the reservoir as long as it was available for others to use for watering stock. In addition, the Act gave the constructor of the reservoir control of the surrounding grazing – up to 160 acres – but subject to regulations the Secretary of the Interior would implement.

The defendant calls the right to water stock a bare license to use unoccupied lands, while the plaintiffs argue the settlers gained an easement around each reservoir. However, the Act's language never states that an easement was created. Instead, it states that a reservoir could be constructed of up to 160 acres. It is also clear from the Act's language that fences could not be constructed without permission of the Secretary of the Interior and he could direct them to be torn down immediately. This clearly indicates Congress had no intent for settlers to gain a permanent right to use or own the land around the reservoir.

H. The Stock Raising Homestead Act[39]

The Plaintiffs claim that Section 10 of the Stock Raising Homestead Act allowed current users of water to have a right of way across public land to that water of one to five miles across depending on the distance to the water source. The regulations

interpreting section 10 state simply that applications for such a "driveway" to access water will be considered as received by the Secretary of the Interior.[40] The fact that Congress split the mineral and surface estate in this Act (and others) does not mean that either ceased to be within the control of the Secretary of the Interior. The land covered by this Act could be acquired in blocks of no more than 640 acres.

I. Taylor Grazing Act[41]

Congress passed the Taylor Grazing Act in response to over-use of the open range. The Act gave the Secretary of the Interior broad discretion to manage the public land through rules and regulations and provided for future grazing to be allowed only via grazing permits. However, the system adopted gave a preference to those who had been grazing the land prior to passage of the Act. The Court of Appeals for the D.C. Circuit stated that one of the two purposes for the Taylor Grazing Act was to identify and protect the stock growers grazing rights. *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (1938). However, the court affirmed that grazing rights were not property rights in the traditional sense of the word, but similar to licenses that could be issued and revoked by the Secretary of the Interior. *Id.* at 315.

J. Nevada's Three Mile Grazing Rule

In the alternative to these federal statutes, plaintiffs allege that they have a surface estate based on Nevada's Three Mile Rule. NEV. REV. STAT. § 533.505(1) (2001). This law was passed in 1925, well

after the Toiyabe National Forest was created in 1907, and stated that a rancher was guilty of a misdemeanor if he allowed his stock to water at a site of another or within three miles of that site for two or more consecutive days. While the plaintiffs try to use this law to create a right, it is a wellestablished legal principle that "[t]he laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control." *United States v. Oregon*, 295 U.S. 1, 27-28 (1935).

In fact, "the construction of grants by the United States is a federal not a state question and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances." *See id.* (citations omitted). In addition, the Act of 1866 only allowed local custom and usage to be evaluated *where they did not conflict with federal law.*

The Taylor Grazing Act did the same: local custom was used as a guide as grazing permits were issued *to the extent they did not conflict with federal law.* Thus, Nevada's Three Mile Rule would only be applicable to the *extent it does not conflict with federal law.* However, none of the parties nor the court have found a federal statute which would establish a similar right to graze for three miles around a water source. Instead, every law and case the court could find reinforces the principle that grazing on federal public land is a privilege and never a right.

None of these statutes give the plaintiffs a surface estate. At most, they may have a right to go on to the land to access the water in which they have a vested right.

The plaintiffs are correct that all of the statutes addressed in this section included savings clauses which stated that no laws could change vested rights. However, this court is not convinced that Congress ever intended to split the surface estate to the extent that plaintiffs claim. There is no indication that Congress intended to give away vast acreages of the public land when the largest amount cited in any of these Acts was 640 Acres. Therefore, plaintiffs have no right to the 752,000 acre surface estate that they claim.

CONCLUSION

The property involved here is not land at a specific time, but rather the usage of water which ebbs and flows throughout the years. The questions the court confronted were whether plaintiffs owned vested water rights and had a right to put to beneficial use the water that traveled the ditches. In addition to a two week trial with witnesses and evidence, the court at the request of the parties made a physical site inspection of many of those ditches.

For the reasons addressed above, the court finds that the plaintiffs have proven that they and their predecessors-in-interest own the rights to use the water listed in this FINAL OPINION: Findings of Fact. The plaintiffs have also proven that they own the

ditch rights to ten of the sixteen ditches and pipelines that they claim.

However, the plaintiffs do not have property rights in the surface estate or in the grazing permits. Thus, the court upholds in part and denies in part the plaintiffs' claims to three kinds of water: 1) vested water rights in the Southern Monitor Valley; 2) vested water rights in the Ralston and McKinneyallotments; and 3) 1866 Act Ditch rights-of-way. The court also grants the defendant's Motion to Dismiss with respect to plaintiffs' Surface Estate and Grazing Permit claims.

NEXT STEPS

This Final Finding of Fact simply addresses what property plaintiffs own. The next and final stage will address whether the plaintiffs' ditch rights-of-way (and other water rights) were taken by the government. The court will use a two step analysis to answer that question. The plaintiffs must present evidence to establish that: 1) plaintiffs had a beneficial use for the water prior to the government revoking their grazing permits and 2) that there was a taking of the plaintiffs' right to use their vested water right. Essentially, the plaintiffs must demonstrate they could have used the water if the government had not deprived them of access to prevent them from using the water. The plaintiffs have a right to the water so long as they can put it to beneficial use.

The parties are directed to the order that accompanies this opinion for the next steps in this case. Approximately sixty days from the date of this opinion

the court will schedule a status conference with the parties to discuss the next immediate steps.

Because of the length of this litigation it is hoped that one final proceeding, whether trial or oral argument, can be used to finally resolve this case. It is also hoped that the valuation issues can be included in this segment of the case.

It is so ORDERED.

_____
LOREN A. SMITH
SENIOR JUDGE

Footnotes

1 Chief Judge Loren A. Smith assumed senior status on July 11, 2000.

2 *See Hage v. United States*, 35 Fed. Cl. 147, 156 (1996) (hereinafter *Hage I*) (granting and denying in part defendant's Motion for Summary Judgement); *Hage v. United States*, 35 Fed. Cl. 737 (1996) (hereinafter *Hage II*) (granting *amici* status to environmental groups and Nevada state agencies); *and Hage v. United States*, 42 Fed. Cl. 249 (1998) (hereinafter *Hage III*) (Preliminary Opinion).

3 R. Michael Turnipseed, State of Nevada, Office of the State Engineer, *Order of Determination* in the matter of the determination of the relative rights in and to the waters of Monitor Valley & Southern Part (140-B), Nye County, Nevada (Sept. 15, 1998). The state adjudication process began on October 15, 1981,

when E. Wayne Hage filed a petition requesting a determination of the relative rights of the claimants to the waters of the Meadow Creek, Barley Creek, Corcoran Creek, Andrews Creek, Pine Creek, Pasco Creek, Mosquito Creek, Barley Creek, and their tributaries, as well as all other waters flowing into or arising in the Southern Monitor Valley.

4 In Nevada water rights exist independent of stream adjudication. The Nevada Supreme Court has stated that "[m]ost water rights upon the streams of this state are undetermined by any judicial decree or other record. While the right exists, it is undefined. For the state, however, to administer such rights, it is necessary that they should be defined." *Ormsby County v. Kearney*, 143 P. 803, 806 (Nev. 1914). Therefore, the Monitor Valley stream adjudication simply defines the parameters of property interests; it does not determine who has title to the water rights at issue. As this court recognized in *Hage I* "the concurrent adjudication of the Monitor Valley has no bearing on the ripeness of the claims before this Court. To hold otherwise would deny citizens of the United States the protection of the federal Constitution's guarantees and make those guarantees solely dependent upon state law. *Compare In re Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) *with Allgeyer v. Louisiana*, 165 U.S. 578 (1897) *and Baker v. Carr*, 369 U.S. 186 (1962). *See also Nollan v. Cal. Coastal Comm.*, 483 U.S. 825 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)." *Hage I* at 163.

5 43 U.S.C. § 666.

6 "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior . . . shall proceed in conformity with such laws . . ." 43 U.S.C. § 383.

7 "Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands . . ." 43 U.S.C.A. § 315 (1998). The Taylor Grazing Act had two purposes: 1) to provide for the best use of the public range and 2) to define the rights of stock grazers and protect them from interference. *See Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Ct. App. 1938).

8 It is important to note that Nevada uses a system of appropriation rather than riparian water use as do most Western states. In *Bergman v. Kearney*, 241 F. 884 (D. Nev. 1917), the district court stated clearly that riparian rights had "no place in the law of Nevada." *Id.* at 893. In addition, the court recognized that, "[w]ater is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate." *Id.*

9In Nevada, the state engineer has been tasked with determining who owns rights to the water within the state. In *Bergman v. Kearney*, 241 F. 884 (D. Nev. 1917), the district court outlined the multiple steps that the state engineer

> must take to make a determination. The engineer must investigate the flow of the stream, the diverting ditches, the lands irrigated, make surveys and prepare maps showing the course of the stream, the location of each ditch or canal, the area, outline and character of culture of each parcel of land upon which the water of the stream has been used, and gather such other data and information as may be essential to a proper determination of water rights in the stream.

Bergman, 241 F. at 884 referencing §§ 20-21 of the Nevada Water Law of 1913 (currently NEV. REV. STAT. 533.100 & 533.105 (2001)). All interested parties are then given an opportunity to file proofs of their ownership of the water. The State Engineer collects, prints, and distributes the proofs to all interested parties. Those parties may contest the proof in writing before the State Engineer issues his Order of Determination. The Order of Determination when filed becomes the equivalent of a complaint in the Nevada district court where the water is located.

The court recognizes there is an on-going state adjudication where both parties had an opportunity to present evidence about who owns the water in question. On October 15, 1981, the Hages filed a petition with the State Engineer requesting a determination of ownership rights of various bodies of waters within the Monitor Valley B Southern Portion. R. Michael Turnipseed, State of Nevada, Office of the State Engineer, *Order of Determination* in the matter

of the determination of the relative rights in and to the waters of Monitor Valley B Southern Part (140-B), Nye County, Nevada at 1 (Sept. 15, 1998). The State Engineer accepted the petition on June 15, 1982, and began taking proofs of ownership that fall. *Id.* at 2. The filing deadline for the proofs was extended repeatedly to February 28, 1994. *Id.* at 4. Field investigations were conducted the summers of 1994 and 1995 with a preliminary order of determination being issued on February 15, 1996. During the field investigations, the State Engineer and his staff measured the streams and their basins and the water flow rate in cubic feet per second. *See id.* at 7-12. They also analyzed whether the streams would meet the crop water needs during the summer and when the streams would dry up. *See id.* After receiving objections to the preliminary order, the final order was issued on September 15, 1998, immediately prior to the original trial in this case. A bench trial was held before the Nye County District Court on November 1, 2001.

10 The pages of the report referred to here (pages 130-172) are appended to this FINAL OPINION.

11 Explicit boundaries and dimensions of the plaintiffs' Monitor Valley property interests are detailed in Appendix A.

12 The plaintiffs proved that some of these bodies of water are also 1866 ditches. To find that an 1866 Ditch exists, the plaintiff had to prove at trial that the ditch was in place prior to 1907 when the Toiyabe National Forest was created by President Theodore Roosevelt. *See Hage I* at 161; *see also* Proclamation dated April

15, 1907. The priority appropriation dates establish how far back in time the State Engineer was able to trace the water's ownership rights through the plaintiffs' predecessors in interest.

13 This is a physical takings claim because plaintiffs argue the government has physically barred them from the land, with threat of prosecution for trespassing if they enter federal lands to maintain their ditches. This is not an idle threat, because the government unsuccessfully prosecuted Mr. Hage for maintaining the White Sage Ditch. The government obtained a criminal conviction against Mr. Hage that was overturned by the Ninth Circuit Court of Appeals. *See United States v. Seaman*, 18 F.3d 649 (1994).

14 Indeed, when asked at trial why he allowed Mr. Seamun to clear trees from 50 feet on each side of the White Sage Ditch, Mr. Hage stated it was because the 1866 Act did not clearly delineate the distance but all other laws from that time allowed a fifty foot area on each side of a ditch.

15 Three rods is the equivalent of 49.5 feet. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1020, 1338 (1984).

16 The Act of 1866 was not the only law to recognize 50 feet rights of way for the purposes of maintaining and operating irrigation ditches and canals. *See* Act of March 3, 1891, 26 Stat. 1095 § 18. The Livestock Reservoir Siting Act of 1891 recognized rights-of-way for up to 160 acres. *See* discussion *infra*.

17"*Provided*, That the possessory rights of others to public lands adjoining such ditch, flume, canal, or aqueduct, previously acquired under the law of the State or of the United States shall not be disturbed by the passage of this act: *And provided further*, that the use and occupation hereby granted shall be for the purpose named and no other." 1866 Cong. Globe 3141 (June 13).

18 "It furnishes the means to actual settlers of acquiring title to their homesteads by segregating the agricultural from the mineral lands, and confirms the rights to the use of water and the right of way for ditches as established by local law and decisions of the court. In short, it proposes no new system, but sanctions, regulates, and confirms a system to which the people are devoutly attached, and removes a cloud of doubt and uncertainty . . ." 1866 Cong. Globe 3227 (June 18).

19"This falls within a well-recognized exception to the rejection of amendments, namely, that amendments may be rejected because the bill already includes those provisions." *See* SUTHERLAND STAT. CONST. § 48:18. As a matter of property rights law, this conclusion should not be surprising in light of the Supreme Court's long-standing recognition that these rights are usually defined by state law and other sources independent of federal protections for private property. *See, e.g., Bd. of Regents v. Roth,* 408 U.S. 564 (1972) (due process protection).

20 Including an ill-fated insertion of beavers by the Forest Service in the late 1940's through the early 1950s.

21 Yet Mr. Hage was found guilty by the U.S. District Court for Nevada for doing just that: allowing an employee to cut trees from a 50 foot section alongside each side of an 1866 Ditch as he maintained it. As Mr. Hage testified at trial, he reached the 50 foot number by a common sense analysis of the laws that he was told would apply to the ditches. His conviction was overturned by the Ninth Circuit Court of Appeals. *See United States v. Seaman*, 18 F.3d 649 (1994). At trial the government did not dispute that the pinions and junipers cut were trash trees.

22 The Ninth Circuit's manifold reasons in *Western Radio Services Company* – which includes references to binding Federal Circuit precedent – refute the government's theory and are worth quoting here:

> First, the Manual and Handbook are not substantive in nature. In *United States v. Doremus*, 888 F.2d 630, 633 n. 3 (9th Cir. 1989), *cert. denied*, 498 U.S. 1046 (1991), we explained in dictum that "the Forest Service Manual merely establishes guidelines for the exercise of the Service's prosecutorial discretion; it does not act as a binding limitation on the Service's authority." *See also Stone Forest Indus. v. United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992) (Manual does not have force and effect of law); *Lumber, Prod. and Indus. Workers Log Scalers Local 2058 v. United States*, 580 F.

> Supp. 279, 283 (D. Or. 1984)(Manual is "basically a large compilation of guidelines . . . [and] not a 'substantive' rule" (internal quotations and citations omitted)). The Manual and Handbook are a series of "[p]rocedures for the conduct of Forest Service activities." 36 C.F.R. § 200.4(b), (c)(1) (1995). The Manual and Handbook are not promulgated in accordance with the procedural requirements of the Administrative Procedure Act. Neither is published in the Federal Register or the Code of Federal Regulations. *See Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). They are not subjected to notice and comment rulemaking; they are not regulations. *HiRidge Lumber Co. v. United States*, 443 F.2d 452, 455 (9th Cir. 1971) (Manual "does not rise to the status of a regulation"). Nor are the Manual and Handbook promulgated pursuant to an independent congressional authority. The National Forest Management Act authorizes the Secretary to promulgate regulations, but the Manual and the Handbook are not regulations from the Secretary. 36 C.F.R. § 200.4(d)(1) (1995) (Chief of Forest Service promulgates rules in Manual and Handbook). The Manual and Handbook provisions are contemplated in a Service regulation, not in a congressional statute. *W. Radio Serv. Co.*, 79 F.3d at 901.

23 See CURTIS H. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 530 vol. II (3d ed. 1988).

24 The Court went on to say "the United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely." *Light*, 220 U.S. at 536.

25 The Court noted that the rules the Department of the Interior established for allocating grazing permits had a three tier ranking preference: 1) first preference went to owners who had base property to support their herds as well as had historically grazed the public range; 2) then the preference went to those who owned base property but had not grazed the range before; and 3) final preference went to those who had no base property. *See Public Lands Council*, 529 U.S. at 734-35.

26 Indeed Congress gave the Secretary of the Interior discretion to "create grazing districts, to establish and modify the boundaries thereof, and from time to time to reclassify the lands therein for other purposes." *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 313 (D.C. Cir. 1938).

27 The court also noted that the regulations establish that if a permit holder did not "make substantial use" of his permit for two years, the Secretary could revoke the portion of the permit for the unused part. The Secretary also had to approve such non-use on an annual basis, but could grant it for no more than three consecutive years. *See Public Lands Council*, 529 U.S. at 747. The defendant asserts that the plaintiffs did not make full use of the permitted land which is why the grazing permits were revoked. However, all

arguments about the "taking" of the grazing permits is moot since the plaintiffs could not hold a property interest in them under the Taylor Grazing Act and its implementing regulations.

28 However, if by revoking the grazing permits the Forest Service and Bureau of Land Management prevented the plaintiffs from accessing and using their vested water rights, then those agencies may have taken the plaintiffs' water rights. Those water rights were a property right and not a license like the grazing permits.

29 The United States District Court in Nevada recently reiterated that grazing rights are not appurtenant to vested water rights. *See Gardner v. Stager*, 892 F. Supp. 1301, 1303 (1995). The fact that plaintiffs "predecessors grazed stock on the land at issue in the 1870's does not mean that the Gardners today have a vested grazing right . . .immune from federal regulations. On the contrary: use of public lands for stock grazing. . .was and is a privilege with respect to the federal government, revocable at any time." *Gardner*, 892 F. Supp. At 1303-04. The Nevada Supreme Court recognized that the United States allows ranchers to graze on federal lands, but can freely revoke that privilege at any time. *See Itcaina v. Marble*, 55 P.2d 625 (Nev. 1935). The Nevada Supreme Court also recognized that portions of Nevada's water law were superceded by the Taylor Grazing Act, 43 U.S.C. § 315 *et seq.* (1934). *See Ansolabehere v. Laborde, 3*10 P.2d 842 (Nev. 1957) *cert. denied*, 355 U.S. 833 (1957) (1925 Stockwatering Act is superceded by Taylor Grazing Act where they overlap).

30 In fact in their post-trial brief, the plaintiffs only allege that their predecessors-in-interest had possession of the range in question as far back as the 1860s.

31 Desert Lands Act, 19 Stat. 377 (1877).

32 Plaintiffs' Pine Creek Ranch encompasses approximately 7,000 acres.

33 Act of 1888, 25 Stat. 527 (1888).

34 Act of 1890, 26 Stat. 391 (1890) (also known as the Canal Act).

35 Creative Act of 1891, 26 Stat. 1103 (1891).

36 The Creative Act gave the President authority to create the Toiyabe National Forest in 1907.

37 Forest Service Organic Act of 1897, 30 Stat. 11 (1897).

38 Livestock Reservoir Siting Act, 43 U.S.C. § 952 (1897). The reservoir portion of this act was repealed by the FLPMA, 43 U.S.C. § 1769 (1976).

39 Stock Raising Homestead Act of 1916, 39 Stat. 862, 43 U.S.C. § 292 *et seq*.

40 Stock Raising Homesteads – Act of December 29, 1916, Circular No. 523 § 15.

41 Taylor Grazing Act, 43 U.S.C. §§ 315 et seq.

No. 91-1470 L
(Filed November 5, 1998)
United States Court of Federal Claims

E. Wayne Hage and Jean N. Hage, Plaintiffs

v.

The United States, Defendant

Takings; Property Interest; Water Rights; Forage; Ditch Rights-of-Way

ORDER

Lyman Bedford and *Michael Van Zandt*, McQuaid, Metzler, Bedford & Van Zandt LLP, San Francisco, CA, for plaintiff.

Dorothy R. Burakreis and *David F. Shuey*, Environment and Natural Resources Division, United States Department of Justice, Washington, D.C. for defendant. *Eric C. Olson*, Department of Agriculture, and *John Payne*, Department of the Interior, were of counsel.

Thomas D. Lustig, National Wildlife Federation, for *amici curiae*, National Wildlife Federation, Nevada Wildlife Federation, Natural Resources Defense Council, and Sierra Club. *Beth Wendel*, National Wildlife Federation and *Johanna H. Wald*, Natural Resources Defense Council, were of counsel. *David Creekman*, Deputy Attorney General, for *amicus*

curiae Office of the State Engineer of the State of Nevada.

PRELIMINARY OPINION

SMITH, Chief Judge:

Plaintiffs, E. Wayne and the Estate of Jean N. Hage, are the owners of the Pine Creek Ranch in Nye County, Nevada. In 1991, plaintiffs filed this claim alleging constitutional, contractual, and statutory causes of action. In 1996, the court granted in part and denied in part defendant's motion for summary judgment, holding that plaintiffs should have the opportunity to prove whether they "own property rights *States*, 35 Fed. Cl. 147, 180 (1996).

In June 1997, the court granted plaintiffs leave to amend their complaint to include a claim of ownership in the surface-estate of approximately 752,000 acres of grazing land on federal allotments. On July 6, 1998, the court stayed defendant's Motion to Dismiss or Alternatively for Partial Summary Judgment until after a limited evidentiary hearing on plaintiffs' property interests.

The court has not had sufficient time to reach a final decision regarding the scope and extent of all the property rights at issue but, to put it metaphorically, has decided which fork in the ditch to follow. Thus, pursuant to the limited evidentiary hearing held in Reno, Nevada, the court issues the following preliminary opinion to streamline and expedite post-trial briefing.[(1)]

INTRODUCTION

The two threshold questions in any takings case are: do plaintiffs "possess a property interest and, if so, what is the proper scope of that interest?" *Store Safe Redlands Assoc. v. United States*, 35 Fed. Cl. 726, 734 (1996). The court finds that plaintiffs have met the threshold test of ownership and have a property interest in the vested water rights claimed. Concomitant with this right, plaintiffs have a property interest in the ditch rights-of-way and forage rights appurtenant to their water rights. The court will make a final determination of the exact scope of these rights in its final opinion. The court has not yet reached a decision on plaintiffs' claim for a surface-estate in 752,000 acres of federally managed lands and the stay of defendant's motion continues.

To better guide post-trial briefing, the court makes the following findings of fact:[(2)]

Water Rights

As the court stated regarding plaintiffs' Motion in Limine, the Order of Determination of the Office of the State Engineer does not rise to the level of a "final order" for purposes of collateral estoppel.

However, given the State Engineer's clear expertise in this area, his highly compelling testimony at trial, and the interests of comity, the court hereby concurs with, and incorporates by reference the findings of ownership contained at pages 130-173 of his report on the Southern Monitor Valley.[(3)]

The court has not reached a final decision regarding plaintiffs' claimed water rights in the Ralston and Mckinney allotments. The parties should address both the ownership and scope issues for these water rights in their post-trial briefs.

Ditch Rights-of-Way and Forage

Section 9 of the Act of July 26, 1866, 43 U.S.C. § 661, recognized plaintiffs' vested water rights, but did not dimensionally define the "ditch right of way" which accompanied these rights. Based on the consistent dimensional scope described in subsequent federal legislation, the Act of 1891, 43 U.S.C. § 946,[(4)] Act of 1895, 43 U.S.C. § 956,[(5)] and Act of 1901, 43 U.S.C. § 959[(6)], for similar ditch rights-ofway, the testimony at trial, and the Forest Service Handbook, 5509.11, ch.62.11 (Aug. 3, 1992), which notes that the determination of whether a right of way under the Act of 1866 exists or not, is "a factual question"; the court finds that plaintiffs have a ditch right-of-way on the ground occupied by the water and fifty feet on each side of the marginal limits of their 1866 ditch.

Concurrent with the accompanying easement to perform ditch maintenance via the right-of-way, the court finds that a limited right to forage is appurtenant to and a component of a vested water right. The court notes the undisputed historical use of the ditches and water at issue for stockwatering and livestock maintenance. Persuasive testimony at trial on the nature and intent of the Congressional Acts dealing with western land management bore out the conclusion that the United States intended to respect

and protect the historic and customary usage of the range. To that end, the court finds as a matter of common sense, that implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water.

The court holds that the extent of the right to forage around an Act of 1866 ditch is contiguous with the scope of the ditch right-of-way: the ground occupied by the water and fifty feet on each side of the marginal limits of the ditch.

Surface Estate Claim

The court has not reached a decision on defendant's stayed Motion to Dismiss or Alternatively for Partial Summary Judgment with regard to plaintiffs' claim of a property interest in the surface estate of 752,000 acres formerly permitted to plaintiffs. The court has the parties' earlier briefs, but invites the parties to re-address the issue in light of the testimony at trial and the court's preliminary findings.

The Takings Phase

As the court noted at the close of trial, whether or not a taking has occurred is a mixed question of law and fact. Since the court heard many of the factual issues relevant to the legal question of what constitutes a taking of property within the Fifth Amendment's strictures, the court invites plaintiffs to file a Motion for Summary Judgment on this issue and invites the government to file either an opposition or an

opposition and cross-motion. It would be efficient for both sides to file these motions along with their post-trial briefs on the scope issues. The court will resolve any scheduling disputes at the hearing on November 13, 1998.

The court has given considerable thought to the appropriate legal threshold in an alleged taking of vested water rights and believes the legal question before the court is twofold. Either plaintiffs' access to and use of their vested water rights is totally dependent upon the issuance of a federal grazing permit, in which case there has not been a taking; or plaintiffs' right to use and access the water is a true vested right, not a mere illusory one, and therefore not totally dependent on the issuance of a federal grazing permit. If the latter is the case and the United States denies plaintiffs access to and use of their water, then a taking has occurred.

As the court held in *Hage I*, federal courts "have considered the permit system to be an administrative method employed by the government to allow the parties the exclusive right to graze based on historic grazing practices. All the courts which have considered this issue have held or assumed such agreements to be licenses which confer certain privileges to the permittee, revocable at the government's discretion."

35 Fed. Cl. 167 (citations omitted).

The court is not questioning the government's authority to issue grazing permits or control access to

federal lands. The question before the court, and the one the parties should address is: what are the Fifth Amendment consequences of the government's exercise of their permit authority with regard to vested water rights?

Underlying the dilemma is, what is the meaning of a "vested water right" if the government can deny plaintiffs access and use by merely denying them a grazing permit? Does not the very concept of vested rights embody a recognition of supremacy over all later claimants, and isn't this the protection explicitly recognized by the Act of July 26, 1866?

While the court recognizes that it has not yet defined the exact scope of plaintiffs' property ownership, the legal questions of whether such property interests can be, and were in fact, taken in this context, are not dependent on the size or scope of such rights. The court thus directs the parties to address the legal question of whether or not a taking of plaintiffs' vested water rights, ditch rights-of-way, forage rights, and surface estate has occurred in their briefing as outlined above.

Briefing Schedule

Due to the court's exceptionally tight schedule in the coming months, the following briefing schedule is established. It will only be altered under exceptional circumstances. Plaintiffs' brief will be due January 15, 1999 and shall address: first, the scope and extent of plaintiffs' property interests as outlined in this

preliminary opinion; and second, whether or not a taking of plaintiffs' property rights has occurred.

Defendant shall respond by February 28, 1999.[7] Plaintiffs' reply is due March 15, 1999, and defendant's sur-reply is due March 30, 1999. The court will hear closing arguments on both the property rights issues and takings on April 22, 1999.

IT IS SO ORDERED.

_____
LOREN A. SMITH
CHIEF JUDGE

Footnotes

1. As the court stressed in its concluding comments at trial, this matter has been on the court's docket for quite some time and it is the court's desire to reach a conclusion on this matter in as timely a manner as possible. To this end, the court again urges the parties to pursue settlement discussions and is available to help such discussions move forward in any way the parties feel would be helpful. In the interim, the parties are again urged to work together in order to stipulate to the administrative elements of trial, such as documentary and exhibit evidence specifically in preparation of the scheduled November 13, 1998 post-trial evidentiary conference.

2. While the parties are welcome to dispute the findings of fact in this preliminary opinion, they should limit their arguments to the scope of plaintiffs'

property interests and the court's finding with respect to the *Order of Determination.*

3. R. Michael Turnipseed, State of Nevada, Office of the State Engineer, *Order of Determination* in the matter of the determination of the relative rights in and to the waters of Monitor Valley - Southern Part (140-B), Nye County, Nevada (September 15, 1998).

4. "The right of way through the public lands and reservations of the United States is hereby granted . . .for the purpose of irrigation . . . to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof," Act of March 3, 1891.

5. "The Secretary of the Interior is authorized and empowered, . . . to permit the use of the right of way through the public lands of the United States, . . . to the extent of the ground occupied by the waters of the canals and reservoirs and fifty feet on each side of the marginal limits thereof," Act of January 21, 1895.

6. "The Secretary of the Interior is authorized and empowered, . . . to permit the use of the right of way through the public lands, forest, and other reservations of the United States, . . . [for] the supplying of water for domestic, public, or any other beneficial uses . . . not to exceed fifty feet on each side of the marginal limits thereof," Act of February 15, 1901.

7. Each side's briefs shall be limited to 75 pages, with reply briefs limited to 30 pages

United States Court of Federal Claims

No. 91-1470 L.

June 11, 1996

E. Wayne Hage and Jean N. Hage, Plaintiffs

v.

The United States, Defendant.

Mark L. Pollot, Boise, Idaho, for plaintiffs. John E. Marvel, Elko, N.V., was of counsel.

Dorothy R. Burakreis, General Litigation Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C., for defendant. Susan V. Cook, David F. Shuey, Department of Justice and Eric C. Olson, Department of Agriculture, were of counsel. Thomas D. Lustig, National Wildlife Federation, for amid curiae, State of Nevada, National Wildlife Federation, Nevada Wildlife Federation, Natural Resources Defense Council, and Sierra Club. Beth Wendel, National Wildlife Federation and Johanna H. Wald, Natural Resources Defense Council, were of counsel. David Creekman, Deputy Attorney General, for amici curiae State Engineer of the State of Nevada.

OPINION

SMITH, Chief Judge.

This matter is before the court on the State of Nevada's and various environmental groups' motion to intervene pursuant to RCFC 24(a) and (b). Previously the court orally denied the motion to intervene but granted the applicants amid curiae status. This written opinion is issued because the court believes it may be useful in this case and to the bar generally to outline the extent of participation permitted by amid and to explain the reason for denial of the applicants' motion.

FACTS

E. Wayne & Jean N. Hage filed this suit alleging constitutional, contractual and statutory causes of action. First, plaintiffs claimed that the defendant took compensable property interests in their grazing permit, water rights, ditch rights-of-way, rangeland forage, cattle and ranch in Nye County, Nevada. Second, the plaintiffs maintained that their grazing permit was a contract which the defendant breached, entitling them to damages. Third, plaintiffs claimed entitlement to compensation for improvements they made to the public rangeland. Defendant filed a motion for summary judgment on all three claims. On March 8, 1996, this court granted in part and denied in part defendant's motion. See Hage v. *United States*, 35 Fed. Cl. 147 (1996).

The Hages' claim is based upon actions undertaken by both the State of Nevada and the federal government. Nevada's Department of Wildlife, with permission from the Forest Service, releases elk and other game animals onto federal rangeland, including the land on which plaintiffs hold grazing permits and preferences. The

Hages allege that the release of the elk interferes with their rights under the grazing permit and their vested water rights because the elk reduce the amount of forage and water available to their cattle. The Hages also claim that the defendant illegally overlaps the elk hunting season with the grazing season allowed under their permit.[1] The overlap, argues the Hages interferes with their rights under the permit for exclusive use of the land and with their ability to comply with the permit terms.

Shortly after this case was filed, the State of Nevada, National Wildlife Federation, Natural Resources Defense Council, Nevada Wildlife Federation and the Sierra Club filed a motion to intervene in this matter on behalf of the United States pursuant to 24 of the Rules of the United States Court of Federal Claims. The applicants claimed an interest in the same property rights claimed by plaintiffs, specifically the right to the beneficial use of water claimed by plaintiffs, the right to the use and enjoyment of the rangeland and forage encompassed by plaintiffs' grazing permit and the right to determine the ownership of water rights which plaintiffs claimed they owned.

After consideration of the briefs and oral argument, this court denied the applicants intervenor status but allowed the applicants to participate as amici *curiae. On* March 3, 1993, this court issued an order allowing amid to file briefs regarding discovery disputes fifteen days following the filing of the brief they were supporting. The order also permitted amid to make a motion to the court if it wishes to participate more extensively in the proceedings of the case. The court also has allowed

amici to file briefs supporting defendant's motion for summary judgment, to participate at oral argument, to file status reports regarding the Monitor Valley water rights adjudication, and to participate with the parties in telephone status conferences.

DISCUSSION

The applicants sought to intervene as a matter of right pursuant to RCFC 24(a). The applicants argued that they satisfied each element of RCFC 24(a) and, therefore, warranted intervenor status. Rule 24(a) allows intervention if, upon timely application,

> the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

RCFC 24(a). The applicants satisfied the first requirement by filing their motion in a timely fashion, three months after plaintiffs filed their complaint. The applicants also claimed that the Department of Justice would not adequately represent their interests.

The Court of Appeals for the Federal Circuit interpreted Rule 24 in *American Maritime Transport, Inc. v. United* States, 870 F. 2d 1559 (Fed.Cir.1989) *(American Transport).* The court determined that to intervene as a matter of right, an applicant must

evidence a direct, immediate, legally protectable interest in the proceedings. The applicant must demonstrate that he would "either gain or lose by the direct legal operation and effect of the judgment," Id. at 1561 (citations omitted) (emphasis in original). A court cannot allow intervention to protect an indirect or contingent interest. Id.

In a situation analogous to the present case, Judge Margolis held *in Karuk Tribe of California v. United States 27* Fed. Cl. 429 (1993) *(Karuk Tribe)*, that the intervenor applicants could not meet the *American Transport* standard for intervention pursuant to RCFC 24. In *Karuk Tribe*, *the* applicant-intervenors, members of the Hoopa Valley Tribe, sought to intervene as defendants. Id. at 430. The plaintiffs sought monetary compensation from the United States for an alleged taking of its property when Congress enacted the Settlement Act of 1988, 25 U.S.C. §§ 1300i to 1300i-11, dividing the former Hoopa Valley Tribe Reservation but excluding the Karuks from sharing in the reservation. Id at 431. The applicants-intervenors argued that a monetary award to the Karuk Tribe would threaten the Hoopas' interest in sharing the benefits of the Settlement Act. The applicants argued that a judgment in favor of plaintiffs could cause Congress to modify the Settlement Act which the Hoopas would be incapable of challenging. [2] Id

Judge Margolis found the applicants' interest to be indirect and contingent upon other events which may never occur as a result of the litigation. As Judge Margolis noted, the singular direct result of a judgment in favor of plaintiff would be a monetary award from

the government. Id. The applicants only could be affected if Congress modified the provisions of the Settlement Act in such a manner as to take away the Hoopa Valley Tribe's legally protectable rights. Id. Judge Margolis found the applicants' interest insufficient for intervention because these events were not certain to occur even if plaintiffs prevailed. Id. at 432.

In this litigation, the State of Nevada wished to intervene to protect its interest in the elk, the revenues generated from hunting on federal land, the regulation of hunting seasons and the ability to manage its wildlife and recreational programs. The State also maintained that as a sovereign, it has exclusive right to administer its water policy, control its water supply and determine who owns the water rights at issue. The State claimed that an adverse decision against the federal government coupled with the doctrine of stare decisis would lessen its ability to protect those interests in the future.

Similar to *Karuk Tribe*, Nevada alleged possible scenarios that it believed would occur and would adversely affect their interest if plaintiffs prevail. The State of Nevada claimed that, if this court awards a large judgment to plaintiffs, the Forest Service would be discouraged from allowing future releases of wildlife on federal lands, to the detriment of Nevada. Or, if this court found that plaintiffs' alleged water rights encompassed the right of plaintiffs' cattle to consume forage, the elk may not have enough forage to eat, which would also destroy the viability of the State's wildlife program. The State also claimed that if this

court determined that defendant did take plaintiffs' water right, the State would lose its ability to administer its water policy and control its water supply on federal land.

The environmental group applicants also argued hypothetical repercussions which might result from an adverse judgment and which would adversely affect their interest in the rangeland encompassed by the Hages' permit. The environmental groups claimed an aesthetic injury to their recreational enjoyment of the rangeland caused by the Hages' activities and also professed an interest in the need for a enlightened public policy for protection of the rangelands. The environmental groups maintained that if plaintiffs' claim succeeds, the Forest Service would not vigorously enforce its regulations or support proper land management and grazing policies because of fear of additional lawsuits by ranchers. If the Forest Service is forced to slacken their rangeland management as a consequence of this lawsuit, the environmental groups contend that major range deterioration would result, jeopardizing their members' use and continued enjoyment of the rangeland.

As in *Karuk Tribe,* none of the repercussions described by the State or the environmental groups are certain to develop if plaintiffs succeed. The court agrees that litigation and adverse judgments can affect agencies and their policies, but the court cannot assume that an adverse judgement necessarily will cause the effects which the groups predict. First, the court cannot assume that an adverse judgment would cause the Forest Service to disregard its own regulations and

statutory obligations. Also, many possible consequences might result from a judgment either for or against the government.

The court found that the applicants could not establish a direct, immediate and legally protectable interest in the proceedings necessary to justify intervention as a matter of right. The only direct result of a victory by plaintiffs would be a monetary award paid by the federal government. The above scenarios described by the State and the environmental groups are indirect and speculative at best. These speculative repercussions are contingent upon policy choices outside of the court's authority. As the court noted in Hage; under our constitutional system, the greatest deference must be given to the policy choices of the executive and legislative branches. Only when these policy choices infringe the constitutionally protected liberties of litigants may the courts act with regard to them. For it to be otherwise would transform this constitutional republic into a judicial oligarchy. The courts have never been a proper place to debate public policy, though this may appeal to the judicial ego. Once judges start setting public policy they cease to be the least dangerous branch. See *Hage, 35 Fed. Cl. at 151, citing* The Federalist No. 47 (James Madison).

The court also determined that an adverse decision would not, through the doctrine of stare decisis, preclude the applicants from protecting their interests in the legal arena. The court does not address the legality of the State's wildlife and hunting programs or its water policy. The court does not consider the arguments of the different competing interests for the

rangeland. The suit is limited to plaintiffs' Fifth Amendment taking claims and a claim for compensation under *43 U.S.C. § 1752(g). See Hage v. United States 35* Fed. Cl. 147 (1996). If the outcome of this case indirectly causes results disfavored by Nevada or the environmental groups, they may object through the political or administrative process. As this court emphasized in Hage, a court, in administering justice, does not shape or seek to influence public policy. See Hage 35 Fed. Cl. at 150-153.

The court also held that the applicants' interests are adequately represented by the Department of Justice (DOJ). The court found a strong similarity between the interests of the applicants and the federal government. All parties vehemently oppose each of plaintiffs' claims. All parties agree that plaintiffs do not possess the property interests they allege in the water rights, ditch rights-of-way or forage. The parties agree that plaintiffs do not have the right to exclusive use of the grazing allotment or to the beneficial use of the water flowing through the Monitor Valley. Nevada also argued that because the Forest Service is a multiple use agency it does not represent the interest of the Nevada Department of wildlife, which solely is dedicated to wildlife resources. The State further claimed that it was not adequately represented by the United States because the United States has mixed objectives in this litigation, one of which is to minimize financial exposure of the federal government. While the court agrees that Nevada and its agencies have different goals than the Forest Service and DOJ, no evidence has been presented that their ultimate objectives in this litigation are different. Indeed,

minimizing financial exposure is perhaps the surest sign of adequacy of representation: defeating the plaintiffs' claims is the ultimate goal of both defendant and the applicants. The court, therefore, found that the interest of the applicants did not warrant intervention as of right.

In the alternative, the applicants sought permissive intervention. The court may permit intervention at its discretion if the applicant's claim or defense and the main action have a question of law or fact in common. *See* RCFC 24(b)(2). The applicants, however, do not have a claim against the United States. Also, the court found that intervention would not serve the interests of judicial economy because the applicants merely argue issues raised by the primary *parties. See United States* v. *American Inst. Of Real Estate Appraisers, 442 F.Supp. 1072 (N.D.Ill.1977).* Therefore, the court denied the applicants' motion for permissive intervention.

The court granted the applicants amici status to allow the applicants to participate as friends of the court. The court agrees with amid that they have specialized knowledge which may be beneficial to the court in the resolution of this case. As in many Fifth Amendment taking cases, the court must look to state law to determine whether plaintiffs have the property interest alleged in the water rights, ditch rights-of-way and forage. *See Hage, 35 Fed. Cl. at* 171-176. The court may also seek amici's expertise if the court deems it necessary to determine whether the defendant utilized or permitted third parties to utilize plaintiffs' water rights. The court is confident that defendant and amici

will work together to inform the court of their position on plaintiffs' property rights claims.

Throughout the rest of this case, amici shall bear the burden of demonstrating that they specifically can contribute expertise and arguments not presented by defendant. The court will determine at the appropriate time whether the court will invite amici to participate in each subsequent proceeding from the date of this opinion.

While it is the policy of the court that all substantive proceedings in this case are open to the public, including of course amici, telephone status conferences concerning discovery and scheduling may be limited to the parties depending upon the logistics and ability to conference in amici. Because, however, the court values amici's participation, it will make every effort to include amici even in these proceedings.

IT IS SO ORDERED.

Footnotes

1The duration of the hunting season is set by the State through the Nevada Department of Wildlife.

2The Hoopas waived claims arising out of the Settlement Act. See 25 U.S.C. § 1300i-l(a)(2)(A)(i).

United States Court of Federal Claims

E. Wayne Hage and Jean N. Hage, Plaintiffs

v.

The United States, Defendant

No. 91-1470 L.

March 8, 1996

Mark L. Pollot, Boise, Idaho, for plaintiffs. John E. Marvel, Elko, NV, was of counsel.

Dorothy R. Burakreis, General Litigation Section, Environment and Natural Resources Division, U.S. Department of Justice, Washington, D.C. for defendant. Susan V. Cook, David F. Shuey, Department of Justice and Eric C. Olson, Department of Agriculture, were of counsel.

Thomas D. Lustig, National Wildlife Federation, for amici curaie, State of Nevada, National Wildlife Federation, Nevada Wildlife Federation, Natural Resources Defense Council, and Sierra Club. Beth Wendel, National Wildlife Federation and Johanna H. Wald, Natural Resources Defense Council, were of counsel.

Opinion

SMITH, Chief Judge.

Plaintiffs, E. Wayne and Jean N. age, are ranch owners in Nye County, Nevada. In this suit they allege constitutional, contractual and statutory causes of action. First, plaintiffs claim that the defendant took compensable property interests in their grazing permit, water rights, ditch rights-of-way, rangeland forage, cattle and ranch. Second, the plaintiffs claim that their grazing permit is a contract which the defendant has breached, entitling them to damages. Third, plaintiffs claim entitlement to compensation for improvements they have made to the public rangeland. Defendant has moved for summary judgment on all three claims.

The court grants in part and denies in part defendant's motion for summary judgment. The court finds that plaintiffs' grazing permit is a license, the cancellation of which does not give rise to damages. Thus, defendant's motion for summary judgment is granted for this claim. The court denies defendant's motion regarding the taking claims and the claim for compensation for improvements under 43 U.S.C. § 1752(g). The court finds that a limited evidentiary hearing is necessary to address the mixed questions of law and fact regarding the existence of the property interests claimed by plaintiffs in the water rights, forage rights and ditch rights-of-way. Plaintiffs also will have the opportunity to demonstrate a taking of their cattle. The court also finds that compensation may be required for improvements on the range made by plaintiffs if defendant cancelled the permit in part to devote the land to another public purpose.

INTRODUCTION

Plaintiffs claim that defendant has taken their property rights in water, ditch rights-of-way, and forage which date from the 1800s. It is the court's duty to determine whether plaintiffs hold the property rights claimed, the scope of those rights, and whether government action has deprived the Hages of rights requiring just compensation under the Fifth Amendment.

There are various analyses, both pro and con, that view the court in a takings case as a defender against regulatory excess or as an activist advocate for certain policy positions. These analyses, it seems to the court, misconstrue the role of the judge in this important area of constitutional adjudication. While it is true that the judiciary has a particularly focused mission in protecting the liberties of the citizen, it is no less true that members of the legislative and executive branches have an equally heavy responsibility for guarding those same precious liberties. The judiciary is only seen as more involved in this task because it is the courts' only responsibility under the rule of law, while the Congress and the President are given numerous affirmative tasks in maintaining and defending a Nation based upon constitutional government.

In taking claims the judge does not sit as super legislator or executive, intent on preventing regulation that "goes too far," as a facile reading of Justice Holmes might imply. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922). The job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their constitutional rights under the Fifth Amendment have been violated by some governmental action. The court

must proceed to analyze this claim, as any other legal claim, regardless of the consequences to governmental policy. Unless property right claims are to be given lesser due process than other claimed constitutional violations, the court must interpret the words of the constitutional protection as it would any other language conferring rights. In this case the key terms, "property," "taken,'' and "just compensation," are concepts regularly dealt with in the law. The tools of this legal analysis are the same as those used in interpreting contracts, deeds, wills, regulations or any other legal instruments. The tools and skills of legal analysis have little to do with public policy, and much to do with the integrity of the rule of law.

In the concrete taking case the court must initially decide if the plaintiff has an actual property interest, if this is a point of dispute. This determination is based upon long and venerable case precedent, developed over the last two centuries. It is further clarified in the light of our law's Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decisionmaking builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates. The genius of our Framer's tripartite division of constitutional power is the creation of separated institutions that each best deal with different categories of governmental decisions. The Federalist No. 47 (James Madison).

If the court decides that plaintiff does have a property right based upon current law and precedent, the court must next determine whether that property right has been taken by the government. This is the point at which most of the confusion about the judge's role occurs, and not the least of this confusion comes from judges. While Holmes' sweeping and often brilliant rhetorical flourishes may receive some of the blame, the real problem is due to the nature of these "taking" disputes. Taking cases are invariably tough cases pitting strongly held values, about significant public concerns, against other strongly held values and interests. This leads, too often, to the view of the judge as a policy maker, not a judicial decision-maker bound by constitutional language and precedent. To conclude that policy making is the nature of the court's role in taking cases, however, is to substitute a psychological impression or an ideological bent for hard legal analysis about property law and the Fifth Amendment. Taking cases are only about one thing, whether the government action in question takes private property without just compensation. Taking cases are not about "the environment" or "endangered species" or "wetlands." On these topics the courts must defer to the President and Congress.

When the court approaches the question of what is a "taking," it must use exactly the same tools as it uses in analyzing what constitutes a property right. What has the term meant historically; what has the binding precedent stated; and finally, what legal conclusions logically flow from the instant fact pattern. For if the word "taken" in the Fifth Amendment has no fixed meaning, other than the whim of the court, then all of

the important purposes that the Framers assigned to a written Constitution are really worse than a paper wall against tyranny: they are a sham.

When a court finds a statute, a regulation, or a governmental action to be a "taking" requiring compensation, it is not saying the government went "too far." In fact, the court is saying nothing about the purpose or character of the governmental action whatsoever. Rather, the court is finding that the government has, as a factual matter, deprived an actual property owner of some part of a legally recognized property interest.

Courts have found the "too far" language taken by itself not to be very helpful in drawing the distinction between a taking and an incidental diminution in value. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 2893, 120 L.Ed.2d 798 (1992); Florida Rock Indus., Inc. v. United States, 18 F. 3d 1560, 1568 (Fed.Cir.1994) (cert. denied 513 U.S. 1109, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995)). Since Holmes penned those words, "too far," later Supreme Court and other court opinions have laid down precedent that helps crystalize judicial analysis into a somewhat more coherent framework. This precedent indicates that after the court determines that the plaintiff indeed owned a property interest, the next step in the analysis is to determine whether there is any restriction inherent in the property that is derived from background principles of the state's law. Lucas, 505 U.S. at 1028-31, 112 S.Ct. at 2899-2902. For example property has never been understood to derive any value from activities that endanger public safety,

health, or morals. Thus, an establishment distributing cocaine or pornography could be prohibited without any plausible claim of a taking since these activities have never been considered, as a matter of law, to add value to the property. See, e.g., Bennis v. Michigan, 516 U.S. 442, 116 S: t. 994, 134 L.Ed.2d 68 (U.S.).

A second point of analysis is the historically recognized limitation on the uses of property that are characterized under the concept of reciprocal advantage. Certain restrictions, mainly in communities, are not takings because they impose general restrictions which apply broadly and confer benefits as well as burdens generally. Zoning law is the primary area where this concept limits what is a taking. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L. Ed. 303 (1926).

A third general body of analysis limiting what is a taking is nuisance law. Nuisance is a historically grounded concept, it is not merely what the government prohibits at any one time. Florida Rock Indus., Inc. v. United States, 21 Cl. Ct. 161, 166-68 (1990) (vacated on other grounds 18 F.3d 1560 (1994), cert. denied 513 U.S. 1109, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995). See also Florida Rock Indus., Inc. v. United States, 791 F. 2d 893, 896 (1986). Otherwise, nuisance would devour the Fifth Amendment, because whatever the government prohibited the property owner from doing would never be a taking. While nuisance law evolves historically, only rarely has it evolved by immediate governmental fiat. Nuisance law has been our society's historic method for harmonizing one person's liberty with another person's rights.

The court must also look to the actual regulatory action challenged. Here again, it is not the soft focus "too far," but rather two groups of inquiries. First, what is the actual impact of the regulation on the property? Is it de minimis when compared with some of the other factors mentioned above? Or does it deprive the property owner of either substantially all of a recognized property interest, See, e.g., Loveladies Harbor, Inc. v. United States, 15 Cl.Ct. 381, 386-387 (1988) (summary judgment denied), 21 Cl.Ct. 153 (1990), aff'd 28 F.3d 1171 (Fed.Cir. 1994); or of a significant portion of the value of the total property? Florida Rock, 18 F.3 d 1560 (19 Second, the court must look to custom and usage with respect to regulation of this specific type of property. Is this the kind of restriction that has historically been applied to the property and thus been a part of the property owner's understanding of its value, or as the cases have put it part of the property owners legitimate investment backed expectations? Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). See also Loveladies Harbor, Inc. v. United States, 28 F.3d 1171(Fed.Cir. 1994); Florida Rock, 18 F.3d 1560.

While it might be justly said that this analysis is not as rigorous as a mathematical formula, judicial reasoning rarely is. It is, however, a far cry from the charge of being unprincipled or ideological. Rather, it uses the classic tools of law to make rule-bound decisions, irrespective of the merits of the governmental policies that lie behind the regulations at issue.

Finally, since the federal judge is not elected, as is the President and the Congress, it would be highly

presumptuous of him or her in a democratic society to import into the judicial analysis, views on the need or the lack thereof for the government action challenged. The taking clause was not written to protect merely against frivolous exercises of governmental power, but more precisely to protect against the opposite. Presumably, the political process protects against most frivolous exercises. The protection of the Fifth Amendment is most needed to protect the minority against the exercise of governmental power when the need of government to regulate is greatest, and the desire of the popular majority is strongest. In this way, and in this way only, does the judiciary properly affect policy, and that effect is to adjudicate the limits that the rule of law and a written Constitution impose upon popular government. The existence of property rights, not the judiciary's finding of a "taking," impose these limits.

FACTS

Plaintiffs, Wayne and Jean age, purchased Pine Creek Ranch in 1978 and used it for cattle ranching. The ranch, established in 1865, is located in central Nevada and consists of approximately 7,000 acres. To raise cattle economically in such an and region, plaintiffs depend upon access to large quantities of land, including government owned rangeland, and to the limited water supply in the Toiyabe National Forest. Plaintiffs use ditch rights-of-way, which are easements on federal lands, to transport water for irrigation, stock watering and domestic purposes.

In 1907 Congress created the Toiyabe National Forest. The Forest Service issued a grazing permit to the owners of Pine Creek Ranch, based upon the preferential use of the range, which enabled the various ranch owners to continue to graze their livestock on federal lands adjacent to Pine Creek Ranch.

The Forest Service has granted each subsequent owner of Pine Creek Ranch such a grazing permit. Without access to water located in the Toiyabe National Forest, the ranch cannot successfully operate.

Plaintiffs received their first grazing permit on October 30, 1978 [1] which allowed them to graze cattle within six allotments of the Toiyabe National Forest. [2] The permit established general provisions and requirements for plaintiffs' use of the federal land for grazing. In addition to these general provisions, the permit also contained terms unique to plaintiffs. Such terms included number, kind and class of livestock permitted to graze, and the period of such use. Pursuant to their permit, plaintiffs could graze their cattle for specified portions of the year, depending upon the allotment.

Specific provisions in the permit reserved to the federal government the broad power to suspend, revoke or amend the pen¯nit subject to certain conditions. For example Part 1, § 3 of the permit stated in pertinent part:

> [T]his grazing permit may be revoked or suspended, in whole or in part, for failure to comply with any of the provisions and requirements specified in Parts 1, 2 and 3 hereof,

> or any of the regulations of the Secretary of Agriculture on which this permit is based, or the instructions of Forest officers issued thereunder....

In Part 2, § 8(b), the permit stated that the grazing privilege will terminate "whenever the area described in this permit is needed by the Government for some other form or use." Moreover, the government reserved the power in Part 2, § 6, to adjust any terms of the permit when necessary for resource protection.

In 1984, plaintiffs applied for and received a permit modifying their grazing allotment. The 1984 permit also contained new language broadening the scope of the Forest Service's authority to alter or nullify the grazing privilege. Part 1, § 4 stated:

> This permit may be modified at any time during the term to conform with needed changes brought about by law, regulations, executive orders, allotment management plans, land management planning, numbers permitted or season of use necessary because of resource condition or other management needs.

Parts 2 and 3 of the 1984 permit also created additional requirements that plaintiffs had to satisfy as a condition for grazing on the public land. Under the 1984 permit, plaintiffs were responsible for additional maintenance and structural improvements on the federal lands. Plaintiffs also were required to graze at least 90% of the permitted number of cattle or risk termination of their permit for "non-use." The Forest Service states that

this provision was added to maintain the balance of forage resources and redistribute such resources in accordance with the Toiyabe Forest Plan. Def. Ex. 19, App. 000311. (Deposition Exhibit 108).

In 1991, the Forest Service modified plaintiffs' permit, and all other permits within the Toiyabe National Forest, to bring the permits into compliance with the new Toiyabe Forest Plan. The new permits did not substantially change the 1984 provisions.

The events which precipitated commencement of the present litigation began primarily from disputes over the Table Mountain and Meadow Canyon allotments.

THE TABLE MOUNTAIN ALLOTMENT

In 1979, after receiving permission from the United States Forest Service, the Nevada Department of Wildlife (NDOW) released elk into the Table Mountain allotment area of the Toiyabe National Forest. The Forest Service approved the release after conducting two studies to determine the suitability of introducing elk into the area.

Plaintiffs objected to the release of the elk, arguing that the elk drank water and ate forage which belonged to plaintiffs and were needed for their cattle. Plaintiffs also informed the State of Nevada that the hunting season for elk on Table Mountain overlapped with the cattle grazing period and that the presence of elk impeded the grazing and movement of their livestock. The State of Nevada responded that cattle grazing and hunting on public land "appear to be reasonably

compatible" and that plaintiffs' complaint was the first the State had received. The State informed plaintiffs that the ranchers and hunters must stop "squabbling" and share their usage of the public rangelands.

In October 1988, the Forest Service informed plaintiffs that they were in violation of their permit and risked its suspension or cancellation because plaintiffs failed to remove their cattle from the allotment by the September 30, 1988, deadline stated in the permit. Plaintiffs claimed that they were experiencing difficulty removing their cattle due to recreational and Forest Service activities on the rangeland. Plaintiffs, however, did remove the majority of the cattle by October 22.

In January 1989, the Forest Service sent plaintiffs a letter to "show cause" as to why the Forest Service should not reduce by 20% the number of cattle permitted to graze for the 1989 grazing season on the Table Mountain allotment. The Forest Service also charged plaintiffs for the excess use of the rangeland for the time in October when plaintiffs' cattle were observed on the allotment after the September 30th deadline. Plaintiffs failed to respond to the letter.

In February 1989, the Forest Service notified plaintiffs that 20% of their cattle allotment for Table Mountain would be suspended for the 1989 grazing season. The Forest Service did not implement the 20% cattle suspension until the 1990 grazing season, however, because of administrative appeals of the agency action.

Plaintiffs, without notifying the Forest Service, did not graze any cattle on the Table Mountain allotment

during the 1990 grazing season. The Forest Service determined that this action violated the "non-use" provision of the 1984 permit because plaintiffs failed to graze at least 90% of the total permitted cattle on the allotment.

In October 1990, the Forest Service sent plaintiffs another letter requesting plaintiffs to "show cause" why the Forest Service should not (a) cancel 25% of the permit to graze cattle on the allotment and (b) suspend an additional 20% under the permit of the remaining cattle allowed to graze for two successive years. The Forest Service believed such actions were warranted because plaintiffs' failure to control and take account of their livestock during the 1990 grazing season constituted repeated violations of the permit terms.

In November 1990, plaintiffs responded to the Forest Service's "show cause" letter. Plaintiffs requested an evidentiary hearing, contending that the Forest Service actions denied plaintiffs due process of law. Because an evidentiary hearing is not provided for in its regulations before cancellation or suspension of a permit, the Forest Service did not grant the requested hearing. In December 1990, the Forest Service cancelled 25% of the Table Mountain allotment grazing permit and suspended an additional 20% of the remaining allotment for a two year period. The Forest Service decision was upheld in administrative appeals and plaintiffs did not seek judicial review of those appeals.

THE MEADOW CANYON ALLOTMENT

Plaintiffs also dispute Forest Service actions concerning the Meadow Canyon allotment. In 1980, the Forest Service diverted the flow of water in the Meadow Canyon allotment from Meadow Spring to Q (McAffee) Spring, claiming that Meadow Spring was contaminated. The Forest Service then used the new source from Q Spring as a domestic water supply for the Guard Station located in the Toiyabe National Forest. The Forest Service, however, neglected to obtain approval from the State Engineer for a change in point of diversion of the water.

Plaintiffs claim rights to all the water of Meadow Canyon Creek, allegedly appropriated by Pine Creek Ranch in 1868, including both Meadow Spring and Q Spring. In October 1981, plaintiffs filed a request with the State Engineer to initiate a water rights adjudication of the Monitor Valley. [3] The State granted the petition. [4] Plaintiffs requested the adjudication to prevent the Forest Service from diverting water which plaintiffs allegedly owned.

During the summer of 1990, defendant notified plaintiffs that because of serious range deterioration, plaintiffs would be required to remove their cattle from Meadow Canyon by August 10, 1990, rather than the permit date of October 15, 1990. Plaintiffs' expert, Robert N. Schweigert, 5 disputed defendant's opinion and considered the Meadow Canyon allotment to be in good to excellent condition when compared with other Western rangeland. Under the pen¯nit, the Forest Service must give permittees one year notice of the permit modification. In an extreme emergency, however, the Forest Service may immediately reduce

the number of livestock or time of grazing to preserve or protect the rangeland.

In August 1990, defendant sent plaintiffs a letter requesting plaintiffs to "show cause" why 100% of plaintiffs' Meadow Canyon allotment should not be cancelled because of plaintiffs' refusal to remove their cattle from Meadow Canyon. Plaintiffs began to remove their cattle at the end of August 1990. Defendant, however, observed 128 head of plaintiffs' cattle (38% of the total number originally permitted) on the allotment in October 1990 and concluded that plaintiffs had made no serious effort to comply with the Forest Service's instructions. The Forest Service informed plaintiffs that any of its livestock found on the Meadow Canyon allotment after November 12, 1990, would be subject to impoundment.

On February 13, 1991, defendant suspended the permit for five years and cancelled 38% of the permitted numbers allowed in Meadow Canyon. This percent decrease is identical to the percentage of plaintiffs' cattle found on the allotment in October 1990, in violation of the Forest Service's instructions.

In the summer of 1991, the Forest Service twice impounded plaintiffs' cattle after allegedly observing many of plaintiffs' cattle on the Meadow Canyon allotment. Plaintiffs dispute the basis for the removal and impoundment of the cattle, arguing that if any of plaintiffs' cattle were observed on the Meadow Canyon allotment in the spring and summer of 1991, it was due to interference and actions by the defendant, not plaintiffs.

DITCH RIGHTS-OF-WAY

Plaintiffs allegedly own ditch rights-of-way, which allow them to transport water for stock watering, irrigation, and domestic purposes. Plaintiffs and defendant acknowledge the importance of the ditch rights-of-way for transporting water. The parties, however, disagree over the scope of restrictions permitted regarding plaintiffs' alleged ditch rights-of-way pursuant to the Act of 1866 and the present regulatory scheme. In 1986, the Forest Service informed plaintiffs that it had the authority to regulate vested ditch rights-of-way and informed plaintiffs that any actions in maintaining the ditches must be approved by the Forest Service. In July 1991, plaintiff, E. Wayne Hage, and his employee, Lloyd C. Seaman, were arrested and convicted for cutting and removing trees within and around White Sage Ditch in the Toiyabe National Forest in violation of Forest Service regulations. The Ninth Circuit reversed the criminal conviction after determining that the United States had not proved each element of the criminal act. United States v. Seaman and Hage, 18 F. 3d 649 (9th Cir. 1994).

CLAIMS

In September 1991, plaintiffs filed a complaint alleging constitutional, contractual and statutory causes of action. Plaintiffs argue that they possess compensable property interests in their grazing permit, water rights, ditch rights-of-way, forage on the rangeland, cattle and ranch. According to plaintiffs, these property rights were taken by the federal government through physical

and regulatory actions. First, plaintiffs allege that the suspension and cancellation of the grazing permit deprived them of their right to graze their cattle. Second, plaintiffs argue that they were deprived of their water rights by the Forest Service cancelling and suspending their permit and diverting and using their water. Third, plaintiffs claim that defendant took their property interest in the ditch rights-of-way by forbidding plaintiffs' access to the ditches. Fourth, plaintiffs claim that non-indigenous elk consumed forage and drank water reserved for plaintiffs' cattle in violation of plaintiffs' property rights. Fifth, plaintiffs claim that when the Forest Service impounded plaintiffs' cattle, defendant took plaintiffs' personal property. Sixth, plaintiffs allege that by cancelling and suspending portions of their grazing permit and interfering with their water rights, ditch rights-of-way, and forage, defendant has deprived plaintiffs of all economic use of their ranch.

In addition to the constitutional taking claims, plaintiffs argue that the grazing permit was a contract. Plaintiffs claim that by cancelling and suspending the permit, defendant breached the contract, entitling plaintiffs to damages. Finally, plaintiffs allege entitlement to compensation for improvements made to federal rangeland pursuant to 43 U.S.C. § 1752(g).

DISCUSSION

I. JURISDICTION

Before this court considers the merits of defendant's motion for summary judgment, the court must first

address defendant's argument that this court does not have jurisdiction to hear plaintiffs' Fifth Amendment water rights taking claim. Defendant bases its jurisdictional argument on three theories: 1) that this court does not have jurisdiction over stream adjudications; 2) that this court does not have jurisdiction to determine title disputes in a water rights taking claim; and 3) that this federal court does not have jurisdiction based on considerations of federalism. In the alternative, defendant argues that even if this court decides that it does have jurisdiction over water rights taking claims, this court should dismiss the claim in deference to the currently pending Nevada stream adjudication.

Initially, defendant asserts that the jurisdiction granted to this court by Congress under the Tucker Act does not include jurisdiction to hear plaintiffs' water rights taking claim because the court's jurisdiction does not include general stream adjudications. Defendant bases this argument on the language within the Tucker Act that limits the court to hearing certain claims for money damages against the federal government.[6] 28 U.S.C. § 1491. Therefore, defendant argues that a water rights taking claim is outside the scope of this court's jurisdiction because the court would be adjudicating water rights among numerous parties rather than simply determining money claims against the federal government. Defendant further argues that because this court cannot join private defendants, this court does not have jurisdiction to determine plaintiffs' water rights relative to defendant's rights because the outcome would affect persons who are not parties in this lawsuit.

Next, defendant argues that the Tucker Act does not give this court jurisdiction to determine title to water rights. Defendant claims that because water cannot be measured or defined in a manner similar to real property, determining title to water is synonymous with stream adjudication. Defendant does acknowledge that this court may resolve land title disputes as a preliminary matter to determining whether the federal government has taken real property. See Yaist v. United States., 228 Ct.Cl. 281, 656 F. 2d 616 (1981); Bourgeois v. United States, 212 Ct.Cl. 32, 545 F.2d 727 (1976). Defendant argues, however, that this court does not have the same jurisdiction to determine water title disputes as a preliminary matter to determine whether the federal government has taken water rights. In support of this position, defendant argues that land and water title disputes fundamentally are different because stream adjudications determine the correlative rights of all water users while quiet title actions resolve ownership in a single piece of defined land.

Finally, defendant claims that for various reasons the McCarran Amendment unequivocally requires this court to dismiss the water rights claim in deference to the Nevada stream adjudication. The McCarran Amendment waives the sovereign immunity of the United States with respect to general stream adjudications in state courts. 43 U.S.C. § 666. Based on this premise, defendant argues that the McCarran Amendment dictates a clear federal policy that all lawsuits relating to water must be in state court. The McCarran Amendment also requires that all parties claiming an interest in a specific water body be invited to participate in the relevant adjudication to prevent

piecemeal adjudication and confusion regarding the relevant water rights. 43 U.S.C. § 666; See also Reynolds v. Lewis, 58 N. M. 636,545 P.2d 1014, 1015-16 (1976). Defendant further argues that because all parties claiming rights to use water from the Monitor Valley cannot be joined in this suit, this court cannot hear plaintiffs' water rights taking claim.

As an alternative to its argument opposing jurisdiction, defendant asserts that if this court has jurisdiction to adjudicate water rights, this court should decline to exercise jurisdiction in deference to the state adjudication proceeding. Defendant concedes that a party may bring an action in federal court, notwithstanding the pendency of an action in state court concerning the same matter, if the federal court rightfully has jurisdiction. McClellan v. Carland, 217 U.S. 268, 282, 30 S.Ct. 501, 504-05, 54 L. Ed. 762 (1910). Notwithstanding this general rule, defendant argues that the McCarran Amendment is an unusual statute designed to prevent inconsistent dispositions of water rights and the traditional rule allowing parallel proceedings does not apply. Defendant claims that the Supreme court opinions in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), reh. den. sub. nom. Akin v. United States, 426 U.S. 912, 96 S. Ct. 2239, 48 L.Ed.2d 839 (1976) ("Colorado River ") and Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 103 S. Ct; 3201, 77 L.Ed.2d 837 (1983), reh. den. 464 U.S. 874, 104 S. Ct: 209, 78 L.Ed.2d 185 (1983) ("San Carlos Apache"), support defendant's position that the general rule of concurrent jurisdiction does not apply in water rights adjudication proceedings, and, therefore, this

court should dismiss plaintiffs' water rights taking claim. Defendant claims that dismissal of this case is the only method which allows the state to continue its water adjudication process without the potential for inconsistent dispositions of property and duplicative litigation.

In contrast, plaintiffs argue that this court has jurisdiction to adjudicate plaintiffs' water rights and has an affirmative obligation to do so. Plaintiffs argue that the unresolved determination of title to water rights does not prevent this court from asserting jurisdiction. Plaintiffs note that a title dispute, as part of a taking claim, traditionally does not prevent jurisdiction in this court, assuming jurisdiction otherwise exists. See Oak Forest, Inc. v. United States, 23 Cl.Ct. 90 (1991); MR.K. Corp. v. United States, 15 Cl.Ct. 538 (1988). Moreover, plaintiffs contend that determining title to water is no different than determining title to real property, and the same jurisdictional rules should apply to all forms of property.

Plaintiffs also claim that this court is the only forum in which to adjudicate their taking claim under the Tucker Act. Colorado River Water Conservation Dist. v. U"ited States., 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). Consequently, if this court does not accept jurisdiction, defendant would be allowed to take property of private citizens in violation of the Fifth Amendment without granting plaintiffs due process of law. Moreover, plaintiffs claim that forbidding them to proceed in this court in deference to the state stream adjudication effectively allows defendant to take

plaintiffs' water rights for years without compensation because the state stream adjudication proceeding can take decades to resolve. [7]

Plaintiffs also argue that the McCarran Amendment does not preclude this court from adjudicating water rights. Citing the cases of National Audubon Soc. v. Dept of Water and Power, 496 .S p. 499, 504 (E.D.Cal.1980) and South Dalts Water Agency v. United States Dept of Interior, 767 F. 2d 531, 541 (9th Cir. 1985), plaintiffs note that Congress passed the McCarran Amendment merely to waive the federal government's sovereign immunity and allow the United States to be joined as a party in state stream and water rights adjudications. Plaintiffs argue that Congress did not intend to limit the forums available when addressing water rights. See United States v. Cappaert, 508 F. 2d 313, 320-21 (9th Cir.1974), aff'd 426 U.S. 128, 96 S.Ct: 2062, 48 L.Ed.2d 523 (1976). Therefore, according to plaintiffs' argument, the McCarran Amendment does not prohibit jurisdiction in a federal court to adjudicate water rights.

Finally, plaintiffs assert that the case cited by defendant, Colorado River, strengthens plaintiffs' argument for jurisdiction by this court. In that case, plaintiffs argue that the Supreme Court held that when the federal government participates in a state proceeding under the McCarran Amendment, and the state proceeding does not adequately resolve federal claims, the federal court should not dismiss the water rights claims or abstain from asserting jurisdiction. Colorado River, 424 U.S. at 820, 96 S.Ct. at 1247-48. Similarly, plaintiffs argue that the Nevada water

adjudication cannot address plaintiffs' taking claim and, therefore, under Colorado River, this court must address plaintiffs' claim.

The court finds that the Tucker Act requires this court to exercise jurisdiction and that exercising jurisdiction is in no way contrary to the language or purpose of the McCaffan Amendment. Under the Tucker Act, this court is granted jurisdiction to determine whether the government has taken any type of property interest protected by the Fifth Amendment. The Fifth Amendment provides in part, "nor shall private property be taken for public use without just compensation." The purpose of the "taking clause" is "to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.l2d 1554 (1960). Were this not so, government would have a powerful and dangerous tool to discriminate against discrete and insular minorities of our population.

Moreover, the Fifth Amendment's protection is not confined to real property. A party may have a property interest in a mortgage, see Shelden v. United States, 34 Fed.Cl. 355 (1995); in a mineral estate, see Whitney Benefits, Inc. v. United States, 18 Cl.Ct. 394, 399 (1989), affd, 926 F.2d 1169 (Fed.Cir.1991), cert. denied 502 U.S. 952, 112 S.Ct. 6,116 L.Ed.2d 354 (1991), in navigational servitudes, see Kaiser Aetna v· United States, 444 U.S. 164,1 00 S.Ct. 383, 62 L. Ed.2 d 332 (197 9); in air space, see United States v. Causby, 328 U.S. 256, 265 n. 10, 66 S.Ct. 1062,1 068 n. 10, 90 L.Ed. (1946); and in a leasehold

estate, see United States States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L.Ed. 311 (1945), among others. Likewise, plaintiffs can have a property interest in water, and even defendant concedes that a water right is a type of property right. Thus, the court has no choice in exercising its jurisdiction here. This is especially true when both sides have admitted that the state water adjudication possibly may take decades. [8]

Determining whether the defendant has taken property, as one of this court's jurisdictional mandates, is not adjudicating water rights as defendant asserts. This court agrees with defendant that the U.S. Court of Federal Claims should not engage in stream adjudications. Stream adjudication is a creature of state law that enables a state to administer a system of recording property interests in water. States have created intricate processes to determine who exactly owns the right to use water within the state, as well as to determine whether a stream or river has been over-appropriated. This court should thus refrain from entering into the business of stream adjudication.

Contrary to defendant's argument, however, this court may determine if plaintiffs have title to water rights in the Monitor Valley without entering into a stream adjudication. This court has jurisdiction to determine title to real property as a preliminary matter when addressing a taking claim. See e.g., Bourgeois v. United States, 545 F.2d 727 (Ct.C1.1976} (stating that in a suit seeking compensation, the court is not denied jurisdiction simply because their is a quite title issue involved in determining compensation); Yaist v. United

States, 656 F.2d 616 (Ct.Cl. 1981). Similarly, this court may determine whether plaintiffs have title to a property interest in water as a preliminary matter before addressing whether that property interest has been taken by the government.

Moreover, plaintiffs are correct that the McCarran Amendment does not preclude federal courts from exercising jurisdiction regarding water rights claims. In Colorado River, the federal government brought suit against over one thousand water users in district court to adjudicate reserved water rights for itself and on behalf of certain Indian tribes under Colorado law. United States v. Akin, 504 F.2d 115 (10th Cir. 1974), rev d on other grounds sub nom. Colorado River, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). One of the defendants sought to join the government in the concurrent state proceeding to resolve all the government's claims. The issue presented was whether the McCarran Amendment repealed district-court jurisdiction under 28 U.S.C. § 1345. Colorado River, 424 U.S. at 800, 96 S.Ct. at 1238. Based upon the language of the amendment and its legislative history, the Supreme Court concluded that the amendment never was intended to diminish federal court jurisdiction. "The immediate effect of the amendment is to give consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the use of water." Id at 809, 96 S.Ct. at 1242. The Court concluded that because the amendment did not clearly repeal district-court jurisdiction, the Court would not presume this intent. In a later application of Colorado River, the Supreme Court stated, "Colorado River, of course, does

not require that a federal water suit must always be dismissed or stayed in deference to a concurrent and adequate comprehensive state adjudication." Arizona v. San Carlos Apache Tribe of Arizona, 463 U.S. 545, 569,103 S.Ct. 3201, 3215, 77 L.Ed.2d 837 (1983).

Similarly, the language of the McCarran Amendment does not limit this court's jurisdiction to hear plaintiffs' water rights taking claim. The McCarran Amendment serves a limited purpose which defendant now seeks to expand. Senator McCarran, who introduced the legislation, stated in the Senate report that the legislation was "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." S.Rep. No. 755, 82D Cong., 1st Sess., 2 (1951). Congress passed this amendment because private parties and states never knew how much water the federal government might claim it owned. The McCarran Amendment forced the federal government to participate in water proceedings to create a final determination of water ownership. The court thus cannot abstain from its obligation to exercise its jurisdiction based upon a statute enacted merely as a waiver of the federal government's sovereign immunity in state stream adjudications. Defendant's position, in some ways, would be to turn the McCarran Amendment on its head.

Furthermore, the McCarran Amendment does not mandate an absolute policy of deference to state proceedings as defendant suggests. In Colorado River, the Supreme Court did not create a blanket rule requiring federal courts to decline jurisdiction to

adjudicate water rights claims in deference to state proceedings. Rather, the Supreme Court expressed its reluctance to dismiss the proceeding noting the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River, 424 U.S. at 817, 96 S. Ct. at 1246, citing England v. Medical Examiners, 375 U.S. 411, 415, 84 S.Ct. 461, 464-65,11 L.Ed.2d 440 (1964).

In conclusion, this court determines that based on the Tucker Act this court is required to exercise jurisdiction and that the McCarran Amendment does not affect such jurisdiction. Furthermore, this court is the only forum vested with jurisdiction to hear plaintiffs' Fifth Amendment taking claim and to deny plaintiffs a forum would violate their rights to due process of law.

II. RIPENESS

Defendant argues that until Nevada completes the Monitor Valley adjudication, plaintiffs' water rights taking claim is unripe because plaintiffs' alleged water rights are not ascertainable or quantifiable. Defendant also argues that plaintiffs' ditch rights-of-way claim is not ripe for adjudication at this time. Because ripeness is a doctrine that affects this court's jurisdiction, the court must consider this issue before addressing the merits of defendant's motion for summary judgment.

Defendant's ripeness argument is a fraternal twin to its jurisdictional argument; defendant puts a different spin on the same logical structure to urge this court to dismiss plaintiffs' claim for lack of ripeness. Similar to

its initial jurisdictional argument, defendant argues that until Nevada completes the Monitor Valley adjudication, plaintiffs' water rights taking claim must be dismissed because plaintiffs cannot prove ownership of the water rights. Defendant maintains that the only method by which plaintiffs can prove ownership of the water rights is through the statutory adjudication proceeding pursuant to Nevada law. Therefore, defendant contends that until the adjudication procedure is complete, plaintiffs cannot prove that they own the water rights. Hence, the water rights claim must be dismissed because plaintiffs cannot prove a present controversy ripe for adjudication;

Defendant also claims that plaintiffs' evidence of title to the water rights at issue is insufficient and too inconclusive to allow this court to consider plaintiffs' claim at this time. According to the defendant's argument, the two Nye County district court decisions which plaintiffs presented as evidence of ownership of their water rights are not valid proofs of title to water rights under Nevada law. Also, defendant asserts that even if these decisions are valid against private citizens, the decisions cannot bind the federal government because it was not a party to the proceedings. Therefore, according to the defendant, until Nevada completes the Monitor Valley adjudication and determines that plaintiffs own water used by the defendant, plaintiffs' taking claim is merely a hypothetical question.

Concurrently, amici also argue that plaintiffs' water rights taking claim is not ripe for review because plaintiffs do not have conclusive title to those rights

pursuant to the present Nevada statutory adjudication procedure. Amici argue that plaintiffs' claim of vested water rights through the court decrees in Peterson v. Humphrey, No. 588 (Nye County Dist.Ct, Nev. 1879) and United Cattle and Packing Co. v. Smith, No. 5038 (Nye County Dist.Ct, Nev. 1942) are contrary to Nevada law. As support for its argument, amici provide the affidavit of Mr. Michael Turnipseed, the State Engineer of Nevada and executive head of the Division of Water Resources. In that affidavit, Mr. Turnipseed testified that plaintiffs' court decrees do not confer an absolute right to the water claimed and that water rights under Nevada law receive conclusive effect only after the parties complete the statutory adjudication procedure.

In addition, defendant argues that plaintiffs' claim for interference with its ditch rights-of-way is not ripe because plaintiffs rights are not vested. Defendant concedes that a party could acquire a vested right of way under the Act of 1866 to transport water if the claimant completed ditch construction and began transporting water while the land was in the public domain. See e.g., Bear Lake & River Waterworks & Irrig. Co. v. Garland, 164 U.S. 1, 18-19, 17 S.Ct. 7, 11-12, 41 L. Ed. 327 (1896). Such a right-of-way is confined to the original alignment and scope of the right-of-way existing prior to the time when the land was reserved from the public domain. See e.g., Union Mill & Mining Co. v. Dangberg, 81 F. 73,105 (C.C.D.Nev.1897).

According to defendant, plaintiffs do not possess vested ditch rights-of-way because they cannot testify to the validity of these ditches based upon personal

knowledge of the original alignment and scope of the ditches constructed prior to 1907. Furthermore, defendant argues that plaintiffs are not competent to give an expert opinion on the status of the ditch rights-of-way prior to 1907. Therefore, because plaintiffs cannot prove that the present ditches are identical to the pre-1907 ditches and that plaintiffs own the right to use these ditches, defendant argues, plaintiffs' ditch rights-of-way taking claim cannot be ripe for adjudication until plaintiffs apply for a special use ditch permit and the Forest Service denies such a request. See Williamson County Regional Planning Commn v. Hamilton Bank, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) (party must submit an application for variance before claim can be considered ripe for review).

Defendant next argues that, even assuming arguendo that plaintiffs do own vested ditch rights-of-way, plaintiffs use of the ditches exceeds the scope of their property interest. Defendant notes that vested ditch rights-of-way under the Act of 1866 are subject to the Forest Service's regulations, including special use permits when necessary. See 43 U.S.C; 1761(b)(3) and Part 2800. See also Elko County Board of Supervisors v. Click an, 909 F. Supp. 759 (D.Nev. 1995). According to defendant, the regulations allow "normal" maintenance of vested ditch rights-of-way including minor trimming and clearing of vegetative material within the right-of-way. Any other form of maintenance, beyond minor trimming, may be performed only with prior approval by the Forest Service through a special use permit. See 43 C.F.R. § 280 1.1-1. Defendant argues that because plaintiffs'

actions exceed "normal" maintenance, as determined by the Forest Service, plaintiffs must apply for a special use permit. Because plaintiffs have not sought such a permit to perform maintenance beyond the scope of their property right, plaintiffs' claim of a taking of their ditch rights-of-way is also not ripe.

In contrast, plaintiffs argue that defendant's ripeness argument is erroneous because plaintiffs can prove title to the water rights and ditch rights at issue and the continuous use of both until the rights were taken by the defendant. Plaintiffs claim that the stream adjudication does not prove who owns title to the water rights and is not a prerequisite to ownership of the water. According to plaintiffs, the stream adjudication does not perfect water right claims. Rather, it is a process to determine the quantity of water rights owned so that the state can administer the water rights and prevent overappropriating a stream.

Plaintiffs claim that Nevada law recognizes rights established prior to 1905 as vested water rights. Moreover, plaintiffs claim that Nevada courts recognize that vested water rights are outside the framework of statutory water law and are not affected by water laws enacted after 1905. See In re Manse Spring, 60 Nev. 280, 108 P. 2d 311 (1940). Therefore, plaintiffs claim that because their water rights, exist independent of the stream adjudication, the completion of the stream adjudication is not necessary for their claim to be ripe. Furthermore, plaintiffs contend that they can prove by the two state court decrees, certificates of appropriation of water rights, surveys, deeds, and local custom and law that plaintiffs' predecessors in interest

acquired vested water rights in the public lands prior to 1905 for stockwatering, irrigation and domestic purposes. Because plaintiffs can prove ownership of water rights prior to 1905, plaintiffs argue, they have vested water rights under Nevada law. In re Marise Spring, 108 P. 2d at 311. By the Act of 1866, plaintiffs argue, defendant recognized all vested water rights on federal lands obtained by local custom and law. 43 U. S.C. § 661. Therefore, plaintiffs argue that they have requisite title to the water rights at issue and that their claim is ripe. In the alternative, plaintiffs claim that even if they do not have conclusive title, their numerous documents asserting ownership of the water rights create a factual issue regarding whether plaintiffs own the water rights and whether defendant's actions prevented plaintiffs from using their water rights.

Additionally, plaintiffs claim that their ditch rights-of-way claim is ripe for review. First, plaintiffs maintain that they can demonstrate ownership of vested ditch rights-of-way and that such ownership is recognized by state law and the Act of 1866. Plaintiffs claim that through historical documents and surveys they can establish original ditch construction and that the ditches are still maintained and operated in the same manner as the original ditch construction prior to 1907. Second, plaintiffs argue that their ditch rights-of-way were expressly excluded from the national forest and are outside the scope of Forest Service regulations.

Plaintiffs assert as a matter of law that forcing them to submit to the permit process itself constitutes a taking because it requires plaintiffs to exchange protected

property rights for potential property rights. Plaintiffs claim that under the Act of 1866, there is no requirement that plaintiffs apply for or receive a special use permit to perform maintenance on their ditches. Plaintiffs argue that defendant's alleged authority over ditch rights-of-way does not alter rights granted to plaintiffs under the Act of 1866 for the use, maintenance, and operation of the ditch rights-of-way. Therefore, they claim that by preventing them access to the ditches, defendant has taken their property.

Under the ripeness doctrine, a federal court only can hear cases in which the litigants seek judicial intervention for actual governmental interference. In Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S.Ct. 1507,18 L.Ed.2(1681 (1967), the Supreme Court listed the two major criteria in deciding whether a case is ripe. First, a court must consider "the hardship to the parties of withholding court consideration" and, second, "the fitness of the issues for judicial decision." Id. at 149, 87 S.Ct, at 1515. Therefore, under the ripeness doctrine, this court is obligated to hear this case if the court determines that these plaintiffs will suffer real consequences if the court declines to consider their claims.

Plaintiffs claim that the alleged taking of their water and ditch rights-of-way in the Monitor Valley put their ranch out of business and stripped it of all economic value. Furthermore, plaintiffs claim that defendant is still using water which rightfully belongs to plaintiffs and they seek compensation for this alleged taking. On a motion for summary judgment, the court must accept these allegations as true in determining whether

plaintiffs' water rights and ditch rights-of-way claims are ripe for review.

Contrary to defendant's argument, this court finds plaintiffs' claims ripe for review because plaintiffs have alleged real and concrete consequences resulting from current government action. The court has an affirmative obligation to hear these claims despite the Monitor Valley adjudication because the two proceedings are independent of one another. Moreover, the Monitor Valley stream adjudication began fifteen years ago and may take decades to complete. Such a delay would make a mockery of the Constitution's guarantee of both due process and just compensation. See, e.g., Bovules v. United States, 31 Fed.Cl. 37 (1994).

Defendant is correct that a taking cannot occur if the party alleging the taking cannot prove ownership of the property at issue. As discussed in the jurisdiction section, however, this court has jurisdiction to determine title regarding the water rights and ditch rights-of-way at issue.

Contrary to defendant's argument, the ripeness doctrine does not require that the adjudication be complete as a prerequisite to this court's exercise of jurisdiction. [9] Defendant and amici confuse determining title to water with the state's administrative procedure to determine the parameters of the allocated property interests in water rights. In Nevada, the water rights exist independent of the stream adjudication.

> Most water rights upon the streams of this state are undetermined by any judicial decree or other

record. While the right exists, it is undefined. For the state, however, to administer such rights, it is necessary that they should be defined.

Ormsby County v. Kearney, 37 Nev. 314,142 P. 803, 806 (1914). The Monitor Valley stream adjudication, therefore, does not determine who has title to the water rights at issue but defines the parameters of property interests in relation to other water rights. Using the analogy of land, the adjudication process determines the boundaries of the lot. The adjudication process does not determine whether the lot exists, as defendant and amici argue. Therefore, the concurrent adjudication of the Monitor Valley has no bearing on the ripeness of the claims before this court. To hold otherwise would be to deny citizens of the United States the protection of the federal Constitution's guarantees and make those guarantees solely dependant upon state law. Compare In re Slaughter- House Cases, 83 U.S. (16 Wall.) 36,21 L.Ed. 394 (1872) with Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L. Ed. 832 (1897) and Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). See also Nollan v. California Coastal Commission, 483 U.S. 825,107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); Dolan v. City of Tigard, 512 U.S. 374,11 4 S.Ct. 2309,129 L. Ed. 2d 304(1994).

Furthermore, plaintiffs have presented various documents which at least present evidence of ownership of a property right to use an amount of water in the Toiyabe National Forest. Defendant and amici claim that such materials are inconclusive to prove title to the water rights relative to defendant's interest in the water. This may well be true, but it is not a matter to be resolved on a motion for summary judgement. It is a matter best decided at trial where both parties may present evidence and testimony, subject to cross examination, regarding the existence and the ownership of the property rights at issue.

The court also finds that plaintiffs' ditch rights-of-way claim is ripe for adjudication. Similar to the water rights taking claim, plaintiffs argue that defendant has prevented them from using and maintaining their ditch rights-of-way. Without access to the ditches, plaintiffs argue, they cannot use their water for feeding the cattle or for other domestic purposes. Plaintiffs claim that the direct result of defendant's interference with plaintiffs' ditch rights-of-way and the transportation of water was to force plaintiffs' ranch out of business and to sacrifice their vested water rights.

Defendant also argues that plaintiffs' taking claim is not ripe until plaintiffs apply for and are denied a permit to use the ditches because plaintiffs do not have vested rights. In the alternative, defendant argues that even if the rights are vested, plaintiffs exceeded the scope of their vested rights. Plaintiffs argue that the administrative procedure of applying for the permit is in itself a taking because the permit process denies

plaintiffs their alleged vested ditch rights-of-way which they ask this court to enforce.

When confronted with administrative procedure the ripeness doctrine requires that the relevant administrative agency reach a final decision that actually affects a plaintiff before a court will adjudicate a challenge to the agency's action. See Abbott Labs. v. Gardner, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Plaintiffs claim that by requiring them to apply for a FLMPA permit, the Forest Service is forcing them to forfeit their vested ditch rights-of-way. This argument was rejected by the Supreme Court in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985). The Supreme Court stated, "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself `take' the property in any sense...." Id. at 127,106 S.Ct. at 459. Accord Tabb Lakes, Ltd v. United States, 10 F.3d 796 (Fed.Cir. 1993). This court holds, therefore, that the requirement for plaintiffs to obtain a special use permit in compliance with the Forest Service's rules and regulations itself does not create a per se taking. See also Gardner v. Stager, 892 F.Supp. 1301 (D. Nev. 1995) (permit required for maintenance of ditch rights-of-way in national forest).

Contrary to defendant's position, however, the law doe,' not require plaintiffs to apply for a permit if the procedure itself is not a reasonable variance procedure, see Loveladies Harbor, Inc. v. United States, 15 Cl.Ct. 381, 386-387 (1988) (summary judgment denied), 21 Cl.Ct. 153 (1990), aff'd 28 F.3d 1171 (Fed.Cir.1994)

(addressing variance procedures in a federal taking claim), and is so burdensome that it effectively deprives the property of value. See Stearns Co. v. United States, 34 Fed.Cl. 264 (1995). The case defendant cites for the proposition that plaintiffs must first seek a permit, Williamson County, does not apply to the present facts. In Williamson County, the Supreme Court held that a taking claim is not ripe until the claimant seeks a variance from permit denial in claims arising from local zoning laws. This decision has been limited to those situations involving alleged violations of local and state zoning rules where an initial denial is not the end of the administrative process. See, e.g., Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 386-387 (1988) (summary judgment denied), 21 Cl.Ct. 153 (1990), aff'd 28 F. 3d 1171 (Fed.Cir.1994); Culebras Enterprises Corp. v. Rivera Rios, 813 F. 2d 506, 515 (1st Cir. 1987); Littlefield v. City of Afton, 785 F. 2d 596, 609 (8th Cir. 1986).

Defendant used a similar ripeness argument, which this court rejected, in Stearns Co. v. United States, 34 Fed.Cl. 264 (1995). In Stearns, defendant argued that plaintiff's taking claim was not ripe until plaintiff sought, and was denied, a compatibility determination for subsurface mining on federal lands. Plaintiff claimed that the compatibility determination process itself was a taking because the process was so futile, or burdensome, that it effectively deprived the property of value. The court denied defendant's motion for summary judgment, allowing plaintiff the opportunity to prove at trial that a compatibility determination is not a reasonable variance type procedure and that the requirement to seek this procedure was so burdensome

as to require compensation under the Fifth Amendment. This court determines, analogous to Stearns, that plaintiffs need not apply for a permit if plaintiffs can establish that the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights. See also Loveladies Harbor, Inc. v. United States, 15 Cl.Ct. 381, 386-387 (1988) (summary judgment denied), 21 Cl.Ct. 153 (1990), aff'd 28 F. 3d 1171 (Fed. Cir. 1994).

Next, defendant claims that plaintiffs do not have the right to even try to demonstrate vested ditch rights-of-way because plaintiffs were not alive at the time of those rights' creation and therefore cannot prove that the present ditches are identical to those constructed prior to 1907. The court finds this argument untenable. Any vested ditch rights-of-way constructed prior to 1907 did not die with the original owner. Property rights which attach to land are inheritable, devisable and transferable. Plaintiffs deserve the opportunity to prove at trial that they own rights to certain ditches and that these ditches are identical to those constructed prior to 1907 and used continuously since construction.

This court finds that plaintiffs have demonstrated that their water rights and ditch rights-of-way taking claims are ripe for review. At this stage of this litigation there is clearly a large factual component to the question of whether plaintiffs have a property interest in the water and ditches and whether defendant appropriated these rights without just compensation. Plaintiffs seek judicial review from this court under the Tucker Act for claimed actual damages caused by past and current government actions. Additionally, the court finds that

denying plaintiffs the opportunity to bring their taking claims at this time would deny plaintiffs due process of law.

III. MERITS OF MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) of the Rules of the United States Court of Federal Claims, defendant seeks summary judgment. In its complaint, plaintiffs argue three theories for recovery. First, plaintiffs claim that the grazing permit creates a binding contract between the parties which defendant has breached. Second, plaintiffs claim a taking of their property without just compensation. Third, plaintiffs seek compensation for improvements constructed in the Toiyabe National Forest. Defendant argues that it is entitled to judgment as a matter of law on each theory.

Rule 56(c) states that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The party seeking to defeat a motion for summary judgment cannot rely on mere allegations to demonstrate the existence of material facts that would preclude summary judgment. Anderson v. Liberty Lobby, Inc.. 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Supreme Court noted in Celotex Corp. v. Catrett, 477 U.S. 317, 323-24,106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986), that "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of

factually unsupported claims or defenses." Thus, the non-moving party must designate specific facts demonstrating a genuine issue for trial.

A. Is a Grazing Permit a Contract?

In their complaint, plaintiffs allege that the grazing permit is a binding contract between the federal government and plaintiffs. In its motion for summary judgment, defendant claims that the issuance of a grazing permit does not as a matter of law create such a contract. Defendant bases its argument on two theories: 1) that the plain language of the permit clearly creates a license agreement, not a contract and 2) that Congress never delegated to the Forest Service the power to contract on behalf of the government with plaintiffs. As this issue is before the court on defendant's motion for summary judgment, the court must consider all facts in the light most favorable to the nonmovant; here the plaintiffs.

Defendant asserts that the plain language of the agreement indicates that the Forest Service and Congress intended the permit to constitute a license, not a contract, between the parties. Defendant argues that the permit is a license because it is a personal privilege which defendant may revoke. Defendant also notes that the Forest Service has broad discretion to suspend or cancel a permit and that such discretion is traditionally a quality found in a license, not a contract.

Even if the permit could appear to be a contract, defendant argues that the Forest Service had no authority to create a binding contract with plaintiffs. To

support its argument, defendant relies on the Ninth Circuit's decision in Osborne v. United States, 145 F. 2d 892 (9th Cir. 1944) ("Osborne"). In Osborne, the government appropriated the national forest land on which plaintiff held grazing privileges. Id at 895. The plaintiff sought damages for the value of the grazing privileges based on the language of the relevant regulations, which stated: "A term permit shall have the full force and effect of a contract between the United States and the permittee." Id (quoting 36 C.F.R. § 231.9). The Ninth Circuit held that such language could not be interpreted literally because Congress never gave the Department of Agriculture authorization to contractually bind the government by issuance of a grazing permit. The Osborne court stated:

> It is safe to say that it has always been the intention and policy of the government to regard the use of the public lands for stock grazing, ... as a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation.

Id at 896. The Ninth Circuit interpreted the contract language to mean that the government would regard the terms of the permit as binding between the parties although the agreement did not create a contract. Os borne, 145 F. 2d at 895. Defendant, relying on the Osborne decision, thus claims that the permit merely grants plaintiffs a license to graze. Defendant further argues that the Forest Service could not contract with plaintiffs since it did not have the authority to do so. Plaintiffs' mistaken belief that the permit contractually bound defendant is thus irrelevant.

Defendant further cites the Supreme Court case of Buford v. Houtz 133 U.S. 320, 10 S.Ct. 305, 33 L. Ed. 618 (1890) ("Buford "), as the seminal case to support its argument that a grazing privilege never creates a contract. There the Court held that during the time period in question, before the creation of national forests and parks, the government granted all people an implied license to use the public lands for grazing. Id. at 326, 10 S.Ct. at 307. Since the decision in Buford, argues defendant, the privilege to graze on public lands has been considered a revocable license.

In contrast, plaintiffs argue that because the permit has all the "earmarks" of a contract: offer, acceptance and consideration -even a "contract number," the permit should be interpreted as a contract. The permit, claim the plaintiffs, creates mutual obligations and rights between the parties. In return for an exclusive right to graze, plaintiffs pay an annual grazing fee and agree to abide by defendant's regulations. Plaintiffs argue that the Forest Service also described the permits as contracts, administered the permits as contracts and enforced the permits as contracts. Plaintiffs therefore claim that this court must interpret the permit as a contract, not a license agreement.

After considering all factors most favorable to plaintiffs, the court concludes that as a matter of law the permit does not create a contract between the parties. First, the language and characteristics of the agreement are that of a license. Second, the Forest Service, as agent for the federal government, did not have the authority to contractually bind the government.

Thus, the permit did not create contractual rights; rather, it merely granted plaintiffs certain exclusive privileges based upon historical grazing practices.

Plaintiffs' grazing permit has the traditional characteristics and language of a revokable license, not a contract. A contract creates legally enforceable rights and duties between the parties whereby the breach of such agreement gives rise to a remedy. Restatement (Second) of Contracts, § I (1981). In contrast, a license creates a personal or revokable privilege allowing a specific party to utilize the land of another for a specific purpose but does not vest any title or interest in such property in the licensee. Moreover, a party cannot transfer an interest in property with a license. See Arthur L. Corbin, 2 Corbin on Contracts § 404 (rev. ed. 1993). A contract, on the otherhand, is analogous to a lease (and in various circumstances the legal conceptions merge into one) and creates a vested property interest against the world. See Arthur L. Corbin, 3A Corbin on Contracts § 686 (1963 ed.).

The language of plaintiffs' grazing permit has few earmarks of a contract but many characteristics of a license. See Arthur L. Corbin, 2 Corbin on Contracts §§ 1.1-1.3, § 404 (rev. ed. 1993). Unlike a contract, the permit does not create affirmative obligations on the part of the defendant. Similar to a license, defendant merely agrees to allow plaintiffs to graze cattle according to the permit terms for a period not exceeding ten years. Also similar to a license, plaintiffs cannot legally assign or transfer the permit, the permit creates a personal privilege for plaintiffs' individual use for the specific purpose of grazing cattle. Defendant

may modify the permit because of "resource conditions or management needs." In fact, defendant reserved the right to cancel the permit in its totality if the government decides to devote the land for another public purpose incompatible with grazing. Based upon these factors, the court finds that the plain language of the grazing permit evidences no intention on behalf of the government to create a contract.

Contrary to plaintiffs' argument, the inclusion of a "contract number" to identify each grazing permit does not metamorphize the permit into a contract. Plaintiffs have not provided any documentation to support their position that the Forest Service had the requisite authority to enter into a grazing contract with plaintiffs. "Government's agents cannot contract to do that which they do not have a legal right to do." Clawson v. United States, 24 CI.Ct. 366, 371 (1991) ; see also Osborne v. UnitedStates, 145 F. 2d 892, 896 (9th Cir. 1944).

Even if plaintiffs believed the permit to be a contract and relied on the permit as a contract, Forest Service personnel cannot contractually bind the government without the proper legal authority.

The Supreme Court has never specifically addressed whether a grazing permit creates a contract between the government and the permittee. Of course, there is nothing in our legal theory that says what is called a permit may not in the eyes of the law be found to be a contract or vice versa. And, of course, Congress could turn these permits into contracts, leases or even fee estates, if it chose. Also, contrary to defendant's

assertion, Buford v. Houtz did not address directly whether a permit created a contract. Buford addressed whether one private party could exclude another private party from grazing on public lands. The Supreme Court held that the government gave its tacit consent to such use of the public lands as a privilege to all people and no private party could alter that use. Buford, 133 U.S. at 326-27,10 S.Ct. at 307-08.

Historically, federal courts have followed the analysis in Buford when confronted with grazing rights issues. Approximately thirty-five years after the Buford decision, Congress passed the Taylor Grazing Act and created specific grazing districts upon the public lands which required the issuance of exclusive permits for these grazing privileges. 43 U.S.C.A. §§ 315, et seq. Federal courts, confronted with these grazing permits, have considered the permit system to be an administrative method employed by the government to allow parties the exclusive right to graze based upon historical grazing practices. All the courts which have considered this issue have held or assumed such agreements to be licenses which confer certain privileges to the permittee, revokable at the government's discretion. See, e.g., United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973); Swim v. Berglond, 696 F. 2d 712 (9th Cit. 1983); Diamond Ring Ranch, Inc. v. _Morton, 531 F. 2d 1397 (10th Cir.1976); Fulton v. United States, 825 F. Supp. 261 (D.Nev.1993). Plaintiffs have brought forth no persuasive arguments regarding why their grazing permit should be interpreted any differently from those grazing permits dealt with by other federal courts over a long period and held to be licenses.

Based upon the permit language, legal doctrine and precedent, the court finds that the permit at issue here is not a contract the breach of which may require damages. This court thus grants defendant's motion for summary judgment on this issue.

B. Did Defendant Take Plaintiffs' Property Without Just Compensation?

An analysis of plaintiffs' taking claims must begin with the language of the Fifth Amendment to the Constitution, which states, "[n]or shall private property be taken for public use, without just compensation." The Fifth Amendment requires that society as a whole, rather than a particular property owner, bear the burden of the exercise of state power in the public interest. Armstrong v. United States, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); Agins v. City of Tiburon, 447 U.S. 255,260-61, 100 S.Ct. 2138,2141-42, 65 L.Ed.2d 106 (1980).

The right to just compensation is as fundamental a right as the right to vote and the right to free exercise of religion. See Stearns Co. v. United States, 34 Fed. Cl. 264, 271(1995) citing Dolan v. City of Tigard, 512 U.S. 374, -, 114 S.Ct. 2309, 2320, 129 L.Ed.2d 304 (1994). At the heart of a free society is the ability of its citizens to own property and exclude others, including the government, from using that property. As Justice Story stated, "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred." Witney Benefits, Inc. v. United States,, 18 Cl.Ct. 394, 399 (1989), aff'd 926 F. 2d 1169 (Fed.Cir. 1991), cert. denied

502 U.S. 952, 112 S.Ct. 406, 116 L.Ed.2d 354 (1991), citing Wilkinson v. Leland 27 U.S. (2 Pet.) 627, 657, 7 L. Ed. 542 (1829). This mandate requires a court to determine "when and whether government's actions destroy the rights in property that are an essential component of ordered liberty." Id

As taking jurisprudence has developed, the Supreme Court has interpreted the Constitution to prevent government from doing through general regulation what it is prevented from doing through direct specific action-taking private property for public use without just compensation. fn10 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L. Ed. 322 (1922). Regulations, of course, can become so burdensome as to effectively result in the equivalent of a direct, physical appropriation of a property interest. As stated by the Supreme Court over one-hundred and fifty years ago in M'Culloch v. Maryland, 17 U.S. (4 Wheat) 316, 4 L. Ed. 579 (1819), "[a]n unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation." Id at 327. As Justice Holmes stated in Pennsylvania Coal Co. v. Mahon, if the government could regulate private property without restraint, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

Our first inquiry here is to determine whether, on defendant's motion for summary judgment, the court can find that plaintiffs have no property interest as a

matter of law on undisputed facts. There generally is a heavy burden placed upon a summary judgment movant in a taking case because this category of claim is generally so fact intensive. See Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed.Cir. 1983); Brown v. United States, 73 F.3d 1100 (Fed.Cir. 1996). Property rights are generally defined by state law, though in certain cases federal property rights can be created. See, e.g., Horne v. Adolph Coors Co., 684 F. 2d 255 (1982) (patent is property interest created by federal law). Thus, our analysis must focus on whether, at this point, the court can say that plaintiffs clearly have no property interest under state law.

1. Do Plaintiffs have a Property Interest in the Toiyabe National Forest or in Their Grazing Permit?

Plaintiffs concede in their complaint that the permit does not give them any right, title or interest in federal lands. Plaintiffs claim, however, that they have a property interest in the permit because the federal government issued the permit in recognition of rights which existed prior to the creation of the Toiyabe National Forest. Defendant claims that the issuance of a grazing permit, as a matter of law, does not create a compensable property interest under the Fifth Amendment. To support its position, defendant argues that Congress did not intend to create such a right by issuing grazing pen¯nits; that the permit does not have characteristics of private property; and that even if the permit creates value to the permittee, revocation of the permit is not compensable under the Fifth Amendment.

While Congress certainly could have created a property right in a grazing permit, defendant argues that Congress made absolutely clear its intent that grazing permits be classified as revocable licenses, whereby the issuance of such permits did not give rise to such property rights. Defendant stresses that both the Granger-Thye Act of 1950,16 U.S.C. § 580L,, and § 402(h) of FLMPA, 43 U.S.C. § 1752(h) expressly state that the issuance of a grazing permit does not grant "any right, title, interest or estate" in national forest land or resources. [11] The House Committee records stress the members' intention that the grazing permits reflect the use of the public land as a privilege, not a right. H.R.Rep. No. 1163. Finally, the Forest Service regulations, which specifically are incorporated into all grazing permits, also state that the issuance of a grazing permit does not convey "right, title, or interest held by the United States in any land or resources." 36 C.F.R. § 222.3(b). Next, defendant claims that the rights given under the permit do not have the characteristics of private property but of a license. First, the grazing permit allows the Forest Service to suspend, cancel or modify a permit without compensation. Defendant cites the Ninth Circuit which held a grazing permit to be a revocable privilege "which is withdrawable at any time for any use by the sovereign without the payment of compensation." Swim v. Bergland, 696 F.2d 712, 719 (9th Cir. 1983), citing Osborne v. United States, 145 F.2d 892, 896 (9th Cir. 1944). Second, defendant notes that the permit cannot legally be bought or sold, a traditional characteristic of a property right. Third, the permit does not give plaintiffs the right to exclude all parties from the

grazing allotment, also a traditional aspect of a right in real property.

Defendant also argues that although the grazing permit may have value to plaintiffs, the Fifth Amendment does not require compensation when defendant's actions affect the value of the permit or ranch because the sovereign itself created the value by issuing the grazing permit. See, e.g., United States v. Fuller, 409 U.S. 488, 491, 93 S.Ct: 801, 803-04, 35 L.Ed.2d 16 (1973). Although the permit may have value to plaintiffs, argues defendant, value itself does not create a compensable property right, no matter how seemingly unjust the consequences to plaintiffs. See, e.g., United States v. Cox, 190 F.2d 293,295, (10th Cir. 1951), cert. denied 342 U.S. 867, 72 S.Ct. 107, 96 L. Ed. 652 (1951).

To further support its position, defendant brings to the court's attention the case of White Sands Ranchers of New Mexico v. United States, 14 Cl. Ct. 559 (1988). In White Sands, plaintiffs claimed a compensable right to the value that the permit lands contributed to their fee ranches. The Claims Court found no such right, stating:

> It is settled law that grazing permits, though they are of much value to ranchers in the operation of an integrated ranching unit., nevertheless do no constitute property for purposes of the just compensation clause. United States v. Cox, 190 F.2d 293 (10th Cir.) cert. denied, 342 U.S. 867, 72 S.Ct. 107,96 L. Ed. 652 (1951).... It has also been held that even as the grazing permits may not be assigned any compensable value in their own right, so neither

> may the market value which they contribute to private fee lands be recognized in the just compensation due upon the taking of the private lands. United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973).

Id at 566-67. Following from this, defendant argues that the Forest Service's decision to suspend and cancel part of plaintiffs' permit does not require compensation because the value given to plaintiffs by the right to graze on federal lands does not translate to a compensable property interest under any circumstances.

Plaintiffs give creative, though rather stretched, reasons why they have a compensable property interest in their grazing permit. Plaintiffs concede that the cases cited by defendant do stand for the proposition that the mere issuance of a grazing permit does not grant any right, title or interest in the public lands. Plaintiffs claim that this rule does not apply to them for two reasons. First, plaintiffs argue that they have prior vested rights on the public lands which the grazing permit cannot effect; and, second, that a permittee may have a property interest in the permit even if a permittee does not have a property interest in the underlying rangeland.

Plaintiffs argue that they have a property right in the grazing permits, not because of the issuance of the permit per se, but due to a property right in the permit flowing from the Act of 1866, an independent act of the Congress. Plaintiffs contend that the permit embodies their underlying property right in the land and

resources of the public lands conceded by the Act of 1866. Plaintiffs claim that the Act of 1866 merely enacted as federal law the custom and usage of the Western states and territories to recognize the rights of the first appropriator to acquire a priority right to the use and enjoyment of the public land over those who had not expended such labor. See, e.g., Wyoming v. Colorado, 259 U.S. 419, 460-61, 42 S.Ct. 552, 555-56, 66 L. Ed. 999 (1922), vacated 353 U.S. 953, 77 S.Ct. 865, 1 L.Ed.2d 906 (1957). Plaintiffs argue that their predecessors in interest conferred a benefit to the public lands by improving it and initiating an economically useful enterprise. Plaintiffs claim that Congress enacted the Act of 1866 as a "reward" with a recognition of property rights which their predecessor in interest had acquired in the rangeland.

After considering all factors most favorable to the plaintiffs, the court concludes that as a matter of law plaintiffs do not have a property interest in the permit or the rangeland themselves. To defeat defendant's motion for summary judgment, plaintiffs cannot rely on mere allegations to demonstrate a genuine issue for trial. Plaintiffs have failed to provide this court with facts to support their allegations of a property interest in the grazing permit or in the rangeland. Plaintiffs provide no logical support for the theory that Congress intended to create a property right in the permit itself. In fact, the court can clearly determine, based upon the language and history of the Granger-Thye Act and the Taylor Grazing Act, that Congress had no legislative intention of creating a property interest in the permit just as Congress had no legislative intention of creating a property interest in the underlying federal lands.

Plaintiffs furnish no evidence supporting the existence of vested rights in the rangeland itself under the Act of 1866 or state law. In fact, all precedent indicates that the privilege to graze never created a property interest but rather a preference to use the allotment before the government gave the right to another. In other words, a preference grants a party the right of first refusal, not a property right in the underlying land. In Wyoming v. Colorado, 259 U.S. 419, 460-61, 42 S.Ct. 552, 555-56, 66 L. Ed. 999 (1922), vacated 353 U.S. 953, 954, 77 S.Ct. 865, 866, 1 L.Ed.2d 906 (1957), the Supreme Court did not determine that private parties had a property interest in the federal lands. Rather, the Supreme Court held that one who makes beneficial use of the public lands has a greater priority to the use of the that land than another private party who did not. 1d. Likewise, the Act of 1866 did not "reward" parties with a recognition of property rights upon the rangeland. The Act clearly acknowledged vested rights in water and ditch rights-of-way according to state law. The Act does not address property rights in the public lands and the court declines to create such rights contrary to the clear legislative intention of Congress.

The Supreme Court, in Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 96 S.Ct. 910, 47 L.Ed.2d 1 (1975) ("Alamo "), did find a possible compensable interest in the federal government's condemnation of a leasehold estate to graze held by a private party lessee and Arizona as lessor. The Supreme Court addressed Arizona law and the unique facts at issue, including a state lease to graze under the New Mexico-Arizona Enabling Act. Alamo does not create support for plaintiffs' assertion of property rights in the permit or

the underlying rangeland. Alamo, however, does not endorse the legal theory, nor can it be interpreted to find, that federal grazing permits are property rights. A lease and a permit are very different legal relationships. See, e.g., United States v. General Motors Corp., 323 U.S. 373, 377, 65 S.Ct. 357, 359, 89 L. Ed. 311 (1945) (addressing property interest in a leasehold estate).

Moreover, value which the permit adds to the base property and reasonable expectations of private parties on the ability to graze upon public lands alone do not create a property interest. An interstate highway near a citizen's motel might make it far more valuable. The closing of such a highway in favor of a better route would hardly be considered a taking even though it might destroy the economic viability of the motel. The permit obviously adds value to plaintiffs' ranch and plaintiffs may have expected the option to renew the permit indefinitely. The court also understands that without a grazing permit, the ranch may become worthless. But the court emphasizes that plaintiffs' investment-backed expectations and reliance on the privilege to graze do not, in themselves, create a property interest in the rangeland or the permit.

The court finds no legal foundation to elevate plaintiffs' grazing permit to a property interest. Since plaintiffs have presented no documents or other facts or legal theories demonstrating any type of property interest in the public range or in their grazing permit, the court finds that plaintiffs do not have such a property interest. Because plaintiffs have no property interest in the rangeland or their pen¯nit, defendant's motion for

summary judgment on this issue must be granted. 2. Do Plaintiffs Have a Property Interest in Water Rights, Ditch Rights-of-way and Forage in the Toiyabe National Forest?

In their complaint, plaintiffs allege ownership to all the water in the Meadow Canyon and Table Mountain allotments, [12] to certain ditch rights-of-way and the forage in the Meadow Canyon and Table Mountain allotments. Plaintiffs claim that through physical actions and regulations defendant has taken these property rights without just compensation. Defendant argues that even if this court determined that it did have jurisdiction and that plaintiffs' claims are ripe, plaintiffs do not own the property interest in the public lands which they allege. Because plaintiffs do not have the requisite property interest, defendant argues, the court must grant its motion for summary judgment because plaintiffs' have failed to meet their burden of demonstrating a genuine issue for trial.

The court denies defendant's motion for summary judgment regarding plaintiffs' water rights, ditch rights-of-way and forage taking claims. As discussed in the jurisdiction and ripeness sections, the court finds that plaintiffs have presented sufficient documentation of ownership of water rights, ditch rights-of-way, and forage to proceed with these taking claims. At the limited evidentiary hearing, the court will determine if plaintiffs do have the property interests which they allege and over which a disputed issue of material fact exists.

a) Water Rights

Defendant and amici present three theories why plaintiffs cannot prove the requisite ownership of water rights in the Toiyabe National Forest. First, defendant implies that plaintiffs cannot have ownership of water on federal lands. Second, defendant and amici argue that even if plaintiffs have a right to some of the water, that right does not encompass all of the water claimed by plaintiffs. Third, defendant and amici claim that defendant never appropriated plaintiffs' water rights for the government or third party use or denied plaintiffs access to their alleged water rights. Since the United States did not deny plaintiffs the use of their alleged water rights, contends defendant and amici; plaintiffs' water rights taking claim must be dismissed. In other words, unless defendant and other third party users drank the streams dry, thereby preventing plaintiffs from obtaining any water, plaintiffs cannot argue a taking occurred.

Amici adds another dimension to the water rights issue. They contend that water rights are not similar or analogous to traditional property rights subject to the just compensation requirement of the Fifth Amendment. Amici argue that water rights are limited, usufructuary rights which do not entitle the appropriator to actual possession or ownership of water, but only to the right to put a certain quantity of water to beneficial use.

Determining title to this type of water right and the scope of the water right is an issue of first impression in this court. Flowing water presents unique ownership issues because it is not amenable to absolute physical

possession. Unlike real property, water is only rarely a fixed quantity in a fixed place. Nevertheless, the right to appropriate water can be property right. See, e.g., Wyoming v. Colorado, 259 U.S. 419, 460-61, 42 S.Ct. 552, 555-56, 66 L. Ed. 999 (1922), vacated on other grounds 353 U.S. 953, 77 S.Ct. 865, 1 L.Ed.2d 906 (1957); In re Manse Spring, 60 Nev. 280, 108 P.2d 311 (1940). Amici provides no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection. This is particularly true in the west where water means the difference between farm and desert, ranch and wilderness, and even life and death. This court holds that water rights are not "lesser" or "diminished" property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.

The issues which this court must determine are: what water rights do plaintiffs own, if any, which could be subject to a taking? And, whether under the facts presented, did government regulation of water usage in the Toiyabe National Forest effectively take plaintiffs' water rights? Under 16 U.S.C. § 481, the use of water within national forests is subject to regulation. See 36 C.F.R. 251.53(l)(1). As demonstrated, the parties strongly disagree regarding whether plaintiffs own any water rights, the scope of those rights, and the ability of the Forest Service to regulate the alleged water rights.

Defendant first argues that plaintiffs cannot claim water rights superior to defendant's upon federal lands. This allegation is incorrect. The Act of 1866 clearly

acknowledges vested water rights on public lands. The Act states in relevant part:

> 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, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same....

43 U.S.C. § 661. Also, the Supreme Court, has acknowledged that private parties may acquire water rights on federal lands. See, e.g., Bruder v. Naroma Water and Mining Co., 101 U.S. 274, 276, 25 L.Ed. 790 (1879) (water rights on public lands are rights "which the government had ... recognized and encouraged and was bound to protect"); Central Pac. Ry. Company v. Alameda County, California, 284 U.S. 463, 52 S.Ct. 225, 76 L. Ed. 402 (1932).

The Act of 1866 states that priority of possession to the rights of water on federal lands will be determined by local law. Nevada has adopted the prior appropriation doctrine for the administration of water rights. Under this system, the date of the appropriation determines the appropriator's priority to use the water, with the earliest user having the superior right. See Humboldt Land & Cattle Co. v. Allen, 14 F. 2d 650 (D.C.Nev.1926), aff'd 274 U.S. 711, 47 S.Ct. 574, 71 L. Ed. 1314 (1927). The date the water right was first put to beneficial use is extremely important because available water is distributed according to priority

rather than being apportioned among all users. Plaintiffs will have the opportunity at trial to prove vested water rights appropriated before defendant acquired water rights in the Toiyabe National Forest. Subject to reasonable regulation, if plaintiffs' water rights have priority over defendant's rights, plaintiffs, as senior appropriators, have a right to utilize their total volume of water before defendant has any right to utilize their water rights. 43 U.S.C. § 661 (water rights vested under local law are protected).

Second, the court disagrees with defendant's and amici's position that plaintiffs cannot have a vested right to all the water in certain areas of the Toiyabe National Forest. Nevada law allows a party to appropriate any amount of water, including the entire flow of a spring, to be put to beneficial use. Nev. Rev. Stat. § 533.030 states in relevant part, "[r]ights to the use of water are restricted to the amount which is necessary for irrigation and other beneficial purposes. Nev. Rev. Stat. § 533.060. A water user does not have the right to the entire flow of a stream or spring unless that entire flow is being put to beneficial use." Id (emphasis added). The court concludes that, under the cited Nevada law, plaintiffs could have vested rights to put each spring and stream to beneficial use.

The court further finds defendant's and amici's argument denying appropriation of plaintiffs' alleged water rights to be illogical and circular. Plaintiffs argue that if defendant had not interfered with plaintiffs' alleged priority water rights, plaintiffs would have put the water to beneficial use. For example, plaintiffs claim that defendant installed a water supply system

for an administrative site at a spring whose water is owned by plaintiffs, allowed non-indigenous elk to drink water claimed by plaintiffs, and prevented plaintiffs from access to their water.

Defendant cannot logically argue under such circumstances that plaintiffs alleged water rights were not taken because plaintiffs never used the water. Obviously, plaintiffs could not make beneficial use of their water rights if they were prevented from doing so because someone else already utilized the water. Defendant's argument reminds the court of the old story of the person who killed his parents and then claims the sympathy of the court because he is an orphan. The only difference is in this case the prosecutor is doing the killing and using the issue of orphanage to discriminate against the orphan! The court finds that whether defendant utilized plaintiffs' water for its use and for the use of third parties or prevented plaintiffs access to their water rights are questions of fact to be addressed in determining whether there has been a taking.

Finally, the court does not accept defendant's "no denial of access" argument as a reason to grant summary judgment. Defendant argues that until plaintiffs apply for and are denied the right to change the place of diversion, defendant has not taken plaintiffs' water by denying access. The court finds implausible the concept that plaintiffs should be required to apply for a change of place of diversion before bringing their claim. Plaintiffs specifically argue that their water right includes the right to use the water at specified locations. Plaintiffs will have the opportunity at trial to

demonstrate that in Nevada, water rights include the right to use the water at certain locations without creating ditch pipelines.

The court declines to grant defendant's motion for summary judgment regarding plaintiffs water rights taking claim. The court has studied the voluminous filings to support defendant's and amici's position that plaintiffs own no property which defendant could have taken. This court concludes that plaintiffs have demonstrated enough facts indicating ownership of water rights, which defendant may have used, to allow plaintiffs to proceed with their taking claim at this stage of the proceedings. The court will hold a limited evidentiary hearing at which time plaintiffs and defendant may present evidence and testimony regarding ownership of water rights and the scope of that property right in Nevada.

b) Ditch Rights-of-way

Defendant argues that even if the court finds plaintiffs' ditch rights-of-way taking claim ripe, defendant did not take plaintiffs ditch rights as a matter of law. Defendant argues that even assuming that plaintiffs have valid ditch rights-of-way protected under the Act of 1866, the Forest Service may regulate and restrict activities beyond the scope of normal maintenance and repair. See 43 C.F.R. § 2801.1. Therefore, because plaintiffs activities went beyond "normal" maintenance, argues defendant, defendant acted properly and reasonably by regulating plaintiffs' actions on the public lands. In contrast, plaintiffs claim that defendant

imposed unreasonable conditions on access and maintenance of plaintiffs ditch rights.

As discussed in the ripeness section, if this court concludes that plaintiffs own certain ditch rights-of-way pursuant to the Act of 1866, it is the court's role to determine the scope of that property right. According to the Forest Service Manual § 5522.1(4), a permit is not required for plaintiffs to perform "normal maintenance or minor changes made in the facilities on the right-of-way to maintain capacity of the ditch as it existed on October 21, 1976." The scope of the property right in the ditch rights-of-way are determined by referring to state law and interpreting the applicable regulations.

Plaintiffs will have the opportunity at the evidentiary hearing to prove their ownership of vested ditch rights and that their desired use and maintenance of these rights does not exceed the scope of their property interest, requiring a special use pen¯nit. If plaintiffs establish both facts, then the court will permit plaintiffs' ditch rights-of-way taking claim to proceed.

c) Forage

In their complaint, plaintiffs contend that the right for their cattle to graze is linked to their vested water right under the Act of 1866 and state law. Defendant argues that as a matter of law, plaintiffs' alleged vested water rights do not grant plaintiffs the right to "bootstrap" an interest in adjacent federal lands and resources. Defendant acknowledges that a stockwatering right is premised on the ability to graze stock and put the water to beneficial use and that if

defendant revokes the grazing permit the stockwatering right will be worthless.

Defendant also notes that courts consistently have held that an easement to graze on public lands does not attach to a water right on public lands. The Supreme Court unequivocally determined grazing on the public lands to be a privilege, revocable at the government's will. See, e.g., Buford v. Houtz, 133 U.S. 320, 10 S.Ct. 305, 33 L. Ed. 618 (1890); Light v. United States, 320 U.S. 523, 31 S.Ct. 485, 55 L. Ed. 570 (1911); Omaecheverria v. Idaho, 246 U.S. 343, 38 S. Ct. 323, 62 L. Ed. 763 (1918); United States v. Fuller, 409 U.S. 488, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973). The Nevada Supreme Court also assumed grazing on public lands to be some type of "implied license," noting that a grazing privilege is not a right conferred by the federal government and that the use of the public range may at any time be withdrawn from such use. Itcaina v. Marble, 56 Nev. 420, 55 P.2d 625 (1936). The Supreme Court of Nevada also determined in Ansolabehere v. Laborde, 73 Nev. 93, 310 P.2d 842 (1957), that those aspects of the Nevada Stockwatering Act concerning the control of grazing privileges on the public lands were superseded by the Taylor Grazing Act. Id. at 102, 310 P.2d 842.

Finally, defendant cites a recent analogous case from the district court of Nevada, Gardner v. Stager, 892 F. Supp. 1301(D.Nev. 1995). Plaintiffs brought suit to "quiet title" to alleged grazing and water rights in the Humboldt National Forest. The district court noted that plaintiffs' claim to vested grazing rights "are directly contradicted by an unbroken line of Supreme

Court precedent." Id at 1304. Also, the court found that although plaintiffs' predecessors in interest grazed stock on the land at issue for more than eighty years, this use did not give plaintiffs a vested grazing right immune from federal regulation. The court held that grazing remains a privilege, subject to regulation by the federal government and revocable at any time. Id. at 1303.

Defendant notes that the United States does not need to compensate private parties for the reduction in value of adjacent private property when the Forest Service cancels or suspends grazing privileges. Defendant emphatically argues based upon precedent and persuasive authority that the ability to graze on national forest lands is a privilege, not a right. Defendant claims that in no manner could plaintiffs acquire a property interest in the ability to graze on public lands. Therefore, defendant could not "take" plaintiffs' grazing rights because plaintiffs never had a property interest in their privilege to graze.

Plaintiffs present a novel argument regarding how and why they have vested grazing rights in the Toiyabe National Forest despite the overwhelming cases finding no such right. Under the Act of 1866, plaintiffs note, Congress provided that the right to use water which has vested and accrued and is recognized and acknowledged by local customs and law shall be maintained and protected. 43 U.S.C. § 661. The Act of 1866 instructs courts to apply state law to determine title and scope of water rights. Plaintiffs assert that in Nevada the right to bring cattle to the water, and for cattle to consume forage adjacent to a private water right, is inherently part of the vested stockwater right.

Obviously, there is some logical support for this proposition even in light of the small amount of knowledge of bovine behavior held by the court.

Plaintiffs claim that the right to use water on the public lands and the right to graze under Nevada law "are inextricably intertwined." Cattle graze on the public range because water exists on the public lands. The cattle will roam and drink from all available water sources and consume forage near the water source. Plaintiffs argue that Nevada law recognizes this fact in its water code which refers to "rights to water range livestock at a particular place" and to the "watering place." NRS §§ 533.485-510. Plaintiffs further argue that Nevada courts also considered water and grazing rights as combined interests. The Nevada Supreme Court in Ansolabehere v. Laborde, 73 Nev. 93, 310 P.2d 842 (1957), cert. denied 355 U.S. 833, 78 S.Ct. 51, 2 L.Ed.2d 45 (1957), held that "the right to the use of water for watering livestock in this arid state depends for this value on the public range; hence we think the two matters are properly connected." See also In re Calvo, 50 Nev. 125, 253 P. 671 (1927). Thus, plaintiffs claim that under Nevada law, their vested water right, as acknowledged by the Act of 1866, includes the right for the cattle to consume forage adjacent to the water.

The court agrees with defendant that each case it cites stands for the general proposition that the right to graze is a revokable privilege. The court also agrees with defendant and the numerous courts which have addressed this issue, that plaintiffs do not have a property interest in the rangeland. The court also agrees that defendant may revoke grazing privileges

which in reality prevent plaintiffs from the beneficial use of the stockwatering rights. Nevertheless, neither the Supreme Court, or other lower federal courts, have addressed the scope of the water rights acknowledged by the Act of 1866. If Nevada law recognized the right to graze cattle near bordering water as part of a vested water right before 1907, when Congress created the Toiyabe National Forest, plaintiffs may have a right to the forage adjacent to their alleged water rights on the rangeland. [13]

The court notes that Nevada has addressed the conflict between the role of the state to define water rights and the role of the federal government to manage, regulate and control national forests. The Nevada courts, however, did not address whether Nevada law prior to the creation of the Toiyabe National Forest from the public domain directly granted the right to utilize forage appurtenant to a water right. In fact, the Nevada Supreme Court cases of In re Calvo, Ansolabehere v. Laborde and Itcaina v. Marble, demonstrate the conflict over the right to graze versus the right to use water on public lands. See In re Calvo, 50 Nev. 125, 253 P. 671 (1927), Ansolabeliere v. Laborde, 73 Nev. 93, 102, 310 P.2d 842 (1957), and Itcaina v. Marble, 56 Nev. 420, 55 P. 2d 625 (1936) (state regulates water rights on federal lands and regulated grazing on the federal lands until the enactment of the grazing acts at which time Nevada continued to regulate the water on federal lands while the federal government regulated the right to graze.)

When the federal government created the Toiyabe National Forest, it could not unilaterally ignore private

property rights on the public domain. If Congress wanted to remove all private property interests in the public domain, which were created by the state under state law, the Constitution would have required the federal government to pay just compensation. Just as the federal government could not take private property rights in water or ditch rights-of-way when it created the Toiyabe National Forest, the government could not take any other form of private property right in the public domain. Plaintiffs will have the opportunity at trial to prove property rights in the forage stemming from the property right to make beneficial use of water in the public domain within Nevada originating prior to 1907.

3. Did Defendant's Impoundment of Plaintiffs' Cattle Qualify as a Compensable Taking Under the Fifth Amendment?

In their complaint, plaintiffs allege that defendant took their cattle without just compensation. Specifically, plaintiffs argue that this is not a case of a simple trespass of plaintiffs' cattle caused by plaintiffs' carelessness. Rather, plaintiffs allege that defendant was able to impound and sell their cattle only because it made demands under the permit which defendant knew plaintiffs could never satisfy as well as physically opened gates, causing the cattle to wander to the suspended allotment. Defendant argues that summary judgment is appropriate because (1) this court is not the proper forum to review defendant's actions; (2) plaintiffs' cattle were trespassing and (3) plaintiffs "essentially" consented to defendant's actions by failing to retrieve their cattle.

Defendant claims that its actions under the permit, as administrative actions, cannot be reviewed by this court. As defendant notes, plaintiffs did object to defendant's actions and sought administrative appeals through the Forest Service's administrative review. After exhausting administrative review, however, plaintiffs did not seek judicial review of defendant's actions. Therefore, if plaintiffs want to argue that the Forest Service's actions were improper under the permit, plaintiffs must seek review in the proper forum, the district court. To proceed in this court, defendant argues, plaintiffs must accept defendant's actions as lawful and proper. See Florida Rock Indus. v. United States, 791 F.2d 893, 898-99 (Fed.Cir.1986), cert. denied, 479 U.S. 1053, 107 S.Ct. 926, 93 L.Ed.2d 978 (1987).

Defendant argues that by signing the grazing permit, plaintiffs authorized the impoundment and sale of their cattle. The permit specifically incorporates the Forest Service regulations permitting impoundment and sale of livestock under specific conditions. Defendant argues that under 36 C.F.R. § 2b2.10, [14] the unauthorized pasturing of cattle on a national forest constitutes a tort and trespass. When cattle are found on federal lands improperly, the cattle may be seized and sold under 16 U. S.C. § 551[15] and applicable regulations. Pursuant to plaintiffs' grazing permit and the relevant regulations, defendant argues that plaintiffs' cattle were trespassing on federal lands and that defendant, as the landowner, had a right to confiscate the cattle. See U[n]ited States v. Gardner, 903 F.Supp. 1394 (D.Nev.1995). For example, after the Forest Service suspended plaintiffs' right to graze on the Meadow

Canyon allotment, defendant claims that any grazing by plaintiffs' cattle constituted a trespass. Defendant argues that when it observed plaintiffs' cattle grazing on the Meadow Canyon allotment during the suspension, it gave plaintiffs numerous opportunities to remove their cattle. Defendant claims that plaintiffs failed to remove the cattle, and, as a landowner, defendant had the right to remove the cattle itself when plaintiffs failed to comply with the Forest Service's instructions. See United States v. West, 232 F.2 d 694, 698 (9th Cir.1956), cert. denied 352 U.S. 834, 77 S.Ct. 51, 1 L.Ed.2d 53 (1956), quoting Camfield v. United States, 167 U.S. 518, 524, 17 S.Ct. 864, 866-67, 42 L.Ed. 260 (1897) (the United States has "the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers.")

Plaintiffs are estopped from claiming a taking based upon the impoundment and sale of their cattle, argues defendant, because the Forest Service notified plaintiffs at every point of the process. Defendant argues that plaintiffs "essentially" consented to the sale of the cattle by the terms of their permit and then by failing to redeem their cattle from the Forest Service. Defendant notes that after the impoundments, defendant gave plaintiffs an opportunity to redeem their cattle before auction. Defendant also notes that it sent plaintiffs numerous warnings that their cattle were trespassing and that if plaintiffs did not remove their cattle, defendant would impound them. Defendant argues that "this Court has never required the state to compensate the owner for the consequences of his own neglect." Texaco, Inc. v. Short, 454 U.S. 516, 530, 102 S.Ct. 781, 792, 70 L.Ed.2d 738 (1982). Defendant argues

that a taking cannot occur when the Forest Service merely followed their regulations which plaintiffs agreed to follow when they signed their grazing permit.

Plaintiffs seek just compensation for the impoundment and sale of their cattle by claiming, consistently and forcefully, that the Forest Service knowingly created an environment that made it economically and practically infeasible to manage the cattle on the allotments. Plaintiffs argue that the Forest Service intentionally made demands and conditions under the permit that the plaintiffs could not satisfy including establishing deadlines which were inherently impossible to meet for moving cattle onto and off of the allotments. For example, plaintiffs argue that the presence of their cattle on the Meadow Canyon allotment during the suspension and plaintiffs' inability to move the cattle were caused by the interference of defendant with the allotment itself and through regulatory schemes. Plaintiffs also claim that they could not redeem the cattle because defendant's actions made plaintiffs' economic operation of the ranch impossible. Plaintiffs contend that defendant's actions were designed to interfere with plaintiffs' allotments and operation of their ranch thereby causing plaintiffs to lose their grazing permit and the use of their stockwatering rights. Plaintiffs argue that just compensation is required because defendant's created a situation whereby they knew plaintiffs could not prevent their cattle from moving onto the Meadow Canyon allotment during the suspension and therefore guaranteed the confiscation and sale of plaintiffs' property.

The court determines that genuine issues of material fact exist regarding the impoundment and sale of the cattle which prevent the court from granting defendant's motion for summary judgment. This court agrees with defendant that plaintiffs must concede all actions as proper under the permit to bring a taking claim. This court is not the proper forum to question defendant's actions under the permit. Defendant, however, goes one step further. Defendant claims that because plaintiffs admit that defendant exercised its rights under the regulations and permit, defendant's actions cannot cause a taking of plaintiffs' property. This argument is not correct. A taking occurs when government, acting within its statutory powers, infringes upon a party's property rights. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); Loveladies Harbor, Inc. v. United States, 15 Cl.Ct. 381, 386-387 (1988) (summary judgment denied), 21 Cl.Ct. 153 (1990), aff'd 28 F.3d 1171 (Fed.Cir.1994); Whitney Benefits Inc. v. United States, 18 Cl.Ct. 394 (1989), aff'd 926 F.2d 1169 (Fed.Cir.1991), cert. denied 502 U.S. 952,112 S.Ct. 406,116 L.Ed.2d 354 (1991).

The government's argument confuses two different concepts. The first is that the Tucker Act and the Fifth Amendment provide a property owner a remedy for an authorized government action that "takes" private property. The second is that the Administrative Procedure Act, 5 U.S.C. § 701 et seq., provides district court review of government actions or regulations that go beyond the scope of the law. Here, since the plaintiffs did not challenge the government action in district court, the government suggests that the action

must be lawful and cannot be a taking. This is not what Loveladies Harbor teaches. See Loveladies Harbor, Inc. v. United States, 15 Cl.Ct. 381, 386-387 (1988) (summary judgment denied); 21 Cl.Ct. 153 (1990), aff'd 28 F.3d 1171 (Fed.Cir.1994). While the seizure under the permit restrictions cannot be a taking, plaintiffs' argument is that the alleged governmental actions that led to the permit being violated were a taking. Under this view, the seizure under the permit is merely the measure of damages of the taking, it is not the claimed taking. This claim cannot be resolved against plaintiffs on summary judgment but must be answered at trial.

Plaintiffs must demonstrate that defendant's total actions, although the final seizure was permitted by regulation, caused a taking without compensation. Unlike the issue of water rights, ditch rights-of-way and forage, the scope of the property rights in the cattle is easily ascertainable. Plaintiffs owned cattle which allegedly were trespassing on federal lands which defendant confiscated and sold. Plaintiffs appear to argue that defendant took their cattle by regulation and by physically inducing the cattle to graze on the Meadow Canyon allotment during the suspension period. Plaintiffs also argue that defendant created a situation where it was physically and economically impossible to prevent their cattle from wandering and to redeem their cattle after impoundment. Plaintiffs argue that the creation of this environment caused a taking which otherwise would not have occurred. The seizure of the cattle was the effect of the taking and its measure of damages. Plaintiffs must demonstrate that despite the regulations and permit terms and despite

the warnings and opportunities to redeem their cattle, defendant's actions still constituted a taking.

Addressing plaintiffs' taking claims, the court concludes that a limited initial evidentiary hearing is necessary to address the mixed questions of fact and law regarding the property interests claimed by plaintiffs in the water rights, forage and ditch rights-of-way. These property rights issues will determine whether a taking analysis is needed. If plaintiffs prove prior vested rights in the water, encompassing forage rights and vested ditch rights-of-way, plaintiffs are entitled to proceed to the taking issue. If no property rights are found then these claims must be dismissed. The issue of whether defendant's confiscation of plaintiffs' cattle qualifies as a taking will be addressed following the property rights hearing stage.

C. Are Plaintiffs Entitled to Compensation for Improvements Made to the Toiyabe National Forest Pursuant to 43 U.S.C. §1752(g)?

In their complaint, plaintiffs claim compensation for authorized permanent improvements constructed by them on their allotments because defendant cancelled their permit to devote the allotments to another public purpose. Defendant argues that the partial cancellation of plaintiffs' permit was not done to devote the rangeland for another public purpose, but rather, to enforce the terms and conditions of the permit and to protect the range.

Plaintiffs claim that defendant's argument is merely a pretext to cancel plaintiffs' permit and devote the range

to another public purpose without compensating plaintiffs' for the value of their improvements. [16] First, plaintiffs claim that the five-year suspension of all grazing on the Meadow Canyon allotment was a de facto cancellation of the permit because the suspension extends past the expiration of the permit. [17] Second, plaintiffs allege that defendant did not cancel the permit to enforce compliance with the permit terms, but rather, to "protect and preserve the national forest so that other uses of the forest may be expanded or added." For example, plaintiffs contend that the Forest Service intends to use the allotment to "ranch elk" in an effort to improve the local economy by generating hunting license fees and that the Forest Service's real goal is to preserve the forest in a "pristine" condition to maximize its value to environmentalists, fishermen and recreationalists. Defendant argues that plaintiffs do not qualify for compensation under 43 U.S.C. § 1752(g) for three reasons. First, defendant claims that it cancelled 25% of the Table Mountain and 38% of the Meadow Canyon allotments because of plaintiffs' "persistent violations" of the terms and conditions of their permit. Second, defendant argues that the allotments have not been devoted to another public purpose because cattle grazing continues to be one of the multiple uses of the range. Therefore, defendant claims a reduction in the permitted number of cattle allowed to graze does not qualify as changing the use of the range. Third, even if this court determines that the range has been devoted to another public purpose, plaintiffs are not entitled to compensation because, under the terms of the permit, all improvements are the property of the federal government.

The court must determine whether, on defendant's motion for summary judgment, it can find that defendant did not devote the rangeland to another public purpose as a matter of law on undisputed facts. Defendant argues, however, that even if this court finds that defendant did devote the land to another public purpose when it cancelled plaintiffs' permit, plaintiffs do not own the property at issue and therefore no compensation is due. Defendant provided in its brief a partial section of the relevant portion of plaintiffs' grazing permit which states:

> The permanent improvements constructed, or existing for use, in conjunction with this permit are the property of the United States Government, unless specifically designated otherwise, or covered by a cooperative agreement. They will not be removed, nor compensated for upon cancellation of this permit...

Defendant, however, neglected to mention the rest of the sentence which states that parties will not be compensated for improvements on the rangeland "except in the National Forests in the 11 contiguous western states when cancelled in whole or in part to devote the land to another public purpose." (emphasis added). Therefore, contrary to defendant's position, 18 plaintiffs are entitled to compensation if defendant cancelled the permit in part to devote the land to another public purpose because plaintiffs' allotments are part of the Toiyabe National Forest.

The court notes that plaintiffs' claim for compensation under 43 U.S.C. § 1752(g) is nearly identical to their taking claims. Under both claims, plaintiffs consistently allege that defendant wants plaintiffs to forfeit their grazing and water rights so that the Forest Service may devote the land and water rights to another public purpose. For example, plaintiffs allege that defendant prevented their access to the water and ditches to allow third parties and the Forest Service to use the water. Regarding plaintiffs' forage claim, plaintiffs allege that defendant cancelled the permit in part to allow the elk to graze and drink on the Table Mountain and Meadow Canyon allotments. Regarding their cattle taking claim, plaintiffs allege that defendant created conditions which it knew plaintiffs could not satisfy to force plaintiffs to forfeit their cattle and grazing permit.

Plaintiffs, however, do not need to prove a taking to receive compensation under 43 U.S.C. § 1752(g). To prevail, plaintiffs must demonstrate that first, defendant actually cancelled the permit not to enforce the permit terms but rather to have access to the water and allotments for use by the Forest Service, elk, hunters, fishermen, or tourists. Second, plaintiffs must demonstrate that such use actually does devote the allotment to another "public purpose" within the meaning of 43 U.S.C. § 1752(g).

The court finds that plaintiffs may proceed with their compensation claim under 43 U.S.C. § 1752(g) because plaintiffs have demonstrated sufficient facts indicating the possibility that the government may have cancelled their permit in part to devote the rangeland to another public purpose. The court, therefore, denies defendant's

motion for summary judgment on this issue because a trial is necessary to address the mixed questions of fact and law regarding whether defendant did cancel the permit in part to devote the rangeland to another public purpose. Compensation under 43 U.S.C. § 1752(g) will be addressed during the taking analysis following the property rights hearing.

CONCLUSION

This court grants in part and denies in part defendant's motion for summary judgment. While the court does not grant this motion in its entirety, the resolution of the motion has narrowed and clarified the issues for trial.

The court shall hold a limited evidentiary hearing to determine whether plaintiffs own property rights in the claimed water, ditch rights-of-way and forage and the scope of those rights. If plaintiffs prove prior vested rights in the water, encompassing forage rights and vested ditch rights-of-way, then plaintiffs may proceed with this portion of their taking claim. The court also must hold a hearing to determine whether defendant's actions leading to the impoundment and sale of plaintiffs' cattle constituted a taking. Finally, a trial is required on plaintiffs' claim for compensation under 43 U.S.C. § 1752(g) for the value of the improvements which they constructed on the Table Mountain and Meadow Canyon allotments.

The court will hold a telephone status conference on March 19, 1996 at 3:30 p.m. EST. The parties should be

prepared to discuss a schedule for discovery and the evidentiary hearing in accordance with this opinion.

IT IS SO ORDERED.

Footnotes

1 The term for each permit is ten years. Plaintiffs permit had an eight year term because plaintiffs' predecessor used the first two years of the ten year permit.

2 Table Mountain, Meadow Canyon, McKinney, Silver Creek, Monitor Valley (East & West).

3 The Monitor Valley water rights adjudication is distinct from the Monitor Valley allotment.

4 The Monitor Valley adjudication, which began in 1981, is still in process over a decade later. The Office of the Attorney General for the State of Nevada stated that a draft Preliminary Order of Determination of the Relative Rights In and To the Waters of Monitor Valley may be ready for the State Engineer's review by spring of 1996.

5 Mr. Schweigert worked as a Range Conservationist and Range Studies Specialist for the Bureau of Land Management in Winnemucca, Nevada, from 1980-1984. Mr. Schweigert then opened his own consulting business, Intermountain Range Consultants, in 1984.

6 2 8 U.S. C. § 1491, the Tucker Act, states in relevant part:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of

> Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

7 See supra note 4.

8 See supra note 4.

9 Title to water rights has monetary value independent of the adjudication procedure. In Nevada, parties have bought and sold unadjudicated water rights for over a century. I S.V. Ciriacy-Wantrup, et al., Water and Water Rights, § 53.1 (Robert E. Clark ed., 1967).

10 It would appear that if no public use is involved, the federal government is bared both by the "just compensation" and the "due process" clauses of the Fifth Amendment from taking at all and must return the property while paying just compensation for a temporary taking.

11 Plaintiffs' permit was issued under the Granger-Thye Act which gave the Forest Service the authority to issue permits for grazing on national forest lands. 16 U.S.C. § 580 et seq.

12 Specifically, plaintiffs claim water rights in the Toiyabe National Forest from Meadow Canyon Creek, Punch Bowl Spring, McMonigal Spring, North Urnberland, Bach Spring, Pablo Canyon Creek, Warm Springs, Barley Creek, Corcoran Creek, Raltson Valley-Antelope Spring, Pine Creek Well, and Stone Cabin Valley-Salisbury Well.

13 If plaintiffs prove a right to the use of the forage, then plaintiffs may have a valid taking claim regarding the elk if plaintiffs can demonstrate (1) that the Forest Service had no legal right to permit non-

indigenous elk on plaintiffs' allotment and (2) if plaintiffs can demonstrate that the elk actually consumed forage to which plaintiffs' cattle were entitled.

14 36 C.F.R. § 262.10 provides that "[u]nauthorized livestock or livestock in excess of those authorized by a grazing permit on the National Forest System, which are not removed therefrom within the periods prescribed by this regulation, may be impounded and disposed of by a forest officer as provided here."

15 16 U.S.C. § 551, part of the 1897 Organic Act, grants the Secretary of Agriculture the authority to make such rules as are necessary to regulate the occupancy and use of the national forests for their protection.

16 Under 43 U.S.C. § 1752(g), a party is entitled to compensation for the value of improvements constructed on the rangeland when the government devotes the land to another public purpose.

17 In 1991, defendant also cancelled 38°l0 of the cattle permitted on the Meadow Canyon allotment.

18 The court notes that defendant's conspicuous omission of a portion of the relevant sentence regarding when compensation is due under 43 U.S.C. § 1752(g) seriously undermines the credibility of its arguments.

16 U.S.C.A. § 524

§ 524. Rights-of-way for dams, reservoirs, or water plants for municipal, mining, and milling purposes

Rights-of-way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national forests of the United States, are granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated.

Rights-of-Way, Principles and Procedures; Rights-of-Way Under the Federal Land Policy

20979 grants. We disagree with commenters' suggestion that the definition of TUPs should not address public safety. The MLA specifically states that BLM may issue TUPS to “protect the natural environment or public safety” (see 30 U.S.C. 185(e)). We also disagree with the commenters that said under a TUP there may not be any natural environment to protect. The “natural environment” is the land for which BLM issues the original grant and any attendant TUP, which holders must protect.

In the final rule we moved the definition of “tenant” from proposed section 2806.5 to this section. The final rule's definition is similar, but more specific, than the

previous rule's definition (see previous section 2800.0-5(bb)), and is also consistent with the proposed rule.

We use the term "third party" in the proposed and final rules. We did not define it in the proposal, but do define it in the final rule to make clear that BLM considers a third party to be any party aside from the applicant, holder, or BLM.

In the final rule we added a definition of "tramway" to eliminate confusion over the meaning of the term. One of the right-of-way uses FLPMA specifically mentions is tramways (see 43 U.S.C. 1761(a)(6)). BLM administers a large amount of timber property in western Oregon and on other public lands where the term is commonly used to describe systems for transporting and hauling timber from the forest. Previous regulations did not define the term and there has been ongoing confusion over what type of transportation system qualifies as a tramway.

Therefore, in the final rule we added a definition of tramway that is consistent with common usage of the word and existing policy.

One commenter said that we should add a definition of "trespass" to the final rule, while other commenters said that the proposed definition of "trespass" was too open ended and gave BLM too much discretion. In the proposed rule we defined the term "trespass" in the body of the regulatory text in section 2808.10, as we do in the final rule. We disagree with the commenter that the definition of the term is too open ended and gives BLM too much discretion. The final definition is

consistent with previous regulations (see previous sections 2800.0-5 (u), (v), and (w)) and does not give BLM any more discretion than do previous rules.

Several commenters said that the definition of "unnecessary and undue degradation" should be changed to "unnecessary and undue damage" and should not include "non-willful" acts. Other commenters said that "degradation" can mean almost anything and does not provide guidance to industry on what to avoid. The term "unnecessary or undue degradation" is statutory in origin and for that reason we decline to change "degradation" to "damage." The term appears in section 302(b) of FLPMA (43 U.S.C. 1732(b) which states that "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."

In our 1999 proposed rule, we defined the term "unnecessary and undue degradation" to mean "surface disturbance that is greater than that which would occur when the same or a similar activity is being done by a prudent person in a usual, customary, and proficient manner that considers the effects of the activity on other resources and land uses outside the area of the activity. The disturbance may be either willful or nonwillful." We have decided to delete this proposed definition (and the existing definition at 43 CFR 2800.0-5(x)) because we find it to be unnecessary. Issuing a right-of-way grant is a highly discretionary act on BLM's part. In final section 2804.26(a), BLM has established standards for exercising this discretion. For instance, as final section 2804.26 makes clear, an

application may be denied if the proposed use is not in the public interest or is inconsistent with the purpose for which we manage the public lands.

"Unnecessary or undue degradation" sets a standard far less stringent that those in section 2804.26. The Secretary, through BLM, will continue to observe the "unnecessary or undue degradation" standard in addressing a right-of-way application and in assessing and administering the terms and conditions and conditions of a grant, but will allow the facts posed by a particular situation give meaning to this phrase.

In the final rule we moved the definition of "zone" from proposed section 2806.5 to this section. We amended the definition in the final rule to more accurately describe a zone as "one of eight geographic groupings necessary for linear right-of-way rent assessment purposes, covering all lands in the contiguous United States."

Section 2801.6 Scope

This section explains what these final regulations apply to and what the final regulations do not apply to. In this final rule we combined proposed sections 2801.7 and 2801.8 into this section. We also amended this section by adding new paragraphs (b)(5), (6), and (7).

We added new paragraph (b)(5) to alleviate the concerns of some commenters that this rule would have a negative effect on rights under R.S. 2477.

We added new paragraph (b)(6) to clarify that the right-of-way regulations do not apply to existing rights for private reservoirs, ditches, and canals established prior to FLPMA under the Mining Act of July 26, 1866. We think this clarification will be helpful in eliminating any confusion associated with the previous regulatory language found in former section 2801.4.

In the 1866 Act, Congress granted Federal protection for vested state law-based water rights and rights-of-way for ditches, canals and other structures necessary for the use of water. Under the Act, a private party could acquire a right-of-way across Federal lands without any action by the government—no application or filing with the government was necessary, and no governmental approval was required. The right-of-way vested once a ditch or canal was constructed and a water right acquired. Once the right-of-way was created, it existed in perpetuity and included the right to operate and maintain the ditch, canal or conduit within the right-of-way. See, e.g., Utah Power & Light v. United States, 243 U.S. 389, 405 (1917); Gorrie v. Weiser Irr. Dist., 153 P. 561, 562 (Id. 1915); Perry v. Reynolds, 122 P.2d 508, 511 (Id. 1942); United States v. Big Horn Land & Cattle Co., 17 F.2d 357, 366 (8th Cir. 1927).

Other statutes enacted after the 1866 Act also allowed private parties to acquire rights-of-way across Federal lands. Unlike 1866 Act rights-of-way, however, these other statutes required government action before rights-of-way vested. For example, the Act of March 3, 1891 required an applicant to file and get government approval of a map before the right-of-way vested. The

1891 Act differed from the 1866 Act in several other ways, too.

Unlike the 1866 Act, the 1891 Act defined the physical extent of the right-of-way. In addition, the 1891 Act allowed for establishment of rights-of-way for irrigation purposes on reserved lands; the 1866 Act did not apply to reserved lands.

When FLPMA was enacted in 1976, it repealed the existing laws governing rights-of-way and replaced them with a single mechanism for establishing a right-of-way over the public lands. Section 501(a) of FLPMA provides the Secretary of the Interior with authority to "grant, issue, or renew rights-of-way over, upon, under, or through" the public lands. 43 U.S.C. 1761. In addition, FLPMA provides the Secretary with authority to impose terms and conditions on these rights-of-way that, among other things, "minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment." Section 505(a); 43 U.S.C. 1765.

But FLPMA did not terminate rights-of-way established under the prior statutes. Instead, FLPMA expressly preserved and protected such pre-existing private rights-of-way. Section 701(a) of FLPMA provides that FLPMA does not terminate "any valid lease, permit, patent, right-of-way, or other land use right or authorization" existing at the time of FLPMA's enactment. 43 U.S.C. 1701, note 1. In addition, section 701(h) of FLPMA provides that all actions taken by the Secretary in the exercise of her authority under FLPMA are "subject to valid existing rights." 43 U.S.C.

1701, note 1. Together, these provisions of FLPMA ensure that pre-FLPMA rights-of-way are protected and preserved.

This final rule therefore reflects long-standing 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-ofway holder.

Title III of FLPMA provides the Secretary of the Interior with broad law enforcement authority. Section 302(b) provides that the Secretary "shall * * * take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. 1732(b). In addition, section 303(g) provides: "The use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited." 43 U.S.C. 1733(g).

BLM's trespass regulations, at 43 CFR part 9230, specify that, among other things, the "extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass." 43 CFR 9239.0-7. Trespassers are liable to the United States in a civil action for damages and may be prosecuted under criminal law. Therefore, with respect to 1866 Act rights-ofway, Section 302(b) of FLPMA and the trespass regulations provide BLM with the authority to take an enforcement action against a right-of-way holder undertaking activities inconsistent with the original grant.

We added new paragraph (b)(7) to address statutory changes to the Federal Power Act (FPA) and FLPMA.

These changes incorporate existing policy and implement FPA and FLPMA amendments.

One commenter stated that the final rule should state if there are any rights-of-way outside the scope of the rule and should address rights-of-way in wilderness areas or "short term rights-of-way on wilderness lands." We did not amend the final rule as a result of these comments. However, the final rule explains what the final regulations do not apply to and includes language in paragraph (b)(3) that states that the regulations do not apply to "Lands within designated wilderness areas, although BLM may authorize some uses under parts 2920 and 6300 of this chapter."

Section 2801.7 Information Collection Matters

We deleted this section from the final rule because it is not necessary to publish this information in the text of the regulations.

These regulations contain information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.), we submitted a copy of the proposed information collection requirements to the Office of Management and Budget (OMB) for review. OMB approved the information collection requirements under Control Number 1004-0189, which expires October 31, 2005.

Section 2801.8 Severability

This section explains that if any court holds provisions of these regulations invalid, the remainder of the rules are not affected. This principle has always applied to BLM regulations, but it is stated here for clarity. This section was proposed as section 2801.10. We made

editorial changes to the section, but its effect is the same as the proposed rule.

Section 2801.9 When Do I Need a Grant?

This section is a combination of proposed sections 2801.7 and 2801.8. It explains that you must have a grant when you plan to use public lands for certain systems or facilities, whether over, under, on, or through public lands. The section lists examples of the types of systems or facilities that require grants. The section also explains additional requirements for rights-of-way for generating, transmitting, or distributing energy. Finally, the section provides a cross-reference to BLM regulations for rights-of-way for transporting oil and gas resources.

Section 2801.10 How Do I Appeal a BLM Decision Issued Under These Regulations?

This is a new section to these regulations. The proposed rule listed the basic contents of this section for each action which allows a right to appeal. This final rule replaces the appeals language in each of those sections with a cross-reference to this section. This eliminates redundancy and brings this rule in line with other BLM regulations that handle appeals sections in a similar manner.

We received several comments on the subject of appeals. One commenter wanted the regulations to state whether or not applicants had the right of appeal if BLM rejected their applications. As a result of this comment, we amended final section 2804.26 and it now

states that applicants have the right of appeal to the Interior Board of Land Appeals (IBLA) if BLM denies their applications.

Several commenters wanted the opportunity for State Director review for initial disagreements with BLM before BLM referred the matter to the IBLA. One commenter suggested language to accomplish this administrative review. Although other BLM programs have adopted these reviews, BLM did not add State Director review provisions to this final rule. When you appeal a decision to IBLA, BLM is not prohibited from reconsidering or discussing the appealed decision with you or other interested parties. If BLM decides to rescind or amend the appealed decision as a result of additional review or discussion with you or other interested parties, we may rescind or amend only after asking IBLA to remand the matter for BLM's further consideration and IBLA's consent to this request. We encourage BLM personnel, grant holders, and applicants to work toward informal resolution of disputes over BLM decisions proposed or made by BLM both before and after appeals are filed. In BLM's right-of-way program these informal reviews and discussions have been and are a useful way to resolve disputes without unnecessarily formal mid-level reviews, such as State Director reviews.

Several commenters said that there is no part 4 in this title. The commenters are mistaken. Part 4 of 43 CFR is in a volume separate from the volume where BLM's regulations are located. Parts 1 through 999, including part 4, are in the first volume of 43 CFR and parts 1000

through 10010, including BLM's regulations, are in the second volume.

§ 1752. Grazing leases and permits

(g) Cancellation of permit or lease; determination of reasonable compensation; notice Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein. Except in cases of emergency, no permit or lease shall be canceled under this subsection without two years' prior notification.

43 U.S.C.A. § 661
§ 661. Appropriation of waters on public lands; rights of way for canals and ditches

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, 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; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

<See also amendment set out after text

Credits
(R.S. §§ 2339, 2340.)

Editors' Notes
AMENDMENT OF SECTION
<Pub.L. 94-579, Title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793, effective on and after Oct. 21, 1976, insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System amended section to read as follows:

"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, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same.

"All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights as may have been acquired under or recognized by this section."

43 USC 1761(c)(2)(A)

43 USC § 1761(c)(2)(A): Nothing in this subsection shall be construed as affecting any grants made by any previous Act. To the extent any such previous grant of right-of-way is a valid existing right, it shall remain in full force and effect unless an owner thereof notifies the Secretary of Agriculture that such owner elects to have a water system on such right-of-way governed by the provisions of this subsection and submits a written application for issuance of an easement pursuant to this subsection, in which case upon the issuance of an easement pursuant to this subsection such previous grant shall be deemed to have been relinquished and shall terminate.

43 U.S.C. § 661

> 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, 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; but whenever any person, in the

> construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section.

Federal Land Policy and Management Act, § 701:

43 USC § 1701 - Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that-

> (1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;
>
> (2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;
>
> (3) public lands not previously designated for any specific use and all existing classifications of public lands that were effected by executive

action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological

values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

NOTES

Source

(Pub. L. 94-579, title I, § 102,Oct. 21, 1976, 90 Stat. 2744.)

References in Text

This Act, referred to in subsecs. (a)(1), (3) and (b), is Pub. L. 94-579, Oct. 21, 1976, 90 Stat. 2743, as amended, known as the Federal Land Policy and Management Act of 1976. For complete classification of this Act to the Code, see Tables.

The Mining and Minerals Policy Act of 1970, referred to in subsec. (a)(12), is Pub. L. 91-631, Dec. 31, 1970, 84 Stat. 1876, which is classified to section 21a of Title 30, Mineral Lands and Mining.

Short Title of 2009 Amendment

Pub. L. 111-88, div. A, title V, § 501,Oct. 30, 2009, 123 Stat. 2968, provided that: "This title [enacting sections 1748a and 1748b of this title] may be cited as the `Federal Land Assistance, Management, and Enhancement Act of 2009' or `FLAME Act of 2009'."

Short Title of 1988 Amendment

Pub. L. 100-409, § 1,Aug. 20, 1988, 102 Stat. 1086, provided that: "This Act [enacting section 1723 of this title, amending section 1716 of this title and sections 505a, 505b, and 521b of Title 16, Conservation, and enacting provisions set out as notes under sections 751 and 1716 of this title] may be cited as the `Federal Land Exchange Facilitation Act of 1988'."

Short Title

Pub. L. 94-579, title I, § 101,Oct. 21, 1976, 90 Stat. 2744, provided that: "This Act [see Tables for classification] may be cited as the `Federal Land Policy and Management Act of 1976'."

Savings Provision

Pub. L. 94-579, title VII, § 701,Oct. 21, 1976, 90 Stat. 2786, provided that:

"(a) Nothing in this Act, or in any amendment made by this Act [see Short Title note above], 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 [Oct. 21, 1976].

"(b) Notwithstanding any provision of this Act, in the event of conflict with or inconsistency between this Act and the Acts of August 28, 1937 (50 Stat. 874; 43 U.S.C. 1181a-1181j [1181a et seq., see Tables for classification]) and May 24, 1939 (53 Stat. 753), insofar as they relate to management of timber resources, and disposition of revenues from lands and resources, the latter Acts shall prevail.

"(c) All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

"(d) Nothing in this Act, or in any amendments made by this Act, shall be construed as permitting any person to place, or allow to be placed, spent oil shale, overburden, or byproducts from the recovery of other minerals found with oil shale, on any Federal land other than Federal land which has been leased for the recovery of shale oil under the Act of February 25, 1920 (41 Stat. 437, as amended; 30 U.S.C. 181 et seq.).

"(e) Nothing in this Act shall be construed as modifying, revoking, or changing any provision of the Alaska Native Claims Settlement Act (85 Stat. 688, as amended; 43 U.S.C. 1601 et seq.).

"(f) Nothing in this Act shall be deemed to repeal any existing law by implication.

"(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or-

"(1) as affecting in any way any law governing appropriation or use of, or Federal right to, water on public lands;

"(2) as expanding or diminishing Federal or State jurisdiction, responsibility, interests, or rights in water resources development or control;

"(3) as displacing, superseding, limiting, or modifying any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more States or of two or more States and the Federal Government;

"(4) as superseding, modifying, or repealing, except as specifically set forth in this Act, existing laws applicable to the various Federal agencies which are authorized to develop or participate in the development of water resources or to exercise licensing or regulatory functions in relation thereto;

"(5) as modifying the terms of any interstate compact;

"(6) as a limitation upon any State criminal statute or upon the police power of the respective States, or as derogating the authority of a local police officer in the performance of his duties, or as depriving any State or political subdivision thereof of any right it may have to exercise civil and criminal jurisdiction on the national resource lands; or as amending, limiting, or infringing the existing laws providing grants of lands to the States.

"(h) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

"(i) The adequacy of reports required by this Act to be submitted to the Congress or its committees shall not be subject to judicial review.

"(j) Nothing in this Act shall be construed as affecting the distribution of livestock grazing revenues to local governments under the Granger-Thye Act (64 Stat. 85, 16 U.S.C. 580h), under the Act of May 23, 1908 (35 Stat. 260, as amended; 16 U.S.C. 500), under the Act of March

4, 1913 (37 Stat. 843, as amended; 16 U.S.C. 501), and under the Act of June 20, 1910 (36 Stat. 557)."

Severability

Section 707 ofPub. L. 94-579provided that: "If any provision of this Act [see Short Title note set out above] or the application thereof is held invalid, the remainder of the Act and the application thereof shall not be affected thereby."

Existing Rights-of-Way

Section 706(b) ofPub. L. 94-579provided that: "Nothing in section 706(a) [see Tables for classification], except as it pertains to rights-of-way, may be construed as affecting the authority of the Secretary of Agriculture under the Act of June 4, 1897 (30 Stat. 35, as amended, 16 U.S.C. 551); the Act of July 22, 1937 (50 Stat. 525, as amended, 7 U.S.C. 1010-1212); or the Act of September 3, 1954 (68 Stat. 1146, 43 U.S.C. 931c)."

05/21/2012

Case No. 12-16172

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITY OF TOMBSTONE;

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF AGRICULTURE; TOM VILSAK (in his official capacity); TOM TIDWELL (in his official capacity); CORBIN NEWMAN (in his official capacity);

Defendants-Appellees.

9th CIR. R. 27-3 EMERGENCY MOTION UNDER F.R.A.P. 8 FOR INJUNCTION PENDING INTERLOCUTORY APPEAL

Appeal from the United States District Court for the State of Arizona

Case No. 4:11-CV-00845-FRZ, Hon. Frank Zapata, presiding

It is not too late to rescue “The Town Too Tough to Die.” As discussed below, this Court should grant Tombstone an injunction pending appeal under the Tenth Amendment. The principle of state sovereignty animating this emergency motion is that the federal government only has the power to regulate individuals, not the States. Defendants are unconstitutionally, and dangerously, regulating the State of Arizona by impeding the City of Tombstone’s efforts to restore its municipal water system during a declared State of Emergency.

***

Facts Showing the Existence and Nature of the Claimed Emergency

Tombstone files this emergency motion because relief is needed in less than 21 days to prevent irreparable harm. Defendants have refused to allow the City to freely and fully repair and restore its 130 year old water infrastructure in the Huachuca Mountains—a municipal water system that dates back to the days of Wyatt Earp and Doc Holliday.

It is now peak season for water consumption in Tombstone and there is not enough water flowing from the Huachuca Mountain water system to support both adequate safe drinking water and fire suppression. App. 529-30, 563. Worse still, the springs that have been restored are seasonal and will experience diminished flow this summer and, to the extent the flow continues, temporary repairs allowed to one of the three springs currently operating are likely to wash away in the annual impending Monsoon. App. 218, 504. Moreover, wildfires are currently raging throughout Arizona, including a recent fire in the Huachuca Mountains, and Tombstone is contractually obligated to furnish the Arizona State Forester with water and equipment to combat regional wildfires. App. 23-28. Faced with a lack of water flowing from the Huachuca Mountains, and only a partially repaired water system, Tombstone may not be able to perform under this contract, undermining the wildfire-fighting capacity of federal, state and local agencies in the region.

Previously, between May and July 2011, the Monument Fire engulfed a large part of the eastern portion of the Huachuca Mountains where Tombstone's water supply infrastructure is located. In July 2011, the monsoon rains were record-breaking. With no vegetation to absorb the runoff, huge mudslides forced boulders—some the size of Volkswagens—to tumble down mountainsides crushing Tombstone's waterlines and destroying reservoirs; thus, shutting off Tombstone's main source of water. In response, Governor Jan Brewer marshaled all of the police powers of the State of Arizona to charge Tombstone with repairing its infrastructure by declaring a State of Emergency specifically for the City. App. 172-173, 505-06, 571-72.

Despite this State of Emergency, for nine months Defendants have been impeding Tombstone's efforts to take reasonable emergency action to repair its century-old Huachuca Mountain water infrastructure. Initially, they allowed mechanized equipment to repair two of Tombstone's twenty-five spring catchments. App. 214-18, 443, 454-55, 472-73, 475-76, 479-81, 491, 497. Of the remaining twenty-three springs, Defendants have denied the use of mechanized equipment and motorized vehicles despite their usual and customary use for maintenance of Tombstone's municipal water system for decades. App. 212-13, 505-06, 514, 613, 617-18, 622-23, 627-29, 633-34. Defendants are requiring Tombstone to use hand tools and non-mechanized equipment to restore twenty three of its twenty-five springs and related infrastructure. App. 214-17, 505, 514, 480. As of March 1, 2012, these restrictions were extended even to the two springs and related infrastructure previously approved for repairs using mechanized and motorized

equipment. App. 514. Along the way, Defendants have played a cynical game of bureaucratic cat and mouse, rendering the exhaustion of administrative remedies futile in the context of this ongoing State of Emergency. App. 140-45, 151-58.

Defendants' conduct has placed the lives and properties of Tombstone residents—and Arizonans across the state—in jeopardy. Only three springs out of the twenty-five owned by Tombstone are providing the City with water. App. 218.

Rather than receiving 400 gallons of mountain spring water per minute, the amount Tombstone can expect seasonally if its municipal water system were fully restored, Defendants' intransigence is rationing the City to no more than between 100 and 150 gallons of mountain spring water per minute. App. 218, 529-30, 638.

When and How Counsel for the Other Parties were Notified and Whether They Have Been Served with the Motion.

Tombstone notified counsel for Defendants of this motion by email on May 14, 2012, and again on May 15, 2012, that this motion would be filed on or before May 21, 2012. In response, Defendants' counsel advised Tombstone via email that they oppose this motion. The Clerk of the Court and the Court's staff attorney were notified by telephone on May 15, 2012 that this motion would be filed on or before May 21, 2012. This Motion will be served upon filing.

Date: May 21, 2012

s/Nicholas C. Dranias
Attorney for Movant

Legal Background of the Appeal

On March 1, 2012, the district court denied Tombstone's first motion for preliminary injunction without prejudice, allowing the City to file an amended complaint and a second preliminary injunction motion by March 30, 2012.fn1 Dist. Ct. Dkt. 44. The denial barred Tombstone from filing any reply brief in support of its second motion and also did not allow oral argument.fn2 Accordingly, on March 30, 2012, Tombstone filed a First Amended Complaint and a second preliminary injunction motion seeking to stop Defendants' interference with its emergency repair efforts to restore its municipal water system based on the Administrative Procedure Act and the Tenth Amendment.fn3 Dist. Ct. Dkt. 47, 48. After Defendants responded, the court entered an order on May 4, 2012, instructing the parties to draft proposed orders containing detailed proposed findings of fact and conclusions of law. Dist. Ct. Dkt. 56. Two days later, on Sunday afternoon, May 6, 2012, the court vacated that order, indicating a short decision would be issued in a "few days." Dist. Ct. Dkt. 57. More than a week later, on May 14, 2012, the court denied Tombstone's second preliminary injunction motion, whereupon this appeal was immediately filed. Dist. Ct. Dkt. 58, 60.

The district court's decision was based primarily on the doctrines of administrative exhaustion and sovereign

immunity. Notably, the court did not address Tombstone's argument that pursuing administrative remedies would be futile. But there is no requirement for a State or its political subdivision to exhaust administrative remedies where, as here, doing so is futile because of the inadequacy of such remedies to prevent irreparable harm or where, as here, the conduct of administrative officials, the administrative process or the requirement of pursuing administrative remedies are themselves challenged as unconstitutional.

Mathews v. Eldridge, 424 U.S. 319, 330 (1976); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773 (1947); *Terrell v. Brewer*, 935 F.2d 1015, 1019 (9th Cir. 1991). Moreover, sovereign immunity cannot bar the requested preliminary injunctive relief under the Tenth Amendment as against the individual Defendants because unconstitutional actions by federal officials are simply not those of the sovereign. *United States v. Yakima Tribal Court*, 806 F.2d 853, 859-60 (9th Cir. 1986). Correspondingly, allowing *timely temporary* injunctive relief against federal officers for unconstitutional conduct does not have the practical effect of evading any sovereign immunity enjoyed by the United States because there is no such sovereign immunity. No case cited by the district court holds otherwise. Indeed, courts have been careful to emphasize that the Quiet Title Act does not provide the sole vehicle for equitably remedying independent constitutional or administrative wrongs by federal officers that may incidentally affect federal property. *See, e.g., Donnelly v. United States*, 850 F.2d 1313, 1317-18 (9th Cir. 1988); *Lee v. United States*, 809 F.2d

1406, 1409 n.2 (9th Cir. 1987); *Patchak v. Salazar*, 632 F.3d 702, 711 (D.C. Cir. 2011); *Kansas v. United States*, 249 F.3d 1213, 1225 (10th Cir. 2001). Accordingly, this interlocutory appeal seeks review of the district court's decision with respect to Tombstone's Tenth Amendment claim.

Impracticality of First Seeking Relief in the District Court under F.R.A.P. 8(a)

In light of the ongoing State of Emergency, it would be impractical to file this motion in the district court because Tombstone cannot risk further delay. Such delay is likely because there is no reason to believe that the district court will grant the requested relief. The court has already denied two preliminary injunction motions brought by Tombstone, even going so far as to deny Tombstone any right of reply or oral argument in support of its second motion. Substantially all legal grounds for the requested relief were presented in the second motion.

Moreover, the court premised the denial of the second motion on the doctrines of sovereign immunity and administrative exhaustion. It is unlikely the court would refrain from erroneously applying those doctrines to this motion.

Argument

In the present case, by declaring a State of Emergency for Tombstone's water supply crisis, Governor Jan Brewer exercised "all police power vested in the state by the constitution and laws of this state" to alleviate

the peril facing Tombstone from the loss of its municipal water supply. Ariz. Rev. Stat. §§ 26-301(15), 26-303(E); App. 470. It is very clear what this means in practical terms.

Tombstone is empowered to use all of the police powers of the State of Arizona to repair and restore: (1) the pipelines depicted in the surveyed rights of way shown at App. 403, 651; and (2) the water structures depicted in the surveyed parcels and rights of way shown at App. 299, 304, 313, 318, 323, 328, 333, 343, 348, 358, 368, 373, 378, 383, 388, 394, 425-29, 434-38 (with coordinates and dimensions plainly set out in the notices of appropriation shown at App. 297, 302-03, 307-09, 311, 314, 316, 319, 321, 324, 326-27, 331-32, 336-37, 341-42, 346-47, 351-52, 356-57, 362-63, 366-67, 371, 376, 381, 386, 392).

Defendants disingenuously claim they do not know what Tombstone wants.

The truth is Tombstone has repeatedly explained to Defendants what it intends to do. The work involves ground displacement by equipment powerful enough to move huge boulders and deep mud; i.e., probing the ground for buried springs, building simple dam-like structures called "catchments" at the springs, building up mounds of dirt around the springs called "flumes" to keep workers safe from flash floods in the coming Monsoons (with the incidental benefit of protecting the completed repair work), and burying pipes to those catchments. In fact, completing repairs to Tombstone's municipal water system requires nothing more than what Defendants already approved during November

2011 with respect to one of Tombstone's water sources, namely Miller Spring No. 1. App. 450, 454-55, 491.

Defendants cannot in good faith claim ignorance about the work that needs to be done.

Similarly, Defendants' feigned ignorance cannot be justified by any legitimate question over Tombstone's authority to restore its municipal water system under emergency conditions. The State of Arizona has concurrent police power jurisdiction over federal lands located within its boundaries. *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976). No federal law clearly and unequivocally preempts Tombstone's exercise of such power to restore its municipal water system under these circumstances. To the contrary, a long-standing national policy of comity requires deference to state sovereign interests in developing, owning and maintaining local water rights and infrastructure. *United States v. New Mexico*, 438 U.S. 696, 713-18 (1978).

Furthermore, it is a red herring for Defendants to recount interagency confusion about the issuance of permits for Tombstone's municipal water system as a basis for doubting Tombstone's authority to operate its municipal water system. Those interagency disputes have nothing to do with Tombstone's authority to restore its municipal water system. As admitted by the U.S. Forest Service itself *in 1916*, Tombstone's municipal water system rests upon water rights and pipeline rights of way protected by the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C. § 661 ("1866 Act"). App. 206, 414 ("The forest service has recognized the

existence of a right of way for your reservoir and pipelines across the forest under sections 2339 and 2340 U.S. Revised Statutes.") In fact, the Forest Service specifically told Tombstone's immediate predecessor in interest, the Huachuca Water Company, that "since your rights are recognized it is doubted whether you would care to formally apply for an additional permit." App. 415.

Likewise, it is mere chaff for Defendants to detail the lack of express federal land patents, title or easement grants reflecting Tombstone's rights of way.

Securing rights under the 1866 Act requires no federal permit or approval because the Act *automatically* protects rights recognized under local custom or law. *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917); *Jennison v. Kirk*, 98 U.S. 453, 456, 460 (1878). Rights protected by the 1866 Act are superior to any conflicting land patent. *California v. United States*, 438 U.S. 645, 656 n.11 (1978).

In view of the foregoing, Defendants have erected procedural barriers to the restoration of Tombstone's municipal water system *not* because of any actual need for further administrative review of the proposed work. Defendants are commandeering Tombstone's municipal water system simply to make the town knuckle under. But the Tenth Amendment protects Tombstone from such abuse during a declared State of Emergency. For this reason, Tombstone moves for an injunction to bar the individual Defendants from interfering with its efforts to freely and fully restore its municipal water system during this appeal.fn4

I. Applicable Standard for Motion.

"The standard . . . applied by the Ninth Circuit in ruling on motions for stays and injunctions pending appeal . . . is comparable to that used by a district court in evaluating a motion for preliminary injunction." Judge Dorothy Nelson et al, *Federal Ninth Civil Circuit Appellate Practice* § 6:267 (2001). Preliminary injunctions are granted upon the weighing of four factors: (1) whether the plaintiff is likely to succeed on the merits, (2) whether the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) whether the balance of equities tips in his favor, and (4) whether an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit applies a modified "sliding scale" approach to preliminary injunctions in which "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011). These elements weigh in favor of Tombstone.

II. Tombstone is Already Suffering Irreparable Harm.

Irreparable injury includes harm to public health and safety. *United States v. Midway Heights County Water Dist.*, 695 F. Supp. 1072, 1075 (E.D. Cal. 1988); *Taverns for Tots, Inc. v. City of Toledo*, 307 F. Supp. 2d 933, 945 (N.D. Ohio 2004). In *Midway Heights County Water*

Dist., for example, the court ruled that the harm to public health and safety from slight violations of federal water purity standards was sufficient to constitute irreparable harm for preliminary injunctive relief. In *Taverns for Tots, Inc.*, the court ruled that the threat of second-hand smoke caused enough irreparable injury to justify a preliminary injunction.

Here, Defendants' refusal to allow Tombstone to freely and fully restore its municipal water supply is in direct contravention of a declared State of Emergency, which specifically charged Tombstone to make emergency repairs to its water infrastructure. App. 571. Astoundingly, Defendants disregard the threat of arsenic posed by the City's increasingly contaminated well water supply, a threat that could deprive the City of adequate safe drinking water at any time. App. 529-30.

Furthermore, Defendants are denying Tombstone the ability to modernize its water distribution system because the cost of doing so without adequate water flowing from the Huachuca Mountains cannot be justified. Defendants do this despite the fact that the City does not have adequate fire suppression capability, and Tombstone's historic downtown nearly burnt down in a fire *just seven months before the Monument Fire*. App. 561-63. Finally, Defendants are compromising the entire region's wildfire fighting capacity *just as wildfire season begins*. App. 23-28.

In short, Defendants' regulatory commandeering of Tombstone's municipal water system is causing at least as much harm to public health and safety as exposing

tavern patrons to second-hand smoke or delivering water that marginally violates federal health and environmental standards. Significantly, before litigation commenced, Defendants conceded the risk to the public, stating:

Water from the springs is needed for safe drinking water for residents as well as visitors to this tourism based economy, as well as for emergency fire suppression . . . . Health and safety risks exist to the City of Tombstone if repairs are not complete expeditiously.

App. 472; *see also* App. 449, 452, 455, 465, 471, 470. These pre-litigation admissions illustrate that there is nothing speculative about Tombstone's claim that Defendants' interference with the restoration of its municipal water system harms public health and safety, which constitutes irreparable injury as a matter of law.

III. The Equities and Public Interest Favor Tombstone.

Tombstone's interest in protecting public health and safety is a "paramount" public interest, which is not outweighed by any other interest or equity that Defendants might claim. *Quoting Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981). First of all, there is no competent evidence of any environmental interest that could outweigh Tombstone's public health and safety interest. It appears the Monument Fire destroyed any ecosystem that may have existed. Despite Freedom of Information Act requests served by the Goldwater Institute on all

relevant federal agencies, no study has been produced showing any endangered or threatened animals are currently inhabiting the fire and flood ravaged area surrounding Tombstone's municipal water system. App. 40-42, 44.

Although Defendants advanced conclusory statements in the lower court about the presence of spotted owl nesting areas in the vicinity of the proposed repair work, voluminous documents originating from the Fish and Wildlife Service show that the sort of repair work contemplated by Tombstone poses no threat to the spotted owl or other endangered or threatened species in the unlikely event they return to the area despite the catastrophic Monument Fire. App. 44-45, 497. And, in any event, the coming Monsoons will wash away any footprint left by the contemplated restoration work. App. 505-06.

Secondly, no public interest under federal law favors imposing a regulatory rigmarole on Tombstone's emergency municipal water system restoration work. A national policy of comity requires deference to state sovereign interests in developing, owning and maintaining local water rights and infrastructure. *New Mexico*, 438 U.S. at 713-18. Viewed against this national policy, no federal law clearly and unequivocally preempts Tombstone's emergency exercise of police powers to restore its municipal water system. Accordingly, federal law should be construed to accommodate, rather than preempt, Tombstone's exercise of police powers to protect public health and safety interest. *Chamber of Commerce of the United States v. Whiting*, 131 S.Ct. 1968, 1985 (2011); *Wyeth v.*

Levine, 555 U.S. 555, 565 (2009); *Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992). For this reason, any public interest federal law serves favors the requested relief.

Significantly, the statutes purportedly authorizing Defendants' regulatory activities, as well as Defendants' own internal guidelines, explicitly recognize the continued viability of Tombstone's rights of way and permit the proposed water structure repair work. The Federal Land and Management Policy Act of 1976 guarantees continued recognition of vested rights under the 1866 Mining Act. 43 U.S.C. § 1761(c)(2)(A). The November 6, 1906, Proclamation of President Theodore Roosevelt establishing the Huachuca Forest Reserve (now known as the Coronado National Forest) declared, "This proclamation will not take effect upon any lands . . . which may be covered by any prior valid claim, so long as the . . .claim exists." 34 Stat. 3255 (1906). The Wilderness Act of 1964 was expressly made "subject" to existing rights. 16 U.S.C. § 1131(c). 16 U.S.C. §1134(a) further guarantees that state and private owners of interests in lands surrounded by a Wilderness Area "shall be given such rights as may be necessary to assure adequate access to such State-owned or privately owned land by such State or private owner and their successors in interest." 16 U.S.C. §1134(a); *Oregon Chapter of Sierra Club*, 172 IBLA 27, 42 (2007). Additionally, §1134(b) requires the Forest Service to permit means of ingress and egress "customarily enjoyed" for valid occupancies located within wilderness areas. Likewise, the Arizona Wilderness Act of 1984, which designated the Miller Peak Wilderness Area on lands surrounding portions of

Tombstone's municipal water system, requires administration of the Area was to be conducted "subject to valid existing rights." 98 Stat. 1485, Pub. L. No. 98-406, §101(a)(14)(b). Correspondingly, Forest Service's own guidelines allow motorized and mechanized transportation that was "practiced before the area was designated as Wilderness." 2300 Forest Service Manual, Ch. 20, § 2323.43d, available at http://www.fs.fed.us/im/directives/fsm/2300/2320.doc. Finally, the same guidelines require the Forest Service to "permit maintenance or reconstruction of existing [water] structures . . . [including] reservoirs, ditches and related facilities for the control or use of water that were under valid special use permit or other authority when the area involved was incorporated under the Wilderness Act." *Id*.

Taken together, it is apparent that no public interest would be served by impeding Tombstone's ability to freely and fully restore its municipal water system during a State of Emergency using customary heavy vehicles and equipment. There is certainly no indication that any applicable federal law requires the subordination of public health and safety to some other interest. The equities and public interest thus clearly favor the requested relief.

III. Tombstone Has a Likelihood of Success on the Merits.

Serious questions going to the merits are raised by Plaintiffs' Tenth Amendment claim. As recently held by a unanimous Supreme Court, "[i]mpermissible interference with state sovereignty is not within the

National Government's enumerated powers." *Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). Given that the federal government only has enumerated powers, this holding implies that the Property Clause is limited by the principle of state sovereignty. Indeed, the rule of law that the principle of state sovereignty limits even plenary powers of the federal government is underscored by the fact that the federal government's treaty power was at issue in *Bond*. Similarly, *Massachusetts v. Sebelius*, 698 F.Supp.2d 234, 235-46 (E.D. Mass. 2010), recently enforced the Tenth Amendment to strike down the Defense of Marriage Act even though Congress' spending power was at issue. Just as the principle of state sovereignty limits the reach of the treaty and spending powers, so does that principle limit the reach of the Property Clause.

One of the clearest examples of impermissible interference with state sovereignty is federal commandeering of the organs or officials of state government. *New York v. United States*, 505 U.S. 144, 166 (1992). This ban on commandeering is not a constitutional axiom. Rather, it is an implication of the first principle that "[t]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Printz v. United States*, 521 U.S. 898, 920 (1997). This first principle applies tautologically to justify the requested injunctive relief.

By overriding a gubernatorial emergency proclamation and commandeering Tombstone's municipal water system, Defendants are *literally* regulating the State of

Arizona through its political subdivision. They are *not* regulating individuals.

Defendants' conduct is no different in principle than demanding Tombstone secure a federal permit to drive a fire truck or a squad car during a firestorm or a riot. For this reason, Defendants' regulatory commandeering of Tombstone's municipal water system violates the principle of state sovereignty enforced in *Printz*, 521 U.S.at 920. Simply put, from the perspective of state autonomy, there are no material differences between commandeering municipal officials and commandeering sovereign property without which the municipality cannot fulfill the Supreme Court has revived *National League of Cities* by effectively overturning *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). As explained in *Alden v. Maine*, contrary to the holding of *Garcia*, the Court is committed to enforcing the principle of state sovereignty that "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" 527 U.S. 706, 714 (1999) (citations omitted). This ruling and others indisputably echo the methodology, rationale and holding of *National League of Cities*, 505 U.S. at 852-54. *See also United States v. Lopez*, 514 U.S. 549, 552 (1995); *United States v. Morrison*, 529 U.S. 598, 611, 617-18 (2000). Such fully-engaged judicial review of federal incursions into the province of state sovereignty has been further buttressed by cases that have repeatedly applied heightened scrutiny to federal actions that have invoked the 14th Amendment's Enforcement Clause to

override state sovereignty (where, if anything, the principle of state sovereignty is less secure than here). *See, e.g., Horne v. Flores*, 129 S.Ct. 2579, 2595-96 (2009); *City of Boerne v. Flores*, 521 U.S. 507, 527-36 (1997).

In short, under current precedent, as in *National League of Cities*, the federal judiciary properly patrols the traditional boundaries between state sovereignty and federal power without deferring to Congress. *Brzonkala v. Virginia Polytechnic* its traditional function of protecting public health and safety. Defendants are depriving the State of its structural autonomy *and its reason for being* just as assuredly as if they had directly commanded Tombstone's Mayor to use hand tools to repair the city's water infrastructure himself. This conclusion is reinforced by the revival of *National League of Cities v. Usery*, 426 U.S. 833 (1976).

When enforcing state sovereignty's limitation on claims of federal power, *Inst. & State Univ.*, 169 F.3d 820, 844-47 (4th Cir. 1999), *aff'd*, *Morrison*, 529 U.S. 598. This jurisprudence is utterly inconsistent with the holding of *Garcia* that the defense of state sovereignty must be mounted from within the political process at the federal level—in Congress—not within the court system. 469 U.S. at 554.

Consequently, the Supreme Court has by inescapable logical implication overruled *Garcia*, and thereby reinstated *National League of Cities*. *New York*, 505 U.S. at 161-66 (citing *Hodel*, 452 U.S. at 287-88, which applied *National League of Cities*); *Sebelius*, 698 F. Supp. 2d at 249 n.142, 252 n.154 (citing *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997)); Erwin

Chemerinsky, *The Hypocrisy of Alden v. Maine: Judicial Review Sovereign Immunity and the Rehnquist Court*, 33 Loyola L.A. L. Rev. 1283, 1299 (June 2000). This conclusion is underscored by the unanimous holding of *Bond*, which for the first time confirmed *citizen standing* to enforce the Tenth Amendment in court—something utterly inconceivable under *Garcia*.

Applying *National League of Cities* leaves no doubt that Defendants' refusal to allow Tombstone to freely and fully repair its municipal water system violates the principle of state sovereignty. This is because such conduct: (1) regulates "states as states," (2) concerns attributes of state sovereignty, and (3) impairs the state's ability to structure integral operations in areas of traditional governmental functions. *National League of Cities*, 426 U.S. at 852-54. First, as discussed above, Defendants' regulatory interference with Tombstone's repair work during a declared State of Emergency clearly constitutes the regulation of the State, not individuals. Second, Defendants' interference concerns essential attributes of state sovereignty because the Supreme Court has specifically recognized that maintenance of a municipal water system is an essential government function.

Brush v. Commissioner, 300 U.S. 352, 370-71 (1937). The same is true about fire protection. *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 343 (4th Cir. 2000). Third, Defendants' interference with Tombstone's ability to protect public health and safety is a textbook example of impairment of governmental functions traditionally assigned to the States. *National*

League of Cities, 426 U.S. at 851. Taken together, Defendants' conduct raises serious questions going to the merits of Tombstone's Tenth Amendment claim.

Conclusion

For the above reasons, while this appeal is pending, the Court should enjoin Defendants, TOM VILSAK, TOM TIDWELL, and CORBIN NEWMAN, and anyone acting at their direction, from in any way interfering with the Tombstone's use of heavy equipment and vehicles identified at App. 517-20 to fully repair and restore (1) the pipelines depicted in the surveyed rights of way shown at App. 403, 651; and (2) the water structures depicted in the surveyed parcels and rights of way shown at App. 299, 304, 313, 318, 323, 328, 333, 343, 348, 358, 368, 373, 378, 383, 388, 394, 325-29, 434-38 (with coordinates and dimensions plainly set out in the notices of appropriation shown at App. 297, 302-03, 307-09, 311, 314, 316, 319, 321, 324, 326-27, 331-32, 336-37, 341-42, 346-47, 351-52, 356-57, 362-63, 366-67, 371, 376, 381, 386, 392), by (c) probing the ground for buried springs; (d) building simple dam-like structures called "catchments" at the springs once located; (e) building up mounds of dirt around the springs called "flumes" to keep workers safe from flash floods in the coming Monsoons; and (f) burying pipes to those catchments.

RESPECTFULLY SUBMITTED on this 21st day of May by:

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Footnotes

1 Approximately three weeks after Tombstone filed its first preliminary injunction motion, the City retained the Goldwater Institute. The Institute immediately filed a motion to sever, continue and separately brief the City's Tenth Amendment claim because it was not expressly included in the first motion as a basis for relief.

2 This prohibition prejudiced Tombstone because Defendants were able to advance misleading representations and erroneous arguments without rebuttal. App. 140-45, 151-58.

3 Tombstone's Tenth Amendment claim was not considered by the district court except in connection with the second preliminary injunction motion.

4 Such relief would not render the case moot because the impending Monsoon, as well as periodic wildfires and flooding, ensure that the underlying dispute between the parties is likely to recur unless finally adjudicated.

right-of-way easement rather than at the 1866 Act. The government contends that plaintiffs should be denied the 50-foot rights-of-way because Mr. Hage exceeded the dimensions appropriate for normal, reasonable maintenance as defined under the Manual and the Forest Service practice. This contention must be rejected for the simple reason that the Forest Service Manual does not have the force of law.

It cannot alter statutory right."
Okay. Now my separate findings and conclusions.
Irreparable harm to the defendants.

I find specifically that beginning in the late '70s and '80s, first, the Forest Service entered into a conspiracy to intentionally deprive the defendants here of their grazing rights, permit rights, preference rights. I can utter no finding as to their motivation. It could have been for a variety of motivations. Maybe they wanted to protect the conservation interests, maybe they wanted to recognize the contemporaneous rights of the hunters, or the state's rights to regulate wildlife. But for whatever reason, they intentionally entered into a conspiracy to deprive the Hages of their water right -- of their grazing permit preference rights.

The main evidence of that -- and it's also a basis and that's the reason for asking the local U.S. Attorney to attend, the main basis for that finding is based upon the conduct of the Forest Service first and later the BLM. I've already cited these bases in a separate transcript as a basis for criminal reference of Mr. Seley, and I'm adding Mr. Williams, to the U.S. Attorney for potential consideration of criminal prosecution for the conspiracy.

The citation so far that I've given and I will -- I'm giving them notice that I'm making that reference to the U.S. Attorney, I'm not sure how the U.S. Attorney is going to handle it. I don't think the local U.S. Attorney could handle it because of the conflict of interest. They're the ones who introduced Washington counsel and asked that they be admitted.

They may well be able to cover it by invitation to an adjacent -- I'm sure they could not cover it by invitation of a U.S. Attorney out of Washington, D.C. They may be able to cover the conflict by invitation of an Assistant U.S. Attorney from a nearby district, California or Arkansas or Kansas. They'll have to resolve that for themselves.

But I'm specifically making reference for the reasons I'm giving in writing, and I will require them to account back to me in six months -- within six months, as to any action they've taken.

But, more importantly, I've also made those same written findings, four bases for giving written notice of civil contempt as against Mr. Williams and the Forest Service and Mr. Seley, BLM, for civil contempt, for obstruction of justice in this civil case, for contempt of the court's processes.

Now, that's a separate issue. But the importance today is to the four grounds for my finding for irreparable harm.

My finding is that the government entered into an intentional deprivation of Hage's property rights and

privilege rights, preference rights. For whatever motivation, they have demonstrated a repeated and continuing course of conduct and a pattern which demonstrates to the Court that it will continue in the future unless I enjoin it.

The four grounds that I cited and are the subject of the written notices -- and I'm hereby giving, by the way, the written notice, Madam Clerk will provide us a date certain for answering the contempt issue, has nothing to do with this trial. It's a separate issue of contempt.

And, of course, I have to give written notice, and I understand from Madam Clerk she'll be able to give the written notice of the minute entry with the attached transcript listing all the reasons to Mr. Williams and Mr. Seley by tomorrow.

And since they're here, I'll instruct government counsel not on their behalf, of course, but on their behalf to convey to them those notices that I channel through you.

But for purposes of my holding of irreparable harm, the intentional conspiracy and act to deprive the Hages constituting irreparable harm consisted of the arrest and attempted conviction of Mr. Hage for practicing his property interest right recognized by the Court of Claims.

These folks have heard from three federal courts, and in spite of that they have continued an attempt to deprive the Hages of their permit rights and their water rights.

They heard from the Ninth Circuit where the conviction on Mr. Hage for criminal conduct was reversed.

They heard from the Court of Claims starting with *Hage I* in 1996 in the denial of motion for summary judgment to the government.

They heard from the Court of Claims in 1996 in Hage II, and in 1998 in *Hage III*, and in 2002 in *Hage IV*, and in *Hage V* in 2008.

In spite of that hearing from the government and notice of the filing of this case here before this Court, submitting -- the government submitting -- by their own complaint waiving sovereign immunity and submitting to this Court the issues involved that I've already addressed, by the filing of the complaint in this Court in '07, this is an '07 case, in spite of that, number one, they sought from the State Engineer water rights on their own behalf, the government's behalf, not for the purposes defined by the public water reserve -- and for the purposes of the public water reserve, that is, quote unquote, for public -- I'm sorry, for road maintenance, fire protection, et cetera, but, in addition, for public livestock water with the admission from their own agents here on the stand that they had no cattle, no sheep to water. The specific intent for seeking that water right filing was to give the water rights belonging to the Hages to others.

So they made water filings, for example, on at least four springs, each designating in addition to wildlife, which

was -- they had every right to suggest, was part of the public water reserve or for the backpacker or for the hunter or for the guardhouse or the outhouse, 400 cattle for the use of others, water, stock watering rights, in clear derogation of their water rights.

Second, they solicited and granted temporary rights to others, namely, Snow as well as others, temporary permits over top of their watering permits that had been revoked with the express contemplation and knowledge, as I heard from the witnesses here on the stand, that those cattle of Snow would undoubtedly wander onto and use the water rights already declared by the Court of Claims in Hage.

Third, trespass notices after the filing of this case in '07 to people who leased cattle and/or sold cattle to the Hages which the Hages acknowledged, admitted, was under their express control, which the Hages admitted liability for, if any liability there was.

To the Forest Service's credit in some of these notices to others for which they collected -- the Forest Service and the BLM collected thousands of dollars from others whose cattle were under the control of the Hages, the government collected thousands of dollars, and I can only conclude it was part of an effort and a conspiracy to deprive the Hages of their preference permit rights and, more importantly, their water rights and their ditch rights.

We even had evidence here that Snow said I want to apply for those permit rights that you're soliciting, and,

by the way, I'm in process of working with the State Engineer to get the Hages' water rights.

Snow is probably part of the conspiracy, but certainly the agency principals were part of the water rights, and probably the U.S. Attorney out of Washington advising them was probably part of the conspiracy.

And the last one was the recent solicitation for Ralston Allotments to which there are ten responses. Snow's letter in evidence, seven of the last eight years he received the temporary allotment assignments.

So I'm finding and concluding as a matter of law that the government and the agents of the government in that locale, sometime in the '70s and '80s, entered into a conspiracy, a literal, intentional conspiracy, to deprive the Hages of not only their permit grazing rights, for whatever reason, but also to deprive them of their vested property rights under the takings clause, and I find that that's a sufficient basis to hold that there is irreparable harm if I don't -- and it's in the public interest, if I don't restrain the government from continuing in that conduct.

Especially the collection from innocent others of thousands of dollars for trespass notices is abhorrent to the Court, and I express on the record my offense of my own conscience in that conduct. That's not just simply following the law and pursuing your management right, it evidences an actual intent to destroy their water rights, to get them off the public lands.

For hundreds of thousands of dollars they purchased the ranch with recognized value in the forage rights, let alone the water rights, and at some point in time during that period the Forest Service -- I don't know, maybe it was for the private use so that they would have a private domain of the forester.

As you know, under a RICO charge, it doesn't have to be for the sole benefit of the participant, charged participant, in the RICO enterprise, it can be for the benefit of the enterprise. But you still have entered into a conspiracy for RICO purposes. And it certainly was in violation of mail fraud and fraud provisions to the contrary.

If it was for the sole purpose of managing the lands which would have been an innocent purpose, nothing wrong with that. But the intent to deprive them of their preference is abhorrent and shocks the conscience of the Court and constitutes a basis for an irreparable harm finding.

So I am going to enjoin the government from doing such conduct in the future. You will not issue trespass notices to either the Hages or anybody leasing to them cattle or where they own the cattle of another to any third party as long as the Hages clearly claim responsibility for it and as long as the other third party clearly provides proof that they are under lease and control, sole discretion and control of the Hages and as long as it's in the prior allotments that the Hages had.

Now, what remedy to impose. Can I give a judgment for trespass.

There's one other reason I asked the Assistant U.S. Attorney to be here, and I'll do that after we conclude the hearing, and that's for future *pro hac vice* purposes. I cannot give a trespass judgment in this case. I do find that the Hages need -- what they really need economically are grazing permits.

It's not sufficient for their economic purposes for this ranch to simply claim or use their water rights. Even
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United States Court of Appeals for the Federal Circuit

THE ESTATE OF E. WAYNE HAGE AND THE ESTATE OF JEAN N. HAGE,

Plaintiffs-Cross Appellants,

v.

UNITED STATES,

Defendant-Appellant.

2011-5001, -5013

Appeals from the United States Court of Federal Claims in case no. 91-CV-1470, Senior Judge Loren A.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Cross-Appellants, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and
it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 26, 2012.

Dated: 10/19/2012

FOR THE COURT
Jan Horbaly
Clerk