

In The  
**Supreme Court of the United States**

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

*Petitioners,*

v.

UNITED STATES,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Federal Circuit**

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**BRIEF *AMICI CURIAE* OF THE PUBLIC LANDS  
COUNCIL, NATIONAL CATTLEMEN'S BEEF  
ASSOCIATION, OREGON CATTLEMEN'S  
ASSOCIATION, WASHINGTON CATTLEMEN'S  
ASSOCIATION AND NEVADA CATTLEMEN'S  
ASSOCIATION IN SUPPORT OF PETITIONERS**

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On behalf of The Public Lands Council, the National Cattlemen's Beef Association, the Oregon Cattlemen's Association, Washington Cattlemen's Association and Nevada Cattlemen's Association, the undersigned counsel respectfully submits this brief of *amicus curiae*, in support of the Estate of E. Wayne Hage and the Estate of Jean N. Hage, Petitioners, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.<sup>1</sup>



### **INTERESTS OF *AMICI CURIAE***

*Amici Curiae* represent companies and families that depend on federal forests and rangeland for their livestock operations and livelihoods. Many of *amici's* members hold rights-of-way across federal lands that derive from Congressional legislation enacted during the public land disposition era. *Amici's* members are predecessors to those that settled the vast western United States. Many of *amici's* members likewise own water rights, vested and recognized under state law that are enjoyed and exercised on federal lands by

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<sup>1</sup> The parties were given timely notice of *amici's* intention to file a brief. Petitioners and respondents consented to the filing of this brief. Pursuant to this Court's Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that no party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation and submission of this brief.

virtue of holding vested 1866 Mining Act rights-of-way. The water rights are used in conjunction with federal grazing permits administered by the United States Forest Service (Forest Service), as well as the United States Bureau of Land Management (BLM).

When court decisions expand the Forest Service's and BLM's authority to administer and define vested rights-of-way across federal land, the resulting implementation of permits, projects, plans, and rules commensurately threaten to diminish *amici's* members' property, livestock operations and livelihoods.

The Public Lands Council (PLC), headquartered in Washington, D.C., represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado nonprofit corporation. PLC membership consists of state and national cattle, sheep, and grasslands associations in states such as Arizona, California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. PLC works to maintain a stable business environment for public land ranchers in the West where roughly half the land is federally owned and many operations have, for generations, depended on public and forest lands for water and forage.

The National Cattlemen's Beef Association (NCBA) is the national trade association representing the entire cattle industry. NCBA is a Colorado nonprofit corporation. NCBA represents nearly 139,000 cattle

producers and 45 affiliated state associations throughout the United States. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. NCBA members are proud of their tradition as stewards and conservators of America's land and waters, and good neighbors to their communities. Many of NCBA's western members also hold federal grazing permits.

The Oregon Cattlemen's Association (OCA) is a nonprofit and non-governmental organization that seeks to advance the economic, political and social interests of the cattle industry in Oregon and to represent cattle producers throughout the state. Members of OCA include those that are impacted by the status of rights-of-way and perfected water rights on federal lands. The members of OCA have a direct economic interest and stake in the interpretation of public land entry laws, including the Mining Act of 1866. The members of OCA also have a direct economic interest and stake in the federal government's treatment of vested water rights and rights-of-way on federal lands, the loss of which would pose a grave threat to the livelihoods of many OCA members.

The Washington Cattlemen's Association (WCA) formed in 1925 as a grassroots organization devoted to promotion of agriculture and the cattle industry. WCA actively participates in promoting and preserving the beef industry through producer and consumer education, legislative participation, regulatory review,

and litigation. One of WCA's many goals is to protect water and property rights of its members by working to ensure that stock water sources, both riparian and groundwater, remain intact. Many of WCA's members' cattle operations are dependent upon forage and water located on federal land, including forest land. The members of WCA have a direct economic interest and stake in the federal government's treatment of vested water rights and rights-of-way over federal lands.

The Nevada Cattlemen's Association (NCA) is a nonprofit trade association established in 1935. The NCA works hard to protect private property, vested water and grazing rights. The land of Nevada is primarily owned by the United States. As such many of NCA's members are dependent upon federal grazing permits to sustain their livelihood. Any diminishment of water rights and rights-of-way across public lands threatens NCA's membership.

For decades, *amici's* members have been stewards of federal land where they rely upon the use of water for stock operations. Many of *amici's* operations are located adjacent to federal land and are dependent upon the diversion of water across federal land for irrigation purposes. In some cases, *amici's* members have invested considerable sums of money to construct water infrastructure on federal land to promote the exercise of grazing privileges.

Water rights perfected on federal land or diverted through federal land are an integral component of

many of *amici* members' livestock operations. The continued vitality of many livestock operations is founded upon ownership of senior water rights. The economic vitality of *amici's* members is placed in jeopardy when their exercise of water rights and ditch rights-of-way through federal land is prohibited or subjected to undue governmental interference. Absent water, many of *amici's* operations, homesteads, and grazing privileges are substantially diminished in value. *Amici* must find alternative land, stock-water and irrigation water in order to maintain their livestock herds. Finding alternative water and forage is no small task in the arid West where the prior-appropriation doctrine is paramount.

Mindful of their great dependency upon the use of federal lands, *amici* constantly track court decisions that may threaten to impose new obligations or conditions upon *amici's* membership. *Amici's* concerns stem from a tidal wave of public land management policy changes that gained momentum in 1976. That year Congress abandoned its pro-development policy on public lands in favor of a new era of federal land retention with an emphasis on conservation and preservation. Since that time, contentious land issues have arisen with respect to vested rights on federal land. Among these are agency regulation of water rights and rights-of-ways recognized under the Mining Act of 1866.

*Amici's* members are greatly concerned with the Federal Circuit Court of Appeals' opinion rendered July 26, 2012. In condoning the Forest Service's

assertion of primary jurisdiction over 1866 Mining Act rights-of-way, *amici* fear the precedent imposed by the Court of Appeals will render rights vested under the 1866 Mining Act susceptible to diminishment or complete evisceration by Forest Service regulations. Mindful of the Forest Service's more recent efforts to utilize special use permits as a vessel for exacting private water interests, *amici* have a substantial interest in the questions presented by Petitioners to this Court.



### STATEMENT OF THE CASE

This case pertains to Petitioners' claims for just compensation following the government's taking of water rights and ditch rights-of-way appurtenant to the Petitioners' ranching operation in the State of Nevada. *Amici* wish to raise a few salient points with respect to 1) the Court of Appeals' interpretation of the 1866 Mining Act, and 2) analysis of the Forest Service's actions as a physical or *per se* taking.

E. Wayne Hage and Jean N. Hage purchased the Pine Creek Ranch in 1978. Pet. at 6. As with many cattle operations in the western United States, Petitioners' operation of the Ranch includes the use of adjoining federal lands. For Pine Creek Ranch this entailed the use of approximately 750,000 acres of adjoining federal land under grazing permits from the Forest Service and the BLM.

After purchasing the Ranch, the Hages expended significant resources toward improving and maintaining the Ranch, both on the Hages' patented land and their grazing allotments. Pet. at 7. These improvements included corral and water facilities, a cattle guard, spring boxes and three miles of pipeline to a holding tank and trough. *Estate of Hage v. United States*, 82 Fed.Cl. 202, 205-06 (2008) (*Hage V*).

Relations between the Hages and Forest Service began to deteriorate after the Forest Service approved the release of elk into the Table Mountain allotment area of the Toiyabe National Forest in 1979. *Hage V*, 82 Fed.Cl. at 206. The introduction of elk brought numerous problems, including interference with the Hages' ability to get cattle off Table Mountain at the end of the grazing season. In addition, the Forest Service "fenced off certain meadows and spring sources on the Table Mountain allotment and erected electric fences which excluded the 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." *Id.*

Years of discord followed on multiple fronts. Among other things, the Forest Service insisted that the Hages maintain their ditches with nothing other than hand tools. *Id.* The Forest Service threatened to prosecute the Hages if they entered federal lands to maintain their ditches and, in fact, unsuccessfully prosecuted Wayne Hage for clearing trees around the White Sage Ditch. *Id.* (citing *Hage v. United States*,

51 Fed.Cl. 570, n. 13 (2002) (*Hage IV*)). Willows, riparian growth, upland vegetation and beaver dams began to proliferate upstream from the Hages' lands. As a result, water flow to their irrigated pastures was significantly reduced. *Hage V, supra* at 206. The government asserted that the Hages needed a special use permit for permission to cut the trees surrounding their vested water rights. *Id.*

On September 26, 1991, the Hages filed a Complaint in the Court of Federal Claims alleging that the government took compensable property interests from their grazing permits, water rights, ditch rights-of-way, rangeland forage, cattle, and ranch. *Pet.* at 10. Nearly twenty years of litigation ensued at the Court of Claims, culminating in six published decisions (*Hage I* through *VI.*)

In *Hage IV*, the Claims Court made numerous findings that under the Mining Act of 1866, the Hages owned vested rights-of-way over federal lands. *Hage v. United States*, 51 Fed.Cl. 570 (2002); 43 U.S.C. § 661, repealed Oct. 21, 1976 (14 Stat. 251, 253 (previously codified at R.S. § 2339)). In particular, the court found that the Hages own vested water rights in various 1866 Act ditches, wells, creeks, pipelines and water sources. This included rights to 1866 Act ditches, stock waters, and waters flowing from federal land to Petitioners' patented lands. *Pet.* at 11 (citing *Hage IV*, 51 Fed.Cl. at 576-80.) The Claims Court determined the Hages were *not* required under the law to seek permission to maintain an 1866

Ditch. *Hage IV*, *supra* at 585-86. The court rejected the Forest Service's ripeness arguments. *Id.*

In *Hage V*, the Claims Court analyzed actions on behalf of the Forest Service under the rubrics of both "physical" and "regulatory" takings. The court found a physical taking arose from the Forest Service's threat of prosecution which physically barred the Hages from the land. In addition, the Claims Court found a physical taking arose when the Forest Service fenced water sources in a manner that prevented the Hages from using their water rights. Finally, the court found that regulatory policies and procedures utilized by the Forest Service effectuated a regulatory taking because it prevented the Hages from accessing and using water. *Estate of Hage v. United States*, 82 Fed.Cl. 202, 211-13 (2008).

Final judgment was issued on August 2, 2010. *Estate of Hage v. United States*, 93 Fed.Cl. 709 (2010). 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). Pet. at 12.

On July 26, 2012, the Court of Appeals for the Federal Circuit issued a decision that affirmed in part, reversed in part, vacated in part, and remanded in part, the decision of the Claims Court. *Estate of Hage v. United States*, 687 F.3d 1281 (C.A. Fed. 2012). Of relevance to Petitioners' request for writ, the Court of Appeals determined that:

- 1) Petitioners' regulatory takings claim was unripe given Petitioners did not apply for a special use permit to conduct ditch maintenance; and
- 2) Petitioners failed to prove that the Forest Service took water that Petitioners could have put to beneficial use.



### **SUMMARY OF THE ARGUMENT**

In holding that the Petitioners' regulatory takings claims are unripe, the Federal Circuit Court of Appeals committed an error by determining that the Forest Service has authority to require a special use permit for routine ditch maintenance on forest land. In actuality, rights-of-way granted under the 1866 Mining Act are unequivocal in nature and their scope determined by state law and local custom. The question of scope is within the province of the court, not agencies. By insisting that only hand tools may be used to perform 1866 ditch maintenance, the Forest Service administratively adjudicated the scope of Petitioners' vested rights-of-way. The permit requirement imposed by the Forest Service is improper and therefore cannot render Petitioners' claims unripe.

The Court of Appeals likewise erred in determining that a regulatory takings analysis is applicable to portions of Petitioners' claims. Petitioners' claims should be analyzed under a physical takings analysis. Due to the nature of the property interest involved,

water rights and vested rights-of-way, the Forest Service's actions resulted in complete ouster and dispossession of the Petitioners' property interest. This is the functional equivalent of physically appropriating the entirety of Petitioners' interest, whether by fence, threat of prosecution, or policy.

The Court of Appeals decision threatens to harm interests held by *amici's* membership. Under the court's reasoning, the Forest Service is empowered to define the scope of vested 1866 rights-of-way. The Forest Service's "hand tool" policy and permitting requirements render it capable of diminishing vested rights absent payment of just compensation. For these reasons, *amici* respectfully request that the Court grant the Hages' petition for certiorari.



## ARGUMENT

### **I. The Federal Circuit's Decision is Contrary to the Mining Act of 1866.**

A salient issue in this case is whether and to what extent the Forest Service has the authority to impose a permitting requirement for the repair and maintenance of ditch easements vested under 1866 Mining Act rights-of-way (R.S. 2339). The Federal Circuit determined that the Petitioners' regulatory taking claim was not ripe given that they did not apply for a special use permit required by the Forest Service to conduct maintenance on their ditches. Pet. at 18.

The Court of Appeals construction of the Mining Act of 1866 constitutes reversible error. The Mining Act of 1866 does not vest the Forest Service or other agencies with authority to administratively define the scope of R.S. 2339 rights-of-way. Rather, the scope of a R.S. 2339 right-of-way is determined by state law and custom. In Nevada, the easement owner may take whatever actions are reasonable to promote the purpose of the easement, so long as the owner does not cause an undue burden or unwarranted interference with others who also have the right to use the property. Ultimately the scope of an easement or R.S. 2339 right-of-way is within the province of the court, not the Forest Service.

**A. The Scope of a R.S. 2339 Right-of-Way is Determined by Reference to State Law and Custom.**

Until its repeal by the Federal Land Policy and Management Act in 1976 (FLPMA), Section 9 of the 1866 Mining Act (R.S. 2339) entitled settlers to establish water conveyance easements across the public domain. In pertinent part, the 1866 Statute, as amended, provided:

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.

In holding that the Forest Service has authority to demand a special use permit for 1866 ditch maintenance, the Court of Appeals failed to recognize the long accepted doctrine that the general purpose of R.S. 2339 “was to give the sanction of the government to possessory right acquired under the local customs, laws and decisions of the court.” *Jennison v. Kirk*, 98 U.S. 453, 461, 8 Otto 453 (1878). Congress explicitly determined that the law of the sovereign state should determine the scope of R.S. 2339 easements. Until 1976, no statute departed from the commonly held belief that such easements were valid across federal lands. Even then, Congress preserved 1866 Act rights-of-way arising prior to enactment of FLPMA. FLPMA notably had a savings provision providing, among other things, that “Nothing in this Act . . . , or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act.” *See note*, 43 U.S.C. § 1701 (referencing savings provisions of Federal Land Policy Act of 1976, Pub. L. No. 94-579, Title VII, § 701, 90 Stat. 2786). Hence, R.S. 2339 easements are distinguishable as vested property *rights* as opposed to revocable post-FLPMA rights-of-way.

Under Nevada law, the owner of an easement right-of-way may prepare, maintain, improve and repair the easement in any manner and to any extent reasonably calculated to promote the purposes for the easement. *Cox v. Glenbrook Co.*, 78 Nev. 254, 263, 371 P.2d 647, 653 (1962). In *Cox*, the conveyance to the defendant granted “full right of use over the roads of the grantor as now located.” *Cox, supra* at 256. The court held that the defendant had the right to grade and level the road with mechanical equipment for the purpose of using the road. *Id.* at 263-264. Moreover, in *Ennor v. Raine*, 27 Nev. 178, 74 P. 1 (1903), the Supreme Court of Nevada held that the holder of a R.S. 2339 right-of-way has the right to go onto another’s property to remove obstructions to the flow of water.

As characterized by this Court, R.S. 2339 is an “*unequivocal* grant of the right of way” across public land to exercise vested water rights and construct canals and ditches. *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 275, 1879 WL 16620 (1879) (emphasis added). Under Nevada law, it follows that the scope of Petitioners’ R.S. 2339 easement is measured by a reasonableness standard to achieve the end purpose. The Court of Appeals erred in determining that an *additional* license, in the form of a special use permit, may be demanded of a R.S. 2339 owner in order to enjoy rights already included within the scope of the existing easement. While the Forest Service may be entitled to regulate the use and occupancy of forest land, the special use permit requirement goes too far

in Petitioners' case. Petitioners' entitlement to maintain ditches derives from a vested real property interest, not a permitted use.

**B. The Scope of Petitioners' 1866 Rights-of-Way is under the Province of the Courts, not Agencies.**

The 1866 Act is silent with respect to how ditch rights under R.S. 2339 are to be administered or validated. Moreover, no express statute vests the Forest Service with authority to adjudicate the scope of R.S. 2339 easements. Nevertheless, the Forest Service insisted that absent a special use permit, Petitioners could only maintain their 1866 Act ditches and other water sources through the use of hand tools. Pet. at 8. Forest Service regulations provide that a special use permit is necessary for ditch maintenance unless an authorized officer determines that the proposed use "is a routine operation or maintenance activity within the scope of a statutory right-of-way for a highway pursuant to R.S. § 2477 (43 U.S.C. § 932, repealed Oct. 21, 1976) or for a ditch or canal pursuant to R.S. 2339 (43 U.S.C. § 661, as amended)." 36 C.F.R. § 251.50(3).

The "hand tool" policy imposed by the Forest Service is tantamount to an administrative adjudication of Petitioners' R.S. 2339 rights-of-way. Namely, that Petitioners' R.S. 2339 easement is fixed and limited such that only hand tools can be used for maintenance absent a special use permit. In ruling that the

Forest Service may require a special use permit for ditch maintenance, the Court of Appeals improperly suggests the Forest Service has primary jurisdiction to adjudicate and administer the scope of Petitioners' ditch easements.

The Court of Appeals' holding is in serious conflict with the Tenth Circuit. In 2005, the Tenth Circuit held that the BLM lacks primary jurisdiction to make binding determinations with respect to R.S. 2477 rights-of-way – the counterpart to R.S. 2339. *See Southern Utah Wilderness Alliance v. Bureau of Land Management, et. al.*, 425 F.3d 735, 751-57 (10th Cir. 2005) (*SUWA II*). Likewise, the Tenth Circuit has ruled that based on state law, the scope of a R.S. 2477 road includes improving the road to two lanes without a permit. *See Sierra Club v. Hodel*, 848 F.2d 1068, 1084 (10th Cir. 1988), *overruled* on other grounds by *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (*en banc*).

Like R.S. 2477 roads, Petitioners' Title to R.S. 2339 rights-of-way arose under the 1866 Mining Act. Title passed without any involvement by the Forest Service or BLM. Petitioners' rights have the status of vested real property interests. Any interpretation by the Forest Service as to the scope and reasonableness of maintenance activities is therefore questionable. As rightfully determined by the Tenth Circuit, this is a matter in the province of the courts, not agencies. The Forest Service may not impose a permit requirement that, in effect, adjudicates the scope of Petitioners' 1866 rights-of-way. The Court of Appeals erred in

determining that a special use permit must be requested as a precedent to Petitioners' takings claim. It is the Forest Service's permit requirement, together with a threat of prosecution, which establishes a taking.

## **II. The Government's Actions Should be Analyzed under the Rubric of a Physical or *Per Se* Taking.**

The actions of the Forest Service in this case fall under the rubric of a physical or *per se* taking. This Court has consistently held that when the government physically takes possession of property for some public purpose, it has a categorical duty to compensate the former owner. *United States v. Pewee Coal Co.*, 341 U.S. 114, 115, 71 S.Ct. 670, 95 L.Ed. 809 (1951). This holds true regardless of whether the interest taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945).

This Court has also recognized that government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or practical ouster compensable under the Fifth Amendment. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). The Court's precedents establish two categories of regulatory actions that generally will be deemed *per*

se takings for Fifth Amendment purposes. The first being where government requires an owner to suffer a permanent physical invasion of her property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed. 868 (1982). The next being where regulations completely deprive an owner of ‘all economically beneficial us[e]’ of her property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Petitioners’ case falls squarely under this Court’s physical takings jurisprudence given the nature of the property interests involved. Petitioners own water rights, together with vested R.S. 2339 easements for the use of water, ditches and canals on federal land. Thus, Petitioners possess but a few “sticks of the bundle.”

By fencing off water sources, threatening prosecution, or improperly requiring a special use permit to maintain ditches and canals, the government physically overtakes the narrow property interest owned by the Petitioner. Effectively, the government dispossesses Petitioners of their water rights and easements through practical ouster. The loss is clearly of the nature of “an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it.” *United States v. Causby*, 328 U.S. 256, 265, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). Moreover, the deprivation is a permanent, physical invasion of the type recognized by this Court in *Loretto*, *supra*. By temporarily fencing out Petitioners’ cattle and preventing ditch maintenance

under threat of prosecution, water is irrevocably appropriated by the government to serve competing policies of vegetation growth and elk propagation. Hence, while ouster may be temporary, the water is permanently lost.

This Court's holdings are clear that where the government exacts an easement or leasehold interest, a *per se* physical taking occurs. *Dolan v. City of Tigard*, 512 U.S. 374, 384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945). Here, the government achieved the same end. It expropriated a property interest back to the servient estate through the exclusion of Petitioners' cattle, establishment of administrative hurdles and threats of prosecution. These actions constitute a direct and immediate interference with the customary use and enjoyment of the entire property interest owned by the Petitioners. *Cf. Causby, supra*. Accordingly, the Court of Appeals' analysis under the regulatory takings framework should be reversed.

### **III. The Federal Circuit's Analysis and Deference to Forest Service Harms *Amici's* Members.**

The issues presented here are of paramount concern to *amici* members, who hold water rights, ditches and canals on federal land. Under the Federal Circuit Court of Appeals' reasoning, the Forest Service is empowered to require special use permits to conduct nearly any maintenance upon 1866 ditches or water facilities. This poses a serious threat to

*amici's* membership given the Forest Service's latest trend of using special use permits as a vessel for water right exactions. For example in *Trout Unlimited v. U.S. Dept. of Agriculture*, 320 F.Supp.2d 1090 (D.Colo. 2004), the Forest Service relied upon 36 C.F.R. § 251.56 (2012) to condition its renewal of a reservoir permit upon the applicant dedicating a portion of its water rights toward bypass flows. More recently, in *National Ski Areas Ass'n, Inc. v. U.S. Forest Service*, \_\_\_ F.Supp.2d \_\_\_, 2012 WL 6618263 (D.Colo. 2012), the Forest Service was found to have violated the Administrative Procedures Act and National Forest Management Act by promulgating an internal directive that requires permanent transfer of water rights to the federal government in exchange for a permit under the National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497b(7). These examples illustrate the Forest Service's willingness to utilize special use permits as leverage to procure vested water uses on federal land.

By sustaining the Forest Service's permit requirements, the Court tacitly allows the Forest Service to adjudicate the scope of 1866 rights-of-way. The decision threatens to harm *amici's* members' ability to carry out livestock activities both on and off federal land. Armed with the authority to unilaterally determine what constitutes reasonable or routine maintenance, the Forest Service is empowered to subjugate vested 1866 Mining Act rights-of-way in favor of whatever policy rules the day. Such regulatory action, if analyzed under the rubric of regulatory takings,

has staggering potential to diminish the use of vested water rights and R.S. 2339 easements on federal land.



**CONCLUSION**

*Amici* respectfully request that the Court grant the Hages' petition for a writ of certiorari.

Respectfully submitted,

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