

June 23, 2008

Dear Member,

Friday, June 6, 2008, Judge Loren Smith issued the final decision from the US Court of Federal Claims in *Hage v. United States*. Wayne and Jean Hage have won their Fifth Amendment case.

The property rights western ranchers hold on federal grazing allotments have been defined and given Fifth Amendment protection when taken through physical and regulatory actions by the federal government. The precedents set extend beyond the west and establish a deterrent to environmental policies that take property from all Americans. At long last, landowners have protection from the radical environmental agenda.

h is a remarkable victory, led by two American heroes, guided by the formidable legal team of Ladd Bedford and Mike Van Zandt, and supported for the past 17 years by the greatest membership in the land — the members of *Stewards of the Range*.

My Mom and Dad weathered 13 years fighting the US Forest Service and Bureau of Land Management on our Nevada cattle ranch, before filing the case. They faced unbelievable harassment and a concerted effort by the agencies to force us from our home and land.

The agencies claimed we held no property rights on the federal lands. The court has ruled against them. While we did not win every issue, we have secured protection for water rights on federal lands that flow to private property; for range improvements on the federal lands; and, for the ditch rights of ways. The court ruled that all these rights shall be compensated, awarding 4.2 million, plus interest for the past 17 years, plus attorney's fees.

Enclosed is the courts decision. It is beautifully written and done so with the full respect for the fundamental right to own property in America. Also enclosed is an analysis by our president, Fred Kelly Grant, which explains what led to some of the courts decisions.

The government now has 60 days to decide whether to appeal. If they do then we will defend the courts decision in the US Court of Appeals in Washington, DC, and possibly at the Supreme Court.

In the interim, enjoy your victory. You are holding an important piece of American history made possible by you and all the members of Stewards. As you read the decision, know that because of your support, this remarkable precedent is now etched in case law protecting every Americans right to own property.

On behalf of the Stewards leadership and the family of Wayne and Jean Hage, thank you for your faith and generous support for the *Hage v. United States* case. Although Mom and Dad are not here to celebrate with us, I know how proud and thankful they were to have your help.

Dad said best the reason we filed this case: "Either you have the right to own property, or you are property." Thanks to you, Mom and Dad, we have the right to own property!

Warm Regards,

Margaret H. Byfield
Executive Director

Fifth Amendment Victory in Hage

The Final Decision in Hage v. United States

By Fred Kelly Grant

"In seeking your destiny, patience is your ally." This classic thought must have guided the Wayne and Jean Hage family, their lawyers, and their supporters through the often dim years spent in litigating the taking of their dream ranch by the power of their Government.

The thought is from the movie "Star Wars" released to thrill the youth (and many of us parents who had to guard against generation gap) in 1973. To outside observers it must seem that the *Hage v. United States* case has been pending from even before that time.

As Stewards of the Range members know, Wayne and Jean, husband and wife, filed the lawsuit in the United States Court of Federal Claims in the District of Columbia in 1991. Ladd Bedford and Mike Van Zandt are the two primary attorneys who have guided their case. The Hages filed as a last resort to save their investment, their retirement, and their dream from the grasp of their federal government. During the ensuing long years of litigation, the evidence has made clear a well-planned government attempt to take their property without complying with the Fifth Amendment's command that just compensation be paid for private property taken for public use.

On Tuesday, June 3, 2008, seventeen years later, word came to the attorneys from the office of Senior Judge Loren Smith that the decision would be out before "the end of the week." True to his word, and taking the entire week, the judge issued the decision around the 5pm hour on Friday, June 6.

I Victory for the Hages, Precedent for Private Property

After nearly two decades there is victory. Finally, there is to be compensation to the family, which had been displaced from a major portion of their ranch by Government regulatory actions, at times carried out by armed federal officers. The family is not the same. Jean Hage died twelve years ago after learning they had weathered a successful summary judgment motion, knowing that their case would finally be tried. Wayne Hage died at a time when he could realistically believe that ultimate victory was in the offing. He had survived court successes in the denial of motions to dismiss, and had gone through two trials to determine the property owned by him and whether there had been an actual taking warranting compensation. Throughout their lives, their faith in their case did not dwindle, "patience was their virtue."

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The victory is of course not total. Now, resting in the names of the Wayne Hage Estate and the Jean Hage Estate, the case decision did **not** reward compensation for every property right the Hages believed was taken. Some recovery was blocked by an unfortunate case decision in *Colvin v. United States*, handed down in 2006 by the Federal Circuit, the very court that reviews Judge Smith's work.

The victory, while not complete, is enormous -- and it sets a precedent that must stand as a decisive bar to rogue federal agency personnel and to arbitrary agency actions designed simply to remove a family from their home and ranch.

In fact, the victory is even larger than westerners had hoped. Its precedent value will not **be** limited to the ranching west. There are portions of this decision that will protect any property owner who is arbitrarily and capriciously treated by a federal management agency. The "regulatory taking" aspects of the decision, based on analysis ordered by the famous *Penn Central* decision, may be used to deter government attempts to take wetlands, to restrict access, to usurp water rights, to engage in land use planning and to manipulate and force owners into relinquishing ownership and control of land and water throughout the nation.

II Milestone Events in the Government Take Over

The evidence shows a rocky relationship between the Hages and the Forest Service, almost from the beginning of Hage ownership of the Pine Creek Ranch. What it didn't show as clearly was that the prior owners also had big trouble with the Forest Service, which caused them to sell. That experience viewed with the, problems encountered by the Hages, clearly showed the intensity with which the Forest Service pursued control of this ranch and its water.

There were two summer grazing ranges managed by the Forest Service. These were in the high desert mountains known as Table Mountain and the Toiyabe Mountain range. The mountains, 11,000 and 12,000 elevation respectively, framed the beautiful Monitor Valley where the Pine Creek Ranch house and operations was based. The portions of Monitor Valley not privately owned, were managed under a Bureau of Land Management grazing allotment.

The Ralston Valey where the cattle grazed the winter months was south of Monitor Valley, separated by Belmont pass. It was made up of several high desert sagebrush dominated allotments, virtually unfenced, and ended at the Tonopah Test Site where military aircraft was developed and tested. The ranch stretched 80 miles from end to end, and the Hages owned over 7000 private acres within the vast high desert operation.

Within months of the Hage's purchase, the Forest Service authorized the introduction of Elk on Table Mountain causing a series of problems, Elk destroyed the fences. Hunting season was set to coincide with the end of grazing season making it impossible for the Hages to gather the semi wild cattle with a mountain full of hunters and discharging firearms. Springs were fenced off from the cattle, and ultimately the Hages permitted numbers were reduced as the elk increased. Eventually the Hages found it necessary, to take non-use on the Table Mountain allotments, but

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even this was not enough to satisfy the Forest Service. Mysteriously, gates were opened and the Hague's cattle wandered back in, as the agency made charges of trespass against the family.

Across the valley, on the Toiyabe Mountain range, one of Hage's springs had been fenced off and piped into the Forest Service camp. The rerouting of the water forced the cattle to drink in a confined area the agency would later claim was overgrazed and use it as a reason to cancel the Hage's permits for five years. This range was unfenced for twenty five miles, and there was no way to keep the cattle off the mountain, even though the Hages gathered the allotment daily as they migrated into the valley during the spring of 1991. The Forest Service gathered and impounded what remained with semi automatic weapons.

While the Forest Service was systematically taking away the Hage's summer range, they prevented the Hages from maintaining their ditch easements across the federal lands, which carried their water to private hay meadows used to feed the cattle during the fall and winter

months. As a result, the water was severely restricted by willow and juniper growth, beaver dams and other obstructions.

The Forest Service eventually carried through on its threat to charge Wayne with criminal trespass for clearing the ditches. They did so five months after the Hages filed the takings case. The charges were based on events from .year's prior that led Hage to stop all maintenance on his ditches. He was charged, tried and convicted in a federal district court. The Ninth Circuit Court of Appeals overturned the conviction. The fact that this particular court overturned a decision which would obviously have pleased the government and anti-grazing environmental groups, shows how flimsy and phony were the ,charges.

In hindsight it is remarkable that the Hages, withstood the twelve years of harassment before filing their claim. The 1983 year of charges one would have broken most ranchers. In a 105 day summer grazing season, ,they received 40 letters and 70 personal visits from the Forest Service charging them with a multitude of violations. The court noted that some were "extremely minor infractions." One such incident was a charge of failure to maintain a drift fence on Table Mountain. Out of the 25 miles of fence, one staple was missing from one post.

Even though the Hages did all they could to comply, the agency would not be satisfied until they had taken every right the Hage's ,had to make a living on Pine Creek Ranch.

In four opinions deciding issues leading to the final decision, Judge Smith set forth the facts. Each established precedent; each brought some hope to ranch operators.

Early on, the government filed a Motion for Summary Judgment (an attempt to gain victory without a trial on the merits; a victory based on written affidavits not subject to cross examination and on legal citations). In the first major decision, which Judge Smith calls *Hage I* (35 Fed. Cl.147), the Court granted part of the government's motion, denying the Hages claim for damages for cancellation of their grazing permit. Judge Smith followed traditional case law holding a grazing permit is a license, not a contract or a property interest.

But, the Hages won the right to continue trial of their claims on the ... they had property interest in foraging rights, water rights, and ditch ... Forest, (2) whether cancellation of the grazing permit was done to co another public purpose, i.e., elk population(which would have allowed them compensation for the improvements made on the range), and (3) whether impoundment of the cattle was a taking.

A trial on the property issues was held, and much later, in *Hage IV* (51 Fed. Cl. 570, 572), Judge Smith made significant property decisions, which lead to a takings-compensation stage of the case. In *Hage IV*, he ruled that (1) Hages had no property interest in grazing permits which would give rise to a taking claim (previously decided in *Hage I*); (2) Hages claim to property interest in a surface estate of the federally managed portion of the allotment---752,000 acre surface estate for grazing -- was denied; and (3) the Court ruled that Hages had vested water rights under Nevada law in 1866 ditches, wells, creeks, pipelines, as well as waters in three separate allotments. The water rights found to exist were divided into three major classes: 1866 Act ditches, stockwaters, and waters flowing from "federal lands to Plaintiffs' patented land." And, the court held that the Hages also held a compensate interest in forage rights of way fifty feet wide, on each side of the 1866 ditches..

In 2004, Judge Smith conducted another trial in Reno to determine whether the government's actions rose to a taking, and, if so, what compensation was due under the Fifth Amendment to the United States Constitution.

III. The Legal Standard Applied For 'Taking Analysis

Judge Smith begins his analysis of the legal standards governing his decision in this case with words of such great import to our freedom that they bear quoting at some length. They stated permanently established principles of human freedom that no citizen should ever forget, should never put out of his/her minds-eye.

Some fear that our younger generations have lost touch with the principles. If that is so, and if something is not done to return "eye of the tiger" focus to them, our Nation as we know it will not survive. Our ancestors will have fought in vain, and the death and horribly debilitating injuries being suffered by our young citizens in Iraq and Afghanistan will be for nought. Read and contemplate the full meaning of the Judge's words:

"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 of Government, Sections 124, 201, 222 (" whenever 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 provided by John Locke). 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

"property 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)

Judge Smith then points out that he has already ruled, in *Hage IV*, that the government committed a physical taking when it prevented Hages from accessing their 1866 Act ditches. He refers to such a taking as the "classic example" of the taking concept: the "permanent physical occupation or invasion" of the property which results in ousting the property owner from possession. So, in *Hage IV*, the government was held to have made a "classic" taking with regard to the Cages access to the 1866 Act ditches.

As to the other Hage claims, he turns to the legal standards for examining whether a regulatory taking has occurred. Pointing out that there is no "bright line" in the law to distinguish physical takings from regulatory takings, he relies on *Lucas v. South Carolina Coastal Council*, and *Penn Central Transportation Co. v. New York*, for the balancing tests used in determining whether there has been a regulatory taking of a property right. The elements are (1) "the extent to which the regulation has interfered with distinct investment backed expectations," (2) "the character of the governmental action" (which can be short-handed to whether the government has acted benignly or maliciously), and (3) "the economic impact of the regulation on the claimant."

At no point in the discussion does Judge Smith state an attempt to define any taking in this case as "temporary" as opposed to "permanent." That distinction requires a whole different set of legal standards, which fortunately do not clog the court's decision in this case.

IV. The Specific Takings Decisions

A. No Taking and No Compensation for Impoundment of the Cattle

Judge Smith holds that the 1991 impoundment of cattle was not a taking, thus no compensation is to be awarded. He found that the cattle were "in trespass" because the Forest Service had ordered Cage to remove the cattle, and they were not removed in timely fashion.

The implication from this short treatment of the removal in response to the Forest Service order is that Cages deliberately delayed removing the cattle through an entire year. While, the non-taking decision might remain the same under an accounting of the actual facts, it is important to note that the Hages did not delay, but instead did all they could to comply.

The cancellation of the permit took place in the fall of 1990, after the cattle had already migrated to the winter range. In fact, the Forest Service took their famous "dust bowl" pictures of the allotment after several hard freezes, implying they were taken during the normal grazing season. They used these to justify the five-year cancellation of the

permit. It wasn't until the next spring that the cattle naturally migrated back into the unpermitted area, drifting across approximately 25 miles of unfenced boundary from a permitted allotment. The Hages gathered the allotment each day, holding the cattle on private meadows until they could be shipped for sale. This however was not enough to satisfy the agency, and 104 head of their cattle were impounded.

The Court points out that the Forest Service had the authority to disallow grazing on the allotment. The court's holdings make clear that Hages had no property right attached to the permit, which would allow them to graze in spite of the Forest Service's decision. Thus, in spite of the difficulty in gathering which was ignored by the Forest Service and not considered by the Court, the cattle were in trespass, could be legally impounded, and there was no taking.

The fact that government agencies ignore the difficulties in gathering cattle in remote mountainous areas is well known throughout the west. As an example, consider the plight which two Owyhee County, Idaho ranchers face each year. The Lowry family, well known to Stewards members, is allowed to turn cattle into a particular allotment for only a 15 day period. Good ranch management would call for at least a 30 day period of grazing, or more, but a spurious "hot weather" cut-off has been imposed by the BLM. Objective non-government range specialists have debunked the "science" that calls for the arbitrary cut-off, but the government is the government, so the 15 day limit holds. This allotment is so invaded by junipers which the BLM has prevented clearing, that if the cattle were released into the whole allotment, it would be impossible to gather them in the 15 day period. So, the Lowrys must let the cattle into the very first pasture in the allotment, confine them there and remove them by the end of the 15 day period -- else they would be faced with the same type of impoundment suffered by the Cages.

Mike Canley, the unofficial historical laureate of Owyhee County ranching, faces a similar problem. There is a portion of his allotment that is so mountainous and juniper invaded that it is virtually impossible to adequately graze th allotment and still remove the cattle as demanded by the BLM.

So, the natural elements of the grazing lands present a real trespass problem to ranchers, unless the agencies make appropriate adjustments because of the terrain. With anti-grazing interests pressuring the agencies, and filing and threatening lawsuits, agency personnel are running scared. Many of us fear that the results of the impoundment analysis in this case will only encourage the push toward trespass actions and eventual impoundments.

B. No Taking and Compensation for the "Entire Ranch" And for Stock Waters

1 Entire Ranch

Throughout the west, ranchers have argued that allotments cannot be analyzed separately. They contend that for financial and property interest purposes, the base property of deeded land, together with the allotment lands, form the "entire ranch operation."

For some members not familiar with western ranching operations in the "federally managed" land states, this may sometimes be confusing. The "base property" is the privately owned, deeded, land that forms the base of the ranch operations. Here is located the ranch house, storage units, any sleeping quarters for hired hands, main corrals, and, in many cases, the pastures for growing hay to provide feed for the livestock during the winter months. This base property is not sufficient to adequately feed livestock in sufficient numbers to make the operation viable.

For economic viability, the base property is dependent upon the non-deeded acres which are managed by the federal land agencies and which form the "allotment" in combination with the base property. One ranch may have several allotments, as did the Pine Creek Ranch. The allotment lands are dependent upon the base property, and the base property is dependent upon the allotment lands to make up an economically viable ranch. For taxation purposes, and for bank financing security purposes, the rancher is considered to be the owner of the "whole ranch," i.e., the base property and all allotments adjudicated to that base property. If, for example, the federal land agency, here the Forest Service, cancels a permit, or even reduces grazing on an allotment or part of an allotment, that action adversely affects the rancher's position with the bank for the annual operating loan.

This "entire ranch operation" has served as the base for the Owyhee Public Lands Management Act of 2008, which was developed through the Owyhee Initiative Agreement, and is sponsored by Senator Mike Crapo. The appraisal process connected with the Act and Agreement is based upon that concept.

Ranchers had obviously hoped that the *Hage* decision would hold that a cancellation of grazing would constitute a taking of the value of the entire ranch operation.

The cancellation or suspension or reduction is a regulatory action. It substantially diminishes the value of the entire ranch, and eliminates the investment-backed expectations for the ranch. Under the *Penn Central* analysis described by Judge Smith, it makes good common sense that when the regulatory action "takes" away from the rancher the economic viability of the ranch, the entire loss of the ranch as a whole should be compensated. The Fifth Amendment requires payment of "just" compensation for a taking. Considering the relationship between the allotment lands, water and the base property, it would seem that "just" compensation should be such as to make the rancher whole from the damage caused by the government.

For many years of this process, many of us were optimistic about this claim. It makes sense from the standpoint of the "investment backed expectation" element of takings analysis. A ranch operating loan certainly is dependent upon carrying authority on the whole ranch, including the allotments. So, shutting down grazing on one or more allotments "interferes" with the rancher as to that element of analysis. The third element, i.e. the economic impact on the claimant, certainly is relevant because the suspension of grazing on any part of the allotments will severely irripact the rancher in much greater proportion than any harm that would occur to the public through continued grazing. And, even the second element, i.e. the "character of the governmental action," in this case should have favored the Hages. The entire history of the government's campaign to get this ranch and its water shows a pattern of arbitrary and capricious actions -- actions designed not to better manage the resource but to deprive the Cage family of a peaceful and viable operation of its property.

But, alas, in the way of such analysis stood the case decision in *Colvin v. United States*, 468 F. 3d 803 (2006). The Colvin Cattle Company claimed the right to graze allotment lands without a permit. They acted on the claim and grazed. When the Company's cattle was impounded for trespass and sold, a takings claim was filed in the Claims Court. The trial court denied the claim, without even holding a trial on the merits. Then, on appeal, the Federal Circuit, which is the

appellate court that reviews and oversees Judge Smith's decisions, affirmed the decision, holding that a rancher has no right to takings compensation based on cancellation or other loss of a grazing permit. In reaching its decision, the Federal Circuit made several statements destructive to any theory of property interest in the "entire ranch" including the forage on the allotment lands. The Court, for example, made the statement quoted by Judge Smith: that the fact 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."

2. Stockwaters

The *Colvin* decision also led to Judge Smith's denying of the Hages' claim for compensation for loss of stockwater. In fact, and in law, the Cages owned a property right in the stockwaters originating on federally managed land, which made up the allotments. Hages established that water right and current counsel in the Nevada state water courts -- in cases tried simultaneously with the claims court process. The Nevada decision granting stockwater rights to the Cages was acknowledged by Judge Smith.

Ranchers in other states, such as Idaho, have fought for and won the same property right in the use of such stockwaters. In the Lowrys (LU Ranch) water case supported by Stewards members, and in the companion Joyce water case (the ranch operated by managing partner Paul Nettleton) the Idaho Supreme Court ruled that the ranchers owned such right, and that the federal government had no such stockwater right unless it actually owned livestock which watered from the streams or springs.

But, even though Cages held that ownership, *Colvin* blocked a finding of a taking and resulting compensation. Judge Smith reduces the argument to a footnote on page 8 by pointing out that the stockwaters originate and terminate on federal lands, are used for watering cattle lawfully grazing on those lands, and there is no taking when the grazing permit has been cancelled. In other words, the beneficial use to those waters is denied to the rancher when he has been deprived of the privilege of grazing where his cattle can make use of the waters. For this proposition, again, Judge Smith cites *Colvin*.

3. Colvin v. United States

How did this case come to be, decided just two years prior to Judge Smith's decision? The issues taken to court in *Colvin* have to be premised on a claimed right to graze on federally managed lands without a permit.

For years, the legitimacy of that claim has been debated in the west. Proponents of the concept contend that when the government, in weeks and months after passage of the Taylor Grazing Act, "adjudicated" the allotments, the grazing rangelands were taken out of the public domain. They were no longer public lands, and the ranchers had surface estate rights to the forage on the adjudicated allotment lands.

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But most ranchers, even those who believe there is historic soundness to the theory, have refused to attempt grazing without the permit. Realistically, there are two roadblocks to such a grazing operation: 1) the district courts have long held that the grazing permit is only a privilege which can be cancelled (with certain statutory due process considerations applicable) as can any privilege;

and 2) many banks will not grant and extend operating loans if there is no permit demonstrating the carrying authority for the "whole ranch" including the allotment lands.

Former congresswoman Helen Chenoweth Hage firmly held the belief that no permit was necessary for grazing on the allotment lands. After leaving Congress she continued to pursue her belief that no grazing permit was necessary. Colvin Cattle Company took the chance to advance that theory to the Claims Court. After the cattle were impounded, Colvin Cattle filed a takings claim. As already pointed out, the trial court denied the claim on submission of pleadings and affidavits. There was no evidentiary hearing on any of the issues as there were in *Hage*. Then, on appeal, the Federal Circuit affirmed the trial court, and made statements that the rancher has no property interest at all in the permit.

However, only few ranchers would take the risk and test the theory. Stewards' late president, Frank Duran, a long time friend and supporter of the Cage family, took the position that grazing without a permit would not be tolerated by the agencies. He was concerned that ranchers who tried the theory would lose their entire operation. He reiterated his position throughout his visits with his friends in his beloved Dakotas and at Stewards' conferences. Stewards Board of Directors agreed with their President as to the serious nature of the risk to ranchers, and Stewards never advised anyone to graze without a permit.

Only in the state of Idaho is there even a glimmer of a chance that there might be any private property interest in the grazing "preference," not the permit but the "preference." Dr. Chad Gibson and I pushed a set of bills to the Idaho legislature several years ago in order to just try to familiarize the legislators with the property interest argument. To our surprise, Rep. Frances Field of Owyhee County got the bills through the House of Representatives without an opposing vote. Then Chad and I were called in to assist Senator Ric Branch, in getting the bills through the Senate where there was more "anti-grazing" sentiment. With the help of Secretary of State Pete Cenarussa, a long time sheep man, Senator Branch, was able to secure passage by a vote of 26-9. So, in Idaho, there is a state recognized property interest in the grazing preference, it is a crime to interfere with operation of the grazing preference, and the priority date for use of stockwater is the date on which the very first watering historically took place.

Such statutes do not exist in most states, and not in Nevada. It remains to be seen whether the Claims Court will follow federal law that holds that state law determines the parameters of private property rights when the Idaho statutes are called into play.

C. There Was Taking of Surface Waters Flowing from Federally Managed Lands to the Deeded Lands and Compensation Awarded.

In *Hage IV*, Judge Smith had already ruled that Hages held a vested water right in surface waters flowing from federally managed lands within the allotments to Hages privately owned deeded property. In determining that this water right had been taken, the Judge used an analysis with
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two elements: could Cages have put the water to beneficial use, and did the government's actions rise to the level of a taking.

The dilemma for the Hages attorneys was to show that even without the allotment land grazing, the Hages could have made beneficial use of the water on their own deeded land or elsewhere.

1. Beneficial Use

Attorneys Ladd Bedford and Mike Van Zandt skillfully proved and argued the elements. First they attempted to show that the waters could have been put to quasi-municipal use through sale to the Southern Nevada Water Authority to provide water to the growing Las Vegas area. Judge Smith rejected that argument, finding evidence that SNWA did not consider ranch water viable because of distance of conveyance and scarcity of quantity.

So, counsel moved on to a beneficial use based on agricultural irrigation on the deeded pastures of the ranch, and sale to others for agricultural use in this arid land. Judge Smith accepted the theory and found that this was the most probable use for the water.

2. The Government's Actions Rose to Level of a Taking

In finding that the government's actions did constitute a taking, Judge Smith first examined the ditches through which water traveled to the Cages private lands.

He stated that once again, the Court had to consider the impact of *Colvin*. Ce stated that because of that decision, Hages had "to establish a taking of their property that is not related to the cancellation of grazing permits." Ce again emphasized that *Colvin* held that cancellation of a grazing permit "did not constitute a taking of the company's water rights, as the grazing permit was a privilege and not a right." So, Judge Smith concluded that "Plaintiffs [Hages]

must... 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."

Beginning his analysis with recognition that "water ownership is defined by the right to access and use that water," he examined the evidence that the Forest Service built fences around streams. Ce found that by erecting the fences and by threatening Hages with trespass actions, the government prevented access to the water, and their actions were a "physical" taking which deprived Hages of use of their property.

Ce distinguished *Colvin* in this instance because there was no evidence in *Colvin* that the government physically denied access.

Judge Smith's decision that a physical taking had occurred would cover only the period of time during which the Cages had a grazing permit. So, for the period of time after the permit was cancelled, as to the surface water claim the Judge was required to analyze the government's actions from the standpoint of a regulatory taking.

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Applying the three *Penn Central* elements to the evidence, Judge Smith found: first, that the government's actions in allowing brush to overgrow the stream beds and allowing beavers to build dams interfering with water flow. and in denying Hages' attempts to clean and maintain the ditches, the government interfered with the investment backed expectations of the Cages created when they bought the water rights with the purchase of the ranch; second, he found that the government actions of stating a restriction that cleaning of ditches could be done only with hand tools, threatening trespass and intimidating the Hages interfered with the investment backed expectations and were pervasive enough to rise to the level of a taking; and third, that the government's actions resulted in "severe reduction in water flow to Plaintiff's patented lands" which caused them serious economic harm by depriving them of needed irrigation water. The

loss of irrigation water made the ranch "unviable," and deprived them of water they "could have sold in the market."

D. Taking of 1866 Act Irrigation Ditches and Compensation Awarded.

Judge Smith previously had identified the 1866 Act ditches that constituted rights of ways across the federally managed lands. He had also decided that the Hages had the right to access those rights of ways. Ce recognized a reality of ranch economics by concluding that they purchased those ditch rights of way when they purchased the ranch. Those ditches were the primary means for conveying irrigation water to the base property of the ranch.

As a result, Judge Smith found that the Hages definitely "had a significant investment-backed expectation in the ditches." Because the Cages were prevented from accessing the ditches and properly maintaining them, the first element of *Penn Central* was met.

Judge Smith also found that the harassing character of the government's interference actions satisfied the second element of *Penn Central*. One of the irrational restrictions that the government had placed on the Hages required them to perform clearing and maintenance of the ditches only with hand tools. The idea that the government would require the clearance of miles of ditches which it had allowed to become clogged with overgrowth caused the Judge to believe that the action was based solely on "hostility" to the Hages.

The third element, economic impact, also favored the Cages. The Judge found that it would have been economically impractical for Hages to hire enough men with hand tools to do any substantial cleaning of the ditches. Ce pointed out that there were thousands of acres over which the ditches passed. Ce had visited the ranch during the progress of the case, and that convinced him that it would take "years or decades" for "hundreds of workers" to clear the ditches.

So, based again on *Penn Central*, the Judge found there to be a regulatory taking of the ditches.

E. Taking of the 50 Foot Wide Forage on each side of each 1866 Ditch, but No Compensation Awarded.

Previously, Judge Smith had found that the Hages held property rights in a 50 foot wide right of way along each side of each of the 1866 ditches. Judge Smith found the rationale was the need for forage for animals getting to the ditch for water.

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Even though there was a taking of these rights of way, compensation was denied. Judge Smith found that it would not have been economically feasible to feed livestock only on these right of Way strips. Ce found that the cost would have been prohibitive for the Cages to fence the entire area as they would have had to do in order to prevent the cattle from getting outside the 50 foot strips. He also found that "it is highly unlikely that there would be a willing buyer for the right to graze on that [50 foot wide forage rights of way] land." So, no compensation.

V. Just Compensation

The decision sets forth the rules under which "just" compensation is determined:

1. 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."
2. The fair market value of the property at the time of the taking must be used to find the amount of just compensation.
3. Fair market value is the amount that a willing buyer would pay a willing seller in an arm's length transaction."

A . W a t e r

Applying these rules, Judge Smith finds that compensation for the surface waters must be based upon the value of the amount of water that would have flowed to the Hages' private lands, in acre feet, from the streams, creeks, wells, and pipelines that were taken. Based on prior findings of the Nevada State Water Engineer's office, the Judge found the amount of Hages water in the

Southern Monitor Valley to be 17,520.65 acre feet. He also found that Hages had proved that the ten springs on other parts of the property would produce 47.45 acre feet.

So; the court calculated compensation for the total of 17, 568.1 acre feet, at a value for agricultural use proved by Cages' witnesses of \$162.50 per acre foot in the year 1991 when the taking occurred. Multiplication resulted in the compensation of \$2,854,816.20 for the surface Water and 1866 Act ditches.

B . C o m p e n s a t i o n f o r I m p r o v e m e n t s P u r s u a n t t o F e d e r a l L a n d M a n a g e m e n t P o l i c y A c t (F L P M A) .

FLPMA provides, in 42 USC Section 1752 (g) that when a permit is cancelled, the permittee is entitled to reasonable compensation for his interest in authorized permanent improvements placed or constructed by the permittee on the land covered by the permit.

The statute on its face requires several elements for payment of compensation:

1. The cancellation of permit must be for the purpose of devoting the land to another public purpose [other than grazing] -- such public purpose may be sale,
2. reasonable compensation for a value to be determined by the Secretary, 3. authorized permanent improvements placed or constructed by permittee on land,

4. reasonable compensation must not exceed fair market value of the permittee's interest.

The government opposed payment for any improvements because Hages had not sought a determination of reasonable value from the Secretary as required by the statute. The government argued that since the administrative relief had not been sought, this Court could not hear the claim because it was not "ripe," that is, it was not yet ready for judicial decision because administrative process had not been exhausted.

Hages counsel contended that there was no procedure established by the Forest Service for pursuing the establishment of compensation by the Secretary, so Hages could not be forced to pursue administrative remedy.

The Court accepted Bedford and Van Zandt's argument for two basic reasons: first, the Service had not established a clear procedure for seeking administrative compensation, and second, "considering the history of the Forest Service's relations with [Hages], this claim [for improvements] would likely be futile."

Next, Hages had to prove that the permit was cancelled in order to put the land to a public use other than grazing. As Judge Smith had already ruled, Hages had to prove that cancellation was not merely for the purpose of enforcing terms of the permit. They had to prove that the cancellation was ordered so that the land could be sold or put to another public use.

Judge Smith found that the lands had not been grazed for the 13 years between cancellation and the trial in the case. The Meadow Canyon Allotment had been used for wildlife and recreational purposes. The government had approved desert entry applications for the Ralston allotment for the purpose of growing irrigated crops. The Judge found from the evidence that the land had been diverted from grazing to recreation, irrigated crops, and wildlife. So, he found the second statutory element proven.

The Judge then set the amount of reasonable compensation for the following improvements, which had been placed on the land or constructed by the Cages:

1. for 238 miles of fence \$904,400 (based on a 1991 price of \$4,000 per mile in Central Nevada, and adjusted for five percent physical deterioration),
2. for 634 miles of roads and trails the amount of \$458,065 (based on \$850 per mile in 1991),
3. for improvements on 7 springs the amount of \$3150 (based on \$500 per spring, with a .9 adjustment for deterioration at springs and wells.

The total for improvements was \$1,365,615.00. The total for water rights was \$2,854,816.20. Total compensation awarded was \$4,220,431.20, plus interest from 1991 and attorney's fees.