

The Wayne Hage Case: Public Grazing Land & Private Water Rights

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Federal Public Rangelands: The Implied License

Nineteenth Century:

- Federal public lands were a commons
- Grazing was unregulated, unrestricted, open to all

Federal government's inaction interpreted as “implied license” to graze. Buford v. Houtz, 133 U. S. 320 (1890)

No Right to Graze

Government's implied consent to grazing on federal lands "did not confer any vested right on the complainant, 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 (1911).

"Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used." Omaechevarria v. Idaho, 246 U.S. 343 (1918).

I-da-ho

Private Water Rights in Western States

Doctrine of Prior Appropriation (state law)

- Water rights separate from land ownership
- Water right established by putting water to use
- “First come, first served”; user who first used water has highest priority
- Extended non-use can result in loss of water right

Water rights on federal land: Mining Act of 1866

- “recognized and confirmed” private water rights established on federal land pursuant to state law.
- granted rights-of-way across federal land for water ditches.

Bifurcated Grazing and Water Interests on Western Federal Public Land

Ranchers grazing livestock on western federal public lands in the late 19th century:

- had only a revocable license to use the land.
- could establish a property right to use the water for their livestock to drink.

Regulation of Livestock Grazing on Federal Public Lands

Forest Service Organic Act (1897) and Taylor Grazing Act (1934) ended era of unrestricted grazing on federal lands.

Tacit “implied license” replaced by explicit licenses (i.e., permits) specifying who may graze, where, how many livestock, etc.

Permit, like previous implied license, is revocable, and “shall not create any right, title, interest, or estate in or to the lands.” Taylor Grazing Act, 43 U.S.C. 315b.

No Compensation for Revocation of Grazing Permit

Grazing on public lands is “a privilege which is withdrawable at any time for any use by the sovereign without the payment of compensation.” Osborne v. United States, 145 F.2d 892 (9th Cir. 1944).

No compensation due for value added to private land by a federal grazing permit. United States v. Fuller, 409 U.S. 488 (1973).

Riddle

For many public lands ranchers with water rights, if their privilege to graze on surrounding federal public lands were revoked

- their water rights would become worthless, and
- their water rights might be forfeited for non-use.

Sooooo . . .

- Is revocation of grazing privileges a taking of a water right if it “denies an owner economically viable use” of the water right?
- Is a right to graze appurtenant to a water right?

No

“The plaintiff urges that the adjoining lands provide the means to use the water beneficially and must therefore be deemed appurtenant to it. He claims too much.”
Hunter v. United States, 388 F.2d 148 (9th Cir. 1967).

“The Act [of 1866] cannot fairly be read to recognize private property rights in federal lands, regardless of whether proffered as a distinct right or as an inseparable component of a water right.” Diamond Bar Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999).

Important Limitation on Lucas v. South Carolina Coastal Council

The “denies economically viable use” standard for a “categorical taking” applies only to *regulations* that restrict the use of *private property*.

No case (that I know of) has ever held that a denial of use of public land is a taking, even if it has the practical effect of making private property unusable.

General Principle?

To be a taking, a government action must involve the exercise of governmental power. (?)

There can be no taking when the government is simply exercising its proprietary power over its own property.
(?)

See Washoe County v. United States, 319 F.2d 1320 (Fed. Cir. 2003) (denial of right-of-way for a water pipeline across federal land is not a taking of a water right).

Enter Wayne Hage

- Nevada Rancher
- Author, “Storm Over Rangelands: Private Rights in Federal Lands”
- Hero of the “Ranchers’ Rights Movement”
- Theory:
 - Through long-standing use, ranchers have established “surface estate” in federal lands.
 - This “surface estate” was recognized (but not mentioned) by Congress in the Mining Act of 1866 and other statutes.
 - Denial of grazing is a taking of this surface estate and/or other property rights.

Down the Primrose Path

- Several ranchers who lost their grazing permits filed lawsuits asserting theories developed in Hage's book.
- All failed:
 - Colvin Cattle Co. v. United States, 468 F.3d 803 (Fed. Cir. 2006)
 - Diamond Bar Cattle Co. v. United States, 168 F.3d 1209 (10th Cir. 1999)
 - Walker v. United States, 79 Fed. Cl. 685 (2008).

Estate of Hage v. United States: The Earth is Still (Mostly) Round

In Estate of Hage v. United States, 82 Fed. Cl. 202 (2008) Senior Judge Loren Smith *rejected* claims that Hage was entitled to compensation when the federal government revoked his grazing permits because

- his federal grazing permits were property, or
- his federal grazing permits were contracts, or
- he had established a “surface estate” in the federal lands, or
- without the ability to graze, he could no longer make use of his water rights, or
- he had “forage rights” that were appurtenant to his water rights or to his ditch rights-of-way.

Estate of Hage v. United States: A Few Flat Spots

Judge Smith *accepted* claims that Hage was entitled to compensation because:

- (1) *During the time that Hage still had grazing permits, the federal government fenced his cattle out of streams on public land.*
- (2) Natural vegetation growing along streams on public land absorbed water, thereby reducing the flow of water into Hage's ditches that took water from those streams to his private land.
- (3) The government prevented Hage from maintaining his water ditches on public land.

Fences and Takings

Judge Smith held that fencing Hage's cattle out of streams on public lands was a "physical taking." Problems:

- (1) Water rights are usufructory, not possessory, so application of "physical taking" doctrine is problematic
- (2) Fencing cattle out of streams did *not* prevent Hage from using the water, which was diverted through irrigation ditches to Hage's private land.
- (3) In Nevada (as well as other western states), a water right does *not* include a right of access across the lands of another to reach the water.
- (4) If kicking Hage's cattle off *all* public land is not a taking, why is fencing them out of *just the streams* a taking?

Vegetation and Takings

- Judge Smith held that the government had taken Hage's water rights by preventing him from clearing vegetation along streams on public land. The vegetation absorbed water that would otherwise have flowed downstream to water ditches that served Hage's private land.
- Problem: This holding is a novel and radical expansion of water rights at the expense of private and public landowners' rights. A water right has never before been held to include a right to remove natural vegetation on the upstream land of another.

Ditch Maintenance and Takings

- Judge Smith held that the government had taken Hage's ditch rights by preventing him from maintaining his ditches on public land.
- Problem: The government did not forbid Hage from maintaining his ditches; it only required that he obtain a permit to do so.
- A permit requirement is not a taking. *See, e.g., United States v. Riverside Bayview Homes, 474 U.S. 121, 127 (1985).*

Ditch Maintenance and Takings (cont.)

- Judge Smith held that it would have been “futile” for Hage to apply for a ditch maintenance permit, because the government was so overtly hostile to Hage.
- Problem: Of the several permit applications that Hage had filed in the past, *all were granted*.
- By his own account, Hage made a unilateral decision to stop applying for permits because, under his legal theories, he didn’t need them.