UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE
---o0o---

UNITED STATES OF AMERICA, Plaintiff, -vs- ESTATE OF E. WAYNE HAGE, et al., Defendants.	No. 2:07-CV-1154-RCJ-VCF June 6, 2012 Reno, Nevada Volume 22

TRANSCRIPT OF BENCH TRIAL

APPEARANCES:

FOR THE PLAINTIFF:	STEPHEN BARTELL, ANNA STIMMEL and BRUCE TRAUBEN Assistant United States Attorneys Washington, D.C.
FOR DEFENDANT ESTATE OF E. WAYNE HAGE:	MARK POLLOT Attorney at Law Boise, Idaho
	JOHN W. HOFFMAN Attorney at Law Reno, Nevada
FOR DEFENDANT WAYNE N. HAGE:	IN PROPRIA PERSONA
Reported by:	Margaret E. Griener, CCR #3, RDR Official Reporter 400 South Virginia Street Reno, Nevada 89501 (775)329-9980

RENO, NEVADA, WEDNESDAY, JUNE 6, 2012, 1:36 P.M.

---o0o---

THE COURT: Thank you. Please be seated.

The Court notes the same appearances of counsel.

Let's see. Mr. Williams and Mr. Seley are in the courtroom, correct?

And do we have a local U.S. Attorney in the courtroom, as well, Assistant U.S. Attorney? Yes. Okay. Good.

All right. Let me make some preliminary findings and conclusions, just like Judge Smith in Hage -- whatever it was IV or V, I'll address that -- made preliminary and then final opinion, that's what the Court is doing here. I'm making preliminary findings and conclusions.

You'll have to have patience and listen for quite a while for the following reason: Most of the plaintiff's case and most of their closing argument was spent in constructing straw men and straw men arguments and then challenging defendants to knock them down.

A primary example of that, of course, is that the defendants were seeking a declaration or judgment that they had free-ranging rights everywhere but certainly on their 750,000 acres that they claimed under their allotments and water rights. That simply was not the case, of course.

At no time in this trial -- while they made that claim in front of the Court of Claims, at no time in this trial, and in response to several inquiries from this Court, they clearly disclaimed that they were seeking any adjudication or judgment of a free-ranging forage right, they were only seeking to protect their water rights and any attendant foraging right or access rights as already declared by the Court of Claims.

So this Court is not writing on a clean slate. Most of the long-standing dispute between the Forest Service and the BLM and the Hages has been resolved, adjudicated, in courts. I only have one little tail end of it.

So in the hope of greatly narrowing what I have to decide, I'm going to recite at quite some length the Court of Claims', Judge Smith's decision to which this Court is bound and to which the parties are bound.

Madam Clerk, when I begin to read these decisions, the record will reflect that I am quoting. When I use the word comment or my comment, the record will reflect that I am adding my comment either for purposes of expanding or extending the finding of Judge Smith relative to the purposes of this case, or to correct a conclusion of law relative to this case as opposed to a takings case, or to make extra comment which I intend to be extra conclusions or, in some cases, findings. Otherwise, I'm quoting from Judge Smith and

his decision, and the purpose is to demonstrate to the parties and the appellate court that I am not writing on a clean slate.

Again, most of this case has already been resolved by prior litigation, so I am doing that both for the purpose of adopting Judge Smith's findings and conclusions, which I am bound to, as well as making it clear what things Judge Smith ruled upon and what few remaining items I have to rule upon. So you will bear with me while we undertake that.

I understand from a layman's perspective a lot of this will be sleeping material. Not so to the attorneys. They will understand and the appellate court will understand clearly what Judge Smith resolved and, therefore, what's left for me to resolve, and the basis of the legal rulings on which I predicate findings and further legal conclusions.

I start with -- there's a whole series of Hage cases, of course, including the final judgment. I start with Hage V, which is a final opinion and judgment, simply because that summarizes what went before.

Then, of course, I'll revert to and go back to Hage I, II, III and IV, which are very extensive. So bear with me. Lean back and listen.

Hage V, June 6th, 2008, Judge Smith.

"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.... "

Comment. I'll skip the next three paragraphs because they're just simply Judge Smith getting lyrical.

"Plaintiffs, the Estate of E. Wayne Hage and the Estate of Jean N. Hage, have been the owners of the Pine Creek Ranch in Nye County, Nevada since 1978."

Comment here. Again, I'm reading this for the purpose of adopting it as my own findings and conclusions, and it is hereby incorporated by reference in that regard.

"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. 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 USC 1752(g).

"Facts. The facts of this case are well-described in the Court's previous four opinions. 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 Stewart Spring, plaintiffs installed a new spring box and three miles of pipeline to a holding tank and trough."

Comment. I will provide Madam Court Reporter with these so that she can make the transcript correct relative to the written opinion.

"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.

"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 plaintiff's lands. As a result of pinon, juniper, and willows clogging the canyon, plaintiffs saw a significant reduction in the water flow to their irrigated pastures. From water in 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. 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."

Comment. My emphasis added to the next and to the rest of the paragraph.

"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 percent of their cattle numbers on the Meadow Canyon Allotment should not be canceled. 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 plaintiff's 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. The Forest Service kept the proceeds of the sale.

"Procedural History. Plaintiffs filed a claim in this Court alleging: One, the government took compensable property interests in their grazing

permit, water rights, ditch rights-of-way, rangeland forage, cattle, and ranch; two, the grazing permit was a contract, which defendant breached, entitling them to damages, and, three, they are entitled to compensation for improvements they made on public rangeland.

"In *Hage I*, the Court granted-in-part and denied-in-part the government's motion for summary judgment. 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. (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.)"

I'm adding my comment. Clearly, the issue before this Court -- before Judge Smith, in determining property interests was property for purposes of the takings clause, clearly not for purposes of the due process clause, both procedural and substantive, which I will address later.

"However, the Court denied the government's motion for summary judgment with regard to: Number one, whether plaintiffs had a property interest in foraging rights, water rights, and ditch

rights-of-way in the Toiyabe National Forest; two, 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; and, three, whether the Forest Service's impoundment of the Hages' cattle constituted a compensable taking.

"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. 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*.

"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.* The Court later rescinded its decision in *Hage III* with a final opinion on four issues regarding plaintiffs' property rights. *Hage IV*. 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. ('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. Third, the Court determined under Nevada law that plaintiffs had appropriated and maintained vested water rights in various 1866 Act ditches, wells, creeks, and pipelines, as well as waters in the Monitor Valley, Ralston, and McKinney Allotments. These water rights fell into three major categories: Number one, 1866 Act ditches; number two, stockwaters; and, three, 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.

"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 43 USC section 1752(g)."

Comment. That's for improvements.

Next two paragraphs, my comment as well, I will read, again, Judge Smith is waxing lyrical on property rights, the importance.

"Taking. 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. ('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 thereupon 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, '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.*

"The Fifth Amendment protects citizens by providing that if private property is taken for public use, those citizens should be justly compensated. Amendment 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."' Citing *United States versus General Motors, Corp., Transportation Co. versus Chicago* (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.'"

That's *Loretto.*

"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. 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."

That's *Lucas*.

"Instead, the Court has focused on 'essentially ad hoc, factual inquiries.'"

Penn Central.

"Penn Central provides a multi-factor balancing test for determining when compensation is required for a regulatory taking: One, the extent to which the regulation has interfered with distinct investment-backed expectations; two, the character of the governmental action; and, three, the economic impact of the regulation on the claimant. 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.' 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.'"

Loretto.

"The second situation is when the regulation 'denies all economically beneficial or productive use of the land.'

"B. The impoundment" --

Turning now to the issues of the case.

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

"Plaintiffs" --

Comment. I feel it necessary to read this so that we delete this issue from this case but also to adopt Judge Smith's legal rulings relative to the impoundment of the cattle.

"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 the 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 revokable license and not a property right recognized by case law."

Comment. Again, I emphasize whenever he's using the term property right, he's talking about property right for purposes of the Fifth Amendment takings clause, not for the due process clause.

"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. The Forest Service kept this amount to cover the costs of impoundment.

"Therefore the Court must deny plaintiffs' claim for compensation of the value of cattle impounded by the Forest Service."

Comment. Clearly, he's making no legal ruling that the Forest Service impoundment or declaration of trespass was not in violation of due process rights. He's simply saying that because it was pursuant to a trespass otherwise in place, and because there is no right to compensation for denial of a permit, the Court -- that Court would not give compensation for the impoundment of the cattle.

Next category,

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

"Plaintiffs argue that the government's actions constitute a taking of the 'entire ranch,' focusing on the BLM's decision to cancel plaintiffs' grazing permits and to suspend grazing on certain allotments."

Comment. Here, as well as in other places, I will add my comment that clearly both the Court, Smith, and the plaintiffs in that case, the Hages, were contemplating that their action was the appeal and was the seeking of a remedy

for the denial of further grazing permits by the Forest Service and the BLM. Therefore the arguments that there was no appeal or an intention not to take an appeal are inaccurate and a mischaracterization.

> "As stated previously" -- I'm sorry. "This argument" by plaintiffs "must fail in light of the Federal Circuit's decision in *Colvin Cattle Company versus United States.* 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 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."

My comment. Again, emphasizing property interests for purposes of the takings clause, *United States versus Fuller.*

> "Therefore the Court denies plaintiffs' claim for compensation for the 'entire ranch.'"

Next category.

> "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*. 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. 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.

"First. 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 the water is put to a 'beneficial use.' Desert Irrigation, Nevada Supreme Court 1997. The Nevada state legislature declared at

the beginning of the 20th century, 'beneficial use shall be the basis, the measure and the limit of the right to the use of water.' Nevada Revised Statute section 533.035."

Comment. This will, of course, be the determining factor in my determination of what attendant wandering right, forage right, whatever you call it, will be attached to the right to access the water for beneficial use for livestock watering.

"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."

Citing *United States versus Alpine Land and Reservoir* out of this Court, Ninth Circuit, however, 1983.

"In addition, the right to use water can be lost by voluntarily abandoning it."

Manse Spring, Nevada Supreme Court, 1940.

Comment. That is also an additional constraint, the ability to abandon it or to forfeit it, that's also a very important determining limitation on the wandering right of cattle relative to a livestock use.

"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 to sustain the growth in that area. However, defendant countered with evidence that the Southern Nevada Water Authority did not consider ranch waters a viable resource option because of the significant distance and relatively small quantities of waters available."

My comment. I already gave you a humorous anecdote about someone else attempting that argument down in Las Vegas.

"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.

"Number two. The 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" --

Comment. I add now with my own emphasis.

"-- as the grazing permit was a privilege and not a right. *Colvin Cattle*, ('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.'"

That's my emphasis.

"In *Colvin,* the government denied access to the allotment for grazing purposes" --

I'm going to repeat that sentence, comment with my own emphasis.

"In *Colvin*, the government denied access to the allotment for grazing purposes but did not impede

access to the water. 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."

Comment. The next paragraph is fully with emphasis my own.

"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."

Comment. I'll read further here in just a moment about the distinguishment of Colvin Cattle versus this case.

Next subcategory,

"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*, as previously described, the Federal Circuit held that the cancellation of a grazing permit" --

Comment. Alone and by itself. End of comment.

"-- did not constitute a taking of the plaintiffs' water rights. However, unlike this case, in *Colvin Cattle* the government did not prevent the plaintiff from accessing their water. Here, the government did not only cancel plaintiffs' grazing permit, it actively prevented them from accessing the water through threat of prosecution for trespassing" --

My comment. Which is exactly what the government is doing here. End comment.

"-- 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."

I'll add my comment. You'll notice what Judge Smith did not cover, and that is construction of fences or other obstruction of access to the water right during periods when they did not have a grazing permit. That, I believe, is left for me to decide.

"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 streambeds 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.' Mr. Hage testified at trial that after 1990, he was only able to irrigate 25 percent of his land due to reduced waters in Mosquito Creek, Barley Creek, and Pine Creek. Spreading and evapotranspiration 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 streambed. 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 versus Raine,* the Supreme Court of Nevada recognized the right" --

Back up. Comment. This paragraph, the first two sentences of this paragraph, I will emphasize with my own emphasis.

"In *Ennor versus 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. '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. Defendant, on the other hand," the government, "incorrectly argues that the case represents -- incorrectly argues that the case represents a principle 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 or 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" --

Comment. I'm adding my emphasis now.

"-- 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 another growth in the streambed 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 action rose to the level of a taking."

My comment, very important comment now. What Judge Smith considered was takings and the right of access to water for purposes of the takings clause. He did not consider, and therefore left it to me, the need to enjoin the government's continued denial of access to stock watering rights for the purpose of watering stock.

Next subsection,

"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 'the 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."

That was in *Hage IV*.

"Plaintiffs argue that through intimidation, threats, indictment, and conviction, the government prevented them from maintaining their ditches. First, plaintiffs argue that the threat of prosecution for trespassing on federal land kept plaintiffs from accessing the ditches for maintenance. However, it was 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*. Further, as the Court noted in *Hage IV*, the District Court in Nevada recognized 'a vested right-of-way which runs across forestlands is nevertheless subject to reasonable forest 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.'"

Comment. For emphasis I'm going to reread those couple of sentences because it is a determining rule of law to

which I am bound, which will help me determine whether or not there are substantive due process rights violated by the government in denying access to cattle on owned or vested water rights. Reading again,

> "Further, as the Court noted in *Hage IV*, 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."

Adding my comment. We could say the same thing about reasonable Forest or BLM regulation with respect to foraging rights and permit rights.

"Where" -- this is the standard for the government, adding my comment, and it will be the standard in the injunction which I issue against the government. This is the standard for you to advise your clients, the agency heads, as to when they cross the boundary, when they are exceeding their power and authority, and when they are violating this Court's injunction.

This is the standard 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.

Please mark that in these conclusions because that will be the standard that will govern your advice to your

clients.

"The evidence is clear that the ditches to which plaintiffs have established a property right were in need of routine maintenance. In order to access the water, trees and undergrowth had to be removed as well as roots, silt, and other deposits. The water areas had been clogged with pinon, pine, juniper, and willow. Plaintiffs' application for a special use permit to maintain their ditches with the appropriate equipment would clearly have been futile; the Forest Service had threatened to prosecute plaintiffs for trespassing and had actually secured a conviction, which was later overturned by the Ninth Circuit. Based on the history between the Forest Service and plaintiffs, the special use requirement for ditch maintenance" --

Adding my comment. The Court, Judge Smith, is only talking about the ditch maintenance permit. But I am talking, and have the right to talk, about the foraging, grazing permit. End of comment.

"The special use permit requirement for ditch maintenance rises to the level of a prohibition, and is therefore a taking of their property rights. Further, the hand tools requirement prevented all effective ditch maintenance, as it cannot be

seriously argued that the work normally done by caterpillars and backhoes 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."

Adding my comment. Judge Smith not only held several weeks of trial here in Reno, as well as other weeks of trial on earlier Hage decisions, but he also visited the site, walked it.

"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, enough to suggest that the implementation of the hand tools requirement was based solely on hostility to plaintiffs."

I'll add my comment. I'm going to make similar findings with respect to our case.

"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."

I'll add my commentary here and again later, that that's all that Judge Smith did, is he determined that relative to ditch rights there was a 50-foot right-of-way on either side for maintenance of the ditch. That's all that he did.

"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."

Now, not so important to us, but nevertheless I will read it, are the following sections on determining just compensation. They do have some relevance in my determination of trespass damages and counterdamages or irreparable harm.

"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. For purposes of just compensation, the Court must use the fair market value of the property at the time of the taking. This is the amount that a willing buyer would pay a willing seller in an arm's length transaction.

"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, 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 acre feet. In addition, plaintiffs have established a

right in ten springs on other parts of the ranch. Plaintiffs introduced evidence that the ranch springs can be estimated to produce three gallons per minute each, so the ten springs would therefore produce 43,200 gallons per day. As there are 325,851 gallons in one acre foot of water, the ten springs would produce .13 acre feet per day, or 47.45 acre feet 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 acre feet plus 47.45 acre feet, for a total of 17,568.1 acre feet. 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 acre feet 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."

Now, again this next section, Compensation Under Section 1752, that pertains to the improvements. I'm not so sure that that helps us here, although, of course, I am bound to its findings.

The only purpose to which it might be relevant is in establishing or underpinning the Court's determination that there was a substantive due process right in the grazing permits. I will quote one paragraph out of that section.

> "The Court finds plaintiffs are entitled to recover for the follow improvements constructed by them," and only them, not rights which they purchased: "Number one, 238 miles of fences, which represents 80 percent of the ranch's fences; number two, 634 miles of established roads and trails (either built or extensively maintained by plaintiffs); three, 44.7 miles of ditches and pipelines; and, four, improvements at Ice House Spring, Frazier's Hill, Baxter Spring, Stewart Spring, Clay Well, Upper Airport Pipeline, and Pine Creek Well."

I will quote further here because there is an important issue, and it's short. The judge determines the basis for awarding compensation was that the government did not terminate their grazing rights for violation of the term permits, rather, the government terminated the rights for other uses on the public lands of those grazing rights, and therefore, under the agreements, the plaintiffs in that case, defendants here, were entitled to compensation. That is an important issue to us.

"Number 1, Fences.

"The evidence introduced at trial shows that there are approximately 298 miles of fences on the ranch, of which 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 cents for an estimated physical deterioration of these newer fences, the Court finds that the replacement cost of the fences built by plaintiffs was $904,400.

"Number 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 four-wheel drive pickup truck, is approximately $850 in 1991. Applying an adjustment of .85 for an estimated 15 percent physical deterioration, the Court finds that the value of the ranch roads and trails was $458,065.

"Three, Improvements to Springs and Wells.

"Plaintiffs proved that they made improvements on seven springs during the ten 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.

"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."

I'll add my comment. In other words, to protect a government's intentional intrusions on property rights.

"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," I add my comment, the

intentional 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 those limits.

"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 section 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 taking and attorney's fees and costs under the Uniform Relocation Act. It is so ordered."

The date of that decision was June 6th, 2008.

Now, before I get to underlying *Hage I* through *IV*, I

do need to emphasize *Hage VI* and *VII* which clarified and expanded a little bit the final opinion in *Hage V*.

I'm going to give you brief restroom break. And you might even anticipate going to 6:00 p.m. tonight. So I'll give you several restroom breaks. We'll take five minutes while I go out and retrieve *Hage VI* and *VII* for that clarification.

(A recess was taken.)

THE COURT: Thank you. Please be seated. Thank you.

Continuing, and just for clarification, especially with respect to what the Court is adopting and is bound to, the final VI and VII were clarifications of the judge's ruling in the final judgment.

Let's see. This was the judge's further decision.

> "On June 6th, 2008, the Court issued an opinion resolving the final remaining issue in this long-standing 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."

That was *Hage V*.

> "In its latest opinion, 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 for the value of range improvements, for a total award of $4,220,431.20, plus interest from the date of the taking.

"On December 12, 2008, the defendant filed a motion for partial reconsideration on the limited subject of the Court's award of compensation for range improvements. On January 30, 2009, the Court ordered plaintiff to respond. Defendant's subsequent reply was received. After full briefing and oral argument, the Court hereby denies defendant's motion for partial reconsideration."

My comment. This number VI deals with the Court's -- with the government's request for reconsideration relative to the improvements on the basis, first, of who undertook the improvements, and, more importantly, the -- and the amount therefor, and, more importantly, the authorization of improvements made by plaintiffs, since the government contended that these were not authorized improvements. And a minor correction to the Court's opinion. The Court concluded by denying reconsideration but added the small correction.

And then number VII, *Hage VII*, which was the final judgment and order, very short, 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. The clerk is directed to enter judgment accordingly and close this case. It is so ordered."

Now, with that clarification and basic summary, I need to turn to I, II, III and IV. They are extensive, and you'll have to bear with me because they do bind this Court, they bind the parties, and they frame exactly what is left for me to decide, which is not a lot.

Hage I. *Hage I* was simply a determination on a motion to dismiss.

> "The Court of Federal Claims, Smith, held that: Ongoing state adjudication of stream rights did not render exercise of jurisdiction by Court of Federal Claims improper; number two, the owners' claims were ripe for review; number three, the grazing permit was not contract, but rather was revokable license; number four, owners did not have property interest in national forest or grazing permit; number five, fact issues as to whether owners had a property interest in water rights, ditch rights-of-way, and in foraging in national forest precluded summary judgment; and, number six, fact issue as to whether the United States created a situation in which owners' livestock wandered onto

federal land such that impoundment of cattle qualified as compensable taking precluded summary judgment; and, number seven, fact question as to whether United States cancelled the permit in part to devote rangeland to another public purpose, as would entitle owners to compensation for improvement they made, precluded summary judgment."

I note the date of this decision is March 8th, 1996, and the case was filed in the Court of Claims in September of 1991, and therefore that will support the conclusion of this Court that the appellants had every right -- under the APA, had every right and had every intent of prosecuting their appeal of the Forest Service's and BLM's determinations in the Court of Claims and they had that expectation. And the government, by responding and proceeding with those proceedings, waived any exhaustion requirement under the APA, and therefore that Court and this Court have jurisdiction of the appeal of any arbitrary or capricious action in the cancellation of the grazing permit rights.

Number one, *Hage I*, this is important because it also includes a lengthy explanation of the facts which, of course, I'm bound to and which I incorporate here as an important discussion of my own facts.

"Plaintiffs E. Wayne and Jean N. Hage 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."

Commentary. I correct myself. This wasn't motion to dismiss, this was summary judgment.

"The Court finds that plaintiffs' grazing permit is a license, the cancellation of which does not give rise to damages. Thus, defendants' 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 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 canceled 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."

We'll skip the next paragraph.

I'll read only one sentence out of next paragraph. Here, Judge Smith goes extensively into the background and the analysis required for a Fifth Amendment takings claim. But I will read this one sentence.

"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."

I add my comment. He's talking about Fifth Amendment takings property rights only.

I'll skip down to the point where he starts with the facts.

"Plaintiffs, Wayne and Jean Hage, purchased Pine Creek Ranch in 1978" --

I add my commentary. These are my determination of facts as well.

"-- 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 arid 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 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 which allowed them to graze cattle within six allotments of the Toiyabe National Forest. 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 permit subject to certain conditions. For example, Part 1, section 3 of the permit stated in pertinent part:

'This 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, section 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 -- some other form or use.' Moreover, the government reserved the power in Part 2, section 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, section 4, stated:

'The 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 percent of the permitted number of cattle or risk termination of their permit for nonuse. 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.

"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 the 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 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."

Commentary. I'll add my commentary. It's long been established, both in the Nevada Supreme Court as well as the U.S. Supreme Court, that since the 1934 Grazing Act, the federal government controls and manages the grazing on public lands.

The state government controls and manages wildlife on the public lands, with certain important exceptions; for example, the Endangered Species Act.

Number three, the state or states regulate the granting, permitted use, termination or abandonment and adjudication according to state law of waters on public lands as well as on private lands.

"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 percent 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 percent of their cattle allotment for Table Mountain would be suspended for the 1989 grazing season. The Forest Service did not implement the 20 percent cattle suspension until 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 percent 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 percent of the permit to graze cattle on

the allotment and, B, suspend an additional 20 percent 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 violation 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 canceled 25 percent of the Table Mountain Allotment grazing permit and suspended an additional 20 percent of the remaining allotment for a two-year period. The Forest Service decision was upheld in administrative appeals and plaintiff 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. Plaintiffs requested the -- the State granted the petition. 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, 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 permit, 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 percent of plaintiffs' Meadow Canyon Allotment should not be canceled because of plaintiffs' refusal to remove their cattle from Meadow Canyon. Plaintiffs began to remove their cattle at the end of August 1990."

I'll add my comment. The later opinion that I already read from noted that the government itself conceded that they did not send the letter and it was not received until only seven days before the deadline given to comply.

"Defendant, however, observed 128 head of plaintiffs' cattle (38 percent 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 13th, 1991, defendant suspended the permit for five years and canceled 38 percent 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," the government, "not plaintiffs.

"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 the United States had not proved each element of the criminal act.

"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 by canceling 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."

I add my commentary. The Court of Claims only has jurisdiction of claims, damage claims against the government. That would include constitutional taking claims as well as

breach of contract claims.

The next section, I'll skip the first paragraph, briefly, which discusses jurisdiction of the Court of Claims. I just note there that the government made suggestion that there was no jurisdiction because there was a pending state court adjudication of the water rights, and the Court rejected that argument.

The Court determined, as I've determined in my own case, that the Court does have the right to determine water rights as between the relative parties in front of it, especially the government, for the purpose of determining takings under the Fifth Amendment clause. I've also made the same legal conclusion here.

All right. Also, in that same discussion, however, is a very important discussion that binds me on property and what the Court was determining relative to property interests. And then by side comment, I'll make my own findings as to property interests here under the due process clause.

> "Moreover, the Fifth Amendment's protection is not confined to real property. A party may have a property interest in a mortgage, in a mineral estate, in navigational servitudes, in air space, and in a leasehold estate, 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.

"Determining whether the defendant has taken property, as one of this Court's jurisdictional mandates, is not adjudicating water rights as defendant asserts," the government asserts. "This Court agrees with defendant that the U.S. Court of Federal Claims should not engage in stream adjudications."

I add my commentary. I can, however. I have concurrent jurisdiction to do that.

"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 the taking claim. 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."

I add my commentary. I'm adopting this same conclusion of the law relative to my own jurisdiction.

"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," federal district court, "to adjudicate reserved water rights for itself and on behalf of certain Indian tribes under Colorado law. 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 USC section 1345. 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. The Court concluded that because the amendment did not clearly repeal district-court," federal 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.'

"Similarly, the language of the McCarran Amendment does not limit this Court's," Federal Court of Claims, "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 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.'"

I add my commentary, waiver of sovereign immunity.

"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. Defendants' position," the government'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."

I'll stop reading there because I don't have that issue. We do have an adjudication in state court which this Court also intends to adopt. I'm not going to read it, but, of course, I recognize it.

Now, reading under argument of the government on ripeness, that the claim in front the Court of Claims was not ripe relative to the water rights. That court disagreed, of course, but it went on to say,

"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 a conclusive title to those rights pursuant to the present Nevada statutory adjudication procedure. *Amici* argue that the plaintiffs' claim of vested water rights through the court decrees in *Peterson versus Humphrey,* Nye County 1879, and *United Cattle and Packing versus*

Smith, 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."

I'll add my comment. The Court here concludes otherwise.

Continuing,

"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."

Comment. I will repeat for emphasis.

"The defendant," the government, "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. 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.

"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.

"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."

I'll skip down now to the Court's contrast with plaintiffs' argument and with the Court's conclusion.

"In contrast, plaintiffs argue that defendants' 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 over-appropriating the stream."

I'll add my commentary. That's the ultimate conclusion of that Court, and it's the basis for my conclusion admitting all of Ms. Morrison's title report regarding the water rights, their prior use, beneficial use, and vested rights versus certificated or adjudicated rights.

"Plaintiffs claim that Nevada law recognizes

rights established prior to 1905," that's plaintiffs, that's the defendants here, "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. 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. By the Act of 1866, plaintiffs argue, defendant" --

I add my commentary, and I emphasize these two sentences.

"By the Act of 1866, plaintiffs argue, defendant recognized all vested water rights on

federal lands obtained by local custom and law."

Now I add my commentary. That's my conclusion of law as well. The 1866 Act mandated recognition. So in spite of plaintiffs' argument here, that state law cannot create the right on federal lands, I don't need to address that question because Congress has clearly recognized in the 1866 Act that the federal government will recognize existing water rights established under state law.

> "By the Act of 1866, plaintiffs argue, defendant recognized all vested water rights on federal lands obtained by local custom and law, 43 United States Code section 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."

I'll add my commentary. I similarly adopt the various documents in Ms. Morrison's report that establish vested rights as well as certificated and adjudicated rights.

Just briefly, I'll add,

> "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."

Skipping down, again, which simply addresses ripeness but still part of this section, conclusion of law.

"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 15 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.

"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. In Nevada, the water rights exist independent of the stream adjudication."

That's his conclusion of law. I add my commentary, and mine.

He's quoting now from case law in Nevada,

"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*, 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 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.

"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 judgment. It's a matter best left for trial."

The Court next addresses the obligation to obtain a permit for maintenance of their ditch rights and concludes that requiring a permit would be burdensome and effectively

deprives the property of value.

The Court then, quoting further, states,

> "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."

I'll add my comment, he's talking, of course, about ditch rights.

Okay. Skipping down now to the merits of the motion for summary judgment. The first thing the Court addresses is the grazing permit, whether it's a contract or not. We're not talking about a property interest but a contract or not, which would give rise to a breach of contract for which the Court of Claims has jurisdiction, and the Court concludes that it is not a contract.

Skipping down,

> "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."

Now, I will add my commentary and findings on property interests for due process purposes.

The determinations are not coextensive. There's a much higher burden for a plaintiff to recover compensation in establishing a property right for purposes of the Fifth Amendment takings clause. It's a much higher burden.

In order to establish a violation of the due process clause, both procedural and substantive, a plaintiff must also show a property or liberty interest.

Clearly, Judge Smith was not saying in any of these opinions that the grazing permit did not constitute a property interest for purposes of the due process clause. He even acknowledged as much. This Court has to determine that.

Clearly, a grazing permit provides a property interest for purposes of the due process clause.

Under the statute of 1934, the Taylor Grazing Act which regulates the BLM, and under the Forest Reorganization Act permitting process for the Forest Service, both those statutes mandate providing preferences and a scheme which grants preferences.

Using the example of the Taylor Grazing Act, with several bases, one is a land-based preference, the other is a

livestock preference.

The government in the statute and in regulations concedes that procedural due process rights attach because they provide for procedural due process, and this Court concludes that there is a property interest for purposes of the due process clause in a permit.

I also determine and conclude that there is a property interest for purposes of violation of the substantive provisions of the due process clause. The due process clause contained in the same Fifth Amendment as the takings clause protects citizens of the United States against the deprivations of the government when the government takes away property or liberty interests, and it provides a protection just like the takings clause does to my or your properties.

When the government intends to take away a property interest or a liberty interest, it must provide procedural due process and in some cases cannot even do so even if it grants procedural due process rights. That's when we talk about substantive due process. That's the difference.

Procedural due process, it's a lesser property interest, all that the government has to provide before it deprives you of it is procedural due process, the right to a hearing and notice and to be heard.

In the case of a substantive due process right, the government, even if it complies with procedural due process,

cannot take the right or can only take it under certain limited circumstances.

An example of a privilege, license, which carries property interests for purposes of the due process right is your license to practice law, or your right to practice as a medical doctor.

The state government or a hospital, a county-owned hospital, cannot take away your right to practice medicine without procedural due process provided. And even in some cases they can't take it at all, except in certain limited, narrow circumstances.

Another example where substantive due process attaches is to your liberty interest. The government, of course, has to provide procedural due process before they can jail you for a year, but, in addition, under substantive due process provisions, they can't take it at all and they can't put you in jail for a year unless they comply with certain limited, narrow restrictions; for example jury trial, for example, substantial evidence to support the jury verdict, other provisions. They can't take it at all unless they comply with those provisions.

I'm concluding that the permit process for grazing is one to which substantive due process rights attach as well as procedural due process. And the main basis for that conclusion is the requirements of the statute, the Taylor

Grazing Act itself, and the Forest Organization Act that mandate the recognition and granting of preferences for those according to existing custom and use, or thereafter established custom and use, should have a right and preference to grazing permit.

This does not conflict with Judge Smith's holdings or any of the holdings of the Ninth Circuit or the Supreme Court.

I clearly recognize that there is no property interest for purposes of the takings clause. This is not even a contract right for which you can seek compensation for violation or breach of contract, but it is a right, a property interest for purposes of the due process clause, and for that the government must provide procedural due process. And in some respects they are limited from taking it at all under substantive due process.

For example, if the government wants to take or suspend your permit rights because of violations of the terms, they can do so, but only if they comply with certain narrow restrictions mandated by the substantive due process due process clause. The main requirement is that there be a reasonable relationship between the suspension or termination to the violation.

So if, for example, you keep your cattle 30 days beyond a demand on the range, 30 days after the BLM or Forest

Service demands that you get them off, the Forest Service or the BLM have every right to fine you, to tell you that after certain dates they may have the right to impound, to give you trespass notice. They may even -- very gray here, they may even have the right to suspend for a period of time, let's say a one month or two-month period, certain portion of the grazing right.

Clearly in violation of the substantive due process right, what they don't have the right to do is they don't have the right to suspend 25 percent of your grazing permit for two years, nor do they have the right to take your grazing permit away from you.

So in instruction to your client when they will be breaching the criminal parameters of my injunction that I intend to order, your advice to the client will be that you have every right to regulate and manage the lands for management purposes.

You may not manage the lands for the benefit of another private party.

You may not manage the lands, other than is required by statute like the Endangered Species Act, for the benefit of an environmental group or a group of hunters.

You certainly may not manage the rights or lands against a particular permit preference holder in favor of another potential permit holder. That will violate the

criminal parameters of the injunction I intend to order, and it will cause those agents who inflict that violation to be brought before the Court for criminal violation of my injunction.

So the standard is a reasonable relationship between the sanction they impose and the violations that they note and adjudicate.

Skipping down now, I do just need to add this one little comment by Judge Smith and adopting it as my own.

> "Historically, federal courts have followed the analysis in *Buford* when confronted with grazing rights issues. Approximately 35 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. 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."

Next section, Did Defendants Take Plaintiffs' Property Without Just Compensation? I don't think I need to read this section because I've already covered most of it in the final decision. There is just one little subsection.

The Court said there's two inquiries. First, do plaintiffs have a property interest in the Toiyabe National Forest or in their grazing permit. And, as I already told you, quote unquote, the defendant claims that the issuance of the grazing permit as a matter law does not create a compensable property interest under the Fifth Amendment. And the Court agreed.

The Court clearly held here, my own commentary, that there is no contract right and no compensable -- therefor, and no compensable property interest under the Fifth Amendment for a takings claim in the permit.

Going further and quoting,

> "Plaintiffs furnish no evidence supporting the interest 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."

Quoting down further,

> "Rather the Supreme Court held that one who makes beneficial use of public lands has a greater priority to the use of that land than another private party who did not. 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."

I add my commentary, I am also similarly bound.

Next section, Do Plaintiffs Have a Property Interest in Water Rights, Ditch Rights-of-Way and Forage. Just very briefly.

> "In their complaint, plaintiffs allege ownership to all the water in the Meadow Canyon and Table Mountain Allotments, to certain ditch rights-of-way and the forage in the Meadow Canyon and Table Mountain Allotments."

The Court denied the defendant's, government's, motion for summary judgment at that stage, leaving those issues for trial. He addressed water rights and told why those had to be left for trial. He concluded, quoting,

"Nevertheless the right to appropriate water can be a property right."

Quoting further,

"Defendant," the government, "first argues that plaintiffs cannot claim water rights superior to defendant's," the government'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.'"

That's the language of the statute. He goes on to quote from the Supreme Court and clearly concludes that the plaintiffs can have a vested water right in areas on the public lands. Same with respect to ditch rights-of-way.

Different with respect to forage. Here the Court concludes to the opposite.

"Plaintiffs present a novel argument

regarding how and why they have vested grazing rights in the Toiyabe National Forest despite 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. 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.' Plaintiffs further argue that Nevada courts also considered water and grazing rights as combined interests. The Nevada Supreme Court in *Ansolabehere* held that 'the right to the use of water' -- that was 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. 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," this is the Court of Federal Claims, "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."

I'm going to read that one more time.

"Neither the Supreme Court, or other lower federal courts, have addressed the scope of water rights acknowledged by the Act of 1866. If Nevada law recognized the right to graze cattle near bordering water as part of" -- and I add my commentary, not as an independent forage right,

"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."

Adding my commentary, I so conclude as a matter of law.

Going on with the quote,

"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* and *Itcaina* demonstrate the conflict over the right to graze versus the right to use water on public lands," citing those cases. From *Marble,* in parentheses, "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 rights 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 in Nevada originating prior to 1907."

Now I add my commentary. The Court did not go on to do that at trial because the plaintiff in that case was only asking for the impairment and compensation attributable to government's interference with its ditch rights and some water rights, including the restriction of flow and the denial by the government of the right to maintain the ditches so that there would be proper flow.

So at trial and in the final judgment the Court of Claims never had the opportunity to rule, nor did it rule on this very question which is at the core of this case: Is there a foraging right attendant to the water right, part of the water right.

That was the reason for my questions of counsel in his closing argument. Clearly you can't say in reconciling the tension between the grazing right management of the federal government and the water management right of the state government, you can't say that the attendant grazing right, even if it's part of the water right, extends to the whole amount of the range, or that it can supersede the purposes for which management is given to the Forest Service and the BLM.

You can't do that. Give me some limitation.

The potential limitations that I could select from is the 50-foot limitation that the Court decreed for maintenance only on the ditch rights. Clearly the Court was not considering a cattle foraging right. It said numerous times throughout these decisions a 50-foot right-of-way to maintain the ditches.

The Court could also select a half mile, which was part of some of the testimony in the maps that were proposed.

The Court could select a three-mile limitation. I believe the three-mile limitation is too far, although -- although the State recognized a three-mile limit before the imposition of grazing management on the federal government in its attempted regulation in the vacuum.

I don't think the state is necessarily conveying an intent to say that three miles is the necessary ranging right from the water source. They're not attempting to say that. They're trying to eliminate conflict between competing users of the water or nearby waters, and to avoid the conflict they're saying if you come within three miles, then you have a problem.

Nor do I think that the federal government in adopting its statute and regulations of the one-to-five-mile limitations relative to the distance between water sources is trying to say -- relative to stock trailing rights, is trying

to indicate an intent that that's the attendant grazing right to the water right.

They're trying to regulate trailing rights across public lands and across even lands where they've granted another use or superior use or preferential use to someone else.

I'm going to adopt as a finding of fact that it's a half mile. I think that's the most reasonable. I recognize the tendency of cattle to roam well beyond the half mile, but that roaming would be, in my mind, a logical finding as relevant to grazing, not watering up to a half mile.

Fifty feet is too narrow. A cow -- exploring the mind of a cow, could still be very intent on water and obtaining water during the course of a several-hour period and wander easily far beyond 50 feet grazing as it went.

Beyond half a mile I think the cow is intent on moving away from the water or is more intent on gazing than it is on watering.

So I'm going to find as a matter of law and conclude, therefore, as a conclusion of law that under Nevada law, recognized under the 1866 statute, that the attendant foraging right to the water source right is one-half mile from a stream on either side and one-half mile in radius around a sole point water source.

I'll skip the next section, impoundment of the

plaintiffs' cattle. The Court concluded that it would not grant summary judgment, but as we read in the later decision, did not give compensation for that, and the Court denied the motion for summary judgment on compensation for the improvements as we saw.

That was number I. I'm just going to summarize now most of the rest of these.

II. In II, the Court of Federal Claims held that, number one, state and environmental groups would not be allowed to intervene as of right but they would be granted *amici* status to all them to participate in friends of court briefs and even in discovery.

In III, which is a critical opinion, very short, the Court of Claims held that plaintiffs met the threshold test of ownership and had a property interest in vested water rights, and, number two, plaintiffs had a property interest, this is for purposes of the takings clause, in ditch rights-of-way and forage rights appurtenant to their rights.

And one thing I can conclude as a matter of law, if the Court of Claims held as a matter of law that the plaintiff established a property interest for purposes of the takings clause, that was also coterminous with and coextensive with a property interest in due process rights for purposes of procedural due process and substantive due process because the takings clause requires you can't even take it unless you give

compensation.

The opposite direction is not true. In other words, just because that Court concludes that there's not a property interest for purposes of the takings clause does not mean that there's not a property interest for due process purposes which I have already addressed.

As further support for my one-half-mile finding and conclusion, I will address the extent to which Judge Smith addressed and found and concluded relative to the 50-foot right.

The Court makes the following findings of fact relative to water rights, which really primarily addressed the ditch 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" --

And he's talking about the State Engineer's conclusions just prior to the state court adjudication, based upon that engineer's report in the upper Monitor Valley -- lower Monitor Valley.

> "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 to 173 of his report on the Southern Monitor Valley.

"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. Section 9 of the Act of 1866 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 and Act of 1901, for similar ditch rights-of-way, the testimony at trial, and the Forest Service Handbook, 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 50 feet on each side of the marginal limits of their 1866 ditch.

"Concurrent with the accompanying easement to perform ditch maintenance" -- that's the purpose of the 50-foot -- "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."

I'm bound by that decision. So is the Ninth Circuit. It's conclusive on the parties, therefore I don't have to decide that question. I'm concurring with Judge Smith and adopting his conclusion of law let alone his finding that under Nevada law there is an appurtenant grazing right to a water right.

Now, quoting further, he goes on to hold the extent of the right to forage on a ditch right and only a ditch

right.

"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 water and 50 feet on either side of the marginal limits of the ditch."

That's his ruling and conclusion.

Okay. That was III. Those were the main ones.

IV was the preliminary opinion. It's very extensive, and I won't need to quote too much for it because I've already read you V.

VI, however, is the final opinion, findings of fact. Here I will adopt as my own, as though I were including it here, in whole or in part, the background and findings and conclusion adopted by Judge Smith.

The first area that I would quote, if we had time is the section under "This Court has jurisdiction because this is not an *in rem* adjudication."

Under two, water rights, the Court adjudicates the water right, vested water rights. The Court adjudicates the Monitor Valley water rights. And I adopt in whole its findings and conclusions which lists specific rights, beginning with Andrews Creek, Barley Creek, Combination Springs, Meadow Canyon Creek, Mosquito Creek, Pasco Creek, Pine Creek -- I'm sorry, Pine Creek -- these will be attached,

please, to the final judgment -- Smith Creek, White Sage Ditch.

In the Ralston and McKinney Allotments, the Court upheld and designated water rights in those allotments. In the Ralston Allotment it's specified by source, which again will be included in an exhibit to the final judgment, the AEC Well, the Airport Well, the Baxter Spring, the Black Rock Well, Cornell Well, Frazier Spring, Henry's Well, Humphrey Spring, Pine Creek Well, Ray's Well, Rye Patch Channel, Salisbury Well, Silver Creek Well, Snow Bird Spring, Spanish Spring, Stewart Spring, Well No. 2, Well No. 3.

In the McKinney Allotment, Caine Springs, Cedar Corral Springs, Mud Springs, Perotte Springs.

In the ditch rights-of-way that adjudicate those and determine a property interest.

Also raised in this final opinion, he further quotes,

> "Defendant and *amici* challenged plaintiffs' entitlement to forage rights surrounding the 1866 ditches, arguing again 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. 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.' Upon careful consideration of the trial evidence and evaluation of applicable law, the Court reaffirms its findings," which I just read to you a moment ago, "regarding ditch rights-of-way and the forage rights."

In other words, there are attendant forage rights. That question has been determined for.

Now, I want to emphasize in commentary that my finding relative to a half mile is not a finding that you have a property right for purposes of the takings clause, Judge Smith would have denied that.

My finding of a half-mile right attendant to a water right is for the purpose of your defense to trespass. In other words, if a cow having properly been placed upon a water source wanders up to no more than a half mile away, they cannot cite you for trespass even if you hold no permit. Beyond that they can cite you for trespass, and they can give the appropriate notice of potential of impoundment.

There's extensive discussion of the 50-foot

right-of-way for purposes of the takings clause and there, of course, I have to adopt and I'm bound by Judge Smith's rulings for the takings clause property right definition.

The Court goes on to determine the ditch rights, the 1866 Act ditches which were relevant to his compensation clause case, and the Court found persuasive that the following ditches are 1866 Act ditches.

To the extent the Court rejected others, I'm bound and you're bound. To the extent the Court didn't consider any ditches at all or any water sources at all, I'm not bound and I will rule and will include at your -- at my invitation, I will include your request for additional springs and/or ditches in the exhibit attached to the judgment, if you can show, by attaching them in the exhibit, proper support that they were not denied recognition under either the water -- Monitor Valley Water Adjudication or under Judge Smith's rulings and that there's proper support even if they were not part of the adjudication as long as the adjudication didn't cover the land which should have included those water sources. If it did, then you're barred under *res judicata*.

In establishing 1866 ditches and rights-of-way, he mentioned specifically Andrews Creek Ditch, Barley Creek Ditch, Borrego Ditches, Combination Pipeline, Corcoran Ditch, Meadow Creek Ditch, Pasco or Tucker Ditch, Pine Creek Irrigating Ditch, Spanish Spring Pipeline, the White Sage

Irrigation Ditch.

The Court finds specifically plaintiffs failed to meet their burden of proof on the following:

Baxter Spring Pipeline, Corcoran Pipeline, Desert Entry Ditch, Hot Well Ditch, Mount Jefferson Spring and Pipeline, and the Salisbury Well Pipeline.

So you can't ask me to attach that as part of the exhibit to the judgment.

He further goes on to say that "Vested rights-of-way may be subject to reasonable regulation where they run across federal land."

This is important and I'm bound by it and so are the defendants here.

> "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 exercise of those rights so severely as to amount to a prohibition."

So, for example, even through there may be a half mile or a 50-foot right adjacent to a ditch, if you want to run it across a public highway or through a private patented land owned by somebody else, or you want to run it through land otherwise withdrawn for other public purposes, you cannot do it except pursuant to the right of regulation by the Forest Service and BLM.

Do you get that?

MR. POLLOT: Yes, your Honor.

THE COURT: In other words, if they determine that you're trampling over grandma's flower beds, they can say, no, you've got to go around. If they determine that you're overgrazing that portion just like you're overgrazing others, they have the right to say only so many cattle or only so many cattle at a time.

In other words, just as Judge Smith determined relative to the rights-of-way, I'm determining with respect to the half-mile limitation as well. Just because I'm saying they can't cite you for trespass, it does not mean, in fact, I conclude to the contrary that they still have the right to regulate that area.

Citing *Elko County*, District of Nevada 1995, a federal district court case,

"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."

And within the limits that the Forest Service knows about under Judge Smith's order.

"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," or to allow them to cross the lands in a reasonable way and subject to reasonable limitation. "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."

I'll add my commentary now. This is the primary basis for the ultimate remedy that I'm going to choose in this case, an injunction on both parties.

One other finding it talked about,

"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 state 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 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, theain 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

they admit that. So clearly it's not enough for the Hages just to have the beneficial use of water for stock watering. They need and they acknowledge that they need the grazing right, and they acknowledge that the BLM and the Forest Service have the right to manage that right as they must, as Congress gave it to them, including the right to diminish your grazing right in times of drought or in times of depletion of the range or in favor of other public uses, for example, the elk.

They have the right to include that in the management calculation. And if the State of Nevada says it's not incompatible to let elk or wolves run in that area, I must acknowledge the Forest Service and the BLM's right to manage that into the management of the range. And you have to accommodate it. And you even have to accommodate it within the reserved water -- what did we call it, preserved water right, PWRs? You even have to accommodate it within the reserved water rights of the government for the purpose of wildlife and other public users.

For example, you can't complain to the government that they're letting backpackers or an occasional person on horseback crossing, or a person on four-wheelers cross. You can't complain to them that they're letting those others use your water rights because they have a PWR for that purpose.

So you will be enjoined and mandated to do the

obvious, and that is apply for, receive, and comply with the terms of permits for the grazing rights according to the original terms and AUMs of the rights granted to your predecessors by both the Forest Service and the BLM.

Now, I'm not saying that the Forest Service and the BLM can't regulate that down to practically nothing. They can. They have that discretion. And I will give them authorization right now, as long as they're exercising their discretion reasonably and not in violation of the offensive conduct that I've already cited them for, up to a maximum of no more than 25 percent of reduction from those AUMs in the original permits without the other side's consent, if they consent. We acknowledge this is a drought year. We need a 50 percent in this year.

They testified to me that they know a lot about managing this range, and certainly they shouldn't take interest in derogation of the land itself. Then, if you propose a reasonable reduction, even 50 percent, they ought to be ready to consent to it not require a court hearing. But if they don't consent in excess of 25 percent, you can ask the Court for permission. You must ask the Court for permission.

So wherever without their consent you want the Court to further reduce their AUMs for any permit period or for an emergency period, you must ask the Court for permission and be prepared to prove the reasonableness of the request.

You must also ask the Court's permission before you cite them for trespass. You can do the citings, you can manage, you can go out there and do the observations, but you can't issue the trespass citation without my permission. There was one other area under that, trespass citations, and you can't give notice of intent to impound without my permission.

Basically what I'm saying is for some reason in the case of the Hages, maybe it's more widespread than that, I just simply don't know and it's not a matter for my cognizance, but in the case of the Hages I don't trust the Forest Service or the BLM to manage the lands consistent with the purpose and the discretion given to them. So I'm taking cognizance of it, just like a busing decree, and it will remain in effect as long as it needs to remain in effect, and that's the limitation and the time period limitation on the -- on the injunction.

Now, the counterinjunction to the government is you must grant the permits. You denied these permits in violation of their due process, procedural and substantive due process rights. You sent out an invitation in '02, '03 -- '02 or '03 or '04 to reinstate their BLM permits, I think it was, wasn't it? Mr. Hage sent back yes, please, renew. He added one clause. What was the clause exactly?

MR. POLLOT: Subject to UCC1-207.

THE COURT: Subject to UCC1-207. I don't even think Mr. Hage Senior knew what that meant. I certainly don't know what it means and the government doesn't know what it means. So it was not a basis, nor a reasonable basis, it was nothing but arbitrary and capricious to conclude that was a refusal to request renewal of the permits.

And later on that basis, when the government itself impeded -- threatened trespass, impeded taking their cattle off the land in a timely fashion, severely restricted the AUMs, to then say based upon their nonuse they have forfeited the right to these permits, is also arbitrary and capricious.

What else could they do? Their cattle was impounded and all they could do was sell the cattle, and that's what they did. So your use of nonuse for three years as a basis was arbitrary and capricious.

Now, the government argues, well, they didn't appeal. I read the letter from counsel in San Francisco. Clearly he was appealing. But in that letter and in later letters he basically said our appeal is in the already-filed Court of Claims action.

The government waived any claim of exhaustion under the APA, and it waived any claim of exhaustion for failure to appeal, number one, by defending and the jurisdiction in the Court of Claims over those very same issues and, number two, by its voluntary waiver of sovereign immunity and filing of

this case in 2007 here. So it was an arbitrary and capricious taking for due process purposes of the permit, and, therefore I'm going to mandate and enjoin the government to grant the permit as I'm enjoining them to apply for it.

These parties over two decades of time have been unable to resolve their differences so I'll resolve their differences for them. I'm going to mandate that they get back in the system, apply for the permits, and comply with the management discretionary decisions of the BLM and the Forest Service, and I'm going to mandate that the BLM and Forest Service act reasonably in granting the permits and managing the grazing preference.

I'll just take -- just like I would take control of a busing decree for two decades, three decades, four decades, whatever it takes, maybe it's until after Mr. Williams and Mr. Seley move on. You'll tell me when. You need to terminate this judgment, Judge, because, you know, we've had good relations now for a decade. You'll tell me when. Until then, I'll manage the dispute for you because you have evidenced no ability to do so.

One or two last things.

Why can't I give a judgment for trespass. I think you have established that there was some trespass. We have pretty clear markings on the map of where the cattle were identified.

I can't give a judgment for specific trespass for the following reasons: First, the Estate of Hage has established a valid defense. They have a right to have cattle on their water source water rights within 50 feet for maintenance of the ditch rights and within a half mile of those ditch rights and the water source for purposes of beneficial use of the stock water right.

Again, that's subject to appropriate regulation by the BLM and the Forest Service on even that half mile, and I'm not saying you have any property right for purposes of the takings clause or for purposes of the due process clause. I'm just saying you have a defense.

Second, the Estate of Hage, Estate of Hage as one party never owned any of the observed cattle, they've proven that to my satisfaction, so they can't be held to be guilty of trespass, Mr. Hage can, and Mr. Hage can on behalf of all of those parties you've cited, third parties.

Third, the evidence is not clear as to the sightings. The testimony of those who were actually engaged in the observations and who took the picture is ambiguous and conflicting. Some testified that they stood on the very spot where they pushed the GPS button to mark the coordinates. Some testified that they estimated the GPS coordinates or they went there afterwards where they thought the cattle were in an effort not to chase the cattle away and attempted to estimate

the coordinates. Most, however, provided photographs where I can actually observe and roughly estimate where the cattle actually were.

For 75 percent, as you might suspect, of the photographs, it shows the cattle on or near the streams, and that would just make common sense, wouldn't it? They're in the greenbelt areas that surround probably within 50 feet, certainly no more than 100, 300 feet of the streambeds. Those are greenbelt areas.

Even the Forest Service and the BLM acknowledge they need those greenbelt areas. And they need foraging, at least by the elk and maybe by the cattle, too, to maintain those. There was testimony that those grasses disappear if they don't -- if they aren't foraged. Those types of grasses disappear.

In addition, relevant to and attendant to the foraging permits there are maintenance obligations, for example, like for some of the grains and some of the grasses, the Hages have an obligation to plant and replant. But the sightings language is unclear. Seventy-five percent of the photographs show them reasonably, common-sense-wise, within the parameters that I've defined, to which they had an attendant grazing right, the right in which the cattle can drop their head.

The other 25 percent, common-sense-wise, are up on a

hillside. They could be far, far away from the water source. They could be outside a half mile. And even the Hages admitted they're either on their way to another water source that the cow is aware of, or they're simply grazing.

That's another reason to say that what the Hages really need here is a permit not just enforcement of your water rights.

Those, of course, would be an appropriate -- on appropriate lands for the basis -- and provide a basis for giving a trespass citation, and you have the right to do that in the future, and you have the right to monitor and inspect for that.

So the third reason is the evidence is ambiguous. The marks on the map aren't ambiguous and the initials are there and the mapmaker simply -- the mapmaker didn't engage in the observations. The mapmaker simply took the coordinates and plotted them on the map.

And I acknowledge that some of those, many of those are certainly outside of 50 feet, not necessarily outside of a half mile. But, again, where the coordinates are in relation to the actual cows is, is ambiguous.

The fourth reason, many of these cattle are on the water source or within close proximity or on an 1866 ditch right. Some are within a trail and cattle water trailing right area, or within one mile either way or road easement.

The next reason, fifth, there's no quantification of the forage taken or impaired on noneasement lands. Here I need to make the legal conclusion.

You will tell me in the briefing whether your citation to the Code of Federal Regulations is appropriate, and I'll have to make a legal conclusion on that. But if your citation is correct, to 43 CFR 9239.0-8, that the measure of damage is determined by the law of the state of Nevada, then I make the following conclusions of law.

The Nevada statute does provide, of course, that it is the value of the forage consumed. I think Nevada law would also provide it's the damage incurred by the government to the lands by virtue of the trespass. So at least those two elements of damage may be assessed by the government.

To the extent the statute says there will be no trespass for livestock on the commons without fencing, I don't think that's the law of Nevada relative to a trespass on commons -- on public lands. The management authorities who have the right to manage have said you can't put fences on those lands to keep wildlife or others out without our permission and as part of the management so there won't be fences. And in that circumstance you just can't cite that part of the Nevada Revised Statute to say, therefore, there can be no damage.

I think the courts of Nevada and the Supreme Court,

if I'm guessing, would clearly state that fencing is beside the point. It's the value of the forage taken combined with the damage to the public lands. I think that would be the law of the State of Nevada.

I agree with you that President Reagan had no right to extend the $1.43, or whatever it was, but as far as I can tell, the $1.43 and 35, whatever it was, adjusted over time by regulation -- Mr. Myhre, one more comment that I need you here for, I'm sorry, it will come in about five minutes -- is that it's probably based upon reasonable calculation of the value of the forage.

It's not $10 or $12 or $15, which is what Hage would charge for lease land with the coexistent obligation to monitor the cattle, maybe even provide vet service, certainly make sure they don't break through fences, irrigate the land, harvest it. But, nevertheless, I'm sure it's based upon cost to the government for management. So as far as I can tell, and subject to your briefing, that's probably the best value.

But the reason why I don't think I can render a judgment for trespass is there's no quantification of the forage taken or the impairment on noneasement lands.

The next reason, number six, is the takings award by the Court of Claims. Therefore, there's no trespass, and trespass judgment would be inconsistent with the Court of Claims judgment, except, of course, on lands beyond the Court

of Claims judgment.

The seventh reason is that there would be an offset, there would be an offset for the some 150,000, I think, they collected from others. Is that what it was?

MR. HAGE: It's probably over a hundred thousand, your Honor.

THE COURT: Right. And that's what it was for, was paid by others? I think so. And, more importantly, it would be permitted and should be permitted as an offset to the judgment given by the Court of Claims. The Court of Claims has given a $14 million judgment. So all we're talking about is offset anyway.

Instead, in equity, I will give the judgment that the Bureau of Land Management and the Forest Service really need, assuming that they're being consistent with their purposes and their discretion given to them by Congress for managing that lands, and that is a mandatory injunction that Hage will apply for a permit and abide by the terms, because that's what the government really needs anyway, and the government can't manage as required unless they so apply. That's what the government really needs.

And in equity trespass judgment doesn't help you. I'm sure you think it does, in order to get a handle and control on the Hages. But I'm going to control the Hages from now on. And if they -- you'll ask me -- you'll tell me we've

done observations, they have a hundred head of cattle for a month beyond the permitted time period, may we trespass them, and I'll tell you yes. May we give them notice that, if it's beyond a month, we will impound, and I'll tell you yes, you can give them that. And may we impound, and I'll tell you yes, you can impound.

In other words, I'm here to control you, Hages. You haven't been able to resolve this with the government, just like they haven't been able to resolve it with you, and so I'm going to baby-sit both sides, just like a child. That's what I'm going to do.

That's the extent of my findings and conclusions. There will be a final decision, probably again another tome, after I read the briefs. That will help you in narrowing the briefs.

Any clarifications or requests for additional findings and conclusions? I'll solicit -- for example, you can go beyond the normal brief limits of 30 pages by attaching suggested additional findings and conclusions or suggested clarifications of the findings and conclusions that I've made, or request for additional findings areas.

MR. BARTELL: Could we have just a moment to consult, your Honor?

THE COURT: You bet. Now, off the record in a separate record, please.

(Discussion held off the record.)

THE COURT: All right. Back on the record, please, of this case.

Additional requests?

MR. BARTELL: Your Honor, if we could just seek some clarification from the Court regarding the timing.

THE COURT: Please.

MR. BARTELL: So that we're able to comply with the Court's order, time will be needed to basically stop the process, notices, holding referrals perhaps from Treasury.

THE COURT: Right.

MR. BARTELL: It takes --

THE COURT: That's part of the injunction. I'm glad you reminded me. That's part of the injunction. You must withdraw from Treasury any trespasses, notices on third parties, where Hages clearly recognize and admitted liability for the same.

MR. BARTELL: Also, regarding timing, is there also timing for which the defendants would be required to not allow their cattle past the distances this Court has ordered, the half mile for instance?

THE COURT: Immediately. You will forthwith apply for the permits, and immediately you're going to have to undertake action to make sure they don't wander beyond -- as far as I'm concerned, they're subject to their injunction

immediately even though the permanent injunction won't be entered for awhile yet, and so you're mandated to comply immediately, too.

I am going to order the government forthwith to grant the permits -- what is it? It's June now. These would normally run through October on the forestlands and during the winter on the BLM lands.

So you've got to undertake action forthwith, number one, to comply with the half-mile limit, otherwise, I'll expect to see them here tomorrow asking for the right to issue a trespass notice. I really don't expect them to do that. I think it would be unreasonable.

But you -- so I'm trying to give you the clarification best I can. All I'm saying is you -- both sides need to realize the parameters the Court has laid out for you and try to comply in good faith forthwith.

MR. BARTELL: Well, again, your Honor, we will, of course, follow the Court's order. But it will take some time to -- we can't do this today.

THE COURT: Correct.

MR. BARTELL: And it will just -- and we'll do it as quickly as possible, pull the referrals, as you said, comply with the Court's order.

THE COURT: Understand.

MR. POLLOT: Yes, sir -- I'm sorry. Go ahead.

THE COURT: Clarification?

MR. HAGE: Your Honor, clarification on the half-mile perimeter --

THE COURT: That's a defense, it's not a right. It's your defensive zone for a trespass notice.

MR. HAGE: Okay. If I'm applying for a permit immediately, and if I understood the Court correctly, I'm to gather cattle immediately also; is that correct?

THE COURT: I don't think I can mandate that you gather cattle immediately. I don't think I can do that. I think all I can say is forthwith you will apply for the permits in the AUMs numbers previously designated.

MR. HAGE: Okay.

THE COURT: They've got to have reasonable time to entertain that, decide whether to cut it down, to half it, whatever they want to do, time in front of the Court if you don't agree. Hopefully you will work together to agree, which will establish a basis for cooperating in the future.

And I won't require, mandate that you gather, but I will mandate that you comply, at a minimum, with the normal permit restrictions that you're applying for, dates and times, as established by precedent that I heard evidence of, and -- and you'll make sure that your permit application is from tomorrow going forward and so that they can take that into account.

In other words, if they want to calculate the total number of days that a range can stand, they'll include not only from tomorrow forward, they'll include the time that you've had the cattle on the range, including the half-mile area which they have the right to manage, from the time that you put them up there.

So if the maximum the range can stand is 90 days, it will be from that prior date. That's the best guideline I can give you. See if you can work it out. And if you can't, then I'll have to make a decision.

MR. HAGE: I'd like to try to work it out with them --

THE COURT: Good.

MR. HAGE: And if we can't, I would request we have a hearing.

THE COURT: I'm available.

MR. HAGE: Thank you.

MR. POLLOT: Your Honor, I have one further clarification.

THE COURT: Please.

MR. POLLOT: I had actually risen originally about asking that the referrals be withdrawn. We have at least one of the individuals who said that there is now a mark on his credit report --

THE COURT: Right.

MR. POLLOT: -- regarding that.

Will part of the injunction be to correct that?

THE COURT: They would normally do that in normal course. They would withdraw the credit bureau report or they would send a supplementary report saying there's no debt as part of the process.

If there's any attempts to withhold from Social Security, that would stop forthwith upon that withdrawal.

If there's any referrals to collection agencies, the Treasury will do that.

MR. POLLOT: Thank you, your Honor.

THE COURT: They don't need to worry about it. I understand there may be an immediate problem, but in due course the Treasury will withdraw or supplement that report.

MR. POLLOT: Thank you. I'm grateful, your Honor.

MR. BARTELL: Your Honor, it's come to our attention, and we haven't verified this, that some of these third parties may have been attempting to impose liens on Mr. Williams' or Mr. Seley's property. Would part of this Court's order also be we're going to stop all this process --

THE COURT: No, but I will advise them there's federal criminal statutes that prohibit that.

MR. BARTELL: Thank you.

THE COURT: The judge may be crazy, but if you

want to lien his land, be advised that there's a criminal statute that prohibits you from doing that.

And, of course, this Court intends to protect the personal physical integrity, as well as the financial integrity, of the agents of the government.

MR. POLLOT: And, your Honor, so that -- for the record, we're not personally aware of anything like that.

THE COURT: Good. Okay. Thank you very much. Court will be in recess.

(The proceedings were adjourned.)

* * *

-o0o-

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Margaret E. Griener 07/29/2012
Margaret E. Griener, CCR #3, RDR
Official Reporter

I N D E X