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Est. of Hage v. U.S., __ F.3d __, 2012 WL 3043001 (Fed. Cir. 2012)
Ada C. Montague

ABSTRACT

The decision by the United States Court of Appeals for the Federal Circuit (Appeals Court) in *Hage VI* raises the question of what it means to own the right to use stock water and perform range improvements on public, federal lands. In *Hage VI* the Appeals Court altered a trend of favoring private property rights on public lands by reversing the Court of Federal Claims (Claims Court) decision to award the Hage family \$14.2 million for government takings of private property interests on public lands.¹

INTRODUCTION

In 2009, the Claims Court held the government interfered with the Hage's cognizable property interests on public lands, which included certain rights to stock water and range improvements such as fencing and ditch maintenance.² In 2012, the Appeals Court upset almost twenty years of precedent when it overturned the 2009 decision, finding the claims unripe.³ The Appeals Court concluded no regulatory takings occurred, and the claim for physical takings was unfounded because there was no evidence the government interfered with any perfected water rights.⁴ In addition, the Hages did not follow the necessary administrative steps to obtain compensation for range improvements.⁵ The latest decision, however, does not preclude future takings claims if the government interferes with private property interests on federal public lands.⁶

¹ *Est. of Hage v. U.S.*, __ F.3d __, 2012 WL 3043001 (Fed. Cir. 2012).

² *The Est. of Hage v. U.S.*, 90 Fed.Cl. 388, 391 (Fed. Cl. 2009) *vacated sub nom. Est. of Hage v. U.S.*, __ F.3d __, 2012 WL 3043001 (Fed. Cir. 2012); *see also* 43 U.S.C.A. § 661 (2012); *see also* Nev. Rev. Stat. Ann. § 533.085.

³ *Est. of Hage v. U.S.*, __ F.3d __, 2012 WL 3043001 at * 4 (Fed. Cir. 2012).

⁴ *Id.* at *9.

⁵ *Id.* at *8.

⁶ *Id.* at *7.

FACTUAL BACKGROUND

Hage VI could be the finale to a thirty-year conflict between Nevada ranchers and the federal government.⁷ In 1978, the Hage family acquired their ranch, which consisted of roughly 7,000 acres private land and 752,000 acres of adjoining federal lands operated by the prior owners under grazing permits from the Forest Service.⁸ In addition to the land, the Hages' also obtained vested water rights from their predecessors-in-interest, which, under Nevada state law, entitled them to streams and ditches located on federal public land.⁹ In 1991, ranch owners sued for government takings when the U.S. suspended permits to graze livestock on federal land and then cancelled them altogether.

It was not long after the Hage family purchased its operation when conflicts with the government became an issue. According to the Appeals Court, "As early as 1978, the Forest Service observed unauthorized grazing by the Hages' cattle, and made several requests that the cattle be moved."¹⁰ After an estimated forty letters and seventy visits for violations of the grazing permits, the Forest Service began suspending the Hages' grazing permits for issues such as overgrazing and lack of livestock control.¹¹ Disputes over special use permits for maintenance of ditch rights-of-way on federal lands also became an issue.¹² The Hages' performed ditch maintenance without the permits and eventually the Ninth Circuit held the Hage's criminally liable for damaging and removing government property, the trees and shrubs growing in the ditches.¹³

PROCEDURAL BACKGROUND

⁷ *Id.* at *9.

⁸ *Id.* at * 1.

⁹ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 (Fed. Cir. 2012); see Act of July 26, 1866 (43 U.S.C. § 661).

¹⁰ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 (Fed. Cir. 2012).

¹¹ *Id.*

¹² *Id.* at *2.

¹³ *Id.* at *5; see *United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994).

In 1991, the Hages brought suit against the U.S. for Fifth Amendment takings, compensation for range improvements, and breach of contract.¹⁴ After nearly twenty years of litigation, the Claims Court awarded the Hages \$14.2 million in just compensation.¹⁵ The *Hage VI* decision overturned the Claims Court award to the Hage family, finding the takings claims unripe.¹⁶

When the *Hage* litigation began, the Claims Court considered only the issue of what property interests the plaintiffs owned.¹⁷ The Claims Court clarified the legal standard for vested water rights and denied takings claims could apply to grazing permits.¹⁸ The Court did find the Hage family established ownership of substantial vested water rights and many Act of 1866 ditch rights-of-way located on public lands.¹⁹

In 2008, the Claims Court decided the issue of whether a government takings occurred.²⁰ The Court held that, “The Forest Service’s construction of fences on federal land around water and streams in which ranch owners had a vested water right constituted a physical taking.”²¹ The Claims Court also determined the Hage family should be compensated for improvements made to public lands whose utility expired with the grazing permits.²²

ANALYSIS

In July 2012, the Court of Appeals determined that the takings claims were not ripe and compensation therefore was unwarranted.²³ The Appeals Court found that the Claims Court “erred in holding that applying for a special use permit would have been futile” and that “the

¹⁴ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 at * 2 (Fed. Cir. 2012); see 43 U.S.C. § 1752(g).

¹⁵ *Id.*; see *Estate of Hage v. United States*, 82 Fed.Cl. 202 (2008)(*Hage V*); see also 43 U.S.C. § 1752(g).

¹⁶ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 at *9 (Fed. Cir. 2012).

¹⁷ *Hage v. U.S.*, 35 Fed.Cl. 147, 150 (Fed. Cl. 1996).

¹⁸ *Id.* at 170.

¹⁹ *Hage v. U.S.*, 51 Fed.Cl. 570, 574 (Fed. Cl. 2002).

²⁰ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 at * 2 (Fed. Cir. 2012).

²¹ *Id.*

²² *Id.*

²³ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 at * 9 (Fed. Cir. 2012).

mere existence of a requirement for a special use permit” is not a regulatory takings. It explained that the government may regulate private property provided it does not go too far.²⁴ The Appeals Court did agree the government could not prevent access to vested water rights without just compensation.²⁵ However, the Appeals Court found no takings had occurred in this case “...because there is no evidence that water was taken that the Hages could have put to beneficial use.”²⁶ In addition, the Appeals Court affirmed the Hage’s were not entitled to compensation for range improvements because they failed to request a valuation from the Secretary of the Interior.²⁷ The Appeals Court vacated the regulatory and physical takings claims and claim for compensation and remanded the case.²⁸

In *Hage V*, the Claims Court found that vested water rights are a cognizable property interest that cannot be taken without just compensation.²⁹ The Appeals Court agreed in *Hage VI*, maintaining that the government cannot “... prevent [the Hages] from accessing water to which they owned rights without just compensation.”³⁰ The Appeals Court explained, “The government, for example, could not entirely fence off a water source, such as a lake, and prevent a water rights holder from accessing such water. Assuming the other criteria for a Fifth Amendment taking were met, such fencing could be a taking.”³¹

The takings claim in *Hage VI* was only barred by the fact that the Hages could not show they held a valid vested water right, which would require the element of beneficial use. The Appeals Court explained, “...water rights do not include an attendant right to graze, but it does

²⁴ *Id.* at *5; citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

²⁵ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 at * 8 (Fed. Cir. 2012).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Est. of Hage v. U.S.*, ___ F.3d ___, 2012 WL 3043001 at * 7 (Fed. Cir. 2012)

³¹ *Id.*

not follow that the government may prevent all access to such water rights.”³² As a result, a takings claim could still be made in Nevada for interference with valid vested water rights.³³ In regards to compensation for range improvements, the Appeals Court clarified, that a claimant must “... request a determination by the Secretary [of the Interior] of the value of the improvements as required by the statute.”³⁴ Without such a request the claim would fail to exhaust administrative remedies.³⁵

CONCLUSION

Hage VI is a touchstone case for asserting private property interests on public lands. Parties interested in making a takings claim for water rights on federal public land must hold a valid vested water right under their state’s laws. Furthermore, gaining compensation for range improvements must follow statutorily available administrative remedies. While *Hage VI* marks the end of a long legal battle, it does not mean an end to protecting private property interests on public lands.³⁶ The Court of Appeals sets a slightly new tone by dismissing the claims as unripe in this instance. However, it does not go so far as to prevent private property ownership on federal public lands altogether.

³² *Id.*

³³ *Id.*

³⁴ *Id.*; see *Colvin Cattle v. United States*, 468 F.3d 803, 809 (Fed.Cir. 2006)(citing *Julius Goldman’s Egg City v. United States*, 214 Ct.Cl. 345, 556 F.2d 1096, 1099 (Ct.Cl. 1977)).

³⁵ *Id.*

³⁶ Paul Larmer, *The Sagebrush Rebels ride again – and again*, The High Country News (Dec. 10, 2007), <http://www.hcn.org/issues/360/17393>.