

# Victory at Pine Creek

BY TIM FINDLEY

*“[W]henever the legislators endeavor to take away and destroy the property of the people... they put themselves into a state of [w]ar with the people, who are thereupon absolved from any further obedience.”*

JOHN LOCKE, AS QUOTED BY SENIOR FEDERAL CLAIMS COURT JUDGE LOREN A. SMITH IN HIS LANDMARK DECISION COSTING THE GOVERNMENT OVER \$12 MILLION FOR THE TAKING OF WAYNE HAGE'S PROPERTY.

He had been with us at the end game. Before Wayne Hage died in 2006, he knew he had won perhaps the most significant land-use case of the 20th century. Fate would deny him and his wife Jean the glory of what is also probably the highest award for a grazing taking in history. But that award still seems somehow respectful to the 20-some years, more than 17 of them in courtrooms, that Hage fought on, a calm, determined man with no patience for fools.

It is the “clarity” of the decision that is its greatest beauty, agrees Hage’s daughter Mar-

garet Byfield, and the lead attorney on the case Ladd Bedford.

“It is a good, clear precedent that sends a simple message that the government must change its way of doing business in the West,” Bedford says.

Judge Smith awarded the Hage estate \$4.2 million for the taking of their water rights and improvements on grazing allotments in Nevada, but he also awarded interest and the cost of legal fees that are expected to amount to another \$8.6 million.

Attorneys Bedford and co-counsel Mike

Van Zandt and J. Dennis McQuaid took the case without fees, which are estimated to amount to some \$3 million. But almost as significant as the declaration of takings by the government was Judge Smith’s decision that the government may be held responsible for legal fees in such a case. That alone opens opportunities for ranchers and grazing right holders who have long feared they could not afford to defend their rights.

“Now you’ll see more lawyers stepping forward the way Ladd did,” says Tony Lesperance, Nevada state agriculture director. His testimony during the prolonged case was crucial in determining that the U.S. Forest Service had attempted to convert Hage’s rights to water to other uses without due process.

Bedford, Lesperance, all of the Hage children, and, toward the end, Hage’s second wife, former Idaho Congresswoman Helen Chenoweth, were part of a team, a small army brought together by the relentless intellectual faith of Hage. Helen called him “the smartest man I ever met.” Adding yet more tragedy and irony to the case, she was killed in an auto accident only five months after Wayne died of cancer.

The government may yet appeal the case, although legal observers think that unlikely in face of double damages that could be imposed.

It would be an exaggeration to say it was never about the money. Hage was driven to serious financial problems by the confiscation of his cattle and denial of grazing ground. Judge Smith’s award is meant to make the Pine Creek Ranch whole again. Hage’s son Wayne Jr. now works the ranch, and quietly has recently encountered still new federal challenges of trespass on the vast unfenced regions of the Monitor Valley. The court battles are not over.

It was a political victory for Hage’s long-held belief in a “split



C.J. HADLEY

*The Hage family during good times, gathered at the barn at Pine Creek Ranch in Monitor Valley, Nev. This photo was taken before ideologists with the U.S. Forest Service and the heavy hand of government reached into their world. From left: Margaret, Wayne, Jean, Ruth and Ramona. Young Wayne and Laura are in front.*



Wayne Hage and his second wife, former Rep. Helen Chenoweth, became celebrities and talked to groups across the country about the Hage case and private property rights. No one fought harder.

estate” of federal land and private use, and it was a strategic victory worthy of the date the decision was issued, June 6, the anniversary of D-day in 1944 and the date Wayne died in 2006.

Judge Smith wrote in his conclusion:

“The protection of the Fifth Amendment is most needed to protect the minority against the 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 these limits.”

There seems little doubt that the band of uniformed men Wayne Hage saw approaching him on horseback in 1979 were little impressed then by Hage’s property rights. It was not the first time Hage had encountered the mildly hostile presence of the Forest Service in Monitor Valley, but the corner was turned that summer day when that new survey crew told him the government intended to file claims on his water rights.

For more than the next decade, an ongoing dispute with federal authorities played out like a chess game as the Forest Service first announced its intentions to assist Nevada authorities in introducing herds of elk on Hage allotments. That had predictable consequences not only in torn fences and dangerous incidents during hunting season, but from the elk sharing precious water resources in the high desert. The Forest Service solution

was to build higher fences that would keep out cattle, but not leaping elk.

Now, the feds, customarily wearing sidearms in their approaches, were accusing Hage of trespass and demanding he give up the allotments where he had established troughs, spring boxes, and pipelines and taken his full beneficial rights to irrigation water established in 1866 for his own ranch.

It was obvious that the Forest Service wanted him out. It was just as obvious that Hage had no intention of leaving. Harassment in the form of threatening letters and unexpected visits piled up the tension. Hage held to his own sharp focus on his rights, but stayed as closely as possible within the rules.

The government simply changed the rules. They declared Meadow Canyon to be “overgrazed” and ordered Hage to keep his cattle away from that area. But Meadow Canyon had 25 miles of unfenced boundary with Monitor Valley. They knew that it would be impossible to keep all cattle off the meadow. Privately the Forest Service encouraged the input of environmental groups demanding an end to all grazing on “public” land where they determined a habitat was threatened.

Confiscation of Hage’s cattle began in 1991, and despite Hage’s attempt to redeem his stock by paying the cost of impoundment, the government sold them for \$39,150, the only amount for which the Hage estate was not compensated by Smith’s ruling. Reasonable time, the judge said, had expired.

Reluctantly, Hage went to court at the beginning of a 17-year odyssey that created Stewards of the Range and took Hage on

almost constant speaking tours explaining why the Court of Claims, not the Federal District Court, was the place to seek relief against unbridled bureaucratic actions.

It would require four separate hearings to determine the facts and judgment on the case. With small exceptions, Hage won every one.

The autocratic and unaccountable behavior of the Forest Service was repeatedly established. It not only demanded Hage remove his cattle, but denied him his own water rights and improvements. Forced to concede that the rancher had 1866 water rights for which he maintained ditches and other water works, the Forest Service tried to force him out by demanding that he use only “hand tools” in clearing the willows and other obstructions that the feds actively established to clog the streams.

As the stress twisted greater on Hage’s financial and family security, his beloved wife Jean died in 1996, leading some to believe that the ice man of Pine Creek might at last give up. But he only fought harder, carrying his case into a book and across the nation in speaking to sympathetic crowds and even to Congress. When he married Helen Chenoweth in 1999, they traveled together like celebrities, with her dazzling personality reflecting off Wayne’s demanding concentration.

“This conflict,” Judge Smith wrote, “is a drama worthy of a tragic opera with heroic characters; however, this is a court of law. Its duty is to decide cases in accordance with the law as that law is received from the cases which bind us, and the statutes, and the Constitution which the Court is bound by its oath to follow.”

But even to the judge, it seemed that more than just an issue of “law” was evident in Forest Service actions. As his ruling observed:

“Further, the hand-tools requirement prevented all effective ditch maintenance as it cannot be seriously argued that work normally done by Caterpillars and backhoes could be accomplished with hand tools over thousands of acres.... With hand tools the task would have required years or decades and required hundreds of workers.”

In all, the court awarded \$2,854,816.20 for the value of Hage water rights plus \$1,365,615 for the value of improvements, including 634 miles of road and trails, and 298 miles of fence.

Throughout all four hearings over the years, there was the looming, almost vulture-like presence of Johanna Wald of the Natural



After Wayne and Jean died, the family carried on, with young Wayne running the outfit. From left: Wayne Hage and his wife Yelena, Margaret (Hage) Byfield and husband Dan, Helen Chenoweth-Hage, David and Laura (Hage) Perkins, Jeff and Ramona (Hage) Morrison, and Jace and Ruth (Hage) Agee. This is Pine Creek Ranch's backyard. Helen died five months after Wayne on their anniversary, Oct. 2, 2006. BELOW: When Wayne married Helen Chenoweth in 1999, they traveled together like celebrities, with her dazzling personality reflecting off Wayne's demanding concentration. "This conflict," Judge Smith wrote, "is a drama worthy of a tragic opera with heroic characters; however, this is a court of law. Its duty is to decide cases in accordance with the law as that law is received from the cases which bind us, and the statutes, and the Constitution which the Court is bound by its oath to follow."



Resources Defense Council sitting in court as a "friend of the court." She was joined by representatives of the Sierra Club and the National Wildlife Federation (which was retained by much-discredited former Nevada Attorney General Frankie Sue Del Papa). All of these groups saw Hage as a symbol of the "Sagebrush Rebellion" in the 1970s. To the environmentalists, ruining Hage would stand for a precedent to eliminate grazing on public land. They lost.

"I think my mom [Jean] won," says Margaret Hage Byfield. "Mom wanted most to know what we own. I think that clarity was there."

The ruling was certainly vindication for Wayne Hage. "A right not defended," he said often, "is a right waived." Hage, for all the times he spoke on it, never really promised to win. He promised to fight. His presence during the four hearings was almost astonishing for his seemingly encyclopedic knowledge of the law and the case. It was as if he had memorized every word. He was often able to anticipate federal prosecutors as they searched

through volumes looking for the right citation.

"It's tremendous for me," says another daughter, Ramona Morrison, who worked closely with her father on the research. "It makes me feel even better knowing that it sends a message to many who told him it was impossible."

Yet, in his final ruling, Judge Smith seemed to leave no doubt about the fundamental importance of the case.

"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.'"

Maybe even Judge Smith won. We can reveal now for the first time that *RANGE* was happy to provide the advice the Washington, D.C., jurist asked for on picking out a new western outfit before he left Reno. ■

*Tim Findley has been following the Hage case for years and received a painful and prolonged education from the Ice Man. Long-time friend and RANGE publisher C.J. Hadley, and Findley, eulogized Hage at his funeral at Pine Creek Ranch.*