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Up Front

Has the fat lady sung?
By C.J. Hadley

The Hage family owns 130 valuable water rights in central Nevada, connected to their 7,000-acre base property in Monitor Valley. They had grazing preferences for 700,000 more. The original property rights—going back to the 1860s—were approved by state law long before the U.S. Forest Service and Bureau of Land Management existed.

Shortly after the Hages bought the ranch and all rights in 1978, it became obvious that several federal agencies coveted this huge stretch of high desert. Relentless pressure was put on the family. The abuse was so intense that Wayne and Jean Hage filed suit against the government in 1991 for a "taking" based on the Fifth Amendment to the Constitution. Nineteen years later, on Aug. 2, 2010, after expending enormous time, effort, money and blood, Chief Judge Loren A. Smith of the U.S. Court of Federal Claims ruled that the Hages' private property had been taken without just compensation and that the family was owed $14 million. By that time Jean was dead (heart failure), Wayne was dead (cancer), and Wayne's second wife, Helen Chenoweth-Hage, was dead (auto accident).

Did the new judges have a better understanding of the Hage case?

"No problem," the feds bragged after the Smith decision, saying they had "more lawyers and more money." They had brought another case against the family, in 2007, which held off the "just compensation" payment due to continuing litigation.

In a later trial for trespass against Wayne Hage Jr. and the Estate of E. Wayne Hage, District Court Chief Judge Robert C. Jones ruled again for the Hages. "Beginning in the late '70s and '80s," Jones wrote, "the Forest Service entered into a conspiracy to intentionally deprive the defendants of their grazing rights, permit rights, and preference rights." *(Check many stories listed under "Hage v. United States" at www.rangemagazine.com.)*

The trespass case was appealed to the 9th U.S. Circuit Court of Appeals and overturned by three judges claiming "bias against the government" by Judge Jones. *(See Ramona Hage Morrison's "The Ultimate Land Clearance" on page 28.)* The court remanded the case back to a district court judge who ruled based on taxes paid (not number of cattle alleged to be grazing in the wrong place)—$587,294.28.

This agonizing saga is still in court. On April 13, 2018, three different judges for the 9th Circuit heard Wayne Jr.'s appeal against that exorbitant fine for trespass, estimated based on evidence in the law to be approximately $15,000.

The three new judges on the 9th Circuit had a slightly better understanding of the case than the earlier panel. Without a grazing permit, which the agencies refused to give, cattle were not allowed out on the ranges. Wayne Jr. asked: "If you do not let me take cattle to water, how can I use it and keep my water rights? Forest Service district ranger Steve Williams told us to take a helicopter and fly the cow over the water and drop her in, but don't let her feet touch the ground."

Judge William A. Fletcher said with a chuckle, "Maybe you could use a two- or three-mile straw?" Judge Andrew J. Kleinfeld added (thanks to recent insane legislative action on climate change in Sacramento), "We aren't allowed straws in California." And Judge Fletcher asked Wayne, "Would it kill the cattle if you can't do this?"

"Yes, Your Honor."

Judge Kleinfeld stated: "You have a right and government has commensurate duty to allow you to take that water right. Looks as though you have gone up against a brick wall there." Judge Fletcher said: "The law has commands for them. You are not allowed to graze without a permit. They are not allowed to deny you the ability of taking your water to your ranch."

"If I do that, Your Honor," Wayne replied, "I am facing another prosecution. The last time I tried to use the water rights in a decent manner I got taken to court again."

Judge Richard C. Tallman asked the Department of Justice attorney: "If both sides are willing to talk to each other and work this out, would mediation be of assistance? Not by a regular mediator, perhaps by a judge?"

Elizabeth Ann Peterson responded: "Well, Your Honor, we ordinarily are eager to try to work out disputes...but this is not a case that I think is likely to reach a satisfactory understanding among all the parties simply because it's extremely complicated." Tallman added later: "Are the emotions here so raw on both sides after 26 years of litigation that there is no way in this lifetime that the Forest Service and BLM are going to issue grazing permits to Mr. Hage even if he applied for them now?" Tallman also asked Mark Pollot, lawyer for the Hage Estate: "Doesn't a trespass establish a vio-

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lation of the regulations?"

Pollot respectfully disagreed. "Your Honor, if a rancher's cattle are found in trespass, penalties include shortening the term of that permit, reducing the numbers of the permit, or refusing to grant a new permit. One case in the U.S. Court of Federal Claims happened more than 25 years ago. The trial court in that case found that Mr. Hage had the authority to bring his livestock on that land to access and use the water and the grazing was simply incidental to the water."

Judge Kleinfeld was worried about the extent of the trespass. "Mr. Hage obviously had a claim of rights and operated under a belief that he had a right. In addition, the first district court decision said he did indeed have a right to do what he did. In those circumstances, can it properly be held that his grazing without a permit but pursuant to a right that he believes and a district judge has accepted, did he *willfully* violate the law?"

Water rights are central in the West. Judge Fletcher asked the DOJ lawyer: "If you are not going to let Hage use it, don't you have to condemn it and pay for it? If cows don't drink water they are going to die." He also said: "You understand that there is no issue here on whether the government can grant an easement. The Hages already own the easement. It's property. The government is not the judge of this. This court is and this court says they have an easement."

With the creation of the USFS and subsequently the BLM later on, longtime ranchers had to start getting grazing permits. "The question in 1996 in the Court of Federal Claims," Wayne explained, "was prior to that did Nevada law recognize an appurtenant right to the forage as part of the water right itself? In order to take up the water on land in the desert and make beneficial use of it you would have to have cattle that had incidental grazing with it or you wouldn't be able to sustain cattle on those water rights. Could the Forest Service and BLM at that point in time extinguish that or was it a prior existing right, which they had no authority over?"

Wayne's elder sister, Ramona Hage Morrison, did much of the research for her family at the Library of Congress in Washington, D.C. She has attended, testified and researched every detail for the entire excessive nightmare.

"The 9th U.S. Circuit Court of Appeals made clear in both the Hunter [which the Hage case was based on] and our cases that if the government failed to issue a grazing permit to the holder of stockwater rights to access those

rights," she says, "then the owner of the water had the right to remove that water from its source under the Act of 1866 to another place of use. Much of the water belonging to Pine Creek Ranch arises within the boundaries of wilderness areas. In our case, the land-management agencies are in the difficult position of either having to issue a grazing permit or be faced with the removal of nearly all of the water within those wilderness areas. Should the BLM or USFS prevent removal of the water, as DOJ council has said in writing and in open court, the Hages can file another constitutional Fifth Amendment taking of property case without there being a question of ripeness."

Since nearly every ranch located on western federal lands can document that they own appurtenant vested and/or certificated water rights arising on federally managed lands, ranchers within the jurisdiction of the 9th Circuit who have been prevented by the USFS, BLM and other agencies from accessing their stockwaters may now be able to recoup their losses by bringing takings' lawsuits. "That, however," according to Judge Fletcher, "is not what we are dealing with here today."

"If you are not going to let Hage use it, don't you have to condemn it and pay for it? If cows don't drink water they are going to die."

For more than 100 years, the USFS and later BLM have been working diligently to destroy state law—the prior appropriation water doctrine. DOJ counsel has stated numerous times that the government has the right to the waters on the lands it "owns." Ranchers have heard this numerous times: "In many cases," Ramona says, "the agencies have repeatedly acted in clear contravention of numerous state and federal Supreme Court decisions as well as the plain language of the federal land-management statutes. Court records show the USFS and BLM singled out the Hage family for malicious prosecution, threats and intimidation, and economic destruction in what appears to be a conspiracy to destroy western water law. The DOJ attorneys who have been pushing this agenda in the courts may very well have legally impaled themselves on their own petard, openly bragging they could get any decision they wanted from the 9th Circuit in their efforts to destroy the Hages. Now they have. This court has said twice that ranchers can remove the water from federal lands when the government refuses them access."

A 9th Circuit decision on the trespass fine is expected sometime soon.

Has the fat lady sung? Not quite, but she's been warming up for a very long time. ■