EYE OF THE STORM

The Hage family's fight for liberty. Words by Ramona Hage Morrison. Photos © Jim Keen.

"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."

CHIEF FEDERAL DISTRICT COURT JUDGE ROBERT C. JONES, JUNE 6, 2012, U.S. V. THE ESTATE OF E. WAYNE HAGE AND WAYNE N. HAGE

The following multigenerational, 35-year Hage family saga chronicles not only unprecedented government abuse of power but also triumph in the face of extraordinary adversity. This is a very personal story of my family's fight for liberty. While American soldiers have paid the ultimate price for our liberty with their blood, the courtroom is a different type of battleground where freedom from a tyrannical government must be vigilantly defended by every generation. And by the grace of God, against all odds, we are prevailing.

In order to fully appreciate the enormity of recent rulings of the parallel Hage cases—the 1991 Hage v. U.S. "takings" case in the U.S. Court of Federal Claims and the 2007 U.S. v. Hage "forage right" case in the Federal District Court of Nevada, and in particular the June 6 preliminary decision by Judge Robert C. Jones—I must first take you back through time to put these decisions into context.

Moving Into the Eye of the Storm

In spring 1978, my parents Wayne and Jean Hage, my sisters Ruth, Margaret and Laura, brother Wayne and I moved from a ranch in the lush Sierra Valley of Northern California to Pine Creek Ranch, headquartered 60 miles north of Tonopah, Nev. My father had long dreamed of owning an "open range" ranch similar to ones he had worked on as a young man in northeastern Nevada and on the southern Idaho Owyhee Desert. Having harvested hay with mowing machines pulled by draft horses, and then pitching the same hay to cattle all winter, he sought the kind of ranch wherein only the milk cow and the saddle horses needed feeding through the winter.

Such was Pine Creek Ranch. Cattle summered on meadows on the 12,000-foot Mount Jefferson and 11,000-foot Table Mountain. During the fall, they migrated south down Monitor Valley to winter on the rich browse and desert grasses in Ralston Valley. Best of all, cattle work was accomplished almost entirely horseback. The ranch was stocked with beefmaster cattle bred to climb mountains, travel longer distances from water in the desert, and deliver their calves without assistance. For a young girl who routinely ditched 4-H sewing lessons in order to do anything horseback, Pine Creek was a dream come true. That was before we became acquainted with the U.S. Forest Service (FS) and Bureau of Land Management (BLM).

The Conspiracy

While Dad had been told by the previous owners of Pine Creek that the BLM and FS were becoming increasingly difficult to work with, he confidently believed, based upon past experience, that he was more than capable of cooperating with the local bureaucrats. But this notion quickly changed that first year when the forest ranger issued a mandatory five-day notice to move cattle while we attended my grandmother's funeral in Elko. He refused our request for an extension.

Mom and Dad worked endlessly to comply with the ever-changing terms and conditions of permits, to keep cattle numbers within permitted limits, and to move on and

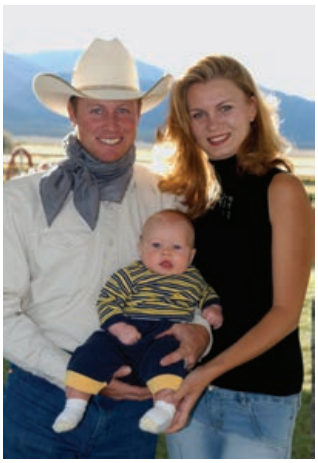
off allotments at designated times. They didn't play fast and loose with the grazing regulations. In fact, in order to document that they weren't overgrazing, for years they hired Al Steninger, a range consultant and former BLM employee who flew his twin-engine plane to Pine Creek to conduct range studies. His voluminous reports became evidence in three administrative appeals, all of which we won, but which ultimately provided no real remedy for the conflict. Mom and Dad spent hundreds of thousands of dollars documenting our proper range management and defending administrative appeals of onerous agency decisions. Ranch profits hemorrhaged accordingly.

Government harassment became intense. In one 105-day grazing season my parents were visited 70 times, usually by an armed employee, and received an additional 40 certified letters containing various citations and notices. One such five-day notice demanded we replace one missing fence staple on Table Mountain which could only be reached by a 20-mile horseback ride.

Finally, in 1991, the Forest Service, in what might be characterized as a set-up, cut the Meadow Canyon Allotment first by 35 percent, and then 100 percent for five years, allegedly to allow the range to "recover." In fact, it was a clear attempt to force us to abandon our water rights. The statutory requirement for abandonment of a water right is five years of nonuse. That allotment shared 25 miles of unfenced boundary with our Monitor Valley Allotment, managed by the BLM. Native cattle that, like salmon, were used to returning to the same mountain pastures every summer were repeatedly moved off the allotment by us. Even though my brother Wayne Jr. and our employees rode every other day to keep cattle from trespassing, FS ranger Dave Greider orchestrated two armed raids and confiscated over 100 head of cattle. Those cattle were subsequently sold at private auction and the proceeds kept to pay for their extravagant paramilitary actions.

The Fifth Amendment of the U.S. Constitution says, "No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Mom and Dad were never afforded the constitutional protection of due process of law *before* their livelihood was hauled away in cattle trucks. Rapists and murderers, as a matter of law, receive more due process than my parents did as law-abiding, taxpaying citizens of the United States. The ranch's 2,000 remaining cows were quickly gathered and sold at fire-sale prices to prevent further theft by the Forest Service. The ranch was for all practical purposes shut down. The most heartbreaking image I have from that period is of the two-foot-tall weeds growing in the corrals across from the ranch house.

The question then became, do we own property in the nature of vested and certificated water rights, easements, right-of-ways, forage and improvements on our range allotments, or are we merely serfs, grazing by permission of the U.S. government? These are rights which Dad documented in his book, "Storm Over Rangelands" (1989), but which, until recently, ranchers and attorneys viewed with great skepticism as being something that could be defended in court. Nonetheless, the U.S. Supreme Court ordered eight copies of the book for its law library. Mom and Dad decided to put that question before the U.S. Court of Federal Claims (USCFC) in Washington, D.C., in a Fifth Amendment taking of property case in 1991, Hage v. U.S.



Wayne Jr., Yelena and Bryan Hage. LEFT: Wayne Jr. has been checking cattle at the home ranch. He rests the land one year out of seven, letting native grasses thrive.

Court, Court, and More Court

The Hage rulings are the result of an incredible amount of litigation on the part of one family—not a corporation, not a state or federal agency—attempting to defend their constitutionally guaranteed property rights.

Four months after filing the landmark Hage v. U.S. "takings" case in 1991, my father Wayne Sr. was indicted for maintaining his 1866 Mining Act ditch right-of-ways. A weeklong criminal trial ensued with Nevada Federal District Court Judge Howard McKibbon presiding. Dad was convicted of destruction of government property totaling less than $100. He was then subjected to drug testing, house arrest, and searches by a federal probation officer. The 9th Circuit Court of Appeals overturned that appalling conviction.

In 1997, a two-week water adjudication for the Southern Monitor Valley was conducted at Dad's request. He successfully defended Pine Creek's vested and certificated water rights against the FS attempt to claim-jump the same waters. The state engineer's ruling was upheld by the 5th Judicial District Court of Nevada.

The USCFC takings case finally went to trial in 1998. Chief Judge Loren E. Smith first presided over a two-week trial to determine the property interests belonging to Pine Creek Ranch. In 2004, a second three-week trial was commenced to determine which property had been taken and its value. The family was ultimately awarded a $14 million judgment. In total, Judge Smith issued an unprecedented eight published decisions. Those trials occurred during my father's lifetime.

My mother Jean suffered a fatal stroke during surgery in 1996 at age 54, attributable to the enormous stress under which she had lived since we bought the ranch. Based on her title research of Pine Creek, she believed that we owned property interests in our grazing allotments, and was determined to protect those rights for the next generation—her five children. So far, the courts have agreed with her. In 1999, Dad married Idaho Congresswoman Helen Chenoweth, who fully backed my father in his epic battle with the U.S. government. Dad passed away from cancer at 69 in 2006, and Helen died tragically in a car crash four months later on their seventh wedding anniversary.

My generation's battle began a year later when the FS and BLM filed a Federal District Court lawsuit in 2007, U.S. v. Estate of E. Wayne Hage and Wayne N. Hage, attempting to gain an adverse ruling to undermine the USCFC takings case. They alleged we were trespassing on government-managed lands. A 22-day trial spanned from March 27 to June 6 of this year with Chief Judge Robert C. Jones presiding. Wayne Jr., a rancher representing himself pro se, attorney Mark Pollot, and myself as paralegal were up against a team of three Department of Justice attorneys, agency attorneys, paralegals and their staffs. Instead of its intended result, the forage right trial resulted in, among other things, Judge Jones finding criminal and civil contempt of court and obstruction of justice against BLM and FS

The northern winter range in the Ralston Valley viewed from the Silver Creek drainage. Historically, this country also ran a lot of sheep.

employees. He ordered a civil show-cause hearing for the last week of August.

During the trial in Reno, we recessed to travel to Washington, D.C., to attend a 30-minute appeal hearing April 2 before the Federal Circuit Court of Appeals in the now 22-year-old takings case of Hage v. U.S. Its decision was issued July 26, and will be discussed below.

The 13 trial weeks and multiple court rulings in which we prevailed do not count previous administrative appeals, all of which we won, but received no relief from bureaucratic harassment. It doesn't count the 100-plus depositions of bureaucrats and experts, motion and status hearings, writing or reviewing briefs, document production, and trial preparation. In preparation for our forage right trial this spring, unable to afford a legal staff, we copied 30 of the 50 case file boxes from the USCFC takings case. We also sent 47,000 pages of production documents to the government and prepared 1,230 trial exhibits, including 501 ranch title exhibits.

Wayne Jr. has carried on where Dad left off. While he manages Dad's estate as executor, he is also in charge of the estate's litigation, pursuant to Dad's instructions before his death. Running the ranch since graduating from Hillsdale College, Wayne worked closely with my father developing long-term plans for the ranch and litigation.

Judge Jones Makes Historical Ruling Protecting Rangeland Grazing

For more than a century the courts have wrestled with the issue of livestock grazing on federally managed lands, mostly to the detriment of the western rancher. Most of the adverse case law, however, is the result of rulings from cases which were lost procedurally. They never went to trial where actual evidence was heard. The Hage cases are unique and the only ones in 100 years where 501 title exhibits were brought before the court proving our preexisting rights to use the range and waters. The evidence establishing our rights was created under local laws and customs and court rulings beginning in the 1860s, long before the creation of either the BLM or FS. Those rights were preserved in every land law passed by Congress, including the 1934 Taylor Grazing Act and the omnibus 1976 Federal Land Policy & Management Act.

In his June 6 preliminary ruling in the forage right case, U.S. v. Hage, Judge Jones set the stage for his historic decision for western ranchers. In an unprecedented use of court time, he spent three hours reading into the record the published decisions from the USCFC takings case and adopting Judge Smith's findings as his own. He explained to the packed courtroom: "You'll have to have patience and listen for quite a while for the following reason. 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."

For the first time in history a court has protected the historical property interests ranchers own on western rangelands. It did so in two ways. First, the court found that both constitutional Fifth Amendment substantive due process and procedural due process rights attach to grazing preferences. The judge explained during trial that Congress intended to protect ranchers' preexisting rights by issuing grazing preferences only to the established ranchers who could prove historical use of the range and ownership of water rights under local law and custom. The finding of a substantive due process right to grazing preferences in practical terms greatly limits the government's ability to simply take grazing permits as it did in our case, or even

reduce livestock below the historical permitted numbers. And perhaps most importantly, it prevents the government from using the administrative appeals process as a weapon to tie ranchers up in endless futile appeals.

Second, Judge Jones found that based on evidence presented at trial, we had a half-mile forage right around and adjacent to all of our waters, attendant to our stock watering rights. Livestock could not be found in trespass in those areas.

Addressing the government's case alleging trespass of livestock on federally managed lands, Judge Jones found the cattle belonging to Wayne, or leased by him, not to be in trespass. Most of the trespass allegations were determined to be near or at the waters belonging to the Hage estate, and the government's method of documenting the allegations were deemed unreliable. At one point forest ranger Steve Williams suggested the only way we could access our stockwaters without being deemed to be in trespass by him was to lower cows to our water by helicopter.

Going forward, the court placed my family under the permanent injunctive relief of this court, similar to the civil rights busing cases. Wayne was ordered to immediately apply for grazing permits and the government was ordered to issue permits at the highest historical numbers of our predecessors. Judge Jones said he did not trust the BLM and FS to act within their discretion. Therefore, grazing permit levels can only be cut up to 25 percent for legitimate management purposes such as drought, and never permanently. But court approval must be sought for cuts over 25 percent, or to issue trespass or impoundment notices. We can now ranch unmolested for the first time in 35 years.

Government's Attempt to End-Run Hage v. U.S. Turns Into Justice Department Train Wreck

The advantage of 22 years of successful litigation is that it functions as a judicial hedge of protection from bureaucrats seeking revenge through the courts. The mistake made by both the FS and BLM and their legal counsel is that they repeatedly ignored eight published decisions from USCFC, the water decree, and criminal case—a fact not lost on Judge Jones. While bureaucrats and their attorneys live off the taxpayer and China, using government money to plot the eradication of western ranchers, in this case they seem to have been caught in a web of their own making.

During the five-year U.S. v. Hage forage right case, a counterclaim was filed by Mark Pollot for the estate which alleged the United States, through its agencies, agents, departments and employees, infringed upon and deprived the estate of its constitutionally protected property and other rights. Based on evidence at trial, the court found: "[S]ometime in the '70s and '80s, the Forest Service first and then BLM 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." Judge Jones added: "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 their private use so that they would have a private domain of the forester.... 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."

He then referred BLM manager Tom Seley and forest ranger Steve Williams to the U.S. Attorney, "for potential consideration for prosecution for the conspiracy," requiring the U.S. Attorney's office to report back in six months as to any action it's taken. He also gave Seley and Williams notice to appear for a show-cause hearing for civil contempt of court.

The first act the court recognized as 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." Judge Jones added, "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."

The four grounds for irreparable harm were: (1) that the BLM and FS sought stockwater rights with the specific intent to "give the water rights belonging to the Hages to others"; (2) they solicited and granted permits to others, namely Gary Snow of Fallon, Nev., and testified they knew Snow's cattle would use Hage waters; (3) the issuance of trespass notices to third parties whose cattle were under legal possession of Wayne Jr.; and (4) the recent solicitation sent to 75 ranchers for term grazing permit applications for the Hages' Ralston Allotment.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The Hages in 2006 at Pine Creek Ranch in Monitor Valley, Nev. From left: Young Wayne with wife Yelena, Margaret Hage Byfield, Dan Byfield, Helen Chenoweth Hage, David Perkins, Laura Hage Perkins, Jim Morrison, Ramona Hage Morrison, Jace Agee, Ruth Hage Agee.

The court specifically mentioned, "Snow is probably part of the conspiracy, but certainly the agency principals...and probably the U.S. Attorney out of Washington advising them was probably part of the conspiracy." The judge emphasized: "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."

The judge made a finding of RICO [Racketeer Influenced and Corrupt Organizations], or "racketeering," noting that RICO

doesn't have to benefit the participant but that it can be for the benefit of the enterprise. He said: "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."

Finally, as if the Justice Department wasn't having enough troubles of its own making, on June 6 the judge revoked automatic admission status to all Washington, D.C.-based Justice Department attorneys. He told the packed courtroom he had been "turned around" in four cases including ours and they would not be readmitted into his courtroom unless they could prove in a hearing that they could follow the rules of ethics and local rules of the court.

Hage "Takings" Case Suffers Narrow Setback at Fed Circuit

On July 26, the three-judge panel of the Federal Circuit Court of Appeals handed down its decision in the 22-year-old Hage v. U.S. takings case. Most of the findings by Judge Smith regarding the Hage property interests were not overturned, including a finding of a physical taking of waters in the ditches. As Judge Jones observed, the three-judge panel expressly said the Hages have "an access right" to their waters. Finally, the portion of the takings judgment that was overturned was on the basis that the claims were not ripe, not because the government was acting correctly. We have filed a petition for rehearing en banc before the full Federal Circuit panel and have already determined to pursue a petition for certiorari with the Supreme Court should we not receive satisfaction at the Federal Circuit.

Agency Brass Defend Agency Actions Leading to Contempt of Court

On Friday, August 31, a separate weeklong show-cause hearing ended with Judge Jones finding Tonopah BLM manager Tom Seley and Humboldt-Toiyabe forest ranger Steve Williams in contempt of court. The contempt, including witness intimidation, occurred during the pendency of the five-year-old forage right case mentioned above.

Seley was specifically found having intent to destroy the Hages' property and business interests. "Mr. Seley can no longer be an administrator in this BLM district. I don't trust him to be unbiased. Nor can he supervise anybody in this district," the judge stated in his order from the bench.

The contempt finding was the result of the FS and BLM having filed the 2007 suit against Wayne Jr. and the estate of E. Wayne Hage, but also seeking alternative remedies while the case was pending in derogation of the court's jurisdiction.

The court noted: "You got a random draw of a judge. You submitted to this civil process." Then Seley and Williams pursued their own remedies by trying to extort money out of third-party ranchers who had leased cattle to Wayne Jr. They issued trespass notices, demands for payments, their own judgments, and in one instance coerced a $15,000 settlement. All of this was done during the time the court had jurisdiction over these issues.

The hearing began Monday, August 27, with a cadre of agency heads from Washington, D.C., regional and state offices turning up at the Reno courthouse to defend their policies and employees. After intense questioning by the court, Judge Jones made witness credibility findings in which FS Region 4 Director Harv Forsgren was found lying to the court.

In his bench ruling, Judge Jones stated: "The most persuasive testimony of anybody was Mr. Forsgren. I asked him, has there been a decline in AUMs [animal unit months/livestock numbers] in the West. Then I asked him, has there been a decline in the region, or this district. He said he doesn't know. He was prevaricating. His answer speaks volumes about his intent and his directives to Mr. Williams." The court noted that anybody who is school age or older knows "the history of the Forest Service in seeking reductions in AUMs and even an elimination of cattle grazing during the last four decades. Not so much with the BLM—they have learned that in the last two decades."

In his findings of witness intimidation, Judge Jones noted: "Their threats were not idle. They threatened one witness' father's [grazing] allotment." The judge referenced testimony wherein Steve Williams delivered trespass notices accompanied by an armed employee. In one instance the armed man snuck up behind one of the witnesses with his hands ready to draw his guns. "Packing a gun shows intent," the court noted.

Seley and Williams were held personally liable for damages totaling over $33,000 should the BLM and FS fail to fund the losses to Hage and third parties. In addition, Judge Jones imposed an injunction wherein the BLM and FS are prevented from interfering with third-party leasing relationships when the livestock are in the clear operational control of Wayne Jr.

The Next Steps

The government is expected to appeal the Jones decision to the 9th Circuit Court of Appeals, where it assumes it will face a more favorable court. In the meantime, the criminal investigation is ongoing. The Hage family will be considering further legal actions as a result of the conspiracy findings of the court. It is likely these two conflicting cases, Hage v. U.S. and U.S. v. Hage, are headed for the U.S. Supreme Court.

My mother and father's dream of seeing the property rights protected for the next generation paved the way for the landmark court decisions we have today. However, never during all those weeks in court did we anticipate the tables would be so dramatically turned as they were in the forage right trial this spring.

In 1991, Dad was charged criminally by the FS for lawfully maintaining his ditch right-of-way. In 2012, on day 19 of the trial, the government began its cross-examination of Danny Berg, a rancher who had leased cattle to Wayne Jr. Evidence was presented in a letter from Tom Seley where Mr. Berg's father had been threatened that his allotment would be affected if Danny didn't immediately remove his cattle from Pine Creek.

The judge's reaction says it all: "So the threat in the prior letter is an abomination, and the threat here is an abomination, and especially tying it to a threat against the father's allotment is a total twice abomination.... And Mr. Seley will stand before this court for contempt with his checkbook in hand and potentially, as I give judgment, and potentially risk imprisonment as well. That's the clear notice. He'll need to hire a criminal attorney." ■

Ramona Hage Morrison, the oldest of the five Hage children, researched the Forest Service records at the National Archives for "Storm Over Rangelands" while working in Washington, D.C., for Rep. Pashayan. She worked for the Nevada Mining Association for five years and has worked on extensive title research jobs for ranchers across the West. She testified for nearly three days in the recent forage-right trial on the Pine Creek title exhibits first compiled by her mother. She also serves on the Nevada Board of Agriculture. Ramona lives with her family in Spanish Springs, Nev. For more information, contact her at rhmorrison@sbcglobal.net or 775.722.2517.