

# Water in the West: Vested Water Rights Merit Protection under the Takings Clause

Kathryn M. Casey\*

“The fundamental maxims of a free government seem to require that the rights of personal liberty and *private property should be held sacred*.”<sup>1</sup>

## I. INTRODUCTION

Property rights are a fundamental aspect of liberty in the United States.<sup>2</sup> The protection of individuals’ “settled, justified expectations”<sup>3</sup> in their property rights is integral to this concept. In fact, property owners’ expectations associated with long-standing property rights continue to be a significant consideration in takings jurisprudence.<sup>4</sup> The Takings Clause of the Fifth Amendment provides, in part, “nor shall private property be taken for public use, without just compensation.”<sup>5</sup> This clause is implicated

---

\* Juris Doctor Candidate, May 2003, Chapman University School of Law. Email: kcasey21@hotmail.com. The author would like to thank Professor Craig Anthony (Tony) Arnold for providing invaluable insight and guidance throughout the drafting of this comment; Mark D. Schopper for his inspiration in developing the topic of this comment, for graciously offering his editorial expertise, and for his abiding encouragement and support; and the *Chapman Law Review* editors for their technical proficiency and substantive suggestions in preparing this comment for publication. Copyright 2003, Kathryn M. Casey, all rights reserved.

<sup>1</sup> *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829) (emphasis added).

<sup>2</sup> See Lynda L. Butler, *The Pathology of Property Norms: Living Within Nature’s Boundaries*, 73 S. CAL. L. REV. 927, 997 (2000) (“Modern interpretations of property norms primarily focus on the relationship between property and political and economic freedom, justifying property rights because of their importance to individual liberty.”); David L. Callies, *Property Rights Since Penn Central: Regulatory Takings, Investment-Backed Expectations, and Economically Beneficial Use: How Perspectives on Property Rights Have Changed From Penn Central to Lucas*, 171, 173 (A.L.I.-A.B.A. Course of Study, Oct. 17, 1996) (recognizing that property rights have always been fundamental to and part of the preservation of liberty and personal freedom in the United States); Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 Sw. U. L. REV. 627, 638 (1988) (“To the Framers [of the Constitution], identifying property with freedom [and liberty] meant that if you could own property, you were free. Ownership of property was protected.”).

<sup>3</sup> Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 327 (2002).

<sup>4</sup> See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (holding investment-backed expectations are one consideration in a three-prong test used to determine if a regulatory taking has occurred).

<sup>5</sup> U.S. CONST. amend. V. If a taking occurs, the government must justly compensate the property owner. In other words, the property owner is entitled to receive the “fair mar-

whenever property is “taken” by the government. Throughout American history, takings jurisprudence has primarily focused on eminent domain in relation to real property.<sup>6</sup> The United States Supreme Court has fashioned several distinct tests for determining when government action amounts to a taking.<sup>7</sup> While these tests have provided guidance for courts deciding takings cases involving land rights, the appropriate analysis for takings cases relating to water rights is less clear.

In many parts of the western United States,<sup>8</sup> water is a limited, and even scarce, resource. Consequently, water rights are very valuable in those regions. The Prior Appropriation Doctrine, based on the concept of “first in time, first in right,” has therefore emerged as the most suitable water allocation scheme.<sup>9</sup> Water users in the West have used the Prior Appropriation Doctrine for over a century to secure vested property rights in water, and have thus developed significant expectations regarding its use.<sup>10</sup> Continued population expansion in the western United States, however, has led to a significant increase in governmental regulation of water.<sup>11</sup> As a result, a struggle has ensued over the allocation and regulation of water in the West.<sup>12</sup> This ongoing struggle is exemplified by the recent case of *Hage v. United States*.<sup>13</sup> This comment addresses the same issues confronted by the *Hage*

---

ket value” of the property on the date of the taking. *United States v. 564.54 Acres of Land*, 441 U.S. 506, 511 (1979). See generally George W. Miller, *Natural Resources Development and Takings Litigation*, 33 (A.L.I.-A.B.A. Course of Study, Jan. 7, 1999) (discussing “just compensation”).

<sup>6</sup> See Michael Allan Wolf, *Pondering Palazzolo: Why Do We Continue to Ask the Wrong Questions?*, 32 ENVTL. L. REP. 10367 (2002).

<sup>7</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (holding regulation that deprives landowner of all economically viable use of property is a *per se* regulatory taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding permanent physical occupations of property constitute a *per se* physical taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (holding temporary physical invasions may constitute a physical taking in some circumstances); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (establishing a three-prong test to determine whether a diminution in economically viable use constitutes a regulatory taking).

<sup>8</sup> In this comment the “western United States” encompasses the eleven western states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

<sup>9</sup> Marcus J. Lock, *Braving the Waters of Supreme Court Takings Jurisprudence: Will the Fifth Amendment Protect Western Water Rights from Federal Environmental Regulation?*, 4 U. DENV. WATER L. REV. 76, 77 (2000). See also 2 *WATERS AND WATER RIGHTS* § 12.02(b) (Robert E. Beck ed., 1991) [hereinafter 2 *WATER RIGHTS*].

<sup>10</sup> See Sean E. O’Day, *San Carlos Apache Tribe v. Superior Court: Rejecting Legislative Favoritism in Water Right Allocations*, 4 U. DENV. WATER L. REV. 29, 29 (2000).

<sup>11</sup> See Chris Bromley, *A Political and Legal Analysis of the Rise and Fall of Western Dams and Reclamation Projects*, 5 U. DENV. WATER L. REV. 204, 208 (2001); David H. Getches, *The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States’ Role?*, 20 STAN. ENVTL. L.J. 3, 9 (2001).

<sup>12</sup> Getches, *supra* note 11, at 8.

<sup>13</sup> 35 Fed. Cl. 147 (1996); 35 Fed. Cl. 737 (1996); 42 Fed. Cl. 249 (1998), *rescinded in part by* 51 Fed. Cl. 570 (2002).

Court. That is, should water rights be afforded protection under the Takings Clause, and if so, what level of protection is appropriate? The position taken in this comment is that water rights merit *significant* protection.

It appears that at least one federal judge is in agreement with this position. At the very minimum, Judge Loren A. Smith, the presiding judge in *Hage v. United States*, has brought the issue of vested water rights to the forefront of takings jurisprudence. Moreover, Judge Smith's decision in *Hage* secured at least one victory for appropriators of "old" vested water rights by holding that vested water rights and corresponding ditch rights-of-way are "property interests" subject to protection under the Takings Clause.<sup>14</sup> This holding provides the core of the discussion section of this comment. To appreciate the complexity of the water rights issues addressed in *Hage*, however, some historical and contextual background is necessary and is, therefore, provided for the reader.

Section II of this comment provides an in depth discussion of *Hage*, including the facts, procedural history, and the court's analysis of the issues as of the publication of this comment. *Hage* epitomizes the tension that exists between the federal government and individuals who possess water rights in the public domain. Accordingly, the discussion of *Hage* is critical in providing the background and context through which one can understand the issues analyzed in the later sections of this comment.

Section III provides an overview of the historical development and scope of water rights. The overview illustrates that enforcement of the Prior Appropriation Doctrine has consistently secured and protected expectations in water rights.<sup>15</sup> This section also describes the process by which one acquires a vested water right, and how the timing of appropriation can have a significant impact on the value of that right. Finally, an explanation of the inherent differences between land and water as natural resources is included, highlighting the unique constitutional considerations presented by takings disputes involving water rights.

Section IV of this comment discusses constitutional protections, specifically the Due Process Clause and the Takings Clause,<sup>16</sup> that provide protection to water rights and private property interests. Two opposing ideologies are discussed: first, the republican-positivist tradition,<sup>17</sup> and second, the federalist-natural

---

<sup>14</sup> *Hage*, 35 Fed. Cl. at 172 ("[W]ater rights are not 'lesser' or 'diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.")

<sup>15</sup> See discussion *infra* Part III.

<sup>16</sup> U.S. CONST. amend. V.

<sup>17</sup> Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 226 (1995).

law tradition.<sup>18</sup> On the one hand, supporters of the republican-positivist tradition embrace the Public Trust Doctrine and the allocation of natural resources to further the public good, even if such focus results in the diminution of private property rights and associated expectations.<sup>19</sup> On the other hand, the federalist-natural law tradition encourages increased protection of private property interests and expectations, while advocating against governmental regulation that could compromise those interests.<sup>20</sup> The latter tradition welcomes the position taken by the *Hage* court thus far, and is consistent with the notion that the scope of water rights should be far-reaching. In that vein, the discussion will show why water rights, although different in nature from land rights, should receive important consideration in the context of takings jurisprudence.

Finally, Section V discusses the relevant physical and regulatory takings tests that are traditionally invoked in land-rights cases and applies those standards to the takings claims posed in *Hage*.<sup>21</sup> The Supreme Court has found it necessary to set precedent requiring monitoring of government activity in the area of land use regulation.<sup>22</sup> This section discusses why the *Hage* court should take the next logical step and elevate the level of protection afforded to vested water rights to conform with the existing framework for takings cases involving land. When such a framework is applied to takings disputes involving water, long-standing expectations associated with water rights are preserved. The comment concludes with some final thoughts from the author.

## II. CASE OVERVIEW: *Hage v. United States*

Most Americans would tell you today that the western lands belong to them, they are 'public.' But the old-timers still alive who came from the families that first settled these lands will tell you a different story . . . . How the West changed from an area governed by state property law to one strangled by federal rules and regulation is a lesson to the rest of America. How the West and America climbs out of this hole, is what *Hage v. United States* is all about.<sup>23</sup>

---

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See cases cited *supra* note 7 (articulating the appropriate cases that have outlined tests for physical and regulatory takings).

<sup>22</sup> See, e.g., *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>23</sup> Margaret Hage Gabbard, *For Land & Liberty: The Story Behind Hage v. United States*, at [http://www.stewardsoftherange.org/hage\\_v\\_us/hage\\_v\\_us-bkgnd.htm](http://www.stewardsoftherange.org/hage_v_us/hage_v_us-bkgnd.htm) (last visited Mar. 17, 2003). The Stewards of the Range website was created after the filing of *Hage v. United States* and is intended to provide information related to the progression of the case, as well as raise money for the litigation fees incurred by the Hages.

### A. The Hages and Pine Creek Ranch

In the Spring of 1978, Wayne and Jean Hage<sup>24</sup> purchased Pine Creek Ranch (the "Ranch"), which consisted of approximately 700,000 acres located in the high desert mountains of central Nevada.<sup>25</sup> The Ranch was an "old cow outfit steeped deep in western tradition – tough horses, good cowhands, and family."<sup>26</sup> Indeed, the Hages used the Ranch to operate a complex ranching operation with over 2,000 head of cattle.<sup>27</sup> To operate the Ranch economically, the Hages depended on government owned rangeland, water in the Toiyabe National Forest, and ditch rights-of-way (easements across federal lands) to transport the water.<sup>28</sup> A revocable grazing permit was granted to the Hages in 1978, allowing them to graze the cattle during certain times of the year on six specific allotments located within the Toiyabe National Forest.<sup>29</sup>

The Hages claim that not long after they purchased the Ranch they were beset by the "rabid environmental agenda that was spreading across the nation."<sup>30</sup> Within two months of the Hages' purchase, the National Park Service offered to buy the Ranch for only half of the price originally paid by the Hages.<sup>31</sup> Over the next twelve years, the Hages allegedly faced "relentless harassment" from the United States Forest Service and the Bu-

---

<sup>24</sup> For purposes of uniformity, plaintiffs Wayne and Jean Hage are referred to as "the Hages" throughout the course of this comment. Sadly, however, Jean Hage passed away shortly after the Hages' summary judgment victory in 1996. Gabbard, *supra* note 23. Jean Hage's estate is thereafter listed as a co-plaintiff in the 1998 and 2002 Hage opinions.

<sup>25</sup> Hage v. United States, 42 Fed. Cl. 249 (1998). See also David Morgan, *The Revealing Story of a Rancher and the National Debt*, ASHEVILLE TRIB., Oct. 29, 1999. The Ranch stretches eighty miles from North to South and encompasses over 1,100 square miles. Gabbard, *supra* note 23.

<sup>26</sup> Gabbard, *supra* note 23.

<sup>27</sup> Hage v. United States, 35 Fed. Cl. 147, 153 (1996). See also Gabbard, *supra* note 23.

<sup>28</sup> Hage, 35 Fed. Cl. at 153.

<sup>29</sup> *Id.* The Bureau of Land Management (BLM) is responsible for the administration of grazing on federal lands, and oversees the granting of permits. The BLM "leases approximately 170 million acres of public land for grazing purposes." Brian L. Frank, *Cows in Hot Water: Regulation of Livestock Grazing Through the Federal Clean Water Act*, 35 SANTA CLARA L. REV. 1269, 1269 (1995). The term for a grazing permit administered by the BLM is ten years. Hage, 35 Fed. Cl. at 153 n.1. Each permit establishes general provisions and requirements for the use of federal land for grazing. The Hages' permit also included individualized terms, dictating the number, kind, and class of livestock permitted to graze, as well as the period of use. *Id.* at 153. The Hages were responsible for maintenance and improvements on the federal land, and were also required to graze at least ninety percent of the permitted number of cattle. *Id.* at 153–54. Failure to abide by permit requirements resulted in termination or revocation of the permit: "[T]his grazing permit may be revoked or suspended, in whole or in part, for failure to comply with any of the provisions and requirements specified . . . [T]he grazing privilege will terminate 'whenever the area described in this permit is needed by the Government for some other form or use.'" *Id.* at 153.

<sup>30</sup> Gabbard, *supra* note 23.

<sup>31</sup> *Id.* See also Wayne Hage, *Rancher Wins Fight for Rights*, 18 THE NEW AMERICAN 10 (May 20, 2002), at [http://www.thenewamerican.com/tna/2002/05-20-2002/vo18no10\\_rancher.htm](http://www.thenewamerican.com/tna/2002/05-20-2002/vo18no10_rancher.htm).

reau of Land Management. Those agencies were reportedly encouraged by a number of active environmental groups.<sup>32</sup> Much of this alleged harassment related to two of the Hages' cattle grazing allotments and ditch rights-of-way.

### 1. Table Mountain Allotment

In 1979, the Hages opposed the Nevada Department of Wildlife's introduction of elk into the Table Mountain allotment of the Toiyabe National Forest.<sup>33</sup> The Hages claimed that the elk consumed water and forage needed for their cattle, and that elk hunters interfered with their cattle's ability to graze and move about the federal land.<sup>34</sup> The government responded that the Hages needed to "share" the usage of public rangelands.<sup>35</sup> Later, in 1988, the Forest Service claimed that the Hages were in violation of their grazing permit, thus requiring that the Hages remove their cattle from the Table Mountain allotment by September 1988.<sup>36</sup> Subsequently, in 1989, the Forest Service notified the Hages that twenty percent of their cattle allotment would be suspended for that year.<sup>37</sup> The Forest Service then cancelled twenty-five percent of the Hages' grazing permit in 1990 and suspended another twenty percent of the remaining Table Mountain allotment for a period of two years.<sup>38</sup>

### 2. Meadow Canyon Allotment

The Hages also experienced problems with the Meadow Canyon allotment, another one of their allotments in the Toiyabe National Forest. In 1980, the Forest Service "diverted the flow of water" in the Meadow Canyon allotment, and allegedly used the water as a "domestic water supply" for the Forest Service's guard station.<sup>39</sup> The Hages claimed to have appropriated all of this

---

<sup>32</sup> Gabbard, *supra* note 23.

<sup>33</sup> *Hage*, 35 Fed. Cl. at 154.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* The Hages subsequently removed the majority of cattle by October 22, 1988. *Id.*

<sup>37</sup> *Id.* This notification followed a "show cause" letter sent to the Hages in early 1989. The letter asked the Hages to illustrate why the Forest Service should not reduce the permitted number of cattle by twenty percent. The Forest Service also accused the Hages of "excess use of the rangeland" during the one-month period in 1988 when the permit was expired. *Id.*

<sup>38</sup> *Id.* at 155. This action followed the Hages' failure to graze any of their cattle during the 1990 season without notice to the Forest Service. The Forest Service deemed this inaction "non-use" and a violation of the 1984 grazing permit. Consequently, the Forest Service sent the Hages a second "show cause" letter. Upon the Hages response to the letter and request for an evidentiary hearing, the Forest Service implemented the twenty-five percent cancellation and twenty percent suspension. *Id.* at 154-55.

<sup>39</sup> *Id.* at 155. Specifically, the "district ranger [in Meadow Canyon] decided they would pipe the water from the spring, through a newly installed \$50,000 water purification facility, into [the Forest Service Ranger Station]." Morgan, *supra* note 25. The water was

water, and requested a water rights adjudication to prevent the Forest Service's diversion.<sup>40</sup> During a subsequent field hearing, the Nevada state water engineer acknowledged the Hages' "ownership [of water] and the Forest Service's illegal confiscation."<sup>41</sup> Undeterred, the Forest Service demanded in 1990 that the Hages remove their cattle from the Meadow Canyon allotment because of alleged "serious range deterioration."<sup>42</sup> Despite the Hages' initial efforts to remove the cattle, the Forest Service informed the Hages that any cattle or livestock found on the Meadow Canyon allotment after November 12, 1990, would be confiscated and impounded.<sup>43</sup> In 1991, the Forest Service suspended the Hages' permit for five years and decreased by thirty-eight percent the number of cattle allowed on the allotment.<sup>44</sup> The Forest Service also twice impounded cattle found grazing on the Meadow Canyon allotment during the summer of 1991.<sup>45</sup>

### 3. Ditch Rights-of-Way

The Hages also contended ownership of ditch rights-of-way, which allowed for the transportation of water for stock watering, irrigation, and domestic purposes.<sup>46</sup> Although the Forest Service acknowledged those rights-of-way and their importance for water transportation, the parties disagreed as to the scope of the rights under the Act of 1866.<sup>47</sup> In 1986, the Forest Service notified the Hages that it reserved authority to regulate vested ditch rights-of-way, and would require pre-approval for any ditch maintenance.<sup>48</sup>

---

diverted from Meadow Spring to Q (McAfee) Spring. The Forest Service claimed that Meadow Spring was experiencing contamination. *Hage*, 35 Fed. Cl. at 155.

<sup>40</sup> *Hage*, 35 Fed. Cl. at 155.

<sup>41</sup> Morgan, *supra* note 25. Despite the state water engineer's determination that the Hages possessed ownership interests in the water on Meadow Canyon, the "Forest Service has maintained a fence around the spring so that cattle and wildlife [could not] drink, and the water [was] still being piped into the ranger's [station]." *Id.*

<sup>42</sup> *Hage*, 35 Fed. Cl. at 155. In August 1990, the Forest Service sent a "show cause" letter requesting that the Hages illustrate why their permit should not be cancelled (based on their failure to remove 100% of their cattle from the Meadow Canyon allotment). *Id.*

<sup>43</sup> *Id.* Between August and November 1990, the Hages removed sixty-two percent of their cattle from the Meadow Canyon allotment. However, 128 cattle head (thirty-eight percent) remained on the allotment. *Id.*

<sup>44</sup> *Id.* The thirty-eight percent reduction is equivalent to the percentage of cattle found on the allotment in October 1990. *Id.*

<sup>45</sup> *Id.* According to the Hages, the Forest Service brought in over thirty riders to round up the cattle. Half of the riders were armed with semi-automatic rifles and wore bulletproof vests. The Hages allege that the riders ran a bull and cow to death before presenting the Hages with a bill for their "confiscation expense." Gabbard, *supra* note 23.

<sup>46</sup> *Hage*, 35 Fed. Cl. at 156.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* In July 1991, Wayne Hage and his employee, Lloyd Seaman, were arrested and convicted for violation of the Forest Service regulations after cutting and removing trees adjacent to the ditch rights-of-way. The Ninth Circuit subsequently reversed the conviction. *Id.* See *United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994).

## B. The Hages' Claims

On September 26, 1991, the Hages filed suit in the United States Court of Federal Claims<sup>49</sup> in Washington, D.C., alleging "constitutional, contractual and statutory causes of action."<sup>50</sup> The Hages argued that they possessed a property interest in their "grazing permit, water rights, ditch rights-of-way, forage on the rangeland, cattle and ranch."<sup>51</sup> Moreover, they maintained that the actions of the Forest Service and federal government constituted an unlawful deprivation of those rights.<sup>52</sup> Specifically, the Hages claimed:

First . . . the suspension and cancellation of the grazing permit deprived them of their right to graze their cattle. Second . . . they were deprived of their water rights by the Forest Service canceling and suspending their permit and diverting and using their water. Third . . . the [federal government] took their property interest in the ditch rights-of-way by forbidding [them] access to the ditches. Fourth . . . non-indigenous elk consumed forage and drank water reserved for [their] cattle in violation of [their] property rights. Fifth . . . when the Forest Service impounded [their] cattle, [the federal government] took [their] personal property. Sixth . . . by canceling and suspending portions of their grazing permit and interfering with their water rights, ditch rights-of-way, and forage, [the federal government] . . . deprived [them] of all economic use of their ranch.<sup>53</sup>

In addition, the Hages claimed that grazing permits are contracts and that the cancellation or suspension of the permits resulted in a breach of contract entitling them to damages.<sup>54</sup> The Hages also sought compensation under 43 U.S.C. § 1752(g)<sup>55</sup> for the improvements they made to federal rangeland.<sup>56</sup> The Hages later filed an amended complaint including a claim of ownership in the 752,000 acre surface-estate adjacent to the Ranch.<sup>57</sup>

## C. The *Hage* Court's Analysis and Holding

In 1996, after a contentious battle between the parties, the *Hage* court concluded that: (1) the United States Court of Federal Claims had jurisdiction to hear the Hages' claims; and (2) the

---

<sup>49</sup> *Hage*, 35 Fed. Cl. at 156. Almost all takings claims against the United States must be brought in the United States Court of Federal Claims (CFC). For an extensive discussion of the CFC, see Robert Meltz, *Takings Claims Against the Federal Government*, 475 (A.L.I.-A.B.A. Course of Study, Sept. 30, 1999).

<sup>50</sup> *Hage*, 35 Fed. Cl. at 156.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 43 U.S.C. § 1752(g) (1986).

<sup>56</sup> *Hage*, 35 Fed. Cl. at 156.

<sup>57</sup> *Hage v. United States*, 42 Fed. Cl. 249, 249 (1998).

Hages' claims were ripe for review.<sup>58</sup> Next, the court discussed the Hages' complaint in light of the federal government's motion for summary judgment. As previously noted, the initial complaint argued three theories of recovery: (1) the grazing permit created a binding contract between the Hages and the federal government, which the federal government breached; (2) the federal government's actions constituted a taking of the Hages' property without just compensation; and (3) the Hages were entitled to compensation for improvements they made to the Toiyabe National Forest.<sup>59</sup> The Court addressed each claim individually.

### 1. A Grazing Permit is a License, Not a Contract

The court concluded as a matter of law that a grazing permit does not create a binding contract between two parties.<sup>60</sup> The court noted in its decision that a grazing permit's language and characteristics are indicative of a license, rather than a contract.<sup>61</sup> In addition to determining that the permit was not a binding contract, the court also found that the Forest Service, acting as an agent of the federal government, did not possess the requisite authority to bind the federal government contractually.<sup>62</sup> Consequently, the Hages' permit did not give rise to contractual rights or duties, but only granted the Hages "certain exclusive privileges based upon historical grazing practices."<sup>63</sup> Because this had been the original contention of the federal government, the court granted that aspect of the federal government's motion for summary judgment.

### 2. Property Interest in the Grazing Permit and the Rangeland

The Hages had argued that because their grazing permit was issued "in recognition of rights which existed prior to the creation of the Toiyabe National Forest," they possessed a protected property right in the permit.<sup>64</sup> The court rejected this argument and held in favor of the federal government, finding that the Hages did not possess a protected property interest in either the permit or

---

<sup>58</sup> *Hage v. United States*, 35 Fed. Cl. 147, 160–63 (1996) (addressing both defendant's and plaintiffs' claims regarding jurisdiction and ripeness before reaching its conclusions).

<sup>59</sup> *Id.* at 165.

<sup>60</sup> *Id.* at 166.

<sup>61</sup> *Id.* The court stated that a license "creates a personal or revokable [sic] privilege allowing a specific party to utilize the land of another for a specific purpose but does not vest any title or interest in such property in the licensee." *Id.* See also ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 404 (1950). In the alternative, a contract is "analogous to a lease . . . and creates a vested property interest against the world." *Hage*, 35 Fed. Cl. at 166. See also ARTHUR LINTON CORBIN, 3A CORBIN ON CONTRACTS § 686 (1960).

<sup>62</sup> *Hage*, 35 Fed. Cl. at 166.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 168.

the actual rangeland itself.<sup>65</sup> The court enumerated two reasons for this finding. First, the Hages were unable to demonstrate vested property rights in the rangeland under the Act of 1866.<sup>66</sup> Second, a “grazing permit is a right created by the government, and was never intended to be a compensable property right.”<sup>67</sup>

Furthermore, the court found that the permit granted only a “preference to use the allotment before the government gave the right to another.”<sup>68</sup> Thus, the value of the Hages’ “fee lands and water rights must be valued independently of any value added by any appurtenant grazing permits or grazing preferences.”<sup>69</sup> Although the revocation of the permit may have caused a significant diminution in value of the Hages’ Ranch, the court emphasized that “investment-backed expectations and reliance on the privilege to graze do not, in themselves, create a property interest in the rangeland or the permit,”<sup>70</sup> regardless of “how seemingly unjust the consequences”<sup>71</sup> to the Hages.

### 3. Vested Property Interest in the Water

In 1996, the court found that “the right to appropriate water can be [a] property right” protected under the Fifth Amendment.<sup>72</sup> Indeed, constitutional traditions mandate that water rights, “which are as vital as land rights,” receive equal protection under the Fifth Amendment to the Constitution.<sup>73</sup> If the federal government re-routed the Hages’ water such that they could not make beneficial use of their water rights, the federal government could not reasonably argue in the alternative that the Hages’ water rights were taken due to lack of use.<sup>74</sup> Ultimately, the court found that the Hages had demonstrated ample evidence indicating own-

---

<sup>65</sup> *Id.* at 170–71.

<sup>66</sup> *Id.* at 170.

<sup>67</sup> *Bradshaw v. United States*, 47 Fed. Cl. 549, 553 (2000). *See also Alves v. United States*, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (holding grazing permits do not constitute compensable property under the Fifth Amendment); *United States v. Fuller*, 409 U.S. 488, 492 (1973) (holding that the government is not required to compensate for value it itself created when issuing a grazing permit).

<sup>68</sup> *Hage*, 35 Fed. Cl. at 170. In short, a preference “grants a party the right of first refusal, not a property right in the underlying land.” *Id.*

<sup>69</sup> *Hage v. United States*, 51 Fed. Cl. 570, 587 (2002).

<sup>70</sup> *Hage*, 35 Fed. Cl. at 171.

<sup>71</sup> *Hage*, 51 Fed. Cl. at 587 (citing *Hage v. United States*, 35 Fed. Cl. 147, 169 (1996)).

<sup>72</sup> *Hage*, 35 Fed. Cl. at 172.

<sup>73</sup> *Id.* Specifically, the court stated:

*Amici* provides no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection. This is particularly true in the West where water means the difference between farm and desert, ranch and wilderness, and even life and death. This court holds that water rights are not “lesser” or “diminished” property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.

*Id.*

<sup>74</sup> *Id.* at 173.

ership of vested water rights, and allowed the takings claim to proceed.<sup>75</sup>

In 1998, the court published a brief preliminary opinion in which it held that the Hages did meet the threshold test of ownership, and successfully demonstrated a valid property interest in their vested water rights.<sup>76</sup> In 2002, the court issued a final factual opinion in which it articulated the extent and scope of the Hages' water rights.<sup>77</sup> Based on a preponderance of the evidence, the court found that the Hages and their predecessors had appropriated and maintained vested water rights in several "ditches, wells, creeks, and pipelines . . . that cross their land and grazing areas as well as the Monitor Valley, Ralston, and McKinney allotments."<sup>78</sup>

#### 4. Vested Property Interests in Act of 1866 Ditch Rights-of-Way

The Hages also claimed that the federal government "took" their property when it denied them access to their 1866 Act ditches.<sup>79</sup> In 1996, the court granted the Hages the opportunity to substantiate ownership of vested ditch rights-of-way, such that their "desired use and maintenance of [those] rights [did] not exceed the scope of their property interest, [thus] requiring a special use permit."<sup>80</sup> The 1998 preliminary opinion stated 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."<sup>81</sup> Furthermore, the court defined the scope of the Hages' ditch rights-of-way as including the "ground occupied by the water and fifty feet on each side of the marginal limits of their 1866 ditch."<sup>82</sup>

In 2002, the final factual opinion confirmed that the Hages successfully established that they, together with their predecessors in interest, had created and used "a subset" of the claimed 1866 ditches prior to the creation of the Toiyabe National Forest in 1907.<sup>83</sup> In addition, the Hages presented evidence demonstrat-

---

<sup>75</sup> *Id.*

<sup>76</sup> See *Hage v. United States*, 42 Fed. Cl. 249 (1998).

<sup>77</sup> *Hage v. United States*, 51 Fed. Cl. 570, 570 (2002).

<sup>78</sup> *Id.* at 576.

<sup>79</sup> *Id.* at 580. The Hages claim that the federal government's denial of access to the 1866 Act ditches "is a physical takings claim because . . . the government has physically barred them from the land, with threat of prosecution for trespassing if they enter federal lands to maintain their ditches." *Id.* at 580 n.13. See also *infra* text accompanying note 92 (discussing the validity of this takings claim).

<sup>80</sup> *Hage v. United States*, 35 Fed. Cl. 147, 174 (1996).

<sup>81</sup> *Hage v. United States*, 42 Fed. Cl. 249, 251 (1998).

<sup>82</sup> *Hage*, 42 Fed. Cl. at 251.

<sup>83</sup> *Hage*, 51 Fed. Cl. at 583. The Hages "proved that only a subset of their vested water rights actually constitute[d] 1866 Act Ditches." *Id.* The following are 1866 ditches:

ing that those same ditches had been consistently maintained and used since 1907.<sup>84</sup> Undisputed trial testimony regarding “historic use of [those] ditches for livestock watering,” and congressional intent expressed when passing the 1866 Act, revealed that “the United States intended to ‘respect and protect the historic and customary usage of the range.’”<sup>85</sup> In accordance with congressional intent, the court affirmed several of the Hages’ claimed vested ditch rights-of-way.<sup>86</sup>

The opinion further stated that, although the federal government had a right to *reasonably* regulate the Hages’ vested ditch rights-of-way that traverse federal land, the federal government did not have the right to deny the Hages access to their vested water rights “without providing a way for them to divert that water to another beneficial purpose if one exist[ed].”<sup>87</sup> The court emphasized that the government cannot cancel grazing permits in an attempt to prohibit individuals from acquiring water by rerouting it for another valid and beneficial use.<sup>88</sup> Quintessentially, the Hages “ha[d] a right to go onto the land and divert the water.”<sup>89</sup>

##### 5. No Property Right in the 752,000 Acre Surface-Estate

In 1997, the Hages amended their original complaint to include a claim to 752,000 acres of surface-estate for grazing.<sup>90</sup> Essentially, the acreage at issue reflected the area encompassed in their previously permitted grazing allotments.<sup>91</sup> Although the Hages relied on a long and extensive line of federal laws dating back to the eighteenth century,<sup>92</sup> the court was not persuaded to find in favor of the Hages.<sup>93</sup> Instead, the court found that while

---

Andrew’s 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, and White Sage Irrigation Ditch. *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 581 (quoting *Hage v. United States*, 42 Fed. Cl. 249, 251 (1998)).

<sup>86</sup> *Id.* at 584. The following are not 1866 ditches, and thus did not give rise to vested rights: Baxter Spring Pipeline, Corcoran Pipeline, Desert Entry Ditch, Hot Well Ditch, Mount Jefferson Spring and Pipeline, and Salisbury Well Pipeline. *Id.*

<sup>87</sup> *Id.* “[R]easonable’ 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.” *Elko County Bd. of Supervisors v. Glickman*, 909 F. Supp. 759, 764 (D. Nev. 1995). See also *Hage v. United States*, 51 Fed. Cl. 570, 584 (2002).

<sup>88</sup> *Hage*, 51 Fed. Cl. at 584.

<sup>89</sup> *Id.*

<sup>90</sup> *Hage v. United States*, 42 Fed. Cl. 249, 249 (1998).

<sup>91</sup> *Hage*, 51 Fed. Cl. at 588.

<sup>92</sup> *Id.* The Hages relied on the following federal acts in their claim to the 752,000 acre surface-estate: The Ordinance of May 20, 1785; Kearney’s Code and the Treaty of Guadalupe-Hidalgo; the Act of 1866; the Desert Lands Act of 1877; the Act of 1888; the Act of 1890; the Act of 1891; the Forest Service Organic Administration Act; the Livestock Reservoir Siting Act; The Stock Raising Homestead Act; the Taylor Grazing Act; and Nevada’s Three Mile Grazing Rule. *Id.* at 588–91.

<sup>93</sup> *Id.* at 592. The court stated that the Hages “ha[d] no right to the 752,000 acre surface estate that they claim[ed].” *Id.*

the Hages did have a right to physically go on the federal land to access the water, they did not possess a property right in the surface-estate.<sup>94</sup> The court was unconvinced that Congress ever intended to divide up the surface-estate. The court made this finding despite federal statutes relied on by the Hages, which contain savings clauses that mandate that later enacted laws cannot change vested rights.<sup>95</sup> Specifically, the court did not find any indication that "Congress intended to give away vast acreages of the public land when the largest amount cited in any of [the specified federal acts] was 640 Acres."<sup>96</sup>

#### 6. Confiscation of the Hages' Cattle May be a Regulatory Taking

The federal government claimed to have rightfully confiscated the Hages' trespassing cattle under the terms of the grazing permit.<sup>97</sup> The Hages argued, in opposition, that the federal government's ludicrous demands under the permit resulted in a taking of their cattle without compensation.<sup>98</sup> The court stated that, unlike the Hages' takings claims pertinent to the possession and scope of the water rights, ditch rights-of-way, and forage rights, "the scope of the property rights in the cattle is easily ascertainable."<sup>99</sup> The court deferred its analysis of this takings issue until the Hages' other potential property rights were defined via a limited initial evidentiary hearing.<sup>100</sup>

#### 7. The Hages are Entitled to Proceed with a 43 U.S.C. § 1752(g) Claim for Compensation

Finally, the court found that under 43 U.S.C. § 1752(g),<sup>101</sup> the Hages were entitled to compensation for authorized permanent improvements on their allotments if the federal government cancelled the permit with the intention of devoting the land to "another public purpose."<sup>102</sup> The Hages alleged that the government did not cancel their grazing permit in order to devote the rangeland to another public purpose, but in fact was "preserv[ing] the forest in a 'pristine' condition to maximize its value to environmentalists, fishermen and recreationalists."<sup>103</sup> This claim did not

<sup>94</sup> *Id.* at 591.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 592.

<sup>97</sup> *Hage v. United States*, 35 Fed. Cl. 147, 176 (1996).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 178.

<sup>100</sup> *Id.*

<sup>101</sup> "Under 43 U.S.C. § 1752(g), a party is entitled to compensation for the value of improvements constructed on the rangeland when the government devotes the land to another public purpose." *Id.* at 178 n.16.

<sup>102</sup> *Hage*, 35 Fed. Cl. at 179.

<sup>103</sup> *Id.* at 178-79.

require the Hages to establish a taking, and the court will determine compensation during the takings phase of the case.<sup>104</sup>

#### D. The Next and Final Step in the *Hage* Trial

In January 2002, Judge Smith issued a final factual opinion.<sup>105</sup> In sum, the court held that the Hages do possess vested rights to use water in the Southern Monitor Valley, and in the Ralston and McKinney allotments. The court also found that the Hages owned vested ditch rights in ten ditches and pipelines under the 1866 Act.<sup>106</sup> The court did, however, grant the federal government's Motion to Dismiss regarding the Hages' surface-estate and grazing permit claims.<sup>107</sup>

Although the *Hage* litigation has resulted in four opinions over the course of six years, the court has only determined what property rights the Hages actually possess. The next and final stage of the *Hage* case will address whether the Hages' water rights and ditch rights-of-way were actually taken by the federal government such that just compensation is due.<sup>108</sup> Beginning in the Spring of 2003, the Hages must proffer evidence to establish: "1) [that they] had a beneficial use for the water prior to the government revoking their grazing permits and 2) that there was a taking of [their] right to use their vested water right."<sup>109</sup> Essentially, the Hages are required to show that they could have put the water to beneficial use if the federal government had not "deprived them of access to prevent them from using the water."<sup>110</sup>

The next section of this comment will discuss the nature and scope of property rights in water, as well as how water rights are acquired under the Prior Appropriation Doctrine. An understanding of the principles underlying Nevada water law, as well as how Nevada courts treat water rights, is crucial to determining the extent of the Hages' vested water rights in the context of their takings claims.

### III. NATURE AND SCOPE OF PROPERTY RIGHTS IN WATER

For centuries property rights have played a critical role in defining a society's fundamental relationship with its foundation

---

<sup>104</sup> *Id.* at 179–80. In order to prevail, the Hages must illustrate that (1) the federal government "cancelled the permit not to enforce the permit terms but rather to have access to the water and allotments for use by the Forest Service, elk, hunters, fishermen, or tourists;" and (2) "such use actually does devote the allotment to another 'public purpose' within the meaning of 43 U.S.C. § 1752(g)." *Id.* at 179.

<sup>105</sup> *Hage v. United States*, 51 Fed. Cl. 570, 572 (2002).

<sup>106</sup> *Id.* at 592.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

ecosystem. In colonial America, for example, the expectation of property rights in land contributed to the development of America's capitalist economy, private property system, [and] republican political structure . . . . On a more global scale, the quest for water resources and rights has had similarly profound effects.<sup>111</sup>

Unlike land, a person cannot "own" water in its natural state.<sup>112</sup> Instead, federal and state governments are required to regulate water and other natural resources to ensure that allocation and conservation of such is executed in the best interest of the public.<sup>113</sup> Generally, resource allocation systems are based on principles of private property and policies that "define and allocate private rights of use, control, exchange, and expectation of gain."<sup>114</sup>

The regulation of water, as well as other types of real property, typically falls within state jurisdiction. Three legal doctrines for water allocation are observed in the United States: (1) the common law Riparian Doctrine,<sup>115</sup> (2) the Prior Appropriation Doctrine,<sup>116</sup> and (3) the Hybrid System (based on a combination of the Riparian and Prior Appropriation Doctrines).<sup>117</sup> Nevada, like the majority of states in the western United States, recognizes the

111 Butler, *supra* note 2, at 927–28 (citations omitted).

112 1 WATERS AND WATER RIGHTS § 6.01(b) (Robert E. Beck ed., 1991) [hereinafter 1 WATER RIGHTS].

113 Getches, *supra* note 11, at 6–8.

114 Butler, *supra* note 2, at 934.

115 1 WATER RIGHTS, *supra* note 112, § 6.01(a). Under the Riparian Doctrine, the water in a river belongs only to the owners of land bordering the waterway. JOSEPH SAX ET AL., LEGAL SOURCES OF WATER RESOURCES: CASES AND MATERIALS 9 (3d ed. 2000) [hereinafter SAX ET AL., WATER RESOURCES]. When there is a shortage of water supply, riparian states "ration the water among the riparians according to a broad reasonableness standard." *Id.* The Riparian Doctrine has been adopted by "almost all of the states bordering on or east of the Mississippi River." *Id.* These states include: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. *Id.*

116 2 WATER RIGHTS, *supra* note 9, § 12.01. Under the Prior Appropriation Doctrine, "available water generally is allocated on a first-come, first-served basis to anyone (whether riparian or not) who puts the water to a beneficial offstream use." SAX ET AL., *supra* note 115, at 9. The Prior Appropriation Doctrine has been adopted by the arid inland states of the West. *Id.* These states include: Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. *Id.* at 9, 281.

117 Hybrid states are "[t]hose conterminous states that border the Pacific Ocean or straddle the Hundredth Meridian," and include: California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. SAX ET AL., *supra* note 115, at 9. Today, riparian rights remain important only in California, Nebraska, and Oklahoma. *Id.* The other hybrid states "initially adopted the common law but later abolished it, or essentially abandoned it, and appropriation dominates in them." *Id.*

## Prior Appropriation Doctrine for the administration of water rights.<sup>118</sup>

### A. Historical Development of the Prior Appropriation Doctrine Under State Law

In the early nineteenth century, the influx of settlers in the western United States gave rise to legal conflicts regarding the right to use water.<sup>119</sup> The common law Riparian Doctrine, recognized in the eastern United States, did not satisfactorily address the high demand for water in the arid western states, such as Nevada.<sup>120</sup> Indeed, the "hydrologic, climatic, and geologic conditions of the West" prompted westerners to seek a more fitting water allocation regime.<sup>121</sup> They found this regime in the Prior Appropriation Doctrine and its recognition of the first in time, first in right notion.<sup>122</sup> Under the Prior Appropriation Doctrine, "the date of the appropriation determines the appropriator's priority to use the water, with the earliest user having the superior right."<sup>123</sup> As such, senior appropriators "reasonably expect[] that *no part* of their rights [will] be lost to junior appropriators . . . [who will] bear the entire burden under the rule that first in time is first in right as between appropriators."<sup>124</sup>

The Prior Appropriation Doctrine "originally functioned as a simple, judicially enforced, system to divide small streams for a region sustained by mining, livestock grazing, and eventually irri-

118 SAX ET AL., *supra* note 115, at 9. See also 1 WATER RIGHTS, *supra* note 112, § 8.02(b); *United States v. Humboldt Lovelock Irr. Light & Power Co.*, 97 F.2d 38, 42-44 (9th Cir. 1938).

119 Lock, *supra* note 9, at 77. "Referring to the rough hewn western settler's deep felt importance of water . . . Samuel Clemens . . . noted that 'in the west whiskey is for drinkin' and water is for fightin'." Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, 12 NAT. RESOURCES & ENV'T 14, 14 (1997).

120 Targ, *supra* note 119, at 14; *Jones v. Adams*, 6 P. 442, 447 (Nev. 1885); *Reno Smelting, Milling & Reduction Works v. Stevenson*, 21 P. 317, 322 (Nev. 1889) ("Our conclusion is that the common-law doctrine of riparian rights is unsuited to the condition of our state."); *Twaddle v. Winters*, 85 P. 280, 284 (Nev. 1906) (stating that the way of life in Nevada would be "strangled by the enforcement of the riparian principle").

121 Lock, *supra* note 9, at 77; *Twaddle*, 85 P. at 284 ("[T]he law of ownership of water by prior appropriation . . . is essential under our climatic conditions to the general welfare, and that the common law regarding the flow of streams . . . is unsuitable under our sunny skies, where the lands are so arid.").

122 2 WATER RIGHTS § 12.02(b). "The fundamental principles governing original acquisition of property rights reward the first laborer, first discoverer, and first captor." Butler, *supra* note 2, at 934. Indeed, "[b]y awarding property rights to the first possessor, the common law of property is giving 'significance and form to what might seem the quintessentially individualistic act: the claim that one has, by possession, separated for oneself property from the great commons of unowned things.'" *Id.* at 935 (quoting Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 88 (1985)) (internal quotation marks omitted).

123 *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996).

124 Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423, 433 (1995).

gation.”<sup>125</sup> In the late twentieth century, however, the Doctrine transformed from a “simple allocation instrument [to] a mature mixed administrative-property regime.”<sup>126</sup> Today, all western states, with the exception of Colorado, employ an administrative permit system to create and enforce water rights and priorities under the Prior Appropriation Doctrine.<sup>127</sup>

## B. Acquiring a Vested Right in Water Under the Prior Appropriation Doctrine

Generally, “[o]ne acquires a property right (an appropriation) by taking the water of a natural stream and applying it to a ‘beneficial use’ in a non-wasteful manner with due diligence.”<sup>128</sup> Thus, water rights under the Prior Appropriation Doctrine are contingent upon the *use* of the water, and are subject to limitations.<sup>129</sup> The *Hage* court reiterated this idea, noting that a water right only “vests” when the water is actually put to beneficial use.<sup>130</sup> The vested right commences either on the date that the appropriator puts the water to beneficial use, or when the appropriator begins work on a ditch or flume with the intent to divert the water under the Doctrine of Relation.<sup>131</sup> In Nevada, “a vested water right is one that was used continuously prior to 1905 to the present and is specifically protected by statute.”<sup>132</sup> Furthermore, “[b]eneficial use [is] the basis, the measure and the limit of the right to the use

---

125 A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770 (2001) [hereinafter Tarlock, *Future of Prior Appropriation*].

126 *Id.* at 771.

127 A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 881 (2000) [hereinafter Tarlock, *Rule, Principle, or Rhetoric?*]. “State institutions ‘originally evolved to support new appropriations of water and to protect those appropriations once achieved.’ Now, the same institutions . . . continu[e] to protect vested water use rights.” Jeffrey J. Clayton, “*Here is a Land Where Life is Written in Water*”: *Re-Writing Western Water Law in the 21st Century*, 5 U. DENV. WATER L. REV. 525, 529 (2002).

128 SAX ET AL., WATER RESOURCES, *supra* note 115, at 98.

129 Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269 (1990) [hereinafter Sax, *The Future of Water Law*]. Sax states that “[t]he very terminology of water law reveals . . . limitation[s] on water rights: terms such as ‘beneficial,’ ‘non-wasteful,’ ‘navigation servitude,’ and ‘public trust’ all import an irreducible public claim on waters as a public resource, and not merely as a private commodity.” *Id.*

130 *Hage v. United States*, 51 Fed. Cl. 570, 592 (2002).

131 *Irwin v. Strait*, 4 P. 1215, 1215 (Nev. 1884). The Court specifically stated:

In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water, but, applying the doctrine of relation, fixes it as of the time when he begins his dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence.

*Id.*

132 *Bradshaw v. United States*, 47 Fed. Cl. 549, 552 (2000). See also NEV. REV. STAT. § 533.085 (2001).

of water."<sup>133</sup> A use is deemed beneficial if: (1) the purpose for the use is permissible; and (2) the use is not wasteful in amount.<sup>134</sup>

In addition, rights under the Prior Appropriation Doctrine are often limited to a right to divert and use a certain quantity of water.<sup>135</sup> In Nevada, however, a party may "appropriate *any* amount of water, including the *entire* flow of a spring, to be put to beneficial use."<sup>136</sup> Although appropriators may acquire an exclusive vested water right by demonstrating "beneficial use" of the diverted water,<sup>137</sup> such a right does not equate to sole private ownership.<sup>138</sup> Appropriators can possess a private property right to use the water, but the "ownership of the resource itself remains in the public."<sup>139</sup> Thus, vested water rights under the Prior Appropriation Doctrine can best be characterized as "usufructuary" as opposed to "possessory."<sup>140</sup> Although usufructuary water rights are not absolute property rights, they have "always been treated as transferable property rights,"<sup>141</sup> and continue to be "among the most valuable property rights known to the law."<sup>142</sup> This is partic-

133 NEV. REV. STAT. § 533.035 (1995).

134 SAX ET AL., *WATER RESOURCES*, *supra* note 115, at 124. Historically, "irrigation, manufacturing, power production, and domestic and municipal" uses of water have been considered beneficial. Use of water for recreational or aesthetic purposes has been the source of controversy regarding beneficial use. *Id.* See also *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983). The court stated that "[t]here are two qualifications to what might be termed the general rule that water is beneficially used . . . . First, the use cannot include any element of 'waste' . . . . Second . . . the use cannot be 'unreasonable' considering alternative uses of the water." *Id.*

135 2 WATER RIGHTS, *supra* note 9, § 12.02.

136 *Hage v. United States*, 35 Fed. Cl. 147, 173 (1996) (emphasis added). "Rights to the use of water are restricted to the amount which is necessary for irrigation and other beneficial purposes. A water user does not have the right to the entire flow of a stream or spring *unless* that entire flow is being put to beneficial use." *Id.* (emphasis added) (citing NEV. REV. STAT. § 533.030 (1995); NEV. REV. STAT. § 533.060 (1995)).

137 *Twaddle v. Winters*, 85 P. 280, 285 (Nev. 1906) (granting plaintiffs the "exclusive right to use" and the "exclusive use" of ditches and water at issue).

138 *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917) ("Water is not capable of permanent private ownership; it is the use of water which the state permits the individual to appropriate. The water itself . . . belongs to the public."). Essentially, "[w]hile the owner of a water right has a vested interest in that right, the right itself is something less than the full ownership of property because it is a right not to the corpus of the water but to the use of the water." *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 315 (D.C. Cir. 1938).

139 *Lock*, *supra* note 9, at 82-83 (quoting *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo. 1999)) (citation omitted).

140 Jan G. Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901, 911 (1989). Unlike a right of pure ownership, a "usufructuary" right is defined merely as a right to divert and use water in a beneficial manner. Margaret Z. Ferguson, *Instream Appropriations and the Dormant Commerce Clause: Conserving Water for the Future*, 75 GEO. L.J. 1701, 1711 (1987). See also Tarlock, *Rule, Principle, or Rhetoric?*, *supra* note 127, at 897 ("All water rights are usufructuary; they are rights to the use of water and do not confer ownership of a stream or aquifer.").

141 Tarlock, *Future of Prior Appropriation*, *supra* note 125, at 777.

142 *Lock*, *supra* note 9, at 81 (quoting *White v. Farmers' Highline Canal & Reservoir Co.*, 43 P. 1028, 1030 (Colo. 1896)). See also *Strait v. Brown*, 1881 WL 4108, at \*3 (Nev. 1881) ("There is . . . no difficulty in recognizing a right to the use of water flowing in a stream as private property.").

ularly true in the western United States, where “[t]he belief that water is a form of property is deeply rooted in [western] traditions.”<sup>143</sup>

Furthermore, mere ownership of land does not give rise to any water right in prior appropriation states like Nevada, as it does in jurisdictions that recognize the common law Riparian Doctrine. In fact, most appropriators, like the Hages, do not own the land adjacent to their water rights. In such cases, it is necessary to obtain “legal access across other peoples’ land to get to the water in order to appropriate it, and to carry it to the place of use” via a ditch right-of-way or other type of easement.<sup>144</sup> Moreover, a vested right to divert water actually “carries with it *the right to go upon the land* through which the ditch or flume is conducted.”<sup>145</sup>

### C. Federal Statutes Related to Water Rights

Prior to the legitimization of appropriative rights through states’ laws, “the federal government by silent acquiescence approved the rule—evidenced by local legislation, judicial decisions, and customary law and usage—that the acquisition of water by prior appropriation for a beneficial use was entitled to protection.”<sup>146</sup> In addition, for over a century, the United States has formally acknowledged the validity of vested water rights obtained pursuant to state law.<sup>147</sup> This recognition was codified in the Mining Act of 1866. In pertinent part, the Act states that:

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 the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed.<sup>148</sup>

The 1866 Act expressly recognized Congress’s intent to protect water and ditch rights established in western states under the Prior Appropriation Doctrine.<sup>149</sup> An amendment to the Act in 1870 (Placer Act of 1870), confirmed that those possessing vested

---

<sup>143</sup> David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 419 (1994).

<sup>144</sup> SAX ET AL., WATER RESOURCES, *supra* note 115, at 99.

<sup>145</sup> Vansickle v. Haines, 1872 WL 3542, at \*17 (Nev. 1872) (emphasis added).

<sup>146</sup> State of Colo. Dept. of Natural Res. v. S.W. Colo. Water Conservation Dist., 671 P.2d 1294, 1305 (Colo. 1983) (quoting Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 154 (1935)). See also Lock, *supra* note 9, at 80.

<sup>147</sup> See Andrus v. Charlestone Stone Prods. Co., 436 U.S. 604, 614 (1978) (private water rights on federal lands are governed by state and local law and custom).

<sup>148</sup> The 1866 Mining Act, codified at 30 U.S.C. § 51 (1986 & Supp. 2002); 43 U.S.C. § 661 (1986 & Supp. 2002).

<sup>149</sup> 2 WATER RIGHTS, *supra* note 9, § 11.03(a).

water rights in the public domain would maintain priority over all subsequent appropriators, *including the federal government* and its grantees.<sup>150</sup> Finally, in the Desert Land Act of 1877, Congress legislated that the right to use water in certain western states and territories “depend[s] upon [a] bona fide prior appropriation [of water],” and that all surplus water “shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes *subject to existing rights*.”<sup>151</sup> “Together, these statutes sanctioned the states’ and territories’ customary system for allocating water, thereby ensuring productive economic use of the western lands through security in water rights.”<sup>152</sup>

In light of the effect of the 1866 Act and the 1870 Amendment, it is clear why the Hages’ claim to vested water and ditch rights-of-way rested so heavily upon the Act. In essence, the United States’ Toiyabe National Forest was created “subject to” the vested water rights and ditch rights-of-way of 1866 appropriators, including the Hages and their predecessors. Thus, under the Prior Appropriation Doctrine, the federal government may only obtain a *junior appropriative right* to the Hages’ senior water rights.<sup>153</sup> This outcome is significant because it demonstrates the federal government’s inability to secure a vested right in the water appropriated by the Hages without providing compensation or demonstrating that the Hages failed to put the water to a beneficial use.

#### D. Historical Protection of Senior Appropriators under Nevada Case Law

In the nineteenth century, the Nevada Supreme Court prioritized the protection of individual property rights over the interests of the public good. This emphasis on protecting private property

---

<sup>150</sup> The Placer Act of 1870, ch. 235, 16 stat. 217 (portions of the Act survive at 30 U.S.C. § 52 (1986 & Supp. 2002), and at 43 U.S.C. § 661 (1986 & Supp. 2002)). The Placer Act states: “[A]ll patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the [1866 Act].” *Id.* See also A. DAN TARLOCK ET AL., WATER RESOURCE MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY 107 (5th ed. 2002) [hereinafter TARLOCK ET AL., WATER RESOURCE MANAGEMENT].

<sup>151</sup> Desert Land Act, Act of March 3, 1877, ch. 107, 19 Stat. 377 (codified as amended at 43 U.S.C. § 321 (1986 & Supp. 2002)) (emphasis added). See also Targ, *supra* note 119, at 15.

<sup>152</sup> Targ, *supra* note 119, at 15.

<sup>153</sup> *Id.* at 16. The federal government must undergo equivalent procedures and requirements as any other appropriator. See, e.g., NEV. REV. STAT. § 533.010 (Michie 1995 & Supp. 2001); United States v. New Mexico, 438 U.S. 696, 702 (1978). Where water is needed only to serve a secondary purpose, “Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator.” *Id.*

rights is evident in early Nevada case law. In an 1872 case, the Nevada Supreme Court proclaimed:

But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which it is to be hoped will never receive sanction from the tribunals of this country.<sup>154</sup>

Even into the early twentieth century, when conservation of natural resources emerged as an important consideration, the court remained committed to protecting appropriators' vested water rights and their associated expectations. Basically, the court took the position that conservation "should be encouraged by all legitimate means, but not to the extent of depriving the owner of water already acquired by prior application to a beneficial use."<sup>155</sup>

As decided by the Supreme Court of Nevada, "ownership in water can be acquired by prior appropriation and use."<sup>156</sup> The court has recognized several beneficial uses of water. For example, the use of water for irrigation has been accepted as a useful purpose in Nevada. The court specifically stated that an appropriator may "secure[] the right to the use of sufficient water to irrigate such land . . . such use being a beneficial one."<sup>157</sup> Irrigation has been acknowledged as a beneficial use for agricultural purposes, as well as for the production of grass "to be gathered and cured as feed for stock."<sup>158</sup> In addition, the use of water for domestic purposes and stock watering have also been recognized as beneficial uses of water.<sup>159</sup> Nevada's early recognition of irrigation, stock watering, and domestic uses of water as beneficial purposes under the Prior Appropriation Doctrine will be important for the Hages' argument that alternative beneficial uses of the water existed. Furthermore, the Hages' position as the senior appropriator of the water will strengthen their argument of priority over the federal government in the takings phase of the litigation.

In addition, a string of cases demonstrate the Nevada Supreme Court's willingness to protect senior appropriator's rights

---

154 *Vansickle v. Haines*, 1872 WL 3542, at \*6 (Nev. 1872).

155 *Tonkin v. Winzell*, 73 P. 593, 595 (Nev. 1903).

156 *Mosier v. Caldwell*, 1872 WL 3550, at \*1 (Nev. 1872).

157 *Rodgers v. Pitt*, 129 F. 932, 942 (D. Nev. 1904). See also *Jones v. Adams*, 6 P. 442, 444 (Nev. 1885) ("[T]he right to use water for the purpose of irrigation [has been] expressly recognized.")

158 *Rodgers*, 129 F. at 942 (quoting *Smyth v. Neal*, 49 P. 850, 851 (Or. 1897)).

159 *Bliss v. Grayson*, 56 P. 231, 235-41 (Nev. 1899). In *Bliss*, the court stated that both parties in the litigation had "acquired a right to the use of the waters of the Humboldt River for beneficial purposes." *Id.* at 240. In their complaints, both parties argued a valid appropriation for irrigation, *watering stock*, and for *domestic purposes*. *Id.* at 235-36.

over junior appropriators,<sup>160</sup> the federal government, riparian proprietors,<sup>161</sup> and all others. The court has protected these rights regardless of whether the appropriation was made directly or through the agency of another.<sup>162</sup> If, however, the senior appropriator only appropriated a portion of the water in a stream or other watercourse, or only used the water seasonally, others could validly claim the residue or the entirety of the water when it was not being used.<sup>163</sup> According to the Nevada Supreme Court, the Prior Appropriation Doctrine confers a duty upon the federal and state governments to protect vested water rights.<sup>164</sup> As stated by the court, “[i]f the law were otherwise the right to the use of water would rest upon a very frail foundation.”<sup>165</sup> The emphasis on protecting the rights of senior appropriators is still observed today.

Though over one hundred years have passed since the inception of the Prior Appropriation Doctrine, it “remains deeply entrenched in the states and in the courts.”<sup>166</sup> Furthermore, as

---

160 See, e.g., *Lobdell v. Simpson*, 1866 WL 1628 (Nev. 1866) (holding that the first appropriator of water on public land is entitled to the full quantity appropriated by him); *Barnes v. Sabron*, 1875 WL 4031, at \*8 (Nev. 1875) (holding that the first appropriator of Currant Creek waters has the right to insist that the water be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use); *Jerrett v. Mahan*, 17 P. 12, 15–16 (Nev. 1888) (“If plaintiff first appropriated the waters in question . . . the law gave him the right to continue their exclusive use.”); *Roeder v. Stein*, 42 P. 867, 868 (Nev. 1895) (“[I]f the appropriation has been made before others acquire rights in the stream, after that no change can be made to their detriment.”); *Rodgers v. Pitt*, 129 F. 932, 942 (D. Nev. 1904) (Defendant was not entitled to any waters of the Humboldt river. “To hold otherwise would be to take away from complainant, whose predecessors in interest had made a prior appropriation and diverted the water to a beneficial use, the quantity of water to which he was entitled, and give to the defendants . . . water to which they never were entitled.”); *Doherty v. Pratt*, 124 P. 574 (Nev. 1912) (holding that junior appropriators may not interfere with a prior appropriator’s rights or dam, unless the interference is necessary—and then, the interference may not injure the rights of the prior appropriator); *Campbell v. Goldfield Consol. Water Co.*, 136 P. 976 (Nev. 1913) (holding that a party who has not made an appropriation of water has no right as against an existing appropriator).

161 *Bliss*, 56 P. at 241 (“It is now the settled doctrine of this state that a person can acquire the right to use the waters flowing in a stream . . . by appropriation, as against riparian proprietors or other persons.”).

162 *Prosole v. Steamboat Canal Co.*, 140 P. 720, 723 (Nev. 1914). See also *Pincolini v. Steamboat Canal Co.*, 167 P. 314, 314 (Nev. 1917) (“[P]laintiffs had the same rights to water transported in the ditch owned by appellant, by reason of prior appropriation in themselves and their predecessors in interest, as would be the case were they appropriators direct from a natural stream.”).

163 *Barnes v. Sabron*, 1875 WL 4031 (Nev. 1875). The court stated:

We think the rule is well settled, upon reason and authority, that if the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person, or persons, may not only appropriate a part, or the whole of the residue and acquire a right thereto, as perfect as the first appropriator, but may also acquire a right to the quantity of water used by the first appropriator at such times as not needed or used by him.

*Id.* at \*14.

164 *Reno Smelting, Milling & Reduction Works v. Stevenson*, 21 P. 317, 321 (Nev. 1889) (“The right to water in this country, by priority of appropriation thereof, we think it is, and has always been, the duty of the national and state governments to protect.”).

165 *Ronnow v. Delmue*, 41 P. 1074, 1075 (Nev. 1895).

166 *Tarlock, Future of Prior Appropriation, supra* note 125, at 773.

water law becomes more complicated, the “strict enforcement of water rights assumes an even greater importance.”<sup>167</sup> Overall, case law demonstrates the Nevada Supreme Court’s willingness to protect vested water rights, which is a significant consideration when takings disputes involving water arise. Without question, this will be a critical point when the court considers the Hages’ takings claims, as Nevada courts have traditionally encouraged the protection of senior appropriators’ vested water rights.

#### E. Prior Appropriation Doctrine Protects Water Rights Holders’ Expectations

“The core idea of prior appropriation is the protection of investment-backed expectations from the risks of variable water years and perhaps now global climate change.”<sup>168</sup> Appropriative rights are based on priority and originated in the “first in time, first in right” concept. In fact, the notion of priority is a “foundational principle of property law and has many powerful justifications.”<sup>169</sup> The protection of property rights holders’ expectations continues to be the “best justification for priority” under the Prior Appropriation Doctrine.<sup>170</sup>

Possessors of vested water rights “need clear, consistent rules that do not invite challenges to claimed entitlements” of appropriated water.<sup>171</sup> Although many courts have interpreted the primary purpose of water allocation schemes as the creation of “certain, exclusive property rights . . . the real function should be to *protect the expectation of the water users* to a sufficient supply to support the underlying beneficial use.”<sup>172</sup> Indeed, a system of priority protects legitimate expectations, as the Prior Appropriation Doctrine “promotes investment by giving security of use.”<sup>173</sup>

---

167 *Id.*

168 Tarlock, *Rule, Principle, or Rhetoric?*, *supra* note 127, at 884.

169 *Id.* at 885.

170 *Id.*

171 *Id.* at 886. See also Tarlock, *Future of Prior Appropriation*, *supra* note 125, at 776 (“Any water allocation regime requires a set of reasonably predictable property rules.”); Butler, *supra* note 2, at 936 (“The importance to property law of promoting certainty is evidenced by its impact on a wide range of laws affecting natural resources, including . . . water.”).

172 Tarlock, *Rule, Principle, or Rhetoric?*, *supra* note 127, at 908 (emphasis added).

173 *Id.* at 886 (quoting CHARLES J. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 6 (National Water Commission, Legal Study No. 5, 1991)). The United States Supreme Court also recognized the importance of affording security to appropriators in *Arizona v. California*, 460 U.S. 605, 620 (1983). The Court stated: “The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.” *Id.* See also RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 83, 155 (1998).

#### IV. CONSTITUTIONAL PROTECTIONS AFFORDED TO PROPERTY AND WATER RIGHTS

[T]he dichotomy between personal liberties and property rights is a false one. 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 . . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.<sup>174</sup>

Like many other rights, property rights are included under the United States Constitution's umbrella of protections. Indeed, the Constitution provides for two significant means of protecting one's property. First, the Due Process Clauses of the Fifth and Fourteenth Amendments afford a broad protection of property rights. Second, the Takings Clause of the Fifth Amendment provides just compensation for real property—a more narrow facet of the many property interests that have developed over time. While these avenues of protection differ in scope and purpose, both require that a court "first ascertain the existence and nature of the underlying property interest and then determine whether the government's action with respect to that property interest has violated constitutional requirements."<sup>175</sup>

##### A. The Due Process Clause

The Fifth Amendment of the United States Constitution provides: "No person shall . . . be deprived of . . . property, without due process of law."<sup>176</sup> The later-enacted Fourteenth Amendment extends an individual's due process protection to State activity.<sup>177</sup> The United States Supreme Court has recognized both substantive and procedural protection under the Constitution. Pursuant to these Amendments, a Due Process claim will succeed where it can be shown that government action has worked a deprivation of a "protected property interest without adequate procedural safeguards."<sup>178</sup> If a court finds this to be the case, the regulation or activity complained of will be invalidated as unconstitutional.

---

<sup>174</sup> *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

<sup>175</sup> Stephen J. Massey, Note, *Justice Rehnquist's Theory of Property*, 93 YALE L.J. 541, 542 (1984).

<sup>176</sup> U.S. CONST. amend. V.

<sup>177</sup> U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of . . . property, without due process of law.").

<sup>178</sup> Massey, *supra* note 175, at 544. See also SAX ET AL., WATER RESOURCES, *supra* note 115, at 111 ("[W]ater rights are property rights protected by the due process clause of the federal constitution.").

Historically, the Supreme Court has divided procedural due process claims into three distinct categories: "(1) entitlements based on the fulfillment of criteria under which the government provides a benefit; (2) entitlements based on the inapplicability of the exclusive conditions under which the government may deprive the beneficiary of the benefit; and (3) substantial property interests based on traditional criteria of ownership."<sup>179</sup> Significantly, only the third category merits protection under both the Due Process Clause and the Fifth Amendment's Takings Clause.<sup>180</sup> *Hage*, however, does not address potential violations of due process rights.

## B. The Takings Clause

The Fifth Amendment to the United States Constitution states that private property shall not be taken for public use without just compensation.<sup>181</sup> This right to compensation for a taking under the Fifth Amendment is recognized as one of the "principal foundations of American liberty, and it is no less fundamental than the rights secured by the First Amendment or the other amendments of the Bill of Rights."<sup>182</sup> According to the United States Supreme Court: "The Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>183</sup>

Like the Due Process Clause, the Takings Clause was made applicable to the states via the Fourteenth Amendment.<sup>184</sup> Unlike the Due Process Clause, however, when a court finds a regulation unconstitutional pursuant to the Takings Clause, the remedy is just compensation, not invalidation of the regulation. Thus, "[n]ot all takings are unconstitutional; it is the absence of just compensation that makes a taking unconstitutional."<sup>185</sup>

Property that cannot be taken without just compensation includes "common law property, such as realty and personalty, and its ancillary forms."<sup>186</sup> In addition, the Supreme Court has fre-

179 Massey, *supra* note 175, at 543 (citations omitted). See Parratt v. Taylor, 451 U.S. 527 (1981); Bishop v. Wood, 426 U.S. 341 (1976); Mathews v. Eldridge, 424 U.S. 319 (1976).

180 Massey, *supra* note 175, at 543-44.

181 U.S. CONST. amend. V.

182 Stearns Co. v. United States, 34 Fed. Cl. 264, 271 (1995). See also Dolan v. City of Tigard, 512 U.S. 374 (1994).

183 Armstrong v. United States, 364 U.S. 40, 49 (1960). See also Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978).

184 Chi., Burlington, & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 239 (1897).

185 Susan M. Stedfast, *Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management*, 29 ENVTL. L. 881, 884-85 (1999).

186 Massey, *supra* note 175, at 544-45 (citations omitted).

quently recognized that property in the context of the Takings Clause includes the entire “group of rights inhering in the citizen’s [ownership].”<sup>187</sup> Though some takings cases do not involve an actual dispute over the ownership of property, many takings cases do.<sup>188</sup> The litigants in those cases, like the Hages in *Hage v. United States*, seek clarification of the precise essence of the underlying property right. In such cases, “the claimant must establish that prior law had created reasonable expectations that the contested action defeated.”<sup>189</sup> Thus, it is necessary to establish a property right before a court can consider whether a taking has occurred.

Generally, a taking under the Fifth Amendment occurs in one of two sets of circumstances. In the first instance, a taking can occur when the government directly intrudes on private property by physically taking possession of it, or by asserting title or some other dominion over it (“physical taking”).<sup>190</sup> In the second instance, a taking can occur when the government regulates property so extensively that a constructive possession of the property results (“regulatory taking”).<sup>191</sup> To qualify as a regulatory taking, it is necessary that the “government regulation lowers the value or interferes with the use of property interests without actually taking physical possession or usurping legal title.”<sup>192</sup> In regulatory takings analyses, two lines of cases<sup>193</sup> have emerged: (1) partial-takings cases;<sup>194</sup> and (2) total-takings cases.<sup>195</sup>

### 1. Takings Disputes Involving Water

One might assume that a contested governmental activity would conveniently fit into either the physical taking category or the regulatory taking category. However, Supreme Court precedent is not totally clear on the matter, making the question of

---

<sup>187</sup> *Penn Cent.*, 438 U.S. at 142 (Rehnquist, J., dissenting) (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)).

<sup>188</sup> Massey, *supra* note 175, at 545. “When private loss and governmental involvement are clear, the disputed issue is whether the loss that the government has inflicted amounts to a ‘taking’ for which it must pay compensation.” *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). See also *Stedfast*, *supra* note 185, at 884; GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 4.5 (2002).

<sup>191</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Supreme Court first recognized the term “regulatory taking” in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 651 (1981). See also *Stedfast*, *supra* note 185, at 884; Nancy Kubasek, *From the Environment*, 31 *REAL EST. L.J.* 157, 157 (2002).

<sup>192</sup> COGGINS & GLICKSMAN, *supra* note 190, § 4.5.

<sup>193</sup> Kubasek, *supra* note 191, at 157.

<sup>194</sup> Partial takings cases are governed by the analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

<sup>195</sup> Total takings cases were first recognized in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

whether a specific governmental action gives rise to a taking under the Fifth Amendment difficult to answer. The answer becomes even less clear when the property right at issue is water.<sup>196</sup>

The Hages' claim for compensation under the Takings Clause involves vested property interests in water, ditch rights-of-way, and adjacent forage on public lands.<sup>197</sup> Their claim relies upon the split-estate theory. Under this theory, the federal government maintains title to the public lands, but various types of private interests, such as water rights, can be severed from the public domain and acquired by private property owners.<sup>198</sup> Basically, "the acquiescence of the federal government in the prior appropriation of western public lands and resources has conferred a property interest on those who occupied and made beneficial use of those resources."<sup>199</sup>

## 2. Competing Ideologies: The Role of Expectations in Takings Involving Water

A discussion of water rights would not be complete without noting the numerous limitations imposed on those possessing vested water rights. Two competing traditions in American legal history shape property rights expectations: (1) the republican-positivist tradition, and (2) the federalist-natural law tradition. An analysis of these traditions helps to explain the relationship between limitations on property rights and the existing expectations of property owners regarding those rights in the context of takings jurisprudence.<sup>200</sup>

### a. Republican-Positivist Tradition and the Public Trust Doctrine

The republican-positivist tradition places emphasis on "the relationship between the individual and the civil community and holds that all claims to property are subject to an implied public interest limitation."<sup>201</sup> Supporters of the republican-positivist tra-

<sup>196</sup> Lock, *supra* note 9, at 110.

For the better part of this century, a landowner wishing to sue the government for taking his property without just compensation has faced an uncertain task. In analyzing the taking of a water right, the application of a real property based takings framework to the proscription of a usufructuary right only compounds this uncertainty.

*Id.* See also COGGINS & GLICKSMAN, *supra* note 190, § 4.5 ("The confusion can be exacerbated . . . because the original or paramount government ownership often negates or curtails the asserted private property interest at issue.").

<sup>197</sup> Hage v. United States, 35 Fed. Cl. 147, 150 (1996).

<sup>198</sup> Hage v. United States, 51 Fed. Cl. 570, 573 (2002). See also Hage, *supra* note 31.

<sup>199</sup> Patrick Austin Perry, *Law West of the Pecos: The Growth of the Wise-Use Movement and the Challenge to Federal Public Land-Use Policy*, 30 LOY. L.A. L. REV. 275, 296 (1996).

<sup>200</sup> A. Dan Tarlock, *Local Government Protection of Biodiversity: What is its Niche?*, 60 U. CHI. L. REV. 555, 558 (1993) [hereinafter Tarlock, *Local Government*].

<sup>201</sup> Mandelker, *supra* note 17, at 226.

dition focus more on the furtherance of the public good than on preservation of private property rights. This theoretical focus has persisted even when its practical effect has been increased regulation of property rights and devaluation of expectations associated with those rights. Water is seen "as a necessary and common [media] for community development . . . [and has] been held subject to the perceived societal necessities of the time and circumstances."<sup>202</sup>

The Public Trust Doctrine, which emerged from Roman law and English common law,<sup>203</sup> was incorporated in United States law when the original thirteen states adopted English common law.<sup>204</sup> Today, this doctrine "recognizes a pre-existing right of the State in the flow of its rivers."<sup>205</sup> Thus, private interests in water have been recognized as being "subject to a servitude and a trust in favor of the public."<sup>206</sup> The basic argument promulgated by supporters of this doctrine is that private rights in water have never existed, in spite of longstanding contrary assumptions. The rationalization is that water has been a part of the public trust from "time immemorial."<sup>207</sup> Some legal theorists and commentators have even argued that the Public Trust Doctrine should convert into an expansive easement on all private property.<sup>208</sup> The logical implication of such an easement would be a substantial limitation on the scope of the Takings Clause.

#### b. Federalist-Natural Law Tradition and the Wise-Use Movement

"The federalist-natural law tradition holds that property rights generate firm expectations entitled to judicial protection from excessive government regulation."<sup>209</sup> Proponents of this theory "emphasize the importance of an unencumbered right to use private property, and guard this right with the same fervor as those who support individual civil freedoms."<sup>210</sup> In contrast to the republican-positivist tradition, supporters of this tradition en-

<sup>202</sup> Sax, *The Future of Water Law*, *supra* note 129, at 269.

<sup>203</sup> Andrew H. Sawyer, *Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 OKLA. L. REV. 311, 313 (1997). See also *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997); *Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709, 718 (1983). The Supreme Court first recognized the Public Trust Doctrine in 1892. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 436-37 (1892).

<sup>204</sup> Jack H. Archer & Terrance W. Stone, *The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81, 84 (1995).

<sup>205</sup> Sax, *The Future of Water Law*, *supra* note 129, at 269.

<sup>206</sup> *Id.*

<sup>207</sup> James S. Burling, *Protecting Property Rights in Aquatic Resources After Lucas*, 349, 372 (A.L.I.-A.B.A. Course of Study, June 11, 1997).

<sup>208</sup> *Id.* at 373.

<sup>209</sup> Mandelker, *supra* note 17, at 226.

<sup>210</sup> Archer & Stone, *supra* note 204, at 81.

courage the entitlement-to-property theory, in which takings law is organized “under the premise that the protection of private property rights is the dominant purpose in taking[s] law.”<sup>211</sup> Furthermore, they argue that the Public Trust Doctrine should not be used to undermine traditional and commonly understood expectations of private property rights.<sup>212</sup> If a property right, such as the Hages’, was created prior to the creation of the public trust, later application of a newly defined public trust would carry with it momentous takings implications.<sup>213</sup> In essence, when a takings dispute arises, an argument in favor of the public trust should not be used to extinguish property interests acquired before the public trust even existed. The positions assumed by the federalist-natural law tradition were later expounded upon with the creation of the Wise-Use movement.

The Wise-Use movement, which has been described as a “volatile mix of traditional conservative ideology blended with some revolutionary proposals to open public lands to greater private exploitation,”<sup>214</sup> takes the federalist-natural law perspective to an extreme level. While Wise-Use supporters may advocate a more hard-line interpretation of the federalist-natural law theory, both perspectives support decreased regulation and natural resource limitations. In addition, both perspectives promote increased protection of individuals’ expectations regarding their private property rights.

Viewing property rights from either the federalist-natural law tradition or Wise-Use perspective, one could argue that differences in land rights and water rights should not lead to a devaluation of an individual’s expectation in protecting a property interest in water. It follows that supporters of this argument have claimed that increased government regulation of public lands constitutes a taking under the Fifth Amendment when economic activities and expectations of public land users are negatively impacted.<sup>215</sup>

---

211 Mandelker, *supra* note 17, at 228.

212 Burling, *supra* note 207, at 374.

213 *Id.* at 375.

214 Perry, *supra* note 199, at 276 (quoting LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHT MOVEMENT 11 (John D. Echeverria & Raymond Booth Eby eds., 1995)). The Wise-Use movement is represented by a “coalition of property owners, natural resource industries, trade associations, and conservative political interest groups, all of whom profess an ideological and economic interest in the continued utilization of public lands” and resources. *Id.*

215 CHARLES F. WILKINSON & MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 54 n.269 (1987).

## V. DISCUSSION

## A. The Future of Vested Water Rights and Takings Jurisprudence

As the preceding background suggests, there are various policy and legal arguments that can be made regarding water rights and takings. Obviously, water is a uniquely different resource than land. Those differences, however, should not require the application of different tests when takings issues arise. The *Hage* court stated: "The property involved in this case is atypical of most takings litigation. It is not land or minerals at a specific time, but rather the usage of water which ebbs and flows throughout the year."<sup>216</sup> Water can be distinguished from land in a number of ways, including its usufructuary nature, its natural flow,<sup>217</sup> and the public's continued interest in its allocation and conservation. Traditionally, appropriators did not have a right to waste water,<sup>218</sup> create a nuisance with it, or even let it sit idly. These policies still hold true today. For example, a cessation in beneficial use by a right holder can result in the termination of the right itself.<sup>219</sup> "Nevertheless, the right to appropriate water can be [a] property right."<sup>220</sup> In fact, when a water right vests, "it becomes a constitutionally protected property interest which can be sold, leased, or otherwise alienated."<sup>221</sup>

As a result of the inherent differences between land and water, takings cases involving water present a number of unique constitutional considerations.<sup>222</sup> As previously noted, some of the questions that arise regarding these constitutional considerations are: (1) What is the scope of water rights and to what extent are they constitutionally protected?; and (2) Are the standards for determining when property has been taken the same for water as for land? These questions are very important to rights holders in regions where water is a scarce commodity. The answers to these questions will likely dictate the future of takings cases where water rights are at issue. The next section of this comment offers answers to those questions.

---

<sup>216</sup> *Hage v. United States*, 51 Fed. Cl. 570, 573 (2002).

<sup>217</sup> *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996). "Unlike real property, water is only rarely a fixed quantity in a fixed place." *Id.*

<sup>218</sup> See *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983) (stating that the use of water cannot include any waste or be unreasonable).

<sup>219</sup> See *In re Manse Spring*, 108 P.2d 311, 315 (Nev. 1940) (holding that an appropriator with a vested water right can lose that right by voluntarily abandoning it).

<sup>220</sup> *Hage*, 35 Fed. Cl. at 172.

<sup>221</sup> Lock, *supra* note 9, at 81-82 (quoting D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1, 5 (1991)).

<sup>222</sup> SAX ET AL., WATER RESOURCES, *supra* note 115, at 316. See also *Hage*, 35 Fed. Cl. at 172 ("Flowing water presents unique ownership issues because it is not amenable to absolute physical possession.").

The position taken in this comment is that the scope of vested water rights and corresponding ditch rights-of-way should be interpreted extremely broadly. Indeed, unless courts afford water rights significant protection under the Takings Clause, the security of investment and priority guaranteed by the Prior Appropriation Doctrine will be compromised. In addition, the reasonable expectations of senior appropriators regarding property interests in water will be defeated unless water rights are protected.<sup>223</sup> As shown above, inherent rights and expectations do in fact exist regarding the use of water, and like any other property right, these rights should be protected. As such, applying the existing takings framework developed in land disputes to water disputes may be the most effective way of protecting both water rights and senior appropriators' expectations. From the holdings thus far in *Hage*, it appears that the court does intend to protect the Hages' vested water rights under such a framework.

#### B. What the Court in *Hage* Should Do

In *Hage*, the United States Court of Claims rejected the long-standing argument that a usufructuary right in water is subject to lesser constitutional protection than a property interest in land. Specifically, the court held:

*Amici* provides no reason within our constitutional tradition why water rights, which are as vital as land rights, should receive less protection [than land rights]. This is particularly true in the West where water means the difference between farm and desert, ranch and wilderness, and even life and death. This court holds that *water rights are not "lesser" or "diminished" property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution.*<sup>224</sup>

This language is a strong indication that the court will ultimately grant the Hages' water rights significant protection under the Takings Clause. If indeed the Hages meet their burden of proving a valid "beneficial use" of the water, and the court remains consistent with the above holding, the probable result is that the takings standards applied in the next phase of the case will be the same as if land had been at issue. If that is the case, the *Hage* court is

---

<sup>223</sup> Grant, *supra* note 124, at 461 ("Viewed loosely, the longstanding appropriation doctrine policy of security of investment leaves no room for the public trust doctrine to curtail water rights without just compensation.")

<sup>224</sup> *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996) (emphasis added). See also David Abelson, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 407 (1994) ("From the Zuni and Tohono O'odham Indians, to James Marshall's gold strike on January 24, 1848, to the great cattle drives of the 1800's, water has been critical for survival and economic viability in the West.") (emphasis added) (citations omitted).

likely to find that many of the government's actions against the Hages were constitutionally impermissible.

Thus far, the court has recognized the Hages' vested property rights in both the water and 1866 Act ditches.<sup>225</sup> As noted, the court has previously recognized those rights as equally important as rights vested in land.<sup>226</sup> Before addressing the Hages' takings claims, however, it is necessary to demonstrate that the Hages, after the revocation of their grazing permit, would in fact have been able to put their water to beneficial use if the federal government had not either diverted it, or hindered access to it.<sup>227</sup>

### 1. Beneficial Use of the Hages' Water

For over one hundred years, the Hages and their predecessors put the appropriated water and ditch rights-of-way to beneficial use by providing a water supply to cattle in conjunction with a ranching operation.<sup>228</sup> When the federal government validly revoked the Hages' permit to graze cattle on the public domain,<sup>229</sup> the use of the water for that purpose no longer existed. Thus, the question remains: if the federal government had not denied the Hages access to the water, could the Hages have put the water to *another* beneficial use? It appears from the available facts of this case that the Hages could have readily done so.<sup>230</sup> In fact, there are at least two other ways in which the Hages could have made beneficial use of the water.

Initially, it is important to point out that the Hages used the water for "irrigation, stock watering and *domestic purposes*,"<sup>231</sup> even prior to the revocation of the grazing permit. Accordingly, the domestic purpose remained a beneficial use after the revocation of the grazing permit. Additionally, the Hages could have continued to water stock on the Ranch. As discussed above, the Nevada Supreme Court has recognized that the use of water for domestic purposes and for stock watering are beneficial uses.<sup>232</sup> Therefore, the Hages had at least two, and possibly three, beneficial uses for the water.

---

<sup>225</sup> *Hage v. United States*, 51 Fed. Cl. 570, 591 (2002).

<sup>226</sup> *Hage*, 35 Fed. Cl. at 172.

<sup>227</sup> *Hage*, 51 Fed. Cl. at 592 ("Essentially, the [Hages] must demonstrate they could have used the water if the government had not deprived them of access to prevent them from using the water. The [Hages] have a right to the water so long as they can put it to beneficial use.")

<sup>228</sup> *Hage*, 35 Fed. Cl. at 153.

<sup>229</sup> *Id.* at 166-67.

<sup>230</sup> See Jeffrey J. Weschsler, Note, *This Land is our Land: Ranchers Seek Private Rights in the Public Rangelands*, 21 J. LAND RESOURCES & ENVTL. L. 461, 484 ("[T]he value of Hage's water right was not completely eviscerated by the revocation of the grazing permit because Hage retains legal options for the use of his water.")

<sup>231</sup> *Hage*, 35 Fed. Cl. at 153 (emphasis added).

<sup>232</sup> *Bliss v. Grayson*, 56 P. 231, 235-41 (Nev. 1899).

In addition, it is likely that the Hages could have made a beneficial use of the water by selling it. Under Nevada's system of appropriation, state agencies are permitted to appropriate water for instream flows.<sup>233</sup> Under the current permit system, however, those agencies typically have very low junior priorities and are subject to the senior's appropriation rights.<sup>234</sup> Thus, Nevada, as well as other states utilizing the Prior Appropriation Doctrine, allow for the "purchase or leasing of existing water rights for instream flow purposes."<sup>235</sup> In addition, "willing-buyer, willing-seller acquisition programs" exist through which private non-profit organizations or governmental agencies buy or lease existing senior water rights.<sup>236</sup> Therefore, the Hages, as senior appropriators with vested water rights, could have sold or leased their water rights. Assuming that the Hages are able to demonstrate that another beneficial use for the water existed, potential physical and regulatory takings arguments merit discussion.

## 2. Analysis of the Hages' Takings Claims under the Existing Framework Applied in Land Cases

### a. Physical Takings

Courts deciding cases involving permanent physical occupations of property apply the standard set forth by the United States Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>237</sup> In *Loretto*, the Court required that a building owner be compensated for two cable boxes and corresponding wires that were affixed to the roof of her building and alongside the exterior walls pursuant to a local New York ordinance.<sup>238</sup> As a result of *Loretto*, a permanent physical occupation of private property is now deemed a *per se* taking under the Fifth Amendment.<sup>239</sup> The Court recognized that in this type of case, "the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than per-

---

<sup>233</sup> SAX ET AL., WATER RESOURCES, *supra* note 115, at 114. When appropriation results in an inadequate supply of flowing water, wildlife is negatively impacted. As a result, "states have created mechanisms that allow for the ownership of instream water rights." Jack Sterne, *Instream Rights and Invisible Hands: Prospects for Private Instream Water Rights in the Northwest*, 27 ENVTL. L. 203, 203 (1997). Whereas traditional water rights grant the appropriator the right to "remove" a certain quantity of water for a beneficial use, "instream rights entitle the owner to have a quantity of water left in place to support wildlife and recreational uses." *Id.*

<sup>234</sup> SAX ET AL., WATER RESOURCES, *supra* note 115, at 114.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 115.

<sup>237</sup> 458 U.S. 419 (1982).

<sup>238</sup> *Id.* at 422, 441.

<sup>239</sup> "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

haps any other category of property regulation.”<sup>240</sup> Therefore, when the government physically occupies property, it “does not simply take a single ‘strand’ from the ‘bundle’ of property rights: it chops through the bundle, taking a slice of every strand.”<sup>241</sup>

In addition, the Supreme Court’s holding in *United States v. Causby*<sup>242</sup> suggests that *Loretto*’s bright-line rule is not limited to physical occupations of land. In *Causby*, the Court found a physical taking of an easement in property in the context of airspace. The Court held that the United States committed “an intrusion so immediate and direct as to subtract from the owner’s full enjoyment of the property and to limit his exploitation of it” when it flew its airplanes frequently and directly above the plaintiff’s land.<sup>243</sup> The Court’s application of land takings jurisprudence to airspace supports the argument that such a framework may also be applicable to water.

A second category of physical takings cases does not recognize a *per se* rule, but nevertheless requires just compensation for some temporary physical invasions.<sup>244</sup> In *Kaiser Aetna v. United States*, the Court required that a landowner be compensated for the government’s imposition of a navigational servitude that required public access to a pond.<sup>245</sup> The landowner in *Kaiser Aetna* reasonably relied on government consent when he connected the pond to the navigable water at issue. The Court’s emphasis was on the landowner’s right to exclude, which is historically “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”<sup>246</sup> The Court held that the servitude “[would] result in an actual physical invasion of the privately owned marina . . . . And[,] even if the Government physically invade[d] only an easement in property, it must nonetheless pay just compensation.”<sup>247</sup>

As the Court emphasized in both *Loretto* and *Kaiser Aetna*, “property law has long protected an owner’s expectation that he will be relatively undisturbed at least in the possession of his

---

<sup>240</sup> *Loretto*, 458 U.S. at 441.

<sup>241</sup> *Id.* at 435 (citing *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)).

<sup>242</sup> 328 U.S. 256 (1946).

<sup>243</sup> *Id.* at 265.

<sup>244</sup> *Loretto*, 458 U.S. at 435 n.12 (“The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude.”). Cases involving temporary physical invasions are not afforded protection via a *per se* takings rule as denoted in *Loretto*, but rather require a more complex balancing test to determine if a taking has occurred. See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82–84 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979).

<sup>245</sup> *Kaiser Aetna*, 444 U.S. at 180.

<sup>246</sup> *Id.* at 176.

<sup>247</sup> *Id.* at 180.

property.”<sup>248</sup> While the *Hage* case involves a property interest in water as opposed to land, the Hages’ expectations involving their rights are not considerably different from those in *Loretto* and *Kaiser Aetna*. Water rights, as mentioned above, are usufructuary in nature and are technically “owned” by the public.<sup>249</sup> A reasonable expectation still remains, however, that the government and third parties will not be permitted to physically occupy, invade, or completely deny the rights holder use of the water itself. An examination of the facts in *Hage*, using the standards set out in *Loretto* and *Kaiser Aetna*, shows that the government has arguably physically “taken” the Hages’ water rights in two distinct respects.

The first of the two potential physical takings occurred when the Forest Service physically denied the Hages access to the water. The Forest Service diverted the flow of water in the Meadow Canyon allotment, and subsequently used the new water source as a domestic water supply for the Guard Station located on the public domain.<sup>250</sup> The government’s re-routing of water effectively denying an appropriator’s vested rights constitutes a *per se* permanent physical taking under *Loretto*. In order to refute this allegation, the government will have to prove that the reason for re-routing the water was to prevent waste as a result of water contamination downstream,<sup>251</sup> or for some other legitimate reason.

The second of the two potential physical takings occurred when the Forest Service denied the Hages access to water, which had always been available to them through the 1866 Act ditches. The government physically barred the Hages from going on federal land to access ditch rights-of-way that served as the only means of accessing the water. As the *Hage* court articulated in 2002, such interference gives rise to a physical takings claim.<sup>252</sup>

---

<sup>248</sup> *Loretto*, 458 U.S. at 436. See also Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1228 (1967).

<sup>249</sup> *Bergman v. Kearney*, 241 F. 884, 893 (D. Nev. 1917) (“[W]ater itself . . . belongs to the public.”).

<sup>250</sup> *Hage v. United States*, 35 Fed. Cl. 147, 155 (1996).

<sup>251</sup> *Id.* Specifically, the Forest Service claimed that Meadow Spring was contaminated. *Id.* The facts do not indicate whether further evidence was brought forth to validate this claim. In addition, however, the Forest Service failed to obtain the State Engineer’s approval for this change in diversion. *Id.* This fact potentially suggests that the Forest Service’s failure to observe procedure evidences bad faith.

<sup>252</sup> *Hage v. United States*, 51 Fed. Cl. 570, 580 n.13 (2002). Specifically, the Hages claim that the “government took their property when it prevented them access to their 1866 Act ditches.” *Id.* at 580. The court responded that this claim “is a physical takings claim because [the Hages] argue[d] the government . . . physically barred them from the land, with threat of prosecution for trespassing if they enter[ed] federal land to maintain their ditches.” *Id.* at 580 n.13. In addition, the court noted that this was “not an idle threat,” as “the government unsuccessfully prosecuted Mr. Hage for maintaining the White Sage Ditch.” *Id.* The Ninth Circuit overturned the government’s initial conviction of Mr. Hage in this instance. *Id.*; *United States v. Seaman*, 18 F.3d 649 (1994).

The court emphasized that a “physical taking occurs 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.’”<sup>253</sup> Because this rationale could readily be applied to the facts in *Hage*, it would appear that the *Hage* court will likely find a taking as to this issue.

Another argument put forth by the Hages was that a physical taking occurred when the federal government permitted non-indigenous elk and other wildlife to drink the water, as well as forage on the land adjacent to the ditch rights-of-way.<sup>254</sup> The United States Court of Federal Claims addressed a similar takings issue in *Bradshaw v. United States*.<sup>255</sup> In *Bradshaw*, the plaintiffs alleged a taking when the Bureau of Land Management allowed horses to forage on their grazing allotments as well as drink from springs in which the plaintiffs claimed to possess vested rights.<sup>256</sup> The court sought guidance from the Federal Circuit, the Tenth Circuit, and the Supreme Court.<sup>257</sup> Ultimately, the court held that the federal government is not liable for damage or depletion of privately owned rights on federal land caused by horses or other animal trespassers.<sup>258</sup> Given the factual similarities between *Hage* and *Bradshaw*, it is likely that this physical takings claim will fail.

Alternatively, the Hages might argue a *temporary* physical taking occurred when the government allowed non-indigenous elk to drink from water in the public domain in which the Hages possessed vested water rights. In fact, this argument is somewhat analogous to that posed in *Kaiser Aetna*. Like the plaintiff in *Kaiser Aetna*, the Hages’ rights were subjected to temporary physical invasions. However, the argument as presented in this case is rather weak. The weakness lies in the fact that “the right to exclude” has never been associated with vested water rights. In light of the *Kaiser Aetna* distinction, as well as the precedent set by *Bradshaw*, it would be difficult for the Hages to show that the federal government had a duty to keep elk and other wildlife from

---

<sup>253</sup> *Hage*, 51 Fed. Cl. at 576 (quoting *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 642 (1879)).

<sup>254</sup> *Hage v. United States*, 35 Fed. Cl. 147, 156 (1996).

<sup>255</sup> 47 Fed. Cl. 549 (2000).

<sup>256</sup> *Id.* at 554.

<sup>257</sup> *Id.* at 553–54. See *Alves v. United States*, 133 F.3d 1454 (Fed. Cir. 1998); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986). In *Mountain States*, the plaintiffs alleged a taking when the Bureau of Land Management failed to prevent a trespass of wild horses on the plaintiffs’ land. The court held that the wild horses were not “instrumentalities of the federal government whose presence constitutes a permanent governmental occupation” of the plaintiffs’ property. *Id.* at 1428. The court based its holding on a long line of cases where courts have determined that damage to private property by protected wildlife does not constitute a compensable taking. *Id.* at 1428–31. See also *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

<sup>258</sup> *Bradshaw*, 47 Fed. Cl. at 554.

drinking water and foraging on land that is considered part of the public domain.

b. Regulatory Takings

Over the last century, government regulation of private property has increased dramatically. In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court recognized the necessity of articulating parameters for such regulation.<sup>259</sup> As a result of *Pennsylvania Coal*, private property may be “regulated to a certain extent,” but a regulation that “goes too far . . . will be recognized as a taking.”<sup>260</sup> Over eighty years ago, the Court recognized that the United States was “in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>261</sup>

i. Regulation that Denies Landowner All Economically Viable Use of Property is a *Per Se* Taking under the Fifth Amendment

In *Lucas v. South Carolina Coastal Council*, the Supreme Court created a *per se* rule requiring just compensation when a private landowner is denied *all* economically viable use of his or her property as a result of government regulation.<sup>262</sup> This *per se* rule is triggered when “total deprivation of beneficial use is . . . the equivalent of a physical appropriation.”<sup>263</sup> The only instance in which the *per se* rule may be overcome is where a private landowner is denied use interests that were not originally part of the property title at issue.<sup>264</sup> Nuisance uses, as well as limitations on uses prescribed by background principles of state property law inherent in a landowner’s title, fall into this exception category.<sup>265</sup>

<sup>259</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

<sup>260</sup> *Id.* at 415. See also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (finding that *Pennsylvania Coal* “is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a ‘taking.’”).

<sup>261</sup> *Pa. Coal*, 260 U.S. at 416.

<sup>262</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992).

<sup>263</sup> *Id.* at 1017. The Court stated:

Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life,” in a manner that secures an “average reciprocity of advantage” to everyone concerned.

*Id.* at 1017–18 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

<sup>264</sup> *Lucas*, 505 U.S. at 1027.

<sup>265</sup> *Id.* at 1029. The Court articulated that “[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the re-

In making this determination, the Court listed several factors to be considered:

[T]he degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, . . . the social value of the claimant's activities and their suitability to the locality in question, . . . the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, . . . [whether] a particular use has long been engaged in by similarly situated owners[,] . . . [and whether] other landowners, similarly situated, are permitted to continue the use denied to the claimant.<sup>266</sup>

Only upon the determination that the denied use is already prohibited will the government escape an obligation to pay compensation. Otherwise, the government is required to compensate private landowners when regulation operates to deny all economically viable use of private landowners' real property.

The majority opinion in *Lucas* has been characterized as "arguably the most important expression of an expectations-oriented understanding of property."<sup>267</sup> The Court drew a clear distinction between real and personal property, emphasizing that historically, "greater traditional protection of rights to make productive economic use of real property" has been afforded.<sup>268</sup> This principle stems from "the American people's time-honored and judicially respected expectations of greater security in real property."<sup>269</sup> Furthermore, the Court gave "great weight to the traditional understandings of citizens with respect to the scope and content of property rights."<sup>270</sup> Given the history of water allocation under the Prior Appropriation Doctrine and the clear expectations

---

restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* The Court also stated, "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. Overall, *Lucas* establishes three exceptions to the *per se* taking rule: "1) restrictions that inhere in the title to the property itself; 2) restrictions upon the use of property deriving from background principles of state property law; or 3) restrictions grounded in nuisance law." Archer & Stone, *supra* note 204, at 112.

<sup>266</sup> *Lucas*, 505 U.S. at 1030-31.

<sup>267</sup> Arnold, *supra* note 3, at 328. See also Butler, *supra* note 2, at 929-30.

Although the precise meanings and expectations attributed to private property norms may vary from group to group or person to person, the norms generally involve a belief in the existence or necessity of certain key attributes . . . . Basic characteristics of property include: a preference for private ownership; exclusivity, or the power and right to exclude others; free transferability, or the right to alienate property; and a reasonable expectation of gain, including the right to conduct an economically viable use free from unfair government or private interference.

*Id.* (emphasis added).

<sup>268</sup> Arnold, *supra* note 3, at 329.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

placed upon priority of use, the Court's discussion of expectations in *Lucas* is arguably relevant to situations involving appropriator's expectations in vested water rights, and should be considered in takings disputes involving those rights. Moreover, *Lucas* raises several regulatory takings arguments that may benefit the Hages.

The categorical *per se* rule that emerged from *Lucas* will be especially helpful to the Hages in the upcoming takings phase of the trial. The Hages argued that the excessive regulation of their 1866 Act ditch rights-of-way essentially precluded access to the water. In its 2002 opinion, the court recognized that the Hages "ha[d] a right to go onto the land and divert the water."<sup>271</sup> If, in fact, the federal government's regulation precluded the Hages from accessing the ditches, it would be impossible for the Hages to physically obtain *any* of the water in order to put it to beneficial use. Under *Lucas*, this is a *per se* taking that requires compensation.

In addition, the Hages contended that regulation requiring a "special permit" granting access to the ditches was a taking.<sup>272</sup> The Hages do not dispute that the ditch rights-of-way are subject to reasonable Forest Service regulation, including the "need to obtain special use permits when necessary."<sup>273</sup> Although rights-of-way on public lands are subject to reasonable regulation by the Forest Service, such regulation may not "prohibit[] the ranchers from exercising their vested rights nor limit[] their exercise of those rights so severely as to amount to a prohibition."<sup>274</sup> From the Hages' perspective, the special permit requirement is a surreptitious method of denying access to the ditches and the water contained therein. Given the troubled relationship between the Hages and the Forest Service, it seems highly unlikely that the Forest Service would ever grant such a permit. Therefore, the taking of the Hages' right to access the ditches and maintain them at a level consistent with their property interest may require just compensation.

Lastly, the Hages argue that the federal government's physical impounding of their cattle is a regulatory taking.<sup>275</sup> The Hages did sign the grazing permit, which incorporated the Forest Service's regulations "permitting impoundment and sale of livestock under specific conditions."<sup>276</sup> Congress and the Bureau of Land

---

271 Hage v. United States, 51 Fed. Cl. 570, 584 (2002).

272 *Id.* at 584.

273 *Id.* The Forest Service claimed that "normal maintenance" of the ditches includes "minor trimming and clearing of vegetation around the ditches." *Id.* All other maintenance exceeding "normal maintenance" requires a special use permit. *Id.* See also 43 C.F.R. § 2801.1-1 (2002).

274 *Elko County Bd. of Supervisors v. Glickman*, 909 F. Supp. 759, 764 (D. Nev. 1995).

275 Hage v. United States, 35 Fed. Cl. 147, 178 (1996).

276 *Id.* at 176.

Management have the authority to “control the occupancy and use of public land and to protect that land from trespass and injury.”<sup>277</sup> Accordingly, the Hages’ failure to remove their cattle from the public domain within a reasonable time may have resulted in a trespass, thus permitting the federal government to rightfully confiscate the cattle under the permit and Forest Service regulations.<sup>278</sup> Such was the case in *Bradshaw*, where the court held that the plaintiffs’ failure to remove their cattle from the public domain after the revocation of their grazing permit did not constitute a compensable taking.<sup>279</sup>

The facts in *Hage*, however, are distinguishable from *Bradshaw* in many respects. In *Bradshaw*, the plaintiffs admitted that their cattle were at times located on the public domain without the federal government’s consent.<sup>280</sup> The plaintiffs also neglected to redeem their cattle after the confiscation when given the opportunity to do so.<sup>281</sup> The Hages, however, allege that the Forest Service was “able to impound and sell their cattle only because it made demands under the permit which [the Forest Service] knew [the Hages] could never satisfy as well as physically opened gates, causing the cattle to wander to the suspended allotment.”<sup>282</sup> Specifically, the Hages argue that the Forest Service intentionally enacted regulatory schemes that “created a situation where it was physically and economically impossible to prevent their cattle from wandering and to redeem their cattle after impoundment.”<sup>283</sup> Thus, while at first glance this claim appears to imply a physical taking, it more appropriately constitutes a potential regulatory taking. Under *Lucas*, it is plausible that the Forest Service’s regulations were so unreasonable and restrictive that the Hages were ultimately denied all economic beneficial use of their cattle. If that turns out to be the case, the *Hage* court has determined that the total value of the confiscated cattle will be the Hages’ remedy.<sup>284</sup>

---

277 *Klump v. United States*, 38 Fed. Cl. 243, 248 (1997).

278 Specifically, 36 C.F.R. § 262.10 (2002) provides that “[u]nauthorized livestock or livestock in excess of those authorized by a grazing permit on the National Forest System, which are not removed therefrom within the periods prescribed by this regulation, may be impounded and disposed of by a forest officer as provided herein.” The Secretary of Agriculture has the “authority to make such rules as are necessary to regulate the occupancy and use of the national forests for their protection.” *Hage*, 35 Fed. Cl. at 176 n.15.

279 *Bradshaw v. United States*, 47 Fed. Cl. 549, 555 (2000).

280 *Id.* at 554.

281 *Id.* at 555.

282 *Hage*, 35 Fed. Cl. at 176.

283 *Id.* at 178.

284 *Id.* (finding that “[t]he seizure of the cattle was the effect of the taking and its measure of damages”).

ii. Regulation that Results in Diminution of Economically Viable Use of Property *May* be a Taking under the Fifth Amendment

While *Lucas* is used to analyze governmental regulation that effectively denies a private landowner *all* economic use of his or her property, *Penn Central Transportation Co. v. New York City* is used to analyze governmental regulation that significantly *minimizes* a landowner's use of property.<sup>285</sup> Thus, although a mere "diminution in property value"<sup>286</sup> is not a *per se* taking, some diminutions are so severe that a taking results despite some remaining economically viable use in the property.<sup>287</sup> In *Penn Central*, the United States Supreme Court fashioned a three-prong test for determining when a regulatory taking has occurred.<sup>288</sup> In determining whether a governmental regulation constitutes a taking, an *ad hoc* inquiry is conducted through an examination of three factors: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action.<sup>289</sup> Like *Lucas*, *Penn Central's* balancing test gives weight to the property rights holder's expectation in his or her property right.

Even if the *Hage* Court is unwilling to go so far as to find a categorical *per se* taking under *Lucas*, it may still find a taking under *Penn Central*. As stated, the extensive regulation of the ditch rights-of-way in *Hage* not only prevented access to the water, but also prevented the Hages from performing maintenance on the 1866 Act ditches.<sup>290</sup> The outcome of applying the

---

<sup>285</sup> 438 U.S. 104 (1978). In *Lucas*, Justice Scalia pointed out that there are two distinct categories of government activity that will give rise to a *per se* taking without inquiry into the public interest furthered by the regulation: (1) physical occupations of property; and (2) regulations that deny all economically beneficial or productive uses of land. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). Clearly, the *Lucas* holding means that "courts are not to apply the *Penn Central* balancing test if a land-use regulation is a taking *per se*. When a *per se* taking does not occur, the *Penn Central* balancing test applies." Mandelker, *supra* note 17, at 224. See also David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441, 448 (2002) (A partial taking under *Penn Central* "occurs whenever a land use regulation deprives a landowner of sufficient use and value that goes beyond necessary exercise of the police power for the health, safety, and welfare of the people, but stops short of depriving the landowner of all economically beneficial use.").

<sup>286</sup> *Penn Cent.*, 438 U.S. at 131.

<sup>287</sup> See, e.g., *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 160 (1990) (holding that ninety-nine percent diminution in value qualifies as a taking); *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161, 175-76 (1990) (holding that ninety-five percent diminution in value may be construed as a taking).

<sup>288</sup> *Penn Cent.*, 438 U.S. at 124.

<sup>289</sup> *Id.* In the years after *Pennsylvania Coal v. Mahon* was decided, the Court was "unable to develop any 'set formula' for determining when 'justice and fairness' require[d] that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.* The Court in *Penn Central* remedied this dilemma by articulating a three-prong test.

<sup>290</sup> *Hage v. United States*, 51 Fed. Cl. 570, 584 (2002).

first prong of the *Penn Central* test to the *Hage* case is unambiguous. The economic impact of the governmental regulations was clearly devastating to the Hages, who lost all economically viable use of their water rights. It should be reiterated, however, that it would be useless for the Hages to resurrect any argument involving the revocation of their grazing permit. As indicated by the court, there is no property interest in the permit or adjacent surface-estate,<sup>291</sup> and the result of that economic loss will not be used by the court as a factor to determine the economic impact of the regulations. What is a factor to be considered, however, is the succession of aggressive regulatory measures utilized by the government to ensure that the Hages could not continue to use their property rights in the water and ditches.

The second prong of the *Penn Central* test turns on the extent to which government regulation interferes with a property owner's investment-backed expectations.<sup>292</sup> For a court to consider such investment-backed expectations, those expectations must be both distinct and "reasonable."<sup>293</sup> In some instances, courts have employed a "notice" rule that qualifies the validity of reasonable expectations.<sup>294</sup> In those cases, "courts reject[ed] takings claims involving land that was acquired with actual or constructive knowledge of existing or pending regulatory limitations."<sup>295</sup> The rule from those cases is that a property owner's expectations are reasonably limited by pre-existing knowledge that his or her property rights may be subject to regulatory restrictions.

When applying the second prong of the *Penn Central* test to the *Hage* case, it would even be difficult for proponents of the Pub-

---

<sup>291</sup> *Id.* at 592.

<sup>292</sup> *Penn Cent.*, 438 U.S. at 124.

<sup>293</sup> *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1987). "[E]xpectations can only be of consequence where they are 'reasonable' ones." *Id.* See also Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 25 (1997) ("Expectations are reasonable when a person, passably acquainted with the state of the law and the legal process (which includes the currently accepted morals, mores, customs and usages, and . . . the general social milieu), foresees that the occurrence of a particular contingency is likely to receive proper legal protection.").

<sup>294</sup> See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1009-10 (1984) (holding that reasonable investment-backed expectations in trade secrets do not exist when disclosed after the adoption of a statute requiring disclosure); Grant, *supra* note 124, at 438-39 (discussing how *Monsanto* gives insight to how the owner-expectations factor might operate in water right suits). *Monsanto*, although involving property interests in trade secrets as opposed to interests in real property, is applicable in takings cases. The court held that notice of a government regulation can limit landowner investment-backed expectations in takings cases. *Monsanto*, 467 U.S. at 1006-07. See also *Furey v. City of Sacramento*, 592 F. Supp. 463 (E.D. Cal. 1984), *aff'd on other grounds*, 780 F.2d 1448 (9th Cir. 1986); *Sucesion Suarez v. Gelabert*, 541 F. Supp. 1253 (D.P.R. 1982), *aff'd*, 701 F.2d 231 (1st Cir. 1983).

<sup>295</sup> Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939, 979 (1999).

lic Trust Doctrine to deny the existence of reasonable investment-backed expectations. The Hages' predecessors in interest acquired property rights in the water and ditches at issue in 1865, when the Ranch was established,<sup>296</sup> long before the federal government began to assert dominion over the public domain,<sup>297</sup> and well before Nevada's creation of the contemporary regulatory permit system.<sup>298</sup> It would, therefore, be reasonable to characterize those interests as quite "old." "The distinction between 'old' and 'new' property is . . . relevant . . . . The common law's longstanding protection of 'old property' may seem to render more reasonable the expectations connected with it in comparison to the expectations of a holder of 'new property.'"<sup>299</sup> For example, if the Hages' situation were compared to an appropriator possessing water rights under the current permit system, the outcome of this analysis might be significantly different. The modern permit system was created to anticipate controversies between the state and appropriators over beneficial use, quantities of diversion, and so on.<sup>300</sup> This regulatory scheme is generally efficient, as it creates standards for the use of water and provides each appropriator with notice about the limitations of water rights so that distinct and clear expectations are formed. But, "keep in mind that however attractive a modern [permit] administrative system may be, it does not settle the very old, pre-permit system claims which are often the most important and valuable water rights."<sup>301</sup> That, of course, is the precise situation that exists in *Hage*.

In addition to the fact that "old" appropriative rights like the Hages' were not acquired with notice of current regulatory schemes, the value of those "old" rights plays an important role in the analysis of investment-backed expectations. Admittedly, limited property rights give way to limited expectations, just as property rights with little chance of economic prosperity would lead to decreased expectations regarding their economic potential. However, "[t]he oldest rights are the most valuable,"<sup>302</sup> and concrete expectations are sure to develop over the course of many years.

---

296 *Hage v. United States*, 35 Fed. Cl. 147, 153 (1996).

297 *Id.* Congress created the Toiyabe National Forest in 1907, approximately forty years after the Ranch was established. *Id.*

298 See *Prosole v. Steamboat Canal Co.*, 140 P. 720, 721 (Nev. 1914). In 1907, the Nevada legislature passed an act "to provide for the appropriation and distribution and use of the water." *Id.* Any appropriation prior to 1907 is considered to have been acquired prior to the current permit system. *Id.*

299 Massey, *supra* note 175, at 556.

300 SAX ET AL., WATER RESOURCES, *supra* note 115, at 109. Specifically, "permit administration gives the state an opportunity to consider such issues as beneficial use before the fact, to provide public records of actual use and to assure that there is unappropriated water available before anyone begins work on a diversion." *Id.*

301 *Id.*

302 *Id.* at 104.

While the Hages cannot predicate their takings phase argument on reliance interests in the grazing permits, *other* expectations regarding their right to put the water and ditches to beneficial use will become clear. As senior appropriators of vested water rights not subject to restrictions imposed by the current permit system, the Hages reasonably expected to be able to use the water in an economically beneficial manner.<sup>303</sup> Such an expectation developed as a result of the very nature of the water allocation scheme under the Prior Appropriation Doctrine—a framework that the federal government formally assented to and continues to recognize in the western United States today. The federal government's imposition of regulations restricting access to the ditches and water clearly interferes with these expectations in a manner detrimental to the Hages.

The third and final prong of the *Penn Central* test requires inquiry into the character of the governmental action.<sup>304</sup> The Court in *Penn Central* stated that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>305</sup> The disputed regulations in *Hage* can be characterized as amounting to a physical invasion. As stated, the ultimate effect of the regulations was a virtual denial of access to the ditches, and consequently access to the water as well. Although the federal government's intent may have been to preserve the public domain for the public good, an invasion of this sort cannot be deemed necessary to satisfy that objective.

If the court in *Hage* applies *Penn Central*'s balancing test, it seems likely that the court will find that the federal government's extensive regulation of the Hages' 1866 ditches constitutes a taking under the Fifth Amendment. If the court examines the Hages' claims under *Lucas* and *Penn Central*'s regulatory takings framework, the Hages' expectations associated with their vested water rights will be thoroughly and properly considered. In addition, the Hages' vested water rights would be afforded the significant protection prescribed by the Takings Clause.

## VI. CONCLUSION

“The oldest rights are the most valuable, and much controversy still turns on the validity and status of rights acquired many

---

<sup>303</sup> See discussion *supra* Part V.B.1. This section of the comment outlines how the Hages could have put their water to a beneficial use if the federal government had not rerouted or denied access to the ditches and water.

<sup>304</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>305</sup> *Id.*

years ago, often in the nineteenth century. In western water law, age is not coextensive with obsolescence."<sup>306</sup> These ideas capture the essence of vested water rights acquired long ago; they are extremely coveted, virtually priceless to those who have rightfully appropriated them, and the subject of an ongoing and passionate dispute in the western United States. Per the discussion in this comment, the government's activity in *Hage* simply went "too far" in many respects. The remaining question is how the *Hage* case should be resolved, and, more generally, how water rights should be treated by courts in the West.

The regulatory takings standards articulated in *Lucas* and *Penn Central*, as well as the physical takings standards set forth in *Loretto*, *Causby*, and *Kaiser Aetna*, are not only readily applicable to the *Hage* dispute and other takings disputes involving water, but are also well suited for this purpose. Accordingly, those standards should be applied by the *Hage* court in the takings phase of the trial and by other courts in similar controversies involving water rights. The application of those standards will ensure that vested water rights are afforded the significant protection they deserve.

The inherent differences between water and land as natural resources do not support the conclusion that water should be afforded less protection under the Takings Clause. In fact, Nevada case law and expectations founded on the Prior Appropriation Doctrine suggest that vested water rights should be vigorously protected and preserved. The *Hage* court recognized "that water rights are not 'lesser' or 'diminished' property rights unprotected by the Fifth Amendment. Water rights, like other property rights, are entitled to the full protection of the Constitution."<sup>307</sup> Although water and land are different in nature, the recognition of water rights as a protected property right does not require the creation of new legal theories, or even new justifications of old theories. Indeed, the most appropriate way of affording water rights full protection under the Takings Clause is to examine takings disputes involving water under the same framework currently applied to land disputes. Most importantly, recognition of water rights as protected property under the Takings Clause is not a dramatic departure from well established constitutional precedent, but merely the logical extension of it.

---

306 SAX ET AL., WATER RESOURCES, *supra* note 115, at 104.

307 *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996).

