

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA  
3 BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE  
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4 UNITED STATES OF AMERICA, :  
5 : No. 2:07-CV-1154-RCJ-VCF  
6 Plaintiff, :  
7 : June 6, 2012  
8 -vs- :  
9 : Reno, Nevada  
10 ESTATE OF E. WAYNE HAGE, et :  
11 al., : Volume 22  
12 Defendants. :  
13

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14 TRANSCRIPT OF BENCH TRIAL

15 APPEARANCES:

16 FOR THE PLAINTIFF: STEPHEN BARTELL, ANNA STIMMEL and  
17 BRUCE TRAUBEN  
18 Assistant United States Attorneys  
19 Washington, D.C.

20 FOR DEFENDANT ESTATE OF E. WAYNE HAGE: MARK POLLOT  
21 Attorney at Law  
22 Boise, Idaho

23 JOHN W. HOFFMAN  
24 Attorney at Law  
25 Reno, Nevada

FOR DEFENDANT WAYNE N. HAGE: IN PROPRIA PERSONA

Reported by: Margaret E. Griener, CCR #3, RDR  
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1 RENO, NEVADA, WEDNESDAY, JUNE 6, 2012, 1:36 P.M.

2 ---o0o---

3  
4 THE COURT: Thank you. Please be seated.

5 The Court notes the same appearances of counsel.

6 Let's see. Mr. Williams and Mr. Seley are in the  
7 courtroom, correct?

8 And do we have a local U.S. Attorney in the  
9 courtroom, as well, Assistant U.S. Attorney? Yes. Okay.  
10 Good.

11 All right. Let me make some preliminary findings  
12 and conclusions, just like Judge Smith in Hage -- whatever it  
13 was IV or V, I'll address that -- made preliminary and then  
14 final opinion, that's what the Court is doing here. I'm  
15 making preliminary findings and conclusions.

16 You'll have to have patience and listen for quite a  
17 while for the following reason: Most of the plaintiff's case  
18 and most of their closing argument was spent in constructing  
19 straw men and straw men arguments and then challenging  
20 defendants to knock them down.

21 A primary example of that, of course, is that the  
22 defendants were seeking a declaration or judgment that they  
23 had free-ranging rights everywhere but certainly on their  
24 750,000 acres that they claimed under their allotments and  
25 water rights. That simply was not the case, of course.

1           At no time in this trial -- while they made that  
2 claim in front of the Court of Claims, at no time in this  
3 trial, and in response to several inquiries from this Court,  
4 they clearly disclaimed that they were seeking any  
5 adjudication or judgment of a free-ranging forage right, they  
6 were only seeking to protect their water rights and any  
7 attendant foraging right or access rights as already declared  
8 by the Court of Claims.

9           So this Court is not writing on a clean slate. Most  
10 of the long-standing dispute between the Forest Service and  
11 the BLM and the Hages has been resolved, adjudicated, in  
12 courts. I only have one little tail end of it.

13           So in the hope of greatly narrowing what I have to  
14 decide, I'm going to recite at quite some length the Court of  
15 Claims', Judge Smith's decision to which this Court is bound  
16 and to which the parties are bound.

17           Madam Clerk, when I begin to read these decisions,  
18 the record will reflect that I am quoting. When I use the  
19 word comment or my comment, the record will reflect that I am  
20 adding my comment either for purposes of expanding or  
21 extending the finding of Judge Smith relative to the purposes  
22 of this case, or to correct a conclusion of law relative to  
23 this case as opposed to a takings case, or to make extra  
24 comment which I intend to be extra conclusions or, in some  
25 cases, findings. Otherwise, I'm quoting from Judge Smith and

1 his decision, and the purpose is to demonstrate to the parties  
2 and the appellate court that I am not writing on a clean  
3 slate.

4           Again, most of this case has already been resolved  
5 by prior litigation, so I am doing that both for the purpose  
6 of adopting Judge Smith's findings and conclusions, which I am  
7 bound to, as well as making it clear what things Judge Smith  
8 ruled upon and what few remaining items I have to rule upon.  
9 So you will bear with me while we undertake that.

10           I understand from a layman's perspective a lot of  
11 this will be sleeping material. Not so to the attorneys.  
12 They will understand and the appellate court will understand  
13 clearly what Judge Smith resolved and, therefore, what's left  
14 for me to resolve, and the basis of the legal rulings on which  
15 I predicate findings and further legal conclusions.

16           I start with -- there's a whole series of Hage  
17 cases, of course, including the final judgment. I start with  
18 Hage V, which is a final opinion and judgment, simply because  
19 that summarizes what went before.

20           Then, of course, I'll revert to and go back to Hage  
21 I, II, III and IV, which are very extensive. So bear with me.  
22 Lean back and listen.

23           Hage V, June 6th, 2008, Judge Smith.

24           "This case involves the conflict of two  
25 legitimate claims on the public lands. Both claims

1 can be found in the nation's earliest history. On  
2 the one hand, there is the nation's interest in  
3 preserving the quality of its lands and exercising  
4 its ownership rights, as well as getting adequate  
5 value for the public from those lands. Early on  
6 there was the competing interest of eager citizens  
7 and new immigrants in acquiring land to possess, to  
8 develop, and to settle in order to feed their  
9 families and live in freedom and independence from  
10 the feudal overlords who had owned the land they  
11 farmed in Europe. This desire for the seemingly  
12 limitless land west of the Atlantic coast captivated  
13 virtually everyone, from George Washington to the  
14 humblest east coast farmer.... "

15 Comment. I'll skip the next three paragraphs  
16 because they're just simply Judge Smith getting lyrical.

17 "Plaintiffs, the Estate of E. Wayne Hage and  
18 the Estate of Jean N. Hage, have been the owners of  
19 the Pine Creek Ranch in Nye County, Nevada since  
20 1978."

21 Comment here. Again, I'm reading this for the  
22 purpose of adopting it as my own findings and conclusions, and  
23 it is hereby incorporated by reference in that regard.

24 "The Pine Creek Ranch is located in central  
25 Nevada and consists of approximately 7,000 acres of

1 patented land used primarily for grazing cattle. In  
2 1991, plaintiffs filed a claim against the United  
3 States alleging constitutional, contractual, and  
4 statutory causes of action arising from an alleged  
5 suspension and cancellation of permits to graze  
6 livestock on federal land. Plaintiffs allege that  
7 policies promoted by the Forest Service, combined  
8 with the Forest Service actively preventing  
9 plaintiffs from accessing and maintaining their water  
10 rights, amounted to a taking of their property as  
11 requiring just compensation under the Fifth  
12 Amendment.

13 "The Court has published four opinions in  
14 this case. In this current and final stage of the  
15 litigation, the Court must determine whether the  
16 government's actions amounted to a taking as defined  
17 by the Fifth Amendment and, if so, what is the amount  
18 of just compensation due to plaintiffs. In addition,  
19 the Court must determine whether plaintiffs are  
20 entitled to recover compensation under the Federal  
21 Land Policy and Management Act, 43 USC 1752(g).

22 "Facts. The facts of this case are well-  
23 described in the Court's previous four opinions.  
24 Briefly, the Pine Creek Ranch, which plaintiffs  
25 purchased in 1978, was established in 1865. To raise

1 cattle economically in such an arid region,  
2 plaintiffs depend upon access to large quantities of  
3 land, including federal land, and to the limited  
4 water supply in the Toiyabe National Forest.

5 Plaintiffs use ditch rights-of-way, which are  
6 easements on federal land, to transport water for  
7 irrigation, stock watering and domestic purposes.

8 "After purchasing Pine Creek Ranch,  
9 plaintiffs constructed range improvements, both on  
10 the patented lands (the land plaintiffs own) and on  
11 the allotments appurtenant to the ranch. These  
12 improvements included corral and water facilities at  
13 the Pine Creek well, drift fences in the Monitor  
14 Valley, and a cattle guard in the Mosquito Creek  
15 area. Further range improvements included new spring  
16 boxes at Ice House Spring and at Frazier Spring. At  
17 Stewart Spring, plaintiffs installed a new spring box  
18 and three miles of pipeline to a holding tank and  
19 trough."

20 Comment. I will provide Madam Court Reporter with  
21 these so that she can make the transcript correct relative to  
22 the written opinion.

23 "In 1979, after receiving permission from the  
24 Forest Service, the Nevada Department of Wildlife  
25 released elk into the Table Mountain Allotment area

1 of the Toiyabe National Forest. The Forest Service  
2 approved the release after conducting two studies to  
3 determine the suitability of introducing elk into the  
4 area. Plaintiffs objected to the Forest Service's  
5 action arguing that the elk drank water and ate  
6 forage which belonged to plaintiffs and were needed  
7 for their cattle. Plaintiffs also informed the State  
8 of Nevada that the hunting season for elk overlapped  
9 with the cattle grazing period and that the presence  
10 of elk impeded the grazing and movement of their  
11 livestock. The State of Nevada responded that cattle  
12 grazing and hunting on public land appeared to be  
13 reasonably compatible.

14 "With the introduction of elk on Table  
15 Mountain came numerous problems, including elk  
16 hunters tearing down fences and scattering cattle.  
17 In addition, the overlap between grazing season and  
18 elk hunting season interfered with the Hages' ability  
19 to get the cattle off Table Mountain at the end of  
20 grazing season. Following the introduction of elk,  
21 the Forest Service fenced off certain meadows and  
22 spring sources on the Table Mountain Allotment and  
23 erected electric fences which excluded plaintiffs'  
24 cattle from waters owned by plaintiffs, as well as  
25 from the adjacent forage. The fences excluded cattle



1 but allowed elk, who could jump the fences, to access  
2 the water.

3 "Relations between the Forest Service and  
4 plaintiffs deteriorated. In 1983, plaintiffs  
5 received 40 letters from the Forest Service charging  
6 them with various violations. In the same year, the  
7 Forest Service paid 70 visits to plaintiffs.  
8 Following the 40 letters and 70 visits, the Forest  
9 Service filed 22 charges against plaintiffs. Many of  
10 these complaints cited issues of fence maintenance,  
11 some of them extremely minor infractions. In  
12 addition, the Forest Service insisted that plaintiffs  
13 maintain their 1866 Act ditches with nothing other  
14 than hand tools.

15 "Willows, other riparian growth, and upland  
16 vegetation proliferated upstream from plaintiff's  
17 lands. As a result of pinon, juniper, and willows  
18 clogging the canyon, plaintiffs saw a significant  
19 reduction in the water flow to their irrigated  
20 pastures. From water in Corcoran Creek, for example,  
21 plaintiffs could irrigate 20 acres, contrasted with  
22 80 acres in the mid-1990s. A proliferation of  
23 vegetation and the existence of dozens of beaver dams  
24 on Barley Creek has effectively stopped the flow of  
25 water to plaintiffs' Haystack fields. When

1 plaintiffs purchased the ranch, Barley Creek Ditch  
2 irrigated approximately 1,000 acres of the Haystack  
3 fields. The waters in Mosquito Creek, Pine Creek  
4 Ditch, and other creeks in which plaintiffs have a  
5 vested water right showed a sharp decrease in water  
6 flow. The government threatened to prosecute  
7 plaintiffs for trespassing if they entered federal  
8 lands to maintain their ditches. As the Court stated  
9 in *Hage IV*, this was clearly no idle threat, as the  
10 government unsuccessfully prosecuted Mr. Hage for  
11 clearing trees around the White Sage Ditch. The  
12 government stated that plaintiffs should have applied  
13 for a special use permit for permission to cut the  
14 trees surrounding their vested water rights.

15 "In 1990, the Forest Service determined that  
16 Meadow Canyon Allotment had been 'overgrazed' and  
17 ordered plaintiffs to keep off that area. Meadow  
18 Canyon had 25 miles of unfenced boundary with Monitor  
19 Valley, and cattle often drifted between the two  
20 allotments. With such a large unfenced boundary, it  
21 was nearly impossible to keep cattle from wandering  
22 onto Meadow Canyon."

23 Comment. My emphasis added to the next and to the  
24 rest of the paragraph.

25 "In July 1990, the Forest Service ordered

1 plaintiffs to remove all cattle from Meadow Canyon by  
2 August 10, 1990. In August of that year, the Forest  
3 Service sent plaintiffs a letter asking them to show  
4 cause why 100 percent of their cattle numbers on the  
5 Meadow Canyon Allotment should not be canceled.

6 Mr. Grider, the district ranger during the time in  
7 question, admitted that the Hages did not receive his  
8 show cause letter until August 20, 1990, even though  
9 the letter gave the Hages six days from August 17,  
10 1990 to comply. The district ranger issued a notice  
11 to plaintiffs in the fall of 1990 that any cattle  
12 found on Meadow Canyon were subject to impoundment.

13 Mr. Hage responded with several letters detailing the  
14 problems inherent in keeping cattle off Meadow Canyon  
15 and detailing his attempts to prevent cattle from  
16 entering.

17 "In 1991, the Forest Service twice impounded  
18 plaintiff's cattle, and when plaintiffs were unable  
19 to redeem the cattle by paying the costs of  
20 impoundment, the cattle were sold by the Forest  
21 Service at auction for a total of \$39,150. The  
22 Forest Service kept the proceeds of the sale.

23 "Procedural History. Plaintiffs filed a  
24 claim in this Court alleging: One, the government  
25 took compensable property interests in their grazing

1 permit, water rights, ditch rights-of-way, rangeland  
2 forage, cattle, and ranch; two, the grazing permit  
3 was a contract, which defendant breached, entitling  
4 them to damages, and, three, they are entitled to  
5 compensation for improvements they made on public  
6 rangeland.

7 "In *Hage I*, the Court granted-in-part and  
8 denied-in-part the government's motion for summary  
9 judgment. The Court held that plaintiffs' grazing  
10 permit was a license, not a contract or a property  
11 interest, and hence no damages could be awarded for  
12 its revocation. (It is settled law that grazing  
13 permits, though they are of much value to ranchers in  
14 the operation of an integrated ranching unit,  
15 nevertheless do not constitute property for purposes  
16 of the just compensation clause.)"

17 I'm adding my comment. Clearly, the issue before  
18 this Court -- before Judge Smith, in determining property  
19 interests was property for purposes of the takings clause,  
20 clearly not for purposes of the due process clause, both  
21 procedural and substantive, which I will address later.

22 "However, the Court denied the government's  
23 motion for summary judgment with regard to: Number  
24 one, whether plaintiffs had a property interest in  
25 foraging rights, water rights, and ditch

1 rights-of-way in the Toiyabe National Forest; two,  
2 whether the cancellation of plaintiffs' permit to  
3 graze cattle on federal lands was done, at least in  
4 part, to devote the rangeland to another public  
5 purpose, in which case plaintiffs were entitled to  
6 compensation for the improvements they made on the  
7 land; and, three, whether the Forest Service's  
8 impoundment of the Hages' cattle constituted a  
9 compensable taking.

10 "In *Hage II*, the Court denied the motion of  
11 various state and private groups to intervene in the  
12 case, but granted them *amici curiae* status so that  
13 they could participate in the adjudication process.  
14 The State of Nevada, the State Engineer of Nevada,  
15 National Wildlife Federation, National Resources  
16 Defense Council, Nevada Wildlife Federation, Sierra  
17 Club, Nevada Department of Wildlife, and Pacific  
18 Legal Foundation were granted status as *amici curiae*.

19 "After a two-week trial on the property  
20 phase, the Court issued a preliminary opinion that  
21 served to 'streamline and expedite post-trial  
22 briefing.' *Hage III*. The Court later rescinded its  
23 decision in *Hage III* with a final opinion on four  
24 issues regarding plaintiffs' property rights. *Hage*  
25 *IV*. First, the Court again held that plaintiffs did

1 not have a property interest in grazing permits that  
2 could give rise to a taking claim, as a grazing  
3 permit is a license, not a irrevocable right.

4 ('Plaintiffs' fee lands and water rights must be  
5 valued independently of any value added by any  
6 appurtenant grazing permits or grazing preferences').

7 Second, the Court denied plaintiffs' claim to a  
8 752,000-acre surface estate for grazing, relying on  
9 numerous western land statutes going back to the 18th  
10 century. Third, the Court determined under Nevada  
11 law that plaintiffs had appropriated and maintained  
12 vested water rights in various 1866 Act ditches,  
13 wells, creeks, and pipelines, as well as waters in  
14 the Monitor Valley, Ralston, and McKinney Allotments.  
15 These water rights fell into three major categories:  
16 Number one, 1866 Act ditches; number two,  
17 stockwaters; and, three, waters flowing from federal  
18 lands to plaintiffs' patented land. Finally, the  
19 Court held that plaintiffs were entitled to ditch  
20 rights-of-way on each side of the 1866 Act ditches.

21 "In 2004, the Court held a two-week trial in  
22 Reno, Nevada to determine whether the government's  
23 actions constituted a taking, and if so, what just  
24 compensation was due to plaintiffs. Following the  
25 filing of post-trial briefs by plaintiffs, defendant,

1           and *amici curiae*, the Court heard oral argument. In  
2           this fifth and final opinion, the Court will first  
3           turn its attention to the taking issue, addressing  
4           each category of property identified in *Hage IV*.  
5           Then the Court will address plaintiffs' claim for  
6           compensation under 43 USC section 1752(g)."

7           Comment. That's for improvements.

8           Next two paragraphs, my comment as well, I will  
9           read, again, Judge Smith is waxing lyrical on property rights,  
10          the importance.

11          "Taking. Legal standard. The notion of  
12          private property is fundamental to the existence of  
13          our nation. It is a fundamental duty of a government  
14          to protect, rather than to destroy, personal  
15          property. John Locke, *Two Treatises on Government*.  
16          ('Whenever the legislators endeavor to take away, and  
17          destroy the property of the people, they put  
18          themselves into a state of war with the people, who  
19          are thereupon absolved from any further obedience.')

20          (emphasis in original). The founders of our nation  
21          envisioned personal property as a fundamental right.  
22          It is part of the trinity of values underlying in our  
23          reverence for 'life, liberty, and property.' These  
24          three ideas are all aspects of the fundamental  
25          integrity of each person. As the Supreme Court has

1           stated, 'property does not have rights. People have  
2           rights. The right to enjoy property without unlawful  
3           deprivation, no less than the right to speak or the  
4           right to travel, is in truth, a "personal" right.'  
5           *Lynch v. Household Finance.*

6                        "The Fifth Amendment protects citizens by  
7           providing that if private property is taken for  
8           public use, those citizens should be justly  
9           compensated. Amendment V. The classic example of a  
10          taking requiring just compensation is when 'the  
11          government's action amounts to a physical occupation  
12          or invasion of the property, including the functional  
13          equivalent of a "practical ouster of the owner's  
14          possession.'" Citing *United States versus General*  
15          *Motors, Corp., Transportation Co. versus Chicago*  
16          (holding the government's occupation of a private  
17          warehouse was a taking). A permanent physical  
18          occupation constitutes a *per se* taking, 'without  
19          regard to whether the action achieves an important  
20          public benefit or has only a minimal economic  
21          impact.'

22                        That's *Loretto*.

23                        "This Court already held in *Hage IV* that the  
24          government's actions which physically prevented  
25          plaintiffs from accessing their 1866 Act ditches



1           amounted to a physical taking. However, there is no  
2           bright line between physical and regulatory takings.  
3           Several of plaintiffs' other claims not previously  
4           addressed fall into the category of regulatory  
5           taking, such as the requirement of a special use  
6           permit for clearing brush and the regulations that  
7           led to willow proliferation. Therefore, the Court  
8           turns its attention to the legal standard for a  
9           regulatory taking.

10                   "The Supreme Court has declined to establish  
11           any 'set formula' for determining when government  
12           regulation is a taking."

13                   That's *Lucas*.

14                   "Instead, the Court has focused on  
15           'essentially ad hoc, factual inquiries.'"

16                   *Penn Central*.

17                   "Penn Central provides a multi-factor  
18           balancing test for determining when compensation is  
19           required for a regulatory taking: One, the extent to  
20           which the regulation has interfered with distinct  
21           investment-backed expectations; two, the character of  
22           the governmental action; and, three, the economic  
23           impact of the regulation on the claimant. In  
24           addition, there are two categories of *per se* taking  
25           in which a balancing is not necessary. 'The first

1 encompasses regulations that compel the property  
2 owner to suffer a physical invasion of his property.'  
3 When an owner has suffered a destruction of his  
4 property through a regulation, 'no matter how minute  
5 the intrusion, and no matter how weighty the public  
6 purpose behind it, we have required compensation.'"

7 *Loretto.*

8 "The second situation is when the regulation  
9 'denies all economically beneficial or productive use  
10 of the land.'

11 "B. The impoundment" --

12 Turning now to the issues of the case.

13 "B. The Impoundment of Plaintiffs' Cattle  
14 was not a Taking.

15 "Plaintiffs" --

16 Comment. I feel it necessary to read this so that  
17 we delete this issue from this case but also to adopt Judge  
18 Smith's legal rulings relative to the impoundment of the  
19 cattle.

20 "Plaintiffs seek compensation for the value  
21 of their impounded cattle. In July and September  
22 of 1991, the Forest Service impounded a total of 105  
23 head found in trespass on Meadow Canyon. These  
24 cattle were in trespass because the Forest Service  
25 had decided not to allow grazing on Meadow Canyon and

1 had ordered plaintiffs to remove all cattle from that  
2 allotment by August 10, 1990. Plaintiff had nearly a  
3 year in which to remove the cattle from that area.  
4 While the presence of elk hunters may have impeded  
5 access of the cattle for the portion of the year, the  
6 elk hunting season was confined to a few months and  
7 should not have prevented plaintiffs from removing  
8 the cattle within a year. Again, the fact that the  
9 cattle were in trespass relates to the Forest  
10 Service's decision to not allow grazing on Meadow  
11 Canyon, which has no relevance to a Fifth Amendment  
12 claim, since the claimed property interest was, in  
13 fact, a revokable license and not a property right  
14 recognized by case law."

15 Comment. Again, I emphasize whenever he's using the  
16 term property right, he's talking about property right for  
17 purposes of the Fifth Amendment takings clause, not for the  
18 due process clause.

19 "As the Forest Service had the authority to  
20 determine whether plaintiffs' cattle were allowed on  
21 Meadow Canyon and gave plaintiffs nearly a year to  
22 comply with the decision before impounding the  
23 cattle, the impounding of plaintiffs' cattle was not  
24 unlawful. After plaintiffs were unable to redeem the  
25 cattle due to financial difficulties, defendant sold

1           the cattle at auction for \$39,150. The Forest  
2           Service kept this amount to cover the costs of  
3           impoundment.

4                         "Therefore the Court must deny plaintiffs'  
5           claim for compensation of the value of cattle  
6           impounded by the Forest Service."

7           Comment. Clearly, he's making no legal ruling that  
8           the Forest Service impoundment or declaration of trespass was  
9           not in violation of due process rights. He's simply saying  
10          that because it was pursuant to a trespass otherwise in place,  
11          and because there is no right to compensation for denial of a  
12          permit, the Court -- that Court would not give compensation  
13          for the impoundment of the cattle.

14                         Next category,

15                         "C. Plaintiffs are not Entitled to  
16           Compensation for the 'Entire Ranch.'

17                         "Plaintiffs argue that the government's  
18           actions constitute a taking of the 'entire ranch,'  
19           focusing on the BLM's decision to cancel plaintiffs'  
20           grazing permits and to suspend grazing on certain  
21           allotments."

22           Comment. Here, as well as in other places, I will  
23           add my comment that clearly both the Court, Smith, and the  
24           plaintiffs in that case, the Hages, were contemplating that  
25           their action was the appeal and was the seeking of a remedy

1 for the denial of further grazing permits by the Forest  
2 Service and the BLM. Therefore the arguments that there was  
3 no appeal or an intention not to take an appeal are inaccurate  
4 and a mischaracterization.

5 "As stated previously" -- I'm sorry. "This  
6 argument" by plaintiffs "must fail in light of the  
7 Federal Circuit's decision in *Colvin Cattle Company*  
8 *versus United States*. As stated previously by this  
9 Court, plaintiffs have no right to compensation based  
10 on the loss of their grazing permit. Further, the  
11 Federal Circuit has held that the ranch may have lost  
12 value by virtue of losing the grazing lease is of no  
13 moment because such loss in value has not occurred by  
14 virtue of governmental restrictions on a  
15 constitutionally cognizable property interest."

16 My comment. Again, emphasizing property interests  
17 for purposes of the takings clause, *United States versus*  
18 *Fuller*.

19 "Therefore the Court denies plaintiffs' claim  
20 for compensation for the 'entire ranch.'"

21 Next category.

22 "D. Surface Waters Flowing from Federal Land  
23 to Patented Lands were Taken.

24 "The surface waters which flow from federal  
25 land to Plaintiffs' patented lands are a vested water

1 right which the Court recognized in *Hage IV*.  
2 Plaintiffs argue that because of the policies and  
3 procedures employed by the government, a portion of  
4 the surface waters that should flow to plaintiffs'  
5 patented pastures no longer reach there. According  
6 to plaintiffs, the proliferation of riparian  
7 vegetation, the presence of beaver dams, and the  
8 denial of plaintiffs' access to stream channels for  
9 clearing and maintenance purposes led to the reduced  
10 water flow. Therefore, plaintiffs assert a taking  
11 and demand just compensation. The Court uses a  
12 two-part inquiry to assess the claims. First,  
13 plaintiffs must show that they could have put the  
14 water to beneficial use. Second, plaintiffs must  
15 show that the government's actions rose to the level  
16 of a taking. Extensive evidence has convinced the  
17 Court that but for government actions plaintiffs  
18 would have had the water in which they had a vested  
19 right.

20 "First. Beneficial Use.

21 "Plaintiffs, under Nevada law, do not own  
22 title to the water. Rather, they own the right to  
23 use the water, so long as the water is put to a  
24 'beneficial use.' Desert Irrigation, Nevada Supreme  
25 Court 1997. The Nevada state legislature declared at

1           the beginning of the 20th century, 'beneficial use  
2           shall be the basis, the measure and the limit of the  
3           right to the use of water.' Nevada Revised Statute  
4           section 533.035."

5           Comment. This will, of course, be the determining  
6           factor in my determination of what attendant wandering right,  
7           forage right, whatever you call it, will be attached to the  
8           right to access the water for beneficial use for livestock  
9           watering.

10                   "Plaintiffs must therefore establish that  
11           they could have put the water to beneficial use, for  
12           the right to use water cannot be unreasonable or  
13           include waste."

14                   Citing *United States versus Alpine Land and*  
15           *Reservoir* out of this Court, Ninth Circuit, however, 1983.

16                   "In addition, the right to use water can be  
17           lost by voluntarily abandoning it."

18                   Manse Spring, Nevada Supreme Court, 1940.

19           Comment. That is also an additional constraint, the  
20           ability to abandon it or to forfeit it, that's also a very  
21           important determining limitation on the wandering right of  
22           cattle relative to a livestock use.

23                   "Plaintiffs offered evidence at trial that  
24           the Pine Creek Ranch water rights could have been put  
25           to quasi-municipal use. Due to the growing demand

1           for water in the Las Vegas area, plaintiffs argue  
2           that the water could have been sold to the Southern  
3           Nevada Water Authority to sustain the growth in that  
4           area. However, defendant countered with evidence  
5           that the Southern Nevada Water Authority did not  
6           consider ranch waters a viable resource option  
7           because of the significant distance and relatively  
8           small quantities of waters available."

9           My comment. I already gave you a humorous anecdote  
10          about someone else attempting that argument down in Las Vegas.

11          "Plaintiffs also offered evidence that if it  
12          were not sold for quasi-municipal use, the water  
13          could have been sold for agricultural use for the  
14          irrigation of crops or for stockwatering.

15          "As it appears to the Court that the sale  
16          for quasi-municipal use is unlikely, the probable and  
17          likely use for the surface waters would be for  
18          irrigation and other agricultural purposes. The  
19          Court finds that plaintiffs would have put the waters  
20          to beneficial use to irrigate their own agricultural  
21          pastures, or could have sold the water to others to  
22          use for the same purpose, particularly considering  
23          the years in question had limited rainfall.

24          "Number two. The Taking of the Ditches.

25          "The next step of the analysis is whether



1 the government's actions rose to the level of a  
2 taking, requiring just compensation. Once again this  
3 Court turns its attention to the Federal Circuit's  
4 holding in *Colvin Cattle*. In order for plaintiffs'  
5 claim to succeed, they must establish a taking of  
6 their property that is not related to the  
7 cancellation of grazing permits. In that case, the  
8 Circuit court held that the BLM's cancellation of a  
9 Nevada cattle company's grazing permit on federal  
10 land did not constitute a taking of the company's  
11 water rights" --

12 Comment. I add now with my own emphasis.

13 "-- as the grazing permit was a privilege and  
14 not a right. *Colvin Cattle*, ('Because Colvin's water  
15 rights do not have an attendant right to graze, no  
16 governmental action restricting Colvin's ability to  
17 graze on federal land can affect its water right in a  
18 manner cognizable under the Fifth Amendment.')

19 That's my emphasis.

20 "In *Colvin*, the government denied access to  
21 the allotment for grazing purposes" --

22 I'm going to repeat that sentence, comment with my  
23 own emphasis.

24 "In *Colvin*, the government denied access to  
25 the allotment for grazing purposes but did not impede

1 access to the water. Plaintiffs must, therefore,  
2 show that the Forest Service took actions or  
3 established policies, distinct from the decision to  
4 cancel plaintiffs' grazing permit, that constituted a  
5 taking under the Fifth Amendment."

6 Comment. The next paragraph is fully with emphasis  
7 my own.

8 "It is important to again note the difference  
9 between water ownership and real property ownership;  
10 water is a usufructuary as opposed to a possessory  
11 right. Whereas real property ownership is defined by  
12 a right to exclude others from that property, water  
13 ownership is defined by the right to access and use  
14 that water. Plaintiffs argue that the government  
15 took several actions that precluded their right to  
16 access and use their water."

17 Comment. I'll read further here in just a moment  
18 about the distinguishment of Colvin Cattle versus this case.

19 Next subcategory,

20 "Constructing Fences Amounted to a Physical  
21 Taking.

22 "First, plaintiffs argue that the government  
23 constructed fences around streams in which plaintiffs  
24 have established a vested water right. These fences  
25 prevented plaintiffs' cattle from accessing water

1           during the time in which cattle were still permitted  
2           to graze on the allotments. In *Colvin Cattle*, as  
3           previously described, the Federal Circuit held that  
4           the cancellation of a grazing permit" --

5           Comment. Alone and by itself. End of comment.

6           "-- did not constitute a taking of the  
7           plaintiffs' water rights. However, unlike this case,  
8           in *Colvin Cattle* the government did not prevent the  
9           plaintiff from accessing their water. Here, the  
10          government did not only cancel plaintiffs' grazing  
11          permit, it actively prevented them from accessing the  
12          water through threat of prosecution for  
13          trespassing" --

14          My comment. Which is exactly what the government is  
15          doing here. End comment.

16          "-- and through the construction of the  
17          fences. Clearly, these actions prevented plaintiffs'  
18          access to the water and there was plainly a 'physical  
19          ouster' which deprived plaintiffs of the use of their  
20          property.

21          "Therefore, the Court finds that the  
22          government's construction of fences around the water  
23          and streams amounts to a physical taking during the  
24          time period in which plaintiffs still had a grazing  
25          permit and their cattle had the right to water at

1           these streams. Since this pertains only to a limited  
2           time period, the Fifth Amendment inquiry does not end  
3           here."

4           I'll add my comment. You'll notice what Judge Smith  
5           did not cover, and that is construction of fences or other  
6           obstruction of access to the water right during periods when  
7           they did not have a grazing permit. That, I believe, is left  
8           for me to decide.

9                        "B. The Government's Actions Amounted to a  
10           Regulatory Taking.

11                       "Second, plaintiffs argue that policies  
12           promoted by the Forest Service, including permitting  
13           brush to overgrow the streambeds and allowing beavers  
14           to establish dams in the upper reaches of streams,  
15           prevented plaintiffs from accessing and using the  
16           water in the 'upper reaches of the Hages' grazing  
17           lands.' Mr. Hage testified at trial that after 1990,  
18           he was only able to irrigate 25 percent of his land  
19           due to reduced waters in Mosquito Creek, Barley  
20           Creek, and Pine Creek. Spreading and  
21           evapotranspiration were also issues.

22           Evapotranspiration represents the water used by  
23           plants, and can represent a significant loss of water  
24           when plants develop root structure into existing  
25           shallow aquifers or groundwater. Plaintiffs offered

1 evidence at trial that the willow growth in the  
2 creeks had gotten so thick that it was difficult to  
3 walk across, or even to see in some places, the  
4 streambed. Plaintiffs' expert witness estimated the  
5 average historical flow in the seven creeks reaching  
6 the ranch to be 13,000 acre feet. The actual flow at  
7 the time of trial was close to 5,000 acre feet,  
8 reflecting an 8,000 acre feet diminishment.

9 "In *Ennor versus Raine*, the Supreme Court of  
10 Nevada recognized the right" --

11 Back up. Comment. This paragraph, the first two  
12 sentences of this paragraph, I will emphasize with my own  
13 emphasis.

14 "In *Ennor versus Raine*, the Supreme Court of  
15 Nevada recognized the right of a prior appropriator  
16 of water to go onto land upstream belonging to  
17 another to clear obstructions in the natural channel  
18 that interfere with the flow of water to his point of  
19 diversion. 'Plaintiff was as much entitled to have  
20 it flow through the Ennor Ranch in the natural  
21 channel, and in the ditches used by him or his  
22 grantors prior to the location of that place, as  
23 through his own lands, and had as much right to  
24 remove dams and obstructions on the Ennor Ranch to  
25 the extent necessary to allow his water to flow for

1 the proper irrigation of his crops as he had to  
2 remove dams on his own ranch of obstructions in his  
3 own lane or doorway, provided he did so peaceably.'  
4 Plaintiffs argue that this case recognizes a right to  
5 go 'on the upstream area of their grazing lands' to  
6 clear any obstructions, including riparian growth and  
7 beaver dams. Defendant, on the other hand," the  
8 government, "incorrectly argues that the case  
9 represents -- incorrectly argues that the case  
10 represents a principle that the downstream user has  
11 the right only to remove unnatural obstacles placed  
12 in the channel by an upstream owner that divert or  
13 obstruct the flow of water. The government's narrow  
14 interpretation is inconsistent with both the case law  
15 and logic.

16 "As plaintiffs are arguing that policies and  
17 procedures prevented their access, the Court turns to  
18 the *Penn Central* factors to determine whether or  
19 government's actions amounted to a taking. First,  
20 plaintiffs clearly had investment-backed expectations  
21 in the water rights as those rights had been  
22 purchased along with the ranch. In an arid region  
23 such as central Nevada water is highly valuable and  
24 sought after. It gives the land most of the land's  
25 value. It is unreasonable to expect that plaintiffs

1 would even purchase the ranch without the water  
2 rights which gave it its value. The government  
3 interfered with their expectations by allowing  
4 riparian growth to increase upstream and by  
5 preventing, through threats, plaintiffs" --

6 Comment. I'm adding my emphasis now.

7 "-- plaintiffs' access to the areas upstream  
8 to clear the obstructions in the water flow. The  
9 second factor, the character of the governmental  
10 action, is different for the riparian growth policy  
11 than for the threats. On one hand, there is no  
12 evidence that the policy that led to a proliferation  
13 of willows and another growth in the streambed was  
14 malicious in nature. On the other hand, the threats  
15 and intimidation that pervaded the relationship  
16 between plaintiffs and the Forest Service interfered  
17 with plaintiffs' vested water rights by barring  
18 necessary maintenance. The third factor, the  
19 economic impact of the regulation on the claimant,  
20 leans decidedly against the government. The severe  
21 reduction in water flow to plaintiffs' patented lands  
22 deprived them of the water they needed for irrigation  
23 making the ranch unviable and which they could have  
24 sold in the market.

25 "Considering all three factors, the Court

1 finds that the government's actions had a severe  
2 economic impact on plaintiffs and that the  
3 government's action rose to the level of a taking."

4 My comment, very important comment now. What Judge  
5 Smith considered was takings and the right of access to water  
6 for purposes of the takings clause. He did not consider, and  
7 therefore left it to me, the need to enjoin the government's  
8 continued denial of access to stock watering rights for the  
9 purpose of watering stock.

10 Next subsection,

11 "1866 Act Irrigation Ditches were Taken.

12 "Plaintiffs offered evidence that had the  
13 government not prevented their access to their  
14 various 1866 Act ditches, the water could have been  
15 put to use for agricultural purposes or could have  
16 been sold for quasi-municipal use, as discussed  
17 above. The Court finds that plaintiffs could have  
18 put the water from their 1866 Act Irrigation Ditches  
19 to beneficial use for agricultural purposes. This  
20 Court has already held that 'the Government cannot  
21 cancel a grazing permit and then prohibit the  
22 plaintiff from accessing the water to redirect it to  
23 another place of valid beneficial use. The  
24 plaintiffs have a right to go on land and divert the  
25 water."



1           That was in *Hage IV*.

2           "Plaintiffs argue that through intimidation,  
3           threats, indictment, and conviction, the government  
4           prevented them from maintaining their ditches.

5           First, plaintiffs argue that the threat of  
6           prosecution for trespassing on federal land kept  
7           plaintiffs from accessing the ditches for  
8           maintenance. However, it was only threats that kept  
9           plaintiffs from their waters; the Forest Service  
10          informed plaintiffs that only hand tools could be  
11          used for ditch maintenance. Defendant counters that  
12          plaintiffs could have applied for a special use  
13          permit to perform anything beyond normal maintenance,  
14          which would include minor trimming and clearing of  
15          vegetation. See *Hage IV*. Further, as the Court  
16          noted in *Hage IV*, the District Court in Nevada  
17          recognized 'a vested right-of-way which runs across  
18          forestlands is nevertheless subject to reasonable  
19          forest regulation, where "reasonable" regulation is  
20          defined as regulation which neither prohibits the  
21          ranchers from exercising their vested rights, nor  
22          limits their exercises of those rights so severely as  
23          to amount to a prohibition.'

24           Comment. For emphasis I'm going to reread those  
25          couple of sentences because it is a determining rule of law to

1 which I am bound, which will help me determine whether or not  
2 there are substantive due process rights violated by the  
3 government in denying access to cattle on owned or vested  
4 water rights. Reading again,

5 "Further, as the Court noted in *Hage IV*, the  
6 District Court in Nevada recognized, 'a vested  
7 right-of-way which runs across Forest Service lands  
8 is nevertheless subject to reasonable Forest Service  
9 regulation."

10 Adding my comment. We could say the same thing  
11 about reasonable Forest or BLM regulation with respect to  
12 foraging rights and permit rights.

13 "Where" -- this is the standard for the government,  
14 adding my comment, and it will be the standard in the  
15 injunction which I issue against the government. This is the  
16 standard for you to advise your clients, the agency heads, as  
17 to when they cross the boundary, when they are exceeding their  
18 power and authority, and when they are violating this Court's  
19 injunction.

20 This is the standard where reasonable regulation is  
21 defined as regulation which neither prohibits the ranchers  
22 from exercising their vested rights nor limits their exercises  
23 of those rights so severely as to amount to a prohibition.

24 Please mark that in these conclusions because that  
25 will be the standard that will govern your advice to your

1 clients.

2 "The evidence is clear that the ditches to  
3 which plaintiffs have established a property right  
4 were in need of routine maintenance. In order to  
5 access the water, trees and undergrowth had to be  
6 removed as well as roots, silt, and other deposits.  
7 The water areas had been clogged with pinon, pine,  
8 juniper, and willow. Plaintiffs' application for a  
9 special use permit to maintain their ditches with the  
10 appropriate equipment would clearly have been futile;  
11 the Forest Service had threatened to prosecute  
12 plaintiffs for trespassing and had actually secured a  
13 conviction, which was later overturned by the Ninth  
14 Circuit. Based on the history between the Forest  
15 Service and plaintiffs, the special use requirement  
16 for ditch maintenance" --

17 Adding my comment. The Court, Judge Smith, is only  
18 talking about the ditch maintenance permit. But I am talking,  
19 and have the right to talk, about the foraging, grazing  
20 permit. End of comment.

21 "The special use permit requirement for ditch  
22 maintenance rises to the level of a prohibition, and  
23 is therefore a taking of their property rights.  
24 Further, the hand tools requirement prevented all  
25 effective ditch maintenance, as it cannot be

1 seriously argued that the work normally done by  
2 caterpillars and backhoes could be accomplished with  
3 hand tools over thousands of acres. The Court  
4 visited many of these ditches and stream courses  
5 spread over thousands of acres. With hand tools the  
6 task would have taken years or decades and required  
7 hundreds of workers."

8 Adding my comment. Judge Smith not only held  
9 several weeks of trial here in Reno, as well as other weeks of  
10 trial on earlier Hage decisions, but he also visited the site,  
11 walked it.

12 "The Court must again turn to the *Penn*  
13 *Central* factors to inform its regulatory taking  
14 analysis. First, plaintiffs had a significant  
15 investment-backed expectation in the ditches, as  
16 these were the primary means for conveyance of water  
17 for irrigating the ranch. The ditches were rights  
18 purchased along with the ranch. Second, plaintiffs  
19 offered ample evidence that the Forest Service had  
20 engaged in harassment towards plaintiffs, enough to  
21 suggest that the implementation of the hand tools  
22 requirement was based solely on hostility to  
23 plaintiffs."

24 I'll add my comment. I'm going to make similar  
25 findings with respect to our case.

1           "Third, the economic impact of this  
2           regulation was considerable; it would have been  
3           economically impractical for plaintiffs to hire  
4           enough men with hand tools to perform any sort of  
5           substantial work clearing the ditches. Plaintiffs  
6           had a right to effectively maintain their ditches,  
7           including the 50-foot wide rights-of-way on either  
8           side of the ditch beds."

9           I'll add my commentary here and again later, that  
10          that's all that Judge Smith did, is he determined that  
11          relative to ditch rights there was a 50-foot right-of-way on  
12          either side for maintenance of the ditch. That's all that he  
13          did.

14          "Therefore, the Court finds that the  
15          government's actions in both preventing access to the  
16          ditches and in limiting the maintenance to the use of  
17          hand tools constituted a taking of plaintiffs' water  
18          rights in the 1866 Act ditches that have been  
19          previously identified."

20          Now, not so important to us, but nevertheless I will  
21          read it, are the following sections on determining just  
22          compensation. They do have some relevance in my determination  
23          of trespass damages and counterdamages or irreparable harm.

24          "Just Compensation.

25          "Where a taking has occurred, a plaintiff is

1           entitled to just compensation. The fundamental  
2           principle of just compensation is reimbursement to  
3           the owner, so that he is put in as good a position  
4           pecuniarily as if his property had not been taken.  
5           For purposes of just compensation, the Court must use  
6           the fair market value of the property at the time of  
7           the taking. This is the amount that a willing buyer  
8           would pay a willing seller in an arm's length  
9           transaction.

10                   "Possibly the most difficult step in the  
11           analysis is the amount of just compensation due to  
12           plaintiffs. The amount of water that would have  
13           flowed to plaintiffs' patented lands without the  
14           government's actions must be estimated based on  
15           evidence produced at trial regarding the amount of  
16           water, in acre feet, that would flow in the streams,  
17           creeks, wells, and pipelines to which plaintiffs have  
18           established a property right that the government has  
19           taken.

20                   "The Nevada State Water Engineer's office  
21           adjudicated water rights in southern Monitor Valley,  
22           which lies at the northern end of the ranch. The  
23           State Engineer determined the amount of plaintiffs'  
24           water in southern Monitor Valley to be 17,520.65 acre  
25           feet. In addition, plaintiffs have established a

1 right in ten springs on other parts of the ranch.  
2 Plaintiffs introduced evidence that the ranch springs  
3 can be estimated to produce three gallons per minute  
4 each, so the ten springs would therefore produce  
5 43,200 gallons per day. As there are 325,851 gallons  
6 in one acre foot of water, the ten springs would  
7 produce .13 acre feet per day, or 47.45 acre feet per  
8 year.

9 "Based on the evidence produced at trial,  
10 the Court finds that the total amount of acre feet of  
11 water was 17,520.65 acre feet plus 47.45 acre feet,  
12 for a total of 17,568.1 acre feet. As the Court  
13 previously stated, the probable beneficial use for  
14 the water was for agricultural use. The Court finds  
15 that the agricultural value of the water on the Pine  
16 Creek Ranch was \$162.50 per acre foot in 1991, as  
17 shown by plaintiffs' experts.

18 "Thus, multiplying 17,568.1 acre feet by  
19 \$162.50, the Court finds that plaintiffs are entitled  
20 to the amount of \$2,854,816.20 for the value of their  
21 water rights."

22 Now, again this next section, Compensation Under  
23 Section 1752, that pertains to the improvements. I'm not so  
24 sure that that helps us here, although, of course, I am bound  
25 to its findings.

1           The only purpose to which it might be relevant is in  
2 establishing or underpinning the Court's determination that  
3 there was a substantive due process right in the grazing  
4 permits. I will quote one paragraph out of that section.

5           "The Court finds plaintiffs are entitled to  
6 recover for the follow improvements constructed by  
7 them," and only them, not rights which they  
8 purchased: "Number one, 238 miles of fences, which  
9 represents 80 percent of the ranch's fences; number  
10 two, 634 miles of established roads and trails  
11 (either built or extensively maintained by  
12 plaintiffs); three, 44.7 miles of ditches and  
13 pipelines; and, four, improvements at Ice House  
14 Spring, Frazier's Hill, Baxter Spring, Stewart  
15 Spring, Clay Well, Upper Airport Pipeline, and Pine  
16 Creek Well."

17           I will quote further here because there is an  
18 important issue, and it's short. The judge determines the  
19 basis for awarding compensation was that the government did  
20 not terminate their grazing rights for violation of the term  
21 permits, rather, the government terminated the rights for  
22 other uses on the public lands of those grazing rights, and  
23 therefore, under the agreements, the plaintiffs in that case,  
24 defendants here, were entitled to compensation. That is an  
25 important issue to us.



1                   "Number 1, Fences.

2                   "The evidence introduced at trial shows that  
3                   there are approximately 298 miles of fences on the  
4                   ranch, of which 80 percent, or 238 miles, were built  
5                   by plaintiffs within ten years prior to 1991. The  
6                   average cost of constructing one mile of four-strand  
7                   fence in central Nevada in 1991 was \$4,000. Applying  
8                   an adjustment of .95 cents for an estimated physical  
9                   deterioration of these newer fences, the Court finds  
10                  that the replacement cost of the fences built by  
11                  plaintiffs was \$904,400.

12                  "Number 2, Roads.

13                  "There are 634 miles of roads and trails on  
14                  the ranch, which range from two-lane graded roads to  
15                  a horse pack trail. Plaintiffs offered evidence that  
16                  considering the wide range of equipment, operator and  
17                  fuel costs, and the amount of work associated with  
18                  the varying conditions and terrain on the ranch, the  
19                  average cost of constructing one mile of ranch road  
20                  or trail, passable by a four-wheel drive pickup  
21                  truck, is approximately \$850 in 1991. Applying an  
22                  adjustment of .85 for an estimated 15 percent  
23                  physical deterioration, the Court finds that the  
24                  value of the ranch roads and trails was \$458,065.

25                  "Three, Improvements to Springs and Wells.

1                   "Plaintiffs proved that they made  
2                   improvements on seven springs during the ten years  
3                   prior to 1991. The average value of physical  
4                   improvements made to springs is approximately \$500  
5                   per spring. Making an adjustment of .9 to consider  
6                   deterioration at these springs and wells, the Court  
7                   finds the value of the spring boxes and other  
8                   improvements to be \$3,150.

9                   "The Court finds that plaintiffs are  
10                  entitled to \$904,400 for the value of fences,  
11                  \$458,065 for roads and trails, \$3,150 for the value  
12                  of improvements at seven springs and wells, for a  
13                  total amount of \$1,365,615.

14                  "Conclusion.

15                  "As the Court stated in *Hage I* and still  
16                  firmly believes, the taking clause was not written to  
17                  protect merely against frivolous exercises of  
18                  governmental power, but more precisely to protect  
19                  against the opposite."

20                  I'll add my comment. In other words, to protect a  
21                  government's intentional intrusions on property rights.

22                  "Presumably the political process protects  
23                  against most frivolous exercises. The protection of  
24                  the Fifth Amendment is most needed to protect the  
25                  minority against the exercise," I add my comment, the

1 intentional exercise, "of governmental power when the  
2 need of government to regulate is greatest, and the  
3 desire of the popular majority is strongest. In this  
4 way, and in this way only, does the judiciary  
5 properly affect policy, and that effect is to  
6 adjudicate the limits that the rule of law and a  
7 written constitution impose upon popular government.  
8 The existence of property rights, not the judiciary's  
9 finding of a taking, impose those limits.

10 "Following this spirit, as well as the law  
11 and the evidence, the Court hereby finds that the  
12 government's actions amount to a taking of  
13 plaintiffs' property with respect to their surface  
14 water rights and their 1866 Act ditches. The Court  
15 further finds that the government dedicated  
16 plaintiffs' historical grazing lands to 'another  
17 public purpose' for the purposes of section 1752(g).  
18 Thus, plaintiffs are hereby awarded \$2,854,816.20 for  
19 the value of their water rights plus \$1,365,615 for  
20 the value of their improvements, for a total award of  
21 \$4,220,431.20, plus interest from the date of the  
22 taking and attorney's fees and costs under the  
23 Uniform Relocation Act. It is so ordered."

24 The date of that decision was June 6th, 2008.

25 Now, before I get to underlying *Hage I* through *IV*, I

1 do need to emphasize *Hage VI* and *VII* which clarified and  
2 expanded a little bit the final opinion in *Hage V*.

3 I'm going to give you brief restroom break. And you  
4 might even anticipate going to 6:00 p.m. tonight. So I'll  
5 give you several restroom breaks. We'll take five minutes  
6 while I go out and retrieve *Hage VI* and *VII* for that  
7 clarification.

8 (A recess was taken.)

9 THE COURT: Thank you. Please be seated. Thank  
10 you.

11 Continuing, and just for clarification, especially  
12 with respect to what the Court is adopting and is bound to,  
13 the final VI and VII were clarifications of the judge's ruling  
14 in the final judgment.

15 Let's see. This was the judge's further decision.

16 "On June 6th, 2008, the Court issued an  
17 opinion resolving the final remaining issue in this  
18 long-standing case; whether the government's actions  
19 amounted to a taking under the Fifth Amendment and,  
20 if so, the amount of just compensation due to  
21 plaintiffs."

22 That was *Hage V*.

23 "In its latest opinion, the Court found that  
24 the government's action was indeed a taking under the  
25 Fifth Amendment and awarded plaintiffs \$2,854.816.20

1           for the value of their water rights, plus \$1,365,615  
2           for the value of range improvements, for a total  
3           award of \$4,220,431.20, plus interest from the date  
4           of the taking.

5                        "On December 12, 2008, the defendant filed a  
6           motion for partial reconsideration on the limited  
7           subject of the Court's award of compensation for  
8           range improvements. On January 30, 2009, the Court  
9           ordered plaintiff to respond. Defendant's subsequent  
10          reply was received. After full briefing and oral  
11          argument, the Court hereby denies defendant's motion  
12          for partial reconsideration."

13                       My comment. This number VI deals with the  
14          Court's -- with the government's request for reconsideration  
15          relative to the improvements on the basis, first, of who  
16          undertook the improvements, and, more importantly, the -- and  
17          the amount therefor, and, more importantly, the authorization  
18          of improvements made by plaintiffs, since the government  
19          contended that these were not authorized improvements. And a  
20          minor correction to the Court's opinion. The Court concluded  
21          by denying reconsideration but added the small correction.

22                       And then number VII, *Hage VII*, which was the final  
23          judgment and order, very short, Smith, Senior Judge,

24                       "Pursuant to the joint submission of interest  
25          calculations for the award of interest on the value

1 of plaintiffs' water rights, the Court hereby awards  
2 plaintiffs the total amount of \$14,243,542. The  
3 clerk is directed to enter judgment accordingly and  
4 close this case. It is so ordered."

5 Now, with that clarification and basic summary, I  
6 need to turn to I, II, III and IV. They are extensive, and  
7 you'll have to bear with me because they do bind this Court,  
8 they bind the parties, and they frame exactly what is left for  
9 me to decide, which is not a lot.

10 *Hage I.* *Hage I* was simply a determination on a  
11 motion to dismiss.

12 "The Court of Federal Claims, Smith, held  
13 that: Ongoing state adjudication of stream rights  
14 did not render exercise of jurisdiction by Court of  
15 Federal Claims improper; number two, the owners'  
16 claims were ripe for review; number three, the  
17 grazing permit was not contract, but rather was  
18 revokable license; number four, owners did not have  
19 property interest in national forest or grazing  
20 permit; number five, fact issues as to whether owners  
21 had a property interest in water rights, ditch  
22 rights-of-way, and in foraging in national forest  
23 precluded summary judgment; and, number six, fact  
24 issue as to whether the United States created a  
25 situation in which owners' livestock wandered onto

1 federal land such that impoundment of cattle  
2 qualified as compensable taking precluded summary  
3 judgment; and, number seven, fact question as to  
4 whether United States cancelled the permit in part to  
5 devote rangeland to another public purpose, as would  
6 entitle owners to compensation for improvement they  
7 made, precluded summary judgment."

8 I note the date of this decision is March 8th, 1996,  
9 and the case was filed in the Court of Claims in September  
10 of 1991, and therefore that will support the conclusion of  
11 this Court that the appellants had every right -- under the  
12 APA, had every right and had every intent of prosecuting their  
13 appeal of the Forest Service's and BLM's determinations in the  
14 Court of Claims and they had that expectation. And the  
15 government, by responding and proceeding with those  
16 proceedings, waived any exhaustion requirement under the APA,  
17 and therefore that Court and this Court have jurisdiction of  
18 the appeal of any arbitrary or capricious action in the  
19 cancellation of the grazing permit rights.

20 Number one, *Hage I*, this is important because it  
21 also includes a lengthy explanation of the facts which, of  
22 course, I'm bound to and which I incorporate here as an  
23 important discussion of my own facts.

24 "Plaintiffs E. Wayne and Jean N. Hage are  
25 ranch owners in Nye County, Nevada. In this suit

1           they allege constitutional, contractual and statutory  
2           causes of action. First, plaintiffs claim that the  
3           defendant took compensable property interests in  
4           their grazing permit, water rights, ditch  
5           rights-of-way, rangeland forage, cattle and ranch.  
6           Second, the plaintiffs claim that their grazing  
7           permit is a contract which the defendant has  
8           breached, entitling them to damages. Third,  
9           plaintiffs claim entitlement to compensation for  
10          improvements they have made to the public rangeland.  
11          Defendant has moved for summary judgment on all three  
12          claims.

13                         "The Court grants in part and denies in part  
14          defendant's motion for summary judgment."

15                         Commentary. I correct myself. This wasn't motion  
16          to dismiss, this was summary judgment.

17                         "The Court finds that plaintiffs' grazing  
18          permit is a license, the cancellation of which does  
19          not give rise to damages. Thus, defendants' motion  
20          for summary judgment is granted for this claim. The  
21          Court denies defendant's motion regarding the taking  
22          claims and the claim for compensation for  
23          improvements under 1752(g). The Court finds that a  
24          limited evidentiary hearing is necessary to address  
25          the mixed questions of law and fact regarding the



1 existence of the property interests claimed by  
2 plaintiffs in the water rights, forage rights and  
3 ditch rights-of-way. Plaintiffs also will have the  
4 opportunity to demonstrate a taking of their cattle.  
5 The Court also finds that compensation may be  
6 required for improvements on the range made by  
7 plaintiffs if defendant canceled the permit in part  
8 to devote the land to another public purpose.

9 "Introduction.

10 "Plaintiffs claim that defendant has taken  
11 their property rights in water, ditch rights-of-way,  
12 and forage which date from the 1800s. It is the  
13 Court's duty to determine whether plaintiffs hold the  
14 property rights claimed, the scope of those rights,  
15 and whether government action has deprived the Hages  
16 of rights requiring just compensation under the Fifth  
17 Amendment."

18 We'll skip the next paragraph.

19 I'll read only one sentence out of next paragraph.  
20 Here, Judge Smith goes extensively into the background and the  
21 analysis required for a Fifth Amendment takings claim. But I  
22 will read this one sentence.

23 "The job of the Court is to deal with a  
24 concrete claim, by an aggrieved person or persons,  
25 that their constitutional rights under the Fifth

1           Amendment have been violated by some governmental  
2           action."

3           I add my comment. He's talking about Fifth  
4 Amendment takings property rights only.

5           I'll skip down to the point where he starts with the  
6 facts.

7           "Plaintiffs, Wayne and Jean Hage, purchased  
8 Pine Creek Ranch in 1978" --

9           I add my commentary. These are my determination of  
10 facts as well.

11           "-- and used it for cattle ranching. The  
12 ranch, established in 1865, is located in central  
13 Nevada and consists of approximately 7,000 acres. To  
14 raise cattle economically in such an arid region,  
15 plaintiffs depend upon access to large quantities of  
16 land, including government owned rangeland, and to  
17 the limited water supply in the Toiyabe National  
18 Forest. Plaintiffs use ditch rights-of-way, which  
19 are easements on federal lands, to transport water  
20 for irrigation, stock watering and domestic purposes.

21           "In 1907 Congress created the Toiyabe  
22 National Forest. The Forest Service issued a grazing  
23 permit to the owners of Pine Creek Ranch, based upon  
24 the preferential use the range, which enabled the  
25 various ranch owners to continue to graze their

1           livestock on federal lands adjacent to Pine Creek  
2           Ranch. The Forest Service has granted each  
3           subsequent owner of Pine Creek Ranch such a grazing  
4           permit. Without access to water located in the  
5           Toiyabe National Forest, the ranch cannot  
6           successfully operate.

7                        "Plaintiffs received their first grazing  
8           permit on October 30, 1978 which allowed them to  
9           graze cattle within six allotments of the Toiyabe  
10          National Forest. The permit established general  
11          provisions and requirements for plaintiffs' use of  
12          the federal land for grazing. In addition to these  
13          general provisions, the permit also contained terms  
14          unique to plaintiffs. Such terms included number,  
15          kind and class of livestock permitted to graze, and  
16          the period of such use. Pursuant to their permit,  
17          plaintiffs could graze their cattle for specified  
18          portions of the year, depending upon the allotment.  
19          Specific provisions in the permit reserved to the  
20          federal government the broad power to suspend, revoke  
21          or amend the permit subject to certain conditions.  
22          For example, Part 1, section 3 of the permit stated  
23          in pertinent part:

24                                'This grazing permit may be revoked  
25                                or suspended, in whole or in part, for failure to

1           comply with any of the provisions and  
2           requirements specified in Parts 1, 2 and 3  
3           hereof, or any of the regulations of the  
4           Secretary of Agriculture on which this permit is  
5           based, or the instructions of Forest officers  
6           issued thereunder.'

7            "In Part 2, section 8(b), the permit stated  
8           that the grazing privilege will terminate 'whenever  
9           the area described in this permit is needed by the  
10          government for some other form -- some other form or  
11          use.' Moreover, the government reserved the power in  
12          Part 2, section 6, to adjust any terms of the permit  
13          when necessary for resource protection.

14           "In 1984, plaintiffs applied for and  
15          received a permit modifying their grazing allotment.  
16          The 1984 permit also contained new language  
17          broadening the scope of the Forest Service's  
18          authority to alter or nullify the grazing privilege.  
19          Part 1, section 4, stated:

20                 'The permit may be modified at any  
21                 time during the term to conform with needed  
22                 changes brought about by law, regulations,  
23                 executive orders, allotment management plans,  
24                 land management planning, numbers permitted or  
25                 season of use necessary because of resource

1           condition or other management needs.'

2           "Parts 2 and 3 of the 1984 permit also  
3           created additional requirements that plaintiffs had  
4           to satisfy as a condition for grazing on the public  
5           land. Under the 1984 permit, plaintiffs were  
6           responsible for additional maintenance and structural  
7           improvements on the federal lands. Plaintiffs also  
8           were required to graze at least 90 percent of the  
9           permitted number of cattle or risk termination of  
10          their permit for nonuse. The Forest Service states  
11          that this provision was added to maintain the balance  
12          of forage resources and redistribute such resources  
13          in accordance with the Toiyabe Forest Plan.

14          "In 1991, the Forest Service modified  
15          plaintiffs' permit, and all other permits within the  
16          Toiyabe National Forest, to bring the permits into  
17          compliance with the new Toiyabe Forest Plan. The new  
18          permits did not substantially change the 1984  
19          provisions.

20          "The events which precipitated the  
21          commencement of the present litigation began  
22          primarily from disputes over the Table Mountain and  
23          Meadow Canyon Allotments.

24          "The Table Mountain Allotment.

25          "In 1979, after receiving permission from

1           the United States Forest Service, the Nevada  
2           Department of Wildlife released elk into the Table  
3           Mountain Allotment area of the Toiyabe National  
4           Forest. The Forest Service approved the release  
5           after conducting two studies to determine the  
6           suitability of introducing elk into the area."

7           Commentary. I'll add my commentary. It's long been  
8           established, both in the Nevada Supreme Court as well as the  
9           U.S. Supreme Court, that since the 1934 Grazing Act, the  
10          federal government controls and manages the grazing on public  
11          lands.

12          The state government controls and manages wildlife  
13          on the public lands, with certain important exceptions; for  
14          example, the Endangered Species Act.

15          Number three, the state or states regulate the  
16          granting, permitted use, termination or abandonment and  
17          adjudication according to state law of waters on public lands  
18          as well as on private lands.

19          "The Forest Service approved the release  
20          after conducting two studies to determine the  
21          suitability of introducing elk into the area.

22          "Plaintiffs objected to the release of the  
23          elk, arguing that the elk drank water and ate forage  
24          which belonged to plaintiffs and were needed for  
25          their cattle. Plaintiffs also informed the State of

1 Nevada that the hunting season for elk on Table  
2 Mountain overlapped with the cattle grazing period  
3 and that the presence of elk impeded the grazing and  
4 movement of their livestock. The State of Nevada  
5 responded that cattle grazing and hunting on public  
6 land 'appear to be reasonably compatible' and that  
7 plaintiffs' complaint was the first the State had  
8 received. The State informed plaintiffs that the  
9 ranchers and hunters must stop 'squabbling' and share  
10 their usage of the public rangelands.

11 "In October 1988, the Forest Service  
12 informed plaintiffs that they were in violation of  
13 their permit and risked its suspension or  
14 cancellation because plaintiffs failed to remove  
15 their cattle from the allotment by the September 30,  
16 1988, deadline stated in the permit. Plaintiffs  
17 claimed that they were experiencing difficulty  
18 removing their cattle due to recreational and Forest  
19 Service activities on the rangeland. Plaintiffs,  
20 however, did remove the majority of the cattle by  
21 October 22.

22 In January 1989, the Forest Service sent  
23 plaintiffs a letter to 'show cause' as to why the  
24 Forest Service should not reduce by 20 percent the  
25 number of cattle permitted to graze for the 1989

1 grazing season on the Table Mountain Allotment. The  
2 Forest Service also charged plaintiffs for the excess  
3 use of the rangeland for the time in October when  
4 plaintiffs' cattle were observed on the allotment  
5 after the September 30th deadline. Plaintiffs failed  
6 to respond to the letter.

7 "In February 1989, the Forest Service  
8 notified plaintiffs that 20 percent of their cattle  
9 allotment for Table Mountain would be suspended for  
10 the 1989 grazing season. The Forest Service did not  
11 implement the 20 percent cattle suspension until 1990  
12 grazing season, however, because of administrative  
13 appeals of the agency action.

14 "Plaintiffs, without notifying the Forest  
15 Service, did not graze any cattle on the Table  
16 Mountain Allotment during the 1990 grazing season.  
17 The Forest Service determined that this action  
18 violated the 'non-use' provision of the 1984 permit  
19 because plaintiffs failed to graze at least 90  
20 percent of the total permitted cattle on the  
21 allotment.

22 "In October 1990, the Forest Service sent  
23 plaintiffs another letter requesting plaintiffs to  
24 'show cause' why the Forest Service should not, A,  
25 cancel 25 percent of the permit to graze cattle on



1 the allotment and, B, suspend an additional  
2 20 percent under the permit of the remaining cattle  
3 allowed to graze for two successive years. The  
4 Forest Service believed such actions were warranted  
5 because plaintiffs' failure to control and take  
6 account of their livestock during the 1990 grazing  
7 season constituted repeated violation of the permit  
8 terms.

9 "In November 1990, plaintiffs responded to  
10 the Forest Service's 'show cause' letter. Plaintiffs  
11 requested an evidentiary hearing, contending that the  
12 Forest Service actions denied plaintiffs due process  
13 of law. Because an evidentiary hearing is not  
14 provided for in its regulations before cancellation  
15 or suspension of a permit, the Forest Service did not  
16 grant the requested hearing. In December 1990, the  
17 Forest Service canceled 25 percent of the Table  
18 Mountain Allotment grazing permit and suspended an  
19 additional 20 percent of the remaining allotment for  
20 a two-year period. The Forest Service decision was  
21 upheld in administrative appeals and plaintiff did  
22 not seek judicial review of those appeals.

23 "The Meadow Canyon Allotment.

24 "Plaintiffs also dispute Forest Service  
25 actions concerning the Meadow Canyon Allotment. In

1           1980, the Forest Service diverted the flow of water  
2           in the Meadow Canyon Allotment from Meadow Spring to  
3           Q (McAfee) Spring, claiming that Meadow Spring was  
4           contaminated. The Forest Service then used the new  
5           source from Q Spring as a domestic water supply for  
6           the Guard Station located in the Toiyabe National  
7           Forest. The Forest Service, however, neglected to  
8           obtain approval from the State Engineer for a change  
9           in point of diversion of the water.

10                   "Plaintiffs claim rights to all the water of  
11           Meadow Canyon Creek, allegedly appropriated by Pine  
12           Creek Ranch in 1868, including both Meadow Spring and  
13           Q Spring. In October 1981, plaintiffs filed a  
14           request with the State Engineer to initiate a water  
15           rights adjudication of the Monitor Valley.

16           Plaintiffs requested the -- the State granted the  
17           petition. Plaintiffs requested the adjudication to  
18           prevent the Forest Service from diverting water which  
19           plaintiffs allegedly owned.

20                   "During the summer of 1990, defendant  
21           notified plaintiffs that because of serious range  
22           deterioration, plaintiffs would be required to remove  
23           their cattle from Meadow Canyon by August 10, 1990,  
24           rather than the permit date of October 15, 1990.  
25           Plaintiffs' expert Robert N. Schweigert, disputed

1           defendant's opinion and considered the Meadow Canyon  
2           Allotment to be in good to excellent condition when  
3           compared with other western rangeland. Under the  
4           permit, the Forest Service must give permittees one  
5           year notice of the permit modification. In an  
6           extreme emergency, however, the Forest Service may  
7           immediately reduce the number of livestock or time of  
8           grazing to preserve or protect the rangeland.

9                         "In August 1990, defendant sent plaintiffs a  
10           letter requesting plaintiffs to 'show cause' why 100  
11           percent of plaintiffs' Meadow Canyon Allotment should  
12           not be canceled because of plaintiffs' refusal to  
13           remove their cattle from Meadow Canyon. Plaintiffs  
14           began to remove their cattle at the end of August  
15           1990."

16                        I'll add my comment. The later opinion that I  
17           already read from noted that the government itself conceded  
18           that they did not send the letter and it was not received  
19           until only seven days before the deadline given to comply.

20                        "Defendant, however, observed 128 head of  
21           plaintiffs' cattle (38 percent of the total number  
22           originally permitted) on the allotment in  
23           October 1990 and concluded that plaintiffs had made  
24           no serious effort to comply with the Forest Service's  
25           instructions. The Forest Service informed plaintiffs

1           that any of its livestock found on the Meadow Canyon  
2           Allotment after November 12, 1990, would be subject  
3           to impoundment.

4                        "On February 13th, 1991, defendant suspended  
5           the permit for five years and canceled 38 percent of  
6           the permitted numbers allowed in Meadow Canyon. This  
7           percent decrease is identical to the percentage of  
8           plaintiffs' cattle found on the allotment in  
9           October 1990, in violation of the Forest Service's  
10          instructions.

11                        "In the summer of 1991, the Forest Service  
12          twice impounded plaintiffs' cattle after allegedly  
13          observing many of plaintiffs' cattle on the Meadow  
14          Canyon Allotment. Plaintiffs dispute the basis for  
15          the removal and impoundment of the cattle, arguing  
16          that if any of plaintiffs' cattle were observed on  
17          the Meadow Canyon Allotment in the spring and summer  
18          of 1991, it was due to interference and actions by  
19          the defendant," the government, "not plaintiffs.

20                        "Plaintiffs allegedly own ditch  
21          rights-of-way, which allow them to transport water  
22          for stock watering, irrigation, and domestic  
23          purposes. Plaintiffs and defendant acknowledge the  
24          importance of the ditch rights-of-way for  
25          transporting water. The parties, however, disagree

1 over the scope of restrictions permitted regarding  
2 plaintiffs' alleged ditch rights-of-way pursuant to  
3 the Act of 1866 and the present regulatory scheme.  
4 In 1986, the Forest Service informed plaintiffs that  
5 it had the authority to regulate vested ditch  
6 rights-of-way and informed plaintiffs that any  
7 actions in maintaining the ditches must be approved  
8 by the Forest Service. In July 1991, plaintiff, E.  
9 Wayne Hage, and his employee, Lloyd C. Seaman, were  
10 arrested and convicted for cutting and removing trees  
11 within and around White Sage Ditch in the Toiyabe  
12 National Forest in violation of Forest Service  
13 regulations. The Ninth Circuit reversed the criminal  
14 conviction after determining the United States had  
15 not proved each element of the criminal act.

16 "Claims.

17 "In September 1991, plaintiffs filed a  
18 complaint alleging constitutional, contractual and  
19 statutory causes of action. Plaintiffs argue that  
20 they possess compensable property interests in their  
21 grazing permit, water rights, ditch rights-of-way,  
22 forage on the rangeland, cattle and ranch. According  
23 to plaintiffs, these property rights were taken by  
24 the federal government through physical and  
25 regulatory actions. First, plaintiffs allege that

1 the suspension and cancellation of the grazing permit  
2 deprived them of their right to graze their cattle.  
3 Second, plaintiffs argue that they were deprived of  
4 their water rights by the Forest Service cancelling  
5 and suspending their permit and diverting and using  
6 their water. Third, plaintiffs claim that defendant  
7 took their property interest in the ditch  
8 rights-of-way by forbidding plaintiffs' access to the  
9 ditches. Fourth, plaintiffs claim that  
10 non-indigenous elk consumed forage and drank water  
11 reserved for plaintiffs' cattle in violation of  
12 plaintiffs' property rights. Fifth, plaintiffs claim  
13 that when the Forest Service impounded plaintiffs'  
14 cattle, defendant took plaintiffs' personal property.  
15 Sixth, plaintiffs allege by canceling and suspending  
16 portions of their grazing permit and interfering with  
17 their water rights, ditch rights-of-way, and forage,  
18 defendant has deprived plaintiffs of all economic use  
19 of their ranch.

20 "In addition to the constitutional taking  
21 claims, plaintiffs argue that the grazing permit was  
22 a contract."

23 I add my commentary. The Court of Claims only has  
24 jurisdiction of claims, damage claims against the government.  
25 That would include constitutional taking claims as well as

1 breach of contract claims.

2           The next section, I'll skip the first paragraph,  
3 briefly, which discusses jurisdiction of the Court of Claims.  
4 I just note there that the government made suggestion that  
5 there was no jurisdiction because there was a pending state  
6 court adjudication of the water rights, and the Court rejected  
7 that argument.

8           The Court determined, as I've determined in my own  
9 case, that the Court does have the right to determine water  
10 rights as between the relative parties in front of it,  
11 especially the government, for the purpose of determining  
12 takings under the Fifth Amendment clause. I've also made the  
13 same legal conclusion here.

14           All right. Also, in that same discussion, however,  
15 is a very important discussion that binds me on property and  
16 what the Court was determining relative to property interests.  
17 And then by side comment, I'll make my own findings as to  
18 property interests here under the due process clause.

19           "Moreover, the Fifth Amendment's protection  
20 is not confined to real property. A party may have a  
21 property interest in a mortgage, in a mineral estate,  
22 in navigational servitudes, in air space, and in a  
23 leasehold estate, among others. Likewise, plaintiffs  
24 can have a property interest in water, and even  
25 defendant concedes that a water right is a type of

1 property right. Thus, the Court has no choice in  
2 exercising its jurisdiction here. This is especially  
3 true when both sides have admitted that the state  
4 water adjudication possibly may take decades.

5 "Determining whether the defendant has taken  
6 property, as one of this Court's jurisdictional  
7 mandates, is not adjudicating water rights as  
8 defendant asserts," the government asserts. "This  
9 Court agrees with defendant that the U.S. Court of  
10 Federal Claims should not engage in stream  
11 adjudications."

12 I add my commentary. I can, however. I have  
13 concurrent jurisdiction to do that.

14 "Stream adjudication is a creature of state  
15 law that enables a state to administer a system of  
16 recording property interests in water. States have  
17 created intricate processes to determine who exactly  
18 owns the right to use water within the state, as well  
19 as to determine whether a stream or river has been  
20 over-appropriated. This Court should thus refrain  
21 from entering into the business of stream  
22 adjudication.

23 "Contrary to defendant's argument, however,  
24 this Court may determine if plaintiffs have title to  
25 water rights in the Monitor Valley without entering



1           into a stream adjudication. This Court has  
2           jurisdiction to determine title to real property as a  
3           preliminary matter when addressing the taking claim.  
4           Similarly, this Court may determine whether  
5           plaintiffs have title to a property interest in water  
6           as a preliminary matter before addressing whether  
7           that property interest has been taken by the  
8           government."

9           I add my commentary. I'm adopting this same  
10          conclusion of the law relative to my own jurisdiction.

11           "Moreover, plaintiffs are correct that the  
12          McCarran Amendment does not preclude federal courts  
13          from exercising jurisdiction regarding water rights  
14          claims. In *Colorado River*, the federal government  
15          brought suit against over one thousand water users in  
16          district court," federal district court, "to  
17          adjudicate reserved water rights for itself and on  
18          behalf of certain Indian tribes under Colorado law.  
19          One of the defendants sought to join the government  
20          in the concurrent state proceeding to resolve all the  
21          government's claims. The issue presented was whether  
22          the McCarran Amendment repealed district court  
23          jurisdiction under 28 USC section 1345. Based upon  
24          the language of the amendment and its legislative  
25          history, the Supreme Court concluded that the

1 amendment never was intended to diminish federal  
2 court jurisdiction. The immediate effect of the  
3 amendment is to give consent to jurisdiction in the  
4 state courts concurrent with jurisdiction in the  
5 federal courts over controversies involving federal  
6 rights to the use of water. The Court concluded that  
7 because the amendment did not clearly repeal  
8 district-court," federal district court,  
9 "jurisdiction, the Court would not presume this  
10 intent. In a later application of *Colorado River* the  
11 Supreme Court stated, '*Colorado River*, of course,  
12 does not require that a federal water suit must  
13 always be dismissed or stayed in deference to a  
14 concurrent and adequate comprehensive state  
15 adjudication.'

16 "Similarly, the language of the McCarran  
17 Amendment does not limit this Court's," Federal Court  
18 of Claims, "jurisdiction to hear plaintiffs' water  
19 rights taking claim. The McCarran Amendment serves a  
20 limited purpose which defendant now seeks to expand.  
21 Senator McCarran, who introduced the legislation,  
22 stated in the senate report that the legislation was  
23 'not intended to be used for any purpose than to  
24 allow the United States to be joined in a suit  
25 wherein it is necessary to adjudicate all of the

1 rights of various owners on a given stream.'" "

2 I add my commentary, waiver of sovereign immunity.

3 "Congress passed this amendment because  
4 private parties and states never knew how much water  
5 the federal government might claim it owned. The  
6 McCarran Amendment forced the federal government to  
7 participate in water proceedings to create a final  
8 determination of water ownership. The Court thus  
9 cannot abstain from its obligation to exercise its  
10 jurisdiction based upon a statute enacted merely as a  
11 waiver of the federal government's sovereign immunity  
12 in state stream adjudications. Defendants'  
13 position," the government's position, "in some ways,  
14 would be to turn the McCarran Amendment on its head.

15 "Furthermore, the McCarran Amendment does  
16 not mandate an absolute policy of deference to state  
17 proceedings as defendant suggests."

18 I'll stop reading there because I don't have that  
19 issue. We do have an adjudication in state court which this  
20 Court also intends to adopt. I'm not going to read it, but,  
21 of course, I recognize it.

22 Now, reading under argument of the government on  
23 ripeness, that the claim in front the Court of Claims was not  
24 ripe relative to the water rights. That court disagreed, of  
25 course, but it went on to say,

1                   "Defendant also claims that plaintiffs'  
2                   evidence of title to the water rights at issue is  
3                   insufficient and too inconclusive to allow this Court  
4                   to consider plaintiffs' claim at this time.

5                   According to the defendant's argument, the two Nye  
6                   County District Court decisions which plaintiffs  
7                   presented as evidence of ownership of their water  
8                   rights are not valid proofs of title to water rights  
9                   under Nevada law. Also, defendant asserts that even  
10                  if these decisions are valid against private  
11                  citizens, the decisions cannot bind the federal  
12                  government because it was not a party to the  
13                  proceedings. Therefore, according to the defendant,  
14                  until Nevada completes the Monitor Valley  
15                  adjudication and determines that plaintiffs own water  
16                  used by the defendant, plaintiffs' taking claim is  
17                  merely a hypothetical question.

18                  "Concurrently, *amici* also argue that  
19                  plaintiffs' water rights taking claim is not ripe for  
20                  review because plaintiffs do not have a conclusive  
21                  title to those rights pursuant to the present Nevada  
22                  statutory adjudication procedure. *Amici* argue that  
23                  the plaintiffs' claim of vested water rights through  
24                  the court decrees in *Peterson versus Humphrey*, Nye  
25                  County 1879, and *United Cattle and Packing versus*

1           *Smith*, 1942, are contrary to Nevada law. As support  
2           for its argument, *amici* provide the affidavit of  
3           Mr. Michael Turnipseed, the State Engineer of Nevada  
4           and executive head of the Division of Water  
5           Resources. In that affidavit Mr. Turnipseed  
6           testified that plaintiffs' court decrees do not  
7           confer an absolute right to the water claimed and  
8           that water rights under Nevada law receive conclusive  
9           effect only after the parties complete the statutory  
10          adjudication procedure."

11                 I'll add my comment. The Court here concludes  
12 otherwise.

13                 Continuing,

14                 "In addition, defendant argues that  
15           plaintiffs' claim for interference with its ditch  
16           rights-of-way is not ripe because plaintiffs' rights  
17           are not vested. Defendant concedes that a party  
18           could acquire a vested right-of-way under the Act of  
19           1866 to transport water if the claimant completed  
20           ditch construction and began transporting water while  
21           the land was in the public domain."

22                 Comment. I will repeat for emphasis.

23                 "The defendant," the government, "concedes  
24           that a party could acquire a vested right-of-way  
25           under the Act of 1866 to transport water if the

1 claimant completed ditch construction and began  
2 transporting water while the land was in the public  
3 domain. Such a right-of-way is confined to the  
4 original alignment and scope of the right-of-way  
5 existing prior to the time when the land was reserved  
6 from the public domain.

7 "According to defendant, plaintiffs do not  
8 possess vested ditch rights-of-way because they  
9 cannot testify to the validity of these ditches based  
10 upon personal knowledge of the original alignment and  
11 scope of the ditches constructed prior to 1907.  
12 Furthermore, defendant argues that plaintiffs are not  
13 competent to give an expert opinion on the status of  
14 the ditch rights-of-way prior to 1907. Therefore,  
15 because plaintiffs cannot prove that the present  
16 ditches are identical to the pre-1907 ditches and  
17 that plaintiffs own the right to use these ditches,  
18 defendant argues, plaintiffs' ditch rights-of-way  
19 taking claim cannot be ripe for adjudication until  
20 plaintiffs apply for a special use ditch permit and  
21 the Forest Service denies such a request.

22 "Defendant next argues that, even assuming  
23 *arguendo* that plaintiffs do own vested ditch  
24 rights-of-way, plaintiffs' use of the ditches exceeds  
25 the scope of their property interest. Defendant

1 notes that vested ditch rights-of-way under the Act  
2 of 1866 are subject to the Forest Service's  
3 regulations, including special use permits when  
4 necessary."

5 I'll skip down now to the Court's contrast with  
6 plaintiffs' argument and with the Court's conclusion.

7 "In contrast, plaintiffs argue that  
8 defendants' ripeness argument is erroneous because  
9 plaintiffs can prove title to the water rights and  
10 ditch rights at issue and the continuous use of both  
11 until the rights were taken by the defendant.  
12 Plaintiffs claim that the stream adjudication does  
13 not prove who owns title to the water rights and is  
14 not a prerequisite to ownership of the water.  
15 According to plaintiffs, the stream adjudication does  
16 not perfect water right claims. Rather, it is a  
17 process to determine the quantity of water rights  
18 owned so that the State can administer the water  
19 rights and prevent over-appropriating the stream."

20 I'll add my commentary. That's the ultimate  
21 conclusion of that Court, and it's the basis for my conclusion  
22 admitting all of Ms. Morrison's title report regarding the  
23 water rights, their prior use, beneficial use, and vested  
24 rights versus certificated or adjudicated rights.

25 "Plaintiffs claim that Nevada law recognizes

1 rights established prior to 1905," that's plaintiffs,  
2 that's the defendants here, "as vested water rights.  
3 Moreover, plaintiffs claim that Nevada courts  
4 recognize that vested water rights are outside the  
5 framework of statutory water law and are not affected  
6 by water laws enacted after 1905. Therefore,  
7 plaintiffs claim that because their water rights  
8 exist independent of the stream adjudication, the  
9 completion of the stream adjudication is not  
10 necessary for their claim to be ripe.

11 "Furthermore, plaintiffs contend that they  
12 can prove by the two state court decrees,  
13 certificates of appropriation of water rights,  
14 surveys, deeds, and local custom and law that  
15 plaintiffs' predecessors in interest acquired vested  
16 water rights in the public lands prior to 1905 for  
17 stockwatering, irrigation and domestic purposes.  
18 Because plaintiffs can prove ownership of water  
19 rights prior to 1905, plaintiffs argue, they have  
20 vested water rights under Nevada law. By the Act of  
21 1866, plaintiffs argue, defendant" --

22 I add my commentary, and I emphasize these two  
23 sentences.

24 "By the Act of 1866, plaintiffs argue,  
25 defendant recognized all vested water rights on



1 federal lands obtained by local custom and law."

2 Now I add my commentary. That's my conclusion of  
3 law as well. The 1866 Act mandated recognition. So in spite  
4 of plaintiffs' argument here, that state law cannot create the  
5 right on federal lands, I don't need to address that question  
6 because Congress has clearly recognized in the 1866 Act that  
7 the federal government will recognize existing water rights  
8 established under state law.

9 "By the Act of 1866, plaintiffs argue,  
10 defendant recognized all vested water rights on  
11 federal lands obtained by local custom and law, 43  
12 United States Code section 661. Therefore,  
13 plaintiffs argue that they have requisite title to  
14 the water rights at issue and that their claim is  
15 ripe. In the alternative, plaintiffs claim that even  
16 if they do not have conclusive title, their numerous  
17 documents asserting ownership of the water rights  
18 create a factual issue regarding whether plaintiffs  
19 own the water rights and whether defendant's actions  
20 prevented plaintiffs from using their water rights."

21 I'll add my commentary. I similarly adopt the  
22 various documents in Ms. Morrison's report that establish  
23 vested rights as well as certificated and adjudicated rights.

24 Just briefly, I'll add,

25 "Additionally, plaintiffs claim that their

1 ditch rights-of-way claim is ripe for review. First,  
2 plaintiffs maintain that they can demonstrate  
3 ownership of vested ditch rights-of-way and that such  
4 ownership is recognized by state law and the Act of  
5 1866. Plaintiffs claim that through historical  
6 documents and surveys they can establish original  
7 ditch construction and that the ditches are still  
8 maintained and operated in the same manner as the  
9 original ditch construction prior to 1907.

10 "Second, plaintiffs argue that their ditch  
11 rights-of-way were expressly excluded from the  
12 national forest and are outside the scope of Forest  
13 Service regulations."

14 Skipping down, again, which simply addresses  
15 ripeness but still part of this section, conclusion of law.

16 "Contrary to defendant's argument, this Court  
17 finds plaintiffs' claims ripe for review because  
18 plaintiffs have alleged real and concrete  
19 consequences resulting from current government  
20 action. The Court has an affirmative obligation to  
21 hear these claims despite the Monitor Valley  
22 adjudication because the two proceedings are  
23 independent of one another. Moreover, the Monitor  
24 Valley stream adjudication began 15 years ago and may  
25 take decades to complete. Such a delay would make a

1           mockery of the Constitution's guarantee of both due  
2           process and just compensation.

3                         "Defendant is correct that a taking cannot  
4           occur if the party alleging the taking cannot prove  
5           ownership of the property at issue. As discussed in  
6           the jurisdiction section, however, this Court has  
7           jurisdiction to determine title regarding the water  
8           rights and ditch rights-of-way at issue.

9                         "Contrary to defendant's argument, the  
10          ripeness doctrine does not require that the  
11          adjudication be complete as a prerequisite to this  
12          Court's exercise of jurisdiction. In Nevada, the  
13          water rights exist independent of the stream  
14          adjudication."

15                        That's his conclusion of law. I add my commentary,  
16          and mine.

17                        He's quoting now from case law in Nevada,

18                                 "Most water rights upon the streams of this  
19          state are undetermined by any judicial decree or  
20          other record. While the right exists, it is  
21          undefined for the state, however, to administer such  
22          rights, it is necessary that they should be defined;  
23          *Ormsby*, 1914.

24                                 "The Monitor Valley stream adjudication,  
25          therefore, does not determine who has title to the

1 water rights at issue but defines the parameters of  
2 property interests in relation to other water rights.  
3 Using the analogy of land, the adjudication process  
4 determines the boundaries of the lot. The  
5 adjudication process does not determine whether the  
6 lot exists, as defendant and *amici* argue. Therefore,  
7 the concurrent adjudication of the Monitor Valley has  
8 no bearing on the ripeness of claims before this  
9 Court. To hold otherwise would be to deny citizens  
10 of the United States the protection of the federal  
11 Constitution's guarantees and make those guarantees  
12 solely dependant upon state law.

13 "Furthermore, plaintiffs have presented  
14 various documents which at least present evidence of  
15 ownership of a property right to use an amount of  
16 water in the Toiyabe National Forest. Defendant and  
17 *amici* claim that such materials are inconclusive to  
18 prove title to the water rights relative to  
19 defendant's interest in the water. This may well be  
20 true, but it is not a matter to be resolved on a  
21 motion for summary judgment. It's a matter best left  
22 for trial."

23 The Court next addresses the obligation to obtain a  
24 permit for maintenance of their ditch rights and concludes  
25 that requiring a permit would be burdensome and effectively

1 deprives the property of value.

2           The Court then, quoting further, states,

3           "This Court determines, analogous to *Stearns*  
4           that plaintiffs need not apply for a permit if  
5           plaintiffs can establish that the procedure to  
6           acquire a permit is so burdensome as to effectively  
7           deprive plaintiffs of their property rights."

8           I'll add my comment, he's talking, of course, about  
9           ditch rights.

10           Okay. Skipping down now to the merits of the motion  
11           for summary judgment. The first thing the Court addresses is  
12           the grazing permit, whether it's a contract or not. We're not  
13           talking about a property interest but a contract or not, which  
14           would give rise to a breach of contract for which the Court of  
15           Claims has jurisdiction, and the Court concludes that it is  
16           not a contract.

17           Skipping down,

18           "After considering all factors most favorable  
19           to plaintiffs, the Court concludes that as a matter  
20           of law the permit does not create a contract between  
21           the parties. First, the language and characteristics  
22           of the agreement are that of a license. Second, the  
23           Forest Service, as agent for the federal government,  
24           did not have the authority to contractually bind the  
25           government. Thus, the permit did not create

1 contractual rights; rather, it merely granted  
2 plaintiffs certain exclusive privileges based upon  
3 historical grazing practices."

4 Now, I will add my commentary and findings on  
5 property interests for due process purposes.

6 The determinations are not coextensive. There's a  
7 much higher burden for a plaintiff to recover compensation in  
8 establishing a property right for purposes of the Fifth  
9 Amendment takings clause. It's a much higher burden.

10 In order to establish a violation of the due process  
11 clause, both procedural and substantive, a plaintiff must also  
12 show a property or liberty interest.

13 Clearly, Judge Smith was not saying in any of these  
14 opinions that the grazing permit did not constitute a property  
15 interest for purposes of the due process clause. He even  
16 acknowledged as much. This Court has to determine that.

17 Clearly, a grazing permit provides a property  
18 interest for purposes of the due process clause.

19 Under the statute of 1934, the Taylor Grazing Act  
20 which regulates the BLM, and under the Forest Reorganization  
21 Act permitting process for the Forest Service, both those  
22 statutes mandate providing preferences and a scheme which  
23 grants preferences.

24 Using the example of the Taylor Grazing Act, with  
25 several bases, one is a land-based preference, the other is a

1 livestock preference.

2           The government in the statute and in regulations  
3 concedes that procedural due process rights attach because  
4 they provide for procedural due process, and this Court  
5 concludes that there is a property interest for purposes of  
6 the due process clause in a permit.

7           I also determine and conclude that there is a  
8 property interest for purposes of violation of the substantive  
9 provisions of the due process clause. The due process clause  
10 contained in the same Fifth Amendment as the takings clause  
11 protects citizens of the United States against the  
12 deprivations of the government when the government takes away  
13 property or liberty interests, and it provides a protection  
14 just like the takings clause does to my or your properties.

15           When the government intends to take away a property  
16 interest or a liberty interest, it must provide procedural due  
17 process and in some cases cannot even do so even if it grants  
18 procedural due process rights. That's when we talk about  
19 substantive due process. That's the difference.

20           Procedural due process, it's a lesser property  
21 interest, all that the government has to provide before it  
22 deprives you of it is procedural due process, the right to a  
23 hearing and notice and to be heard.

24           In the case of a substantive due process right, the  
25 government, even if it complies with procedural due process,

1 cannot take the right or can only take it under certain  
2 limited circumstances.

3 An example of a privilege, license, which carries  
4 property interests for purposes of the due process right is  
5 your license to practice law, or your right to practice as a  
6 medical doctor.

7 The state government or a hospital, a county-owned  
8 hospital, cannot take away your right to practice medicine  
9 without procedural due process provided. And even in some  
10 cases they can't take it at all, except in certain limited,  
11 narrow circumstances.

12 Another example where substantive due process  
13 attaches is to your liberty interest. The government, of  
14 course, has to provide procedural due process before they can  
15 jail you for a year, but, in addition, under substantive due  
16 process provisions, they can't take it at all and they can't  
17 put you in jail for a year unless they comply with certain  
18 limited, narrow restrictions; for example jury trial, for  
19 example, substantial evidence to support the jury verdict,  
20 other provisions. They can't take it at all unless they  
21 comply with those provisions.

22 I'm concluding that the permit process for grazing  
23 is one to which substantive due process rights attach as well  
24 as procedural due process. And the main basis for that  
25 conclusion is the requirements of the statute, the Taylor



1 Grazing Act itself, and the Forest Organization Act that  
2 mandate the recognition and granting of preferences for those  
3 according to existing custom and use, or thereafter  
4 established custom and use, should have a right and preference  
5 to grazing permit.

6 This does not conflict with Judge Smith's holdings  
7 or any of the holdings of the Ninth Circuit or the Supreme  
8 Court.

9 I clearly recognize that there is no property  
10 interest for purposes of the takings clause. This is not even  
11 a contract right for which you can seek compensation for  
12 violation or breach of contract, but it is a right, a property  
13 interest for purposes of the due process clause, and for that  
14 the government must provide procedural due process. And in  
15 some respects they are limited from taking it at all under  
16 substantive due process.

17 For example, if the government wants to take or  
18 suspend your permit rights because of violations of the terms,  
19 they can do so, but only if they comply with certain narrow  
20 restrictions mandated by the substantive due process due  
21 process clause. The main requirement is that there be a  
22 reasonable relationship between the suspension or termination  
23 to the violation.

24 So if, for example, you keep your cattle 30 days  
25 beyond a demand on the range, 30 days after the BLM or Forest

1 Service demands that you get them off, the Forest Service or  
2 the BLM have every right to fine you, to tell you that after  
3 certain dates they may have the right to impound, to give you  
4 trespass notice. They may even -- very gray here, they may  
5 even have the right to suspend for a period of time, let's say  
6 a one month or two-month period, certain portion of the  
7 grazing right.

8           Clearly in violation of the substantive due process  
9 right, what they don't have the right to do is they don't have  
10 the right to suspend 25 percent of your grazing permit for two  
11 years, nor do they have the right to take your grazing permit  
12 away from you.

13           So in instruction to your client when they will be  
14 breaching the criminal parameters of my injunction that I  
15 intend to order, your advice to the client will be that you  
16 have every right to regulate and manage the lands for  
17 management purposes.

18           You may not manage the lands for the benefit of  
19 another private party.

20           You may not manage the lands, other than is required  
21 by statute like the Endangered Species Act, for the benefit of  
22 an environmental group or a group of hunters.

23           You certainly may not manage the rights or lands  
24 against a particular permit preference holder in favor of  
25 another potential permit holder. That will violate the

1 criminal parameters of the injunction I intend to order, and  
2 it will cause those agents who inflict that violation to be  
3 brought before the Court for criminal violation of my  
4 injunction.

5           So the standard is a reasonable relationship between  
6 the sanction they impose and the violations that they note and  
7 adjudicate.

8           Skipping down now, I do just need to add this one  
9 little comment by Judge Smith and adopting it as my own.

10           "Historically, federal courts have followed  
11 the analysis in *Buford* when confronted with grazing  
12 rights issues. Approximately 35 years after the  
13 *Buford* decision, Congress passed the Taylor Grazing  
14 Act and created specific grazing districts upon the  
15 public lands which required the issuance of exclusive  
16 permits for these grazing privileges. Federal  
17 courts, confronted with these grazing permits, have  
18 considered the permit system to be an administrative  
19 method employed by the government to allow parties  
20 the exclusive right to graze based upon historical  
21 grazing practices. All the courts which have  
22 considered this issue have held or assumed such  
23 agreements to be licenses which confer certain  
24 privileges to the permittee, revokable at the  
25 government's discretion."

1           Next section, Did Defendants Take Plaintiffs'  
2 Property Without Just Compensation? I don't think I need to  
3 read this section because I've already covered most of it in  
4 the final decision. There is just one little subsection.

5           The Court said there's two inquiries. First, do  
6 plaintiffs have a property interest in the Toiyabe National  
7 Forest or in their grazing permit. And, as I already told  
8 you, quote unquote, the defendant claims that the issuance of  
9 the grazing permit as a matter law does not create a  
10 compensable property interest under the Fifth Amendment. And  
11 the Court agreed.

12           The Court clearly held here, my own commentary, that  
13 there is no contract right and no compensable -- therefor, and  
14 no compensable property interest under the Fifth Amendment for  
15 a takings claim in the permit.

16           Going further and quoting,

17           "Plaintiffs furnish no evidence supporting  
18 the interest of vested rights in the rangeland itself  
19 under the Act of 1866 or state law. In fact, all  
20 precedent indicates that the privilege to graze never  
21 created a property interest but rather a preference  
22 to use the allotment before the government gave the  
23 right to another. In other words, a preference  
24 grants a party the right of first refusal, not a  
25 property right in the underlying land."

1           Quoting down further,

2           "Rather the Supreme Court held that one who  
3           makes beneficial use of public lands has a greater  
4           priority to the use of that land than another private  
5           party who did not. Likewise, the Act of 1866 did not  
6           'reward' parties with a recognition of property  
7           rights upon the rangeland. The Act clearly  
8           acknowledged vested rights in water and ditch  
9           rights-of-way according to state law. The act does  
10          not address property rights in the public lands and  
11          the Court declines to create such rights contrary to  
12          the clear legislative intention of Congress."

13          I add my commentary, I am also similarly bound.

14          Next section, Do Plaintiffs Have a Property Interest  
15          in Water Rights, Ditch Rights-of-Way and Forage. Just very  
16          briefly.

17          "In their complaint, plaintiffs allege  
18          ownership to all the water in the Meadow Canyon and  
19          Table Mountain Allotments, to certain ditch  
20          rights-of-way and the forage in the Meadow Canyon and  
21          Table Mountain Allotments."

22          The Court denied the defendant's, government's,  
23          motion for summary judgment at that stage, leaving those  
24          issues for trial. He addressed water rights and told why  
25          those had to be left for trial. He concluded, quoting,

1                   "Nevertheless the right to appropriate water  
2                   can be a property right."

3                   Quoting further,

4                   "Defendant," the government, "first argues  
5                   that plaintiffs cannot claim water rights superior to  
6                   defendant's," the government's, "upon federal lands.  
7                   This allegation is incorrect. The Act of 1866  
8                   clearly acknowledges vested water rights on public  
9                   lands. The Act states in relevant part:

10                               'Whenever, by priority of possession,  
11                               rights to the use of water for mining,  
12                               agricultural, manufacturing, or other  
13                               purposes have vested and accrued, and the  
14                               same are recognized and acknowledged by the  
15                               local customs, laws and decisions of courts,  
16                               the possessors and owners of such vested  
17                               rights shall be maintained and protected in  
18                               the same.'

19                   That's the language of the statute. He goes on to  
20                   quote from the Supreme Court and clearly concludes that the  
21                   plaintiffs can have a vested water right in areas on the  
22                   public lands. Same with respect to ditch rights-of-way.

23                   Different with respect to forage. Here the Court  
24                   concludes to the opposite.

25                   "Plaintiffs present a novel argument

1           regarding how and why they have vested grazing rights  
2           in the Toiyabe National Forest despite overwhelming  
3           cases finding no such right. Under the Act of 1866,  
4           plaintiffs note, Congress provided that the right to  
5           use water which has vested and accrued and is  
6           recognized and acknowledged by local customs and law  
7           shall be maintained and protected. The Act of 1866  
8           instructs courts to apply state law to determine  
9           title and scope of water rights. Plaintiffs assert  
10          that in Nevada the right to bring cattle to the  
11          water, and for cattle to consume forage adjacent to a  
12          private water right, is inherently part of the vested  
13          stockwater right. Obviously, there is some logical  
14          support for this proposition even in light of the  
15          small amount of knowledge of bovine behavior held by  
16          the Court.

17                 "Plaintiffs claim that the right to use  
18          water on the public lands and the right to graze  
19          under Nevada law 'are inextricably intertwined.'  
20          Cattle graze on the public range because water exists  
21          on the public lands. The cattle will roam and drink  
22          from all available water sources and consume forage  
23          near the water source. Plaintiffs argue that Nevada  
24          law recognizes this fact in its water code which  
25          refers to 'rights to water range livestock at a

1 particular place' and to the 'watering place.'  
2 Plaintiffs further argue that Nevada courts also  
3 considered water and grazing rights as combined  
4 interests. The Nevada Supreme Court in *Ansolabehere*  
5 held that 'the right to the use of water' -- that was  
6 1957 -- held that 'the right to the use of water for  
7 watering livestock in this arid state depends for  
8 this value on the public range; hence we think the  
9 two matters are properly connected. Thus, plaintiffs  
10 claim that under Nevada law, their vested water  
11 right, as acknowledged by the Act of 1866, includes  
12 the right for the cattle to consume forage adjacent  
13 to the water.

14 "The Court agrees," this is the Court of  
15 Federal Claims, "with defendant that each case it  
16 cites stands for the general proposition that the  
17 right to graze is a revokable privilege. The Court  
18 also agrees with defendant and the numerous courts  
19 which have addressed this issue, that plaintiffs do  
20 not have a property interest in the rangeland. The  
21 Court also agrees that defendant may revoke grazing  
22 privileges which in reality prevent plaintiffs from  
23 the beneficial use of the stockwatering rights.  
24 Nevertheless, neither the Supreme Court, or other  
25 lower federal courts, have addressed the scope of the



1 water rights acknowledged by the Act of 1866. If  
2 Nevada law recognized the right to graze cattle near  
3 bordering water as part of a vested water right  
4 before 1907, when Congress created the Toiyabe  
5 National Forest, plaintiffs may have a right to the  
6 forage adjacent to their alleged water rights on the  
7 rangeland."

8 I'm going to read that one more time.

9 "Neither the Supreme Court, or other lower  
10 federal courts, have addressed the scope of water  
11 rights acknowledged by the Act of 1866. If Nevada  
12 law recognized the right to graze cattle near  
13 bordering water as part of" -- and I add my  
14 commentary, not as an independent forage right,

15 "As part of a vested water right before 1907,  
16 when Congress created the Toiyabe National Forest,  
17 plaintiffs may have a right to the forage adjacent to  
18 their alleged water rights on the rangeland."

19 Adding my commentary, I so conclude as a matter of  
20 law.

21 Going on with the quote,

22 "The Court notes that Nevada has addressed  
23 the conflict between the role of the state to define  
24 water rights and the role of the federal government  
25 to manage, regulate and control national forests.

1           The Nevada courts, however, did not address whether  
2           Nevada law prior to the creation of the Toiyabe  
3           National Forest from the public domain directly  
4           granted the right to utilize forage appurtenant to a  
5           water right. In fact, the Nevada Supreme Court cases  
6           of *In re Calvo*, *Ansolabehere* and *Itcaina* demonstrate  
7           the conflict over the right to graze versus the right  
8           to use water on public lands," citing those cases.  
9           From *Marble*, in parentheses, "state regulates water  
10          rights on federal lands and regulated grazing on the  
11          federal lands until the enactment of the grazing acts  
12          at which time Nevada continued to regulate the water  
13          on federal lands while the federal government  
14          regulated the rights to graze.

15                        "When the federal government created the  
16          Toiyabe National Forest, it could not unilaterally  
17          ignore private property rights on the public domain.  
18          If Congress wanted to remove all private property  
19          interests in the public domain, which were created by  
20          the state under state law, the Constitution would  
21          have required the federal government to pay just  
22          compensation. Just as the federal government could  
23          not take private property rights in water or ditch  
24          rights-of-way when it created the Toiyabe National  
25          Forest, the government could not take any other form

1 of private property right in the public domain.  
2 Plaintiffs will have the opportunity at trial to  
3 prove property rights in the forage stemming from the  
4 property right to make beneficial use of water in the  
5 public domain in Nevada originating prior to 1907."

6 Now I add my commentary. The Court did not go on to  
7 do that at trial because the plaintiff in that case was only  
8 asking for the impairment and compensation attributable to  
9 government's interference with its ditch rights and some water  
10 rights, including the restriction of flow and the denial by  
11 the government of the right to maintain the ditches so that  
12 there would be proper flow.

13 So at trial and in the final judgment the Court of  
14 Claims never had the opportunity to rule, nor did it rule on  
15 this very question which is at the core of this case: Is  
16 there a foraging right attendant to the water right, part of  
17 the water right.

18 That was the reason for my questions of counsel in  
19 his closing argument. Clearly you can't say in reconciling  
20 the tension between the grazing right management of the  
21 federal government and the water management right of the state  
22 government, you can't say that the attendant grazing right,  
23 even if it's part of the water right, extends to the whole  
24 amount of the range, or that it can supersede the purposes for  
25 which management is given to the Forest Service and the BLM.

1 You can't do that. Give me some limitation.

2 The potential limitations that I could select from  
3 is the 50-foot limitation that the Court decreed for  
4 maintenance only on the ditch rights. Clearly the Court was  
5 not considering a cattle foraging right. It said numerous  
6 times throughout these decisions a 50-foot right-of-way to  
7 maintain the ditches.

8 The Court could also select a half mile, which was  
9 part of some of the testimony in the maps that were proposed.

10 The Court could select a three-mile limitation. I  
11 believe the three-mile limitation is too far, although --  
12 although the State recognized a three-mile limit before the  
13 imposition of grazing management on the federal government in  
14 its attempted regulation in the vacuum.

15 I don't think the state is necessarily conveying an  
16 intent to say that three miles is the necessary ranging right  
17 from the water source. They're not attempting to say that.  
18 They're trying to eliminate conflict between competing users  
19 of the water or nearby waters, and to avoid the conflict  
20 they're saying if you come within three miles, then you have a  
21 problem.

22 Nor do I think that the federal government in  
23 adopting its statute and regulations of the one-to-five-mile  
24 limitations relative to the distance between water sources is  
25 trying to say -- relative to stock trailing rights, is trying

1 to indicate an intent that that's the attendant grazing right  
2 to the water right.

3 They're trying to regulate trailing rights across  
4 public lands and across even lands where they've granted  
5 another use or superior use or preferential use to someone  
6 else.

7 I'm going to adopt as a finding of fact that it's a  
8 half mile. I think that's the most reasonable. I recognize  
9 the tendency of cattle to roam well beyond the half mile, but  
10 that roaming would be, in my mind, a logical finding as  
11 relevant to grazing, not watering up to a half mile.

12 Fifty feet is too narrow. A cow -- exploring the  
13 mind of a cow, could still be very intent on water and  
14 obtaining water during the course of a several-hour period and  
15 wander easily far beyond 50 feet grazing as it went.

16 Beyond half a mile I think the cow is intent on  
17 moving away from the water or is more intent on gazing than it  
18 is on watering.

19 So I'm going to find as a matter of law and  
20 conclude, therefore, as a conclusion of law that under Nevada  
21 law, recognized under the 1866 statute, that the attendant  
22 foraging right to the water source right is one-half mile from  
23 a stream on either side and one-half mile in radius around a  
24 sole point water source.

25 I'll skip the next section, impoundment of the

1 plaintiffs' cattle. The Court concluded that it would not  
2 grant summary judgment, but as we read in the later decision,  
3 did not give compensation for that, and the Court denied the  
4 motion for summary judgment on compensation for the  
5 improvements as we saw.

6 That was number I. I'm just going to summarize now  
7 most of the rest of these.

8 II. In II, the Court of Federal Claims held that,  
9 number one, state and environmental groups would not be  
10 allowed to intervene as of right but they would be granted  
11 *amici* status to all them to participate in friends of court  
12 briefs and even in discovery.

13 In III, which is a critical opinion, very short, the  
14 Court of Claims held that plaintiffs met the threshold test of  
15 ownership and had a property interest in vested water rights,  
16 and, number two, plaintiffs had a property interest, this is  
17 for purposes of the takings clause, in ditch rights-of-way and  
18 forage rights appurtenant to their rights.

19 And one thing I can conclude as a matter of law, if  
20 the Court of Claims held as a matter of law that the plaintiff  
21 established a property interest for purposes of the takings  
22 clause, that was also coterminous with and coextensive with a  
23 property interest in due process rights for purposes of  
24 procedural due process and substantive due process because the  
25 takings clause requires you can't even take it unless you give

1 compensation.

2           The opposite direction is not true. In other words,  
3 just because that Court concludes that there's not a property  
4 interest for purposes of the takings clause does not mean that  
5 there's not a property interest for due process purposes which  
6 I have already addressed.

7           As further support for my one-half-mile finding and  
8 conclusion, I will address the extent to which Judge Smith  
9 addressed and found and concluded relative to the 50-foot  
10 right.

11           The Court makes the following findings of fact  
12 relative to water rights, which really primarily addressed the  
13 ditch rights.

14           "As the Court stated regarding plaintiffs'  
15 motion in limine, the order of determination of the  
16 office of the State Engineer does not rise to the  
17 level of a 'final order' for purposes of collateral  
18 estoppel. However, given the State Engineer's clear  
19 expertise in this area, his highly compelling  
20 testimony" --

21           And he's talking about the State Engineer's  
22 conclusions just prior to the state court adjudication, based  
23 upon that engineer's report in the upper Monitor Valley --  
24 lower Monitor Valley.

25           "However, given the State Engineer's clear

1 expertise in this area, his highly compelling  
2 testimony at trial, and the interests of comity, the  
3 Court hereby concurs with, and incorporates by  
4 reference, the findings of ownership contained at  
5 pages 130 to 173 of his report on the Southern  
6 Monitor Valley.

7 "The Court has not reached a final decision  
8 regarding plaintiffs' claimed water rights in the  
9 Ralston and McKinney Allotments. The parties should  
10 address both the ownership and scope issues for these  
11 water rights in their post-trial briefs.

12 "Ditch rights-of-way. Section 9 of the Act  
13 of 1866 recognized plaintiffs' vested water rights  
14 but did not dimensionally define the "ditch  
15 right-of-way" which accompanied these rights. Based  
16 on the consistent dimensional scope described in  
17 subsequent federal legislation, the Act of 1891 and  
18 Act of 1901, for similar ditch rights-of-way, the  
19 testimony at trial, and the Forest Service Handbook,  
20 which notes that the determination of whether a  
21 right-of-way under the Act of 1866 exists or not, is  
22 'a factual question'; the Court finds that plaintiffs  
23 have a ditch right-of-way on the ground occupied by  
24 the water and 50 feet on each side of the marginal  
25 limits of their 1866 ditch.



1           "Concurrent with the accompanying easement  
2           to perform ditch maintenance" -- that's the purpose  
3           of the 50-foot -- "via the right-of-way, the Court  
4           finds that a limited right to forage is appurtenant  
5           to and a component of a vested water right. The  
6           Court notes the undisputed historical use of the  
7           ditches and water at issue for stockwatering and  
8           livestock maintenance. Persuasive testimony at trial  
9           on the nature and intent of the Congressional Acts  
10          dealing with western land management bore out the  
11          conclusion that the United States intended to respect  
12          and protect the historic and customary usage of the  
13          range. To that end, the Court finds as a matter of  
14          common sense, that implicit in a vested water right  
15          based on putting water to beneficial use for  
16          livestock purposes was the appurtenant right for  
17          those livestock to graze alongside the water."

18                 I'm bound by that decision. So is the Ninth  
19          Circuit. It's conclusive on the parties, therefore I don't  
20          have to decide that question. I'm concurring with Judge Smith  
21          and adopting his conclusion of law let alone his finding that  
22          under Nevada law there is an appurtenant grazing right to a  
23          water right.

24                 Now, quoting further, he goes on to hold the extent  
25          of the right to forage on a ditch right and only a ditch

1 right.

2 "The Court holds that the extent of the right  
3 to forage around an Act of 1866 ditch is contiguous  
4 with the scope of the ditch right-of-way: the ground  
5 occupied by water and 50 feet on either side of the  
6 marginal limits of the ditch."

7 That's his ruling and conclusion.

8 Okay. That was III. Those were the main ones.

9 IV was the preliminary opinion. It's very  
10 extensive, and I won't need to quote too much for it because  
11 I've already read you V.

12 VI, however, is the final opinion, findings of fact.  
13 Here I will adopt as my own, as though I were including it  
14 here, in whole or in part, the background and findings and  
15 conclusion adopted by Judge Smith.

16 The first area that I would quote, if we had time is  
17 the section under "This Court has jurisdiction because this is  
18 not an *in rem* adjudication."

19 Under two, water rights, the Court adjudicates the  
20 water right, vested water rights. The Court adjudicates the  
21 Monitor Valley water rights. And I adopt in whole its  
22 findings and conclusions which lists specific rights,  
23 beginning with Andrews Creek, Barley Creek, Combination  
24 Springs, Meadow Canyon Creek, Mosquito Creek, Pasco Creek,  
25 Pine Creek -- I'm sorry, Pine Creek -- these will be attached,

1 please, to the final judgment -- Smith Creek, White Sage  
2 Ditch.

3           In the Ralston and McKinney Allotments, the Court  
4 upheld and designated water rights in those allotments. In  
5 the Ralston Allotment it's specified by source, which again  
6 will be included in an exhibit to the final judgment, the AEC  
7 Well, the Airport Well, the Baxter Spring, the Black Rock  
8 Well, Cornell Well, Frazier Spring, Henry's Well, Humphrey  
9 Spring, Pine Creek Well, Ray's Well, Rye Patch Channel,  
10 Salisbury Well, Silver Creek Well, Snow Bird Spring, Spanish  
11 Spring, Stewart Spring, Well No. 2, Well No. 3.

12           In the McKinney Allotment, Caine Springs, Cedar  
13 Corral Springs, Mud Springs, Perotte Springs.

14           In the ditch rights-of-way that adjudicate those and  
15 determine a property interest.

16           Also raised in this final opinion, he further  
17 quotes,

18                   "Defendant and *amici* challenged plaintiffs'  
19 entitlement to forage rights surrounding the 1866  
20 ditches, arguing again that Nevada law does not  
21 recognize forage rights as a component of water  
22 rights.

23                   "Many statutes with similar purposes to the  
24 1866 Act incorporate a consistent 50-foot  
25 right-of-way for ditches. In addition, there was

1           undisputed testimony at trial about the historic use  
2           of these ditches for livestock watering and  
3           irrigation. There was also persuasive testimony  
4           about the intent of Congress when it passed these  
5           acts. Specifically, the United States intended to  
6           'respect and protect the historic and customary usage  
7           of the range.' Upon careful consideration of the  
8           trial evidence and evaluation of applicable law, the  
9           Court reaffirms its findings," which I just read to  
10          you a moment ago, "regarding ditch rights-of-way and  
11          the forage rights."

12                     In other words, there are attendant forage rights.  
13          That question has been determined for.

14                     Now, I want to emphasize in commentary that my  
15          finding relative to a half mile is not a finding that you have  
16          a property right for purposes of the takings clause, Judge  
17          Smith would have denied that.

18                     My finding of a half-mile right attendant to a water  
19          right is for the purpose of your defense to trespass. In  
20          other words, if a cow having properly been placed upon a water  
21          source wanders up to no more than a half mile away, they  
22          cannot cite you for trespass even if you hold no permit.  
23          Beyond that they can cite you for trespass, and they can give  
24          the appropriate notice of potential of impoundment.

25                     There's extensive discussion of the 50-foot

1 right-of-way for purposes of the takings clause and there, of  
2 course, I have to adopt and I'm bound by Judge Smith's rulings  
3 for the takings clause property right definition.

4           The Court goes on to determine the ditch rights, the  
5 1866 Act ditches which were relevant to his compensation  
6 clause case, and the Court found persuasive that the following  
7 ditches are 1866 Act ditches.

8           To the extent the Court rejected others, I'm bound  
9 and you're bound. To the extent the Court didn't consider any  
10 ditches at all or any water sources at all, I'm not bound and  
11 I will rule and will include at your -- at my invitation, I  
12 will include your request for additional springs and/or  
13 ditches in the exhibit attached to the judgment, if you can  
14 show, by attaching them in the exhibit, proper support that  
15 they were not denied recognition under either the water --  
16 Monitor Valley Water Adjudication or under Judge Smith's  
17 rulings and that there's proper support even if they were not  
18 part of the adjudication as long as the adjudication didn't  
19 cover the land which should have included those water sources.  
20 If it did, then you're barred under *res judicata*.

21           In establishing 1866 ditches and rights-of-way, he  
22 mentioned specifically Andrews Creek Ditch, Barley Creek  
23 Ditch, Borrego Ditches, Combination Pipeline, Corcoran Ditch,  
24 Meadow Creek Ditch, Pasco or Tucker Ditch, Pine Creek  
25 Irrigating Ditch, Spanish Spring Pipeline, the White Sage

1 Irrigation Ditch.

2 The Court finds specifically plaintiffs failed to  
3 meet their burden of proof on the following:

4 Baxter Spring Pipeline, Corcoran Pipeline, Desert  
5 Entry Ditch, Hot Well Ditch, Mount Jefferson Spring and  
6 Pipeline, and the Salisbury Well Pipeline.

7 So you can't ask me to attach that as part of the  
8 exhibit to the judgment.

9 He further goes on to say that "Vested rights-of-way  
10 may be subject to reasonable regulation where they run across  
11 federal land."

12 This is important and I'm bound by it and so are the  
13 defendants here.

14 "Because the Hages have vested rights-of-way  
15 under the 1866 Act, this Court must then address  
16 their contention that they are not subject to Forest  
17 Service regulations. As the District Court in Nevada  
18 recognized, a vested right-of-way which runs across  
19 Forest Service lands is nevertheless subject to  
20 reasonable Forest Service regulation, where  
21 'reasonable' regulation is defined as regulation  
22 which neither prohibits the ranchers from exercising  
23 their vested rights nor limits their exercise of  
24 those rights so severely as to amount to a  
25 prohibition."

1           So, for example, even through there may be a half  
2 mile or a 50-foot right adjacent to a ditch, if you want to  
3 run it across a public highway or through a private patented  
4 land owned by somebody else, or you want to run it through  
5 land otherwise withdrawn for other public purposes, you cannot  
6 do it except pursuant to the right of regulation by the Forest  
7 Service and BLM.

8           Do you get that?

9           MR. POLLOT: Yes, your Honor.

10          THE COURT: In other words, if they determine  
11 that you're trampling over grandma's flower beds, they can  
12 say, no, you've got to go around. If they determine that  
13 you're overgrazing that portion just like you're overgrazing  
14 others, they have the right to say only so many cattle or only  
15 so many cattle at a time.

16          In other words, just as Judge Smith determined  
17 relative to the rights-of-way, I'm determining with respect to  
18 the half-mile limitation as well. Just because I'm saying  
19 they can't cite you for trespass, it does not mean, in fact, I  
20 conclude to the contrary that they still have the right to  
21 regulate that area.

22          Citing *Elko County*, District of Nevada 1995, a  
23 federal district court case,

24                 "Under the 1866 Act, vested ditch  
25                 rights-of-way are subject to Forest Service

1 regulations, including the need to obtain special use  
2 permits when necessary."

3 And within the limits that the Forest Service knows  
4 about under Judge Smith's order.

5 "The government cannot deny plaintiffs access  
6 to their vested water rights without providing a way  
7 for them to divert that water to another beneficial  
8 purpose if one exists," or to allow them to cross the  
9 lands in a reasonable way and subject to reasonable  
10 limitation. "The government cannot cancel a grazing  
11 permit and then prohibit the plaintiffs from  
12 accessing the water to redirect it to another place  
13 of valid beneficial use. The plaintiffs have a right  
14 to go onto the land and divert the water."

15 I'll add my commentary now. This is the primary  
16 basis for the ultimate remedy that I'm going to choose in this  
17 case, an injunction on both parties.

18 One other finding it talked about,

19 "The Forest Service manual does not have the  
20 force of law.

21 "The government's federal law argument does  
22 not squarely resolve the interpretive problems with  
23 the state at issue. Instead, the government directs  
24 the Court to look at the USFS Manual as an  
25 authoritative pronouncement on the scope of the



1 right-of-way easement rather than at the 1866 Act.  
2 The government contends that plaintiffs should be  
3 denied the 50-foot rights-of-way because Mr. Hage  
4 exceeded the dimensions appropriate for normal,  
5 reasonable maintenance as defined under the Manual  
6 and the Forest Service practice. This contention  
7 must be rejected for the simple reason that the  
8 Forest Service Manual does not have the force of law.  
9 It cannot alter statutory right."

10 Okay. Now my separate findings and conclusions.

11 Irreparable harm to the defendants.

12 I find specifically that beginning in the late '70s  
13 and '80s, first, the Forest Service entered into a conspiracy  
14 to intentionally deprive the defendants here of their grazing  
15 rights, permit rights, preference rights.

16 I can utter no finding as to their motivation. It  
17 could have been for a variety of motivations. Maybe they  
18 wanted to protect the conservation interests, maybe they  
19 wanted to recognize the contemporaneous rights of the hunters,  
20 or the state's rights to regulate wildlife. But for whatever  
21 reason, they intentionally entered into a conspiracy to  
22 deprive the Hages of their water right -- of their grazing  
23 permit preference rights.

24 The main evidence of that -- and it's also a basis  
25 and that's the reason for asking the local U.S. Attorney to

1 attend, the main basis for that finding is based upon the  
2 conduct of the Forest Service first and later the BLM.

3 I've already cited these bases in a separate  
4 transcript as a basis for criminal reference of Mr. Seley, and  
5 I'm adding Mr. Williams, to the U.S. Attorney for potential  
6 consideration of criminal prosecution for the conspiracy.

7 The citation so far that I've given and I will --  
8 I'm giving them notice that I'm making that reference to the  
9 U.S. Attorney, I'm not sure how the U.S. Attorney is going to  
10 handle it. I don't think the local U.S. Attorney could handle  
11 it because of the conflict of interest. They're the ones who  
12 introduced Washington counsel and asked that they be admitted.

13 They may well be able to cover it by invitation to  
14 an adjacent -- I'm sure they could not cover it by invitation  
15 of a U.S. Attorney out of Washington, D.C. They may be able  
16 to cover the conflict by invitation of an Assistant U.S.  
17 Attorney from a nearby district, California or Arkansas or  
18 Kansas. They'll have to resolve that for themselves.

19 But I'm specifically making reference for the  
20 reasons I'm giving in writing, and I will require them to  
21 account back to me in six months -- within six months, as to  
22 any action they've taken.

23 But, more importantly, I've also made those same  
24 written findings, four bases for giving written notice of  
25 civil contempt as against Mr. Williams and the Forest Service

1 and Mr. Seley, BLM, for civil contempt, for obstruction of  
2 justice in this civil case, for contempt of the court's  
3 processes.

4 Now, that's a separate issue. But the importance  
5 today is to the four grounds for my finding for irreparable  
6 harm.

7 My finding is that the government entered into an  
8 intentional deprivation of Hage's property rights and  
9 privilege rights, preference rights. For whatever motivation,  
10 they have demonstrated a repeated and continuing course of  
11 conduct and a pattern which demonstrates to the Court that it  
12 will continue in the future unless I enjoin it.

13 The four grounds that I cited and are the subject of  
14 the written notices -- and I'm hereby giving, by the way, the  
15 written notice, Madam Clerk will provide us a date certain for  
16 answering the contempt issue, has nothing to do with this  
17 trial. It's a separate issue of contempt.

18 And, of course, I have to give written notice, and I  
19 understand from Madam Clerk she'll be able to give the written  
20 notice of the minute entry with the attached transcript  
21 listing all the reasons to Mr. Williams and Mr. Seley by  
22 tomorrow.

23 And since they're here, I'll instruct government  
24 counsel not on their behalf, of course, but on their behalf to  
25 convey to them those notices that I channel through you.

1           But for purposes of my holding of irreparable harm,  
2 the intentional conspiracy and act to deprive the Hages  
3 constituting irreparable harm consisted of the arrest and  
4 attempted conviction of Mr. Hage for practicing his property  
5 interest right recognized by the Court of Claims.

6           These folks have heard from three federal courts,  
7 and in spite of that they have continued an attempt to deprive  
8 the Hages of their permit rights and their water rights.

9           They heard from the Ninth Circuit where the  
10 conviction on Mr. Hage for criminal conduct was reversed.

11           They heard from the Court of Claims starting with  
12 *Hage I* in 1996 in the denial of motion for summary judgment to  
13 the government.

14           They heard from the Court of Claims in 1996 in *Hage*  
15 *II*, and in 1998 in *Hage III*, and in 2002 in *Hage IV*, and in  
16 *Hage V* in 2008.

17           In spite of that hearing from the government and  
18 notice of the filing of this case here before this Court,  
19 submitting -- the government submitting -- by their own  
20 complaint waiving sovereign immunity and submitting to this  
21 Court the issues involved that I've already addressed, by the  
22 filing of the complaint in this Court in '07, this is an '07  
23 case, in spite of that, number one, they sought from the State  
24 Engineer water rights on their own behalf, the government's  
25 behalf, not for the purposes defined by the public water

1 reserve -- and for the purposes of the public water reserve,  
2 that is, quote unquote, for public -- I'm sorry, for road  
3 maintenance, fire protection, et cetera, but, in addition, for  
4 public livestock water with the admission from their own  
5 agents here on the stand that they had no cattle, no sheep to  
6 water. The specific intent for seeking that water right  
7 filing was to give the water rights belonging to the Hages to  
8 others.

9           So they made water filings, for example, on at least  
10 four springs, each designating in addition to wildlife, which  
11 was -- they had every right to suggest, was part of the public  
12 water reserve or for the backpacker or for the hunter or for  
13 the guardhouse or the outhouse, 400 cattle for the use of  
14 others, water, stock watering rights, in clear derogation of  
15 their water rights.

16           Second, they solicited and granted temporary rights  
17 to others, namely, Snow as well as others, temporary permits  
18 over top of their watering permits that had been revoked with  
19 the express contemplation and knowledge, as I heard from the  
20 witnesses here on the stand, that those cattle of Snow would  
21 undoubtedly wander onto and use the water rights already  
22 declared by the Court of Claims in Hage.

23           Third, trespass notices after the filing of this  
24 case in '07 to people who leased cattle and/or sold cattle to  
25 the Hages which the Hages acknowledged, admitted, was under

1 their express control, which the Hages admitted liability for,  
2 if any liability there was.

3 To the Forest Service's credit in some of these  
4 notices to others for which they collected -- the Forest  
5 Service and the BLM collected thousands of dollars from others  
6 whose cattle were under the control of the Hages, the  
7 government collected thousands of dollars, and I can only  
8 conclude it was part of an effort and a conspiracy to deprive  
9 the Hages of their preference permit rights and, more  
10 importantly, their water rights and their ditch rights.

11 We even had evidence here that Snow said I want to  
12 apply for those permit rights that you're soliciting, and, by  
13 the way, I'm in process of working with the State Engineer to  
14 get the Hages' water rights.

15 Snow is probably part of the conspiracy, but  
16 certainly the agency principals were part of the water rights,  
17 and probably the U.S. Attorney out of Washington advising them  
18 was probably part of the conspiracy.

19 And the last one was the recent solicitation for  
20 Ralston Allotments to which there are ten responses. Snow's  
21 letter in evidence, seven of the last eight years he received  
22 the temporary allotment assignments.

23 So I'm finding and concluding as a matter of law  
24 that the government and the agents of the government in that  
25 locale, sometime in the '70s and '80s, entered into a

1 conspiracy, a literal, intentional conspiracy, to deprive the  
2 Hages of not only their permit grazing rights, for whatever  
3 reason, but also to deprive them of their vested property  
4 rights under the takings clause, and I find that that's a  
5 sufficient basis to hold that there is irreparable harm if I  
6 don't -- and it's in the public interest, if I don't restrain  
7 the government from continuing in that conduct.

8           Especially the collection from innocent others of  
9 thousands of dollars for trespass notices is abhorrent to the  
10 Court, and I express on the record my offense of my own  
11 conscience in that conduct. That's not just simply following  
12 the law and pursuing your management right, it evidences an  
13 actual intent to destroy their water rights, to get them off  
14 the public lands.

15           For hundreds of thousands of dollars they purchased  
16 the ranch with recognized value in the forage rights, let  
17 alone the water rights, and at some point in time during that  
18 period the Forest Service -- I don't know, maybe it was for  
19 the private use so that they would have a private domain of  
20 the forester.

21           As you know, under a RICO charge, it doesn't have to  
22 be for the sole benefit of the participant, charged  
23 participant, in the RICO enterprise, it can be for the benefit  
24 of the enterprise. But you still have entered into a  
25 conspiracy for RICO purposes. And it certainly was in

1 violation of mail fraud and fraud provisions to the contrary.

2 If it was for the sole purpose of managing the lands  
3 which would have been an innocent purpose, nothing wrong with  
4 that. But the intent to deprive them of their preference is  
5 abhorrent and shocks the conscience of the Court and  
6 constitutes a basis for an irreparable harm finding.

7 So I am going to enjoin the government from doing  
8 such conduct in the future. You will not issue trespass  
9 notices to either the Hages or anybody leasing to them cattle  
10 or where they own the cattle of another to any third party as  
11 long as the Hages clearly claim responsibility for it and as  
12 long as the other third party clearly provides proof that they  
13 are under lease and control, sole discretion and control of  
14 the Hages and as long as it's in the prior allotments that the  
15 Hages had.

16 Now, what remedy to impose. Can I give a judgment  
17 for trespass.

18 There's one other reason I asked the Assistant U.S.  
19 Attorney to be here, and I'll do that after we conclude the  
20 hearing, and that's for future *pro hac vice* purposes.

21 I cannot give a trespass judgment in this case. I  
22 do find that the Hages need -- what they really need  
23 economically are grazing permits.

24 It's not sufficient for their economic purposes for  
25 this ranch to simply claim or use their water rights. Even



1 they admit that. So clearly it's not enough for the Hages  
2 just to have the beneficial use of water for stock watering.  
3 They need and they acknowledge that they need the grazing  
4 right, and they acknowledge that the BLM and the Forest  
5 Service have the right to manage that right as they must, as  
6 Congress gave it to them, including the right to diminish your  
7 grazing right in times of drought or in times of depletion of  
8 the range or in favor of other public uses, for example, the  
9 elk.

10 They have the right to include that in the  
11 management calculation. And if the State of Nevada says it's  
12 not incompatible to let elk or wolves run in that area, I must  
13 acknowledge the Forest Service and the BLM's right to manage  
14 that into the management of the range. And you have to  
15 accommodate it. And you even have to accommodate it within  
16 the reserved water -- what did we call it, preserved water  
17 right, PWRs? You even have to accommodate it within the  
18 reserved water rights of the government for the purpose of  
19 wildlife and other public users.

20 For example, you can't complain to the government  
21 that they're letting backpackers or an occasional person on  
22 horseback crossing, or a person on four-wheelers cross. You  
23 can't complain to them that they're letting those others use  
24 your water rights because they have a PWR for that purpose.

25 So you will be enjoined and mandated to do the

1 obvious, and that is apply for, receive, and comply with the  
2 terms of permits for the grazing rights according to the  
3 original terms and AUMs of the rights granted to your  
4 predecessors by both the Forest Service and the BLM.

5 Now, I'm not saying that the Forest Service and the  
6 BLM can't regulate that down to practically nothing. They  
7 can. They have that discretion. And I will give them  
8 authorization right now, as long as they're exercising their  
9 discretion reasonably and not in violation of the offensive  
10 conduct that I've already cited them for, up to a maximum of  
11 no more than 25 percent of reduction from those AUMs in the  
12 original permits without the other side's consent, if they  
13 consent. We acknowledge this is a drought year. We need a  
14 50 percent in this year.

15 They testified to me that they know a lot about  
16 managing this range, and certainly they shouldn't take  
17 interest in derogation of the land itself. Then, if you  
18 propose a reasonable reduction, even 50 percent, they ought to  
19 be ready to consent to it not require a court hearing. But if  
20 they don't consent in excess of 25 percent, you can ask the  
21 Court for permission. You must ask the Court for permission.

22 So wherever without their consent you want the Court  
23 to further reduce their AUMs for any permit period or for an  
24 emergency period, you must ask the Court for permission and be  
25 prepared to prove the reasonableness of the request.

1           You must also ask the Court's permission before you  
2 cite them for trespass. You can do the citings, you can  
3 manage, you can go out there and do the observations, but you  
4 can't issue the trespass citation without my permission.  
5 There was one other area under that, trespass citations, and  
6 you can't give notice of intent to impound without my  
7 permission.

8           Basically what I'm saying is for some reason in the  
9 case of the Hages, maybe it's more widespread than that, I  
10 just simply don't know and it's not a matter for my  
11 cognizance, but in the case of the Hages I don't trust the  
12 Forest Service or the BLM to manage the lands consistent with  
13 the purpose and the discretion given to them. So I'm taking  
14 cognizance of it, just like a busing decree, and it will  
15 remain in effect as long as it needs to remain in effect, and  
16 that's the limitation and the time period limitation on the --  
17 on the injunction.

18           Now, the counterinjunction to the government is you  
19 must grant the permits. You denied these permits in violation  
20 of their due process, procedural and substantive due process  
21 rights. You sent out an invitation in '02, '03 -- '02 or '03  
22 or '04 to reinstate their BLM permits, I think it was, wasn't  
23 it? Mr. Hage sent back yes, please, renew. He added one  
24 clause. What was the clause exactly?

25           MR. POLLOT: Subject to UCC1-207.

1           THE COURT: Subject to UCC1-207. I don't even  
2 think Mr. Hage Senior knew what that meant. I certainly don't  
3 know what it means and the government doesn't know what it  
4 means. So it was not a basis, nor a reasonable basis, it was  
5 nothing but arbitrary and capricious to conclude that was a  
6 refusal to request renewal of the permits.

7           And later on that basis, when the government itself  
8 impeded -- threatened trespass, impeded taking their cattle  
9 off the land in a timely fashion, severely restricted the  
10 AUMs, to then say based upon their nonuse they have forfeited  
11 the right to these permits, is also arbitrary and capricious.

12           What else could they do? Their cattle was impounded  
13 and all they could do was sell the cattle, and that's what  
14 they did. So your use of nonuse for three years as a basis  
15 was arbitrary and capricious.

16           Now, the government argues, well, they didn't  
17 appeal. I read the letter from counsel in San Francisco.  
18 Clearly he was appealing. But in that letter and in later  
19 letters he basically said our appeal is in the already-filed  
20 Court of Claims action.

21           The government waived any claim of exhaustion under  
22 the APA, and it waived any claim of exhaustion for failure to  
23 appeal, number one, by defending and the jurisdiction in the  
24 Court of Claims over those very same issues and, number two,  
25 by its voluntary waiver of sovereign immunity and filing of

1 this case in 2007 here. So it was an arbitrary and capricious  
2 taking for due process purposes of the permit, and, therefore  
3 I'm going to mandate and enjoin the government to grant the  
4 permit as I'm enjoining them to apply for it.

5           These parties over two decades of time have been  
6 unable to resolve their differences so I'll resolve their  
7 differences for them. I'm going to mandate that they get back  
8 in the system, apply for the permits, and comply with the  
9 management discretionary decisions of the BLM and the Forest  
10 Service, and I'm going to mandate that the BLM and Forest  
11 Service act reasonably in granting the permits and managing  
12 the grazing preference.

13           I'll just take -- just like I would take control of  
14 a busing decree for two decades, three decades, four decades,  
15 whatever it takes, maybe it's until after Mr. Williams and  
16 Mr. Seley move on. You'll tell me when. You need to  
17 terminate this judgment, Judge, because, you know, we've had  
18 good relations now for a decade. You'll tell me when. Until  
19 then, I'll manage the dispute for you because you have  
20 evidenced no ability to do so.

21           One or two last things.

22           Why can't I give a judgment for trespass. I think  
23 you have established that there was some trespass. We have  
24 pretty clear markings on the map of where the cattle were  
25 identified.

1           I can't give a judgment for specific trespass for  
2 the following reasons: First, the Estate of Hage has  
3 established a valid defense. They have a right to have cattle  
4 on their water source water rights within 50 feet for  
5 maintenance of the ditch rights and within a half mile of  
6 those ditch rights and the water source for purposes of  
7 beneficial use of the stock water right.

8           Again, that's subject to appropriate regulation by  
9 the BLM and the Forest Service on even that half mile, and I'm  
10 not saying you have any property right for purposes of the  
11 takings clause or for purposes of the due process clause. I'm  
12 just saying you have a defense.

13           Second, the Estate of Hage, Estate of Hage as one  
14 party never owned any of the observed cattle, they've proven  
15 that to my satisfaction, so they can't be held to be guilty of  
16 trespass, Mr. Hage can, and Mr. Hage can on behalf of all of  
17 those parties you've cited, third parties.

18           Third, the evidence is not clear as to the  
19 sightings. The testimony of those who were actually engaged  
20 in the observations and who took the picture is ambiguous and  
21 conflicting. Some testified that they stood on the very spot  
22 where they pushed the GPS button to mark the coordinates.  
23 Some testified that they estimated the GPS coordinates or they  
24 went there afterwards where they thought the cattle were in an  
25 effort not to chase the cattle away and attempted to estimate

1 the coordinates. Most, however, provided photographs where I  
2 can actually observe and roughly estimate where the cattle  
3 actually were.

4 For 75 percent, as you might suspect, of the  
5 photographs, it shows the cattle on or near the streams, and  
6 that would just make common sense, wouldn't it? They're in  
7 the greenbelt areas that surround probably within 50 feet,  
8 certainly no more than 100, 300 feet of the streambeds. Those  
9 are greenbelt areas.

10 Even the Forest Service and the BLM acknowledge they  
11 need those greenbelt areas. And they need foraging, at least  
12 by the elk and maybe by the cattle, too, to maintain those.  
13 There was testimony that those grasses disappear if they  
14 don't -- if they aren't foraged. Those types of grasses  
15 disappear.

16 In addition, relevant to and attendant to the  
17 foraging permits there are maintenance obligations, for  
18 example, like for some of the grains and some of the grasses,  
19 the Hages have an obligation to plant and replant. But the  
20 sightings language is unclear. Seventy-five percent of the  
21 photographs show them reasonably, common-sense-wise, within  
22 the parameters that I've defined, to which they had an  
23 attendant grazing right, the right in which the cattle can  
24 drop their head.

25 The other 25 percent, common-sense-wise, are up on a

1 hillside. They could be far, far away from the water source.  
2 They could be outside a half mile. And even the Hages  
3 admitted they're either on their way to another water source  
4 that the cow is aware of, or they're simply grazing.

5 That's another reason to say that what the Hages  
6 really need here is a permit not just enforcement of your  
7 water rights.

8 Those, of course, would be an appropriate -- on  
9 appropriate lands for the basis -- and provide a basis for  
10 giving a trespass citation, and you have the right to do that  
11 in the future, and you have the right to monitor and inspect  
12 for that.

13 So the third reason is the evidence is ambiguous.  
14 The marks on the map aren't ambiguous and the initials are  
15 there and the mapmaker simply -- the mapmaker didn't engage in  
16 the observations. The mapmaker simply took the coordinates  
17 and plotted them on the map.

18 And I acknowledge that some of those, many of those  
19 are certainly outside of 50 feet, not necessarily outside of a  
20 half mile. But, again, where the coordinates are in relation  
21 to the actual cows is, is ambiguous.

22 The fourth reason, many of these cattle are on the  
23 water source or within close proximity or on an 1866 ditch  
24 right. Some are within a trail and cattle water trailing  
25 right area, or within one mile either way or road easement.



1           The next reason, fifth, there's no quantification of  
2 the forage taken or impaired on noneasement lands. Here I  
3 need to make the legal conclusion.

4           You will tell me in the briefing whether your  
5 citation to the Code of Federal Regulations is appropriate,  
6 and I'll have to make a legal conclusion on that. But if your  
7 citation is correct, to 43 CFR 9239.0-8, that the measure of  
8 damage is determined by the law of the state of Nevada, then I  
9 make the following conclusions of law.

10           The Nevada statute does provide, of course, that it  
11 is the value of the forage consumed. I think Nevada law would  
12 also provide it's the damage incurred by the government to the  
13 lands by virtue of the trespass. So at least those two  
14 elements of damage may be assessed by the government.

15           To the extent the statute says there will be no  
16 trespass for livestock on the commons without fencing, I don't  
17 think that's the law of Nevada relative to a trespass on  
18 commons -- on public lands. The management authorities who  
19 have the right to manage have said you can't put fences on  
20 those lands to keep wildlife or others out without our  
21 permission and as part of the management so there won't be  
22 fences. And in that circumstance you just can't cite that  
23 part of the Nevada Revised Statute to say, therefore, there  
24 can be no damage.

25           I think the courts of Nevada and the Supreme Court,

1 if I'm guessing, would clearly state that fencing is beside  
2 the point. It's the value of the forage taken combined with  
3 the damage to the public lands. I think that would be the law  
4 of the State of Nevada.

5 I agree with you that President Reagan had no right  
6 to extend the \$1.43, or whatever it was, but as far as I can  
7 tell, the \$1.43 and 35, whatever it was, adjusted over time by  
8 regulation -- Mr. Myhre, one more comment that I need you here  
9 for, I'm sorry, it will come in about five minutes -- is that  
10 it's probably based upon reasonable calculation of the value  
11 of the forage.

12 It's not \$10 or \$12 or \$15, which is what Hage would  
13 charge for lease land with the coexistent obligation to  
14 monitor the cattle, maybe even provide vet service, certainly  
15 make sure they don't break through fences, irrigate the land,  
16 harvest it. But, nevertheless, I'm sure it's based upon cost  
17 to the government for management. So as far as I can tell,  
18 and subject to your briefing, that's probably the best value.

19 But the reason why I don't think I can render a  
20 judgment for trespass is there's no quantification of the  
21 forage taken or the impairment on noneasement lands.

22 The next reason, number six, is the takings award by  
23 the Court of Claims. Therefore, there's no trespass, and  
24 trespass judgment would be inconsistent with the Court of  
25 Claims judgment, except, of course, on lands beyond the Court

1 of Claims judgment.

2 The seventh reason is that there would be an offset,  
3 there would be an offset for the some 150,000, I think, they  
4 collected from others. Is that what it was?

5 MR. HAGE: It's probably over a hundred  
6 thousand, your Honor.

7 THE COURT: Right. And that's what it was for,  
8 was paid by others? I think so. And, more importantly, it  
9 would be permitted and should be permitted as an offset to the  
10 judgment given by the Court of Claims. The Court of Claims  
11 has given a \$14 million judgment. So all we're talking about  
12 is offset anyway.

13 Instead, in equity, I will give the judgment that  
14 the Bureau of Land Management and the Forest Service really  
15 need, assuming that they're being consistent with their  
16 purposes and their discretion given to them by Congress for  
17 managing that lands, and that is a mandatory injunction that  
18 Hage will apply for a permit and abide by the terms, because  
19 that's what the government really needs anyway, and the  
20 government can't manage as required unless they so apply.  
21 That's what the government really needs.

22 And in equity trespass judgment doesn't help you.  
23 I'm sure you think it does, in order to get a handle and  
24 control on the Hages. But I'm going to control the Hages from  
25 now on. And if they -- you'll ask me -- you'll tell me we've

1 done observations, they have a hundred head of cattle for a  
2 month beyond the permitted time period, may we trespass them,  
3 and I'll tell you yes. May we give them notice that, if it's  
4 beyond a month, we will impound, and I'll tell you yes, you  
5 can give them that. And may we impound, and I'll tell you  
6 yes, you can impound.

7 In other words, I'm here to control you, Hages. You  
8 haven't been able to resolve this with the government, just  
9 like they haven't been able to resolve it with you, and so I'm  
10 going to baby-sit both sides, just like a child. That's what  
11 I'm going to do.

12 That's the extent of my findings and conclusions.  
13 There will be a final decision, probably again another tome,  
14 after I read the briefs. That will help you in narrowing the  
15 briefs.

16 Any clarifications or requests for additional  
17 findings and conclusions? I'll solicit -- for example, you  
18 can go beyond the normal brief limits of 30 pages by attaching  
19 suggested additional findings and conclusions or suggested  
20 clarifications of the findings and conclusions that I've made,  
21 or request for additional findings areas.

22 MR. BARTELL: Could we have just a moment to  
23 consult, your Honor?

24 THE COURT: You bet. Now, off the record in a  
25 separate record, please.

1 (Discussion held off the record.)

2 THE COURT: All right. Back on the record,  
3 please, of this case.

4 Additional requests?

5 MR. BARTELL: Your Honor, if we could just seek  
6 some clarification from the Court regarding the timing.

7 THE COURT: Please.

8 MR. BARTELL: So that we're able to comply with  
9 the Court's order, time will be needed to basically stop the  
10 process, notices, holding referrals perhaps from Treasury.

11 THE COURT: Right.

12 MR. BARTELL: It takes --

13 THE COURT: That's part of the injunction. I'm  
14 glad you reminded me. That's part of the injunction. You  
15 must withdraw from Treasury any trespasses, notices on third  
16 parties, where Hages clearly recognize and admitted liability  
17 for the same.

18 MR. BARTELL: Also, regarding timing, is there  
19 also timing for which the defendants would be required to not  
20 allow their cattle past the distances this Court has ordered,  
21 the half mile for instance?

22 THE COURT: Immediately. You will forthwith  
23 apply for the permits, and immediately you're going to have to  
24 undertake action to make sure they don't wander beyond -- as  
25 far as I'm concerned, they're subject to their injunction

1 immediately even though the permanent injunction won't be  
2 entered for awhile yet, and so you're mandated to comply  
3 immediately, too.

4 I am going to order the government forthwith to  
5 grant the permits -- what is it? It's June now. These would  
6 normally run through October on the forestlands and during the  
7 winter on the BLM lands.

8 So you've got to undertake action forthwith, number  
9 one, to comply with the half-mile limit, otherwise, I'll  
10 expect to see them here tomorrow asking for the right to issue  
11 a trespass notice. I really don't expect them to do that. I  
12 think it would be unreasonable.

13 But you -- so I'm trying to give you the  
14 clarification best I can. All I'm saying is you -- both sides  
15 need to realize the parameters the Court has laid out for you  
16 and try to comply in good faith forthwith.

17 MR. BARTELL: Well, again, your Honor, we will,  
18 of course, follow the Court's order. But it will take some  
19 time to -- we can't do this today.

20 THE COURT: Correct.

21 MR. BARTELL: And it will just -- and we'll do  
22 it as quickly as possible, pull the referrals, as you said,  
23 comply with the Court's order.

24 THE COURT: Understand.

25 MR. POLLOT: Yes, sir -- I'm sorry. Go ahead.

1 THE COURT: Clarification?

2 MR. HAGE: Your Honor, clarification on the  
3 half-mile perimeter --

4 THE COURT: That's a defense, it's not a right.  
5 It's your defensive zone for a trespass notice.

6 MR. HAGE: Okay. If I'm applying for a permit  
7 immediately, and if I understood the Court correctly, I'm to  
8 gather cattle immediately also; is that correct?

9 THE COURT: I don't think I can mandate that you  
10 gather cattle immediately. I don't think I can do that. I  
11 think all I can say is forthwith you will apply for the  
12 permits in the AUMs numbers previously designated.

13 MR. HAGE: Okay.

14 THE COURT: They've got to have reasonable time  
15 to entertain that, decide whether to cut it down, to half it,  
16 whatever they want to do, time in front of the Court if you  
17 don't agree. Hopefully you will work together to agree, which  
18 will establish a basis for cooperating in the future.

19 And I won't require, mandate that you gather, but I  
20 will mandate that you comply, at a minimum, with the normal  
21 permit restrictions that you're applying for, dates and times,  
22 as established by precedent that I heard evidence of, and --  
23 and you'll make sure that your permit application is from  
24 tomorrow going forward and so that they can take that into  
25 account.

1           In other words, if they want to calculate the total  
2 number of days that a range can stand, they'll include not  
3 only from tomorrow forward, they'll include the time that  
4 you've had the cattle on the range, including the half-mile  
5 area which they have the right to manage, from the time that  
6 you put them up there.

7           So if the maximum the range can stand is 90 days, it  
8 will be from that prior date. That's the best guideline I can  
9 give you. See if you can work it out. And if you can't, then  
10 I'll have to make a decision.

11           MR. HAGE: I'd like to try to work it out with  
12 them --

13           THE COURT: Good.

14           MR. HAGE: And if we can't, I would request we  
15 have a hearing.

16           THE COURT: I'm available.

17           MR. HAGE: Thank you.

18           MR. POLLOT: Your Honor, I have one further  
19 clarification.

20           THE COURT: Please.

21           MR. POLLOT: I had actually risen originally  
22 about asking that the referrals be withdrawn. We have at  
23 least one of the individuals who said that there is now a mark  
24 on his credit report --

25           THE COURT: Right.



1 MR. POLLOT: -- regarding that.

2 Will part of the injunction be to correct that?

3 THE COURT: They would normally do that in  
4 normal course. They would withdraw the credit bureau report  
5 or they would send a supplementary report saying there's no  
6 debt as part of the process.

7 If there's any attempts to withhold from Social  
8 Security, that would stop forthwith upon that withdrawal.

9 If there's any referrals to collection agencies, the  
10 Treasury will do that.

11 MR. POLLOT: Thank you, your Honor.

12 THE COURT: They don't need to worry about it.  
13 I understand there may be an immediate problem, but in due  
14 course the Treasury will withdraw or supplement that report.

15 MR. POLLOT: Thank you. I'm grateful,  
16 your Honor.

17 MR. BARTELL: Your Honor, it's come to our  
18 attention, and we haven't verified this, that some of these  
19 third parties may have been attempting to impose liens on  
20 Mr. Williams' or Mr. Seley's property. Would part of this  
21 Court's order also be we're going to stop all this process --

22 THE COURT: No, but I will advise them there's  
23 federal criminal statutes that prohibit that.

24 MR. BARTELL: Thank you.

25 THE COURT: The judge may be crazy, but if you

1 want to lien his land, be advised that there's a criminal  
2 statute that prohibits you from doing that.

3 And, of course, this Court intends to protect the  
4 personal physical integrity, as well as the financial  
5 integrity, of the agents of the government.

6 MR. POLLOT: And, your Honor, so that -- for the  
7 record, we're not personally aware of anything like that.

8 THE COURT: Good. Okay. Thank you very much.  
9 Court will be in recess.

10 (The proceedings were adjourned.)

11 \* \* \*

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13

14 I certify that the foregoing is a correct  
15 transcript from the record of proceedings  
in the above-entitled matter.

16 /s/Margaret E. Griener 07/29/2012  
17 Margaret E. Griener, CCR #3, RDR  
18 Official Reporter

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