# In the United States Court of Federal Claims



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E. WAYNE HAGE AND
THE ESTATE OF JEAN N. HAGE,

*Plaintiffs,*

v.

THE UNITED STATES,

*Defendant.*

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No. 91-1470L

Senior Judge Smith

Filed: FEB -5 2003

## ORDER

On April 29, 2002, Defendant filed a Motion for Partial Summary Judgment on Plaintiffs' Claim of Taking Based Upon Denial of Access to Stockwaters and Forage. Plaintiffs filed their opposition to Defendant's motion on May 29, 2002, and Defendant replied on June 12, 2002. Oral argument on Defendant's motion was held on July 26, 2002. After careful consideration of the briefs and oral argument, the Court hereby DENIES Defendant's Motion for Partial Summary Judgment.[1]

In its motion, Defendant argues that Plaintiffs' taking claims based upon lack of access to federal grazing allotments as a result of the withdrawal of the grazing privilege must be dismissed as noncompensable. Defendant believes that Plaintiffs are attempting to "bootstrap" a property right to forage or an easement to graze onto their vested water rights. Defendant relies on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) for the principle that grazing is a revocable privilege and serves as a pre-existing limitation on Plaintiffs vested water rights and any forage associated with stockwaters or 1866 Act ditches on federal lands. As a matter of law, defendant claims that the loss of access as a result of withdrawal of the grazing privilege is therefore noncompensable, since that interest was never part of Plaintiffs' title to water rights or ditch rights under the 1866 Act.

Plaintiffs respond that Defendant's motion should be denied because: (1) plaintiffs' bundle of rights in this case amounts to a "fee interest" which includes the right of access to vested water

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[1] The Court's decision was conveyed to the parties in a telephone status conference on December 11, 2002. This Order sets forth the basis for the Court's decision.

rights; and (2) that the taking was not the result of a revocation of the grazing permits, but rather a combination of physical and regulatory actions by the government that culminated in the taking of Plaintiffs' cattle operation and stockwater rights in 1991. In support, plaintiffs argue that the government is estopped from asserting the grazing rights have no value because they routinely impose estate taxes on property rights located on grazing allotments when the rancher using those allotments dies. Plaintiffs also highlight that a factual dispute exists as to why their grazing permits were not renewed. Furthermore, even if the grazing permits were renewed, plaintiffs could not abide by them because the government's unlawful actions closed their livestock business in 1991. Lastly, Plaintiffs argue that unlike the permit grazing lands in *United States v. Fuller*, 409 U.S. 488 (1973), these property rights are independent of the grazing permit, have independent value apart from any permit, and enhance the value of the base properties to which they are appurtenant.

As an initial matter, the Court recognizes that this is Defendant's fourth motion for summary judgment or partial summary judgment, and appreciates the government's efforts to narrow the issues in this matter. In this instance, however, Defendant has failed to set forth an issue that the Court can dispose of on summary judgment. First, as Plaintiffs established at trial, the stockwater rights and ditch rights were possessed by Plaintiffs' predecessors in interest long before the grazing permit system was established by the government. Second, Defendant's reliance on *Lucas* is misplaced because the permissible permanent easement the Supreme Court envisioned was in the context of pre-existing nuisance principles inherent in the landowner's title itself. *Lucas*, 505 U.S. 1028-29. Lastly, Defendant appears to suggest that the rights the Court enumerated in *Hage v. United States*, 51 Fed. Cl. 570 (2002), are essentially worthless without a corresponding grazing permit. Even looking past the factual disputes that exist surrounding the cancellation of the grazing permits, the Court is not of the opinion that the lack of a grazing permit that prevents access to federal lands can eliminate Plaintiffs' vested water rights and ditch rights that pre-date the creation of the permit system. The value of these rights, if any, is something to be determined at trial. For these reasons, the Court hereby DENIES Defendant's Motion for Partial Summary Judgment.

It is so ORDERED.

LOREN A. SMITH
Senior Judge