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## Estate of Hage v. United States, 687 F.3d 1281 (Fed. Cir. 2011)

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Estate of Hage v. United States, 687 F.3d 1281 (Fed. Cir. 2011)

# COURT REPORTS

## FEDERAL COURTS

### UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**Estate of Hage v. United States**, 687 F.3d 1281 (Fed. Cir. 2011) (holding that a rancher's claim that he had suffered a regulatory taking of his water rights was not ripe for review because the mere existence of a requirement for a special use permit did not itself constitute a regulatory taking, and, in the absence of evidence that the government took water the ranchers could have put to beneficial use, the construction of fences near a water ditch did not amount to a physical taking).

In 1978, E. Wayne Hage and Jean Hage ("Hages") acquired a cattle-ranching operation in Nevada, covering approximately 7,000 acres of private land. The Hages also used nearly 752,000 acres of adjoining federal lands under grazing permits from the Forest Service and Bureau of Land Management (collectively, the "government"). The Hages' purchase included water rights previous owners had obtained under Nevada state law in streams and ditches now located on federal lands.

The government required the Hages to obtain special use permits before they could perform any ditch maintenance on the federal lands. The Hages complied until 1986, when they stopped applying for the permits because they believed that they were no longer necessary. The Hages nevertheless continued to perform ditch-maintenance operations on the federal lands, including clearing trees along the ditch right-of-way. Mr. Hage was subsequently charged and convicted of damaging and removing government property. However, the conviction was eventually overturned on the grounds of inadequate proof of the value of the property affected.

In 1991, the Hages filed suit against the United States in the United States Court of Federal Claims ("claims court"), alleging a Fifth Amendment "taking" of their private property (in their water rights), a right to compensation for range improvements, and breach of contract (a discussion of range improvements related compensation intentionally omitted here). Nearly twenty years later, after two trials and multiple opinions by the claims court, the claims court awarded the Hages compensation for a regulatory and physical taking of their water rights with pre-judgment interest.

The government appealed the claims court's ruling to the United States Court of Appeals for the Federal Circuit ("appeals court"). On appeal, the government argued (i) the Hages' regulatory takings claim was not ripe because the Hages failed to obtain a permit to maintain the ditches; and (ii) the government had not effected a physical taking of their water rights because (a) the claims relating to the construction of fences surrounding water sources on federal lands in which they held grazing permits were time-barred; (b) Mr. Hage

already testified that fences the government erected in 1988 and 1990 did not exclude cattle from their water sources; (c) a water right has no “access component” and there is thus no appurtenant right to use and occupy federal rangelands for access to the water; and (d) the Hages failed to prove that they could have put the water to beneficial use.

First, the court of appeals found the Hages’ claim for a regulatory taking of their water rights was not ripe. Neither party entered evidence that the government would have denied the Hages a permit, had they applied for one. The appeals court rejected the Hages’ argument that the mere existence of a requirement for a permit constituted a regulatory taking. Accordingly, the appeals court concluded the claims court erred in finding the government had effected a regulatory taking of the Hages’ water rights. The appeals court further held the Hages did not presently have to apply for a permit because it would be futile based on the history of the parties involved and the permit requirement itself would amount to a prohibition of their use; a taking of their water rights.

Next, the appeals court examined the government’s claim that any physical takings claim based upon fences built in 1981 and 1982 were time-barred pursuant to the six-year statute of limitations period prescribed in 28 U.S.C. § 2501. The appeals court agreed. The Hages had, in fact, filed the suit in 1991; nearly a decade after the BLM built fences on the property. The appeals court did agree with the Hages’ assertion that the government could not prevent them from accessing their water without just compensation, and that entirely fencing off a water source could, theoretically, amount to a physical taking. The court of appeals held, however, in the absence of any evidence that the government “took” water the Hages could have put to beneficial use, the Hages failed to satisfy the requirements for a successful Fifth Amendment takings claim. Therefore, the appeals court held the claims court erred in ruling that the government’s construction of the fences amounted to a physical taking.

Accordingly, the appeals court affirmed the claims court’s ruling that the erection of fences in 1981 and 1982 were time-barred; reversed the claims court’s ruling that there had been a regulatory and physical taking of the Hages’ water rights; vacated any damages awards; and remanded the case without costs.

*Michael Lerch*

## STATE COURTS

### CALIFORNIA

**Cal. Pines Prop. Owners Ass’n v. Pedotti**, 141 Cal. Rptr. 3d 793 (Cal. Ct. App. 2012) (holding that by acting in accord with typical practices of a rancher in Modoc County, Pedotti satisfied the “best efforts” clause of a water storage agreement because he used the diligence of a reasonable person under comparable circumstances).

In 1992, California Pines Property Owners Association (“Association”) acquired land in Modoc County, California, which included the Donovan Reservoir (“Reservoir”). Nearby, Robert Pedotti purchased the 1,761-acre