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Estate of Hage v. United States, 82 Fed. Cl. 202 (Cl. Ct. 2008)

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not hold Reclamation liable. The court found, however, that Casitas had a physical takings claim under the Fifth Amendment.

Elizabeth A. Dawson

UNITED STATES COURT OF FEDERAL CLAIMS

Estate of Hage v. United States, 82 Fed. Cl. 202 (Cl. Ct. 2008) (holding that the U.S. Forest Service violated Nevada ranchers' Fifth Amendment right after the agency built fences blocking the ranchers access to the stream, and when stream flows dropped due to an agency policy of encouraging vegetative growth along the stream and preventing the ranchers from trimming that growth).

The Hages, ranchers in central Nevada, owned several grazing permits and vested water rights in streams originating in the Toiyabe National Forest. After numerous trespassing violations, the United States Forest Service ("USFS") revoked their grazing permits. In four earlier decisions, the United States Court of Federal Claims held that the revocation of grazing permits did not constitute a taking because the permits were a license, not a property right. Here, the Hages alleged that subsequent USFS policies impaired their vested water rights, resulting in a regulatory taking.

Beginning in the 1990s, the USFS instituted an elk habitat improvement program that encouraged riparian growth and beaver dams along the upper reaches of a stream from which the Hages had vested water rights. The USFS also built fences around the upper reaches that prevented cattle but allowed elk to reach the water source. The court used a two-part inquiry to determine if those policies resulted in a taking: (1) whether the Hages would have put the missing water to a beneficial use to satisfy their usufructory right; and (2) whether the government actions constituted a taking. The court held the Hages would have put the water to beneficial use by irrigating the remaining ranchland as they had in the past when flows were larger.

The court spent more time on the takings question. The court emphasized that the revocation of the Hages' grazing permits was not a taking because those permits were licenses, not property rights. However, if the Hages could distinguish their water rights from their grazing rights, the court could perform a takings analysis. The USFS constructed fences around streams from which the Hages' cattle drank water. The court found the physical impediment to the streams constituted a physical taking because it actively prevented the Hages from exercising their water rights.

Next, the court analyzed the effects of the USFS policies encouraging riparian growth. In *Ennor v. Raine*, the Nevada Supreme Court recognized the right of downstream water users to go upstream and clear impediments to stream flows. However, the USFS threatened and did prosecute the Hages when they attempted to clear the brush upstream. To determine whether the USFS had committed a regulatory

taking, the court applied the three-factor test articulated by the United States Supreme Court in *Penn Central Transp. Co. v. New York City*: (1) the extent to which the regulation interfered with distinct investment-back expectations; (2) the character of the government action; and (3) the economic impact of the regulation on the claimant. The court held that the Hages purchased the water rights with the ranch, satisfying the first factor. The behavior of the USFS, which consisted of threats, letters, and personal visits, amounted to intimidation, souring the USFS case for the second factor. The USFS argued the Hages could have applied for a special use permit, but that the Hages would have been limited to the use of hand tools. Nevertheless, the court held that because the amount of resultant work would be so extensive, that stipulation amounted to a prohibition. Lastly, the court held that the ranch was economically unviable without the water rights.

Thus, the court held the USFS had taken the Hages property, more than 17,000 acre-feet. At \$162.50 an acre foot, the court awarded just compensation of \$2.8 million.

Zachary Smith

UNITED STATES DISTRICT COURTS

United States v. Robertson Terminal Warehouse, Inc., 575 F.Supp. 2d 210 (D. D.C. 2008) (holding (1) the United States maintains fee simple title to the lands it holds, subject to trusts for the public benefit; (2) the doctrine of accretion only applies to natural increases of riparian land; and (3) riparian owners qualified right to lay fill and construct wharves on appurtenant land is subject to governmental regulation).

The United States brought this quiet title action in the District Court for the District of Columbia against the record-title holders to all lands, submerged and fast, along the Potomac River waterfront in Alexandria, Virginia. The Old Dominion Boat Club (“Old Dominion”), one of several named defendants, held record title to two disputed areas, the North and South Tracts, of the Alexandria waterfront. In this case, Old Dominion moved for summary judgment on the basis that it had the right to possess the fast land at issue, regardless of whether the land existed east of the defining “1791 mark.” The court granted the motion in part and denied in part.

The land at issue along the Potomac River originally belonged to the King of England. Before the American Revolution, the King granted all the land of what is now the State of Maryland to Lord Baltimore, including the bed of the Potomac River. Lord Baltimore’s land and title passed to Maryland following the American Revolution, and in 1791 Maryland ceded the land to the United States for the District of Columbia. Thus, the United States maintained title to the bed of the Potomac River since 1791.

Old Dominion presented four arguments against the United States’ assertion of title. First, it argued the United States only held trust title,