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

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court found that the state statutes regarding public participation in enforcement actions were inadequate to warrant precluding a citizen suit. The court reasoned that the ex post facto nature of the Alabama notice provisions were not comparable because the analogous CWA provisions provided notice to the public and the ability to present evidence in hearings prior to issuance of the final order. The court of appeals additionally held that fifteen days was an unreasonable time for the public to make proper requests for a hearing to appeal the decision on the final order. Consequently, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's denial of summary judgment and held that the public participation and notice sections of the statute were not comparable with the analogous CWA provisions. Thus, McAbee's citizen suit could proceed as a matter of law.

Holly Shook

FEDERAL CLAIMS COURT

Hage v. United States, 51 Fed. Cl. 570 (Fed. Cl. 2002) (holding that continual beneficial use of water for ranching established vested water rights and that because plaintiff possessed rights-of-way to ditches under the 1866 Ditch Rights-of-Way Act, he need not prove that the ditches remained in the same beds).

E. Wayne Hage and the Estate of Jean N. Hage ("Hage") sued the United States in the United States Court of Federal Claims seeking damages for unconstitutional takings of: (1) vested water rights in the Southern Monitor Valley; (2) vested water rights in the Ralston and McKinney allotments; (3) ditch rights-of-way; (4) grazing permits; and (5) a surface estate. The United States moved to dismiss. The court deferred claims regarding takings and compensation, and focused solely on whether Hage demonstrated a property interest, and the scope of that interest. The court found that Hage possessed vested water rights in both the Southern Monitor Valley and the Ralston and McKinney allotments and rights-of-way to three ditches and therefore denied the United States' motion to dismiss with regard to these claims. The court found that Hage possessed no rights to grazing permits or a surface estate and granted the motion to dismiss with regard to these claims.

Hage owned the Pine Creek Ranch in Nevada, and filed suit alleging takings in 1991 because the government revoked his grazing permits; diverted the water on his grazing allotments; blocked access to ditches; allowed other species to use the water reserved for his cattle; impounded his cattle; deprived Hage of the economic use of the ranch; and owed Hage for improvements made to the rangeland. In 1996, the court partially granted the United States' motion for

summary judgment, but held that Hage retained the opportunity to determine whether his claimed rights existed. Hage amended his complaint to add a claim for a surface estate, which the court refused to rule on until after conducting an evidentiary hearing. In 1998, the court held a two-week trial and issued a preliminary opinion for purposes of encouraging a settlement. The holding in this case rescinded all of the preliminary opinion not explicitly reaffirmed in this opinion.

The court first addressed jurisdiction, challenged by the state of Nevada by a Writ Petition for Writ of Mandamus or Prohibition. Nevada argued that the court should halt this proceeding because the state began its adjudication process in September 1998, immediately prior to the evidentiary hearing for the federal takings proceeding. Nevada claimed that the *in rem* nature of the takings suit meant that the court should halt its consideration of the rights issues and give Nevada jurisdiction because the adjudication initiated *in rem* proceedings at the state level first. The court found it possessed jurisdiction because Hage sought monetary compensation for takings by the government so the proceeding was not *in rem* and the court could determine validity of claims, even while the state adjudication of the basins took place.

Next, the court addressed Hage's claims for vested water rights. The court found that possession of a vested right requires acquisition of a right from the government, diversion for a beneficial use, and continuous use. The court held that Hage proved continued beneficial use of a water right appropriated by predecessors by the preponderance of evidence presented, including testimony by the state engineer, to nine creeks, ditches and springs in the Southern Monitor Valley.

The court also held that Hage demonstrated continuous and beneficial use of water rights appropriated by predecessors to several bodies of water in the Ralston and McKinney allotments. In the Ralston allotment, the court found that Hage possessed water rights to eighteen channels, ditches and wells. In the McKinney allotment, the court found Hage possessed vested water rights to four springs.

Hage also claimed to possess a property interest to several ditches covered by the 1866 Ditch Rights-of-Way Act ("Act"). The United States argued that only one of the ditches fell under the Act because the others no longer followed their original ditch beds. The court decided requiring Hage to prove that the ditches ran in the same beds placed an unreasonable burden on him because flooding and other natural forces changed the course of beds. Therefore, the court found that Hage demonstrated rights-of-way to ten ditches under the Act. The court found Hage failed to meet the necessary burden of proof for six right-of-way claims to other pipelines and ditches.

The court agreed with the United States argument that a vested right-of-way is potentially subject to reasonable regulation. However, the court found that such regulation could not deny access to water

rights without allowing Hage to divert water to another beneficial use, therefore the court granted Hage the right to divert the water.

The court addressed the United States' argument that a United States Forest Service ("USFS") manual determined the scope of right-of-way easements, and that a right-of-way of fifty feet exceeded the necessary amount for reasonable maintenance. The court ruled that the USFS manual lacked the force of law and constituted only persuasive authority. In addition, the court found that the USFS lacked the authority to adjudicate rights-of-way under the Act, since that role was reserved for the judiciary. Finally, the court found that legislative intent, and common sense, supported a fifty-foot right-of-way to allow access to the ditches for maintenance.

The court next addressed Hage's claim regarding the grazing permit. The court held that the Taylor Grazing Act and several cases hold that permits are only a license to use the land for grazing, not an absolute right, and that the Secretary of the Interior may cancel or modify permits. Therefore, Hage possessed no property interest in the grazing permit, and no compensable right existed.

Finally, the court addressed Hage's claim to a 752,000-acre surface estate for grazing originating under the Ordinance of May 20, 1785; Kearney's Code and the Treaty of Guadalupe-Hidalgo; the Act of 1866; the Desert Lands Act of 1877 and the subsequent Acts of 1888 and 1890; the Creative Act of 1891; the Forest Service Organic Administration Act; the Livestock Reservoir Siting Act; the Stock Raising Homestead Act; the Taylor Grazing Act; and Nevada's Three Mile Grazing Rule. The court found that legislative intent behind these statutes did not support granting Hage a large surface estate under these acts, and that at most Hage could go on the land to access water in which he owned a vested right.

Jared Ellis

UNITED STATES DISTRICT COURTS

City of Olmstead Falls v. United States Env'tl. Prot. Agency, 233 F. Supp. 2d 890 (N.D. Ohio 2002) (holding the sovereign immunity waiver in the Clean Water Act's citizen suit provision does not apply if the citizen fails to provide notice prior to filing suit; the sovereign immunity waiver in the federal facilities pollution control provision does not apply when there is no allegation of a federal facility engaging in polluting; the Administrative Procedure Act's sovereign immunity waiver does not apply to discretionary actions; and the mandamus statute does not apply to allegations of failure to perform discretionary duties).