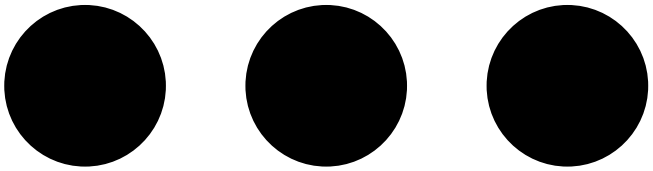
Written by **William F. Jasper** on March 20, 2006

Huge Win for Property Owners

In the May 20, 2002 issue of *The New American*, this magazine reported on one of the most high-profile takings cases to go before the courts in recent years. The United States, through its Department of Agriculture, Forest Service, Department of Interior, and Bureau of Land Management, had attempted to reclassify the Pine Creek Ranch in central Nevada as public land, and thereby take the ranch without compensation to the owner, Wayne Hage (pictured). The result was the filing in 1991 of the case *Hage v. United States* before the U.S. Court of Federal Claims. This court has issued three published opinions on the case since 1996, all extremely favorable to Hage and property owners in general. Once again, *The New American's* William F. Jasper visits with Wayne Hage about the current status of the case and what the future may hold.



THE NEW AMERICAN: *Wayne, why did the United States attempt to reclassify your ranch as public land?*

Wayne Hage: The answer to that question really comes down to a failure or unwillingness on the part of the federal government to understand that private property in the West developed under an entirely different doctrine than did property in those states east of the 100th meridian.

TNA: *Can you briefly explain the difference between these two property doctrines you mentioned?*

Hage: The eastern states, up to the 100th meridian, that's basically the line between Kansas and Colorado, were settled under the concept of the riparian water doctrine. The riparian doctrine, which has roots in Anglo Saxon law, says in simple terms that if a person acquires lawful title to a parcel of land he has the exclusive right to the utilization of the water and vegetation on the land. The riparian doctrine had historically applied to areas of adequate or excess rainfall.

TNA: *How does this riparian water doctrine, as you call it, differ from the doctrine of land ownership in the West?*

Hage: The 17 western states fall almost entirely under the Prior Appropriation Water Doctrine. Under that doctrine, the person who acquires title to the water has a right to acquire the use of as much land as is necessary to put the water to beneficial use. This water doctrine developed anciently in the desert regions of the old world. It came down to us through Las Siete Partidas, the great law code of Spain, and Mestas Ordinanzas of Spain and Mexico, which established the land-use law that governs in the western United States today.

TNA: *If I understand you, would it be correct to say that under the riparian doctrine of the East, control*

of the land conveys the control of the water on the land?

Hage: That is an excellent way to simplify it.

TNA: *Then under the Prior Appropriation Water Doctrine, control of the water allows one to control the land necessary to properly use that water?*

Hage: Again, that is an excellent way to simplify it.

TNA: *How did the United States end up with two separate land settlement patterns which are so different from each other?*

Hage: There are two basic answers. For one thing, the difference in rainfall patterns between East and West demanded it, and the Prior Appropriation Water Doctrine of land settlement was already well established in the southwestern part of the present United States long before there was a United States of America. Congress and the executive wisely recognized this long-established law when they approved the Treaty of Guadalupe-Hidalgo in 1848. The United States wisely chose not to disturb a system of property law which predated the establishment of the United States and chose instead to adopt the principles of Prior Appropriation as U.S. Law with the Act of July 26, 1866.

TNA: *This raises another question. Why are vast segments of the West designated "public lands"?*

Hage: You are referring to what I often call the public lands myth. On much of the western land area, particularly the vast western range lands, the underlying land itself, the mineral estate, is held by the United States just as it had previously been held by the King of Spain and later by the Mexican government. What the rancher acquired were grazing easements over the lands of the government. These were inheritable rights. An inheritable right is known as a fee. The lands covered by these grazing easements, called grazing allotments, are in fact held by the United States, but are referred to properly as fee lands because the fee, the inheritable right to use, is owned separately from the underlying lands.

The term "public lands" has been erroneously applied to these lands. I say erroneously because the United States Supreme Court held in *Bardon v. Northern Pacific Railway Company* that "lands to which rights and claims of another attach do not fall within the classification of public lands." Rights and claims of ranchers to water rights and grazing easements (range rights) cover virtually all these lands. According to the U.S. Supreme Court, the ranchers' grazing allotments cannot be public lands.

TNA: *The case you just cited —* Bardon*, I believe you called it — is that still applicable?*

Hage: *Bardon v. Northern Pacific Railway Company* has been cited 133 times by other courts and has never been overturned in whole or in part.

TNA: *Some of the reports circulated by your opposition after the court ruled in its Final Opinion and Finding of Fact in 2002 for* Hage v. United States *suggested that the only forage the court found you owned on these lands was a strip 50 feet on each side of your irrigation ditches. Can you explain that?*

Hage: Yes. The government agencies started that rumor shortly after they realized they had lost their claim to water and forage on Pine Creek Ranch. Unfortunately, several erstwhile lawyers in the West parroted that same disinformation.

TNA: *But, how did that disinformation, as you call it, develop?*

Hage: At a hearing held in the court, June 30, 1993, the U.S. stipulated on the record that we do own the range and water rights we claimed under Nevada law. The United States wanted to argue that there

was some federal law which superseded our rights. The court, in that same hearing, confirmed that Nevada law controlled and there was no federal law of property which could supersede the state law. Since June 30, 1993, the issue of whether I owned the range and water rights I claimed was not an issue before the court. It was no longer a point in contention. Both sides stipulated, on the record, that I did own those rights and the court affirmed the issue of law.

TNA: *Where did the issue of the forage on 50 feet on each side of an irrigation ditch come from?*

Hage: About four months after I had first filed my taking claim with the court, the United States brought criminal charges against me for cleaning vegetation out of my irrigation ditches. In June of 1993, the issue of whether I owned the vegetation on my ditch right-of-ways had been appealed to the 9th Circuit Court of Appeals, which eventually ruled in my favor. The issue of who owned the forage on the ditch right-of-ways was then not covered by the 1993 stipulation. The U.S. Court of Federal Claims devoted considerable dicta in the Final Opinion holding that I also owned the forage on the ditch right of ways. Some reviewers who have never read all three published opinions of the court and who have relied on the Final Opinion and Finding of Fact only fail to realize that the issue of forage on the ranch as a whole was settled in my favor in 1993.

TNA: *Why are ranchers required to have a grazing permit if, as you say, they already own the water and forage on these lands?*

Hage: The truth is that a rancher is not required to have a grazing permit. The grazing permit should more accurately be called a grazing management permit. It is a cooperative permit whereby the rancher permits the U.S. Forest Service or Bureau of Land Management to manage his private range rights in return for the rancher being permitted to participate in the range improvement fund for capital expenditures. When the federal agency cancels a grazing permit, as they did in my case, they cancelled my ability to participate in the range improvement fund, but they also cancelled any authority to manage my private range and water rights.

TNA: *Is this part of the reason the rulings in your case have caused so much consternation among environmental groups and federal land management agencies?*

Hage: Yes! The one thing the environmentalists and federal land management agencies hate to lose is control. Without the grazing management permit or some other management agreement with the rancher, they cannot legally control his property rights.

TNA: *Why is control so important to the groups we just mentioned?*

Hage: The answer is water. Fresh water is the "oil" of the 21st century. There is a massive effort by private corporations and the federal government — aided and abetted by the environmental groups — to divest private owners in the West of their water rights.

TNA: *But isn't the rancher required to pay a grazing fee? Isn't he actually buying or leasing the forage or those lands from the government?*

Hage: If a rancher is under a permit, he is required to pay a grazing fee. The grazing fee should more properly be called a grazing management fee. If a person acquires an actual receipt with all the code numbers translated into wording, the receipt clearly states that the commodity the rancher has purchased from the government is management.

TNA: *Why is there such widespread dissatisfaction and conflict in the West over the grazing*

permit/grazing fee issue?

Hage: When the cooperative grazing permit was first instituted by the Forest Service and BLM, it was applied in clear recognition of the rancher's prior appropriation rights. Particularly in the last 25 years, the federal agencies have attempted to impose the riparian doctrine and the public lands myth on the western rancher through regulation. This has resulted in an ever-growing taking of ranchers' private rights through regulation.

TNA: *Where is your case today as far as the U.S. Court of Federal Claims is concerned?*

Hage: The case is awaiting judgment on how much the United States owes me for the taking of access to my water rights since 1991.

TNA: *Is there any possibility that the case could be settled prior to judgment?*

Hage: We attempted to settle with the United States after trial. We calculated what the court would probably award for a temporary taking of my water rights and then discounted that figure substantially. The United States would not accept any settlement offer from us. We had to hand the issue back to the court.

TNA: *What do you think the court's judgment will be?*

Hage: I have no idea. I can tell you what I think it should be. I think I should receive the fair market rent value of my water rights for the period of time they have denied or restricted access to my water rights and range rights plus compensation for the permanent damages they have caused while my water rights have been controlled by them.

TNA: *When do you think the court's judgment will be forthcoming?*

Hage: Again, I have no idea. The court has had the judgment issue for approximately 14 months now. All we can do is wait and see.

TNA: *One last question — have you noticed any significant change in how the agencies deal with you?*

Hage: In actual fact, after these rulings in the case, the agencies should not be attempting to deal with me at all. The U.S. Forest Service has shown a greater respect for the court's rulings than the BLM. However, some of the same problems that the Forest Service originally created still exist. The BLM has shown blatant contempt for the court's rulings by continuing to rent some of my range and water rights to third parties.

TNA: *What, in your mind, is the remedy to the agencies' reluctance or refusal to follow the court's rulings?*

Hage: I have discussed this extensively with my counsel and the first thing to come to mind is an action for contempt of court. I suppose a second takings case for summary judgment based on what the court has previously ruled is also an option.

TNA: *Thank you, Wayne, for the very informative update on* Hage v. United States. *We know that thousands of ranchers and property owners throughout the land are watching this case with great interest. We, at* TNA*, wish not only you, but all property owners, a very favorable resolution of this vital issue.*

Photo: Wayne Hage