What, exactly, are Public Lands?

(Note: If you read just one property rights article this year, this should be the one. Through a thoughtful read, the words and knowledge of Wayne Hage will enhance your understanding of property rights and its associated definitions and case law. If one has property to which they have rights and claims – i.e., such as range rights, including, but not limited to, water, forage, ditch rights, roads and access -- their property is, by definition, not public lands. The U.S. Supreme Court defined public lands in Bardon v Northern Pac. R. Co. 12 S.C. 536, 539 (1892), cited 133 times and never overturned in whole or in part. It was last cited in Watt v Western Nuclear, Inc., 462 U.S. 36 (1983). The U.S. Supreme Court said: "It is well settled that all land to which any claims or rights of others have attached does not fall within the designation of public land." Bardon v Northern Pac. R. Co. 12 S.C. 536, 539 (1892). The question must now be asked, by definition as above, are the grazing lands referred to in the new Bureau of Land Management [BLM] grazing regulations http://www.blm.gov/grazing/final/ really public lands, or do they have rights and claims of others attached? If the rights and claims of others are attached, the regulations do not apply, because the grazing lands are not public lands. The government has been able to claim more and more authority over landowners by mere assertion. Government has simply defined most western ranchers out of the question by saying grazing allotments are public lands. This is the crux of what Wayne Hage sought to teach people in the west in his last years. It is hard for folks to believe, because they don't want to believe that the government would seek to deceive them. The fact is that government is guilty of deceit by definition. We must get to the point of understanding before we can effectively protect and defend private property rights.)

The Denotative and Connotative Definitions Of the Phrase "Public lands"

June 2003

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Over the past half century, no term or phrase has caused more confusion in

the western land debate than the term “public lands”. On the one hand, the rancher is told by the Bureau of Land Management or U.S. Forest Service that these lands are “public lands” and he owns no property rights in his grazing land and only has a conditional privilege to graze by virtue of his grazing permit issued by the agency. On the other hand, if the rancher dies, his heirs must pay an inheritance tax on what the Internal Revenue Service says are his property rights in his grazing lands.

In understanding this confusion and deriving a solution, it is instructive to observe what the courts have said on this matter.

“The words ‘public lands’ are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. United States v Blendaur, 128 F. 910, 913, 63 C.C.A. 636.”

In common usage we see the term “public land” used to describe a variety of lands from national parks to wildlife refuges, grazing lands and virtually any land or site to which the public may have access.

This broad-umbrella definition basically includes all lands or sites in which the United States has an interest and has been widely applied to rancher’s grazing allotments.

A review of United States Supreme Court opinions where the issue involved lands of the public domain shows us that the term “public land” has a definite and fixed meaning. In Bardon v Northern Pacific Ry. Co. 12 S Ct 856, 145 US 535, 538, 36 L Ed 806, the Court stated: “It is well settled that all land to which any claims or rights of others have attached does not fall within the designation of public land.”

In Northern Pacific Railroad Company v Wismer, C.C.A. Wash., 230 F. 591, 593, the Court held that “public lands are lands open to sale or other disposition under the general laws, lands to which no claims or rights of others have attached.”

The primary origin of this confusion can be traced to the publication of the report of the Public Land Law Review Commission in 1968. The Commission, established in 1964, was ostensibly created to review and

clarify the status of all land laws relating to the public domain.

In the Commission's Report, national forests, national grasslands, grazing districts, minerals, water recourses, wildlife habitat, outdoor recreation, etc; are all discussed within the context of the terms "public land" or "public domain." This broad, all inclusive, and essentially political definition is in direct conflict with the lawful definition held by the United States Supreme Court: "lands to which no right or claim of another has attached".

The bulk of the western lands to fall under the "umbrella" definition are lands originally withdrawn from the public domain under the Forest Reserve Act, and known today as national forests. An even greater land mass was withdrawn from the public domain under the Taylor Grazing Act, and designated grazing districts.

Virtually all national forest lands and grazing districts have rights attached in the form of vested water rights. Most of these water rights are for livestock watering purposes, giving the owner of the vested water right a fee (the inheritable right to use) in the land serviced by the stock water. It is this fee, based on the ownership of the water right, upon which the Internal Revenue Service assesses an inheritance tax at the passing of an estate from a deceased owner to his heirs; even though the underlying title to the land itself, with all its minerals, remains in the United States.

A rancher's grazing allotment, where he owns the water rights and the inheritable right to use the lands serviced by that water, is clearly land to which rights or claims of another have attached. Just as clearly, these lands cannot be public lands as defined by the United States Supreme Court. Grazing allotments are clearly not lands "available for disposal under the general land laws."

The discord in western land jurisprudence arises from the use of the term "public land" by the federal land management agencies in its broad, political sense, to characterize a rancher's grazing allotment. They then attempt to invoke regulatory authority, which only applies to public lands when defined in the lawful sense. The agencies then demand that a rancher have agency permission to utilize his own water rights and grazing lands.

If land of the United States is, in fact, "land available for disposal under the general land laws, lands to which no right or claim of another attaches," then

the Secretary of Agriculture or Interior has plenary power to exercise the authority granted by Congress under Article 4, Section 3, Clause 2 of the Constitution for the United States of America.

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

If Congress has made rules and regulations, which resulted in "rights and claims of another" attaching, then certainly, those property rights greatly restrain the power of the Congress and the Secretaries of Interior and Agriculture, relative to those lands.

Congress did, in fact, create many land disposal laws, some of which resulted in the acquiring of the fee (the inheritable right to use the land) in association with vested water rights.

Successful arguments, relative to ranchers grazing allotments, must clearly make the distinction between public land and fee land. (Hage v US) Too often the rancher and his counsel have fallen into the trap created by the use of the term "public land", by the United States. By failing to rebut the use of the term "public land" the rancher has essentially stipulated that he has no rights to defend. The opponent then can invoke Article 4, Section 3, Clause 2 and the myriad grazing regulations from the Code of Federal Regulations to defeat the rancher.

It is imperative to properly assert title to fee lands, based on the ownership of vested water rights, and to consistently rebut any use of the term "public lands." The argument can then be confined to the issue of property rights. Regulations of the agencies under a grazing permit are not relevant to vested water rights and fee lands unless the owner of those rights chooses to subordinate his property to agency control.

Related, recommended reading:

Bardon v. Northern Pac. R. Co., 145 U.S. 535 (1892)

Link to the Case Preview: http://supreme.justia.com/us/145/535/

Link to the Full Text of Case:
http://supreme.justia.com/us/145/535/case.html

Article 4, Section 3, Clause 2 (U.S. Constitution)

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

1. Records of the Federal Convention
2. Levi Lincoln, Governor of the Northwest Territory, 2 February 1802
3. St. George Tucker, Blackstone's Commentaries 1:App. 283--86, 1803
4. Sere v. Pitot
5. Johnson & Graham v. M'Intosh
6. James Kent, Commentaries 1:360--61, 1826
7. American Insurance Co. v. Canter
8. Joseph Story, Commentaries on the Constitution 3:§§ 1317--22, 1833

http://press-pubs.uchicago.edu/founders/tocs/a4_3_2.html

Hage v. U.S.

http://www.stewardsoftherange.org/hage_v_us/hagedecision2002.pdf
January 29, 2002 (35 pages; 529 KB)

http://www.stewardsoftherange.org/hage_v_us/preliminary-opinion.asp
November 5, 1998

http://www.stewardsoftherange.org/casecitations/hagevus96.pdf (18 pages; 2.63 MB)

The Finish Line in Sight for Landmark Hage v. U.S.
-- Closing Arguments Heard in Takings Case for Nevada Rancher

October 31, 2004

It's been nearly fourteen years since Nevada rancher, Wayne Hage and his late wife, Jean, filed their takings case against the United States. On Thursday, October 21, 2004, ranchers from at least five states crowded into the small courtroom and spilled out into the hallway to hear the closing arguments in this landmark case being heard by Judge Loren Smith of the U.S. Federal Claims Court.

Reno, Nevada (PRWEB) – It's been nearly fourteen years since Nevada rancher, Wayne Hage and his late wife, Jean, filed their takings case against the United States. On Thursday, October 21, 2004, ranchers from at least five states crowded into the small courtroom and spilled out into the hallway to hear the closing arguments in this landmark case being heard by Judge Loren Smith of the U.S. Federal Claims Court.

Wayne Hage is no stranger to the courts. From the time Hage purchased Pine Creek Ranch in 1978 until he filed the takings case in 1991, Hage spent countless hours fighting the BLM and the Forest Service over his water and grazing rights. The mission of the government agencies was clearly to reclaim the use of the federal lands that Hage had permits on, by whatever means necessary, including fencing off Hage's springs and the eventual confiscation of his cattle.

During the three weeks takings trial held in Reno last May, Judge Smith heard how Hage purchased the property rights when he bought Pine Creek Ranch and how he created additional property rights through range improvements. The evidence proved that Hage had patented parcels of land

totaling about 7,000 acres, water rights in seven streams confirmed by the Nevada state engineer, underground water located all over the ranch, 1866 ditch rights-of-way which were purchased with the ranch for conveyance of water for irrigation and stock and range improvements such as water tanks, pipes and troughs, fences, spring improvements, ditches, corrals, cow camps, roads and trails.

Throughout the first trial, the Judge also heard how the government's actions harassed and interfered with Hage to the point at which this profitable ranch was no longer a viable economic operation. Without notification, the Forest Service introduced a small herd of elk onto one of Hage's primary grazing allotments in 1979. By 1990, the allotment was overrun by the ever-growing elk herd and Hage's allotment numbers had been either cancelled or suspended to the point at which the allotment was unusable for the ranch's livestock operation.

On the brink of bankruptcy, Hage filed suit in 1991, choosing to fight for his constitutional rights. In an earlier case, the Court found that Hage did, in fact, own the rights to the water, the ditch rights of way and the forage adjoining the ditches. Based on that decision, the Courts must now decide whether the government took those rights from Hage and if so, how much compensation Hage is due for the takings.

A summary of the value of the ranch, as presented by Hage's attorneys, was $23,979,000, which includes $12,000,000 for the water rights alone. The government suggested a value of $1,500,000, slightly more than what Hage paid for the ranch over twenty-five years ago. Hage's attorney pointed out that should the government acquire the ranch at their suggested price, they would have an immediate gain of $12,000,000 in the 20,000 acre feet of water alone.

Judge Smith issued an admonition to counsel to explore every possibility of a settlement and scheduled a telephone conference to discuss such on November 18, 2004. If no settlement is announced, or if counsel cannot report any real possibility of settlement, Judge Smith will then begin to put together his decision in this historic case.

Ranchers and other landowners across America are anxiously awaiting the outcome of this historical case as many have similar circumstances facing aggressive environmental agendas and federal agency policies that threaten

their property rights and for some, their livelihood.

A complete case history and detailed trial reports are available online at http://www.stewardsoftherange.org

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http://www.stewardsoftherange.org

512-365-8038

http://pdfserver.prweb.com/pdfdownload/173264/pr.pdf

Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983)

Link to the Case Preview: http://supreme.justia.com/us/462/36/

Link to the Full Text of Case: http://supreme.justia.com/us/462/36/case.html

U.S. Court Judgments

http://www.stewardsoftherange.org/FedLand/fedland-timelineusc.htm

"As a teenager, I used to wonder if Johnny Tremaine, Nathan Hale and John Paul Jones knew what exciting times they grew up in. I suspected they were oblivious to their place in history and wished I could have been there to partake in the creation of a new nation, founded in liberty & justice for all. And now I look around, and I see I have the very same opportunity I yearned for so long (ago)." - Rich Martin, June 15, 2003.