YOU DRANK MY MILKSHAKE! ACCUSATIONS OF WATER RIGHTS TAKINGS IN *ESTATE OF HAGE V. UNITED STATES*

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I. INTRODUCTION

Journalists recently described water as the new oil in both the southwest United States and around the world.[1] In the film, *There Will Be Blood*, the main antagonist, Daniel Plainview, analogizes oil to milkshakes: if someone has a long enough straw, he can drink someone else's milkshake.[2] Similar to the circumstances of *There Will Be Blood*, water, like oil, can be taken off-site by water rights holders, resulting in conflict.[3] As water supplies become scarcer throughout the world,[4] water rights takings claims may become more common, requiring a framework to deal with the claims.

A recent water rights case, *Estate of Hage v. United States*,[5] demonstrates the legal issues associated with water rights takings claims. E. Wayne and Jean Hage owned a cattle ranch located in Nevada and grazed their cattle on adjacent Forest Service lands.[6] The Hages had some conflicts with the Forest Service and, in 1991, the Hages filed suit against the Forest Service, claiming that the Forest Service committed a taking of their grazing rights, cattle, land, and water rights by revoking their grazing permit and limiting access to water

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[1] Julie Ann Grimm, *Private Water Pipeline Proposed for S.F.*, SANTA FE NEW MEXICAN, Nov. 2, 2008, at A1; Rohini Nilekani, *Is Water the Next Oil?*, YALEGLOBAL ONLINE, May 31, 2007, http://yaleglobal.yale.edu/content/water-next-oil.

[2] THERE WILL BE BLOOD (Paramount Vantage and Miramax Films 2007). The film is based on the novel *Oil!* written by Upton Sinclair. Greg Brian, *There Will Be Blood: How Upton Sinclair's* Oil! *Inspired the Acclaimed Film*, ASSOCIATED CONTENT, Feb. 5, 2008, http://www.associatedcontent.com/article/574051/there_will_be_blood_how_upton_sinclairs.html?cat=40.

[3] James H. Davenport & Craig Bell, *Governmental Interference with the Use of Water: When Do Unconstitutional "Takings" Occur?*, 9 U. DENV. WATER L. REV. 1, 31 (2005); Andrew P. Tauriainen, *California's Evolving Water Law: The Water Rights Protection and Expedited Short-Term Water Transfer Act of 1999*, 31 MCGEORGE L. REV. 411, 415 (2000).

[4] Nilekani, *supra* note 1.

[5] Estate of Hage v. United States, 82 Fed. Cl. 202 (2008).

[6] Hage v. United States, 35 Fed. Cl. 147, 153 (1996).

sources located on Forest Service land.[7] The lawsuit continued for seventeen years, producing four decisions, but never reaching an actual conclusion.[8] Finally, in the recent *Estate of Hage v. United States* decision, Senior Judge Loren A. Smith of the U.S. Court of Federal Claims[9] held that the Forest Service committed both physical and regulatory takings of vested water rights in violation of the Fifth Amendment.[10] Specifically, Judge Smith found that the fencing of spring sources on Forest Service property prevented the Hages' cattle from accessing those water sources, resulting in a physical taking of water rights.[11] Using the *Penn Central Transportation Co. v. New York City*[12] balancing test, the judge found that permit requirements for maintenance of ditches constituted a regulatory taking of water rights.[13] Moreover, vegetation clogged the ditches, sucking up water and reducing the Hages' water supply by up to seventy-five percent.[14] Judge Smith reasoned that although the Hages could have applied for a special use permit to clear the ditches, application for such a permit would have been "futile" because of the bad blood between the Hages and the Forest Service that had developed over the years.[15] Therefore, Judge Smith held that the regulation resulted in a taking because, although the Hages never applied for the permit, it was clear that the Hages would never have received the permit anyway.[16]

In spite of these findings, Judge Smith's analysis was faulty. Specifically, Judge Smith incorrectly found a physical taking of water rights based on the *per se* rule "that a permanent physical occupation of property is a taking."[17] However, even if the Hages' cattle could not access any water on the grazing allotments because of the fencing, this would only amount to a temporary act with no physical possession during the period in which the fencing was in place and the grazing permit was in effect. Temporary acts that result in no physical possession are not subject to the *per se* rule and courts must analyze the claim under the *Penn Central* balancing test in order to determine if there is a taking.[18]

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[7] *Id.* at 156.

[8] *Estate of Hage*, 82 Fed. Cl. at 205. The Hages died before the conclusion of this case. Dennis Hevesi, *Wayne Hage, 69, Rancher Who Won Land Rights Case*, N.Y. TIMES, June 8, 2006, at A23.

[9] The U.S. Court of Federal Claims typically handles claims for money damages based on the Constitution, federal laws, or contracts with the United States. U.S. Court of Federal Claims, http://www.uscfc.uscourts.gov/about-court (last visited Feb. 14, 2010).

[10] *Estate of Hage*, 82 Fed. Cl. at 211-13.

[11] *Id.* at 211.

[12] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

[13] *Estate of Hage*, 82 Fed. Cl. at 213; *see Penn Cent.*, 438 U.S. at 124; *infra* Part II.B.

[14] *Estate of Hage*, 82 Fed. Cl. at 206.

[15] *Id.* at 212-13.

[16] *Id.*

[17] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[18] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335-36 (2002); *Loretto*, 458 U.S. at 435 n.12. *Compare* United States v. Pewee Coal Co., Inc., 341 U.S. 114, 115-16 (1951) (holding that actual physical possession, although temporary, resulted in a taking without applying a balancing test), *with* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (holding that there was no taking when there was no physical possession of the mine).

Furthermore, Judge Smith also inappropriately applied the *Penn Central* balancing test in this case to find a regulatory taking of water rights. The factors in the *Penn Central* test are 1) "[t]he economic impact of the regulation on the claimant," 2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and 3) "the character of the governmental action."[19] Judge Smith quickly glossed over the *Penn Central* factors, holding that the vegetation growth in the ditches and the Forest Service's refusal to allow the Hages to clear the vegetation without a permit made the ranch economically unviable, interfered with investment-backed expectations, and was threatening in character.[20] However, the Hages had no reasonable investment-backed expectations in clearing the ditches because the Forest Service had a legitimate government interest in regulating the clearing of vegetation on government land. This makes the Hages' expectation that they could clear government land without regulation unreasonable. Also, in weighing the character of the governmental action factor, the court should consider whether the regulation is legitimate, not the nature of the relationship between the regulated party and the regulating agency.[21] If the Forest Service appeals this decision to the U.S. Court of Appeals for the Federal Circuit, the court will likely overturn the regulatory and physical takings of water rights.

This Note examines both the physical and regulatory takings of water rights found in *Estate of Hage* and provides an analysis of how takings law should apply to water rights. Part II of this Note provides a brief background of takings law under the Fifth Amendment of the Constitution with a focus on case law involving water rights. Parts III and IV review the history of the *Estate of Hage* case and focus on the recent *Estate of Hage* decision, including Judge Smith's logic for finding that there was a taking of water rights. In Part V, this Note analyzes the *Estate of Hage* decision as applied to takings law and congressional mandates regarding public lands, concluding that the circumstances in this case cannot support the physical and regulatory takings of water rights held by Judge Smith. Finally, Part VI concludes that because water is a unique form of property, the courts must treat water rights taking claims differently than more traditional takings cases.

II. Takings Law Background

A. General Takings Law

The Takings Clause of the Fifth Amendment of the Constitution provides protection for privately-held property with the statement "nor shall private property be taken for public use, without just compensation."[22] The Fourteenth Amendment of the Constitution, which applies to state governments, incorpo-

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[19] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[20] *Estate of Hage*, 82 Fed. Cl. at 212-13.

[21] Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 879 (D.C. Cir. 1999).

[22] U.S. Const. amend. V.

rates the Takings Clause.[23] However, before the Takings Clause will apply, a court needs to determine if the plaintiff had a property right under state law.[24]

Takings of property can be either physical or regulatory.[25] The Supreme Court described how to differentiate between physical and regulatory takings in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[26] in which a regional planning agency imposed two development moratoria upon the land owners surrounding Lake Tahoe.[27] There, the Supreme Court held that the development moratoria were not physical takings but were instead potential regulatory takings.[28] According to the Supreme Court, "physical [takings] are relatively rare, easily identified, and usually represent a greater affront to individual property rights."[29] Earlier, in the *Loretto v. Teleprompter Manhattan CATV Corp.* case,[30] the Supreme Court defined physical takings as "permanent physical occupation[s] of property."[31] *Loretto* acknowledges that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[32] Accordingly, if a regulation deprives a property owner of his or her right to exclude, there may be a *per se* physical taking.[33] However, physical deprivations of property can be temporary and, in that case, the *per se* rule may yield to "a more complex balancing process to determine whether [the physical deprivations of property] are a taking."[34]

If a physical act, such as the closure of a mine, is temporary and there is no physical possession of the property, then the *per se* rule does not apply. For example, in *United States v. Central Eureka Mining Co.*,[35] the government ordered the closure of the Central Eureka mine.[36] In that case, the Supreme Court found that such a temporary action did not result in a taking because "the Government did not occupy, use, or in any manner take physical possession of the gold mines."[37] The Court balanced the interests of the government against that of the mine owner and found that the required closure of the mine was reasonable.[38] However, in *United States v. Pewee Coal Co.*,[39] the United

[23] U.S. CONST. amend. XIV; *see* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (stating that private property taken without compensation violates the Fourteenth Amendment, essentially incorporating the Takings Clause).
[24] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
[25] Douglas L. Grant, *ESA Reductions in Reclamation Water Contract Deliveries: A Fifth Amendment Taking of Property?*, 36 ENVTL. L. 1331, 1361 (2006).
[26] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).
[27] *Id.* at 306, 323-24.
[28] *Id.* at 323-24.
[29] *Id.* at 324.
[30] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[31] *Id.* at 441.
[32] *Id.* at 435 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179-80 (1979)).
[33] *Id.* at 435-36.
[34] *Id.* at 435 n.12. *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 335-36.
[35] United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958).
[36] *Id.* at 156.
[37] *Id.* at 165-66.
[38] *Id.* at 168-69. The Court balanced the monetary damage to the mine owners and the government's need to regulate the gold mine during a time of war, holding that the regulation was essential to the war effort and the effect to the mine owners was incidental. *Id.*
[39] United States v. Pewee Coal Co., 341 U.S. 114 (1951).

States took physical control over a mine for a period of close to six months.[40] The Supreme Court held that the occupation was a taking without applying a balancing test because there was an "actual taking of possession and control."[41] Although *Central Eureka Mining* and *Pewee Coal* predate the *per se* discussion in *Loretto*, these cases demonstrate that there is a clear distinction between temporary physical takings resulting in physical possession and those that do not.[42] Thus, a temporary physical taking can be a simple, *per se* taking, but only if there is physical possession of the property.[43]

On the other hand, regulatory takings are not as straightforward as physical takings.[44] The Supreme Court recognized that some regulation is necessary but "if [the] regulation goes too far it will be recognized as a taking."[45] Subsequent decisions have attempted to clarify when regulation has gone too far.[46] For example, in *Lucas v. South Carolina Coastal Council*,[47] the South Carolina legislature passed the Beachfront Management Act, which prohibited construction of residences within a certain designated zone along the coast.[48] The regulation prevented development of Lucas's parcels as single-family residences because they were in the designated zone; Lucas filed suit, claiming a taking of his property.[49] The Supreme Court held that if a regulation deprives a property owner of all economic use of the property, there is a regulatory taking.[50] However, the Court also held that there is no taking based on existing "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[51] In Lucas's case, the Court ruled that compensation was required if the regulation prohibited uses "beyond what the relevant background principles would dictate" and remanded the case.[52]

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[40] *Id.* at 115.

[41] *Id.* at 115-16.

[42] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431-32 (1982) (discussing the difference between *Pewee Coal* and *Central Eureka Mining*).

[43] *Compare Pewee Coal Co.*, 341 U.S. at 115-16 (holding that actual physical possession, although temporary, resulted in a taking without applying a balancing test), *with Cent. Eureka Mining Co.*, 357 U.S. at 165-66 (holding that there was no taking when there was no physical possession of the mine).

[44] *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (stating that a regulatory taking occurs when the "regulation goes too far" but providing no further guidance).

[45] *Id.*

[46] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[47] *Lucas*, 505 U.S. 1003.

[48] *Id.* at 1008-09.

[49] *Id.*

[50] *Id.* at 1019.

[51] *Id.* at 1029. In *Lucas*, the Court gave the example of a nuclear power plant straddling an earthquake fault, stating that such a use would not be allowed under "background principles of the State's law." *Id.* Such a use would never be permissible, even if it "eliminat[ed] the land's only economically productive use." *Id.*

[52] *Id.* at 1030, 1032.

B. The Penn Central *Test*

As explained in *Lucas*, if a regulation does not deprive a property owner of all economic use of the property, then the balancing test provided in *Penn Central* applies.[53] In *Penn Central*, the owner of Grand Central Terminal sued the City of New York when the city refused, under the city's landmarks preservation law, to allow construction of an office building at the terminal site that would exceed fifty floors in height.[54] The Supreme Court identified three factors that must be balanced in order to determine if a regulatory taking has occurred despite the fact that the owner retains some economic use of the property: 1) "[t]he economic impact of the regulation on the claimant," 2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and 3) "the character of the governmental action."[55] Over time, the Supreme Court changed "distinct investment-backed expectations" to "reasonable investment-backed expectations."[56]

In a subsequent decision, the Supreme Court held that the *Penn Central* balancing test applies to temporary takings as well as regulatory takings.[57] While courts need to consider all three of the *Penn Central* factors in a regulatory takings analysis,[58] some courts have denied takings claims solely based on the "reasonable investment-backed expectations" factor.[59] Regardless, the *Penn Central* balancing test has historically been difficult to meet.[60] The Supreme Court has only once found a temporary regulatory taking to be compensable under *Penn Central*, and that was in a plurality opinion.[61]

The economic impact factor of the *Penn Central* test is the most straightforward factor, requiring that the plaintiff suffer an economic impact.[62] However, if the economic impact does not deprive the property owner of all economic use of the property, an economic impact alone is not enough to qualify for a taking under the *Penn Central* test.[63] Accordingly, the Supreme Court has directed lower courts to focus on the other two factors in the *Penn Central* balancing test when determining whether a regulatory taking has occurred.[64]

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[53] *See id.* at 1015; *see* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[54] *Penn Cent.*, 438 U.S. at 116-19.
[55] *Id.* at 124.
[56] *See, e.g.*, Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226 (1986); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-10 (1984).
[57] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335-37 (2002). The *Penn Central* test does not apply when there is permanent physical possession of the property or where a regulation deprives the owner of all economic use of the property. *See Lucas*, 505 U.S. at 1019; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).
[58] Palazzolo v. Rhode Island, 533 U.S. 606, 633-34 (2001) (O'Connor, J., concurring).
[59] Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63, 95-96 (1996).
[60] Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 886 (D.C. Cir. 1999) (Williams, J., concurring).
[61] E. Enters. v. Apfel, 524 U.S. 498, 502, 528-29, 537-38 (1998).
[62] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
[63] *Id.* at 130. *Lucas* applies if the property owner is deprived of all economic use. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).
[64] *Penn Cent.*, 438 U.S. at 130-31.

In 2001, the Supreme Court justices disagreed regarding the definition of reasonable investment-backed expectations, showing that the *Penn Central* balancing test, as a whole, is not straightforward.[65] In *Palazzolo v. Rhode Island*, the plaintiff sought a permit to fill coastal wetlands in Rhode Island where regulations were in place protecting those wetlands.[66] After the Rhode Island Coastal Resources Management Council denied the plaintiff a permit multiple times, the plaintiff filed suit claiming a taking of his property without just compensation.[67] This plurality decision revolved around the definition of reasonable investment-backed expectations as applied to the *Penn Central* balancing test.[68] Five justices joined in the plurality opinion, including Justices O'Connor and Scalia, but Justices O'Connor and Scalia had conflicting concurrences regarding the application of the reasonable investment-backed expectations factor in the *Penn Central* balancing test.[69] Justice O'Connor stated that the Court must consider restrictions on the property existing at the time of purchase in order to determine the owner's reasonable investment-backed expectations.[70] Justice Scalia disagreed, stating that the existing restriction should have no bearing on reasonable investment-backed expectations because a court may find such a restriction unconstitutional at a later date.[71] The four dissenting justices agreed with Justice O'Connor, making Justice O'Connor's concurrence controlling.[72] However, although Justice Scalia did not agree that a court should consider existing regulations in determining reasonable investment-backed expectations, he believed that courts must consider "background principles of the State's law" as required under *Lucas*.[73] Therefore, "background principles of the State's law" are always considered part of reasonable investment-backed expectations analysis,[74] regardless of whether the court considers existing regulations as well.

Like its treatment of the other two *Penn Central* factors, the Court did not define "character of the governmental action."[75] However, the Supreme Court's analysis focuses on the interference aspect of government actions,

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[65] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 633-35 (2001) (O'Connor, J., concurring); *id.* at 636-37 (Scalia, J., concurring).

[66] *Id.* at 614 (plurality opinion).

[67] *Id.* at 615-16.

[68] *Id.* at 610; *id.* at 633-35 (O'Connor, J., concurring); *id.* at 637 (Scalia, J., concurring).

[69] *Id.* at 610 (plurality opinion); *id.* at 633-35 (O'Connor, J., concurring); *id.* at 637 (Scalia, J., concurring).

[70] *See id.* at 635 (O'Connor, J., concurring).

[71] *Id.* at 637 (Scalia, J., concurring).

[72] *Id.* at 633-35 (O'Connor, J., concurring); *id.* at 643 n.6, 644-45 (Stevens, J., concurring in part, dissenting in part); *id.* at 654 n.3 (Ginsburg, Souter & Breyer, JJ., dissenting); *id.* at 654-55 (Breyer, J., dissenting); Patrick A. Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow's Ear*, 30 B.C. ENVTL. AFF. L. REV. 101, 109 (2002).

[73] *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[74] *Palazzolo*, 533 U.S. at 633-35 (O'Connor, J., concurring); *id.* at 637 (Scalia, J., concurring); *Lucas*, 505 U.S. at 1029.

[75] John A. Kupiec, Note, *Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations in Total Regulatory Taking Claims*, 49 B.C. L. REV. 865, 866 (2008).

rather than the actual goals of government actions, by stating that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by [the] government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[76] Subsequently, the U.S. Court of Appeals for the District of Columbia Circuit has refined the character of the governmental action factor even further. Specifically, in *District Intown Properties Ltd. Partnership v. District of Columbia*,[77] the U.S. Court of Appeals for the District of Columbia Circuit considered a case very similar to *Penn Central* in which the mayor for the District of Columbia denied development permits for a cathedral protected by the local landmark protection law.[78] In addressing the character of the governmental action, the court held that all courts must consider the legitimacy of the regulation in applying the *Penn Central* test.[79] Therefore, at a minimum, the courts must consider "background principles of the State's law" and the legitimacy of the regulation when applying the *Penn Central* balancing test.[80]

C. Water Rights and Takings Law

Water rights pose an interesting challenge to traditional takings law because they are considered usufructuary, not possessory like land or other property.[81] However, the Supreme Court has recognized that water rights are property rights[82] and has addressed the physical taking of water rights in three cases.[83] First, in *International Paper v. United States*,[84] the government ordered termination of a leased water diversion to International Paper Company in order to increase power production in the Niagara River, shutting down the International Paper mill for approximately nine months.[85] The government argued that it terminated the diversion under agreement, but the Court found that the government used its eminent domain powers instead.[86] The Supreme Court held that termination of the diversion was a taking, requiring just compensation under the Constitution.[87] Second, in *United States v. Gerlach Live Stock*,[88] the government constructed Friant Dam, which diverted water away

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[76] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted).
[77] Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999).
[78] *Id.* at 876.
[79] *Id.* at 879.
[80] Palazzolo v. Rhode Island, 533 U.S. 606, 633-35 (2001) (O'Connor, J., concurring); *id.* at 637 (Scalia, J., concurring); *Dist. Intown Props.*, 198 F.3d at 879-80; Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).
[81] Davenport & Bell, *supra* note 3, at 32.
[82] Wyoming v. Colorado, 259 U.S. 419, 460-61 (1922), *vacated on other grounds*, 353 U.S. 953 (1957). In addition, the Nevada Supreme Court held that vested water rights are real property rights, although the rights are still subject to police power. Town of Eureka v. State Eng'r, 826 P.2d 948, 951 (Nev. 1992).
[83] Dugan v. Rank, 372 U.S. 609 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950); Int'l Paper Co. v. United States, 282 U.S. 399 (1931).
[84] *Int'l Paper Co.*, 282 U.S. 399.
[85] *Id.* at 404-06.
[86] *Id.* at 407.
[87] *Id.* at 408.
[88] *Gerlach Live Stock Co.*, 339 U.S. 725.

from the plaintiff, a live stock production company.[89] The Court reasoned that actions for the public's benefit do not justify the taking of private water rights without compensation.[90] Although the Court found that the dam allowed water-rights holders to use water more efficiently, it still held that the diversion of water rights was a taking based on California law.[91] Third, *Dugan v. Rank*[92] also involved water rights blocked by the Friant Dam.[93] Similar to *Gerlach*, the Supreme Court found that the government's actions constituted a taking of water rights.[94] The Court reasoned that "[a] seizure of water rights need not necessarily be a physical invasion of land."[95]

Despite these three Supreme Court cases, the Ninth Circuit Court of Appeals held in *County of Okanogan v. National Marine Fisheries Service*[96] that the government still has a right to restrict access to vested water rights across government-owned land.[97] In *County of Okanogan*, plaintiffs alleged that the Forest Service took their vested water rights without just compensation by amending the plaintiffs' right-of-way permit to limit diversions.[98] Specifically, the Ninth Circuit Court of Appeals found that there was no taking of water rights because the Forest Service "had the authority to restrict the use of [revocable] rights-of-way" over Forest Service land which allowed for the transportation of water.[99]

Finally, the U.S. Court of Appeals for the Federal Circuit recently held in *Casitas Municipal Water District v. United States*[100] that diversion of water for government use constituted a physical taking.[101] In *Casitas*, the Bureau of Reclamation required the Casitas Municipal Water District to divert its contracted water right in order to meet federal requirements under the Endangered Species Act, resulting in a permanent loss of water to Casitas.[102] The Federal Circuit found that the diversion was a partial taking of water rights, requiring just compensation, because Casitas had a contracted water right and the government physically appropriated the property.[103]

Estate of Hage, as discussed in Part V, differs significantly from *International Paper*, *Gerlach Live Stock*, *Dugan*, and *Casitas*, cases in which courts upheld water-rights-takings claims, because *Estate of Hage* did not involve any physical diversion of water away from the owner.[104] Like other property, the

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[89] *See id.* at 728-30.
[90] *Id.* at 752.
[91] *Id.* at 731, 752, 754-55.
[92] Dugan v. Rank, 372 U.S. 609 (1963).
[93] *Id.* at 615.
[94] *Id.* at 620.
[95] *Id.* at 625.
[96] County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081 (9th Cir. 2003).
[97] *Id.* at 1084-85.
[98] *Id.* at 1084.
[99] *Id.* at 1085.
[100] Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008).
[101] *Id.* at 1295.
[102] *Id.* at 1281-82.
[103] *Id.* at 1281-82, 1295.
[104] *Compare*, *e.g.*, *id.* at 1282 (in which a physical diversion of water was required by the Bureau of Reclamation), *with* Estate of Hage v. United States, 82 Fed. Cl. 202, 206 (2008) (in which there was no physical diversion, only fencing and vegetation growth in ditches).

physical taking of water rights requires physical occupation, such as a diversion.[105] Without such a diversion, the *per se* rule for taking cannot be applied and any takings analysis must be conducted under the *Penn Central* balancing test.[106]

III. HISTORY OF THE *ESTATE OF HAGE* CASE

E. Wayne and Jean Hage purchased Pine Creek Ranch located in Nevada in 1978 for the purpose of cattle ranching.[107] Previous owners established the 7000-acre ranch in 1865.[108] However, additional land beyond the 7000 acres was necessary to graze the cattle and the Hages obtained a grazing permit with a ten-year term along with the purchase of the ranch.[109] The grazing permit covered 752,000 acres of land owned by the Forest Service.[110] The terms of the grazing permit gave the Hages access to federal land, but also allowed the Forest Service to terminate the permit if the Hages violated any terms of the permit or if the Forest Service needed the land for another use.[111] The terms of the permit limited the amount of cattle allowed on each allotment in order to prevent overgrazing.[112]

In purchasing the ranch, the Hages also obtained ownership of vested water rights through ten ditch rights-of-way that the federal government granted under the Ditch Act of 1866.[113] Those ditches were located on Forest Service land but provided water to the Hages' ranch.[114] As with most property rights, state law governs water rights, such as those of the Hages, and in Nevada the prior appropriation doctrine applies.[115] Under that doctrine, first in time, first in right is the mantra.[116] As explained by Judge Smith, "the date of the appropriation determines the appropriator's priority to use the water, with the earliest user having the superior right."[117] Under prior appropriation, the water does not actually have to be located on the owner's property; there can be ownership of water rights that are physically located off-site like the Hages' water rights.[118]

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[105] *See supra* notes 35-43 and accompanying text.

[106] *See supra* notes 53-61 and accompanying text.

[107] Hage v. United States, 35 Fed. Cl. 147, 153 (1996).

[108] *Id.*

[109] *Id.* Upon purchase of the ranch in 1978, the grazing permit entitled the Hages to eight years remaining on the previous owner's permit. *Id.* at 153 n.1. The Hages modified and renewed the permit in 1984. *Id.* at 153.

[110] Hage v. United States, 51 Fed. Cl. 570, 588 (2002).

[111] *Hage*, 35 Fed. Cl. at 153.

[112] Estate of Hage v. United States, 82 Fed. Cl. 202, 206 (2008); *Hage*, 35 Fed. Cl. at 153.

[113] 43 U.S.C. § 661 (2006); *Hage*, 51 Fed. Cl. at 583; *Hage*, 35 Fed. Cl. at 156.

[114] *Estate of Hage*, 82 Fed. Cl. at 205.

[115] *Hage*, 35 Fed. Cl. at 172.

[116] A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 N.D. L. REV. 881, 881 (2000).

[117] *Hage*, 35 Fed. Cl. at 172; *see also* Tarlock, *supra* note 116, at 881-82.

[118] Davenport & Bell, *supra* note 3, at 31.

A. You Fenced My Milkshake!

In 1979, the Nevada Department of Wildlife released elk into the Table Mountain Allotment where the Hages also grazed their cattle.[119] The Forest Service also "fenced off certain meadows and spring sources on the Table Mountain allotment and erected electric fences," excluding the Hages' cattle from those areas.[120] The fences did not exclude the elk because the elk could jump the fences.[121] In 1990, the Forest Service determined that an allotment within the Hages' grazing permit was overgrazed in violation of the permit and revoked the Hages' grazing permit for that area.[122] When the cattle continued to graze on the revoked allotment, the Forest Service impounded the cattle.[123]

B. You Regulated My Milkshake!

In addition to the issues with the grazing permit, in 1986, Congress passed a statute granting the Forest Service authority to regulate the maintenance of ditches on Department of Agriculture lands, which includes Forest Service lands.[124] The statute states:

> The Secretary of Agriculture shall have the authority to administer all rights-of-way granted or issued under authority of previous Acts with respect to lands under the jurisdiction of the Secretary of Agriculture, including rights-of-way granted or issued pursuant to authority given to the Secretary of the Interior by such previous Acts.[125]

The Forest Service then promulgated regulations granting the Chief of the Forest Service the authority to require special permits for ditches on Forest Service land.[126] The Forest Service required the Hages to obtain a special permit in order to clear the ditches with mechanized equipment.[127] However, the Hages could clear the ditches legally without a permit if they only used hand tools.[128] The Hages refused to apply for the permit and water flow from the ditches decreased due to vegetation clogging the ditches.[129] The Forest Service enforced the regulation by arresting Mr. Hage in 1991 for cutting trees around the ditches without a permit.[130] A jury convicted Mr. Hage of violating 18 U.S.C. § 1361, which makes it a felony to damage government property exceeding $100, and 18 U.S.C. § 641, which makes it a felony to sell government property exceeding $100 without permission.[131] However, the Ninth Cir-

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[119] *Estate of Hage*, 82 Fed. Cl. at 206.
[120] *Id.*
[121] *Id.* Although not explicitly stated in the *Estate of Hage* decision, the Forest Service likely erected the fences so that the elk would not have to compete with cattle for water.
[122] *Id.* at 206, 215; *Hage*, 35 Fed. Cl. at 155.
[123] *Estate of Hage*, 82 Fed. Cl. at 206-07.
[124] 43 U.S.C. § 1761(b)(3) (2006). The Forest Service is an agency of the U.S. Department of Agriculture. U.S. Forest Service, http://www.fs.fed.us/aboutus/ (last visited October 27, 2008).
[125] 43 U.S.C. § 1761(b)(3).
[126] 36 C.F.R. § 251.53(*l*)(1) (2008).
[127] *Estate of Hage*, 82 Fed. Cl. at 212.
[128] *Id.*
[129] *Id.* at 212-13.
[130] Hage v. United States, 35 Fed. Cl. 147, 156 (1996).
[131] United States v. Seaman, 18 F.3d 649, 650 (9th Cir. 1994); *see* 18 U.S.C. §§ 641, 1361 (1988).

cuit Court of Appeals overturned the conviction because the value of the trees was less than $100 and Mr. Hage merely committed a misdemeanor.[132]

The Hages filed a claim against the Forest Service in September 1991, claiming that the Forest Service committed a taking of their grazing rights, cattle, land, and water rights.[133] The Forest Service filed a motion for summary judgment on all the claims, which Judge Smith granted regarding the grazing rights, but denied regarding all the other claims.[134] In terms of the water rights, Judge Smith determined that the Hages had vested water rights based on the Ditch Act of 1866.[135] However, Judge Smith postponed the decision on water rights takings until 2008.[136]

IV. Statement of the Case

The 2008 *Estate of Hage* decision is the last Federal Claims Court decision in a series of five opinions over twelve years.[137] Judge Smith identified the purpose of this last opinion: to determine if the Forest Service actions constituted a taking under the Fifth Amendment, and if so, what compensation was due to the Hages for the taking.[138] Applying the facts of the case as described above, Judge Smith held that the cattle impoundment was not a taking because the Forest Service was within its discretion in revoking the grazing permit and impounding the cattle.[139] Similarly, Judge Smith ruled that revocation of the grazing permit did not result in a taking of the ranch because the Forest Service had a right to revoke the permit at any time.[140] In reaching this decision, he cited *Colvin Cattle Co. v. United States*,[141] which held that a grazing permit is a license and that loss of value associated with losing such a license is not a "cognizable property interest."[142] However, Judge Smith found that the fencing of water sources on the Table Mountain Allotment and reduction in water

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[132] *Seaman*, 18 F.3d at 650-51.

[133] *Hage*, 35 Fed. Cl. at 156.

[134] *Id.* at 150.

[135] Hage v. United States, 51 Fed. Cl. 570, 576 (2002); *see also* Nev. Rev. Stat. § 533.085 (2008) (protects vested water rights); Bradshaw v. United States, 47 Fed. Cl. 549, 552 (2000) ("Under Nevada law, a vested water right is one that was used continuously prior to 1905 to the present and is specifically protected by statute.").

[136] *Hage*, 51 Fed. Cl. at 584, 592. In the 2008 decision, Judge Smith stated that the court "already held . . . that the Government's actions which physically prevented Plaintiffs from accessing their 1866 Act ditches amounted to a physical taking," citing to footnote thirteen in the 2002 decision. Estate of Hage v. United States, 82 Fed. Cl. 202, 208 (2008). However, footnote thirteen in the 2002 decision only recognizes it as a physical takings claim and the 2002 decision explicitly states that the water-rights-takings issue will be dealt with in a future phase of the case. *Hage*, 51 Fed. Cl. at 580 n.13, 584, 592. Judge Smith confined the analysis for both physical and regulatory takings of water rights to the 2008 decision. *Estate of Hage*, 82 Fed. Cl. at 210-13.

[137] *Estate of Hage*, 82 Fed. Cl. at 205 n.1.

[138] *Id.* at 205.

[139] *Id.* at 209.

[140] *Id.*

[141] Colvin Cattle Co. v. United States, 468 F.3d 803 (Fed. Cir. 2006).

[142] *Estate of Hage*, 82 Fed. Cl. at 209 (citing *Colvin Cattle*, 468 F.3d at 808).

flow from the ditches resulted in a taking of water rights under the circumstances.[143]

A. Two-Prong Test for Water Rights Takings

Judge Smith recognized that the revocation of the grazing permit could not support a taking of water rights under the holding in *Colvin Cattle*.[144] Instead, Judge Smith developed a two-prong test for water takings: 1) there must be a beneficial use for the water, and 2) "the Government's actions [must rise] to the level of a taking."[145] When both prongs are satisfied, Judge Smith held that the action resulted in a taking.[146]

In terms of the first prong, Judge Smith found that the Hages could have used the water to irrigate agricultural lands or could have sold the water rights, thus showing beneficial use.[147] However, the takings analysis under the second prong proved to be more complex.[148] Judge Smith analyzed the fencing of water sources under a physical taking framework.[149] He also separately analyzed the Forest Service regulation as a regulatory taking, considering both the actual surface water and the ditches that transport the water as property.[150]

B. Physical Taking

Judge Smith held that the government action rose to the level of a physical taking because the fencing of "certain meadows and spring sources" resulted in a "'physical ouster' which deprived [the Hages] of the use of their property" during the period when the grazing permit was still in effect.[151] Judge Smith acknowledged that revocation of the grazing permit could not constitute a physical taking under *Colvin Cattle*.[152] In *Colvin Cattle*, the Bureau of Land Management (BLM) revoked a grazing permit and the affected rancher sought damages.[153] Although the rancher could no longer legally graze the land, the BLM did not restrict the rancher's access to water.[154] Judge Smith distinguished the Hages' situation from *Colvin Cattle* because there was actual fencing of water sources and possible prosecution implications for the Hages, as demonstrated by the Forest Service's prior charges against Mr. Hage.[155]

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143 *Id.* at 211.
144 *Id.* at 210-11.
145 *Id.* at 210.
146 *Id.*
147 *Id.* at 210, 212.
148 *Id.* at 211-13.
149 *Id.* at 211.
150 *Id.* at 211-13.
151 *Id.* at 206, 211. Judge Smith did not clarify whether the holding of a physical taking was based on *Loretto*, *Lucas*, or some other case. For the purposes of this Note, I assume that the physical taking holding was based on *Loretto* because *Lucas* applies to regulatory takings. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548 (2005).
152 *Estate of Hage*, 82 Fed. Cl. at 211.
153 Colvin Cattle Co. v. United States, 468 F.3d 803, 806 (Fed. Cir. 2006).
154 *Id.*
155 *Estate of Hage*, 82 Fed. Cl. at 211; *see* United States v. Seaman, 18 F.3d 649, 650 (9th Cir. 1994).

C. Regulatory Taking of Surface Water

In analyzing the regulatory taking claim for surface water, Judge Smith applied the *Penn Central* balancing test and held that the reduction in water flow needed for irrigation had an economic impact, meeting the first factor of the *Penn Central* test.[156] Judge Smith also found that the Hages had investment-backed expectations because the Hages would not have purchased the ranch without the water rights.[157] Finally, Judge Smith found that the character of the governmental action was actually "the threats and intimidation that pervaded the relationship between [the Hages] and the Forest Service," not the vegetation growth.[158]

D. Regulatory Taking of Ditches

For the determination of whether there was a regulatory taking of the ditches, Judge Smith also applied the *Penn Central* balancing test with the same results.[159] He reasoned that the economic impact was severe because of the cost associated with clearing the ditches by hand, which is the only way the Hages could clear the ditches legally without a permit.[160] Additionally, Judge Smith held that the Hages had investment-backed expectations in the ditches as the ranch's water transport system.[161] Finally, Judge Smith found that the character of the governmental action in requiring the permit for clearing was harassment of the Hages.[162] Although Judge Smith acknowledged that the Hages could have applied for a permit to clear the ditches mechanically, and that the Forest Service could reasonably regulate the ditches, he nevertheless ruled that the "application for a special use permit to maintain their ditches with the appropriate equipment would clearly have been futile" because of the poor relationship between the Forest Service and the Hages.[163] In the end, Judge Smith awarded nearly $3 million in damages to the Hages' estate in compensation for the water rights.[164]

V. ANALYSIS

Physical takings are uncommon and obvious.[165] In addition, under the *per se* rule of *Loretto*, physical takings cannot be found in cases which the act in question is only temporary with no physical occupation.[166] Thus, Judge Smith incorrectly applied the *per se* rule to an action that was only temporary with no

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156 *Estate of Hage*, 82 Fed. Cl. at 212.
157 *Id.*
158 *Id.*
159 *Id.* at 213.
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.* at 212-13.
164 *Id.* at 216.
165 Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002).
166 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 431-32, 435 n.12 (1982).

physical occupation in *Estate of Hage*.[167] In the Hages' case, the fencing only limited access for the Hages' cattle temporarily during the period when the grazing permit was in effect.[168] Moreover, the fencing of flowing, moving water rights is not a physical occupation because water rights are usufructuary, not possessory.[169] On appeal, the court should apply the *Penn Central* balancing test instead.[170]

If the Forest Service appeals Judge Smith's decision, the U.S. Court of Appeals for the Federal Circuit should not find a regulatory taking under the *Penn Central* balancing test because the Hages had no reasonable investment-backed expectation that the Forest Service would not regulate removal of vegetation on government land. Judge Smith acknowledged that the Forest Service could regulate the ditches in a reasonable manner, but concluded that the Forest Service effectively denied the permit because application for the permit would have been "futile."[171] Judge Smith held that the effective denial of the permit resulted in a taking.[172] Judge Smith's reasoning is inconsistent with takings law, which requires consideration of the "background principles of the State's law of property and nuisance."[173] These background principles include regulation of public lands as well as regulation of water rights. Although state law considers water rights as equivalent to real property in Nevada,[174] water rights are also a public resource.[175] As it can with many other property rights, the government can regulate water rights for public purposes.[176] As stated by David Abelson, a water rights attorney, "Investment-backed expectations are not reasonable if they fail to acknowledge the power of the government to regulate in the public interest."[177] The Forest Service is required to manage its rangelands in the public interest, balancing multiple uses that benefit all

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[167] *See Estate of Hage*, 82 Fed. Cl. at 211 (admitting that the physical taking "pertains only to a limited time period"); Hage v. United States, 35 Fed. Cl. 147, 172 (1996) (admitting that "[f]lowing water . . . is not amenable to absolute physical possession"). *Compare* United States v. Pewee Coal Co., 341 U.S. 114, 115-16 (1951) (holding that actual physical possession, although temporary, resulted in a taking without applying a balancing test), *with* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (holding that there was no taking when there was no physical possession of the mine).

[168] *Estate of Hage*, 82 Fed. Cl. at 211 (stating that physical taking was only for "a limited time period" because the taking ended when the grazing permit was revoked).

[169] Davenport & Bell, *supra* note 3, at 33; Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 260 (1990) (stating that water rights are different from typical property rights for a variety of reasons).

[170] *See Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 335-36.

[171] *Estate of Hage*, 82 Fed. Cl. at 212-13.

[172] *Id.* at 213.

[173] Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Scalia, J., concurring); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[174] Town of Eureka v. State Eng'r, 826 P.2d 948, 951 (Nev. 1992).

[175] NEV. REV. STAT. § 533.025 (2007) ("The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public."); *see, e.g.*, Bergman v. Kearney, 241 F. 884, 893 (D. Nev. 1917).

[176] David Abelson, Comment, *Water Rights and Grazing Permits: Transforming Public Lands into Private Lands*, 65 U. COLO. L. REV. 407, 422 (1994).

[177] *Id.* at 417.

users.[178] Therefore, the Hages cannot claim that their water rights transcend any Forest Service regulation promulgated in the public interest.

Finally, Judge Smith should have considered the legitimacy of the government action in determining its character, not the demeanor of agency staff. The courts typically apply the character of the governmental action to the regulation itself.[179] Assuming that the Forest Service effectively denied the permit, Judge Smith should have determined if the regulation was legitimate, not if the Forest Service had some sort of vendetta against the Hages. Because the regulation is consistent with current federal law requiring federal agencies to manage federal lands "under the principles of multiple use and sustained yield," Judge Smith should have found that the character of the governmental action was legitimate.[180]

A. Physical Taking Analysis

The Hages had a water right through their cattle,[181] which was within the grazing allotment, but did not have a permanent right to access that water. Under Nevada state law, cattle drinking water out of a stream is a diversion and an appropriation of water;[182] therefore, cattle drinking water from the streams on the allotment constituted a water right for the Hages. Judge Smith made findings of fact that the fencing completely excluded the Hages' cattle from diverting their appropriated water rights within the grazing allotment.[183] Assuming that the fencing prevented the cattle from accessing any water sources on the grazing allotment, water rights alone do not guarantee that the Hages' cattle will have access to the water because "access across federal land is not part of an irrigators' right to water."[184] The Hages did not own the land surrounding the water sources; the Forest Service owned it.[185] Although the Hages had vested water rights under the Ditch Act of 1866, they did not have vested rights to access the springs and meadows that the Forest Service

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[178] Public Rangelands Improvement Act, 43 U.S.C. § 1901(b)(2) (2006) (requiring federal agencies to "manage, maintain and improve the conditions of the public rangelands so that they become as productive as feasible for all rangeland values in accordance with management objectives").

[179] Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 879 (D.C. Cir. 1999) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) & Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982)).

[180] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (2006).

[181] *See* Steptoe Live Stock Co. v. Gulley, 295 P. 772, 775-76 (Nev. 1931).

[182] *Id.*

[183] Although it is difficult to believe that the Forest Service could accomplish the onerous task of installing electric fences to exclude the cattle from all water sources on the Table Mountain Allotment, Judge Smith made finding of facts to that effect that will be difficult to challenge in future appeals. Estate of Hage v. United States, 82 Fed. Cl. 202, 206, 211 (2008).

[184] Davenport & Bell, *supra* note 3, at 37.

[185] *Estate of Hage*, 82 Fed. Cl. at 205. The water source was located in the Toiyabe National Forest owned by the Forest Service. *Id.*

fenced.[186] The vested right is in the water itself that flows to the ranch, not in the access across federal land.[187]

The fencing was only temporary because the grazing permit that gave the Hages access to the water was a revocable license, giving them no right to access the property without the grazing permit.[188] A court must analyze temporary actions under the *Penn Central* balancing test.[189] Like in *County of Okanagon*, where the plaintiffs could not assert a taking of water rights because access depended upon a revocable right-of-way, there is no taking of water rights associated with revocation of a grazing permit because the government has the right to restrict revocable permits, even if it results in lack of access to off-site water.[190] Judge Smith agreed with this principle.[191] In this case, fencing only affected the cattle's access to water from 1979 until the cancellation of the grazing permit in 1990.[192] The Hages lost their right to access the water when they lost the grazing permit, creating only a temporary impact on their rights.

In addition to involving only a temporary action, there was also no physical occupation of the water rights in *Estate of Hage*. The fencing of a water source is not a typical and obvious physical taking, which the courts should consider when applying traditional takings law to water rights. In typical physical takings, "the government directly appropriates private property for its own use."[193] Here, water sources were fenced in order to supply water for elk.[194] Although the Hages had a private property right to the water under Nevada law,[195] the act of fencing water sources was certainly not a direct appropriation of water like an actual diversion.[196] At best, it is an indirect appropriation of

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[186] *See* County of Okanogan v. Nat'l Marine Fisheries Serv., 347 F.3d 1081, 1086 (9th Cir. 2003) (stating that a government limitation on diversions as part of a revocable right-of-way permit did not amount to a taking of water rights). The Nevada Supreme Court also considers water rights and access to public lands to be separate. Ansolabehere v. Laborde, 310 P.2d 842, 849 (Nev. 1957).

[187] Davenport & Bell, *supra* note 3, at 37.

[188] Hage v. United States, 35 Fed. Cl. 147, 153 (1996).

[189] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 335-36 (2002).

[190] *County of Okanogan*, 347 F.3d at 1085.

[191] Estate of Hage v. United States, 82 Fed. Cl. 202, 211 (2008) (stating that the physical taking was only for "a limited time period" because the taking ended when the grazing permit was revoked).

[192] *Id.* at 215; *Hage*, 35 Fed. Cl. at 154-55.

[193] E. Enters. v. Apfel, 524 U.S. 498, 522 (1998).

[194] *Estate of Hage*, 82 Fed. Cl. at 206. Some may argue that the elk are diverting the water for the government, resulting in a taking. However, the Ninth Circuit Court of Appeals held that animals cannot be agents for the government. Christy v. Hodel, 857 F.2d 1324, 1335 (9th Cir. 1988) ("[T]he government is not answerable for the conduct of the bears in taking plaintiffs' property.").

[195] *See* Steptoe Live Stock Co. v. Gulley, 295 P. 772, 775-76 (Nev. 1931).

[196] *See* Dugan v. Rank, 372 U.S. 609, 615, 620 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725, 729-30, 752 (1950); Int'l Paper Co. v. United States, 282 U.S. 399, 405-06, 408 (1931). All three cases found physical takings of water but, unlike this case, involved diversions.

water by the elk, which does not fit the typical physical taking mold described in the *Tahoe-Sierra* case.[197]

Temporary physical takings with no physical occupation require "a more complex balancing process to determine whether they are a taking."[198] The categorical *per se* rule under *Loretto* does not apply to a temporary fencing of water sources with no physical occupation because of the rationale the Court applied in *Pewee Coal* and *Central Eureka Mining*, as explained above.[199] The Supreme Court held that lower courts should use the *Penn Central* balancing test to determine temporary takings, the same test as required to analyze partial regulatory takings.[200] Therefore, Judge Smith should have applied the *Penn Central* balancing test to the fencing in *Estate of Hage* because it resulted in a temporary physical act with no physical occupation.

B. Penn Central *Analysis*

In *Estate of Hage*, Judge Smith considered the reduced flow of the water via the ditches to the Hages' ranch to be a regulatory taking because the Hages could not legally clear the vegetation in the ditches mechanically without a permit.[201] Because the Hages were still receiving some water, the permit regulation could not have resulted in a complete regulatory taking of all economic use under *Lucas*.[202] Instead, courts must apply the *Penn Central* factors to determine if there is a taking when the owner has not lost all economic use of his or her property.[203]

In applying the *Penn Central* factors to this case, Judge Smith considered the economic impact of the regulation, the Hages' investment-backed expectations, and the character of the governmental action.[204] Even if Judge Smith assumed that the Forest Service effectively denied the permit to clear the ditches, he incorrectly applied the *Penn Central* balancing test in finding that all three factors balanced in favor of the Hages. Acknowledging that the ditches were subject to reasonable regulation,[205] Judge Smith incorrectly held that the Hages had a reasonable investment-backed expectation in clearing pub-

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[197] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 324 (2002).

[198] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982). *Compare* United States v. Pewee Coal Co., 341 U.S. 114, 115-16 (1951) (holding that actual physical possession, although temporary, resulted in a taking without applying a balancing test), *with* United States v. Cent. Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (holding that there was no taking when there was no physical possession of the mine).

[199] *Loretto*, 458 U.S. at 435 n.12. *Compare Pewee Coal Co.*, 341 U.S. at 115-16 (holding that actual physical possession, although temporary, resulted in a taking without applying a balancing test), *with Cent. Eureka Mining Co.*, 357 U.S. at 165-66 (holding that there was no taking when there was no physical possession of the mine).

[200] *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 335-36.

[201] Estate of Hage v. United States, 82 Fed. Cl. 202, 212-13 (2008).

[202] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

[203] *Estate of Hage*, 82 Fed. Cl. at 212; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

[204] *Estate of Hage*, 82 Fed. Cl. at 212-13.

[205] *Id.* at 212.

lic lands without a permit and that the character of the governmental action was improper.[206]

1. Economic Impact

Assuming that the Forest Service effectively denied the Hages a permit to clear the ditches because of their poor relationship with the Forest Service, the Hages suffered an economic impact because they were unable to clear the ditches mechanically.[207] The Court of Appeals for the Federal Circuit has held that denial of a grazing permit does not result in a loss of value to private property when there were no "governmental restrictions on a constitutionally cognizable property interest."[208] This is because, under the Taylor Grazing Act, grazing permits are not compensable property.[209] As mentioned before, the Hages had no property interest in their grazing permit because it was a revocable license.[210] However, denial of the permit to clear the ditches is a different situation than denial of a grazing permit because, under Nevada state law, the Hages had a property interest in the vested water rights that they obtained through the 1866 Ditch Act.[211] Judge Smith established that vegetation growth diminished the water flow to the ranch and that the Hages were economically impacted by the reduction in their ability to irrigate.[212] In addition, the Hages would suffer an economic impact in hand-clearing the ditches.[213] Therefore, the Hages met the *Penn Central* factor for economic impact. Although this factor balances in favor of the Hages, it is not enough, on its own, to demonstrate a regulatory taking.[214]

2. Investment-backed Expectations

Judge Smith incorrectly held that the Hages had reasonable investment-backed expectations. In fact, the Hages had no reasonable investment-backed expectations in obtaining permission to clear vegetation on Forest Service land because investment-backed expectations are not reasonable when they ignore the right of the government to regulate its own land.[215] The government has authority to regulate uses on its own land, which a court must consider as part of the Hages' investment-backed expectations.[216] In addition, Congress

[206] When the Hages first filed suit against the Forest Service, the government argued that the claim was not ripe for adjudication because the Hages did not apply for the special-use permit to maintain their ditches. Hage v. United States, 35 Fed. Cl. 147, 161 (1996). However, Judge Smith held that the plaintiffs should be allowed to proceed "if plaintiffs can establish that the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." *Id.* at 164.

[207] *Estate of Hage*, 82 Fed. Cl. at 212-13.

[208] Colvin Cattle Co., Inc. v. United States, 468 F.3d 803, 808 (Fed. Cir. 2006).

[209] United States v. Fuller, 409 U.S. 488, 494 (1973).

[210] *Estate of Hage*, 82 Fed. Cl. at 210; *Hage*, 35 Fed. Cl. at 153.

[211] Town of Eureka v. State Eng'r, 826 P.2d 948, 951 (Nev. 1992).

[212] *Estate of Hage*, 82 Fed. Cl. at 210 (stating that the Hages could have beneficially used the water or sold the water rights for irrigation purposes).

[213] *Id.* at 213.

[214] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978).

[215] Pace Res., Inc. v. Shrewsbury Twp., 808 F.2d 1023, 1033 (3d Cir. 1987).

[216] *See* Light v. United States, 220 U.S. 523, 536 (1911) ("The United States can prohibit absolutely or fix the terms on which its property may be used.").

promulgated the Public Rangelands Improvement Act, stating that the national policy for Forest Service and other federal agencies is to "manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values in accordance with management objectives."[217] Therefore, the Hages had no reasonable investment-backed expectation that the Forest Service would manage the adjacent Forest Service lands for the Hages' grazing and water rights alone. Congress directed the Forest Service to provide for "all rangeland values," and the Forest Service, in doing so, promulgated a reasonable regulation to require permits before clearing of public lands.[218] This allows the Forest Service to manage lands for wildlife and other public land uses that may be required under federal law.[219]

Nor did the Hages have a reasonable expectation that the Forest Service would not regulate the water rights, either directly or indirectly. As acknowledged by Judge Smith, water rights are usufructuary, not possessory.[220] In 1938, the U.S. Court of Appeals for the District of Columbia Circuit provided a concise and thorough statement of this principle: "While the owner of a water right has a vested interest in that right, the right itself is something less than the full ownership of property because it is a right not to the corpus of the water but to the use of the water."[221] Moreover, state law typically divides water sources among various users who each have a right to use a specified amount of water for beneficial use.[222] It is impossible to assign each molecule of water to a certain user. Finally, a water right holder is not entitled to use a water right free of any regulation.[223] Water rights are subject to the beneficial use doctrine where a water right holder must put his water right to beneficial use or risk use by another water user.[224] In addition, under Nevada law, water is a public resource and, as such, water rights are subject to reasonable regulation.[225] Because appropriated water rights, even vested ones, are subject to the beneficial use doctrine and regulations for public use, the Hages had no reasonable expectation that their water rights would continue to flow without additional permit requirements or regulations.

Furthermore, it does not matter that the Forest Service promulgated a regulation requiring a permit after the Hages' purchase of the ranch. According to *Lucas*, "reasonable expectations must be understood in light of the whole of our legal tradition."[226] In *Lucas*, zoning regulations came into effect after the

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[217] Public Rangelands Improvement Act, 43 U.S.C. § 1901(b)(2) (2006).

[218] *Id.*; 36 C.F.R. § 251.53(*l*)(1) (2008).

[219] *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1536(a)(2) (2006) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . . .").

[220] Estate of Hage v. United States, 82 Fed. Cl. 202, 211 (2008).

[221] Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 315 (D.C. Cir. 1938).

[222] Brian E. Gray, *The Property Right in Water*, 9 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1, 4 (2002) (explaining that water is a common resource "shared . . . by water right holders and other consumptive users").

[223] Bergman v. Kearney, 241 F. 884, 893 (D. Nev. 1917).

[224] Andrew H. Sawyer, *Changing Landscape and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 OKLA. L. REV. 311, 343 (1997).

[225] *See* NEV. REV. STAT. § 533.025 (2008).

[226] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring).

plaintiff had purchased the property.[227] Nonetheless, the Court still held that, based on the facts of the case, there was no taking of property, acknowledging that property law cannot be static.[228] States should have flexibility to regulate in response to changing conditions.[229] Thus, the Hages cannot claim that they expected the Forest Service to never regulate the clearing of vegetation from government land in the future, even though the regulation was not in place when the Hages purchased the property.[230] Therefore, the Hages did not have reasonable investment-backed expectations that clearing of Forest Service land would not be regulated in the future.

3. Character of the Governmental Action

It was inappropriate for Judge Smith to hold that the character of the governmental action was not valid based on purported "threats and intimidation" by the Forest Service.[231] Although the Court never clearly defined the term "character of the governmental action,"[232] the U.S. Court of Appeals for the District of Columbia Circuit has held that "the character of the governmental action depends both on whether the government has legitimized a physical occupation of the property . . . and whether the regulation has a legitimate public purpose."[233] Here, the court must weigh effective denial of the permit against the legitimacy of the regulation. The Forest Service regulation was a general regulation brought about to control private activities on public lands through the issuance of permits.[234] Therefore, it did not regulate the Hages' water rights specifically and the Forest Service did not promulgate the regulation as a vengeful act against the Hages, as Judge Smith suggested.[235] The regulation applied to the entire National Forest System and was consistent with the Federal Land Policy and Management Act of 1976, which requires the Forest Service and other federal agencies to manage federal lands "under principles of multiple use and sustained yield."[236] Although the Forest Service had the discretion to require the permit or not,[237] the regulation did have a legitimate public purpose in regulating uses on public lands that are subject to multiple uses and mandates beyond just grazing of cattle.[238] In weighing the character of the governmental action, Judge Smith should have not focused on the Forest Service's purported vengeance towards the Hages, but rather, whether the Forest Service was regulating uses on public lands consistent with

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[227] *Id.* at 1008 (majority opinion).
[228] *Id.* at 1032; *id.* at 1035 (Kennedy, J., concurring).
[229] *Id.* at 1035 (Kennedy, J., concurring).
[230] Hage v. United States, 35 Fed. Cl. 147, 153, 156 (1996).
[231] Estate of Hage v. United States, 82 Fed. Cl. 202, 212 (2008).
[232] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Kupiec, *supra* note 75, at 866.
[233] Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 879 (D.C. Cir. 1999) (emphasis and citations omitted).
[234] 36 C.F.R. § 251.53 (2008).
[235] *Hage*, 35 Fed. Cl. at 153, 156.
[236] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (2006); 36 C.F.R. § 251.53.
[237] 36 C.F.R. § 251.53.
[238] 43 U.S.C. § 1732(a); *see generally* 43 U.S.C. §§ 1751-53.

congressional mandate.[239] Although Judge Smith correctly refused to consider the growth of vegetation to determine the character of the governmental action,[240] he incorrectly applied the character of the governmental action factor to the relationship between the Hages and the Forest Service. Instead, Judge Smith should have applied the character of the governmental action factor to the regulation itself, as the U.S. Court of Appeals for the District of Columbia Circuit did, and held that the character of the governmental action was legitimate.[241]

C. *The Future of* Estate of Hage

If the Forest Service appeals this decision to the U.S. Court of Appeals for the Federal Circuit, the court will likely reverse the finding of a taking of water rights. Although the U.S. Court of Appeals for the Federal Circuit will more than likely accept the factual findings made by Judge Smith that the Forest Service erected electric fences, preventing cattle from accessing all water sources within the Table Mountain Allotment,[242] the court will likely recognize that this was only a temporary taking with no physical occupation, which should have been analyzed under the *Penn Central* balancing test. The *Penn Central* factors for a compensable temporary taking will be difficult to meet considering that the Forest Service has a public mandate to manage public lands for multiple uses and "all rangeland values," which includes maintenance of wildlife habitat.[243]

Moreover, the U.S. Court of Appeals for the Federal Circuit will also likely find that there was no regulatory taking of water rights under the *Penn Central* balancing test because: 1) the Hages had no reasonable expectation that the Forest Service would forego regulating activities on its own land, and 2) the character of the governmental action was legitimate. Congress has directed the federal land management agencies, including the Forest Service, to regulate rangelands for all viable public uses.[244] Therefore, it was not reasonable for the Hages to assume that the Forest Service would back away from that mandate, despite the fact that the regulation was not in place at the time the Hages purchased the ranch in 1978.[245] In addition, the court cannot base the character of the governmental action upon the relationship between the parties, but instead must consider whether the regulation is legitimate.[246] Given the Forest Service responsibility for management of public lands, it is likely that the U.S. Court of Appeals for the Federal Circuit will find the regulation to have been legitimate if the court analyzes the character of the governmental action factor as intended.[247]

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[239] 43 U.S.C. § 1732(a).
[240] Estate of Hage v. United States, 82 Fed. Cl. 202, 212 (2008).
[241] Dist. Intown Props. P'ship v. District of Columbia, 198 F.3d 874, 879 (D.C. Cir. 1999).
[242] *Estate of Hage*, 82 Fed. Cl. at 206, 211.
[243] 43 U.S.C. § 1732(a); Public Rangelands Improvement Act, 43 U.S.C. § 1901(b)(2) (2006).
[244] 43 U.S.C. § 1901(b)(2).
[245] Hage v. United States, 35 Fed. Cl. 147, 153, 156 (1996).
[246] *Dist. Intown Props. P'ship*, 198 F.3d at 879.
[247] *See* 43 U.S.C. §§ 1732(a), 1901(b)(2).

Recently, in *Casitas*, the U.S. Court of Appeals for the Federal Circuit held that a required diversion of water for endangered species resulted in a physical taking of water rights.[248] However, the Hages' claims are much more tenuous than the claims made in the *Casitas* case. In *Casitas*, there was an actual diversion of water required by the Bureau of Reclamation and a contracted water right.[249] It is also important to note that the three Supreme Court cases that did find water rights takings, involved diversions as well.[250] However, in this case, the government did not intentionally divert the water for another use; natural growth of vegetation prevented the water from reaching the Hages' ranch.[251] Therefore, there was no actual government action, except the effective denial of the permit to clear the ditches, and that government action did not rise to the same level as requiring a diversion of water. In addition, the Hages did not have a contract for the water from the government agency in question that would have given them the strength of a breach of contract claim like in the *Casitas* case.[252] Although the U.S. Court of Appeals for the Federal Circuit seems predisposed to find water rights takings after the *Casitas* case, the U.S. Court of Appeals for the Federal Circuit can easily distinguish the *Estate of Hage* case from the *Casitas* case because there is no physical diversion of water.

VI. CONCLUSION

Water rights are a unique form of property because the rights are not clearly possessory and can be transported off-site, making it possible for someone with a long enough "straw" to "drink someone else's milkshake."[253] As water resources become scarcer, water rights takings claims may become more common in an attempt to protect those property rights. Takings law is already a complex and unclear area of law when dealing with land and other property that is clearly possessory.[254] Furthermore, the application of takings law to water rights adds another layer of complexity because water rights are usufructuary and not subject to "absolute physical possession."[255] Despite this complexity, case law has consistently found: 1) takings of water rights when actual

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[248] Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1295 (Fed. Cir. 2008).

[249] *Id.* at 1281-82.

[250] Dugan v. Rank, 372 U.S. 609, 615, 620 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725, 729-30, 752 (1950); Int'l Paper Co. v. United States, 282 U.S. 399, 405-06, 408 (1931).

[251] Estate of Hage v. United States, 82 Fed. Cl. 202, 206 (2008).

[252] *Casitas*, 543 F.3d at 1281.

[253] Davenport & Bell, *supra* note 3, at 3; Sax, *supra* note 169, at 260; Andrew P. Tauriainen, *California's Evolving Water Law: The Water Rights Protection and Expedited Short-Term Water Transfer Act of 1999*, 31 MCGEORGE L. REV. 411, 415 (2000); THERE WILL BE BLOOD (Paramount Vantage & Miramax Films 2007).

[254] BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977); Daniel J. Curtin, Jr., *Foreword* to TAKING SIDES ON TAKINGS ISSUES xxi, xxi (Thomas E. Roberts ed., 2002) ("Takings law is notoriously complex, and a desire for clarity exists among many of those who must deal with it.").

[255] Hage v. United States, 35 Fed. Cl. 147, 172 (1996); *see* Sax, *supra* note 169, at 260.

diversions are involved;[256] and 2) the state can regulate water rights for public purposes.[257] *Estate of Hage* is inconsistent with over seventy years of case law. The U.S. Court of Appeals for the Federal Circuit should overturn the decision on appeal, not only to protect reasonable government regulation of public property, but also to clarify the limits of water rights takings for future cases.

[256] Dugan v. Rank, 372 U.S. 609, 615, 620 (1963); United States v. Gerlach Live Stock Co., 339 U.S. 725, 729-30, 752 (1950); Int'l Paper Co. v. United States, 282 U.S. 399, 405-06, 408 (1931); *Casitas*, 543 F.3d at 1296.

[257] Abelson, *supra* note 176, at 422.