DISCLAIMER

Electronic versions of the exhibits in these minutes may not be complete.

This information is supplied as an informational service only and should not be relied upon as an official record.

Original exhibits are on file at the Legislative Counsel Bureau Research Library in Carson City.

Contact the Library at (775) 684-6827 or library@lcb.state.nv.us.

In the United States Court of Federal Claims

* *

E. WAYNE HAGE AND
THE ESTATE OF JEAN N. HAGE,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* *

No. 91-1470L

Senior Judge Smith

Filed: FEB -5 2003

ORDER

On April 29, 2002, Defendant filed a Motion for Partial Summary Judgment on Plaintiffs' Claim of Taking Based Upon Denial of Access to Stockwaters and Forage. Plaintiffs filed their opposition to Defendant's motion on May 29, 2002, and Defendant replied on June 12, 2002. Oral argument on Defendant's motion was held on July 26, 2002. After careful consideration of the briefs and oral argument, the Court hereby DENIES Defendant's Motion for Partial Summary Judgment.[1]

In its motion, Defendant argues that Plaintiffs' taking claims based upon lack of access to federal grazing allotments as a result of the withdrawal of the grazing privilege must be dismissed as noncompensable. Defendant believes that Plaintiffs are attempting to "bootstrap" a property right to forage or an easement to graze onto their vested water rights. Defendant relies on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) for the principle that grazing is a revocable privilege and serves as a pre-existing limitation on Plaintiffs vested water rights and any forage associated with stockwaters or 1866 Act ditches on federal lands. As a matter of law, defendant claims that the loss of access as a result of withdrawal of the grazing privilege is therefore noncompensable, since that interest was never part of Plaintiffs' title to water rights or ditch rights under the 1866 Act.

Plaintiffs respond that Defendant's motion should be denied because: (1) plaintiffs' bundle of rights in this case amounts to a "fee interest" which includes the right of access to vested water

[1] The Court's decision was conveyed to the parties in a telephone status conference on December 11, 2002. This Order sets forth the basis for the Court's decision.

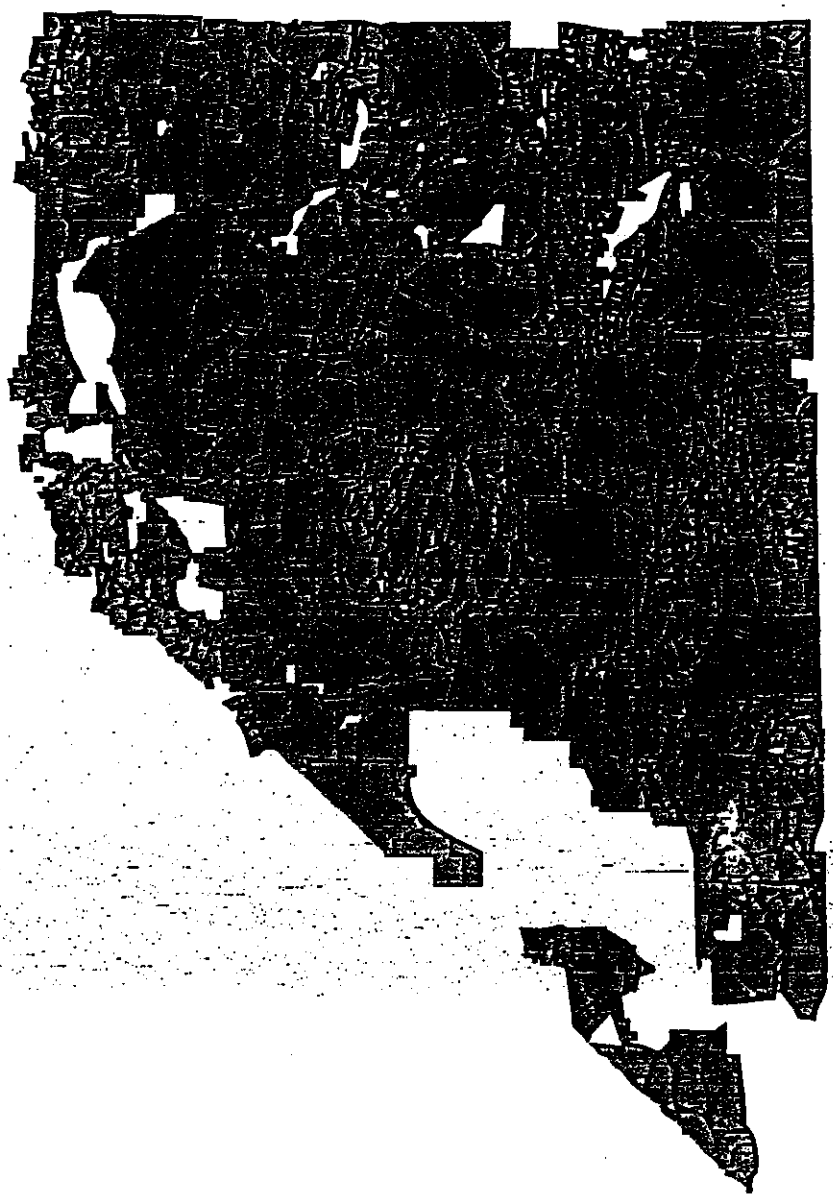
rights; and (2) that the taking was not the result of a revocation of the grazing permits, but rather a combination of physical and regulatory actions by the government that culminated in the taking of Plaintiffs' cattle operation and stockwater rights in 1991. In support, plaintiffs argue that the government is estopped from asserting the grazing rights have no value because they routinely impose estate taxes on property rights located on grazing allotments when the rancher using those allotments dies. Plaintiffs also highlight that a factual dispute exists as to why their grazing permits were not renewed. Furthermore, even if the grazing permits were renewed, plaintiffs could not abide by them because the government's unlawful actions closed their livestock business in 1991. Lastly, Plaintiffs argue that unlike the permit grazing lands in *United States v. Fuller*, 409 U.S. 488 (1973), these property rights are independent of the grazing permit, have independent value apart from any permit, and enhance the value of the base properties to which they are appurtenant.

As an initial matter, the Court recognizes that this is Defendant's fourth motion for summary judgment or partial summary judgment, and appreciates the government's efforts to narrow the issues in this matter. In this instance, however, Defendant has failed to set forth an issue that the Court can dispose of on summary judgment. First, as Plaintiffs established at trial, the stockwater rights and ditch rights were possessed by Plaintiffs' predecessors in interest long before the grazing permit system was established by the government. Second, Defendant's reliance on *Lucas* is misplaced because the permissible permanent easement the Supreme Court envisioned was in the context of pre-existing nuisance principles inherent in the landowner's title itself. *Lucas*, 505 U.S. 1028-29. Lastly, Defendant appears to suggest that the rights the Court enumerated in *Hage v. United States*, 51 Fed. Cl. 570 (2002), are essentially worthless without a corresponding grazing permit. Even looking past the factual disputes that exist surrounding the cancellation of the grazing permits, the Court is not of the opinion that the lack of a grazing permit that prevents access to federal lands can eliminate Plaintiffs' vested water rights and ditch rights that pre-date the creation of the permit system. The value of these rights, if any, is something to be determined at trial. For these reasons, the Court hereby DENIES Defendant's Motion for Partial Summary Judgment.

It is so ORDERED.

LOREN A. SMITH
Senior Judge

Nevada Grazing Allotments



Source: *Nevada Grazing Statistics Report and Economic Analysis for Federal Lands in Nevada*, State of Nevada Department of Agriculture, 2001.

HAGE V. U.S. DECISION DEFINITIONS

Source of definitions - *Hage v. U.S.*, Page 11 Sections II, b.

"This court finds that **plaintiffs** presented evidence at trial that showed by the preponderance of evidence that the plaintiffs and their predecessors appropriated and maintained a **vested water right** in the following bodies of water on the **Ralston and McKinney allotments.** In addition to certificates of appropriation that were entered into evidence, the plaintiffs also submitted an exhaustive **chain of title** which showed that the **plaintiffs and their predecessors-in-interest had title to the fee lands** where the following springs and creeks are located."

Where ultimate conclusions can be determined only by applying rules of law, result reached embodies "conclusion of law," not "finding of fact," **as respects appellate review.** *Mallinger v. Webster City Oil Co.*, 234 N.W. 254, 256, 211 Iowa 750.

A conclusion by way of reasonable inference from the evidence is a **"finding of fact"** within statutory rule **making trial justice's findings conclusive**. Gen.Laws 1938, c. 300, art. 3, § 6. *Recchia v. Walsh-Kaiser Co.*, 43 A. 2d 313, 314, 71 R.I. 208.

VESTED – VESTED RIGHT

It is **only a vested right** which cannot be taken away except by due process of law. *Merritt v. Ash Grove Lime & Portland Cement Co.*, 136 Neb. 52, 285 N.W. 97 (1939); Crump v. Guyer, 60 Okla. 222, 157 P. 321, 2 A.L.R. 331 (1916)

The word "property" as used in the Due Process Clause refers to vested rights, and there is not reference to mere concessions or privileges which may be bestowed or withheld at will. *Senior Citizens League v. Department of Social Sec. Of Wash.*, 38 Wash. 2d 142, 228 P.2d 478 (1951).

A mere subjective **"expectancy" is not an interest in property** protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570, 1 I.I.R. Cas. (BNA) 33 (1972).

To have a property interest in a benefit protected by procedural due process, **a person must have more than an abstract need or desire** for it, and he or she must have more than a unilateral expectation of it; in short, **he or she must have a legitimate claim of entitlement to it.)** *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548, 1 I.E.R. Cas. (BNA) 23 (1972).

Licenses and permits are generally not considered property in any constitutional sense. *Wiggins Ferry Co. v. East St. Louis*, 107 US 365, 27 L Ed 419, 2 S Ct 257; *Union Pass R. Co. v. Philadelphia*, 101 US 528, 25 L Ed 912.

Accordingly, the revocation of such qualified rights does not amount to deprivation of property without due process of law. *State v. Durein*, 70 Kan. 1, 78 P. 152 (1904).

(In recognition of the Commerce Clause of the US Constitution, it has often been declared that a state cannot make the payment of a license [permit] tax or the securing of a license [permit] a condition to carrying on interstate commerce and cannot tax the privilege of carrying on interstate business.)

The substantial **value of property lies in its use**; if the right of use is denied, the value of the property is annihilated and ownership is rendered a barren right. *City of Akron v. Chapman*, 160 Ohio St. 382, 52 Ohio Op. 242, 116 N.E.2d 697, 42 A.L.R.2d 1140 (1953).

FIND—FINDS—FINDING OF FACT

Find:

To "find" in law, **means to determine and declare an issue**. *Brooks v. Stewart*, 218 P.2d 56,60,97 Cal.App.2d 385.

To "find" **is to ascertain by judicial inquiry**. *Hallgring v. Board of Com'rs of City of Newark*, 95 A.2d 498, 500, 25 N.J.Super. 88.

Finding:

A **"finding" is** the **ascertainment of facts** and the result of investigation, and a **"judgment" is the application of the law to ascertain facts** and result from consideration. *Warner v. Baltimore & O. R. Co.*, 22 Ohio Dec. 1, 11 Ohio N.P., N.S., 487.

The **"finding"** is ascertainment of facts by judge, the **court's decision** upon the facts, and court's best judgment of what entire evidence establishes. *Herman v. Glassock*, 155 P.2d 912, 913, 68 Cal.App.2d 98.

The term "findings" as used in Civil Practice Act relating to court's duty to make findings refers to **determination of questions of fact, not to a statement by court of various inferences, which could possibly be drawn from the evidence**. *Kazansky v. Bergman*, 164 N.Y.S.2d 93, 98, 4 A.D.2d 79.

Facts stated by trial court in a memorandum made part of the decision, not inconsistent with facts specifically found, become part of the "findings" and the Supreme Court is bound to accept the facts so found on appeal. *Sime v. Jensen*, 7 N.W.2d 325, 327, 213 Minn. 476.

Trial court's "finding" is the equivalent of a "verdict": *Western Reserve Mut. Casualty Co. v. Holstein*, 47 N.E.2d 794, 796, 72 Ohio App. 65.

A finding by the court **takes the place of a verdict by the jury**. *Rhodes v. United States Nat. Bank*, 66 F. 512, 514, 13 C.C.A. 612, 34 L.R.A. 742.

Finding of Fact:

The **purpose of "findings of fact"** is to **aid appellate court** in reviewing decision below. *Hurwitz v. Hurwitz*, 136 F.2d 796, 799, 78 U.S.App.D.C. 66, 148 A.L.R. 226.

Conclusions of Court of Appeals, in reversing the judgment of Circuit Court, that evidence was so overwhelmingly against verdict of jury that it would be unjust and wrong to let it stand, **was but a "finding of fact," and Supreme Court, on certiorari to Court of Appeals would accept that Conclusion without going to the record to determine the correctness of the conclusion, since the conclusion was not subject to revision.** *Thompson v. Curry*, 56 So.2d 362, 363, 256, Ala. 564.

A "fee simple title" is **a merchantable title** or one not subject to such reasonable doubt as would create a just apprehension and is such a title as would be regarded as merchantable **so that persons of reasonable prudence and intelligence would be willing to take it and pay the fair value of the land.** *Bragg v Chilcote*, 176 Ill.App 371

PUBLIC LAND

Public lands comprise the general public domain; unappropriated lands; the lands not held back or reserved for any special governmental or public purpose. *U. S. v. Garetson*, 42 4. 22, 24.

The words "public lands" are used to describe such as are subject to sale or other disposal under general laws. *Southern Pac. R. Co. v. Ambler Grain & Million Co.*, D.C. Cal., 57 F.2d 536, 539.

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.Ct. 856, 145 U.S. 535, 538, 36 L.Ed. 806.

"Public lands" are lands open to sale or other disposition under general laws, lands to which no claims or right of others have attached...*Northern Pac. Ry Co. v. Wismer*, C.C.A.Wash., 230 F 591, 593.

Having various meanings under different statutes and circumstances, the term "public lands" generally refers to government lands that are open to public sale or other disposition under general laws and that are not held back or reserved for a governmental or public purpose. The phrase "public lands" is synonymous with "public domain." *Kindred v Union P.R.Co.*, 225 US 582, 56 L ed 1216, 32 S Ct 780; *Humboldt County v United States* (CA 9 Nev) 684 F 2d 1276; *Columbia Basin Land Protection Assoc. v Schlesinger* (CA 9 Wash)

Title to lands in territory that is ceded to the United States passes to the federal government, which takes proprietary title **only** to the lands that the ceding government held in the proprietary capacity. *United States v Gardner* (DC Nev) 903 F Supp 1394, (CA 9 Nev)

Property rights that vested prior to the cession of the land will be protected, . . . because a treaty of cession usually protects complete title in real property existing at the time of cession by a foreign government and such title generally need not be presented for confirmation. *Carino v Insular Government of Philippine Islands*, 212 US 449, 54 L Ed 594, 29 S Ct 334; *United States v Coronado Beach Co.*, 255 US 472, 65 L Ed 736, 41 S Ct 3781; *Tyler v Magwire*, 84 US 253, 17 Wall 253, 21 L Ed 576.

STATE JURISDICTION

The Courts of a state must determine the validity of title to land within the state, even if the title emanates from the United States or if the controversy involves the construction of federal statutes; *Garland v Wynn*, 61 US 6, 20 How 6, 15 L Ed 801