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NOTE

TAKINGS IN THE COURT OF FEDERAL CLAIMS: DOES THE COURT MAKE TAKINGS POLICY IN *HAGE*?

I. INTRODUCTION

In the eleven western states, almost half of the land is federally owned and a large percentage of that federal land is used for grazing privately-owned domestic livestock.¹ The Department of the Interior estimates that permitted grazing occurs on thirty-six percent of federal land, but this percentage is much higher in the areas containing more federal rangeland.² In 1990, the eleven western states had approximately seventeen million beef cattle and 102,800 beef producers.³ Roughly eighteen percent of those beef producers had federal grazing permits, but in some states that percentage was much higher.⁴ For example, eighty-eight percent of the cattle in Idaho graze for at least part of the year on federal lands.⁵

Livestock grazing programs are managed by either the United States Forest Service or the United States Bureau of Land

1. See 2 SECRETARY OF THE INTERIOR, U.S. DEP'T OF INTERIOR, THE IMPACT OF FEDERAL PROGRAMS ON WETLANDS 220 (1994) [hereinafter FEDERAL PROGRAMS]. Forty-eight percent of the land in the 11 western states (including Washington, Oregon, California, Arizona, New Mexico, Nevada, Idaho, Montana, North Dakota, South Dakota, and Wyoming, but excluding western North Dakota) is federally owned and approximately 75 percent of that federal land is grazed by domestic livestock. *Id.*

2. See *id.* The excluded areas are those in which federal rangeland is scarce, such as in the coastal areas and the Central Valley. See *id.*

3. See *id.*

4. See *id.*

5. See *id.*

Management ("BLM"), depending on the location.⁶ In Idaho, New Mexico, and Nevada, "eighty percent of the permitted cattle graze on BLM lands and twenty percent on Forest Service lands."⁷ For ranchers in these dry states, a grazing permit from one of these federal agencies can mean the difference between a profitable ranch and a non-existent ranch.⁸

Wayne and Jean Hage own a ranch in Nevada that had depended for its survival on federal grazing land and water sources running within federal forest land.⁹ In order to graze cattle on federal lands legally, the Hages had grazing permits from the Forest Service that determined how many and what kind of livestock the Hages could graze, as well as when and where.¹⁰ When those permits were modified and the grazing allowances significantly decreased in the late 1980s and early 1990s, the Hages found that they were unable to properly manage their ranch and its cattle herds.¹¹ Claiming a taking in violation of the Fifth Amendment, the Hages brought suit against the federal government in 1991.¹²

In March 1996, the United States Court of Federal Claims issued a preliminary opinion in the Hages' case.¹³ Although

6. *See id.* The two agencies together administer 87 percent of the government's rangeland. *See id.*

7. *See id.*; *see also* Joseph M. Feller, *What is Wrong With the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 558 (1993/1994) ("The BLM . . . is the largest land manager, public or private, in the United States."). Feller points out that the BLM manages over two-thirds of the state of Nevada and that "[g]razing by domestic livestock, primarily cattle, is permitted on over 90 percent of the land under the BLM's jurisdiction." *Id.* at 560.

8. *See* David Abelson, Comment, *Water Rights and Grazing Permits: Transforming Public Lands Into Private Lands*, 65 U. COLO. L. REV. 407, 408 (1994) ("Due to the aridity of the West, ranchers must have access to vast areas of rangeland in order to provide enough forage for their livestock.").

9. *See Hage v. United States*, 35 Fed. Cl. 147, 153 (1996) ("Without access to water located in the Toiyabe National Forest, the ranch cannot successfully operate."). Hage is a prominent figure in the Wise Use Movement, whose proponents claim that grazing rights are property rights. *See* Abelson, *supra* note 8, at 409-10. Hage is also tied with the "Stewards of the Range," which is the legal arm of the ranchers' resistance. *See* James Ridgeway & Jeffrey St. Clair, *On The Range*, LAS VEGAS REV.-J., July 16, 1995, available in WESTLAW, 1995 WL 5796579.

10. *See Hage*, 35 Fed. Cl. at 153.

11. *See id.* at 177.

12. *See id.* at 156. The Hages are suing for \$28.4 million. *See* Ridgeway & St. Clair, *supra* note 9, at *5.

13. *See Hage*, 35 Fed. Cl. at 147.

this story is not yet over, a review of the court's preliminary opinion will lead to a clearer understanding of its potential outcome and the court's role in takings litigation. This article explores Fifth Amendment takings law from the perspective of the Court of Federal Claims, as presented in part in the *Hage* case. Part II briefly reviews Fifth Amendment takings jurisprudence and the elements needed to prove a takings claim. Part III explores the recent *Hage* decision and its potential outcome in the Court of Federal Claims. Part IV discusses the court's justification for its recent takings opinions favoring private property owners and the policymaking action of courts versus legislatures in the takings arena. Part IV also refers to the *Hage* case and concludes that the Court of Federal Claims is not poised to set significant precedent, nor to effect general takings policy, with the *Hage* case. In addition, the Hages are unlikely to recover a significant amount, if anything, for the alleged taking of their property. Part V concludes that takings policy will continue to evolve with input from both the judiciary and the legislature.

II. FIFTH AMENDMENT TAKINGS

The Takings Clause of the Fifth Amendment prohibits the federal government from taking private property for public use without just compensation.¹⁴ A taking can arise when a government action results in the physical occupation of private property,¹⁵ or when a governmental regulation of private property "goes too far."¹⁶ When a regulatory taking is alleged, the court must first determine whether there is a complete deprivation of the economically beneficial use of the property.¹⁷ The government has "gone too far" and taken private property when

14. See U.S. CONST. amend. V. The Fifth Amendment prohibition against uncompensated takings also applies to the states through its incorporation into the Due Process Clause of the Fourteenth Amendment. See U.S. CONST. amend. XIV, § 1; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978).

15. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

16. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

17. See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987) ("We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.'") (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

a regulation denies an owner all economically beneficial use of his property.¹⁸ However, a regulation that results in less than a complete deprivation need only promote and substantially advance a legitimate governmental interest to withstand a takings claim.¹⁹

The Hages have alleged a regulatory taking of their grazing and water rights, but they must first establish that they actually own a property interest protected by the Fifth Amendment before the Court of Federal Claims will determine whether a taking has actually occurred.²⁰ Although many westerners use public land in a manner that does not result in, or arise from, a private property right,²¹ the Hages believe that a vested property right may be established by a rancher's traditional use of public lands.²² Underlying the Hages' case is the fact that historical grazing policy is at odds with present environmental policy.²³ Policy, however, is not an issue in the Hages' case;²⁴ whether compensatory property rights have been taken is. On one side, Wayne Hage "seeks to intertwine his use of federal lands with his constitutionally protected water right, hoping to

18. See *Keystone*, 480 U.S. at 495.

19. See *Nollan*, 483 U.S. at 834; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 132-38 (1978). For instance, the use of private property may be limited without a taking by zoning restrictions and the prevention of a nuisance. See *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

20. See *Hage*, 35 Fed. Cl. at 151 ("In the concrete taking case the court must initially decide if the plaintiff has an actual property interest, if this is a point of dispute. This determination is based upon long and venerable case precedent, developed over the last two centuries."); see also Theodore Blank, Comment, *Grazing Rights on Public Lands: Wayne Hage Complains of a Taking*, 30 IDAHO L. REV. 603, 608 (1993/1994) ("This inquiry, into the nature and extent of the governmental action, becomes necessary only after the complainant has successfully established ownership of an interest that qualifies as property under the Fifth Amendment.").

21. See Blank, *supra* note 20, at 608 n.27 (citing 1 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 3.04(3)(c)(i) (1993) ("Many interests created by federal law, such as grazing leases, do not amount to true property rights.")).

22. See *id.* at 610.

23. See generally Feller, *supra* note 7, at 556-57 ("Historically, these lands have been managed primarily for the benefit of livestock ranchers, with environmental protection and alternative uses relegated to a secondary role at best. Over the last two decades, new Congressional mandates have called on the BLM to serve a broader constituency and to ensure protection of environmental resources such as wildlife, water quality, and natural scenery.").

24. See *infra* part IV.

force the conclusion that a regulatory interference with livestock grazing 'takes' both a grazing right and his water right."²⁵ In response, the government maintains that a grazing permit is merely a license to graze, and therefore any governmental regulation of grazing practices does not invoke any Fifth Amendment taking concerns.

III. THE HAGE CASE

A. *The Pine Creek Ranch and the Hages' Federal Grazing Permit*

The Pine Creek Ranch in central Nevada has been used for cattle ranching since its creation in 1865.²⁶ The ranch is approximately 7000 acres in size, but ranch owners have always had to rely upon the use of additional government-owned rangeland for grazing their cattle and ditch rights-of-way through federal land for access to water supplies.²⁷ The first grazing permit was issued to the owners of Pine Creek Ranch in 1907 based upon their prior use of the range.²⁸

Wayne and Jean Hage purchased the Pine Creek Ranch and received their first grazing permit from the United States Forest Service in 1978.²⁹ This permit allowed the Hages to graze their cattle within six allotments of the Toiyabe National Forest during specified times of the year.³⁰ However, that permit and those that followed contained specific provisions that allowed the federal government to suspend, revoke or amend the permit for a variety of reasons.³¹ For example, part 2, section 8 of the

25. Blank, *supra* note 20, at 610.

26. *See Hage*, 35 Fed. Cl. at 153.

27. *See id.* "Plaintiffs use ditch rights-of-way, which are easements on federal lands, to transport water for irrigation, stock watering and domestic purposes." *Id.* The Hages use 512,000 acres of BLM rangeland and 240,000 acres of the Toiyabe National Forest for cattle grazing. Blank, *supra* note 20, at 609.

28. *See Hage*, 35 Fed. Cl. at 153.

29. *See id.*

30. *See id.* "[T]he permit also contained terms unique to plaintiffs . . . [including] number, kind and class of livestock permitted to graze, and the period of such use." *Id.*

31. *See id.* Federal regulations also state the reasons for which a grazing preference and permit may be cancelled, modified or suspended. *See* 36 C.F.R. § 222.4 (1995) (Forest Service regulation regarding grazing permits); 36 C.F.R. §§ 4140.1,

1978 permit stated that the government could terminate the grazing permit "whenever the area described in this permit is needed by the Government for some other form or use."³² Moreover, the 1984 permit also required the Hages to meet certain use conditions in order to retain their permit.³³

The Hages' conflicts with the Forest Service began almost as soon as they bought their ranch. In 1979, the Forest Service granted permission to the Nevada Department of Wildlife ("NDOW") to release elk for hunting into the Hages' Table Mountain allotment area of the Toiyabe National Forest.³⁴ The Hages complained to the state about the elk, arguing that the elk drank their water, ate their forage, and "impeded the grazing and movement of their livestock."³⁵ The state responded by stating that elk hunting and cattle grazing "appear to be reasonably compatible," and therefore the Hages would need to share their use of the public rangelands with the hunters.³⁶ Meanwhile in 1980, the Forest Service also began to divert the flow of water in springs claimed by the Hages in their Meadow

4170.1-1 to -2 (1995) (BLM regulations regarding grazing permits). In general, a valid grazing permit may be cancelled, modified or suspended if the permittee violates the terms or conditions in his permit, federal regulations, or state or federal law, or if the forage resource has been damaged or destroyed. See 36 C.F.R. §§ 222.4, 4140.1, 4170.1-1, 4170.1-2 (1995); see also Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505, 508 (1993/1994) (discussing the acquisition and potential loss of a federal grazing preference).

32. *Hage*, 35 Fed. Cl. at 153. The government could also change any of the permit's terms when necessary for resource protection. See *id.* The Hages' revised 1984 permit added more restrictions: "[t]his permit may be modified at any time during the term to conform with needed changes brought about by law, regulations, executive orders, allotment management plans, land management planning, numbers permitted or season of use necessary because of resource condition or other management needs." *Id.*

33. See *id.* For example, the Hages "were responsible for additional maintenance and structural improvements on the federal lands. . . . [and] were required to graze at least 90% of the permitted number of cattle or risk termination of their permit for 'non-use.'" *Id.* at 153-54.

34. See *id.* at 154.

35. *Id.*

36. *Id.* Grazing permits are generally subject to multiple use management of public lands requirements under the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315r (1994), the Federal Land Policy & Management Act of 1976, 43 U.S.C. §§ 1702(c), (k) (1994), the Public Range Lands Improvement Act of 1978, 43 U.S.C. §§ 1901(b)(2), 1902(d), (f), 1903(b) (1994), and various federal regulations.

Canyon allotment.³⁷ The Hages responded by filing a request with the State Engineer to initiate water rights adjudication in 1981.³⁸

By the late 1980s, the Forest Service had threatened to modify, suspend or cancel the Hages' grazing permits in these two allotments in response to alleged permit violations and serious range deterioration.³⁹ After the Forest Service cancelled 25% of the Table Mountain allotment grazing permit and suspended 20% of the same for two years,⁴⁰ cancelled 38% of the Meadow Canyon allotment and suspended 100% of the same for five years,⁴¹ and impounded and sold a number of cattle, the Hages decided to sue.

B. *Wayne Hage Gets His First Day in Court*

In 1991, Wayne and Jean Hage brought suit against the United States claiming that the federal government, through the actions of the Forest Service, had taken their grazing and water rights.⁴² In their complaint, the Hages sought recovery based on three theories. First, they claimed "that the grazing permit create[d] a binding contract between the parties which [the] defendant ha[d] breached," thus entitling them to damages.⁴³ Second, they claimed that the government took their property without just compensation.⁴⁴ Third, they claimed that they were entitled to compensation for improvements construct-

37. *See Hage*, 35 Fed. Cl. at 155.

38. *See id.* This adjudication, which began in 1991, was still in progress in 1996. *See id.* at 155 n.4.

39. *See id.* at 154-55. In 1988, the United States General Accounting Office (GAO) reported "that 20 percent of BLM and Forest Service allotments were being overgrazed and that for 75 percent of these areas, the rangeland managers had scheduled no change in grazing practices." FEDERAL PROGRAMS, *supra* note 1, at 221. *See generally* Feller, *supra* note 7, at 560-62 (describing the environmental impacts of livestock grazing which can cause severe deterioration).

40. *Hage*, 35 Fed. Cl. at 154.

41. *See id.* at 155.

42. *See id.* at 156. The Hages complained that the government had taken "compensable property rights in their grazing permit, water rights, ditch rights-of-way, forage on the rangeland, cattle and ranch . . . through physical and regulatory actions." *Id.*; *see also* Blank, *supra* note 20, at 609-10.

43. *Hage*, 35 Fed. Cl. at 156, 165-67.

44. *See id.* at 156, 167-78.

ed in the Toiyabe National Forest.⁴⁵ In response, the government sought summary judgment on each theory.

In March 1996, the United States Court of Federal Claims issued a preliminary opinion granting summary judgment to the government on the Hages' grazing permit claim only.⁴⁶ Holding that the Hages' grazing permit was merely a license to graze cattle, the court stated that the privilege to graze does not create a property right deserving of Fifth Amendment protection.⁴⁷ In regard to the Hages' other claims, however, the court denied summary judgment and concluded that the mixed questions of law and fact regarding the Hages' alleged property interests needed to be addressed at a limited evidentiary hearing.⁴⁸ A takings analysis will be conducted only if, at such a hearing, the court determines that the Hages actually own property rights in the claimed water, ditch rights-of-way and forage.⁴⁹

1. A Federal Grazing Permit is Merely a License to Graze⁵⁰

On the Hages' first theory, the court found that the grazing permit did not create a contract between the parties as a matter of law.⁵¹ The court agreed with the government's argument that a grazing permit does not create contractual rights because "the language and characteristics of the agreement are that of a license," and because "the Forest Service, as an agent for the federal government, did not have the authority to contractually bind the government."⁵² Instead of creating contractual rights,

45. *See id.* at 156, 178-180.

46. *See id.* at 147.

47. *See id.* at 171.

48. *See id.*

49. *See id.* at 178.

50. Although contractual rights, not property rights, were at issue in regards to the Hages' grazing permit, the court's holding is important to the general discussion because the Hages tried to intertwine their water and property rights with their grazing privilege. *See infra* notes 59, 73, 78-79 and accompanying text.

51. *See Hage*, 35 Fed. Cl. at 166.

52. *Id.* at 166. The claims court points out that "[a]ll the courts which have considered this issue have held or assumed such agreements to be licenses which confer certain privileges to the permittee, revokable at the government's discretion. *Id.* at 167; *see also* *Buford v. Houtz*, 133 U.S. 320, 326 (1890) ("We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years,

the permit “merely granted plaintiffs certain exclusive privileges based upon historical grazing practices.”⁵³

Those historical grazing practices, however, are the backbone of the Hages’ property rights argument. Wayne Hage acknowledges that his grazing permit does not *create* a grazing right protected by the Fifth Amendment; however, he does assert that he owns a property interest that vested prior to the creation of the permit system and the federal agencies that administer that system.⁵⁴ In his book, *Storm Over Rangelands: Private Rights in Federal Lands*, Hage argues that the permit “is only an acknowledgement of a prior existing private property right, created by the conjunction of two federal actions.”⁵⁵ Those two federal actions consist of the government’s severance of water rights from rights to the underlying public land,⁵⁶ and “the federal government’s acquiescence in the grazing of livestock on public lands.”⁵⁷ Hage asserts that these two federal actions together created a “property interest in the beneficial use of his state perfected water right.”⁵⁸ Moreover, Hage argues, his constitutionally protected water right combined with his grazing preference create a compensable property interest

that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.”)

53. *Hage*, 35 Fed. Cl. at 166. “[A] license creates a personal or revokable privilege allowing a specific party to utilize the land of another for a specific purpose but does not vest any title or interest in such property in the licensee.” *Id.* Under the federal land management statute, permits and leases for domestic livestock grazing on public lands are issued for ten-year periods. See 43 U.S.C. § 1752(a) (1994).

54. See *Blank*, *supra* note 20, at 611. Public lands were divided into specific grazing districts by the Taylor Grazing Act of 1934, which also required the issuance of exclusive permits for grazing privileges. See Pub. L. No. 34-482, 48 Stat. 1269 (codified as amended at 43 U.S.C. §§ 315-315r (1994)). See also *Falen & Budd-Falen*, *supra* note 31, at 507 (“[A] [grazing] preference is not, nor can it be, ‘created’ by the BLM or Forest Service. Rather during the grazing adjudication process, which usually occurred when the federal lands were withdrawn from settlement, preferences were awarded to those live operators who met certain qualifications.”).

55. *Blank*, *supra* note 20, at 610 (citing WAYNE HAGE, *STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS* 161-64, 181-87 (1989)).

56. See *id.* “[B]y statute, the federal government authorized the creation of rights to water on public lands in individuals who complied with state law.” *Id.*

57. *Id.* The federal government did not only acquiesce, but actually encouraged, such grazing during the time of western settlement and acquisition. See *Falen & Budd-Falen*, *supra* note 31, at 511-22.

58. *Blank*, *supra* note 20, at 610.

that the government has hindered through regulatory and administrative actions.⁵⁹

The claims court did not agree. Instead, the court determined that the grazing permit "never created a property interest but rather a preference to use the allotment before the government gave the right to another."⁶⁰ In so finding, the court referred to *Wyoming v. Colorado*,⁶¹ in which the Supreme Court held that a private party "who makes beneficial use of the public lands has a greater priority to the use of the land than another private party who did not."⁶² The person with priority, however, does not have a compensable property interest in the federal lands.⁶³ The court also pointed out that the Act of 1866, which did recognize vested rights in water and ditch rights-of-way through federal lands under state law, did not address private property rights in the public lands.⁶⁴

As for the Hages' investment-backed expectations and their essential need for grazing rights, the court acknowledged that "[t]he permit obviously adds value to plaintiffs' ranch and plaintiffs may have expected the option to renew the permit indefinitely."⁶⁵ Moreover, the court pointed out that the Hages' ranch may become worthless without a grazing permit.⁶⁶ Nevertheless, the court stressed "that [the] plaintiffs' investment-backed expectations and reliance on the privilege to graze do not, in themselves, create a property interest in the rangeland or the permit."⁶⁷ In addition, the court noted that it had previously found no right to the value that permitted grazing lands

59. *See id.* at 610-11.

60. *Hage*, 35 Fed. Cl. at 170. "In other words, a preference grants a party the right of first refusal, not a property right in the underlying land." *Id.*

61. 259 U.S. 419 (1922), *modified at* 353 U.S. 953 (1957).

62. *Hage*, 35 Fed. Cl. at 170.

63. *See id.*

64. *See id.* Moreover, the court stated that it "declines to create such rights contrary to the clear legislative intention of Congress." *Id.*; *see also* Blank, *supra* note 20, at 612-22 (discussing the acts passed and cases decided regarding the creation of water and grazing rights).

65. *Hage*, 35 Fed. Cl. at 171.

66. *See id.*

67. *Id.*; *see also* Blank, *supra* note 20, at 609 ("Hage insists that without grazing access, his water right has ceased to be economically viable and his reasonable investment-backed expectations have been defeated, resulting in a taking of his property without just compensation.").

contribute to a ranch.⁶⁸ In *White Sands Ranchers v. United States*, for example, the Court of Federal Claims declared that “[i]t is settled law that grazing permits, though they are of much value to ranchers in the operation of an integrated ranching unit, nevertheless do not constitute property for purposes of the just compensation clause.”⁶⁹

2. The Hages’ Potential Property Rights in Water, Ditch Rights-of-Way, Forage, and Cattle

On the Hages’ second theory of recovery, the court held that the plaintiffs had presented enough evidence to show potential ownership of certain water rights, ditch rights-of-way, and forage, and thus denied the defendant’s motion for summary judgement.⁷⁰ First, the court emphasized that “the right to appropriate water can be a property right,”⁷¹ and that both the legislature in the Act of 1866 and the Supreme Court in numerous cases have clearly acknowledged that private parties

68. *See Hage*, 35 Fed. Cl. at 169, 171.

69. *White Sands Ranchers v. United States*, 14 Cl. Ct. 559, 566 (1973). With support from the Supreme Court in *United States v. Fuller*, 409 U.S. 488 (1973), the claims court concluded by stating that “[i]t has also been held that even as the grazing permits may not be assigned any compensable value in their own right, so neither may the market value which they contribute to private fee lands be recognized in the just compensation due upon the taking of the private lands.” 14 Cl. Ct. at 567; *see also Fuller*, 409 U.S. at 494 (“The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property right be created in the permit lands themselves as a result of the issuance of the permit. Given that intent, it would be unusual, we think, for Congress to have turned around and authorized compensation for the value added to feed lands by their potential use in connection with permit lands.”).

70. *See Hage*, 35 Fed. Cl. at 171. The defendant initially argued that the court did not have jurisdiction to hear the Hages’ Fifth Amendment water-rights taking claim. *See id.* at 156-58. The court, however, found that it “has jurisdiction to determine title to real property as a preliminary matter when addressing a taking claim. Similarly, this court may determine whether plaintiffs have title to a property interest in water as a preliminary matter before addressing whether that property has been taken by the government.” *Id.* at 159. The Hages are also currently involved in litigation with the State of Nevada regarding their water rights in the Monitor Valley. *See id.* at 160.

71. *Id.* at 172 (citing *Wyoming v. Colorado*, 259 U.S. 419, 460-61 (1922), *modified* at 353 U.S. 953 (1957)).

may acquire vested water rights on public lands.⁷² Thus the Hages may have compensable rights in water on federal lands.

Assuming that they have compensable water rights, the Hages argued that they also have compensable forage rights that are "linked to their vested water right under the Act of 1866 and state law."⁷³ The Hages asserted that this right vested prior to 1907, when the federal land in question was first appropriated by the government.⁷⁴ Although they will have the opportunity to prove the existence of such forage property rights, the Hages' claim appears to be unsupported by both legislation and case law.⁷⁵ First, courts have held that grazing on federal land is merely a revokable privilege, and not a property right in federal rangeland.⁷⁶ Second, Congress has not established a property right in forage through any act or regulation.⁷⁷

The government asserts that, "as a matter of law, [the

72. *See id.* The court quotes the 1866 Act:

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. . . .

Id. (quoting 43 U.S.C. § 661). The court also cites two Supreme Court cases: *Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879), and *Central Pac. Ry. Co. v. Alameda County, Cal.*, 284 U.S. 463 (1932), for support.

73. *Hage*, 35 Fed. Cl. at 174. "Plaintiffs claim that the right to use water on the public lands and the right to graze under Nevada law 'are inextricably intertwined.'" *Id.* at 175. The court acknowledged that the Supreme Court has never addressed the scope of the water rights recognized by the Act of 1866. *Id.* at 175.

74. *See id.* at 175.

75. *See id.* at 174-75. Even the claims court says that the "[p]laintiffs present a novel argument regarding how and why they have vested grazing rights in the Toiyabe National Forest despite the overwhelming cases finding no such right." *Id.*

76. *See, e.g.*, *United States v. Fuller*, 409 U.S. 488 (1973); *Buford v. Houtz*, 133 U.S. 320 (1890). *See supra* notes 53, 60-64 and accompanying text.

77. Both the Act of 1866 and the Act of 1870, which incorporated the 1866 Act, granted water rights and ditch rights arising under the prior appropriation doctrine, but neither addressed property rights in federal land. Act of July 26, 1866, ch. 262, 14 Stat. 251 (codified as amended at 30 U.S.C. § 51 (1994) and 43 U.S.C. § 661 (1994)); Act of July 9, 1870, ch. 235, 16 Stat. 217 (codified as amended at 30 U.S.C. § 52 (1994) and 43 U.S.C. § 661 (1994)); *see also* *Ickes v. Fox*, 300 U.S. 82, 95 (1937) (reasserting that water rights were severed from federal lands by the Desert Act of 1877); *California Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158-62 (1935) (stating that Congress had intended to sever water on public lands from federal ownership with the Desert Act of 1877).

Hages'] alleged vested water rights do not grant [them] the right to 'bootstrap' an interest in adjacent federal lands and resources."⁷⁸ Furthermore, the government emphasizes that "courts consistently have held that an easement to graze on public lands does not attach to a water right on public lands."⁷⁹ Nevertheless, the court recognized that the federal government had to acknowledge at least some state-created private property rights in the public domain when it created the Toiyabe National Forest.⁸⁰ Moreover, compensation would be required under the Constitution if Congress had removed *all* of the state-created private property interests in the public domain.⁸¹ The Hages will have an opportunity to prove that they do in fact have property rights in the forage that stem from their property right to make beneficial use of the water within the federal forestland;⁸² however, the court will conduct a taking takings analysis only if they prove the existence of such a property right in forage.

The Hages have also claimed that the Forest Service took their property when it "imposed unreasonable conditions on access and maintenance of [their] ditch rights."⁸³ The government, however, argues that the Hages' activities exceeded "normal" maintenance, and thus the Forest Service "acted properly and reasonably by regulating [the Hages'] actions on the public lands."⁸⁴ As with their other alleged property rights, the Hages will need to prove their ownership of vested ditch rights and "that their desired use and maintenance of these rights does not exceed the scope of their property interest, requiring a

78. *Hage*, 35 Fed. Cl. at 174. "Defendant acknowledges that a stockwatering right is premised on the ability to graze stock and put the water to beneficial use and that if defendant revokes grazing permit the stockwatering right will be worthless." *Id.*

79. *Id.* at 174; see also *Buford v. Houtz*, 133 U.S. 320 (1890).

80. See *Hage* 35 Fed. Cl. at 175.

81. See *id.* at 175-76. "Just as the federal government could not take private property rights in water or ditch rights-of-way when it created the Toiyabe National Forest, the government could not take any other form of private property right in the public domain." *Id.* at 176.

82. See *id.*

83. *Id.* at 174.

84. *Id.* at 173. The defendant asserts that federal regulations allow the Forest Service to regulate and restrict ditch use and activities beyond the scope of normal maintenance and repair. *Id.* (citing 43 C.F.R. § 2801.1 (1995)).

special use permit⁸⁵ in order to proceed with the takings claim.

3. The Hages' Other Claims: Compensation for Cattle Taken and for Improvements Made to Federal Forest Land

The Hages also claimed that they should have been compensated for cattle taken by the Forest Service.⁸⁶ The cattle had been found on one allotment after the grazing period had expired and on another allotment after the Hages' permit for that area had been suspended.⁸⁷ The government argued that the cattle were thus trespassing on federal lands, and that it could, as the landowner, confiscate and sell the cattle.⁸⁸ In addition, the government emphasized that the Hages were notified of the impoundment and impending sale of their cattle,⁸⁹ and, therefore, they need not be compensated for "the consequences of [their] own neglect."⁹⁰

The Hages alleged that the Forest Service "knowingly created an environment that made it economically and practically infeasible to manage the cattle on the allotments."⁹¹ In addition, they insisted that the Forest Service purposely caused them to lose their grazing permit and the use of their stockwatering rights.⁹² The court denied the defendant's motion for summary

85. *Id.* at 174.

86. *See id.* at 176.

87. *See id.* at 154-55.

88. *See id.* at 176. Defendant also asserts that "[w]hen cattle are found on federal lands improperly, the cattle may be seized and sold under 16 U.S.C. § 551 and applicable regulations." *Id.* Such regulations include 36 C.F.R. § 262.10, (1991) which permits the Forest Service to impound and sell livestock under certain conditions. *See id.*

89. *See id.* at 177.

90. *Id.* (quoting *Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982)).

91. *Id.*

92. *See id.* The court stated:

Plaintiffs appear to argue that defendant took their cattle by regulation and by physically inducing the cattle to graze on the Meadow Canyon allotment during the suspension period. Plaintiffs also argue that defendant created a situation where it was physically and economically impossible to prevent their cattle from wandering and to redeem their cattle after impoundment.

Id. at 178. Hage also claimed that he watched rangers drive his cattle to off-limits range in order to set him up. *See Jim Carrier, Rebels on the Range; Nevadans Take on Federal Sovereignty*, DENVER POST, Jan. 21, 1996, at A1.

judgment, but also determined that the Hages must concede that the government acted properly under the permit in order to bring a takings claim.⁹³

Because the cattle were seized in accordance with the permit's restrictions and federal regulations, the court stated that the seizure of the cattle could not constitute a taking.⁹⁴ However, the Hages will be given an opportunity to try to prove their claim that the government's actions that caused them to violate the permit were actually the taking.⁹⁵ In other words, "[t]he seizure of the cattle was the effect of the taking and its measure of damages."⁹⁶ The court is unlikely to agree, which is apparent from its emphasis on the fact that the Hages will need to demonstrate that the government's actions constituted a taking "despite the regulations and permit terms and despite the warnings and opportunities to redeem their cattle."⁹⁷

In addition to the compensation sought for their cattle, the Hages have also sought compensation for the improvements that they have added to federal property. In conjunction with this claim, the Hages argue that the Forest Service cancelled their permit in order to devote their allotments to another public purpose.⁹⁸ Pursuant to federal land management statutory requirements,⁹⁹ the Hages are entitled to compensation for the improvements if the government actually did cancel the permit in order to devote the allotments to another "public purpose," rather than to simply enforce the Hages' permit terms, as alleged by the Forest Service.¹⁰⁰ Moreover, the

93. See *Hage*, 35 Fed. Cl. at 178.

94. See *id.*

95. See *id.*

96. *Id.* "Under this view, the seizure under the permit is merely the measure of damages of the taking, it is not the claimed taking." *Id.*

97. *Id.*

98. See *id.*

99. See 43 U.S.C. § 1752(g) (1994).

100. See *Hage*, 35 Fed. Cl. at 179. According to the Hages' grazing permit: [P]ermanent improvements constructed, or existing for use, in conjunction with this permit are the property of the United States Government . . . [which] will not be removed, nor compensated for upon cancellation of this permit . . . except in the National Forests in the 11 contiguous western states when cancelled in whole or in part to devote the land to another public purpose.

Hages do not need to prove a taking to receive such compensation.¹⁰¹ At the evidentiary hearing, both parties will have the opportunity to present evidence and testimony regarding ownership of these rights and the scope of that ownership.

C. *Will the Hages Win Their Case in the Court of Federal Claims?*

The Hages' actual property rights on the public lands have yet to be decided. Their chances of prevailing appear strongest in regard to their water rights; however those rights are basically useless without the adjacent forage and grazing rights. At first glance, monetary compensation may seem both "fair," particularly since the Hages cannot run their ranch without either their water rights or grazing privileges, and necessary, since the Hages appear to have vested rights in the water. A closer look at legal precedent and public land-use law, however, may reveal a different outcome.¹⁰²

The Court of Federal Claims came to the conclusion that the Hages might have compensable property rights in water on federal lands based on congressional intent and state law.¹⁰³ Pursuant to the Act of 1866, local law is used to determine priority of possession in water rights on federal lands.¹⁰⁴ In Nevada, the earliest appropriator of the water has priority over all other appropriators, including the government.¹⁰⁵ Therefore, the Hages would have a right superior to that of the government to use *any* amount of water previously appropriated if the Hages were the first of the two to make a beneficial use of the water.¹⁰⁶

Id.

101. *See id.*

102. *See* Blank, *supra* note 20, at 625-27 (explaining that the Hages' property had not been taken because the government had not physically intruded on the water and the Hages' investment-backed expectations were not reasonable).

103. *See Hage*, 35 Fed. Ct. at 172.

104. *See id.* at 172-73.

105. *See id.* Private individuals can acquire water rights by prior appropriation in all of the western states. *See* GEORGE C. COGGINS, FEDERAL PUBLIC LAND AND RESOURCE LAW § 365 (3d ed. 1993).

106. *See Hage*, 35 Fed. Cl. at 172-73. The court notes that this is "[s]ubject to reasonable regulation." *See id.* at 172.

Without a grazing right, however, the Hages cannot make a "beneficial" use of their water, thus rendering their right subject to forfeiture under Nevada law.¹⁰⁷ This loss through forfeiture would not normally constitute a taking; however, the Hages will have had to forfeit their rights only because of the government's deliberate actions.¹⁰⁸ But the Hages are not claiming a taking by forced forfeiture.¹⁰⁹ Instead, they claim that their reasonable investment-backed expectations in their water rights have been defeated by the government's actions denying them use of federal lands.¹¹⁰ Assuming that they could proceed on this argument, the Hages would then need to prove that their expectations were actually reasonable to win a takings claim.¹¹¹ The Supreme Court has recently held that a property owner's expectations are not reasonable when "the proscribed use interests were not part of his title to begin with."¹¹² In the Hages' case, the grazing privilege constitutes the "proscribed use interest" which was not part of their original title. Because the court has already determined that a grazing privilege is not a property right,¹¹³ any expectation in water use dependant on the ability to graze on federal lands would not be reasonable.¹¹⁴ Moreover, the court's recent takings decisions often reflect that "those who buy property subject to a preexisting regulatory scheme will have great difficulty showing that a later regulatory action went so far beyond that which a reasonable owner would have anticipated as to effect a taking of their property."¹¹⁵

Although the Hages' future expectations in the use of their

107. See NEV. REV. STAT. § 533.060 (1995). Note that the use of water within national forests is subject to regulation under 16 U.S.C. § 481 (1994). See *Hage*, 35 Fed. Cl. at 172.

108. See *supra* notes 91-92 and accompanying text.

109. Nor does the court address this possibility.

110. See *Blank*, *supra* note 20, at 625-26.

111. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring) ("Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations."); *Blank*, *supra* note 20, at 626-27.

112. *Lucas*, 505 U.S. at 1027.

113. See *supra* notes 60-64 and accompanying text.

114. See *Blank*, *supra* note 20, at 627.

115. George W. Miller & Jonathan L. Abram, *A Survey of Recent Takings Cases in the Court of Federal Claims and the Court of Appeals for the Federal Circuit*, 42 CATH. U. L. REV. 863, 863-64 (1993).

water may be unreasonable, the court is likely to find that the Hages did in fact have a vested compensable property right in their water located on federal lands when the elk were released with the permission of the Forest Service. In *Kaiser-Aetna v. United States*, the Supreme Court held that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."¹¹⁶ Following the holding in that case, the Hages had at least a right to exclude the non-indigenous elk from using their water, and therefore, they should at least receive compensation for the water used by the elk.¹¹⁷

IV. TAKINGS TODAY: DOES THE COURT MAKE PUBLIC POLICY?

*"Takings cases are invariably tough cases pitting strongly held values, about significant public concerns, against other strongly held values and interests."*¹¹⁸

A. *The Court's Role in Takings Jurisprudence*

The United States Court of Federal Claims has jurisdiction over any claim brought by a citizen against the federal government that is founded upon a Constitutional provision, a congressional act or executive regulation, a government contract, or a monetary claim in a case not sounding in tort.¹¹⁹ Takings litigation accounts for at least one-fifth of the court's docket.¹²⁰

In the past decade, the Court of Federal Claims has established itself as a major force in the development of takings jurisprudence.¹²¹ Its numerous decisions favoring private prop-

116. 444 U.S. 164, 179-80 (1979) (citations omitted); *see also* *Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property—[is] the right to exclude others.").

117. *But cf.* *Fallini v. United States*, 31 Fed. Cl. 53 (1994) (holding that ranchers did not suffer a compensable taking when water produced in excess of their total preference was consumed by wild horses allowed to graze on their allotment).

118. *Hage*, 35 Fed. Cl. at 151.

119. *See* The Tucker Act, 28 U.S.C. § 1491 (1994).

120. Takings cases for more than \$10,000 must be brought in the Court of Federal Claims. *See* 28 U.S.C. §§ 1346(b), 1491(a) (1994).

121. *See generally* *Miller & Abram*, *supra* note 115.

erty owners,¹²² however, have garnered criticism from environmentalists and a variety of comments both pro and con from legal scholars.¹²³ One commentator, for example, asserts that the court's *Loveladies Harbor* decision "appears to ignore the Nation's sentiment to preserve and protect our environment."¹²⁴ Furthermore, he states that "[t]he *Loveladies Harbor* decision is a takings decision which skirts important issues in favor of clinging inflexibly to concepts of a generic takings analysis."¹²⁵ Another author attacks the Supreme Court as well, stating that it "has legitimized the concept of regulatory takings as a judicial check on land use and environmental regulation."¹²⁶

The *Hage* opinion is particularly interesting because Chief Judge Loren A. Smith begins his opinion with a summary of takings jurisprudence and, in response to the criticism, a clear defense of the court's more recent stance in takings litigation. Judge Smith begins by acknowledging that some consider the court in a takings case to be a "defender against regulatory excess," while others believe that the court should be "an activist advocate for certain policy positions."¹²⁷ Judge Smith asserts, however, that both of these views "misconstrue the role of

122. See, e.g., *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990); *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989); *Florida Rock Indus. v. United States*, 8 Cl. Ct. 160 (1985).

123. See, e.g., Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and The Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, (1995); Roger J. Marzulla & Nancie G. Marzulla, *Regulatory Takings In The United States Claims Court: Adjusting The Burdens That In Fairness And Equity Ought To Be Borne By Society As A Whole*, 40 CATH. U. L. REV. 549 (1991); Timothy G. Warner, *Recent Decisions by the United States Claims Court and the Need for Greater Supreme Court Direction in Wetlands Taking Cases*, 43 SYRACUSE L. REV. 901 (1992); Patrick Kennedy, Comment, *The United States Claims Court: A Safe "Harbor" From Government Regulation of Privately Owned Wetlands*, 9 PACE ENVTL. L. REV. 723 (1992).

124. Kennedy, *supra* note 123, at 735. Kennedy also asserts that *Loveladies Harbor* "should serve as an example of why more concrete and specific rules regarding takings issues should be formulated." *Id.*

125. *Id.* at 744. The author goes on to say that "[e]ach issue in *Loveladies Harbor* was supported by case law favoring the government's position. However, the court went out of its way to avoid these cases and the arguments they espoused." *Id.* But see Marzulla & Marzulla, *supra* note 118, at 555 ("[T]he Claims Court has rarely shirked its duty to wrestle to the heart of a fact pattern and to tailor an appropriate result.").

126. Blumm, *supra* note 123, at 171.

127. *Hage*, 35 Fed. Cl. at 150.

the judge" in the takings arena.¹²⁸ He states:

In taking claims the judge does not sit as super legislator or executive, intent on preventing regulation that "goes too far." . . . The job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their constitutional rights under the Fifth Amendment have been violated by some governmental action. The court must proceed to analyze this claim, as any other legal claim, regardless of the consequences to governmental policy. Unless property right claims are to be given lesser due process than other claimed constitutional violations, the court must interpret the words of the constitutional protection as it would any other language conferring rights. . . . The tools and skills of legal analysis have little to do with public policy, and much to do with the integrity of the rule of law.¹²⁹

In other words, the court must act only as a "judicial decision-maker bound by constitutional language and precedent," and not as a policymaker.¹³⁰ Policymaking is left to the legislature and the executive, as intended by the Framers of the Constitution.¹³¹

1. The Court as a Policymaker

In *Hage*, Judge Smith asserts that policymaking in the takings arena should be left to the legislature. However, the court's inherent policy, which derives from the Fifth Amendment, is to *protect* private property rights from governmental

128. *Id.*

129. *Id.* at 150-51. The court also states:

When a court finds a statute, a regulation, or a governmental action to be a "taking" requiring compensation, it is not saying the government went "too far." . . . Rather, the court is finding that the government has, as a factual matter, deprived an actual property owner of some part of a legally recognized property interest. . . . Courts have found the "too far" language taken by itself not to be very helpful in drawing the distinction between a taking and an incidental diminution in value.

Id. at 151.

130. *Id.*

131. *See id.* ("The genius of our Framers' tripartite division of constitutional power is the creation of separated institutions that each best deal with different categories of governmental decisions.")

takings.¹³² This idea of protecting private property is a policy created by the judiciary, since the Fifth Amendment does not actually prohibit the government from taking private property. Instead, the Takings Clause merely states that just compensation must be paid when private property is taken by the government.¹³³

Judge Smith is correct to the extent that the court is not supposed to be a policymaker; however, certain judicial policy decisions have been made more recently in the takings arena that have contributed to the formation of public policy in favor of the private property owner. Furthermore, takings jurisprudence is actually defined in part by policy decisions made by judges past and present.¹³⁴ For example, courts have been instrumental in developing regulatory takings policy since the Supreme Court created the concept in *Pennsylvania Coal Co. v. Mahon*.¹³⁵ In *Pennsylvania Coal*, the Court stated for the first

132. In his introduction to a book on regulatory takings, Judge Smith wrote that "the very purpose of the Bill of Rights is to protect the citizen against the government, specifically the federal government." Chief Judge Loren A. Smith, *Introduction to ROGER CLEGG ET AL., REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 2* (1994). The dictionary defines "policy" as "a definite course of action adopted for the sake of expediency, facility, etc.," and "a course of action adopted and pursued by a government, rules, political party, etc.," and "action of procedure conforming to or considered with reference to prudence or expediency." RANDOM HOUSE UNABRIDGED DICTIONARY 1497 (2d ed. 1993).

133. See U.S. CONST. amend. V. The Takings Clause of the Fifth Amendment reads: "Nor shall private property be taken for public use *without* just compensation." *Id.* (emphasis added). See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("[T]he [Fifth] amendment . . . is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. . . ."); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 (1985) ("[S]o long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional."); see also Erika Jones et al., *The Fifth Amendment's Just Compensation Clause: Implications for Regulatory Policy*, 6 ADMIN. L.J. 674, 675 (1993) (stating that it is a well-settled principle that the government can take one's property, as long as it pays for it); Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439, 440 (1993) (stating that the Takings Clause "only requires that just compensation be available through the courts where such a taking is found to have occurred.").

134. See, e.g., *Block v. Hirsh*, 256 U.S. 135, 167 (1921) (McKenna, J., dissenting) (stating that the court must often draw the line that separates the legal from the illegal operation of the police power. When the court draws that line, it is arguably creating policy.)

135. 260 U.S. 393 (1922).

time that a regulation that "goes too far," but does not result in an actual physical invasion, will be recognized as a taking.¹³⁶ Prior to *Pennsylvania Coal*, a taking occurred only when the government physically occupied private property.¹³⁷ What Justice Holmes meant when he wrote "goes too far" has been left to the courts to decide.¹³⁸ In deciding this question over the years, the courts have created takings policy by creating the different tests used to find a regulatory taking.¹³⁹

Another example of court-made policy is evident in the more recent wetlands cases. In *Loveladies Harbor, Inc. v. United States*, the Court of Federal Claims held for the first time that the Army Corps of Engineers' denial of a section 404 dredge-

136. *Id.* at 415. The majority held that the statute preventing mining in order to prevent subsidence of surface property was invalid because it took private property without just compensation. *See id.* at 415-16. Justice Brandeis dissented, stating that the restriction in question was "merely the prohibition of a noxious use," and that a regulation preventing a public harm was a valid exercise of the police power which did not constitute a taking. *Id.* at 417.

137. A literal reading of the Fifth Amendment shows that it only requires compensation to be paid when the federal government *takes* private property, but not when it *regulates* private property. *See* William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 782 (1995); *cf.* *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) ("It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily.")

138. Justice Holmes merely stated that the diminution in value "depends upon particular facts." *Pennsylvania Coal Co.*, 260 U.S. at 413. In *Hage*, the Court of Federal Claims points out that "[r]egulations, of course, can become so burdensome as to effectively result in the equivalent of a direct, physical appropriation of a property interest." 35 Fed. Cl. at 168; *see also* Marzulla & Marzulla, *supra* note 123, at 550 ("[T]he Claims Court, almost alone among judicial tribunals in this country, has intuitively understood the importance of the *ad hoc* factual inquiry prescribed by the Supreme Court for regulatory takings cases.")

139. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (establishing a takings analysis that begins with the categorical rule that a landowner is entitled to just compensation whenever a regulation deprives the landowner of "all economically beneficial or productive use of [his] land."); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) (establishing a two-part test from the *Agins* factors used to decide regulatory takings); *Agins v. City of Tiburon*, 447 U.S. 255, 260-63 (1980) (establishing a three-part test to be used in regulatory takings cases); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (establishing the three-prong *Penn Central* test for regulatory takings, which includes the economic impact of the regulation, the interference with distinct investment-backed expectations, and the character of the governmental regulation).

and-fill permit under the Clean Water Act¹⁴⁰ constituted a compensatory taking of private property.¹⁴¹ Before *Loveladies Harbor*, the court had held that permit denials were merely invalid, thus allowing the dredge-and-fill activity to occur. After *Loveladies Harbor*, a private property owner subject to a taking of private wetlands property may receive compensation, and the dredge-and-fill activity may be prevented.¹⁴² In either case, the private property owner wins his or her takings claim, but only in the second case does the public also benefit by the prevention of wetlands deterioration. This change in the court's final conclusion has been criticized as a change in judicial policy in favor of private property owners in wetlands cases,¹⁴³ but the change could be found to favor the environment as well.

The policy initiated by the Supreme Court and followed by the Court of Federal Claims involving the "parcel as a whole" issue is also court-created. In *Penn Central Transportation Co. v. New York City*, the Supreme Court first discussed the "parcel as a whole" concept and stated that the Court will not find a taking where the government prevents a private property owner from using only part of his property.¹⁴⁴ In other words, there will be no taking if the private landowner still has use of a significant portion of his or her property.¹⁴⁵ This concept was given new meaning, however, in Chief Judge Smith's opinion in *Loveladies Harbor*. In *Loveladies Harbor*, the Court of Federal

140. 33 U.S.C. § 1344 (1994).

141. See 21 Cl. Ct. 153, 153 (1990); see Kennedy, *supra* note 118, at 725 ("The remedy in *Loveladies Harbor*, unlike any other previous case, required the government to pay just compensation—specifically \$2,658,000."); see also *Florida Rock Indus. v. United States*, 21 Cl. Ct. 161 (1990) (deciding on the same day as *Loveladies Harbor* that a permit denial under section 404 was a compensatory taking); 1902 *Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381 (E.D. Va. 1983) (holding for the first time that a permit denial was a taking, although this particular permit denial was arbitrary and capricious).

142. Actually, the Supreme Court held that a regulatory taking gives rise to a Fifth Amendment guarantee of compensation three years before the Court of Federal Claims held the same. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

143. See generally Kennedy, *supra* note 123.

144. 438 U.S. 104, 130-31 (1978); see also *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (using the "bundle" of property rights analogy and stating that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."). The *Andrus* court also stated that "the denial of one traditional property right does not always amount to a taking." *Id.* at 65.

145. See *Penn Central*, 438 U.S. at 130-31.

Claims stated that it was focusing on the "interference with the rights in the parcel as whole,"¹⁴⁶ but defined that whole parcel as only the 12.5 acres affected by the permit denial, instead of the original 250 acres bought by the plaintiff or the fifty-one acres currently owned by the plaintiff.¹⁴⁷ The concept has been addressed by other courts, including the Supreme Court in a footnote to *Lucas v. South Carolina Coastal Council*, in which Justice Scalia discussed how to define the property interest actually lost to a regulatory taking.¹⁴⁸ His dictum, however, did not provide property owners with definite rules about their property interests.¹⁴⁹

2. The Court as an Impetus to Policymaking

Some would argue that the examples above merely represent judicial activism instead of policymaking decisions; however, none can deny that the courts' decisions favoring private property owners can have significant impacts on governmental policymaking.¹⁵⁰ Glenn Sugameli of the National Wildlife

146. 15 Cl. Ct. 381, 391 (1988).

147. *See id.* at 393. The plaintiffs had originally bought 250 acres, but only 51 acres remained in their possession at the time of the alleged taking. Of these 51 acres, 38.5 were not considered by the court because they were not being considered in the permit application at issue. *See id.* at 392-93.

148. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). Justice Scalia wrote:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened property of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . The answer to this difficult decision may lie in how the owner's reasonable expectations have been shaped by the State's law of property. . . .

Id.

149. *See Sugameli, supra* note 133, at 477-83 (discussing the *Lucas* statements and that of other courts on this issue).

150. *See* Chief Judge Loren A. Smith, *Foreword* to 40 CATH. U. L. REV. 509, 511-12 (1991) (describing the nature of the United States Court of Federal Claims and the ramifications of its decisions, and stating that "[t]he interpretation of a contract dispute, a tax statute, or an employment regulation may have profound effects on the ability of the government to operate.") [hereinafter *Foreword*]; *see also* Marzulla & Marzulla, *supra* note 123, at 549-50 (stating that the homogeneity of the claims court "appears to have noticeably diminished the United States Supreme Court's interest in reviewing Claims Court regulatory takings decisions, thereby underscoring the impor-

Foundation, for example, asserts that a taking can have the same practical effect of invalidating a regulation, which "can in turn have far-reaching impacts on public policy, potentially damaging the ability of government to regulate in areas of important public interest such as health, safety and the environment."¹⁵¹ He also argues that takings litigation has been used as a tool to influence government policymakers.¹⁵²

The federal government has responded to the courts' more recent takings cases by changing some of its policies in order to prevent regulatory takings. Some believe that the government has thus fostered efforts to "thwart" environmental regulation in general,¹⁵³ while others believe that the government has merely acted "[i]n an effort to formulate a prospective remedy for the ever-growing complexity of governmental regulations and corresponding impositions on private property."¹⁵⁴ President Reagan's Executive Order No. 12,630, for example, has support from the latter group.¹⁵⁵ This Order, issued in 1988, directed government agencies and the Executive to consider whether proposed policy or regulatory actions would give rise to Fifth Amendment takings claims from affected property owners.¹⁵⁶ One writer opposed to the Order states that it "require[s] that all federal regulations be approved . . . under a test that severely misrepresents Supreme Court precedent on takings law."¹⁵⁷ Directly contrasting that view, a proponent of

tance of the decisions penned by Claims Court judges.").

151. Sugameli, *supra* note 133, at 441-42. Because of the potential impacts, Sugameli asserts that

[b]oth sides in the current debate on takings recognize the larger stakes involved in every takings case. Pro-takings advocates are using takings as a way to launch a back-door administrative, legislative and judicial attack on the laws and regulations that they cannot modify or repeal on the merits. In response, public interest advocates representing environmental, labor, health, safety and other concerns are working on all three takings fronts to protect these programs.

Id. at 442.

152. *See id.* at 451 ("Pro-takings activists have targeted litigation as an important means of achieving their ends.").

153. *See id.* at 442-54.

154. Marzulla & Marzulla, *supra* note 123, at 566.

155. Governmental Action and Interference with Constitutionally Protected Property Rights, Exec. Order No. 12,630, 3 C.F.R. 554 (1988), *reprinted in* 5 U.S.C. § 601 (1994).

156. *See* Marzulla & Marzulla, *supra* note 123, at 566-67.

157. Sugameli, *supra* note 133, at 443-44.

the Order asserts that it "reflects thoughtful consideration and vigorous debate throughout the affected government agencies, and attempts to establish a practical and workable procedure for implementing the holdings in *Nollan* and *First English*."¹⁵⁸ Government attempts to comply with the Order have received mixed reviews and efforts have been made to rescind the Order.¹⁵⁹

In response to the takings confusion,¹⁶⁰ Republican congressional candidates and members promised in 1992, as part of their "Contract With America," to enact legislation creating a statutory right to compensation for regulatory takings.¹⁶¹ In 1995, the House and Senate considered bills directed at such regulation, the former known as the "Private Property Protection Act of 1995," and the latter known as the "Omnibus Property Rights Act of 1995."¹⁶² Both bills are "primarily aimed at

158. Marzulla & Marzulla, *supra* note 123, at 567.

159. See Sugameli, *supra* note 133, at 445. Sugameli tells us that 20 distinguished academic experts have urged President Clinton to rescind the Order. In a letter to the President signed April 2, 1993:

They concluded that the Order was "based on an erroneous, biased view of the law . . . [and] represents a misguided effort to use the specter of government liability under the Fifth Amendment in order to frustrate regulatory activity that certain members of the Reagan Administration opposed as a matter of policy."

Id. (quoting Letter from Bruce A. Ackerman et al., to the President of the United States 1 (April 2, 1993)).

160. See *Private Property Rights: Hearings on S. 605 Before the Senate Comm. on the Judiciary*, 104th Cong., 1st Sess. (Apr. 6, 1995) [hereinafter *Hearings on S. 605*] (testimony of Loren A. Smith, Chief Judge, United States Court of Federal Claims) ("[N]either government nor citizen has much guidance as to what will or will not be a taking."). In *Bowles v. United States*, Chief Judge Smith points out that takings law is a difficult subject for both the federal government and the private citizen because there is little precedential guidance. 31 Fed. Cl. 37, 39 (1994). He also implies that the political branches should act in this area:

There must be a better way to balance legitimate public goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. . . . Judicial decisions are far less sensitive to societal problems than the law and policy made by the political branches of our great constitutional system.

Id. at 40.

161. See Payson R. Peabody, *Will the 104th Congress Revolutionize Fifth Amendment Takings Law? An Analysis of the Private Property Protection Act of 1995*, 5 FED. CIRCUIT BAR J. 199 (1995), available in WESTLAW, 5 FEDCJB 199. One can probably assume that those Republicans supporting the proposed measure would not agree with Kennedy, *supra* note 123 at 3, who calls the court a "safe harbor" from governmental regulation.

162. H.R. 925, 104th Cong., 1st Sess. (1995); S. 605, 104th Cong., 1st Sess., 141

direct regulation of traditional forms of private property,"¹⁶³ and both attempt to clarify ambiguities created by the Supreme Court's *Penn Central* test.¹⁶⁴ For example, both bills establish certain thresholds for mandatory compensation—property owners would receive compensation whenever *any* portion of their property has been diminished beyond the threshold amount.¹⁶⁵ In addition, both bills direct reviewing courts to consider only the part of the land affected by the regulation, not the property as a whole.¹⁶⁶ One commentator remarks that these two provisions, if passed, "are likely to result in larger and more frequent awards of compensation than would occur under existing Fifth Amendment law."¹⁶⁷ That may sound attractive to the private property owner; however, this compensatory scheme could lead to problems of non-payment by under-funded agencies, since both bills require payment from the annual appropriation of the agency whose regulation caused the taking.¹⁶⁸

The two property rights bills, if passed, would create the first statute to explicitly state that private property owners have a right to compensation from the federal government under the Fifth Amendment.¹⁶⁹ Although this is already stated in the Fifth Amendment itself, the bills' proponents argue that the congressional statute would "bring new vitality to Fifth Amendment jurisprudence, and a new willingness on the part of federal judges to enforce its guarantees in the context of federal and state regulatory takings claims."¹⁷⁰ One can argue, however,

CONG. REC. S4492-01, S4497 (1995).

163. Peabody, *supra* note 161 at 203.

164. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). For the three prongs of the *Penn Central* test, see *supra* note 139.

165. See Peabody, *supra* note 161, at 203-05. The House bill sets the threshold at 20 percent, and the Senate bill sets it at 30 percent. See *id.* at 204. The House bill also requires the government to buy the property at the owner's option if the regulation diminishes its use by more than 50 percent. See *id.* at 203.

166. See *id.* at 204. But see *id.* at 219 ("Even here, however, federal courts will most likely interpret the Bill's language as requiring an analysis of a parcel that is larger than the affected piece alone because concentrating on the affected piece alone would always yield a 100% diminution.").

167. *Id.* at 205.

168. See *id.* at 203 n.24, 205. "Under existing law, payments for compensation are made out of general government funds." *Id.* at 203 n.24.

169. See *id.* at 219-20.

170. *Id.* at 220. The reader may be interested to note that Payson Peabody was a Judicial Intern to Chief Judge Loren A. Smith in 1994-1995.

that it is the courts' more recent stance in regulatory takings cases that has already given new vitality to Fifth Amendment jurisprudence, which has in turn led to proposals such as those contained in these two bills.

B. *The Court's Role From Justice Stevens's Perspective*

Whether one believes that the Court of Federal Claims actually makes policy or merely follows judicial precedent in formulating equitable results may depend on one's own political interests. Judge Smith would certainly argue the latter.¹⁷¹ Justice Stevens would agree with Judge Smith's statement that the courts are "bound by constitutional language and precedent,"¹⁷² but he would argue that the courts, including the Court of Federal Claims and the Supreme Court, have acted outside of those boundaries, with "far reaching" policy implications.¹⁷³

Justice Stevens contends that the Supreme Court has shown an imprudent "lack of self-restraint" in deciding certain recent takings cases.¹⁷⁴ In his dissent in *First English Evangelical Lutheran Church v. County of Los Angeles*, for example, Justice Stevens stated that the Supreme Court has "reached out to address an issue not actually presented . . . and has then answered that self-imposed question in a superficial and . . . dangerous way."¹⁷⁵ In *First English*, the Court created an additional takings policy by holding for the first time that a *temporary* taking of private property required just compensation.¹⁷⁶ Although Chief Justice Rehnquist supported his *First English* opinion with judicial precedent,¹⁷⁷ Justice Stevens asserted that "the Court distorts our precedents in the area of regulatory

171. See *supra* part IV.A.

172. *Hage*, 35 Fed. Cl. at 151.

173. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 340 (1987) (Stevens, J., dissenting).

174. See *id.* at 325.

175. *Id.* at 322.

176. See *id.* Although the ordinance which "took" the plaintiff's property was invalidated, Justice Rehnquist states that "[i]nvalidation of the ordinance . . . though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause." *Id.* at 319.

177. See *id.* at 318-22.

takings when it concludes that all ordinances which would constitute takings if allowed to remain in effect permanently, necessarily also constitute takings if they are in effect for only a limited period of time.¹⁷⁸ In addition, Justice Stevens suggested that temporary takings should be a due process issue rather than a regulatory takings issue.¹⁷⁹ In conclusion, he contended that “[t]he policy implications of [the *First English*] decision are obvious and, I fear, far reaching. . . . Much important regulation will never be enacted.”¹⁸⁰

In his dissent in *Dolan v. City of Tigard*, Justice Stevens also spoke out against the Court’s creation of another new takings policy—the “rough proportionality” test—and the application of that test in the *Dolan* case.¹⁸¹ In *Dolan*, the Supreme Court held, in a 5-4 decision, that the City of Tigard could not arbitrarily require a private landowner to dedicate a portion of her property in exchange for a building permit or variance.¹⁸² Writing for the majority, Chief Justice Rehnquist stated that the “unconstitutional conditions” doctrine prohibits the government from requiring a person to relinquish a constitutional right “in exchange for a discretionary benefit conferred by the government where the property sought has little or no relation-

178. *Id.* at 322. Justice Stevens also asserted that “this Court’s precedents demonstrate that the type of regulatory program at issue here cannot constitute a taking.” *Id.* at 325.

179. *See id.* at 339. He states that “it is the Due Process Clause rather than [the regulatory taking doctrine] that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking.” *Id.*; *see also* *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 205 (1985) (Stevens, J., concurring) (“The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. . . . [A]s long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute [with regulatory bodies] as a ‘taking’ of private property.”).

180. *First English*, 482 U.S. at 340. Justice Stevens strongly asserts that the Court has acted improperly:

[T]he loose cannon the Court fires today is not only unattached to the Constitution, but it also takes aim at a long line of precedents in the regulatory takings area. It would be the better part of valor simply to decide the case at hand instead of igniting the kind of litigation explosion that this decision will undoubtedly touch off.

Id. at 341.

181. *See Dolan v. City of Tigard*, 512 U.S. 374, 396-411 (1994) (Stevens, J., dissenting).

182. *See id.* at 392-96.

ship to the benefit."¹⁸³ In dissent, Justice Stevens contended that "the application of the 'unconstitutional conditions' label to a mutually beneficial transaction between a property owner and a city" is a "judicial innovation" similar in stature to that of the regulatory takings doctrine established by Justice Holmes.¹⁸⁴ As for the newly created "rough proportionality" test,¹⁸⁵ Justice Stevens asserted that the Court erected "a new constitutional hurdle" despite the fact that "[n]ot one of the state cases cited by the Court [for precedent] announces anything akin to a 'rough proportionality' requirement."¹⁸⁶

C. *The Development of Takings Policy in Light of Chief Judge Smith's Statements in Hage*

In regard to takings claims, Justice Stevens appears to believe strongly in the concept of judicial restraint.¹⁸⁷ Judicial restraint, however, is not characteristic of takings policy development.¹⁸⁸ Without the judicial activism of Justice Holmes, regulatory takings might not exist today.¹⁸⁹ If courts always ignored changes in governmental and societal policy when making legal decisions regarding property use, zoning might be considered unconstitutional.¹⁹⁰ Although courts will generally

183. *Id.* at 385.

184. *See id.* at 406-07. "[T]he Court's reliance on the 'unconstitutional conditions' doctrine is assuredly novel, and arguably incoherent." *Id.* at 409. Justice Stevens also states that "[o]ne can only hope that the Court's reliance today on First Amendment cases, . . . and its candid disavowal of the term 'rational basis' to describe its new standard of review, . . . do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era." *Id.*

185. *See id.* at 391. Under this test, the city "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

186. *Id.* at 398.

187. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1061 (1992) (Stevens, J., dissenting) ("Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question.").

188. *See supra* part IV.A.1.

189. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). "While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations." Treanor, *supra* note 137, at 783.

190. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). While upholding a zoning ordinance that "would have been rejected as arbitrary and oppressive" at an earli-

follow constitutional language and precedent as suggested by Chief Judge Smith,¹⁹¹ certain judges deciding regulatory takings cases have been known to glean new material from the same precedent.¹⁹² While these judges would not state that they are intentionally creating takings policy, new takings tests constitute new policy.¹⁹³

In *Bowles v. United States*,¹⁹⁴ Chief Judge Smith stated that “[j]udicial decisions are far *less sensitive* to societal problems *than* the law and policy made by the political branches of our great constitutional system.”¹⁹⁵ Two years later, in *Hage v. United States*, Judge Smith went one step further and asserted that judicial decisions are not at all sensitive to societal problems:

To conclude that policy making is the nature of the court's role in taking cases, however, is to substitute a psychological impression or an ideological bent for hard legal analysis about property law and the Fifth Amendment. Taking cases are only about one thing, whether the government action in question takes private property without just compensation. Taking cases are not about “the environment” or “endangered species” or “wetlands.” On these topics the courts must defer to the President and Congress.¹⁹⁶

er date, Justice Sutherland stated that:

Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Id. at 387.

191. See *Hage*, 35 Fed. Cl. at 151.

192. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988).

193. See *supra* notes 136-39, 144-49 and accompanying text.

194. 31 Fed. Cl. 37 (1994).

195. *Id.* at 40 (1994) (emphasis added). In *Bowles*, Judge Smith also stated that the courts “can only interpret the rather precise language of the Fifth amendment to our Constitution in very specific factual circumstances.” *Id.*

196. *Hage*, 35 Fed. Cl. at 151.

Judge Smith also maintained that, not only does the court decline to make policy based on societal concerns, but it also does not factor in government policy when deciding a case. He stated:

Finally, since the federal judge is not elected, as is the President and the Congress, it would be highly presumptuous of him or her in a democratic society to import into the judicial analysis, views on the need or the lack thereof for the government action challenged.¹⁹⁷

The courts, however, are effecting and affecting takings policy each time a new case is decided. If takings law had developed strictly in line with Judge Smith's statements, regulatory takings would not be an issue and Judge Smith would not be defending his decisions.¹⁹⁸ Moreover, strict compliance with Judge Smith's statements conflicts with the statements of Justice Sutherland in *Euclid v. Ambler Realty Company*.¹⁹⁹ While holding for the first time that a zoning ordinance is a restriction on the use of private property allowed under the Constitution, Justice Sutherland pointed out that new regulations of private property will be allowed to develop under the growing or contracting scope of various constitutional protections.²⁰⁰

Despite the fact that government policy should not affect a court's decisions, Judge Smith does believe that "it is the judge's duty to provide assistance to the Congress where the court's experience can aid in making the administration of justice more fair and efficient."²⁰¹ Because takings cases can be "expensive, unpredictable in their rules, and often not very just in their results," Judge Smith provided his own expertise on takings through testimony given to the Senate's Committee on the Judiciary.²⁰² In his testimony, however, he was certain to clarify that "with respect to the policy goals of this legislation, I and the court take no position as this is a matter within the

197. *Id.* at 152.

198. *See supra* note 189 and accompanying text.

199. 272 U.S. 365 (1926).

200. *See id.* at 387; *supra* note 190.

201. *Hearings on S. 605, supra* note 160 (testimony of Loren A. Smith, Chief Judge, United States Court of Federal Claims).

202. *Id.*

discretion of the political branches of our great constitutional system.²⁰³

D. *Takings For The Public Good*

In the 1980s and 1990s, the Court of Federal Claims decided some significant takings cases in favor of the private property owner. In *Hage*, the court may find yet another taking of private property.²⁰⁴ Such generous decisions spark criticism from supporters of environmental regulation, which is particularly suspect in many takings cases.²⁰⁵ However, a court's finding that a taking has occurred should not necessarily be viewed as a win only for the private property owner with a concurrent loss for the environment. Instead, it can be viewed as a win for the public at large.²⁰⁶

Judge Smith pointed out that "[t]he purpose of the 'taking clause' is 'to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice should be borne by the public as a whole.'²⁰⁷ Furthermore, he emphasized that "[t]he Fifth Amendment requires that society as a whole, rather than a particular property owner, bear the burden of the exercise of state power in the public interest."²⁰⁸

203. *Id.*

204. However, this author believes that the Hages do not have a very strong case.

205. See generally Ridgeway & St. Clair, *supra* note 9.

206. See generally *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417-18 (1922) (Brandeis, J., dissenting) (asserting that a regulation which prevents a public harm should be allowed to stand, but a regulation which promotes a public good should be considered a taking because the public should pay for a government action which provides benefits beyond what is necessary to protect the health, safety and welfare of the general public).

207. *Hage*, 35 Fed. Cl. at 158 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). "The right to just compensation is as fundamental a right as the right to vote and the right to free exercise of religion." *Id.* at 168.

208. *Id.* at 167-68 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980)). In his dissent in *Florida Rock Indus. v. United States*, Chief Judge Nies asserted that "[t]he more often the government must pay for exercising control over private property, the less control there will be. That is the reality. . . ." And, "[o]wnership of property carries responsibilities to the community as a whole as well as privileges." 18 F.3d 1560, 1575, 1580 (Fed. Cir. 1994). Judge Smith acknowledges the tension between the court's "role as a guardian of the public fisc and its role as a guardian of the individual's legal rights against government conduct," but it seems likely that he would put the later first. *Foreword*, *supra* note 150, at 511.

His recent takings decisions have reflected this view by remedying situations "which, if left untouched, would have left the property owner severely and adversely affected by the operation of a government regulation."²⁰⁹ Some would argue, however, that the court's decisions in general may have, instead, "lost sight of Congress' intent in promulgating section 404" of the Clean Water Act.²¹⁰ Whether one agrees with one view or the other may hinge on one's gut feelings about environmental protection, rather than on a serious consideration of the court's role in takings litigation. But viewing certain takings as a public benefit, in which the public pays for the benefit of environmental protection, may make the court's recent holdings easier to accept.

E. *A Return to the Hage Case: Will New Policy Be Made?*

Livestock grazing on public lands has received much more attention in the last two decades as the federal government has received more pressure from environmentalists to better protect western environmental resources.²¹¹ Although BLM proponents claim that they are successfully changing their practices in favor of a cleaner environment, BLM critics continue to claim that "the Bureau's managers still place the interests of livestock operators above environmental values."²¹²

Some believe that the western ranchers still have a great deal of power over livestock grazing programs,²¹³ while others

209. Marzulla & Marzulla, *supra* note 123, at 563. In *Florida Rock*, for example, "the court appeared to have been influenced in part by the inequity of a situation where property owners were 'singled out' to bear the burden of a regulation merely because of the timing of the commencement of mining." *Id.* at 559.

210. Thomas Hanley, *A Developer's Dream: The United States Claims Court's New Analysis of Section 404 Takings Challenges*, 19 B.C. ENVTL. AFF. L. REV. 317, 320 (1991).

211. *See* Feller, *supra* note 7, at 556.

212. *Id.* at 556-57; *see also id.* at 586-99 (discussing two examples in which the author believes that the BLM's "policies and practices lead to the subordination of environmental values to livestock interests."); Ridgeway & St. Clair, *supra* note 9, at 13 ("Until now the federal managers of the public domain in the [BLM] and Forest Service have, if anything, been accused of being too cozy with the ranchers, mining companies, loggers and other business interests they superintended.")

213. *See* Ridgeway & St. Clair, *supra* note 9, at 14 ("The political power of the Western rancher cannot be underestimated."). *But see id.* at 15-16 (pointing out that Jim Nelson, the supervisor of the Toiyabe National Forest who has begun to crack

such as Wayne Hage believe that ranchers are paying for the fact that Americans have lost sight of the importance of private property.²¹⁴ Wayne Hage has already closed down his ranch, but whether he will be compensated for his loss remains open for debate. Whether the judges of the Federal Court of Claims agree with Hage's opinions, however, should not be important. Judge Smith has already made it very clear that the court's role is to "interpret the words of the constitutional protection," and certainly not to "import into the judicial analysis, views on the need or the lack thereof for the governmental action challenged."²¹⁵

Based on the preliminary opinion and the precedent given in support of the government's case, the court does not appear poised to grant compensation in the *Hage* case, except perhaps for the water used by the elk and the improvements made to the land. The court acknowledged that the Hages have given "creative" reasons and presented "novel" arguments for why they should have a property right in federal lands;²¹⁶ however, those novel arguments are supported by neither case law nor legislation. Moreover, the court stated that it "declines to create such rights contrary to the clear legislative intention of Congress."²¹⁷ The Hages could win on certain arguments only if

down on "renegade" ranchers like Wayne Hage, thinks that "the Wise Use movement is really a front for right-wing political forces and multinational corporations.").

214. See Wayne Hage, *Property Rights*, LAS VEGAS REV.-J., Nov. 5, 1995, available in WESTLAW, 1995 WL 5804170. Hage quotes John Adams to support his position on the importance of private property: "The moment the idea is admitted into society that property is not as sacred as the laws of God, and there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist." *Id.* at 2. Hage also emphasizes that "[o]ur founders knew that private property was the cornerstone of all civil liberties. . . . [In addition] [t]he concept of property in America stemmed from the Lockean doctrine that the individual is sovereign in his own right. Your life was your property, not the state's." *Id.* at 2, 5.

215. *Hage*, 35 Fed. Cl. at 151, 152.

216. See *id.* at 169-70, 174-75. Glenn P. Sugameli recognizes that creative and novel arguments are not enough. He points out:

In the wake of *Lucas*, those who might be overly encouraged by publicity surrounding this issue should be aware that courts have continued to reject creative and premature takings claims. This includes the Court of Federal Claims, which has been the subject of recent misguided commentary identifying a pro-takings trend based upon three decisions of a single judge, all of which are under appeal.

Sugameli, *supra* note 133, at 502-03.

217. *Hage*, 35 Fed. Cl. at 170; see also Blank, *supra* note 20, at 612-22 (discussing

the government changes its own policy, without the court's input.

V. CONCLUSION

In *Pennsylvania Coal Co. v. Mahon*, Justice Holmes warned that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . [S]ome values are enjoyed under an implied limitation and must yield to the police power."²¹⁸ Holmes' opinion and his "goes too far" language has sparked political debate and judicial growth in the takings arena. Judicial tests used to determine whether a taking has occurred have evolved in a manner leaving property owners with no clear guidance. Regulations that would not have resulted in takings twenty years ago are now suspect.²¹⁹ And property owners afraid of environmental regulation have cried out for protective legislation. Congressional legislation could quell some of the confusion, but the courts would continue to play a significant role in takings jurisprudence with their ever-changing interpretations of property rights and the parcels affected. Therefore, takings policy is likely to continue to evolve with the input of both the judiciary and the legislature.

*Danielle M. Stager**

the acts passed and cases decided regarding the creation of water and grazing rights).

218. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

219. See Hanley, *supra* note 210, at 317-18.

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