

## **Saving the American Rancher: Using Water and Custom to Recognize a Private Property Right on Federal Land**

### ABSTRACT

It is widely accepted that grazing on public lands is a privilege and not a right. However, this well-known concept must be questioned in light of Congress's favorable treatment of customary practices before the turn of the nineteenth century. It was Congress' intent to honor the customary practices of those who toiled tirelessly to turn the Great American Desert into an economically viable location for the American public. The rancher, who used public lands to graze his livestock, has not been given the benefit of customary usage of the range to the extent allowed by Acts of Congress. Courts and Congress used to favor miners, farmers, and other groups over the rancher. This adverse viewpoint substantially interfered with the adoption and enforcement of ranching custom on public land. Customary usage of the range, in particular water and practices of enforcing custom through stockman organizations and neighbor cooperation, were substantially ignored when a series of recent court decisions decided the fate of the rancher's stake in public lands. Only one court correctly recognized an exception to the general notion that grazing is a privilege and not a right. This exception, granted implicitly by Congress through its goal of protecting customary usage of public lands, affords ranchers a forage right that is synonymous with a valid right-of-way for transporting water across federal lands. Congress transferred the rights-of-way to individuals in order to allow them to move water across the public lands, and in doing so, Congress also transferred a synonymous forage right. Congress retained almost all of the control over public lands. However, a forage right, fifty feet on either side of a valid water right-of-way, represents a single sliver in the bundle of rights not retained by the federal government. The American rancher is a dying breed. His sole reliance upon the continued use of the public lands makes him vulnerable to extinction. An exception to the idea that grazing on public lands is a privilege and not a right will help to protect him from multiple influences that could lead to his downfall. The customary use of public lands by his fore fathers, along with a valid state water right and a valid right-of-way to transport water, secures the rancher a sliver in the bundle of sticks we call the public lands.

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“In the arid West, which at the beginning of the nineteenth century was named the Great Desert, water is the key to life, liberty, and property, which are more or less the same thing.”<sup>1</sup>

“It was an axiom of the ‘cow country’ that water controlled the range.”<sup>2</sup>

## INTRODUCTION

The West was once a symbol for freedom and prosperity. Its arid climate once drew dreamers and explorers to its vast, wide-open spaces. A fortune could be made if one knew how to exploit the hidden mineral deposits, the wooded mountains, and the grassy glades that made up the West. The rancher of yesterday, the same one who is embodied in movies and dime store novels, once ruled over the arid West. His decedents now live in a world that would be unrecognizable to yesterday’s rancher. Today’s rancher not only fights the same rugged environment that his forefathers fought before him, he now also fights against forces that threaten to exterminate his way of life. This Article explains the rancher’s battle for a small sliver in the bundle of sticks known as the federal lands.

The Fifth Amendment of the United States Constitution requires the federal government to compensate individuals for the private property that the government takes.<sup>3</sup> This Article argues that a limited private property right in federal lands exists and belongs to ranchers who are entitled to compensation if their grazing privileges are revoked. This property right is a limited forage right<sup>4</sup> on fifty feet of either side of a valid ditch right-of-way<sup>5</sup> and was established by customary practices and congressional intent to honor Western custom.

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<sup>1</sup> BETTY FUSSELL, *RAISING STEAKS: THE LIFE AND TIMES OF AMERICAN BEEF* 83-84 (Harcourt Inc., 1st ed. 2008).

<sup>2</sup> ERNEST STAPLES OSGOOD, *THE DAY OF THE CATTLEMAN* 184 (Univ. of Minnesota Press 1929).

<sup>3</sup> U.S. CONST. amend. V.

<sup>4</sup> For the purposes of this Article, “limited forage right” means the right of a rancher to place livestock on a limited amount of land so the livestock can graze the existing forage.

<sup>5</sup> For the purposes of this Article, “valid ditch right-of-way” means that a rancher is entitled to a right-of-way along either side of a ditch. To be considered an “1866 ditch,” the owners of the ditch must have been established and used it prior to the government removing the land from the public domain. *Hage v. United States*, 51 Fed. Cl. 570, 583

The Rancher's continued existence in our society depends on whether he can continue to live his life on his own terms. Finding a private property interest in the federal lands is just the beginning of the rancher's fight to continue with his way of life. This Article will find the rancher's a private property right in federal lands by examining statutes, case law, congressional intent, and historical customary practices. This Article will also explain why the rancher needs his private property right and how his way of life hangs in the balance.

There are many terms used throughout this Article that need to be defined to accurately convey the state of the law, as well as the dilemmas that ranchers face. For the purposes of this Article, the term "rancher" refers to anyone engaged in the business of placing livestock on federal land with the intent to let those animals graze. The term "livestock" encompasses multiple species of animals including cattle, sheep, and goats. This Article will distinguish between "grazing" and "forage rights." "Grazing" is a term that refers to the act of livestock consuming the grass, brush, or forbs found on federal land. "Forage rights" specifically describe the right of a rancher to place livestock on federal land and allow his livestock to consume grass, brush, and forbs found within fifty feet of a valid ditch right-of-way. For the purposes of this Article, "federal lands," "public lands," and "rangelands" will be used interchangeably.

Section I of this Article entitled "Background" will discuss a brief history of the Western livestock industry and unique aspects of the West that cultivated unique issues. This section will also include a discussion of relevant statutes and cases that pave the way for the rancher to claim a private property right on federal land. Section II is entitled "How the Privilege Became a Right." This section will cover customary practices on federal land regarding water and forage rights, codifications of custom, and congressional intent which recognized the adoption of local custom

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(Fed. Cl. 2002). Additionally, to be an "1866 ditch," the owner must show the ditch has been maintained and continually used since the land was removed from the public domain. *Id.*

in the West. Finally, Section III, entitled “The Rancher’s Dilemma,” will discuss current hardships and challenges the rancher faces, as well as his inability to obtain a fair outcome in today’s court system.

## I. BACKGROUND

The Western livestock industry became prominent in the years following the Civil War.<sup>6</sup> Ranchers moving into the West took advantage of demand for fresh meat created by the influx of miners.<sup>7</sup> Ranchers needed to protect their use of the range because public land policy was not in their favor.<sup>8</sup> Congress sought to assist the family farmer, rather than the rancher who could not obtain enough land to sustain a livestock operation in the arid West.<sup>9</sup> Land laws at the time did not give the rancher a suitable means of obtaining federal land to sustain his business.<sup>10</sup> The rancher needed thousands of acres of land to operate his business and this was far from the 1,120 acres that could be obtained through laws at the time.<sup>11</sup>

Due to livestock crowding on the range, and subsequent overgrazing, the rancher sought alternative ways to continue his business despite issues plaguing the livestock industry at the time.<sup>12</sup> An efficient, effective, and legally obtainable way for the rancher to control rangeland was to gain control of water rights located on federal land and administered under state law.<sup>13</sup> Additionally, local, state, and national stockman associations, as well as cooperating neighbors, sought to protect the first in time, first in right principle regarding the usage of federal lands for

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<sup>6</sup> James Muhn, *Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. LAND RESOURCES & ENVTL. L. 67, 70 (2001).

<sup>7</sup> OSGOOD, *supra* note 2, at 21.

<sup>8</sup> Muhn, *supra* note 6, at 72.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 73.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

grazing.<sup>14</sup> Stock associations had their own rules and systems based on a “sense of equity.”<sup>15</sup> These associations wielded enormous power as lobbying forces.<sup>16</sup> They adjudicated over disputes and grazing practices, and maintained the rancher’s rangeland interests by creating “a virtual law unto themselves.”<sup>17</sup> Unfortunately for the rancher, he found that his associations and neighbors were not enough to avoid overcrowding of the range.<sup>18</sup>

In order to protect his grazing interests, the rancher fell back on barbed-wire fence to exclude newcomers.<sup>19</sup> This method was frowned upon by Congress and it enacted legislation banning unauthorized fencing of federal land.<sup>20</sup> State law also had an effect on how rights and usage of the range were governed. Before the enactment of the Taylor Grazing Act, “[s]tate and territorial legislatures enacted laws intended to protect range rights.”<sup>21</sup> After the passing of the Taylor Grazing Act, a system of permits and lease-like agreements administered by the Secretaries of Agriculture and Interior, and issued to ranchers, governed the use of the range.<sup>22</sup> Many ranchers at the time of the enactment of the Taylor Grazing Act advocated for this permit system,<sup>23</sup> most likely hoping it would add force to each rancher’s customary use of specific areas on the range. However, in recent years, the rancher no longer carries the optimism and support he once had for

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<sup>14</sup> PAUL F. STARRS, LET THE COWBOY RIDE 52-53 (Gregory Conniff, Edward K. Muller, Bonnie Loyd, & David Schuyler eds., John Hopkins Univ. Press 1<sup>st</sup> ed. 1998); OSGOOD, *supra* note 2, at 183-85.

<sup>15</sup> OSGOOD, *supra* note 2, at 200 (quoting Minute Books of the Laramie County Stock Growers’ Ass’n & Wyoming Stock Growers’ Ass’n).

<sup>16</sup> STARRS, *supra* note 14.

<sup>17</sup> *Id.*

<sup>18</sup> OSGOOD, *supra* note 2, at 189-90.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 192-93.

<sup>21</sup> Muhn, *supra* note 6, at 73.

<sup>22</sup> BUREAU OF LAND MANAGEMENT, U.S. DEP’T OF INTERIOR, *About Livestock Grazing On Public Lands*, <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing/about> (Last visited February 7, 2018) [hereinafter Fact Sheet].

<sup>23</sup> Richard H. Lane, *Sheepherders, Sheepmen, and Nevada Public Lands: The past as Future?*, in NEVADA LIFESTYLES AND LANDS 70, 70 (Ruth M. Houghton & Leontine Nappe eds., 1977).

a government grazing system.<sup>24</sup> This system has sometimes been viewed as “something less than a blessing.”<sup>25</sup> Today’s rancher must pay the federal government fees in order to use the federal land for grazing.<sup>26</sup> Tension between agency officials and ranchers over how the federal lands should be managed and other aspects of the grazing system have led to conflicts that make their way into court rooms and the news. Some ranchers do their best to cooperate with government officials when required to change their use of the federal lands. Unfortunately, other ranchers find it difficult to form relationships of trust and cooperation with federal agencies. This leads to disputes and a disdain for the current management of the grazing system.

Grazing rights are once again in the national spotlight. Incidents involving the Bundy standoffs in Southern Nevada<sup>27</sup> and Oregon<sup>28</sup>, as well as extended prison sentences for the Hammond family<sup>29</sup> have created legal and moral questions as to the government’s involvement in administering grazing permits on federal land.

The federal government owns a substantial amount of land in the West and the unique circumstances regarding this ownership and the rancher’s use of the land creates complicated

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

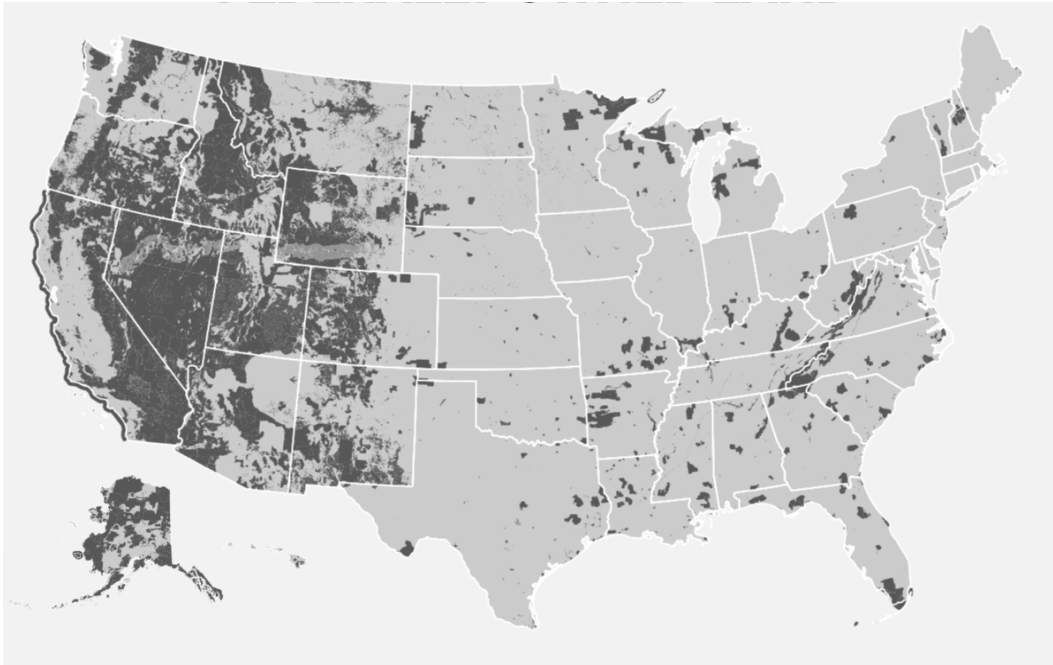
<sup>26</sup> See Fact Sheet *supra* note 22.

<sup>27</sup> Around 200 gunmen and followers staged an armed protect in Southern Nevada after the BLM began rounding up Cliven Bundy’s cattle after he failed to pay grazing fees. ASSOCIATED PRESS, *Federal authorities indict 19 in 2014 range standoff in Nevada*, FOX NEWS U.S. (Mar. 4, 2016), <http://www.foxnews.com/us/2016/03/04/federal-authorities-indict-19-in-2014-range-standoff-in-nevada.html>.

<sup>28</sup> Armed protestors in a standoff at an Oregon wildlife refuge gathered to shed light on federal land management after two ranchers were sentenced to jail for starting fires that spread to federal land. John Bacon, *Trial Begins for Oregon standoff leader Ammon Bundy*, USA TODAY (Sept. 13, 2016), <http://www.usatoday.com/story/news/nation/2016/09/13/trial-begin-protesters-oregon-refuge-standoff/90298366/>.

<sup>29</sup> After being sentenced to a lesser prison sentence by the trial judge, an appellate judge sentenced two ranchers to prison to the mandatory minimum under an antiterrorism law after they were convicted of arson for setting fire to federal land. Les Zaitz, *Oregon ranchers’ fight with feds sparks militias’ interest*, THE OREGONIAN (Dec. 31, 2015), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/12/ranchers\\_fight\\_with\\_feds\\_spark.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/12/ranchers_fight_with_feds_spark.html).

issues that are unfamiliar to those from other parts of the Country.<sup>30</sup> The federal government has ownership of about forty-seven percent of the West, whereas the federal government owns about four percent of the land just east of the Mississippi River.<sup>31</sup> Needless to say, it is a different world out West with different problems. The following map highlights the vast ownership (marked in dark grey) of land owned by the federal government throughout the United States:



The history of the western livestock industry and the unique issues that the West faces have required lawmakers and judges to create and interpret the laws that make up the legal landscape affecting ranchers. The statutory background discussed in the next section creates a private interest in the federal lands and opens the door for the rancher to claim it. The cases that follow keep the

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<sup>30</sup> Andy Kiersz & Brett LoGiurato, *This map shows the huge amount of land the federal government owns in the American West*, BUSINESS INSIDER (Jan. 7, 2016), [http://www.businessinsider.com/federal-government-land-map-oregon-militia-2016-1?utm\\_source=hearst&utm\\_medium=referral&utm\\_content=allverticals](http://www.businessinsider.com/federal-government-land-map-oregon-militia-2016-1?utm_source=hearst&utm_medium=referral&utm_content=allverticals).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (cropped and changed color).



door propped open and allow the rancher a chance to prove that his private right exists by pointing to congressional intent and historical customary practices of yesterday's rancher.

## A. STATUTES

The federal statutes that are listed and discussed below include the Mining Act of 1866, the Desert Land Act, and the Taylor Grazing Act. The rancher will find that his private property right was created and protected by these statutes. The other two statutes are from Nevada and Utah and turn unwritten custom into law.

### **The Mining Act of 1866**

The Mining Act of 1866 is at the heart of the discussion regarding the rancher's forage rights because it creates the rancher's private property right in the federal lands. The rancher must find his stake in the public lands implicit in the following text:

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; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section [first paragraph of this section].<sup>33</sup>

Most notably, the plain reading of the statute does not define the scope of the right-of-way afforded to the owners. However, courts have recognized that customary usage of the right-of-way should define the scope. For example, the Federal Court of Claims<sup>34</sup> noted that “[i]n the Ditch

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<sup>33</sup> Appropriation of waters on public lands; rights-of-way for canals and ditches 43 U.S.C. § 661 (2012) (alteration in original).

<sup>34</sup> See *infra* discussion labeled “*Hage v. United States.*”

Right-of-Ways Act, Congress chose not to enact detailed dimensions of the ditch rights-of-way. Instead, Congress expressly deferred to state and local custom and usage.”<sup>35</sup> Furthermore, in 1874 the Supreme Court in *Basey v. Gallagher* stated that Congress intended to recognize valid customary uses of water in the West.<sup>36</sup> The Court went on to say in the same case that custom, state legislation, and court decisions regarding the use of water are valid sources of power and that the “union of the three conditions in a particular case is not essential.”<sup>37</sup> The Court did note, however, that statutory regulation was “superior” to local custom and in case of conflict between the two, statutory regulation must control.<sup>38</sup>

### **The Desert Land Act**

A determination of when Congress decided to separate the bundle of sticks making up the federal lands drastically affects the rancher’s argument for a private forage right on federal lands. The Desert Land Act codified Congress’s intent to separate land and water.<sup>39</sup> This separation effectively separated the bundle of sticks making up the federal lands.<sup>40</sup> The Court in *Ickes v. Fox*, in 1877,—while discussing the Desert Land Act—explicitly stated that Congress had “the power to dispose of the land and water composing it together or separately” and that through the Desert Land Act,<sup>41</sup> Congress, “if not before,” separated the federal land from the water on the land.<sup>42</sup> The Court explicitly ruled out the possibility of a land right carrying a water right with it; however, the

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<sup>35</sup> *Hage v. United States* (Hage IV), 51 Fed. Cl. 570, 581 (2002).

<sup>36</sup> *Basey v. Gallagher*, 87 U.S. 670, 683–84 (1874).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

<sup>40</sup> *Id.*

<sup>41</sup> Grant of desert land to States authorized, 43 U.S.C. § 641 (2012).

<sup>42</sup> *Ickes*, 300 U.S. at 95.

Court did not answer the question of whether or not water rights, prior to their separation from federal land rights, carried some kind of limited forage right as well.<sup>43</sup>

### **The Nevada Stock Watering Act**

On the state level, the Nevada Stock Watering Act,<sup>44</sup> an example of the codification of a western customary practice, was created in order to allow Nevada to regulate disputes arising on the range as a valid exercise of its police power.<sup>45</sup> The relevant text from the Nevada Stock Watering Act follows:

[T]he value of the right to water such stock is directly dependent upon the availability to the owner of such right of the use of the public range in the vicinity of such watering places; and that the existence in the separate owners of two or more rights for watering range live stock in the same vicinity tends to produce controversies concerning the use of the public range, which often results in breaches of the peace.<sup>46</sup>

Any person who, without the right so to do, shall, on two or more separate days during any season, water more than 50 head of livestock at the watering place at which another shall have a subsisting right to water more than 50 head of livestock, or within 3 miles of such place, with intent to graze the livestock so watered on the portion of the public range readily accessible to livestock watering at the watering place of such other person, shall be guilty of a misdemeanor.<sup>47</sup>

While discussing the preamble, the Nevada Supreme Court stated that the Act was meant to protect “the grazing uses established by custom based on the experience of grazers.”<sup>48</sup> The court made it clear that grazing livestock on public lands did not create a property right and that use of the public domain occurs only at the “sufferance of the federal government.”<sup>49</sup> However, the court

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<sup>43</sup> *Id.*

<sup>44</sup> Unlawful acts; penalties, NEV. REV. STAT. ANN. § 533.505 (2015).

<sup>45</sup> *Itcaina v. Marble*, 56 Nev. 420, 427 (1936) (citing the preamble from the original Act).

<sup>46</sup> *In re Calvo*, 50 Nev. 125, 130 (1927).

<sup>47</sup> NEV. REV. STAT. ANN. § 533.505 (2015).

<sup>48</sup> *Itcaina*, 56 Nev. at 427.

<sup>49</sup> *Id.* at 432.

did not rule out the possibility of a water right having an attached forage right. Instead, the court only stated that grazing alone did not create a property interest in federal land.<sup>50</sup>

### **The Taylor Grazing Act**

Conflicts between state law and federal law create questions as to whether the rancher's stake on public lands actually exists. The Nevada Supreme Court held in *Ansolabehere v. Laborde*, that where the Taylor Grazing Act conflicted with the Nevada Stock Watering Act's provisions regarding "grazing use of the public lands" the Taylor Grazing Act rendered the state law ineffective.<sup>51</sup> Determining where conflicts arise with the Nevada Stock Watering Act's Three Mile Rule requires a definition of the scope of the ditch right-of-way, specifically, the distance of the right-of-way, as well as a quick look at the relevant section of the Taylor Grazing Act:

That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.<sup>52</sup>

A plain reading of the statute shows that interest or title in the federal lands was not created by the Taylor Grazing Act. The Taylor Grazing Act does not prohibit a previously created right or interest from existing after the creation of the Act. As long as the right or interest existed before the enactment of the Taylor Grazing Act, it should be protected. In *Colvin Cattle Co. v. United*

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<sup>50</sup> *Id.*; "Congress has not conferred upon Citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be used." *Omaechevarria v. Idaho*, 246 U.S. 343, 354 (1918). Using federal lands for grazing has always been deemed as a license and not a property interest. *Walker v. United States*, 142 N.M. 45, 48 (2007), construing *Bufford v. Houtz*, 133 U.S. 320, 326 (1890). "[U]se of public lands for stock grazing. . . was and is a privilege with respect to the federal government, revocable at any time." *Gardner v. Stager*, 892 F. Supp. 1301, 1303-04 (D. Nev. 1995).

<sup>51</sup> *Ansolabehere v. Laborde*, 73 Nev. 93, 94 (1957).

<sup>52</sup> 43 U.S.C. § 315(b) (2012).

*States*, the Court of Appeals for the Federal Circuit reaffirmed the notion made clear in two Nevada Supreme Court cases:<sup>53</sup> The Nevada Stock Watering Act does not establish a right to graze alongside a valid water right.<sup>54</sup> The reasoning from the three cases is sound.<sup>55</sup> The Three Mile Rule of the Nevada Stock Watering Act does not create a right, because a right based on custom already existed.<sup>56</sup> The Nevada Stock Watering Act is simply a codification of a previous customary practice that “secur[ed] the peaceful and most economical use of the public lands of the state, by protecting the grazing uses established by customs based on the experience of grazers.”<sup>57</sup>

### **Utah’s Livestock Watering Act of 2008**

The State legislature in Utah paid close attention to the ruling from *Hage v. United States*<sup>58</sup> when it drafted Utah’s Livestock Watering Act of 2008. The now removed section of the Act was an effort to protect the rancher from federal agencies and “ensure the future of ranching in Utah.”<sup>59</sup> The relevant text from the Act defines a “forage right:” “‘Forage right’ means a right for livestock to forage within fifty feet of (I) A water source; (II) the place to which water is diverted; or (III) a right-of-way for the maintenance and enjoyment of a livestock watering right.”<sup>60</sup> The specific increments that were defined in the statute seem to be directly adopted from the ruling of *Hage IV*.<sup>61</sup>

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<sup>53</sup> *In re Calvo*, 50 Nev. 125, 138 (1927); *Itcaina*, 56 Nev. at 432.

<sup>54</sup> *Colvin Cattle Co. v. United States*, 468 F.3d 803, 808 (Fed. Cir. 2006).

<sup>55</sup> See *supra* discussion labeled “The Nevada Stock Watering Act.”

<sup>56</sup> See discussion *infra* “*Hage v. United States*.”

<sup>57</sup> *Calvo*, 50 Nev. at 427.

<sup>58</sup> See generally discussion *infra* “*Hage v. United States*.”

<sup>59</sup> Erik Brinkerhoff, Note, *Utah’s Livestock Watering Act of 2008: Will the Amended Legislation Avoid the Litigation Stampede?*, 29 J. Land Resources & Envtl. L. 419 (2009).

<sup>60</sup> H.B. 208, 2008 Leg., 58th Sess. (Utah 2008).

<sup>61</sup> Brinkerhoff *supra* note 59, at 422.

## B. CASE LAW

The following section will include a discussion of cases that allow the rancher a chance to prove that his private property interests exists. The courts in *Hage v. United States*<sup>62</sup> and *Walker v. United States*<sup>63</sup> are the only courts to discuss forage rights explicitly, and the rest of the cases in this section discuss the issues involving grazing rights and water rights on federal land. Many of these cases used reasoning from each other when they were being decided. The outcome of this whirlwind of decisions and reasoning is that ranchers can still claim their private property right after they prove that Congress meant to respect the customary uses of the range. Some of these cases appear to apply directly to forage rights, but a closer look at the reasoning used to justify the varying courts decisions reveals that the rancher still has the opportunity to prove that his forage right exists.

### *Hage v. United States*

From 1991, the date the Hage family filed suit against the federal government, to 2013, the date of the final opinion, the Hages battled with the federal government over their possessory interest in the federal lands.<sup>64</sup> Wayne and Jean Hage purchased a ranch in Nevada consisting of around 7,000 acres of private land and used about 752,000 acres of adjoining federal land through grazing permits issued by the Bureau of Land Management (BLM) and the Forest Service.<sup>65</sup> The Hage family acquired rights to use water located on federal land under Nevada law when they

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<sup>62</sup> See *infra* discussion labeled “*Hage v. United States*.”

<sup>63</sup> See *infra* discussion labeled “*Walker v. United States*.”

<sup>64</sup> The following is a complete list of the opinions in this litigation and any citations from this line of litigation will be referred to by the parenthetical name listed in the citation. *Hage v. United States (Hage I)*, 35 Fed. Cl. 147 (1996); *Hage v. United States (Hage II)*, 35 Fed. Cl. 737 (1996); *Hage v. United States (Hage III)*, 42 Fed. Cl. 249 (1998); *Hage v. United States (Hage IV)*, 51 Fed. Cl. 570 (2002); *Estate of Hage v. United States (Hage V)*, 82 Fed. Cl. 202 (2008); *Estate of Hage v. United States (Hage VI)*, 90 Fed. Cl. 388 (2009); *Estate of Hage v. United States (Hage VII)*, 93 Fed. Cl. 709 (2010); *Estate of Hage v. United States (Hage VIII)*, 687 F.3d 1281 (Fed. Cir. 2012); *Estate of Hage v. United States (Hage IX)*, 113 Fed Cl. 277 (2013).

<sup>65</sup> *Hage VIII*, 687 F.3d at 1283.

purchased the ranch.<sup>66</sup> When this suit was commenced, the family alleged contractual, statutory, and constitutional causes of action.<sup>67</sup>

The Hage family argued that “various surface rights” on federal land, such as water usage, forage rights, pipeline, and ditch rights-of-way, were owned by ranchers and not the federal government.<sup>68</sup> Most important, the Court of Federal Claims found that a section of the Mining Act of 1866<sup>69</sup> and the Ditch Rights-of-Way Act,<sup>70</sup> allowed plaintiffs to maintain a fifty-foot right-of-way through federal land on either side of an 1866 ditch.<sup>71</sup> The Federal Court of Claims found “a limited right to forage is appurtenant to and a component of a vested water right.”<sup>72</sup> The court’s finding was supported by historical use of the water and ditches in question by livestock for maintenance and stock watering.<sup>73</sup> That court, in determining that a synonymous forage right existed, found testimony on the intent of Congress “to respect and protect the historic and customary usage of the range” persuasive.<sup>74</sup> The scope of the right-of-way, allowing a limited forage right adjacent to an 1866 ditch, was left undisturbed in the following proceedings and on appeal.<sup>75</sup> However, the trial court denied compensation for the forage right, because it reasoned

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<sup>66</sup> *Id.* at 1284.

<sup>67</sup> *Hage IV*, 51 Fed. Cl. at 572.

<sup>68</sup> *Id.* at 573.

<sup>69</sup> *See supra* discussion labeled “The Mining Act of 1866.”

<sup>70</sup> *Id.*

<sup>71</sup> *See Hage VIII*, 687 F.3d at 1287–88 (referring to the right to maintain ditches as “private property” but denying a regulatory taking claim because the claim was not ripe); *Hage IV*, 51 Fed. Cl. at 583; *Hage III*, 42 Fed. Cl. at 251.

<sup>72</sup> *Hage III*, 42 Fed. Cl. at 251.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See Hage IX*, 113 Fed. Cl. at 280 (acknowledging on remand a forage right even though compensation for a taking of that right was denied); *see Hage VIII*, 687 F.3d at 1287–88 (referring to the right to maintain ditches as “private property” but denying a regulatory taking claim because the claim was not ripe); *see Hage V*, 82 Fed. Cl. at 213 n.11 (stating that compensation was not warranted however a forage right did exist); *Hage IV*, 51 Fed. Cl. at 581.

that it was “economically unfeasible” to graze livestock on the limited 100 foot right-of-way.<sup>76</sup> This finding was also upheld on appeal and remand.<sup>77</sup>

There is tension in the Court of Appeals for the Federal Circuit’s opinion. The court cited a case in an effort to clarify the law and in the process, the court’s interpretation of the prior case seems to be at direct odds with the forage right acknowledged by the trial court. On appeal, the court clarified that *Colvin Cattle Co. v. United States*<sup>78</sup> stood “for the proposition that water rights do not include an attendant right to graze,” while still recognizing that the Hage family had a property interest in their ditch right-of-way that was construed in the court below to include a forage right.<sup>79</sup> This conflict was somewhat clarified on remand to the Federal Court of Claims. On remand, the court acknowledged the previous trial court’s denial of compensation for the forage on the Hages’ right-of-way.<sup>80</sup> The trial court noted on remand that the phrase cited from *Colvin Cattle Co.*, which is reproduced above, does not apply to the forage right because it was used to deal with an unrelated claim.<sup>81</sup> *Hage v. United States* recognized a preexisting forage right that has been unnoticed by other courts in this nation.

### ***United States v. Estate of Hage***

In a separate action from the line of litigation described in *Hage I–IX*,<sup>82</sup> *United States v. Estate of Hage* took place in the Ninth Circuit.<sup>83</sup> In this line of litigation, the United States brought an action against Wayne E. Hage and his son Wayne N. Hage, alleging that the Hage family grazed

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<sup>76</sup> *Hage V*, 82 Fed. Cl. at 213 n. 11.

<sup>77</sup> See *Hage IX*, 113 Fed. Cl. at 280 (acknowledging on remand a forage right even though compensation for a taking of that right was denied); see *Hage VIII*, 687 F.3d at 1287–88 (referring to the right to maintain ditches as “private property” but denying a regulatory taking claim because the claim was not ripe).

<sup>78</sup> See *infra* discussion labeled “*Colvin Cattle Co. v. United States*.”

<sup>79</sup> *Hage VIII*, 687 F.3d at 1287–91.

<sup>80</sup> *Hage IX*, 113 Fed. Cl. at 280.

<sup>81</sup> *Id.* at 280–81.

<sup>82</sup> See *infra* discussion labeled “*Hage v. United States*.”

<sup>83</sup> *United States v. Estate of Hage*, 810 F.3d 712 (9th Cir. 2016).



cattle on federal lands without authorization or a permit.<sup>84</sup> The Ninth Circuit held that water rights have “no effect” on the need for a rancher to apply for and receive a grazing permit, however, the court did reaffirm that an owner of a water right can divert water across federal land to continue to use the water for beneficial use.<sup>85</sup> The court claimed that the Federal Circuit agreed that a water right does not hold an appurtenant right to graze; however, the partial quote that the court refers to was the Federal Circuit’s clarification of a previous holding from another Federal Circuit case, *Colvin Cattle Co.*<sup>86</sup> The court in *Colvin Cattle Co.* based its decision on the absence of state law recognizing a forage right appurtenant to a water right.<sup>87</sup> Additionally, any binding rules<sup>88</sup> from *Colvin Cattle Co.* does not directly apply to a forage right.<sup>89</sup> Custom can be a suitable form of power to justify a forage right, especially in the absence of a state law or court ruling.<sup>90</sup> Custom, as long as it does not conflict with a state law or court holding at the time of the Ditch Rights-of-Way Act of 1866 enactment, is just as persuasive as state law or court decisions.<sup>91</sup> When the Ninth Circuit claimed that no appurtenant forage right existed and that the Federal Circuit agreed, it did so under reasoning from *Colvin Cattle Co.* The court in *Colvin Cattle Co.*, concluded that the forage right did not exist because there was no state law or court decision justifying its existence.<sup>92</sup> In making this conclusion, the court did not address whether an argument based on congressional intent and custom could justify a forage right. Because this argument is absent, the Ninth Circuit’s decision does not keep the rancher from claiming his forage right.

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<sup>84</sup> *Id.* at 714.

<sup>85</sup> *Id.* at 717–18 (emphasis in original omitted).

<sup>86</sup> *Id.* at 718; *Hage VIII*, 687 F.3d at 1290 (referring to *Colvin Cattle Co. v. United States*, 468 F.3d 803 (Fed. Cir. 2006)); see *infra* discussion labeled “*Colvin Cattle Co. v. United States.*”

<sup>87</sup> *Colvin Cattle Co. v. United States*, 468 F.3d 803, 807–08 (Fed. Cir. 2006).

<sup>88</sup> See *infra* discussion labeled “*Colvin Cattle Company v. United States.*”

<sup>89</sup> *Hage IX*, 113 Fed. Cl. at 280–81.

<sup>90</sup> *Basey v. Gallagher*, 87 U.S. 670, 683–84 (1874).

<sup>91</sup> *Id.*

<sup>92</sup> *Colvin Cattle Co.*, 468 F.3d at 808.

The Ninth Circuit also cites *Diamond Bar Cattle Co.*, as agreeing with the conclusion that no appurtenant right to graze exists when a rancher has a right to use water on public lands.<sup>93</sup> *Diamond Bar Cattle Co.*<sup>94</sup> was decided on similar reasoning as *Colvin Cattle Co.*, namely that no statute or court decision existed to justify an appurtenant forage right.<sup>95</sup> An argument based on congressional intent and custom was not made.<sup>96</sup> The Ninth Circuit also relied on *Hunter*; however, the court in *Hunter* arguably left open the possibility of a forage right supported by custom and congressional intent.<sup>97</sup> The court in *Hunter*, failed to specify any customary arguments made by the parties regarding a forage right synonymous with an 1866 right-of-way and a valid state water right.<sup>98</sup> Even when statutes and court cases do not exist to justify a forage right, it can be recognized by looking at congressional intent and customary practices. The Supreme Court recently refused to review the Ninth Circuit's decision; however, the Hage family's attorney is undeterred and is determined to continue on with the subject matter of the litigation.<sup>99</sup>

### ***Colvin Cattle Co. v. United States***

The Colvin Cattle Company brought suit against the United States and alleged a taking of its water rights on federal land.<sup>100</sup> The Company failed to pay its grazing permit fees and continued to graze its cattle on federal land until the BLM issued a notice of intent to have the cattle removed.<sup>101</sup> The BLM still allowed Colvin Cattle Company to access its water rights but

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<sup>93</sup> *United States v. Estate of Hage*, 810 F.3d 712, 718 (9th Cir. 2016) (citing *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1215 (10th Cir. 1999)).

<sup>94</sup> See *infra* discussion labeled "*Diamond Bar Cattle Company v. United States*."

<sup>95</sup> *Diamond Bar Cattle Co.*, 168 F.3d at 1213–17.

<sup>96</sup> *Id.*

<sup>97</sup> See *infra* discussion labeled "*Hunter v. United States*."

<sup>98</sup> *Hunter v. United States*, 388 F.2d 148, 153–55 (9th Cir. 1967).

<sup>99</sup> Mateusz Perkowski, *Supreme Court turns down Hage lawsuit appeal*, CAPITAL PRESS (Oct. 24, 2016), <http://www.capitalpress.com/Livestock/20161024/supreme-court-turns-down-hage-lawsuit-appeal>.

<sup>100</sup> *Colvin Cattle Co. v. United States*, 468 F.3d 803, 805 (Fed. Cir. 2006).

<sup>101</sup> *Id.*

authorized another rancher to run his livestock on the land that the company had previously held a permit for.<sup>102</sup> The company argued that inherent in its water rights was “a free-standing right to graze.”<sup>103</sup> The court emphasized that grazing on federal lands before Congress created the grazing permit system was “a privilege, not a right.”<sup>104</sup> The court seemed to favor an argument stemming from the Ditch Rights-of-Way Act of 1866, however, Colvin Cattle Company’s reliance on Nevada state law (Nevada Stock Watering Act’s Three Mile Rule) fell short of proving an inherent connection between water rights and grazing rights.<sup>105</sup> The court claimed that the purpose of the Nevada Stock Watering Act was only to allow the state to exercise police power over the public domain.<sup>106</sup>

The court stated that the Nevada Stock Watering Act could not have created a right,<sup>107</sup> which is accurate.<sup>108</sup> However, this law, which does not create a right, arguably codified a custom that was present at the time the Mining Act of 1866 was enacted. The court noted that this statute would have been superseded by the Taylor Grazing Act,<sup>109</sup> however, the Taylor Grazing Act specifically points out that existing water rights would not be diminished or impaired by the passing of the Taylor Grazing Act.<sup>110</sup> The Colvin Cattle Company should not have argued that the law created a right because it may have succeeded if it had argued that the law merely represented a valid custom. The court did not mention an argument based on custom and congressional intent, even though an argument such as this had been made successfully in the Federal Court of Claims

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<sup>102</sup> *Id.* at 806.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 807.

<sup>105</sup> *Id.* at 807–08.

<sup>106</sup> *Colvin Cattle Co.*, 468 F.3d at 808.

<sup>107</sup> *Id.*

<sup>108</sup> *See supra* discussion labeled “The Nevada Stock Watering Act.”

<sup>109</sup> *Id.*

<sup>110</sup> Grazing permits; fees; vested water rights; permits not to create right in land, 43 U.S.C. § 315(b) (2012).

just four years prior in *Hage IV*.<sup>111</sup> A forage right synonymous with a water right on fifty feet of either side of an 1866 ditch was acknowledged by the same court that decided *Colvin Cattle Co.* in 2012.<sup>112</sup>

***Diamond Bar Cattle Co. v. United States***

Kit and Sherry Lane were owners of the Diamond Bar Cattle Company and the Laney Cattle Company.<sup>113</sup> The predecessors of the ranch began grazing cattle on federal land in 1883 and had obtained grazing permits from the Forest Service beginning in 1907.<sup>114</sup> The Lanes argued that their right to use water on federal land was accompanied by a “possessory property right.”<sup>115</sup> The Lanes based this argument on the premise that New Mexico law did not require them to obtain federal grazing permits.<sup>116</sup> The Tenth Circuit found that state law did not exist to justify a grazing right appurtenant to a water right.<sup>117</sup>

Interestingly, the Tenth Circuit discussed the findings in *Hage III*<sup>118</sup> and attempted to distinguish the Lanes’ case from the *Hage* decision in three ways.<sup>119</sup> First, the Tenth Circuit arguably misinterpreted *Hage III* when it attempted to distinguish Lane’s argument regarding New Mexico law, and the possibility of state law in Nevada justifying a forage right adjacent to an 1866 ditch.<sup>120</sup> While the Federal Court of Claims opened up the possibility of state law allowing a forage right adjacent to an 1866 ditch,<sup>121</sup> the court found in later proceedings that state law was not

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<sup>111</sup> *Hage IV*, 51 Fed. Cl. at 580–81; see *supra* discussion labeled “*Hage v. United States*.”

<sup>112</sup> See *Hage VIII*, 687 F.3d at 1286–88 (referring to the Hage’s ditch right-of-way which included a fifty-foot forage right appurtenant to the water right as “private property”).

<sup>113</sup> *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1210 (10th Cir. 1999).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1210–11.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1213–17.

<sup>118</sup> See *infra* discussion labeled “*Hage v. United States*.”

<sup>119</sup> *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1216–17 (10th Cir. 1999).

<sup>120</sup> *Id.* at 1216.

<sup>121</sup> *Hage I*, 35 Fed Cl. at 174–76.

adequate to establish this right, and then relied upon custom and congressional intent.<sup>122</sup> The Tenth Circuit arguably relied on incorrect reasoning from *Hage III*, and should have considered custom and congressional intent just as the Federal Court of Claims had done. The Tenth Circuit's second attempt at distinguishing the facts in *Diamond Bar Cattle Co.* from the *Hage* decisions was done by pointing out that the Lanes had asked the court to find a significantly larger right in their case than the rights found in *Hage*.<sup>123</sup> The third and final distinction pointed out by the court was that *Hage* was a takings case whereas the Lanes requested injunctive and declaratory relief granting a grazing permit vesting a property interest in the federal lands.<sup>124</sup> While the analysis may be different for the two causes of action, a court finding that a right exists under the Fifth Amendment Takings Clause should be honored in a suit for injunctive and declaratory relief. The only caveat to this line of thinking was addressed by the Tenth Circuit when it pointed out the broader scope of a right asked for by the Lanes opposed to the fifty-foot right-of-way granted to the Hages.<sup>125</sup>

The Lanes also argued that the Doctrine of Prior Appropriation could extend far beyond the realm of water and that any natural resource that could be controlled by man's labor—specifically the grazing opportunities on federal land—could pass to him a possessory interest in federal land as long as he put the land to beneficial use.<sup>126</sup> The court did not find this argument persuasive and noted that the interpretation of the Mining Act of 1866 was “contrary” to the language of the Act but also to the well-recognized body of law that forbids a private property grazing right on public lands.<sup>127</sup> The court mentioned that the Mining Act of 1866 could not “fairly

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<sup>122</sup> *Hage III*, 42 Fed. Cl. at 251; *Hage IV*, 51 Fed. Cl. at 580–81.

<sup>123</sup> *Diamond Bar Cattle Co.*, 168 F.3d at 1216–17. This Article only discusses a forage right adjacent to 1866 ditches and only fifty feet on either side of any such ditches, anything past those fifty feet is not within the scope of this Article and the Tenth Circuit pointed out the difference between these two cases.

<sup>124</sup> *Id.* at 1217.

<sup>125</sup> *Id.* at 1216–17.

<sup>126</sup> *Id.* at 1215.

<sup>127</sup> *Id.*

be read to recognize private property rights in federal lands, regardless of whether proffered as a distinct right or as an inseparable component of a water right.”<sup>128</sup> The Tenth Circuit relied on two cases to support its assertion; however, the cases cited do little to illuminate the reasoning behind that conclusion.

First, the court referred to a sentence from the Supreme Court case *United States v. Rio Grande Dam & Irrigation Co.*, stating that the effect of the Mining Act of 1866 was to recognize the validity of local custom, court decisions, and laws in respect to the appropriation of water.<sup>129</sup> The Supreme Court in *Rio Grande Dam & Irrigation Co.* quotes another Supreme Court case that says the Ditch Rights-of-Way Act recognized a pre-existing right of possession for right-of-ways,<sup>130</sup> one that could arguably have carried with it a synonymous forage right. Because the right-of-way could have contained a pre-existing forage right at the time, Congress recognized custom as a valid source of power to create a forage right. The Tenth Circuit’s reliance on *Rio Grande Dam & Irrigation Co.* fails to illuminate why a private property right in the form of a forage right could not exist.

The second case that the Tenth Circuit relied on is *Cleary v. Skiffich*.<sup>131</sup> In a case involving a mill site,<sup>132</sup> the Colorado Supreme Court stated that the only thing attached to the water right was a right-of-way to divert the water through ditches.<sup>133</sup> The court stated that title to the land upon which the mill rested could not be transferred under a theory that it was appurtenant to the existing water right.<sup>134</sup> Once again, because the scope of a right-of-way has yet to be defined, it is possible

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<sup>128</sup> *Id.*

<sup>129</sup> *Diamond Bar Cattle Co.*, 168 F.3d at 1215 (quoting *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899)).

<sup>130</sup> *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 705 (quoting *Broder v. Natoma Water Co. & Mining Co.*, 101 U.S. 274, 276 (1879)).

<sup>131</sup> *Diamond Bar Cattle Co.*, 168 F.3d at 1215.

<sup>132</sup> *Cleary v. Skiffich*, 28 Colo. 362, 364 (1901).

<sup>133</sup> *Id.* at 373.

<sup>134</sup> *Id.*

that a forage right is included within that scope. The Tenth Circuit's reliance upon *Cleary* proves that a private right to graze is generally not created through the ownership of a water right. However, a forage right, synonymous with a water right and a valid right-of-way, is still left untouched by the court in *Cleary* as well as the ruling from *Diamond Bar Cattle Co.*

### ***Walker v. United States***

On the state level, one court has discussed customary practices regarding the connection between water rights and forage rights. The United States Court of Federal Claims certified two questions to the Supreme Court of New Mexico inquiring about the current state of New Mexico law in regards to whether forage rights were implicit within a vested water right.<sup>135</sup> The Walkers owned a forty-acre ranch in New Mexico, where they raised cattle and grazed on two adjacent allotments administered by the United States Forest Service.<sup>136</sup> The Forest Service asked the Walkers to remove cattle in increments due to overgrazing and drought conditions.<sup>137</sup> The Walkers failed to do so until they were ordered to by the United States District Court for the District of New Mexico.<sup>138</sup> The Court of Claims determined that state laws were silent as to a forage right.<sup>139</sup> The Walkers argued that custom was a valid source of power creating a right to graze, but the New Mexico Supreme Court did not find that customary practices supported a claim for an “implicit ‘possessory’ right to graze.”<sup>140</sup> The court reasoned that control of water did not translate to a grazing right because the “right to graze must come from an independent source of authority related to the land.”<sup>141</sup> The court, in mentioning the Homestead Act of 1862,<sup>142</sup> the Stockraising

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<sup>135</sup> *Walker v. United States*, 142 N.M. 45, 47 (2007).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 48.

<sup>140</sup> *Id.* at 58.

<sup>141</sup> *Walker*, 142 N.M. at 57.

<sup>142</sup> Homesteads, 43 U.S.C. §§ 161-284 (1970) (repealed 1976).

Homestead Act,<sup>143</sup> and the Kincaid Act,<sup>144</sup> seemed to require that Congress explicitly grant rights to individuals rather than allowing the court to infer a right from historical custom. The court also mentioned the well-recognized idea that using federal lands for grazing has always been deemed as a license and not a property interest.<sup>145</sup> Somewhat contradictory to a requirement that a forage right must be explicitly granted to the individual, the Supreme Court allows custom to be considered when determining issues pertaining to water rights.<sup>146</sup> An explicit grant of a forage right from Congress does not exist because Congress chose to “expressly defer[] to state and local custom and usage” when determining the scope of ditch right-of-ways.<sup>147</sup> To require an explicit grant of a forage right to individual ranchers would be redundant given Congress’s adoptions of customary rules and regulations present at the time of the Mining Act of 1866.

### *Hunter v. United States*

The United States brought an action against Roy Hunter, a cattle rancher, for watering and grazing his cattle on federal land without a grazing permit.<sup>148</sup> Hunter argued that his water rights had an appurtenant right to graze cattle based on the Ditch Rights-of-Ways Act of 1866.<sup>149</sup> The court found that Hunter did in fact have a right to use water on federal lands but the court found that a grazing right was not appurtenant to the water rights.<sup>150</sup> Hunter argued that the lands next to his water right “provide the means to use water beneficially and must therefore be deemed appurtenant to it.”<sup>151</sup> The court rejected this argument, and reasoned that the “appurtenance must

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<sup>143</sup> Stock-Raising Homestead, 43 U.S.C. §§ 291-98 (repealed 1976).

<sup>144</sup> Limitation as to Amount and Additional Enlargements, 43 U.S.C. §§ 222-24 (repealed 1976); *Walker*, 142 N.M. at 57-58.

<sup>145</sup> *Walker*, 142 N.M. at 58 (construing *Buford v. Houtz*, 133 U.S. 320, 326 (1890)).

<sup>146</sup> *Basey v. Gallagher*, 87 U.S. 670, 683-84 (1874).

<sup>147</sup> *Hage IV*, 51 Fed. Cl. at 581.

<sup>148</sup> *Hunter v. United States*, 388 F.2d 148, 150 (9th Cir. 1967).

<sup>149</sup> *Id.* at 153-54.

<sup>150</sup> *Id.* at 153-55.

<sup>151</sup> *Id.* at 154.



be limited to that which is essential to the use of the right granted; it does not include the thing with which the right granted is used.”<sup>152</sup> The Ninth Circuit was unwilling to interpret the Mining Act of 1866 to allow a grazing right appurtenant to a water right on federal land, reasoning that it had “found nothing to indicate that Congress intended to impose” anything further than the rights explicitly mentioned within the statute.<sup>153</sup> In the context of appropriation of water, the court found that custom had been “crystalized into law by judicial decision or statute.”<sup>154</sup> However, the court does not specify whether or not an argument of custom could be brought to justify forage rights appurtenant to a ditch right-of-way.<sup>155</sup> It is also unclear whether the Ninth Circuit considered congressional intent or local custom when determining that Congress had granted a limited forage right appurtenant to a water right. The court only says that it “found nothing” and failed to elaborate on any arguments made by the parties involved.<sup>156</sup>

The statutes and cases discussed leave open the possibility that ranchers, whom had valid state water rights and right-of-ways, in 1866, obtained a limited forage right to graze their livestock on federal land. The rancher must rely on customary practices at the turn of the nineteenth century, congressional intent, and a few statutes that codified the local customs, rules, and regulations of the time to have his forage right recognized.

## II. HOW THE PRIVILEGE BECAME A RIGHT

Custom has been used by Congress and the Courts to create rights in certain contexts. “[C]ustoms, usages, and regulations” of miners were recognized by Congress and adopted into law

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 154.

<sup>154</sup> *Hunter*, 388 F.2d at 152.

<sup>155</sup> *Id.* at 153-55.

<sup>156</sup> *Id.* at 153.

allowing the doctrine of prior appropriation to vest water rights and right-of-ways.<sup>157</sup> Congress respected the customs of the west, so much that it recognized the doctrine of prior appropriation in the Mining Act of 1866.<sup>158</sup> The “inherent justice” associated with the miner’s customs, usages, and regulations were widely recognized by courts and legislatures of the states.<sup>159</sup> Another example of customary practice gaining a legal foothold was recognized in the General Mining Law of 1872:

Congress acquiesced to what miners had long been doing without legal sanction: taking what they found on public land. This statute permitted miners to stake claims and to appropriate whatever their labor brought to light; indeed they could appropriate the surface as well by parenting their claim. Unlike homestead legislation, this antique statute has never been repealed: if you can find an unclaimed valuable deposit of a locatable (“hardrock”) mineral and are willing to spend a mere \$100 a year for five years working it, you too may acquire a piece of federal land for \$5 an acre.<sup>160</sup>

Stepping away from the mining context, control of the federal lands for the purpose of grazing was intertwined with the use and control of water rights. Early on, ranchers used a similar concept of prior appropriation to control public lands.<sup>161</sup> Ranchers would set up claims on certain areas just like miners had done.<sup>162</sup> These claims could not be upheld in court by ranchers, and

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<sup>157</sup> *Atchison v. Peterson*, 87 U.S. 507, 512 (1874).

<sup>158</sup> *Id.* at 513.

<sup>159</sup> *Id.* at 513-14.

<sup>160</sup> SCOTT LEHMANN, *PRIVATIZING PUBLIC LANDS* 34 (Kristin Shrader-Frechette ed., 1995) (footnotes omitted).

<sup>161</sup> OSGOOD, *supra* note 2, at 183 (“The idea that a certain area might become the accustomed range to be held against all comers on the basis of priority right was developed to its greatest extent during the earliest days of the boom period.”); *see generally Atchison*, 87 U.S. at 512 (“And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor.”).

<sup>162</sup> Jeany Pontrelli, *Western Lands: A Perception Through History and Fiction*, in *NEVADA LIFESTYLES AND LANDS* 8, 9 (Ruth M. Houghton & Leontine B. Nappe eds., 1977) (Ranchers would often place advertisements in papers claiming public land: “I, the undersigned, do hereby notify the public that I claim the valley branching off the Glendive Creek, four miles east of the Allard and extending to its source on the south side of the Northern Pacific Railroad as a stock range. Chas. S. Johnson”); OSGOOD, *supra* note 2, at 185-86 (“We the undersigned stock growers of the above described range, hereby give notice that we positively decline allowing any outside party, or any party’s herds upon the range, the use of our corrals nor will they be permitted to join in any roundup on said range from and after this date.”).

required them to gain control of water next to their claims or unite with cooperating neighbors to exclude newcomers.<sup>163</sup> Denying newcomers from land already claimed by stockmen was one of the only ways to prevent overcrowding on the range.<sup>164</sup> An effective way of controlling the rangeland was to gain control of water.<sup>165</sup> After all, “he who controlled the water, controlled the adjacent range.”<sup>166</sup>

In an area where it was useless to farm due to lack of irrigation water, ranchers held their grazing land by “common consent” of others in the region.<sup>167</sup> The “wealth of the country” could be found in its grazing resources.<sup>168</sup> People in these regions created “a law unto themselves” based on customary practices.<sup>169</sup> “It remains, then, for the occupants themselves to adjust the question of range rights by some mutual agreement that will insure safety to their herds and protect them against the intrusion of others.”<sup>170</sup> In order to make the “plains and the hillsides” valuable, ranchers needed to ensure their livestock had access to water in those areas.<sup>171</sup> A rancher’s individual water rights were the best means of measuring his rights to the federal lands.<sup>172</sup> In fact, it was viewed that “ownership of the watering-places gives tenure to contiguous ranges. This fact is recognized by Western cattlemen, and the questions as to the number of cattle individual owners are permitted to hold, under regulations of the various local associations, is determined by the question of water

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<sup>163</sup> OSGOOD, *supra* note 2, at 183-84; Pontrelli, *supra* note 162.

<sup>164</sup> OSGOOD, *supra* note 2, at 185.

<sup>165</sup> Muhn, *supra* note 6, at 73.

<sup>166</sup> *Id.*

<sup>167</sup> Pub. Lands Comm’n, *Report of the Public Lands Commission Created by the Act of March 3, 1879, related to Public lands in the Western Portion of the United States and to the Operation of Existing Land Laws*, 344 (1880) [hereinafter Report of the Public Lands Commission].

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at IX.

<sup>170</sup> H. M. Taylor, *Report of H.M. Taylor, Agent Bureau of Animal Industry: On the condition of the range cattle industry*, in U.S. DEPARTMENT OF AGRICULTURE: THIRD ANNUAL REPORT OF THE BUREAU OF ANIMAL INDUSTRY FOR THE YEAR 1886 105, 316 (1887).

<sup>171</sup> *Id.* at 110.

<sup>172</sup> *See id.*

frontage.”<sup>173</sup> William Jones, a New Mexico rancher, commented in a sworn statement on how range rights were acquired:

A custom has grown up and become thoroughly established among people of the community that where one stockman has developed water on and taken possession of the range by fully stocking the same that he will not be molested by other stockmen in his possession and enjoyment of such range.<sup>174</sup>

In light of the scarcity of water in the arid West, one Colorado cattleman described just how intertwined water and public land were:

The water controls the land. Wherever there is any water, there is a ranch. On my own ranch I have 2 miles of running water; that accounts for my ranch being where it is. The next water from me in one direction is 23 miles; now, no man can have a ranch between these two places. I have control of the grass the same as though I owned it. . . . That is the way all over the West.<sup>175</sup>

Custom was used in other parts of the West to divvy up land in accordance with water ownership. The Surveyor-General of Colorado, Utah, Nevada, and Idaho noted that the settlers in Rio Grande del Norte Valley:

[H]old their lands without title and in accordance with their own customs. The land along the streams, being the only land that can be cultivated, each man holds so many *varas* or yards front on the stream and extended back at right angles with the stream to the bluff or as far as water can be carried by ditches for irrigation.<sup>176</sup>

Ranchers throughout the West were unsuccessful in adopting the system of stock growing similar to the one used by the settlers in the Rio Grande del Norte Valley because of the restraints imposed by eastern-made land laws.<sup>177</sup> Instead, ranchers turned to stock associations and neighbors to help them enforce the rules that had formed from custom:

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<sup>173</sup> H. M. Taylor, *Report of H.M. Taylor, Agent Bureau of Animal Industry: On the importance of the range industry*, in U.S. DEPARTMENT OF AGRICULTURE: SECOND ANNUAL REPORT OF THE BUREAU OF ANIMAL INDUSTRY FOR THE YEAR 1885 293, 109 (1886).

<sup>174</sup> WAYNE HAGE, *STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS* 11 (1989).

<sup>175</sup> Report of the Public Lands Commission, *supra* note 168, at 297.

<sup>176</sup> OSGOOD, *supra* note 2, at 18 (citing Commissioner of the General Land Office, *Report of the Commissioner of the General Land Office, for the Year 1864*, 80 (1865)) (emphasis added).

<sup>177</sup> OSGOOD, *supra* note 2, at 18.

[E]xclusion of outsiders must come through some sort of an understanding among those already on the ground. Cooperation among neighbors in the conduct of their business resulted in the growth of a certain amount of range privilege and good will. . . . The Montana stockmen, through their local associations endeavored to control the range. . . .<sup>178</sup>

The methods and practices used by neighbors were not successful in preventing overgrazing on public lands.<sup>179</sup> Regardless of the inability of the rancher to create his own method of enforcement, the widely accepted, albeit difficult to enforce, understanding of the West was that the rancher controlled the range that was adjacent to his valid control of water.<sup>180</sup>

Customary practice leading to the ownership of a forage right, synonymous with a valid water right and right-of-way, was codified in two statutes: the now repealed section of the Utah Livestock Watering Rights Law<sup>181</sup> and the Nevada Stock Watering Act's Three Mile Rule.<sup>182</sup>

The Utah Livestock Watering Rights Law was an important step forward in protecting the American rancher. The intent of the legislature in creating the law was to protect the rancher from federal agencies and ensure that Utah ranchers could continue their business into the future.<sup>183</sup> Generally, states cannot grant a right to graze on federal land.<sup>184</sup> However, Utah's bill did not grant forage rights to ranchers because that right existed in 1866 and was approved by Congress at that

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 184-85; *e.g.* STARRS, *supra* note 14, at 51 (“while it was all but impossible for a rancher in the arid West to purchase all the land needed to ranch, acquiring all surface-water rights, and rigorously controlling any artesian wells or pumping of water, was the next best thing, for by controlling the water a rancher could effectively block any other use of a body of land.”).

<sup>181</sup> H.B. 208, 2008 Leg., 58th Sess. (Utah 2008).

<sup>182</sup> Unlawful acts; penalties, NEV. REV. STAT. ANN. § 533.505 (2015).

<sup>183</sup> Brinkerhoff, *supra* note 59.

<sup>184</sup> *Id.* at 431.

time.<sup>185</sup> This law was not well received by the Forest Service and BLM in Utah and Nevada.<sup>186</sup> The Forest Service and BLM sent letters “which stated that the act potentially created private ownership of federal land and that the federal agencies could not invest in rangeland improvements if this was the case.”<sup>187</sup> The section defining “forage rights” was removed.<sup>188</sup> After the definition’s removal, the rancher was left without explicit statutory protection. The rancher can only rely on case law and custom to protect his limited forage rights. However, the rancher can still rely on one statute from Nevada to bolster his argument that custom existed and created limited forage rights synonymous to his 1866 ditches and valid state water right.

The Nevada Stock Watering Act, specifically the Three Mile Rule, is the codification of customary practices related to forage rights. The rule was limited by Congress,<sup>189</sup> but only to the extent that the fifty-foot right-of-way is in conflict with the Three Mile Rule. The Taylor Grazing Act allows for previous rights to be protected,<sup>190</sup> so in essence, the Nevada Stock Water Act’s Three Mile Rule was a codification of a custom existing before the enactment of the Taylor Grazing Act. The Ditch Rights-of-Way Act of 1866, did not explicitly define the scope of the right-of-way (the distance on either side of the ditch or if any vested right, i.e. a forage right, was synonymously included with the right-of-way)<sup>191</sup> and it was not until *Hage* that a court decided to create a fifty-foot requirement.<sup>192</sup> Until that scope was defined by a court, it is reasonable to

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<sup>185</sup> *Hage III*, 42 Fed. Cl. at 250; *Hage IV*, 51 Fed. Cl. at 581; *see Hage V*, 82 Fed. Cl. at 213 n.11 (stating that compensation was not warranted however a forage right did exist); *see Hage VIII*, 687 F.3d at 1287-88 (referring to the right to maintain ditches as “private property” but denying a regulatory taking claim because the claim was not ripe); *see Hage IX*, 113 Fed. Cl. at 280 (acknowledging on remand a forage right even though compensation for a taking of that right was denied).

<sup>186</sup> Brinkerhoff, *supra* note 59, at 434.

<sup>187</sup> *Id.*

<sup>188</sup> UTAH CODE ANN. § 73-3-31 (2016) (removing “forage right” definition in 2009).

<sup>189</sup> *See supra* discussion labeled “The Nevada Stock Watering Act.”

<sup>190</sup> Grazing permits; fees; vested water rights; permits not to create right in land, 43 U.S.C. § 315(b) (2012).

<sup>191</sup> *Hage III*, 42 Fed. Cl. at 250.

<sup>192</sup> *Id.* at 251.

believe, that the Nevada Stock Watering Act's Three Mile Rule acknowledged that a forage right was within the scope of an 1866 ditch right-of-way across federal lands. However, when the Nevada Stock Watering Act comes into conflict with an act of Congress, the state law is nullified.<sup>193</sup> Therefore, an interpretation of a fifty-foot right-of-way of a federal statute would conflict directly with the Nevada Stock Watering Act's Three Mile Rule. That still means that the Nevada Stock Watering Act acknowledges a forage right within fifty-feet of a valid 1866 ditch. A conflict between the two laws does not exist as to the presence of the ditch right-of-way and the synonymous forage right, the only conflict being whether or not the distance from the ditch is three miles or 50 feet.

It was Congress's intent, when drafting the Mining Act of 1866, to protect and respect customary usage of the range.<sup>194</sup> During debates on the House floor, Congressman Higby described the object of the Mining Act of 1866 as:

[P]reserv[ing] to those companies and individuals who have constructed ditches and flumes over the mineral lands of the States of California, Oregon, and Nevada to a very large extent the right of way over the public land, and that they shall be protected in the property which they have created to such a vast amount.<sup>195</sup>

During the debates on the proposed Mining Act of 1866, Congressman Higby also claimed that the owners of the ditches had the same rights-of-way that they originally had as long as those rights of possession respected the laws of the state where they were located.<sup>196</sup> Additionally, in respect to the property interest in the ditches: "the property shall be undisturbed; and . . . the right of way shall be guaranteed by the General Government so long as these ditches . . . shall be used

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<sup>193</sup> *In re Calvo*, 50 Nev. 125, 138 (1927).

<sup>194</sup> *Hage III*, 42 Fed. Cl. at 251.

<sup>195</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3141 (1866).

<sup>196</sup> *Id.*

for the purposes named in the bill.”<sup>197</sup> Finally, in the context of miners, Congressman Higby explained the main focus of the bill: “[T]he General Government shall extend the same security that has always been extended to this kind of property under the rules and regulations of the miners and the legislation of these several States.”<sup>198</sup> Because it was the intent of Congress to allow for miner regulations, rules (i.e. customs), and state legislation to be protected, then it is equally understandable that ranchers, another group affected by this legislation, would have a protected interest guided by the rules and regulations of their industry. “The dimensions used in the House’s version of the bill demonstrate Congress understood and accepted the local law and custom when it drafted, debated, and passed the 1866 Act.”<sup>199</sup>

On the Senate floor, Senator Stewart stressed that the peculiarities of the West required Americans entering the last frontier to make laws for themselves, and as a result these Americans formed their own rules and customs.<sup>200</sup> Senator Stewart placed miners on a pedestal when he spoke of the miner giving “the honest toil of his life to discover wealth which when found is protected by no higher law than that enacted by himself under the implied sanction of a just and generous Government.”<sup>201</sup> To the miner, his prize was gold and silver;<sup>202</sup> for the cattleman, his gold was the water he owned the right to use, and his silver was the grassy glades next to the precious gold that flowed from the springs of the Great American Desert. The miner expected his “hard-earned treasure” to be protected.<sup>203</sup> It makes sense that the cattleman felt the same way about his water and the grass next to it. Senator Stewart praised the miner for his “untiring energy” to “enhance

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Hage IV*, 51 Fed. Cl. at 582.

<sup>200</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3226 (1866).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*



the value of the property of the nation” and it seems that the Senate was concerned with “the sand plains, alkaline deserts, and dreary mountains of rocks and sage brush of the great interior” staying “worthless.”<sup>204</sup> “The Mining Act of 1866 “proposes no new system, but sanctions, regulates, and confirms a system to which the people are devotedly attached, and removes a cloud of doubt and uncertainty.”<sup>205</sup> Senator Stewart urged that the best way for the government to give title to the rights-of-ways “so important for permanent prosperity” was to give the title to those who had followed “local rules” in obtaining them.<sup>206</sup> The rancher did what Congress wanted. He tamed the Great American Desert and made it useful just as the miner had.<sup>207</sup> And in taming the desert, the rancher supported the miner.<sup>208</sup> It is clear that Congress’s intent was to “honor the scope of property rights as defined by their independent sources.”<sup>209</sup>

Establishing a forage right might not be the easiest path for ranchers to accomplish. In order to establish the right, a three-step analysis must take place.<sup>210</sup> First, the court must determine if the plaintiff has ownership of 1866 Act ditches.<sup>211</sup> Second, the court must examine whether the proof submitted for each ditch was established prior to a certain date<sup>212</sup> (in *Hage IV* the court chose 1907 because that was when the land where the ditches were located became part of the Toiyabe National Forest<sup>213</sup>). Finally, the court must determine what the “extent” of the right-of-way is.<sup>214</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 3227.

<sup>206</sup> CONG. GLOBE, 39th Cong., 1st Sess. 3227 (1866).

<sup>207</sup> *See generally* OSGOOD, *supra* note 2, at 24.

<sup>208</sup> Ruth M. Houghton & Leontine B. Nappe, *General Introduction*, in *NEVADA LIFESTYLES AND LANDS* 1, 5 (Ruth M. Houghton & Leontine B. Nappe eds., 1977).

<sup>209</sup> *Hage IV*, 51 Fed. Cl. at 582.

<sup>210</sup> *See Id.* at 580–83.

<sup>211</sup> *Id.* at 580.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 580–583.

The “extent” of the right-of-way is discovered by considering customary practices that created a limited forage right synonymous with a valid water right and an 1866 ditch right-of-way.<sup>215</sup>

The court in *Hage V* found that it was “economically unfeasible” to graze cattle on a 100-foot strip of land.<sup>216</sup> The court reasoned that erecting a fence to keep cattle from grazing land beyond the right-of-way would negatively impact a possible sale of the forage right to another rancher.<sup>217</sup> The court claimed that it was “unlikely” that a buyer would want to purchase the forage right on the 100-foot right-of-way.<sup>218</sup> The reasoning behind this statement is somewhat puzzling given that fencing costs can vary depending on the type of fence built and the materials used.<sup>219</sup> The court does not go into detail as to the economic feasibility of a rancher fencing off ditch right-of-ways and using them to graze livestock.<sup>220</sup> Additionally, in coming to a conclusion regarding the feasibility of grazing livestock on this stretch of land, the court should have considered multiple factors regarding the efficient use of forage, including the number of livestock that can graze in that area, length of time livestock can graze, and the size of the area.<sup>221</sup> Sometimes specific species of livestock can use a particular stretch of land better than others.<sup>222</sup> Given the multiple variables involved in determining whether or not grazing on a 100-foot stretch is economically feasible, the court in *Hage V* may have prematurely jumped to conclusions that are inconsistent with real world

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<sup>215</sup> *Hage III*, 42 Fed. Cl. at 251.

<sup>216</sup> *Hage V*, 82 Fed. Cl. at 213 n.11.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See generally Ralph Mayer, Tom Olson, William Edwards & Andy Chamra, *Estimated Costs for Livestock Fencing*, AG DECISION MAKER 1 (2012), <https://www.extension.iastate.edu/agdm/livestock/pdf/b1-75.pdf> (The cost per foot for a woven wire fence is \$1.93 and the cost of an electrified polywire fence is \$0.20 per foot).

<sup>220</sup> *Hage V*, 82 Fed. Cl. at 213 n.11.

<sup>221</sup> See Gene Frause, *Pasture Management: Making Stocking Rates Work for You*, BEEF CATTLE (2012), [https://www.extension.umn.edu/agriculture/beef/components/docs/making\\_stocking\\_rates\\_work\\_for\\_you.pdf](https://www.extension.umn.edu/agriculture/beef/components/docs/making_stocking_rates_work_for_you.pdf).

<sup>222</sup> See Richard V. Machen & Robert K. Lyons, *Livestock for Small Acreage Landowners*, Texas Agriculture Extension Service, <http://overton.tamu.edu/files/2011/04/b6091.pdf> (last visited Nov. 11, 2016) (“Because of their relatively small size, goats are even better suited for small acreage operations than cattle.”).

applicability.<sup>223</sup> Not every ditch right-of-way is going to be economically feasible to graze; however, that determination should be left to the rancher who could possibly utilize an obscure, small, or inconvenient stretch of land economically.

Congress recognized the customary practices in the late 1800s when it enacted the Mining Act of 1866, specifically adopting Western custom as law. It was customary for ranchers to control sections of federal land whenever that land was located near a water source he had rights to. Because Congress adopted Western custom when it allocated a right-of-way across federal land to individuals with water rights, today's rancher holds a limited forage right that passed along to him synonymously through his valid 1866 ditch rights-of-way.

### III. THE RANCHER'S DILEMMA

The following comical, yet accurate, description of what a rancher is, captures the honest, hardworking nature of the rancher and his continued battle to live his life on his own terms.

Ranchers are usually found where there's cattle feeding, dehorning, trading, branding, roping and doctoring. Bankers hate to see them coming, little boys admire them, the Secretary of Agriculture confuses them, the Secretary of Interior infuriates them, city people visit and don't understand them, meals wait on them, other ranchers compete with them, barbed wire cuts them, television glorifies them but nothing discourages them. . . . They put up with relatives, worms, flies, floods, blizzards, feed salesmen, drought, bad luck and bad weather. Today a rancher must be a salesman, animal nutritionist, vet, biologist, weather prophet, and a banker's calculated risk. He handles more money than most businessmen, and makes less clear profit than a paper boy. . . . No one gets kicked, run-over, stepped on, bruised, cut up, or as mad as he does in a single day's work. . . . No one is as generous, big hearted, friendly, dependable, wise, or honest; and he will swap anything except his spurs, ropes, bits, wife, or children. He trusts his fellow man. The rancher is. . . the self-made man of today. Big business doesn't fear him, the government doesn't subsidize him, he relies on free enterprise, and the hope that next year will be as

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<sup>223</sup> Telephone Interview with Fred Stewart, Owner & Operator, Stewart's 96 Ranch (Nov. 20, 2016). (A 100-foot strip of forage could be worth something depending on how many cattle are on the land and how long the cattle are on the strip.) (Fred Stewart is not to be confused with Senator Stewart mentioned in this Section.) Fred Stewart is my relative and I appreciate his willingness to speak with me regarding the status of today's ranching industry.

good (or better) as last. He doesn't cry on shoulders, when hard times hit, but resolves to do better if he can. *He is the epitome of the American ideal. . .*<sup>224</sup>

Ranchers are forced to stake their entire business on the whims of federal agencies. This situation leads the rancher to fear that he might be unable to make a living if his ability to graze livestock on public lands is revoked, even though he has a valid ownership of a state water right.<sup>225</sup> The court in *Colvin Cattle Company* seemed to have little sympathy for the loss of value in a ranch due to the revocation of a grazing permit.<sup>226</sup> The court reasoned that the loss in value is not attributable to the government because the government's restrictions on grazing do not restrict a "constitutionally cognizable property interest."<sup>227</sup> If courts do not recognize that a grazing right or forage right exists, any restriction on grazing permits by government agencies will have a negative effect on a rancher's business. There would be no effective recourse for him to regain his losses, except maybe unemployment benefits. However, given the rancher's "self-made"<sup>228</sup> image, he probably would refuse to accept those benefits.

The court in *Diamond Bar Cattle Company* considered the plaintiffs' argument that water rights are of "little utility" if the plaintiff cannot graze around the water.<sup>229</sup> The court found that the uselessness of the plaintiffs' water rights were their own fault because they had failed to renew their permits.<sup>230</sup> The court recognized that water rights can become useless if a grazing permit is not issued to the owner of the water rights. However, it claimed that the reliance and expectations of the "privilege to graze" did not create a property interest in the grazing permit or the range.<sup>231</sup>

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<sup>224</sup> Alan L. Forsgren, *Ranching in Nevada*, in NEVADA LIFESTYLES AND LANDS 79, 79–80 (Ruth M. Houghton & Leontine B. Nappe eds., 1977) (emphasis added).

<sup>225</sup> Brinkerhoff, *supra* note 59, at 420–22.

<sup>226</sup> *Colvin Cattle Co. v. United States*, 468 F.3d 803, 808 (Fed. Cir. 2006).

<sup>227</sup> *Id.*

<sup>228</sup> Forsgren, *supra* note 225.

<sup>229</sup> *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1217 (10th Cir. 1999).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

Water rights are incredibly valuable in the arid west. Ranchers depend on public lands for their livelihood and using those lands requires water.<sup>232</sup> A small exception to the general rule excluding a private right in federal land would be greatly appreciated by the rancher. The rancher needs a desirable compromise to make up for the inherent unfairness of a rancher not being able to use the land surrounding his valid water right and right-of-way when his grazing permit is pulled. After all, “[s]o far as cattle-production is concerned, range forage without water is worthless,”<sup>233</sup> and a water right, without access to the surrounding land, is just as useless.<sup>234</sup>

This issue was somewhat addressed by the court in *Hunter* as well. The court noted in a footnote that:

Although the Hunters labored long and hard and went to some expense to put in and build access roads and several shacks upon the lands incidental to their livestock operations, they did so in the knowledge that they were mere squatters and that the government could and might at any time exercise its full proprietorship and dispossess them without any payment of any compensation.<sup>235</sup>

The lack of sympathy displayed by the court system for the hardworking rancher, whose forefathers helped to develop and settle the Great American Desert, gives the modern rancher a good reason to be frightened for his livelihood. If the worst should happen, and government agencies force ranchers from public lands, there is no way for a blue collared, hardworking American to provide for his family and the world.

Besides the legal argument widening the scope of a valid right-of-way,<sup>236</sup> the rancher comes to the courts seeking a judgment based in equity and on common sense. The Court of

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<sup>232</sup> “[T]he value of the right to water such stock is directly dependent upon the availability to the owner of such right of the use of public range in the vicinity of such water places.” *In re Calvo*, 50 Nev. 125, 130 (Nev. 1927).

<sup>233</sup> WESLEY CALEF, PRIVATE GRAZING AND PUBLIC LANDS STUDIES OF LOCAL MANAGEMENT OF THE TAYLOR GRAZING ACT 29 (The Univ. of Chi. Press 1960).

<sup>234</sup> *Diamond Bar Cattle Co.*, 168 F.3d at 1217.

<sup>235</sup> *Hunter v. United States*, 388 F.2d 148, 155 n.6 (9th Cir. 1967).

<sup>236</sup> *See supra* Section III.

Appeals for the District of Columbia noted that the privileges to graze on public lands are “something of real value to the possessors and something which have their source in an enactment of the Congress” affording the holders of these rights equitable protection.<sup>237</sup> When it comes to common sense, using cattle to graze alongside a valid ditch right-of-way, transporting precious water through the arid West, just makes sense;<sup>238</sup> even to a court with a “small amount of knowledge of bovine behavior.”<sup>239</sup>

The rancher, like the cowboy, “is the universal symbol of the western range livestock industry.”<sup>240</sup> “But durable though he may be as a symbol, the cowboy is disappearing from the range.”<sup>241</sup> The rancher is constantly fighting multiple battles on different fronts. Not only must he be mindful of his increasing age and the lack of involvement by a younger generation, he also must be aware of the current political and judicial atmosphere that threatens to change his way of life.

The ranching industry has been facing an age crisis in recent years. Over half of all ranch operators are over the age of fifty-five with fewer and fewer young people stepping up to the plate and taking over the family business.<sup>242</sup> By one estimate, in 2033 a rancher under the age of thirty-five will be a thing of the past.<sup>243</sup> And by 2050 the average ranch operator will be 60.<sup>244</sup> This is an increase of forty percent from 1920.<sup>245</sup>

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<sup>237</sup> *Red Canyon Sheep Co.*, 98 F.2d at 316 (“We rule that the valuable nature of the privilege to graze which arises in a licensee whose license will in the ordinary course of administration of the Taylor Grazing Act ripen into a permit, makes that privilege a proper subject of equitable protection against an illegal act.”).

<sup>238</sup> *Hage III*, 43 Fed. Cl. at 251.

<sup>239</sup> *Hage I*, 35 Fed. Cl. at 175.

<sup>240</sup> CALEF, *supra* note 234, at 19.

<sup>241</sup> *Id.*

<sup>242</sup> Henry B. Glick, Charles Bettigole, Devin Routh, Lindsay Seegmiller, Catherine Kuhn, Ambika Khadka & Chadwick D. Oliver, *Wyoming’s Aging Agriculture Landscape: Demographic Trends Among Farm and Ranch Operators 1920-2007*, 36 SOC’Y FOR RANGE MGMT. 1, 9 (2014).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 10.

<sup>245</sup> *Id.*

Concern about the loss of “knowledge, wisdom, and ultimately, each community’s cultural heritage” also becomes an important thing to consider as the average age of ranchers continues to rise.<sup>246</sup> Recently, ranchers have been unable to find someone to pass on the family business to.<sup>247</sup> This unfortunate reality has led to the sale of family-owned ranches.<sup>248</sup> Even when there is a willing heir, the rancher must overcome yet another .<sup>249</sup> To the “land rich” and “cash poor” ranchers, the taxes involved with inheriting the family ranch make the transfer unrealistic, and the resulting inability to pay pushes young ranchers away from the family business.<sup>250</sup>

If the pressures to sell land were not high enough already, increased development in rural areas has spurred ranchers to sell their land for commercial development.<sup>251</sup> The transition from agricultural land to developed land has claimed more than 24 million acres since 1982.<sup>252</sup> Just to put that figure in perspective, that is about 1.6 acres lost per minute.<sup>253</sup>

The rancher needs to keep a mindful eye on current litigation surrounding his business and way of life. A conservation group hoping to limit livestock grazing filed a recent suit that threatens to disrupt the rancher’s way of life.<sup>254</sup> The suit was filed against the Forest Service for issuing grazing permits to four ranchers in Idaho.<sup>255</sup> One of the ranchers who is using one of the grazing permits in question said that he grazes half of the number of cattle that he used to.<sup>256</sup>

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Glick, *supra* note 243, at 10.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Keith Ridler, *Lawsuit Targets Grazing in Forest*, THE ARGUS OBSERVER, Oct. 14, 2016, at A1.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

In the last seventy years, the rancher has seen the number of animals that he can put on public land decrease significantly.<sup>257</sup> Just on BLM managed federal land alone, the rancher has seen roughly a thirty percent decline in livestock grazing since 1971.<sup>258</sup> This translates to a decrease from 12.8 million animal unit months to 9 million animal unit months.<sup>259</sup> A single animal unit month is the amount of forage needed to feed a single cow for a month.<sup>260</sup> Drought is also another factor that has caused reduced livestock numbers on federal land.<sup>261</sup> After livestock numbers drop due to drought, federal agencies are hesitant to allow the numbers to go back up.<sup>262</sup>

The increasing average age of ranchers, the lack of interest/ability of young ranchers to obtain the family business, and the decrease in the rancher's availability to graze on federal land is pushing the rancher to the outer edges of his sustainability. The general public should be mindful as to how it formulates public land policy.<sup>263</sup> The rancher must be able to maintain his assets, make a profit, and preserve his family integrity.<sup>264</sup> If he cannot maintain these things, the public will suffer, and the nation will cease to prosper.<sup>265</sup>

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<sup>257</sup> Tay Wiles & Brooke Warren, *Federal-lands ranching: A half-century of decline: How grazing fell from its Western pedestal — and fueled Sagebrush Rebellion*, HIGH COUNTRY NEWS (June 13, 2016), <http://www.hcn.org/issues/48.10/federal-lands-grazing>.

<sup>258</sup> See DEPARTMENT OF THE INTERIOR, *Economic Report FY 2012*, 60 (July 29, 2013), <https://www.doi.gov/sites/doi.gov/files/uploads/FY2012%20DOI%20Econ%20Report%20%28Final%29%202013-09-25.pdf>.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 59 n.66.

<sup>261</sup> Wiles, *supra* note 258.

<sup>262</sup> *Id.*

<sup>263</sup> Forsgren, *supra* note 225, at 81.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* The livestock industry of the West is an important source of food supply for the people of the nation. In the arid regions of the West, commercial success in the livestock industry requires that sheep and cattle be run upon the open range. This is a matter of common knowledge. *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 314 (D.C. Cir. 1938).



Despite the pressures felt by today's rancher, he remains hopeful and optimistic.<sup>266</sup> Fred Stewart owns and operates Stewart's 96 Ranch in Paradise Valley, Nevada.<sup>267</sup> Stewart's family has owned the ranch since 1864 and has raised cattle in the surrounding Valley and adjacent federal lands for 152 years.<sup>268</sup> Stewart said that he does not fear for the ranching and beef production industry as a whole.<sup>269</sup> However, he was less sure about the rancher's continued use of federal land for grazing.<sup>270</sup> The Stewart family strives to work cooperatively with agency officials on the ground regarding their federal grazing permits.<sup>271</sup> Stewart acknowledges the "fragile" nature of the Great Basin and tries to work with the land, incorporating a century and a half of ranching heritage and knowledge with new and improved range management techniques advocated for by agency officials.<sup>272</sup>

Stewart commented on the heritage and history that he witnesses everyday: "It's really neat to go out on the land and know that your family was doing the same thing on the same land 150 years ago. It's awe inspiring. I often think about what my dad would think about what I'm doing now."<sup>273</sup> The Stewart family is fortunate to have a daughter who will carry on the family tradition, heritage, and business.<sup>274</sup> Stewart is optimistic about the future of the 96 Ranch, when asked about his daughter he said: "Every generation has to do their own thing. She'll do things different than I do, but that's good because that's how you keep it going. I'm excited for her to have that opportunity."<sup>275</sup>

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<sup>266</sup> Stewart, *supra* note 224.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> Stewart, *supra* note 224.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

## CONCLUSION

The West, with its arid landscape and abundance of federally owned land, can create an environment of conflict and prosperity. The ranchers of yesterday were among the first to settle and tame the Great American Desert and their decedents continue to run their livestock on the same land today.

The rancher of today faces obstacles and hurdles that his forefathers could never have imagined. Faced with the possibility of removal from the public lands, an aging workforce, and loss of public grazing land, the rancher must seek out some fair outcome that somewhat makes up for the loss of his business and way of life. Finding a limited forage right, synonymous with a valid 1866 ditch right-of-way, is a small step in the right direction. Compensating the rancher for the loss of the forage right when his ability to graze on federal lands ends, protects a right that dates back to the late nineteenth century. A right that was created by custom, protected by congressional intent, and justified by simple common sense and equity.

Saving the American rancher saves more than a blue-collared American's job. It saves a way of life, a heritage, and a hope that the next generation will have a better opportunity to succeed than the last generation. The rancher is not a quitter, he is not a complainer, he is a fair and just being that wants to live his life on his own terms and provide for his family and the world. Allowing him a small property right in the federal lands is a small price to pay for lifetimes of back-breaking, honest work that he and his forefathers contributed to this Country.

The American rancher must now fight his own battle. His way of life is at stake and he must protect his interests so that he can hand them down to his children. Ronald Reagan once said that:

Freedom is never more than one generation away from extinction. We didn't pass it on to our children in the bloodstream. It must be fought for, protected, and handed

on for them to do the same or one day we will spend our sunset years telling our children and our children's children what it once was like in the United States when men were free.<sup>276</sup>

The rancher's way of life is on the verge of extinction now more than ever. We can only hope that he will never have to feel the pain of explaining to his children and their children what it was like to be an American rancher. Pray that day never comes because on that day America will have lost "the epitome of the American ideal."<sup>277</sup>

Shane M. Bell\*\*

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<sup>276</sup> Ronald Reagan, President of the United States, A Foot in the Door: An address to the Illinois Manufacturers' Costs Ass'n (May 9, 1961).

<sup>277</sup> Forsgren, *supra* note 225, at 79-80.

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