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February 2, 2011

Nevada Board of Wildlife Commissioners  
C/O Suzanne Scourby, Executive Assistant  
1100 Valley Rd.  
Reno, NV 89512

Subj.: Feral Horse Committee

Dear Commissioners:

I first need to clarify an important point. This is a personal communication, not an official communication from the Lyon CAB. I am submitting this communication in response to requests by Lyon County constituents who were concerned that since the Lyon CAB doesn't meet until February 3<sup>rd</sup>, that comments submitted to their CAB might not make it to the Commission in time for your February 4<sup>th</sup> meeting. Therefore I agreed to condense these concerns into a single letter and submit it. This letter is not intended to either supersede or diminish any formal recommendations coming from the CAB, but rather present in one document various concerns expressed by some constituents.

I need to also mention that one of the constituents provided a "home-made" recording of the January 31 Feral Horse Committee Meeting in order to "validate" their concerns. For the record, two concerns appeared to have been unfounded. As I explained to the citizens, I am not forwarding those issues to you. However the following concerns appear to be substantiated by the recording and they are expressed below.

The first issue of concern involved citizen confusion as to what the Commission's Feral Horse Committee is actually tasked to do. The Committee's discussions appeared to be all over the map, ranging from the 8100 Fund to a debate on water rights. I received three citizen opinions that none of the observers in the Reno office could track in on what the Committee was actually doing or where it was headed. I was requested to obtain a copy of the Committee's assigned duties, responsibilities and objectives, so please consider this letter my formal request for same. I will take responsibility for forwarding any documents received to the parties of interest.

The second issue raised involved a Committee made up of lay persons who were apparently attempting to produce legal opinions and develop strategies involving laws that they apparently did not have a clear understanding of. The Nevada Board of Wildlife Commissioners is provided competent legal counsel. Most attorneys will tell you that it is foolish for someone without legal training to attempt to interpret laws and court decisions. I had to agree that some of the specific details discussed should probably have been turned over to D.A.G. Stockton for competent interpretation and response.

State Board of Wildlife Commissioners  
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The third issue involved this whole business of water rights. I concur with these constituents that meddling in Federal Reserved Water Rights could produce huge unanticipated and undesirable consequences, and to some degree it already has. Although BLM historically has taken a hands-off approach to water, those rights exist "to the minimum amount of water reasonably necessary" to fulfill a purpose mandated by Congress. 16 USC 1331 et seq. has established such purposes and it appears that the State Engineer cannot lawfully deny an application properly made by BLM for water to serve purposes established by Congress, although it does seem reasonable that the State Engineer could make a determination as to the amount(s) of water that are reasonably necessary for the purposes described in each application.

Unfortunately this Commission's and the Feral Horse Committee's foray into the issue of water rights is already producing unintended consequences. Some interest groups are pushing the BLM and other Federal agencies to start exercising their rights. Others are looking for a showdown in court, believing that their legal counsels could present compelling arguments that all activities authorized by Congress that take place on public lands fall within the dominion of Federal Reserved Water Rights, and that water found on or under Federal Public Lands should be allocated by the agency that issues Congressionally authorized leases and permits on those public lands.

I'm not going to speculate on whether such a court ruling could ever occur, but I am sensitive to the fact that Federal judges, particularly at the Appeals Court and Supreme Court level, don't necessarily share the same perspective about range uses and water that we do in Nevada. Taking the concerns expressed to me and formulating my own opinion on the subject, and as an agricultural water rights holder myself, I am very wary of starting in any direction that could ultimately be driven by forces outside Nevada and that could produce any degree of restructuring of how water is utilized on public lands. However this genie is now out of the bottle and outside forces are lining up to see how they might exploit this issue to their own advantage.

Finally an argument was raised based on a widely distributed copy of the decision written in Mountain States Legal Foundation v. Hodell where the 10<sup>th</sup> Circuit Court of Appeals wrote, "The governmental trust responsibility for wildlife is lodged initially in the states, but only 'in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.'" I'm personally concerned that the Commission and its committees don't set sail in a direction that could inadvertently result in a narrowing of the scope in which the State can manage wildlife on the Federal lands that predominate our state.

Respectfully submitted,



Willis Lamm

c: Governor Brian Sandoval  
Doug Busselman, Nevada Farm Bureau Federation

Attachments: Federal Reserved Water Rights, *Scribd Library*  
Water rights / FRWR / wild horse decisions

# Federal Reserved Water Rights

Development and Status of Federal Reserved Water Rights:

When the United States reserves public land for uses such as Indian reservations, military reservations, national parks, forest, or monuments, it also implicitly reserves sufficient water to satisfy the purposes for which the reservation was created. Both reservations made by presidential executive order or those made by an act of Congress have implied reserved rights. The date of priority of a federal reserved right is the date the reservation was established.

The federal reserved water rights doctrine was established by the U.S. Supreme Court in 1908 in *Winters v. United States*. In this case, the U.S. Supreme Court found that an Indian reservation (in the case, the Fort Belknap Indian Reservation) may reserve water for future use in an amount necessary to fulfill the purpose of the reservation, with a priority dating from the treaty that established the reservation. This doctrine establishes that when the federal government created Indian reservations, water rights were reserved in sufficient quantity to meet the purposes for which the reservation was established.

The Winters Doctrine was a landmark case for it was the first time the federal government deviated from the established convention that water law was purely a state matter. In 1952, however, Congress passed the McCarren Amendment which returns substantial power to the states with respect to the management of water. The McCarren Amendment requires that the federal government waive its sovereign immunity in cases involving the general adjudication of water rights. Prior to this legislation, the federal government had reserved the right not to be included in general basin adjudications conducted under state law. The McCarren Amendment, however, recognized that the exemption of the federal government from these adjudications would undermine the state's water allocation systems. Therefore, any federal agency claiming a federal reserved water right must participate in the state's adjudication process.

Federal court decisions since the McCarren Amendment have further limited federal reserved water rights. In the 1976 *Cappaert v. United States of America*, the Court ruled that a federal reserved water right quantification was limited to the primary purpose of the reservation and only to the minimum amount of water necessary to fulfill the purpose of the reservation. In 1978, in *United States of America v. New Mexico*, the Court found that the reserved water rights on national forests apply only to the preservation of timber resources and water flows. All other claimed needs were to be considered secondary purposes and the federal government would have to obtain rights like any other appropriator under state law. These rulings have narrowed the scope of the Winters Doctrine. Federal reserved water rights may only include quantities of water necessary to meet the primary purpose for which the reservation was established ("primary purpose" requirement) and only in the minimum amounts necessary to meet those purposes ("minimal needs" requirement).

The Winters Doctrine originally applied to Indian reservations but has since been applied to other federal land reservations. A variety of court decisions have extended the reserved right doctrine to encompass not only Indian reservations, but water uses in national forests, national parks and monuments, and military reservations. In the 1963 *Arizona v. California* decision, the U.S. Supreme Court found the Winters Doctrine equally applicable to other federal establishments and affirmed an allocation of water for non-Indian federal uses.

Today, federal reserved water rights can be asserted on most lands managed by the federal government. Reserved rights are, for the most part, immune from state water laws and therefore, are not subject to diversion and beneficial use requirements and cannot be lost by non-use. The federal government, however, is required to submit all reserved water rights claims to the state's adjudication process, and are limited by the "primary purpose" and "minimal needs"

**Bradshaw v. United States**  
**U.S. Court of Federal Claims**  
**47 Fed.Cl. 549**  
**Sept. 15, 2000**

**Summary of Opinion**

This lawsuit is the culmination of a lengthy dispute between the Bradshaws, who are ranchers, and the United States government. In this opinion, the Court of Claims rejects Bradshaw's argument that by failing to control wild horses the United States Government, through the Bureau of Land Management, had taken the plaintiff's property without just compensation. Whatever damage the horses did to the Bradshaw's property, it was not a taking of private property for public use.

**Text of Opinion**

This takings case is before the court on defendant's motion to dismiss or alternatively for summary judgment. Plaintiffs, owners of a ranch in Nevada, seek compensation under the Fifth Amendment for deprivation of property rights that they claim to own. The property rights that plaintiffs claim to own include water rights in springs located on public lands; ditches and right-of-ways to water on public lands; grazing and forage rights on public lands; improvements made on public lands; heads of cattle; damage to their ranch by feral horses; and the loss of economic viability of their entire ranch due to the government's activities and regulatory acts. Defendant argues that as a matter of law, plaintiffs do not own any property for which they can be compensated.

After a full briefing and oral argument, the defendant's motion for summary judgment, is granted-in-part and denied-in-part.

**FACTS**

Plaintiffs, Barry and Norma Bradshaw, are the owners of a 1,000 acre ranch located in East Central Nevada ("the Ranch"). Plaintiffs purchased the Ranch in 1990. Plaintiffs claim that the Ranch has been in operation since 1867. The Ranch is surrounded by public lands administered by the United States Forest Service and the Bureau of Land Management ("BLM"). The public lands are divided into grazing "allotments," and some of these allotments abut plaintiffs' unfenced or partially-fenced private property.

Plaintiffs claim that at the time they acquired the Ranch, they also acquired rights to water appurtenant to the Ranch, and plaintiffs claim that these water rights were lawfully acquired by their predecessors-in-interest. The springs in which plaintiffs claim to have prior rights are situated over a large tract of land managed by the United States Forest Service and the BLM. Most of these springs are located within the Blackrock and Duckwater Allotments, upon which plaintiffs have had grazing permits. Plaintiffs further claim to own the right to construct and maintain ditches and build improvements surrounding those springs.

The State Engineer's Office records show that the rights plaintiffs claim on federal lands are unadjudicated claims of vested rights, and in two instances, permitted rights. The State of Nevada has not commenced an adjudication of water rights within the basin where plaintiffs' vested rights are located. Accordingly, neither the Forest Service, nor BLM has yet filed claims of vested stockwater rights under the Executive Order of April 17, 1926, Public Water Reserve No. 107.

The same tract of land was used by plaintiffs' predecessors-in-interest to graze livestock owned by the Ranch's owners since 1867. Plaintiffs assert that in 1907, grazing permits were issued in recognition of the prior regular use of the rangelands adjacent to the Ranch and in recognition of its vested stockwater rights established by prior appropriation. From the time the Ranch was begun, the livestock on the Ranch drank from the springs located on the federal lands and grazed on the forage surrounding those springs.

The controversy leading up to this lawsuit began in 1995 when plaintiffs' permit to graze cattle on the Blackrock Allotment (located within the Humboldt National Forest) was canceled because of their failure and refusal to pay grazing fees. Plaintiffs claimed to need no permit because they had acquired a property right to graze based on historic grazing by their predecessors-in-interest. After the permit was canceled, plaintiffs continued to graze their cattle on the public lands within the Blackrock Allotment. The Forest Service sought injunctive relief against this continued trespass, which was granted in *United States v. Barry Bradshaw*, CV-N96-176-DWH (D.Nev.1996) (slip op.), in spite of plaintiffs' argument that their actions did not constitute a trespass.

After plaintiffs paid the fines associated with the trespass, a new grazing permit was issued on May 16, 1996 authorizing seasonal grazing use from June 9, 1995 to June 8, 2005 on lands within the Duckwater Allotment. From this time on, plaintiffs' and defendants' views of the facts diverge.

Defendant alleges that plaintiffs repeatedly trespassed on the Duckwater Allotment in violation of their grazing permit. Plaintiffs deny this allegation, claiming to have been using only the forage and the water that they owned. BLM concluded that these unauthorized use violations were willful trespass violations and on May 9, 1997 fined plaintiffs \$3,399.70. Plaintiffs denied that they were trespassing, but paid the fine on March 31, 1998 after losing a protest filed with the BLM as well as an appeal of the decision.

Despite the BLM decision, plaintiffs continued to allow their cows to graze on the public lands. On March 11, 1998, BLM issued to plaintiffs a Notice of Proposed Decision to cancel 25% of permitted cattle numbers for a three-year period, along with a Notice of Intent to remove unauthorized livestock. The Proposed Decision became final effective on April 27, 1998. BLM issued another trespass notice as a result of its March 18, 1998 finding that 104 cattle were grazing in an unauthorized area. Plaintiffs once again denied that they were trespassing.

On March 31, 1998, BLM impounded plaintiffs' unauthorized cattle. After plaintiffs paid \$18,000 in fines owed for the various trespass violations issued, the cattle were released to them. Ultimately, BLM permanently canceled plaintiffs' grazing permit on June 5, 1998. Plaintiffs' appeal of this decision is still pending.

Defendant claims that the cattle, up to as many as 220 head at a time, were in continuous trespass from April 1996 until March 31, 1998. Plaintiffs dispute this assertion, claiming that BLM agents consistently failed to distinguish between plaintiffs' unfenced private property and public lands.

In August 1998, after the permit was canceled, BLM conducted a second impoundment of 45 cattle belonging to plaintiffs. Plaintiffs objected to the impoundment on the ground that the cattle were rightfully exercising their right to forage and water and that the cows should never have been impounded in the first place. Despite plaintiffs' objection, the cattle were sold at auction on August 11, 1998. BLM then demanded that plaintiffs pay the outstanding fines and costs, less the amount collected at the public sale.

Plaintiffs further allege that BLM has allowed uncontrolled growth and overgrazing by feral horses. Plaintiffs contend that the horses consumed the forage on the lands on which plaintiffs' cows were permitted to graze, thus forcing plaintiffs to graze their cattle in unauthorized areas. Plaintiffs also allege that the horses have caused damage to their private property. Defendant admits that there were excess wild horses in the area, but asserts that it was unable to remove them until an appropriate management level had been established.

Plaintiffs deny this assertion. Defendant disputes that the government took plaintiffs' property by allowing feral horses to graze there, in that they dispute that plaintiffs owned any property that could be taken because plaintiffs never had an exclusive privilege to graze on the allotment. Plaintiffs deny this allegation. Furthermore, defendant argues that, as a matter of law, plaintiffs are not entitled to compensation for damage caused by the wild horses. Plaintiffs dispute this argument as well.

Plaintiffs filed their complaint in this case on September 4, 1998 seeking compensation under the Fifth Amendment, asserting that defendant took their property. Defendant then filed the instant motion to dismiss, or alternatively, for summary judgment.

## DISCUSSION

### I. STANDARD FOR TAKINGS CASES

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This amendment has been interpreted to mean that the government owes compensation whenever it takes private property rights, whether by regulation or by physical presence on the land. See e.g. Hendler v. United States, 952 F.2d 1364, 1373-74 (Fed.Cir.1991). In a takings case, the Court must determine the following issues: whether a plaintiff holds the claimed property rights; the scope of those rights; and whether governmental action has deprived the plaintiff of those rights. See Store Safe Redlands Associates v. United States, 35 Fed.Cl. 726, 728 (1996).

### II. PLAINTIFFS' COMPENSABLE PROPERTY INTERESTS

To defeat defendant's motion, plaintiffs must first demonstrate that they possessed a legally recognizable property interest at the time of the alleged taking. See Store Safe Redlands, 35 Fed.Cl. at 734. Only after plaintiffs have proven that they indeed own the property in question will the Court address the scope of those rights and whether the rights have been taken by government action.

#### A. Water Rights and Ditch Right of Way

Plaintiffs claim that they have acquired by prior appropriation rights in the following areas: Ike Spring, Big Ike Spring, Little Ike Spring, Lower Ike Spring, Blackrock Spring, Vanover Spring, Box Spring, Sawmill Spring, Limerock Spring, Bull Spring, Cherry Spring, Freeland Spring, Silver Spring, Mustang Spring, Birch Spring, Willow Spring, Indian Spring, Leona Spring, Unnamed Springs in Sections 34 and 14, and all waters flowing from these various springs. Plaintiffs claim that their predecessors acquired stockwatering rights in these springs in 1867, the year that the Ranch began operation.

Defendant argues that plaintiffs' rights are, at best, undefined and that in any event, any alleged rights do not include a right to forage or an easement to use of the Springs located on the public lands. Defendant, however, admits that plaintiffs do possibly have some water rights. Defendant acknowledges that the State Engineer's Office records show that the rights plaintiffs claim on federal lands are unadjudicated claims of vested rights, and in two instances, permitted rights.

Nevada currently uses the doctrine of prior appropriation. See United States v. Humboldt Lovelock Irr. Light & Power Co., 97 F.2d 38, 42-44 (9th Cir.1938). Water is appropriated when it is used for a beneficial use, including stockwatering. See N.R.S. § 533.490 (1997). A permitted right is issued by the State Engineer if a permittee is able to demonstrate that the water has been appropriated. See N.R.S. § 533.425 (1997). Under Nevada law, a vested water right is one that was used continuously prior to 1905 to the present and is specifically protected by statute. 6 WATERS AND WATER RIGHTS at 500 (1994) (citing N.R.S. § 533.085). If

more than one entity is claiming water from the same source, the State can institute an adjudication proceeding to determine who has priority.

The 1866 Mining Act grants two possessory rights: (1) the right to the use of water for mining, agricultural, manufacturing, or other purposes, if the same are recognized and acknowledged by the local customs, laws, and the decisions of courts; and (2) a right of way for the construction of ditches and canals for the purposes specified. See 43 U.S.C. § 661.

Defendant seeks to have this Court decide exactly what the scope of any rights plaintiffs may have under the 1866 Act. This Court declines to do so at this time. If plaintiffs can prove that they do own compensable water rights on the public lands, then this Court will address the issue of the scope of those rights.

Because plaintiffs may be able to prove at trial that they have water rights that are recognized under Nevada's prior appropriation doctrine, and a right of way for the construction of ditches, this Court finds that defendant's motion must be denied on these issues.

## B. Grazing and Forage Rights

### 1. Permit

Defendant apparently believes that plaintiffs are claiming that the cancellation of their grazing permit constitutes a taking. The Court does not so interpret plaintiffs' claims. Nowhere in their answering brief do plaintiffs claim that the cancellation of their grazing permit is a taking. Instead, they claim: (1) that they have a vested right to forage in the areas in which they have water rights and (2) an historic grazing preference based on their predecessor's grazing practices, neither of which constitutes a taking of a grazing permit.

To the extent, however, that plaintiffs are claiming that the cancellation of their grazing permit is a taking, defendants' motion for summary judgment is granted. A grazing permit is a right created by the government, and was never intended to be a compensable property right. See Alves v. United States, 133 F.3d 1454, 1457 (Fed.Cir.1998) (affirming the trial court's decision that grazing permits do not constitute compensable "property" under the Fifth Amendment); see also United States v. Fuller, 409 U.S. 488, 492, 93 S.Ct. 801, 35 L.Ed.2d 16 (1973) (holding that the jury in a condemnation case could not take into consideration the value of the grazing permit in determining just compensation for the property because the government cannot be required to compensate for value that it itself created); Taylor Grazing Act of 1934, 43 U.S.C. § 315(b) (providing that the issuance of a grazing permit does not grant any right, title, interest, or estate in or to lands held by the United States).

### 2. Historic Rights

Like the plaintiff in Alves, plaintiffs here argue that they have a right to graze on the public lands because their predecessors acquired that right under Nevada common law. The Federal Circuit rejected this argument in Alves, holding instead that the distinction between a grazing preference (the historic right) and a grazing permit was irrelevant for Fifth Amendment purposes. Alves, 133 F.3d at 1457. According to the Federal Circuit, neither the grazing permit, nor the historical grazing preference is a compensable interest under the reasoning set out by the Supreme Court in Fuller that the government cannot be required to compensate for value that it created.

Defendant acquired the land in question in 1848 under the treaty of Guadalupe- Hidalgo, 9 Stat. 922 (1848). The Supreme Court has consistently ruled that any grazing allowed on the public lands was allowed by "tacit consent" under an "implied license" and was suffered only so long as the government did not withdraw its

consent. See *Light v. United States*, 220 U.S. 523, 535, 31 S.Ct. 485, 55 L.Ed. 570 (1911) (citing *Buford v. Houtz*, 133 U.S. 320, 10 S.Ct. 305, 33 L.Ed. 618 (1890)). The government's failure to object to the grazing in the years prior to the Taylor Grazing Act "did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes." *Id.* Congress is charged with the preservation of the public lands and "it is not for the courts to say how that trust shall be administered." *Id.* at 537, 31 S.Ct. 485. This Court cannot compel Congress "to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes." *Id.*

Accordingly, this court grants defendant's motion for summary judgment on the issue of the taking of plaintiffs' grazing rights.

#### C. Improvements Made on U.S. Land

Plaintiffs contend that as a result of the denial of their grazing permits and ejection from the federal lands, they have been deprived of the use and benefit of improvements they created upon the federal lands. Defendant disputes this allegation, claiming instead that plaintiffs have not created any such improvements. This is a factual issue that cannot be decided by summary judgment.

#### D. Damage by Feral Horses

Plaintiffs allege that BLM has allowed feral horses to overrun the public lands upon which it had grazing permits. These feral horses have allegedly caused damage to plaintiffs' Ranch, to the improvements they claim to have made on the public lands, and to the springs in which they claim to have rights. The feral horses also allegedly ate the forage located on the public lands, which plaintiffs claim the right to under a grazing allotment, leaving their cattle with nothing to graze.

The Federal Circuit, addressing a similar issue in *Alves v. United States*, 133 F.3d 1454, cited with approval the Tenth Circuit's opinion in *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir.1986) (en banc). In *Mountain States*, plaintiffs were alleging that BLM's failure to prevent animal trespass on plaintiffs' lands in violation of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, constituted a Fifth Amendment taking of the forage consumed by the animals. *Mountain States*, at 1425. The court rejected this argument. The court found that the wild horses were not "instrumentalities of the government whose presence constitutes a permanent governmental occupation" of plaintiffs' property. *Id.* at 1428. Relying on a litany of cases where courts have determined that damage to private property by protected wildlife does not constitute a taking for which the government owes compensation, *id.* at 1428-29, the court concluded that regulation of the wild horses is a land-use regulation that is "reasonably related to the promotion of the public interest," and thus not a compensable taking. *Id.* at 1430. The Supreme Court in *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), in upholding the Wild Free-Roaming Horses and Burros Act, recognized the important governmental interest inherent in the protection of the wild horses and burros roaming the public lands. See *Kleppe*, 426 U.S. at 535-36, 96 S.Ct. 2285. "The provisions of the [Act] advance this important governmental interest." *Mountain States* at 1430.

This Court agrees with the analysis set forth in *Kleppe*, *Mountain States*, and *Alves*. Accordingly, defendant's motion is granted on this issue. Even assuming plaintiffs do have property rights on the federal lands, defendant is not liable to plaintiffs for damage caused by the feral horses because the feral horses are not instrumentalities of the government and because the regulation "is a land-use regulation that is reasonably related to the promotion of the public interest." *Id.*

#### E. Impounded Cattle

Defendant urges this Court to grant its motion for summary judgment denying plaintiffs compensation for the cows that were impounded. After consideration of defendant's arguments, this Court grants the motion. Defendant claims that the cows were impounded on March 31, 1998 and again on August 4-5, 1998 because of their continual trespass on federal lands without authorization since 1995. The plaintiffs respond that at times, cattle that were alleged to be trespassing were actually on plaintiffs' own unfenced private property. Plaintiffs, however, have admitted that the cows that were impounded in March and August 1998 were located on the public lands and not on plaintiffs' private property at the time of the taking.

## 1. Threshold Jurisdictional Issue

To the extent that plaintiffs are alleging that the government acted improperly and impounded cows which were not trespassing on government property, there is a jurisdictional issue this Court must address. The Court of Federal Claims does not have jurisdiction over claims sounding in tort. See Davis v. United States, 35 Fed.Cl. 392, 395 (1996). If plaintiffs are claiming that defendant tortiously took their cattle, then plaintiff can bring an action in tort in U.S. District Court. Tort is not their only remedy, however. Where the government has taken property improperly, the taking gives rise to two violations of the property owner's rights, and the property owner may choose which of those two causes of action it wishes to pursue. See Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358, 1363-64 (Fed.Cir.1998) ("The two separate wrongs give rise to two separate causes of action, and the property-owner may elect to sue for just compensation or to seek relief for the legal improprieties committed in the course of the taking.... [T]here is no sound reason why the claimant might not waive that right [to sue in trespass], and electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation.").

Plaintiffs in this case have apparently waived their tort claim or are not asserting it here and are not contending that defendant's actions in taking the cattle were unlawful. Thus, this Court has jurisdiction to hear plaintiffs' taking claims. See e.g. Osprey Pacific Corp. v. United States, 41 Fed.Cl. 150, 157 (1998) ("It is hardly a defense for the government to say it was wrong. A plaintiff may elect to come to this court for monetary damages as long as [it is] not challenging the government's actions.").

## 2. Compliance With Regulations

Defendant asserts that the impoundment of the cattle cannot constitute a taking because it was done pursuant to the regulations set out in 43 C.F.R. pt. 4100. Addressing a similar claim, the Court in Klump v. United States, 38 Fed.Cl. 243 (1997) held that the regulations concerning impoundment of cattle found in the Federal Land Policy and Management Act, 43 U.S.C. § 315, et seq., and the related grazing regulations were "narrowly directed at protecting government land from unauthorized trespass and protecting the economic value of government land without having any unreasonable economic affect on cattle owners, and are fully consistent with the cattle owner's reasonable investment-backed expectation." Klump, at 248. The court in Klump, found that the undisputed facts clearly showed that BLM complied with all of the narrowly tailored regulations, and thus was not a taking. See *id.*

To the extent that plaintiffs are accepting BLM's agents actions as lawful, the impoundment of the cattle cannot constitute a taking. Congress has the authority "to control the occupancy and use of public land and to protect that land from trespass and injury." See Klump, at 248. These regulations are narrowly tailored to meet that goal. Cattle which are lawfully on government land are not impounded. See *id.* Where an owner does graze cattle on public lands without proper authorizations, the regulations provide for ample notice to the cattle owner prior to impoundment and for an opportunity to redeem the cattle once they are impounded. See *id.* at 249. The cattle are sold at auction only after the owner has failed to redeem them. See *id.* Plaintiffs in this case had opportunity to remove their cattle from the public lands to avoid impoundment, and to redeem the cattle once

they were impounded. Indeed, they did redeem their cattle after the March 31 impoundment. Their failure to do so following the August 4-5, 1998 impoundment does not constitute a compensable taking.

### 3. Defendant's Collateral Estoppel Argument

The Court has considered defendant's argument that plaintiffs are collaterally estopped to deny their cattle trespassed and consumed forage on National Forest lands because of the decision in United States v. Barry Bradshaw, CV-N96-176- DWH (D.Nev.1996). In light of the foregoing analysis, this Court finds it unnecessary to decide this issue. Furthermore, the alleged trespass at issue in this case occurred well after the U.S. District Court decision in United States v. Barry Bradshaw was rendered. Accordingly, defendant's motion is granted with regard to the impounded cattle.

### F. Entire Ranch

The Court understands plaintiffs' final argument to be that because plaintiffs have been denied their grazing privileges and access to their water rights, the Ranch is no longer economically viable. Plaintiffs contend that without access to the forage and water, they are unable to raise cattle, thus rendering the Ranch economically useless.

With regard to the grazing rights, plaintiffs cannot claim that the economic viability of the Ranch has been taken based on the denial of the grazing permit. As set out above, defendant cannot be required to compensate for the loss of value caused by an alleged taking, when it created the value in question. See United States v. Fuller, 409 U.S. at 492, 93 S.Ct. 801, 35 L.Ed.2d 16 (holding that the jury in a condemnation case could not take into consideration the value of the grazing permit in determining just compensation for the property because the government cannot be required to compensate for value that it itself created).

With regard to plaintiffs' other arguments, however, the Court leaves open the question as to whether plaintiffs do own compensable water rights within the federal lands. However, whether or not the taking of plaintiffs' claimed water rights, if any, renders the Ranch economically useless is a factual issue which cannot be decided on summary judgment. Accordingly, defendant's motion for summary judgment is denied with regard to the economic viability of the entire ranch.

## CONCLUSION

For the reasons discussed above, defendant's motion for summary judgment is granted with regard to the denial of the grazing permit, the historical grazing preference, the damage caused by the feral horses, and the impounded cattle. Defendant's motion is otherwise denied.

**Fallini v. United States**  
**U.S. Court of Appeals, Federal Circuit**  
**56 F.3d 1378**  
**June 8, 1995**

**Summary of Opinion**

Fallini is a rancher who leases grazing land from the federal government. The government prohibits him from keeping wild horses from watering from sources that Fallini has developed on public lands to water his cattle. The Court of Federal Claims said that this requirement was not a taking of Fallini's private property for a public use without just compensation. In this opinion, the appellate court holds that the lawsuit is barred by the statute of limitations, that is, that Fallini waited too long to file this lawsuit.

**Text of Opinion**

In this Fifth Amendment "takings" case, the Fallinis, who are engaged in cattle ranching in Nevada, argue that the federal government has taken personal property from them without compensation. The Fallinis contend that the government effected a "taking" by requiring them to provide water to wild horses living in the area in which the Fallinis conducted their ranching activities. The Court of Federal Claims ruled against the Fallinis, concluding on motion for summary judgment that they had no property right that was taken by governmental action. *Fallini v. United States*, 31 Fed.Cl. 53 (1994). We conclude that their complaint was not filed within the applicable statute of limitations period and that the complaint should be dismissed on that ground.

I

The appellants, Susan and Joseph Fallini, own a 2700-acre ranch in south-central Nevada. The Fallinis' ranch property is located within a region known as the Reveille Allotment, which consists of 657,520 acres of federally owned land. Pursuant to federal permits, the Fallinis graze cattle on the public land surrounding their ranch property.

The Fallini family has engaged in ranching in the area since the 19th century. Over time, they have developed a number of water sources on the public land to water the cattle that are permitted to graze there. Although the Fallinis do not own the land where the water sources are located, they contend that under federal and state law they enjoy proprietary rights in all the water they produce from the waterworks that they and their predecessors have constructed.

In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340, which provided for the management and protection of wild horses and burros on public lands. The Act prohibited the removal, destruction, or harassment of wild horses and burros found on public lands, and it authorized the Secretary of the Interior to issue regulations providing for the management of the wild horses and burros.

In November 1992, the Fallinis filed a complaint in the Court of Federal Claims, contending that the government had taken their property by requiring them "to provide water to wild horses whenever plaintiffs provided water to their domestic livestock after December 17, 1971 [the effective date of the Wild Free-Roaming Horses and Burros Act], on penalty of loss of their grazing preference." The Fallinis' complaint does not describe exactly what the government required them to do in order to "provide water to the wild horses," but they elsewhere assert that they have been prohibited from fencing their water sources in ways that would permit cattle access to the water but prevent wild horses from having access. In their complaint, the Fallinis alleged that between 1971 and 1991 the cost of providing water to wild horses that took water from the Fallinis' developed water sources totaled approximately \$1 million.

The Court of Federal Claims granted summary judgment to the government. The court first held that the Fallinis do not own the water they produce in excess of the amounts necessary to satisfy the cattle authorized under their federal grazing permits. The court further concluded that, because the government may regulate the use of the public lands on which the Fallinis' cattle are allowed to graze, the Fallinis "did not have a compensable expectancy in exclusion of wild horses and other wild animals from the allotment or exclusive use of the forage and water." *Fallini v. United States*, 31 Fed.Cl. at 58. On appeal, the Fallinis contend that the court erred in characterizing their interest in the water that they brought to the surface at the developed water sources on the Reveille Allotment. Based on their claim that they enjoy ownership rights in that water under federal and state law, the Fallinis argue that the government took their property without compensation when it prohibited them from barring the wild horses from drinking water at those sites.

The government responds, first, that the Fallinis failed to file their complaint within the applicable statute of limitations period and that the complaint therefore should be dismissed. On the merits, the government argues that the Court of Federal Claims was correct in ruling that the government had the right to condition the Fallinis' use of the public lands on their not barring the wild horses from having access to the developed water sources.

II

We do not reach the merits of the Fallinis' claim, but instead vacate the judgment of the Court of Federal Claims and direct that court to dismiss the complaint as untimely filed. The Fallinis brought their claim against the United States under the Tucker Act, 28 U.S.C. § 1491. Actions brought under the Tucker Act are time-barred unless they are filed within six years of the date that the cause of action accrued. 28 U.S.C. § 2501. As a general matter, a cause of action accrues when all the events have occurred that fix the defendant's alleged liability and entitle the plaintiff to institute an action. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed.Cir.1994). The question whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue. *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed.Cir.), cert. denied, 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984).

In the present case, the objective standard is clearly met, because the appellants have been cognizant of the facts underlying the alleged taking since long before they filed their complaint in the

Court of Federal Claims. The complaint alleges that the uncompensated taking began in 1971, when Congress enacted the Wild Free-Roaming Horses and Burros Act, and has continued since that time.

On October 3, 1983, the Fallinis sent a bill to the Bureau of Land Management seeking compensation for the water drunk by the wild horses. At least by that date, then, the Fallinis were aware of all the facts necessary to establish the liability of the United States for the alleged taking. Unless the Fallinis were justified in delaying the filing of their complaint following that event, their claim is barred because it was not filed in the Court of Federal Claims until 1992, more than six years after the 1983 bill that the Fallinis submitted to the Bureau of Land Management.

The Fallinis advance two theories that, they claim, enable them to avoid dismissal under the time bar. First, they argue that their complaint was filed within the limitations period because they have experienced a continuous taking over many years and the taking did not stabilize until November 28, 1986, a date slightly less than six years before the filing of their suit. Second, they allege that every drink taken by every wild horse from 1971 through the date of the filing of their complaint constituted a separate taking. Under that theory, the Fallinis would not be able to recover for any water taken more than six years before they filed suit, but they would be entitled to claim compensation for the water taken within the six-year period before their complaint was filed. As we analyze the case, neither of the Fallinis' theories suffices to overcome the limitations bar.

In support of their first theory, the Fallinis claim that they have been subject to a continuous taking under *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), and its progeny. See generally *Applegate v. United States*, 25 F.3d 1579, 1581-84 (Fed.Cir.1994). Under that theory, they contend, their cause of action for the continuous taking that began in 1971 did not accrue until 1986.

In *Dickinson*, the Supreme Court announced the principle that, when the government allows a taking of land to occur by a continuing process of physical events, plaintiffs may postpone filing suit until the nature and extent of the taking is clear. 331 U.S. at 749, 67 S.Ct. at 1385. The taking in *Dickinson* resulted from the government's construction of a dam that intermittently inundated the property of nearby landowners. Noting that the landowners were uncertain at first how frequently the dam would result in flooding (and thus whether an actual permanent taking had occurred), the Court in *Dickinson* held that the plaintiffs' cause of action in such a case does not accrue until "the situation becomes stabilized." *Id.*

*Dickinson* contains language that can be read to suggest that a cause of action for a taking does not accrue until all the damages resulting from the taking can be finally calculated. See, e.g., *Dickinson*, 331 U.S. at 749, 67 S.Ct. at 1385 (landowner may postpone suit until "the consequences [of the governmental act in question] have so manifested themselves that a final account may be struck"). That interpretation of the *Dickinson* rule, however, would be broader than even the appellants contend for, as it would mean that in a case such as this one, where the damages continue to increase over time, the plaintiffs' cause of action would never accrue and the statute of limitations would never run. See *Gustine Land & Cattle Co. v. United States*, 174 Ct.Cl. 556, 656, 1966 WL 8856 (Ct.Cl.1966) (broad interpretation "would put the *Dickinson* doctrine in unending conflict with the statute of limitations").

The Supreme Court has not read *Dickinson* so expansively. In *United States v. Dow*, 357 U.S. 17, 27, 78 S.Ct. 1039, 1047, 2 L.Ed.2d 1109 (1958), the Court characterized *Dickinson* as holding only that the statute of limitations does not bar an action for a taking by flooding "when it was uncertain at what stage in the flooding operation the land had become appropriated to public use."

Following *Dow*, the Court of Claims adopted a similarly narrow interpretation of *Dickinson* and the meaning of "stabilization" in the takings context. In *Kabua v. United States*, 546 F.2d 381, 384, 212 Ct.Cl. 160 (1976), the court noted that in *Dow*, the Supreme Court "more or less limited [*Dickinson*] to the class of flooding cases to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking." *Accord Hilkovsky v. United States*, 504 F.2d 1112, 1114, 205 Ct.Cl. 460 (1974) (*Dow* "distinguished the flooding situation in *Dickinson* from other types of Government taking because, in the slow flooding situation in *Dickinson*, the full extent of the Government taking could not be known until the high water mark of the flooding had been reached"). And in *Barnes v. United States*, 538 F.2d 865, 210 Ct.Cl. 467 (1976), on facts very similar to those in *Dickinson*, the court held that a taking by flood accrued in 1973 rather than in 1969, the date of the first flood. The court explained that the taking must be dated from the time that "it first became clearly apparent ... that the intermittent flooding was of a permanent nature."

*Id.* at 873. In other post-*Dickinson* cases, the Court of Claims has made clear that it is not necessary that the damages from the alleged taking be complete and fully calculable before the cause of action accrues. *Columbia Basin Orchard v. United States*, 88 F.Supp. 738, 739, 116 Ct.Cl. 348 (1950) ("we do not think the Supreme Court, in the *Dickinson* case, meant to hold that plaintiff was entitled to wait until any possibility of further damage had been removed"); *Nadler Foundry & Mach. Co. v. United States*, 164 F.Supp. 249, 251, 143 Ct.Cl. 92 (1958) (same); see also *Wilcox v. Executors of Plummer*, 29 U.S. (4 Pet.) 172, 177, 7 L.Ed. 821 (1830) (statute of limitations begins to run when breach of duty occurs; "right to sue is not suspended, until subsequent events shall show the amount of damage or loss").

In the case at bar, the "permanent nature" of the taking was evident to the Fallinis at least by 1983, when they sent their water bill to the Bureau of Land Management. The Fallinis maintain that the taking was continuous from 1971 on, but that it did not "stabilize" until November 28, 1986. The only event to occur on or about that date, however, was the formation of the Herd Management Area (HMA) in settlement of one of the Fallinis' prior suits against the government.

The HMA established the historical location and herd population of wild horses in the Reveille Allotment. As part of the settlement, the Bureau of Land Management undertook to conduct an annual census of wild horses in the HMA and to remove any excess horses. Thus, the formation of the HMA served only to reduce the damages the Fallinis were suffering because of the alleged taking; it did nothing to establish that the horses' drinking constituted a taking for which the United States was liable.

Three years before the HMA was established, the Fallinis billed the federal government for the water allegedly taken by the wild horses up to that point. At least by that time, the situation had become clearly apparent, and therefore had "stabilized" within the meaning of *Dickinson*, because the bill that the Fallinis sent to the Bureau of Land Management indicated that they were fully aware of all the

facts that, on their view of the case, led to the conclusion that the government's actions amounted to a taking. The only changes in the ensuing years were changes in the number of protected horses in the Reveille Allotment, and thus the amount of water taken. Nothing that happened in those later years had the legal effect of triggering, for the first time, the Fallinis' obligation to sue for the alleged takings that had occurred since the enactment of the Wild Free-Roaming Horses and Burros Act in 1971. Thus, the Fallinis' first theory does not allow them to avoid the statute of limitations bar.

Under their second theory, the Fallinis concede application of the time-bar as to pre-1986 events, but seek compensation for injury they suffered after 1986, *i.e.*, within the six years prior to the filing of their suit. That claim, however, depends upon characterizing every drink by every wild horse as a new and independent federal taking compensable under the Fifth Amendment.

In analyzing this theory of recovery, it is useful to analogize the conduct at issue in this case to a taking of real property. If a landowner owns a parcel of beachfront property and the government enacts legislation demanding that the landowner allow others to walk along the shore, the government has effected a taking of an easement on the landowner's property. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987). For purposes of claim accrual, such a taking occurs on the date of enactment of the legislation. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d at 1482; *De Anza Properties X, Ltd. v. Santa Cruz*, 936 F.2d 1084 (9<sup>th</sup> Cir.1991). Every instance of a beachcomber using the public easement does not constitute a separate taking, even though each use may inflict psychic or economic injury on the landowner.

The analysis of the present facts is similar. In their complaint, the Fallinis allege that the Wild Free-Roaming Horses and Burros Act deprived the Fallinis of their right to exclude wild horses from the developed water sources on the Reveille Allotment. In light of those allegations, it is the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking. The fact that the water at issue in this case is personalty and the land at issue in the easement case was realty does not alter the nature of the analysis. For purposes of determining when the Fallinis' claim accrued, it is necessary in either case to look to the nature and timing of the governmental action that constituted the alleged taking. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d at 1481.

If the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking might well be different. See *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 (10th Cir.1986) (en banc), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1616, 94 L.Ed.2d 800 (1987). But the horses are not agents of the Department of the Interior any more than beachcombers wandering across a property owner's land are agents of the legislature that mandated the creation of an easement along the shore.

What the Fallinis may challenge under the Fifth Amendment is what the government has done, not what the horses have done. The only governmental action that could constitute a compensable taking in this case is the government's directive forbidding the Fallinis from shooing the horses away from the water that the Fallinis have produced at their developed water sources. That governmental action cannot be regarded as recurring with every new drink taken by every wild horse, even though the consumption of water by the wild horses imposes a continuing economic burden on the Fallinis. See

*Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980) (proper focus, for statute of limitations purposes, "is upon the time of the [defendant's] *acts*, not upon the time at which the *consequences* of the acts became most painful"). Because the Fallinis identify the enactment of the Wild Free-Roaming Horses and Burros Act as the governmental action that prevented them from fencing the horses away from their water sources, and because they admit that they suffered injury from the date of enactment, their claim must be regarded as accruing long before they filed their present suit.

### III

Based on our analysis of the Fallinis' takings claim, we conclude that their claim was time-barred. We therefore vacate the judgment and remand this case to the Court of Federal Claims with instructions to dismiss the complaint as untimely. Each party shall bear its own costs.

Fallini v. Hodel (9th Cir. 1992)

Joe B. Fallini, Jr.; Susan L. Fallini; Helen L. Fallini, plaintiffs-appellees,  
v.

Donald P. Hodel, Secretary of the Interior, Robert  
Buford, director of the Bureau of Land Management; Edwardf.  
Spang, Nevada State Director, Bureauof Land  
Management, defendants-appellants. joe B. Fallini, Jr.; Susan L.  
Fallini; Helen L. Fallini, plaintiffs-appellees, v. Donald P. Hodel,  
Secretary of the Interior, Robert Buford, director of the Bureau of  
Land Management; Edwardf. Spang, Nevada State Director,  
Bureauof Land Management, Defendants, and animal Protection  
Institute, Defendant-intervenor-appellant

United States Court of Appeals, Ninth Circuit. - 963 F.2d 275

Argued and Submitted July 19, 1991. Decided May 1, 1992

William B. Lazarus, U.S. Dept. of Justice,  
Washington, D.C., for defendants-appellants.

W. Alan Schroeder, Boise, Idaho, for  
plaintiffs-appellees.

Laurens H. Silver, Sierra Club Legal Defense Fund, San Francisco, Cal., for  
defendant-intervenor-appellant.

Appeal from the United States District Court  
for the District of Nevada.

Before: GOODWIN and SNEED, Circuit

Judges, and TAYLOR, District Judge.

GOODWIN, Circuit Judge:

Joe, Susan, and Helen Fallini operate a cow and calf ranch on approximately 2,700 acres of deeded land in Nye County, Nevada, and hold grazing permits on 657,520 acres of public land in the Reveille Allotment of the Tonopah Resource Area. The competition between domestic cattle and free roaming wild horses for food and water on these public lands has produced folk lore, movies, legislation, and litigation.

The government appeals a judgment in favor of the Fallinis and adverse to the Bureau of Land Management, which is charged with the administration of public lands under the Taylor Grazing Act of 1934, 43 U.S.C. § 315 et seq. (1988) (as amended). We must consider whether the Fallinis violated their federal range improvement permit when they installed highway guardrails around one of their water holes to discourage wild horses from grazing the surrounding land. Concluding that they did not, we affirm the district court.

The Fallini operation, known as the Twin Springs Ranch, depends on the public lands of the Reveille Allotment for grazing during that part of the year in which natural forage is produced on the desert. The Fallini permits include the right to develop deep wells at their own expense, but they also provide that the water thus produced be made available to wildlife.

The Fallinis rotate their cattle from one area to another by closing access to one water hole and opening access to another. Virtually all of the usable water within the Allotment is artificially produced, including Deep Well, the site with which this case is concerned. The central Nevada mountains enjoy minimal rainfall and light accumulations of winter snow. The resulting moisture appears only briefly on the surface, and cattlemen since pioneer times have relied on wells in order to take advantage of the seasonal pasture within the Allotment. With the coming of rural electrification and advanced technology in the 1930s, the development of deep wells made it feasible to graze cattle in areas that had until then been the exclusive habitat of desert wildlife.

In September of 1967 the BLM, pursuant to section 4 of the Taylor Grazing Act, 43 U.S.C. § 315c, issued the Fallinis a range improvement permit, designated Deep Well, authorizing them to maintain and use a stockwatering facility on public lands inside the Allotment. The permit at Deep Well--one of several issued to the Fallinis over the years authorizing improvements at the major water sources within the Allotment--allows the Fallinis to make improvements so that nearby grazing lands can be available for cattle grazing.

In 1971 Congress enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340. At that time, according to stipulations by the parties, approximately 130 wild horses roamed within the Reveille Allotment but no wild horses or burros roamed within the vicinity of Deep Well. By 1984, however, approximately 1,800 wild horses inhabited the Allotment, and several hundred of these horses, attracted by the Fallinis' stock-watering facility, grazed the land surrounding Deep Well.

In late 1983, the Fallinis, without first obtaining BLM approval, installed highway guardrails across the entrances to nine of their water troughs within the Reveille Allotment, including Deep Well. The guardrails were erected at a height and in a manner that would prevent access to the water by wild horses; the guardrails do not bar access by cattle or indigenous wildlife.

On December 23, 1983, the BLM's manager for the Reveille Allotment issued a proposed decision stating that the installation of the guardrails constituted a modification of the watering facility and violated the Fallinis' improvement permit because BLM approval had not first been obtained as required by the applicable regulations. See 43 C.F.R. 4140.1(b)(2) (1982). The proposed decision required removal of the guardrails within 15 days and stated that failure to do so would result in cancellation of the Fallinis' permit. The Fallinis removed the guardrails at every water source except Deep Well and protested the BLM's proposed decision as it applied to Deep Well. On May 3, 1984, the BLM cancelled the Deep Well permit.

The Fallinis appealed the BLM's decision to an administrative law judge who found that the Fallinis "have not violated the conditions of the ... permit involved in this case nor any applicable federal regulations." The BLM appealed to the Interior Board of Land Appeals (IBLA) which reversed the administrative law judge. See *Fallini v. BLM*, 92 IBLA 200 (1986).

The Fallinis then appealed to the district court. Judge Foley made four rulings: first, the installation of the guardrails did not require prior BLM approval; second, the BLM acted beyond its authority and jurisdiction; third, the BLM's decision was tainted by improper political influence; and fourth, the BLM's decision effected a regulatory taking of the Fallinis' water rights in violation of the Fifth Amendment. See *Fallini v. Hodel*, 725 F.Supp. 1113 (D.Nev.1989).

This decision, involving the application of law to facts over which the parties disagree, calls for review without deference to the trial court's application of law, but with proper respect to the trial court's determination of the facts. Fed.R.Civ.P. 52(a); *United States v. McConney*, 728 F.2d 1195, 1200-01 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

Final decisions of the IBLA are reviewed under the Administrative Procedure Act, 5 U.S.C. § 706(2). Section 706 states that the reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be-- ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) contrary to constitutional right ...; or (C) in excess of statutory jurisdiction, authority, or limitations.... *Id.* The scope of judicial review under this standard is narrow, and this court "cannot merely substitute [its] judgment for that of the IBLA." *Baker v. United States*, 613 F.2d 224, 226 (9th Cir.1980).

An agency's interpretation of the governing statute or of its own regulations is entitled to deference, but courts are the final authorities on issues of statutory and regulatory construction. *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir.1987). The applicable standard of review is whether the agency decision "was based upon a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983).

### III. DISCUSSION

#### A. Violation of the Range Improvement Permit

The IBLA found that the Fallinis violated permit conditions and modified their range improvement at Deep Well without first obtaining BLM approval, in violation of 43 C.F.R. § 4140.1(b)(2). That regulation provides that persons may be subject to civil and criminal penalties for "[i]nstalling, using, maintaining, modifying, and/or removing range improvements without authorization." Because the installation of guardrails was intended to and did deter wild horses from watering at Deep Well, the pivotal question was whether this alteration of the water hole gates to exclude unwanted horses was a "modification" that required prior BLM authorization. The trial court held that it was not. In reviewing the trial court's approach to the IBLA decision, two words become important: "gate" and "wildlife."

The permit for Deep Well allows the permittee to install "4 Steel gates" and requires wildlife access to water. The permit provides in relevant part that "[a]ny public lands or impounded waters will be available for wildlife use" and that the permit "is subject to cancellation for noncompliance with the rules and regulations now or hereafter approved by the Secretary of the Interior."

The Fallinis contend that their highway guardrails are gates, and both the IBLA and the trial court agreed. This may have been an unwarranted stretch of language, but it is not challenged on appeal. The permit requires the permittee to allow access to the impounded water by "wildlife." There seems to be no question but that water pumped from a deep well into a storage tank and then allowed to flow into watering troughs is "impounded." We turn then to the meaning of wildlife.

Ordinarily there would be little basis for quibbling about whether wild horses are wildlife. However, in a forensic range war, words can take on strange meanings. Here the trial court held that the term "wildlife" as used in the Fallinis' 1967 permit did not include feral horses. In this respect, we hold that the trial court's finding was not clearly erroneous.

Although the Fallinis' permit and its specifications were never subsequently changed, the record indicates that the Deep Well facility was changed numerous times over the years. The specified improvements were repaired, replaced, and substituted, and in some respects substantially altered. Until 1983, none of the different or additional installations was determined by the BLM to be a "modification" for which prior agency approval was required.

The IBLA concluded that the guardrails were gates and thus fell within the categories of improvements listed in the Deep Well permit. The IBLA chose to disregard definitional questions about what constituted a gate and instead focused on the purpose the gates were intended to serve. The IBLA then determined that the purpose underlying the installation of the guardrails-- impeding wild horse access to the water while allowing cattle access-- differed from the original purpose authorizing the installation of gates in the 1967 permit. Accordingly, the IBLA ruled that the installation of the guardrails constituted a modification requiring prior BLM approval.

Noting that an agency acts arbitrarily when it entirely fails "to consider an important aspect of the problem" before it, see *National Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1512 (9th Cir.1986) (quoting *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867), the district court concluded that the IBLA failed to consider the purposes of the Taylor Grazing Act in construing the intent of the parties in 1967 and the purpose for which the Deep Well range improvement permit was issued.

The intent of the parties in drafting the permit is a question of fact. In construing the permit language, the trial court accepted the Fallinis' view that the language should mean what it meant to the parties in 1967 when the permit was issued, and not what it might mean 20 years later after Congress had dramatically changed the legal environment in which range management would occur in the future.

The 1971 wild horse legislation shortly resulted in the proliferation of feral horses in numbers that far exceeded both the carrying capacity of the range and the imagination of the parties at the time the permits were granted. When the Fallinis' permit was issued, small scattered bands of wild horses roamed the intermountain deserts of central Nevada as well as other similar ranges in neighboring states. But wild horses were not considered "wildlife" for grazing permit purposes. It was customary for ranchers to round up redundant wild horses and ship them off for purposes that aroused the indignation and political energy of urban voters. For range permits in 1967 "wildlife" included the occasional mountain sheep, mule deer, antelope, coyote, kit fox and the birds and rodents that make up the fauna that have evolved in an almost waterless desert.

As the district court recognized, no sane rancher would spend thousands of dollars to drill a deep well and build associated water works in order to attract a population of wild horses that would eat and uproot all the grass for miles around the water hole. Before the Fallinis developed the Deep Well water facility, the few wild horses in that part of Nevada searched elsewhere for feed and water. After the laws were changed to protect the horse population, the water developed by the Fallinis attracted the recently protected and rapidly multiplying horses in numbers that made this confrontation between

horses and cows on the same range inevitable.

The trial court reasoned that the BLM could not claim that a purpose of the range improvement permit was to provide water to wild horses because none had roamed the Deep Well area at the time the permit was issued. Thus, based on the permit's language and surrounding circumstances, the court concluded "that 'wildlife' does not include 'wild horses' ..." The court went on to say that the guardrails did not violate the permit conditions. *Fallini*, 725 F.Supp. at 1117. We agree.

The trial court noted that the primary purpose of the Taylor Grazing Act is "to promote the highest use of the public lands pending its final disposal." 43 U.S.C. § 315. We have stated that "the purpose of the Taylor Grazing Act is to stabilize the livestock industry and protect the rights of sheep and cattle growers from interference." *Kidd v. United States Dep't of the Interior, Bureau of Land Management*, 756 F.2d 1410, 1411 (9th Cir.1985).

With these principles in mind, the trial court correctly turned to the original purpose of the permit in deciding that the failure to obtain prior approval before erecting the guardrails did not constitute a violation of the permit terms.

The district court announced three alternative grounds for its decision. First, the court accepted the Fallinis' argument that the BLM acted beyond its authority and jurisdiction by appropriating the Deep Well water in a manner contrary to state water laws. The district court also concluded that "improper political considerations tainted the agency's exercise of its discretion." The court read the record as showing that the BLM's decision to cancel the Deep Well permit was improperly influenced by wild horse activists. The court cited no evidence, however, that the IBLA's decision was affected in any way by political pressure. As a final alternative ground for its decision, the district court held that the BLM's cancellation of the Deep Well permit constituted a regulatory taking of the Fallinis' water rights in violation of the Fifth Amendment.

Because we find adequate reasons to affirm the district court without reaching the state law, political influence, or takings issues, there is no need for us to rule on them.

The district court's factual finding regarding the intent of the parties at the time the permit was issued was not clearly erroneous. The court's application of the law to these facts was free from reversible error. Accordingly, the judgment is AFFIRMED.

TAYLOR, District Judge, dissenting:

I respectfully dissent. Rather than the majority's inquiry for the supposed intent of the parties (as in a contract dispute), our inquiry should be for the intent of Congress. Under the plain language of the Taylor Grazing Act of 1934 and the subject permit, wild horses are "wildlife."

It is true that purposes of the Taylor Grazing Act include promoting the highest use of public lands, stabilizing the livestock industry, and protecting the rights of sheep and cattle growers. 43 U.S.C. § 315; *Kidd v. United States Dept. of the Interior*, 756 F.2d 1410, 1411 (9th Cir.1985). However, that Congressional intent must be read in harmony with the additional Congressional intent more recently expressed in the Wild Free-Roaming Horses and Burros Act. It seems apparent that, having

knowledge of the earlier Act, Congress intended to allow wild horses and burros to proliferate and be treated as "wildlife" under the Taylor Grazing Act.

Nothing in the Taylor Grazing Act contemplates there be a "status quo" concerning wildlife. On the contrary, Congress anticipated future regulations to encourage propagation of wildlife (43 U.S.C. § 315h). Congress also provided that nothing in that Act should be construed to impair any right thereafter initiated (43 U.S.C. § 315), or impair the right to use water for a purpose which might thereafter be initiated (43 U.S.C. § 315b).

Later, in 1971, such a purpose was initiated. In the Wild Free-Roaming Horses and Burros Act, Congress acknowledged that wild free-roaming horses contribute to the diversity of life forms and are an integral part of the natural system of the public lands. 16 U.S.C. § 1331. The court should read these enactments together, and harmonize them if possible. Accordingly, I must conclude that wild horses are within the meaning of "wildlife" in the intent of Congress, the Taylor Grazing Act, and the permits granted under it.

The fact that Congress gave protected "wildlife" status to wild horses may work a hardship on the Fallinis. But this court should not try to make it right by re-defining "wildlife" to fit a supposed intent of the parties.

A remedy for the Fallinis may exist in the Taylor Grazing Act itself, which provides for a reduction or remittance of grazing fees if there is a range depletion due to natural causes. 43 U.S.C. § 315b.

However, if that is not satisfactory, any change in the law should come from Congress, and not by way of the court's re-definition of terms.

The trial court's opinion is found in 725 F.Supp. 1113 (D.Nev.1989). For an earlier chapter in this conflict, see *Fallini v. Hodel*, 783 F.2d 1343, 1344 (9th Cir.1986)

This section of the Act provides that "[f]ences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands ... under permit issued by the authority of the Secretary." 43 U.S.C. § 315c

# In the United States Court of Federal Claims

No. 03-1942L

Filed: September 2, 2005

COLVIN CATTLE CO., INC.,	)	<u>Fifth Amendment Taking</u> : A state
	)	water right does not confer an attendant
Plaintiff,	)	right to graze cattle on federal lands as
	)	such grazing was historically permitted
v.	)	at the sufferance of the federal
	)	government.
THE UNITED STATES,	)	
	)	<u>Contracts</u> Leasehold interests in
Defendant.	)	public lands: A lease to graze cattle
	)	issued under the Taylor Grazing Act,
	)	43 U.S.C. §§ 315-315r(2000), does not
	)	constitute a contract binding the United
	)	States.

Michael J. Van Zandt, McQuaid Bedford & Van Zandt, LLP, San Francisco, CA, attorney of record for plaintiff Lyman D. Bedford, of counsel.

Kathleen L. Doster, with whom was Assistant Attorney General Thomas L. Sansonetti, General Litigation Section, Environment and Natural Resources Division, Department of Justice, Washington, D.C, for defendant.

## OPINION

WIESE, Judge.

Plaintiff, Colvin Cattle Co., Inc., the owner of 520 acres of land located near the publically held Montezuma Allotment in central Nevada, sues here for the alleged taking of its water rights and ranching operations as a result of the government's denial of an application to graze cattle on federal lands. Plaintiff additionally asserts a breach of contract arising from the government's cancellation of plaintiff's grazing lease. This case is before the court on defendant's motion to dismiss or, alternatively, for summary judgment on the grounds that plaintiff's water rights do not confer a compensable right to graze on federal lands and that its grazing lease does not create a contractually enforceable right against the government. After hearing oral argument on July 20, 2005, we now rule in defendant's favor and direct the dismissal of plaintiff's claims.

The Montezuma Allotment comprises 625,000 acres of public land in Nye and Esmeralda Counties, Nevada, which was reserved for federal use by the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315-315r (2000). Plaintiff first applied to the BLM for a grazing lease on the Montezuma Allotment on September 5, 1969, which was in turn granted on January 19, 1970.

## FACTS

The current dispute arose in February 1995 when plaintiff, a long-time rancher on the Montezuma Allotment, failed to pay \$966 in grazing fees to the Bureau of Land Management (“BLM”) in connection with its grazing of cattle on publically held land. As a result of that failure, the BLM issued a notice of trespass on March 15, 1995, for “[g]razing livestock in the Montezuma Allotment without an authorization.” Plaintiff in turn challenged the federal government’s ownership of the land in question and submitted payment of the grazing fee to the Esmeralda County treasurer under the theory that the state, rather than the federal government, was the legitimate owner of the land. The county promptly returned the check to plaintiff uncashed.

On May 21, 1997, after numerous unsuccessful attempts to settle the trespass claims against plaintiff, the BLM issued a “Proposed Decision Order to Remove and Demand for Payment on the Montezuma Allotment.” In response, plaintiff submitted a June 6, 1997, protest in which it continued to challenge the government’s ownership of the land. The BLM rejected plaintiff’s challenges in a July 24, 1997, “Final Decision,” concluding that plaintiff had been “knowingly, and willfully grazing livestock without a grazing authorization.” The decision demanded payment in the amount of \$37,332.26 for costs and damages associated with plaintiff’s unauthorized grazing and provided for the cancellation of plaintiff’s grazing lease and the removal of plaintiff’s cattle if payment was not made within 15 days. Plaintiff appealed the BLM’s decision to the Interior Board of Land Appeals on September 4, 1997, but that appeal was dismissed on November 28, 1997.

After more than three years of additional attempts to remedy the trespass claims against plaintiff, the BLM issued a notice of intent on June 25, 2001, to have plaintiff’s cattle removed from the public lands. The following year, on May 1, 2002, in connection with the cancellation of plaintiff’s grazing lease, the BLM canceled plaintiff’s range improvements permits and ordered plaintiff to remove all materials associated with such improvements within 180 days. Plaintiff did not respond to the cancellation notice and instead filed suit in this court on August 18, 2003. Thereafter, on November 26, 2003, the BLM issued a final trespass decision ordering plaintiff to remove all range improvements from the public lands. By its terms, however, the order excluded from removal “facilities necessary for exercise of the water rights (e.g. wells) . . . established pursuant to Nevada law.

Although plaintiff is permitted continued access to the water on the Montezuma Allotment, the BLM has since authorized another rancher, Bud Johns, to graze livestock on that same land. As a condition of that authorization, however, Mr. Johns must haul water to the Montezuma Allotment for use by his cattle.

## DISCUSSION

### I.

In determining whether plaintiff has suffered a Fifth Amendment taking, we must begin by examining the nature of plaintiff’s asserted property right. *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002). At its core, plaintiff’s claim is that a right to the beneficial use of water established under Nevada law carries with it an attendant right to graze cattle on federal land since grazing is the only beneficial use to which the water can be put. See *Buford v. Houtz*, 133 U.S. 320, 322 (1890) (recognizing that due to “the scarcity of water, and the aridity of the climate,” land on the public range “can never be subjected to any beneficial use other than the grazing of stock”). Plaintiff maintains that the question of whether it has a right to graze is thus inseparable from the question of whether it has a right to the beneficial use of water, and, in plaintiff’s view, “denying the right to use a water right for its legal purpose is the same as destroying that right.”

The case law makes clear, and plaintiff concedes, that a grazing permit does not rise to the level of a protectable property interest, nor does it confer any right, title, or interest to the lands of the United States. *Light v. United States*, 220 U.S. 523, 535 (1911) (ruling that the federal government’s failure to object to the use of public lands for private grazing “did not confer any vested right on the [users], nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes”).<sup>3</sup> According to plaintiff, however, its takings claim is not based on a federal permit or license to graze but rather rests on a state-created water right confirmed by the United States in the Mining Act of 1866, 43 U.S.C. § 661 (2000). Plaintiff argues, in other words, that the right in question was created not by the United States but by the appropriation of water under Nevada law. Once such a vested right exists, plaintiff argues, the United States can extinguish that right only upon the payment of just compensation.

Plaintiff’s asserted right to graze cattle on public land is essentially predicated on three sources: the Supreme Court’s decision in *Buford*, 133 U.S. 320; the state of Nevada’s 1925 Stockwatering Act, Nev. Rev. Stat. §§ 533.485–533.510; and the federal Mining Act of 1866, 43 U.S.C. § 661. Plaintiff begins its argument with the Supreme Court’s decision in *Buford*. Under its reading of that decision, plaintiff contends that the state of Nevada had the right to define grazing in connection with water rights on public lands prior to the reservation of those lands by the federal government through the enactment of the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315–315r (2000). To the extent the state had in fact regulated or controlled grazing on those lands, plaintiff interprets *Buford* as recognizing a vested property right in the public lands that would remain enforceable against the United States even after that land was later reserved for federal use by the Taylor Grazing Act.

Plaintiff next turns to the 1925 Stockwatering Act, Nev. Rev. Stat. §§ 533.485–533.510, for the state’s definition of such a right. That act, plaintiff asserts, recognizes subsisting rights to the beneficial use of water based on a continuous appropriation. See *Hage v. United States*, 51 Fed. Cl. 570, 577 (2002) (recognizing a vested right by appropriation under Nevada law where there exists “the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use” including “by watering livestock directly from the source”). Plaintiff additionally maintains that “[t]he right to use water on the public lands and the right to graze under Nevada law are inextricably intertwined” (citing *Itcaina v. Marble*, 55 P.2d 625 (Nev. 1936)). See also *In re Calvo*, 253 P. 671, 676 (Nev. 1927) (observing that “[t]he right to the use of water for watering live stock in this arid state depends for its value on the public range; hence we think the two matters are properly connected”).

While plaintiff concedes that even under *Buford*, a mere statement of the right to graze from the state would be overridden by any future federal reservation because no state statute alone “grants (nor could it grant) a property interest in federal lands that may be enforced against the United States,” *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1214 (10th Cir. 1999), plaintiff argues that the validation of prior rights on federal land can nonetheless be accomplished by reliance not only on local law but also on a corresponding act of Congress. In plaintiff’s view, Congress passed such an act in the Mining Act of 1866, which expressly defers to the state’s local custom and usage:

Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the 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 . . . .

43 U.S.C. § 661.

As the Supreme Court recognized in Jennison v. Kirk, 98 U.S. 453, 457 (1878), the purpose of the Mining Act is to “give the sanction of the United States, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands.” The Jennison Court went on to note:

[W]henver rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them; and that the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, should be “acknowledged and confirmed.”

Id. at 460.

The confirmation by the Mining Act of vested state water rights—including the right for cattle to consume forage adjacent to water—is, in plaintiff’s view, a framework recognized by this court in Hage v. United States, 35 Fed. Cl. 147 (1996), where the court observed:

[N]either the Supreme Court, or other lower federal courts, have addressed the scope of the water rights acknowledged by the [Mining Act]. If Nevada law recognized the right to graze cattle near bordering water as part of a vested right before 1907, when Congress created the Toiyabe National Forest, plaintiffs may have a right to forage adjacent to their alleged water rights on the rangeland.

Id. at 175. In a later decision, the Hage court repeated its “common sense” analysis that “implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water.” Hage v. United States, 42 Fed. Cl. 249, 251 (1998). In its final decision, the court went on to conclude that although the plaintiffs did not possess a compensable property right in grazing permits on federal lands, they nonetheless owned vested property rights in water and were thus entitled to ditch rights-of-way under the Mining Act of 1866 Hage, 51 Fed. Cl at 581.

The creation of vested water rights under state law and the confirmation of those rights under federal law is, in plaintiff’s view, a regime that is further recognized by the Taylor Grazing Act, which provides in relevant part:

[N]othing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, 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 subchapter, 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 subchapter shall not create any right, title, interest, or estate in or to the lands.

43 U.S.C. §315b. Plaintiff thus argues that the Taylor Grazing Act not only recognizes water rights vested under state law, but also confirms the method of acquiring those rights, specifically by preserving the legal status quo described in Buford and acknowledged by the Mining Act of 1866.

## II.

Defendant does not dispute that the right to appropriate water can rise to the level of a compensable property interest. Rather, defendant argues that even if plaintiff in fact possesses such a water right (a contention it does not address), the use of a public resource is not a “stick in the bundle of property rights,” American Pelagic Fishing Co. v. United States, 379 F.3d 1363, 1376 (Fed. Cir. 2004), since ownership of a water right does not include an attendant right to graze cattle on federal lands.

Defendant begins its argument with the assertion that title to the lands comprising the Montezuma Allotment was conferred on the United States through the Treaty of Guadalupe Hidalgo in 1848. United States v. Nye County, 920 F. Supp. 1108, 1110 (D. Nev. 1996) (“On February 2, 1848, following the Mexican American War and pursuant to the Treaty of Guadalupe Hidalgo, . . . Mexico ceded lands, including the area comprising present day Nevada, to the United States.”). Subsequent grazing on these public lands, defendant continues, was done at the sufferance of the federal government and did not confer on private parties any vested right in the land. Light, 220 U.S. at 535. Further, defendant asserts, the Property Clause of the United States Constitution gives Congress the power over federal lands “to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them.” Utah Power & Light Co. v. United States, 243 U.S. 389, 389 (1917).

Given this history, defendant argues that any grazing that occurred on the Montezuma Allotment prior to the enactment of the Taylor Grazing Act of 1934 was done at the federal government’s sufferance and not at the state’s, and therefore the grazing could continue only so long as the United States (and not the state of Nevada, as plaintiff contends) did not cancel its “tacit consent.” Light, 220 U.S. at 535.

In Light, the Supreme Court indeed held that the United States “can prohibit absolutely or fix the terms on which its property may be used.” *Id.* at 536. In reaching this result, the Court observed:

[W]ithout passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for [the pasturing of livestock]. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes.

*Id.* at 535 (citation omitted).

We do not believe, as plaintiff suggests, that the ownership and control by the United States of public lands is altered by the Supreme Court’s decision in Buford. Although plaintiff reads Buford as recognizing a vested property right in public lands created under state law, a long line of Supreme Court precedent, like Light, 220 U.S. at 535, confirms that silence or inaction by the federal government regarding grazing on public lands does not create the property right plaintiff now claims. See also United States v. Holliday, 24 F. Supp. 112, 114 (D. Mont. 1938) (“Subsequent authorities have unquestionably modified the doctrine of implied license [as recognized in Buford], holding the possession thus permitted is by no means irrevocable, and that failure to object did not confer any vested rights nor deprive the government of the power to recall any implied license under which the land had been used by private individuals.”). In addition, the case law is equally clear that the “use of public lands for grazing is not a right but a privilege.” Diamond Bar Cattle, 168 F.3d at 1212. Thus,

plaintiff can find no support for the proposition that the right to use public land before that land was reserved for federal use by the Taylor Grazing Act can be enforced against the United States as the equivalent of a property right of ownership. Itcaina, 55 P.2d at 629–30 (holding that while “in the absence of government regulations, the state may regulate the use of the unreserved and unappropriated public domain . . . [n]o property right can be acquired by such use”).

Even if Buford could be construed as acknowledging such a right, however, we do not believe that the state of Nevada ever conferred on plaintiff the right to graze on federal lands in the first instance. Plaintiff traces its water rights to Nevada’s 1925 Stockwatering Act, Nev. Rev. Stat. §§ 533.485–533.510, and three cases it believes link the right to graze with a vested stockwatering right. See Itcaina, 55 P.2d 625; Ansolabehere v. Laborde, 310 P.2d 842 (Nev. 1957); In re Calvo, 253 P. 671. But while the Nevada Supreme Court has indeed recognized a connection between a stockwatering right and the ability to graze (i.e., that the use of a stockwatering right may be dependent for its value on an adjacent public range, In re Calvo, 253 P. at 672), the court has additionally ruled that the state of Nevada did not intend to create any right or title to public lands in passing the 1925 Stockwatering Act:

The state [of Nevada] is not asserting any right or title to the public domain under [the 1925 Stockwatering Act]. All that the state seeks to do pursuant to the [Act] is to exercise police regulations over the public domain. . . . Furthermore any time the federal government . . . in any . . . manner undertakes to exercise control over [the public domain], the [Act] becomes inoperative in so far as it conflicts with the authority of the federal government.

*Id.* at 675. Similarly, in Itcaina, the Nevada Supreme Court held:

No property right can be acquired by [grazing livestock upon the public domain]. All persons so using the public domain do it merely by sufferance of the federal government or, as it is sometimes designated by the courts, by virtue of an implied license. This use is often alluded to as a right. It is not a right that the government of the United States has conferred, and these public range lands may at any time be withdrawn from such use . . . .

55 P.2d at 629–30; see also Ansolabehere, 310 P.2d at 845 (recognizing that portions of Nevada’s water laws were superceded by the Taylor Grazing Act). Thus, while the state had the authority to regulate the use of federal lands, it did not have the power to alter their ownership. In addition, the Ninth and Tenth Circuits have expressly rejected the assertion that a right to graze on federal lands is attendant to a state water right. In Hunter v. United States, 388 F.2d 148 (9th Cir. 1967), for example, the United States sought an injunction to prevent the grazing and watering of cattle within the boundary of a national monument. In response, the plaintiff argued that the “taking and use of the water constituted an appropriation vesting in his predecessors a water right, together with an appurtenant right of way to graze cattle, which rights the general government was bound to honor under the provisions of the [Mining] Act of 1866.” *Id.* at 151. As to the water right, the court concluded that “a legal basis for the acquisition of an appropriation to water by virtue of local decisions has been established” and that such a “grant of the use of waters from the federal government . . . is entitled to protection.” *Id.* at 153. As to the alleged grazing right, however, the court observed:

Whether this “grant” carried with it an easement to graze is a question readily answered. Hunter's contention is based upon the well-settled rule that the grant of a right in real property includes all incidentals possessed by the grantee and without which the property granted cannot be fully enjoyed. He

urges that the adjoining lands provide the means to use the water beneficially and must therefore be deemed appurtenant to it. He claims too much. The appurtenance must 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.

Id. at 153–54. Accord *Gardner v. Stager*, 892 F. Supp. 1301, 1303–04 (D. Nev. 1995), *aff'd*, 103 F.3d 886 (9th Cir. 1996) (finding that the plaintiffs’ argument that their predecessors acquired vested water rights to which grazing rights were appurtenant was “expressly rejected long ago” (citing *Hunter*, 388 F.2d at 153–55)).

Similarly, in *Diamond Bar Cattle*, 168 F.3d 1209, the holders of expired permits to graze cattle on public lands sought a declaratory judgment from the court that their water rights acquired under New Mexico law included an inseparable right to graze the land. In rejecting the plaintiffs’ argument that a vested water right included a right to graze public lands, the Tenth Circuit observed that “[a]ny grazing of cattle on public lands by plaintiffs’ predecessors was permitted by an implied license, which is merely a ‘personal privilege to do some particular act or series of acts on land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor.’” Id. at 1212. The court went on to note that while various state statutes may have purported “to grant possessory interests in public domain lands that may be enforceable against non-federal claimants, no New Mexico statute grants (nor could it grant) a property interest in federal lands that may be enforced against the United States.” Id. at 1214.

Nor does the Mining Act of 1866 either confer or confirm any grazing right on federal lands. In *Jennison*, 98 U.S. at 460, the Supreme Court construed section 9 of the Mining Act as recognizing only two possessory rights: the right to use water on public lands for “mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when recognized by the local customs, laws, and decisions of the courts”; and “the right of way for the construction of ditches and canals to carry water for those purposes.” No other possessory right—specifically the right to graze—was recognized by the Mining Act. See *Diamond Bar Cattle*, 168 F.3d at 1215 (concluding that the Mining Act “cannot fairly 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”).

We must likewise reject plaintiff’s contention that its position finds support in *Hage*, 35 Fed. Cl. at 175. In addition to being the only court to find a right to graze in connection with the Mining Act, the *Hage* court explicitly concluded that the Mining Act “does not address property rights in the public lands and the court declines to create such rights contrary to the clear legislative intention of Congress.” Id. at 170. Further, the *Hage* court did not find that the plaintiffs’ water right included a right to graze on land adjacent to the water (as plaintiff here claims for itself) but instead found a very limited right to graze cattle within 50 feet on each side of an established Mining Act ditch right-of-way. 42 Fed. Cl. at 251. See, e.g., *Diamond Bar Cattle*, 168 F.3d at 1216–17 (distinguishing between the right asserted in *Hage*—“to forage only along the waterfront or a right to lead . . . cattle to water solely to drink”—and the broader claim of a right to “occupy and possess, without federal authorization . . . federal land for cattle grazing purposes”). Finally, the *Hage* court was concerned with limiting the plaintiffs’ access to water, a consideration not at issue here. In the words of the *Diamond Bar Cattle* court, the United States in the instant case “has not acted to take plaintiffs’ water rights, has not denied access to the water, and has not sought to divert plaintiffs’ use to a governmental purpose.” Id. at 1217. Because plaintiff has failed to establish a compensable property right to graze cattle on the Montezuma Allotment, its takings claims must be rejected.

### III.

Plaintiff additionally claims that the government had an obligation to prevent both Bud Johns's cattle and wild horses from infringing upon plaintiff's water rights. Although plaintiff acknowledges that both the Supreme Court and this court have characterized intrusions by wildlife as outside the control of the government and thus not instrumentalities of a taking (see, e.g., Kleppe v. New Mexico, 426 U.S. 529, 535–36 (1976); Bradshaw v. United States, 47 Fed. Cl. 549, 554 (2000)), plaintiff maintains that its case is distinguishable because wild horses have *permanently* occupied the area designated under its grazing lease. Plaintiff fails to explain, however, why such a distinction removes its claim from the purview of Kleppe and Bradshaw.

As to Bud Johns's cattle, the United States cannot be held responsible for the incursion of water rights by a private party. Alves v. United States, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (“There clearly can be no taking when whatever acts complained of are those of private parties, not the government.”). It is worthy of note, however, that Bud Johns's grazing authorization specifies that he must provide his own water for his cattle. Accordingly, plaintiff's allegations regarding intrusions on its water rights by third parties must also be rejected.

#### IV.

In addition to the taking of its water rights, plaintiff also alleges the taking of its ranch under the theory that cattle ranching is the only economically viable use for the property—a use made untenable by the loss of its watering and grazing rights. We do not believe, however, that any decrease in the value of plaintiff's ranch due to a change in plaintiff's use of the Montezuma Allotment results in a compensable taking. See United States v. Fuller, 409 U.S. 488, 493 (1973) (holding that “the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands”). This is particularly true where, as here, plaintiff is found to have no compensable grazing right and has made no showing that it has been deprived of any water right. See Diamond Bar Cattle, 168 F.3d at 1217 (“Plaintiffs contend their water right is of little utility if their cattle have no place to graze. If true, the fault lies with plaintiffs, who were fully apprized of the consequences of failing to renew their permits.”); Hage, 35 Fed. Cl. at 171 (recognizing that a ranch may be rendered worthless in the absence of a grazing permit, but noting that “plaintiffs' investment backed expectations and reliance on the privilege to graze do not, in themselves, create a property interest in the rangeland or the permit”).

#### V.

In addition to its takings claims, plaintiff asserts a breach of contract claim and a claim arising under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(g) (2000). As to plaintiff's breach of contract claim, the case law is clear that “as a matter of law the [grazing] permit does not create a contract between the parties.” Hage, 35 Fed. Cl. at 166. As to its section 1752(g) claim, plaintiff argues that defendant has reduced the total number of cattle allowed to graze on the Montezuma Allotment, thereby rededicating the range in whole or in part to a use other than grazing and thus entitling plaintiff to compensation for its leasehold interest. Plaintiff additionally argues that there is no administrative prerequisite to filing a claim under section 1752(g).

In defendant's view, section 1752(g) is inapplicable here because plaintiff's lease was not canceled in order to devote the lands to another public purpose. Even if section 1752(g) were applicable, however, defendant argues that plaintiff's section 1752(g) claim is unripe because plaintiff has not exhausted its administrative remedies, specifically by applying to the “Secretary concerned” for plaintiff's “interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not

to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein." 43 U.S.C. § 1752(g).

Because it is undisputed that another rancher is now using the lands in question to graze his cattle, the court is unable to conclude that the lands have been devoted to another public purpose as is required by the terms of the statute. Plaintiff's section 1752(g) claim therefore must fail.

#### CONCLUSION

For the reasons set forth above, defendant's motion to dismiss plaintiff's complaint is granted and the Clerk is directed to enter judgment accordingly. No costs.

# Mountain States Legal Foundation v. Hodel

U.S. Court of Appeals, Tenth Circuit

799 F.2d 1423

August 22, 1986

## Summary of Opinion

Plaintiff Mountain States Legal Foundation, representing cattlemen, sued defendant Hodel, the Secretary of the Interior claiming that the failure of the secretary to remove wild mustangs and burros off private land constituted a taking of private property (gazing capacity) for public use. Plaintiff sought compensation for the taking. In this opinion, the Court of Appeals rejects that argument finding that the decrease in value was not sufficient to constitute a taking under the Fifth Amendment to the United States Constitution.

## Text of Opinion

The Mountain States Legal Foundation and the Rock Springs Grazing Association (collectively referred to hereinafter as "the Association") brought this action on behalf of their members against the Secretary of the Interior and other government officials to compel them to manage the wild horse herds that roam public and private lands in an area of southwestern Wyoming known locally as the "checkerboard." [FN1] The checkerboard comprises over one million acres of generally high desert land and has been used by the Association since 1909 for the grazing of cattle. The lands involved in this case are in the Rock Springs District of the checkerboard, an area approximately 40 miles wide and 115 miles long. Record, vol. 1 at 17; Appellant's Brief at 5-6. In this area of the checkerboard, the Association's cattle roam freely on property owned by the Association and on the alternate sections of land owned by the federal government. Thousands of wild horses also roam these lands.

FN1. The "checkerboard" derives its name from the pattern of alternating sections of private and public land which it comprises. The checkerboard scheme of land ownership is a result of the Union Pacific Act passed in 1862. Under the Act, the Union Pacific Railroad Company was awarded the odd-numbered lots of public land along the railbed right-of-way as the company completed each mile of the transcontinental railroad. Today, more than half of the checkerboard remains under federal ownership, while the remainder is held privately.

The Association sought a declaratory judgment that the Secretary had mismanaged the wild horses, and that the Secretary's failure to remove wild horses from the Association's lands was arbitrary and capricious. On this basis, the Association also sought a writ of mandamus to compel the Secretary to remove the wild horses from its lands and to reduce the size of the wild horse herds on adjacent public lands. The Association also sought

damages under the Fifth Amendment for the alleged uncompensated taking of its lands. For this alleged taking, the Association sought to recover \$500,000 from the Director of the Bureau of Land Management ("BLM") and ten dollars from the United States.

The district court granted the Association's petition for mandamus, dismissed the Association's claim against the Director of the BLM, and granted summary judgment for the government on the Association's Fifth Amendment takings claim. The Association appealed the dismissal of the claim against the Director and the grant of summary judgment. The government did not challenge the grant of mandamus on appeal. We affirmed the dismissal, but reversed and remanded the grant of summary judgment, holding that an unresolved factual issue precluded a summary determination of the takings claim. *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir.1984), vacated sub nom. *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468 (10th Cir.1985). We granted the government's petition for rehearing en banc to consider whether the Secretary's failure to manage the wild horse herds, in accordance with the requirements of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982), gives rise to a claim for a taking of the Association's property under the Fifth Amendment. We also consider whether the trial court properly dismissed the Association's claim against the Director of the BLM.

Wild horses and burros are the progeny of animals introduced to North America by early Spanish explorers. They once roamed the western rangelands in vast herds. But over time, desirable grazing land was fenced off for private use, while the animals were slaughtered for sport and profit. The herds began to dwindle, and the remaining animals were driven to marginal, inhospitable grazing areas. Alarmed at decline of these herds, Congress in 1971 enacted the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (1982), to protect the wild horses and burros from "capture, branding, harassment, or death." *Id.* § 1331. According to congressional findings, these "living symbols of the historic and pioneer spirit of the West" had been cruelly slain, used for target practice, and harassed for sport. S.Rep. No. 242, 92d Cong., 1st Sess., reprinted in 1971 U.S.Code Cong. & Ad.News 2149, 2149. Congress also found that the wild horses and burros had been exploited by commercial hunters who sold them to slaughterhouses for the production of pet food and fertilizer. *Id.*; see also Johnston, *The Fight to Save a Memory*, 50 Texas L.Rev. 1055, 1056-57 (1972).

Established under authority granted Congress by the Property Clause of the Constitution, [FN3] the Act declares wild horses and burros to be "an integral part of the natural system of the public lands," 16 U.S.C. § 1331 (1982), and mandates that the animals be managed "as components of the public lands." *Id.* § 1333(a). The Act directs the Secretary to protect and manage the wild horses and burros "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands." *Id.* Section 1334 of the Act provides that, if wild horses or burros stray from public lands onto privately-owned land, the owner of such lands may inform a U.S. Marshal or an agent of the Secretary, who shall arrange to have them removed. Any person who "maliciously causes the death or harassment of any wild free-roaming horse or burro" is subject to criminal penalties. *Id.* § 1338(a)(3). The Department of the Interior has defined "malicious harassment" as

any intentional act which demonstrates a deliberate disregard for the well-being of wild free-roaming horses and burros and which creates the likelihood of injury, or is detrimental to normal behavior patterns of wild free-roaming horses and burros including feeding, watering, resting, and breeding. Such acts include, but are not limited to, unauthorized chasing, pursuing, herding, roping, or attempting to gather or catch wild free-roaming horses and burros.

43 C.F.R. § 4700.0-5(k) (1985).

FN3. The protection of the wild horses and burros on public lands was upheld as a proper exercise of congressional power under the Property Clause in *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976).

The Association alleges that the Secretary has disregarded its repeated requests to remove wild horses from its lands, that it is prohibited by section 1338 of the Act from removing the wild horses itself, and that the wild horses grazing on its lands have eroded the topsoil and consumed vast quantities of forage and water. In support of its Fifth Amendment claim, the Association argues that "it is the panoply of management responsibilities set forth in the Act and its regulations, including [section 1334], which ... subject the United States to liability due to its pervasive control over the horses' existence." Appellant's Supp. Brief on Rehearing En Banc at 8 (emphasis added). In our prior opinion in this case, a panel of this court, with one judge dissenting, found that the government's "complete and exclusive control" over wild horses made the Wild Free-Roaming Horses and Burros Act "unique" in the field of wildlife protection legislation. 740 F.2d at 794. This degree of control, the court said, was potentially "significant" in determining the government's liability under the Fifth Amendment. *Id.* With the benefit of additional briefing and oral argument, it is now apparent to us that, in the area of wildlife protection legislation, there is nothing novel about the nature and degree of the government's control over wild horses and burros.

At the outset, it is important to note that wild horses and burros are no less "wild" animals than are the grizzly bears that roam our national parks and forests. Indeed, in the definitional section of the Act, Congress has explicitly declared "all unbranded and unclaimed horses and burros on public lands" to be "wild horses and burros." 16 U.S.C. § 1332(b) (1982) (emphasis added). [FN4]

FN4. When the United States Supreme Court considered and upheld the constitutionality of the Act in *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), it decided the scope of the federal government's authority over "wildlife" on federal lands and referred consistently throughout its opinion to "wildlife" rather than feral or domestic animals. The Court held that "the Property Clause also gives Congress the power to protect wildlife on the public lands, state law notwithstanding." 426 U.S. at 546, 96 S.Ct. at 2295. The Court's holding purported to extend to "wildlife" even though an amicus curiae brief filed in that case specifically drew the Court's attention to the fact that the horses legislatively deemed wild in the Wild Free-Roaming Horses and Burros Act were in fact feral animals that either had themselves reverted to a wild state or were the progeny of horses that had done so. Brief of Amicus Curiae, International Association of Game, Fish and Conservation Commissioners on the Merits at 4-8, *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976). The amicus brief therefore urged the Supreme Court to limit its holding to feral animals and not to address more broadly the question of federal authority over wildlife on federal lands. *Id.* at 4-13. This the Supreme Court declined to do, thus implicitly accepting Congress' determination to treat the horses as wild. Cf. *Key v. State*, 215 Tenn. 136, 144, 384 S.W.2d 22, 26 (1964) (feral hogs are wildlife protected by the laws of the state).

It is well settled that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised "as a trust for the benefit of the people." *Geer v. Connecticut*, 161 U.S. 519, 528-29, 16 S.Ct. 600, 604, 40 L.Ed. 793 (1896), overruled on other grounds, *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). [FN5] The governmental trust responsibility for wildlife is lodged initially in the states, but only "in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." *Id.* at

528; see also *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410, 10 L.Ed. 997 (1842). Neither state nor federal authority over wildlife is premised upon any technical "ownership" of wildlife by the government. Although older decisions sometimes referred to government "ownership" of wildlife, that language has been deemed "a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Toomer v. Witsell*, 334 U.S. 385, 402, 68 S.Ct. 1156, 1165, 92 L.Ed. 1460 (1948). As the Supreme Court declared, "[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government ... has title to these creatures until they are reduced to possession by skillful capture." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 97 S.Ct. 1740, 1751, 52 L.Ed.2d 304 (1977) (citing *Missouri v. Holland*, 252 U.S. 416, 434, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920)); *Geer*, 161 U.S. at 539-40, 16 S.Ct. at 608 (Field, J., dissenting).

FN5. Hughes overruled the narrow holding of *Geer* by rejecting the view that a state, without violating the Commerce Clause of the Constitution, may prohibit the export of wildlife lawfully taken within the state.

In exercising their powers "to preserve and regulate the exploitation of an important resource," both the state and federal [FN6] governments have often enacted sweeping and comprehensive measures to control activities that may adversely affect wildlife. For example, the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407 (1982 & Supp. II 1984), establishes plenary federal authority for the conservation of marine mammals and preempts entirely state laws pertaining to their taking. *Id.* § 1379(a). While the Wild and Free-Roaming Horses and Burros Act makes it illegal to "maliciously" cause the death or harassment of a wild horse or burro, *Id.* § 1338(a)(3) the Marine Mammal Protection Act establishes a federal moratorium of indefinite duration against any "taking" of a marine mammal, a term defined to include harassing, hunting, capturing, or killing, whether done maliciously or not. *Id.* § 1362(12). Indeed, even unintentional, inadvertent takings that occur incidental to an otherwise lawful activity are strictly regulated and, for "depleted" marine mammal species, prohibited altogether. *Id.* § 1371(a)(4)(A), (5)(A). These prohibitions apply despite the fact that the hearty appetites of some marine mammal species for fish and shellfish often put them in conflict with human competitors for the same resource. Moreover, the mere presence of sea otters in an area may restrict the rights of oil companies or developers to exploit resources that would otherwise produce handsome returns. See H.R.Rep. No. 124, 99th Cong., 1st Sess. 16 (1985). Despite their losses, those individuals and corporations are prohibited from "taking" the otters, and they are unable to call upon the government to remove them--as a private landowner can do when bothered by wild horses. See *id.* at 19.

FN6. Federal authority for the conservation of wildlife has been upheld under the Constitution's treaty-making power, *Missouri v. Holland*, 252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920), commerce power, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977), and property power, *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976).

Another wildlife species, the bald eagle, is protected not by one federal law, but by three: the Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (1982), the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (1982) and (in 48 states at least) the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982 & Supp.1984). Together, these statutes authorize a degree of federal control at least as "complete and exclusive" as that provided by the Wild Free-Roaming Horses and Burros Act. Indeed, in many respects their commands are far more sweeping. For example, not only is it illegal under each of these laws to capture or kill bald eagles, but the Bald and Golden Eagle Protection Act prohibits removing or destroying their nests or collecting their feathers. 16 U.S.C. § 668(a) (1982). [FN7]

FN7. The Bald and Golden Eagle Protection Act was amended in 1978 to authorize the Secretary of the Interior to issue regulations permitting "the taking of golden eagle nests which interfere with resource development or recovery operations." 16 U.S.C. § 668a (1982). No such authority exists with respect to bald eagle nests, however, whether they interfere with resource development or recovery operations and whether they occur on public or private lands. Bald eagles may not be taken unless the Secretary of the Interior specifically issues a permit. *Id.*

In addition, the Endangered Species Act makes it illegal to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any endangered species or attempt to do so, again without regard to whether such actions are done maliciously. 16 U.S.C. §§ 1532(19), 1538(a) (1982). The prohibition against "harming" an endangered species is especially broad, having been construed to mean that one who maintains on his own land grazing animals that so modify natural habitat as to cause indirect injury to endangered species can be required to remove those grazing animals from his land. *Palila v. Hawaii Department of Land & Natural Resources*, 471 F.Supp. 985, 995, 999 (D.Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir.1981). [FN8] Thus, even though eagles and other endangered species often prey on privately- owned livestock and poultry, the Endangered Species Act prohibits self-help measures which have the effect of "harming" such predators.

FN8. The Endangered Species Act authorizes as an affirmative defense to prosecutions for violations of that Act that the defendant acted to protect himself or another person from bodily harm. 16 U.S.C. § 1540(a)(3), (b)(3) (1982). No similar statutory defense exculpates actions to protect property. Several state courts have held that, as a matter of state constitutional law, a person may kill wildlife contrary to the state's conservation laws where such action is necessary to protect his property. See, e.g., *Cross v. State*, 370 P.2d 371 (Wyo.1962). No case has yet addressed whether a similar right exists under the United States Constitution, though the bodily injury defense contained in the Endangered Species Act suggests a congressional view that it does not.

Because the Wild Free-Roaming Horses and Burros Act only prohibits the harassment of wild horses when it is done "maliciously," 16 U.S.C. § 1338(a)(3) (1982), it is not clear that the appellants are completely prevented from taking measures to protect their forage from wild horses without running afoul of the proscriptions of the Act. For example, neither Wyoming nor federal law prohibits the Association from fencing out wild horses and burros. In *Anthony Wilkinson Livestock Co. v. McIlquam*, 14 Wyo. 209, 83 P. 364 (1905), the court upheld a landowner's right to erect a lawful fence to keep out his neighbor's trespassing cattle. Although the fence cut off the neighbor's access to public grazing lands, the court concluded that so far as the mere right to build fences on his land is concerned, [a landowner] is not prohibited by any law or rule that we are aware of from building a fence along one, or two, or three sides of his premises, or through the center thereof, or upon any other part of his land, if he so chooses, unless by so doing he invades some right of another, or violates some public statute. *Id.* at 223, 83 P. at 369. In *Camfield v. United States*, 167 U.S. 518, 17 S.Ct. 864, 42 L.Ed. 260 (1897), the Supreme Court addressed the right of a landowner to enclose his property when it lies in a checkerboard arrangement with public land. In that case, the government maintained that a private landholder could not fence in his odd-numbered lots since to do so would also enclose the even-numbered federal lots. Rejecting the government's argument, the court observed that this was a contingency which the government was bound to contemplate in giving away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it.... *Id.* at 528, 17 S.Ct. at 868.

With respect to each of these federal wildlife protection statutes, the degree of governmental control over activities affecting the wildlife in question cannot be said to be different in character from that mandated by the Wild and Free-Roaming Horses and Burros Act. Indeed, in some of these examples, the governmental control over the wildlife is more pervasive, more sweeping, and more restrictive than that provided by the Wild Free-Roaming Horses and Burros Act.

Many state wildlife conservation laws provide similar, comprehensive control over activities affecting protected species. Most states, for example, have enacted endangered species laws containing prohibitions that parallel those contained in federal wildlife protection laws. See, e.g., Cal. Fish & Game Code §§ 2050-2098 (West 1984 & Supp.1986); Colo.Rev.Stat. §§ 33-2-101 to -108 (1984); Ga.Code Ann. §§ 27-3-130 to -132 (1986); Ill. Ann. Stat. ch. 8, §§ 331-341 (Smith-Hurd 1975 & Supp.1986); Ind.Code Ann. §§ 14-2-8.5-1 to -15 (Burns 1981 & Supp.1986); Iowa Code Ann. §§ 109A.1-10 (West 1984); Md.Nat.Res.Code Ann. §§ 10-2A-01 to -09 (1983 & Supp.1985); Neb.Rev.Stat. §§ 37-430 to -438 (1984).

The foregoing discussion demonstrates the fallacy in the Association's argument that the wild horses are, in effect, instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of the Association's property. In structure and purpose, the Wild Free-Roaming Horses and Burros Act is nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife. It is not unique in its impact on private resource owners.

Of the courts that have considered whether damage to private property by protected wildlife constitutes a "taking," a clear majority have held that it does not and that the government thus does not owe compensation. The Court of Claims rejected such a claim for damage done to crops by geese protected under the Migratory Bird Treaty Act in *Bishop v. United States*, 126 F.Supp. 449, 452-53, 130 Ct. Cl. 198 (1954), cert. denied, 349 U.S. 955, 75 S.Ct. 884, 99 L.Ed. 1279 (1955). The United States Court of Appeals for the Seventh Circuit rejected a similar claim under the Federal Tort Claims Act in *Sickman v. United States*, 184 F.2d 616 (7th Cir.1950), cert. denied, 341 U.S. 939, 71 S.Ct. 999, 95 L.Ed. 1366 (1951). Several state courts have also rejected claims for damage to property by wildlife protected under state laws. See, e.g., *Jordan v. State*, 681 P.2d 346, 350 n. 3 (Alaska App.1984) (defendants were not deprived of their property interest in a moose carcass by regulation prohibiting the killing of a bear that attacked the carcass because "their loss was incidental to the state regulation which was enacted to protect game"); *Leger v. Louisiana Department of Wildlife & Fisheries*, 306 So.2d 391 (La.Ct.App.), writ of review denied, 310 So.2d 640 (La.1975) (because wildlife is regulated by the state in its sovereign, as distinct from its proprietary capacity, the state has no duty to control its movements or prevent it from damaging private property); *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (N.Y.Ct.App.1917) (damage to timber by beavers not compensable because the state has a general right to protect wild animals as a matter of public interest, and incidental injury by them cannot be complained of); see also *Collopy v. Wildlife Commission, Department of Natural Resources*, 625 P.2d 994 (Colo.1981); *Maitland v. People*, 93 Colo. 59, 63, 23 P.2d 116, 117 (1933); *Cook v. State*, 192 Wash. 602, 74 P.2d 199, 203 (1937); *Platt v. Philbrick*, 8 Cal.App.2d 27, 30, 47 P.2d 302, 304 (1935). But see *State v. Herwig*, 17 Wis.2d 442, 117 N.W.2d 335 (1962); *Shellnut v. Arkansas State Game & Fish Commission*, 222 Ark. 25, 258 S.W.2d 570 (1953).

The majority view that rejects takings claims for damage caused by protected wildlife is consistent with the Supreme Court precedent that controls our decision. In *Andrus v. Allard*, 444 U.S. 51, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979), the Court clarified its stance on the takings clause:

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-128 [98 S.Ct. 2646, 2658-2661, 57 L.Ed.2d 631] (1978), is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation--by definition-- involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 [43 S.Ct. 158, 159, 67 L.Ed. 322] (1922); see *Penn Central*, *supra*, at 124 [98 S.Ct. at 2659].

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "justice and fairness." *Ibid.*; see *Goldblatt v. Hempstead*, 369 U.S. 590, 594 [82 S.Ct. 987, 990, 8 L.Ed.2d 130] (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central*, *supra*, at 123-128 [98 S.Ct. at 2658-2661]. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic. *Id.* at 65, 100 S.Ct. at 326; see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). More recently, in *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), overruled on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), the Court emphasized that, in cases involving alleged unconstitutional takings of private property, it

"has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.' Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors--such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action--that have particular significance." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 [100 S.Ct. 383, 390, 62 L.Ed.2d 332] (1979) (citations omitted).

*Id.* at 295, 101 S.Ct. at 2370.

In an unbroken line of cases, the Supreme Court has sustained land-use regulations that are reasonably related to the promotion of the public interest, consistently rejecting the notion that diminution in property value, standing alone, constitutes a taking under the Fifth Amendment. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (ordinance prohibiting excavation below certain level did not constitute a taking of land used for sand and gravel mining); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute which mandates the destruction of red cedar trees in order to protect apple orchards held not to constitute a taking); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (enactment of zoning ordinance limiting uses of unimproved property reducing property's value by seventy-five percent did not constitute a taking); *Hadacheck v. Sebastian*, 239 U.S. 394, 405, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance precluding the manufacture of brick did not constitute a taking even though it reduced value of petitioner's land to less than one-tenth its prior value). In the regulatory context, the Court has said, "the 'taking' issue ... is resolved by focusing on the uses the regulations permit." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131, 98 S.Ct. 2646, 2662, 57 L.Ed.2d 631 (1978).

It is well settled that a land-use regulation may effect a taking if it "does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land...." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (citations omitted). But in *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), the Supreme Court recognized the important governmental interest in preserving wild horses and burros in their natural habitat, citing congressional findings that their preservation would "contribute to the diversity of life within the Nation and enrich the lives of the American people." *Id.* at 535, 96 S.Ct. at 2289 (citing 16 U.S.C. § 1331 (1970 ed., Supp. IV)). The provisions of the Wild Free-Roaming Horses and Burros Act advance this important governmental interest.

The Association has not argued, or even suggested that the Act deprives it of the "economically viable use" of its property. Rather, it contends that the consumption of forage by the wild horses, standing alone, requires the government to pay just compensation. In determining whether a particular land-use regulation deprives a property owner of the "economically viable use" of his land, the court must examine the impact of the regulation on the property as a whole. *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. at 2662. The Ninth Circuit has explained:

[I]t is well settled that taking jurisprudence does not divide a single parcel into discrete segments or attempt to determine whether rights in a particular segment of a larger parcel have been entirely abrogated. The Supreme Court has long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the investment-backed expectations of a claimant that government deprivation of the right to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the parcel as a whole. *Penn Central*, *supra*, 438 U.S. at 130, n. 27, 98 S.Ct. at 2662, n. 27.

*MacLeod v. Santa Clara County*, 749 F.2d 541, 547 (9th Cir.1984), cert. denied, --- U.S. ----, 105 S.Ct. 2705, 86 L.Ed.2d 721 (1985).

Considering the economic impact on the Association's property as a whole, the Act does not interfere with the Association's "distinct investment- back expectations" of using its property for grazing cattle. Nor does it impair the Association's right to hold the property for investment purposes. See *id.* at 547 n. 7. Moreover, the Association has not been deprived of its "right to exclude" the wild horses and burros. See *supra* note 8 (discussion of right to fence property); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-93, 62 L.Ed.2d 332 (1979). Admittedly, the grazing habits of the wild horses have diminished the value of the Association's property. But "a reduction in the value of property is not necessarily equated with a taking." *Allard*, 444 U.S. at 66, 100 S.Ct. at 327. In this case, the reduction in the value of the property pales in comparison to that sustained in *Village of Euclid*, 272 U.S. at 384, 47 S.Ct. at 117 (75% of property value lost) and *Hadacheck*, 239 U.S. at 405, 36 S.Ct. at 143 (92.5% of property value lost).

Whether a particular land-use regulation gives rise to a taking under the Fifth Amendment is essentially an ad hoc inquiry. Although the economic burden imposed on the Association is significant, the Association has not even contended that it has been deprived of the "economically viable use" of its lands. In view of the important governmental interest involved here, we conclude that no taking has occurred and that the district court correctly granted summary judgment for the government. Because no taking occurred, we also affirm the trial court's dismissal of the Association's claim against the Director of the BLM.

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the opinion of the majority and from the basic position it represents.

This "basic position" seems to be that the case represents a challenge by plaintiffs to the extent of the authority of, and control over the horses, exercised by the BLM. However, no one challenges this authority nor the extent thereof, but instead it is accepted in its fullest extent and it, as the Government suggests, is complete and is exclusive. The consequences of the existence of this authority and the consequences of the failure by the BLM to perform its duties under the Act is instead the basic issue as will be further described.

The complaint of owners of grazing lands commenced this action against several federal officials and the United States for the unconstitutional taking, without condemnation proceedings, of forage on their private lands and for damage to their land. The taking, and general damage to the range, it is alleged, resulted from the failure by the defendants to manage herds of wild horses contrary to and in violation of the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331. Also substantial damages were sought against officials for willfully preventing the proper management of the horses under the Act to the damage of plaintiffs.

This case concerns grazing in the southwestern part of Wyoming known as the checkerboard. These lands are so described because alternate sections are private lands and public lands. In the area in question, which is about 115 miles long and 40 miles wide, the Rock Springs Grazing Association composed of a group of ranchers owns or leases the private lands. The area, of course, generally follows the railroad. The land is described as high desert, the forage is very limited, the area is sensitive to overuse, and there are few if any fences to mark property lines. The Grazing Association has been in business since 1909 and has used the area with seasonal variations during that time. The depositions indicate that with the limited forage and a need to use different portions of the area during different seasons a large acreage is required to support a horse or cow.

The Government acknowledges that the horses have been using plaintiffs' private lands for grazing; that there has been an overpopulation of horses since the BLM assumed control of them; and that requests have been made by plaintiffs under the Act for it to remove the horses from their private lands. The record shows the horses were not so removed.

The Complaint as to the number of horses, states:

"Plaintiff Rock Springs Grazing Association is desirous of maintaining and preserving a reasonable number of wild horses in the checkerboard area pursuant to previous understandings with the defendants and other interested parties. The Association has expressed to defendants on numerous occasions its willingness to accomplish the purposes of the Wild Horse Act and allow a reasonable and manageable number of wild horses to remain on Association land."

The plaintiffs assert, and the Government agrees, that the complete and exclusive control and management of the horses is in the Government; that this control is complete; that the Government by the express provisions of the Act must remove horses from private lands when requested; that many such requests have been made by plaintiffs but the horses were not removed and continued to consume the forage on plaintiffs' lands.

The trial court issued the writ of mandamus and ordered all wild horses removed from the Association's land within one year and a reduction in the wild horse population on the public lands within two years. The trial court eventually dismissed the claim against the BLM director and granted the Government's cross-motion for summary judgment on the unconstitutional taking claim. The plaintiffs relinquished their claim for attorneys'

fees and costs. The plaintiffs appeal the dismissal of their claim against the BLM director and the court's order denying damages against the Government.

Again it must be emphasized the complaint is that the BLM has specific duties under the Act but has failed to carry them out. These duties relate to the obligation of the agency to control the horses; to move them when the Act requires such action; to capture and remove the horses from the range; and if necessary to sell or to destroy the horses. The Act assumes the ability of the BLM to exercise complete control of the horses. The BLM has assumed it has both the ability and the authority to completely and exclusively control the horses.

The Government seeks on appeal to change the issues, the arguments and the contentions of the parties to make it appear that we are concerned here with the issues presented in other cases wherein the authority of the agency is challenged or where it is asserted that the authority is limited. These are the migratory bird cases, the marine mammal cases and the endangered species cases. However, no one here challenges the ability or extent of authority of the BLM to completely control the horses at all times. This is accepted. The ability of the BLM as a practical matter to control the horses wherever they are is a very significant factor, as is its ability to capture, mark, sell and convey title to the horses as would be done as to any domestic animal.

This pervasive control placed in the BLM is thus fully acknowledged by all parties as are the active affirmative duties of the agency under the Act. With no challenge to the BLM's authority and with the assertion of the agency that it indeed has such duties and has the exclusive control of the horses the discussion of the cases concerning waterfowl, marine animals and endangered species are interesting historically on the issue of prohibitions on the public, the extent of challenged authority, and are very important in that context but are well outside the issues of this case. We have instead the explicit duties of the BLM acknowledged by it and the admitted failure to perform such duties. Thus we are not exploring the extent, nature and existence of the duties. The agency has admitted facts demonstrating that it has not performed its duties. The case is thus about the consequences of the failure to so perform.

As it is easy to overlook this basic issue, it is also easy to overlook just what horses we are concerned with on this appeal. The statute, 16 U.S.C. §§ 1331-40, provides (by definition) that it covers "all unbranded and unclaimed horses and burros on public lands of the United States." There are no other qualifications. Thus the category of animals covered is determined by their location--not the nature of the animals but instead where they are found. They are not within the Act when found on state land or private land. The "place" separates them from all other horses unbranded and unclaimed running free. If they are not on public land of the United States they are not under the Act. The Regulations further refine this geographically controlled coverage by adding a date--thus those animals "that have used public lands on or after December 15, 1971." No reference whatever is made to the origin or nature of the animals. Thus any unclaimed unbranded horse is within the definition of the Act if it is at the required place at the required time. It is thus apparent that a determined effort was made in drafting to include in the definition for coverage purposes only certain horses by location and date. Nevertheless any horse and all horses here concerned under this test are really domestic animals according to the record. They are not unbranded and unclaimed wild animals--but "all such" horses.

Apparently by design, the horses are not referred to in the Act as "wild horses" or "wild animals". There would seem to be no basis for treating them as wild animals for some purposes and not for others as the Government would have us do. The horses cannot be biologically so altered by an Act of Congress into "wild animals". We have seen that certain individuals in the Army were made "gentlemen" by Act of Congress but that may not have been all that successful either.

The record shows that the horses here concerned bear recognizable traits or characteristics of particular breeds. These horses in the not too distant past in this area were the ungathered portion of ranch herds maintained by the ranchers as a readily available pool of stock for ranch use and for use by the military. The record shows that particular breeds were from time to time introduced into the herds to improve the quality or characteristics of the pool for specific anticipated uses. Needed horses were easily gathered from time to time.

The statute appears to be drawn to completely exclude all state authority in the control or management of the horses. Thus the statute nowhere refers to the horses as "wild animals" which would permit the states to participate and which would also recognize the interest of the citizens of the state therein. To this end control or movement of the horses by a state official or anyone else constitutes a criminal offense. See *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976); (*State of New Mexico v. Morton*, 406 F.Supp. 1237 (M.D.N.M.1975)).

These horses are thus placed in a newly created legal category not wild animals, not estrays, not migratory, not related to treaty obligations but as part of the public lands as the Supreme Court noted. This was an innovative device to exclude state participation and to place exclusive control in the Secretary. This theory is absolutely the only basis advanced to support the jurisdiction of the BLM. The horses are thus expressly and necessarily made a part of the public lands. The Act says they are "components" of the public lands under the "jurisdiction" of the Secretary. Thus they cannot be described as "wild animals", as the Act avoids doing this, but instead are a part of the public lands--a "component" thereof, a part thereof and that alone.

The nature of the Government's interest in the public lands is certainly clear and it must be recognized that the interest in the components thereof is of the same nature and character. The Act in no way indicates otherwise. There can thus be no issue of ownership of wild animals.

The persons who drafted the statute were thus clear and precise in placing the jurisdiction of the Secretary only on the "component of public land" theory, on his control over the public lands for public use and the Government's ownership thereof. This theory was convincing to the Supreme Court and we should adhere to it.

As herein mentioned, the Secretary is required to remove the horses from private land when requested to do so by the Regulations--§ 4750.3. The Secretary is so required to act on request, as would be expected when dealing with something he can control and over which he has actually assumed control. Also he must:

1. Gather and capture and mark horses under stated circumstances. (Capture methods are described in great length in the Regulations.)
2. Relocate horses and move them from place to place. (Removal is described in a separate section of the Regulations.)
3. Transport horses.
4. Offer horses for adoption (sale) and convey title to them on request as would be typical of all horses under state law.
5. See that appropriate use is made of all ranges and multiple use is adhered to.

The Regulations state that their objective is to provide procedures "for protecting, managing and controlling" the horses. The term "controlling" is thereafter implemented in the Regulations in detail with the provisions to carry out the statutory duties. In the statement of policy in the Regulations (§ 4700.0-6) it is provided that "they ... will be ... controlled...." In § 4730.1 relating to the inventories the Regulation again provides in planning for "control" certain practices shall be followed and the term "control" is again used in the planning section--§ 4730.6. This "control" over this component of the public lands must mean that the horses be located and relocated from time to time at places which are in accordance with the management duties of the Secretary and thus where the BLM thinks they should be. No one else can do this--no one else can move them for to do so is a criminal offense.

Thus accepting the authority of the BLM as it has assumed it to be, and its undertaking complete control of the horses, its failure to perform its duties as asserted by the plaintiffs, and as the record shows, has caused the consumption and destruction of plaintiffs' property for a public use without compensation. The plaintiffs are thus entitled to compensation and the relief afforded by the trial court.

The Bivens cause of action advanced by the plaintiffs has much appeal under these circumstances where its elements seem to be admitted by the officials and the other facts supporting it are not challenged. However, I am not prepared to extend the doctrine to a complete failure to act.

The value of forage as a separate item of property ownership is acknowledged by the BLM in its regular fees charged for grazing by permittees. 43 U.S.C. § 315-315q. But more importantly in this consideration are the fees charged by the BLM for livestock which trespass on public lands--§ 4720.2(b). These trespass fees are also provided for in the Regulations herein considered and are to be assessed against horses in private ownership which use the public lands without a permit. The BLM by the regular fees and by trespass fees states its view of the value of forage consumed on public land.

Forage as a separate item of property is recognized in Wyoming between private entities. Forage is by statute a crop in Wyoming. Wyo.Stat. Ann. § 11-1-101(a)(iii). Crops are there protected. Crops are recognized generally as personal property, a separate property interest, in condemnation actions, see *King v. United States*, 427 F.2d 767 (Ct.Cl.1970), and under the common law. An owner of stock is liable therefor when he knows that they will go on the land of another.

The BLM in this action has acknowledged that it administered the checkerboard area for grazing as if it were one range with the public and the fee land together as a unit. The horses were thus controlled as if there was but one ownership of land and forage and thus managed to use the public land and forage, and plaintiffs' land and forage without a distinction. This consumption of privately owned forage was of course to support the horses for a public purpose.

The Government has thus used and caused the consumption of plaintiffs' property for a public purpose. The component horses obviously have gone upon private land and have consumed plaintiffs' forage. This has been on a regular basis as part of the Government's control of the horses and management of the range as a unit.

The physical "presence" here is not a casual one nor a random one nor one brought about by the movement of ducks or wild animals or any animals by themselves. We are not concerned with geese flying from place to place nor deer moving about. Instead we are here concerned with the physical presence of one of the components of the Government's land directed and orchestrated on a regular basis by the BLM. This was

continuous and pervasive because of the affirmative duties to control placed on the BLM by the Act and the Regulations. It was also because of the significant factor that the area was managed and the horses managed without regard to the ownership of the different tracts within it.

The basic elements of a taking are described in *Penn Central Transp. Co. v. New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). The opinion makes the distinction just referred to when it states that:

"[A]ctions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' "

The concern is with the condemnation of forage by the Government which took place at the least after the plaintiffs requested removal of the horses from private land, and the BLM refused to perform its duty to remove them. We also have the acknowledgment by the Government that there was an overpopulation of horses on this range when suit was filed. The record shows that the BLM again had taken no steps to perform its statutory duty to remove the excess which necessarily included plaintiffs' land.

I would remand the case to the trial court on the issue of the taking of forage from plaintiffs' lands for a factual determination whether such forage was taken by the continued failure to manage the horses and by permitting their continued use of private lands by the increased number of horses and burros since the operative date in 1971. I would further remand for a further consideration of the Bivens issue.

I agree with the dissenting opinion by Circuit Judge BARRETT.

BARRETT, Circuit Judge, dissenting.

I must respectfully dissent. I continue to adhere to the reasoning of the prior opinion by a panel of this court reversing and remanding the grant of summary judgment on the basis that wild free-roaming horses and burros are not "wild animals." *Mountain States Legal Foundation v. Clark*, 740 F.2d 792 (10th Cir.1984), vacated sub nom. *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468 (10th Cir.1985). Assuming, however, that the animals protected under the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331-1340 (the Act), are "wild animals," I would nonetheless dissent from the majority opinion. RSGA should not be precluded from litigating its "taking" claim as a matter of law given the Act's unique wildlife protection scheme. Summary judgment is inappropriate and this case should be remanded to the district court to determine whether the facts here, i.e., the amount of damage to RSGA's property and the cause of that damage, entitle RSGA to relief under the Taking Clause of the Fifth Amendment.

I disagree with the majority's characterization of the Act as "nothing more than a land-use regulation enacted by Congress to ensure the survival of a particular species of wildlife." *Mountain States Legal Foundation v. Hodel*, maj. op. at 1428. The plain and unambiguous language of the Act makes clear that Congress intended that wild free-roaming horses and burros be maintained on public lands and not on private lands. Unlike the treatment of wildlife in other federal statutes, wild free-roaming horses and burros under the Act are by definition specific to the public lands. As I read the Act, Congress did not intend to burden private landowners but rather intended to have the Government assume the complete responsibility for maintaining as well as protecting these animals.

In the section of the Act entitled "Congressional findings and declarations of policies," 16 U.S.C. § 1331, Congress expressly stated: "It is the policy of Congress that wild free-roaming horses and burros shall be

protected from capture, branding, harassment, or death; and to accomplish this they are to be considered in the area where presently found, as an integral part of the natural system of the public lands." (Emphasis added.) Wild free-roaming horses and burros are defined as "all unbranded and unclaimed horses and burros on public lands of the United States...." 16 U.S.C. § 1332(b) (emphasis added). "Range" is defined as "the amount of land necessary to sustain an existing herd or herds of wild free-roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands...." 16 U.S.C. § 1332(c) (emphasis added). "Public Lands" is defined as "any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service." 16 U.S.C. § 1332(e).

The Act directs the Secretary to manage wild free-roaming horses and burros on and as part of the public lands:

The Secretary is authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands, and he may designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation.... The Secretary shall manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.

16 U.S.C. § 1333(a) (emphasis added). Section 1334 of the Act also makes clear Congress' express intent that wild free-roaming horses or burros be maintained on the public lands and not on private lands: "If wild free-roaming horses or burros stray from public lands onto privately owned lands, the owners of such land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed." 16 U.S.C. § 1334 (emphasis added). While a private landowner may choose to maintain these animals on his property, *id.*, it is clear under the Act that the Secretaries have an affirmative and mandatory duty to remove wild horses from private lands at the request of landowners, consistent with congressional intent that these horses be maintained on public lands. Therefore, if the Wild Free-Roaming Horses and Burros Act is a land-use regulation, it is only with respect to public, not private lands.

The majority not only incorrectly characterizes the Wild Free-Roaming Horses and Burros Act as a land-use regulation, but also inappropriately compares the Act with other federal wildlife statutes. My research reveals that the Wild Free-Roaming Horses and Burros Act is the only federal wildlife act which imposes a duty upon an agency of the federal government to manage and to maintain wildlife specifically on the public lands. Again, assuming *arguendo*, that wild horses and burros are "wild animals," the Act is nonetheless unique in the duty Congress imposed on the Secretaries of the Interior and Agriculture to maintain and to manage these animals on the public lands. The specific and identifiable duty imposed upon the executive branch to maintain and to manage these animals on public lands is the feature which makes the Act unique among federal wildlife statutes. While other wildlife conservation laws may also authorize and require exclusive governmental control over wildlife, this Act is unique insofar as the complete and total control of the government over wild free-roaming horses and burros is tied to public lands.

The "taking" issue before us in this case is specific to the Wild Free-Roaming Horses and Burros Act. Properly stated, the issue is whether damage to private property by wild horses caused by the failure of the Government to remove the horses from private lands at the request of landowners constitutes a violation of the Fifth Amendment Taking Clause under the Act? Assuming that a private landowner's property is damaged by a failure of the Government to maintain and to manage wild horses and burros on public lands as required by the

Act, I believe there can be a violation of the Fifth Amendment Taking Clause. Therefore, summary disposition of RSGA's "taking" claim is inappropriate.

The Fifth Amendment of the United States Constitution provides in relevant part: "nor shall private property be taken for public use without just compensation." While the Supreme Court has apparently never addressed the issue of whether property damage caused by wild animals can constitute a taking, see generally, Note, "The Liability of the Federal Government for the Trespass of Wild Horses and Burros," 20 Land & Water L.Rev. 493, 506 (1985), the majority applies the "land-use regulation" taking cases to this case. As noted above, I do not believe this is a land-use regulation case nor do I believe this case can be decided as a matter of law based upon prior Supreme Court decisions.

The Supreme Court has often stated that there is no "set formula" for determining when justice and fairness require that economic injuries caused by public action (or inaction) must be deemed a compensable taking. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005, 104 S.Ct. 2862, 2874, 81 L.Ed.2d 815 (1984) (citations omitted).

[W]e have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have "particular significance:" (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."

*Connolly v. Pension Benefit Guaranty Corp.*, --- U.S. ----, ----, 106 S.Ct. 1018, 1026, 89 L.Ed.2d 166 (1986) (citations omitted).

While the general rule is that a Fifth Amendment taking claim is to be determined on a case by case basis, the Supreme Court has held that a permanent physical invasion by the Government constitutes a taking per se without regard to other factors that a court might ordinarily examine. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432, 102 S.Ct. 3164, 3174, 73 L.Ed.2d 868 (1982). All other taking claims not involving a permanent physical invasion must be resolved by an ad hoc inquiry considering the factors set forth above. *Id.* RSGA apparently does not contend that the presence of wild horses upon its property constitutes a permanent physical occupation. Therefore, the resolution of RSGA's taking claim in this case must be made upon a review of the facts in light of the factors articulated by the Supreme Court.

The Supreme Court has stated: "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly*, 106 S.Ct. at 1027, quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960). In this case it is not only fair and just that the Government not impose a burden on a few individuals to sustain wild free-roaming horses and burros, but it is also the express intent of Congress that private landowners not be required to share the burden of sustaining these animals which compete with livestock for scarce and valuable high plains forage. RSGA should be given an opportunity to demonstrate how and to what extent it has been harmed by the failure of the Secretaries to remove the horses from its property. The majority concedes that "the economic burden imposed on the Association is significant...." *Mountain States Legal Foundation v. Hodel*, maj. op. at 1431. In light of the direct impact of the Secretaries' action under the Act on RSGA's land, I am not prepared to hold as matter of

law that a compensable "taking" has not occurred in this case. I would therefore reverse the district court's holding that "the use of private lands by excess horses under the Act does not rise to the level of a Fifth Amendment violation" and remand the case to the district court for fact-finding consistent with the Supreme Court's previous holdings regarding "taking" claims.

I fully concur in the views expressed by Circuit Judge SETH in his separate dissenting opinion.

HOLLOWAY, Chief Judge, joins in the dissents of Circuit Judges SETH and BARRETT.

# United States Court of Appeals for the Federal Circuit

06-5012

COLVIN CATTLE COMPANY, INC.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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DECIDED: November 1, 2006

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Before NEWMAN, MAYER, and RADER, Circuit Judges.

MAYER, Circuit Judge.

Colvin Cattle Company, Inc. (“Colvin”) appeals the judgment of the United States Court of Federal Claims, which dismissed its complaint alleging takings of its water rights and ranching operations, breach of contract, and other injuries. Colvin Cattle Co., Inc. v. United States, 67 Fed. Cl. 568 (2005). We affirm.

## Background

Colvin owns a 520-acre cattle ranch in Nevada, adjacent to the Montezuma Allotment. The allotment comprises 625,000 acres of public land in Nevada, and the Bureau of Land Management (“BLM”) administers cattle grazing on it pursuant to the 1934 Taylor Grazing Act (“TGA”), 43 U.S.C. § 315 et seq. The land was initially conferred on the United States in 1848 through the Treaty of Guadalupe Hidalgo, and it has remained in the federal government’s possession ever since. Colvin alleges, and the government does not contest, that it possesses stockwatering rights in the allotment.

Colvin first applied to the BLM for a grazing lease in 1969, which was granted on January 19, 1970. The lease was last renewed in 1989, for a term of ten years, but it remained effective only upon Colvin making the requisite annual payments. By its terms, it conveyed “no right, title or interest held by the United States in any lands or resources.”<sup>1</sup> In February 1995, Colvin failed to pay the \$966 annual grazing fee. As a result of that failure, the BLM issued Colvin a trespass notice on March 15, 1995, demanding that it stop grazing its cattle on the allotment. Ultimately, in 1997, Colvin’s lease was canceled and trespass damages were assessed against it.

However, Colvin continued to graze on the allotment, and on June 25, 2001, the BLM issued a notice of intent to have its cattle removed. Moreover, in May 2002, the BLM canceled Colvin’s range improvement permits, and issued an initial decision ordering that all materials related to range improvements be removed. Colvin did not respond, and the BLM issued a final decision on the matter on November 26, 2003, ordering all range improvements removed, excluding any “facilities necessary for exercise of water rights . . . established pursuant to Nevada law.” Colvin Cattle, 67 Fed. Cl. at 570. Although Colvin may no longer access the allotment for grazing purposes, the government has not impeded its access to water. The BLM has since authorized another rancher to graze livestock, but as a condition of his authorization, he must haul his own water to the allotment.

On August 18, 2003, Colvin filed suit in the Court of Federal Claims, asserting takings claims relating to its water rights and ranching operations, a breach of contract claim relating to its canceled grazing lease, and a claim for compensation under 43 U.S.C. § 1752(g) for the value of improvements made to the allotment. The government moved to dismiss for failure to state a claim or, in the alternative, for summary judgment.

The trial court ruled in favor of the United States on all issues, and dismissed Colvin's complaint. Colvin appeals, and we have jurisdiction under 28 U.S.C. § 1295(a)(3).

### Discussion

Preliminarily, because the trial court relied on matters outside of the pleadings in dismissing Colvin's complaint and Colvin was given a reasonable opportunity to present materials relevant to the government's motion, we treat the trial court's dismissal as a grant of summary judgment in favor of the United States. Fed. R. Civ. P. 12(b); see also Moden v. United States, 404 F.3d 1335 (Fed. Cir. 2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Fed. R. Civ. P. 56(c). As such, we review the trial court's judgment de novo, drawing all reasonable factual inferences in favor of Colvin. Crater Corp. v. Lucent Techs., Inc., 255 F.3d 1361, 1366 (Fed. Cir. 2001). Applying this standard, we reject each of its arguments.

We begin with Colvin's takings claims. Its principal contention is that the United States' actions restricting its ability to graze on the Montezuma Allotment constitute a taking of its water rights. It does not allege that it possesses a free-standing right to graze. Rather it says merely that such a right is inherent in its water rights, and therefore, interfering with its ability to graze constitutes a taking of its water rights. Colvin Cattle, 67 Fed. Cl. at 570. Accordingly, if no such inherent grazing right exists, then governmental actions restricting its ability to graze do not implicate Colvin's water rights in any constitutionally protected manner, and cannot constitute a taking.

Indeed, under our regulatory takings analysis, see, e.g., M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995), the threshold inquiry is "whether the claimant has established a 'property interest' for purposes of the Fifth Amendment," Conti v. United States, 291 F.3d 1334, 1339 (Fed. Cir. 2002) (citations omitted). In other words, the relevant question is whether Colvin's alleged grazing interest is a stick in the bundle of rights it has acquired in the Montezuma Allotment, see M & J Coal, 47 F.3d at 1154 (citing Lucas v. S.C. Coast Council, 505 U.S. 1003, 1027 (1992)): do Colvin's water rights contain an appurtenant grazing right? In deciding this question, we do not rely on the Constitution alone because it "neither creates nor defines the scope of property interests compensable under the Fifth Amendment." Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (citations omitted). We also look to "'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, [to] define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." Id. (citing Lucas, 505 U.S. at 1030).

Turning to the question at hand, the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. As such, "[t]he United States can prohibit absolutely or fix the terms on which its property may be used." Light v. United States, 220 U.S. 535, 536 (1911). Because the Montezuma Allotment has been the continuous property of the United States since 1848, it has always been subject to the Property Clause. Under that clause, Congress enacted the TGA, authorizing the Secretary of the Interior to create grazing districts on federal public lands and to issue grazing leases and permits upon the payment of an annual fee. TGA §§ 315, 315b. As both parties concede, the TGA itself does not confer any grazing rights on private parties. Because the vesting of any property right to graze

on public lands subsequent to the enactment of the TGA would be inconsistent with the act, any grazing right that Colvin possesses necessarily must have vested prior to its enactment.

However, prior to the TGA, grazing on federal public lands was done at the United States' sufferance. See Light, 220 U.S. at 535. It was, and remains, a privilege, not a right. See Omaechevarria v. Idaho, 246 U.S. 343, 352 (1918) ("Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used."). As such, the pre-TGA "implied license" that these lands could be used for grazing was left open only "so long as the Government did not cancel its tacit consent." Light, 220 U.S. at 535 (citing Buford v. Houtz, 133 U.S. 320, 326 (1890)). "Its failure to object [to pre-TGA grazing] . . . did not confer any vested right . . . , nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes." Id. (citations omitted). Accordingly, any water right that Colvin or its predecessors obtained could not and did not include an attendant right to graze on public lands.

Colvin's reliance on Nevada law to establish the contrary proposition fails. Its argument begins well enough by stating that under the Mining Act of 1866, 43 U.S.C. § 661,<sup>2</sup> and the TGA, 43 U.S.C. § 315b,<sup>3</sup> the United States recognizes vested state law-based water rights. It runs into trouble, however, when it asserts that under Nevada law "a stockwatering right has always included the right to graze." Pet. Br. at 29. To support this proposition, Colvin cites the 1925 Nevada Stockwatering Act, Nev. Rev. Stat. §§ 533.485-533.510 ("Stockwatering Act"). Yet, nothing in the Stockwatering Act or Nevada Supreme Court interpretations of it establishes any such right.

In In re Calvo, 253 P. 671, 675 (Nev. 1927), the Nevada Supreme Court stated: "The state is not asserting any right or title to the public domain under the [1925 Stockwatering Act]. All that the state seeks to do pursuant to the statute is to exercise police regulations over the public domain. . . . Furthermore any time the federal government conveys title to any portion of the public domain in this state, or in any other manner undertakes to exercise control over it, the statute in question becomes inoperative in so far as it conflicts with the authority of the federal government." In Itcaina v. Marble, 55 P.2d 625, 629-30 (Nev. 1936), it further clarified: "No property right can be acquired by [grazing livestock upon the public domain]. All persons so using the public domain do it merely by sufferance of the federal government . . . . This use is often alluded to as a right. It is not a right that the government of the United States has conferred, and these public range lands may at any time be withdrawn from such use."

Moreover, the Stockwatering Act could not have conferred such a right, even if it had tried. Because the Montezuma Allotment is and always has been federal land, no right in it may be obtained without congressional authorization. See U.S. Const. art. IV, § 3, cl. 2.; see also Kleppe v. New Mexico, 426 U.S. 529, 539-40 (1976). Ansolabehere v. Laborde, 310 P.2d 842, 842 (Nev. 1957), recognizes as much in holding that to the extent the Stockwatering Act purported to "govern[] the grazing use of the public lands [it was] superseded and rendered ineffective by the enactment by Congress of what is known as the Taylor Grazing Act." Therefore, because Colvin's water rights do not have an attendant right to graze, no governmental action restricting Colvin's ability to graze on federal land can affect its water right in a manner cognizable under the Fifth Amendment.

Colvin's argument that grazing is the only beneficial use for which it may exercise its water rights is to no avail. Even if we accept as true that its water rights are rendered sufficiently without value as to satisfy the second prong of M & J Coal, 47 F.3d at 1153-54 (Fed. Cir. 1995) (setting forth the nature of the loss that is necessary to constitute a taking), its claim fails because, under the first prong, grazing is not a stick in the bundle of rights that it has ever acquired, *id.* at 1154 (citing Lucas, 505 U.S. at 1027).

Colvin's related claim for a taking of its ranch also fails. That the ranch may have lost value by virtue of losing the grazing lease is of no moment because such loss in value has not occurred by virtue of governmental restrictions on a constitutionally cognizable property interest. See also United States v. Fuller, 409 U.S. 488, 493 (1973) (holding that "the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands").

Next, Colvin's argument that the government's alleged failure to prevent the successor to its lease and wild horses from infringing on its water rights constitutes a taking, is also without merit. The government has required Colvin's successor to provide his own water for his cattle, and, more importantly, the United States cannot be held responsible for the incursion on water rights by a private party. See Alves v. United States, 133 F.3d 1454, 1458 (Fed. Cir. 1998) ("There clearly can be no taking when whatever acts complained of are those of private parties.") (citing 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1580 (Fed. Cir. 1995)). And because wild horses are outside the government's control, they cannot constitute an instrumentality of the government capable of giving rise to a taking. See *id.* at 1457-58 (citing Mountain States Legal Found. v. Hodel, 799 F.2d 1423 (10th Cir. 1986) (en banc)); see also Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977) ("[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture.") (citations omitted); Kleppe, 426 U.S. at 535-38.

Colvin next argues that the government's actions leading up to its decision to stop making annual lease payments constitute a breach of contract. However, even if a breach of contract suit could properly be brought under a grazing lease, Colvin's failure to pay occurred in February 1995, and, therefore, any governmental acts giving rise to such a claim necessarily occurred before that time. Because Colvin did not file suit until August 2003, its breach of contract claim is barred by the Tucker Act's six year statute of limitations, 28 U.S.C. § 2501. The trial court dismissed Colvin's claim on the merits; we affirm the dismissal, but do so for lack of jurisdiction. See John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1354 (Fed. Cir. 2006).

Finally, Colvin seeks compensation under 43 U.S.C. § 1752(g)<sup>4</sup> for the value of improvements made to the grazing area. However, even if such a claim may properly be raised here, it did not request a determination by the Secretary of the value of its improvements as required by the statute. Cf. Julius Goldman's Egg City v. United States, 556 F.2d 1096, 1099 (Ct. Cl. 1977) (holding that where the statute in question required that "the measure of fair market value shall be 'as determined by the Secretary.' . . . the court cannot substitute its own discretion for properly exercised administrative discretion."). Therefore, its claim is not ripe for failure to exhaust administrative remedies. Here again, the trial court dismissed Colvin's claim on the merits; we affirm, but for lack of jurisdiction.

#### Conclusion

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED