

# The effect of Federal occupation on the economic and political freedom of the people of Nevada

DAVID K. SCHUMANN

In 1948, Wayne McLeod, Surveyor General and State Land Register of the State of Nevada, in his annual Report made the following statement:

*The interest shown by individuals in acquiring public lands has continued to run high during the biennium; however, the situation has not changed insofar as the Department of the Interior is concerned, and the Department remains steadfast in its determination to prevent Federally owned land passing into private ownership.*

*Our records show that about ten people a week call at the office seeking assistance in acquiring Federal land. This interest prevails in spite of the fact that there is very little encouragement that this office or the Bureau of Land Management (formerly U.S. Land office) can give them. It is difficult for a native-born Nevadan like me to understand why this policy is persisted in by the Interior Department; however, we have had some members of our own official family here in Carson City who favored this policy. A former Nevada State Highway engineer advocated public ownership of our lands rather than allow them to pass to private ownership and produce taxes. This he continued even though this office made a comprehensive study of the public land picture here in Nevada and made our results and conclusions available to the public. I feel that the lackadaisical attitude effected by many of our citizens as regards public ownership of our lands is due entirely to their lack of knowledge of the facts.*

Today, this same "lackadaisical attitude" is characteristic of the "official family" in Carson and throughout the state. The State Brand Inspector is now the subject of an Esmeralda County Grand Jury investigation for his collaboration with the BLM in the theft of Ben Colvin's cattle. It is very disappointing to see the Nevada Attorney General defending the Brand Inspector's actions. One would have thought his job is to represent the officials and not the bureaucrats, CITIZENS but I guess that is unrealistic. Meanwhile, Ben Colvin and Esmeralda County have suffered millions in dollars of damage from BLM misbehavior. We know it is misbehavior because in an identical case involving Wayne Hage, Federal Judge Loren Smith of the U.S. Court of Claims has said it is. Just how much money it will cost the taxpayers of America will be determined in May. Ben Colvin has filed a similar "takings" case. Millions have been sucked out of Nevada by these federal thugs and now millions will be sucked out of the budgets of the Federal agencies by the thugs' victims. Other victims are looking to perhaps file similar "takings" claims.

IF the State Brand Inspector had not collaborated with the feds, the damaged would not have occurred. When the feds steal cattle, they sell them to recover the huge costs involved. I say huge because they import rustlers from all over the United States. When they stole the Dann sisters cattle, they brought in rustlers from as far away as Alabama. I have attached pictures of some of these "men" taken during the theft of the Dann sisters' cattle. The Legislature is supposed to serve the interests of the citizens of Nevada. Therefore, I would like to suggest that one of you draft a bill to prohibit the Nevada State Brand Inspector from issuing a clearance certificate in the absence of a signature by the owner certifying that the cattle are being sold with his permission or a court order from a Nevada Court. Such legislation would be in the best interest of the citizens of Nevada and would simply serve to reinforce Title 43 Section 1733 of the United States Code which clearly states:

(c) Contracts for enforcement of Federal laws and regulations by local law enforcement officials; procedures applicable; contract requirements and implementation

(1) When the Secretary determines that assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources he shall offer a contract to appropriate local officials having law enforcement authority within their respective jurisdictions with the view of achieving maximum feasible reliance upon local law enforcement officials in enforcing such laws and regulations. (underlining added by DKS)

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The feds **NEVER** comply with this law. Why? Because they know local law enforcement officials can only seize property with a court order. The last thing the feds want to do is present their case to a judge because they have no **legal** cause to seize the livestock. I believe you will find that the Nevada Department of Agriculture and the Brand Inspector would welcome such legislation. The Brand Inspector stood up in open court and, after testifying that the "firm policy" of the Agriculture Department had always been **not** to issue a brand certification without the owner's signature or a court order, Gina Sessions in her "unofficial opinion" had changed that. The Brand Inspector testified that taking a citizen's property without due process is "abhorrent."

Nevada citizens have lost their right to traverse the State's highways unmolested by BLM and Forest Service employees. It is a violation of Nevada law to operate a motor vehicle on Nevada highways with forward facing red lights. Nonetheless BLM and Forest Service employees routinely do this. In fact, I have been told these federal civil servants have actually stopped Nevada citizens and given them some sort of traffic citation. Please direct Nevada Sheriffs to arrest anyone they catch operating such a vehicle and, in cases where so-called citations have been issued, direct that Sheriffs arrest the individual responsible for such bogus citations for impersonating a law officer and operating under color of law. **It is a well settled principle of American law that federal employees do not have municipal authority within the bounds of an admitted state. The U.S. Supreme Court has state many times over the last century that in areas which the U.S. Government has not purchased with the consent of the state legislature, it does not have exclusive jurisdiction and, in fact has only the rights of a "mere proprietor."** Mere proprietors do not have the authority or right to behave the way BLM and USFS employees behave.

The State Water engineer has held up water applications based on objections from the BLM and Forest Service. That was never a proper action. However now we have the Nevada Supreme Court agreeing. On January 26, at the request of the U.S. government, they dismissed an appeal by the U.S. government from an award of water rights the 5th Nev. Judicial Court made to Wayne Hage. The Feds withdrew because they knew they would lose on the merits and they didn't want a citable court case. This committee can stand with the citizens of Nevada by simply writing legislation which directs the State Water Engineer to ignore objections from the Federal government. Federal law says that the agencies should operate in compliance with STATE water laws. As usual, the BLM and USFS consider themselves above the law, Federal or State.

The legislature should not be lackadaisical in its support of the basic rights which Nevada citizens seek to enjoy. As late as 1997 in U.S. v State of Alaska, the Supreme Court has cited with approval the decision in Pollard v. Hagan which declared that newer states have equal footing with the original 13 states. The feds wouldn't even think of driving a vehicle with red lights beaming forward down a side street in Philadelphia, let alone a highway. They wouldn't dream of seizing cows without a court order in New Jersey, and they would be laughed at if they tried to claim riverine or any other water rights east of Colorado. So why is the official family so lackadaisical about such basic rights in Nevada?

The citizens of Nevada are doing their part. We are going to make it very costly for the Feds to trample on our rights. It is worth noting what Alf W. Brandt, an Interior Department lawyer said after the U.S. Court of Federal Claims awarded \$14 million plus interest to a group of San Joaquin Valley farmers who had had their water stolen by the U.S. Fish and Wildlife service. "There may be implications for how the Endangered Species Act is implemented." That is the bottom line gentlemen. Make it expensive. The only thing the Feds fear is losing their budget. If Bob Abbey's money is spent paying millions to Wayne Hage and Ben Colvin and hopefully Raymond Yowell, what ~~we~~ <sup>Y</sup> we use to round up feral horses?

WILL

STATE OF NEVADA

**BIENNIAL REPORT**

OF THE

**SURVEYOR GENERAL**

AND

**STATE LAND REGISTER**

For the Period

July 1, 1946, to June 30, 1948, Inclusive

**WAYNE McLEOD**

Surveyor General and State Land Register



CARSON CITY, NEVADA

STATE PRINTING OFFICE - JACK MCCARTHY, SUPERINTENDENT

1948

REPORT OF THE  
SURVEYOR GENERAL AND STATE LAND REGISTER  
OF THE  
STATE OF NEVADA

July 1, 1946-June 30, 1948

INTRODUCTION

The interest shown by individuals in acquiring public lands has continued to run high during the biennium; however, the situation has not changed insofar as the Department of the Interior is concerned, and the Department remains steadfast in its determination to prevent Federally owned land passing to private ownership.

Our records show that about ten people a week call at the office seeking assistance in acquiring Federal land. This interest prevails in spite of the fact that there is very little encouragement that this office or the Bureau of Land Management (formerly U. S. Land Office) can give them. It is difficult for a native-born Nevadan like me to understand why this policy is persisted in by the Interior Department; however, we have had some members of our own official family here in Carson City who favored this policy. A former Nevada State Highway Engineer advocated public ownership of our lands rather than allow them to pass to private ownership and produce taxes. This he continued even though this office made a comprehensive study of the public land picture here in Nevada and made our results and conclusions available to the public. I feel that the lackadaisical attitude effected by many of our citizens as regards public ownership of our lands is due entirely to their lack of knowledge of the facts.

Nevada, like every other State, is heavily burdened with taxes. Here in our State we feel that additional sources of revenue must be found in order to carry on the affairs of State and county. There is a feeling that the property as it now exists carries just about the limit of ad valorem taxation; there is a reluctance to adopt a sales tax, State income tax, a gift tax, or other similar measures followed in other States. Nevada has always been free from such taxes and deficit financing. There always are inequalities in assessments and taxation, but it is appreciated that the real and personal property in the State is now taxed to the limit and little, if any, moneys can be added from the present rolls.

There are some new industries and property coming into the State, but these are not of sufficient amount to add materially to the taxes. It is an established fact that additional taxes usually fall directly or indirectly upon the average man, the home owner, and this small man bears the burden. If more money is to be raised, and if the property remains limited as at present, then the burden may become too great for the home owner to bear.



*Protections are now Bound in the Law Books  
because of Your Dedication.*

February 26, 2004

Dear Member,

You have helped us win one of the most important water rights cases filed in the west. The Monitor Valley Water Adjudication, a key component of the *Hage v. United States* Takings case is over – and we won!

January 26, 2004, the Supreme Court of the State of Nevada issued an order dismissing the appeals filed against the very favorable water rights decision issued by the Fifth Judicial District Court of the State of Nevada in the Monitor Valley Adjudication. The government withdrew its appeal against the awarding of the water rights to Wayne Hage, presumably to avoid a binding decision from the Supreme Court that would reinforce the precedent that ranchers own the water on the federal lands.

The Fifth Judicial District Court had issued a written opinion upholding the State of Nevada Water Engineer's Determination Order in 1998. The Order confirmed that the private landowners held senior water rights in the Monitor Valley basin and that the federal government had a right only to negligible use of the water. Wayne Hage, one of the landowners in the adjudication, was awarded approximately 17,000 acre feet of water, while the government was only awarded 3 acre feet. The federal government contested the decision to the State Court, which upheld the Engineers decision.

But now that they have withdrawn their appeal, the District Court decision stands – and it says in no uncertain terms that the rancher owns the water on Federal lands.

During the 1970's and 80's, the Federal Government had filed claim to the privately held water rights in Monitor Valley, forcing the landowners to begin an extensive water adjudication. The action by the government is one of the main issues that later prompted the takings case, *Hage v. United States*. Not only did the government lay claim to Hage's water rights, but in some cases even fenced out Hage's cattle from springs and transported Hage's water into US Forest Service facilities.

The action by the federal government is not unlike that which ranchers across the West are facing today. The federal land management agencies have been laying claim to water rights in every western state, even though those rights have been privately held since the states were settled. It is one of the most widespread attempts at taking private property today. Everyday, more and more western landowners are being forced into state adjudication processes to retain title to their water rights. They have been forced to defend rights, which have already been recognized by Congress and the courts since the West was settled.

This is the case with the *LU Ranching Case* proceeding in Idaho – another important water rights adjudication we are supporting.

In the Monitor Valley Water Adjudication, the federal government raised and lost many of the arguments they've been making in other adjudications. In the Fifth District Court's decision dealing with stock water rights, the court concludes the government's position is contrary to Nevada State law and upholds the prior appropriation water doctrine that governs western water law.

In this case, the federal government argued that neither federal nor state law allows private parties to obtain stock watering rights on federal lands. They argued that the government's "tacit consent to grazing on public domain" gave them no right to the water. They further argued that as the owner and manager of the land they owned the water rather than the rancher. They also argued that "under Nevada law, water rights are appurtenant to the land where water is used." Their position could not be more contrary to the law, which the Fifth District Court pointed out.

*"This Court rejects these arguments and believes Congress wanted state law to govern water rights and allowed private individuals to obtain vested stock water rights on public land. ... Owners and managers of public land can get water rights, but only after adjudication by the state engineer pursuant to state statute. The state engineer properly found that the federal government has not established vested water rights. The Nevada doctrine of appurtenance does not support the federal government. Under Nevada law, stock water rights can be appurtenant to base ranches rather than the land where livestock drink."*

One argument made by the federal government included one they have raised west wide. They argued that by allowing livestock use of the federal lands, the federal government in effect put the water to beneficiary use and therefore, acquired a vested stock water right. Under Nevada law as with most western states, to prove a water right you have to first put it to beneficial use. The federal government is attempting to show they made beneficial use because they allowed livestock grazing. The court disagreed.

*"Though ownership and management of federal public land for livestock grazing may constitute beneficial use and appropriation, ownership and management of public land alone does not create valid water rights under Nevada state law."*

As to the federal government's arguments that the water right stays with the land, the court again disagreed.

*"This Court rejects the federal government's argument. A water right is not necessarily appurtenant to the land where the water is used. ... Stockwater rights can be appurtenant to the livestock owner's land rather than where they drink. This Court finds the water right perfected by Hage et al's predecessors in interest appurtenant to the base ranches."*

The government also argued that Congress intended for the law of rangeland management to govern stock water rights in the west. The court also ruled against this argument.

*"Congress intended that state law and local custom determine the acquisition of water rights by private individuals on public land in the mid-19th century. ... Water for stock is not included in or preempted by rangeland management policy."*

The government then argued that the Nevada State Engineer interpreted the General Mining Law of 1866 incorrectly when concluding that the laws allow the states to administer water on federal lands. Again the court disagreed with the government.

*"Case law supports the state engineer's reading. ... the General Mining Law of 1866 and the Desert Lands Act of 1877 show Congress' intent to allow states to administer water on public land."*

The Court further held that not only do the state regulations apply to private parties but also to the federal government.

*"Congress granted to the states control over water rights. Under the McCarran Amendment, 43 U.S.C. Section 666, state regulations apply to federal agencies. Federal agencies may and must obtain water rights under state statutes just as private individuals must."*

In a last attempt to convince the court that the federal government should be awarded the vested stock water rights now held by Hage, they argued that the State Engineer's ruling violated "public policy." "Awarding the stock water rights to the owner of livestock rather than the owner of the land upon which stock are grazed and watered, interferes with the ability of the United States to manage and administer public grazing lands, as directed by Congress, for the people of the whole country."

*"This Court disagrees,"* wrote the judge. *"The statutes governing the adjudication of vested water rights do not give the state engineer the authority to consider public policy in adjudicating vested water rights. The statutes give the state engineer the authority to consider only 'proofs.' The state engineer thus acted appropriately."*

The federal government also argued that the state engineer awarded more water than Hage can use and that the amount of water should be limited to the amount of livestock restricted by the federal grazing permits. Again the court disagreed and upheld the state engineer's ruling that Hage submitted substantial proofs showing that their predecessors in interest were first in right, first in time, properly

put the water to beneficial use, and that those rights have been properly passed to the current owners.

Hage holds senior vested stock watering rights, while the federal government is only entitled to diminutive use, junior to any other right.

The Fifth Judicial State Court's ruling is an important victory for western water rights, and for the takings case *Hage v. United States*. Judge Loren Smith in the U.S. Court of Federal Claims case had adopted the State Water Engineer's Determination Order and ruled that Hage owns the water in the Final Determination issued January of 2001. Now that the government has dropped its appeal in the Nevada Supreme Court and this adjudication process is concluded, Smith's ruling is further bolstered.

So now we can look forward to the May 3, 2004 trial in *Hage v. United States* for the takings and valuation phase of the case, with the lingering challenge to Hage's water rights over. This water rights adjudication began in 1982. Stewards members began supporting this action in 1992, when Stewards was created. Now, twelve years later, this case is finally concluded with landmark precedents on the books defending historically held water rights.

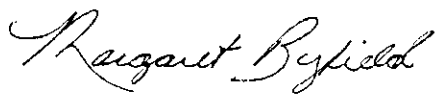
Your dedication and generosity saw this case through to a successful end. But, we are not done yet. We still have two critically important cases we need to win to help restore property rights in America – *Hage v. United States* and the *LU Ranching Water Rights Adjudication*. And, there are other precedent setting cases we look forward to taking on.

Supporting precedent setting litigation takes a unique set of individuals. The cases take years to resolve, the actions seem to progress at a turtle's pace, and there are no guarantees of success. But when we win, we win big and we turn back the radical environmental policy destroying the very foundation of our nation. With every win, we are securing the rights that made America the beacon of liberty.

We are pursuing a vital mission in order to uphold our constitutional protections. We could not fulfill this mission without your help.

Thank you for your support of the Monitor Valley Water Rights Adjudication. Landmark precedents restoring water rights protections are now bound in the law books because of your dedication.

Warm regards,



Margaret H. Byfield  
Executive Director

search Title 43 HELP

- TITLE 43 - PUBLIC LANDS(Notes)
  - CHAPTER 35 - FEDERAL LAND POLICY AND MANAGEMENT(Notes)
    - SUBCHAPTER I - GENERAL PROVISIONS(Notes)

U.S. Code as of: 01/05/99

Property Law Guide

(a) Regulations for implementation of management, use, and protection requirements; violations; criminal penalties

The Secretary shall issue regulations necessary to implement the provisions of this Act with respect to the management, use, and protection of the public lands, including the property located thereon. Any person who knowingly and willfully violates any such regulation which is lawfully issued pursuant to this Act shall be fined no more than \$1,000 or imprisoned no more than twelve months, or both. Any person charged with a violation of such regulation may be tried and sentenced by any United States magistrate judge designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions and limitations as provided for in section 3401 of title 18.

Property Law Articles and Documents

Property Law Discussion

(b) Civil actions by Attorney General for violations of regulations; nature of relief; jurisdiction

At the request of the Secretary, the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of regulations issued by the Secretary under this Act.

(c) **Contracts for enforcement of Federal laws and regulations by local law enforcement officials; procedure applicable; contract requirements and implementation**

(1) **When the Secretary determines that assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources he shall offer a contract to appropriate local officials having law enforcement authority within their respective jurisdictions with the view of achieving maximum feasible reliance upon local law enforcement officials in enforcing such laws and regulations.** The Secretary shall negotiate on reasonable terms with such officials who have authority to enter into such contracts to enforce such Federal laws and regulations. In the performance of their duties under such contracts such officials and their agents are authorized to carry firearms; execute and serve any warrant or other process issued by a court or officer of competent jurisdiction; make arrests without warrant or process for a misdemeanor he has reasonable grounds to believe is being committed in his presence or view, or for a felony if he has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; search without warrant or process any person, place, or conveyance according to any Federal law or rule of law; and seize without warrant or process any evidentiary item as provided by Federal law. The Secretary shall provide such law enforcement training as he deems necessary in order to carry out the contracted for responsibilities. While exercising the powers and authorities provided by such contract pursuant to this section, such law enforcement officials and their agents shall have all the immunities of Federal law enforcement officials.

# NEVADA APPEAL

## Water case confirms property rights

The recent court decision didn't make the front pages of the nation's newspapers. It didn't rate a mention on the evening newscasts. But it could, ultimately, have the same impact on property rights in America that, say, *Brown v. Board of Education* had on school desegregation.

The precedent-setting case involved 275 San Joaquin Valley, Calif., farmers whose water was taken from them by the U.S. Fish and Wildlife Service a decade ago to accommodate two fish on the federal endangered species list — the chinook salmon and the delta smelt.

In 1998, the Tulare Lake Basin Water Storage District and Kern County Water agency sued the federal government on behalf of the aggrieved farmers, to whom they deliver so many acre-feet of water.

The water districts maintained that the government's order that they curtail water deliveries to their farming customers amounted to a regulatory "taking" of the farmers' rightful property.

Three years ago, Judge John Paul Wiese of the U.S. Court of Federal Claims ruled that the government owed the 275 farmers for their water losses. And this past New Year's Eve, he set the amount of damages at \$14 million plus interest (a momentous judgment that received little notice until a few weeks ago).

Alf W. Brandt, the Interior Department lawyer who argued the government's case, says that, in the wake of Judge Wiese's decision, "There may be implications for how the Endangered Species Act is implemented."

Indeed, no longer can government



Joseph PERKINS

If the government feels that a species is so endangered that it needs to take a farmer's water, that it needs to deprive a landowner of full economic use of his or her land, then the government ought to pay the farmer, the landowner, for the loss.

After all, the Fifth Amendment states that private property shall not be "taken for public use, without just compensation."

Environmental activists insist that the Fifth's "takings" clause applies only to property that has been physically taken from a private property owner.

However, in recent decades, the U.S. Supreme Court has ruled on several occasions that the takings clause also applies when government regulation leaves property in private hands while restricting (or forbidding) use of the property.

In 1987, the high court went so far as to liken a state land-use regulation to "extortion" in *Nollan v. California Coastal Commission*.

Five years later, the justices issued a landmark ruling in *Lucas v. South Carolina Coastal Council*, declaring that "when the owner of a real property

regulators take private property — be it water or, presumably, land — to protect this snail darter or that spotted owl with no consideration whatsoever for the economic loss that may be suffered by private property owners.

has been called upon to sacrifice all economically beneficial uses in the name of the common good," he or she must be paid for the regulatory taking.

In a 1994 case, *Dolan v. City of Tigard*, the supremes stated that "we see no reason why the takings clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of poor relation."

And in *Palazzolo v. Rhode Island*, a 2001 case, the justices held that, even though a property owner acquired title to land after certain restrictive environmental regulations took effect, that did not negate his takings claim.

Otherwise, the majority declared, "A state would be allowed, in effect, to put an expiration date on the takings clause."

It remains to be seen whether the Justice Department will appeal Judge Wiese's recent decision.

If it does, the Supreme Court might get its ripest opportunity yet to resolve the long-running conflict between environmental regulation and private property rights.

The justices almost certainly would affirm the government's authority to regulate the use of private property — for protection of endangered species or some other common good.

But they likely would agree with Judge Wiese that private property owners are entitled to compensation when government regulation restricts the reasonable use of their property.

*Joseph Perkins, a columnist for The San Diego Union-Tribune, can be reached at Joseph.Perkins@Union-Trib.com.*

This picture shows four wheelers in all there  
were nine with armed people around us. There  
was also four or five pickups all these people were  
armed  
George

