

Don't Make Poor Choice Judge Smith

by John D. Echeverria

Loren Smith, chief judge of the U.S. Court of Federal Claims, and a leading champion of the idea that courts should read the takings clause of the Fifth Amendment expansively in order to rein in government regulation, is on the verge of adopting a revolutionary new takings theory that would eviscerate public ownership of hundreds of millions of acres of land in the western United States.

The threat arises from a dispute between Wayne Hage, a cattle rancher, and the U.S. Forest Service over control of federal lands in Nye County, Nevada.

In 1978, Mr. Hage purchased a ranch consisting of 7,000 acres and received permits from the U.S. Forest Service and the Bureau of Land Management authorizing him to graze cattle on 750,000 acres of nearby public land. Starting in the 1980's, Hage and the Forest Service became embroiled in disputes arising from the service's decisions to limit the number of cattle on the public range and to permit the release of wild elk onto land where Mr. Hage was grazing cattle.

When the Forest Service terminated Hage's grazing permit for sundry violations, he filed his regulatory takings suit. (He has also become a leader of the anti-government Wise Use movement based on his 1989 book, *Storm Over Rangelands: Private Rights in Federal Lands*.)

Is there any basis to his claims? In a word, no. In accord with the plenary powers conferred on the federal government by the property clause of the Constitution, a rancher receives only a revocable license to use the public lands, rather than a property interest in either the permits or the land itself. The government retains broad authority to terminate permits for good cause, and claims for compensation based on alleged takings of grazing rights have been routinely rejected.

Water Fight

Public land ranchers often claim legal rights to the water they use under state law, but these state water rights do not contradict federal control over the land itself. Thus, more than thirty years ago, a federal appeals court rejected a rancher's claim, based on his state water right, to an absolute property right to continue grazing cattle on public lands annexed to Death Valley National Monument.

The argument advanced by Mr. Hage, that state water rights should trump federal authority to manage the land, would destroy the very essence of the public's title to the public lands.

Yet, on Nov. 5, 1998, after an evidentiary hearing, Judge Smith issued a preliminary opinion that appears to embrace this novel idea. Judge Smith criticized the traditional principle that the federal government can control access to public lands on the ground that it would make Mr. Hage's water rights illusory. While he did not resolve the issue definitively, Judge Smith strongly suggested that the Forest Service could terminate grazing only if it were willing to pay Mr. Hage financial compensation for the taking of his state water rights.

The stakes are huge. The Forest Service and the BLM together manage approximately 260 million acres, mostly in the 11 Western states, classified as "rangelands." Judge Smith is threatening to pull off one of the largest land grabs since Europeans settled America.

Double Whammy

And the irony is striking. For years, the federal land grazing program has been attacked, both by environmentalists and critics of corporate welfare, who point to studies by the General Accounting Office and others showing that grazing fees on federal public lands are substantially lower than the fees paid for leases on private lands. A judicial mandate that the government pay to withdraw the privilege to graze cattle on public lands would confer yet another windfall on public land ranchers at the expense of taxpayers, the actual owners of these lands.

Judge Smith, who has ordered further briefing in the case, still has time to reconsider his preliminary opinion. Whoever prevails, an appeal to the federal circuit court will surely follow; then, perhaps, on to the U.S. Supreme Court.