No. 12-918

# In the Supreme Court of the United States

THE ESTATE OF E. WAYNE HAGE, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly rejected petitioners' claim that the government effected a taking of their water rights, including their easements to operate and maintain certain ditches across federal lands, because petitioners never sought (and thus were not denied) the permit required to bring and operate heavy equipment on National Forest System lands.

2. Whether the court of appeals correctly held that petitioners' claim that the government effected a taking of their stockwater rights failed because the trial record lacked evidence that petitioners were deprived of access to any water they could have put to beneficial use.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 687 F.3d 1281. Opinions and orders of the United States Court of Federal Claims (Pet. App. 22a-23a, 24a-33a, 34a-68a, 69a-129a, 130a-138a, 139a-149a, 150a-231a) are reported at 93 Fed. Cl. 709, 90 Fed. Cl. 388, 82 Fed. Cl. 202, 51 Fed. Cl. 570, 42 Fed. Cl. 249, 35 Fed. Cl. 737, and 35 Fed. Cl. 147, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on July 26, 2012. A petition for rehearing was denied on October 19, 2012 (Pet. App. 284a-285a). The petition for a writ of certiorari was filed on January 17, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Secretary of Agriculture regulates the use and occupancy of National Forest System lands pursuant to 16 U.S.C. 551 (Act of June 4, 1897, ch. 2, § 1, 30 Stat. 35). The Secretary's regulations require permits for use of National Forest System lands, unless an exception to that requirement applies. See 36 C.F.R. 251.50(a). Exceptions to the requirement to obtain permits include uses that "will have [only] nominal effects on National Forest System lands, resources, or programs," and uses for "routine * * * maintenance" of private rights of way recognized pursuant to the Act of July 26, 1866, ch. 262, 14 Stat. 251 (1866 Mining Law). See 36 C.F.R. 251.50(e)(1) and (3).[1]

Rights to use water that is on federal lands may be privately owned, and such rights ordinarily are governed by state law. That state of affairs traces to Congress's severance in the latter half of the 19th century of rights in the use of water on public domain lands from rights in the lands themselves. See *California Or. Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935). Here, the relevant statute effecting that severance was the first such federal statute, the 1866 Mining Law:

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[1] Although those exceptions were promulgated as regulations in 2004, after the events at issue in this case, they reflected longstanding Forest Service policy, and the regulations were issued to "clarify" the permit requirement. 68 Fed. Reg. 2951 (Jan. 22, 2003); 69 Fed. Reg. 41,956 (July 13, 2004); see Pet. 8 (acknowledging shared understanding between petitioners and the Forest Service that "[p]etitioners [could] maintain their 1866 Act ditches and other water sources with * * * hand tools absent a permit from the Forest Service").

> [W]henever, 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 aforesaid is hereby acknowledged and confirmed: *Provided, however*, That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

§ 9, 14 Stat. 253 (30 U.S.C. 51, 43 U.S.C. 661, para. 1). In the 1866 Mining Law, Congress thus recognized prior-appropriation water rights and rights of way for ditches and canals associated with such water rights on federal lands. See *Jennison* v. *Kirk*, 98 U.S. 453 (1879).

The lands and waters at issue here lie in Nevada, which applies the appropriative system of determining water rights, under which water rights accrue to users in the order in which they first put waters to beneficial use. *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945); see *Colorado* v. *New Mexico*, 459 U.S. 176, 179 n.4 (1982) (noting that appropriative rights generally recognized in Western States differ from riparian rights generally recognized elsewhere in the Nation, in that the latter arise from ownership of riparian land, while the former are acquired and maintained by diverting water and putting it to actual beneficial use). Such appropriative rights ordinarily allow the holder to divert

a limited quantity of water from a specified source for a particular beneficial use at a specified place, and may include a right-of-way over the lands of others for transporting the water from the source to the place of use. Nevada also recognizes "instream" stockwatering rights, which entitle the holder to use water for livestock watering without building a mechanical diversion. See *Steptoe Live Stock Co.* v. *Gulley*, 295 P. 772, 774-775 (Nev. 1931).

Under the law of prior appropriation, beneficial use is "the basis, the measure and the limit of the right to the use of water." *Desert Irrigation, Ltd.* v. *Nevada*, 944 P.2d 835, 842 (Nev. 1997) (per curiam) (quoting Nev. Rev. Stat. Ann. § 533.035). Thus, the owner of a water right does not own or acquire title to the water itself, but merely holds a priority over others seeking the right to put the water to beneficial use. The owner therefore cannot appropriate more than he needs, nor may he prevent others from using the water when it is not needed for the purposes of the appropriation. *Gotelli* v. *Cardelli,* 69 P. 8 (Nev. 1902); see *Claypool* v. *O'Neill*, 133 P. 349, 350-351 (Or. 1913). Likewise, Nevada's protection of stockwatering rights in sources on federal lands extends only to water being put to a beneficial use. *Ansolabehere* v. *Laborde*, 310 P.2d 842, 849 (Nev. 1957).

2. In 1978, petitioners[2] acquired a 7000-acre ranch in central Nevada, along with certain stockwatering and irrigation rights in water sources located on neighboring federal lands as appurtenances to the ranch property.

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[2] This action was commenced by E. Wayne Hage and Jean N. Hage, but their estates, petitioners in this Court, were substituted upon their deaths while the action was pending in the Court of Federal Claims. For simplicity, this brief uses "petitioners" to refer to the Hages or to their estates, as the context requires.

Later that year, petitioners applied for and received permits from the Forest Service and the Bureau of Land Management (BLM) authorizing grazing on approximately 752,000 acres of the Humboldt-Toiyabe National Forest and adjoining public lands. Compl. ¶ 12.[3] Petitioners also applied for and received "special use" permits to access federal lands to perform maintenance on ditches and pipelines used in their ranching operation. See, *e.g.*, C.A. App. 805-808, 856-857.

Disputes arose between the Forest Service and petitioners over the existence, nature, and scope of petitioners' rights on National Forest System lands, and over the Forest Service's authority to administer livestock grazing and other uses of federal lands. As petitioners continued their grazing operation on federal lands throughout the 1980s, a persistent pattern of violation of their grazing permits developed. The Forest Service repeatedly notified petitioners of those violations, and it attempted, albeit unsuccessfully, to work with them to resolve the violations. See, *e.g.*, C.A. App. 1135-1137.

From 1988 to 1990, the Forest Service erected portable electric fences to monitor elk activity on petitioners' allotments, in response to petitioners' complaints that elk were overusing riparian areas at the expense of

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[3] See 43 U.S.C. 1702(k), 1712, 1752 (generally providing for plans that prescribe the manner in which livestock grazing is to be conducted on federal lands to meet land-use objectives); 16 U.S.C. 1601, 1604 (similar with respect to management of National Forest System lands); 36 C.F.R. 222.3(a), 261.7 (requiring permits for livestock grazing on National Forest System lands); see also 43 U.S.C. 1901(b) ("reaffirm[ing] a national policy and commitment to * * * manage, maintain and improve the condition of the public rangelands so that they become as productive as feasible for all rangeland values in accordance with management objectives and the land use planning process established pursuant to [43 U.S.C. 1702]").

grazing by petitioners' livestock. C.A. App. 1153, 1160. The fences did not in fact exclude cattle or elk from water sources because they were torn down by elk, *id.* at 1021 (testimony of petitioner E. Wayne Hage); and even when they were intact, the fences did not exclude petitioners or their cattle from the water, which flowed through and beyond the fenced areas, *id.* at 1117 (testimony of Forest Service Range Specialist David Grider).

In 1991, the Forest Service suspended a portion of petitioners' permitted use of federal grazing lands because their overuse of a grazing allotment had degraded the lands' condition. C.A. App. 335, 373-389; see *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 738 (2000) (describing authority to suspend grazing use). Following the suspension, the Forest Service impounded a number of cattle bearing petitioners' brand that remained on the allotment despite repeated notices to remove them (C.A. App. 357, 361), and sold the cattle at auction when petitioners declined to redeem them (*id.* at 367-368). Also in 1991, petitioner E. Wayne Hage and another individual used heavy earth-moving equipment to remove and sell timber from a swath of National Forest System land without authorization from the Forest Service. Both were convicted of damaging and disposing of government property without authorization, but their convictions were reversed on appeal because the government failed to establish at trial the value of the property damaged and removed, an element of the offense. See *United States* v. *Seaman*, 18 F.3d 649 (9th Cir. 1994).

3. In September 1991, petitioners sued the United States in the Court of Federal Claims (CFC) under the Tucker Act, 28 U.S.C. 1491, alleging (as relevant here) that the Forest Service's administration of livestock grazing, and its suspension or cancellation of petitioners'

permits, effected a taking of petitioners' ranch, grazing permits, water rights, forage rights, and cattle. Petitioners asserted that the Forest Service had "ousted" them from their property by, *inter alia*, threatening prosecution, allowing the Nevada Department of Wildlife to release "non-indigenous" elk that consumed water and forage on allotments covered by their permits, harassing them with enforcement of fence-maintenance and cattle-control requirements, and otherwise attempting to appropriate their claimed property interests. C.A. App. 179-187.

a. In September 1992, the United States moved for summary judgment. Although the CFC agreed with the United States that petitioners had no property interest in either grazing permits or the rangeland itself, Pet. App. 203a-204a, it held that petitioners would have "the opportunity at trial to prove property rights in the forage [on National Forest System lands] stemming from the [state] property right to make beneficial use of water," *id.* at 218a. With respect to the claimed taking of ditch rights of way, the CFC held that petitioners would have "the opportunity * * * to prove their ownership of vested ditch rights and that their desired use and maintenance of these rights does not exceed the scope of their property interest." *Id.* at 213a.

b. As relevant here, after trials in 1998 and 2004 , the CFC found that petitioners held three categories of property interests: Rights in ditches recognized under the 1866 Mining Law, stockwater rights in water sources on federal land, and rights in waters flowing from federal lands to their ranch. See Pet. App. 43a.

With respect to the rights of way for ditches and the use of waters flowing through them to petitioners' ranch, the CFC applied the regulatory takings analysis

of *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104 (1978), to determine whether petitioners were entitled to compensation based on what petitioners alleged to have been a denial by the United States of permission to maintain ditches and streambeds that had historically conveyed irrigation water to their private ranch lands. Pet. App. 54a-56a. The CFC found that petitioners had reasonable, investment-backed expectations that water would irrigate their land, and further found that the Forest Service policy for protecting riparian areas had led to proliferation of riparian vegetation and beaver dams in the upper reaches of the streams. *Ibid.* The CFC further found that, but for the Forest Service's actions preventing their maintenance of various 1866 Mining Law ditches, petitioners could have used their water rights for agricultural purposes. *Id.* at 54a-55a.

The CFC further held that petitioners' takings claims were ripe, notwithstanding evidence that petitioners had been granted special use permits for ditch maintenance in the 1980s, and petitioner E. Wayne Hage's testimony to the effect that he stopped applying for permits because he believed that the Forest Service lacked authority to require them. The court concluded that it would have been futile for petitioners to apply for permits during the period in question, and that the existence of the permit requirement had effectively denied petitioners access to maintain the ditches. 82 Fed. Cl. 202, 213 (2008).[4]

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[4] A portion of the CFC's decision is not reproduced in the appendix to the petition for a writ of certiorari. In particular, the following is omitted from the appendix but appears in the CFC's opinion following the citation to *Hage IV* at the top of Pet. App. 56a:

With respect to stockwater rights, the CFC found that the Forest Service's construction of fences in the vicinity of the watering sites amounted to a physical taking of rights to water located within the fenced areas, during the period when petitioners held grazing permits for the relevant allotments. Pet. App. 52a.

The CFC ultimately awarded compensation of $2,854,816.20, based on the quantity of water it found petitioners held rights to, and its determination that "the Government's actions in both preventing access to the ditches and in limiting the maintenance to the use of

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Further, as the Court noted in *Hage IV*, the District Court in Nevada recognized, "a vested right-of-way which runs across Forest Service lands is nevertheless subject to reasonable Forest Service regulation, where 'reasonable' regulation is defined as regulation which neither prohibits the ranchers from exercising their vested rights nor limits their exercises of those rights so severely as to amount to a prohibition." *Id.*

> The evidence is clear that the ditches to which Plaintiffs have established a property right were in need of routine maintenance. In order to access the water, trees and undergrowth had to be removed as well as roots, silt, and other deposits. The water areas had been clogged with pinion, pine, juniper, and willow. Plaintiffs' application for a special use permit to maintain their ditches with the appropriate equipment would clearly have been futile; the Forest Service had threatened to prosecute Plaintiffs for trespassing and had actually secured a conviction, which was later overturned by the Ninth Circuit. Based on the history between the Forest Service and Plaintiffs, the special use permit requirement for ditch maintenance rises to the level of a prohibition, and is therefore a taking of their property rights. Further, the hand tools requirement prevented all effective ditch maintenance, as it cannot be seriously argued that the work normally done by caterpillars and back hoes could be accomplished with hand tools over thousands of acres.

82 Fed. Cl. at 212-213.

hand tools constituted a taking of Plaintiffs' water rights in the 1866 Act ditches." Pet. App. 56a, 58a.

4. As relevant here, the court of appeals vacated the CFC's judgment with respect to the regulatory takings claims related to ditches and water flows, and it reversed the CFC's judgment with respect to physical taking of stockwater rights. Pet. App. 1a-21a.

With respect to the claim that the United States had effected a regulatory taking of petitioners' ditch rights of way and water flows, the court of appeals held that the CFC lacked Tucker Act jurisdiction because such a claim was unripe, given that the United States had not denied any request by petitioners for a special use permit. Pet. App. 8a-13a. The court of appeals rejected petitioners' three arguments to the contrary. First, with respect to petitioners' argument that applying for special use permits would have been futile, the court rejected as unsound the CFC's inference that disputes between the Forest Service and the Hages over the terms of petitioners' grazing permits would have caused the denial of a ditch maintenance permit. *Id.* at 10a. The court noted that "[t]he only evidence of a dispute concerning ditch maintenance is the letter threatening prosecution of Mr. Hage and the actual prosecution of Mr. Hage. This, however, was a result of Mr. Hage's failure to apply for a special use permit." *Id.* at 11a. Second, the court of appeals rejected petitioners' contention that an application for a permit to use heavy equipment would have been futile because the Forest Service limited all ditch maintenance to hand tools. The court recognized that the limitation to hand tools applied only to *unpermitted* maintenance. *Id.* at 12a. Third, "[t]o the extent [petitioners] argue[d] that the mere existence of a requirement for a special use permit con-

stitutes a regulatory taking," the court disagreed. *Ibid.* "The government may regulate private property; it is only when a regulation 'goes too far [that] it will be recognized as a taking.'" *Id.* at 12a-13a (quoting *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)) (third set of brackets in original).

With respect to the CFC's conclusion that fences erected by the Forest Service in isolated areas effected a physical taking of petitioners' stockwater rights, the court of appeals explained that petitioners, like others who "hold water rights [under Nevada law,] 'do not own or acquire title to water,' but 'merely enjoy the right to a beneficial use.'" Pet. App. 13a (quoting *Desert Irrigation*, 944 P.2d at 842). Thus, "[a] water rights holder has no rights to the water beyond what he can put to beneficial use." *Ibid.* Given that scope of petitioners' property right, the court concluded that their claim failed because petitioners failed to present evidence that they were deprived of water that they could have put to beneficial use. In particular, the court noted that petitioners did not show that the fences prevented the water from reaching their land, or that there was insufficient water for their cattle on their grazing allotments. *Id.* at 16a.

**ARGUMENT**

Petitioners "submit that *Loretto v. Teleprompter* [*Manhattan*] *CATV Corp.*, * * * 458 U.S. 419 (1982)[,] rather than *Penn Central* [*Transportation Co.* v. *New York City,* 438 U.S. 104 (1978),] provides the appropriate analytical framework" for their claim that the United States effected a taking of their rights in ditches and water flow, "and that the takings are more properly considered *per se* takings." Pet. 29. That argument was neither presented to nor addressed by the court of appeals. In any event, the court of appeals correctly re-

jected petitioners' claim as unripe because they had not applied for a special use permit to bring heavy equipment onto federal lands to maintain their ditches. That decision does not conflict with any decision of this Court or of another court of appeals. With respect to the claim that Forest Service fences effected a physical taking of petitioners' stockwater rights, the court of appeals' case-specific conclusion that the record did not show that petitioners were deprived of their property interest is correct, and petitioners do not contend it conflicts with any decision of another court of appeals. Further review is not warranted.

1. Petitioners, joined by their amici, principally contend that the Forest Service's requirement to obtain a special use permit to bring heavy equipment onto federal lands effected a taking of their rights to maintain and use ditches on federal lands and to use and enjoy water flowing through them onto their ranch. In particular, they argue that the court of appeals erred in analyzing their claim under the regulatory takings framework of *Penn Central*, *supra*, rather than the per se physical takings analysis of *Loretto*, *supra*. See Pet. i, 29-36. That claim does not warrant review.

a. As an initial matter, petitioners did not argue in the court of appeals that *Penn Central* was inapposite, and the court of appeals proceeded on the understanding that it was reviewing "[petitioners'] regulatory takings claim." Pet. App. 9a. In particular, the CFC explained that "[u]nder the 1866 Act, vested ditch rights-of-way are subject to Forest Service regulations, including the need to obtain special use permits when necessary." Pet. App. 99a. The CFC therefore applied the approach of this Court in *Penn Central*, and it concluded that the Forest Service had effected a regulatory taking

of petitioners' ditch rights by limiting petitioners' activities to maintenance with hand tools unless they applied for and obtained permits, and by threatening to enforce its regulations through prosecution. See *id.* at 56a; note 4, *supra* (setting out portion of CFC opinion omitted from petition appendix).

On appeal, petitioners did not challenge the CFC's analysis of their claim as one for a regulatory taking; indeed, the relevant heading of their brief in the court of appeals argued "there was a regulatory taking of surface water rights." Pet. C.A. Br. 23 (capitalization omitted). Nor did petitioners argue in the court of appeals, as they now do in this Court, that the special use permits they failed to seek were "not authorized or contemplated by any statute or regulation." Pet. i; see Pet. 25-29. Nor did petitioners argue below that the CFC's judgment could be affirmed on the alternative ground that the Forest Service's actions amounted to a per se physical taking of their rights under the 1866 Mining Law. In contrast to their certiorari petition, which cites *Loretto* twice in the Questions Presented (see Pet. i-ii) and repeatedly throughout the body (see Pet. iv), petitioners' briefs in the court of appeals did not cite *Loretto* at all.

This Court has, of course, explained that a regulatory taking theory and a physical taking theory can be understood as two arguments in support of the same claim. See *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). But the prudential considerations underlying this Court's "traditional rule * * * preclud[ing] a grant of certiorari * * * when the question presented was not pressed or passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks and citation omitted)—such as ensuring the

Court will have an adequately developed record, sharpened arguments from the parties, and the benefit of analysis by the lower courts—strongly counsel against review in this case of arguments petitioner did not make below.

b. Instead, petitioners defended on appeal the CFC's application of a futility exception to the rule that a claim for a regulatory taking "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985). See Pet. C.A. Br. 21-23. The court of appeals correctly rejected the CFC's analysis of the futility issue.[5] That fact-bound issue would not merit this Court's attention, and petitioners do not contend otherwise.

The court of appeals also noted "[petitioners'] argu[ment] that the mere existence of a requirement for a special use permit constitutes a regulatory taking." Pet. App. 12a. Given the consensus understanding of

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[5] In particular, the record showed that, although the Forest Service had historically granted special use permits to petitioners that allowed them to bring heavy equipment onto federal land for ditch maintenance, petitioners themselves stopped applying for such permits in 1986, because they believed that the permits were not required. Moreover, it was undisputed that petitioner E. Wayne Hage bulldozed a swath of National Forest System land, and sold timber removed from it as firewood, without a permit. The court of appeals correctly recognized that the record contained no evidence that the Forest Service had denied a permit for ditch maintenance, and that the threat of prosecution for failure to comply with the permit requirement (and the prosecution itself) did not show that a permit application, if petitioners had filed one, would have been futile. See Pet. App. 20a.

the parties and the CFC that petitioners' claim was properly analyzed under *Penn Central*, the court of appeals correctly recognized that petitioners' categorical argument was incompatible with *Penn Central*'s multi-factor balancing approach. See *id.* at 12a-13a ("[I]t is only when a regulation 'goes too far [that] it will be recognized as a taking.") (quoting *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)) (second set of brackets in original). As this Court has explained, "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); see *ibid.* ("Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."). That is especially so where, as here, the use entails the bringing of heavy equipment across the government's own property.

Petitioners, joined by their amici, reconceive the foregoing argument as a claim that their right to maintain the ditches on federal land is paramount over any other right or form of regulation, such that any permit requirement affecting the exercise of their rights effects a per se taking. See Pet. 34-35. Even if that new argument had been presented below, it would not warrant review because its premise—that petitioners' rights of way are a unique form of property that cannot be subjected to regulation, even where they cross federal lands—is incorrect for two independent reasons.

*First*, the Property Clause, U.S. Const. Art. IV, § 3, cl. 2, confers broad authority on Congress to regulate activities occurring on public property that affect federal lands. See *Utah Power & Light Co.* v. *United States*,

243 U.S. 389, 405 (1917) (holding that the United States has "power to control the[] occupancy and use [of federal lands], to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them"). The power to make rules to protect federal lands extends even beyond the boundaries of the lands. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 538 (1976) (citing *Camfield* v. *United States*, 167 U.S. 518 (1897)). And with respect to the federal lands here, "as owner of the underlying fee title," the United States "maintains broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired." *United States* v. *Locke*, 471 U.S. 84, 104 (1985) (citing *Kleppe*, 426 U.S. at 539). Like the claimants to mineral rights in federal lands in *Locke* who "must take their mineral interests with the knowledge that the Government retains substantial regulatory power over those interests," *id.* at 105, petitioners hold their easements subject to the government's regulatory authority over its lands. Thus, just as the United States "was well within its affirmative powers," *id.* at 107, in reasonably regulating the unpatented mining claims on federal lands at issue in *Locke*, so too it can require petitioners to obtain a special use permit for activity of a kind that could potentially harm federal lands.

The permit requirements to which petitioners object serve precisely the sort of purposes approved in *Utah Power*, *Kleppe*, and *Locke*. The special use permit requirement exists not to "administratively redefin[e] the scope and purpose of [petitioners'] easements," Pet. ii, but instead to ensure that petitioners' exercises of their rights in their easements do not injure the federal lands over which the easements lie. Maintenance of petitioners' ditches may be within the scope of their property

right, so long as it does not cause damage to the servient estate. But using heavy equipment for maintenance has the obvious potential to significantly impact National Forest System lands. For example, one notable defiance of the permit requirement by petitioner E. Wayne Hage involved bulldozing a portion of National Forest System lands and removing more than nine cords of firewood without authorization, leading to his prosecution. See C.A. App. 837-851; *United States* v. *Seaman,* 18 F.3d 649, 651 (9th Cir. 1994). For that reason a permitting process is appropriate. Conversely, Forest Service regulations now make explicit (although they did not at the time of the events at issue here) that the special use permit requirement does *not* apply to maintenance of 1866 Mining Law ditches that does *not* have the potential for significant impact on National Forest System resources. See 36 C.F.R. 251.50(e)(3); note 1, *supra.*

*Second*, petitioners' right is qualified by state common law. *Ennor* v. *Raine*, 74 P. 1 (Nev. 1903)—which petitioners themselves offered to the court of appeals as controlling authority on the scope of the state law property right, see Pet. C.A. Br. 29-30—makes clear that ditch maintenance easements are qualified rights, as most easements are. In that case, the easement holder asserted his easement as a defense to a trespass action by the fee owner of the ranch over which the easement lay. *Ennor*, 74 P. at 1. The defendant admitted that he had entered onto the plaintiff's ranch, but asserted that he did so "without any unnecessary injury to the [ranch], and only to the extent needful." *Id.* at 2. The Nevada Supreme Court sustained the jury's verdict for the defendant on the trespass claim, reasoning that the defendant "had as much right to [maintain the ditch] on the [plaintiff's] ranch * * * as he had to [maintain

ditches] on his own ranch * * * , *provided he did so peaceably*." *Ibid.* (emphasis added). That limitation on the easement to perform ditch maintenance comports with the general rule of property law that "[u]nless authorized by the terms of the servitude, the holder [of the servitude] is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment." Restatement (Third) of Prop.: Servitudes § 4.10 (2000).[6] The special use permit process to which petitioners object serves to ensure that petitioners' exercise of their right to maintain their ditches is consistent with the United States' rights as the owner of the underlying fee estate.

c. Petitioners contend (Pet. 21-27) that the decision below conflicts with *Southern Utah Wilderness Alliance* v. *BLM*, 425 F.3d 735 (10th Cir. 2005) (*SUWA II*), which concerned public highway rights-of-way over federal lands recognized under a provision commonly known as Rev. Stat. § 2477, also enacted in the 1866 Mining Law, see § 8, 14 Stat. 253 (43 U.S.C. 932). Petitioners did not rely on *SUWA II* below, and, in any event, no conflict exists. Indeed, *SUWA II* and the decision below are in accord in recognizing the United States' authority to protect federal lands over which public or private easements lie.

In *SUWA II*, BLM, which had responsibility for the federal lands at issue there, sought a declaration that

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[6] The 1866 Mining Act similarly provides that the grant of the ditch right of way at issue here does not confer the right to injure the property of others. See § 9, 14 Stat. 253 ("[W]henever * * * any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.").

certain non-permitted activities by Utah counties to improve certain public highways on federal lands constituted a trespass; the counties defended on the ground that their Rev. Stat. § 2477 rights absolutely privileged their conduct. See 425 F.3d at 742-745. The court of appeals "agree[d] with BLM * * * that the holder of [a Rev. Stat. § 2477] right of way across federal land must consult with the appropriate federal land management agency before it undertakes any improvements to [such a] right of way beyond routine maintenance." *SUWA II*, 425 F.3d at 745. The court found this conclusion consistent with "[t]he principle that the easement holder must exercise its rights so as not to interfere unreasonably with the rights of the owner of the servient estate." *Id.* at 747; see pp. 17-18, *supra*. The *SUWA II* court specifically rejected the counties' argument "that as long as their activities are conducted within the physical boundaries of a right of way, their activities cannot constitute a trespass." *Ibid.* It explained that "[a] right of way is not tantamount to fee simple ownership of a defined parcel of territory. Rather, it is an entitlement to use certain land in a particular way." *Ibid.*

That analysis is fully consistent with the decision below, and it is inconsistent with petitioners' argument that their maintenance activity cannot be constrained by a special use permitting requirement. In particular, *SUWA II* makes clear that the United States can vindicate its interests as the holder of a servient estate through imposing regulatory requirements on easement holders whose activities are of the kind that could threaten federal lands. And just as the Tenth Circuit rejected the counties' absolutist view of their interest in Rev. Stat. § 2477 highways, see *SUWA II*, 425 F.3d at 747, the Federal Circuit below correctly rejected peti-

tioners' claim of an "absolute right" to perform maintenance on their ditches by any means, Pet. App. 10a, 12a-13a.

To be sure, *SUWA II* distinguishes between "routine maintenance, which does not require consultation with the BLM, and construction of improvements, which does," 425 F.3d at 748-749, while the court of appeals below approved the requirement to obtain a permit for ditch "maintenance" with heavy equipment. But that difference in the two opinions reflects differences in context, not a division of legal authority requiring this Court's resolution. For one thing, highways and ditches are different, and the risks posed to federal land by routine maintenance of existing public highways are different from the risks posed by ditch maintenance with heavy equipment by private individuals. Moreover, Congress has imposed different and more stringent requirements for resource protection on lands reserved as National Forests than for the unreserved lands at issue in *SUWA II*. See, *e.g.*, 16 U.S.C. 1601 *et seq.*; *Utah Power*, 243 U.S. at 405. Furthermore, BLM's position in *SUWA II* was "that the Counties' actions went beyond prior levels of maintenance," 425 F.3d at 745, so the case posed no question of whether BLM could impose a permit requirement on counties seeking to perform certain types of highway maintenance. The touchstone of the government's regulatory authority in both *SUWA II* and this case is its need to protect federal lands. Thus, just as *SUWA II* distinguished between highway construction and mere maintenance, so too the Forest Service distinguishes between activities that do not have the potential to injure federal lands (such as routine maintenance of ditches with hand tools) and activities that

could (such as bringing heavy equipment onto federal land to maintain ditches).

As applied here, the special use permit procedure affords the Forest Service an opportunity to be notified of and review plans to bring heavy equipment onto National Forest System lands, to ensure compliance with applicable standards, and to assess access routes and possible mitigation measures to minimize harm to federal lands. Petitioners' contention that the Forest Service is categorically barred from adopting such a protective procedure for activities with the potential to injure federal lands is without merit.

d. Amicus Mountain States Legal Foundation contends (Br. 13-15) that the decision below conflicts with *Western Watersheds Project* v. *Matejko*, 468 F.3d 1099 (9th Cir. 2006). No conflict exists. *Western Watersheds* holds that "BLM's failure to exercise any discretion it might have had to regulate [certain 1866 Mining Act water] diversions" does not "constitute[] a BLM 'action'" requiring consultation under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2). 468 F.3d at 1107. The thrust of the court's reasoning was that BLM's failure to exercise its authority was not an "action" for ESA consultation purposes, *id.* at 1107-1109, but the court also noted that "the only discretion the BLM retained is to regulate the * * * diversions if there is a substantial deviation in use or location," *id.* at 1110 (internal quotation marks omitted). The Ninth Circuit's articulation of the scope of BLM's retained authority for purposes of triggering ESA consultation does not cast doubt on the important propositions here: that the Forest Service may in appropriate circumstances require a special use permit to protect federal lands,

and that petitioners failed to seek (let alone were they denied) such permits.

2. Petitioners also contend (Pet. 36-38) that the court of appeals misapplied the *Loretto* physical takings analysis to the Forest Service's construction of fences in areas where petitioners held stockwater rights. That is incorrect. The court of appeals correctly recognized that petitioners' argument proceeded from a faulty conception of the scope of their property right.

This Court "traditional[ly] resort[s] to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992) (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)). Here, the court of appeals explained that under Nevada law, petitioners' holding of stockwater rights does not mean that they "'own or acquire title to water,' but 'merely enjoy the right to beneficial use.'" Pet. App. 13a (quoting *Desert Irrigation, Ltd.* v. *Nevada*, 944 P.2d 835, 842 (Nev. 1997) (per curiam)). Thus, petitioners "ha[d] no rights to the water beyond what [they could] put to beneficial use." *Ibid.* Because petitioners failed to present evidence that they were deprived of water that they could have put to beneficial use, see *ibid.*, they failed to show that the government's actions effected a taking of their stockwater rights. The court of appeals' resolution of that fact-based issue does not warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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