No. 12-918

IN THE
Supreme Court of the United States

THE ESTATE OF E. WAYNE HAGE AND THE ESTATE OF JEAN N. HAGE, PETITIONERS

v.

UNITED STATES

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

REPLY BRIEF

LYMAN D. BEDFORD

Clausen Law Group
1160 Brickyard Cove Road,
Suite 201
Pt. Richmond, CA 94801
bvilla@clausenlawgroup.com
(510) 234-5155

MARK L. POLLOT
Counsel of Record

7227 West Potomac Dr.
Boise, ID 83704
mpollot@cableone.net
(208) 867-8389

CURRY & TAYLOR ♦ 202-393-4141

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INTRODUCTION

The Petition herein ("Petition" or "Pet.") raised questions of great import whose resolution will affect a large part of the infrastructure of the western United States. Notwithstanding respondent's arguments, there is in fact a split among the circuits regarding the need for a permit for routine operation and maintenance of such rights-of-way. As previously addressed, public safety and welfare are implicated in these questions.

Respondent suggests that the Petition is not worthy of this Court's attention by rearguing the facts of this case, challenging petitioner's right to raise certain questions, and avoiding the questions presented. It does not argue that there is not great public importance in this matter, acknowledge the unappealled finding below that no permit could be required, or explain how its internal policy judgments can supply what Congress did not. The Petition should be granted.

CORRECTIONS TO RESPONDENT'S STATEMENT OF FACTS

The response brief ("Brief" or "Br.) contains numerous errors, mischaracterizations, misstatements of facts, and arguments with which petitioners disagree and are contrary to the findings of the CFC. An exhaustive discussion of each of these erroneous assertions would consume more space than petitioners are allowed. Petitioners will provide only examples here and do not intend to abandon or waive any

argument or issue or indicate agreement with any assertion by respondent.

For example:

(1) Respondent's assertions notwithstanding, the CFC found *both* a physical taking and a regulatory taking of waters other than those fenced in. The physical taking of such waters, not reversed, was based on the practical physical ouster resulting from Forest Service actions, including the threats to prosecute, which prevented effective maintenance of ditches and rights-of-way. Whether by strategy or oversight, respondent did not appeal this physical taking determination of unfenced waters. The regulatory taking was found under a regulatory taking analysis under *Penn Central* as to at least some aspects of respondent's conduct. *See*, e.g., Pet. App. 22a-23a, 45a, 52a, 55a, 125a;

(2) One inexplicable error is respondent's claim that the application of *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982) and similar cases, such as *Arkansas Game and Fish Commission v. United States*, 512 U.S. ___ (2012) (slip.op.), were not raised before the appellate court. In fact, it was addressed before the appellate court both in the Petition for Rehearing before the Court of Appeal and throughout the proceedings below, *See* Argument A, *infra*;

(3) Despite respondent's assertions, the Court of Appeal reversed the United States Court of Federal Claims ("CFC") on only two factual determinations. First, it held that evidence did not support the CFC's finding of futility on the question of ripeness of the regulatory taking claims and therefore vacated the regulatory takings claim on ripeness ground. *Estate of Hage v. United States*, 697 F.3d 1281,

1292 (2012), App. 8a. Second, it rejected the CFC's conclusions of physical takings as to waters from the *fenced-in sources* in which petitioners had water rights. *Id.*, app. 15a-16a, 20a-21a;

(4) Respondent asserts that the Petition acknowledges a "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'." Br. 2. No such shared understanding exists. Petitioners merely acknowledged the Forest Service's position, but believe *no* permit is required for effective routine operation and maintenance of 1866 Act rights-of-way within the scope and purpose of the right-of-way without respect to what tools are used;

(5) Respondent states that during the 1980s "a persistent pattern of violation of [petitioners'] 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." Br. 5. The CFC determination, not overturned by the appellate court, was that respondent's actions with respect to the alleged violations were harassing or motivated by hostility toward the Hages. *Hage V*, 82 Fed.Cl. at 212-13 and n.10, App. 55a-56a. The appellate court merely questioned the CFC's finding of futility based on this and other evidence;

(6) Respondent argues that a need for a permitting requirement was demonstrated by Mr. Hage himself. Respondent baldly asserts, with no support in the record, that Mr. Hage removed trees from within petitioners' White Sage ditch right-of-way

"by means of bulldozing a portion of National Forest System land." Br. 17, citing *U.S. v. Seaman*, 18 F.3d 649 (9th Cir. 1994), filed by respondent four months *after* this case was filed. This alleged removal by bulldozer simply did not happen. Mr. Hage was prosecuted for specific conduct, "the *cutting* and taking away of trees from government property without authorization." *Id.* at 651 (emphasis added). The trees were *cut* (*id.*) on petitioners right-of-way using *hand held tools*, which respondent *now* says requires no permit, not pushed down by use of a bulldozer or other heavy equipment. Nevertheless, he was prosecuted; and

(7) Respondent states "the court of appeals vacated the CFC's judgment . . . with respect to physical taking of stockwater rights. Pet. App. 1a-21a." Br. 10. But this is not entirely accurate. The appellate court reversed the physical takings judgment *only* as to the fenced-in waters, and erroneously so as discussed *infra*.

ARGUMENT

A. THE QUESTION OF THE PROPER ANALYTICAL FRAMEWORK IS PROPERLY BEFORE THIS COURT.

Respondent attempts to avoid the question of what takings occurred and the proper analytical framework to apply by arguing that "[o]n appeal, petitioners did not challenge the CFC's analysis of their claim as one for a regulatory taking . . . [n]or 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'." Br. 13. Respondent asserts that "[i]n contrast to their certiorari petition, which cites *Loretto* . . . repeatedly throughout the body (see Pet. iv), petitioners' briefs in the court of appeals did not cite Loretto at all." *Id.*, internal cites omitted. These assertions are both incorrect and inexplicable in light of the record. Not only did petitioners address *Loretto* and *per se* takings before the appellate court, so did *amicus* Pacific Legal Foundation, even before the Hages' Petition for Rehearing, discussed *infra*. *See*, e.g., Brief of Amicus Curiae Pacific Legal Foundation at 12-13, 18-19.

The posture of the case on appeal is important. Respondent herein was the appellant. Petitioners filed a cross appeal, but only as to the trial court's findings as to certain matters on which petitioners did not prevail at trial, i.e, issues pertaining to the CFC's range improvements. Respondent stated as one of the grounds for its appeal the CFC's findings of a physical taking of waters arising from the erection of fences around certain springs. It did *not* appeal the CFC's findings of physical takings of ditches and other *waters* arising from respondent's interference with the maintenance of petitioners' ditches. Those findings that were not disturbed by the appellate court. See, e.g., Pet. 17-18.[1] Petitioners had no need to address matters not raised by respondent in its appeal or on which it prevailed at trial. Petitioners expressly addressed - issues of physical taking that *were* raised by respondent's appeal, *i.e.*, the fences. Petitioner's Corrected Appellate brief at pp. 38-40. It became

[1] As noted therein, the CFC analyzed these actions both under a physical taking standard *and* a regulatory taking standard.

appropriate for petitioners to further discuss *Loretto* and similar cases only after the appellate decision reversed the CFC's petitioner-favorable decisions, in the process of which it overlooked the CFC's findings that no permit was legally required, applied *Penn Central Transportation Co. v, New York City*, 438 U.S. 104 (1978), and erroneously substituted its judgment for that of the CFC on the question of futility (*see* e.g., Pet. 15, 19, 29-30). Petitioners promptly did so.

On September 6, 2012, petitioners filed with the Circuit Court their Petition for Rehearing followed by a Corrected version September 14, 2012. In both versions, petitioners brought to the appellate court's attention a variety of cases and issues it had overlooked, including *e.g.*, the CFC's explicit finding that "[t]here is no requirement under the law to seek permission to maintain an1866 Act Ditch."; the 10th Circuit's decision in *Southern Utah Wilderness Alliance v. Bureau of Land Management, et al.*, 425 F.3d 735, 745-746 (10th Cir. 2005) (*SUWA II*); and the question of the proper analytical framework to be applied, particularly in light of the unusual nature of the property interests involved.

Specifically, on page 1 of the rehearing petition, petitioners listed *Loretto* as one of the overlooked cases, citing it for the "standard for physical takings, [and its] relationship to easements and *per se* takings". On pages 3-5 of the same document, petitioners discussed the same issues brought before this Court, *i.e.*, the suitability of a *Penn Central* analysis as opposed to a *Loretto* analysis when it comes to takings questions involving property interests as unusual in taking cases as easements and water rights. On pages 7-8 of the same rehearing petition, petitioners explicitly pointed

out that the appellate court failed to apply the proper standard when considering whether there was a taking of water rights because of the fencing off of the waters and equally explicitly pointed to *Loretto* as supplying the proper standard which the court should have applied.

In short, respondent's assertions regarding *Loretto*-related arguments are simply and obviously wrong. The issue is ripe for this Court's review.

B. NO PERMIT CAN BE REQUIRED FOR ROUTINE OPERATION AND MAINTENANCE REGARDLESS OF THE TOOLS USED.

Respondents argue that petitioners had to obtain a permit for the maintenance of their 1866 Act ditches and rights-of-way unless they limited their maintenance to so-called "hand tools." The term is not defined, but the brief distinguishes between tools that "do not have the potential to damage forest service property" (such as hand tools) and those that do (such as heavy equipment). Br. 20-21. ("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).") *Id.* The tool used, however, does not determine whether maintenance or construction are occurring.

This implicates the second question presented, but the brief begs the question and cites no authority

allowing the agencies to bar the easement and ditch owner from exercising his right to perform effective routine operations and maintenance of their ditch rights-of-way within the scope and purposes of their easements absent government permission without paying for it. The Forest Service's attempt to substitute its judgment as to what is reasonable for what Congress granted would alter the terms of Congress' grant. When it attempted this below, the CFC rejected the argument and found that the agency lacked the authority to define or redefine the scope of 1866 Act rights-of-way or to decide what constitutes normal maintenance and use, thereby altering a federal grant. *Id.*, App. 100a-102a, citing *Christensen v. Harris County*, 529 U.S. 576 (2000).

Respondent attempts to do so now by repeated references to heavy equipment, raising the specter of rampaging mechanized equipment laying waste to lands leaving the respondent with no way to protect federal land absent a permitting requirement. This is unsustainable. The notion that some hypothetical individual might exceed his right-of-way or operate carelessly does not justify converting a right-of-way into a permission-of-way without compensation. The BLM itself rejected this idea in 2005.

> This does not mean, however, that BLM cannot take action to protect the public lands when a holder of an 1866 Act right-of-way undertakes activities that are inconsistent with the original right-of-way. In such a situation, if the right-of-way holder does not approach BLM for a FLPMA permit authorizing such activities, FLPMA and BLM's trespass regulations provide

> BLM with the discretion to take an enforcement action against the right-of-way holder.

Id., App. 238a. As the CFC found, the Forest Service and BLM simply lack the authority to alter the terms of a federal grant or to decide for itself what constitutes routine operation and maintenance.

The holdings of *SUWA II* cannot be minimized by suggesting that the rights of 1866 Act highway rights-of-way holders are less worthy of protection than those of 1866 Act water-conveyance rights-of-way. Water conveyance is as vital to the arid west as roads. *SUWA II* clearly states that no permit can be required for access to and maintenance of 1866 Act highway rights-of-way which is consistent with the purpose and within the scope of the right-of-way. *SUWA II*, 425 F.3d at 745. It also clearly states that courts have primary jurisdiction over such questions (*id*, 425 F.3d at 757) and that no permit is required even if the right-of-way owner intends to make "improvements beyond routine maintenance" if the improvements are within the scope and purposes of the easement. He need only "consult" with BLM. *Id.* at 745. There is no reason to apply a different standard to 1866 Act ditch rights-of-way, as respondent now argues, contrary to the BLM's Federal Register notice, *supra.*

C. THE APPELLATE COURT IMPERMISSIBLY SUBSTITUTED ITS INTERPRETATION OF

THE EVIDENCE FOR THAT OF THE TRIAL COURT.

Respondent raises a host of additional arguments which fail to refute the issues and arguments discussed in the Petition. Petitioners' detailed discussion at Pet. 36-38 will not be repeated. There is, however, substantial evidence to support the CFC's finding that petitioners could have put the water to beneficial use both for irrigation and for livestock but for the Forest Service's actions and that the waters interfered with did not reach other lands. *See*, e.g., Pet. 37 n.4; App. 57a-58a, 83a-89a. The water rights found by the CFC, including in fenced-in sources (established by Nevada State Engineer's testimony and order of determination) are based on proven beneficial use of water. Petitioners have those water rights *because* they could and historically did make that use.

For example, at Br. 5-6, respondent claims that livestock was not deprived of access to water because elk trampled the fence, omitting the undisputed findings of fact that fences stood for a time before being trampled, barring petitioners' cattle from accessing water for at least the same period of time. App. 13a. Its claim that water freely flowed through the grazing area despite the fences is a mere allegation, not found in any of the CFC's decisions or the record. Petitioners had both livestock *and* irrigation water rights in the fenced-off sources and water flows from interfered-with sources to other lands which would have been put to beneficial use for irrigation and livestock, were gravely diminished. Pet. 37 n.4. Respondent cites the appellate court as stating there was no evidence of diminished water flow. However, respondent's *own* briefing

(Opening Brief on Appeal at 54-55) shows that it knows otherwise. It acknowledges that its actions interfered with water flow and argued only that the CFC incorrectly calculated the amount or value of that lost flow. *See* also PLF Amicus Br. at 3-4. Of course, if the *Loretto* analysis respondent wishes to avoid is applied, it is clear that a physical taking of petitioners' rights in fenced-in water sources is indisputable and only the compensation due was at issue. The CFC's valuation remains undisturbed.

In the case of the futility argument, the appellate court neither found a lack of evidence nor reversed the CFC's findings of harassment and hostility towards petitioners based on voluminous evidence. Instead, it determined that it was not foreseeable that the Forest Service would use a different permit, a maintenance permit, to carry out similar harassment simply because the Forest Service's prior harassing actions involved grazing permits. (" The Hages fail to explain how disputes concerning their grazing permits would lead the Forest Service to deny them special use permits to maintain their irrigation ditches") (*Estate of Hage*, 687 F.3d at 1287, App. 10a.), ignoring the CFC-determined fact that the grazing permit "disputes" were part of a pattern of harassment, not free-standing disputes.

This Court's precedents impose a very heavy burden on appellants to overturn factual determinations of the trial court. If the trial court's account of the evidence is plausible in light of the record viewed *in its entirety*, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently; where there are two permissible

views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

The judge below not only saw and heard the witnesses and reviewed documentary evidence, he went to the Pine Creek Ranch, observed the physical settings, and could judge the relationship of the testimony of the witnesses to the areas they were testifying about including, but not limited to, factors that would bear on the hostility of Forest Service personnel toward the petitioners, access, and water flow in a way that cannot be demonstrated by maps, photographs and words. The CFC's findings of hostility and harassment are clearly not unreasonable.[2]

CONCLUSION

[2] Indeed, much of the same evidence in this case was introduced in a related case (*United States v. Hage*, Case No. 2:07-cv- 01154-RCJ-VCF (Nev. Dist. 2007)) with similar results in the court's preliminary findings of fact and conclusions of law – a finding of conspiracy against the Hages beginning in the 1980s. Pet. 16 n.1; App. 76a, 82a. (Transcript of Proceedings, United States v. Estate of E. Wayne Hage).

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Lyman D. Bedford, Esq.
Clausen Law Group
1160 Brickyard Cove Road,
Suite 201
Pt. Richmond, CA 94801
bvilla@clausenlawgroup.com
(510) 234-5155

Mark L. Pollot
Counsel of Record
7227 West Potomac Dr.
Boise, ID 83704
mpollot@cableone.net
(208) 867-8389