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# Court ruling overturned in Hage grazing case

## NEWS

JAN 22, 2016 By [RAE PRICE, WLJ EDITOR \(BY-AUTHOR-210-1.HTML\)](#)



A federal appeals court on Jan. 15, sided with the government in a decades-long Nevada grazing rights case. The Ninth Circuit Court of Appeals overturned a lower court ruling from 2013 that found in favor of Tonopah, NV, ranchers E. Wayne Hage and his son, Wayne N. Hage, who are

accused of grazing cattle on federal land without a permit. The senior Hage died in 2006 and his son is now defending the case.

The federal appeals court vacated and reversed portions of the lower court ruling, and, in referring the case back for consideration, in a rare move called for a different district judge, saying Judge Robert Clive Jones had displayed bias against the federal government and grossly abused his contempt power. Jones found Bureau of Land Management and Forest Service employees in contempt of court for the way they handled the case against the Hages.

While the Hages did not hold grazing permits, they did have water rights, which they argued provided an easement to access the water. The lower court concluded because it is not feasible to prevent cattle from eating or wandering, the government cannot succeed on a trespass claim if the cattle remain within a reasonable distance of the water source to which the defendants possess water rights. Jones ruled a "reasonable" distance to be one half-mile.

Jones found that although the cattle had grazed on federal land, the government had proved only two of its many claims because the unauthorized grazing occurred within a half-mile of the water source. The judges in the Ninth Circuit Court, based in San Francisco, disagreed and said cattle can't incidentally graze on public land when accessing a rancher's private water right on federal property.

The defendants argued that, because they had water rights, a necessary easement over federal lands to get their cattle to the water was implied. However, that argument conflicts with a longstanding precedent, the opinion says. The appeals court ruled that ownership of water rights does not give a rancher the right to graze livestock on federal property, though he can divert water from a stream on such land.

In writing the recent opinion, Circuit Court Judge Susan Graber wrote, "Defendants openly trespassed on federal lands. Rather than simply resolving the factspecific inquiries as to when and where the cattle grazed illegally, the district court applied an 'easement by necessity' theory that plainly contravenes the law." The opinion continued, "The district court also encouraged defendants to file a counterclaim that was clearly timebarred. ... Moreover, as discussed more fully in a separate disposition filed today, the court grossly abused the power of contempt by holding two federal agency officials in contempt of court for taking ordinary, lawful actions that had no effect whatsoever on this case."

The Hages have been embroiled in arguments with the government over grazing issues for decades. Following the decision, The *Las Vegas Review-Journal* quoted Hage saying the ruling is, "a big disappointment, not just for my family but for the entire industry."

Mark Pollot, attorney for the Hage's estate, told *WLJ*, in looking at the next step, they have three options: Accept the decision; petition for rehearing en banc from the Ninth Circuit; or immediately file a petition for certiorari with the Supreme Court. He indicated their choice would be one of the last two options.

"We believe that the decision in both the contempt matter and the main case are legally and factually in error and, if allowed to stand, will drive a stake through western water law and other infrastructure that grew out of well more than a century of congressional and judicial actions."

Pollot said, "Any control over water that remains in the states west of the Mississippi River will be illusory." — **Rae Price, *WLJ* Editor**

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# Colorado says 'no' to introduction of wolves

## NEWS

JAN 22, 2016 By [RAE PRICE, WLJ EDITOR \(BY-AUTHOR-210-1.HTML\)](#)



In a move that drew praise from livestock and agricultural groups, the Colorado Parks and Wildlife Commission (Commission) approved a resolution Jan. 13 that prevents the active introduction or reintroduction of wolves into Colorado.

More than 10 years ago, the Commission approved a plan entitled, Findings and

Recommendations for Managing Wolves that Migrate into Colorado. The plan, a collaborative result of the Colorado Wolf Management Working Group (WMWG), was in response to the reintroduction of gray wolves by the U.S. Fish and Wildlife Service (USFWS) into their historic habitat, the northern Rocky Mountains.

In November, the Commission returned to the discussion of wolves and the active introduction or reintroduction of wolves into Colorado. Interest in wolves remains high in Colorado and the proposed resolution generated considerable public discussion and concern.

The WMWG included members of Colorado agricultural and livestock organizations.

Colorado Cattlemen's Association (CCA) Executive Director Terry Fankhauser said, "We have had members and affiliates attend several of the wolf advocate meetings in the state to ensure our perspective opposing wolves in Colorado was understood."

Two CCA members served on the WMWG while others provided testimony at a hearing and wrote letters opposing wolf introduction in the state.

Fankhauser told *WLJ*, "Our opposition is fundamentally founded in science. Colorado is not appropriate habitat. There are too many people spread across the landscape not allowing for enough remote space for wolves to thrive." Secondly, he said, "We do not have an adequate prey base for the wolves, thus creating depredation on livestock and domestic animals."

Bonnie Brown, Executive Director of the Colorado Wool Growers Association, was on the WMWG and provided testimony at the Commission resolution hearing last week. In a statement provided to *WLJ*, Brown said, "We applaud the wildlife Commission for their common sense approach to managing wolves in Colorado. Wolf advocates tug at heart strings and raise funds with beautiful photographs on T-shirts and coffee cups. However, the reality of living with wolves is devastating economic and emotional loss for sheep and cattle ranchers that have livestock attacked by wolves; and it doesn't work out too well if you are deer and elk being constantly harassed by the ever-expanding wolf population."

Brown continued, "Wolf advocates fail to realize—or simply ignore the fact—that the Colorado Parks and Wildlife has to carefully manage diverse wildlife species within the state that has a rapidly increasing human population and limited habitat. The passage of the resolution opposing wolf introduction was an acknowledgement of the importance of sportsmen's dollars that fund wildlife management in our state, the impact on big game herds and livestock, and the habitat provided for all wildlife by farms and ranches in Colorado."

Colorado Farm Bureau (CFB) was also among the groups providing testimony on the resolution. Following the decision, President Don Shawcroft said, "We are very pleased with the Commission's approval of this resolution. Colorado Farm Bureau has long considered that Colorado is not suitable habitat for wolves. Additionally, the predation of wildlife populations by wolves, which is well documented, and human risk factors only increasingly validate the Commission's historic opposition to reintroduction."

CFB voiced concern over the high possibility for conflict with wolf/human interactions, Shawcroft said.

"While problematic interactions between wolf populations and domestic livestock populations would be expected, current laws that we see in other states only allow for protection of livestock in specific circumstances. A rancher who is protecting his livelihood will not have a chance to consult a lawyer to make sure the protection is justified should wolves be allowed for reintroduction."

Matt Robbins, Colorado Parks and Wildlife (CPW) Public Information and Website Manager, told *WLJ* the Commission listened to testimony and recommendations of the working group in making the decision. He said the action is a proactive approach and helps send a message to the USFWS that the state wildlife organization should be a part of wolf management plans. He noted single wolves have been seen in northern Colorado, and currently there are no known packs. However he said it is only a matter of time before the move into the state and CPW would like to help manage the species at that time.

As for Mexican wolves, Robbins said CPW doesn't believe Colorado is part of its natural range. Although animals have entered the state he said a single animal does not determine a natural range.

Managing the species is difficult from a state wildlife standpoint because the wolf is on the federal Endangered Species List. Robbins said, "We can't have a plan for a species that we're not allowed to manage. We would have to defer to the management plan set by the listing of the federal government."

Another factor that helped sway CPW to vote against actively reintroducing wolves is the cost. "Wolf management is costly and currently there is no funding to pay for support of these wolves," said Robbins. "Currently Colorado Parks and Wildlife receives no general fund, Colorado tax dollars to manage wildlife." He noted funding comes from limited sources including sales of hunting and fishing licenses. "The management of wildlife in our state is falling solely on the backs of those who hunt and fish. That's a challenge."

A sometimes overlooked component of introducing an endangered species in Colorado is that the state legislature has the final say. "Our state legislature retains the sole authority to approve Colorado's involvement in any introduction or reintroduction of a listed species within our state, and that includes wolves," Robbins told *WLJ*.

He said the Commission and staff can't participate in the release of wolves without the express approval of the General Assembly.

While pleased with the recent decision, Robbins said CPW continues to work with neighboring states to understand the issue and to be available to USFWS officials as they move forward with wolf management plans.

"Animals will roam, and if they find a way into our state then we'll have to manage them," Robbins said, "unless they get into trouble. Then we have to honor them and protect them."

"CFB believes the reintroduction of wolves into Colorado is a no-win situation," the organization said in a press release. "Wolves will only negatively impact ranchers through animal losses, the state through hunting of big game, and the citizens of Colorado through restricted abilities to use public lands." — **Rae Price, *WLJ* Editor**



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# Obama vetoes bill to overturn WOTUS

## NEWS

JAN 22, 2016 By [KERRY HALLADAY, WLJ MANAGING EDITOR \(BY-AUTHOR-207-1.HTML\)](#)



*Last week, President Barack Obama used his ninth veto of his presidency to veto a bill that would have blocked the implementation of the Waters of the U.S. rule from the EPA and the Army Corps of Engineers. Pictured: President Obama signs the Federal Benefits and Non-Discrimination memorandum in the Oval Office, June 17, 2009. "Veto" stamp added by WLJ. Official White House photo by Pete Souza*

—President calls rule “critical” to U.S. water quality

As he had long threatened, President

Barack Obama vetoed congressional attempts to kill the new Waters of the U.S. rule.

Last Tuesday, Obama used his veto power on S.J. Resolution 22, the bill which would have blocked the implementation of the Environmental Protection Agency’s (EPA’s ) new Waters of the U.S. (WOTUS) rule. Obama called WOTUS “critical” to the protection of the nation’s waterways and the “product of extensive public involvement.”

“Because this resolution seeks to block the progress represented by this rule and deny businesses and communities the regulatory certainty and clarity needed to invest in projects that rely on clean water, I cannot support it. I am therefore vetoing this resolution.”

Unlike most bills that go before Congress, S.J. Resolution 22 said simply:

“That Congress disapproves the rule submitted by the Corps of Engineers and the Environmental Protection Agency relating to “Clean Water Rule: Definition of ‘Waters of the United States,’” and such rule shall have no force or effect.”

The bill was passed by the Senate on Nov. 4, 2015 with a deeply partisan 53 to 44 vote. The House passed the final version on Jan. 13, 2016 with a similarly partisan vote of 253 to 166. In both cases, congressional Republicans overwhelmingly voted in favor and Democrats almost unanimously voted against.

This veto represents the ninth in Obama’s tenure as president, the lowest veto count since Warren Harding served as president in the early 1920s. As Obama’s term does not end for another year, there is time for more veto opportunities to present themselves. More recent low-veto presidents were George W. Bush with 12, Jimmy Carter with 13, and John Kennedy with 12.

Obama’s prior vetoes included a recent vetoing of an attempt at repealing the Affordable Care Act (often called “ObamaCare”), the approval of the Keystone XL Pipeline, and an effort to nullify the EPA’s carbon pollutant standards, to name a few.

To override a presidential veto, both houses of Congress must reconsider and pass the bill with a two-thirds majority. In their final passages of the bill, the Senate passed it with a 53 percent majority and the House passed it with a 58 percent majority. Thus far, none of Obama’s vetoes have been overridden, though three have been sustained. A veto is sustained when a chamber of Congress tries, but fails, to override a veto.

## Responses

Not everyone was pleased by the move, of course. Sen. Joni Ernst (R-IA), who sponsored the Senate bill, described the veto as the president “renegeing” in the commitment to working with Congress he voiced during his recent State of the Union address.

"Instead, the president chose to side with an unchecked federal agency and empower unelected Washington bureaucrats to expand their authority to control what's done on private land. It is clear President Obama did not take into account the comments, perspectives and legitimate concerns raised by those whom this expanded WOTUS rule directly impacts."

Rep. Adrian Smith (R- NE3), who sponsored the House version of the bill, had much the same to say.

"It is not at all surprising the president chose to veto our resolution to block WOTUS given this administration's legacy of governing through an endless flow of regulation," he said in his official response to the veto. "We must continue to keep this issue at the forefront, as this rule is one of the largest abuses of executive power in modern history."

"We are extremely disappointed the president chose to side with the EPA, which has pulled out all the stops and shown an appalling disregard for the law throughout this rulemaking process," said National Cattlemen's Beef Association (NCBA) President Philip Ellis following the veto.

"In siding with the EPA, the president has ignored the will of Congress, including members of his own party. Moreover, he has taken side against the 32 states, and countless stakeholders who have challenged the WOTUS rule.

With Congress clearly showing their disapproval of this rule, the consequences of WOTUS implementation now rest solely with President Obama."

### ***Where to with WOTUS?***

At the moment, implementation of WOTUS is still stayed across all states by the Sixth Judicial Court of Appeals in its early October decision. The 2-1 decision stands until the court can determine appropriate jurisdiction related to other elements of the suit. Though the suit has not progressed as quickly as expected or hoped, the stay remains in effect.

"The veto won't have any direct impact on the lawsuits," Colin Woodall, Vice President of Government Affairs and chief lobbyist for NCBA, told *WLJ*. "Typically, when the judges are looking at these cases, negotiation actions can be used, but they don't have the same kind of weight as something like the GAO (Government Accountability Office) report, for example, that came out right before Christmas that said EPA had broken the law in lobbying for comments for their rule. I don't think that this damages our efforts one way or the other."

Woodall told *WLJ* that the courts are but one of the avenues still available to opponents of WOTUS, though overriding the veto is not one of them.

"There's not the votes in either house [of Congress] to override that veto. We know that to be a fact," he noted, pointing out the slim margins in the most recent congressional votes.

"But that doesn't mean that Congress is no longer out of options. The resolution of disapproval was just one way that they can address this. They still have the opportunity of looking at the fiscal year 2017 appropriations bill to do a defunding. So that is still very much an option that is available to them."

Woodall also pointed out that in exactly one year from last Wednesday, there will be a new administration coming into the White House.

"Depending upon who that is, they can also take action to stop this. Between that and a new Congress, we have not run all of our congressional options out yet. There's still a lot that's at hand here. Our goal would be to utilize those options first just because we want relief sooner than later and the courts, I think, ultimately will grant us that relief. It's just that could be five, six years away before this goes to the Supreme Court. And we really do expect it to go all the way to the Supreme Court." — **Kerry Halladay, *WLJ* Editor**

