Note: The opinions expressed herein are strictly those of the author. The Progressive Rancher does not endorse submissions, but allows all to voice their views.

The Future of Nevada Ranching: *Do Rancher's Property Rights Matter?*

by: Ramona Hage Morrison

Over 20 years ago, thirty Clark County ranchers were driven out of business when the Bureau of Land Management (BLM) began using the terms and conditions of grazing permits to protect the desert tortoise instead of rancher's who had preexisting rights to run livestock. While the tortoise was never actually listed as "endangered" under the Endangered Species Act, cows were deemed to be a threat because they might step on tortoise eggs. The fact that cows, sheep and tortoises had cohabitated for more than a century was ignored.

Then in 1998, the Southern Nevada Public Lands Management Act was passed by Congress. The Act legalized public land sales in Clark County, lands which included some of those same rancher's adjudicated grazing allotments. The Clark County ranchers were never compensated for their vested water rights, forage rights, range improvements, easements and rights of ways. They were simply eradicated by the heavy hand of BLM regulations. Lands that were formerly deemed to be tortoise habitat were sold to developers armed with excavators and paving equipment. Meanwhile, environmentalists and the BLM are mostly mute on the subject of the desert tortoise.

So far 39,378 acres have been sold in Clark County for over $3 billion dollars for an average of $77,253 per acre. According to the BLM 2010 Report to Congress (http://www.blm.gov/pgdata/etc/medialib/blm/nv/field_offices/las_vegas_field_office/snplma/pdf/reports.Par.90311.File.dat/SNPLMA_FY2010_Annual_Report.pdf), ten percent of those moneys were funneled to the Southern Nevada Water Authority and five percent to education. The remaining funds went to the Department of Interior for land acquisition and conservation. To date, a total of 69,120 acres of mostly ranch lands have been acquired—in a state which is already 87 percent government controlled. The BLM and U.S. Forest Service pursued policies burdening grazing permits with so many conditions, they forced many ranchers to become "willing sellers" of their devalued ranches and prime targets for land acquisition.

The sage grouse is the new desert tortoise or spotted owl to be deployed against the Nevada rancher, the mining industry, hunter and recreationalist. The objective is the same—force ranchers to walk away from their vested water rights, forage rights, range improvements and easements without compensation, or at the very least convert them into "willing sellers" at a discount.

Since 1982 Nevada has lost over one-third of its cattle production, down from 700,000 to 450,000. Sheep production, which peaked at 3 million in the 1920's, is now down to a mere 70,000. These losses are largely due to the cuts the BLM and USFS have imposed on ranchers through grazing permits. Computing both direct and indirect economic impacts, Nevada has lost well over **one billion dollars** in economic activity as a result.[1]

Rather than following the land management laws of Congress which specifically protect rancher's preexisting property interests in vested water rights, forage rights, easements, rights of ways and range improvements, the agencies promote policies that eliminate livestock. By extension, their policies encourage massive rangeland fires and the infestation of weeds and cheat grass—something previously not witnessed in Nevada. The agencies assigned to protect and manage the western rangelands and forests instead have created what can only be described as an ecological disaster. Conversely, rangeland grazing by livestock has always corresponded to greater wildlife populations, better access to areas for recreation, and greater water yields from watersheds that supply irrigation and recharge aquifers.

The question remains—what can individual ranchers do to protect their property rights from the sage grouse? The short answer is we need to force the federal land management agencies to follow their own laws. Additionally, we need to document preexisting rights and learn to defend those property rights. Finally, seek the protection of the courts, armed with an exhaustive chains of title, attorneys experienced in this area of law, and carefully framing the issues in a manner which recognizes preexisting rights.

Every land law passed by Congress has provisions protecting preexisting rights. For example, Congress was very clear in the 1976 Federal Land Policy and Management Act when it stated: "Nothing in this Act, or in any amendment made by this Act, **shall be construed as terminating any** valid lease, permit, patent, **right-of-way, or other land use right or authorization existing on the date of approval of this Act.**." (43 U.S.C. 1701 notes).

Nevada's ranches were settled well before the creation of the Forest Reserves and the passage of the Taylor Grazing Act. Nevada's prior appropriation water law is based upon recognition of preexisting beneficial use of water. Vested stock water rights and range (i.e. forage rights) were put to beneficial use well before the statutory water law in Nevada, and an equitable estate was created under the local laws, customs and court decisions of the time. Most of Nevada's range and stock waters were bought, sold, or transferred by inheritance for 40 years before the creation of the Forest Service or BLM. Property taxes were assessed on the use of the range by taxing the livestock. Inheritance taxes were also assessed on the value of the range, and still are by the IRS. (See Griffith v. Godey, 113 U.S. 89 (1885)). These rights can and should be documented with an exhaustive chain of title. (See previous article in *The Progressive Rancher*, February 2013, page 7)

The road ahead for the ranching industry is riddled with attacks on our property rights, and on our very liberty. The past is riddled with bad case law as it relates to the rangeland ranching industry. Many of the worst court decisions were cases where ranchers argued they had rights by virtue of a grazing permit, rather than that they owned preexisting property rights acquired by their predecessors under the local laws, customs and court decisions of the time.

We are a nation of laws, but to some extent our industry has been ineffective in forcing the federal agencies to follow their own laws. When it comes to the federal grazing programs, often government employees ignore those very laws in the enforcement of their own rules and regulations. When bureaucrats act outside their lawful delegated authority, they are no longer protected by immunity from personal liability afforded a government employee.

In the 1991 Fifth Amendment takings case of Hage v. U.S. filed in the U.S. Court of Federal Claims, and in U.S. v. Hage, the 2007 forage right case filed in Nevada Federal District Court, as well as the Southern Monitor Valley Water Adjudication, the primary evidence before the court was an exhaustive chain of title documenting the preexisting use of and rights to the range and vested waters. My family, thankfully, has prevailed in all of these cases against great odds and adversity. Even in the July 26, 2012 Federal Circuit Court of Appeals decision, which reversed, upheld and remanded narrow portions of Judge Loren Smith's eight published rulings from the U.S. Court of Federal Claims, all of Judge Smith's property findings were left intact by the court. The Federal Circuit also reversed its previous disastrous ruling from Colvin v. U.S., when it ruled in the Hage case that we did, in fact, have a right of access to our waters. (The Federal Circuit Court of Appeals decision in Hage v. U.S. is currently on appeal to the United States Supreme Court.)

The future of the ranching industry will depend, in my opinion, in great part on how effective we are in protecting our property rights. We've come a long way. Prior to my father, Wayne Hage, writing "Storm Over Rangelands", many ranchers had no idea they owned anything, including their water rights, on the public domain. Twenty year ago, most judges and lawyers would argue the same position.

Today, however, copies of "Storm Over Rangelands" are housed in the U.S. Supreme Court law library as one of the few authorities on western federal land law not funded or published by a government entity. The numerous published decisions in the Hage cases have clarified the issue of whether or not ranchers own property interests in the nature of an equitable estate on lands managed by the BLM and Forest Service. And we have learned a little along the way about how to plead cases for the greatest chance of success in the court system. There have also been mistakes made from which we have learned as well. But either way, the objective was that we could blaze a trail for defending the western rancher's property rights which others can follow. I am optimistic that is being accomplished.

I am also optimistic that Nevada's ranchers can defend their property rights against a plethora of environmental schemes, including the sage grouse. The rancher's preexisting property rights are the only real line of defense to stop the continued abuse of powers.

[1] *The Economic Impact of Nevada Livestock Industry*, Anthony L. Lesperance, Ph.D. (2002)