

## **Court Sides with New Mexico Cattle Ranchers in Water Dispute** **Tiffany Dowell Lashmet, Texas A&M Agrilife Extension**

A federal court has sided with a group of New Mexico ranchers in a case involving a dispute over stock watering rights in the Lincoln National Forest.

### **Background**

The US Forest Service (USFS) manages federally owned land within the Lincoln National Forest in New Mexico. As part of that management, since 1910, the USFS has issued grazing permits to ranchers to graze cattle on the federally owned forest land. Each year the USFS determines the number of cattle that may be grazed on various portions of the forest, including the Sacramento Allotment.

In 1983, the US Fish and Wildlife Service (USFWS) proposed designating the Sacramento Mountains Thistle as a threatened species pursuant to the Endangered Species Act. A year later, the USFWS determined that “limiting or excluding livestock and humans from the critical habitat areas would help the Sacramento Mountains Thistle to recover.” Thus, the USFS planned to construct fences around 29 water bodies that had been designated as critical habitats for the Thistle.

The Sacramento Grazing Association (SGA) was formed in 1989 to run cattle on an allotment in the Sacramento Mountains of the Lincoln National Forest. In 1989, the SGA acquired the Sacramento Cattle Company, along with all “cattle, water rights, range rights, access rights, and range improvements on the base property, as well as the appurtenant federally-administered grazing allotment known as the Sacramento Allotment.” The 1989 permit from USFS allowed 553 cows for a period of 10 years. SGA admits that they were aware of the fences serving as enclosures at the Sacramento Lake area when it purchased the rights from Sacramento Cattle Company. From 1989-1992, SGA says their cattle were allowed to drink for weeks at a time inside the enclosures due to unlocked gates or gaps. USFS took no enforcement action against SGA for this practice. When a new enclosure was built in 1992, stock water was pumped to the outside of the fence to allow SGA’s cattle to drink. In 1996, the USFS sent a letter to SGA stating that their cattle were not permitted to graze in wetlands along the Sacramento River. Due to drought conditions at the time, however, the USFS District Ranger allowed SGA’s cattle to enter the enclosures so long as SGA monitored forage levels and promptly moved

cattle to another pasture. In 1998, the permit granted prohibited SGA's cattle from grazing in six enclosures.

In 1999, the USFS again re-issued the grazing permit for 553 cattle for 10 years, subject to cancellation or modification as necessary. This permit, however, contained a new clause, which stated that "livestock use" was not permitted on enclosures. In 2001, USFS denied SGA's request to pipe water from within an enclosure to a nearby pasture to water the cattle. The next year, USFS found the SGA cattle inside that same enclosure and informed SGA they were violating the permit and had to remove the animals from the enclosure. In 2006, SGA sought permission to remove a fence to allow cattle to access water in an enclosure and install a temporary pipeline to pump water from another enclosure to a nearby pasture. Both were denied.

For the next several years, there were numerous back-and-forth conversations between SGA and the USFS regarding the allowed number of cattle on the Sacramento Allotment. After a Biological Opinion written by the USFWS in 2004 recommended that all livestock be permanently excluded from the Sacramento Allotment, SGA filed the instant lawsuit.

### **Procedural History**

This lawsuit was filed in 2004 when SGA alleged that the USFS's actions constituted a taking of their water rights, for which they were due just compensation per the Constitution. In 2012, the parties entered into settlement negotiations and sought to develop alternative water sources for SGA's cattle. Although some alternative water sources were identified and developed, the parties were unable to settle all of their disputes.

### **Opinion**

The Court of Federal Claims found in favor of the ranchers on three issues: (1) the statute of limitations did not bar their claims; (2) the ranchers had a property interest under NM law to make beneficial use of stock water sources in the Sacramento Allotment of the Lincoln National Forest; and (3) the US Forest Service's actions with regards to the ranchers rights to use stock water sources constituted a taking in violation of the 5th Amendment. [Read full opinion [here.](#)]

1. *Statute of Limitations.* By law, a claim must be filed in the US Court of Federal Claims within 6 years of the claim accruing. This lawsuit was filed May 4, 2004. A dispute arose over when the SGA claim first accrued. Did the claims accrue in May 1998, when the USFS added language into the SGA permit prohibiting use of exclosures (in which case the statute of limitations did not bar the claim), or did the claims accrue when the exclosures were erected in the Lincoln National Forest, which occurred before 1998? SGA argued it was the inclusion of this language in their official 1998 permit that should be considered claim accrual. The USFS, on the other hand, pointed to various warnings issued to SGA prior to 1998 regarding cattle watering inside exclosures. The Court held that it was the May 5, 1998 permit that was the first official action by USFS resulting in accrual of a claim. Thus, the lawsuit was filed May 4, 2004, just within the 6-year limitations period.

2. *Right to Beneficial Use of Stock Water.* The Court based its decision on New Mexico water law. "Under New Mexico law, the right to beneficial use of water is a property interest distinct and severable from a right to use land. The establishment, maintenance, and extent of this right depends on beneficial use." Additionally, the court explained that the "federal appropriation of water does not, *per se* constitute a taking...Instead, a plaintiff must show that any water taken could have been put to beneficial use." New Mexico water law recognizes two appropriative water rights—those based on common law prior to 1907 and those after 1907 based on the Water Code.

Thus, SGA was required to establish a *prima facie* right to the beneficial use of stock water within the Sacramento Allotment. SGA offered Declarations of Ownership that had been filed with the New Mexico State Engineer between 1999-2003 for each of the stock water exclosures at issue in the case. Declarations of Ownership allow a water rights holder of a pre-1907 right to set forth the use to which the water is applied, the date of the first appropriation, and the location of the water. Once certified by the NM Office of State Engineer, a Declaration of Ownership is *prima facie* evidence of the truth of its contents. Additionally, witnesses testified that prior to 1907, SGA's predecessors grazed cattle on the Sacramento Allotment and made beneficial use of the stock water sources at issue in the case, and made these uses continually through the filing of the Declarations of Ownership. The Court held that SGA met its burden by offering the Declarations of Ownership and uncontroverted testimony of witnesses.

Additionally, the Court rejected the USFS argument that livestock watering did not constitute a “diversion” was required by New Mexico law. The Court noted that for pre-1907 permits governed by common law, a “diversion” was required only for irrigation uses, but for other uses such as livestock watering, “taking” or “direct appropriating” of water—such as consumption by cattle—was sufficient.

*3. USFS Actions Constitute a Taking.* SGA argued that their right to stock water was physically taken when USFS denied access to their cattle. The Court held that here, SGA’s right to stock water was “incrementally and then finally denied” by USFS. Because the USFS fenced off water sources in the Sacramento Allotment, a taking occurred.

The case will now move to determining the adequate compensation owed to SGA for the taking. Before that begins, the Court instructed the parties to “undertake a renewed effort to ascertain whether alternative water sources can be made available to SGA to allow this family enterprise to continue in the cattle business on a viable basis.”

### **Conclusion**

This case addresses important issues for all ranchers grazing federally owned land in the west. Although based on New Mexico law, there have been similar disputes involving ranchers in other western states and, unfortunately, water issues like this are unlikely to go away anytime soon. It remains to be seen whether the USFS will appeal this decision.