

Federal Court Protects Grazing Permits Under the Due Process Clause

In *United States v. Estate of E. Wayne Hage*, the U.S. District Court for the District of Nevada held that the U.S. Forest Service and Bureau of Land Management arbitrarily denied the Defendant Hage, a Nevada ranching family, its long-held grazing permits on federal land. Of particular significance, the court held that there are property rights in federal grazing permits that are entitled to protection under the Due Process Clause of the Fifth Amendment.

In August 2007, the United States sued the Hage family for trespass by the family's cattle on BLM and Forest Service land without the requisite grazing permits. In response, the Hages filed a counterclaim under the APA alleging that Forest Service and BLM officials arbitrarily deprived the Hage family of its grazing rights. The Hages argued that they have held "historic grazing preferences and property rights to the use of stock water dating back to the 1860s." But beginning in 1993, the Hage's grazing permits were consistently denied renewal by the federal government—a decision that the Hages argued was arbitrary and capricious.

The district court concluded that, "[a]lthough there is no property interest in a grazing permit for the purpose of the Takings Clause, there is a property interest in a grazing permit for the purpose of the Due Process Clause, both procedural and substantive." Therefore, the grazing permits are afforded certain procedural safeguards before the permits can be arbitrarily denied, altered, suspended, or terminated.

In the case of the Hage's permits, the court found that the Government's decision to strip the family of their long-held grazing permits and water rights "shocks the conscience" and violates the APA:

The Government has abused its discretion in the present case through a series of actions designed to strip the Estate of its grazing permits, and ultimately to strip Defendants of their ability to use their water rights, for reasons unrelated to the appropriate use of the range or ensuring that historical grazing use is respected.

Concerned that the government may continue to abridge the family's "rights and those statutory privileges of which the Government has arbitrarily and vindictively stripped them," the district court also issued a permanent injunction that the Government grant the Hage's permit renewal application.

In previous litigation in the U.S. Court of Federal Claims and Federal Circuit between the Hage family and the United States, the Hages alleged a Fifth Amendment taking of their water rights, forage rights, and ditch rights of way. After 21 years of litigation, the Federal Circuit in 2012 held that the Hage's regulatory takings claims were unripe because they failed to demonstrate a denied application for ditch access permits. The Federal Circuit also held that fences erected along watercourses where the Hages held water rights did not amount to a taking because they did not prevent the Hages from accessing the water.

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