Public Land & Resources Law Review

Volume 0 *Case Summaries 2015-2016* Article 35

May 2016

United States v. Estate of Hage

Kevin B. Rechkoff
Alexander Blewett III School of Law at The University of Montana, kevin.rechkoff@gmail.com

***United States v. Estate of Hage*, 810 F.3d 712 (9th Cir. 2016).**

Kevin Rechkoff

In their decision to partially vacate and partially reverse the district court's holding for the Defendants, the Ninth Circuit reaffirmed the authority of federal agencies to determine the criteria for grazing on federal land. Additionally, the Ninth Circuit rejected the district court's attempt to attach long established water rights to grazing rights through necessity. Thus, parties seeking to access federal lands for grazing must seek and acquire a permit through the BLM, removing the possibility of water rights representing a sufficient interest to lay claim to a property right. Lastly, any of Defendant's assertions that federal agencies and officials had violated the APA were moot due to the running of the statute of limitations.

I. INTRODUCTION

In *United States v. Estate of Hage*, the United States Court of Appeals for the Ninth Circuit reviewed federal regulations and statutes governing the approval process of grazing permits.[1] Finding binding and explicit language in multiple statutes—stating possession and maintenance of a grazing permit was required to access federal lands—the Ninth Circuit determined the Hages had failed to meet those mandates by not obtaining a permit.[2] Finding that the Secretary of the Interior possesses statutory authority to approve or reject grazing permits, the Ninth Circuit held that in the absence of federal agency approval, grazers do not have a right to access federal lands.[3] Therefore, the Hages were forced to seek alternate legal theories in their attempt to assert a right to access federal lands.[4] In its review, the Ninth Circuit rejected the Hages property right theory.[5] Finding no maneuver could legally circumnavigate the federal government's authority to issue grazing permits, the Ninth Circuit ruled in favor of the United States.[6]

---

1. United States v. Hage, 810 F.3d 712, 717-18 (9th Cir. 2016).
2. *Id.*
3. *Id.*
4. *Id.* at 719, 720.
5. *Id.* at 722.
6. *Id.*

II. FACTUAL AND PROCEDURAL BACKGROUND

E. Wayne Hage and his son, Wayne Hage, began a grazing operation on federal land in 1978.[7] The Hages filed for and received grazing permits through the Bureau of Land Management ("BLM") and the United States Forest Service.[8] In 1993, however, the Hages failed to receive approval in their attempts to renew their grazing permits.[9] Despite the rejection of their application, the Hages "continued to graze cattle on federal lands."[10]

In response, the United States filed trespass claims against the Hages under Nevada state law, seeking injunctive relief and damages.[11] In support, the United States cited multiple statutes that explicitly required a permit to graze on federal land.[12] Under the Taylor Grazing Act of 1934 and the Federal Land Policy and Management Act ("FLPMA"), ranchers maintaining grazing operations on federal land are expressly required to receive a permit from the federal government.[13] In response, the Hages asserted that a permit was not required because the family had acquired a property interest in the land, making the trespass claim moot.[14] Specifically, the Hages pointed to an appurtenant—adjacent to—water right for their cattle to consume river water.[15]

Although the United States District Court for the District of Nevada determined the Hages had grazed on federal lands without the proper documentation, United States District Judge Robert C. Jones held in favor of the Hages.[16] Judge Jones accepted the Hages contention that the appurtenant water right created an "easement by necessity" for the cattle to cross federal land.[17] Without the easement, the Hages argued, the water right would be useless.[18] Agreeing with the Hages, and ignoring binding case and statutory law, the district court ruled that an easement, and thus a property right, had been created, granting the Hages

---

7. *Id.* at 715.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 717.
13. *Id*.
14. *Id.* at 718.
15. *Id.*
16. *Id.* at 715.
17. *Id.*
18. Hage v. United States, 35 Fed. Cl. 147, 171 (Fed. Cl. 1996).

the legal right to cross and graze on the federal land in question.[19] The district court stated the cattle were also permitted to wander a "reasonable distance" from the water to graze because to require the Hages to keep their cattle from moving onto federal land would be "infeasible."[20] "'Arbitrar[ily],'" the district court subsequently concluded that a distance of "one-half mile" from the water source would be a reasonable distance for the cattle to travel without trespassing onto federal lands.[21] Thus, because all but two of the trespass claims involved cattle grazing within the newly constructed half-mile boundary, the federal government was only awarded damages of 165.88 dollars.[22]

Furthermore, Judge Jones encouraged the Hages to file a counter claim, stating the their constitutional right of due process had been violated by the federal government's issuance of trespass notices without court permission.[23] Citing this lack of notice as his reasoning, Judge Jones issued an injunction against the government, preventing federal agencies from issuing trespass notifications without court "permission."[24] Lastly, Judge Jones held two BLM officials involved in the Hages claims in contempt of court.[25] The United States filed a timely appeal.[26]

III. ANALYSIS

On appeal, the United States asserted the language from statutes governing grazing practices and management on federal lands explicitly required permits to be issued before the implementation of a grazing operation.[27] Specifically, the United States argued that the Taylor Grazing Act and FLPMA state that an issuance of a permit does not grant the grazer any title to the land.[28] Relying on long established case law, the United States further asserted that a permit, and the right to use the

19. *Estate of Hage*, 810 F.3d at 715.
20. *Id.* at 716.
21. *Id.* (quoting United States v. Estate of Hage, No. 2:07-cv-01154_RCJ, 2013 WL 2295696, *45 (D. Nev. May 24, 2013)).
22. *Id.*
23. *Id.* at 715.
24. *Id.* at 716.
25. *Id.* at 715.
26. *Id.* at 716.
27. *Id.* at 717.
28. *Id.*

land is a "'revocable privilege.'"[29] Thus, because the Hages had failed to obtain the proper permits, the Hages were trespassing on federal property without the requisite authority.[30] Countering, the Hages relied on the district court's ruling that an appurtenant water right gave the family a property interest through an easement to graze federal lands absent a permit.[31]

In response to the district court's obscure ruling, the federal government conceded that while grazers who own water rights receive preferential treatment in the application process, a water right in isolation does not confer a property right to graze on adjacent land.[32] The requirement to give water rights holder's preferential treatment comes from federal statutory law.[33] However, the federal government asserted there was no mention of a property right being conferred when a water right exists in a grazing situation.[34] Thus, the government argued that the district court's "theory" granting the Hages' an "easement of necessity" had no merit.[35] The United States contented, and the Ninth Circuit found that federal statutory law expressly states the opposite, and represents the preeminent authority.[36]

Additionally, the United States demonstrated that authority to access federal land without a permit only extends to crossings to construct diversions to perfect the water right.[37] In summation, the Ninth Circuit stated that attempts to seek other types of easements have been "expressly rejected," and possession of water rights is "irrelevant" to the question of grazing access.[38] The only valid entry of federal lands in relation to water rights is for "diversionary" purposes.[39] Because the Hages did not seek to divert water, the court ruled that the creation of an "easement by necessity" was a misleading and erroneous application of existing statutory and case law.[40]

---

29. *Id.* (quoting Swim v. Bergland, 696 F.2d 712, 718 (9th Cir. 1983)).
30. *Id.* at 718 (citing 43 U.S.C. § 1733(g) (2012)).
31. *Id.*
32. *Id*. at 717 (citing 43 U.S.C. § 315(b) (2012)).
33. *Id.*
34. *Id*. (citing Hunter v. United States*,* 388 F.2d 148 (9th Cir. 1967)).
35. *Id.* at 718.
36. *Id.* at 717.
37. *Id*. (citing *Hunter*, 388 F.2d 148).
38. *Id.* at 718.
39. *Id.* at 719.
40. *Id.* at 722.

The court also held the "easement by necessity" theory confounded foundational principles of property law.[41] In order to create an easement in the fashion the Hages contend, a "severance of title" is required.[42] However, here, no severance of title occurred.[43] By issuing "reasonable regulations" requiring a grazing permits, the federal government had properly evoked conditions for acquiring access to the lands.[44] The court concluded that because the Hages had not obtained a permit they had no grounds on which an easement could be established.[45]

The Ninth Circuit agreed with the federal government's application of governing statutory law.[46] Singling out Judge Jones as having an improper bias against federal agencies, the court admonished his ruling as having no support in either case or statutory law.[47] In particular, the court pointed to the record as evidence of Judge Jones's improper bias against the federal government, and in particular the BLM and the Forest Service.[48]

In addition to Judge Jones's personal contempt for federal agencies, the Ninth Circuit also concluded his reliance on case law was clearly erroneous.[49] The only case cited by the Hages at trial, and emphasized by Judge Jones as authority, was also misplaced.[50] In the Hages' effort to assert an Administrative Procedures Act ("APA") violation, they were required to overcome expiration of the APA's six-year statute of limitations.[51] Because the Hages grazing application was rejected eighteen years before the commencement of these proceedings, the Hages' attempted to demonstrate that final agency action was not taken until the government sued them for trespass.[52] In support, the Hages cited an excerpt of a case that stated litigation could be construed as the final agency action, tolling the statute of limitations.[53] However,

---

41. *Id*. at 719.
42. *Id*.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id*.
47. *Id*. at 722.
48. *Id.*
49. *Id.* at 721.
50. *Id*. (citing AT&T Co. v. Equal Emp't Opportunity Comm'n, 270 F.3d 973, 975 (D.C. Cir. 2001)).
51. *Id.*
52. *Id.*
53. *Id.* (citing *AT&T*, 270 F.3d at 975).

the Ninth Circuit rejected that contention, stating the excerpt from the case was misleading, and that the court in that situation had ruled out litigation procedures as a mechanism for tolling statutes of limitations.[54] Thus, the Hages were left without support for their claim of an APA violation.

Upon it's conclusions regarding the district court's improper application of the governing statutes and the APA, the Ninth Circuit ordered the case to be handled by a different judge on remand.[55] In it's reasoning for invoking a rarely used procedural tool, the Ninth Circuit pointed to Judge Jones's heavy bias and egregious application of the governing statutes.[56] Particularly, the court perceived Judge Jones's encouragement of the Hages' APA claim as an improper conduct for a judge overseeing the same case.[57] In a perceived abuse of judicial power, the Ninth Circuit ordered Judge Jones to remove himself as the individual proceeding in the determinations of damages stemming from the Hages' unauthorized crossing onto federal lands.[58]

IV. CONCLUSION

By firmly rejecting the district court's application of statutory and binding case law, the Ninth Circuit confirmed the necessity of maintaining a valid permit while grazing on federal lands. Through a multitude of authorities, the court removed any doubt as to the mandatory nature of permits for grazers. Additionally, by ruling against the Hages and assessing trespatory damages against them, the court confirmed private citizens have the burden of ensuring grazing permits are maintained and strictly followed. Lastly, the Ninth's Circuit's stern admonishing of a district judge demonstrates the repercussions of conduct considered outside the purview and authority of judges.

54. *Id*.
55. *Id*. at 724.
56. *Id*. at 722.
57. *Id*.
58. *Id*. at 723.