No. 13-16974

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

ESTATE OF E. WAYNE HAGE and WAYNE N. HAGE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
Honorable Robert C. Jones

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES SEEKING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Page

U.S. Statute

Rules of Court

Miscellaneous

CONSENT TO FILING

Pursuant to FRAP 29(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellees Estate of E. Wayne Hage and Wayne N. Hage.[1] All parties have consented to the filing of this amicus brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have participated as lead counsel or amicus curiae in several cases before the U.S. Supreme Court in defense of the right of individuals to make reasonable use of their property. *See, e.g.*, *Koontz v. St. Johns River Water Management District*, __ U.S. __, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013); *Arkansas Game & Fish Comm'n v. United States*, __ U.S. __, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659, 137 L. Ed. 2d 980 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825,

[1] In accordance with FRAP 29(c)(5)(A)-(C), amicus affirms that no counsel for any party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the amicus, its members, or its counsel have made a monetary contribution to this brief's preparation or submission.

107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987). PLF has participated in numerous water rights disputes between private entities and the government, both before this Court and elsewhere. *See, e.g., Casitas Municipal Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008); *County of Okanogan v. National Marine Fisheries Service*, 347 F.3d 1081 (9th Cir. 2003); *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001). PLF also has extensive litigation experience in cases where due process rights are at stake in the context of land use permitting. Recent cases include *Sackett v. EPA*, 132 S. Ct. 1367 (2012) (certiorari granted on due process, but decided on statutory grounds); *Samson v. City of Bainbridge Island*, 683 F.3d 1051 (9th Cir. 2012); and *Bowlby v. City of Aberdeen*, 681 F.3d 215 (5th Cir. 2012).

PLF previously filed an amicus curiae brief in the Court of Federal Claims and Federal Circuit in support of the Estate of E. Wayne Hage. PLF and its supporters believe that this case is of significant importance to western water users and has far-reaching implications for their traditional rights in water. PLF believes that its public policy perspective and litigation experience will provide an additional and useful viewpoint in this case.

ISSUES ADDRESSED BY AMICUS BRIEF

1. Whether the owner of stock water rights has a right to access and put the water to beneficial use.
2. Whether the government violates due process when it arbitrarily or irrationally

deprives a person of his statutory "grazing preference right" by refusing to accept a permit renewal application for reasons wholly unrelated to the merits of the application.

INTRODUCTION

This appeal arises from the United States' shifting attitude toward ranching and water rights in the western states. The Hage family are Nevada ranchers who own rights to water in several creeks and springs located on public lands and the associated ditch rights-of-way that transport water to the family ranch for irrigation, stock watering, and domestic purposes.[2] *Hage v. United States*, 35 Fed. Cl. 147, 172 (1996) (*Hage I*).

The water rights were appropriated by the Hages' predecessors around the turn of the last century. At that time, our government lauded western settlers for the industry and courage that it took to eke out a living in such hostile conditions as those in Nevada. *Reno Smelting, Milling & Reduction Works Co. v. Stevenson*, 21 P. 317,

[2] The United States does not dispute that the Hage family holds valid, vested water rights for stock watering, among other uses, (1) in the Southern Monitor Valley; (2) in the Ralston and McKinney allotments; and (3) in ten ditch rights-of-way vested under the Mining Act of 1866, 43 U.S.C. § 661, *et seq*. *See Hage v. United States*, 51 Fed. Cl. 570, 592 (2008) (*Hage IV*). Hage's water rights were largely adjudicated by the Court of Federal Claims, which determined that the Hage family own rights to water in creeks and springs located on public lands and the associated ditch rights-of-way that transport his water to his ranch for irrigation, stock watering, and domestic purposes. *Hage v. United States*, 82 Fed. Cl. 202, 204-05 (2008) (*Hage V*), *reversed in part on other grounds*, 687 F.3d 1281 (Fed. Cir. 2012).

321 (Nev. 1889) (in most of Nevada "the soil is arid, and unfit for cultivation unless irrigated by waters of running streams").[3] The arid conditions "impelled settlers upon the public lands to resort to the diversion and use of waters." *Id.* at 321 ("Except in a few favored sections, artificial irrigation, for agriculture, is an absolute necessity."). Because of this, "the doctrine of priority of right to water by priority of appropriation thereof . . . rises . . . to the dignity of a distinct usufructuary estate or right of property." *Id.*; *see also Willey v. Decker*, 73 P. 210, 216-19 (Wyo. 1903) (The harsh conditions in the West shaped the region's water law). And courts from that time period recognized that it was "the duty of the national and state governments to protect" appropriated water rights, *id*., which are "among the most valuable property rights known to the law." *White v. Farmers' Highline Canal & Reservoir Co.*, 43 P. 1028, 1030 (Colo. 1896). The importance of water remains paramount for western ranchers. As Senior Judge Loren Smith of the Court of Federal Claims correctly observed, in Nevada, "water means the difference between farm and desert, ranch and wilderness, and even life and death." *Hage I*, 35 Fed. Cl. at 172.

Over the years, however, the United States changed its public lands policies. Where the government had once encouraged productive use of natural resources, it

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[3] *See also* 5 Robert E. Clark, et al., *Waters and Water Rights*, at 40-41 (1972) (water is a scarce resource in the arid region of the western United States); Sylvia Harrison, *The Historical Development of Nevada Water Law*, 5 U. Denv. Water L. Rev. 148, 148 (2001) (Nevada is the driest state in the Nation.).

began enacting laws intended to enhance the natural conditions of the historic rangelands for environmental and recreational purposes. *Hage V*, 82 Fed. Cl. at 204-05. The government's new land policies were often at odds with the interests of individuals, like ranchers, who rely on natural resources to make a living. This case arose from a conflict between the government and the Hages, resulting in a pattern of excessive and vindictive agency actions against the family.

In a prior case between the Hages and the government, the Court of Federal Claims determined that government agents had used intimidation, harassment, and threats of prosecution for trespassing on federal land to prevent the Hage family from accessing and maintaining their water rights. *Hage V*, at 208, 212-13, *reversed in part on other grounds*, 687 F.3d 1281 (Fed. Cir. 2012). Agents also installed electric fences to block the Hage family's cattle from accessing and vested water rights at times when the Hage family had valid grazing permits allowing cattle to move upon the federal lands. *Id*. at 211. In addition, a combination of agency action and regulation caused the Hage family's streams and ditch rights-of-way to become obstructed by trees and undergrowth as well as roots, silt, and other deposits, so that their water could not reach the location of beneficial use. *Hage I*, 35 Fed. Cl. at 172. In total, the government caused the Hages to lose tens of thousands of acre-feet of water at a fair market value in excess of $2.8 million. *Hage V*, at 214. And, in this case, the trial court determined that, when the Hages applied to have their grazing

permits renewed, the government refused to accept their application, despite a statute providing existing permit holders with a preferred right to renewal. *United States v. Estate of Hage*, 2:07-CV-01154-RCJ, 2013 WL 2295696 at *41-43 (D. Nev. May 24, 2013) (Decision). Worse yet, the government encouraged third party ranchers to take over those grazing allotments, promising that the new ranchers could use stock water that the Hage family owned. *Id*.

Unsurprisingly, the parties have been locked in litigation for the past quarter century, including several takings claims litigated in the Court of Federal Claims and Federal Circuit,[4] a failed attempt by the government to criminally prosecute Wayne Hage and several ranch employees for clearing obstructions from ditch rights-of-way,[5] and the government's present attempt to prosecute the Hage family for "trespassing"

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[4] The Court of Federal Claims concluded that the government's actions had appropriated Hage's right to access and maintain his ditches, resulting in a regulatory and two physical takings of Hage's water and ditch rights-of-way. *Hage V*, 82 Fed. Cl. at 208; *see also Hage IV*, 51 Fed. Cl. at 580 n.13 (finding a physical taking); *Hage V*, 82 Fed. Cl. at 211-13 (finding a regulatory taking). The United States appealed two of the three takings determinations; it did not challenge the lower court's determination that the government's actions, which caused Hage's ditch rights-of-way to become obstructed, effected a physical taking of Hage's water rights. Accordingly, the Federal Circuit did not address that portion of the trial court opinions when it reversed and remanded the trial court's judgment. The effect of the unappealed portion of the trial court's decision is pending on post-judgment motions to the Court of Federal Claims.

[5] The government unsuccessfully attempted to prosecute Hage for removing invasive trees from one of his ditch rights-of-way. *See United States v. Seaman*, 18 F.3d 649 (9th Cir. 1994).

on their own water rights. In this latest litigation, the Nevada District Court concluded that the Hages could not be found liable for trespass under those circumstances. *Estate of Hage*, 2013 WL 2295696 at *41-43. Then, ruling on the family's counterclaims, the court concluded that the government's actions against the family's water rights were both arbitrary and shocking, violating the family's substantive due process rights. *Id*. at *46-48.

The purpose of this amicus brief is to assist the Court in reviewing the district court's due process conclusions; specifically, (1) whether a holder of water rights has a protected interest in the right to access and use water where it crosses the land of another; and (2) whether a statute providing for preferred treatment during the permit review process creates an entitlement subject to the protections of due process.

ARGUMENT

I

HAGE HOLDS A VALID AND PROTECTED PROPERTY RIGHT TO ACCESS AND USE HIS STOCK WATER RIGHTS WITHOUT INCURRING LIABILITY FOR TRESPASS

The district court followed the well-established common law when it ruled that the Hages could drive their cattle over public land to access their stock waters if the impact on those lands was limited and reasonable. *Estate of Hage*, 2013 WL 2295696 at *46-48. Thus, the district court correctly dismissed the government's trespass claims where (1) the family proved that they owned vested water rights at the location of the alleged trespass, and (2) the government was unable to show that the Hages' cattle did anything more than incidentally graze while en route to the stock waters. *Id*.

The right of access is an essential component of water rights. *Estate of Hage v. United States*, 687 F.3d 1281, 1289-90 (Fed. Cir. 2012), *cert. denied*, 133 S. Ct. 2824, 186 L. Ed. 2d 883 (2013) (Ownership of water includes a protected right of access). For over a century, courts from the western states have recognized that water holders have a right to freely access and maintain the flow of their water—even if the holder must cross over another person's land to access it. *See Reno Smelting*, 21 P. at 321 (Nevada law recognizes that a holder of water rights has a right-of-way through

lands of others for the purpose of accessing appropriated water.). This right is essential to a property interest in water because, unlike real property—which is made up of a variety of valuable possessory rights—a water right is comprised wholly of the right to use certain amounts of water for a private purpose.[6] *International Paper Co. v. United States*, 282 U.S. 399, 407 (1931). Simply put, if an owner cannot access his water, he cannot use it, and his rights are rendered worthless. *Hage V*, 82 Fed. Cl. at 208, 212-13 (Hage holds a right to freely access and maintain his water ditches without government permission); *Hage*, 687 F.3d at 1289-90 (Recognizing that, if the government interfered with Hage's right to access stock waters in streams crossing federal lands, its actions would result in a physical taking.).

The government's insistence that a holder of stock water rights should be found liable for civil trespass when exercising his rights of access and use conflicts with the well-settled water law of the western states. For example, under the prior appropriation doctrine, a person creates vested water rights by diverting water from its natural stream and transporting it by means of a ditch or flume to the location where the water is put to beneficial use. *Reno Smelting*, 21 P. at 321. By creating a ditch or flume to divert water, the water holder "creates an interest in the land from

[6] The water rights at issue in this appeal consist primarily of usufructuary rights, i.e., "the exclusive, independent property right to use of water appropriated according to law from any natural stream[.]" 5 Robert E. Clark, et al., *Waters and Water Rights* 347 (1972) (citing 2 Clesson S. Kinney, *Irrigation and Water Rights* 1314-15 (2d ed. 1912); *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945)).

which the diversion is made in favor of him having the right." *Vansickle v. Haines*, 7 Nev. 249, 279, 1872 WL 3542, *overruled on other grounds by Jones v. Adams*, 6 P. 442, 448 (Nev. 1885). And the right to divert and transport water "carries with it the right to go upon the land through which the ditch or flume is conducted, and upon which the dam, by means of which the diversion may be affected, is built, to keep them in repair." *Vansickle*, 7 Nev. at 279; *see also Reno Smelting*, 21 P. at 321.

In *Ennor v. Raine*, Nevada's Supreme Court held that a prior appropriator may lawfully enter a neighbor's upstream property to remove obstructions from the channel in order to maintain the flow of water. 74 P. 1, 2 (Nev. 1903). This rule is repeated in other states that apply the prior appropriation doctrine. For example, in *Ware v. Walker*, California's Supreme Court held that a prior appropriator could lawfully go onto his neighbor's upstream property to remove obstructions that interfered with the flow of water into his ditch. 12 P. 475, 476-77 (Cal. 1886). Ware appropriated a ditch right-of-way that diverted water from a creek across public lands. Walker later purchased the public lands and would not allow Ware to use his ditch. In response, Ware went further upstream, but still on Walker's land, cleared gravel from the stream bed, and built a new dam and ditch to transport the water to his property. Walker tore down the dam and obstructed the portion of the ditch that ran across Walker's land. Ware filed suit and was granted a permanent injunction barring Walker from interfering with Ware's water rights. California's Supreme Court

affirmed the decision, holding that Ware, as the holder of prior appropriated water rights, had "as complete and perfect a right to maintain his ditch, and have the water flow to, in, and through the same, as though such right or easement had vested in him by grant." *Id.* at 477.

Other western states recognize that appropriated water rights create a right-of-way to access the water. *See, e.g., Walker v. United States*, 69 Fed. Cl. 222, 231 (2005) (New Mexico's prior-appropriation doctrine recognizes a right-of-way to maintain and enjoy appropriated water rights); *First State Bank of Alamogordo v. McNew*, 269 P. 56, 66 (N.M. 1928) (a holder of water rights vested owns a right of way for the maintenance and enjoyment of the water rights); *Whitmore v. Pleasant Valley Coal Co.*, 75 P. 748, 749 (Utah 1904) (owner of a ditch right-of-way has the right to enter upon the land to "do all things necessary to maintain, care for, and operate" the ditch); *Willey v. Decker*, 73 P. at 214 (1866 Act recognized right to maintain vested ditch rights-of-way); *City of Helena v. Rogan*, 68 P. 798, 799-800 (Mont. 1902) (the right to enter upstream property includes the right to have sufficient water flow from the head of the stream or its tributaries into his ditch to meet his appropriated needs); *Natoma Water & Min. Co. v. Hancock*, 35 P. 334, 339 (Cal. 1894) (a holder of 1866 Act rights has the right to enter public lands upstream of his ditch to take actions reasonably necessary to maintain the enjoyment of allocated water rights); *Crisman v. Heiderer*, 5 Colo. 589, 596, 1881 WL 222 (Colo.) (an

appropriator had the right to enter the bed of the stream above his ditch to remove obstructions that were diverting water from flowing into his ditch).

The federal government recognized that appropriators have a "pre-existing right of possession"[7] in their ditch rights-of-way in the Act of July 26, 1866, Ch. 262, § 9, 14 Stat. 251, 253 (now codified in 43 U.S.C. § 661 (1976)), which provides:

> [W]henever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; . . . .

Construing this Act, the United States Supreme Court held that Congress created "an unequivocal grant of the right of way" over public lands. *Broder v. Natoma Water & Min. Co.*, 101 U.S. 274, 275 (1879); *see also Hobart v. Ford*, 6 Nev. 77, 82, 1870 WL 2410 (Nev.) (Act of 1866 authorized "any person wishing to construct a canal or ditch for mining or agricultural purposes to construct it over any public land."). The "purpose of the Act of 1866 was to put the contention that the pioneers were trespassers at rest by 'acknowledging' that they never were trespassers; that they were upon the lands of right from the beginning." Samuel C. Wiel, *Water Rights in the Western States* § 96, at 113 (3d ed. 1911) (internal citations omitted). Since water

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[7] *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 155 (1935) (quoting *Broder v. Natoma Water & Min. Co.*, 101 U.S. 274, 276 (1879)).

right holders "were upon the lands of right from the beginning," they did not require permission to lawfully access their property. *Id.*; *see also* James H. Davenport & Craig Bell, *Governmental Interference With the Use of Water: When Do Unconstitutional Takings Occur?*, 9 U. Denv. Water L. Rev. 1, 69 (2005) ("Water rights typically include a right to reasonable access[.]").

The government fails to address the Hage family's right to access their stock waters—a property right established by over a century of common law and recognized by the Federal Circuit in a parallel litigation. *Estate of Hage*, 687 F.3d at 1289-90. Without such discussion, the government's trespass argument is nothing more than an attempt to circumvent the rights and expectations of water holders established by the common law.

II

THE GOVERNMENT'S ARBITRARY AND IRRATIONAL ACTIONS AGAINST THE HAGE FAMILY VIOLATED SUBSTANTIVE DUE PROCESS

The Due Process Clause of the U.S. Constitution guarantees against government deprivations of "life, liberty, or property, without due process of law." U.S. Const. amend. V. In its substantive aspect, due process embraces the fundamental concept that government regulation of property must relate to a legitimate end of government in order to be a valid exercise of authority. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928);

Lawton v. Steele, 152 U.S. 133, 136-37 (1894). This concept is the essential difference between the rule of law and arbitrary government. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). Decisions that restrict the use and enjoyment of their property must be justifiable by one of the legitimate ends of government: the promotion of health, safety, morals, or general welfare. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 395 (1926); *Harris v. Cnty. of Riverside*, 904 F.2d 497 (9th Cir. 1990).

In *Village of Euclid v. Ambler Realty Co.*, the U.S. Supreme Court held that regulatory restrictions on an owner's right to use his land will violate due process if the regulations are "clearly arbitrary and unreasonable, having no substantial relations to the public health, safety, morals, or general welfare." 272 U.S. at 395. In subsequent cases, the Court consistently reiterated that the purpose of the substantive due process test was to assure that individual rights would be protected from unreasonable, arbitrary, or capricious government actions in an environment of increased regulation:

> [The Fifth and Fourteenth Amendments] do not prohibit government regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.

Nebbia v. People of New York, 291 U.S. 502, 525 (1934) (quoted favorably by

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 (1980)). Using different terms, the Supreme Court similarly held in *Goldblatt v. Town of Hempstead*: "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." 369 U.S. 590, 594-95 (1962) (citing *Lawton* 152 U.S. at 137). And more recently, *Lingle* reiterated that a restriction on the right to use one's property must "substantially advance a legitimate state interest" to satisfy the substantive requirement of due process. 544 U.S. at 540.

In this case, the district court determined that the government violated the Hage family's substantive due process rights in two regards: first, the government purposefully interfered with the Hages' vested water rights;[8] and second, the government arbitrarily and irrationally refused to process the family's grazing renewal permit application. *Estate of Hage*, 2013 WL 2295696 at *41-43.

[8] Water rights—like any other property rights—are unquestionably protected by the federal constitution. *See Hage*, 687 F.3d at 1289-90 (water rights protected by Takings Clause); *Cuyahoga River Power Co. v. City of Akron*, 240 U.S. 462, 464 (1916) (water rights are protected by the Due Process Clause); *see also Hage IV*, 51 Fed. Cl. at 584 ("The government cannot deny plaintiffs access to their vested water rights without providing a way for them to divert that water to another beneficial purpose if one exists.").

A. The Government Purposefully Interfered with the Hage Family's Water Rights

For whatever reason, the government chose not to appeal the district court's conclusion that its actions unconstitutionally interfered with the Hage family's water rights. Therefore, it is necessary to consider the trial court's findings and conclusions on that issue in order to fully understand the court's ruling on the government's refusal to process the Hages' grazing permit renewal application. In regard to the family's water rights, the trial court determined that the government:

> (1) invited others [. . .] to apply for grazing permits on allotments where the Hages previously had permits, indicating that [third parties] could use water sources on such land in which Hage had water rights, or at least knowing that [the third parties] would use such sources; [and] (2) applied with the Nevada State Engineer for its own stock watering rights in waters on the land despite that fact that the Government owns no cattle nearby and has never intended to obtain any, but rather for the purpose of obtaining rights for third parties other than Hage in order to interfere with Hage's rights[.]

Estate of Hage, 2013 WL 2295696 at *42. The court explained that "[b]y filing for a public water reserve, the Government in this case sought specifically to transfer to others water rights belonging to the Hages." *Id*. at *43. The government's decision to accept those related findings or conclusions are binding against the United States on appeal. *See Roche Palo Alto LLC v. Apotex, Inc.*, 531 F.3d 1372, 1381 (Fed. Cir. 2008) (a trial court's final, unappealed judgment on the merits is binding against parties) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99 (1981)).

And, importantly, those findings establish that, at the very least, the government purposefully used the permit process in order to interfere with the Hage family's water rights.

B. The Hages' "Grazing Preference Right" Is a Statutory Entitlement Protected by Due Process

The trial court also concluded that the government arbitrarily and vindictively refused to process the Hages' grazing permit renewal application, thereby depriving the family of their statutory entitlement to preferred treatment during the permit review process. *Estate of Hage*, 2013 WL 2295696 at *41-43. Instead of directly addressing the lower court's ruling, the government sets up a strawman argument, characterizing the trial court's decision as creating an entitlement to graze on public lands. *See* Opening Br. of United States at 49, n.10. That is not what the trial court said. Indeed, the court explained: "Although there is no right to graze on federal land, [. . .] the Government may not abuse its discretion in refusing to renew, or in revoking, such a privilege[.]" *Id*. at *41. It was the government's arbitrary and vindictive misuse of the permit process that violated substantive due process. *Id*. at *41-43.

The trial court found that the government interfered with the Hage family's statutory preference right in three ways. First, the trial court determined that the government refused to accept the family's grazing renewal permit application "because he added a reference to the [Uniform Commercial Code] to Mr. Hage's

signature indicating that he was not waiving any rights thereby"—marginalia that the court determined "did not purport to change the substance of the grazing permit renewal for which he was applying, and which had no plausible legal effect other than to superfluously assert non-waiver of rights." *Id*. at *42. Second, the court found that the government "explicitly solicited and granted temporary grazing rights to parties who had no preferences under the TGA [. . .] in areas where the Hages had preferences under the TGA." *Id*. And third, the court determined that the government threatened to prosecute people who had leased or sold cattle to the Hages "in order to pressure other parties not to do business with the Hages, and even to discourage or punish testimony in the present case." *Id.*

The government does not seriously dispute any of the trial court's findings of fact—nor does it dispute the trial court's conclusion that the government's explanation for denying Hage's renewal grazing permit was "based upon its frankly nonsensical position that such an assertion of rights meant that the application had not been properly completed." *Id*.; *see also* Opening Br. of United States at 49, n.10. Instead, the government claims—with almost no argument or citation to case law—that the Hage family had no protected property interest in the permit renewal application process; thus, the government asserts that the family was not protected against the arbitrary and vindictive acts of government agents. *Id*. The United States is incorrect.

It is true that the Taylor Grazing Act does not entitle a rancher to a grazing permit, but that does not mean that established ranchers like the Hages lack any statutory entitlements sufficient to trigger the protections of due process. *Estate of Hage*, 2013 WL 2295696, at *41 ("Although 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."); *see also Buckingham v. Sec'y of U.S. Dep't of Agric.*, 603 F.3d 1073, 1081-82 (9th Cir. 2010) (permit applications are subject to due process). Indeed, the Act establishes an entitlement system that provides preferential treatment during the permit renewal process for established ranchers and substantially limits the government's discretion when considering a renewal application:

> The TGA and the National Forest Organic Act of 1897 *require that permits be granted or not based upon preferences* arising out of existing custom and usage. Substantively, there must be a reasonable relationship between denial, suspension, or termination of a permit, based upon historical custom and usage and the need to preserve the range for future use. Although, for example, reasonable orders to remove cattle temporarily where a range has been over-grazed or where the range is in a drought condition would be within the realm of reason, a due process violation could occur in this context if a permit were reduced or terminated for other reasons, such as to reserve use of the range for non-grazing purposes, or to transfer the permit to another applicant notwithstanding the first user's right to a preference under TGA and the custom and usage standards underlying the preference system.

Decision at *90 (emphasis added); *see also Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 313-14 (D.C. Cir. 1938) (Ranchers who hold a grazing preference right "*are*

entitled as of right to permits as against others who do not possess the same facilities for economic and beneficial use of the range.") (emphasis added). The trial court, therefore, explained that "[r]egardless of whether the grazing permits in this case were only 'privileges,' and not rights, the Government cannot withdraw them or refuse to renew them vindictively or for reasons totally unrelated to the merits of the application as governed by published laws and regulations, lest the Government abuse its executive power in a way that shocks the conscience." *Estate of Hage*, 2013 WL 2295696, at *41.

In insisting that the Hages' statutory renewal preference is not a property interest protected by due process, the government overlooks *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), in which the U.S. Supreme Court expanded the scope of property interests that could fall within the purview of the Due Process Clause to include statutory entitlements (*e.g.*, statutory benefits, like social security, welfare, government employment, etc.). *See also Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1200-01 (9th Cir. 1998) (referring to statutory entitlements as "new property," as opposed to tradition or "old" property).

Roth and its companion case, *Perry v. Sindermann*, 408 U.S. 593 (1972), were due process cases wherein the plaintiffs alleged property interests in continued employment at public colleges and universities arising from statutory entitlements. *See Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 601. *Roth* and *Perry* thus established

an "entitlement approach" that is properly applied to cases in which the plaintiff seeks to establish a property interest in a government benefit. *See Schneider*, 151 F.3d at 1200. To have a cognizable property interest in a permit, a person must have " 'a legitimate claim of entitlement' as opposed to a 'unilateral expectation' or an 'abstract need or desire for it.' " *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998) (quoting *Roth*, 408 U.S. at 557). A statute creates a property interest in a permit if it imposes "significant statutory restrictions" on the reviewing agency's decision to issue a permit. *Foss*, 161 F.3d at 588 (citation omitted); *see also Thornton v. City of St. Helens*, 425 F.3d 1158, 1164-65 (9th Cir. 2005) ("[I]f the governing statute directs that a license shall be renewed upon compliance with certain criteria, none of which involve the exercise of discretion by the reviewing body, the licensee has a property right in the reissuance of the license.") (citation omitted). By contrast, "an applicant does not have a property interest in the renewal of a license if the reviewing body has discretion to deny renewal[.]" *Thornton*, 425 F.3d at 1165 (citation omitted). Discretion aside, a person has a property interest in a permit whose "continued possession may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971).

The United States does very little to refute the district court's determination that the Taylor Grazing Act created an entitlement to preferred treatment during the permit review process, and does absolutely nothing to refute that the Hages' grazing

preference rights were essential to his livelihood as a rancher. *See* Opening Br. of United States at 49, n.10. Instead of addressing *Roth*'s application to this case, the government simply reasserts its claim that, by including marginalia indicating that they refused to waive any legal rights under the Uniform Commercial Code on their renewal application, the Hages never *really* submitted an application, and therefore never triggered his statutory entitlement to preferred treatment. *Id*. at 49-52. That argument, however, was rejected below. *Estate of Hage*, 2013 WL 2295696, at *42. Indeed, the trial court determined that "the burden on the Government of taking a few minutes to realize that the reference to the UCC on the [Hage family's] application was nonsensical and would not affect the terms of the permit was minuscule compared to the private interest affected." *Estate of Hage*, 2013 WL 2295696, at *42. Thus, the court concluded that the governments claim that no application had ever been filed was "nonsensical" and only added to a demonstrated pattern of arbitrary and shocking behavior. *Id*. The United States has not refuted the trial court's well-supported findings and conclusions, which should be affirmed on appeal.

CONCLUSION

For the foregoing reasons, amicus curiae PLF respectfully requests that this Court affirm the district court's conclusions that (1) the Hages were not liable for trespass for accessing their water rights and (2) that the government's arbitrary and vindictive actions violated Hage's substantive due process rights.

DATED: November 26, 2014.

Respectfully submitted,

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