No. 15-1295

In the Supreme Court of the United States

ESTATE OF E. WAYNE HAGE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
JOHN C. CRUDEN
Assistant Attorney General
WILLIAM B. LAZARUS
DAVID C. SHILTON
ELIZABETH ANN PETERSON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioners trespassed on federal land when they grazed cattle on those lands, for years, without federal grazing permits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, treaty, statutes and regulations:

Treaty, statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 15-1295

ESTATE OF E. WAYNE HAGE, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 810 F.3d 712. The opinion of the district court (Pet. App. 23a-166a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 2016. The petition for a writ of certiorari was filed on April 14, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This trespass case brought by the United States concerns petitioners' use, without federal permits, of approximately 752,000 acres of federal land within the Humboldt-Toiyabe National Forest and adjacent public lands administered by the Bureau of Land Management (BLM) in Nevada. The United States

has owned the lands continuously since it acquired them pursuant to the Treaty of Guadalupe Hidalgo in 1848, 9 Stat. 922, and it manages them for grazing and other uses pursuant to federal law. See *United States* v. *Gardner*, 107 F.3d 1314, 1317-1318 (9th Cir.), cert. denied, 522 U.S. 907 (1997).

Since 1934, when Congress enacted the Taylor Grazing Act, 43 U.S.C. 315 *et seq.*, federal law has prohibited ranchers from grazing their cattle on federal public lands without a federal permit. Among other provisions, federal law prohibits "[t]he use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary [of the Interior] or other responsible authority." 43 U.S.C. 1733(g). And longstanding regulations prohibit a person from "[a]llowing livestock * * * to graze on or be driven across [public] lands: (i) Without a permit or lease or other grazing use authorization." 43 C.F.R. 4140.1(b)(1) and (1)(i); see *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 734-735 (2000) (discussing 1937 implementing regulations). Congress has further provided that "[p]reference shall be given in the issuance of [such] grazing permits to * * * owners of water or water rights." 43 U.S.C. 315b; see *Public Lands Council*, 529 U.S. at 734-735 (discussing the preference system).

Federal law also prohibits grazing cattle without a permit on lands within the National Forest System. The Secretary of Agriculture is authorized "to issue permits for the grazing of livestock" on such lands. 16 U.S.C. 580*l*. And longstanding federal regulations prohibit such grazing without a permit. 36 C.F.R. 222.3(a) and 261.7(a).

2. Beginning in 1978, E. Wayne Hage and later his son, Wayne N. Hage, grazed cattle on the federal lands at issue here. Pet. App. 2a.[1] Initially, the Hages applied for and received the necessary federal permits to graze cattle on the land. *Ibid.* In 1993, BLM denied an application for renewal because it had not been completed properly. *Ibid.* Shortly thereafter, the remaining Hage grazing permits expired. Since that time, the Hages have not held any federal grazing permit. Nonetheless, they have continuously grazed cattle on the federal lands at issue here. *Ibid.*

In 2007, the United States sued petitioners in the District Court for the District of Nevada for trespass, seeking damages and injunctive relief for their repeated, willful use of federal lands for livestock grazing without a permit. Pet. App. 1a-3a. The complaint alleged that, since at least 2004, petitioners had placed their cattle (and others' cattle) on federal lands in violation of federal law, describing dozens of such instances. Gov't C.A. Br. 17.

The district court denied the government's motion for summary judgment. See Pet. App. 3a. The court agreed that petitioners had, in fact, grazed cattle on the federal lands without a federal grazing permit. But the court *sua sponte* adopted the view that stock-watering rights under Nevada law—"perfected by [petitioners'] predecessors-in-interest in the late 1800s and early 1900s—provided a defense to the government's [trespass] action." *Ibid.* The court invited petitioners to file a counterclaim, which they did, claiming that the government had violated the

---

[1] E. Wayne Hage is now deceased. The petitioners here are his estate and his son, Wayne N. Hage.

Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Pet. App. 3a-4a.

3. On May 23, 2014, after a 21-day bench trial, the district court entered a final judgment, almost entirely in favor of petitioners. See Pet. App. 23a-166a. The court held that petitioners' state-law water rights gave them an "easement by necessity" over federal lands to access the water sources in which they hold state-law rights, *id.* at 151a; that that easement provided a defense to trespass for grazing cattle within a "reasonable distance" of such a water source, notwithstanding their lack of a federal permit to graze cattle on those lands, *id.* at 155a; and although the court recognized that "any numerical limitation will necessarily be arbitrary," it nonetheless selected "a half mile" from such a water source as the "reasonable distance," *id.* at 154a-155a. The court further reasoned that petitioners "are not liable for trespass where they have willfully placed cattle on federal land for the purpose of watering in places where [they] have stock watering rights, so long as [they] did not intend for the[] cattle to graze more than incidentally." *Id.* at 157a.

Applying its half-mile test, the district court found that the government had proved only two instances of trespass, for which it awarded $165.88 in damages. Pet. App. 139a. It enjoined petitioners not to place cattle on or near federal lands other than to use their water rights, and ruled that "incidental [unauthorized] grazing" consistent with its half-mile rule "shall not constitute a trespass," notwithstanding the permit requirement. *Id.* at 163a.

The district court further determined that it had jurisdiction to hear petitioners' counterclaims against

the United States arising from the cancellation of their permits in the early 1990s. Finding that the "irreparable harm" from those actions warranted injunctive relief, Pet. App. 150a, the court ordered the United States not to issue trespass or impound notices to petitioners or anyone "leasing" cattle to them without the court's permission, *id.* at 164a. It ordered petitioners to apply for "renewal grazing permits," ordered the agencies to grant them, and dictated the terms of the permits. *Id.* at 164a-165a.

Finally, the district court held federal employees in contempt. Pet. App. 150a. The court concluded that "government officials * * * entered into a literal, intentional conspiracy to deprive [petitioners] not only of their permits but also of their vested water rights. This behavior shocks the conscience of the Court." *Ibid.*

4. The court of appeals reversed, remanded, and assigned the case to a new district judge. Pet. App. 1a-22a. The court held that "ownership of water rights has *no effect* on the requirement that a rancher obtain a grazing permit (or other grazing authorization) before allowing cattle to graze on federal lands." *Id.* at 7a. The court explained that the owner of a stock-watering right "is not entitled to an easement to graze livestock on the lands within the boundaries of the federal lands," but "should be allowed a right of way over those lands to divert the water by one of the methods contemplated" by Section 9 of the Act of July 26, 1866 (Mining Act), ch. 262, 14 Stat. 253. Pet. App. 7a-8a (brackets omitted) (quoting *Hunter* v. *United States*, 388 F.2d 148, 154 (9th Cir. 1967)); see 30 U.S.C. 51; 43 U.S.C. 661; *Estate of Hage* v. *United States*, 687 F.3d 1281 (Fed. Cir. 2012), cert. denied 133

S. Ct. 2824 (2013); *Colvin Cattle Co.* v. *United States*, 468 F.3d 803 (Fed. Cir. 2006); *Diamond Bar Cattle Co.* v. *United States*, 168 F.3d 1209 (10th Cir. 1999).

The court of appeals quoted the Federal Circuit's observation in its *Estate of Hage* decision, involving the same family, that although a water right does not include a right to graze, the government may not "prevent all access to such water rights." Pet. App. 8a. The court similarly concluded that the owner of a water right "has a right to access federal lands for the sole purpose of diverting the water." *Id.* at 9a. But it concluded, consistent with the Federal Circuit's decision in *Estate of Hage*, that petitioners' stock-watering rights do not include an implied right to graze cattle on federal land. *Ibid.*

The court of appeals further held that petitioners' APA counterclaim was barred by the statute of limitations. Pet. App. 13a-16a. And the court held that the district court had grossly abused its authority by holding federal employees in contempt, summarily reversing its underlying factual findings. *Id.* at 18a.[2] The court of appeals remanded for entry of judgment in favor of the United States, computation of trespass damages and appropriate injunctive relief, and ordered the case reassigned to a different district judge on remand. *Id.* at 16a-22a.

ARGUMENT

Petitioners have grazed cattle on federal lands, for years, knowing that they lack grazing permits. Petitioners nonetheless contend that their conduct was

---

[2] The contempt order was the subject of a separate appeal. *United States* v. *Estate of Hage*, 632 Fed. Appx. 338 (9th Cir. 2016).

lawful, pressing the theory that their state-law rights to water for stockwatering purposes gave them an appurtenant right to graze cattle on federal land near a water source, notwithstanding their lack of a federal permit. Relying on well-settled case law dating back nearly 50 years, the court of appeals correctly rejected that "idiosyncratic" view. Pet. App. 3a. The court's decision is correct, consistent with the decisions of every other court of appeals to have addressed the issue, and does not warrant review.

1. The court of appeals correctly held that petitioners trespassed by grazing cattle on federal land without a grazing permit.

a. The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, cl. 2. Congress thus has the power "to control the[] occupancy and use [of public lands], to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them." *Kleppe* v. *New Mexico*, 426 U.S. 529, 540 (1976) (quoting *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405 (1917)). "That power is subject to no limitations." *Gibson* v. *Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1872); see *Light* v. *United States*, 220 U.S. 523, 536 (1911) ("The United States can prohibit absolutely or fix the terms on which its property may be used.").

As set forth above, federal law prohibits grazing on the federal lands at issue here, unless the person seeking to use federal lands for that purpose obtains a federal "permit or lease or other grazing use authorization." 43 C.F.R. 4140.1(b)(1)(i) (public lands); see 36

C.F.R. 222.3(a) and 261.7(a) (National Forest lands); see also 16 U.S.C. 580*l*; 43 U.S.C. 1733(g). Petitioners did not have a permit or other authorization, but nonetheless grazed their cattle on these lands for many years.

b. The court of appeals correctly rejected the view that petitioners have an implied easement by necessity to graze cattle on federal land within a half mile of any water source in which they have a state-law watering right.

At the outset, Congress has made it clear that owners of water rights must obtain a permit to graze cattle on federal public lands: Congress has provided that "owners of water or water rights" are given "*[p]reference*" when applying for a permit. 43 U.S.C. 315b (emphasis added). That preference necessarily presupposes that the owners cannot graze without a permit. See Pet. App. 9a n2. Otherwise, the preference would be superfluous.

Petitioners also overstate the scope of any right of way, grounded in federal law predating the Taylor Grazing Act, to access the water sources in which they have a state-law right. In Section 9 of the Mining Act, Congress provided that, whenever a person has vested rights under state or local law to use water on federal land, "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 herein specified*." Mining Act § 9, 14 Stat. 253 (emphasis added) (30 U.S.C. 51 and 43 U.S.C. 661); see *California Or. Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (Post-Mining Act patents convey "legal title to the land conveyed, and such title, and only such title, to the flowing waters thereon as

shall be fixed or acknowledged by the customs, laws, and judicial decisions of the state of their location"); *Bear Lake & River Water Works & Irrigation Co.* v. *Garland*, 164 U.S. 1, 18-19 (1896) (no right of way vests against the government "unaccompanied by the performance of any labor thereon"; "It is the doing of the work, the completion of the well, or the digging of the ditch * * * that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land.").

The Mining Act thus preserved state-law rights to use water located on unreserved public lands and provided a right of way for accessing those waters—but did not provide the grazing easement petitioners contend they have here. "[T]he established rule [is] that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983) (quoting *United States* v. *Union Pac. R.R. Co.*, 353 U.S. 112, 116 (1957)). Pursuant to the Mining Act's express terms, petitioners' predecessors may have acquired a right of way "for the construction of ditches and canals" to divert the waters in which they have usage rights, in order to access and use that water elsewhere, 30 U.S.C. 51, but not an additional, unwritten easement allowing them to graze cattle on federal land within a half-mile radius.

The courts of appeals that have addressed the issue unanimously agree that the Mining Act did not confer an appurtenant right to graze on federal lands, but instead granted only its express right of way for ditches or canals constructed pursuant to state law to

convey water to its place of use. See Pet. App. 7a-8a (collecting cases). In *Hunter* v. *United States*, 388 F.2d 148 (1967), the Ninth Circuit held that a person with a state-law water right "is not entitled to an easement to graze livestock on the lands within the boundaries of the [federal lands]," but that "he should be allowed a right of way over those lands to divert the water by one of the methods contemplated by" the Mining Act. *Id.* at 154; see Pet. App. 10a ("*Hunter* held that an owner of water rights has an easement for *diversionary* purposes only, and it rejected the argument that water rights entitle the owner to any 'additional or other easements.'") (quoting *Hunter*, 388 F.2d at 154).

The Tenth Circuit and the Federal Circuit have reached the same result. See *Estate of Hage* v. *United States*, 687 F.3d 1281, 1290 (Fed. Cir. 2012) ("water rights do not include an attendant right to graze"), cert. denied 133 S. Ct. 2824 (2013); *Colvin Cattle Co.* v. *United States*, 468 F.3d 803, 807 (Fed. Cir. 2006) ("[A]ny water right that Colvin or its predecessors obtained could not and did not include an attendant right to graze on public lands."); *Diamond Bar Cattle Co.* v. *United States*, 168 F.3d 1209, 1217 (10th Cir. 1999) (following *Hunter* and rejecting argument that ranchers have an appurtenant right to graze cattle; "[p]laintiffs do not now hold and have never held a vested private property right to graze cattle on federal public lands").

2. That rule is deeply rooted in history. Before Congress enacted the Taylor Grazing Act, unreserved public lands were held open for private preemption and settlement through such statutes as the Homestead Act, ch. 75, 12 Stat. 392 (1862), and the Mining

Act. Under those statutes, Congress gave bona fide claimants the right to "enter" and occupy specified tracts of land, along with the right to gain title to them. See Paul W. Gates, *History of Public Land Law Development* 310, 708-711 (1968). The public was free to use unoccupied, unreserved lands for hunting, fishing, livestock grazing, and other purposes, but had no right to occupy them without a valid "entry" under a federal statute. *Ibid.*; see *Buford* v. *Houtz,* 133 U.S. 320, 332 (1890) (unenclosed public land must be held open for public grazing).

a. The homesteaders and miners who settled the arid West diverted water from natural streams to remote places for use in irrigated agriculture and mining. To resolve disputes over the right to use scarce water, they applied simple priority rules allocating water rights based on who first diverted the water and put it to use. See *United States* v. *Willow River Power Co.*, 324 U.S. 499, 504 n.2 (1945). That system, the prior-appropriation doctrine, continues to govern the acquisition and administration of water rights in the arid Western States.

In Nevada, as in other prior-appropriation States, beneficial use is "the basis, the measure and the limit of the right to the use of water." *Desert Irrigation, Ltd.* v. *Nevada*, 944 P.2d 835, 842 (Nev. 1997) (per curiam) (citation omitted). The owner of a water right accordingly does not own or acquire title to the water itself, but merely holds a right to divert a specified quantity of water at a specified place and put it to beneficial use. He therefore cannot appropriate more than he needs and may not prevent others from using the water when it is not needed for the purposes of his

appropriation. *Gotelli* v. *Cardelli*, 69 P. 8, 9 (Nev. 1902).

b. An early-1880s boom in cattle ranching, coupled with the introduction of sheep onto the public lands in the 1870s, brought "increased competition for forage" and "led, in turn, to overgrazing, diminished profits, and hostility among forage competitors—to the point where violence and 'wars' broke out." *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 732 (2000). Livestock owners attempted to monopolize water sources and associated federal range lands by, *inter alia*, constructing fences enclosing them. See *Camfield* v. *United States,* 167 U.S. 518, 524-525 (1897)

Congress responded with the Act of Feb. 25, 1885, ch. 149, 23 Stat. 321 (Unlawful Inclosures Act), which expressly prohibited such exclusive claims to public rangelands. See *Camfield*, 167 U.S. at 525. In 1897, Congress authorized the construction and improvement of livestock watering reservoirs on public rangelands, but subjected the reservoirs to regulation by the Secretary of the Interior and required that they be "open to the free use of any person desiring to water animals of any kind." Act of Jan. 13, 1897, ch. 11, § 1, 29 Stat. 484.

In 1905, the United States inaugurated a permit system for grazing use of forest reserves under the Organic Administration Act, ch. 2 [part], 30 Stat. 34; see *Light*, 220 U.S. at 537-538 (upholding injunction against grazing cattle in violation of those regulations); *United States* v. *Grimaud*, 220 U.S. 506, 521-523 (1911) (upholding regulations). But unreserved public lands remained open for public grazing use. In 1916, Congress reserved from settlement all "lands containing water holes or other bodies of water need-

ed or used by the public for watering purposes" and "lands necessary to insure access by the public to watering places reserved hereunder and needed for use in the movement of stock." Stock-Raising Homestead Act, ch. 9, § 10, 39 Stat. 865. And in 1926, President Coolidge issued Public Water Reserve No. 107, which withdrew from settlement, *inter alia*, "every smallest legal subdivision of the public-land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole," to prevent the monopolization of water sources on public lands needed for stock watering. 43 C.F.R. 292.1 (1938); see *United States* v. *State*, 959 P.2d 449, 451-453 (Idaho 1998), cert. denied, 526 U.S. 1012 (1999); *United States* v. *City & Cnty. of Denver*, 656 P.2d 1, 31-32 (Colo. 1982) (en banc).

c. As competition for range resources increased, States enacted legislation to regulate federal rangelands within their boundaries by such means as apportioning the range among user groups. Where they did not conflict with federal law, these measures were upheld as a valid exercise of state police power. See *Omaechevarria* v. *State of Idaho*, 246 U.S. 343, 351-353 (1918) (exclusion of sheep owners a valid exercise of state police power where it did not conflict with the Unlawful Inclosures Act).

In 1925, Nevada enacted a range-regulatory statute, Nev. Rev. Stat. Ann. §§ 533.485-533.510 (LexisNexis 2012), declaring stock-watering on federal rangelands a "beneficial use" of water and recognizing "a subsisting right to water range livestock at a particular place" on public rangelands. This law protected existing range use—regardless of whether it was consistent with the Unlawful Inclosures Act—against

new stockwater appropriations in an area of the range sufficient to graze the livestock watered at a particular place on federal lands. See *Itcaina* v. *Marble*, 55 P.2d 625, 627 (Nev. 1936).

d. In 1934, Congress enacted the Taylor Grazing Act, for the first time authorizing exclusive use of areas of the unreserved public rangelands for livestock grazing. This "marked a turning point in the history of the western rangelands," and Congress aimed to "stop injury" to federal lands from "overgrazing and soil deterioration." *Public Lands Council*, 529 U.S. at 731, 733 (citation omitted). Notably, Congress did not grant or recognize private rights in the public lands. Instead, it authorized the Secretary of the Interior to issue grazing permits and leases, subject to conditions to protect the lands. See 43 U.S.C. 315b. The Taylor Grazing Act authorized the Secretary to divide the public rangelands into grazing districts; to specify the amount of grazing permitted in each; to issue grazing leases or permits to "settlers, residents, and other stock owners"; and to facilitate the construction of "wells, reservoirs and other improvements necessary to the care and management of the permitted livestock." 43 U.S.C. 315; see 43 U.S.C. 315a, 315b, 315c. As noted above, the Act gives "preference" with respect to permit issuance to "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." 43 U.S.C. 315b; see *Public Lands Council*, 529 U.S. at 734.

The Taylor Grazing Act further provides that "issuance of a permit * * * shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. 315b. From their inception, the implementing

regulations have similarly "made clear that the [federal government] retained the power to "modify, fail to renew, or cancel a permit." *Public Lands Council*, 529 U.S. at 735. The Act also provides that it is not to be "administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacture, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands." 43 U.S.C. 315b. For state-law water rights under the 1866 Mining Act, therefore, the Taylor Grazing Act preserved (but did not expand) preexisting rights of way that had vested. And in the Granger-Thye Act, ch. 97, § 19, 64 Stat. 88 (16 U.S.C. 580*l*), Congress authorized a similar permit program for grazing on National Forest System lands that also did not expand any preexisting rights of way.

e. The lengthy history of federal law in this context thus makes clear that petitioners (and their predecessors-in-interest) have never had a property right to graze cattle on federal lands. The United States' prior policy of allowing an implied license to graze cattle on public lands did not confer any right to do so or restrict the government's ability to revoke that implied permission. In the Taylor Grazing Act and the Granger-Thye Act, Congress replaced the implied-license scheme with express permitting requirements, under which the issuance of a grazing permit similarly does not confer property rights. Accordingly, to graze cattle on the federal lands at issue in this case, petitioners must obtain permission from the federal government—via a permit—like everyone else.

Petitioners' water rights give them preference for a permit on public lands, and they may also have a right

of way for ditches and canals. But they do not have an appurtenant easement to graze. Indeed, the federal government has never recognized such a grazing right, which would undermine the Secretary of Agriculture's ability to protect National Forest System lands from "depredations," 16 U.S.C. 551, and the Taylor Grazing Act's aim of preventing "overgrazing and soil deterioration," *Public Lands Council*, 529 U.S. at 733 (citation omitted).

Nevada in turn lacks authority to grant property interests in the lands at issue here, which the United States has owned continuously since it acquired them from Mexico. The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). And it is well established that a property right in federal lands cannot be appropriated by grazing livestock on them. See *Light*, 220 U.S. at 535 (United States' policy of allowing grazing on unreserved, unoccupied public lands "did not * * * deprive the United States of the power of recalling any implied license under which the land had been used for private purposes"); see also *Ansolabehere* v. *Laborde*, 310 P.2d 842, 845-846 (Nev.) (concluding that the Taylor Grazing Act preempted Nevada statutes allowing for the appurtenant use of land adjacent to water subject to a water right), cert. denied, 355 U.S. 833 (1957).

3. Petitioners contend (Pet. 2-3, 11-12) that the court of appeals' decision here conflicts with the Federal Circuit's decision in *Estate of Hage*, involving the same family. But no such conflict exists. In *Estate of Hage*, the Federal Circuit *reversed* an award under

the Fifth Amendment's Just Compensation Clause for the alleged taking of petitioners' stockwater rights by the government's "construction of fences around water sources on federal lands in which they held grazing permits" at the time. 687 F.3d at 1288; see *id.* at 1289 (claim limited "to the time period when the Hages 'still had a grazing permit'") (citation omitted). The Federal Circuit explained that "water rights do not include an attendant right to graze," but that "it does not follow that the government may prevent all access to such water rights." *Id.* at 1290. Applying that standard to the circumstances presented there, the court held that no uncompensated taking occurred because the Hages did not show "that the fences prevented the water from reaching their land" or otherwise prevented them from putting the water to beneficial use. *Ibid.*

Nothing in the court of appeals decision here is to the contrary. Indeed, the court of appeals quoted approvingly the Federal Circuit's conclusion that "water rights do not include an attendant right to graze," Pet. App. 8a (quoting *Estate of Hage*, 687 F.3d at 1290), and applied the same rule here to reject petitioner's claims, *id.* at 9a. Petitioners point to the Federal Circuit's statement that the government may not "prevent all access to such water rights" without just compensation. *Estate of Hage*, 687 F.3d at 1290. But the court of appeals here similarly concluded that "an owner of water rights * * * has a right to access federal lands for the sole purpose of diverting the water." Pet. App. 9a. The cases accordingly articulate a materially identical legal standard.

The Federal Circuit concluded that petitioners' access rights were potentially restricted, but the facts of

that case were different: The case was limited "to the time period when the Hages 'still had a grazing permit,'" *Estate of Hage*, 687 F.3d at 1289 (citation omitted), and it involved (ultimately unfounded) allegations that the government had physically taken the water by constructing fencing to prevent access. Here, by contrast, petitioners had no permit during the period covered by the United States' trespass claim, and there are no allegations that the government imposed any physical barrier preventing access to stockwater on federal lands. Petitioners' defense instead rested solely on the theory that their state-law water right gave them an appurtenant right to graze cattle on federal lands, notwithstanding their lack of federal permits. The Federal Circuit and the Ninth Circuit are in full agreement that this theory is baseless: "[W]ater rights do not include an attendant right to graze." *Id.* at 1290. This case accordingly presents no conflict among the circuits.

4. Contrary to petitioners' assertion (Pet. 15), the court of appeals' decision in this case has no effect on "the right of millions of Americans * * * to access their water, their property, in the historical and customary manner in which the rights vested." The court merely reaffirmed the settled legal regime that has governed the use of federal lands for livestock grazing for more than 80 years. The court's decision thus only affects a handful of ranchers who have chosen to ignore the federal permitting requirement on the basis of a long-discredited legal theory. See *Hunter*, 388 F.2d at 154.

Petitioners assert (Pet. 3) that "bring[ing] cattle to the water is the only way to put the water to beneficial use," and (Pet. 12) that "construct[ing] a ditch or canal

* * * would involve millions (or tens of millions) of dollars in cost and expense." If it is true that their water rights are "of little utility if their cattle have no place to graze,"[3] however, "the fault lies with [petitioners], who were fully apprised of the consequences of failing to renew their permits." *Diamond Bar*, 168 F.3d at 1217. Petitioners "do not now hold and have never held a vested private property right to graze cattle on federal public lands." *Ibid.* Rather, if they wish to graze cattle on federal lands, they must obtain federal permission. See Pet. App. 9a. Petitioners' persistent refusal to apply for such permits presents no question warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
JOHN C. CRUDEN
Assistant Attorney General
WILLIAM B. LAZARUS
DAVID C. SHILTON
ELIZABETH ANN PETERSON
Attorneys

SEPTEMBER 2016

[3] Some ditches already exist, and the government did not allege trespass on any land within 50 feet of those ditches. See Gov't C.A. Br. 17-18.