No. 06-5012

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

COLVIN CATTLE COMPANY, INC.

Plaintiff-Appellant,

v.

UNITED STATES

Defendant-Appellee

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
CASE NO. 03-1942L
SENIOR JUDGE JOHN P. WIESE

BRIEF OF *AMICUS CURIAE* NATURAL RESOURCES DEFENSE COUNCIl IN SUPPORT OF THE UNITED STATES

John Echeverria
Georgetown Environmental Law & Policy Institute
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9850
(202) 662-9005 (fax)

April 4, 2005

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Colvin Cattle Company, Inc. v. United States

No. 03-1942L

Certificate of Interest

Counsel for Natural Resources Defense Council certifies the following:

1. The full name of every party or amicus represented by me is:
   Natural Resources Defense Council

2. The name of the real part in interest (if the party named in the caption is not the real party in interest) represented by me is:
   None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
   None

_____

John D. Echeverria
Counsel for *Amicus Curiae*
Natural Resources Defense Council

Date: April 4, 2006

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Natural Resources Defense Council ("NRDC") respectfully submits this brief *amicus curiae* in support of the United States urging the Court to affirm the judgment below.

INTERESTS OF *AMICUS CURIAE* NRDC

NRDC is a not-for-profit conservation organization with more than 530,000 members nationwide, and with more than 180,000 members in western states with public lands being utilized for grazing purposes, including more than 3,000 members in Nevada. NRDC members use and enjoy many public lands subject to grazing permits and leases for a variety of recreational, ecological and other purposes. Through its scientific, litigation, and other programs, NRDC has long been active in efforts to promote and encourage environmentally sound land management of public lands, including grazing. NRDC has participated, either as a direct party or as an *amicus curiae*, in a number of cases addressing the relationship between water rights and grazing on federal public lands.

STATEMENT OF FACTS

NRDC adopts the statement of facts of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has filed a comprehensive brief explaining why the Court of Federal Claims properly rejected the claims asserted by Colvin Cattle in this case. NRDC will not burden the Court by covering the same ground as the United States, although NRDC supports and joins in the presentation by the United States. Instead this brief seeks to assist the Court by highlighting three specific points either not addressed or not discussed in detail by the United States.

First, this brief seeks to explain the larger political and legal controversy out of which this litigation arose. The most remarkable feature of this case is that the plaintiff, after paying grazing fees to the Bureau of Land Management for some 25 years, adopted the novel position that the federal lands at issue do not belong to the United States but instead belong to the state of Nevada. In accord with this new view, Colvin Cattle ceased paying its grazing fees, triggering the events that eventually led to the loss of its grazing leases, the removal of the range improvements, and the impoundment of its cattle. This ideological test case grew out of the so-called Wise Use Movement and extravagant legal theories, promoted by rancher Wayne Hage and others, questioning over a century of congressional

practice and Supreme Court precedent regarding cattle grazing on western public lands. NRDC believes that an appreciation of this larger context will assist the Court in understanding why this dispute arose and why the judgment of the court below should be summarily affirmed.

Second, this brief seeks to assist the Court by examining in some detail several of the interlocutory orders issued by the Court of Federal Claims in Hage v. United States, a case involving facts very similar to the facts of this case. The Hage case has been pending for 15 years, and the Court of Federal Claims still has not resolved whether there is any basis for holding the United States liable, either under the Takings Clause or on some other theory. Colvin Cattle repeatedly cites the opinions in Hage, suggesting that the rulings in that case support its claim. In fact, the most directly relevant ruling in Hage, rejecting the claim that an appropriative water right includes a property right to graze cattle on public lands, supports the position of the United States in this case. To the extent Colvin Cattle seeks to rely on the separate ruling in Hage that Hage's ditch rights include a right to forage alongside a ditch right of way, that ruling is irrelevant to the resolution of this case and, in any event, is mistaken.

Finally, this brief seeks to assist the Court by addressing why the

United States should not be held liable under the Takings Clause on the ground that the Bureau of Land Management allegedly allowed wild horses and burros to use plaintiff's water. As the United States explains, respectable precedent supports rejection of this claim on the ground that wild horses and burros cannot be viewed as "instrumentalities" of the government. But, in NRDC's view, the more fundamental reason this claim should be rejected is that all wild animals are held by the government in trust for the people and no private property owner can demand compensation for harm done to his property caused by wild animals. This conclusion is supported by the overwhelming weight of authority around the country, as well as binding precedent of this Court.

ARGUMENT

I. THIS LITIGATION GREW OUT OF A RADICAL POLITICAL AND LEGAL EFFORT TO CHALLENGE FEDERAL OWNERSHIP AND CONTROL OF FEDERAL PUBLIC LANDS

This takings case, in its origins, is a manifestation of a larger legal and political movement challenging the federal government's ownership and management authority over federal public lands. As the Court of Federal Claims recounts, this dispute arose when Colvin Cattle ceased paying its grazing fees, the BLM responded in due course with a notice of trespass, and

Colvin Cattle "in turn challenged the federal government's ownership of the land in question and submitted payment of the grazing fee to the Esmeralda County treasurer under the theory that the state, rather than the federal government, was the legitimate owner of the land " Colvin Cattle Co., Inc. v. United States, 67 Fed.Cl. 568, 569 (Fed. Cl. 2005). Thus, rather than a traditional takings case based on the alleged burdensomeness of legitimate government action, this case, "at bottom," as Judge Wiese correctly observed, "is an action questioning the government's *authority* to prohibit grazing on public lands." Id. at 572 n.4 (emphasis added).

In making this broad challenge to the federal government's ownership of and control over federal lands Colvin Cattle was asserting a central tenet of the so-called "Wise Use Movement," made up of a diverse coalition of resource industries and individuals committed to libertarian ideology. One of the leading proponents of this viewpoint has been Wayne Hage, the author of STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS (1989), and the plaintiff in the eponymous takings case pending in the Court of Federal Claims. In Nevada, the primary proponent of this viewpoint has apparently been the Nevada Committee for Full Statehood, which quotes its chairman as saying: "We do not recognize federal control and management

of the 87% of Nevada's lands the feds claim to own." See www.nevadafullstatehood.com (quoting O.Q. Chris Johnson, Chairman, Nevada Committee for Full Statehood). See also Ben Colvin, "I'm Not a Trespasser on My Own Ranch," (Aug. 2, 2001), at http://www.nevadalivestock.org/ben_colvin.htm.

This case is not the only recent litigation to raise such a fundamental challenge to federal control of federal lands. In United States v. Gardner, 107 F.3d 1314, 1317 (9th Cir. 1996), the appeals court considered, and squarely rejected, a claim by another public land rancher who refused to comply with Forest Service restrictions in burned-over areas, claiming that "the federal government does not have title to the land on which the grazing took place." Similarly, in United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996), the federal district court rejected a county ordinance declaring that the United States does not own federal public land in the county and that the county owns all rights of way for roads and corridors crossing public lands. Moreover, the Colvin Cattle case is itself only one of several cases pending in the Court of Federal Claims presenting essentially identical takings claims based on federal regulation of the public range. See, e g., Hage v. United States, 51 Fed.Cl. 570 (2002); Walker v. United States,

69 Fed.Cl. 222 (2005); Sacramento Grazing Assoc. v. United States, 66 Fed.Cl. 211 (2005).

The legal theory advanced by Colvin Cattle and similar advocates is based on two arguments. The first is that the Property Clause, see Art. 4, § 3, does not extend to lands in states in the western United States, such as Nevada. See Joel F. Hanson, *The Cliff & Bertha Gardner Stories and Events,* Nevada Committee for Full Statehood, at http://www.nevadafullstatehood.com/cliff.htm ("The FedGov has converted article IV, meant ONLY to govern territories outside of the admitted States of the Union, into an instrument of tyranny and usurpation."). The second argument is that Nevada's 1864 "Disclaimer Clause," Nevada Enabling Act, 13 Stat. 30 (1864), did not validly disclaim Nevada's potential interests in public lands within the state. There is no merit to either argument.

First, since at least 1840, the Supreme Court has recognized that the Property Clause applies to federal lands within all the States. See United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840) (rejecting the argument that the retention of federal lands within Illinois would encroach upon state rights, stating that Illinois "surely cannot claim a right to the public lands within her limits"). See also Stearns v. State of Minnesota, 179 U.S. 223,

243 (1900) ("Congress … had the power to withdraw all the public lands in Minnesota from private entry or public grant."). Thus, as the Supreme Court explained in the landmark case of United States v. Utah Power & Light Co., 243 U.S. 389 (1917):

> "From the earliest times Congress by its legislation, applicable alike in the states and territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines, and the like. The states and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained."

Id. at 404.

More recently, in Kleppe v. New Mexico, 426 US. 529 (1976), the Supreme Court reaffirmed Congress's broad powers over the federal lands, stating

> "[T]he [Property] Clause, in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands. United States v. San Francisco, 310 U.S. 16, 29-30 (1940); Light v. United States, 220 U.S., [523,] 537 (1911); United States v. Gratiot, 14 Pet., at 537-538 (1840). And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that '(t)he power over the public land thus entrusted to Congress is without limitations.'"

Id., at 539. See also Id. at 540 ("Even over public land within the States,

"[t]he general government doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.'").

Only one U.S. Supreme Court decision – the infamous decision in Dred Scott v. Sandford, 60 U.S. 393 (1856) – ever provided even arguable support for the argument that the Property Clause does not apply in the western states. In that case, Justice Taney ruled that the Property Clause was limited to the original thirteen states. Id. at 437. See generally Peter A. Appel, *The Power of Congress "Without Limitation" in the Twenty-first Century*, 24 Pub. Land & Resources L. Rev. 25, 31 (Winter 2004). However, this holding is no longer good law, having been overruled by Kleppe and the long line of precedent discussed above. See, e g., United States v. Vogler, 859 F.2d 638, 641 (9th Cir. 1988) (rejecting a challenge to federal authority under the Property Clause, reasoning that Kleppe, not Dred Scott, is controlling as to the scope of the clause).

As to the second argument, the federal and Nevada courts have consistently upheld the validity of the Nevada "Disclaimer Clause." See, e.g., United States v. Gardner, 107 F.3d. at 1319; United States v. Nye

County, 920 F.Supp. 1108; In re Calvo, 253 P. 671, 675 (1927). As the Ninth Circuit explained in Gardner, the United States already possessed ownership of and authority over the federal public lands by virtue of the Property Clause. The Nevada Disclaimer Clause is thus "declaratory of the rights already held" by the national government, "and as such is valid under the United States Constitution." Gardner, 107 F.3d at 1320.

The legal theories advanced to support Colvin Cattle's resistance to federal authority have obviously morphed over time. Colvin Cattle is represented by the same counsel who represents Wayne Hage in his takings case. Apparently inspired by certain orders in Hage suggesting that an appropriative water right might include a property right in federal lands, see Hage v. United States, 35 Fed.Cl. 147, 174-76 (1996) (permitting Hage to proceed with his "novel" claim), Colvin Cattle subsequently asserted an identical theory in this case. Colvin Cattle's current legal theory is obviously a far cry from its original position that the lands at issue belong to the state of Nevada. In any event, Colvin Cattle's current legal argument is no more persuasive than its original theory. Indeed, as we discuss below, the latest opinion in the Hage case, the apparent inspiration for this case, actually refutes the argument.

II. THE INTERLOCUTORY ORDERS IN HAGE, TO THE EXTENT RELEVANT TO THIS CASE, SUPPORT REJECTION OF COLVIN CATTLE'S CLAIM.

The United States has explained in thorough fashion why the Court should reject Colvin Cattle's argument that its appropriative water right can be defined to include a vested property right to graze cattle on public lands. Rather than repeat the sound arguments presented by the United States, NRDC will focus on one specific aspect of plaintiff's argument, its effort to rely on the interlocutory orders in the long-running case of Hage v. United States. See Colvin Cattle Brief, at 30, 44. As we explain below, the rulings in Hage actually support the decision of the Court of Federal Claims rejecting Colvin Cattle's taking claim. The Court in Hage rejected the very argument Colvin Cattle is making in this case, that a public land rancher's water right includes an associated right to graze on public lands. Far from supporting Colvin Cattle's position, Hage refutes it. [1]

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[1] While the Court in Hage has not reached the issue of whether the government actions in that case effected a "taking," the Court has suggested that it might be guided on that issue by the analysis in Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed.Cl. 313, 318 (2001). See Hage, 51 Fed. Cl. at 576. See also Colvin Brief, at 51 (citing Tulare Lake). The Court in Tulare Lake ruled that a restriction of use of water for irrigation purposes was appropriately analyzed as a physical occupation of private property supporting a per se finding of a taking. This holding is wrong on a number of grounds, including the fact that a water right is merely a usufructuary right incapable of being "physically occupied." See Desert Irr.

At the same time, the court in Hage did rule, focusing on a different issue, that Hage possessed a vested right to the forage within 50-feet of the ditch rights of way that crossed his allotments. This ruling cannot help Colvin Cattle, however, because Colvin Cattle is not claiming any right in public lands based on ditch rights. The question of whether a ditch right includes a right to graze cattle alongside the ditch is a different question from whether a rancher's appropriative water right includes a right to graze across an entire grazing allotment. Equally important, as we explain below, the court in Hage was mistaken in concluding that a ditch right includes an adjacent grazing right. Thus, even if this particular ruling in Hage were relevant to this case (it is not), the Court should disregard it because it is wrong. In either event, Colvin Cattle is mistaken in suggesting that the rulings in Hage support its taking claim.

The facts of Hage are very similar to the facts of this case. Wayne

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Ltd. v. Nevada, 944 P.2d 835, 842 (Nev. 1997), quoting N.R.S. 538.530 ("beneficial use" is "the basis, the measure and the limit of the right to the use of water."); Washoe County v. United States, 319 F.3d 1320, 1322 (Fed. Cir. 2003) (a water right is "usufructuary in nature, meaning that it is a 'right to use' water in conformance with applicable laws and regulations"). Not surprisingly, therefore, the holding in Tulare Lake has been widely criticized. See , e.g., Klamath Irrigation District v. United States, 67 Fed.Cl. 504, 538 (2005); Allegretti & Co. v. County of Imperial, 2006 WL 773036 (Cal.App, Mar. 28, 2006).

Hage owned a ranch in Nye County, Nevada, and had two grazing permits for lands within the Toiyabe National Forest. Hage v. United States, 35 Fed.Cl. at 153 (1996). In the 1980s, Hage had numerous disputes with the U.S. Forest Service revolving around efforts by federal land managers to control the number and location of cattle on Hage's allotments in order to protect and restore the land and Hage's insistence that he, and he alone, could determine the grazing regime on public lands. Hage, 35 Fed.Cl. at 154. In 1990, after Hage had repeatedly violated his grazing permits, the Forest Service suspended one of his permits for five years and cancelled 25% of the other. Id. at 154-5. Eventually, after Hage continued to defy Forest Service orders, the government impounded his cattle. Id. at 155. In 1991, Hage sued the federal government claiming a takings of his property rights in the permits, water, ditch right of way, and forage. Id. at 150. Remarkably, after 15 years, the Court has not yet reached a final resolution of the liability issues in the case, much less handed down a final judgment.

It is hardly remarkable that Colvin Cattle would invoke Judge Loren Smith's rulings in Hage, given that the Court in that case has adopted the most extreme pro-property rights position in any takings case involving a

public land rancher. Yet, as it has turned out, even that Court has been unwilling to go as far as Colvin Cattle seeks, and specifically rejected the very takings argument Colvin Cattle is making in this case. To be sure, in an "Opinion" issued in 1996, see Hage v. United States, 35 Fed. Cl. 147, 176 (1996), and in a "Preliminary Opinion" issued in 1998, see Hage v. United States, 42 Fed. Cl. 249, 251, Judge Smith considered the possibility that an appropriative water right under Nevada law could be interpreted to include a right to graze cattle on public lands. However, in a subsequent order the Court abandoned this view and concluded that "plaintiff has no right to the 52,000 acre surface estate that they claim." See Hage v. United States, 51 Fed. Cl. 570, 587 (2002). Based on its analysis of the Mining Act of 1866, the Court rejected the claim that Hage could assert a property interest in the federal range based on his possession of water rights, stating that "the Act established water rights, but did not include more than a right-of-way to access those water rights." Id. at 589.

Thus Hage, properly read, supports rejection of Colvin Cattle's claim of a property interest in the federal range. Just as the Court in Hage rejected the claim "to the 52,000 acre surface estate" Hage asserted in that

case, the Court in this case should affirm rejection of the claim that Colvin Cattle's water rights entail a property right in some 522,000 acres of federal land. See Complaint, at 11.

While Colvin Cattle's position is not entirely clear, it also may be seeking to support its claim of a property right in the federal range by relying on the ruling in Hage that a public land rancher can claim a right to graze cattle within 50 feet of each side of a ditch. See Colvin Cattle Br. at 30 (referencing holding in Hage concerning ditches). This argument is unavailing because that asserted property right is very different, legally and factually, from the property right Colvin Cattle is claiming in this case. A forage right along a ditch right of way (if it existed at all) would be limited to the narrow band alongside the ditch. By contrast, the claim of a property right in the range presumably extends to the entire area of the public lands grazed by a particular rancher's cattle. Legally, the argument for a purported forage right alongside the ditch is ostensibly grounded in the legislative history of the Mining Act of 1866 addressing ditch rights as well as certain other federal statutes creating 50-foot buffers in other contexts. By contrast, the purported public range right is based, as explained in Colvin Cattle's Brief, on the theory that a rancher

has vested rights in the entire area where he has put a water right to beneficial use through grazing operations. Thus, there is no reason to believe that the existence of a forage right alongside a ditch right of way, even if valid, would support the claim to a broader public land forage right. Because Colvin Cattle's claim of property right in the federal range is not based on any claimed ditch right, the ruling in Hage regarding ditch rights cannot help Colvin Cattle in this case.

Furthermore, and in any event, the court in Hage was simply mistaken in concluding that a public land rancher with a ditch right of way can assert a property right to run cattle within 50 feet of the ditch. As we explain below, the ruling is contrary to federal as well as state law.

The Mining Act of 1866. First, the ruling in Hage on ditch rights is contrary to the plain language of the Mining Act of 1866 and all relevant precedent interpreting the Act. The Act acknowledges and confirms a "right of way for the construction of ditches and canals" for the purpose of transporting water. 43 U.S.C. § 661. Nothing in this language suggests an intent to create rights beyond the right to construct, maintain, and use the ditch itself. The courts that have specifically addressed the argument that rights in ditch rights of way extend beyond the right of way have rejected

the argument. See, e.g., Hunter v. United States, 388 F.2d 148, 154 (9th Cir. 1967); Utah Light & Traction Co. v. United States, 230 F. 343, 345 (8th Cir. 1915). More generally, the position in Hage is inconsistent with over one hundred years of Supreme Court precedent affirming the federal government's plenary authority over federal public lands. See, e.g., United States v. Fuller, 409 U.S. 488, 491-492 (1973); Light v. United States, 220 U.S. 523, 535 (1911).

Examination of the legislative history of the Mining Act of 1866 confirms that a ditch does not include a right to adjacent forage. The House of Representative's original version of the Mining Act did include a provision granting ditch owners rights on 50 feet of each side of a ditch "for the purposes of repairs and construction." 1866 Cong. Globe 3141 (June 13). But the Senate version of the bill did not include a similar provision, and the final legislation adopted the Senate's approach See S. 152, 39th Cong., (1866). Following the traditional rule of legislative interpretation, the fact that Congress considered adopting language establishing a 50-foot buffer but then omitted the language from the final legislation is strong evidence that the legislature rejected this idea. See e.g., Secretary of the Interior v. California, 464 U.S. 312, 330 (1984) (holding

that the Senate-House compromise resulting in the exclusion of House language demonstrated that Congress intended to reject the House proposal).

Furthermore, and equally important, the proposal that Congress considered was for a right of way for the limited purpose of facilitating "repairs and construction." 1866 Cong. Globe 3141 (June 13). Indeed, the House bill said that "the use and occupation hereby granted shall be for the purpose named and no other." See 1866 Cong. Glob 3131 (June 13). Thus, even if Congress had embraced the House version, the resulting legislation still would not have supported a 50-foot buffer for grazing purposes.

Notwithstanding this evidence that Congress did not intend to establish a 50-foot buffer alongside ditches on public lands, much less a 50-foot buffer for grazing purposes, the Court in Hage ruled that Congress had authorized creation of a 50-foot right of way for grazing purposes. To support this conclusion, the Court in Hage relied on three arguments: (1) Congress included a 50-foot buffer in other public land legislation, which supposedly demonstrates that Congress implicitly intended the same dimension to apply under the Mining Act of 1866; (2) evidence of "the historical use of the ditches and water at issue for stockwatering and livestock maintenance," and (3) evidence about the "nature and intent" of

federal legislation "dealing with western land management [bearing] out the conclusion that the United States intended to respect and protect the historic and customary usage of the range." See Hage, 42 Fed.Cl. at 250-51; see also 51 Fed.Cl. at 581. In totality, the Court said, these considerations supported a finding, "as a matter of common sense, that implicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water." Hage, 42 Fed.Cl. at 251. Even assuming it could ignore the plain language of the Mining Act of 1866, none of these points supports the Court's conclusion.

The Court's reliance on provisions in other statutes to infer the implicit existence of the same provision in the Mining Act of 1866 is wholly illegitimate. The Court referred, for example, to the 1891 Ditches and Canals Act, see 43 U.S.C. § 946, which granted ditch owners a 50-foot right of way alongside ditches under certain circumstances. But this separate enactment merely provided that a public land rancher could use the right of way "only so far as may be necessary for the construction, maintenance, and care of said canal or ditch." 43 U.S.C. § 949. See also Whitmore v. Pleasant Valley Coal Co., 75 P. 748, 749 (Utah 1904) (holding that the 1891 Act established "no right to occupy or use the surface of the land for any other

purpose than that specified"). Thus, even if these other statutory provisions could be read into the Mining Act, they would not necessarily support a 50-foot buffer for grazing purposes. More fundamentally, the fact that Congress knew how to provide for a 50-foot buffer, as it did in other legislation, affirmatively demonstrates that Congress did not intend to create a similar buffer when it enacted the 1866 Mining Act. Cf. Touche Ross & Co. v. Redington, 442 U.S. 560, 572 (1979) (concluding that statute could not be interpreted to provide a private damage remedy because "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly").

The Court's reliance on evidence of "historical use" of the area adjacent to ditches for grazing purposes also is unavailing. If historical use were sufficient to establish public land ranchers' property rights in the public range there would be no debate whatsoever about the existence of such rights, because it is clear that ranchers have long utilized the public range for grazing purposes. But as the Supreme Court has stated over and over again, customary ranching practices on the public range are insufficient as a matter of law to establish private property rights in the public range. See, e g., Omaechevarria v. State of Idaho, 246 U.S. 343, 352 (1918); Light,

220 U.S. at 535. Furthermore, it is a bedrock principle of federal land law that private rights in federal public lands cannot be created by implication. See United States v. Union Pacific Railroad Co., 353 U.S. 112, 116 (1957) ("nothing passes except what is conveyed in clear language"). While the Mining Act of 1866 may not be, strictly speaking, a grant of rights in federal lands, surely the same basic principle applies in this context.

Finally, Congress's intent to "respect and protect the historic and customary usage of the range" lends no support to Hage's claim to private rights in the public range. Congress' intent can readily be adhered to without manufacturing private property rights in the public lands. From the Anti-Inclosure Act of 1885, see 43 U.S.C. § 1061, to the Federal Land Policy and Management Act of 1976, see 43 U.S.C. § 1701, Congress has recognized that grazing is a valuable and legitimate use of public lands under the overall policy of multiple use of the public lands. Continued use of the public lands for grazing purposes, in appropriate locations and subject to appropriate conditions , does not depend on inventing a property right to graze on public lands. See generally Jeffrey J. Wechsler, *This Land is Our Land: Ranchers Seek Private Rights in the Public Rangelands*, 21 J. L. Resources & Envtl. Law 461, 474 (2001) (criticizing the Hage court's

absolutist reasoning).

In sum, the ruling in Hage provides a poor guidepost in this case because it disregards a bedrock principle of federal public land law:

> "All the public lands of the nation are held in trust for the people of the whole country. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine."

Light, 220 U.S. at 537.

Nevada Law. As the Court in Hage explained, wholly apart from the question of whether the Mining Act of 1866 authorized the kind of expansive ditch rights Hage claimed, the validity of Hage's claim to such rights ultimately depended upon whether Nevada law defined a ditch right to include a buffer alongside the ditch for grazing purposes. See Hage, 51 Fed.Cl. at 581.

In a remarkable analysis, the Court in Hage purported to find evidence of a 50-foot state-law rule in the statements of a single federal legislator debating the Mining Act of 1866. In the Court's words, "The act's legislative history shows that Congress believed that Western water and easements law generally allowed a right-of way for 50 feet on both sides of a ditch." Id. Specifically, the Court relied on a statement made by the sponsor of the House bill while proposing to add specific language

establishing a 50-foot buffer that "the 50-foot ditch right-of-way was simply a codification of pertinent state and local law in the Pacific States: 'We propose, in the bill as amended, that they shall have the right of way as they now have, respecting at the same time the rights of possession as established by the laws of the State.' 1866 Cong. Globe 3141 (June 13)." Id. at 582. Based on this evidence alone, the Court in Hage concluded, "The dimensions used in the House's version of the bill demonstrate Congress understood and accepted the local law and custom when it drafted, debated, and passed the 1866 Act." Id.

For a host of reasons, this analysis fails to provide convincing support for the conclusion that Nevada law provides for a 50-foot buffer for grazing purposes alongside a ditch. A single federal legislator is hardly an authoritative guide concerning the content of state law generally, much less the law of a specific state. The statement is made more unreliable by the fact that it was offered by a legislator making the self-serving argument that his proposed amendment would work no change to existing law. Last, but certainly not least, the legislator failed to persuade Congress to accept his proposed amendment, making it impossible to credit his rationale for the amendment as representative of

the opinion of Congress as a whole.

The Court of Federal Claims identified no direct support in Nevada law for the notion that Nevada recognizes a 50-foot buffer alongside a ditch, and we are aware of no such authority. Indeed, as explained by the court below, in 1925 Nevada adopted comprehensive legislation, the Stockwatering Act, addressing cattle grazing on public lands, including the acquisition of associated stockwatering rights. The Nevada Supreme Court has consistently interpreted this legislation as not creating any vested private rights in the federal range. See In re Calvo, 253 P. at 675 ("The state is not asserting any right or title to the public domain under [the 1925 Stockwatering Act]. All that the state seeks to do pursuant to the [Act] is to exercise police regulations over the public domain."); Itcaina v. Marble, 55 P.2d 625, 629-30 (1936)("No property right can be acquired by [grazing livestock upon the public domain]. All persons so using the public domain do it merely by sufferance of the federal government or, as it is sometimes designated by the courts, by virtue of an implied license.").

III. THE DOCTRINE OF PUBLIC OWNERSHIP OF WILDLIFE BARS COLVIN CATTLE'S CLAIM OF A TAKING OF ITS WATER RIGHTS BY WILD HORSES AND BURROS

The United States contends that it cannot be held liable under the Takings Clause for allegedly permitting wild horses and burros to use Colvin Cattle's water because a wild animal is not a governmental "instrumentality." See U.S. Br. at 42-43. Substantial precedent supports the position of the United States, see Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986) (en banc); Bradshaw v. United States, 47 Fed Cl. 549, 554 (2000), and the Court need not go beyond this argument and these precedents to resolve this aspect of the case. However, NRDC submits that the conclusion of the court below also is supported by the more fundamental principle that wild animals are "owned" by the sovereign in trust for the general public and no private property owner can assert a right to recover compensation for injuries to private property caused by wild animals.

As the Supreme Court observed over 100 years ago, wild animals were deemed under Roman law, and later in English law, "as held in common for the benefit of all citizens." Geer v. Connecticut, 161 U.S.

519, 522 (1896). These public rights in wildlife were subsequently passed on to the individual States, vesting each State with "absolute control" over the taking of fish and wildlife by private persons." Id. at 523. In the words of the Supreme Court of California:

> "The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so."

Ex parte Maier, 37 P. 402, 404 (Cal. 1894). The State of Nevada adheres to the doctrine of public ownership of wildlife, see N.R.S. 501.100 ("Wildlife in this state not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada"), as does every other state in the nation. See Michael J. Bean & Melanie J. Rowland, The Evolution of National Wildlife Law 7-15 (3rd ed. 1997); see also John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 Tul. Envtl.L. J. 331, 339-43 (2003).[2]

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[2] Plaintiffs might attempt to contest the continuing vitality of these principles based on the language in several Supreme Court decisions holding that the states' traditional authority over wildlife cannot bar enforcement of federal Commerce Clause authority. See, e g., Hughes v. Oklahoma, 441 U.S. 322, 333-34 (1979). But these decisions "do not, and could not, over rule principles dating back to Roman law that wild animals are the common property of the citizens of the state." Oliver Houck, *Why Do We Protect Endangered Species and What Does It Say About Whether Restrictions on*

The doctrine of public ownership of wildlife supports a wide variety of public actions directed at the protection of wildlife populations, from regulation of hunting on private land, see, e.g., Bishop v. United States, 126 F. Supp. 449 (Ct.Cl.1954), to regulation of harvesting of fish from the ocean. See American Pelagic v. United States, 379 F.3d 1363, 1379 (Fed. Cir. 2004), quoting State v. Leavitt, 72 A. 875, 876 (Me.1909) ("It is, therefore, settled law that each State, unless it has parted with title ... owns the bed of all tidal waters within its jurisdiction, and as well, the tide waters themselves and the fish in or under them, so far as they are capable of ownership.... It is in fact a property right...."). In takings terminology, the doctrine of public ownership of wildlife represents a "background principle" of property law that bars a potential taking claim by limiting the scope of a claimant's alleged property interest. See Lucas, 505 U.S. at

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Private Property to Protect Them Constitute "Takings,' 80 Iowa L. Rev. 297, 311 n. 77 (1995). See also Shepard v. State, 897 P.2d 33, 41-43 (Alaska 1995) (explaining that Hughes addresses whether wildlife represents goods in commerce, not the scope of government authority to conserve wildlife generally). There is no tension between the federal Takings Clause and the state-law doctrine of public ownership of wildlife because the Constitution does not itself define property. Instead, the courts must resort to "existing rules or understandings that stem from an independent source such as state law" to define the range of interests that qualify for protection as "property" under the Fifth and Fourteenth Amendments." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992), quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

1029.

Of most direct relevance here, the public ownership doctrine has long been recognized as precluding public liability for property damage caused by wild animals. The seminal case is the New York Court of Appeal's decision in Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917), in which the Court rejected the taking claim of a timber owner whose trees were destroyed by beavers reintroduced into the wild by state officials. Using eloquent language, the Court said:

> "Wherever protection is accorded [to wildlife], harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result."

Id. at 100. Numerous federal and state courts have applied this rule in a wide variety of factual settings. See, e g., Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) (rejecting claim that Endangered Species Act effected a taking by preventing rancher from killing grizzly bear that destroyed rancher's sheep); Maitland v. People, 23 P.2d 116, 117 (Colo. 1933) (rejecting claim that destruction of crops by wild game protected under a state statute infringed on private property rights, observing "whenever

legislative protection is accorded game, some harm usually is done to some person as an incident to such protection... But such incidental injuries are not sufficient to render the protecting statute unconstitutional"); Leger v. Louisiana Department of Wildlife & Fisheries, 306 So.2d 391 (La.Ct.App. 1975) (because wildlife is regulated by the state in its sovereign capacity, as distinct from its proprietary capacity, the state has no duty to control its movements or prevent it from damaging private property).

Most significantly for the purpose of this Court, the binding precedent of this Circuit is perfectly in accord with this general approach. In Bishop v. United States, 126 F.Supp. 449 (Ct. Cl. 1954), the United States Court of Claims[3] rejected property owners' claims for compensation for damage done to their crops by geese protected under the Migratory Bird Treaty Act, stating that "[t]he mere fact that plaintiffs' property was damaged as a result of the issuance of [the] proclamation [protecting the geese] is not sufficient to show a taking." Id. at 452. The Court continued, "'[t]he general right of the government to protect wild

[3] The decisions of the former Court of Claims represent binding precedent in this Court. See South Corp. v. United States, 690 F.2d 1368, 1370 (Fed. Cir. 1982).

animals is too well established to be now called into question.... The measures best adapted to this end are for the legislature to determine, and the courts cannot review its discretion.'" Id., quoting Barret v. State, supra. Thus Bishop establishes a binding rule in this Circuit that the sovereign right to protect the public's wildlife precludes a claim for compensation against the government based on property damage caused by wild animals.

Based on Bishop and the consistent precedent on this subject from across the country, the Court should affirm the ruling below that the United States cannot be held liable under the Takings Clause for the alleged use of plaintiffs' water by protected wild horses and burros.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Brief of the United States, the Court should affirm the judgment below rejecting Colvin Cattle's claims.

Respectfully submitted,

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John D. Echeverria
Georgetown Environmental Law &
Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9863
(202) 662-9005 (fax)

Counsel for Amicus Curiae
Natural Resources Defense Council

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B)-(C) and Fed Cir. R. 32(b), I certify that the text of this brief, including any headings, footnotes and quotations therein, uses a proportionally spaced 14 point font and contains 6959 words.

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John D. Echeverria
Georgetown Environmental Law &
Policy Institute
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9863
(202) 662- 9005 (fax)

Counsel for *Amicus Curiae*
Natural Resources Defense Council