**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| E. WAYNE HAGE and the estate of JEAN N. HAGE,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | ) | No. 91-1470L<br>Senior Judge Loren Smith |

**POST-TRIAL BRIEF OF AMICI CURIAE NEVADA DEPARTMENT OF WILDLIFE, *ET AL*.**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

On March 8, 1996, this Court held, as have all other courts before it, including the United States Supreme Court, that ranchers like the plaintiffs, who graze livestock on federal public lands by permission of the federal government, have no property right to continue such grazing. Not only did this Court hold that there is no property interest in a federal grazing permit; it also held that:

> Plaintiffs furnish no evidence supporting the existence of vested rights in the rangeland itself under the Act of 1866 or state law. In fact, all precedent indicates that the privilege to graze never created a property interest but rather a preference to use the allotment before the government gave the right to another.

*Hage v. United States*, 35 Fed. Cl. 147, 170 (1996) (*Hage I*). Six years later, this Court confirmed its earlier holding that plaintiffs have no property interest in their grazing permits, and it rejected plaintiffs' claim to a "surface estate" that would give them the right to graze on federal public lands. *Hage v. United States*, 51 Fed. Cl. 570, 586-92 (2002) (*Hage IV*). Furthermore, the United States Supreme Court has held that the increment of value added to any <u>other</u> property right by the availability of grazing on neighboring federal lands is also not a compensable property interest. *United States v. Fuller*, 409 U.S. 488, 491-92 (1973).

In this Court's 2002 decision, however, it held that plaintiffs did possess certain water rights and ditch rights. *Hage IV* at 578-86. This Court allowed plaintiffs to proceed to trial to attempt to prove that the government had taken their water rights or their ditch rights. Plaintiffs have failed to meet their burden.

Most of plaintiffs' takings case is based on government actions restricting, and then revoking, plaintiffs' privilege to graze their livestock on public lands, the very privilege that this Court has already held not to be a property right. As plaintiffs describe their case:

> [I]t is clear that when the physical and regulatory acts taken by the United States <u>excluded plaintiffs' cattle from the allotments</u> appurtenant to the Pine Creek

> Ranch, and forced the plaintiffs to liquidate their herd in 1991, a taking of plaintiffs' property rights occurred. This exclusion was accomplished by the Forest Service impounding and selling plaintiffs' livestock and threatening to continue doing so. This compelled plaintiffs to liquidate their herd. The evidence at trial demonstrates that, after the plaintiffs were forced to liquidate their herd, the United States then took the position in writing that the plaintiffs would never again be granted a grazing permit on the allotments appurtenant to the Pine Creek Ranch . . . .

Plaintiffs' Post-Trial Brief at 15-16 (emphasis added). Most of the specific "physical and regulatory acts" alleged by the plaintiffs to constitute takings are actions that restrict or preclude plaintiffs' grazing on federal public lands, not their use of their own property. *See id.* at 16 - 18 (alleging that "the decision to 'rest' the Meadow Canyon Allotment", "the decision by the BLM to reduce the number of AUMs on the Ralston and McKinney Allotments", "[the decision by the BLM] to grant grazing permits to third parties", "[m]anagement of upland vegetation and its attendant proliferation [which] has resulted in the loss of large areas formerly suitable for grazing", and "imposing unreasonable conditions and restrictions on the Hages' use of their grazing allotment" constituted takings). Plaintiffs argue that these actions were arbitrary and unreasonable, *id.* at 8 - 11, and that these actions effected a taking of plaintiffs' water and ditch rights because plaintiffs could not use their water for stockwatering if they could not graze on the public lands surrounding their water sources and ditches, *id.* at 10, 15 - 17.

In Part I of this brief, amici[1] show that plaintiffs' arguments attacking the propriety of the government's actions should not be heard, because, in a takings claim, the actions of the government must be presumed to be proper. In Part II, we show that the restrictions on plaintiffs' use of the public range are not a compensable taking of plaintiffs' water rights because

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[1] Amici are the Nevada Department of Wildlife, the National and Nevada Wildlife Federations, the Natural Resources Defense Council, and the Toiyabe Chapter of the Sierra Club.

(a) plaintiffs' water rights do not include a right to graze cattle on public lands in order to make use of the water, (b) the restrictions do not meet the established tests for a taking, and (c) under the Supreme Court's decision in *United States v. Fuller*, any value added to a water right by its use in conjunction with grazing on federal public lands is not compensable. In Part III, we show that the government's actions are also not a compensable taking of the 50-foot "forage right" that this Court has held is appurtenant to plaintiffs' ditch rights, because the 50-foot strips have no practical value for grazing if they are not used in conjunction with the surrounding public lands in which plaintiffs have no property interest.

Plaintiffs also allege that their water and ditch rights have been taken by government actions allegedly preventing maintenance of their ditches, by the increased growth of willows and other riparian vegetation following removal of plaintiffs' cattle, and by the introduction of elk on plaintiffs' grazing allotments. In Part IV.A of this brief, amici show that the claim related to ditch maintenance is factually and legally groundless, as well as unripe, because the government did not prevent plaintiffs from maintaining their ditches, because the mere existence of a permit requirement for ditch maintenance is not a taking, and because plaintiffs were never denied a permit. In Part IV.B, amici show that the claim related to willows and other riparian vegetation is legally meritless because the natural growth of vegetation on public lands is not an infringement of plaintiffs' water rights, and factually groundless because the evidence demonstrates no increase in willows, and no decrease in streamflows, resulting from removal of plaintiffs' cattle. Finally, in Part V we show that plaintiffs' claims related to elk are meritless because (a) elk have consumed only *de minimis* quantities of water and have had little or no effect on plaintiffs' ranching operation, (b) as a matter of law, the government is not liable for wild animals' impacts on property, (c) elk have not "physically occupied" plaintiffs' property,

and (d) plaintiffs had no reasonable expectation that their ranching operation would not have to share resources with wildlife.

## ARGUMENT

### I. PLAINTIFFS' CONTENTIONS THAT CERTAIN GOVERNMENT ACTIONS WERE IMPROPER HAVE NO PLACE IN A TAKINGS SUIT.

Plaintiffs allege that various actions of the Forest Service and the Bureau of Land Management were arbitrary, unjustified, or unfair. *See, e.g.,* Plaintiffs' Post-Trial Brief at 8 - 11. Plaintiffs' allegations of official wrongdoing have no basis in fact, as amici anticipate the United States will demonstrate in detail in its post-trial brief. *See* Defendant's Pre-Trial Memorandum (Docket No. 237) at 13 - 26, 37 - 46. Regardless of their factual accuracy, however, plaintiffs' contentions of government impropriety are simply not germane to their takings claims. Plaintiffs might have raised these contentions in an action for judicial review under the Administrative Procedure Act, or possibly in a suit under the Due Process Clause, but they may not make these allegations a part of their takings case in this Court, because a valid taking claim presupposes the validity of the government's actions.

As the Supreme Court explained in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Takings Clause does not place any substantive constraints on government action, but rather "is designed . . . to secure compensation in the event of otherwise proper interference amounting to a taking." *Id*. at 315 (emphasis added). Accordingly, the Federal Circuit has repeatedly held that allegations of illegitimate or wrongful government action are irrelevant in a takings suit. *See, e.g., Rith Energy, Inc v. United States*, 270 F.3d 1347, 1352 (Fed. Cir. 2001) ("in a takings case we assume that the underlying government action was lawful"); *Florida Rock Industries v. United States*, 791 F.2d 893, 899

(Fed. Cir. 1986). As this Court explained in *Osprey Pacific Corp. v. United States*, 41 Fed Cl. 150, 157 (1998), the plaintiff, having elected to forego judicial review in favor of seeking compensation under the Takings Clause, must live with her choice: "A plaintiff may elect to come to this court for monetary damages as long as they are not challenging the government's actions." *Id*. at 157 (emphasis added). This Court previously made the same point in this case:

> This court agrees with defendant that plaintiffs must concede all actions as proper under the permit to bring a taking claim. This court is not the proper forum to question defendant's actions under the permit.

*Hage I,* 35 Fed. Cl. at 177.

Plaintiffs attempt to fit their allegations of improper government action within their takings claim by alleging that certain government actions "did not substantially advance a legitimate governmental purpose." Plaintiffs' Post-Trial Brief at 19 (citing *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-839 (1987)). However the Supreme Court has squarely applied this "substantially advance" test only in the context of development exactions, *see Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan*, and the Court has strongly suggested that this test does not apply outside of that context. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 545, 554 (1994); *see also City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 704, 732 n. 2, 753 n.12 (1999). Sixteen years ago, this Court declared that "no court has ever found that a taking occurred solely because a legitimate state interest was not substantially advanced." *Loveladies Harbor v. United States*, 15 Cl. Ct. 375, 390 (1988), *aff'd*, 28 F.3d 1131 (1994). At least so far as the Federal Circuit and the Court of Claims are concerned, that statement remains true today. *See, e.g., Bamber v. United States*, 45 Fed. Cl. 162, 165 (Fed. Cl. 1999). *See also Simi Investment Co. v. Harris County*, 256 F.3d 323 & n.3 (5th Cir. 2001) (stating that challenges to government action as "illegitimate and arbitrary" lie under the Due Process Clause rather than

the Takings Clause). Accordingly, the claim of a taking based on the theory that the government's actions failed to substantially advance a legitimate government interest must be rejected.

## II. PLAINTIFFS HAVE NOT SUFFERED A COMPENSABLE TAKING OF THEIR WATER RIGHTS AS A RESULT OF RESTRICTIONS ON THEIR GRAZING ON PUBLIC LANDS.

This Court has recognized, in accordance with longstanding precedent, that plaintiffs have no vested property right to maintain cattle on public lands. Plaintiffs nonetheless contend that the government has taken their property rights by restricting, and then revoking, their privilege to graze on public lands. Specifically, plaintiffs contend they have suffered a taking of their water rights because they cannot use their water rights for stockwatering if their cattle are not permitted to graze on public lands. *See* Plaintiffs' Post-Trial Brief at 15 - 17. In a brief previously filed with this Court, amici explained that plaintiffs' theory reflects a fundamental misunderstanding of the nature of a water right. *See* Post-Trial Memorandum of Amici, filed March 16, 1999 (Docket No. 139) at 4-8.

Here, we show that this claim must be rejected for three separate and independent reasons. First, plaintiffs have no property right to place livestock on the public lands in order to utilize their water rights. Second, under the traditional takings tests, plaintiffs' loss of the public lands grazing privilege is not a taking of their water rights. Third, even if plaintiffs had established that their loss of the public lands grazing privilege was a taking of their water rights, they would not be entitled to compensation because, under the Supreme Court's holding in *United States v. Fuller*, 409 U.S. 488, the value added to their water rights by the public lands grazing privilege is not compensable.

### A. Plaintiffs Have No Property Right to Place Livestock on the Public Lands in Order to Make Use of Their Water Rights.

Plaintiffs contend their water rights include a right to bring cattle onto the public lands in order to make use of water. In fact, however, plaintiffs have no such right as a matter of property law, and such a right is not a cognizable property interest for the purpose of takings analysis.

#### 1. No right as a matter of property law.

Under both state and federal law, plaintiffs' water rights do not include an entitlement to bring livestock onto public lands in order to exercise those rights. In Nevada, a water right does not include a right of access to federal public lands. *Ansolabehere v. Laborde*, 73 Nev. 93, 310 P.2d 842, 849 (1957). *See also* 1998 Trial Tr. at 673-74 ( Turnipseed); *id.* at 1387-93 (de Lipkau). The same Nevada decree that confirmed plaintiffs' water rights made clear those rights conferred no right of access to federal lands. *See* DX 530, Monitor Valley Water Rights Decree, at 11 ("[T]his decree does not extend to any claimant . . . the right of ingress or egress on public, private, or corporate lands.").

Federal courts, applying the water law of other western states, have also found that a water right confers no right to graze on federal public lands. *See Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1214 (10th Cir. 1999) (finding that a New Mexico water right does not include a right to graze on federal lands, and that, if it did, it would be contrary to federal law); *Hunter v. United States*, 388 F.2d 148 (9th Cir. 1967) (finding that a California water right does not include an appurtenant right to graze cattle on public lands).

Plaintiffs claim a right of access to federal lands for their cattle under the Mining Act of 1866, but the access granted by that statute is limited to a "right of way for the construction of

ditches and canals" to transport water. 43 U.S.C. § 661. The Courts of Appeal for the Ninth and Tenth Circuits have both concluded that the 1866 Mining Act does not create a right to maintain livestock on federal lands so that they may use water located therein. *See Diamond Bar Cattle Co.,* 168 F.3d at 1215; *Hunter*, 388 F.2d at 153-54. The inference of such a right in the Act would contradict "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are any doubts they are resolved for the Government, not against it." *United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957).

**2. No cognizable property interest for takings purposes**.

Plaintiffs cannot establish, as a matter of takings law, any legally cognizable property interest in maintaining cattle on public lands in order to make use of their water rights. Simply put, the use of a public resource, such as the public lands, is not a "stick in the bundle" of a private property right such as a water right, and therefore the government's denial of the use of a public resource is not a taking of any private property right, regardless of the impact of the denial on the use of the private property.

The Federal Circuit applied this principle most recently in its August 16, 2004, decision in *American Pelagic Fishing Co. v. United States*, No. 03-5101, 2004 WL 1812709. In *American Pelagic*, the federal government had prohibited a fishing company from using its private vessel, the *Atlantic Star*, to fish in the Exclusive Economic Zone (EEZ) off the coast of the United States. The company claimed, *inter alia*, that the government's action had effected a taking of the vessel because it had "taken, destroyed, and deprived [the company] of its compensable, investment backed expectations in the use and operation" of the vessel and had "taken all economically viable use of the vessel." 2004 WL 1812709 at *8.

The Federal Circuit reversed the Claims Court's award to the company. Without reaching the factual issue of whether the government's action had deprived the company of all economically viable use of the vessel, the court ruled that the company's claim failed because the company had no "legally cognizable" right to use its boat to fish in the EEZ. Given that the United States has sovereign rights and exclusive fishery management authority in the EEZ, the court concluded the company "did not have, as one of the sticks in the bundle of property rights that it acquired with title to the *Atlantic Star*, the right to fish . . . in the EEZ." *Id*. at 16.

Similarly, in *Conti v. United States*, 291 F.3d 1334 (Fed. Cir. 2002), the Federal Circuit rejected a taking claim based on the theory that the government's prohibition on drift gillnet swordfishing effected a taking of a fisherman's boat, nets, and gear. The court ruled the plaintiff could not claim a protected interest under the Takings Clause given that "Mr. Conti's ability to use his vessel and gear to catch swordfish using drift gillnets in the Atlantic Swordfish Fishery was dependent upon a [fishing] permit that was revocable at all times . . . ." *Id*. at 1345 n.8.

The same principle explains holdings that a property owner cannot claim an interference with a legally cognizable property right when government management of the navigable waters or the navigable airspace restricts an owner's use of private property. For example, when the government acts to protect the federal navigational servitude in navigable waters, no property owner restricted by the exercise of the servitude can claim that a cognizable property right under the Takings Clause has been taken. *See Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000). For the same reason, in *Air Pegasus of D.C. v. United States*, 60 Fed. Cl. 448 (2004), this Court ruled that the operator of a private helicopter service could not claim a taking of his real property lease when the federal government barred use of the airspace above the property. Because the plaintiff's asserted property right in his lease was "totally dependent"

upon use of the public airspace, the plaintiff had no legally cognizable property right to support its taking claim. The court ruled that "no property right over the navigable airspace above the leased area . . . can attach to the lessee," and therefore the plaintiff lacked "a compensable property interest" based on the lease sufficient to support a taking claim. *Id*. at 459.

Accordingly, the Court must reject plaintiffs' contention that their water rights have been taken as a result of restrictions on grazing on public lands. Plaintiffs admittedly hold water rights, just as the fishermen in *American Pelagic* and in *Conti* owned their vessels and gear. Nonetheless, plaintiffs have no cognizable property right under the Takings Clause to exercise their water rights by grazing their cattle on the public lands, just as the fishermen could claim no cognizable property rights to use their vessels or gear to fish in public waters. Because in all of these cases, the claimed use of the private property allegedly taken is dependent upon use of some public resource to which the plaintiff has no right, the plaintiff lacks a legally cognizable property interest sufficient to support a taking claim.

Plaintiffs' lack of a right to use their waters by placing livestock on public lands does not mean that plaintiffs possess no water rights. The only water use that is prohibited is that which requires grazing on public lands. Plaintiffs remain free to put their water to any other use permitted by state law. *See Hunter*, 388 F.2d at 154 & n. 4.

Finally, the conclusion that plaintiffs lack a property interest in grazing cattle on public lands is supported by common sense. Plaintiffs' predecessor in interest, who originally appropriated water rights on the public lands, acted under an "implied license" to graze on the public lands. *Light v. United States*, 220 U.S. 523 (1911). That license was "a privilege which [was] withdrawable at any time for any use by the sovereign without the payment of compensation." *Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944). When plaintiffs

acquired the ranch in 1978, they did so with the knowledge that their use of the public range was authorized by revocable permits.[2] It would be both illogical and unfair to the public if a public-land rancher could accept the privilege of using public lands and then, once present on the public lands, effectively convert the license to a vested right by acquiring and maintaining state water rights. For the reasons discussed, the law precludes this illogical and inequitable result.

### B. Restriction or Revocation of Plaintiffs' Public Lands Grazing Privilege Is Not a Taking of Their Water Rights Under Established Takings Jurisprudence.

The lack of a cognizable property interest in using their water rights by grazing on public lands is fatal to plaintiffs' claim that the restriction or revocation of their public lands grazing privileges can be a taking of those water rights. But even if it weren't, plaintiffs claim would fail simply because they have not demonstrated a compensable taking under the established tests defining takings.

#### 1. Plaintiffs have not shown a physical taking.

Plaintiffs' first claim that restrictions on grazing on the public lands resulted in a "physical occupation" of their water rights, triggering per se taking analysis. Plaintiffs' Post-Trial Brief at 16. Plaintiffs' physical occupation theory is wrong and should be rejected.

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court drew a sharp line between regulatory restrictions, generally subject to an ad hoc, multi-factor analysis, and permanent physical occupations, subject to a per se test. In general, the Court stated, "[t]he temptation to adopt what amount to per se rules" must be

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[2] *Cf. American Pelagic*, 2004 WL 1812709 ("Because it was already in place by the time American Pelagic purchased the *Atlantic Star* . . . [i]t was against this framework of existing federal restrictions on fishing in the EEZ that American Pelagic invested in the *Atlantic Star*.")

resisted," *id*. at 321, and use of the per se test must be tightly cabined to avoid "transform[ing] government regulation into a luxury few governments could afford." *Id*. at 324. Thus, the Court said, the per se test is reserved for "relatively rare" cases in which the physical occupation can be "easily identified." *Id*. By way of examples, the Court said that a physical invasion occurs "when a leasehold is taken and the government occupies the property . . . when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants . . . or when its planes use private airspace to approach a government airport." *Id*. at 322. By contrast, a regulatory restriction is at issue when "a government regulation . . . merely prohibits landlords from evicting tenants unwilling to pay a higher rent . . . bans certain private uses of a portion of an owner's property . . . or forbids the private use of certain airspace." *Id*. at 322-23.

Under the Supreme Court's guidance, the government's restrictions on grazing on the public range plainly involve restrictions on use of property, not a physical occupation. The government, by restricting, and later prohibiting plaintiffs' grazing on public lands, restricted plaintiffs' ability to use their water rights. The government did not physically divert or occupy the water, nor has it appropriated it for any public use. This is certainly not one of those "relatively rare" cases in which a physical occupation can be "easily identified." *Cf. Rose Acre Farms v. United States*, 373 F.3d 1177 (Fed. Cir. 2004) (rejecting application of physical taking theory to claim that government effected a taking by seizing and destroying hens under a public health statute). *Tahoe-Sierra* compels the conclusion that the per se physical occupation theory has no application in this case.

Furthermore, the physical occupation theory advanced by plaintiffs is inconsistent with the nature of water. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the Supreme Court justified a categorical rule for permanent physical invasions of private

property on the ground that "[t]he power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Under Nevada law, however, like under the law of most western states, a water right is only a right to the use of the water. *See, e.g.,*Nev. Rev. Stat. § 533.035 ("Beneficial use shall be the basis, the measure, and the limit of the right to the use of water."). This right does not attach to any specific corpus of water, and does not grant the holder any entitlement to block others from using the water when the senior holder is not using the water. Under the doctrine of prior appropriation, others are permitted, and even encouraged, to make use of water so long as they do not actually interfere with the senior rightholder's use. *See, e.g., Jennison v. Kirk*, 98 U.S. 453, 461 (1878); *College Irrigation Co. v. Logan River & Blacksmith Fork Irrigation Co.*, 780 P.2d 1241, 1244 (Utah 1989). Given the non-exclusive, usufructory nature of water rights, the notion of a "physical occupation" of a water right simply makes no sense.

Plaintiffs rely heavily on *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), to support their physical taking theory, but *Tulare Lake* does not support their argument. First, the facts of *Tulare Lake* have virtually nothing in common with the facts of this case. *Tulare Lake* involved, not a restriction on a water-using activity like the restrictions on grazing in this case, but a restriction on the quantity of water that the plaintiffs were permitted to use. Specifically, the government required a reduction in the amount of water that plaintiffs pumped from the Sacramento-San Joaquin River Delta. *See* 49 Fed. Cl. at 315-16. Here, the government has put no restriction on the amount of water that plaintiffs may divert from any stream, and no restriction at all on any water use except livestock grazing on federal public lands.

Second, *Tulare Lake* was incorrectly decided and should not be followed by this Court. The Court erred in *Tulare Lake* in concluding that a restriction on water use amounts to a

physical occupation of a water right. Unfortunately, the Court did not have the benefit of the Supreme Court's decision in *Tahoe-Sierra*, which was decided the following year. Thus, *Tulare Lake* does not reflect the Supreme Court's cautionary words about use of per se rules, or the Court's injunction to limit the physical occupation theory to rare and easily identified cases.

More fundamentally, the court erred in *Tulare Lake* in concluding that, because the regulation "deprived [plaintiffs] of the entire value of their contract right," *id*. at 318, it effected a physical occupation of their rights. Even if the regulation had had that effect, a use restriction that strips property of all value is not the same thing as a physical occupation. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 (1992) (describing regulatory restrictions and physical occupation as representing "two discrete categories" of government actions, and placing regulatory restrictions eliminating all value in the first category). In addition, the court's conclusion that the regulation deprived the property of all value was implicitly based on the assumption that the parcel as whole rule did not apply. But that assumption would have been correct only if restrictions on water use represented a physical occupation of private property. *See Tahoe-Sierra* (explaining that parcel rule applies in regulatory cases, but not physical occupation cases). In other words, the court's reasoning in *Tulare Lake* was completely – and fatally – circular.

**2. Plaintiffs have not shown a taking under the *Penn Central* factors.**

Given that plaintiffs cannot rely on a per se physical occupation theory, they could establish a taking only if they could demonstrate a taking under the three-factor test set out by the Supreme Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Plaintiffs have clearly failed to do so. First, plaintiffs have not demonstrated the kind of severe economic injury that would constitute a taking. Plaintiffs have offered evidence of the value of

their rights, *see* Plaintiffs' Post-Trial Brief at 21, but they have not quantified the amount by which that value has allegedly been decreased by the government's actions. By plaintiffs' own account, the majority of the economic value of their rights lies in the potential use of their water for quasi-municipal purposes, *see id.*, a use that is not affected at all by the government's actions restricting their grazing privileges. Even without considering the remaining value related to potential quasi-municipal use of water, plaintiffs have not shown that the impact of the government's actions on their ranch as a whole – including their private fee lands – is sufficient to constitute a taking. *See* Defendants' Pre-Trial Memorandum (Docket No. 237) at 51 - 56.

Second, given the government's authority to modify, or even revoke, plaintiffs' public lands grazing privileges without compensation, plaintiffs cannot claim that restrictions on those privileges interfere with any reasonable expectations. That authority existed long before plaintiffs' acquired their ranch and is reiterated in statutes and regulations and in the terms of plaintiffs' grazing permits.[3] Finally, the character of the government's action here weighs heavily against finding a taking. The government has made no "physical invasion" of plaintiffs property, *see Penn Central*, 438 U.S. at 124, and has not even directly regulated plaintiffs' use of that property. The government has only restricted, and later precluded, plaintiffs' use of the government's property.

Therefore, even if plaintiffs' taking claim were not already precluded by the lack of any property interest in exercising water rights by grazing on public lands, the claim would still fail because plaintiffs have not demonstrated either a physical taking or a taking under the *Penn Central* factors.

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[3] *See, e.g.,* 43 U.S.C. §1752; 36 C.F.R. §§ 222.3(b), 222.4(a).

### C. Even if Restrictions on Plaintiffs' Grazing Privilege Were a Taking of Some Property Right, Plaintiffs Would Not Be Entitled to Compensation Because the Value Attributable to the Grazing Privilege is Not Compensable.

Finally, even if plaintiffs demonstrated a taking of some property interest as a result of grazing restrictions on public lands, they still would not be entitled to compensation under the Takings Clause. Because the grazing privilege itself may be revoked without compensation, plaintiffs are not entitled to compensation for a reduction, or even the total destruction, of the value of their water or other rights resulting from restricting or revoking their grazing privilege.

The controlling authority is *United States v. Fuller*, 409 U.S. 488 (1973). The case involved the condemnation of a rancher's private, fee land. The question before the Supreme Court was whether the rancher's compensation should include the enhanced value of his property based on the potential to use the property in association with grazing privileges on adjacent public lands. The answer was no. The Court relied on the "general principle that the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." *Id*. at 492. Applying the principle in the context of public land grazing, the Court said that the government "need not compensate for value which it could remove by revocation of a permit for the use of lands that it owned outright." *Id*.

Under *Fuller*, even if plaintiffs suffered a taking of some property right, they are not entitled to compensation for any value of their water rights attributable to the public lands grazing privilege. Moreover, since restriction or revocation of the grazing privilege does not affect the value of the water rights for any <u>other</u> potential water use, the value attributable to the

grazing privilege is all that plaintiffs have lost. Any value that the water may have for other uses is still retained by plaintiffs. Therefore, plaintiffs are entitled to no compensation at all as a result of restriction or revocation of their grazing privileges.

## III. PLAINTIFFS SUFFERED NO COMPENSABLE TAKING OF FORAGE RIGHTS WITHIN DITCH RIGHTS OF WAY.

While it is undisputed that plaintiffs have no property right to the forage on the lion's share of the public range that they have used for grazing purposes, this Court has held that they do possess "forage rights" in strips extending for 50 feet on either side of their 1866 Act ditches. In this Part, amici respectfully request that the Court reconsider that holding. But amici also show that, even if the plaintiffs do possess such forage rights, there has been no compensable taking because such narrow strips of forage, standing alone, are economically valueless.

### A. Amici Respectfully Request that the Court Reconsider its Holding that Plaintiffs' Ditch Rights Include Forage Rights Adjacent to the Ditches.

This Court's 2002 opinion concluded that, under the Act of 1866, "'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 IV* at 580 (quoting *Hage v. United States*, 42 Fed. Cl. 249, 251 (1998) (*Hage III*). In a subsequent order, the Court clarified that the forage right extends for 50 feet on each side of an 1866 Act ditch right-of-way. *Hage v. United States*, Order, Sept. 3, 2002 (Docket No. 207) at 1-2. Amici respectfully request that the Court reconsider its determination that plaintiffs have an entitlement to forage within the rights of way.

The Court's finding of forage rights appurtenant to ditch rights of way is not only unprecedented in 150 years of western water and range law, but is also contrary to:

(a) decisions of the United States Supreme Court that there is no property right to

graze livestock on federal public lands. *See, e.g., Fuller*, 409 U.S. at 491-92; *Light v. United States*, 220 U.S. 523, 535 (1911);

(b) decisions of the Courts of Appeal for the Ninth and Tenth Circuits, whose collective domain includes virtually all federal rangelands, specifically rejecting the argument that the Mining Act of 1866 granted any forage rights on public lands. *See Diamond Bar*, 168 F.3d at 1215 ("The Act [of 1866] cannot fairly be read to recognize private property rights in federal lands, regardless of whether proffered as a distinct right or as an inseparable component of a water right."); *Hunter v. United States*, 388 F.2d 148, 153 (9th Cir. 1967) ("He [the plaintiff] urges that the adjoining lands provide the means to use the water beneficially and must therefore be deemed appurtenant to it. He claims too much."); and

(c) this Court's own holding that "[t]he Act [of 1866] does not address property rights in the public lands and the court declines to create such rights contrary to the clear legislative intention of Congress." *Hage I* at 170.

The Court's finding of an appurtenant forage right was based on a "common-sense analysis." *Hage IV* at 580 (citing *Hage III* at 251). Amici respectfully submit, however, that the Court's analysis misconstrued the purpose of a water ditch. A ditch conveys water from a spring or stream to a place of use; it does not provide the place of use. Plaintiffs' ditches for which this Court found rights-of-way under the 1866 Act are irrigation ditches; their purpose is to convey water from streams to hay fields, primarily on plaintiffs' private lands. *See, e.g.,* Plaintiffs' Post-Trial Brief at 6-8. Livestock grazing along the ditches is not necessary, or even helpful, to the operation of the ditches. (Even to the extent that the ditches carry stockwater, the stockwater can be delivered to cattle troughs without allowing grazing along the lengths of the ditches.) Given that grazing along the ditches is not necessary to their operation, and in view of the longstanding rule that grants of private rights in public lands must be narrowly construed, *see supra* page 8, the inference of a forage right appurtenant to a ditch right-of-way is not justified.

In *Hage IV*, this Court referred to three statutes as supporting the inference of a 50-foot right-of-way appurtenant to a ditch right. 51 Fed. Cl. at 581 (citing Acts of 1891, 1895, and

1901, 43 U.S.C. §§ 946, 956, 959). Each of these statutes indeed allows for a 50-foot right-of-way along a canal or ditch, but none of these statutes suggests that Congress intended for the water to be consumed within the 50-foot right-of-way. For example, the Act of 1891, 43 U.S.C. § 946, grants rights of way for canals to irrigation districts, but it does not authorize farmers to plant their irrigated crops within the rights of way. The Act of 1895, 43 U.S.C. § 956, authorizes the Secretary of the Interior to permit the use of rights of way for, *inter alia*, canals for furnishing water for domestic use, but it does not authorize any one to set up housekeeping within the rights of way. Similarly, although 1866 Act ditches may be used to deliver stockwater, nothing in the Act suggests Congress intended to confer a right to graze livestock within the ditch rights of way.

### B. Plaintiffs Suffered No Compensable Taking of Forage Rights Because the Forage Adjacent to the Rights of Way, Standing Alone, is Economically Valueless.

The linchpin of a regulatory taking claim is the degree of economic impact imposed by the challenged government action. "[I]f the regulatory action is not shown to have had a negative economic impact on the property, there is no regulatory taking." *Hendler v. United States*, 175 F.3d 1374 (Fed. Cir. 1999). *See also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 236 (2003) (no compensation required if nothing of value is taken).

Even if plaintiffs did have a right to the forage within 50 feet of the ditches, the claim of a taking with respect to such forage should be rejected because this small area of forage, standing alone, has no positive economic value. The total area of the ten 50-foot ditch rights of way is a couple of hundred acres, and contains around 20 AUMs of forage. *See* Defendants' Pre-Trial Memorandum (Docket No. 237) at 40. Assuming hypothetically that these ten narrow strips could be managed as a single unit, this would be enough forage to support one or two cows

through the year.

Furthermore, if plaintiffs grazed these narrow strips, under federal law they would be responsible for keeping their cattle off of the surrounding 750,000 acres of National Forest and BLM land in which they have no rights *See, e.g., United States v. Shenise*, 43 F. Supp.2d 1190 (D. Colo. 1999) (state "open range" or "fence out" laws preempted by federal law); *Bilderback v. United States*, 558 F. Supp. 903, 907 (D. Or. 1982) (same). Thus, in order to utilize the tiny area within the rights of way area for cattle grazing, plaintiffs would be required to fence the area or establish constant patrols. The cost of building and maintaining fences, or of operating a patrol, would exceed by a wide margin any possible return from grazing one or two cattle in these small spaces. Because these asserted forage rights are, for all intents and purposes, economically worthless, they do not represent an independent property interest that can support a viable taking claim.

To be sure, the forage within the rights of way would have some value if it could be used in coordination with the adjoining public range. But any value that would accrue to the forage in the rights of way as a result of exercising those rights in association with other public lands is, as discussed above, legally noncompensable under *United States v. Fuller*.

The recent decision of this Court in *Palm Beach Isles Assocs.* is highly instructive on this point. The claim was that the government effected a taking of a long, thin piece of property totaling 1.4 acres by refusing to issue a permit for the development of the parcel along with approximately 50 acres of adjacent submerged land. The Court concluded that denial of the permit for the submerged area was not a taking based on the navigation servitude, leaving the question whether the 1.4 acre parcel had been taken. While the 1.4 acres was valuable as part of the larger property, standing on its own it was useless. Relying on the rule that the value of

private property attributable to adjacency to navigable waters is noncompensable, the Court concluded that the plaintiff had not established a taking of the 1.4 acres. The Court's reasoning directly supports the conclusion that plaintiffs cannot establish a taking in this case based on restrictions on their use of the forage in the ditch rights of way, given that the forage is economically unless it could be exploited together with a privilege to use other public lands.

## IV. PLAINTIFFS HAVE NOT ESTABLISHED A TAKING RESULTING FROM ALLEGED REDUCTION OF WATER FLOWS TO PLAINTIFFS' PROPERTY.

Plaintiffs allege that water flows in their irrigation ditches have decreased because (1) the government has prevented them from maintaining the ditches, and (2) the exclusion of their cattle from public lands has led to a proliferation of willows and other vegetation along the streams from which those ditches divert water. Plaintiffs' Post-Trial Brief at 5-8. Plaintiffs claim that the alleged reduction in water flows constitutes a taking of their property. *Id.* at 16-17. This claim is factually groundless and legally meritless.

### A. The Government Did Not Take Plaintiffs' Property by Preventing Plaintiffs from Maintaining their Ditches.

Plaintiffs claim the government took their water rights by preventing them from maintaining their 1866 Act ditches, thereby decreasing the flow of water to their hay fields. Plaintiffs' Post-Trial Brief at 5-6, 16. This claim should be rejected for three reasons.

#### 1. The government did not prevent plaintiffs from maintaining their ditches.

The government did not prevent plaintiffs from maintaining their ditches. By their own account, plaintiffs performed regular maintenance, including the use of motorized earthmoving equipment, on their irrigation ditches from 1979 through 1991, the year their claim was filed in

this Court. *See* DX 329, Plaintiffs' Response to Defendants' First Set of Interrogatories, at 3552 -54 (Answer to Interrogatory 37); 1998 Trial Tr. at 470-71 (Hage).

Even after 1990, there is no evidence that the government prevented plaintiffs from maintaining their ditches. Plaintiff Hage complains of his 1991 criminal prosecution and conviction, but that prosecution and conviction was for the unauthorized cutting and removal of trees for sale as commercial firewood, not for ditch maintenance. *See United States v. Seaman,* 18 F.3d 649, 650-51 (9th Cir. 1994).[4] The evidence shows that Hage's commercial tree-cutting was neither necessary nor appropriate for maintenance of his ditches.[5] *See* DX 316; DX 456 at 4750; 1998 Trial Tr. at 1194-97 (showing tree cutting adversely affected ditch performance). Hage was not prosecuted for his annual use of motorized earthmoving equipment to maintain the ditches. Therefore, there is simply no logical basis for plaintiffs' suggestion that the 1991 prosecution somehow prevented ditch maintenance.

Moreover, if there were some connection between the tree-cutting and *bona fide* ditch maintenance, Hage could have applied for and obtained a permit for the tree-cutting, something

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[4] Hage's conviction was reversed on appeal, but the Court of Appeals did not overturn the trial court's factual determination that Hage had unlawfully cut, removed, and sold commercial firewood from federal public lands. The reversal was solely on the ground that the government had failed to prove that the value of the wood cut was greater than $100, as required for a felony conviction under 18 U.S.C. §§ 641 and 1361. *Seaman*, 18 F.3d at 650-51. The Court of Appeals noted the government could have charged Hage with the included misdemeanor offenses of taking and damaging property of value less than $100, but no such charges were made. *Id.* at 650.

[5] Hage cut trees in 50-foot swaths on both sides of one of his ditches. This Court has stated that Hage "reached the 50 foot number by a common sense analysis of the laws that he was told would apply to the ditches." *Hage IV* at 584 n. 21. But this court did not conclude, and there is no evidence, that cutting trees in 50-foot swaths was a necessary or reasonable measure to maintain flow in, or divert water from, the ditch. The trees that Hage cut for firewood were upland trees – pinon pines and junipers – , not the riparian willows that plaintiffs claim block ditches and absorb water. *See* 1998 Trial Tr. at 472-73 (Hage).

he never even attempted to do. Hage's prosecution for unauthorized tree-cutting was no barrier to conducting ditch maintenance with proper authorization, as discussed below.

**2. The existence of a permit requirement is not a taking of a right of way.**

In answer to the Court's question, "What specific actions did United States government officials take to prohibit plaintiffs from maintaining or accessing the ditches and streams to which they had a vested right?", plaintiffs list only one government action, other than Hage's criminal prosecution, even arguably related to ditch maintenance, namely, "the insistence by the Forest Service that the ditches be maintained only with hand tools."[6] Appendix to Plaintiffs' Post-Trial Brief at 14 (answer to question 9). This allegation apparently refers to Forest Service regulations requiring a special use permit for the use of motorized equipment for ditch maintenance. *See* 36 C.F.R. §§ 251.50(a), 261.1(b), 261.9(a), 261.10(a); *Elko County Board of Supervisors v. Glickman*, 909 F. Supp. 759, 765 (D. Nev. 1995). Plaintiffs do not allege that they were ever denied such a permit, or that, with one, they would not be able to maintain their ditches. Nor were they ever prosecuted or otherwise penalized for maintaining their ditches without one. Thus, plaintiffs' claim boils down to the assertion that the mere existence of a regulation requiring a permit is a taking of their ditch rights of way or water rights.

Plaintiffs' argument was rejected by the Supreme Court nearly twenty years ago:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted. . . . Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

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[6] The other actions listed by plaintiffs in answer to the Court's question relate to access to the ditches by plaintiffs' livestock, not access by the plaintiffs for maintenance. Issues related to watering of livestock are addressed in Part II of this brief.

*United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985). Just last month, the Federal Circuit reiterated that "[t]he requirement that a property owner obtain a permit to undertake a particular use of his land therefore does not in and of itself constitute a compensable taking." *Bass Enterprises Production Co. v. United States*, No. 03-5056, 2004 WL 1925615 (Fed. Cir. Aug. 31, 2004).

This principle was applied specifically to the maintenance of 1866 Act ditches by ranchers on National Forests in Nevada in *Elko County*. "[T]hough we assume that the ranchers have vested rights-of-way under § 661 [the 1866 Act], and that vested rights are protected property interests, a vested right-of-way is nevertheless subject to reasonable Forest Service regulation . . . ." 909 F. Supp at 764. Given Forest Service regulations requiring a permit, "[t]his means that the ranchers, if they wish to enter onto Forest Service land to perform cleaning and maintenance on the ditches, must get the Forest Service's permission to do so." *Id.* at 765. Similarly, the Ninth Circuit has held that the Forest Service's requiring a permit for maintenance and repairs of a road right-of-way across the Toiyabe National Forest in Nevada is a not a taking of property. *Adams v. United States*, 255 F.3d 787, 794-95 (9th Cir. 2001). Finally, this Court itself has held, in this case, that "[u]nder the 1866 Act, vested ditch rights-of-way are subject to Forest Service regulations, including the need to obtain special use permits when necessary. *See* 43 U.S.C. §§ 1761(b)(3) and [43 C.F.R.] Part 2800." *Hage IV* at 584.

**3. Plaintiffs' taking claim related to ditch maintenance is not ripe.**

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court held that a taking claim is not ripe "until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186. Therefore,

plaintiffs' claim related to maintenance of their ditches will not be ripe unless and until they apply for a permit, their application is denied, and they exhaust the Forest Service's administrative appeal process. *See Elko County*, 909 F. Supp. at 765. Since the Forest Service has never denied plaintiffs a permit for ditch maintenance (and, as noted above, plaintiffs have in fact maintained their ditches), plaintiffs' claim is not ripe.

In a previous opinion in this case, this Court stated that "plaintiffs need not apply for a permit if plaintiffs can establish that the procedure to acquire a permit is so burdensome as to effectively deprive plaintiffs of their property rights." *Hage I* at 164 (citing *Stearns Co. v. United States*, 34 Fed. Cl. 264 (1995)). In their Post-Trial Brief, however, plaintiffs make no allegation, and cite no evidence that obtaining a permit for maintenance of their ditches would be burdensome at all. Moreover, the record reveals that prior to 1986, plaintiffs did apply for and did receive special use permits for maintenance of their ditches. *See, e.g.*, DX 288, 291 (ditch maintenance permit), DX 290, 292, 453 (permit extensions). In 1986, however, plaintiffs decided that they didn't want or need to apply for such permits in the future. *See* 1998 Trial Tr. at 447-48 (Hage). Plaintiffs unilateral decision to forego compliance with lawful permit requirements does not render their takings claim ripe.

### B. The Alleged Return of Natural Vegetation on Federal Public Land is Not a Taking of Plaintiffs' Property.

Plaintiffs also allege that, as a result of their inability to graze their cattle on federal public land, willows have proliferated along streams and piñon pine and juniper have proliferated on the uplands. They claim that the proliferation of such vegetation has had the effect of reducing the flow of water in their irrigation ditches and therefore constitutes a taking of their water rights. This claim, too, should be rejected.

### 1. Plaintiffs water rights do not include a right to have the federal government maintain unnatural vegetative conditions on public lands in order to enhance water flows to plaintiffs' property.

Plaintiffs' claim is breathtakingly audacious. The National Forest and BLM lands in question comprise over 750,000 acres of public lands and resources that Congress has mandated be managed "in the combination that will best meet the needs of the American people." 16 U.S.C. § 531(a) (definition of "multiple use" for National Forests). *See also* 43 U.S.C. § 1702(c) (nearly identical definition of "multiple use" for BLM lands). Congress has required the Forest Service and the BLM to manage these lands for a variety of uses and purposes, including outdoor recreation, range, timber, watershed, wildlife and fish, and protection of scientific, scenic, historical, ecological, environmental, and archaeological values. *See* 16 U.S.C. § 528; 43 U.S.C. § 1701(a)(8). But the plaintiffs claim, in effect, a right to have these lands managed instead as water collection systems for their irrigation ditches.

The law affords plaintiffs no such right. Their water rights are confined by the limitations that "background principles of the State's law of property and nuisance already place upon land ownership," or, in this case ownership of water rights. *Lucas*, 505 U.S. at 1029. One such limitation is that a property right does not include the right to have a neighbor maintain its property in an unnatural condition in order to enhance or protect one's own property. "[N]either a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land." Restatement (Second) of Torts § 363 (1965). "A possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land." *Id.* § 840 (1979). A "natural condition" is defined to include "trees, weeds and other vegetation on land that has not been made artificially receptive to it by act of man." *Id.*, cmt. a (emphasis added).

The streams on which plaintiffs claim that willows and other vegetation have proliferated are natural streams, *not* plaintiffs' 1866 Act ditches. *See* Plaintiffs' Post-Trial Brief at 6 (Andrews Creek); *id.* at 7 ( Mosquito Creek); *id.* at 7-8 ( Pine Creek); *id.* at 8 (Corcoran Creek and Meadow Creek).[7] And courts have consistently held that a property owner has no right to the removal of natural vegetation growing along streams on a neighbor's land.

In *Beals v. State of Arizona*, 721 P.2d 1154 (Ariz. 1986), the Arizona Game and Fish Department prevented anyone from clearing a channel through dense thickets of trees that the Department had allowed to grow on its land along the Gila River for the purpose of providing wildlife habitat. The Arizona Court of Appeals held that the Department was not liable for damage caused when the river's flow was diverted by the accumulated vegetation. The court relied on "the rule that so long as one takes no active steps to change the natural flow of water over or from his premises, whether from streams, springs, or on the surface of the land, he is not chargeable with liability for any injury or damage which may result to an adjoining or lower proprietor from such flow." 721 P. 2d at 1158 (citing *Hughes v. Anderson*, 68 Ala. 280, 44 Am. Rep. 147 (1880); *Swett v. Cutts*, 9 Am. Rep. 276 (N.H. 1870); 78 Am. Jur. 2d Waters § 359 (1975)). *Accord*, *Kiel v. Johnson*, 345 S.E. 2d 131, 133 (Ga. Ct. App. 1986) ("[A] landowner is not liable for the diversion of surface water unless he diverts the natural flow of water by 'artificial means'."); *Frank v. Garrison*, 184 A.D.2d 852 (N.Y. 1992) (defendant not liable for flooding of plaintiff's land caused by beaver dams on defendant's land).

As in *Beals*, the government in this case has taken no "active steps" to divert water from

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[7] Although plaintiffs' ditches draw water from these streams, the streams themselves are not part of plaintiffs' ditch rights of way. *See Hage v. United States*, Order, Sept. 3, 2002 (Docket No. 207) (clarifying that plaintiffs' ditch rights-of-way are limited to those ditches listed in *Hage IV* at 583).

any of the streams at issue. If there had been any increase in the growth of willows and other riparian vegetation (none has been proven; see below) since the removal of plaintiffs' cattle, such increase would simply reflect the natural recovery of riparian areas from a degraded state that those cattle had created. As Rangeland Management Specialist Michael Croxen has explained:

> The existence of mature willows along the streams of central Nevada indicates a healthy and functioning riparian ecosystem. A major ecological function of willows is the binding or armoring of otherwise loosely consolidated stream banks by their large and complex root systems. This adds strength to the stream banks, so that they become more resistant to erosion during high flow events. Healthy willows also create barriers or catchments [sic] areas along streams where sediments accumulate to form meadow habitats. The meadows in turn absorb and store water that becomes ecologically available as conditions become dryer in the late summer and fall. Proper grazing management would not permit cattle to trample and graze off the willows; instead it would maintain the condition as either static or increasing.

Declaration of Michael Croxen, September 11, 2001.[8] The government has no duty to maintain riparian areas in a degraded state in order to enhance water flows to plaintiffs' property.

**2. Plaintiffs have no right to graze cattle on federal public lands in order to maintain or enhance water flows to their property.**

In addition to contradicting well-established principles of water law, plaintiffs' claim, that the government has taken their water rights by disallowing their cattle to remove willows and other riparian vegetation on public lands, contradicts the holding of this and other courts that livestock grazing on federal lands is a privilege, not a property right. *See Hage IV* at 586-88; *Hage I* at 168-71. Plaintiffs simply have no right to graze their livestock on federal public lands, for the purpose of removing willows or for any other purpose. Any alleged decrease in the value of plaintiffs' water rights caused by withdrawal of the federal lands grazing privilege is not a

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[8] The Declaration of Michael Croxen is attached as Exhibit 3 to Defendant's Response in Opposition to Plaintiffs' Motion to Amend Complaint, September 14, 2001 (Docket No. 169), and as Exhibit E to Plaintiffs' Rule 26(1) Disclosures, April 4, 2003.

compensable property interest. *See Fuller*, 409 U.S. at 493.

### 3. Plaintiffs have not proven any loss of water as a result of vegetative conditions on public lands.

Even if plaintiffs did have a right for the government to maintain unnatural vegetative conditions on public lands in order to maintain or enhance water flows to plaintiffs' property, plaintiffs have demonstrated no infringement of that right. As amici anticipate the government will demonstrate in its post-trial brief and in its answers to the Court's questions, the evidence adduced at the 2004 trial showed there was, no significant increase in willow growth along streams, and no decrease in streamflows attributable to willow growth, following exclusion of plaintiffs' cattle. *See* Defendants' Pre-Trial Memorandum (Docket No. 237) at 41.

In their Post-Trial Brief, plaintiffs offer a comparison between their decreed water rights and the recent actual flow in their ditches. Plaintiff's Post-Trial Brief at 8; Appendix to Plaintiffs' Post-Trial Brief at 15-16 (answer to question 10). But decreed water rights, which include rights to use of water during times of maximum streamflow in the wettest years, are not, and do not purport to be, a measure of water actually flowing in a ditch in a typical year. *See* Joseph L. Sax *et al*., *Legal Control of Water Resources* 108 (3d ed. 2000). A decreed right cannot be used as a measure of actual water available in an average year, let alone a drought year. Plaintiffs made no showing that the difference between their decreed rights and the actual flows in their ditches, or even a significant fraction thereof, is attributable to the government's actions rather than to the normal difference between decreed water rights and actual water flows.

## V. THE FEDERAL GOVERNMENT DID NOT TAKE PLAINTIFFS' PROPERTY BY COOPERATING WITH THE STATE OF NEVADA TO INTRODUCE ELK ON THE TOIYABE NATIONAL FOREST.

Plaintiffs make various allegations concerning elk introduced to the Toiyabe National

Forest by a cooperative effort of the Forest Service and the Nevada Division of Wildlife (NDOW). Most of these allegations concern the impacts of the elk and of elk hunters on the ability of plaintiffs to graze on the National Forest. *See* Plaintiffs' Post-Trial Brief at 4, 16, 20. Because, as explained in Part II of this brief, plaintiffs have no property interest in grazing on the National Forest, these allegations fail as a matter of law to demonstrate a taking. Since the government may completely exclude plaintiffs from grazing on the National Forest without paying compensation, it follows *a fortiori* that plaintiffs are entitled to no compensation for any lesser interference with their grazing operation allegedly caused by elk.

In this Part, amici will present additional reasons why plaintiffs' elk-related claims must be rejected, namely, that plaintiffs' allegations regarding the impacts of elk are factually groundless, that the government is not liable for property damage caused by wild animals, that plaintiffs' theory that the elk effected a physical occupation of their property is groundless, and that plaintiffs' had no reasonable expectation to conduct grazing operations without sharing the public lands with wildlife.

### A. Plaintiffs Failed to Show that Elk Interfered with their Beneficial Use of Water, or Caused More than De Minimis Harm to their Ranching Operation.

#### 1. There is no evidence that water use by elk had any impact on plaintiffs or their property.

Plaintiffs claim that "the elk competed with the Hages' cattle for water and forage." Appendix to Plaintiffs' Post-Trial Brief at 4. But Plaintiffs offer no evidence whatsoever that water consumption by elk had any impact on plaintiffs or their property.[9]

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[9] Plaintiffs' only evidence concerning water consumption by elk is in Mr. Hage's November 1997 Deposition. When asked "have you determined the approximate amount an elk (continued...)

Any water use by elk was *de minimis* and did not deprive plaintiffs of water. Plaintiffs' counsel speculates, based on no evidence at all, that an elk consumes 15 gallons of water per day. Appendix to Plaintiffs' Post-Trial Brief at 4. However, James Lusk, NDOW's wildlife biologist, testified that an elk's average water consumption is about 3 gallons per day. Lusk, Tr. at 2325:13-18. Even if plaintiffs' counsel's inflated estimate were correct, the total water consumption by elk on plaintiffs' grazing allotments, by plaintiffs' own calculation, would be only 5 acre-feet per year, or less than one tenth of one percent of the 5,000 acre-feet per year of water flowing in the streams in which plaintiffs hold water rights. *See* Appendix to Plaintiffs' Post-Trial Brief at 4 (alleging elk drink 5 acre feet/year); Plaintiffs' Post-Trial Brief at 8 (alleging plaintiffs receive less than 5,000 acre feet of irrigation water). If the actual water use shown by biologist Lusk's testimony is used, the figure is 1 acre-foot per year.

Moreover, regardless of the quantity consumed, plaintiffs have demonstrated no infringement of their water rights. Plaintiffs' rights entitle them only to the beneficial use of water. "[P]laintiffs merely own the right to use all the water they can put to beneficial use." *Hage IV* at 573. Elk would interfere with that right only if their water use left insufficient water in springs or streams for plaintiffs' cattle. Plaintiffs have not even alleged, let alone

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[9] (...continued)
drinks?" he answered: "No I haven't." 1997 Hage Depo. at 979:19-21. Given his lack of knowledge, he was asked how he could claim elk had taken his water. He responded:

> A: "My issue here is not how much specifically the elk might drink, but the fact that nonindigenous elk on my allotment are drinking water that belongs to me."
> Q "I see. So it's the fact that they drink at all, any amount, is what matters and not how much."
> A "That is correct."

*Id*. at 980:12-17.

demonstrated, that such was ever the case.

### 2. There is no evidence that elk, or elk hunting, had any significant effect on the plaintiffs' ranching operation.

Plaintiffs allege that elk damaged fences, and that elk hunters scattered cattle and interfered with plaintiffs' ability to remove their livestock at the end of the grazing season, which coincided with the elk hunting season.[10] Plaintiffs' Post-Trial Brief at 4. However, the evidence does not support these allegations. The fence damage caused by elk was minimal, as was the interference with cattle gathering.

**Damage to fences**. James Lusk, NDOW's biologist who monitored the elk after their release, testified that he specifically looked for instances of elk damage to fencing. Lusk, Tr. at 2326:13-15. He found it was not a serious problem. *Id.* at 2327:23-25. If the elk aren't "being harassed, if they're just moving through at their own pace, usually fences are not a problem. They clear them quite easily." *Id.* at 2328:9-11. Lusk did find "two or three locations where the top strand of wire was broke and it looked like because of the elk tracks and the way they proceeded across the fence that that damage may well have been caused by elk." *Id.* at 2326:22 - 2327:1. In those locations, NDOW and the Forest Service constructed and installed "elk

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[10] Plaintiffs offer no evidence that elk competed with their cattle for forage. Nor could they. Al Steninger, plaintiffs' consultant, investigated elk impacts on Table Mountain and wrote in a July 1987 field report that the "overlap between cattle and elk appears minimal." "Where elk did graze meadows, use levels were slight even by later July." DX 670 at (unnumbered page) 11. Forest Service elk herd monitoring data collected from 1986 to 1992 showed that "at current numbers (300 adult animals), the elk have negligible impacts on vegetation, soil and water . . ." DX 769 at 1. *See also* testimony of NDOW wildlife biologist Lusk, Tr. at 2314:2-8 (studies and observations showed "elk were using the country very lightly" ); Forest Service District Ranger Grider, Tr. at 1718:4-5 ("we determined . . . that the use was slight to light by elk." ).

jumpers"[11] to prevent additional damage.

The absence of damage attributable to elk was also described in a November 6, 1987 memo from Forest Service Resource Specialist Tom Johnson to the District Ranger, DX 672 ("during the 1987 grazing season, I observed no damage to the permanent Allotment fences . . . even though I spent a great deal of time on the mountain."). *See also* Forest Service 1997 Elk Herd Monitoring Summary for 1995 and 1996, DX 775 at 12 (a 1993 Table Mountain fence inspection – done at least two years after fence maintenance had stopped – showed "many areas in need of rebuilding or heavy repair. In only one location were elk thought to have caused some damage.").

**Disruption from hunting**. The Plaintiffs claim that elk hunters on Table Mountain scattered the cattle, making it "extremely difficult" to remove livestock from Table Mountain at the end of the grazing season.[12] Appendix to Plaintiffs' Post-Trial Brief at 4. However, the evidence shows these assertions are not credible.

To begin with, there were other hunting seasons[13] on Table Mountain that existed long before the start of elk hunting in 1984. There were three deer seasons: an archery hunt in August (Lusk, Tr. at 2334:20-22), muzzle loading in September (*id*. at 2334:23-25), and the rifle season

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[11] An elk jumper is a fence with wooden rails instead of wires. Lusk, Tr. at 2329:6-23.

[12] The grazing season on-off dates for Table Mountain set forth in plaintiffs' 1978 permit (from 7/1 to 9/30) predate the introduction of elk in 1979, and were not changed in the 1984 permit. DX 368 & 369. In 1987 and 1988, the Forest Service offered plaintiffs an opportunity to minimize conflict with the hunting season by moving their "off date" on Table Mountain to September 15, and by increasing the number of cattle during the season of use. But plaintiffs did not accept the offer until the 1989 and 1990 grazing seasons. DX 669, 681, 683 (1989 AOP), 687 (1990 AOP); Grider, Tr. at 1713, 1723-24, 1727-29.

[13] The Nevada State Board of Wildlife Commissioners, not the Forest Service, establishes the hunting seasons. DX 681; Grider, Tr. at 1726-27.

in October (*id*. at 2335:2-3). The deer hunt on Table Mountain goes back as far as the 1950s or earlier. *Id*. at 2336:16-20. There was also a sage grouse hunting season, which was in early September until about 1982 or 84, when it was moved to October. *Id*. at 2335:10-22.

During all these hunting seasons, wildlife biologist Lusk never received complaints about hunters scattering livestock other than from plaintiffs, even though his job with NDOW covered about 12,000 square miles (over 7 million acres) of three Nevada counties. Lusk, Tr. at 2337:7-25. As the NDOW wrote to Mr. Hage in January of 1987, "[i]f the hunting season did cause your cattle to leave the mountain; it is unusual. Curiously, cattle grazing permits and hunting seasons overlap throughout Nevada. Yours is the first complaint of this nature that I am aware of us receiving." Letter from William Molini to Wayne Hage, DX 667. Similarly, in all of David Grider's years on Table Mountain, he never saw human activity – even groups of up to 20 people including their saddle stock and about five pack mules – disturb cattle. Grider, Tr. at 1724-25. And NDOW's Jim Lusk testified that groups of riders on Table Mountain did not disturb the cattle. Lusk, Tr. at 2342:2 - 2343:14. Mr. Lusk described the cattle's innocuous reaction to these large groups: "Typically unless you're riding right through them, most of the time they'll stand and just watch you as you go by. . . . I've never seen – unless you physically chase them, I don't see that much of a reaction to people or animals." *Id*. at 2343:7-14.

### B. As a Matter of Law, Any Damage Caused by Elk Is Not a Taking of Plaintiffs' Property.

Plaintiffs' rights are limited by backgrounds principles of property law, *Lucas*, 505 U.S. at 1029, one of which is that the government is not liable for property damage caused by

wildlife.[14] "[O]f the courts that have considered whether damage to private property by protected wildlife constitutes a 'taking,' a clear majority have held that it does not and that the government does not owe compensation." *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1428-29 (10th Cir. 1986) (en banc) (citing nine state and federal cases).

The leading case within the Federal Circuit is *Bishop v. United States*, 126 F. Supp 449 (Ct. Cls. 1954), *cert. denied*., 349 U.S. 955 (1955). In *Bishop*, the court of claims rejected a claim that crop damage caused by protected wild geese can constitute a taking, stating "'[t]he protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds. . . . The measures best adapted to this end are for the Legislature to determine, and courts cannot review its discretion.'" 126 F. Supp. at 452, *quoting Phelps v. Racey*, 60 N.Y. 10, 14 (1875). More recently, in a case very similar to this one, where plaintiffs alleged damage by feral horses to a ranch and National Forest grazing allotment in Nevada, this court held that damage caused by the horses is not a taking, even though the horses are protected by federal law. *Bradshaw v. United States*, 47 Fed. Cl. 549, 554 (2000).

The fact that the elk released by NDOW onto Table Mountain were not native to that part of Nevada does not alter the fact that the government is not liable for damage they might cause. Feral horses, at issue in *Bradshaw,* are not even native to North America, let alone Nevada, yet the court still treated them as wildlife for purposes of takings analysis. *See id.* Moreover, other courts have also held that the introduction of wildlife does not make the government liable for their actions. In *Barrett v. State*, 116 N.E. 99 (N.Y. Ct. App. 1917), New York's highest court

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[14] The elk found on the Table Mountain allotment are clearly wildlife according to Nevada law, which defines wildlife as "any wild mammal . . . found naturally in a wild state, whether indigenous to Nevada or not and whether raised in captivity or not." Nev. Rev. Stat. § 501.097.

considered claims that an introduced beaver population was destroying trees on private land. Although the State had introduced the beavers and then prohibited harming them, the court denied the landowners' claims for recovery, noting that whenever wildlife is protected, individuals may be harmed. "But this is clearly a matter which is confided to [the Legislature's] 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." 116 N.E. at 100.

In *Moerman v. State of California*, 21 Cal. Rptr. 2d 329 (Cal. Ct. App. 1993), a case, like this one, involving introduced elk, the court likewise rejected the argument that government could be held liable for damage to fences caused by the elk or the elk's consumption of forage on plaintiffs' private land.

### C. Elk have not "physically occupied" plaintiffs' property.

Plaintiffs claim that the release of elk effected a physical taking. Plaintiffs' Post-Trial Brief at 16. Even if this claim were not barred under the background principle that the government is not liable for damage caused by wildlife, the physical occupation theory must be rejected for three reasons. First, plaintiffs do not claim the elk were present on plaintiffs' own lands, nor did they present any evidence that the elk consumed anything more than *de minimis* quantities of water. *See supra* Part V.A. Plaintiffs' claim of a physical taking is far more attenuated than that in *Moerman*, where the court found no physical taking even though the introduced elk were on the plaintiff's land.

Second, plaintiffs have no right to exclude elk from federal lands. This Court has already held that plaintiffs' "privilege to graze never created a property interest" in the federal lands, *Hage I* at 170, and "the 'complete power' that Congress has over public lands necessarily

includes the power to regulate and protect the wildlife living there." *Kleppe v. New Mexico*, 426 U.S. 529, 540-41 (1976).

Third, even if plaintiffs had shown some use of their own property by the elk, the elk's transitory nature does not satisfy the strict "permanent physical occupation" requirement enunciated in *Loretto* 458 U.S. at 428 (distinguishing between permanent physical occupations and cases involving a more temporary invasion).

For these reasons, plaintiffs' claim that the presence of the elk physically took their property must be denied.

### D. When the Hages Purchased the Pine Creek Ranch, It Was Reasonable to Expect Their Ranching Operation Would Have to Co-Exist with Wildlife.

Finally, plaintiffs cannot recover under a traditional takings analysis because, among other things, plaintiffs lack sufficient invested-backed expectations to support such a claim. When the Hages purchased the Pine Creek Ranch in 1978, their expectations as to how they could use their private property were defined and limited by existing statutes, state and federal plans, and conditions on the ground at the time of their purchase. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."). Reasonable expectations in 1978 included sharing the land with wildlife, including elk.

#### 1. Laws in effect in 1978 provided for wildlife use on the Toiyabe National Forest and on federal lands managed by the BLM.

When plaintiffs purchased the Pine Creek Ranch in 1978, numerous federal statutes made

it clear that federal lands – both those managed by the Forest Service and by the BLM – were to be managed for multiple uses, including the promotion of wildlife and recreation. Accordingly, plaintiffs could not have had a reasonable expectation that their grazing permit precluded the Forest Service from making management changes to accommodate and enhance wildlife, hunting, and recreation. Relevant statutes include the **Multiple Use and Sustained Yield Act of 1960**, 16 U.S.C. § 528-531 (directing that public lands be utilized for multiple purposes including grazing, recreation, timber, watershed and wildlife and fish, *id*. § 528); the **Forest and Rangeland Renewable Resources Planning Act of 1974**, 16 U.S.C. §§ 1600-1614 (requiring that Forest Service plans provide for multiple-use "and in particular include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness," *id*. § 1604(e)(1)); the **Federal Land Policy and Management Act of 1976**, 43 U.S.C. §§ 1701-1784 (requiring the Secretary of the Interior to "manage the public lands under principles of multiple use and sustained yield," *id*. § 1732(a), and specifying that grazing is only one of several purposes, along with recreation, timber, minerals, watershed, and wildlife and fish, *id*. § 1702©); the **Public Rangelands Improvement Act of 1978**, 43 U.S.C. §§ 1901-08 (reaffirming national policy to improve range condition, *id*. § 1901(b)(2), which is defined as the quality of the land to support a variety of range management objectives, including wildlife habitat, *id*. § 1902(d)); and the **Taylor Grazing Act of 1934**, 43 U.S.C. § 315-315m (protecting the right to hunt and fish on BLM lands in accordance with state laws, and specifying that grazing permittees had no right whatsoever "to interfere with hunting or fishing," *id*. § 315).

### 2. Historic wildlife use and agency plans as of 1978 precluded any reasonable expectation that the Table Mountain Allotment would not be shared with elk and other wildlife.

Elk are native to portions of Nevada. Lusk, Tr. at 2296:6-10 ("most of the occurrence of elk was felt to be in the northeastern corner of the state, [and] portions of White Pine and Elko County."). In the 1930s, NDOW imported and released elk in the Schell Creek range of White Pine County (1932) and into the Spring Mountain range of Clark County, Nevada (1943). Lusk, Tr. 2296:16-18.

When the Plaintiffs acquired their ranch in 1978, NDOW's introduction of elk on Table Mountain had already been approved. In the early 1970s, NDOW began to study the release of elk in the Table Mountain area of the Toiyabe National Forest; it prepared a Feasibility Report in 1974 (DX 626), and the Forest Service completed an Environmental Analysis in 1975. DX 627. Grazing permittees and other interested members of the public were consulted (DX 627 at 12-13). NDOW released 50 elk on Table Mountain in 1979. Lusk, Tr. at 2309:2-3; 2324:20-23.

Prior to the 1979 elk introduction, the Table Mountain allotment had always been used by wildlife. It had been heavily grazed by mule deer, but the deer population "crashed" before the elk were introduced.[15] The use by mule deer was noted in NDOW's 1974 Feasibility Report, which pointed out that the allotment management plan at the time allowed for 240 head of cattle and had "reserved" 277 AUM's [animal unit months] of forage for wildlife (deer).[16]

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[15] 1974 Feasibility Report, DX 626 at 2 ("The successful introduction and establishment of elk may replace the present void resulting from the mule deer population decline.").

[16] 1974 Feasibility Report, DX 626 at 22 ("The Table Mountain Allotment allows 240 head of cattle from July 1 through September 30, for a total of 720 cow months of grazing. The range analysis and allotment management plan have been completed and 277 aum's have been reserved for wildlife (deer) at a rate of 7 deer per aum.")

Because mule deer have always been present on Table Mountain, plaintiffs never had a reasonable expectation that their cattle would not have to share the mountain with other large grazing animals. Moreover, plaintiffs have introduced no evidence to prove that the impact of elk on their grazing operation was any greater than that of deer on their predecessors'. Indeed, as discussed in section V.A., plaintiffs failed to demonstrated any material adverse effect on their property due to the elk. Thus, plaintiffs have not shown that they have been deprived of any reasonable expectation.

For all of the foregoing reasons, all of plaintiffs' claims should be denied..

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