IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 29,544

ROY WALKER and SHELLIE WALKER,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

BRIEF *AMICUS CURIAE* OF THE NEW MEXICO WILDLIFE FEDERATION, THE NEW MEXICO COUNCIL OF TROUT UNLIMITED, AND THE NATIONAL WILDLIFE FEDERATION IN SUPPORT OF THE UNITED STATES

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The New Mexico Wildlife Federation, the New Mexico Council of Trout Unlimited, and the National Wildlife Federation ("amici") respectfully submit this brief *amicus curiae* in support of the United States. As explained in our June 6, 2006 Motion seeking permission to submit this brief, amici are not-for-profit conservation/environmental organizations whose members live in New Mexico and elsewhere in the United States and use the Gila National Forest in New Mexico and other federal public lands for fishing, hunting, hiking, recreation, and enjoyment of the outdoors. The outcome of this case will have a profound impact on amici's members. If water rights established under state law carry with them a right to graze livestock on public lands, then the authority of the U.S. Forest Service and the Bureau of Land Management to regulate and control grazing in order to protect natural resources, such as the wildlife, fish, plants, soils, and scenery that amici's members use and treasure, will be seriously impaired.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case was brought by public lands ranchers seeking compensation under the Takings Clause of the Fifth Amendment for an alleged taking resulting from the U.S. Forest Service's regulation of cattle grazing on the Gila National Forest. A threshold issue in this takings case, as in any takings case, is whether Plaintiffs possess a private property interest that would support a potential taking claim. The case is before this Court on certification by the U.S. Court of Federal Claims of two questions that the Claims Court posited as potentially relevant to the threshold property issue.[1] We urge this Court (1) to hold that the questions were erroneously certified

[1] "1. Does the law of the State of New Mexico recognize a limited forage right implicit in a vested water right? 2. Does the law of the State of New Mexico recognize a limited forage right implicit in a right-of-way for the maintenance and enjoyment of a vested water right?" *Walker v. United States*, 69 Fed. Cl. 222, 233-34 (2005).

because the question whether there is a private right to graze livestock on federal public lands has already been definitively resolved under controlling federal law, or, in the alternative, (2) to answer both certified questions in the negative.

This case involves a legal controversy as to which a great deal of proverbial water has already flowed under the proverbial bridge. For nearly a century, the federal courts, including the United States Supreme Court, have repeatedly and consistently held that grazing on the public lands, whether by the tacit consent or the explicit permission of the federal government, is a revocable privilege, not a property right. *See, e.g., Light v. United States*, 220 U.S. 523, 535 (1911); *Omaecheverria v. Idaho*, 246 U.S. 343, 352 (1918); *United States v. Fuller*, 409 U.S. 488, 491-92 (1973); *Osborne v. United States*, 145 F.2d 892, 896 (9th Cir. 1944). For nearly forty years, the federal courts have also repeatedly rejected attempts to avoid this longstanding precedent by repackaging the claimed property right in the federal range as a component or appurtenance of a state water right. While one judge of the U.S. Court of Federal Claims has issued several interlocutory orders that may provide limited support for this theory, *see Hage v. United States*, 35 Fed. Cl. 147 (1996); *Hage v. United States*, 42 Fed. Cl. 249 (1998); *Hage v. United States*, 51 Fed. Cl. 570 (2002), the overwhelming weight of authority is against the argument. *See*, *e. g*., *Hunter v. United States*, 388 F.2d 148, 151, 154 (9th Cir. 1967); *Diamond Bar Cattle Co v. United States*, 168 F.3d 1209, 1215 (10th Cir. 1999); *Colvin Cattle Co. v. United States*, 67 Fed. Cl. 568, 575 (2005), *appeal docketed*, No. 06-5012 (Fed. Cir.).

Because Plaintiffs claim forage rights on federal public lands, federal law is dispositive of their claims. In *Hill v. Winkler*, 21 N.M. 5, 151 P. 1014 (1915), this Court addressed a claim of private rights in federal public lands very similar to the claim in this case. This Court identified

two alternative readings of state law and selected one alternative on the basis that the other "would be clearly within the prohibition" of an act of Congress and therefore "invalid." *Id*. at 1016. This Court's analysis reflected the principle that, under the Property and Supremacy Clauses, federal law controls the disposition of federal lands and states lack the authority to create private interests in federal lands not authorized by federal law. *See United States v. Oregon*, 295 U.S. 1, 27-28 (1935) ("The laws of the United States alone control the disposition of title to its lands. The States are powerless to place any limitation or restriction on that control."). As we explain below, federal law precludes the theory that possession of a state water right conveys a property right in the public lands themselves. Because federal law is controlling on this issue, any state law suggesting a contrary conclusion would be "a void thing." *Hill*, 151 P. at 1015. Therefore, the Court of Federal Claims erred when it asked this Court to resolve the issue as a matter of state law.

Even if federal law did not independently resolve this case, New Mexico law mandates negative answers to the certified questions. Under New Mexico law, water rights are appurtenant to land, not *vice-versa*. *See* NMSA 1978 § 72-5-23 (1985). No doctrine of water law enlarges the scope of a water right to include an appurtenant right in land. In sum, there is no basis in New Mexico law to conclude that a right to the use of land can be implicit in a water right, either as a general matter of state water law or in the specific context of water rights on federal lands.

This brief is divided into four sections. In the first section, subsection I.A describes the general principles establishing that grazing of cattle on federal lands is governed by federal law, subsection I.B shows that federal law does not recognize any private property right to graze livestock on federal land, subsection I.C explains why the Mining Act of 1866 cannot be read,

and has not been read, to allow public land ranchers to rely on their state water rights to claim grazing rights in the public domain, and subsection I.D concludes that, because Plaintiffs' claims fail as a matter of federal law, this Court should decline to answer the questions certified by the Court of Federal Claims. In the second section, subsection II.A addresses the issue as a matter of New Mexico law and explains why an appropriative water right under New Mexico law does not include the right to use public or private lands for grazing purposes, subsection II.B explains why a ditch right under New Mexico law does not include a right to graze cattle alongside the ditch, and subsection II.C discusses why this Court's decision in *First State Bank of Alamogordo v. McNew*, 33 N.M. 414, 423-25, 269 P. 56, 59-60 (1928), does not support Plaintiffs' claim of private rights in public lands. The third section, III, explains why the interlocutory rulings in *Hage v. United States* provide no persuasive support for Plaintiffs' position, either as a matter of federal law or state (in that case, Nevada) law. The final section, IV, briefly addresses the historical materials cited by Plaintiffs and their amici and explains why those materials, to the extent they are relevant, support the position of the United States and the New Mexico Engineer rather than the position of Plaintiffs.[2]

ARGUMENT

I. PLAINTIFFS' ARGUMENT THAT THEIR STATE WATER RIGHTS INCLUDE A PROPERTY RIGHT TO GRAZE CATTLE ON FEDERAL PUBLIC LANDS IS FORECLOSED BY FEDERAL LAW.

A. Federal Law Governs the Creation of Property Rights in Federal Lands.

The federal government, and only the federal government, has the power to create private

[2] Amici assume, for the purpose of this brief, that Plaintiffs possess valid appropriative water rights under New Mexico law.

property rights in federal public lands. Article IV, section 3, clause 2, of the U.S. Constitution provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." The U.S. Supreme Court has held that this power precludes any independent state authority to vest private parties with property rights in the public domain that are good against the United States. As the Court explained in *Utah Power & Light Co. v. United States*, 243 U.S. 389, 404 (1917):

> [T]he settled course of legislation, congressional and state, and repeated decisions of this court, have gone upon the theory that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to the United States be acquired. . . . Thus while the state may punish public offenses, such as murder or larceny, committed on such lands, and may tax private property, such as live stock, located thereon, it may not tax the lands themselves or invest others with any right whatever in them.

(emphasis added).

The U.S. Supreme Court has also repeatedly emphasized that private property rights can be carved out of the public domain only by express grant and never by implication:

> [W]e must not overlook the general principle announced in many cases in this court, that grants from the sovereign should receive a strict construction, – a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

Northern Pacific Railway Co. v. Soderberg, 188 U.S. 526, 534 (1903) (emphasis added). *See also United States v. Union Pacific Railroad Co.*, 353 U.S. 112, 116 (1957) (referring to "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 doubts they are resolved for the Government, not against it."); *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919) ("such grants must be construed favorably to the government and . . . nothing passes but what is conveyed in

clear and explicit language – inferences being resolved not against but for the government").

B. Federal Law Does Not Recognize Any Private Property Right to Graze Livestock on Federal Public Lands.

Prior to the establishment of formal federal regulation of grazing on the public domain, ranchers commonly seized opportunities to graze cattle on public lands without explicit authorization. However, even under that former regime, ranchers operated on the public lands under an "implied license" from the federal government. *Buford v. Houtz*, 133 U.S. 320, 326 (1890). Long-term occupation of the public lands by such ranchers did not serve to create any vested private rights. *See Light*, 220 U.S. at 535-36 (stating that ranchers were operating under an implied license to graze on public lands that only existed "so long as the government did not cancel its tacit consent").

When, around the turn of the last century, the federal government began to require permits for grazing on the National Forests, the Supreme Court rejected the argument that the new procedures abrogated any "vested rights" based on ranchers' historical use of the range. *See Light*, 220 U.S. at 535 (the United States' failure to object to previous use of its lands for private grazing "did not confer any vested right on [those who previously grazed federal lands], nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes."). *See also Omaechevarria*, 246 U.S. at 352 ("Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used.").

C. The Mining Act of 1866 Does Not Recognize "Forage Rights" Appurtenant to Water Rights or Ditch Rights.

Exercising its exclusive authority to create private rights in federal lands, Congress chose,

in the Mining Act of 1866, to recognize certain water and ditch rights established under state and local procedures. Section 9 of the Act, also known as R.S. 2339, provides:

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

Act of July 26, 1866, § 9, 14 Stat. 251, 253 (previously codified at R.S. 2339 (1878); currently codified at 30 U.S.C. § 51 and 43 U.S.C. § 661). Plaintiffs acknowledge (Plaintiff-Appellants' Brief in Chief, at 7-9) that their alleged property right to graze cattle on public lands – if it exists at all – must be authorized by this statute. As we explain below, section 9 of the Mining Act cannot be read to authorize Plaintiffs' claim of private rights in the public lands. For clarity's sake, it will be convenient to address separately Plaintiffs' claim of a property right in the public domain under section 9 based on their possession of (1) water rights and (2) ditch rights.

1. Water Rights.

Plaintiffs' argument that they can establish property rights in federal lands based on their possession of state water rights is inconsistent with the plain language of section 9. The statute refers to "rights to the use of water," and these words cannot reasonably be stretched to encompass rights in water and in land. Other courts have repeatedly refused to so extend the statute. For example, in *Diamond Bar Cattle Co*. the U.S. Court of Appeals for the Tenth Circuit stated that the argument that a water right recognized under the Mining Act can include a right to graze on federal public lands "is contrary . . . to the language of the Act itself, which simply recognizes rights to the use of water." 168 F.3d at 1215. To like effect, the U.S. Supreme Court,

in *Utah Power & Light Co*., 243 U.S. at 410 - 11, held that section 9's recognition of water rights did not include rights to the use of land, "which is a different matter." *See also Utah Light & Traction Co. v. United States*, 230 F. 343, 345 (8th Cir. 1915) (Section 9 (R.S. 2339) did not "either in letter or in spirit contemplate[] the use of ground within the public lands for other uses and purposes" than the storing and transmission of water); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899) ("The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water.") (emphasis added).

Significantly, other provisions of the Mining Act did create opportunities for private citizens to obtain private rights in federal lands. *See, e g*., Act of July 26, 1866, § 10, 14 Stat. 253 (providing for purchase of land by homesteaders). Given that Congress demonstrated in the Mining Act that it knew how to create private rights in public lands, it would be incongruous to read a grant of private rights in the public lands into section 9, which on its face is limited to water. *See* Jeffrey Wechsler, "This Land is Our Land: Ranchers Seek Private Rights in the Public Rangelands," 21 J. LAND RESOURCES & ENVTL. L. 461, 474 (2001).

Plaintiffs' expansive construction of section 9 also conflicts with the Supreme Court's repeated injunction that grants of private rights in public lands must be express and cannot be implied. *See, e.g., Northern Pacific Railway Co.*, 188 U.S. at 534 ("Nothing passes by implication"). Given that section 9 refers only to water, and contains no indication that it extends to land, fidelity to this rule of strict construction requires rejection of Plaintiffs' position.

Furthermore, Plaintiffs' proposed reading conflicts with the basic purpose of section 9 of the Mining Act. The legislation was designed to sever the public lands from the water thereon,

reserving the former for essentially exclusive federal management, while allowing the latter to be governed by state law. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) ("Congress intended to establish the rule that for the future the land should be patented separately. . . . It is hard to see how a more definite intention to sever the land and water could be evinced."). *Cf. Federal Power Comm'n v. Oregon*, 349 U.S. 435, 447-48 (1995) (stating that similar legislation, the Desert Lands Act of 1877, "severed, for purposes of private acquisition, soil and water rights in public lands, and provided that such water rights were to be acquired in the manner provided by the law of the state of location"). Treating a water right as "implicitly" including a private right in the federal lands would do considerable violence to Congress's scheme to sever the public lands from water rights in the western U.S.

In view of the foregoing, it is hardly surprising that a consistent line of precedent holds that water rights under the Mining Act do not include any associated rights in land. *See, e.g., Utah Power and Light Co*., 243 U.S. at 410 - 11 (holding that water rights under the Mining Act do not include rights to use adjoining lands for hydroelectric power facilities that make use of the water); *Utah Light & Traction Co.*, 243 F.3d at 346 (same); *Cleary v. Skiffich*, 28 Colo. 362, 373, 65 P. 59, 62-63 (1901) (ruling that the Mining Act authorized private rights in water, but did not grant a mill owner any right to the land around the water); *cf. United States v. Schmutz*, 56 F.2d 269, 270 (D. Utah 1932) ("no one has suggested that the state through its engineer or otherwise can give appropriators of the public waters of the state any right in or to the public lands of the United States.").

Even more to the point, several decisions hold that a public land rancher cannot rely on a state water right to lay claim to forage rights on the public range. The Ninth and Tenth Circuit

U.S. Courts of Appeals, the two federal appeals courts with jurisdiction over the bulk of the western states, have both rejected Plaintiffs' position. *See Diamond Bar Cattle Co.*, 168 F.3d at 1215 (referring to the "well-settled body of law holding no private property right exists to graze public rangelands," and stating that the Mining Act "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*, 388 F.2d at 154 ("[Plaintiff] urges that the adjoining [grazing] lands provide the means to use the water beneficially and must therefore be deemed appurtenant to it. He claims too much."). In *Gardner v. Stager*, 892 F.Supp. 1301 (D.Nev.1995), *aff'd*, 103 F.3d 886 (9th Cir.1996), the court concluded, citing *Hunter*, that the plaintiffs "cannot argue, at least not successfully, that their predecessors acquired vested water rights and that grazing rights are 'appurtenant' to such water rights. That argument was expressly rejected long ago." *Id*. at 1303.

> [T]he fact that [plaintiffs'] predecessors grazed stock on the land at issue in the 1870's does not mean that the [plaintiffs] today have a vested grazing right . . . immune from federal pasturage. On the contrary: use of public lands for stock grazing, either under the original regime of "tacit consent" or under the permit system after establishment of the national forests, was and is a privilege with respect to the federal government, revocable at any time.

Id. at 1303-04 (adding that "plaintiffs' pleadings in this case . . . border on the frivolous and sanctionable"). *See also Colvin Cattle Co.*, 67 Fed. Cl. at 575 ("no other possessory right – specifically the right to graze – was recognized by the Mining Act").

Finally, Plaintiffs' proposed interpretation of the Mining Act should be rejected because the argument, if accepted, would impose an unreasonable burden on the property rights of numerous citizens. The Mining Act specifies that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water right, or rights to ditches

and reservoirs used in connection with such rights, as may have been acquired under or recognized by [the Mining Act]." Act of July 9, 1870, ch. 235, § 1, 16 Stat. 217 (1870) (codified at 43 U.S.C. § 661) The effect of this provision is to make lands that have passed into private hands through the homesteading process subject to water rights previously established under the 1866 Mining Act. If Plaintiffs were correct that state water rights recognized under the Mining Act included a right to graze cattle, the effect would be to place an extraordinary cloud on the millions of acres of homesteaded land in the western United States.

This concern is all the more serious because Plaintiffs have identified no geographical limits to their claim and it is difficult to see how, if the claim were valid, it could be predictably cabined. *See* Plaintiff-Appellants' Brief in Chief at 1 (arguing that Plaintiffs' water rights include a property right to exploit the forage on public lands "in the vicinity of the water resources"). Thus, protecting the settled expectations of many thousands of New Mexico landowners argues strongly against Plaintiffs' claim that a water right can carry with it a right to use adjacent lands for grazing purposes.

2. Ditch Rights.

Similarly, the language of the Mining Act recognizing private ditch rights on federal lands cannot be read to include a private property right in the forage on public lands. The Mining Act "acknowledge[s] and confirm[s]" a right of way "for the construction of ditches and canals." On its face, this language grants only the right to construct ditches and canals, and cannot sensibly be read to include a right to graze livestock beside the right of way.

Other courts have arrived at the same conclusion. In *Hunter*, the Ninth Circuit concluded that this provision grants only a "right of way for the construction of ditches and canals needful

to conduct appropriate water from the public domain." 388 F.2d at 154. The court specifically rejected Hunter's claim that the right of way included an accompanying easement to graze livestock. *Id.* *See also Utah Light & Traction Co*., 230 F. at 346 (concluding that a Mining Act ditch right was limited to facilities "constructed for the storing and transmission of the water itself").

In addition, Plaintiffs' theory that a ditch right under the Mining Act includes a right to graze cattle on adjacent public lands would, like their expansive water rights theory, impose an unreasonable burden on property owners. Plaintiffs do not attempt to define with any precision the limits of their alleged private grazing rights derived from ditch rights *See* Plaintiff-Appellants' Brief in Chief, at 1 (describing the claimed forage rights derived from ditch rights as extending "along the rights of way within the allotment"). Moreover, regardless of how these rights might be defined, in practice they would be essentially unlimited in extent; given that ditches are linear, it would be impossible to fence the area alongside ditches while maintaining an economically viable cattle operation. Thus, given cattle's propensity to roam, Plaintiffs' claim of a private right in the forage alongside ditches amounts, in practical effect, to an unlimited claim of private rights in public lands. Just as with claims based in appropriative water rights, these claims of property rights based on ditch rights would place on enormous burden on private property owners who derive their title from homesteaders who acquired titles subject to water rights established under the Mining Act.

D. Because Plaintiffs' Claim Is Precluded by Federal Law, The Court of Federal Claims Erred in Certifying Questions to This Court.

The Court of Federal Claims certified its questions to this Court *sua sponte*. No party requested certification, and the parties were given no opportunity to brief or argue the question of

whether certification was appropriate. Perhaps because of its failure to consult the parties, the Claims Court failed to recognize that, since Plaintiffs' claim is precluded by federal law, there is no controlling issue of state law to be resolved by certification.

As a result of the Claims Court's error, this Court is placed in the position in which the Supreme Court of Alabama found itself in *Palmore v. First Unum*, 841 So. 2d 233 (Ala. 2002). In *Palmore*, the Alabama court had initially accepted a certified question from a federal district court. The question was whether a certain provision of Alabama tort law was a law "which regulates insurance" within the meaning of an applicable federal statute. On careful consideration, the Alabama court recognized that this question hinged on the interpretation of the words "which regulates insurance" in the federal statute:

> Simply put, we are being asked either 1) to interpret federal statutory language with regard to Alabama's tort of bad faith using the relevant federal precedent (something that has already been authoritatively accomplished by the United States Court of Appeals for the Eleventh Circuit) or 2) to give a meaningless "Alabama interpretation" to a phrase found in a federal statute, which would have no binding force or effect in federal court. Because either option would be an exercise in futility, it is clear that our acceptance of this question was erroneous, and we decline to answer it.

841 So. at 236 (footnotes omitted). Similarly, here, Plaintiffs' claim hinges on whether their purported "forage rights" are included in "rights to the use of water" or "right[s] of way for the construction of ditches and canals" within the meaning of the federal Mining Act of 1866. This question has already been authoritatively answered, in the negative, by the United States Court of Appeals for the Tenth Circuit, among other federal courts. *Diamond Bar Cattle Co.*, 168 F.3d at 1215. Any contrary "New Mexico interpretation" of the Mining Act would have no binding force or effect in federal court. Therefore this Court, like the Alabama Supreme Court in *Palmore*, should decline to answer the questions erroneously certified by the federal court.

II. PLAINTIFFS' ARGUMENT THAT THEIR WATER RIGHTS INCLUDE FORAGE RIGHTS IN FEDERAL PUBLIC LANDS IS NOT SUPPORTED BY STATE LAW.

Even if Plaintiffs' assertion of a property right to graze cattle on public land were not inconsistent with the Mining Act of 1866, Plaintiffs' claim to forage rights still must be rejected because there is no basis for Plaintiffs' position in New Mexico law. Because Plaintiffs' claims of forage rights allegedly "implicit" in their water rights and/or their ditch rights raise somewhat different legal issues, it will be useful again to address each claim separately.

A. Water Rights.

Starting at the most basic, Plaintiffs' effort to find forage rights "implicit" in appropriative water rights is contrary to the traditional understanding in New Mexico that interests in water are distinct from interests in land. Under New Mexico law, "the right to use water is considered a property right which is separate and distinct from ownership of the land." *KRM., Inc. v. Caviness*, 1996-NMCA-103, ¶ 6, 122 N.M. 389, 390, 925 P.2d 9, 10. In this respect, the law of New Mexico is consistent with the law of other western states. *See, e g., Matter of Estate of Palizzi*, 854 P.2d 1256, 1260 (Colo. 1993) ("A water right is a separate property right from the land on which it is used."). The fact that New Mexico law recognizes interests in land as separate from interests in water precludes the idea that rights in land can somehow be implicit in a water right. *See also* Brief of Amicus Curiae, John R. D'Antonio, New Mexico State Engineer, at 2-4 (discussing this point at greater length).

The distinction between rights in water and rights in land is repeatedly reflected in New Mexico statutory law. For example, the provision governing applications to impound "stock water" provides:

> Upon the filing of an application pursuant to this section, if the state engineer finds that the capacity of the proposed impoundment is ten acre-feet or less, will not be on a perennial stream and will be used for watering of livestock as defined in Subsection D of this section, the state engineer shall issue a permit to the applicant to impound and use the waters applied for; provided that as part of an application for an impoundment on state or federal land, the applicant submits proof that the applicant is legally entitled to place livestock on the state or federal land where the water is to be impounded and has been granted access to the site and has permission to occupy the portion of the state or federal land as is necessary for the impoundment.

NMSA 1978 § 72-9-3 (2004) (emphasis added). This provision requires an applicant seeking a stockwatering permit to submit proof that he previously obtained separate authorization to place the cattle on state or federal land. Implicit in this procedure is a recognition that interests in land are separate and distinct from interests in water, and that obtaining a legal right to exploit water does not include any legal rights in land.

Plaintiffs mistakenly contend that NMSA 1978 § 19-3-13 (1915) demonstrates that a right to forage can be viewed as implicit in a water right. This provision states:

> Any person, company or corporation that may appropriate and stock a range upon the public domain of the United States, or otherwise, with cattle shall be deemed to be in possession thereof: provided, that such person, company or corporation shall lawfully possess or occupy, or be the lawful owner or possessor of sufficient living, permanent water upon such range for the proper maintenance of such cattle.

Plaintiffs' argument is refuted by this Court's decisions in *Hill v. Winkler*, 21 N.M. 5, 151 P. 1014 (1915), and *Yates v. White*, 30 N.M. 420, 235 P. 437 (1925), and by the Tenth Circuit's decision in *Diamond Bar Cattle Co.*. *Hill* arose from a dispute between ranchers over access to the public range, and a claim by one set of ranchers, based on § 19-3-13, that their prior occupation of the public domain, along with the appropriation of water rights, granted them protected private property rights in the public range. This Court rejected the ranchers' claim:

> We are of the opinion, however, that the two sections of chapter 61 of the Laws of 1889 [now codified at § 19-3-13] can be construed as not intending to grant any exclusive right in the use of the public domain, but, on the contrary, as attempting to provide that all those who seek to stock a range upon the public domain must, before doing so, lawfully possess, or be the lawful owner of, sufficient permanent water on such range for the proper maintenance of such cattle. This would be a sound and proper regulation of the use of the public lands which could be defended. It is clear, however, that any attempt on the part of the Legislature to grant exclusive right or occupancy upon a part of a public domain would be clearly within the prohibition of the act of Congress of February 25, 1885, and therefore invalid.

Hill, 151 P. at 1015-6. This Court's reference to permissible "sound and proper regulation of the use of the public lands" is consistent with the U.S. Supreme Court's rulings, in *Utah Power and Light* and *Omaechevarria v. Idaho*, that, in the absence of federal regulation, the state's regulatory police power extends to the public lands, but the state has no power to create private rights in those lands. *See Omaechevarria*, 246 U.S. at 325, 327; *Utah Power and Light*, 243 U.S. at 404

This Court reaffirmed this reading of § 19-3-13 in *Yates.* *Yates* involved a breach of contract suit by a rancher who claimed that a seller had breached his agreement to remove all of his cattle from the public range. This Court ruled the contract void on the ground that it was premised on a violation of the federal prohibition against inclosures of the federal range. In the course of addressing these issues this Court characterized a public land rancher's rights under § 19-3-13 as follows: "The defendant, then, owning all of the waters on his range, had the right to the exclusive enjoyment of the <u>license</u> to graze these lands as against all others who did not develop other waters upon the same." *Yates*, 235 P. at 437 (emphasis added).

In *Diamond Bar Cattle Co.,* the Tenth Circuit carefully examined the meaning of § 19-3-13, *Hill,* and *Yates*, and explained as follows:

> Plaintiffs read this section as bestowing a private property right to graze cattle on the public domain upon all those with a valid water right. Plaintiffs' interpretation is negated by longstanding New Mexico law. As early as 1915, the New Mexico Supreme Court rejected the proposition that what is now § 19-3-13 created, or was intended to create, a property right in land in the public domain superior or equal to the federal government's right in such land. . . . *Yates* thus reinforced the holding in *Hill* that § 19-3-13 serves only to limit private use of the public domain by restricting grazing access to those who have a water right along the range. More significant, however, is the court's express concession that access to the public domain, even if regulated pursuant to § 19-3-13 and other New Mexico laws, is not a right, but a privilege governed by license.

Diamond Bar Cattle Co., 168 F.3d at 1214.

This Court's interpretation of § 19-3-13 is consistent with NMSA 1978 § 19-3-1 (1915), which established a recording and notice process for persons who take "possession of any lands being a part of the public domain of the United States." In relevant part, this provision states:

> Any person who has taken or may hereafter take possession of any lands being a part of the public domain of the United States, either for agriculture or stockraising . . . and the person so making and recording the same shall have the right to the possession of said lands described therein <u>as against every person except the United States, and those holding or deriving title from the United States</u>.

(emphasis added). This provision, like § 19-3-13, recognizes that the acquisition of possessory rights in federal public lands may create legal rights vis-a-vis other private parties, but not against the United States.[3]

In New Mexico, water rights may be appurtenant to land. *See, e.g.,* NMSA 1978 §§ 72-1-

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[3] Plaintiffs cite *Maxwell Land-Grant Co. v. Dawson*, 7 N.M. 133, 146, 34 P. 191, 194 (1893), for the proposition that ownership of water creates an "easement" over adjacent lands. *See* Plaintiff-Appellants' Brief in Chief, at 28, 35. The cited statement actually appears in the dissent, which makes clear that it is possession of the land that confers a right to graze, not ownership of the water: "he understood that the <u>possession of the land</u> on each side of the stream gave him command of the water, and that this command virtually gave him control of the grazing privileges over the surrounding county." *Id*. (emphasis added).

2 (1915), 72-5-23 (1985). Conveyance of a private ranch, for example, implicitly includes conveyance of appurtenant stockwater rights. *See First State Bank of Alamogordo v. McNew*, 33 N.M. 414, 425, 269 P. 56, 59-60 (1928). But Plaintffs seriously err when they invert this principle by claiming that a right to the use of land is appurtenant to a water right. To amici's knowledge, no court in New Mexico (or any other state) has ever held that conveyance of a water right implicitly includes conveyance of a ranch. If it did, land titles all over New Mexico would be in disarray.

Plaintiffs contend that an appropriative water right should be viewed as creating a vested right to forage on public lands because the federal government could otherwise render appropriative water rights "useless" by barring access to the public range. Plaintiffs' argument proves far too much. It is always the case that, in order to be "useful," a water right requires the use of some land on which to conduct the enterprise that uses the water. For that reason, the Mining Act recognizes rights of way for ditches and canals to transport water from where it is found to the land where it is used. *See* 43 U.S.C. § 661. It does not, however, follow that the water right therefore includes a right to the use of land. *See, e.g., Hunter*, 388 F.2d at 154 ("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."); *Cleary*, 28 Colo. at 373, 65 P. at 63 (water right does not include right to use land on which to beneficially apply the water). A stockwater right does not include the use of grazing lands any more than an irrigation water right includes the use of a farm, a domestic water right includes the use of a home, a water right for industrial purposes includes the use of a factory, or a water right for mining purposes includes the use of a mine.

B. Ditch Rights of Way.

There also is no basis for Plaintiffs' argument that a vested right to graze cattle on federal lands is implicit in the right to construct and maintain a ditch across the property of another.

Most importantly, a specific provision of New Mexico law refutes this argument. NMSA 1978 § 73-2-10 (1915) provides: "All plants of any description growing on the banks of said ditches, or acequias, shall belong to the owners of the land through which said ditches or acequias run." This provision, by affirming that the forage alongside the ditch belongs to the owner of the underlying land, precludes the argument that a ditch right under New Mexico law implicitly includes a right to the forage alongside the ditch. *See* Ira Clark, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT AND USE 26 (1987) (discussing this provision).

More generally, Plaintiffs' claim of a forage right based on a ditch right is inconsistent with the general principle of New Mexico law that easements across the property of another must be construed narrowly. *See Posey v. Dove*, 57 N.M. 200, 213, 257 P.2d 541, 549 (1953). *See also* Brief of Amicus Curiae, John R. D'Antonio, New Mexico State Engineer, at 2-4 (discussing this point at greater length).

While a ditch right can include the right to conduct maintenance of the ditch, this rule does not help Plaintiffs. As a general matter, the owner of a ditch right has "the right to reasonably enter the servient estate to repair and maintain the right of way and remove natural obstructions interfering with its use." *Cox v. Hanlen*, 1998-NMCA-015, ¶ 16, 124 N.M. 529, 534, 953 P.2d 294, 299, *cert. denied*, 124 N.M. 418, 952 P.2d 19 (1998). *See also Dyer v. Compere*, 41 N.M. 716, 720, 73 P.2d 1356, 1359 (1937) ("the owner of the easement has the right to go upon the servient estate at all reasonable times to effect proper repairs and

maintenance"). However, the right to conduct maintenance only encompasses activities designed to help preserve the ditch's capacity to carry water from point A to point B. *See* 21.7.1.9 NMAC (6/15/70 as amended through 12/31/01) (discussing cleaning of ditches). It does not include activities, such as grazing cattle, that are unrelated to ditch maintenance and that may actually make ditch maintenance more difficult. *Cf. Durfee v. Garvey*, 21 P. 302, 302 (Cal. 1889) (case involving allegations that cattle, "by feeding along the ditch, and frequently passing over it, have broken in its sides, and have thereby filled it up and obstructed the flow of water through it").

This Court has recognized that a maintenance right does not encompass activities unrelated to maintenance, such as grazing. In *Rio Costilla Co-op. Livestock Ass'n v. W. S. Ranch Co.*, 81 N.M. 353, 467 P.2d 19 (1970), a Co-op representative had the right to obtain access to a reservoir surrounded by ranch property in order to maintain and inspect the reservoir. *Id*., 81 N.M. at 359, 467 P.2d at 25. The Co-op representative took advantage of an inspection trip to the reservoir to go fishing in the reservoir. *Id*. This Court rejected the argument that this activity was within the scope of the Co-op's maintenance rights, stating that "one who has an easement to enter on land for a particular purpose, and who employs his limited right of entry or occupancy for another purpose, becomes a trespasser while carrying out such other purpose." *Id*. Unauthorized grazing on public lands, like fishing in the reservoir, is outside the scope of the right of access for maintenance and, therefore, represents an illegal trespass.

Finally, the right to graze cattle cannot be defined as implicit in a maintenance right because under New Mexico law the right to maintain a ditch cannot unreasonably interfere with the use of the servient estate. *See Cox*, 1998 NMCA-015, ¶ 16, 124 N.M. at 534, 953 P.2d at 299. Allowing grazing alongside ditches would be unreasonable because it would impose an

enormous burden on the federal lands. Since the areas alongside the ditches are not fenced, and as a practical matter cannot be fenced, allowing cows to forage alongside ditches would effectively mean allowing stock to graze upon many thousands of acres of surrounding federal lands.

C. *McNew* Does Not Support the Plaintiffs' Position.

Plaintiffs and several of their amici rely on this Court's decision in *First State Bank of Alamogordo v. McNew*, 33 N.M. 414, 269 P. 56, 59-60 (1928), to support their proposed version of New Mexico water law. Upon analysis, the decision provides no support for Plaintiffs' position. To the contrary, the decision supports the conclusion that Plaintiffs can claim no protected private property rights in federal public lands.

Several banks sued to set aside as a fraudulent conveyance the transfer by Mr. McNew and his wife to their son (Robert) of certain water rights used to support grazing activity. The trial court ruled that the conveyance was fraudulent. This Court reversed on the basis that the trial court had erred in not permitting the McNews to offer parol evidence to show that they had sold the water rights in an earlier, valid transaction. Specifically, the McNews contended that, prior to their financial difficulties, they had conveyed, in exchange for fair consideration, the water rights and whatever associated rights they had to use the public range. This Court ruled that the McNews should have been permitted to prove this earlier transaction through parol evidence. 269 P. At 60.

Plaintiffs invoke *McNew*, first, to support their argument that a New Mexico water right includes rights in adjacent lands, quoting a passage from the opinion to the effect "[t]he water right is considered incident or appurtenant to the land irrigated." Plaintiff-Appellants' Brief in

Chief, at 30, quoting *McNew*, 33 N.M. at 423, 269 P. at 60. This passage does not support Plaintiffs' argument for several reasons. First, the fact that a water right may be appurtenant to a particular parcel of property does not demonstrate the reverse, that is, that a particular use of real property is appurtenant to a water right.

Second, this Court made the statement quoted above to support its conclusion that the McNews, in transferring whatever rights they may have had in the public range, could be presumed to have also conveyed their associated water rights. This Court permitted the McNews to attempt to prove this earlier transfer by parol evidence because the claimed rights in the public lands were not a genuine real property interest, but instead "merely possessory." *Id.* As this Court explained, "It has been held that a squatter on unsurveyed public lands, awaiting survey and the filing of plats, so that he may secure a preference right of entry, may lawfully appropriate water for the irrigation of such lands, and that the right so appropriated is incident and appurtenant to the lands, and that, since the right in the lands is merely possessory, not resting in grant, such right, with the incident or appurtenant water right, may be transferred by parol." *Id.* While these possessory rights may be transferable between private parties, they are not enforceable against the true owner of the property, the United States. *See* 33 N.M. at 422, 269 P. at 59 (explaining that the senior McNew, "having appropriated and stocked said range with cattle, and being the owner of permanent water for use upon said range for the maintenance of cattle thereon, had possessory rights in said public lands, which he could protect <u>as against one forcibly entering thereon without right</u>") (emphasis added). *See also* 33 N.M. at 423, 269 P. at 60 (citing *Hindman v. Rizor*, 21 Ore. 112, 27 P. 13 (1891), which held that the sale of a possessory right in public lands "vests the possessory right in the purchaser, <u>except as against the</u>

government," 21 Ore. at 117, 27 P. at 14 (emphasis added)).

The Tenth Circuit in *Diamond Bar Cattle Co*. carefully considered and rejected the argument that *McNew* supports the inference of a grazing right, good against the federal government, appurtenant to a water right on federal lands:

> [W]hatever McNew's rights may have been, they were superior only to those who were seeking to make use of public land "without right." As implicitly acknowledged in *Hill* and *Yates,* the government's right to possess, control, and exclude others from public lands is plenary and may not be negated by contrary state law. At best, McNew had a right to possession sufficient to allow him to exclude certain private parties. His own occupation of public lands for grazing was a privilege subject to withdrawal by the government.

168 F.3d at 1214.

Plaintiffs also cite a second passage in *McNew* to support their argument that a New Mexico water right includes a right to use adjacent lands. *See* Plaintiff-Appellants' Brief in Chief, at 42-45, quoting *McNew*, 269 P. at 66. But it is apparent upon analysis that this portion of the Court's opinion does not support Plaintiffs. This portion of the opinion addresses the McNews' separate argument that Robert McNew was the lawful owner of the water rights at issue because he had filed for ownership rights in a portion of the range under the Stock-Raising Homestead Act, and his acquisition of rights under this Act carried with it the acquisition of the associated water rights. This Court rejected the argument, recognizing, in accordance with the fundamental severance between rights in land and rights in water on the public domain, that an acquisition of land rights under a federal statute did not necessarily carry with it a state-administered water right. This conclusion is of no relevance, much less helpful to Plaintiffs' assertion that a state water right includes a property right to use adjacent lands.

III. THE RULINGS IN *HAGE* DO NOT SUPPORT PLAINTIFFS' POSITIONS ON THE CERTIFIED QUESTIONS.

The interlocutory rulings of the U.S. Court of Federal Claims in *Hage v. United States* are at least potentially relevant to this case because the *Hage* court is "the only court" to offer any support for the idea that a state water right may carry with it a property right to use adjacent federal public lands. *Colvin Cattle*, 67 Fed. Cl. at 575. Not surprisingly, Plaintiffs, along with their amici, rely heavily on *Hage* to support their position that the certified questions should be answered in the affirmative. *See* Plaintiff-Appellants' Brief in Chief, at 31, 41; The Paragon Foundation Inc.'s Brief Amicus Curiae, at 6, 24. In addition, the Court of Federal Claims, in its order certifying these questions, suggests that *Hage* might support an affirmative response to these questions. See *Walker*, 69 Fed. Cl. at 231-32. However, all of the rulings in *Hage* are interlocutory. There is as yet no final judgement in the case and there has been no opportunity for the parties to appeal any of the rulings. Moreover, upon analysis, it is apparent that *Hage* did not squarely resolve – even on an interlocutory basis – the questions before this Court. Finally, the rulings in *Hage*, to the extent they are relevant to this case, are mistaken and this Court should not follow them.

A. An Overview of *Hage*.

The *Hage* case, like this case, involves a dispute between public land ranchers and federal agencies charged with managing the public domain. In the 1980's, Hage had numerous disputes with U.S. Forest Service officials arising from their efforts to control the number and location of cattle on the Toiyabe National Forest in order to protect and restore range resources. *See Hage*, 35 Fed. Cl. at 153-55. After Hage repeatedly violated his grazing permits, the Forest Service suspended one of his permits for five years and cancelled 25% of the other. Eventually, after

Hage continued to defy Forest Service orders, the government impounded his cattle and sold them at auction. In 1991, Hage sued the federal government claiming a taking of his property rights in his permits, water, ditch rights of way, and forage. *Id*. at 156. Remarkably, after 15 years of litigation, no final judgment has been entered in the case.

B. *Hage* on Appropriative Water Rights.

The Court of Federal Claims, in its order certifying these questions, stated that the court in *Hage* "held that under Nevada law '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.'" *Walker*, 69 Fed. Cl. at 232, quoting *Hage*, 42 Fed. Cl. at 251. The apparent implication of this statement is that, if the *Hage* court correctly read Nevada law, the same analysis might apply in this case under New Mexico law. For four independent reasons, this conclusion cannot properly be derived from *Hage*: (1) it is doubtful that the court in *Hage* actually resolved what Nevada law holds on this issue; (2) if it did purport to resolve the issue, the ruling was completely unsupported; (3) in addition, if the court did rule that Nevada water rights carry with them rights in adjacent lands, that ruling was contrary to the actual legal rule in Nevada; and (4) for the reasons discussed in section I, this possible interpretation of Nevada law is precluded by controlling federal law. We briefly address each of these points in turn below.

First, at least in the view of one other judge of the Court of Federal Claims, "the *Hage* court did <u>not</u> find that the plaintiffs' water rights included a right to graze on land adjacent to the water . . . but instead found a very limited right to graze cattle within 50 feet on each side of an established Mining Act ditch right-of-way." *Colvin Cattle*, 67 Fed. Cl. at 575 (emphasis added). While the opinions in *Hage* are somewhat ambiguous, this conclusion appears to be well-

founded. The court in *Hage* considered the notion that a water right under Nevada law might include a property right in adjacent lands, but it apparently abandoned the idea in its latest opinion.

This conclusion is confirmed by a careful review of the various rulings in *Hage*. In its 1996 opinion, the *Hage* court stated that plaintiffs were making the "novel argument" that a state water right includes the right to use adjacent lands for grazing purposes. *Hage*, 35 Fed. Cl. at 176. While the court observed that there is "some logical support" for the argument, the court did not accept the argument, instead concluding: "Plaintiffs will have the opportunity at trial to prove property rights in the forage stemming from the property right to make beneficial use of water in the public domain within Nevada originating prior to 1907." Subsequently, in 1998, following a "limited evidentiary hearing," the court issued a "Preliminary Opinion," stating: "the court finds 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. However, in its subsequent 2002 ruling, the court "rescinded" its 1998 Preliminary Opinion. *Hage*, 51 Fed. Cl. at 573. The court's 2002 "Final Opinion: Findings of Fact" concludes that plaintiffs possess certain appropriative water rights, but does not specifically address whether state appropriative water rights include a property right in adjacent lands. Hence, the Court of Federal Claims in *Colvin Cattle* was apparently correct in concluding that "the *Hage* court did not find that the plaintiffs' water rights included a right to graze on land adjacent to the water." 67 Fed. Cl. at 575 (emphasis added).

Second, to the extent the court in *Hage* did conclude (even preliminarily) that a water right includes a property right in adjacent lands, that conclusion was completely unsupported.

Statements to the effect that an argument has "some logical support" or makes "common sense" are obviously no substitute for actual legal analysis or citation to precedent. None of the *Hage* rulings points to any specific affirmative support in Nevada law for the conclusion that an appropriative water right includes rights in adjacent lands.

Third, the best view is that Nevada law actually rejects the idea that a water right includes a property right to use adjacent lands. *See Colvin Cattle*, 67 Fed. Cl. at 573 ("we do not believe that the state of Nevada ever conferred on plaintiff the right to graze on federal lands in the first instance"). In *Colvin Cattle*, the Court of Federal Claims, based on a relatively detailed analysis, rejected the argument by plaintiffs in that case that Nevada's 1925 Stockwatering Act and Nevada Supreme Court precedent established such a right. The court concluded: "[W]hile the Nevada Supreme Court has indeed recognized a connection between a stockwatering right and the ability to graze (i.e., that the use of a stockwatering right may be dependent for its value on an adjacent public range) . . . , the court has additionally ruled that the state of Nevada did not intend to create any right or title to public lands in passing the 1925 Stockwatering Act." *Id.* (citing *In re Calvo*, 50 Nev. 125, 253 P. 671, 675 (1927) and *Itcaina v. Marble*, 56 Nev. 420, 55 P.2d 625, 629-30 (1936)). Thus, if the rulings in *Hage* had arrived at a contrary reading of Nevada law, they would be mistaken.

Finally, for the reasons described in Section I, to the extent the *Hage* court suggests that a Nevada water right might carry with it a property right in adjacent lands, that suggestion would be precluded by section 9 of the Mining Act. That section provides that state law controls the allocation of water on federal land, but it maintains exclusive federal control over the disposition of the federal lands themselves. Indeed, the court in *Hage* appeared to recognize this principle in

1996, when it stated that the Mining Act "does not address property rights in the public lands and the court declines to create such rights contrary to the clear legislative intent of congress." *Hage*, 35 Fed. Cl. at 170. Thus, even if Nevada water law did purport to create forage rights on federal public lands (which it doesn't), it would be ineffective because the federal Mining Act does not allow state law to create such rights.

For all the foregoing reasons, the opinions in *Hage* do not support the argument that a state water right includes a property right to graze livestock on adjacent federal public lands.

C. *Hage* on Ditch Rights.

For the reasons just discussed, it is debatable whether the Court in *Hage* actually recognized broad land rights implicit in water rights. But the court did rule that possession of a ditch right on federal lands includes the right to graze cattle within a fifty-foot right of way on either side of the ditch. *See* 51 Fed. Cl. at 580-83. However, that ruling is plainly mistaken.

This interpretation of the Mining Act is contrary to the language of the statute and every other court decision that has addressed this issue. The Mining Act acknowledges and confirms a "right of way for the construction of ditches and canals" for the purpose of transporting water. Nothing in this language suggests that Congress intended to create rights beyond the right to construct and maintain a ditch for water transportation purposes. Following the longstanding rule that grants of rights in federal resources must be narrowly construed, there is no warrant for reading into this language a grant of a right to the use of the federal range for grazing purposes. Accordingly, other courts that have addressed this issue have rejected the position adopted in *Hage*. *See*, *e.g.*, *Hunter*, 388 F.2d at 151; *Utah Light & Traction Co.*, 230 F. at 345.

A thorough examination of the 2002 *Hage* opinion shows that the court's interpretation of

the scope of a ditch right under the Mining Act was based on a seriously flawed analysis. As the *Hage* court acknowledged, the House of Representative's original version of the Mining Act did include a provision granting ditch owners rights on fifty feet of either side of the ditch "for the purposes of repairs and construction." CONG. GLOBE, 39th Cong. 1st Sess. 3141 (1866). But the Senate version of the legislation did not include a similar provision, and the final bill adopted the Senate's approach. *See Hage*, 51 Fed. Cl. at 582. Following the usual rules of legislative interpretation, the fact that the legislature explicitly considered language establishing a fifty foot right of way, but then rejected it, provides decisive evidence that the legislature rejected the proposal. *See e.g.*, *Secretary of the Interior v. California*, 464 U.S. 312, 330 (1984) (holding that a Senate-House compromise resulting in the exclusion of House language demonstrated that Congress intended to reject the House proposal).

Furthermore, the proposal that Congress considered was for a right of way for the limited purpose of facilitating "repairs and construction." Indeed, the House bill expressly said that "the use and occupation hereby granted shall be for the purpose named and no other." *See* 1866 CONG. GLOBE, 39th Cong. 1st Sess. 3141 (1866). Thus, even if Congress had embraced the House bill, the resulting legislation still would not have supported a fifty-foot right of way for grazing purposes.

Notwithstanding the strong evidence that Congress did not intend to establish a fifty-foot right of way, much less a right of way for grazing purposes, the court in *Hage* ruled that Congress intended to create such a right of way alongside ditches crossing the public domain. The court relied on two arguments, first that Congress had established fifty-foot rights of way in certain other public land legislation and the same intent could be read into the Mining Act and, second,

that Congress understood that state law recognized grazing as a right appurtenant to a ditch and intended to endorse this state law rule. See *Hage*, 51 Fed. Cl. at 582. Neither argument is persuasive.

The first argument is quite simply nonsensical. The fact that Congress established fifty-foot rights of way in other statutes does not demonstrate that Congress intended to create such a right of way in the Mining Act. To the contrary, the fact that Congress established rights of way under other statutes but did not do so in the Mining Act affirmatively supports the conclusion that the Mining Act did not authorize such a right of way. Moreover, the specific statutes cited by the *Hage* court do not support the broad grazing right claimed in *Hage*. For example, the 1891 Ditches and Canals Act granted ditch owners a fifty-foot right of way alongside ditches. *See* 43 U.S.C. § 946. But the statute stated that a 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, this example provides no support for reading a right to graze the public lands into the Mining Act.

As to the second argument, the *Hage* court was mistaken in concluding that the Mining Act should be read as implicitly embracing a state law definition of ditch rights that includes a fifty-foot right of way. In the first place, as previously discussed, this argument is contradicted by the Mining Act itself, which refers to ditch rights alone and makes no mention of interests in land; state law is permitted to grant interests in federal public lands only when expressly allowed by federal law. In any event, the court in *Hage* identified no Nevada precedent establishing that a

ditch right across federal lands includes a fifty-foot right of way – just as there is no room for the same theory under New Mexico law.[4]

Lacking support in legal precedent, the *Hage* court relied on vague and unsupported references to "historical usage" and "common sense" to support the conclusion that ditch rights include a right to the forage on adjacent public lands. *See Hage*, 42 Fed. Cl. at 251. For all that appears, however, these observations are based on nothing more than the fact that, in practice, appropriative water rights have frequently been exercised in association with public land grazing privileges. Without more, this is insufficient to establish that water rights include protected property rights to exploit public lands.

In addition, the *Hage* court invoked what it termed Congress's intent to "respect and protect the historic and customary usage of the range." See *Hage*, 51 Fed. Cl. at 580-581. It is correct, of course, that Congress has recognized grazing as a legitimate public land use in statutes from the Unlawful Inclosures Act of 1885, 43 U.S.C. § 1061, to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 *et seq*. But the traditional practice of allowing grazing on the public lands subject to appropriate regulation cannot itself justify manufacturing private property rights in the public lands. *See* Wechsler, "This Land is Our Land: Ranchers Seek Private Rights in the Public Rangelands," *supra* at 474 (criticizing the *Hage* court's reasoning on this point).

In sum, the rulings in *Hage* provide a poor guide for resolving this case because they

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[4] Of course, if there were support in Nevada law for the position in *Hage*, that would not be controlling on the issue of New Mexico law in this case. *See Diamond Bar Cattle Co.,* 168 F.3d at 1215 (distinguishing *Hage* in part on the ground that it addressed Nevada law, not New Mexico law).

disregard 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." *Light,* 220 U.S. at 537. This Court should decline to follow the rulings in *Hage* in resolving the certified questions.

IV. PLAINTIFFS' HISTORICAL ARGUMENTS ARE LARGELY IRRELEVANT AND OTHERWISE UNPERSUASIVE.

Lacking any genuinely authoritative support in basic legal principles governing management of the public lands, or in the relevant precedents applying these principles, Plaintiffs attempt to make their case by assembling a jumbled pastiche of historical materials which purport to demonstrate the existence of a long-lost conception of broad rancher rights in the public range. Amici will not attempt to dissect or respond to each and every historical citation, but instead offer the following general observations.

First, the relevance of all or most of the historical materials cited by Plaintiffs is highly questionable. Plaintiffs rely heavily on Spanish and Mexican law. Plaintiff-Appellants' Brief in Chief at 10 - 18. But Mexican sovereignty over New Mexico ended with the Treaty of Guadalupe Hidalgo (1848). Since Plaintiffs' claimed water rights originated, at the earliest, in the "late 19th century," Brief in Chief at 3, they post-date the Treaty of Guadalupe Hidalgo. Therefore, the pre-treaty legal regime of New Mexico appears to be largely, if not completely, beside the point for the purpose of this case.

Second, there appears to be a fundamental contradiction in Plaintiffs' resort to Spanish colonial law. Under colonial law, owners of domestic animals apparently were permitted to water their stock at virtually any location, because stockwatering was a domestic water use

shared in common. *See* Michael C. Meyer, WATER IN THE HISPANIC SOUTHWEST 124 (1984). It is difficult to see how those who shared in this communal system of water ownership could rely on their rights in water to assert rights in specific parcels of real property. Since stockwatering was considered to be a communal right, allowing a water right to convey a private right to graze would be unworkable and indeed nonsensical.

Third, to the extent the historical materials suggest that public land ranchers had some type of control over the public range, the materials simply show that possessors of appropriative water rights on federal lands had superior rights to the public lands relative to other potential private users. Throughout the 19th century the U.S. government allowed many citizens to use the public lands for grazing (as well as other purposes). These squatters were able to establish water rights for their exclusive use. Defense of these exclusive rights, as a practical matter, often allowed specific ranchers to effectively control the public range itself. In addition, during the 19th century the U.S. government itself rarely asserted its ownership of the public domain; as a result, squatters may have appeared to actually own the land. But the possession of private rights against other potential private users of the public range does not undermine the paramount ownership claim of the United States. As the Supreme Court explained long ago, the law allowed squatters "by such occupation to acquire the right of undisturbed enjoyment against all the world but the true owner" – the U.S. government. *Basey v. Gallagher,* 87 U.S. 670, 682 (1874). *See also Jennison v. Kirk*, 98 U.S. 453, 462 n.1 (1878).

This basic legal distinction underlies virtually all of the materials Plaintiffs cite in an attempt to show that ranchers with appropriative water rights actually possess private rights in the public range, including Governor Otero's speech asserting that "the man who owns the water

on the public domain to all intents and purposes owns the public range surrounding it for many miles," and the 1888 speech by a member of Congress asserting that "the man who controls the right to the living stream of water is virtually the lord of the territory." *See* Plaintiff-Appellants' Brief in Chief at 20, 24 (emphases added). These references to a "virtual," or "for all intents and purposes" ownership claim in the public range refer to a limited right, one that is not enforceable against the United States. The rights described in these statements are identical to the rights of western miners who held extensive rights in the areas around their water claims, "except as against the government." *Basey*, 87 U.S. at 681.

Finally, it is noteworthy that Plaintiffs' expansive theory that private water rights carry with them private property rights in adjacent lands would apply not only to federal lands but to New Mexico state lands as well. However, in administering its own lands the State of New Mexico has never suggested, so far as we know, that a water right creates any vested rights in state lands. To the contrary, the practice has been to treat interests in state lands as separate from interests in water. *See, e.g. Burguete v. Del Curto*, 49 N.M. 292, 298, 163 P.2d 257, 267 (1945) (referring to individual separately leasing both water rights and grazing rights on New Mexico school lands). Of course, if there were any validity to Plaintiffs' theory, it could imperil the States's ability to effectively manage and control a significant portion of the state's 13,000,000 acres of state trust lands. *See* http://www.nmstatelands.org.

CONCLUSION

For the foregoing reasons, the amici urge this Court (1) to decline to answer the certified questions because the question whether there is a private right to graze livestock on federal public lands has already been definitively resolved as a matter of federal law, or, in the

alternative, (2) to answer both certified questions in the negative.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 8, 2006, I served the BRIEF *AMICUS CURIAE* OF THE NEW MEXICO WILDLIFE FEDERATION, THE NEW MEXICO COUNCIL OF TROUT UNLIMITED, AND THE NATIONAL WILDLIFE FEDERATION IN SUPPORT OF THE UNITED STATES upon the following individuals by placing a copy of that document in the U.S. Mail, first class postage pre-paid, and addressed as follows:

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