M 3-15-99

SUMMARY OF ELKO COUNTY RESOLUTION

The Resolution begins by setting forth a number of state statutes, a 1996 opinion by the Eureka County D.A., a pleading possibly filed by Joel Hansen in Hagen's court in January 1999 on behalf of Cliff and Bertha Gardner, and lengthy discussions and quotations of a number of state and federal cases, entitling all such as the "Legislative Findings" upon which it bases its Resolution.

Most of the actual substance of the Resolution appears at the end of the document. The last (but simplest) is a declaration that "Citizens may gather Estrays[1] upon their private property and dispose of same" in accordance with Nevada law, specifically encouraging the "Citizens to do so and assert their responsibility in this management process." This essentially purports to give Elkoans the right to treat federally-protected wild horses just as they would estrays under state law at NRS 569, if such horses were found on their private property. (By basing the definition of which horses may be gathered solely on state law, disregarding the federal law prohibition of doing anything to horses "who primarily reside" on federal lands, such a result is inescapable. Moreover, the federal act specifically says that "wild horses" are those that are unclaimed and have no owner, so under that reasoning, the owner will always be unknown in the section where a wild horse is found.)

In its Resolution, Elko declares that any ruling that "expands beyond the limits of the Constitution has no binding affect upon Elko County." Therefore, it continues, the Elko Board of County Commissioners "shall not engage in any activities of any form with any governmental agency until the Board has first determined what jurisdiction (originating or otherwise) that governmental agency is operating under and that this Boards shall not proceed with any governmental agency in any activities of any form if said jurisdiction has been determined to be *without limitations* as held in *Kleppe.*" (sic)

Elko's Resolution also declares that it supports and adopts as County policy the doctrine of AB 198[2], and further adopts the doctrine that the Taylor Grazing Act is also state law as set forth in NRS 568, and such is to be utilized in protecting against the implementation of the "without limitations" doctrine of *Kleppe* by any government agency against the County and/or any of its citizens' property.

---

[1] "Estray" is defined as "any livestock running at large upon public or private lands" in Nevada whose owner is unknown in the section where the animal is found, per NRS 569.005(2), which is incorporated first thing in the Resolution.

[2] AB 198, amending NRS 568, is attached to the Resolution and generally provides that: Except as otherwise provided by the Taylor Grazing Act, a grazing preference right is deemed appurtenant to base property and such preference goes to the purchaser, lessee or transferee of such property unless he receives just compensation. AB 198 also provides that a person who willfully or negligently interferes with lawful herding or grazing of livestock on base property or on non-base property by permit within a grazing district, or who damages or destroys a fence, watering facility or other livestock improvement, is guilty of a misdemeanor. (Base property is any land or water in this state that is owned, occupied or controlled by a person occupied or controlled by a person who has obtained an appurtenant grazing preference right that entitles him to priority in the issuance of a permit to graze livestock.)

Elko determined from the Legislative Findings that there is a constitutional paradox exposed within the *Kleppe, New York* and *Printz/Mack* cases, and the U.S. Supreme Court, in its progression from *Gratiot* (1840) to *Kleppe* (1976) has committed a de facto amending or suspension of the Constitution in Elko County, and that the County's fiduciary responsibility to its citizens demands that the County fight such "without limitation" authority exercised by the federal government. If *Kleppe's* "without limitation" language is correct, then in reality there is no county or state government with sovereignty and local government is nothing but a "mirage totally subservient to the federal government." Further, Elko resolved that *Kleppe* would be overturned if the Supreme Court addressed the issues now, notwithstanding recent lower court rulings and stipulations consented to by state officials.

The Legislative Findings discuss and set forth the following matters and reasoning:

In response to fears that the Wild Free-roaming Horses and Burros Act (Act) would be read to provide for federal jurisdiction over every wild horse or burro that at any time sets foot on federal land, the court in *Kleppe* left open the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands, and the question of the permissible reach of the Act over private lands under the Property Clause. However, the court in *Kleppe* also stated that although the furthest reaches of the Property Clause have not been resolved, it had been repeatedly observed that the power over the public lands entrusted to Congress is "without limitation." Elko calls this an amendment or suspension of the Constitution and its guarantees within Elko's jurisdictional boundaries.

Moreover, the federal government is exercising authority under Article 4, which is unlimited, and courts have universally held that people being governed under Article 4 (residents of territories) are not protected by the constitutional guarantees such as those possessed by US citizens. Therefore, federal exercise of Article 4 jurisdiction, and enforcement thereof in Article 3 courts, is a paradox because such federal courts have no jurisdiction, and only Art. 4 courts established by Congress may handle such matters. Moreover, exercise of Article 4 power by Congress relegates citizens to the status of territorial subjects of Congress, without rights except those Congress deigns to give them. Absurd and Intolerable! So, either the federal court has no jurisdiction, or the U.S. agency has no power to be a plaintiff in the action. You just cannot have both. In addition, the 10th amendment reserved rights to the states not expressly held for the federal government. Also, the framers would not have approved. Also, the Constitution allows Congress to govern individuals, but it does not allow Congress to regulate states.

3-15-99

EIKO Dist

ELKO COUNTY, NEVADA RESOLUTION

No. 12-99

A BINDING RESOLUTION FROM THE BOARD OF COMMISSIONERS, ELKO COUNTY, NEVADA, ESTABLISHING COUNTY LAW AND POLICY WITHIN ELKO COUNTY WITH RESPECT TO THE CONTROL OF TRESPASSING ESTRAYS AND/OR LIVESTOCK AND OTHER MATTERS RELATED THERETO.

WHEREAS, the Board of Commissioners, have been petitioned by the People of Elko County demanding certain action dealing with trespassing estrays and/or livestock on private property and action to protect of the general health, safety and welfare and economic stability of the County and its Citizens and other matters relating to the public land management and/or activity within Elko County pursuant to the County's police powers and sovereign legislative authority; and,

WHEREAS, an emergency with respect to trespassing estrays and/or livestock on private property, the general health, safety and welfare and economic stability of the County and its Citizens and other matters relating to the public land management and/or activity within Elko County and in order to efficiently serve the People of Elko County and protect the sovereign interests of the county this board must enact law and policy to assure a remedy.

NOW, THEREFORE BE IT RESOLVED:

I.

THAT, the Elko County Board of Commissioners herein exercises its sovereign legislative and administrative authority and determines that there is an emergency with respect to trespassing estrays and/or livestock on private property and other matters relating to the public land management and/or activity within Elko County and this Board must take action to enact law and policy to assure a remedy of this emergency.

II.

THAT, this Board is acting within its sovereign authorities on this matter and chooses to enact this law and policy to assure a remedy by resolution and determines that such authority is established wherein the courts have stated in part as follows; ***"...[N]evada recognizes that counties can enact legislation of***

general applicability by resolution. 'When a municipal council is given power to legislate in regard to a particular subject mater, and the statute is silent as to the mode in which the power shall be exercised, an enactment by the municipal council is valid whether it is in the form of an ordinance or resolution.' Blanding v. City of Las Vegas, 52 Nev. 52, 75 (1929) (citations omitted). As to the decision to regulate by ordinance or resolution, 'it is within the discretionary powers of the governing municipal board to balance (the) public and private interests against each other in determining the proper course and method of regulation.'" United States v. Nye County, Opinion at pg 19, decided March 1996.

III.

THAT, in order to enact law and policy to assure a remedy in this matter this Board herein below establishes its Legislative Findings as follows:

A. Applicable Nevada Revised Statutes cited and to be supported and/or enforced by this Board

ATTORNEY GENERAL'S OPINIONS.

Since Federal Government has declared limited preemption, state has jurisdiction over wild horses and burros on private lands and over apparently domesticated horses and burros. Although Federal Government has preemptive authority over wild, free-roaming horses and burros on public lands in accordance with federal law (see 16 U.S.C. 1331 et seq.), state may exercise jurisdiction under estray provisions of NRS ch. 569 over wild horses and burros customarily residing exclusively on private lands and over horses and burros that appear to have been domesticated because Federal Government has disclaimed jurisdiction under those circumstances. AGO 82-9 (5-25-1982)

ESTRAYS

(1)

NRS 569.005 Definitions. As used in NRS 569.010 to 569.130, inclusive, unless the context otherwise requires:

1. "Division" means the division of agriculture of the department of business and industry.
2. "Estray" means any livestock running at large upon public or private lands in the State of Nevada, whose owner is unknown in the section where the animal is found.
3. "Livestock" means:
   (a) All cattle or animals of the bovine species;
   (b) All horses, mules, burros and asses or animals of the equine species;
   (c) All swine or animals of the porcine species;
   (d) All goats or animals of the caprine species;
   (e) All sheep or animals of the bovine species; and
   (f) All poultry or domesticated fowl or birds.

(Added to NRS by 1961, 512; A 1993, 1744; 1997, 461)

(2)

NRS 569.010 Estrays deemed property of division; control, placement or disposition of estrays; disposition of money; liability.

1. Except as otherwise provided by law, all estrays within this state shall be deemed for the purpose of this section to be the property of the division.
2. The division has all rights accruing pursuant to the laws of this state to owners of such animals, and may:
   (a)Dispose of estrays by sale through an agent appointed by the division; or
   (b) Provide for the control, placement or disposition of estrays through cooperative agreements pursuant to NRS 569.031.
3. Except as otherwise provided by law, all money collected for the sale or for the injury or killing of any such animals must be held for 1 year, subject to the claim of any person who can establish legal title to any animal concerned. All money remaining unclaimed must be deposited in the livestock inspection

account after 1 year. The division may disallow all claims if the division deems the claims illegal or not showing satisfactory evidence of title.

4. Neither the division nor any political subdivision of this state is liable for any trespass or other damage caused by any of such estrays.

[1:200:1925; NCL § 3993]-(NRS A 1959, 641; 1961, 546; 1991, 1794; 1993, 295, 1744; 1995, 579; 1997, 461)

ATTORNEY GENERAL'S OPINIONS.

Section pertains only to privately owned animals where ownership cannot be ascertained. NCL § 3993 (cf. NRS 569.010) does not give board of stock commissioners (now division of agriculture) jurisdiction over wild horses as such section pertains only to privately owned animals, ownership of which cannot be ascertained. AGO A-19 (6-2-1939)

Unbranded yearling calf on open range not following cow is estray. Unbranded yearling calf on open range which is not following cow is estray and should be reported to board of stock commissioners (now division of agriculture). If owner cannot thereafter be determined, calf

becomes property of board of stock commissioners (now division of agriculture). AGO 81 (10-26-1943)

Department may recover damages from railroad negligently injuring livestock whose ownership cannot be determined. Under NRS 569.010, which places ownership of certain animals in state board of stock commissioners (now division of agriculture), and NRS 705.150 and 705.160, relating to liability of railroads for injuring livestock and claims for such injuries, state board of stock commissioners (now division of agriculture) may recover damages from railroad which negligently injures livestock whose ownership cannot be determined by diligent search. AGO 175 (8-10-1960)

(3)

NRS 569.020 Duties of certain officers who impound livestock; notice to division; contents of notice.

1. Any county, city, town, township or other peace officer or poundmaster who impounds under the provisions of any state law or county or municipal ordinance any livestock shall, immediately after impounding such livestock, send a written notice to the division.
2. The notice must contain a full description, including all brands and marks, sex, age, weight, color and kind of each animal so impounded.
3. If the owner or owners of such livestock are not known and in case of the sale of such impounded livestock as prescribed by law, all notices posted or advertisements published by any officer or other person having charge of the sale include a complete description of each such animal to be sold, including all brands and marks, sex, age, weight, color and kind.

[1:182:1925; NCL § 3990]-(NRS A 1959, 641; 1961, 546; 1993, 1744)

(4)

NRS 569.031 Cooperative agreements for control, placement or disposition of estrays: Required provisions; annual review by division. The division may enter into a cooperative agreement for the control, placement or disposition of the livestock with another agency of this state or with a county, city, town, township, peace officer, poundmaster or nonprofit organization. If an agreement is entered into, it must provide for:

1. The responsibility for the payment of the expenses incurred in taking up, holding, advertising and making the disposition of the estray, and any damages for trespass allowed pursuant to NRS 569.440;
2. The disposition of any money received from the sale of the livestock;

3. The protection of the rights of a lawful owner of an estray pursuant to NRS 569.040 to 569.130, inclusive; and
4. The designation of the specific geographic area of this state to which the cooperative agreement applies.

The division shall annually review the actions of the cooperating person or entity for compliance with the agreement. The division may cancel the agreement upon a finding of noncompliant actions.

(Added to NRS by 1993, 294; A 1995, 649; 1997, 462)

(5)

NRS 569.040 Unlawful to take up or feed estray; exceptions.

1. Except as otherwise provided in subsection 2, NRS 569.040 to 569.130, inclusive, or pursuant to a cooperative agreement established pursuant to NRS 569.031, it is unlawful for any person or his employees or agents, other than an authorized agent of the division, to:

(a)Take up any estray and retain possession of it; or

(b) Feed any estray.

2. For a first violation of paragraph (b) of subsection 1, a person may not be cited or charged criminally but must be reminded that it is unlawful to feed an estray.

[Part 1:27:1923; NCL § 3978] + [Part 9:27:1923; NCL § 3986]-(NRS A 1961, 547; 1991, 913; 1993, 295, 1744; 1995, 579; 1997, 462)

ATTORNEY GENERAL'S OPINIONS.

Unbranded yearling calf on open range not following cow is estray. Unbranded yearling calf on open range which is not following cow is estray and should be reported to board of stock commissioners. If owner cannot thereafter be determined, calf becomes property of board of stock commissioners (now division of agriculture). AGO 81 (10-26-1943)

(6)

NRS 569.045 Person gathering estray to publish notice in newspaper; contents of notice.

1. Before any person gathers any estray horses, he shall cause notice of the gathering to be published in a newspaper of general circulation within the county in which the gathering is to take place.
2. The notice must:

(a)Be published at least once a week for the 4 weeks preceding the gathering;

(b) Clearly identify the area in which the gathering is to take place and the date and time of the gathering;

(c) Indicate a location where owners or possible owners of the estray horses may go to claim an estray horse that was gathered; and

(d) List the name and telephone number of a person who may be contacted if an owner or possible owner is interested in viewing the estray horses gathered.

(Added to NRS by 1991, 912)

(7)

NRS 569.050 Written notice to division when person takes up estray. When any person takes up an estray, he shall, within 5 days thereafter, make out a written description of such animal, setting forth all marks or brands appearing upon such animal, and other marks of identity, such as color, age and sex, and forward the same by mail to the division at its office.

[Part 2:27:1923; NCL § 3979]-(NRS A 1959, 642; 1961, 547; 1993, 1745)

NEVADA CASES.

Instruction on statutory duty to report estrays was proper where supported by evidence in larceny prosecution. In larceny prosecution for branding of calf with intent to steal, under NRS 205.225, where defendant contended cattle of

others found on his ranch were estrays but admitted failure to report them, jury instruction in words of statute, NRS 569.050, which requires report of estray within 5 days, was proper. Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965)

(8)

NRS 569.060 Examination of brand records upon receipt of notice by division; notice to owner; payment of charges incurred for care.

1. Upon receiving notice of the taking up of an estray the division, or its duly authorized agent, shall make or cause to be made an examination of the state brand records.
2. If from the records the name of the owner or probable owner can be determined, the division, or its duly authorized agent, shall forthwith notify him of the taking up of the estray or estrays.
3. Upon the owner's proving to the satisfaction of the division that the estray animal or animals are lawfully his, the division shall issue to him an order to receive them upon the payment of any damages allowed by law and such charges as may be approved by the division as reasonable which may have been incurred in the care of the animal or animals so taken up.
4. Upon receipt of a notice of the taking up of an estray, the division, or its duly authorized agent, may require a closer examination of the brands and marks, as set forth in the notice, and may require a state inspector to examine the brands before advertising.

[4:27:1923; A 1947, 426; 1943 NCL § 3981]-(NRS A 1959, 642; 1961, 547; 1969, 138; 1977, 249; 1993, 1745)

(9)

NRS 569.070 Publication of notice of estray required if owner cannot be determined; reimbursement of expenses for publication; sale of injured or debilitated estray.

1. Except as otherwise provided in subsection 4, if the owner or probable owner of an estray cannot with reasonable diligence be determined by the division or its authorized agent, the division shall advertise the estray or cause it to be advertised.
2. A notice of the estray, with a full description, giving brands, marks and colors thereon, must be published in a newspaper published at the county seat of the county in which the estray was taken up. If there is no newspaper published at the county seat of the county, the notice must be published in the newspaper published at the nearest point to that county.
3. Expenses incurred in carrying out the provisions of subsections 1 and 2 must be deducted from the proceeds of the sale of the estray advertised.
4. Except as otherwise provided in NRS 562.420, the division may sell an injured, sick or otherwise debilitated estray if, as determined by the division, the sale of the estray is necessary to facilitate the placement or other disposition of the estray. If an estray is sold pursuant to this subsection, the division shall give a brand inspection clearance certificate to the purchaser.

[5:27:1923; A 1931, 83; 1931 NCL § 3982]-(NRS A 1961, 547; 1977, 249; 1993, 1745; 1997, 462)

(10)

NRS 569.080 Sale, placement or other disposition of unclaimed estray; issuance of brand inspection clearance certificate upon sale; marking or branding of horses required before placement.

1. If an estray is not claimed within 5 working days after the last publication of the advertisement required by NRS 569.070, it must be:

   (a)Sold by the division; or

   (b) Held by the division until given a placement or other disposition through a cooperative agreement established pursuant to NRS 569.031.

2. If the division sells the estray, the division shall give a brand inspection clearance certificate to the purchaser.
3. Estray horses must be marked or branded before placement.

[6:27:1923; NCL § 3983]-(NRS A 1961, 548; 1993, 295, 1745; 1995, 579; 1997, 463)

(11)

NRS 569.090 Deposit of balance of proceeds of sale; records; payment to owner.

1. Except as otherwise provided pursuant to a cooperative agreement established pursuant to NRS 569.031, the division shall:

   (a) Pay the reasonable expenses incurred in taking up, holding, advertising and selling the estray, and any damages for trespass allowed pursuant to NRS 569.440, out of the proceeds of the sale of the estray and shall place the balance in an interest-bearing checking account in a bank qualified to receive deposits of public money. The proceeds from the sale and any interest on those proceeds, which are not claimed pursuant to subsection 2 within 1 year after the sale, must be deposited in the state treasury for credit to the livestock inspection account.

   (b) Make a complete record of the transaction, including the marks and brands and other means of identification of the estray, and shall keep the record open to the inspection of the public.
2. If the lawful owner of the estray is found within 1 year after its sale and proves ownership to the satisfaction of the division, the net amount received from the sale must be paid to the owner.
3. If any claim pending after the expiration of 1 year after the date of sale is denied, the proceeds and any interest thereon must be deposited in the livestock inspection account.

[7:27:1923; NCL § 3984]-(NRS A 1959, 642; 1961, 548; 1977, 250; 1983, 404; 1991, 1795; 1993, 295, 1745; 1995, 246, 579)

(12)

NRS 569.100 Person taking up estray entitled to hold animal until relieved of custody; unlawful use or taking of estray; penalties.

1. A person who takes up an estray as provided for in NRS 569.040 to 569.130, inclusive, is entitled to hold the estray lawfully until relieved of custody by the division.
2. A person shall not use or cause to be used, for profit or otherwise, any estray in his keeping under the provisions of NRS 569.040 to 569.130, inclusive. A violation of this subsection shall be deemed grand larceny or petit larceny, as set forth in NRS 205.2175 to 205.2707, inclusive, and the person shall be punished as provided in those sections.
3. Any person taking, leading or driving an estray away from the possession of the lawful holder, as specified in NRS 569.040 to 569.130, inclusive, except as herein provided for, is subject to all the penalties under the law, whether he is the claimant of the estray or not.

[8:27:1923; NCL § 3985]-(NRS A 1961, 548; 1993, 1746; 1997, 347)

(13)

NRS 569.110 Escaped or removed estray may be recovered by taker-up. If any such estray or estrays, after having been taken up in accordance with the provisions of NRS 569.040 to 569.130, inclusive, escape or are removed from the custody of the taker-up before being disposed of under the provisions of NRS 569.040 to 569.130, inclusive, then such taker-up shall have the legal right to recover the same wherever found, to be held by such taker-up until disposed of as provided for in NRS 569.040 to 569.130, inclusive.

[11:27:1923; NCL § 3988]-(NRS A 1961, 549)

NRS 569.120 Estrays may be taken up by agents of division; procedure. Estrays may be taken up by duly authorized agents of the division. Procedure for disposing of such estrays must follow the provisions of NRS 569.040 to 569.130, inclusive.

[10:27:1923; NCL § 3987]-(NRS A 1961, 549; 1993, 1746)

(14)

NRS 569.130 Penalties. Any person, firm, company, association or corporation who takes up or retains in his or its possession any estray not his or its property, without the owner's consent, or except in accordance with the provisions of NRS 569.040 to 569.130, inclusive, shall be guilty of a misdemeanor.

[3:27:1923; NCL § 3980] + [Part 9:27:1923; NCL § 3986]-(NRS A 1959, 643; 1961, 549)

LIVESTOCK

(15)

NRS 569.431 "Legal fence" defined. As used in NRS 569.440 to 569.471, inclusive, "legal fence" means a fence with not less than four horizontal barriers, consisting of wires, boards, poles or other fence material in common use in the neighborhood, with posts set not more than 20 feet apart. The lower barrier must be not more than 12 inches from the ground and the space between any two barriers must be not more than 12 inches and the height of top barrier must be at least 48 inches above the ground. Every post must be so set as to withstand a horizontal strain of 250 pounds at a point 4 feet from the ground, and each barrier must be capable of withstanding a horizontal strain of 250 pounds at any point midway between the posts.

(Added to NRS by 1991, 1147)

NRS 569.440 Liability caused by trespassing livestock; liability of landowner for injury to trespassing livestock; trespassing livestock treated as estrays.

1. Except as otherwise provided in NRS 569.461 and 569.471:

(a)If any livestock break into any grounds enclosed by a legal fence, the owner or manager of the livestock is liable to the owner of the enclosed premises for all damages sustained by the trespass. If the trespass is repeated by neglect of the owner or manager of the livestock, he is for the second and every subsequent offense or trespass, liable for double the damages of the trespass to the owner of the premises.

(b) If any owner or occupier of any grounds or crops trespassed upon by livestock entering upon or breaking into his grounds, whether enclosed by a legal fence or not, kills, maims or materially injures the livestock so trespassing, he is liable to the owner of the livestock for all damages, and for the costs accruing from a suit for such damages, when necessarily resorted to for their recovery.

(c) The owner or occupier of grounds or crops so damaged and trespassed upon may take up and safely keep, at the expense of the owner or owners thereof, after due notice to the owners, if known, the livestock, or so many of them as may be necessary to cover the damages he may have sustained, for 10 days, and if not applied for by the proper owner or owners before the expiration of 10 days, the livestock may be posted under the estray laws of the state, and before restitution may be had by the owner or owners of the livestock, all damages done by them, as well also as the expense of posting and keeping them, must be paid. Any justice of the peace in the township has jurisdiction of all such reclamation of livestock, together with the damages, and

expense of keeping and posting the same, when the amount claimed does not exceed $2,500.

2. When two or more persons cultivate lands under one enclosure, neither of them may place or cause to be placed any livestock on his ground, to the injury or damage of the other or others, but is liable for all damages thus sustained by the other or others. If repeated, after due notice is given, and for every subsequent repetition, double damages are recoverable in any court having jurisdiction.

[1:16:1862; B § 3992; BH § 741; C § 777; RL § 2332; NCL § 4016] + [2:16:1862; B § 3993; BH § 742; C § 778; RL § 2333; NCL § 4017] + [3:16:1862; B § 3994; BH § 743; C § 779; RL § 2334; NCL § 4018]-(NRS A 1961, 549; 1991, 1148)

REVISER'S NOTE.

Cf. NRS 569.440 and 569.450. The source act of NRS 569.440 is ch. 16, Stats. 1862; the source act of NRS 569.450 is ch. 223, Stats. 1917. The 1862 act was construed in Chase v. Chase, 15 Nev. 259. The 1917 act, by sec. 3 thereof, contained a general "repealer" provision. But by the provisions of NCL § 3989 (enacted by ch. 27, Stats. 1923), the 1862 act was specifically not repealed. It may be presumed that the legislature in enacting ch. 27, Stats. 1923, knew of the existence of the 1917 act. Accordingly, the reviser included both the acts of 1862 and 1917 as NRS 569.440 and 569.450.

In revised subsec. 2, ", provided said ground be enclosed within a fence," was deleted. In revised subsec. 3, "state" replaced "territory"; "in the township" replaced "in the township or precinct."

NEVADA CASES.

Section modifies common law. Effect of B § 3992 (cf. NRS 569.440) is to modify common law rule requiring owners of horses, cattle and other stock to

keep them confined to extent that no action can be sustained for injuries done to real property or to crops growing thereon by horses and cattle which are allowed to run at large unless land is enclosed with lawful fence. Chase v. Chase, 15 Nev. 259 (1880), cited, Williams Estate Co. v. Nevada Wonder Mining Co., 45 Nev. 25, at 32, 196 Pac. 844 (1921)

"Lawful fence" implies high enough and sufficient to prevent ordinary stock from breaking into enclosure. Words "lawful fence," as used in B § 3992 (cf. Former provisions of NRS 569.440), relating to damages for trespass by animals to enclosed land, imply, in absence of statutory definition, that fence must be high enough and sufficient in other respects to prevent ordinary stock from breaking into enclosure. Chase v. Chase, 15 Nev. 259 (1880)

Section does not authorize person to trespass upon another's land whether fenced or not. There is nothing in B § 3992 (cf. NRS 569.440), relating to damages for trespass by animals to enclosed land, which gives right to any person to enter upon another's land and commit trespass thereon, whether land is fenced or not. Statute limits rights to recover damages for injury caused by trespassing stock where land is not fenced. Chase v. Chase, 15 Nev. 259 (1880), cited, Williams Estate Co. v. Nevada Wonder Mining Co., 45 Nev. 25, at 32, 196 Pac. 844 (1921)

(17)

NRS 569.450 Trespass on cultivated land: No award of damages unless land enclosed by legal fence. No person is entitled to collect damages, and no court in this state may award damages, for any trespass of livestock on cultivated land in this state if the land, at the time of the trespass was not enclosed by a legal fence. [1:223:1917; 1919 RL p. 2846; NCL § 4022] + [2:223:1917; A 1929, 255; NCL § 4023]-(NRS A 1961, 550; 1991, 1149)

(18)

NRS 569.461 Liability of developer of residential, commercial or industrial structure adjoining pasture for damages to legal fence.

1. When a residential, commercial or industrial structure is erected, or any other commercial or industrial activity is undertaken, on land adjoining a pasture and separated from the pasture by a legal fence, the developer of the structure or the person undertaking the activity, unless he makes the election permitted by NRS 569.471, shall repair any damage to the fence caused by or related to the erection of the structure, the associated development of the land or the activity undertaken. The developer or person undertaking the activity is liable for any damage done by any livestock which stray from the pasture through the damaged portion of the fence for which he is responsible, and to the owner of the livestock for any loss suffered as a result of their straying and for the loss accruing from a suit for any such damages when necessarily resorted to for their recovery.
2. For the purposes of this section, a structure is erected on land adjoining a pasture if the land on which it is erected and land adjoining the pasture are owned by the same person directly or through an affiliate, even though the area may be divided into lots, and if the site of the construction is within one-fourth of a mile of the pasture.

(Added to NRS by 1991, 1147)

(19)

NRS 569.471 Replacement of legal fence permitted; conditions; duty and liability. A developer or a person undertaking an activity described in NRS 569.461, at his own expense, may replace a legal fence with a fence certified by the administrator of the division to be equally impervious to livestock, but if he does

so, the duty and liability imposed by NRS 569.461 exist and devolve in the same manner.

(Added to NRS by 1991, 1148; A 1993, 1746)

(20)

CHAPTER 565

INSPECTION OF BRANDS

CROSS REFERENCES

Brand inspection clearance certificate, issuance prohibited if tax unpaid, NRS 575.230

(21)

NRS 565.010 Definitions. As used in this chapter, unless the context requires otherwise:

1. "Administrator" means the administrator of the division.
2. "Animals" means:
   (a)All cattle or animals of the bovine species except dairy breed calves under the age of 1 month.
   (b) All horses, mules, burros and asses or animals of the equine species.
   (c) All swine or animals of the porcine species.
   (d) Alternative livestock as defined in NRS 501.003.
3. "Brand inspection" means a careful examination of each animal offered for such inspection and an examination of any brands, marks or other characteristics thereon.
4. "Division" means the division of agriculture of the department of business and industry.

[Part 1:145:1929; NCL § 3849]-(NRS A 1961, 540; 1989, 748; 1993, 433, 1739; 1995, 514)

(22)

NRS 565.030 Administration and enforcement by division. The division is designated as the authority to administer, and carry out and enforce the provisions of, this chapter and any rules and regulations issued thereunder.

[Part 1:145:1929; NCL § 3849]-(NRS A 1961, 540; 1993, 1739)

(23)

NRS 565.040 Creation of brand inspection districts; animals subject to inspection; adoption and publication of regulations.

1. The administrator may declare any part of this state a brand inspection district.
2. After the creation of any brand inspection district as authorized by this chapter all animals within any such district are subject to brand inspection in accord with the terms of this chapter before:

   (a) Consignment for slaughter within any district;

   (b) Any transfer of ownership by sale or otherwise; or

   (c) Removal from the district if the removal is not authorized pursuant to a livestock movement permit issued by the division.
3. Whenever a brand inspection district is created by the division pursuant to the provisions of this chapter, the administrator shall adopt and issue regulations defining the boundaries of the district, the fees to be collected for brand inspection, and prescribing such other rules or methods of procedure not inconsistent with the provisions of this chapter as he deems wise.
4. Any regulations issued pursuant to the provisions of this section must be published at least twice in some newspaper having a general circulation in the brand inspection district created by the regulations, and copies of the regulations must be mailed to all common carriers of record with the transportation services authority operating in the brand inspection district, which publication and notification constitutes legal notice of the creation of the

brand inspection district. The expense of advertising and notification must be paid from the livestock inspection account.

[2:145:1929; A 1956, 55]-(NRS A 1961, 540; 1991, 1793; 1993, 1740; 1997, 2013)

(24)

NRS 565.070 Fees for brand inspection: Imposition; collection. The division is authorized to levy and collect a reasonably compensatory fee or fees for brand inspection as required under the provisions of this chapter. Any fee or fees so levied must be collected in the manner prescribed by the administrator.

[8:145:1929; NCL § 3856]-(NRS A 1959, 417; 1961, 541; 1969, 138; 1993, 1740)

(25)

NRS 565.075 Federal assessment on livestock: Collection; deposit. The division may collect the assessment required pursuant to 7 U.S.C. § 2904 and shall deposit the money collected with the state treasurer for credit to the account for the promotion of beef.

(Added to NRS by 1987, 148; A 1991, 1794; 1993, 1740)

(26)

NRS 565.090 Removal of animals from brand inspection district without clearance certificate or permit unlawful; notice of contemplated movement; applicability of section; penalty; regulations for permit to move livestock without brand inspection.

1. Except as otherwise provided in subsections 3 and 6, it is unlawful for any person to drive or otherwise remove any animals out of a brand inspection district created under the provisions of this chapter until the animals have been inspected and a brand inspection clearance certificate is issued by the division

or a written permit from the division has been issued authorizing the movement without brand inspection.

2. Any person contemplating the driving or movement of any animals out of a brand inspection district shall notify the division or an inspector thereof of his intention, stating:

   (a) The place at which it is proposed to cross the border of the brand inspection district with the animals.

   (b) The number and kind of animals.

   (c) The owner of the animals.

   (d) The brands and marks of the animals claimed by each owner and, if they are other than the brands and marks legally recorded in the name of the owner, information as to what the claim to ownership or legal possession is based upon.

   (e) The date of the proposed movement across the border of the brand inspection district and the destination of the movement.

   (f) If a brand inspection is required, a statement as to where the animals will be held for brand inspection.

3. This section does not apply to animals whose accustomed range is on both sides of the boundary of any brand inspection district but contiguous to that district and which are being moved from one portion of the accustomed range to another merely for pasturing and grazing thereon.

4. All the provisions of this section apply at all times to the movement of any animals across the Nevada state line to any point outside of the State of Nevada, excepting animals whose accustomed range is on both sides of the Nevada state line but contiguous thereto and which are being moved from one portion to another of the accustomed range merely for pasturing and grazing thereon.

5. In addition to the penalty imposed in NRS 565.170, a person who violates subsection 1 is:

   (a)For the first violation, subject to an immediate brand inspection of the animals by the division and shall reimburse the division for its time and mileage and pay the usual fees for the brand inspection.

   (b) For the second and any subsequent violation, ineligible for a permit to move any livestock without brand inspection until the state board of agriculture is satisfied that any future movement will comply with all applicable statutes and regulations.

6. The division may establish regulations specifying the circumstances under which a permit may be issued authorizing the movement of livestock without a brand inspection pursuant to this section. Such circumstances may include, without limitation, routine movement of horses and bulls within and from this state for the purpose of participating in a rodeo.

[5:145:1929; NCL § 3853]-(NRS A 1961, 542; 1983, 1008; 1993, 1740; 1995, 876)

(27)

NRS 565.100 Unlawful to consign for slaughter, slaughter or transfer ownership within brand inspection district without inspection and issuance of clearance certificate. It is unlawful for any person to consign for slaughter, or slaughter at an approved plant, or transfer ownership of any animals by sale or otherwise within any brand inspection district created under the provisions of this chapter, until such animals have been inspected by an inspector of the division and a brand inspection clearance certificate issued covering the same.

[5.1:145:1929; added 1956, 55]-(NRS A 1961, 543; 1971, 120; 1993, 1741)

(28)

ATTORNEY GENERAL'S OPINIONS.

Brand inspection law applicable to transfer of ownership of livestock incident to transfer of entire ranch property. Brand inspection law is applicable to transfer of ownership of livestock incident to transfer of entire ranch property. AGO 258 (4-24-1957)

(29)

NRS 565.110 Assembly of animals for brand inspection. Except as otherwise provided in NRS 565.090, a person intending to move, drive, ship or transport by common carrier, or otherwise, any animals out of any brand inspection district created under the provisions of this chapter shall assemble and hold them at some convenient and adequate place for such brand inspection as may be required until the animals have been inspected and released as provided for in this chapter.

[6:145:1929; NCL § 3854]-(NRS A 1961, 543; 1993, 1741; 1995, 877)

(30)

NRS 565.120 Brand inspection clearance certificate: Issuance upon completion of inspection; contents; disposition of copies of certificate.

1. Upon the completion of brand inspection the inspector of the division shall, except as otherwise provided in this chapter, issue a brand inspection clearance certificate on which must be entered:

   (a)The name and address of the person or persons claiming to own the animals.

   (b) The proposed destination of the animals.

   (c) The name and address of the consignee.

   (d) A full description of all the animals inspected, including the number, kind, sex, age, color and the brands or brands and marks thereon.

   (e) The amount of the inspection fee or fees collected.

(f) The signature of the owner or his authorized agent.

2. One copy of the brand inspection certificate must be delivered to the common carrier undertaking to transport such animals out of the brand inspection district for attachment to its waybill, or to the person or persons intending to drive, move or otherwise transport such animals out of the brand inspection district other than by common carrier to accompany the animals to destination, and one copy must be immediately forwarded to the office of the division.

[Part 7:145:1929; NCL § 3855]-(NRS A 1961, 543; 1993, 1741)

NRS CROSS REFERENCES.

Issuance of certificate prohibited following nonpayment of tax, NRS 575.230

(31)

NRS 565.130 Refusal to issue certificate or permit: Grounds; duty of division and inspector to prevent unlawful removal of animals.

1. The division or its duly authorized inspector shall refuse to issue brand inspection clearance certificates or permits to remove animals from a brand inspection district without brand inspection as provided in this chapter, subject to brand inspection under the provisions of this chapter, not bearing brands or brands and marks of legal record in the name of the person or persons claiming lawful possession of and applying for inspection of such animals, until satisfactory evidence of such right to legal possession of the same and shipment or removal from such brand inspection district has been supplied the division or its duly authorized inspector.
2. The division and its duly authorized inspector shall also use all due vigilance to prevent the unlawful removal by any person or persons of any animals from any brand inspection district or districts created under the provisions of this chapter.

[9:145:1929; NCL § 3857]-(NRS A 1961, 544; 1993, 1742)

(32)

NRS 565.140 Inspector to give notice to legal owner upon discovery of animals in possession of another; contents of notice.

1. Whenever, incident to any brand inspection under the provisions of this chapter, any inspector shall find in the possession of any person or persons offering animals for inspection any animals to which such person or persons cannot establish their legal ownership or right of possession and the inspector shall be able to determine by means of the brands or brands and marks on such animal or animals, or upon other reliable evidence, the actual legal owner or owners of such animal or animals, the inspector shall immediately notify such legal owner or owners in writing of his findings.
2. The inspector shall include in such notice:

   (a)The date and place where such animal or animals were found.

   (b) A full description of the same.

   (c) The name and address of any person or persons in whose possession they were found.

   (d) All other information which may aid the legal owner or owners of such animal or animals in securing the return thereof or compensation therefor, or in any civil suit or criminal prosecution relating thereto.

[10:145:1929; NCL § 3858]-(NRS A 1961, 544)

(33)

NRS 565.150 Seizure and disposal of animals by inspector when legal ownership cannot be determined.

1. Whenever, incident to any brand inspection under the provisions of this chapter, any inspector shall find in the possession of any persons offering animals for inspection any animals to which such person or persons cannot

establish their legal ownership or right to possession, and the inspector shall be unable to determine by means of the brands or brands and marks on such animals, or otherwise, the actual legal owners of the animals, or, if in the judgment of the inspector such action is necessary to safeguard the legal owners of the animals, if known to the inspector, against their loss, the inspector shall immediately seize and take possession of such animals and proceed to dispose of the same, under the provisions of NRS 569.010 or 569.040 to 569.130, inclusive.

2. Such seizure and disposal by an inspector shall in no way relieve the persons in whose possession the animals were found of any civil or criminal liability arising out of the unlawful removal of such animals from the grazing commons or the unlawful possession of the same.

[11:145:1929; NCL § 3859]-(NRS A 1961, 545)

NRS CROSS REFERENCES.

Estrays, NRS ch. 569

(34)

NRS 565.155 Enforcement of chapter. In addition to enforcing the provisions of this chapter through its inspectors, the division may:

1. Authorize other peace officers to enforce the provisions of this chapter; and
2. Adopt regulations specifying the procedures for the enforcement of the provisions of this chapter by the inspectors of the division and other peace officers.

(Added to NRS by 1971, 255; A 1989, 339; 1993, 1742, 2541; 1995, 703)

NRS CROSS REFERENCES.

Peace officer powers of inspectors, NRS 289.290

(35)

NRS 565.160 Right of division to inspect animals under other laws unaffected. Nothing in this chapter affects the right of the division conferred by any other law or laws to inspect any animals for the determination of the ownership thereof, or for any other purpose under the provisions of any such other law or laws.

[12:145:1929; NCL § 3860]-(NRS A 1961, 545; 1993, 1742)

(36)

NRS 565.170 Penalties. Any person, firm or corporation violating any of the provisions of this chapter:

1. Is guilty of a misdemeanor, and upon conviction thereof shall be punished as provided by law.
2. In addition to any criminal penalty, shall pay to the division an administrative fine of not more than $1,000 per violation.

   If an administrative fine is imposed pursuant to this section, the costs of the proceeding, including investigative costs and attorney's fees, may be recovered by the division.

[14:145:1929; A 1956, 55]-(NRS A 1993, 899; 1995, 548)

B. Legal Memorandum Adopted by This Board

William E. Schaeffer
Eureka County District Attorney
Eureka County Justice Facility
P.O. Box 190 – Eureka, Nevada 89316
(702) 237-5315

Memorandum (First Revision)

TO: Board Of Eureka County Commissioners
Eureka County Public Lands Advisory Commission
Eureka County Natural Resources Director

FROM: District Attorney (Zane Stanley Miles, Deputy)
RE: Wild (Feral?) and Free-roaming Horses and Burros
DATE: May 09, 1996 (Revised June 26, 1996)

This memorandum is not a full-blown legal opinion, although it is based upon a great deal of legal research. It is intended simply to present one possible option for dealing with the feral horse problem in Eureka County and Nevada.

* * * * *

Under the common law of England all wildlife was the private property of the King, the sovereign. For example, in the Robin Hood legend Robin Hood was most avidly pursued by the King's agent, the Sheriff of Nottingham, because Robin repeatedly poached the King'' deer. Robin'' robberies of the rich on the King'' Highway were of secondary importance.

In the Thirteen Colonies, the wildlife, at least theoretically, also were a possession of the King. After the Revolutionary War, the King's sovereignty passed to each of the thirteen new nation states; there was as yet no national government to assume the King's sovereign mantle.

After the Revolution, ownership of the wildlife in each nation-state passed to that government. That's ALL wildlife, deer in the forests, fish in the rivers, rabbits in the woods, tortoises in the desert, elk on the plains, etc.

When the thirteen new nation states formed the present United States of America (by ratification of the Constitution of 1789), they delegated and transfer certain aspects of their nation-state sovereignty to the new national government. The new national government was and is a creation of the sovereign states. The national government is a government of limited powers, those powers enumerated in the Constitution. All other sovereignty was reserved to the individual states.

The Tenth Amendment to the Constitution reiterates that reservation of power to the states, and extends the reservation to "the people."

With one exception, and indirectly a second, there is no language in the Constitution which grants the national government any sovereignty over wildlife.

The Constitution gives the national government exclusive jurisdiction over treaties with foreign nations. Within the "penumbra" of treaty jurisdiction, it appears that the states did grant to the national government jurisdiction over migratory wildlife which could reasonably become the subject of treaties with other nations. The Federal Migratory Bird Act is an example of federal jurisdiction over a particular type of wildlife which is founded upon a duly ratified international migratory bird treaty.

Wild (feral) horses and burros are not considered internationally migratory (although a very few burros may wander back and forth across the U.S./Mexico boundary.) No treaty governs and travels of those burros. Jurisdiction over wild (feral) horses and burros cannot be based on non-existent international treaties.

The states also granted to the national government jurisdiction over interstate commerce. To the extent that wildlife might be the subject of interstate commerce, the Constitution gives the national government authority over that interstate aspect. That indirect interest based on the Interstate Commerce Clause does not stretch to vest ownership of wildlife in the national government.

Very few wild (feral) horses and burros migrate across state lines. While the Interstate Commerce Clause may vest jurisdiction over those few horses and burros in the federal government, it certainly does not give the federal government jurisdiction over those bands of wild (feral) horses roaming Eureka County. So long as those horses – or their parts or proceeds – do not enter interstate commerce, the clause simply does not apply. The horses, like other wildlife, belong to the State of Nevada. NOTE: The present U.S. Supreme Court has

tended to contract the expansive reading given to the Interstate Commerce Clause by earlier, more-liberal (more federal power-oriented) judges. Just last year the Court ruled that the Interstate Commerce Clause can" be stretched to give Congress authority to adopt legislation forbidding possession of firearms within 1,000 feet of schools, even though those weapons may at some time have moved in interstate commerce. That bodes well for a challenge of any federal claim over wild (feral) horses and burros based on the Interstate Commerce Clause.

When the federal "Wild and Free-roaming Horse and Burro Act" was enacted by Congress in 1971, the question of Constitutional authority for the national government to manage wildlife was not raised. Later, in 1976, in Kleppe v. New Mexico, the State of New Mexico stipulated that the horses in question were taken off federal public lands. Apparently, the Supreme Court interpreted that stipulation as an admission by New Mexico that the national government owned the horses. Kleppe since has been cited as authority for that proposition.

However, in 1992, the U.S. Supreme Court ruled in New York v. United States that states cannot transfer any of their inherent sovereignty to the national government, and likewise, the national government cannot transfer any of its attributes of sovereignty to the states.

Applying New York v. U.S. to the wild horse and burro situation, two facts stand out:

1. The wild horse and burro act very probably is an unconstitutional grab by the national government of an attribute of state sovereignty, ownership and control of wildlife not subject to international treaties, and
2. Even if the states wanted to, they cannot cede their inherent authority over non-migratory wildlife to the national government.

It is important to realize that if the national government can usurp jurisdiction over wild (feral) horses and burros, it can usurp jurisdiction over any other wildlife – wildlife which historically and constitutionally has been considered to properly be owned by the individual states and subject solely to their control.

* * * * *

CONCLUSION: A court challenge to the national government's interference with the states' right to manage their wildlife – including wild horses and burros – has a very real likelihood of success. Further, other interference with states' wildlife by the national government, through the Endangered Species Act, also may violate the Constitutional doctrine of separation of powers between the states and the national government. Such a challenge also may serve to prevent the national government from attempting to exercise jurisdiction over and control of other wildlife species currently managed by the states.

Respectfully submitted,
EUREKA COUNTY DISTRICT ATTORNEY
William E. Schaeffer, District Attorney
By Zane Stanley Miles, Chief Deputy

ADDENDUM: Since the foregoing was written, this office has learned that San Bernardino County, California, and two municipalities in that county have filed suit against the federal government over federal claims to have jurisdiction and control over non-migratory species pursuant to the Endangered Species Act. The fauna in question are not migratory and exist only in San Bernardino County.

THE LEGAL THEORY BEING UTILIZED BY SAN BERNARDINO IN ITS CHALLENGE OF THE ENDANGERED SPECIES ACT IS EXACTLY THE SAME AS OUTLINED ABOVE WITH RESPECT TO WILD HORSES AND BURROS – THAT THE FEDERAL GOVERNMENT UNDER THE CONSTITUTION HAS ABSOLUTELY NO JURISDICTION OVER WILDLIFE THAT DOES NOT MIGRATE OVER STATE LINES.

C. Origin and definition determined by this Board with respect to Federal Agency "without limitations" power operating within Elko County

Kleppe v. New Mexico, 426 U.S. 529 (1976) addressing the federal government's power over the public lands within an admitted state of the Union states in part;

> At issue in this case is whether Congress exceeded its powers under the Constitution in enacting the Wild Free-roaming Horses and Burros Act. ***Id@531.***
>
> The Wild Free-roaming Horses and Burros Act, 85 Stat. 649, 16 U.S.C. 1331-1340 (1970 ed., Supp. IV), was enacted in 1971 to protect "all unbranded and unclaimed horses and burros on public lands of the United States," 2 (b) of the Act, 16 U.S.C. 1332 (b) (1970 ed., Supp. IV), from "capture, branding, harassment, or death." 1, 16 U.S.C. 1331 (1970 ed., Supp. IV). ***Id@531.***
>
> The Property Clause of the Constitution provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, 3, cl. 2. ***Id@535.***
>
> Next, appellees refer to Kansas v. Colorado, 206 U.S. 46, 89 (1907). The referenced passage in that case states that the Property Clause "clearly . . . does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits." But this does no more than articulate the obvious: The Property Clause is a [426 U.S. 529, 538] grant of power only over federal property. It gives no indication of the kind of "authority" the Clause gives Congress over its property.
>
> Camfield v. United States, 167 U.S. 518 (1897), is of even less help to appellees. Appellees rely upon the following language from Camfield:

> ***"While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection."*** Id., at 525-526 (emphasis added). (Emphasis in original, underscoring provided).

Appellees mistakenly read this language to limit Congress' power to regulate activity on the public lands; in fact, the quoted passage refers to the scope of congressional power to regulate conduct on private land that affects the public lands. And Camfield holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property. Camfield contains ***no suggestion of any limitation on Congress' power over conduct on its own property; its sole message is that the power granted by the Property Clause is broad enough to reach beyond territorial limits.*** ***Id@537-538.*** (Emphasis and Underscoring added).

"...for the Clause, in broad terms, gives Congress the power to determine what are "needful" rules "respecting" the public lands. United States v. San Francisco, 310 U.S., at 29-30; Light v. United States, 220 U.S., at 537; United States v. Gratiot, 14 Pet., at 537-538. ***And while the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that "[t]he power over the public land thus entrusted to Congress is without limitations."*** United States v. San Francisco, supra, at 29. See Ivanhoe Irrig. Dist. V. McCracken, 357 U.S. 275, 294-295 (1958); Alabama v. Texas, 347 U.S. 272, 273 (1954); FPC v. Idaho

Power Co., 344 U.S. 17, 21 (1952); United States v. California, 332 U.S. 19, 27 (1947); Gibson v. Chouteau, 13 Wall. 92, 99 (1872); United States v. Gratiot, supra, at 537.

The decided cases have supported this expansive reading. It is the Property Clause, for instance, that provides [426 U.S. 529, 540] the basis for governing the Territories of the United States. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673-674 (1945); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922); Dorr v. United States, 195 U.S. 138, 149 (1904); United States v. Gratiot, supra, at 537; Sere v. Pitot, 6 Cranch 332, 336-337 (1810). See also Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948). And even over public land within the States, ***"[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case."*** Camfield v. United States, supra, at 525. We have noted, for example, that the Property Clause gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them . . . ." Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917). And we have approved legislation respecting the public lands "[I]f it be found to be necessary for the protection of the public, or of intending settlers [on the public lands]." Camfield v. United States, supra, at 525. In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain. Alabama v. Texas, supra, at 273; Sinclair v. United States, 279 U.S. 263, 297 (1929); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). ***Although the Property Clause does not authorize "an exercise of a general control over public policy in a State," it does permit "an exercise of the complete power which***

Congress has over particular public property entrusted to it." United States v. San Francisco, supra, at 30 (footnote omitted). In our view, the "complete power" that [426 U.S. 529, 541] Congress has over public lands necessarily includes the power to regulate and protect the wildlife living there. ***Id@539-541***. (Emphasis and Underscoring added).

But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the [426 U.S. 529, 543] Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. Mason Co. v. Tax Comm'n of Washington, 302 U.S. 186, 197 (1937); Utah Power & Light Co. v. United States, 243 U.S., at 403-405; Ohio v. Thomas, 173 U.S. 276, 283 (1899). ***And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const., Art. VI, cl. 2.*** See Hunt v. United States, 278 U.S., at 100; McKelvey v. United States, 260 U.S. 353, 359 (1922). As we said in Camfield v. United States, 167 U.S., at 526, in response to a somewhat different claim: "***A different rule would place the public domain of the United States completely at the mercy of state legislation."***

Thus, appellees' assertion that "[a]bsent state consent by complete cession of jurisdiction of lands to the United States, exclusive jurisdiction does not accrue to the federal landowner with regard to federal lands within the borders of the State," Brief for Appellees 24, is completely beside the point; and appellees' fear that the Secretary's position is that "the Property Clause totally exempts federal lands within state borders from state legislative powers, state police powers, and all rights and powers of local sovereignty and jurisdiction of the

states," id., at 16, is totally unfounded. The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. ***But where those state laws conflict with*** the Wild Free-roaming Horses and Burros Act, ***or with other legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede.*** McKelvey v. United States, supra, at 359. ***Id@542-543.*** (Emphasis and Underscoring added).

We hold today that the Property Clause also gives Congress the power to protect wildlife on the public lands, ***state law notwithstanding***. ***Id@546.*** (Emphasis and Underscoring added).

Appellees are concerned that the Act's extension of protection to wild free-roaming horses and burros that stray from public land onto private land, 4, 16 U.S.C. 1334 (1970 ed., Supp. IV), will be read to provide federal jurisdiction over every wild horse or burro that at any time sets foot upon federal land. While it is clear that regulations under the Property Clause may have some effect on private lands not otherwise under federal control, Camfield v. United States, 167 U.S. 518 (1897), we do not think it appropriate in this declaratory judgment proceeding to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands or the extent to which such regulation is attempted by the Act. We have often declined to decide important questions regarding "the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case," Longshoremen v. Boyd, 347 U.S. 222, 224 (1954), or in the absence of "an adequate and full-bodied record." Public Affairs Press v. Rickover, 369 U.S. 111, 113 (1962). Cf. Eccles v. Peoples Bank, 333 U.S. 426 [426 U.S. 529, 547] (1948). We follow that course in this case and leave open

the question of the permissible reach of the Act over private lands under the Property Clause. ***Id@546-547.***

D. Property Clause (Art IV, § 3, cl 2, US Const), territorial and insular possession law, defined by this Board with respect to Federal Agency "without limitations" power operating within Elko County

It is the Property Clause, for instance, that provides [426 U.S. 529. 540] the basis for governing the Territories of the United States. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673-674 (1945); Balzac v. Porto Rico, 258 U.S. 298, 305 (1922); Dorr v. United States, 195 U.S. 138, 149 (1904); United States v. Gratiot, supra, at 537; Sere v. Pitot, 6 Cranch 332, 336-337 (1810). See also Vermilya-Brown Co. v. Connell, 335 U.S. 377, 381 (1948). ***Kleppe@539-540.***

HOOVEN & ALLISON CO. v. EVATT, 324 U.S. 652 (1945), states in part;

The term 'United States' may be used in any one of several senses. It may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations. It may designate the territory over which the sovereignty of the United States ex- [324 U.S. 652, 672] tends, or it may be the collective name of the states which are united by and under the Constitution. 6

When Brown v. Maryland, supra, was decided, the United States was without dependencies or territories outside its then territorial boundaries on the North American continent, and the Court had before it only the question whether foreign articles brought into the State of Maryland could be subjected to state taxation. It seems plain that Chief Justice Marshall, in his reference to imports as articles brought into the country, could have had reference only to articles brought into a state which is one of the states united by and under the

Constitution, and in which alone the constitutional prohibition here involved is applicable.

The relation of the Philippines to the United States, taken as the collective name of the states which are united by and under the Constitution, is in many respects different from the status of those areas which, when the Constitution was adopted, were brought under the control of Congress and which were ultimately organized into states of the United States. See Balzac v. Porto Rico, 258 U.S. 298, 304, 305 S., 42 S.Ct. 343, 345, 346, and cases cited. Hence we do not stop to inquire whether articles brought into such territories or brought from such territories into a state, could have been regarded as imports, constitutionally immune from state taxation. We confine the present discussion to the question whether such articles, brought from the Philippines and introduced into the United States, are imports so immune.

We have adverted to the fact that the reasons for protecting from interference, by state taxation, the consti- [324 U.S. 652, 673] tutional power of the national government to collect customs duties, apply equally whether the merchandise brought into the country is of foreign origin or not. The Constitution has not made the foreign origin of articles imported the test of importation, but only their origin in a place over which the Constitution has not extended its commands with respect to imports and their taxation. Hence out question must be decided, not by determining whether the Philippines are a foreign country, as indeed they have been held not to be within the meaning of the general tariff laws of the United States, Fourteen Diamond Rings v. United States, 183 U.S. 176, 22 S.Ct. 59, cf. De Lima v. Bidwell, 182 U.S. 1, 21 S.Ct. 743; Dooley v. United States, 182 U.S. 222, 21 S.Ct. 762, and within the scope of other general laws, Faber v. United States, 221 U.S. 649, 31 S.Ct. 659; cf. Huus v. New York & P. R. Steamship Co., 182 U.S. 392, 21 S.Ct.

827; Gonzales v. Williams, 192 U.S. 1, 24 S.Ct. 177; West India Oil Co. v. Domenech, 311 U.S. 20, 61 S.Ct. 90, but by determining whether they have been united governmentally with the United States by and under the Constitution.

That our dependencies, acquired by cession as the result of our war with Spain, are territories belonging to, but not a part of the Union of states under the Constitution, was long since established by a series of decisions in this Court beginning with The Insular Tax Cases in 1901; De Lima v. Bidwell, supra; Dooley v. United States, supra, 182 U.S. 222, 21 S. Ct. 762; Downes v. Bidwell, 182 U.S. 244, 21 S.Ct. 770; Dooley v. United States, 183 U.S. 151, 22 S.Ct. 62; and see also Public Utility Commissioners v. Ynchausti & Co., 251 U.S. 401, 406, 407 S., 40 S.Ct. 277, 279; Balzac v. Porto Rico, supra. This status has ever since been maintained in the practical construction of the Constitution by all the agencies of our government in dealing with our insular possessions. It is no longer doubted that the United States may acquire territory by conquest or by treaty, and may govern it through the exercise of the power of Congress conferred by 3 of Article IV of the Constitution 'to dispose of and make all needful Rules and Regu- [324 U.S. 652, 674] lations respecting the Territory or other Property belonging to the United States.' Dooley v. United States, supra, 183 U.S. at page 157, 22 S.Ct. at page 65; Dorr v. United States, 195 U.S. 138, 149, 24 S.Ct. 808, 813, 1 Ann.Cas. 697; Balzac v. Porto Rico, supra, 258 U.S. 305, 42 S.Ct. 346; Cincinnati Soap Co. v. United States, 301 U.S. 308, 323, 57 S.Ct. 764, 771.

In exercising this power, Congress is not subject to the same constitutional limitations, as when it is legislating for the United States. See Downes v. Bidwell, supra; Territory of Hawaii v. Mankichi, 190 U.S. 197, 23 S.Ct. 787; Dorr v. United States, supra; Dowdell v. United States, 221 U.S. 325, 332, 31

S.Ct. 590, 593; Ocampo v. United States, 234 U.S. 91, 98, 34 S.Ct. 712, 715; Public Utility Commissioners v. Ynchausti & Co., supra, 251 U.S. 406, 407, 40 S.Ct. 279; Balzac v. Porto Rico, supra. And in general the guaranties of the Constitution, save as they are limitations upon the exercise of executive and legislative power when exerted for or over our insular possessions, extend to them only as Congress, in the exercise of its legislative power over territory belonging to the United States, has made those guaranties applicable. See Balzac v. Porto Rico, supra. The constitutional restrictions on the power of Congress to deal with articles brought into or sent out of the United States, do not apply to articles brought into or sent out of the Philippines. Despite the restrictions of 8 and 9 of Article I of the Constitution, such articles may be taxed by Congress and without apportionment. Downes v. Bidwell, supra. If follows that articles brought from the Philippines into the United States are imports in the sense that they are brought from territory, which is not a part of the United States, into the territory of the United States, organized by and under the Constitution, where alone the import clause of the Constitution is applicable. (emphasis and underscoring added).

The status of the Philippines as territory belonging to the United States, but not constitutionally united with it, has been maintained consistently in all the governmental relations between the Philippines and the United [324 U.S. 652, 675] States. Following the conquest of the Philippines, they were governed for a period under the war power. After annexation by the Treaty of Paris of December 10, 1898, military government was succeeded by a form of executive government. By the Spooner Amendment to the Army Appropriation Bill of March 2, 1901, c. 803, 31 Stat. 895, 910, it was provided that 'all military, civil, and judicial powers necessary to govern the Philippine Islands ... shall, until otherwise provided by Congress, be vested in such person and

persons and shall be exercised in such manner as the President of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants of said islands in the free enjoyment of their liberty, property, and religion ....' On July 1, 1902 Congress provided for a complete system of civil government by the original Philippine Organic Act, c. 1369, 32 Stat. 691. Step by step Congress has conferred greater powers upon the territorial government, and those of the federal government have been diminished correspondingly, although Congress retains plenary power over the territorial government until such time as the Philippines are made independent. ***Hooven@671-675.***

BALZAC v. PEOPLE OF PORTO RICO, 258 U.S. 298 (1922) states in part;

The Insular Cases revealed much diversity of opinion in this Court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the Dorr Case shows that the opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court. The conclusion of this court in the Dorr Case, 195 U.S. 149, 24 Sup. Ct. 813, 1 Ann. Cas. 697, was as follows:

> 'We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.'

DORR V. U S, 195 U.S. 138 (1904), states in part;

The practice of the government, originating before the adoption of the Constitution, has been for Congress to establish governments for the territories; and [195 U.S. 138, 148] whether the jurisdiction over the district has been acquired by grant from the states, or by treaty with a foreign power, Congress has unquestionably full power to govern it; and the people, except as Congress shall provide for, are not of right entitled to participate in political authority until the territory becomes a state. Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined.' Cooley, Principles of Const. Law, 164. ***Dorr@147-148.***

DOWNES V. BIDWELL, 182 U.S. 244 (1901) states in part;

Indeed, whatever may have been the fluctuations of opinion in other bodies (and even this court has not been exempt from them), Congress has been consistent in recognizing the difference between the states and territories under the Constitution.

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in

several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; her, upon the other hand, to general statements that the Constitution covers the territories as well as the states, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated, not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land. 'It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually [182 U.S. 244, 259] before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290.

The earliest case is that of Hepburn v. Ellzey, 2 Cranch, 445, 2 L. ed. 332, in which this court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the circuit court of the United States. It was argued that the word 'state.' in that connection, was used simply to denote a distinct political society. 'But,' said the Chief Justice, 'as the act of Congress obviously used the word 'state' in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of

the American confederacy only are the states contemplated in the Constitution , . . . and excludes from the term the signification attached to it by writers on the law of nations.' This case was followed in Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825, and quite recently in Hooe v. Jamieson, 166 U.S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596. The same rule was applied to citizens of territories in New Orleans v. Winter, 1 Wheat. 91, 4 L. ed. 44, in which an attempt was made to distinguish a territory from the District of Columbia. But it was said that 'neither of them is a state in the sense in which that term is used in the Constitution.' In Scott v. Jones, 5 How. 343, 12 L. ed. 181, and in Miners' Bank v. Iowa ex rel. District Prosecuting Attorney, 12 How. 1, 13 L. ed. 867, it was held that under the judiciary act, permitting writs of error to the supreme court of a state in cases where the validity of a state statute is drawn in question, an act of a territorial legislature was not within the contemplation of Congress. ***Downes@258-259.***

That the power over the territories is vested in Congress [182 U.S. 244, 268] without limitation, and that this power has been considered the foundation upon which the territorial governments rest, was also asserted by Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 316, 422, 4 L. ed. 579, 605, and in United States v. Gratiot, 14 Pet. 526, 10 L. ed. 573. So, too, in Church of Jesus Christ of L. D. S. v. United States, 136 U.S. 1, 34 L. ed. 478, 10 Sup. Ct. Rep. 792, in holding that Congress had power to repeal the charter of the church, Mr. Justice Bradley used the following forceful language: 'The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory,

and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. . . . Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions.' See also, to the same [182 U.S. 244, 269] effect First Nat. Bank v. Yankton County, 101 U.S. 129, 25 L. ed. 1046; Murphy v. Ramsey, 114 U.S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747.

In Webster v. Reid, 11 How. 437, 13 L. ed. 761, it was held that a law of the territory of Iowa, which prohibited the trial by jury of certain actions at law founded on contract to recover payment for services, was void; but the case is of little value as bearing upon the question of the extension of the Constitution to that territory, inasmuch as the organic law of the territory of Iowa, by

express provision and by reference, extended the laws of the United States, including the ordinance of 1787 (which provided expressly for jury trials), so far as they were applicable; and the case was put upon this ground. 5 Stat. at L. 235, 239, chap. 96, 12.

In Reynolds v. United States, 98 U.S. 145, 25 L. ed. 244, a law of the territory of Utah, providing for grand juries of fifteen persons, was held to be constitutional, though Rev. Stat. 808, required that a grand jury impaneled before any circuit or district court of the United States shall consist of not less than sixteen nor more than twenty-three persons. Section 808 was held to apply only to the circuit and district courts. The territorial courts were free to act in obedience to their own laws. ***Downes@267-269.***

Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;

2. That territories are not states within the meaning of Rev. Stat. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;

3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully [182 U.S. 244. 271] provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith. ***Downes@270-271.***

AMERICAN INS. CO. V. 356 BALES OF COTTON, 26 U.S. 511 (1828) defining what territorial courts are, states in part;

These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government. ***Id@546.***

UNITED STATES V. GRATIOT, 39 U.S. 526 (1840), states in part

"The term 'territory' as here used, is merely descriptive of one kind of property, and is equivalent to the words 'lands'. And Congress has the same

power over it as any other property belonging to the United States; and this power is vested in Congress **without limitation**, ***and has been considered the foundation upon which the territorial governments rest***." ***Gratiot @ 537***. (emphasis and underscoring added).

KLEPPE V. NEW MEXICO, 426 U.S. 529 (1976), deleting the territorial qualifier, states in part as follows:

"[A]nd while the furthest reaches of the power of the Property Clause have not been definitively resolved, we have repeatedly observed that '[t]he power over the public lands thus entrusted to Congress is **without limitations**.'" ***Kleppe @ 539***. (emphasis and underscoring added).

E. Court's de facto amending and/or suspension of the constitution and its guarantees within Elko County's jurisdictional boundaries rejected by this Board by its adoption of the language in the pleading below, (note: exhibits to pleading are noted included herein)

JOEL F. HANSEN, ESQ.
Nevada Bar No. 001876
JOEL F. HANSEN, ATTORNEY AT LAW
415 South Sixth Street #200
Las Vegas, Nevada 89101
(702) 385-5533
Attorneys for Defendants

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IN RE: CLIFF GARDNER and BERTHA GARDNER,

CV-N-95-328 (DWH)

Petitioners,

PETITION FOR WRIT OF MANDAMUS AND/OR PETITION FOR WRIT OF PROHIBITION

COME NOW, the Petitioners, CLIFF and BERTHA GARDNER, by and through their attorney, Joel F. Hansen, Esq., and Petition this Honorable Court for a Writ of Mandamus and/or a Writ of Prohibition, pursuant to Federal Rule of Appellant Procedure 21. Petitioners seek a writ directing the Federal District Judge David W. Hagen to grant Petitioners' "Motion to Dismiss for Lack of Jurisdiction and Counter Motion to Declare Judgment Void Due to Violation of the Due Process Rights of the Defendants" which were brought below by the Petitioners in response to the "Order to Show Cause" brought by the United States of America against Petitioners on June 18, 1998. (See **Exhibit A** attached).

Judge Hagen has denied the Petitioners' Motion to Dismiss for Lack of Jurisdiction and Counter Motion to Declare Judgment Void and has indicated to counsel that he plans to go forward and allow the government to put on its evidence in the Order to Show Cause in the near future, but Judge Hagen also invited counsel to file a Writ of Prohibition with the Ninth Circuit, obviously for the purpose of testing the validity of his denial of the Motion to Dismiss and the Motion to Declare Judgment Void. (See Transcript of Hearing of November 16, 1998, attached as **Exhibit B**)

The procedural history of this case is that the Plaintiff filed a Complaint for damages and injunctive relief on May 22, 1995. Plaintiff soon thereafter brought a Motion for Summary Judgment which was granted October 4, 1995. See Findings and Fact, Conclusions of Law and Order, dated October 4, 1995, attached as **Exhibit C**. A review of that order reveals that the argument that the Gardners rested their opposition to the Motion for Summary Judgment upon was the doctrine of equal footing.

The case then went on appeal to the Ninth Circuit Court of Appeals and the judgment of the lower court was affirmed in ***United States of America v. Clifford and Bertha Gardner*, 102 F.3d 1314 (Cir. 1997)**. Shortly after the Ninth

Circuit had entered its opinion, present counsel, Joel F. Hansen, was substituted in as the new attorney for the Gardners. Having reviewed the file, Mr. Hansen recognized that the issue of jurisdiction had never been argued in the lower court, and therefore, when the government brought its Order to Show Cause, present counsel recognized the fact that there was lack of jurisdiction on the part of the federal courts, which issue can, of course, can be raised at any time. Also, counsel recognized that the judgment itself had involved a due process violation of the Defendants' rights, and therefore, moved to declare the judgment void due to the violation of these due process rights.

Judge Hagen of the U.S. District Court of the District of Nevada has refused to grant Petitioners' Motion to Dismiss for Lack of Jurisdiction and has also refused to declare the judgment void. In fact, even though the Government never argued against the Motion to Declare the Judgment Void, Judge Hagen has simply ignored that issue and has failed and refused to rule on the issue of the violation of the Defendants' Constitutional due process rights. Instead, Judge Hagen has ruled that unless this Court grants a writ of prohibition, he will proceed with an Order to Show Cause why the Gardners should not be held in contempt. It is for this reason that the Petitioners come before the court to request that it issue a Writ of Mandamus ordering Judge Hagen to grant their Motion to Dismiss for Lack of Jurisdiction and also grant the Counter Motion to Declare the Judgment Void, and further, that this Court prohibit Judge Hagen from going forward with an Order to Show Cause, since Judge Hagen has no jurisdiction over this case, as will be shown below.

The Arguments presented by the Gardners in their Points and Authorities below which point out why the District Court of Nevada does not have proper jurisdiction over this case, and showing why the Gardners' due process rights have been violated are quickly summarized below for this Court's

convenience. However, the entire argument should be reviewed and for this purpose the Points and Authorities filed by Gardners below have been attached for the Court's convenience as **Exhibits D, E, and F.**

I.

ARGUMENT

A. Two Great Paradoxes are Created by the Attempted Exercise of Article IV Jurisdiction by the Federal Government over Lands Within an Admitted State of Union, Paradoxes Which Must Be Resolved.

In Nevada, the Federal Government claims that it exercises ownership and control over more than 87% of the land under Article IV of the U.S. Constitution. The Courts have ruled that this power is exercised by Congress and that it is **without limitation,** since Article IV power has been held by the Courts not to be subject to the limitations of the rest of the Constitution. In other words, the Bill of Rights does not apply inside territory claimed pursuant to Article IV, nor do the rest of the structural and explicit guarantees of the Constitution.

The first paradox is: How can Congress exercise unlimited power over a certain territory while Article III Courts are sitting in that same territory exercising their Constitutional power to limit Congress under the Constitutional limits and guarantees of rights set forth in the rest of the Constitution?

The second paradox is: How can the Federal Government, under Article IV, govern Citizens of the United States who are living within a State and who have, as Citizens, Constitutionally protected rights, when the Courts have uniformly held that people who are being governed under Article IV are not protected by any Constitutional guarantees such as those possessed by Citizens?
It was shown in the briefs below that because Article IV jurisdiction is considered to be outside the Constitution, Article III Courts have no jurisdiction over Article IV questions. It was shown that under controlling U.S. Supreme Court case law,

Congress is incapable of conferring Article IV jurisdiction upon on Article III Court, because Article IV courts are creatures of Congress, while Article III Courts are creatures of the Constitution, deriving their power directly from the Constitution itself and not from Congress.

It was further shown in the briefs below that the exercise of Article IV jurisdiction upon lands within the boundaries of Nevada deprives the Citizens of Nevada of their Constitutional and due process rights. This is because Congress is not restrained by the Constitution in its governance of Article IV territory, and the Courts have held that it is under Article IV that the public lands in Nevada are being administered. But since the Constitution guarantees the Citizens of Nevada their unalienable rights, this situation cannot properly exist within an admitted State of the Union. To allow it to exist strips Citizens such as the Gardners of the protections of the Fourteenth Amendment and leaves them to be treated as subjects instead of as Citizens. The Courts have created a paradox by ruling that Congress can exercise Article IV jurisdiction over vast tracts of lands within a state, yet also holding that all Citizens of the union must be afforded their due process rights and equal protection. Since the Gardners are Citizens but are being governed under Article IV, they have lost the rights guaranteed to them under the structure and the explicit language of the Constitution, such as the right to a Republican form of government, the right to due process of law, the right to have their property claims adjudicated in State Court under the common law, their right to elect the local officials that will govern them, their right to have their water, grazing and ditch rights established under State law, and so on.

As pointed out in the briefs below, the power of Congress is plenary and unlimited under Article IV, and it has been compared to the power of an unlimited monarch. If Article IV power is allowed to be exercised by Congress within the

boundaries of a State, then we have an unlimited monarchy ruling over 87% of the land within a sovereign state, an unresolvable paradox and an intolerable situation.

If the public lands of Nevada are being governed under Article IV, this means that in almost 90% of the State, neither the State nor the Federal Constitution apply, and thus the Citizens are relegated to the status of territorial subjects of Congress, without citizenship and without rights except those that Congress deigns to bestow upon them. (See Defendants briefs below, attached as **Exhibits D, E, and F**).

Indeed, the case, ***United States of America v. Clifford and Bertha Gardner*, 102 F.3d 1314 (Cir. 1997)** itself portrays the paradox that surrounds this issue, for even if the federal government were to hold legitimate authority over those lands which were ceded to the United States by the treaty of Guadalupe Hidalgo after statehood as the case states, what of the lands which the government has purchased since statehood -- for they too are being governed under the authority of Article IV -- which points up the absurdity of the entire proposition. After all, what <u>was</u> the purpose of Article 1, Section 8, Clause 17 of the United States Constitution,, if it was not to protect the sovereignty of the states? Are we to assume that the federal; government was authorized to exercise complete authority over any amount of land it chooses within a state with no restrictions whatsoever -- for that is exactly what is occurring. See **Exhibits G and H**.

Without question, if federal land acquisition continues as it has in recent years, it will not be long until the federal government will own nearly all of Nevada. Can anyone deny that any entity which owns and controls the majority of lands and resources within a state holds sway over that state's politics? The whole notion that the federal government can exercise jurisdiction over tracts of land, either purchased or retained, within a state without obtaining legislative consent from that state flies in the face of the original intent of the founders of this nation --

as is verified by the record of the very debates that went on during the Constitutional convention.

The Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States -- Part II, 1957, **(Exhibit I)** shows that during the constitutional convention the "committee of eleven" proposed that the following power be granted to Congress:

> To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states and the acceptance of the legislature, become the seat of government of the United States, and to exercise like authority over all places purchased for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.
>
> So much of the fourth clause as related to the seat of government was agreed to, nem. con.
>
> On the residue, to wit, "to exercise like authority over all places purchased for forts, & c." --
>
> Mr. GERRY contended that this power might be made use of to enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the state into an undue obedience to the general government.
>
> MR. KING thought himself the provision unnecessary, the power being already involved; but would move to insert, after the word "purchased," the words, "by the consent of the legislature of the state." This would certainly make the power safe.
>
> MR. GOUVERNEUR MORRIS seconded the motion, which was agreed to, nem. con.; as was then the residue of the clause, as amended.

The Report goes on to state, "There appears to be no question but that the requirement was added simply to foreclose the possibility that a State might be destroyed by the purchase by the Federal Government of all of the property within the State."

This record, as well as records of debates from State ratifying conventions, as well as the entire history of events leading up to the adoption the Constitution of the United States leave no doubt as to the intent of the nation at that time. No one wanted the Federal Government to own or have jurisdiction over anything more than the ten miles square, that was to make up the seat or the Federal Government, and those areas needed for bona fide federal functions. See pages 18 through 27 of the Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States – Part II, 1957, (**Exhibit I**).

B. This is a Proper Case for Mandamus

In the case of ***Calderon v. United States District Court for the Central District of California*, 1998 U.S. at. Lexis 30864 (1998)** this court delineated the five factors that support the issuance of a writ of mandamus:

> (1) The party seeking the writ has no other adequate means, such as a direct appeal, to obtain the relief he or she desires.
> (2) The petitioner will be damaged or prejudice in a way that is not correctable on appeal . . . .
> (3) The district court's order is clearly erroneous as a matter of law.
> (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules.
> (5) The district court's order raises new and important problems, or issues of law of first impression.

Id. at 5.

The court went on to state that there must be clear error as a matter of law, but that "the other factors may be more or less relevant, depending on a precise claims at issue. . . .". Id.

Considering these five factors, it is clear that all five factors are applicable in the above case. In fact, the District Court suggested to counsel that an extraordinary writ be pursued to the Court of Appeals because of the posture of this case.

Obviously, the Gardners have no adequate means, such as a direct appeal, to obtain the relief desired, because the case has already been on appeal. The jurisdictional challenge has not been made and of course, jurisdiction is always a question which can be raised at any time before the court. Since the district court has denied the Motion to Dismiss based on the jurisdictional challenge, the Petitioners have no other way to obtain a relief except to petition for an extraordinary writ.

The Petitioners will be damaged or prejudiced in a way that is not correctable upon appeal if the order to show cause is granted. The Gardners depend upon the land in question for their livelihood, and if they are forced to sell off cattle and shut down their operation, awaiting an extending appeal, the Gardners will probably be out of business before the appeal is heard. Because of the pressure of this lawsuit, the Gardners are already under extreme financial dress, and a long wait pending appeal will surely be fatal to their ability to continue ranching. If the District Court enters an Order holding them in contempt and imposing prospective fines for any violation, they will be forced to remove their cattle from the land and they will lose their ranch.

As to the District Court's Order being clearly erroneous as a matter of law, that question needs to be combined with Question No. 5, in that this appeal raises new and important problems or issues of law of first impression, which have not been dealt with in this or any other case. To counsel's knowledge, the arguments presented in this case are new and are issues of law of first impression, but a proper study and review of the points and authorities will show that the District Court's Order is clearly erroneous as a matter of law. The points and authorities set forth the fact that Congress, when it is governing Article IV territory, has "unlimited" authority, and this proposition is not challenged by the Government. In fact, the Government admits that it has unlimited authority, and therefore, it can

shut the Gardner ranch down. The Gardners, on the other hand, state that if Congress has unlimited authority in Article IV territory, then this Court cannot have jurisdiction, since this Court would then be in an untenable position of trying to limit a body which has unlimited authority, which is a logical and possibility. Therefore, either Nevada Public Lands are being legitimately governed under Article IV, and thus the District Court has no jurisdiction, or on the other hand, if they are not being legitimate governed under Article IV, then the Forest Service has no authority and cannot be a proper Plaintiff in this case. Either way, the case should be dismissed for either lack of jurisdiction by the District Court or lack of power on the part of the Forest Service to be a proper Plaintiff in the case.

As to Factor No. 4, it is an oft-repeated error that the courts have assumed that they have jurisdiction in Article IV cases, when in truth and in fact, they cannot possibly have jurisdiction since Congress has unlimited authority and thus must create its own courts as creatures of itself to administer the law in Article IV territories. That error has been repeated
numerous times by many courts, obviously because the issue has never been raised before, but it is being raised now and needs to be dealt with.

Therefore, it is absolutely necessary for the court to consider this Writ of Mandamus/Writ of Prohibition in order to grant relief which cannot be obtained in any other way.

III.

CONCLUSION

The Government in this case wants to have its cake and eat it too. The Government wants to be able to exercise unlimited, monarchical type power over the Citizens of Nevada under Article IV, while at the same time coming into an Article III Court, recognizing its Constitutional authority, and asking it to rule where it in fact has no jurisdiction. Traditionally, and under the

case law cited in Petitioners' briefs below, when Congress governs land under Article IV, it establishes Article IV Courts, because the rest of the Constitution doesn't apply in those areas, and therefore, special Courts must be created which have whatever powers Congress deems proper to give them. Congress in those situations can grant or deny rights to its subjects living within that area, as in its infinite wisdom it so desires, and it can grant or withhold the Courts the power to honor or, on the other hand, to disregard those rights.

At the same time that it claims to have unlimited power to govern these lands under Article IV, the Government maintains that Article III Courts have jurisdiction over federal questions arising under Article IV. Yet Article III Courts, whose power is derived not from Congress, but directly from the Constitution itself, have the power to limit Congress. A power cannot be unlimited if, at the same time, some other power is present which can limit it. This is a logical impossibility. Thus, Article III Courts cannot conceptually or Constitutionally have any power to rule on matters which are being governed by Congress under Article IV. As stated in ***Downes v Bidwell***, 182 U.S. 244, 267 (1900) : "Neither were they (Article IV Courts) organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body was incapable of conferring upon a court within the limits of a state."

In other words, Congress is incapable of conferring article IV jurisdiction upon an Article III Court.

The Forest Service seeks to govern large tracts of Nevada under Article IV, where it has unlimited, monarchical authority derived from Congress. If it is allowed to do that, then Nevada is a territory and her residents are subjects, not Citizens, in 87% of her land. But, if this Court rules that the Forest Service indeed has such monarchical power in Nevada, then this Court must rule that the Federal Courts established under Article III have no jurisdiction, because they then could

not have any power over "King Congress"" actions. If, on the other hand, it is held that Article IV does not apply, and the Federal Government cannot exercise unlimited power within Nevada, then the laws of the State over property rights must be recognized, and the rights of the Gardners, their Constitutional, due process rights, must be recognized, and if they are recognized, then the Gardners have rights which have been arbitrarily and unconstitutionally violated by the Forest Service, through the bringing of this action, and the judgment below must be declared void.

Wherefore, it is respectfully requested that this Court issue a Writ of Mandamus to the District Court of Nevada, and to the Honorable Judge David W. Hagen, commanding him to enter his order finding that the District Court is without jurisdiction to hear this matter or to hold the Gardners in contempt, because the Article III Court has no jurisdiction over the Article IV powers of Congress which are being exercised by the Forest Service.

It is further requested that, should this Court find that the District Court below does have jurisdiction over this case, that it command the District Court to declare the judgment below void, since a finding of Article IV judicial jurisdiction necessarily eliminates Article IV legislative and administrative jurisdiction by Congress and thus by the Forest Service. If that is the case, then this entire proceeding has been conducted by an entity (Plaintiff Forest Service) which has not been limited up to this point by the Constitutional guarantees of the U.S. Constitution, and has by its actions stripped the Gardners' of their citizenship and reduced them to the status of subjects instead of Citizens of the United States of America. A judgment obtained in violation of Due Process of Law is void, and for the Forest Service to exercise unlimited authority is, prima facie, a violation of the Defendants' Constitutional right to due process of law.

It is further respectfully requested that this Court issue a Writ of Prohibition, prohibiting the District Court from proceeding with the hearing on the Order to Show Cause, either because it has no jurisdiction to do so, or because the Forest Service has no legislative or administrative jurisdiction in the case and is thus an improper Plaintiff, or because the judgment sought to be enforced is void.

DATED this ____ day of January, 1999.

Respectfully submitted,
JOEL F. HANSEN, ESQ.
Nevada Bar No. 1876
415 S. Sixth Street #200
Las Vegas, NV 89101

F. Federalism adopted and enforced by this Board

NEW YORK V. UNITED STATES, 505 U.S. 144 (1992) addressing federalism states in part;

In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "[t]he Constitution created a Federal Government of limited powers," Gregory v. Ashcroft, 501 U.S. 452, 457 (1991); and while the Tenth Amendment makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," the task of ascertaining the constitutional line between federal and state power has given

rise to many of the Court's most difficult and celebrated cases. At least as far back as Martin v. Hunter's Lessee, 1 Wheat. 304, 324 (1816), the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States. ***Id@155.***

It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." United State v. Darby, 312 U.S. 100, 124 (1941). As Justice Story put it, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly that what is not conferred is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833). This has been the Court's consistent understanding: "The States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." Garcia v. San Antonio Metropolitan Transit Authority, supra, at 549 (internal quotation marks omitted).

Congress exercises its conferred powers subject to the limitations contained in the Constitution...The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, [505 U.S. 144, 157] is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

The benefits of this federal structure have been extensively catalogued elsewhere, see, e.g., Gregory v. Ashcroft, supra, at 457-460; Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century, 88 Colum. L. Rev. 1, 3-10 (1988); McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1491-1511 (1987), but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have, but what powers in fact have been given by the people." United States v. Butler, 297 U.S. 1, 63 (1936).

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. ***The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses; first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such responsibilities.*** ***Id@156-157.*** (Emphasis and Underscoring added).

...how can a federal statute be found an unconstitutional infringement of state sovereignty when state officials consented to the statute's enactment?

The answer follows from an understanding of the fundamental purpose served by our Government's federal structure. The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State

sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." Coleman v. Thompson, 501 U.S. 722, 759 (1991) (BLACKMUN, J., dissenting). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." Gregory v. [505 U.S. 144, 182] Ashcroft, 501 U.S., at 458. See The Federalist No. 51, p. 323. (C. Rossiter ed. 1961).

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials... The constitutional authority of Congress cannot be expanded by the "consent" of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States. State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution. ***Id@181-182.*** (Emphasis and Underscoring added).

States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 246 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment. ***Id@188.*** (Emphasis and Underscoring added).

JAY PRINTZ, SHERIFF/CORONER, RAVALLI COUNTY, MONTANA, PETITIONER 95-1478 V. UNITED STATES, RICHARD MACK,

PETITIONER 95-1503, _____U.S._____, (June 27, 1997), addressing the Supremacy Clause states in part;

The Government points to a number of federal statutes enacted within the past few decades that require the participation of state or local officials in implementing federal regulatory schemes. Some of these are connected to federal funding measures, and can perhaps be more accurately described as conditions upon the grant of federal funding than as mandates to the States; others, which require only the provision of information to the Federal Government, do not involve the precise issue before us here, which is the forced participation of the States' executive in the actual administration of a federal program. We of course do not address these or other currently operative enactments that are not before us; it will be time enough to do so if and when their validity is challenged in a proper case. For deciding the issue before us here, they are of little relevance. Even assuming they represent assertion of the very same congressional power challenged here, they are of such recent vintage that they are no more probative than the statute before us of a constitutional tradition that lends meaning to the text. Their persuasive force is far outweighed by almost two centuries of apparent congressional avoidance of the practice. Compare *INS v. Chadha, 462 U.S. 919* (1983), in which the legislative veto, though enshrined in perhaps hundreds of federal statutes, most of which were enacted in the 1970's and the earliest of which was enacted in 1932, see *id.*, at 967-975 (White, J., dissenting), was nonetheless held unconstitutional.

The constitutional practice we have examined above tends to negate the existence of the congressional power asserted here, but is not conclusive. We turn next to consideration of the structure of the Constitution, to see if we can discern among its "essential postulate[s]," *Principality of Monaco v.*

Mississippi, 292 U.S. 313, 322 (1934), a principle that controls the present cases.

It is incontestable that the Constitution established a system of "dual sovereignty." *Gregory v. Ashcroft, 501 U.S. 452*, 457 (1991); *Tafflin v. Levitt, 493 U.S. 455*, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text, *Lane County v. Oregon, 7 Wall. 71*, 76 (1869); *Texas v. White, 7 Wall. 700*, 725 (1869), including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, Section;3; the Judicial Power Clause, Art. III, Section;2, and the Privileges and Immunities Clause, Art. IV, Section;2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, Section;4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt, 304 U.S. 405*, 414-415 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, Section;8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal state conflict. See The

Federalist No. 15. Preservation of the States as independent political entities being the price of union, and "[t]he practicality of making laws, with coercive sanctions, for the States as political bodies" having been, in Madison's words, "exploded on all hands," 2 Records of the Federal Convention of 1787, p. 9 (M. Farrand ed. 1911), the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people--who were, in Hamilton's words, "the only proper objects of government," The Federalist No. 15, at 109. We have set forth the historical record in more detail elsewhere, see *New York v. United States, 505 U. S.*, at 161-166, and need not repeat it here. It suffices to repeat the conclusion: "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.*, at 166. [n.10] The great innovation of this design was that-our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U. S. Term Limits, Inc. v. Thornton, 514 U.S. 779*, 838 (1995) (Kennedy, J., concurring). The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens. *See, New York, supra*, at 168-169; *United States v. Lopez, 514 U.S. 549* 576-577 (1995) (Kennedy, J., concurring). *Cf. Edgar v. MITE Corp.,457 U.S. 624*, 644 (1982) ("the State has no legitimate interest in protecting nonresident[s]"). As Madison expressed it: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the

general authority is subject to them, within its own sphere." The Federalist No. 39, at 245.

This separation of the two spheres is one of the Constitution's structural protections of liberty. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory, supra*, at 458. To quote Madison once again:

"In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, at 323.

See also The Federalist No. 28, at 180-181 (A. Hamilton). *Id@* ____.

The dissent of course resorts to the last, best hope of those who defend *ultra vires* congressional action, the Necessary and Proper Clause. It reasons, *post*, at 3-5, that the power to regulate the sale of handguns under the Commerce Clause, coupled with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," Art. I, Section;8, conclusively establishes the Brady Act's constitutional validity, because the *Tenth Amendment* imposes no limitations on the exercise of *delegated* powers but merely prohibits the exercise of powers "*not* delegated to the United States." What destroys the dissent's Necessary and Proper Clause argument, however, is not the *Tenth Amendment* but the Necessary and Proper Clause itself. [n.13] When a "La[w] . . . for carrying into Execution "the

Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, *supra*, at 19-20, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson & Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. J. 267, 297-326, 330-333 (1993). We in fact answered the dissent's Necessary and Proper Clause argument in *New York*: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . [T]he Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." 505 U. S., at 166.

The dissent perceives a simple answer in that portion of Article VI which requires that "all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution," ***arguing that by virtue of the Supremacy Clause this makes "not only the Constitution, but every law enacted by Congress as well," binding on state officers, including laws requiring state officer enforcement. Post, at 6. The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution. Id@ ___.*** (Emphasis and Underscoring added).

The *Printz/Mack* court continued addressing inter-governmental agreements or within the County's jurisdiction a memorandum of understanding (MOU) with federal agencies the court stated in part;

> Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, see *Maryland v. EPA, 530 F. 2d 215*, 226 (CA4 1975); *Brown v. EPA, 521 F. 2d 827*, 838-842 (CA9 1975); and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds, see *District of Columbia v. Train, 521 F. 2d 971*, 994 (CADC 1975). After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness. *EPA v. Brown, 431 U.S. 99* (1977). Although we had no occasion to pass upon the subject in *Brown*, later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs. In *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264* (1981), and *FERC v. Mississippi, 456 U.S. 742* (1982), we sustained statutes against constitutional challenge only after assuring ourselves that they did not

require the States to enforce federal law. In *Hodel* we cited the lower court cases in *EPA v. Brown, supra,* but concluded that the Surface Mining Control and Reclamation Act did not present the problem they raised because it merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-empted field, *Hodel, supra,* at 288. In *FERC,* we construed the most troubling provisions of the Public Utility Regulatory Policies Act of 1978, to contain only the "command" that state agencies "consider" federal standards, and again only as a precondition to continued state regulation of an otherwise pre-empted field. 456 U. S., at 764-765. ***We warned that "this Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations," id., at 761-762.***

We expressly rejected such an approach in ***New York***, and what we said bears repeating:

> **"Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."** *Id.*, at 187. ***Id@ ___.*** (Emphasis and Underscoring added).

IV.

THAT, this Board determines from the above Legislative Findings that there is a constitutional paradox exposed within the ***Kleppe***, ***New York***, and ***Printz/Mack*** cases. Moreover, a progression from the ***Gratiot (1840)*** court to the ***Kleppe (1976)*** court has committed a de facto amending and/or suspension of the constitution within the jurisdiction of Elko County. This Board can not embrace

such legislating from the court and must reject the implementation within Elko County the ***without limitations*** jurisdiction in ***Kleppe*** and must, in order to fulfill its fiduciary constitutional obligation to its Citizens, follow and implement through its sovereign jurisdiction, federalism as held in ***New York***, and ***Printz/Mack***.

V.

THAT, Elko County in the process of fulfilling its fiduciary responsibilities to its Citizens has continually been blocked with the ever presence of the ***without limitations*** of government agencies producing the total absence of responsibility securing the sureness of their position when supported by lower courts as was demonstrated in **Elko County v. Siminoe; In Re: Elko County Grand Jury, U.S. 9th Circuit Court of Appeals, Case No. 96-16394, Filed March 19, 1997,** where in the court stated in part as follows:

> Instead, we examine the jurisdictional issues presented when a state entity subpoenas a federal official. The United States argues that the Touhy doctrine applies in this case to bar state jurisdiction to subpoena federal employees. This court has interpreted United States ex. rel. Touhy v. Ragen, 340 U.S. 462 (1951) to hold that "subordinate federal officers could not be held in contempt for failing to comply with a court order in reliance on a validly promulgated regulation to the contrary." Swett, 792 F.2d at 1451.
>
> Here, the relevant Department of Agriculture regulations essentially bar a USDA official from appearing in "a judicial or administrative proceeding unless authorized in accordance with this subpart." 7 C.F.R. S 1.212. The Forest Service denied Siminoe permission to appear and he based his refusal to testify on that decision.
>
> The Grand Jury interprets 5 U.S.C.S 301 to constitute a waiver of sovereign immunity. We disagree. As the Seventh Circuit has noted previously, "cases involving §1442(a) removals of state subpoena proceedings against unwilling federal officers have held that sovereign immunity bars the enforcement of the subpoena." Edwards v. Dep't. of Justice, 43 F.3d 312, 317 (7th Cir. 1994). Appellant is also unable to demonstrate that the United States waived its sovereign immunity. If anything, the Forest Service's refusal to allow Siminoe to testify is an express application of this immunity. See Boron Oil Co. v. Downie, 873 F.2d 67, 70-71 (4th Cir. 1989) (holding that subpoena of federal official falls within protection of sovereign immunity); United States v. McLeod, 385 F.2d 734, 750-52 (5th Cir. 1967) (same).

In addition, the state court lacked jurisdiction to subpoena Siminoe and could not have issued a bench warrant had he refused to comply with the subpoena. This is true regardless of any court's interpretation of the appropriate regulations. "[A] consideration of the merits can play no part in our decision." Swett, 792 F.2d at 1452; see also In re Boeh, 25 F.3d 761, 764-65 & n.4 (9th Cir. 1994). ***F.3d , (9th Cir. 1996)***

VI.

THAT, this Board determines from the above Legislative Findings that the doctrine held by the high court in ***Kleppe*** was in 1976 and that the recent cases ***New York***, and ***Printz/Mack*** reflect that the present high court would not embrace the central government's ability to operate ***without limitations*** unbridled beyond the constitution within this Board's jurisdiction. Therefore, it is herein determined that ***Kleppe*** and its doctrine, not being visited since 1976 by the high court and by a party with proper standing for original jurisdiction, is readily set aside by the two most recent case cited, any recent lower court rulings following ***stare decisis*** and/or ***consented stipulations by state officials,*** notwithstanding.

VII.

THAT, this Board determines from the above Legislative Findings that if the ***without limitations*** as held in ***Kleppe*** is the prevailing situation in Elko County and the State of Nevada, then in reality there is no county or state government with sovereignty and all of this is nothing more than a mirage of local government totally subservient to the general government. This Board further determines that the court is also bound by the constitution and any ruling that expands beyond the limits of the constitution had no binding affect upon Elko County. Therefore, this Board and its members are bound by their Oath of Office and shall not engage in any activities of any form with any governmental agency until the Board has first determined what jurisdiction (originating or otherwise) that governmental agency is operating under and that this Boards shall not proceed with any governmental agency in any activities of any form if said jurisdiction has been determined to be ***without limitations*** as held in ***Kleppe***.

VIII.

THAT, this Board supports and adopts as Elko County's policy the doctrine of AB-198. Furthermore, this Board adopts the doctrine that the ***Taylor Grazing Act*** is also state law as set forth in Chapter 568 of NRS and is to be utilized in

protecting against the implementation of the ***"without limitations"*** doctrine of ***Kleppe*** by any government agency against the county and/or any of its Citizen's property.

AB-198 states as follows:

Assembly Bill No. 198–
Assemblymen Carpenter, Hettrick, Gustavson,
Collins, Von Tobel, Neighbors, de Braga and Dini

February 11, 1999

Referred to Committee on Natural Resources, Agriculture and Mining
SUMMARY—Revises provisions governing grazing preference rights. (BDR 50-174)
FISCAL NOTE: Effect on Local Government: Yes.
Effect on the State or on Industrial Insurance: No.

~

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [~~omitted material~~] is material to be omitted. Green numbers along left margin indicate location on the printed bill (e.g., 5-15 indicates page 5, line 15).

AN ACT relating to grazing; providing that a grazing preference right is appurtenant to base property; prohibiting a person from being deprived of that right without just compensation under certain circumstances; providing a penalty for willfully or negligently interfering with the herding or grazing of livestock or damaging or destroying certain improvements under certain circumstances; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 568 of NRS is hereby amended by adding thereto a new section to read as follows:

1. Except as otherwise provided in the Taylor Grazing Act:

(a) A grazing preference right shall be deemed appurtenant to base property; and

(b) If base property or any portion of base property is sold, leased or otherwise transferred, the person to whom the property is sold, leased or otherwise transferred must not be deprived of any grazing preference right that is appurtenant to that property unless the person consents to, or receives just compensation for, the deprivation of that right.

2. Except as otherwise provided in NRS 568.230 to 568.370,

PROPOSED by Commissioner _____.

Seconded by Commissioner _____.

PASSED and ADOPTED this, _____ **day of** _____, **1999**

VOTE: AYES -

NAYES -

ABSENT -

SIGNED: _____

A. T. LESPERANCE, CHAIRMAN
BOARD OF COUNTY COMMISSIONERS
ELKO COUNTY, NEVADA

ATTEST:

_____

KAREN DREDGE, COUNTY CLERK

SEAL

inclusive, a person who willfully or negligently:
(a) Interferes with the lawful herding or grazing of livestock on land:
(1) That is base property; or
(2) Other than base property that is located within a grazing district and upon which the livestock are herded or grazed in accordance with a permit to graze livestock issued pursuant to the provisions of the Taylor Grazing Act; or
(b) Damages or destroys a fence, gate, facility for watering livestock or other improvement that is used to sustain livestock and is located on land specified in paragraph (a),
is guilty of a misdemeanor. In addition to any other penalty, the court shall order the person to pay restitution.
3. As used in this section:
(a) "Base property" means any land or water in this state that is owned, occupied or controlled by a person who has obtained an appurtenant grazing preference right for that land or water pursuant to the provisions of the Taylor Grazing Act.
(b) "Grazing preference right" means a right that:
(1) Is conferred upon a person pursuant to the provisions of the Taylor Grazing Act; and
(2) Entitles the person to priority in the issuance of a permit to graze livestock in accordance with those provisions.
(c) "Taylor Grazing Act" has the meaning ascribed to it in NRS 568.010.
Sec. 2. The amendatory provisions of this act do not apply to offenses that are committed before October 1, 1999.

BE IT FURTHER RESOLVED AS FOLLOWS:

IX.

THAT, the Citizens may gather Estrays upon their private property and dispose of same in accordance with the Laws of the State of Nevada and that this Board encourages the Citizens to do so and assert their responsibility in this management process.

BE IT FURTHER RESOLVED AS FOLLOWS:

X.

WHO WE WANT RESOLUTION MAILED TO : INSERT HERE