AMERICA

A UNION OF SOVEREIGN STATES
UNITED ONLY FOR SPECIFIC AND ENUMERATED PURPOSES

(T)*he states, by their deputies ... had made themselves sovereign and independent ... they had already united (under the Articles of Confederation) in virtue of that character ... in virtue of that character, they had appointed deputies to frame a more perfect union ... by these deputies they voted as states ... they ratified the constitution as states ... they immediately amended it as states ... they reserved the supreme power of altering it as states ... they vote in the senate as states ... they are represented as states in the other federal legislative branch. Further, the declaration of independence was never repealed. Its annual commemorations demonstrated, and continue to demonstrate, a publick* (sic) *opinion, that it still lives; and the constitution did not confer sovereignty and independence upon the federal government, as the declaration of independence had done upon the states. On the contrary, by the constitution, the states may take away all the powers of the federal government, whilst that government is prohibited from taking away a single power reserved to the states. Under all these circumstances, is it possible that any one state of the union, in ratifying the constitution, which literally conformed to previous solemn acts, to previous words and phrases, and to the settled rights of the states, entertained the most distant idea, that it was destroying itself; betraying its people; establishing a national government; and creating a supreme negative over all its acts, political and civil, or political only, with which the federal government, or one of its departments, was invested by implication?*"

John Taylor of Caroline, "New Views of the Constitution of the United States," 1823

"*Insofar as we permit the sovereignty of our States to be consumed by the federal government, so to is our liberty through Republican self-governance consumed, and the sacrifice of our forefathers and the birthright of our progeny is squandered*."

The Authors

RS 2477 - A ROAD OUT OF TERRITORIAL BONDAGE

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"*WHAT MAKES A THING TRUE IS NOT WHO SAYS IT, BUT THE EVIDENCE FOR IT*."
Sidney Hook, "Philosophy and Public Policy," 121, (1980)

PREFACE: In 2005, the essay, *Statehood: The Territorial Imperative* was published. This one-of-a-kind publication analyzes the origins of the federal territorial system and the relationship between that system and the States which make up the American Union. In conducting this analysis, the words and writings of the Framers, the words and writings of contemporaneous commentators, and relevant opinions and authoritative writings from the U.S. Supreme Court are documented and analyzed. From this work, certain conclusions have been drawn as to the original intent of an array of clauses in the American Constitution dealing with States and their retained sovereign powers. Two conclusions are central to the findings set down in *Statehood*. First, through recurrence to the historical record it is demonstrated that the States are to be the sole and rightful owners of the sovereign eminent domain and ultimate fee in the land within their borders. Second, in order for new States to be admitted into the Union of States upon an equal footing with the original States, as is their constitutional right, Congress must extinguish the federal title in the former territorial lands which are now held within the States as public lands and dispose of them. This paper builds upon the conclusions found in *Statehood* by focusing upon the perennial western controversy involving ownership of and governmental jurisdiction over those roads or public "*highways*" within the States which happen to traverse federally held land, popularly referred to as "*public land*."

INTRODUCTION: The controversy over public "*highways*" crossing public lands may be referred to as the "Revised Statute (RS) 2477 right-of-way controversy." This paper presents and recommends a constitutional context for litigating this perennial controversy. As a fundamental federalism contest between the States and the United States, such a court challenge would come first before the United States Supreme Court which holds original jurisdiction over such cases. If the States should prevail before the court with their arguments based upon first constitutional principles, and we believe that justice would demand such an outcome, then the States which yet encompass federal public lands within their borders would be released from what the Acting Territorial Governor of Utah in 1896 referred to as "*the bondage of a territorial system*" and what *The Salt Lake Tribune* at the time referred to as "*territorial thralldom*." Stated otherwise, for the States to prevail with a constitutional approach to the RS 2477 question would be to, at long last and for the first time in their histories, gain admission to the American Union of States upon an equal footing[1] with the original States, as to both

[1] "*The 'equal footing' clause has long been held to refer to political rights and to sovereignty. See Stearns v. Minnesota, 179 U.S. 223, 245*." United States v. Texas, 339 U.S. 707, 1950. Political rights defined: "*Those* (rights) *which may be exercised in the formation or administration of the government*." People v. Morgan, 90 Ill. 563; "*Rights of citizens established or recognized by constitutions which give them the power to participate either directly or indirectly in the establishment or administration of government*." People v. Barrett, 203 Ill. 99, Winett v. Adams, 71 Neb. 817. Black's Law Dictionary, 4th Ed.

political rights and sovereignty.[2] Conversely, it will also be shown here that to fail in such an effort before the Court, or to fail to even attempt such an effort, is to condemn these States in perpetuity to a condition of degraded and incomplete statehood, a condition which one federal Circuit Court has referred to as one of "*no independent claim to sovereignty*" like that of the original States. By the same measure, failure in such a court challenge is to cloak the government of the Union with powers never intended by the Framers or ratified by the States with their adoption of the Constitution of the United States in 1788.

With this paper we attempt to demonstrate that the Claims Clause of the U.S. Constitution (Article IV, sec. 3, clause 2) is a proper context for judicial affirmation of every State's right of eminent domain for the construction of highways over all public land within their borders which was not reserved by Congress for public uses by the terms of their respective enabling act compacts with the United States. We frequently refer to the State of Utah. This is done not because this State is unique but because Utah effectively illustrates the condition of every State which still encompasses public lands within its borders. In addition, we have adopted the style of capitalizing the word "State." As in the essay *Statehood* this is done out of recognition that it was the sovereign and independent States that wrote and ratified the Constitution which, in turn, gave birth to the government of their union; and that while they did delegate a certain quantum of their otherwise complete sovereignty to the purposes of that union, they also retained to themselves the larger measure of their original and sovereign powers. James Madison, in "Federalist" No. 39, referred to these reserved powers as a "*residuary and inviolable sovereignty*." We have also adopted the style of "Territory" as meaning federal lands in the pre-statehood condition and "territory" as meaning any lands within a State.

THE RS (REVISED STATUTE) 2477 GRANT

The RS 2477 grant of 1866, in its entirety, reads as follows: "***The right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted***."

By its plain words, RS 2477 was and, as we shall see, remains a grant or divestiture by Congress of a specific "*right*," which is equivalent to an interest in land. By express terms of the grant, this "*right*" may be exercised for a specified purpose on unreserved public lands. And by the nature of a grant that includes no reversionary clause, reason suggests that this "*right*" remains applicable to all of that public land which was not, at the time of the grant, "*reserved for public uses.*"

The RS 2477 grant contains no limiting scope for the "*highways*" to be constructed, nor does it contain stipulations which might define "*construction*." These issues were thus relegated to definition either under Territorial law, in the instance of pre-statehood federal Territories, or State law, in the instance where a federal Territory has been admitted into the Union as a State. The only limitation on this otherwise unconfined grant of "*right-of-way*" is that it may not be exercised upon public lands which had been "*reserved for public uses*."

For its proper interpretation, the words of any statute must be taken in their usual and

[2] Definition "*Sovereignty*": Supreme dominion, authority, or rule. "Black's Law Dictionary," Eighth Edition, 1999. "*(S)upremacy can never be predicated* (based upon) *of any power that can be annulled by another*." Henry St. George Tucker, "Limitations on the Treaty Making Power," Little, Brown, & Co., 1915, pg. 78.

customary meaning.[3] This is to say that parties involved in a legal contest involving RS 2477 must be concerned with each of the following:

A. **Necessary and unavoidable construction**: The simple words and phrases of the RS 2477 statute lend themselves to what the Supreme Court in Shively v. Bowlby (pg. 4), referred to as a "*necessary and unavoidable construction*," the elements of which follow:

- A single thing was granted. That single thing granted was the sovereign power of a "*right-of-way*." This power is to be used to "*construct highways*" across the public domain not reserved, at the time of the grant, for public uses. Any particular road constructed pursuant to the authority granted is a physical manifestation of the granted right but not the grant itself.

- The statute defines and irretrievably conveys a sovereign right in property which, in this instance, is a right-of-way for a particular purpose on public lands.

- No action on the part of any State or Territory was necessary in order to demonstrate acceptance of the grant.[4]

- The statute authorizes performance but it contains no requirement for performance.

- The grant was unconditional other than that the lands subject to the grant could not be reserved for public uses and the roads constructed must be "*highways*" meaning "*public*" ways.

- The grant contains no reversionary clause. That is, no act or failure to act on the part of the grantee can effect a reversion or revocation of the "*right*" which was expressly "*granted*." Nor, as we shall see, may Congress revoke that which was irretrievably "*granted*."

- A grant "*is a contract executed*." Fletcher v. Peck, 10 U.S. 87, 1810, citing Blackstone.

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[3] "...(*I)f the words in the enacting clause, in their nature, import, and common understanding, are not ambiguous, but plain and clear, and their operation and effect certain, there is no room for construction*." Ware v. Hilton, 3 U.S. 199, 1796; "*(T)hat where the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, [21 U.S. 1, 90] is excluded*." Green v. Biddle, 21 U.S. 1, 1821; Justice Marshall (on statutory construction of the Constitution): "*On this subject, also, the Court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that (1) the intention of the instrument must prevail; (2) that this intention must be collected from its words; (3) that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; (4) that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers; is to repeat what has been already said more at large, and is all that can be necessary*." Ogden v. Saunders, 25 U.S. 213, 1827; "*We will not construe a statute in a way that renders words or phrases meaningless, redundant, or superfluous*." New Mexico Cattle Growers Association v. Unites States Fish and Wildlife Service, May 11, 2001, Tenth Circuit Court.

[4] A general theory in law: " *... a proffered benefit is accepted unless its nonacceptance is demonstrated*," Jurisdiction Over Federal Areas Within the State: Report of the Interdepartmental committee for the Study of Jurisdiction Over Federal Areas Within the States, Part I, ch. 2, pg. 8, April 1956.

B. **Context of the times in which the statute was written including the context of its legislative and public history**: RS 2477 was enacted just 81 years after adoption of the Northwest Ordinance of 1787. In this ordinance, "*carrying places*" or portages between bodies of water were termed "*common highways*." In 1787 and also, undoubtedly, in 1866, foot travel, horse travel and the passage of wagons were all sufficient, in the minds of the law givers, for the "*construction*" of public or "*common highways*." It is the nature of these times that form the context in which the RS 2477 statute must be interpreted.

THE RS 2477 GRANT IS IRREVOCABLE

The Federal Land Policy and Management Act of 1976, FLPMA, presumes to revoke the RS 2477 grant as of October 21, 1976. However, Supreme Court opinion has held that an express grant made by a sovereign may not be rescinded:

> "*A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing;....*" "*A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant....*" "*A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant*." Fletcher v. Peck, 10 U.S. 87, 1810.
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> "*All grants of the crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground: that, the prerogatives and rights and emoluments of the crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant, by* ***necessary and unavoidable construction****, shall take away*." Shively v. Bowlby, 152 U.S. 1, 1894, The Rebeckah, 1 C. Rob. Adm. 227, 230. "*Many judgments of this court are to the same effect*." Charles River Bridge v. Warren Bridge, 11 Pet. 420, 544-548; Martin v. Waddell, 16 Pet. 367, 411; Central Transp. Co. v. Pullman's Palace-Car Co., 139 U.S. 24, 49, 11 S. Sup. Ct. 478. (Emphasis added)

By the reasoning of Fletcher v. Peck and Shively v. Bowlby above, that which was granted remains granted, later federal statutes such as FLPMA to the contrary notwithstanding.[5] And while a

[5] FLPMA was intended by Congress to revoke many earlier public land laws. Among these were the Homestead Act of 1862 and RS 2477 of 1866. There is a fundamental distinction to be made between these two laws which has gone unnoticed. The Homestead Act was an act of Congress which established a process. This process made it possible for the people to be granted a patent to a parcel of public land. When this Act was repealed, only the process was repealed. Patents previously granted pursuant to the statutory process remained unaffected. RS 2477 was entirely different. This statute was itself a grant. By this statute, Congress "*hereby granted*" a particular "*right-of-way*" to do a particular thing in a particular place. Congress may erase the words of this grant from the federal code but doing so does nothing to retract that "*right*" which was expressly granted away just as revocation of the Homestead Act did nothing to affect the federal land patents which had been granted pursuant to it. Indeed, if the granted "*right-of-way*" could be revoked, then every "*highway*" that has been "*constructed*" pursuant to the grant could conceivably lose its underlying legal authority and, thus, revert to federal ownership. We assert, therefore, that Congress only "*presumes*" to have revoked, under FLPMA, that which was "*hereby granted*."

sovereign does not grant more than what is expressly granted, the grant of a sovereign does encompass that which is expressly granted.

The Supreme Court itself has equated passage of land from federal ownership by means of patent with passage of land from federal ownership, "*by words of present grant*:"

> "*Nothing passes a perfect title to public lands, with the exception of a few cases, but a patent. The exceptions are, where Congress grants lands, in words of present grant*." Wilcox v. Jackson, 13 U.S. 498, 516, 1839.

And also,

> "*It is true there are exceptions to this rule* (of perfect title being passed by patent). *One is specially provided by statute (Rev. St. 2449), which makes a certification to a state equivalent to a patent as a conveyance of title. Again, as said in Wilcox v. Jackson, supra, 'one class of cases to be excepted is where an act of congress grants land, as is sometimes done in words of present grant.' This exception was recognized in Wisconsin Cent. R. Co. v. Price Co., 133 U.S. 496 , 10 Sup. Ct. 341; St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U.S. 1 , 11 Sup. Ct. Salt Co. v. Tarpey, 142 U.S. 241 , 12 Sup. Ct. 158*." Langdon v. Sherwood, 124, U. S. 74, 83, 8 Sup. Ct. 429, 431.

By its plain words and by their common meaning, RS 2477 can reasonably be construed as nothing less than a "*present grant*." And while the grant is not of land as such, it is a grant of an interest in land. FLPMA at sec. 103(e) defines an interest in land as being equivalent to land. Therefore, a grant of an interest in land is a property right held in the hand of the grantee. Reason dictates that, just as homesteads may not be retaken by the federal government once patented, neither may the sovereign "*right-of-way*" for the "*construction*" of "*highways*" upon the "*unreserved public lands*," which was expressly and irretrievably "*granted*" by law, be retaken or otherwise revoked.

CONSTITUTIONAL CONTEXT OF THE STATE'S SOVEREIGN CLAIM

Eminent domain is a sovereign power that is "*necessary to the being*" of a State. (Reference Kohl v. U.S., pg. 38) And since the sovereign power of eminent domain is "*necessary to the being*" of a State, the possession of it must be a "*claim*" of each new State that is essential to its equality or equal footing with the original States. It must be remembered that each American State is itself a "*crown*" with its own retained sovereign "*prerogatives, rights, and emoluments*" for "*great purposes and for the public use*."[6] Among those retained sovereign "*prerogatives, rights, and emoluments*" of the States, none is more important than sovereignty and jurisdiction over the soil within their borders:[7]

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[6] The jurisdiction of the national government extends to certain enumerated objects only, "*and leaves to the several States a residuary and inviolable sovereignty over all other objects*." James Madison, "Federalist" No. 39. "*The people evidently retained everything that they did not in express terms give up*." General Geo. Washington, letter to Lafayette, April 28, 1788, 4 Documentary History of the Constitution 601-602, 1905.

[7] "*What then is the extent of jurisdiction which a state possesses? We answer, without hesitation, the jurisdiction of a state is co-extensive with its territory; co-extensive with its legislative power*." U.S. v. Bevans, 16 U.S. 336, 1818; "*It rests with the state to determine the extent of territory over which the federal will exercise sovereign jurisdiction*." The Writings of George Washington from the Original Manuscript Sources, 1745-1799.

"*Lordship of the soil remains in full perfection with every state*" and this constitutes "*one of the most valuable and powerful appendages of sovereignty.*" Tench Coxe, Publisher, during the period of the Pennsylvania Constitutional Convention, 1788. Rakove, "Original Meanings," p. 192, Vintage Books, New York 1996.

"*The sovereignty of a State cannot exist without a territorial domain upon which it is to act: and there can be no other restrictions upon its action within its own territory, but what is to be found in its own constitution, or in the national constitution. Of all the attributes of sovereignty, none is more indisputable than that of its action upon its own territory. If that territory happens to be in a waste and wilderness state, it may pass laws to reclaim it; to encourage its population; to promote cultivation; to increase production*." Green v. Biddle, 21 U.S. 1, 1821, Mr. Clay, Amicus for the Demandant.

That each State is a "*crown*" in its own right is evidenced, for example, by the fact that, upon proclamation of its statehood by the President, title to shores and lands submerged beneath navigable waterways vested to the new State as "*sovereign lands*." Not surprisingly, highway transportation is also a matter found within the body of sovereign claims of each State:

"*Obviously, and it may be said primarily, among the incidents of that equality* (between the States)*, is the right to make improvements in the rivers, water-courses, and highways situated within the State*." Withers v. Buckley, 61 US 84, 1857.

The historical record is clear that the original States yielded none of their territorial sovereignty to the new federal government which they established under their Constitution:

"*Each* (former colony) *declared itself sovereign and independent, according to the limits of its territory*." Also, "[T]he *soil and sovereignty within* (the States) *acknowledged limits were as much theirs at the declaration of independence as at this hour.*" Harcourt v. Gaillard, 25 U.S. (12 Wheat) 523, 526, 527, 1827.

Sovereign territorial jurisdiction may be ceded by a State but it can not be taken:

"*This* [State] *jurisdiction cannot be acquired tortiously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state, when such occupancy is for the purpose of protection*." Ft. Leavenworth R. Co. v. Lowe, 114 U.S. 525, 1885.

Since no aspect of State territorial sovereignty was yielded up to the government of the Union under the Constitution, State territorial sovereignty, including territorial eminent domain, must be among those **sovereign claims** of each State which are **expressly protected from federal prejudice** under the Claims Clause:

"[A]*nd* ***nothing*** *in this Constitution shall be so construed as to prejudice any claims of the United States, or* ***of any particular state****.*" Article IV, sec. 3, cl. 2, United States

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John C. Fitzpatrick, Editor.--vol. 32, United States, November 9, 1792.

Constitution, the Claims Clause. (emphasis added)

And, as will be further discussed below, the constitutional Claims Clause was considered to be rooted in the Ninth Article of the Articles of Confederation which reads, in part, as follows:

"[N]*o State shall be deprived of territory for the benefit of the United States*."

The Articles of Confederation were agreed to by Congress on November 15, 1777 and adopted by the thirteenth State, Maryland, on March 1, 1781. The Continental Congress was a congress of the States. It was attended by "*ambassadors*" appointed by the respective States and not by representatives elected by the people. The Articles of Confederation, including Article IX above and Article II which will be cited below, were, therefore, in the manner of a compact between the States. As elements of a compact between the States, these two Articles were expressly incorporated into the Constitution by virtue of Article VI, clause I, the Debts and Engagements Clause: "*All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the confederation*."

Consistent with the constitutional context discussed above, we suggest that the Claims Clause of the U.S. Constitution is a proper basis for assertion of a sovereign State right of eminent domain to be exercised, in part, for the purpose of constructing highways upon that portion of the public domain within State borders which was not reserved, upon the date of statehood, for public uses by terms of an enabling act compact with the United States.

Heretofore, the contest over the RS 2477 "*right-of-way*" has focused upon various physical properties of particular "*highways*," or the date or manner of their construction, or the nature of maintenance that may have been performed, or the extent of use they may have received. These issues, we submit, are irrelevant to the contest. If performance was not required, then performance can not be judged. Pursuant to the Claims Clause, which stands upon the foundation of Article IX of the Articles of Confederation, the singular issue at hand is whether a new State possesses a sovereign and inviolable right to construct roads across all of that part of the public land within its borders which was not reserved by Congress for "*public uses*" upon the date of its statehood.

THE CONTEST FOR TERRITORIAL JURISDICTION

Neither the physical characteristics of any particular public road, way, or trail, nor the date or manner of "*construction,*" nor the nature of use, nor the manner of maintenance are relevant to a constitution-based legal contest involving the RS 2477 grant. As stated above, **the question at issue is sovereign jurisdiction**. Today, both the State of Utah, in the person of several of its counties, and the federal government assert jurisdiction over certain road infrastructure upon public lands in the State. A federalism contest such as this, which involves a jurisdictional conflict between two sovereigns, can not be settled without a recurrence to the full spectrum of relevant constitutional principles and the history underpinning those principles or, what we term a "*whole cloth*" analysis:

> "[W]*hether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument*" of the Constitution. McCulloch v. The State of Maryland, 17 U.S. 316, 1819.

"*The necessities which gave birth to the Constitution, the controversies which precede its formation and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purposes of tracing to its source, any particular provision of the constitution, in order thereby, to be enabled to correctly interpret its meaning*." Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 1895.

"*The values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the Constitution. The precedential value of cases and commentators tends to increase, therefore in proportion to their proximity to the adoption of the Constitution, the Bill of Rights, or any other amendments*." Powell v. McCormack, 395 U.S. 486, 1969.

FEDERAL JURISDICTION OVER PUBLIC LAND

Federal jurisdiction over public lands is asserted pursuant to judicial interpretation of the Property Clause located at Article IV, sec. 3, clause 2 of the U.S. Constitution. This clause reads as follows:

"*The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States*;" Article IV, Section 3, cl. 2, U.S. Constitution, the Property Clause.

The Property Clause power to make "*needful rules and regulations*," is a common, proprietary **administrative power** (Reference footnote 14, pg. 13, Pollard v. Hagan and etc.) delegated for a known or "*needful*" purpose. However, pursuant to an "*expansive*" judicial construction of this phrase, Congress currently claims a "*complete*" **legislative power** "*without limitation*" over public lands "*including police power ... analogous*" to that of a State legislature and yet superior to State power under the Supremacy Clause:

"*Complete*" power:
"*Although the property clause in Article IV, sec. 3, clause 2, of the federal Constitution, conferring upon Congress the power to dispose of and make all needful rules and regulations respecting property belonging to the United States, 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.*" Kleppe v. New Mexico, 426 U.S. 529, 1976.*****

(*****Note: Although the Kleppe decision cites a handful of supportive cases, this essay will, as a rule, aggregate those cases within all references to the Kleppe decision for the purpose of brevity.)

Power "*without limitations*" over public lands:
"*The* (Property) *Clause must be given an expansive reading, for* '[*t*]*he power over the public lands thus entrusted to Congress is without limitations*.'" Kleppe v. New Mexico citing United States v. San Francisco, 310 U.S. 16, 29, 1976.

Police power "*analogous*" to that of a State legislature:
"*Even over public land within the states, the general government 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*; *Congress exercises the powers both of a proprietor and of a legislature over the public domain*" *Camfield v. U.S. 167 U.S. 518 (1897)*." Kleppe v. New Mexico.[8]

Supremacy over conflicting State legislation:
"*Although absent consent or cession a state retains jurisdiction over federal lands within its territory, Congress retains the power to enact legislation respecting those lands pursuant to the property clause of Article IV, sec. 3, clause 2, of the federal Constitution, which confers upon Congress power to dispose of and make all needful rules and regulations respecting property belonging to the United States; the federal legislation under the property clause necessarily overrides conflicting state laws under the supremacy clause in Article VI, clause 2, of the federal Constitution*." Kleppe v. New Mexico.

The federal "*legislative*" power recognized by Kleppe over public lands within ostensibly sovereign States differs in no significant respect from "*exclusive* (federal) *legislation*" authorized under the Enclave Clause, Article I, sec. 8, cl. 17. Stated otherwise, any governmental jurisdiction that is both "*complete*" and "*without limitation*" may also be "*exclusive*" and, thus, equivalent to Enclave Clause legislative power. Kleppe's cite to Camfield alludes to some consideration of "*exigencies*" that might be present in particular cases. It might be suggested that this allowance for "*exigencies*" is an attenuation of federal power under the Property Clause rendering it, in some way, less than "*complete*" and "*unlimited*," under some circumstances. But this is a distinction with little if any substantive utility. The virtual equivalency between Article IV Property Clause powers, as defined by Kleppe, and "*exclusive*" federal legislative power under the Article I Enclave Clause suggests that public lands within States are, in the eye of the Court, de facto, exclusive federal enclaves.

It is doubtful that identification of the line of demarcation between constitutionally enumerated federal powers[9] and retained "*residuary and inviolable*" State sovereignty was intended to be the exclusive province of jurists weighing from the bench some esoteric nuance arising out of some undefined "*exigency*" that is knowable only to a select elite. Certainly the Founders intended that there would be a far more distinct and popularly discernable demarcation: (Reference James Madison and George Washington, footnote 6, pg. 5; Mr. Pendleton, pg. 34)

"*The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary, as distinguished from technical meaning; where the intention is clear, there is no room for construction, and no excuse for*

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[8] Proprietor: "*One who has the legal **right** or exclusive **title** to anything. In many instances it is synonymous with owner.*" Black's Law Dictionary. (emphasis added)

[9] "*This* (federal) *government is acknowledged by all to be one of enumerated powers. ... That principle is now universally admitted.*" Chief Justice Marshall, McCulloch v. Maryland, 17 U.S. 316, 1819.

interpolation or addition." Martin v. Hunter's Lessee, 1 Wheat 304, 1816, and others.

"*Ingenious men may assign ingenious reasons for opposite constructions of the same clause. They may heap refinement upon refinement, and subtilty upon subtilty, until they construe away every republican principle, every right sacred and dear to man. I am, sir, for certainty in the establishment of a constitution which is not only to operate upon us, but upon millions yet unborn. I would wish that little or no latitude might be left to the sophistical constructions of men who may be interested in betraying the rights of the people, and elevating themselves upon the ruins of liberty. Sir, it is an object of infinitely too much importance to be committed to the sport of caprice, and the construction of interested men*." Mr. Williams, The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution, in Convention, Poughkeepsie , June 17, 1788. p. 339.

Only States may be admitted into the Union of States. Therefore, if public lands are, in fact, jurisdictionally equivalent, or virtually equivalent, to Article I enclaves then a question arises: **Were these lands ever admitted into the Union as component parts of jurisdictional States or do they remain as federal jurisdictional Territory regardless of their respective presidential proclamations of statehood?** The robust claim to complete and unlimited federal power upon public lands that was set down in Kleppe suggests that these lands passed from the condition of pre-statehood federal Territories to the condition of post-statehood federal enclaves within States without having ever been part of a State in any independent and sovereign jurisdictional sense. A second question also arises. **If the public lands within a given State remain as federal jurisdictional Territory (or de facto Article I enclaves) without express State consent, can it be truthfully said that this State, or any State similarly situated, has been admitted into the Union upon an equal footing with the original States as is its right?** We suggest that the answer to this question was given by the Court in 1845:

"*Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative: because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted*." Pollard v. Hagan, 44 U.S. 212, 1845.

"*Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union upon an equal footing with the original states, the Constitution, laws, and compact to the contrary notwithstanding*." Pollard v. Hagan, Id.

The Kleppe decision was handed down on June 17, 1976. Just four months later, on October 21, 1976, Congress passed the Federal Land Policy and Management Act or "FLPMA." FLPMA marks that point where Congress codified its intent to breech its compacts with the respective western so-called "*public land States* " by permanently retaining their public lands in federal ownership and

under "*complete*" and "*unlimited*" federal legislative jurisdiction.[10] Section 102 (a)(1) of FLPMA reads:

> "*The Congress declares that it is the policy of the United States that the public lands be retained in Federal ownership, unless...disposal of a particular parcel will serve the national interest.*"

As a consequence of both Kleppe and FLPMA, the public lands remaining within the several States have been confirmed by both the court and by Congress as federal jurisdictional Territory existing in a manner that is entirely indistinguishable from their condition prior to their admission into the Union of States ostensibly as component parts of sovereign States. The Pollard case above instructs us that this perpetuation of federal Territorial governance over public lands within States abridges the rights of the States, under the Equal Footing Doctrine, to hold and to exercise sovereignty and jurisdiction over all of the land within their borders in a manner equivalent to that of the original States. By the same measure, the exercise of federal Territorial or municipal governance within the States without express State consent violates the fundamental principle of constitutional limitation upon the expression of federal power within the States.[11]

STATE JURISDICTION OVER PUBLIC LAND

The following "*whole cloth*" analysis of the proposition of State territorial sovereignty will begin where the courts have begun and that is with the constitutional Property Clause:

> "*The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States*;"

No rendition of the Property Clause can be complete without also considering the Claims

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[10] Section 3, Second of the Utah Enabling Act compact between the United States and the people of the Territory of Utah requires that "*until the* [federal] *title thereto shall have been extinguished by the United Stated, the same shall be and remain subject to the disposition of the United States*." Section 3 of this Act declares that the provisions within this Section, including the Second, shall be, "*irrevocable without the consent of the United States and the people of said State*." Thus, by terms of this compact, public lands cannot be sheltered from disposition by way of a unilateral act of Congress. The affected State must give its consent. Section 102(a)(1) of FLPMA is clearly unilateral and, therefore, a flagrant breach of this solemn enabling act compact. (Also, reference footnote 14)

[11] "*It cannot be denied that the power of a state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power* ***originally and always*** *belonging to the states,* ***not surrendered*** *by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive*." U. S. v. E. C. Knight Co., 156 U.S. 1, 1895. (Emphasis added)

Clause "*proviso*"[12] attached directly to it. Despite this seemingly inescapable fact, it must be noted that none of the Supreme Court cases citing the Property Clause as the source of "*complete*" federal legislative power "*without limitation*" over public lands within the States address the Claims Clause. Consequently, these cases do not appear to consider that this "*proviso*" might have a restraining effect upon that presumed "*power without limit*" which has been bestowed upon Congress as a consequence of the Court's "*expansive reading*" of the Property Clause.[13] The Claims Clause "*proviso*" attached to the Property Clause is repeated here:

> "*(A)nd nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state*."

James Madison, writing in "Federalist" No. 41, spoke of the necessity of attaching such "*provisos*" as the Claims Clause to such delegated powers as the "*power to dispose*"of the public lands and to make "*needful rules and regulations*" respecting them:

> "[I]*n all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment*." James Madison, "Federalist" No. 41.

In marked contrast with the cautionary tone of the "Federalist" in this and similar passages, Kleppe robustly expounds on what it considers to be the irresistible nature of federal power relative to State power: "*The existence of state power, including state power over traditional subjects of state regulation, does not by itself define the reach of federal administrative authority, or raise an impassable barrier to its exercise*." Thus, where the Claims Clause says that "*nothing*" has been given to Congress with which it might "*prejudice*" sovereign State claims, Kleppe boldly asserts that, in fact, nothing absolutely protects sovereign State claims, including State territorial claims, from an essentially unconfined reach of federal administrative power. Note that the court refers to "*subjects*" reserved to State authority as mere "*traditional subjects*." This judicial denigration of retained State sovereignty is further considered beginning on page 34.

In his "Commentaries on the Constitution" (Reference footnote 12, pg. 12), Justice Story recognized that, under Article IX of the Articles of Confederation, State territorial sovereignty was

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[12] Justice Story referred to the Claims Clause as the, "*proviso thus annexed to the power*" delegated to Congress under the Property Clause. Story said further that this "*proviso ... was perhaps suggested by the clause in the ninth article of the confederation, which contained a proviso*, '*that no state shall be deprived of territory for the benefit of the United States*." Story, "Commentaries on the Constitution," Ch. XXXI, sec. 1316, 1833.

[13] *"Congress' Article I powers to legislate are limited not only by the scope of the Framers' affirmative delegation, but also by the principle that the powers may not be exercised in a way that violates other specific provisions of the Constitution. See Williams v. Rhodes, 393 U. S. 23, 29*." Saenz et Al. v. Roe, et al., No. 98-97. Argued January 13, 1999--Decided May 17, 1999. Also see footnote 17, pg. 17, Jack Rakove.

acknowledged as inviolable before the Constitution of 1788. Both Articles II and IX of the Articles of Confederation of 1781 are concerned with absolute protection for State territorial sovereignty from federal encroachment or usurpation:

> ARTICLE II: "*Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled*."
>
> ARTICLE IX: "*[N]o State shall be deprived of territory for the benefit of the United States*."

The importance of these two Articles to the RS 2477 question derives from the fact that their purpose and intent were brought forward into the new Constitution of 1788 by at least four means. These Articles were incorporated into the Constitution, (1) by means of the Claims Clause, as noted by Story, as rights of the States which neither the United States nor Congress had **any** constitutional authority whatever to "*prejudice*," (2) by means of Article VI, clause 1, the Debts and Engagements Clause which preserved in force all obligations arising out of prior existing agreements or contracts including the Articles of Confederation, (3) by the Tenth of the Bill of Rights which clarified that all powers not delegated to the United States by the States in their Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, and (4) by Article I, section 8, clause 17, the Enclave Clause, which prohibits federal acquisition and governance of land within a State other than by the consent of the legislature of the State in which the same shall be.

On occasion, the Court has implied that protection for State territorial sovereignty, which was first set down in Articles II and IX of the Articles of Confederation, was preserved and brought forward as an integral part of the overall constitutional design:

> "*Not only, therefore, can there be no loss of separate and independent autonomy to the states, through their union under the Constitution, but it may be not unreasonably said that the preservation of the states, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.*" Texas v. White, 74 U.S. 700, 1868.

Public lands within sovereign States were not intended to be "*governed*" by Congress under its Property Clause power to "*make needful rules and regulations*." Rather, Congress' power under the Property Clause to make these rules and regulations was intended to be a power not unlike that of a common proprietor.[14] This power to "*make needful rules and regulations*" was to be exercised for the

[14] *"Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the*

purpose of the land's interim protection and ultimate disposal.[15] However, the Kleppe decision elevates Congress' Article IV Property Clause power from that of a common proprietor for a specific purpose to that of a sovereign and supreme legislature possessing "*complete*" and "*unlimited*" power exceeding even those legislative powers authorized under Article I, sec. 7 of the Constitution.

As a "*complete*" **legislative power** "*without limitation*" that is backed up by the Supremacy Clause, federal Property Clause "*needful rules and regulations*" may be used to extinguish State sovereignty and jurisdiction on public lands totally. The "Federalist" would have described what the Supreme Court has done with the Property Clause power to "*make needful rules and regulations*" as, "*so awkward a form of describing an authority to legislate in all possible cases*." James Madison, "Federalist" No. 41. In other words, had the Framers intended that the delegated power to "*make needful rules and regulations*" under the Property Clause be a "*complete*," and "*supreme*" **legislative** power, they would have said so in far more appropriate language:

> "*To disregard such a deliberate choice of words and their natural meaning, would be a departure from the first principle of constitutional interpretation. In expounding the Constitution of the United States," said Chief Justice Taney in Holmes v. Jennison, 14 U.S. 540, "every word must have its due force and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.*" Wright v. United States, 302 U.S. 583, 1938.

No court has articulated the utter absence of authority under the Constitution for a federal **governmental** power upon public lands within States, as distinguished from the ordinary power of a common proprietor holding common "*right and title*," as well as Justice Campbell in Scott v.Sandford, 60 U.S. 393, 1857:

United States to the public lands, and to provide for their sale, and to protect them from Taxation. There was a "... *great trust imposed on the* (the United States) *to dispose of the public domain for the common benefit*." Pollard v. Hagan, 44 U.S. 212, 1845; "(S)*o far as it relates to the public lands within a new State,* (federal power) *amounts to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands*." Coyle v. Smith, 221 U.S. 529, 1911; "*While the disposition of these* (public) *lands is provided for by congressional legislation, such legislation* (rules and regulations) *savors somewhat of mere rules prescribed by an owner of property for its disposal. It is not of a legislative character in the highest sense of the term*...." Butte City Water Co. v. Baker, 196 U.S. 119, 1905, U.S. v. Midwest Oil, 236 U.S. 459, 1915.

[15] The following citation illustrates the actual intended purpose of the "*needful rules and regulations*" of Congress under the Property Clause: "*When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other states, there were within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857, authorizing the inhabitants of Minnesota to form a constitution and a state government, tendered certain propositions to the people of the territory: 'The foregoing propositions herein offered are on the condition that the said convention which shall form the Constitution of said state shall provide, by a clause in said Constitution, or an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any* ***regulations*** *Congress may find* ***necessary for securing the title in said soil to bona fide purchasers thereof***; ...." Stearns v. State of Minn., 179 U.S. 223, 1900.

"*I look in vain, among the discussions of the time, for the assertion of a supreme sovereignty for Congress over the territory then belonging to the United States, or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire, and which had no restriction but the discretion of Congress. This disturbing element of the Union entirely escaped the apprehensive previsions of Samuel Adams, George Clinton, Luther Martin, and Patrick Henry; and, in respect to dangers from power vested in a central Government over distant settlements, colonies, or provinces, their instincts were always alive. Not a word escaped them, to warn their countrymen, that here was a power to threaten the landmarks of this federative Union, and with them the safeguards of popular and constitutional liberty; or that under this article there might be introduced, on our soil, a single Government over a vast extent of country -- a Government foreign to the persons over whom it might be exercised, and capable of binding those not represented, by statutes, in all cases whatever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents -- expressions which have since been developed as prophecies. Every portion of the United States was then provided with a municipal Government, which this Constitution was not designed to supersede, but merely to modify as to its conditions*." Mr. Justice Campbell, Scott v. Sandford, 60 U.S. 393; 15 L. Ed. 691, 1856.

Closer still to the origins of this confederated union of sovereign States, the historical record stands in sharp conflict with the finding of the Kleppe court with respect to the intent and effect of the words of the Property Clause. Not only was it understood that Congress has no constitutional power to retain ownership of, or to perpetuate governance over land, save as provided for in the Enclave Clause, but it was also understood that if Congress were to do such a thing, the liberties of the people would be endangered. Justice Taney, in his Scott v. Sandford decision, refers to relevant words from James Madison speaking in "Federalist" No. 38 dated January 15, 1788:

"*There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State, and the citizens of the State, and the Federal Government.* ***But no power is given to acquire a Territory to be held and governed permanently in that character***. *And indeed the power exercised by Congress to acquire territory and establish a Government there, according to its own unlimited discretion, was viewed with great jealousy by the leading statesmen of the day. And in the Federalist, (No. 38) written by Mr. Madison, he speaks of the acquisition of the Northwestern Territory by the Confederated States, by the cession from Virginia, and the establishment of a Government there, as an exercise of power*

not warranted by the Articles of Confederation, and dangerous to the liberties of the people. ***And he urges the adoption of the Constitution as a security and safeguard against such an exercise of power***." Scott v. Sandford. (emphasis added) (Also reference footnote 37, pg. 32, Stearns v. Minnesota)

Thus, James Madison, writing in "Federalist" No. 38, urged ratification of the proposed Constitution, in part, for the very purpose of **preventing** the establishment of a unified national legislature that would exercise governmental power over an empire of land. Stated otherwise, Madison, in 1788, urged the people to adopt the proposed Constitution specifically to prevent the federal government from acquiring the very powers now validated and granted to it by the Supreme Court through misconstruction of a single phrase in the Property Clause. In this sense Kleppe is more in the nature of a constitutional amendment than a constitutional interpretation. Either Mr. Madison perpetrated a fraud upon the people by urging them to ratify the Constitution as a means of protecting themselves and their territory from "*expansive*" federal governmental power or the Court has perpetrated a fraud upon the people with its Kleppe decision.

For those willing to discover it, there exists from the founding of this country an unbroken line of authoritative commentary relative to the intent of the Property Clause that is entirely consistent with the understanding that the federal role with respect to public lands within the States is merely that of a common proprietor possessing only certain **limited** and **temporary** exemptions from the operation of "*residuary and inviolable*" State sovereignty; and this federal proprietary role is burdened with the **obligation** to provide for the interim protection and ultimate disposal of these lands.

By reassembling and examining this line of consistent intent, such judicial judgements as that set down in Kleppe are revealed as being grossly discordant with and contrary to American style liberty which is rooted in sovereign State self-governance in the Republican form. Recurrence to original or first principles, as has been done here, is clearly essential to a proper understanding of any portion of the Constitution including the Article IV Property Clause:

"*The values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the Constitution.*" Powell v. McCormack, 395 U.S. 486, 1969.

CONSEQUENCES OF AN "*EXPANSIVE READING*" OF FEDERAL POWER

There is no evidence to suggest that the Kleppe court employed a "*whole cloth*" analysis of first constitutional principles while it was validating a "*complete*" federal legislative power "*without limitation,*" "*analogous to the police powers of the several states*" upon public lands. A mere superficial analysis within the context of first principles disproves the Kleppe premise. On its face, the

Kleppe decision directly contradicts historical authority and court opinion on the same subject.[16]

A "*whole cloth*" analysis of the Constitution and its overarching principles clearly demonstrates, as might be expected, that an "*expansive reading*"of federal power under a single phrase in a single clause of the Constitution, creates conflicts with other constitutional provisions which were specifically intended to protect the integrity of State territorial sovereignty.[17] Five of these clauses and twp relevant constitutional amendments are now briefly addressed:

1. Article I, section 8, clause 17 (Enclave Clause):

The Enclave Clause permits the federal government to exercise "*exclusive legislation*" including municipal jurisdiction over "*places purchased by the consent of the legislature of the state in which the same shall be*" in furtherance of its several enumerated purposes. Public lands, however, were not purchased by consent of the State in which they are found; nor did any State cede its sovereignty or jurisdiction over them. Public lands within States were never intended to be subject to Enclave-Clause-like federal jurisdiction.[18] Congress is empowered under the Property Clause only as a common proprietor for the purpose of disposing of them pursuant to "*needful rules and regulations*" adopted for that purpose. Nonetheless, Kleppe recognizes virtual enclave status for these lands without State consent and to the complete and permanent destruction of independent State sovereignty. Public lands within a given State are, therefore, as jurisdictionally foreign to that State as they would be if they were the lands of a different State or a foreign country.[19]

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[16] "*The court (Pollard v. Hagan,* 3 How. 212, *page 229) declared that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to 'deny that Alabama has been admitted into the Union on an equal footing with the original states.' The same principles were applied in Louisiana v. First Municipality, 3 How. 589*." Ward v. Race Horse, 163 U.S. 504, 1896.

[17] "(T)*he completed Constitution was not the sum of a series of decisions taken on discrete issues. It is better imagined (to pursue the mathematical metaphor) as the solution to a complex equation with a large number of dependent variables: change the value of one, and the values shift throughout.*" Jack N. Rakove, "Original Meanings," pg. 14, Vintage Books, New York 1996.

[18] "*It was, therefore, he said, impossible that the state governments should be annihilated by the general government, and it was, he said, strongly implied, from that part of the section under debate which gave Congress power to exercise exclusive jurisdiction over the federal town,* ***that they shall have it over no other place***." Massachusetts Constitutional Convention, 1788, Gen. Brooks (of Lincoln). (emphasis added)

[19] Federal enclaves "*are to Mississippi as the territory of one of her sister states or a foreign land*," United States v. Mississippi Tax Comm'n, 412 U.S. 363, 1973, on appeal from the United States District Court for the Southern District of Mississippi, 340 F. Supp. at 906, United States v. State Tax Commission of Mississippi et Al.; "(Y)*et it may be considered that the United States has two sovereignties, one over the people of the United States, the other over the territories; and that they are as* ***foreign to each other****, as the parliament of England, and the legislature of Jamaica; and that the Courts of each are as foreign as the Courts of Westminster and Kingston.*" American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 1828. (emphasis added)

2. Article I, section 10 (Contracts Clause):

"*No state shall...pass any...law impairing the obligation of contracts....*" The U.S. Supreme Court has affirmed the applicability of this clause to the federal government at least insofar as the terms of the constitutional compact are concerned. Logically, a prohibition against any breach of the terms of the constitutional compact must extend to a prohibition upon any breach of compacts entered into by the United States or by Congress under the authority of that compact.[20] By Article IV, sec. 4, of the Constitution, the Guarantee Clause, and also by Section 3 of its enabling act compact with the United States, the State of Utah, like all other States, is "*guaranteed*" a Republican form of self-government. However, despite these constitutional and contractual guarantees of State self-governance, the people of the State of Utah, and the people of every other State similarly situated, do not elect the federal land managers who exercise over them a "*complete*," "*unlimited*," and supreme municipal legislative power that is "*analogous*" to that of a separate or foreign State. Therefore, a State is denied its "*guarantee of Republican self-governance*" to the extent that it encompasses public lands within its borders and such denial is a breach of the constitutional compact.

3. Article IV, section 3, clause 1: (Admissions Clause)

"*New states may be admitted by the Congress into this union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.*" This clause plainly illustrates the inviolability of State territorial sovereignty which was intended by the Framers and which was ratified by the States. However, to the extent that the federal government exercises "*complete*," "*unlimited*" and supreme municipal jurisdiction "*analogous to that of a state legislature including police power*" over public lands within a State, it also creates a foreign "*federal state*" within that State. Moreover, federal municipal jurisdiction on public lands transcends State borders where public lands of one State lie adjacent to the public lands of another State. This juxtaposition unavoidably results in an unconstitutional joining of the territories of adjoining States into an even more vast and equally foreign "*federal state*" or "*federal empire*."

4. Article IV, section 3 clause 2: (Claims Clause)

"*And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.*" During the time that the States were considering ratification of the proposed Constitution, they were assured by their most trusted officers that, under it, their territorial sovereignty would remain inviolate and safe from federal encroachment. However, the "*expansive*" federal legislative power that has been validated by the Kleppe decision recognizes **no** inviolable

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[20] "(W) *hen a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.*" Alexander Hamilton, 3 Hamilton's Works, 518, 519; "*A contract is a compact between two or more parties, and is either executory or executed. A contract executed, as well as one which is executory, contains obligations binding on the parties.*" Fletcher v. Peck. 10 U.S. 87, 1810.

claims of the States where public lands are concerned. This is despite the fact that the public lands within each State were intended, by terms of each State's enabling act compact with the United States, to be lands **of** the respective States and **not** perpetual federal jurisdictional Territories or enclaves which are "*foreign*" to the State in which they lie.

5. Article IV, section 4: (Guarantee Clause)

"*The United States shall guarantee to every state in this union a Republican form of government....*"[21] The geographic extent of the new State of Utah, by terms of its enabling act compact with the United States, was to include "*all that part of the area of the United States now constituting the Territory of Utah, as at present described ....*" (Reference Utah Enabling Act compact, enacting clause, [1]Endnote 1, pg. 48). However, with respect to the public lands of this State, the citizens of Utah are subject to a supreme "*complete*" and "*unlimited*" **federal** municipal government that is said to be "*analogous*" in its police power to that of their State legislature. Locally based federal managers who interpret, apply and enforce this federal municipal police power are not politically accountable to the people over whom they presume to govern. By contrast, under republican self-governance in the American form, political officers are intended to be politically accountable at the level at which they presume to govern. The constitutional guarantee of Republican self-governance is, therefore, denied to the people of Utah upon some sixty six percent of that territory which was committed to the purposes of their State by terms of their enabling act compact with the United States. The other so-called "*public land states*" are similarly harmed.

6. Tenth of the Bill of Rights:

"*The 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*." No power whatever was delegated to the United States or to Congress under the Constitution to exercise municipal governance within a State other than by the consent of the State at interest as provided under the Enclave Clause. (Reference Harcourt v. Gaillard, pg. 6) Every new State was admitted into the Union of States upon an equal footing as to political rights and sovereignty (Reference footnote 1, pg. 1) with the original States. Despite assurance by the Tenth of the Bill of Rights that there are powers **not** delegated to the United States by the Constitution but which were reserved exclusively to either the States or to the people, the Kleppe decision awards to the United States **every power** and provides that those powers may be exercised within the States under the Supremacy Clause without State consent on the public lands of the State. And this "*complete*" and "*unlimited*" power may even be exercised by Congress upon non-public lands depending upon the "*exigencies of the particular case*."

7. Article XIV, the Fourteenth Amendment: (Privileges and Immunities Clause)

"*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;...nor deny to any person within its jurisdiction the equal protection of the*

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[21] Republican governance: *A state in which the supreme power rests in the body of citizens entitled to vote and is exercised by representatives chosen directly or indirectly by them*. Websters Encyclopedic Unabridged Dictionary of the English Language, 1994 edition.

laws." Insofar as the United States have declined to dispose of the public lands within the respective States, and for so long as the United States continue to exercise "*complete*" and "*unlimited*" legislative jurisdiction over them in a manner "*analogous*" to the police power of a State legislature, it cannot be said that the citizens of these "*public land states*" have obtained their constitutional guarantee of Republican self-governance to an extent equivalent to that of the citizens of the original States. Thus, the United States and their agent Congress are denying the citizens of the so-called "*public land States*" equal protection under the law.

THE CONSTITUTIONAL CONTRADICTION

The U.S. Constitution was painstakingly crafted specifically to avoid internal contradiction. The discussions above demonstrate that Kleppe's "*expansive reading*" of the Article IV Property Clause power is in profound contradiction with numerous clauses and the clear intent of that instrument. An array of contradictions is to be expected when one phrase of the Constitution is interpreted "*expansively*" or, one might say, with reckless abandon, without consideration for the effect of such expansive interpretation on other provisions of that document. (Reference footnote 17, pg. 17, Jack Rakove) The question that must be asked of the Kleppe decision is this: **Is it possible for the Court to grant "*complete*" governmental power "*without limitation,*" "*...including police power*" to an otherwise constitutionally limited and enumerated government without breeching or otherwise violating other fundamental tenets of that government's organizational principles and, as Madison said, without endangering the liberties of the people?**[22] We may also ask whether it is consistent with original intent that we have become a nation where certain States are privileged with full protection under the Constitution while other States are only partially protected with the remainder of their territory being retained and governed by Congress with "*complete*," "*unlimited*" and supreme municipal legislative power analogous to that of their State legislature? or where the residents of certain States are proclaimed to not possess an independent claim to sovereignty simply because the land of their State was acquired directly by the United States from a "*foreign government*?" In fact, federal law upon the public lands within the States is not even constitutional law but *maritime law* or the corporate *law of the sea.*[23]

In July, 1861, President Lincoln presented his "*war message*" to Congress. He addressed the rationale of the southern States in their bid to withdraw from the Union. With respect to their rational, Mr. Lincoln said, "*nothing should ever be implied as law, which leads to unjust, or absurd consequences*." The Kleppe decision might be said to lead to such "*unjust, or absurd consequences*"

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[22] "*The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers*." Citizens' Savings & Loan Ass'n v. City of Topeka, 87 U.S. 655, 1874.

[23] "*The term 'special maritime and territorial jurisdiction of the United States' ...as used in this title, includes: ...* (3)*Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by the consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building*." U. S. Code, Title 18, pt. 1, sec. 7(3)

whereby:

- A constitutionally limited and enumerated government exercises plenary and supreme municipal legislative jurisdiction within sovereign States without State consent.
- Those territorial claims of the States which the Framers represented as being "*inviolable*" are swept aside at the will of Congress.
- Land within certain States is taken without consent for the benefit of other States.
- The territory of certain States is combined with that of adjacent States under a single, plenary and supreme national municipal legislature analogous to a State legislature.
- A vast "*federal empire*" governed under a consolidated, extra-constitutional maritime authority is created.
- Multiple sections of the U.S. Constitution are directly offended by a recklessly "*expansive reading*" of a single phrase in a single clause in the Constitution.
- Certain States are denied the benefits of solemn compacts of trust which were instrumental in the formation of this country, and which became fundamental constitutional principles simply because of the means by which the territories from which they arose were acquired by the United States. (These points will be further discussed below.)

We have been warned of "*sophistical constructions*" of the Constitution "*by interested men*." We ignore this warning at our peril:

> "*Ingenious men may assign ingenious reasons for opposite constructions of the same clause. They may heap refinement upon refinement, and subtilty upon subtilty, until they construe away every republican principle, every right sacred and dear to man. I am, sir, for certainty in the establishment of a constitution which is not only to operate upon us, but upon millions yet unborn.* I would wish that little or no latitude might be left to the sophistical constructions of men who may be interested in betraying the rights of the people, and elevating themselves upon the ruins of liberty. Sir, it is an object of infinitely too much importance to be committed to the sport of caprice, and the construction of interested men.*" Mr. Williams, The Debates in the Convention of the State of New York, on the Adoption of the Federal Constitution, June 1788, pg. 338.

> And also:

> "*That argument cannot be sound which necessarily converts a government of enumerated into one of indefinite powers, and a confederacy of republics into a gigantic and consolidated empire....*" "*(I)nstead of confining itself in time of peace to the diplomatic and commercial relations of the country, it is seeking out employment for itself by interfering in the domestic concerns of society, and threatens in the course of a very few years, to control in the most offensive and despotic manner all the pursuits, the interests, the opinions and the conduct of men*." Hugh Swinton Legar`e, "Kent's Commentaries," 1828.

And also:

"*It is well known that there have always been those amongst us who wish to enlarge the powers of the General Government; and experience would seem to indicate that there is a tendency on the part of this Government to overstep the boundaries marked out for it by the Constitution. Its Legitimate authority is abundantly sufficient for all the purposes for which it was created; and its powers being expressly enumerated, there can be no justification for claiming anything beyond them. Every attempt to exercise power beyond these limits should be promptly and firmly opposed. For one evil example will lead to other measures still more mischievous; and if the principle of constructive powers, or supposed advantages, or temporary circumstances, shall ever be permitted to justify the assumption of a power not given by the Constitution, the General Government will before long absorb all the powers of legislation, and you will have in effect but one consolidated Government .... Every friend of our free institutions should be always prepared to maintain unimpaired and in full vigor the rights and sovereignty of the States and to confine the action of the General Government strictly to the sphere of its appropriate duties ....*" President Andrew Jackson, Valedictory, March 4, 1837.

Heretofore, the RS 2477 question in Utah has been litigated not within a constitutional context but within the context of post Kleppe agency planning documents and post Earth Day social views. The constitutional supremacy of these agency plans is generally accepted since Kleppe opined that federal public land regulations are superior to conflicting State law under the Supremacy Clause. While constitutional supremacy may be proper insofar as protection and disposition of public lands is concerned, it can not be proper if it is employed in such a way as to deny the sovereign States the right to construct, maintain and determine the use of " *highways*" upon public lands within their borders. This right must be among those of the States which are expressly protected under the Claims Clause and which, pursuant to this clause, Congress has no power whatever to prejudice.

There is nothing in the historical record, either explicit or implicit, to support a conclusion that the Framers intended that our constitutionally enumerated federal government would be allowed to engage in municipal governance within the States without express State consent. Much less is there any historical evidence that such governance could be exercised in perpetuity. To the contrary, the historical record, as presented in this paper, is clear. Public lands and the eminent domain thereunder were intended to be, and must be, "*held in trust*" for the States to be carved there from. (Reference Shively, footnote 35 pg. 31)

The Enabling Act compact between the United States and the people of the Territory of Utah, at Section 3, second, includes language the origin of which can be traced to the Northwest Ordinance of 1787 and to the Resolution of the Continental Congress of 1780. This language is intended to bind the United States to its disposal duty under the constitutional Property Clause and, thus, to ensure that the solemn trusts referred to by Pollard would be honored (Reference Pollard, footnote 36, pg. 32):

"*And that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States*." Section 3, second.

The RS 2477 grant was undoubtedly one of the many mechanisms whereby Congress acted upon its constitutional and statutory duty to ultimately dispose of the public lands.

The Kleppe decision represents the circumstances of the American Revolution having come full circle. The American Revolution was a successful revolt against empire and the rules and regulations of a distant, plenary and supreme sovereign. Today, the public lands of America represent the reincarnation of a vast empire, permanently retained and governed under the rules and regulations of a distant, plenary and supreme national legislature. By this national supremacy over local municipal affairs upon public lands, the States may ultimately be disassembled through the influence of "*precedential evolution*" in judicial decision making. The assertion of federal regulatory jurisdiction over State roads on public lands is an incremental step toward this "*mischievous*" end. (Reference President Andrew Jackson, pg. 22)

The Supreme Court has recognized that law makers may err in the crafting of a law. Such error, it says, must be remedied by the law maker:

"*Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd, or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts.*" Crooks v. Harrelson, 282 U.S. 55, 1930, from Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 1982.

The same may be said of the Court. By 1992, when the new nation under the Constitution had existed for 204 years, the U.S. supreme Court had overruled exactly 204 of its own prior cases. (Constitution of the Untied States of America, Analysis and Interpretation, 1992, 2245-2256) Errors made by the Court must be corrected by the Court whenever the opportunity to do so is presented.

ORIGIN OF THE EQUAL FOOTING DOCTRINE

The Equal Footing Doctrine, as originally conceived and not as it may have been recently construed, lies at the core of the purpose and conclusions of this paper. For this reason, it warrants further examination.

The equality spoken of here has been defined by the Court as equality as to "*political rights and sovereignty*." (Reference equal footing defined, footnote 1, pg. 1) This doctrine of equality among the American States originated within the text of the Resolution of the Continental Congress of October 10, 1780. (Reference endnote [2] pg. 54) This resolution was written originally in reference to lands which were expected by the Continental Congress to be ceded to it by certain of the original

thirteen States.[24] By this Resolution the Continental Congress committed itself to certain principles; and it is these principles that reside at the foundation of the American confederacy of sovereign States.[25] The principles set down by the Resolution are these: 1. The ceded Territory would be dedicated to the establishment of new States, 2. new States established within the ceded Territories are guaranteed the right of Republican self-government, 3. new States established within the ceded Territories are guaranteed sovereignty over the soil within their borders, 4. any lands which may be ceded by an original State would be disposed of and not retained in federal ownership and, 5. each new State carved out of the ceded Territories would be admitted into the Union of States with, "*the same rights of sovereignty, freedom and independence, as the other states*." This last promised benefit for the inhabitants of the new federal Territories, we believe, is what has become known as the Equal Footing Doctrine. The discussion that follows will focus on the essential linkage that exists between Congress' self imposed obligation to dispose of the Territorial lands belonging to the United States and the Equal Footing Doctrine.

While the root of the Equal Footing Doctrine is found in the Resolution of October 1780, its progeny are found in the Northwest Ordinance of July 13, 1787, in at least five clauses of the Constitution of September 17, 1787, and in every State enabling act compact written by Congress to facilitate admission of every federal Territory into the Union of States as a new State.

The Northwest Ordinance of 1787 was adopted by the States themselves in the person of their designated ambassadors sitting assembled in the Continental Congress. It is with this instrument that this Congress intended to fulfill its obligations under its own Resolution of October 1780. At Article 4, the Northwest Ordinance directs that, "*The legislatures of those districts or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers*." By this Article, the Continental Congress acknowledged its trust obligation, which originated under its Resolution of 1780, to dispose of the lands which any of the States may cede to it. At Article 5, the Ordinance directs that each new State formed out of the ceded lands shall be admitted into the Union of States, "*on an equal footing with the original States in all respects whatever*."

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[24] Land Cessions from the original States: New York (1780), Virginia (1784), Massachusetts (1785), Connecticut (1786), South Carolina (1787), North Carolina (1789), Georgia (1802)

[25] "*It was only upon the condition that those lands would be considered as common property, to be disposed of for the benefit of the United States, that some of the States agreed to come into a 'perpetual union.'... These solemn compacts, invited by Congress in a resolution declaring the purposes to which the proceeds of these lands should be applied, originating before the constitution, and forming the basis on which it was made, bound the United States to a particular course of policy in relation to them by ties as strong as can be invented to secure the faith of nations.*"..."*The constitution of the United States did not delegate to Congress the power to abrogate these compacts, on the contrary, by declaring that nothing in it 'shall be so construed as to prejudice any claims of the United States, or of any particular State' it virtually provides that these compacts, and the rights they secure, shall remain untouched by the Legislative power which shall make all 'needful rules and regulations' for carrying them into effect.* President Andrew Jackson, Veto of the Land Bill, Dec. 5, 1833.

The doctrine of Equal Footing, meaning equality of "*political rights and sovereignty*," and the trust obligation resting upon Congress to dispose of the public lands were linked by the Continental Congress under the Resolution of 1780 and also under the Northwest Ordinance for good reason. That reason is as follows. For so long as the public lands are held under federal title, certain elements of the sovereignty of the States are held in abeyance. These elements are State taxing authority and State laws governing conveyance or descent of title.[26] Thus, for so long as public lands remain within a given State, that State is denied full equality of sovereignty in relation to that of the original States. Equality of such States in relation to the original States as to sovereignty, or equal footing, can only be achieved if the federal title in the public lands is extinguished and the lands disposed of. The doctrine of equal footing, therefore, gives purpose to the "***needful** rules and regulation*" of congress under the Property Clause.

Just two months after the Continental Congress drafted the Northwest Ordinance, the Constitutional Convention incorporated the essential federalism elements of the Resolution of 1780 into at least five clauses of the Constitution. These clauses include the Enclave Clause of Article I, and the Admissions, Property, Claims and Guarantee, clauses of Article IV. Moreover, the compact of trust which was established by the Resolution, and the terms and procedures for executing that trust which were set down seven years later in the instrument of the Northwest Ordinance, were all brought forward as constitutional obligations by way Article VI, clause 1, the Debts and Engagements Clause. These six clauses of the Constitution are presented in a side-by-side comparison with the corresponding provisions of the Resolution of 1780 in the table below:

Resolution of Congress of October 1780	Relevant Clause of Constitution of 1788
1. "*Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted **and disposed of** for the common benefit of all the United States ...*"	Article IV, sec. 3, cl. 2, the **Property Clause**: "*The Congress shall have the **power to dispose** of and **make all needful rules and regulations** respecting the territory or other property belonging to the United States;*"

[26] "*The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick v. Sullivant, 10 Wheat. 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed [94 U.S. 315, 321] under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State.*" U S v. Fox, 94 U.S. 315, 1876.

2. "*That the said lands shall be granted and settled at such times and **under such regulations** as shall hereafter be agreed on by the United States in Congress assembled*."	Article IV, sec. 3, cl. 2, **Property Clause**, see Row 1 above "... ***make all needful rules and regulations*** ...."
3. "*... and be settled and formed into distinct **republican states** ....*"	Article IV, sec. 4, the **Guarantee Clause**: "*The United States shall guarantee to every state in this union a **Republican form of government**, ...*"
4. " *... which **shall become members** of the federal union ....*"	Article IV, sec. 3, cl. 1, the **Admissions Clause**: "*New **states may be admitted** by the Congress into this union;*"
5. " *... the United States **shall guaranty the remaining territory** of the said States respectively*."	Article I, sec. 8 cl. 17, **Enclave Clause**: "*The Congress shall have power to ... exercise (exclusive legislation in all cases whatsoever) over places **purchased by the consent of the legislature of the state in which the same shall be**, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings*." Article IV, sec. 3, cl. 1, **Admissions Clause**: "*no new State shall be formed or erected within the Jurisdiction of any other State ... **without the consent of the Legislatures of the States concerned** as well as of the Congress*." Article IV, sec. 3, cl. 2, **Claims Clause**: "*and **nothing** in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state*."
6. The agreements listed in items 1-5 above were preserved under the Constitution by way of the Debts and Engagements clause of Article VI.	Article VI, cl. 1, **Debts and Engagements Clause**: "*All debts contracted and engagements entered into, before the adoption of this Constitution, **shall be as valid against the United States under this Constitution, as under the Confederation***."
Admitted States shall "*have the **same rights** of sovereignty, freedom and independence, as the other states*." (Equal Footing with the original states.)	Where a constitutional principle is at issue, **"*uniformity was intended***" and not "*a diversified operation*." U. S. v. Holt State Bank, 270 U.S. 49, 1926.

And how do we know that the Constitution was written by the Framers with the solemn trust established by the Resolution of 1780 held in the fore of their collective mind? Quite simply, and apart from plain logic which would suggest as much based upon the chronology of these events, the Court has told us so.[27] It would be sixteen years after the drafting of the Constitution before the United

[27] "*At the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognised* (sic). *These limits consisted in part, of organized states, and in part of territories, the absolute property and dependencies of the United States. These states, this territory, and future states to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those Limits*." American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 1828.

States would obtain any Territory other than that which was ceded to them by one of the original States. This new Territory was the Louisiana Purchase which was acquired by the United States from France in 1803. Therefore, since the Property Clause was written with only the ceded lands and the solemn trust arising out of the Resolution of 1780 in mind, and since the Continental Congress had expressly obligated itself under this trust to dispose of these lands, the "*power to dispose*" of the "*territory or other property belonging to the United States*" which is delegated to Congress under this clause must be a **constitutional mandate** and not a mere discretionary suggestion.[28] And with the power being expressly delegated, it must be carried out as intended and not perverted to a different purpose.[29] And as the mandate is constitutional in stature, it must apply to all Territorial and all public lands in every State.[30]

EQUAL FOOTING IN THE WESTERN "*PUBLIC LAND STATES*"

Clearly there is compelling historical evidence to support our contention that the essential components of the solemn trust set down by Congress in its Resolution of October 1780 were incorporated by the Framers into the spirit and text of the Constitution of September 1787. As a consequence of this incorporation, these components, including the doctrine of equality or "*equal footing*" between the several States and the obligation resting upon Congress to dispose of the Territorial and public lands, became constitutional mandates and the "Supreme Law of the Land." Nonetheless, and despite the doctrine of uniformity in the application of constitutional principles, there are those who yet maintain that the benefits for new States that were set down in the Resolution and its implementing Northwest Ordinance belong to certain States only and not to others. This distinction between the States is said to be based upon the means by which their respective Territories came into the possession of the United States. The States that are currently being excluded from these benefits are those which were established out of Territories which were acquired directly by the United States from a "*foreign government*" rather than from one of the original States. High ranking officers in the federal government have promoted this view.

In a letter written to the director of Bureau of Land Management dated December 6, 1979, John

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[28] *It must have been the intention of those who gave these* (constitutional) *powers, to insure, so far as human prudence could insure, their beneficial execution*." McCulloch v. Maryland,17 U.S. 316, 1819; "*What the Constitution dictates is to be done*." Robert W. Reid, Admission of Missouri, House of Representatives, 1 Feb. 1820, Annals 35:1027-30; "*And the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domain*." Lessee of Johnson et al. v. McIntosh, 21 U.S. 543, 1823.

[29] "*It may be admitted that a power given for one purpose cannot be perverted to purposes wholly opposite, or besides its legitimate scope*," 2 Story, "Commentaries on the Constitution." sec. 1077; "*The power can only be exercised as prescribed*." Downes v. Bidwell, 182 U.S. 244, 1901.

[30] The government of the Union "*(I)s the government of all; its powers are delegated by all; it represents all, and acts for all*." M'Culloch v. Maryland, 17 U.S. 316, 1819.

D. Leshy,[31] then Assistant Secretary of Interior for Land and Water Resources, wrote the following: "*The United States was* (by terms of the land cessions from the original State of Georgia) *expressly prohibited from retaining ownership of the public lands it gained within what is now Alabama; i.e.*, *in return for assuming title to the land, the Federal Government agreed to dispose of it to form a new state. That explains why the only federal land in Alabama (and other eastern states) has since been acquired by the Federal Government.* ***This rule obviously does not apply to Western States like Nevada, whose territory was originally acquired by the United States directly from foreign governments***." (emphasis added)

The Ninth U.S. Circuit Court of Appeals gave judicial affirmation to the view of Assistant Secretary Leshy when it opined that the State of Nevada, which of course means the people of the State of Nevada, possess, "*no independent claim to sovereignty*" because "*the Federal government was the original owner of the land from which the state of Nevada was later carved*." Ninth Circuit Court of Appeals, Cliff and Bertha Gardner v. U.S., #95-17042, October Term, 1997. This novel idea of an American State having "*no independent claim to sovereignty*" coming from a federal appeals court, we think, should have sent shock waves throughout a nation that boasts of its egalitarianism.

Leshy is correct in stating that the cession instruments issued by certain of the original States required that the lands thus ceded be disposed of and not retained in federal ownership. But, beyond this fact, both he and the Ninth Circuit are guilty of selective remembrance of history. All of the land cession instruments issued by the original States (Reference State land cession dates, footnote 24, pg. 24) were **preceded** by the Resolution of October 1780, and it is by this Resolution that the Continental Congress **bound itself** to dispose of **all** lands that "*any particular states*" may, in the future, cede to it. The land disposal mandates which were written into the several State cession instruments were, therefore, merely reciprocal affirmations of this fact. Congress would have been bound by its own hand to dispose of the public lands in the ceded territories even if the cession instruments from the several States had not included disposal language.

Assistant Secretary Leshy's assertion that certain States may be treated differentially depending upon the means by which their Territory came into the possession of the Union of States fails when it is exposed to no more than the doctrine of uniformity in the application of constitutional principles. The novel idea of the Ninth Circuit Court that certain States have "*no independent claim to sovereignty*"suffers the same fate when examined in the same light. Furthermore, Leshy's belief that the public lands in the State of Alabama were disposed of because the Alabama Territory was secured to the Union of States by way of a cession from an original State (Georgia) also fails. That portion of

[31] John Leshy: Served in the Interior Department in the Carter Administration, with the Committee on Natural Resources, U.S. House of Representatives, and with the Natural Resources Defense Council in California. He served as Solicitor (General Counsel) of the U.S. Department of the Interior throughout the Clinton Administration. Taught at Arizona State University College of Law (1980-1992). Courses Taught: Property, Constitutional Law I, Public Lands and Resources Law, Federal Indian Law, and Natural Resources Seminar. Co-chaired the Obama Administration transition team for the Interior Department.

Alabama which lies below the 31st Parallel and extending to Mobile Bay was contested Territory that was ultimately acquired by the Union of States directly from Spain. The public lands in this portion of the State were also disposed of even though they were obtained by the Union from a "*foreign government*." Leshy's thesis fails to explain this anomaly. And, according to the improbable opinion of the Ninth Circuit Court, the State of Alabama can have "*no independent claim to sovereignty*" over this portion of its territory.

As obviously flawed as they are, the opinions of Leshy and the Ninth Circuit Court hold sway thus far in the halls of government and also with a substantial portion of the general public. The Doctrine of Equal Footing, insofar as it is being applied to the western so-called "*public land states*" by alleged constitutional experts has been perverted beyond recognition thereby making a shambles of the notion of State equality. We turn now to the historical record to further challenge the opinions of Leshy and the Ninth Circuit Court.

The Territory of Orleans was the southernmost portion of the Louisiana Purchase of 1803. The outline of this Territory roughly conformed to the present boundary of the State of Louisiana. As land acquired directly by the United States from a "*foreign government*," the Territory of Orleans, according to the view of Leshy and the Ninth Circuit Court, is a tract the inhabitants of which possess "*no independent claim to sovereignty*" and the public lands of which Congress had no obligation to dispose of. However, should Leshy and the court make such arguments with respect to the State of Louisiana they would be wrong on both counts.

The State of Louisiana was admitted into the Union of States by Congress, "*on an equal footing with the original States in all respects whatever*." Admission of this new State into the Union with this equality was an act of Congress which responded to the requirements of the Louisiana Purchase treaty of April 30, 1803 between the Union of States and France. With respect to territorial and popular equality with the original States, this treaty reads as follows:

> "*(T)he inhabitants of the ceded territory shall be incorporated in the Union of the United States,* ***and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States****;*" (emphasis added)

It is essential, now, to understand what Congress did to assure that the new State of Louisiana and its inhabitants would, in fact, be admitted "*according to the principles of the Federal Constitution*," including the doctrine of equality with the original States. The State's admission into the Union with this stature of equality was assured by the Act of Congress of March 2, 1805. This act (2 Stat. at L. 322, chap. 23) provided that the inhabitants of the "*territory of Orleans*" (the future State of Louisiana) "*shall be entitled to and enjoy all the rights, privileges, and advantages secured by the said* (Northwest Ordinance) *and now enjoyed by the people* (inhabiting States carved out of lands ceded to the United States by certain of the original States)." In other words, "*to fulfil the requirements of the treaty*" with France, the Act of March 2, 1805 extended the Northwest Ordinance

to apply to the Territory of Orleans. And by so extending this Ordinance, "*the territory of Orleans was incorporated into the United States*," and this Territory was, "*(placed) ... exactly in the position which it would have occupied had it been within the boundaries of the United States as a territory at the time the Constitution was framed*." Downes v. Bidwell, 182 U.S. 244, 1901. And as the Territory of Orleans was to enjoy all of the benefits which were provided to those new States which were erected out of lands ceded by certain of the original States it is now clear why the public lands of the State of Louisiana were disposed of and why federal Territorial governance therein was extinguished utterly.[32] As the instrument designed by Congress for carrying out the solemn trust obligation which originated under its Resolution of 1780, the Ordinance expressly acknowledges that the public lands belonging to the United States are to be disposed of and that federal municipal government within the Territory is to be "*temporary*" pending its admission into the Union as a sovereign State.[33]

Authorities on the Constitution concede that this extension by Congress of the Northwest Ordinance to the Territory of Orleans meant that the Doctrine of Equal Footing would also necessarily extended to every new State that may be established within Territories obtained by the Union of States directly from "*foreign governments.*"[34] But if that provision of the Northwest Ordinance which provided for equality among the States extended beyond the Territory of Orleans why would the other benefits of the Ordinance not also extend beyond that Territory including "*temporary*" federal Territorial governance and disposal of the public lands? Both justice and equality under the law would suggest that **all** of the benefits of the Northwest Ordinance must extend to every State **even if** the territory of a particular State was obtained by the Union of States directly from a "*foreign government*." This statement gains even greater force when the words of the treaty which yielded up the Mexican Cession to the Union are considered in relation to the words of the treaty with France which yielded the Louisiana and Orleans Territories.

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[32] As of 1995, the federal government owned 4.97% of the land area in the State of Louisiana. Natural Resource Council of Maine (NRCM) from an updated 1995 table produced by the National Wilderness Institute.

[33] "The Ordinance refers to federal territorial governance as "*temporary*" three times. The Court has affirmed the temporary nature of this federal power. "*By the constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion* (governance or jurisdiction) *and sovereignty, national and municipal, federal and State, over all the territories, **so long as they remain in a territorial Condition***." Shively v. Bowlby, 152 U.S. 1, 1894; "*The Constitution was established by the people of the United States for the United States. It provides for the future admission of territories into the Union, and expressly confers upon Congress the power of governing them as territories, **until** they are admitted as states*." Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 1828. (All emphasis added)

[34] "*Since the admission of Tennessee in 1796, congress has included in each State's act of admission a clause providing that the State enters the Union 'on an equal footing with the original States in all respects whatever.'*" "*With the admission of Louisiana in 1812, the principle of equality was extended to States created out of territory purchased from a foreign power* (2 Stat. 701, 703, 1812)." J. Killian, G. Costello, co-ed. Constitution of the United States of America, Analysis and Interpretation. Washington: CRS, Library of Congress, 1992, 882.

The Treaty of Guadalupe Hidalgo, February 2, 1848, secured to the Union of States the major portions of what are now New Mexico, Arizona, and Colorado and the entire States of California, Utah, Nevada. The language of this treaty parallels that of the treaty with France in its call for incorporation of the inhabitants and their equality with all of the citizens of the other States:

> "*The Mexicans* (occupying the ceded lands) *who shall not* (choose to remain as Mexican citizens) *shall be incorporated into the Union of the United States* ***and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution***."

By the Treaty of Guadalupe Hidalgo, the Mexicans occupying the Territories which were ceded to the Union of States by Mexico were to be "*incorporated into the Union of the United States*" just as the inhabitants of the Territory of Orleans, by the treaty with France, were to be "*incorporated into the Union of the United States*." And also by the treaty of Guadalupe Hidalgo, Mexicans occupying the ceded Territory were to receive, "*all of the rights of citizens of the United States, according to the principles of the Constitution*" just as the inhabitants of the Territory of Orleans, by the treaty with France, were to enjoy, "*according to the principles of the Federal Constitution*, *...all the rights, advantages, and immunities of the citizens of the United States*."

The uniformity of language between the two treaties cannot be missed. The Northwest Ordinance was extended by Congress to the Territory of Orleans in order to fulfill its obligations under the treaty with France. Given the equality of the language of these two treaties and, therefore, the equality of duty resting upon Congress under them, by what reasoning can it be said that the benefits of the Northwest Ordinance can be denied to the inhabitants of the lands ceded by Mexico whether Congress formally extended operation of this ordinance to these Territories or not? And as the rightful claims of the inhabitants of the Territory of Orleans included termination of federal Territorial governance and disposition of the public lands upon the ascendency of their Territory to the sovereign stature of statehood, so to must federal Territorial governance be terminated in the States listed above and the public lands within their borders, in reasonable time, be disposed of.

While the analysis above may be contested by nationalists and others who oppose State sovereignty and independence, the Court has, in the past, affirmed it.[35] Accordingly, it is only upon the faithful execution by Congress of its solemn trust duties under the Resolution of October 1780 **and** under the implementing Ordinance of 1787, each of which were incorporated into the Constitution of 1788, that **any** new State may be admitted into the Union of States upon an equal footing with the

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[35] "*Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion* (governance or jurisdiction) *passed to the United States, for the benefit of the whole people, and* ***in trust for the several states to be ultimately created out of the territory***." Shively v. Bowlby, 152 U.S. 1, 1894. (emphasis added)

original States "*in all respects whatever*."[36] It necessarily follows, then, that the provision in the Federal Land Policy and Management Act of October 21, 1976 which asserts that it will thereafter be, "*the policy of the United States that the public land be retained in Federal ownership...*" is nothing less than a faithless and monumental breach of a solemn trust and of the constitutional compact; and this breach must be actionable under law.[37] Yet this federal policy and the opinions of the Assistant Secretary and of the Ninth Circuit Court stand unchallenged.

THE MYTH OF "CONCURRENT JURISDICTION"

Some federal courts have opined that the so-called "*public land States*" and the United States exercise "*concurrent jurisdiction*" over the public lands. For example:

> "*The state government and the federal government exercise* ***concurrent jurisdiction*** *over the land...The state may exercise its civil and criminal jurisdiction over federal lands within its borders as long as it exercises its power in a manner that does not conflict with federal law*." Cliff and Bertha Gardner v. United States, 9th Circuit Court of Appeals, No. 95-17042, Nov. 25, 1997. (emphasis added)

And also,

> "*Nye, like Toll and Kleppe before it, contemplates the* ***concurrent exercise*** *of state/local and federal jurisdiction over federal lands traversed by RS 2477 rights-of-way and other easements.*" U.S. v. Garfield Co, D. Ut. 2000 citing U.S. v. Nye County Nv., 920 F. Supp. 1108 (D. Nev. 1996), Colorado v. Toll, 268 U.S. 228, and Kleppe v. New Mexico.

Concurrent Jurisdiction is defined as follows: *"The jurisdiction of several different tribunals, each authorized to deal with the same subject-matter at the choice of the suitor*." Cashman v. Vickers 69 Mont. 516 -223 P. 897, 898. Blacks Law Dictionary, 4th Edition, 366.

If we accept the definition of "*concurrent jurisdiction*" above as authoritative then State

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[36] "*Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever*." Pollard v. Hagan, 44 U.S. 212, 1845.

[37] *"(I)f Congress should determine that the great body of public lands within the state of Minnesota should be reserved from sale for an indefinite period it might do so, and thus the lands be exempted from taxation; and yet it cannot be imputed to Congress that it would discriminate against the state of Minnesota, or pass any legislation detrimental to its interests. It had the power to withdraw all the public lands in Minnesota from private entry or public grant, and, exercising that power, it might prevent the state of Minnesota from taxing a large area of its lands, but no such possibility of* ***wrong conduct*** *on the part of Congress can enter into the consideration of this question. It is to be expected that it will deal with Minnesota as with other states, and in such a way as to subserve the best interests of the people of that state*." Stearns v. Minnesota, 179 U.S. 223, 1900. (emphasis added)

jurisdiction upon public lands is anything but concurrent with federal jurisdiction. There is no "*choice of the suitor*" when a legal contest involves public lands. In such cases, federal law and federal courts are the sole determinant of the avenue of judicial recourse. Upon inspection, what the federal courts have called "*concurrent jurisdiction*" is no more than a composite of federal supremacy and State subordination:

> "(T)*he concurrent power of the States, concurrent though it be, is yet subordinate to the legislation of Congress; and that, therefore, Congress may, when it pleases, annul the State legislation; but, until it does so annul it, the State legislation is valid and effectual*." Gibbons v. Ogden, 22 U.S. 1, 1824.

The notion of one government exercising jurisdiction in areas otherwise reserved to the jurisdiction of another as, for example, local municipal jurisdiction was reserved by the States to themselves, was understood by the founders to be a "*solecism* (corruption) *in theory*." The Framers soundly rejected such a structure as a model for the American federal system:

> "*Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred. The important truth, which it unequivocally pronounces in the present case, is that a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity, by substituting VIOLENCE in place of LAW, or the destructive COERCION of the SWORD in place of the mild and salutary COERCION of the MAGISTRACY.*"
> "Federalist" No. 20, Madison

> "*With respect to the concurrent jurisdiction, it is a political monster of absurdity*." Patrick Henry, Virginia Ratification Convention, June 16, 1788.

From Madison we understand that the federal government was not intended to exert its legislative power upon the States. Such power would be "*subversive to the order*" that they were creating. Much less was it intended that federal legislative power would be exerted to the destruction of "*residuary and inviolable State sovereignty* " by way of a recklessly "*expansive reading*" of just four words, "*needful rules and regulations*," in the Property Clause. Rather, it was intended by the Framers that the federal government would govern people and not States [38] and that it would attend to

[38] "*The government of the Union, then ... is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.*" McCulloch v. State, 17 U.S. 316, 1819.

external affairs, and regulate commercial affairs between the States.[39] The States were to be subordinate to the federal government only insofar as that government was operating within those several limited and enumerated spheres which were delegated by them to it under the Constitution.

That "***nothing***" in the form of governmental power is given to Congress with which it might "*prejudice*" the sovereign claims of the States must mean that ***even the Supremacy Clause was intended to be impotent against sovereign State claims including, most particularly in our view, their claim to territorial sovereignty and jurisdiction***. If this were not the case, then these claims of the States could not be properly termed "*sovereign*" as they were by none other than James Madison. This fact alone defeats the entire premise of the Kleppe opinion.

It must be remembered that the Supremacy Clause begins with the words "*This Constitution*." In its entirety, this clause reads: "*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land*." We are accustomed to accepting that the proper laws of Congress are supreme law. However, it seems that we fail to recognize that all the other provisions of "*This Constitution*" are also supreme law. Where the Claims Clause states that "*nothing in this Constitution shall be so construed as to prejudice any claims of the united States or of any particular state*," this too is supreme law. It was clearly intended that "*nothing*" would be allowed to override this absolute barrier against federal power which was erected specifically to protect sovereign State claims including, most particularly, sovereign State territorial claims.

The sovereign and supreme territorial claims of the States were not expected by the Framers to conflict with the sovereign and supreme powers of the United States under the Constitution because the government of the union under the Constitution was given no power whatever to exercise municipal jurisdiction over land within a State. It is only by way of purchase with the consent of a State legislature, as provided under the constitutional Enclave Clause (Art. I, sec. 8, cl. 17), that the central government may legitimately exercise legislative authority or municipal governance over any portion of the territory of a State:

> *"I believe I am still correct, and insist that, if each power is confined within its proper bounds, and to its proper objects, an interference can never happen. Being for two different purposes, as long as they are limited to the different objects, they can no more clash than two parallel lines can meet*." Elliot's Debates, Mr. Pendleton, Virginia Ratification Convention, June 12, 1788.

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[39] "*The powers delegated by the Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; ...The powers reserved to the States will extend to all the objects which in the ordinary course of affairs; concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State*." James Madison, "Federalist" No. 45, Jan. 26, 1788.

"*(T)he United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted*." Pollard v. Hagan, 44 U.S. 212

(Note: The statement above from Pollard, that the United States government has no power to take lands within the boundaries of a state by the exercise of the right of eminent domain, has been overruled by the Supreme Court of the United States in Kohl v. United States, 91 U.S. 367, 1875. without any reference to this statement. A quotation of a single sentence from Cooley on Constitutional Limitations is cited by the court, and relied upon and totally eschewing first constitutional principles and "*whole cloth*" analysis.)

"*RESIDUARY AND INVIOLABLE*" STATE SOVEREIGNTY AS MERE "*TRADITION*"

In National Parks Conservation Association v. Garfield County in the federal District Court of Utah, 2000, the federal government asserted regulatory authority over a Garfield County, Utah, road. This road was claimed by the county pursuant to the RS 2477 grant of right to construct and to hold the same:

"[T]*he United States asserts that Congress and its delegate, the Secretary of the Interior, retain the power under the Property Clause to regulate the use and maintenance of a right-of-way that traverses national park lands*." (Note: The road in question was constructed and in use long before the park land over which it passes was designated as a national park.)

In this Garfield County case, the federal government relied upon the words of the Kleppe court to assert that it has the power to "*prejudice*" the claims of the county and the State to their sovereign jurisdiction over their jointly held right-of-way, the Claims Clause of the U.S. Constitution and its standing as Supreme Law of the Land notwithstanding:

"*Under Kleppe, then, where Congress exercises the Property Power for purposes of managing the public lands, that exercise will be sustained even if it intrudes into subject areas that are* ***traditionally*** *a matter of state power, authority, and control*." U.S. v. Garfield Co, Ut. D. Ut. 2000. (emphasis added)

The Tenth of the Bill of Rights reads: "*The 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*." James Madison referred to those "*reserved*" powers under the Tenth as a "*residuary and inviolable sovereignty*." (Reference Madison, footnote 6, pg. 5) Clearly the federal court does not see these residual State powers as either sovereign or inviolable. Nor does the court see these powers as the Supreme Law of the Land even though their preservation is no less than a constitutional mandate under both the Tenth of the Bill of Rights and the Article IV Claims Clause. It seems to be a tactic of the federal courts to refer to some aspect of the State's "*residuary and inviolable sovereignty*" as merely a "*traditional*" matter. Once the courts have made this degrading characterization, they, and

the Congress as well, clearly see no problem with stripping the States of it whenever doing so suits their purposes. And, of course, once the matter is swept into the federal body, it **then** becomes Supreme Law although, in truth, it is nothing more than usurpation.[40] Nonetheless, the only thing that Congress is required by the federal court to do when ever it sets about to strip the States of more of their retained "*residuary and inviolable sovereignty*" is to make its intentions clear.[41] By this collusion between the federal judiciary and Congress, the very notion of inviolable State sovereignty is insulted and degraded.[42] Our federal system of divided sovereign powers, finely crafted as it was by the Framers, is denied by others who have sworn an oath before their electorate to protect it. The people's liberty as realized through the hard-won gift of sovereign Republican self-governance at the State level is incrementally stolen. This behavior on the part of the federal courts and of Congress is nothing less than alteration of the form of government set down by the people in their Constitution and such alteration by means other than that which is provided under Article V of the Constitution is treason.[43] The greater tragedy is that the States and the people have done little to reverse the trend or to hold their federal agents to account.

HIGHWAYS PURSUANT TO RS 2477 ARE PUBLIC STATE ROADS

The term "*highway*" as used in the RS 2477 grant is defined, in part, as "*a public road*."

Definition: **Highway** - "*A public road.*" "*A way open to all passengers*." Noah Webster, An American Dictionary of the English Language, 1828.

Definition: **Highway** - "*The generic name for all kinds of public ways whether carriage*

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[40] "*It will not follow that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies* (States), *will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such*." Hamilton, "Federalist" No. 33, Jan. 3, 1788.

[41] "*[I]f Congress intends to alter the `usual constitutional balance between the States and the Federal Government,' it must make its intention to do so `unmistakably clear in the language of the statute*." Gregory v. Ashcroft, 501 U.S. 452, 461, 1991, citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 1985. "*This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere*." Gregory v. Ashcroft, 501 U.S. 452, 1991. "*Atascadero was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention `clear and manifest' if it intends to preempt the historic powers of the States*." Gregory v. Ashcroft citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 1947.

[42] "*Our traditional forms of democracy are jeopardized by the tendency to remove decisions on public policy and its application from the localities and states to Washington*." Leonard D. White, "The States and the Nation," 5 (1953) from Berger, "Federalism: The Founder's Design," 57, 1987.

[43] Definition "Treason": *the offense of acting to overthrow one's government or to harm or kill its sovereign; a violation of allegiance to one's sovereign or to one's state; betrayal of a trust or confidence, breach of faith; treachery; a handing over or betrayal*." "Webster's Encyclopedic Unabridged Dictionary of the English Language," 1996.

roads, bridle roads, foot roads, bridges, turnpike roads, railroads, canals, ferries or navigable rivers." 6Mod. 255, 3 Kent 432, City of St. Louis v. Bell Place Realty Co. 259 Mo. 126, 168 S.W. 721, 722, Black's Law Dictionary, 4th Edition.

We now refer to the Enabling Act of the State of Utah to illustrate how Congress, upon the advent of Utah statehood in 1896, withdrew its Territorial jurisdiction over the lands and highways of the new State. This was accomplished by means of section 19 of that Act which reads as follows:

"*... and all laws in force made by said Territory at the time of its admission into the Union shall be in force in said State, except as modified or changed by this Act or by the constitution of the State; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States.*" Utah Enabling Act, Section 19, July 16, 1894.

Section 19 says that the Territorial laws become State laws or "*laws in said State*." This conversion of Territorial laws to State laws must include all laws pertinent to "*highways*." If Territorial laws applied throughout the Territory, including upon the public lands as they undeniably and necessarily did, then State laws must apply throughout the new State or "*in said State*" as well, including upon the public lands. State laws, which are the literal expression of State sovereignty, must apply on public lands not only as a matter of sovereign equality with the original States but also because there is **no** exception made for these lands in the State's enabling act compact. Federal **governmental** jurisdiction is reserved only over "*Indian lands*" under Section 3, second of this Act. And by Section 20 of the Utah Enabling Act compact, all laws which may conflict with the terms of the Act, whether federal of State, are repealed:

"*(A)ll acts or parts of acts in conflict with the provisions of this act, whether passed by the Legislature of said Territory or by Congress, are hereby repealed*." Utah Enabling Act, Section 20, July 16, 1894.

With this provision in the Utah Enabling Act, federal governmental supervision that had been exercised by Congress over the land and people while in the Territorial condition was to be expelled and no longer functional in the new State. All that was to remain of the United States within the new State was their temporary proprietorship over the public lands, their obligation to dispose of these lands, and the powers enumerated to the union of the States and to their Congress under the Constitution.[44] (Reference Pollard v. Hagan, pg. 10)

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[44] "*The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the state, so far from perpetuating any particular institution previously established, admitted it 'on an equal footing with the original states in all respects whatsoever.' The regulation, although embracing provisions of the ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a state and the adoption of a state Constitution, than other acts of Congress for the government of the territory. All were superseded by the state Constitution*." Hawkins v. Bleakly, 243 U.S. 210 (1917) citing Permoli v. New Orleans, 3 How. 589, 610, 11 L. ed. 739, 748; Coyle v. Smith, 221 U.S. 559, 567 , 570 S., 55 L. ed. 853, 858, 859, 31 Sup. Ct. Rep. 688; Cincinnati v. Louisville &

STATES AND THE SOVEREIGN POWER OF EMINENT DOMAIN

The Court has recognized each State's right of eminent domain as an integral portion of their inviolable claim to independent territorial sovereignty:

> "*No one doubts the existence in the State governments of the right of eminent domain, a right distinct from and paramount to the right of ultimate ownership.* ***It grows out of the necessities of their being****, not out of the tenure by which lands are held. It may be exercised, though the lands are not held by grant from the government.... The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law*." Kohl v. U.S., 91 U.S. 367, 1875. (Emphasis added)

We assert that there is no exclusion of public lands from the operation of sovereign State eminent domain within the terms of State enabling act compacts. Only State taxation and State laws governing descent or conveyance of title are excluded from operation upon public lands within State borders and these exclusions were to be temporary pending the lands disposal and extinguishment of the federal title therein. In the absence of an exclusion, in express terms, of some portion of the public lands from the operation of State sovereignty and jurisdiction, as was the case with "*Indian lands*" in the instance of the Utah Enabling Act compact, those lands must be recognized as **subject to** State eminent domain.

The federal power is to "*admit States*," not federal dependencies or provinces or other such degraded, non-self-governing tracts. This precisely limited federal power lies at the root of the Equal Footing Doctrine. The character of newly admitted States must be equal to that of the original States. Simply put, "a State is a State is a State." The United States can not withhold from a prospective new State, as a condition of its admission into the Union, any of those powers or attributes which rightfully belong to it as one admitted into the Union upon an equal footing with the original States, "*in all respects whatever*:"

> "*The power of Congress in respect to the admission of new states is found in the 3d section of the 4th article of the Constitution. ... But what is this power? It is not to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union. It is, as strongly put by counsel, a 'power to admit states*." Justice Lurton, Coyle v. Smith, 221 U.S. 559, 1911.

There are those who assert that new States did, in fact, give up their right to sovereignty and jurisdiction over the public lands within their borders by terms of their enabling act compacts and that they did so as a condition of their admission into the Union of States. Those who make this assertion point to language in each new State's enabling act compact which requires that the people of the Territory, before attaining statehood, "*forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof*." While State enabling act compacts do include this disclaimer, perhaps by different words but to the same effect, the people living in the respective

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N. R. Co. 223 U.S. 390, 401 , 56 S. L. ed. 481, 484, 32 Sup. Ct. Rep. 267.

Territories do not, by these words, relinquish territorial sovereignty or jurisdiction which are governmental terms that are distinct from common, proprietary "*right and title*." Disclaimation of "*right and title*" was no more than the giving up of "*proprietorship*" and not sovereignty:

> "*Although Arkansas has,..., conferred on Congress power to pass laws, civil and criminal, for the administration and control of lands acquired by the United States in Arkansas, it has ceded exclusive legislative jurisdiction neither over lands reserved by the United States from the public domain nor over lands acquired in the state. It follows that the state has retained its legislative jurisdiction, which it acquired by statehood, over public lands within the state, which have been included within the forest reserve*." "***We conclude that the state has legislative jurisdiction over the federal forest reserve lands located within it, whether they were originally a part of the public domain of the United States, or were acquired by the United States by purchase***,...." Wilson v. Cook, 352 U.S. 474, 1946.[45] (emphasis added)

Conveyance of common "*right and title*" is not a sovereign act. Neither sovereignty nor jurisdiction are affected by such conveyance: "*The sale itself was not a legislative act. It was not an act of severeignty* (sic), *but a mere conveyance of title*." Fletcher v. Peck, 10 U.S. 87, 1810.

Every new State, beginning with the first new States established under the Northwest Ordinance of 1787, was required to disclaim ownership of "*right and title*" in the public lands within its borders. President Jackson explained the purpose of this disclaimer in his Veto of the Land Bill of 1833.[46] The purpose of this disclaimer, he said, is to provided Congress with the "*unshackled*" ability to dispose of the public lands in obedience to its obligations under the Resolution of October 10, 1780 and under the affirming land cession compacts between the United States and certain of the original States. And, as a consequence of the Act of March 2, 1805 which was previously discussed, we know that this obligation for public land disposal was extended to the benefit of new States which arose out of lands acquired directly by the United States from "*foreign governments*." The requirement placed upon the people of the respective federal Territories that they yield up proprietary "*right and title*" to the public lands within the borders of their future new States did nothing to diminish those new States

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[45] "*What is most significant about this 1946* (Wilson) *holding is that the opinion of Chief Justice Stone for the Court clearly endorsed the classic doctrine that the state's jurisdiction was the same over federal land as over that of private proprietors, and that the state's power could be overridden only pursuant to the federal government's enumerated powers, the article IV property power itself not being a power of* ***governmental*** *jurisdiction*." David E. Engdahl, Arizona Law Review, Vol. 18, No. 2, 1977. (emphasis added)

[46] "*This condition* (the requirement for cession of proprietary "*right and title*") *has been exacted from the people of all the new territories; and, to put its obligation beyond dispute, each new State, carved out of the public domain, has been required explicitly to recognise* (sic) *it as one of the conditions of admission into the Union. Some of them have declared through their conventions, in separate acts, that their people "forever disclaim all right and title to the waste and unappropriated lands lying within this State, and that the same shall be and remain at the sole and entire disposition of the United States. With such care have the United States reserved to themselves, in all their acts down to this day– in legislating for the Territories and admitting states into the Union–the unshackled power to execute in good faith the compacts of cession made with the original States*." President Andrew Jackson, Veto of the Land Bill, Message from the President of the United States, Returning the Land Bill, Dec. 5, 1833.

as to political rights or sovereignty relative to the original States just as Congress was given "*nothing*" in terms of sovereign legislative or administrative power with which it might "*prejudice*" the sovereign "*claims*" of any State, including every new State:

> "*Clearly, Congress could exact of the new State the surrender of no attribute inherent in her character as a sovereign independent State, or indispensable to her equality with her sister States, necessarily implied and guarantied by the very nature of the federal compact. Obviously, and it may be said primarily, among the incidents of that equality, is the right to make improvements in the rivers, water- courses, and highways, situated within the State*." Withers v. Buckley, 61 US 84, 1857.

> "*This Union' was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union, through the power of Congress to admit new states, might come to be a union of states unequal in power, as including states whose powers were restricted only by the Constitution, with others whose powers had been further restricted by an act of Congress accepted as a condition of admission. Thus it would result, first, that the powers of Congress would not be defined by the Constitution alone, but in respect to new states, enlarged or restricted by the conditions imposed upon new states by its own legislation admitting them into the Union; and, second, that such new states might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further bargained away as conditions of admission.*" Coyle v. Smith, 221 U.S. 559, 1911.

We assert that there is no room for doubt, when the historical record is consulted with intellectual integrity, that complete and unassailable territorial sovereignty and jurisdiction are the inviolable rights of States which have been admitted into the Union upon an equal footing with the original States, "*in all respects whatever*." This complete territorial sovereignty and jurisdiction necessarily includes the right to exercise the sovereign power of eminent domain for public purposes. The sovereign power of eminent domain includes the power to take land, upon payment of just compensation, for the construction of "*highways*" for public use. The sovereign power to construct "*highways*" for public use necessarily includes the power to regulate those "*highways*." Irrespective of court opinion to the contrary, the federal government has no constitutional authority whatever to "*prejudice*" these sovereign "*claims*" of the States, by way of either law or regulation. Much less may the States be legally stripped of these attributes of sovereignty under the pretense that they are merely "*traditional*" matters. This right of the States to construct and regulate "*highways*" without federal interference must be "*ubiquitous*" upon all of the land within their borders including upon public lands excepting only those lands which may have been reserved to federal governmental jurisdiction by terms of a Territory's enabling act compact with the United States. In this case these lands are no longer public lands but federal enclaves.

It would seem that such observations as those above would be self-evident given that the federal government is delegated only limited and enumerated powers, and these for "*different*

purposes" from those retained by the States. (Reference Mr. Pendleton, pg. 34) Moreover, the Constitution under which the federal government was formed was both written and ratified by the States. These States would not have knowingly given birth to a government that was empowered to bring about their demise by way of prejudicing their sovereign claims including their sovereign territorial claims:

> "*There was a good reason, why congress should be only entrusted* (under the Admissions Clause) *with the naked power 'to admit'* (States). *Had it been empowered to annex conditions to this admission, it might easily have enlarged its own powers, and obtained an authority dangerous to the thirteen original states. It was foreseen, that the new would in time exceed the old states, in number and population; and the old states, therefore, for their own security, withheld from congress the dangerous power of modifying the new, by conditions; as such a power might easily be brought to bear upon themselves, and might be used materially to alter the constitution*." John Taylor, "Construction Construed and Constitutions Vindicated," 1820, ed. by Jon Roland, 2002.
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> *"It is safe to say that if, when the constitution was under consideration, had it been thought that any such danger* (usurping the power of the States) *lurked behind its plain words, it would never have been ratified.*" Carter v. Carter Coal Co., 298 U.S. 238, 1936.

Authoritative writings, as compiled in this paper, conflict diametrically with the robust assertion of federal power set down in Kleppe v. New Mexico. This conflict demonstrates the importance of **faithful** recurrence to historical context and first constitutional principles whenever there is need to resolve a federalism question arising between the sovereign States and the enumerated, conventional government of their union. The Court itself has spoken to the importance of history and context in understanding the requirements of the Constitution:

> "*The values of the Framers of the Constitution must be applied in any case construing the Constitution. Inferences from the text and history of the Constitution should be given great weight in discerning the original understanding and in determining the intentions of those who ratified the Constitution. The precedential value of cases and commentators tends to increase, therefore in proportion to their proximity to the adoption of the Constitution, the Bill of Rights, or any other amendments*." Powell v. McCormack, 395 U.S. 486, 1969.

RS 2477 IN THE TERRITORIES

As a benefit offered and not expressly declined, the RS 2477 grant became the law in every federal Territory. The "*right-of-way*" for the "*construction*" of "*highways*" which was granted under the statute supplied a specific authority, akin in its effect to the sovereign power of eminent domain, which did not previously exist in the Territories but which is necessary for one party not otherwise possessing sovereign powers to take the property of another for public purposes. By necessary implication, the grant also provided that no payment was necessary for the lands thus taken because the right to take them without payment for the purpose stated was, "*hereby granted*." And because there is

no legislature in the pre-statehood Territories, only subordinate Territorial Assemblies functioning under the supervision and veto authority of Congress, the authority granted under RS 2477 must have been possessed by any person who had need to construct a "*highway*" upon the unreserved public lands. The only qualification upon this construction would be that the passage thus constructed must be open to public use which is to say, a "*highway*."

RS 2477 IN THE POST-TERRITORIAL STATES

Upon the advent of statehood for a given Territory one might ask what becomes of the sovereign power that individuals possessed under the RS 2477 grant in the pre-statehood Territorial condition? It can only be that, within the States, individuals no longer possess this power akin to eminent domain over the public domain as they had in the pre-statehood Territorial time. Upon the advent of a new State, the sovereign power of eminent domain vests in the State legislature which, in turn, assigns this power to its subordinate municipal jurisdictions as the public need requires. Nonetheless, until the passage of FLPMA in 1976, individuals often built "*highways*" upon the public domain for the purpose of accessing mines, watering sites and for other purposes. Since these individuals did not engage in these projects with individual sovereign authority, they must have done so with the simple acquiescence of the State sovereign. Congress, of course, takes the opposite view. With its passage of FLPMA, Congress presumes to revoke that which was irrevocably granted under RS 2477. For so long as this federal view holds sway before the federal courts, States may not construct "*highways*" upon the public domain at their own behest. Any construction, modification, or maintenance of "*highways*" on these lands must be in accord with federal agency management plans.

The authority granted under RS 2477 in 1866 is not the original source of a State's sovereign right to construct "*highways*" upon the public domain within its borders. As previously discussed, States rightfully possess the power of eminent domain over the full extent of their territory as a proper function of their inherent and pre-existing sovereignty - pre-existing in the sense that the States were sovereigns of their soil and independent of any other authority on Earth upon their declaration of independence in 1776 and long before they created their conventional government under their Constitution. Since the States possess the sovereign power of eminent domain as an inherent and reserved sovereign power, we assert that the "*right-of-way*" granted under RS 2477 has limited utility within the post-Territorial States. Within States, the grant merely duplicates a sovereign power originally and rightfully possessed by the first States and equally possessed by every new State under the Equal Footing Doctrine. However, within the States the RS 2477 grant does offer the limited but useful utility, as it did within the Territories, of exempting the sovereign constructor of "*highways*" upon unreserved public lands from the responsibility for monetarily compensating the federal proprietor for the lands thus taken because the "*right-of-way*" to take them for this purpose without cost was "*hereby granted*" in 1866.

THE ACT OF 1841 AFFIRMS STATE EMINENT DOMAIN UPON PUBLIC LANDS

Through recurrence to the historic record of the Union of States beginning with the Resolution of Congress of October 1780, this paper has demonstrated that States admitted into the Union upon an equal footing with the original States are entitled to the eminent domain over all of the territory within their borders including those public lands which were not reserved for public uses by terms of their

enabling act compacts with the United States. Further evidence in support of this statement is found in the Act of Congress of 1841 and also in the enumerable land grants made to the new States by terms of their enabling act compacts with the United States. While the Act of 1841 and the several State enabling act compacts all granted vast expanses of public lands to the States, none of these acts included a grant of right-of-way over other public lands which would be necessarily taken in gaining access to the granted lands. It must have been understood by Congress that no such grant of right-of-way was necessary when these lands were being granted to States, as distinguished from Territories, because States inherently possess the sovereign power of eminent domain. Note in reading the following excerpt from the Act of 1841 that it pertains to States and not to federal Territories. Federal Territories did not possess anything like an independent power of eminent domain over the unreserved public domain until passage of RS 2477 twenty-five years later:

> "*And be it further enacted, That there shall be granted to each State specified in the first section of this act five hundred thousand acres of land for purposes of internal improvement;*" "*...the selections in all of the said States, to be made within their limits respectively in such manner as the Legislature thereof shall direct;*" "*Sec. 9. And be it further enacted, that the lands herein granted to the States above named shall not be disposed of at a price less than one dollar and twenty-five cents per acre, until otherwise authorized by a law of the United States; and the nett proceeds of the sales of said lands shall be faithfully applied to objects of internal improvement within the States aforesaid, respectively, namely: Roads, railways, bridges canals and improvements of water-courses, and such roads, railways, canals, bridges and water-courses, when made or improved, shall be free for the transportation of the United States mail, and munitions of war, and for the passage of their troops, without the payment of any toll whatever.*" 1840 Ch. 36, pg. 455, Twenty-Seventh Congress, Sess. 1, Ch. 16, 1841.

The significant points from this Act of 1841 which bear upon the present RS 2477 contest may be summarized as follows:

- The Act pre-dated RS 2477 by twenty-five years.
- The Act is a tacit acknowledgment by Congress that States are the road building authority within their borders. (Reference Withers v. Buckley, pg. 40)
- A quantity of public lands within the States was granted to the States proving that the respective States did encompass public lands.
- The instruction to use the proceeds from the sale of granted lands for the construction of public roads and for other public purposes such as the support of public schools did **not** include either an express or an implied grant of right-of-way over **other** public lands which undoubtedly would be necessarily taken in order to access the granted lands.

Two facts are established here which we believe are essential to a just and constitutionally correct resolution of the RS2477 controversy. First, States inherently possess, as a sovereign and supreme claim not subject to prejudice by any power delegated to the government of their union, the eminent domain over all of the territory within their borders including that public domain which was not reserved for public uses by terms of their respective enabling act compacts with the United States. Second, States also possess the right to take public lands for the construction of "*highways*" without compensation to the United States because the "*right-of-way*" to do so was expressly granted, and that which is expressly granted may not be retaken or revoked even though the grantor may assert supremacy.

TERRITORIAL "BONDAGE" - PAST HISTORY AND CURRENT REALITY

This paper proposes that the "*right-of-way*" to "*construct highways*" which was irretrievably "*hereby granted*" under RS 2477 is indistinguishable from and therefore a tautology or duplication of the territorial rights that are inherent in every State. The only exception to the otherwise unimpeded exercise of independent State territorial sovereignty and jurisdiction upon the public domain is the temporary exemption of that land from State taxation and from disposal under State property laws.[47] State territorial sovereignty was understood by the Utah Territory's highest official to be the grand object of ascendency to the dignity and stature of statehood:

> "*Our happiness consists largely in coming here and laying aside and sundering and absolutely abandoning the bondage of a Territorial system and from this time forth we will exercise every right and every privilege of free-born American citizens*." Acting Governor C.C. Richards, Utah statehood day, *Salt Lake Tribune*, Jan. 4, 1896.

The reference to "*territorial bondage*" here is not mere rhetorical hyperbole. Within a federal Territory, the Governor, Secretary of State, Chief Justice and associate justices of the Territorial courts, and the Attorney and Marshall for the Territory were all nominated and, with the advice and consent of the Senate, appointed to their respective offices by the President of the Union of States. Territorial judges served at the pleasure of Congress for a term of four years and not during good behavior. Although these were all political appointees, none of them were politically accountable to those over whom they were empowered to govern or preside. The enactments of the locally elected Territorial Assembly were subject to review and approval, or rejection, by Congress. These are the conditions which *The Salt Lake Tribune*, at the time of Utah statehood in 1896, referred to as "*territorial thralldom*" echoing the sentiments of Acting Gov. Richards. (Reference *The Salt Lake Tribune*, January 4, 1896)

Today however, pursuant to the Kleppe decision and the several prior decisions upon which it presumes to rest, Congress exercises "*complete*" legislative jurisdiction, "*without limitation*," and also a power described as "*analogous to the police power of the several states*"over the public lands within

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[47] "*A state has a perfect right to legislate as she may please, in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens, by descent, devise or Alienation*." Wilcox v. Jackson, 13 Peters 498, 1839. Also reference footnote 26, U S v. Fox, 94 U.S. 315, 1876.

the States. Under Kleppe, federal municipal enactments upon public lands, regardless of their subject matter, defeat State law in every instance of conflict as a consequence of the Supremacy Clause. For these reasons, it is clear that, pursuant to Kleppe, all public lands within the several so-called "*public land states*" remain as federal jurisdictional Territory just as they were federal jurisdictional Territory the moment before their respective proclamations of statehood by the President one hundred years ago or more. By no means can this condition in these States be construed as equality of sovereignty and political rights relative to the original States.

The current controversy over State claimed "*highways*"which traverse public lands is evidence that the federal government intends to perpetuate and enforce, through permanent ownership and supreme police powers, "*the bondage of a Territorial system*" upon the public lands within the several States. This is no less an oppressive and degrading Territorial system simply because we refer to these as "*public lands*" or as a "*national heritage*." The fact is, public lands, as they currently exist, represent the demise of our "*national heritage*" of a federalist system of limited and enumerated powers in the national government and "*residuary and inviolable sovereignty*" in the States. It must be remembered that by Article IX of the Articles of Confederation, "*no State shall be deprived of territory for the benefit of the United States*" and that, pursuant to the Claims Clause, the enumerated government of this union was given no power whatever to "*prejudice*" the sovereign territorial claim of any State. If the present RS 2477 contest should be brought before the Court within its proper constitutional and historical context, and if this contest should result in a judicial affirmation of sovereign State territorial jurisdiction and eminent domain upon the public lands, as we believe justice demands, then it can be fairly said that RS 2477 "*highways*" have proven to be the State's "*road out of Territorial bondage*."

RS 2477 VERNACULAR

It has been said that we have lost the ability to think and to speak about government in the terms of the Framers. Evolution in the interpretation of the words "*needful rules and regulations*" in the Property Clause, as previously discussed, provides a case in point.

Evolution in the scope and reach of government is rooted substantially though not entirely in evolution of the words we use to conduct it. Consider again the words of Revised Statute 2477:

> "*(T)he right-of-way for the construction of highways over public lands, not reserved for public uses, is hereby granted*."

From these few words, which constitute the totality of the statute, certain conclusions are unavoidable when they are given their plain, "*necessary and unavoidable construction*." This clarity is lost, however, when the words used to describe the grant, and also to prosecute the present contest over it, are different. Different words do not convey the same meaning or implication as the actual words of the statute. Consider the following comparisons between the words of the 1866 statute and the words that are being used today by both sides in the RS 2477 contest:

- The "**grant**" is now referred to as an "**offer**." An offer implies the need for a subsequent act of

acceptance. A grant requires no such subsequent act on the part of the grantee.

- The grant of a **singular** right-of-way is today referred to as "**grants** of **rights**-of-way." (43 C.F.R. sec. 2822.1-1, October 1, 1974) This misconstruction from the singular to the plural interjects the implication that it is individual "*highways*" that are the substance of the grant when, in fact, that which was granted was not physical "*highways*" but the singular authority or "*right-of-way*" to construct them.

- Where no federal role in the exercise of the right which was "*hereby granted*" was either expressed or implied, federal agencies now assert that they may or may not **"recognize the validity**" of a constructed "*highway*." This alleged federal role of recognition and approval necessarily implies a federal right to deny to a State that sovereign power which it possesses as an inherent right of statehood and which it **also** possesses by virtue of an expressed and irretrievable congressional grant.

- Where no federal highway standards, such as method of construction, consistency of maintenance, or manner of use were either expressed or implied under the federal grant, federal agencies nonetheless assert that they will determine whether "*highways*" constructed pursuant to the sovereign right of the States are **"valid"** based, in part, on these standards.

- Where a "*right-of-way*" was expressly "**hereby granted**" the word now used is not "**granted**" but "**issued.**" (43 U.S.C. Sec. 2801.4, Feb. 254, 1986) The word "**issued**" suggests "revocability" in subtle but significant contrast with the actual words of the 1866 grant.

- Even though the right-of-way was "**hereby granted**" and no further federal action was required or implied, the federal court has nonetheless referred to, **"the perfection of an RS 2477 right-of-way**." (Sierra Club v. Hodel, 848 F. 2d at 1080) If there is any need to "**perfect**" a State "*highway*," it must be done pursuant to State law as the singular, and not concurrent, sovereign of the soil. Moreover, it is not correct to refer to these "*highways*" as "*RS 2477 rights-of-way*." Correctly stated, they are State rights-of-way constructed pursuant to rightful State sovereignty and also pursuant to the right to construct upon the public lands which was expressly and irretrievably granted by that body with the delegated authority to do so.

- And again, even though the right was "**hereby granted**" the federal court refers, nonetheless, to **"a standing offer**." Streeter v. Stalnaker, 61 Neb. 205, 1901.

- And again, even though the right was "**hereby granted**," lower federal courts have referred to "**the offer of a grant**." Wilkensen v. Dept. of Interior of United States, 634 F.Supp. 1265, D. Colo. 1986. That which is merely "**offered**" has not been actually yielded up and may, impliedly, be withdrawn or revoked. By contrast, the plain words of the grant are "**hereby granted**." Present day federal courts fail to acknowledge that a grant, "*is a contract executed*." (Reference Fletcher v. Peck, pg. 4)

Evolution in the words used to engage in the RS 2477 contest does more than merely obscure the true nature and intended effect of the RS 2477 grant. Linguistic evolution, whether intentional or in error, deflects the course of legal inquiry toward ends not intended by the law giver and, in this instance, destructive of the rights of the beneficiaries. In the instance of the RS 2477 grant, a matter of strictly State interest has become lost in a morass of pretensions to federal power that are demonstrably repugnant to the Constitution and also to the federated system that it was painstakingly crafted to preserve.

CONCLUSIONS

As was the case in Pollard v. Hagan in 1845, the present contest over the RS 2477 grant is a contest of constitutional proportions and character. Unfortunately, it has yet to be prosecuted in that light. The position of the States in this contest must be that they hold sovereign and inviolable jurisdiction over all of that territory within their borders which was proclaimed to be "*the State*" by presidential proclamation and which was not reserved to federal jurisdiction by terms of an enabling act compact with the United States. Most certainly the States retain sovereignty and jurisdiction over their traveling infrastructure including the right to construct and maintain such infrastructure; and this State sovereignty is the unimpeachable Supreme Law of the Land pursuant to the constitutional Claims Clause.

Territorial sovereignty, upon the advent of statehood for a given federal Territory, was temporarily restrained only to the extent that public lands remaining there could not be taxed by the States and they could not be subjected to the municipal sales and conveyance laws of the States pending their disposal and extinguishment of the federal title in them.

Consider the instance of the State of Utah. If this State has no eminent domain authority upon the public lands within its borders, then its independent "*residuary and inviolable sovereignty*" does not go there either. If this sovereignty of the State of Utah does not extend to the public lands within its borders then it can not be said that these lands are "*of*" the State. If these lands are not "*of*" the State then Utah's enabling act compact with the United States is violated because, by its terms, "*all that part of the United States*" which was then known as the Territory of Utah was committed to the purposes of the new State. Only "*Indian lands*" were reserved, by terms of the compact, to the "*absolute jurisdiction*" of the Congress. We contend that this breach of compact is actionable at law and that the State is duty bound to bring such action in obedience to the oath of office taken by its officers and in defense of the sovereign rights of its citizens. This reasoning does not apply only to Utah. It applies to every State established out of a former federal Territory and which still holds public lands within its borders.

It is not possible to square either the notion of "*concurrent jurisdiction*" or the condition permanent federal Territorial status for public lands with the formative history of our federal union. Moreover, application of the Supremacy Clause to an "*expansive reading*" of a single phrase in the Property Clause ("*make needful rules and regulations*") without consideration of the implications of such a reading for other provisions of the Constitution has resulted in nothing less than destruction of the notion of inviolable State sovereignty, and this to the great detriment of our federal system. The Claims Clause was intended to be a most distinct line of defense against such federal usurpation but this and other intended constitutional protections for retained State sovereignty have proven to be inadequate when placed into the care and keeping of what has been termed "*ingenious men*."

Some contend that the RS 2477 grant was a grant "*in presenti*," or "*in the present time*." By this view, it is said that the words of the statute do not constitute an actual grant. Rather, by this view, no true grant is made until actual construction takes place on the land. The rights of the constructor under the grant become affixed only "*at the time*," of construction. It is this view of the RS 2477 statute which allows some to contend that the statute itself is no more than a revocable "*offer*" since the "*grant*" comes into being only upon "*perfection*" by way of construction. Besides being a perversion of the plain text of the statute, the fatal flaw in this "*reasoning*," if it may be so termed, is this. If the grant becomes "*perfected*" only upon completion of construction, then construction must take place prior to the federal grant of authority. This sequence of events is illogical. The words of the statute are, "*The right-of-way for the construction ...* ***is hereby granted***." We therefore assert that, within the context of RS 2477, the notions of "*in presenti*" and post-construction "*perfection*," are simply misguided sophistry.

The court has said that, "... *(W)here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning is excluded*." Green v. Biddle, 21 U.S. 1, 1821. We assert that the presumption by Congress that it might retake that which was expressly granted and the denial by the federal courts of a ubiquitous right of State territorial eminent domain, which every State rightfully possesses as a function of its own retained "*residuary and inviolable sovereignty*," are no less than acts of naked aggression by one government upon the sovereign rights of another and also flagrant violations of a solemn trust and supreme law.

A proper and constitutional resolution of the present RS 2477 contest would result in the public lands of the several States being released from extra-constitutional "*special maritime and territorial jurisdiction*." Unimpaired State sovereignty and jurisdiction would then come to the fore in full measure throughout each State's respective territory as was intended by both the Framers and the respective presidential proclamations of statehood. By this result, the States and their territories will, at long last and for the first time, be released from the "*thralldom*" and "*bondage*" of the degrading federal Territorial system and be admitted into the Union of States upon an equal footing with the original States as to both political rights **and** sovereignty. Only then will statehood celebrations for these eleven western so-called "*public lands States*" have full meaning. In addition, a gross hegemony and usurpation of sovereign State's rights will have been halted and reversed thereby restoring, in some measure, the federalist system which has been the guardian of our liberty and the source of our prosperity since the days of the Framers and that era of extraordinary patriotism.

ENDNOTES

1.

UTAH STATE ENABLING ACT, Approved, July 16, 1894.

AN ACT to enable the People of Utah to form a Constitution and State Government, and to be admitted into the Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Utah, as at present described, may become the State of Utah, as hereinafter provided.

SEC. 2. That all male citizens of the United States over the age of twenty-one years who have resided in said Territory for one year next prior to such election are hereby authorized to vote for and choose delegates to form a Convention in said Territory. Such delegates shall possess the qualifications of such electors; and the aforesaid Convention shall consist of one hundred and seven delegates, apportioned among the several counties within the limits of the proposed State as follows: Beaver County, two delegates; Box Elder County, four delegates; Cache County, eight delegates; Davis County, three delegates; Emery County, three delegates; Garfield County, one delegate; Grand County, one delegate; Iron County, one delegate; Juab County, three delegates; Kane County, one delegate; Millard County, two delegates; Morgan County, one delegate; Piute County, one delegate; Rich County, one delegate; Salt Lake County, twenty-nine delegates, thus apportioned, to-wit: Salt Lake City, First Precinct, four delegates; Second Precinct, six delegates; Third Precinct, five delegates; Fourth Precinct, three delegates; Fifth Precinct, three delegates; all other precincts in said county outside of Salt Lake City, eight delegates; San Juan County, one delegate; San Pete County, seven delegates; Sevier County, three delegates; Summit County, four delegates; Tooele County, two delegates; Uintah County, one delegate; Utah County, twelve delegates; Wasatch County, two delegates; Washington County, two delegates; Wayne County, one delegate; and Weber County, eleven delegates; and the Governor of said Territory shall, on the first day of August, eighteen hundred and ninety-four, issue a proclamation ordering an election of the delegates aforesaid in said Territory, to be held on the Tuesday next after the first Monday in November following. The board of commissioners known as the Utah Commission is hereby authorized and required to cause a new and complete registration of voters of said Territory to be made under the provisions of the laws of the United States and said Territory, except that the oath required for registration under said laws shall be so modified as to test the qualifications of the electors as prescribed in this act, such new registration to be made as nearly conformable with the provisions of such laws as may be; and such election for delegates shall be conducted, the returns made, the result ascertained, and the certificate of persons elected to such Convention issued in the same manner as is prescribed by the laws of said Territory regulating elections therein of members of the Legislature. Persons possessing the qualifications entitling them to vote for delegates under this act shall be entitled to vote on the ratification or rejection of the Constitution, under such rules or regulations as said Convention may prescribe, not in conflict with this act.

SEC. 3. That the delegates to the Convention thus elected shall meet at the seat of government of said Territory on the first Monday in March, eighteen hundred and ninety-five, and, after organization, shall declare on behalf of the people of said proposed State that they adopt the Constitution of the United States, whereupon the said Convention shall be, and is hereby, authorized to form a Constitution and State government for said proposed State.

The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not to be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said Convention shall provide by **ordinance** irrevocable without the consent of the United States and the people of said State--

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship;

Provided, That polygamous or plural marriages are forever prohibited.

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same **shall be and remain subject to the disposition of the United States,** and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territory, under authority of the Legislative Assembly thereof, shall be assumed and paid by said State.

Fourth. That provision shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

SEC. 4. That in case a Constitution and State government shall be formed in compliance with the provisions of this act, the Convention forming the same shall provide by ordinance for submitting said Constitution to the people of said State for its ratification or rejection, at an election to be held on the Tuesday next after the first Monday in November, eighteen hundred and ninety-five, at which election the qualified voters of said proposed State shall vote directly for or against the proposed Constitution, and for or against any provisions separately submitted. The return of said election shall be made to the said Utah Commission, who shall cause the same to be canvassed, and if a majority of the votes cast on that question shall be for the Constitution, shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said Constitution, articles, propositions, and ordinances. And if the Constitution and government of said proposed State are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of said election, and thereupon the proposed State of Utah shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original States, from and after the date of said proclamation.

SEC. 5. That until the next general census, or until otherwise provided by law, said State shall be entitled to one Representative in the House of Representatives of the United States, which Representative in the Fifty-fourth Congress, together with the Governor and other officers provided for in said Constitution,

may be elected on the same day of the election for the adoption of the Constitution; and until said State officers are elected and qualified under the provisions of the Constitution, and the State is admitted into the Union, the Territorial officers shall continue to discharge the duties of the respective offices in said Territory.

SEC. 6. That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools, such indemnity lands to be selected within said State in such manner as the Legislature may provide, with the approval of the secretary of the interior; provided, that the second, sixteenth, thirty-second, and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

SEC. 7. That upon the admission of said State into the Union, in accordance with the provisions of this act, one hundred sections of the unappropriated lands within said State to be selected and located in legal subdivisions, as provided in section six of this act, shall be, and are hereby, granted to said State for the purpose of erecting public buildings at the capital of said State, when permanently located, for legislative, executive, and judicial purposes.

SEC. 8. That lands to the extent of two townships in quantity, authorized by the third section of the act of February twenty-one, eighteen hundred and fifty-five, to be reserved for the establishment of the University of Utah, are hereby granted to the State of Utah for university purposes, to be held and used in accordance with the provisions of this section; and any portions of said lands that may not have been selected by said Territory may be selected by said State. That in addition to the above, one hundred and ten thousand acres of land, to be selected and located as provided in the foregoing section of this act, and including all saline lands in said State, are hereby granted to said State, for the use of said university, and two hundred thousand acres for the use of an agricultural college therein. That the proceeds of the sale of said lands, or any portion thereof, shall constitute permanent funds, to be safely invested and held by said State, and the income thereof to be used exclusively for the purposes of such university and agricultural college, respectively.

SEC. 9. That five per centum of the proceeds of the sales of public lands lying within said State, which shall be sold by the United States subsequent to the admission of said State into the Union, after deducting all the expenses incident to the same, shall be paid to the said State, to be used as a permanent fund, the interest of which only shall be expended for the support of the common schools within said State.

SEC. 10. That the proceeds of lands herein granted for educational purposes, except as hereinafter

otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools, and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be surveyed for school purposes only.

SEC. 11. The schools, colleges, and university provided for in this act shall forever remain under the exclusive control of said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or of the income thereof, shall be used for the support of any sectarian or denominational school, college, or university.

SEC. 12. That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand by the State of Utah under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant, it is hereby declared, is not extended to said State of Utah, the following grants of land are hereby made to said State, for the purposes indicated, namely:

For the establishment of permanent water reservoirs for irrigating purposes, five hundred thousand acres; for the establishment and maintenance of an insane asylum, one hundred thousand acres; for the establishment and maintenance of a school of mines in connection with the university, one hundred thousand acres; for the establishment and maintenance of a deaf and dumb asylum, one hundred thousand acres; for the establishment and maintenance of a reform school, one hundred thousand acres; for establishment and maintenance of State normal schools, one hundred thousand acres; for the establishment and maintenance of an institution for the blind, one hundred thousand acres; for a miners' hospital for disabled miners, fifty thousand acres. The United States penitentiary near Salt Lake City and all lands and appurtenances connected therewith and set apart and reserved therefor are hereby granted to the State of Utah.

The said State of Utah shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act; and the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the Legislature of the State may provide.

SEC. 13. That all land granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the unappropriated public lands of the United States within the limits of the said State of Utah.

SEC. 14. That the State of Utah shall constitute one judicial district, which shall be called the district of Utah, and the circuit and district courts thereof shall be held at the capital of this State for the time being. The judge of said district shall receive a yearly salary of five thousand dollars, payable monthly, and shall reside in his district. There shall be appointed clerks of said courts, who shall keep their offices at the capital of said State. There shall be appointed for said district one district judge, one United States

attorney, and one United States marshal. The regular terms of said courts shall be held at the place aforesaid on the first Monday in April and the first Monday in November of each year. For judicial purposes, the district of Utah shall be attached to the eighth judicial circuit, and only one grand jury and one petit jury shall be summoned in both of said courts.

SEC. 15. That the circuit and district courts for the district of Utah and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties possessed and required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations.

SEC. 16. That the marshal, district attorney, and clerks of the circuit and district courts of the said district of Utah, and all other officers and other persons performing duty in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the same fees and compensation allowed by law to other similar officers and persons performing similar duties.

SEC. 17. That the Convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the Territory of Utah at the time of the admission of the said State into the Union, to such courts as shall be established under the Constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah: and no indictment, action, or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the State or United States courts according to the laws thereof, respectively. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of said Territory, or that may hereafter lawfully be prosecuted upon any record from said court, may be heard and determined by said Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the said State from or to the supreme court of such State, as the nature of the case may require. And the circuit, district, and state courts herein names shall, respectively, be the successors of the supreme court of the Territory as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of the Territory, mentioned in this act, in any case arising within the limits of the proposed State prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by the law prior to the admission of said State into the Union.

SEC. 18. That the sum of thirty thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the treasury not otherwise appropriated to said Territory for defraying the expenses of said Convention and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial Legislature.

SEC. 19. That the Constitutional Convention may, by ordinance, provide for the election of officers for a full State government, including members of the Legislature and Representative in the fifty-fourth Congress, at the time for the election for the ratification or rejection of the Constitution; but the said State government shall remain in abeyance until the State shall be admitted into the Union as provided by this act. In case the Constitution of said State shall be ratified by the people, but not otherwise, the Legislature thereof may assemble, organize, and elect two Senators of the United States in the manner now prescribed by the laws of the United States; and the Governor and Secretary of State of the proposed State shall certify the election of the Senators and Representative in the manner required by law, and when such State is admitted into the Union, as provided in this act, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all rights and privileges of Senators and Representatives of other states in the Congress of the United States; and the State government formed in pursuance of said Constitution, as provided by the Constitutional Convention, shall proceed to exercise all the functions of State officers; and all laws in force made by said Territory at the time of its admission into the Union shall be in force in said State, except as modified or changed by this act or by the Constitution of the State; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States.

SEC. 20. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the Legislature of said Territory or by Congress, are hereby repealed.

2.

RESOLUTION OF THE CONTINENTAL CONGRESS
October, 10, 1780

"*Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular states, pursuant to the recommendation of Congress of the 6 day of September last, shall be granted and disposed of for the common benefit of all the United States that shall be members of the federal union, and be settled and formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereignty, freedom and independence, as the other states: that each state which shall be so formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: and that upon such cession being made by any State and approved and accepted by Congress, the United States shall guaranty the remaining territory of the said States respectively. ...*" "*That the said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them ....*"