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**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

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| **UNITED STATES OF AMERICA**<br><br>**Plaintiff,**<br><br>**vs.**<br><br>**NYE COUNTY, NEVADA**<br><br>**Defendant.** | **Case No. CV-S-95-00232-LDG-(RJJ)**<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTS I AND IV**<br><br>**ORAL ARGUMENT REQUESTED** |

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MISCELLANEOUS

## I. INTRODUCTION

In this case of first impression the United States requests this Court to declare that the federal government holds sole title to and exclusive sovereignty over approximately 93 percent of Nye County, to the complete exclusion of all state and local jurisdiction. Essentially, such a ruling would divide Nye County into two distinct juridical entities: one entity (consisting of approximately seven percent of Nye County) which attained the full status of statehood in 1864 and is subject jointly to the jurisdiction of federal and state governments under the constitutional system of dual sovereignty, and a second entity (13 times larger than the first) which retains its pre-statehood territorial status as a possession of the United States subject solely to federal jurisdiction and management, free from "interference" by the State of Nevada and Nye County.

The United States concocts this revolutionary theory by selectively choosing phrases from the United States Constitution and the Nevada Enabling Act, while utterly ignoring other provisions of both documents which contradict its claims. The plain truth of the matter is that our constitutional system of dual sovereignty, which allocates to the federal government certain enumerated

powers and reserves to the states the core functions of local government, does not permit the establishment of such a "Nevada Territory" within the borders of the State of Nevada. Nor does the Nevada Enabling Act's guarantee of a republican form of government to the people of Nevada and admission to the Union on an equal footing with the original states, allow of an interpretation that these very rights were bargained away as the price for entering the Union in 1864. The federal government's argument here flies in the face of the Constitution's fundamental mandate of dual sovereignty:

> Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.

United States v. Lopez, 115 S. Ct. 1624, 1638 (1995) (Kennedy and O'Connor concurring).

Plaintiff's entire case boils down to a simple syllogism: (1) the federal government has sole sovereignty over all lands to which it holds title; (2) the Federal Government holds title to 93 percent of Nye County; (3) therefore, the federal government has sole sovereignty over 93 percent of Nye County. The United States then argues strenuously that Congress has decreed that this "Nevada Territory" shall be managed for the benefit of all of the people of the United States, granting to the people of

Nevada no greater or lesser authority over the "Nevada Territory" than the people of, for example, New York, Maine or Alabama. What the United States fails to establish -- and the reason its cause must fail -- is the constitutional authority under which the enumerated powers of the federal government may be enhanced through a state's disclaimer of its core state sovereignty over purely local matters. Indeed, the Supreme Court has consistently held that the powers of the federal government are enumerated in the Constitution, and that any federal legislation which purports to add to these constitutionally enumerated powers by subtracting core sovereign powers from the states is unconstitutional and void. Put simply, if the United States were to prevail in its assertion that the Nevada Enabling Act transferred most of Nevada's sovereignty to the federal government, that provision of the Enabling Act would be unconstitutional and void.

Happily, the Nevada Enabling Act is not unconstitutional because it does not purport to transfer the vast majority of state sovereignty to the federal government. At most, the Enabling Act sought to continue the great westward expansion of the country, fueled in Nevada by historic events such as the discovery of the Comstock Lode in 1859 and the completion of the

Transcontinental Railroad in 1867. Beginning with the Northwest Ordinance in 1787 and continuing through the subsequent acquisitions of territory for our expanding nation (e.g., the Louisiana Purchase and the Treaty of Guadalupe Hidalgo), land sales and disposal were a major source of income for the federal treasury, even creating large revenue surpluses which the federal government was able to distribute among the states. Deposits of the surplus to the states began on January 1, 1867, "and in the succeeding quarters a total of $28 million was transferred to the states." See Paul W. Gates, History of Public Land Law Development 55 (1968) (written for the Public Land Law Review Commission) [hereafter the "Public Land Law Report"]. Following this program of privatization, essentially all of the unappropriated public lands were eventually sold off in states such as Ohio, Indiana, Illinois, Wisconsin, Michigan, Alabama, Louisiana and Kansas.

The Supreme Court of the Nineteenth Century reaffirmed the linkage between privatization of the western lands and the westward expansion of our nation's boundaries, stating that "[t]he words `public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." Barker v. Harvey, 181

U.S. 481, 490 (1901). The United States concedes as much, in footnote two of its memorandum, when it describes the "historical and also judicially accepted meaning" of the term "public lands" as "subject to sale or other disposal under general laws."

When Congress established the Nevada Territory in 1861, it continued this program of privatization by providing that the land in the Territory should be surveyed "preparatory to bringing the same into market." It further forbid the territorial legislature from enacting "any law interfering with the disposal of the soils" -- language taken directly from the Northwest Ordinance, and repeated (with slight variation) in the Enabling Acts of virtually all of the new states which had at that time been admitted to the Union. Two and a half years later, Congress enacted legislation to enable Nevada to join the Union and explicitly provided in the Nevada Enabling Act "that five percentum of the proceeds of the sales of all public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, . . . shall be paid to the said state." 13 Stat. 30, ' 10. Thus, contrary to the United States' position, the language in the Enabling Act in which the people of the Nevada Territory were required to disclaim title to the

unappropriated public lands within the Territory is revealed to be nothing more than a statement to facilitate conveyance of clear title by the United States to purchasers and transferees of the public lands. To suggest that this phrase was intended to exclude from statehood the vast majority of the land and resources of the new state turns the description of the state's boundaries in the Nevada Enabling Act, which makes no mention of such an exclusion, inside out.

Indeed, the very language of the Nevada Enabling Act makes clear that it was the federal government's *obligation* – not its option – to sell all of the unappropriated public land in Nevada. 150 years is surely sufficient time in which to do so. And, of course, in order for a disclaimer to occur, there must be someone capable of issuing one. Who could disclaim ownership of the public land in Nevada before there was a duly elected state government? The vote of the people of Nevada did not include an apporoval of only part of the terms of admission. Each term was integral and each dependent upon all others being respected and carried out, including the federal government's obligation to sell the unappropriated public land for the creation of homesteads and enterprise.

Even if the disclaimer language in the Enabling Act could be read as an attempt to disclaim title to all unappropriated lands (and assuming arguendo such a disclaimer were constitutional), it could not be read consistently with the provision in the Enabling Act that Nevada enters the Union "upon an equal footing with the original states, in all respects whatsoever."

Title to the unappropriated public lands in the original thirteen colonies transferred from the crown to the thirteen states when they attained independence in 1776. The United States acknowledges that, pursuant to the Equal Footing Doctrine, title to lakebeds and streambeds passed to all states (including Nevada) upon their admission to the Union regardless of whether states "disclaimed" public lands or not. The disclaimer language on which the United States bases its case, however, contains no exception for such lakebeds and streambeds. The United States cites no reason or authority for the brazen proposition that Nevada did not receive title to the unappropriated public lands, along with the lakebeds and streambeds, at the time it became a state, on an equal footing with the original thirteen.

## II. HISTORICAL FRAMEWORK

### A. Public Land In The Colonies And Under The Articles Of Confederation

Great Britain established sovereignty over the region of North America that became the original thirteen colonies by discovery and conquest, and title to all vacant land was vested in the Crown. Johnson v. Mc'Intosh, 21 U.S. (8 Wheat.) 543 (1823). After the American Revolution, title to the public land which had previously been vested in Great Britain, "passed definitively to the [] States." Id. at 583; see Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839) ("the ultimate fee . . . was in the crown previous to the Revolution, and in the states of the Union afterwards").

This passage of title to the public lands to the thirteen newly independent states created a major problem which nearly resulted in disunion. Seven of the states obtained title to vast tracts of land west of the Appalachian Mountains. The remaining six states, which were locked in the midst of other state boundaries, acquired no such claims to western lands. These six states feared that the seven "landed" states could exercise undue influence over their smaller neighbors. Accordingly, as a condition of ratifying the Articles of Confederation they insisted on an agreement that the landed states divest themselves of their western lands.

The landed states agreed to surrender their lands, which were located north and west of the Ohio River (i.e., the Northwest Territory), to the Confederation for the purpose of forming new and independent states and, as New York proclaimed, "for no other use or purpose whatsoever." See 3 Way & Gideon, Journals of the American Congress, 1774-1778 at 582-586 (1823) [hereafter cited as "Way & Gideon"]. In its deed of cession, drafted by Thomas Jefferson, Virginia required:

> that the territory so ceded shall be laid out and formed into States . . . and that the States so formed shall be distinct republican States, and admitted members of the Federal Union; having the same rights of sovereignty, freedom, and independence, as the other States.

4 Way & Gideon at 342-344. Land ceded by the other states contained similar language requiring the land be disposed of for the purposes of developing new states. See 4 Way & Gideon 501-04, 523-25, 645-48, 697-98, 769-72, and 834-35.

In July 1787, while the Constitutional Convention was meeting in Philadelphia, Congress, meeting in New York, undertook the task of providing for the disposal of the land in the Northwest Territory. Congress adopted the Northwest Ordinance to establish territorial governments, to admit new states, and to apply the proceeds of sale of the public lands to the Revolutionary War debt. Northwest

Ordinance of 1787, reprinted in 1 Stat. 50 (Aug. 7, 1789) [hereinafter "Northwest Ordinance"]. The provisions of the Northwest Ordinance, which "shall be considered as articles of compact between the original States, and the people and States in the said Territory," mandated in relevant part that: "[t]he 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." Id., July 13, 1787, art. IV (emphasis added). The Ordinance also provided that states were to be formed in the Territory and that those future states would be admitted "on an equal footing with the original states in all respects whatever." Id. art. V.

B. Public Land And The Constitution

Meanwhile, at the Constitutional Convention in Philadelphia, the Framers of the Constitution sought to provide authority in the federal government to own land for national purposes and, through separate constitutional provisions, to allow for the formation of new states and the disposal of the Northwest Territory. The power to hold title to property was created through the adoption of the Enclave Clause, which allows the federal government to hold

land in "places purchased by the consent of the Legislature of the State" for "the erection of forts, magazines, arsenals, dockyards, and other needful buildings." U.S. Const. art. 1, ' 8, cl. 17.

The Constitutional Convention then turned to the ceded territory, providing in Article IV of the Constitution that:

> 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 Legislature of the States concerned as well as the Congress.

U.S. Const. art. IV, ' 3, cl. 1. The Framers made Congress' duty to dispose of the ceded land crystal clear in the next section of the Constitution:

> 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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.

U.S. Const. art. IV, ' 3, cl. 2.

Of course, the thirteen original states continued to own all unappropriated public lands within their borders following ratification of the Constitution in 1789. See Public Land Law Report. By 1796, Vermont, Kentucky and

Tennessee also had been admitted to the Union. Each of these new states was admitted to the union succeeding to ownership of all unappropriated public land within their borders, as had the original thirteen. Accordingly, Vermont, Kentucky and Tennessee owned (and continue to own) all the unappropriated public lands within their boundaries; no land was withheld from these states for the federal government. Id. at 287.

Following adoption of the Constitution, the federal government privatized hundreds of millions of acres of previously unappropriated land and fueled the westward expansion of America and the creation of states.1/ Thus, the federal government owned at one time the territory that became the states of Ohio, Illinois, Indiana, Michigan, Kentucky, Wisconsin and the eastern part of Minnesota. In each of those states, Congress systematically privatized the land by selling same, completely divesting itself of the unappropriated land, as had always been contemplated and as Constitutionally required.

This disposal of land enabled the newly formed states to create cities, towns and counties and for the states'

1/ The first United States Congress explicitly adopted the 1787 Northwest Ordinance in order to provide for the establishment of government of the Northwest Territory and to develop the area for future new States. 1 Stat. 50 (Aug. 7, 1789).

inhabitants to create and establish enterprises of all sorts. It also enabled the states, through the private exploitation of the disposed land, to generate state revenues through the taxes derived from such private enterprises and to develop a tax base from which to derive public services and the operation of state government for the benefit of the people.

This process was repeated in the land acquired through the Louisiana Purchase, the land ceded from Mexico after the Mexican-American War, the land acquired through treaty with Spain, and other lands acquired in the great westward expansion of the United States. In this way, virtually the entire continental United States was settled and the states were admitted to the Union. See generally Public Land Law Report, supra, at 75-120.

**III. DESCRIPTION OF NYE COUNTY, NEVADA**

Nye County, the defendant in this lawsuit, is a political subdivision of the State of Nevada. Stipulation of Undisputed Material Facts [hereinafter "Stip. Facts"], at **&** 17. Nye is the largest county in Nevada, and the third largest county in the United States, covering more than 18,000 square miles of the central and southwest Nevada, larger than the combined area of the states of Vermont and New Hampshire.

Understanding the problem that faces the 19,000 residents of Nye County and their elected officials requires no more than a quick glance at the Department of the Interior's map of Nevada. USGS map -- State of Nevada -- Surface Management Status by BLM, (1990), attached hereto as Exhibit A. The first thing that one notices about the map is that it is almost entirely colored yellow. The key reveals that yellow indicates "public land" which is under the jurisdiction of the Bureau of Land Management. National forest system lands stand out in green; Department of Defense property are marked in pink; Department of Energy facilities are designated in brown; and Bureau of Reclamation lands in purple. See Exhibit A. This collage of color, representing land under the jurisdiction and administration of the United States and its various departments and agencies, covers 87 percent of the entire State of Nevada and nearly 93 percent of the County of Nye. Stip. Facts, & 15. It is no exaggeration to say that one must get within inches of the map to locate the seven percent of the land -- depicted as tiny white islands in the midst of a vibrant yellow, green and pink sea -- over which the people of Nye County, rather than the federal government, have control. See Exhibit A.

**IV. STANDARD OF REVIEW**

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Shaw v. Lindheim, 919 F.2d 1353, 1358 (9th Cir. 1990). The same legal authority is applicable to review on cross-motions for summary judgment. See, e.g., Abend v. MCA, Inc., 863 F.2d 1465 (9th Cir. 1988), aff'd and remanded, 495 U.S. 207 (1990).

The court should not weigh the evidence or assess the truth of matters in ruling upon a motion for summary judgment, but rather ascertain whether there is a genuine issue for trial. Crane v. Conoco, Inc., 41 F.3d 547, 549 (9th Cir. 1994). Accordingly, summary judgment is appropriate where the evidence is so one-sided that one party clearly prevails as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). Indeed, the function of summary judgment is to avoid unnecessary trials. Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1471 (9th Cir. 1994).

## V. ARGUMENT

### A. The Federal Government Has Breached Its Compact With The State Of Nevada By Repudiating Its Duty To Dispose Of The Public Lands.

Picking and choosing among historical events, the United States now claims that it owns 87 percent of the State of Nevada and nearly 93 percent of Nye County. Stip. Facts, & 15. In seeking to "set the record straight" and stop a movement that "is gaining momentum throughout the west," Memorandum of Points and Authorities in Support of Plaintiff's Amended Motion for Partial Summary Judgment [hereafter "Fed. Gov. Brief"], at 3, the United States employs a two-step analysis: (a) the United States acquired the lands that now comprise the State of Nevada from Mexico "before Nevada was a state or Nye was a county," id. at 27; and (b) since it "retained title" to the majority of these lands, it must own them today. Id. By selectively fast forwarding over the majority of the 147 years of history since the Treaty of Guadalupe Hidalgo, including the establishment of the Territories of Utah and Nevada and the admission of Nevada to the Union, the United States ignores its obligation, practice and commitment to dispose of public lands in the west.

1. Under The Nevada Enabling Act, The United States Is Obligated To Sell Or Otherwise Dispose Of The Public Lands Located Within The Borders Of The State Of Nevada

In 1864, the United States government and the people of Nevada entered into a Compact. The foundations of the Compact were the Constitution of the United States and the history of the westward migration and settlement of the United States. The terms of the Compact which imposed obligations upon both the State of Nevada and the United States, were offered by the United States through the Nevada Enabling Act, and built upon the Nevada Territory Act and its predecessor, the Utah Territory Act. One of the terms requires the federal government to sell or otherwise dispose of the public lands it held within the State of Nevada. The United States' offer was accepted by the people of Nevada through the adoption of the Ordinance of the Constitution of the State of Nevada.

From before the adoption of the Constitution until 1976, Congress followed a consistent program, evidenced by various territorial acts, of obtaining title to western lands, perfecting that title, and disposing of the land, by sale or otherwise, so as to promote the settlement the land and the creation of future states. In this way, virtually the entire continental United States was settled and the states were admitted into the Union. See Public Land Law Report at 75-120.

In 1848, at the conclusion of the Mexican-American War, the United States obtained a vast expanse of land in the south west quadrant of present day United States by cession from Mexico through the Treaty of Guadalupe Hidalgo. Stip. Facts, & 1. Two years later, Congress designated this land the Utah Territory and established a territorial government. 9 Stat. 453 (Sep. 9, 1850) [hereinafter "Utah Territorial Act"]. From its inception, like the other territories that preceded it, Congress intended the unappropriated public lands within the Utah Territory to be marketed to the public. Accordingly, Congress provided that the land "shall be surveyed . . . preparatory to bringing the same into market." Id. ' 15. The Utah Territory Act explicitly instructed that the territorial legislature "no law shall be passed interfering with the primary disposal of the soil." Id. ' 6.

Eleven years later, Congress carved the Nevada Territory out of the Utah Territory and established the Nevada Territorial government. 12 Stat. 209 (Mar. 2, 1861) [hereinafter "Nevada Territorial Act"]. Congress limited the reach of the Nevada Territorial legislature, as it had the Utah legislature, by providing that its authority extended to "all rightful subjects of legislation . . . but

no law shall be passed interfering with the primary disposal of the soil." Id. ' 6.

In 1864, Congress established the terms for the admission of Nevada "into the Union upon an equal footing with the original States, in all respects whatsoever." 13 Stat. 30 (Mar. 21, 1864) [hereinafter "Nevada Enabling Act"] (Mar. 21, 1864). The Nevada Enabling Act recognized that Nevada "shall consist of all the territory included" within certain established boundaries, id. ' 2, but made no reservation of land to be held permanently by the federal government. Moreover, the Act established a plan for the sale of the unappropriated public lands within the borders of the State of Nevada and required:

> That five percentum of the proceeds of the sales of all 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 for the purpose of making and improving public roads, constructing ditches or canals, to effect a general system of irrigation of the agricultural land in the state, as the legislature shall direct.

Id. ' 10 (emphasis added).

The United States makes much of the language in the Nevada Enabling Act by which the people of Nevada disclaimed title to the public lands. However, such

language (or its functional equivalent, that the state shall pass no law "interfering with the primary disposal of the soil by the United States") neither adds to nor subtracts from the title claims of the United States or the State of Nevada. In Van Brocklin v. Tennessee, 117 U.S. 151 (1886), decided by the Supreme Court a mere 22 years after Nevada joined the Union, the Court examined the enabling and admissions acts of most of the states admitted to that date, virtually all of which contained either the "disclaimer of title" or "noninterference with disposal of the soils" clauses, and determined that these clauses were interchangeable. Id. at 167. Importantly, the Court noted that the absence of such language in the California Enabling Act made no difference, since such clauses "are but declaratory, and confer no new right or power upon the United States." Id.2/

2/ The fact that the disclaimer language conveys no title, but merely confirms whatever may have been the state of title at the time of admission, is critical to understanding why the Equal Footing Doctrine is not violated by the fact that several states (Vermont, Maine, Kentucky, Texas, California and West Virginia) had no such provisions in their Enabling or Admission Acts, and yet stand on an equal footing with other states - such as Nevada.

It is evident that the disclaimer clause is merely a reaffirmation of the existing state of title since it did not operate upon statehood to convey title to streambeds and lakebeds to the United States, even though these lands most certainly constitute unappropriated public lands. See Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); see also Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). At most, the disclaimer language reaffirms the fact that Nevada entered the Union on the same terms as all of the other states which preceded or followed it insofar as title to the public lands is concerned.

Furthermore, the Compact language, like any other contract provision, must be read in light of the meaning which the parties ascribed to it at the time. In a case decided by the Supreme Court 11 years after Nevada entered the Union, the Court stated matter-of-factly the commonly-accepted meaning of the phase: the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. Newhall v. Sanger, 92 U.S. 761, 763 (1875); see also Barker v. Harvey, 181 U.S. 481 (1901). Indeed, the United States concedes that the term "public lands" "is used in its historical, and also judicially accepted, meaning as lands 'subject to sale or other disposal under general laws'."

Fed. Gov. Brief at 4 n. 2. Accordingly, it is clear that the people of Nevada disclaimed title to the "public lands" within their Territory merely to facilitate their sale or disposal by the United States -- not, as the United States contends, as an absolute conveyance to allow the United States to retain forever or dispose of the land as it wishes.

The United States boldly claims that "County's assertion that the United States has no authority to retain the public lands in its possession is without merit," Fed. Gov. Brief, at 25, pointing to Light v. United States, 220 U.S. 523 (1911), and Nevada v. United States, 512 F. Supp. 166 (D. Nev. 1981), dismissal aff'd. on other grounds, 699 F.2d 486 (9th Cir. 1983), as though these cases were sound authority for this proposition. The United States claims: "As Light reveals, Nye County's theory was asserted, and thoroughly rejected, over 80 years ago." Fed. Gov. Brief, at 26. This statement is simply untrue.

Light v. United States was a trespass action brought by the United States against a Colorado rancher, alleging that he had unlawfully allowed his cattle to graze on public lands. Finding that the United States was entitled to the injunctive relief it sought based on common law, the court never reached any of the constitutional issues as the

United States claims. The concluding sentences of the opinion clearly make this point:

> It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the Reserve to graze thereon. Under the facts the court properly granted an injunction. The judgment was right on the merits, wholly regardless of the question as to whether the Government had enclosed its property.
>
> This makes it unnecessary to consider how far the United States is required to fence its property, or the other constitutional questions involved. For, as said in Siler v. Louisville & Nashville R.R., 213 U.S. 175 "where cases in this court can be decided without reference to questions arising under the Federal Constitution that course is usually pursued, and is not departed from without important reasons.

Light, 220 U.S. at 528 (emphasis added).

Moreover, the Light Court nowhere speaks of Congress' power to retain the public lands, stating instead: "`Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of'." Id. at 536 (emphasis added). Indeed, the Court goes on to quote with approval from Van Brocklin as follows: "It is true that the `United States do not and cannot hold property as a monarch may for private or personal purposes'." Id. In sum, Light says nothing about the authority of the United States to retain the public

lands but merely affirms its right to exclude trespassers while title resides in the federal government.

Even more egregious is the United States's citation of Nevada v. United States to support its assertion that "these types of claims were also rejected by this court much more recently." Fed. Gov. Brief, at 26. The United States misleadingly asserts that the decision was "affirmed on other grounds" id., failing to reveal to the Court that these "other grounds" were the lack of subject matter jurisdiction in the District Court itself, rendering the decision (to which the United States devotes almost a full page of its brief) void and of no precedential effect. The Ninth Circuit clearly ruled that the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction should have been granted, stating:

> We therefore affirm the district court's dismissal because we conclude that the only justiciable controversy which may have been presented in the case was rendered moot by the rescission of the challenged moratorium. Thus there is no present controversy to sustain this action.

Nevada, 699 F.2d 486, 487.

The determination that the District Court lacked jurisdiction over the case brought by Nevada ab initio necessarily rendered the District Court's opinion a

nullity. The status of an earlier decision which is later found to be moot was succinctly described by the Ninth Circuit: "The case has no precedential authority. We are in no way bound by its reasoning." Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 n.1 (9th Cir. 1993); see also County of Los Angeles v. Davis, 440 U.S. 625 (1979); Kuahulu v. Employers Ins., 557 F.2d 1334 (9th Cir. 1977). Moreover, the Court's decision was explicitly grounded on the Court's finding (as urged by the United States) "that this case does not involve a claim of title to land." Nevada, 699 F.2d at 487.

2.Congress Breached The Obligation To Sell Or Otherwise Dispose Of The Public Lands By Passing FLPMA In 1976

Congress terminated the program of disposing of federal lands in 1976 by adopting a policy of retention of the public lands in the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. ' 1701 et seq. Stip. Facts, & 11. As outlined above, however, the disposal of public lands by the federal government was much more than a mere "policy" to be abandoned at Congress' whim. It was an obligation imposed as part of the Compact with the people of Nevada. Never has Nevada consented to the revocation of the obligations and duties imposed on both the State and the

federal government by the Nevada Enabling Act and the Ordinance of the State of Nevada that served as the basis for the State's admission to the Union. Without such consent, the Nevada Enabling Act and the Nevada Ordinance are clear: the federal government has an irrevocable duty to dispose of the public lands within the State of Nevada and tender five percent of the proceeds to the State. Any other course constitutes a direct and undeniable breach of the compact drafted by Congress and imposed at Congress' own insistence.

Congress' abrupt abandonment of its obligation to dispose of the public lands served as a catalyst for the "Sagebrush Rebellion" of the late 1970's in which nearly every western state, including Nevada, enacted statutes declaring certain rights over the federally owned and managed lands within their borders.3/ Nevada's law, enacted in 1979, provides:

> Subject to existing rights, all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control.

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3/ See Albert W. Brodie, A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands 12 Pac. L.J. 693, 694 n.3 (1981) [hereinafter "Brodie"] (citing bills adopted as of 1981).

Nev. Rev. Stat. ' 321.5973(1).4/ This statute responds directly to Congress' breach of the Compact with Nevada and repudiation of its duty to dispose of the land.

### 3.Nothing In The Constitution Authorizes This Breach Of The Compact

The federal government is one of limited powers as specifically set forth in the Constitution. United States v. Lopez, 115 S. Ct. 1624 (1995). As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Id. (quoting The Federalist No. 45, pp. 292-93 (C. Rossiter ed. 1961)). Accordingly, if the federal government has authority to retain public lands, that power must be expressly granted in the Constitution.

The Constitution grants authority to Congress over two classes of real property: (a) property owned by the

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4/ The term "public lands" for purposes of Section 321.5973, is defined to mean all lands within the State of Nevada except lands held by private persons, lands held by the state or its political subdivisions, and lands located within congressionally authorized national parks, monuments, national forests or wildlife refuges or those acquired by consent from the state legislature or controlled by the Departments of Energy or Defense or the Bureau of Reclamation. Nev. Rev. Stat. ' 321.5963(2).

federal government with the consent of the legislature of the state in which the property is found; and (b) property held temporarily by the United States for the purpose of forming additional states. Neither provision authorizes the federal government to retain public lands.

The first type of property is governed by Article I, Section 8, Clause 17 of the Constitution, known as the Enclave Clause. The Enclave Clause permits the United States to establish governmental seats, erect forts, arsenals and other "needful buildings" on property obtained by cession from the states (as in the case of the District of Columbia) or purchased by the federal government from a willing state. U.S. Const. art. I, ' 8. cl. 17. The Founding Fathers added the state legislative consent provision to the Enclave Clause to alleviate their fears that the federal government would use the clause "to enslave [a state] by buying up its territory, and that the strongholds proposed would be a means of drawing the State into an undue obedience to the general government."5/ Thus, the Founding Fathers made federal ownership -- and, therefore, the exercise of authority -- expressly contingent upon state legislative consent. Congress' power

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5/ Brodie, supra, at 697 (quoting Statement of Massachusetts Delegate Elbridge Gerry).

over land obtained pursuant to the Enclave Clause is unfettered and includes the authority to "exercise exclusive Legislation in all Cases whatsoever." U.S. Const. art. I, ' 8, cl. 13.

The second category of property recognized by the Constitution is property held pursuant to the Territory Clause contained in Article IV, Section 3, Clause 2 of the Constitution, which grants Congress the authority "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Congress' power over property in this category, which includes property in the public domain, "the power of disposition and of making all needful rules and regulations." Gibson v. Chouteau, 80 U.S. 92, 99 (emphasis added). Congress' Article IV authority "to dispose of . . . Territory and other Property" thus contrasts sharply with its Article I power "to exercise exclusive legislation in all cases whatsoever" involving property purchased by the United States with state legislative consent. The power to dispose of property in the former cannot possibly be read to grant Congress the authority to exercise exclusive legislative power as does the latter.

Contrary to the United States' assertion, Fed. Gov. Brief, at 21, the Territory Clause does not grant title or ownership rights to the United States, nor does it grant Congress the power to retain, rather than to dispose of, title to the public lands in Nevada. The term "Territory," given its plain and intended meaning, refers to real property held by the United States for the purpose of forming new states and obviously cannot include land located within the boundaries of an existing state.6/ The phrase "other Property" also cannot be interpreted to include public land within the State of Nevada. At the time of the drafting of the Constitution, North Carolina and Georgia had not yet ceded their western territory to the United States. Brodie, supra, at 696. Additionally, some of the Framers anticipated that the boundaries of the

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6/ Clause 1 of Article IV, Section 3 provides:

> 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 shall 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.

U.S. Const. art. IV, ' 3, cl. 1 (emphasis added). Furthermore, the public land at issue here forever lost its territorial status when Nevada was admitted as a State in 1864.

United States would eventually encompass other unknown land west of the Mississippi. Because none of this property could properly be termed "Territory" of the United States at the time, the "other Property" language was likely included to accommodate the future territories of the United States that would be acquired. Id. at 720. There is no textual or historical support whatsoever for the proposition that the Framers intended the phrase "other Property" to include unappropriated public land that the United States simply decides to retain and manage in perpetuity.

The very structure of the Constitution supports the restriction of the term "other Property" to future territories of the United States. The Territory Clause is found in the section of the Constitution that establishes the respective authorities of the federal and state governments. The Enclave Clause, by contrast, is contained in the section of the Constitution that sets forth the enumerated powers of the federal government. Accordingly, while Congress is empowered to do as it pleases with territory and other property pre-statehood, it does not have the right to retain and regulate public land within the boundaries of a state once formed. Texas v. White at 731. Any other construction of these clauses is

unsupportable: if the Founding Fathers intended to grant the federal government power to retain public lands that power would have been enumerated in Article I, alongside the other enumerated powers.

Furthermore, the Territory Clause only speaks to Congress' authority to regulate territory or other property "belonging to the United States." The clause does not mention public lands nor does it attempt to define what property the United States might own. Indeed, the Framers made sure that the Territory Clause would not affect title and ownership claims by the United States and the respective states by specifically providing that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." Thus, if the United States has any claim to public land in Nye County, it must derive from a source other than the Constitution.7/

This is a case of first impression and none of the cases cited by the United States address or resolve the question of the Congress' commitment to the people of Nevada to sell the public land within its borders. The

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7/ "Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it." Barker v. Harvey, 181 U.S. at 489.

Territory Clause authorizes only the disposal of public lands. Indeed, the people of the Territory of Nevada relied on the Territory Clause when they expressly agreed in the Ordinance of the Constitution of the State of Nevada, upon which Nevada's admission to the Union was conditioned, that the public lands "shall be and remain at the sole and entire disposition of the United States." Nev. Const. Ordinance (1864).

### B. A Judgment Awarding The United States Sole And Exclusive Jurisdiction Over 93 Percent Of Nye County Would Violate The Constitution's Prohibition Against The Transfer Of Core State Functions To The Federal Government

The mere fact that the Constitution may, in some instances, authorize Congress to exercise certain powers does not, by itself, end the constitutional inquiry. Rather, the Constitution requires that this Court engage in a two-step analysis:

1. Does Congress possess the enumerated power to retain the public lands, as it claims?

2. If so, would the exercise of that power in the present instance constitute an unconstitutional invasion of the core state powers reserved to Nevada?

The preceding section demonstrated that the Constitution does not empower Congress to retain public lands. As shown

below, the United States also fails the second step of the inquiry.

The relief sought by the United States -- a declaration that it has sole ownership and exclusive sovereignty over 93 percent of the land of Nye County -- cannot be granted, for it would destroy the delicate balance of dual sovereignty established by the Constitution. The principle of dual sovereignty, like the principle of separation of powers, is a structural component embedded in the Constitution; thus, in ascertaining whether Congress possesses constitutional authority to enact particular legislation, this Court must go beyond merely identifying an enumerated power in Article I of the Constitution:

> Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

New York v. United States, 505 U.S. 144 112 S. Ct. 2408, 2418 (1992).

In its brief, the United States cites Kleppe, 426 U.S. at 540, for the proposition that the United States acts as both proprietor and sovereign over land which it owns, and in fact asserts that the United States "doubtless has power over its own property analogous to the police power of the several states." Fed. Gov. Brief, at 22. Indeed, in recent litigation in another circuit, the United States contended that "indeed, Congress may regulate conduct occurring on or off federal land which affects federal land." Duncan Energy Co. v. United States Forest Service, 50 F.3d 584 (8th Cir. 1995).

Whatever the validity of the holdings in those cases, however, the principles they establish remain limited by the requirement that the sovereign powers of the State of Nevada must be preserved.

> [T]he 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. . . . The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

Texas v. White, 74 U.S. (1 Wall.) 700, 725 (1869). The powers which belong to the United States do not belong to the state, and the converse is also true:

> In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

New York, 112 S. Ct. at 2417. Only by observing the requirement that dual sovereignty be preserved can this Court ensure the absolute constitutional command that "neither government may destroy the other nor curtail in any substantial manner the exercise of its powers." Id. at 2421 (quoting Tafflin v. Levitt, 493 U.S. 455, 458, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887 (1990)). Indeed, the Supreme Court recognizes that the federal government's authority over federally-owned land is constrained by certain core state functions reserved for the states, "[t]rue, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States . . ." Utah Power & Light Co. v. United States, 243 U.S. 389, 404 (1917). Criminal investigative

powers are thus core issues of public safety reserved to the states.

### 1. The Constitution Forbids The Transfer Of Core State Functions To The Federal Government

The Constitution prevents the accumulation of power in a single, national government in order to protect individual liberty:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' Coleman v. Thompson, 501 U.S. 1277, 1281, 111 S. Ct. 2546, 2570, (1991).

New York, 505 U.S. 144, 167, 112 S. Ct. 2408, 2431; Gregory v. Ashcroft, 501 U.S. 452, 2395, (1991) ("a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front").

Since the indestructibility of Nevada's core state sovereignty exists, in the end, for the protection of her citizens, no provision in her Enabling Act (or any subsequent legislation) could constitutionally effect a transfer of core state powers from Nevada to the federal

government. "State officials thus cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution," New York, 112 S. Ct. at 2432, for "[t]he constitutional authority of Congress cannot be expanded by the `consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States." Id.

The principle of dual sovereignty under our constitutional system is structural and inviolate; neither officials of the state nor of the federal government may alter this constitutional structure by ordinance, compact, or in any other manner (short of amending the Constitution). As the Supreme Court has explained: Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials. An analogy to the separation of powers among the Branches of the Federal Government clarified this point. The Constitution's division of power among the three branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment.

Id.

Hence, the disclaimer language of the Compact, relied upon so heavily by the United States, cannot survive if it purports to extend the powers of Congress to encompass powers reserved to the State of Nevada under the Constitution.

The core state powers which the United States cannot invade and Nevada cannot relinquish to the federal government include the "power of sovereignty, the power to govern men and things within the limits of its dominion." Nebbia v. New York, 291 U.S. 502, 524 (1934). This general power encompasses the right and duty of states "to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community. . . . [and] power can neither be abdicated nor bargained away." Chicago & Alton R.R. Co. v. Tranbarger, 238 U.S. 67, 77 (1915); see also City of El Paso v. Simmons, 379 U.S. 497, 508 (1965) ("the State has the sovereign right . . . to protect the . . . general welfare of the people. . ."); Breard v. Alexandria, 341 U.S. 622, 640 (1951) ("`the police power of a state extends beyond health, morals, and safety, and comprehends the duty, within constitutional limitations, to protect the well being and tranquility of the community'").

The Supreme Court also has specifically held that the state's general police power includes the elemental

authority to regulate the use of land, including zoning and other land use regulations. In Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978), the Supreme Court upheld a local zoning restriction in part because of the state's sovereign ability to reasonably conclude that "`the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." Id. at 125. See also Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (prohibition of industrial use upheld as proper use of police power); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (ordinance prohibiting excavation below water table found to be a valid exercise of police power). The police power also extends to the regulation, disposition and preservation of natural resources. See Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84, 93 (1963) (allocation and conservation of natural resources on and beneath lands within state police power).

This Court must reserve these police powers for the States, as it is the foundation of our Constitutional system of dual sovereignty:

> The maintenance of the authority of the States over matters purely local is . . . essential to the preservation of our institutions. . . . In interpreting the Constitution it must never be forgotten that the Nation is made up of States to

> which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. The power of the States to regulate their purely internal affairs by such laws as seem wise to local authority is inherent and has never been surrendered to the general government.

Hammer v. Dagenhart, 247 U.S. 251, 275 (1918). See also Lawrence H. Tribe, American Constitutional Law ' 5-20 at 381 (2d ed. 1988) ("The full body of the Constitution . . . should indirectly guarantee that . . . powers that are `delegated to the United States' may not be exercised so as to destroy the essence of a state's semi-autonomous character as a polity in its own right."). Accordingly, courts have frequently invalidated federal actions that infringe on elements of state sovereignty. See Ashton v. Cameron County Water Improvement Dist., 298 U.S. 513 (1936) (federal statute providing for bankruptcy of state political subdivision infringes state control over fiscal affairs); Keller v. United States, 213 U.S. 138 (1909) (federal statute prohibiting houses of prostitution in which aliens reside infringes state police power); United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1870) (statute regulating sale of illuminating oils interferes with state's police powers).

The United States may believe that its policies are wiser, its legislators more enlightened, and its land

managers more capable than those of Nevada. Even if the federal government were correct in claiming superiority, it would not alter the iron-bound protection which the Constitution provides to the citizens of Nye County:

> The Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.

New York, 112 S. Ct. at 2434.

### 2. The Equal Footing Doctrine Guarantees That Each State Possesses The Same Aspects Of Sovereignty Possessed By All Other States

The Equal Footing Doctrine requires that each state possess and maintain the same attributes of sovereignty possessed by the original thirteen state and every other state. The Supreme Court describes the guarantee of equality of sovereignty as it defines the constitutional division of powers between the federal government and a State:

> The `equal footing' clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty which would produce inequality among the States. For equality of States means that

> they are not `less or greater, or different in dignity or power.' There is no need to take evidence to establish that meaning of "equal footing."

United States v. Texas, 339 U.S. 707, 719-20 (1950) (internal citations omitted). The Federal Government concedes this point in its memorandum, stating that the Equal Footing Doctrine:

> requires that all states be given equal political rights and sovereignty. The doctrine exists to ensure that "each state shares `those attributes essential to its equality in dignity and power with other states.'"

Fed. Gov. Brief, at 23-24 (citations omitted).

The Equal Footing Doctrine dictates that states own the soil under the navigable inland waters because that ownership is an inseparable attribute of state sovereignty; as such, each state holds title to that soil as against the federal government. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845); Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). Similarly, in Coyle v. Smith, 221 U.S. 559, 565 (1911), the Supreme Court invalidated a federal effort to designate the location of the capital of Oklahoma, reasoning that:

> `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.

Id. at 567. A judgment of federal ownership and sole sovereignty over the public lands of Nevada would render the State of Nevada less equal than its brother and sister states in terms of power, dignity and authority.

Indeed, the federal government's presumptuous usurpation of the rights of states to ownership of the unappropriated public lands within their borders has, for nearly 100 years, hobbled the western states in settlement and in the creation of tax bases from which to derive the revenues for basic state functions. It is no accident that the gross state products of those states east of the Mississippi that have not been subject to federal retention of public lands are well above those in the west. It is not that the lands of the western states is less habitable than those in the east. It is that the federal government has prevented settlement.

The western states have thus been denied the equal footing of the availability of all the land in their territories for the development and improvement of their states and the funding of their governments for the support of their citizens.

### 3.The Constitution's Guarantee Of A Republican Form Of Government Forbids Federal Usurpation Of Essentially Local Functions

Article IV, Section 4 of the Constitution, known as the Guarantee Clause, provides: "The United States shall guarantee to every State in this Union a Republican Form of Government. . . ." U.S. Const. art. IV, ' 4. South Carolina v. United States, 199 U.S. 437 (1905), overruled on other grounds sub nom Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). According to the Supreme Court, the Guarantee Clause "expresses the full limit of National control over the internal affairs of a State" since a State's "internal affairs are matters of its own discretion." The guarantee of a republican form of government also was included in the Compact between Nevada and the United States. Nevada Enabling Act, at ' 14.

In Coyle v. Smith, 221 U.S. 559 (1911), the Supreme Court held that the Guarantee Clause forbids the federal government from imposing "restrictions upon a new State which deprives it of equality with other members of the Union. . . ." Id. at 567. Thus, Congress could not, under the Oklahoma Enabling Act, require Oklahoma to locate its state capital in a certain city as a restriction upon its admission to the Union since the "power to locate its own seat of government and to determine when and how it shall be changed from one place to another, and to appropriate

its own public funds for that purpose, are essentially and peculiarly state powers." Id. at 565. Similarly, in Forsyth v. Hammond, 166 U.S. 506 (1897), the plaintiff argued that the annexation of her land by a court rather than by the legislature was a denial of the guarantee of a Republican Form of Government. Id. at 519. The Court agreed, holding that "the decision was upon a question of a local nature, involving the internal policy of the State, and therefore is such a decision as should be . . . recognized and followed by the Federal courts." Id. at 520.

The Guarantee Clause not only protects citizens against nonrepresentative state and local government forms, but serves as an important limitation upon the powers of Congress to interfere in essentially local matters. The Guarantee Clause reserves for the states those matters that lie "at the heart of representative government." Gregory, 501 U.S. at 463. By limiting the efforts of Congress to control core local functions, "[t]he States thereby retain the ability to set their legislative agendas; state government officials remain accountable to the local electorate." New York, 112 S. Ct. at 2433.

All states are guaranteed a republican form of government and, therefore, the federal government may not

exercise local powers in one state which it does not exercise in the others:

> All states, after their admission into the Federal Union, stand upon equal footing and the constitutional duty of guaranteeing each state a republican form of government gives Congress no power in admitting a state to impose restriction which would operate to deprive that state of equality with other states.

Butler v. Thompson, 97 F. Supp. 17, 20-21 (E.D. Va.), aff'd, 341 U.S. 937 (1951). An award of sole sovereignty to the United States would deprive the citizens of Nye County -- unlike their counterparts in other countries and other states -- of the ability to hold their elected officials responsible for decisions regarding essential local functions including land use planning, economic development, providing infrastructure, and the host of other police power activities which lie at the center of state and local government. Accordingly, this Court should grant the relief requested by Nye County and reaffirm for its citizens the rights guaranteed by the Constitution.

#### 4.A Judgment For The United States Would Deprive Nye County Of Authority Over Core State Functions

The federal government claims sole and exclusive sovereignty over matters relating to the public land in Nye

County that are essential to the citizens of Nye County. A decision granting the relief requested by the federal government, would render the County incapable of exercising its sovereign police powers. Nye County could not make land use decisions or perform the myriad of other functions that comprise traditional state police powers. Even today, Nye County is not able to provide basic governmental functions without the consent of the federal government.

For example, the federal government claims that it can, at will, close roads located in the County and used by County residents. The federal government determined that three roads should remain closed despite the County government's repeated assertions that use of the roads was necessary for the citizens of the County. Stip. Facts, && 22-23, 30. Ignoring the County's wishes, the federal government closed the roads by creating hazards in the middle of the roads in order to make them impassible.8/ See Declaration of Richard Carver, attached hereto as Exhibit B. The federal government then tried to prevent the County from making the roads safe by removing the

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8/ Pursuant to the Stipulation regarding this Motion for Summary Judgment, Nye County specifically refrains from addressing whether Jefferson Canyon Road constitutes a RS 2477 right-of-way. See Stipulation of May 25, 1995, at & 8. If necessary, Nye County is prepared to demonstrate that the roads at issue are RS 2477 roads under Section 8 of the Act of July 26, 1866, 14 Stat. 251.

hazards. Id. && 5-13; see also Stip. Facts, & 22-25. By this lawsuit, the United States seeks to empower the federal government to continue to close roads in Nye County, based solely on the federal government's interpretation of the best interests of all the citizens in the United States. Such a result would eliminate Nye County's ability to plan and provide for transportation within the County, a core function of local government.

Similarly, the federal government claims that it can, at will, decide where to place Nye County's sanitary landfill sites and decide, at will, to move them. See Declaration of Offutt, attached hereto as Exhibit C, at && 2-4. The federal government manages so much land in Nye County that there are no non-federally managed sites appropriate for sanitary landfill operations. To make matters worse, Nye County does not have the authority to condemn federal property under eminent domain proceedings. It is the federal government that decides the location and operation of sanitary landfill sites in Nye County.

The federal government also claims that it can, at will, grant or deny telephone lines to County employees. Nye County was unable to run a telephone line across 700 feet of federally managed property to permit employees at a landfill to call for help in the event of injury or emergency because the federal government would not approve

the County's request for a right of way. Declaration of Offutt at & 6. After undue delay, the County installed cellular telephone service because it did not require federal approval.

Another core government function denied Nye County is the development of a meaningful comprehensive land use plan. Land use determinations clearly fall within the core functions of a state government. See, discussion, supra. In Nye County, however, County determinations about land use are nearly meaningless in light of the federal management of 93 percent of the County's land. Nye County established a Comprehensive Plan, passed by the Board of Commissioners on April 5, 1994, but was not able to address the overriding issue in the County -- the 93 percent of the land that is federally managed. See Nye County Comprehensive Plan, attached hereto as Exhibit D. The Plan notes that several characteristics set Nye County apart from other counties in the United States, including the following: (1) 93 percent of the land is federally managed; (2) approximately 22 percent of the total land is withdrawn from multiple use for special federal purposes; (3) Nye County contains three potentially hazardous facilities;9/ and (4) a large parcel of land used for

9/ These sites include the Nevada Test Site, the Beatty Low-Level Radioactive Waste Disposal Facility, and the Department of Defense Low-Level Radioactive Waste Disposal

restricted access or secret federal activities is located in the center of the County, disrupting transportation and economic activities in the County. Id. at 8-9. These factors make meaningful land use planning by the County impossible.

Nye County also cannot plan its own economic development. The federal government manages land immediately around the towns and cities of Nye County and expansion can only occur with the consent of the federal government. In 1985, Nye County identified almost 40,000 acres of land "needed for urban expansion" and suitable for disposal by the federal government. See Nye County Policy Plan for Public Lands, attached hereto as Exhibit E at 14. The federal government has not disposed of any significant portion of that land. Nye County simply cannot develop economically without some measure of control over the land bordering its urban areas.

Finally, the federal government effectively claims that it can tell Nye County officials what to say and can restrict their ability to express their political opinions. In this action, the federal government seeks to enjoin and invalidate a resolution passed by the Nye County Board of

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Facility on NTS. A fourth site in Nye County, Yucca Mountain, is the sole candidate for the nation's first civilian high-level nuclear waste repository.

Commissioners. Nevada law is clear that resolutions are fundamentally different from ordinances, which can direct or proscribe conduct. See Nev. Rev. Stat. ' 318.055 (resolutions are equivalent to petitions for proposing improvement district, ordinance are required to establish such a district); id. " 244.095 - 244.115 (establishing procedures for enacting an ordinance).10/

The federal government's intention to silence Nye County is further demonstrated by its complaint that Nye County expressed "objectionable" opinions in comments filed with the Department of the Interior and in letters to various federal public officials. Complaint, && 14-16, 18-19, 22-23. In effect, the federal government seeks nothing less than a judicial declaration that these opinions are wrong, and a restraint upon the County's right to free expression. Yet it is precisely such political expression, and the right to petition the federal government for redress of grievances, that the First Amendment protects.

Each of the above examples demonstrates core state and local government functions that are denied Nye County

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10/ The federal government's observation that "counties may act either through ordinances or resolutions," Fed. Gov. Brief, at 28, n.18, is true as far as it goes, but fails to recognize that the actions are of a fundamentally different nature. One directs conduct; the other expresses opinions.

because of the federal usurpation of these powers. In each case the federal government claims the right to make final decisions about matters that are within the powers reserved for states under the Constitution. Because the federal government makes the foregoing policy decisions, in each instance Nye County officials are reduced to merely implementing federal policy, and County elected officials are thus insulated from accountability for their landfill related decisions. As the Supreme Court stated in New York v. United States, 505 U.S. 144 (1992), the Constitution forbids such federal usurpation of powers reserved to the states.

### C. All Public Lands Within The Borders Of The State Of Nevada Transferred To The State Of Nevada On Statehood Under The Equal Footing Doctrine

#### 1. Historical Origins

The Equal Footing Doctrine is deeply rooted in history, and the proper application of the doctrine requires an understanding of its origins. Under English common law, the English Crown held sovereign title to all lands not otherwise owned or appropriated. All vacant lands not owned by private citizens were vested in the Crown. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 595 (1823). Because title to such land was important to the

sovereign's ability to provide for the exploration and orderly settlement of unsettled land, it was considered an essential attribute of sovereignty.

When the thirteen Colonies became independent from Great Britain, title to the vacant land which had previously been vested in Great Britain passed to the newly independent states. Id. at 583. The newly formed state governments succeeded to title to all unappropriated lands within their boundaries as an incident of sovereignty. Clark v. Smith, U.S. 38 (13 Pet.) 195, 201 (1839). That ownership and title was necessary for orderly settlement and the establishment of towns. It also facilitated the establishment of good title to purchasers and settlers, a necessary duty of government. In Shively v. Bowlby, 152 U.S. 1 (1894), the Supreme Court set this forth in detail:

> The English possessions in America were claimed by right of discovery. Having been discovered by subjects of the King of England, and taken possession of in his name, by his authority or with his assent, they were held by the King as the representative of and in trust for the nation and all vacant lands, and the exclusive power to grant them, were vested in him...[a]nd, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several States, subject to the rights surrendered to the national government by the constitution of the United States.

Id. at 14-15 (internal citations omitted).

Immediately after the Revolution, seven states which owned unappropriated lands beyond their settled boundaries ceded those lands to the Confederation. The various deeds of cession which issued from the seven states ceding western lands included provisions requiring that the lands be divided into states admitted with all rights of sovereignty, freedom and independence and that "they shall be faithfully and bona fide disposed of for that purpose and for no other purpose whatsoever." See, e.g., Virginia Final Act of Cession of 1783. By resolution, the Confederation agreed:

> that the unappropriated lands that may be ceded or relinquished to the United States...shall be disposed of for the common benefit of the United States and be settled or formed into distinct republican states, which shall become members of the federal union, and shall have the same rights of sovereignty and freedom and independence as the other states...

18 Journals of the Continental Congress 915 (Ford & Hunt ed. 1904-37).

The Confederation's resolution placed the Congress in the position of being a mere trustee of the ceded lands. See Pollard v. Hagan, 44 U.S. (3 How.) 212, 224 (1845). The western land was "to be held by the United States until it is in a suitable condition to become a state upon an equal footing with other states." Dred Scott v. Sanford,

U.S. 60 (19 How.) 393, 432 (1857). All land held by the United States in the West, then, was held in trust for the establishment of future states which were expected to enjoy the same rights of sovereignty and independence as the original thirteen. The trust was to terminate upon admission of the states to the Union:

> 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*. . . and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease. [emphasis supplied]

Pollard, 44 U.S. (3 How.) at 222.

2. Evolution of Equal Footing Doctrine

Shortly after the cession of western lands, the states of Vermont and Kentucky were established and admitted to the United States. Although the term "equal footing" was not used in the acts of admission, the status and requirement of equality was implicit:

> The definition of `a State' is found in the powers possessed by the original states which adopted the Constitution a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union. The first two States admitted into the Union were the states of Vermont and Kentucky. . . . No terms or conditions were exacted from either.

> Each act declares that the state is admitted `as a new and entire member of the United States of America.'

Coyle v. Smith, 221 U.S. 559, 566-7 (1911), (internal citation omitted). The third state admitted after the Revolution was Tennessee, the enabling act for which re-emphasized the equality of the states "in all respects whatsoever." Id. at 567. "This Union," it said, "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." Id. at 567.

As the nation grew and new states were established, the nature and extent of "equal footing" was tested in a dispute over whether the United States retained ownership of land under navigable waters within the State of Alabama, or if title to and ownership of that land passed automatically to Alabama on statehood. The Supreme Court concluded in 1845, that the land passed to the State of Alabama pursuant to the Equal Footing Doctrine:

> 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 [the land comprising Alabama] to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the

> constitution, laws, and compact, to the contrary notwithstanding.

Pollard, 44 U.S. (3 How.) at 228-9 (emphasis supplied).

The Court further indicated that the United States held the land that became Alabama only as a trustee for the creation of the future state:

> [I]t was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them.

Id. at 222.

The Court's decided then, that the United States had no power to convey such lands, but rather, was under a duty to hold them in trust for the future state. Id. at 230.

Some years later, the Court was called upon to address the matter again, this time when the United States had made a conveyance of land prior to statehood. In Shively v. Bowlby, 152 U.S. 1 (1894), the Court determined that land held by the United States in territorial condition is held in trust for the future states. Id. at 566. The Shively Court concluded, however, that the United States does have

the power to dispose of lands in the territories while they are in territorial condition to private parties "for the promotion of convenience in commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory." Id. at 48. The Shively Court also reaffirmed the general principle of equal footing:

> 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 guaranteed by the very nature of the Federal compact.

Id. at 560.

The particular issue in dispute in Pollard and Shively concerned the ownership of land under navigable waters. But there is no principled reason the same principle would not apply to land that is not submerged and the doctrine of equal footing has been recognized as much broader, encompassing all the powers, rights, privileges, incidents of sovereignty and conditions applicable to the original thirteen states. The doctrine was further extended in Coyle v. Smith, 221 U.S. 559 (1911), where the Court held:

> The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original

> States, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Id. at 573 (emphasis added). This clarified that no condition may be imposed on the admission of a new state that was not imposed on the admission of the original thirteen. Thus, the Court extended the doctrine by emphasizing that if Congress could not require an existing state to perform a particular act *after admission*, it could not condition the admission of a new state on performance of that same act.

### 3. Under The Equal Footing Doctrine, Nevada Owns All Unappropriated Public Lands Within Its Borders.

The Nevada Enabling Act required that the people of the territory "forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States." 13 Stat. 30 (Mar. 21, 1864). If this language is interpreted to transfer title from Nevada to the United States, it would impose an unconstitutional condition on the admission of the future state that was not placed on the original

thirteen or, for that matter, the three that followed.11/ In fact, it was a condition that was not required of Texas, our 28th state. Such an interpretation would also impose a condition that could not be demanded of the State of Nevada after admission, i.e., the cession of Nevada lands to the federal government.

The original thirteen states were not required to surrender the unappropriated public lands within their borders to the federal government, and that condition may not Constitutionally be required of the subsequently admitted states. Coyle, 221 U.S. at 573. Clearly, many states subsequently admitted were subject to the improper condition that they surrender ownership to their unappropriated public lands to the federal government. See Pollard, 44 U.S. (3 How.) 212; Van Brocklin v. Anderson, 117 U.S. 151, 164-66 (1886). The test for equal footing concerns not the conditions under which those states were admitted, but rather, those under which the original thirteen were admitted. Pollard, 44 U.S. (3 How.) at 229-30; Coyle, 221 U.S. at 573. Those original thirteen states were not required to surrender any part of their land as a condition of admission to the Union. Significantly,

11/ As discussed above, Nye Court argues alternatively that the disclaimer merely acted to perfect title in the United States so as to assist in the disposal of the land by sale or otherwise.

surrender or cession also was not required of the two states that succeeded the original thirteen. Coyle, 221 U.S. at 566-67.

Under Coyle, the restriction was tightened considerably; nothing may be exacted of a prospective state that could not be demanded of an existing one:

> The plain deduction from this case is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission.

Coyle, 221 U.S. at 573 (emphasis added).

Even assuming there is any question about what was required of the original thirteen when they were admitted as states to the union, there is certainly no question about what can be demanded of the existing states. Congress may not, by legislative enactment, force any existing state to surrender any of its unappropriated public land to the federal government. The federal government could not, then, constitutionally require Nevada, as a condition of statehood, to surrender any such lands.

Pollard and Coyle speak in broad terms. In the same way that the Supreme Court has concluded that the term "no law" in the First Amendment means no law, the Coyle Court made clear that no condition may be placed on the admission of a new state that was not equally applied to the original thirteen. See Coyle, 221 U.S. at 573. The decision contains no modifiers. It articulates no limits. It does not say conditions of some kinds are permissible. It says that no power may be shorn away by "any conditions, compacts or stipulations." Id. (emphasis added). Therefore, Nevada could not constitutionally disclaim its right and title to the unappropriated public lands within its borders on admission because to do so would violate the Equal Footing Doctrine.

The Supreme Court has adopted a strong presumption against finding that Congress intended to defeat a state's title to land that had once been part of a federal territory, prior to the state's admission to the Union. In Utah Division of State Lands v. United States, 482 U.S. 193 (1987), the Court assumed, arguendo, that the federal government could reserve title to territory so as to overcome the presumption of state ownership, but it found that Congress would have to demonstrate clearly and affirmatively that it intended to defeat the future state's

title to land within its borders. In United States v. Holt State Bank, 270 U.S. 49 (1926), the Court ruled that:

> disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitively declared or otherwise made very plain.

Id. at 55; See also, Nowak and Rotunda, Treatise on Constitutional Law, Substance and Procedure, 2d, Section 3.6, Vol. 1, page 322, fn 4 [hereinafter Nowak and Rotunda].

Nevada's legitimate claim on the public land is undeniable. The federal government held that land in trust for Nevada. Pollard, 44 U.S. (3 How.) 212; Shively, 152 U.S. 1; United State v. Holt State Bank, 270 U.S. 49, 55 (1926); Utah Division of State Lands, 482 U.S. 193. On statehood, the trust was executed by the automatic transfer of title and ownership to that land, just as was described in Pollard and just as occurred in Pollard, Shively, Holt Bank, Utah Division of State Lands and United States v. Texas, 339 U.S. 707 (1950). The purpose of the trust was accomplished on statehood, the trust automatically executed and, as the Court said in Pollard, "the power of the United States over these lands, as property, was to cease." Pollard 44 U.S. at 224.

D.Withholding The Unappropriated Public Lands From The State Of Nevada Directly Impacts Its Sovereignty

The federal government argues that the Equal Footing Doctrine, while vital, applies only to sovereignty and the political equality of a state. Fed. Gov. Brief, at 23. The federal government's argument proceeds from the premise that the Equal Footing Doctrine applies only to sovereignty issues and not to issues of economics and physical differences in states. It then makes the leap that the ownership of land of the sort that is contested in the instant matter is an economic matter rather than a matter of sovereignty.

The failure of this argument is shown by the fact that the very case the government has cited in support of this proposition, United States v. Texas, 339 U.S. 707, 716 (1950), bears on the matter of the ownership of land. In that case, the question before the Court was whether the State of Texas or the United States owned land under the marginal sea. The Court concluded that, as a result of the Equal Footing Doctrine,the United States owned that land, the land's having automatically transferred to the United States on the admission of Texas as a state. Id. 718. In making its decision, the Court noted:

> Yet the `equal footing' clause has long been held to have a direct effect on certain property

> rights. Thus the question early arose in controversies between the Federal Government and the States as to the ownership of the shores of navigable waters and the soils under them. It was consistently held that to deny to the States, admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States but reserved them to themselves.

Id. at 716.

The Court's rationale was simple and clear. When Texas entered the union, it did so as a sovereign nation. Id. at 712-13. As a sovereign nation, it owned the land under the marginal sea to the extent of three miles. The Court concluded, however, that ownership of that land was an incident of federal sovereignty and, therefore, to grant Texas ownership would be to put Texas on a footing superior to that of her sister states. Id. at 717-18. That, the Court concluded, would be a violation of the Equal Footing Doctrine and, as a result, title to the land transferred automatically on Texas' admission to statehood. Id. at 718.

1. Ownership Of The Unappropriated Public Lands Is An Incident Of Sovereignty

It is well settled that the ownership of certain types of land is an incident of sovereignty. Pollard, 44 U.S. (3 How.) at 229; United States v. Holt State Bank, 270 U.S.

49, 55 (1926); Utah Division of State Lands, 482 U.S. at 196. In fact, it is true that virtually all cases decided under the Equal Footing Doctrine are cases bearing on the ownership of land, and in each of those cases, ownership of land was decided on the basis of the Equal Footing Doctrine. Indeed, it is well settled that the ownership of unappropriated public lands is also an incident of sovereignty. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543; Shively, 152 U.S. at 15. It is for this reason that the government's argument that the ownership of public lands is a matter of economics or volume of land is simply misplaced. Equal footing does not require economic parity, but it does require sovereign parity and sovereign parity is lost when a state is deprived of lands of a type that other sovereigns have been allowed to retain. As the Supreme Court in Texas said: "the `equal footing' clause has long been held to have a direct effect on certain property rights," id. at 716, as it decided a matter of ownership of land on the basis of equal footing. It is also interesting to note that Texas did retain all unappropriated public lands within its borders. Id. at 714.

As has been pointed out above, among the traditional roles of the sovereign has been the ownership of vacant, unappropriated public lands for settlement, the

establishment of towns, economic development and the development of a tax base for the support of state government. This role was recognized as an essential element of sovereignty by the original thirteen States which succeeded to those lands formerly owned by the British crown on independence. Shively, 152 U.S. at 15. It also was recognized by Congress when Kentucky and Vermont retained the unappropriated lands within their borders. Van Brocklin, 117 U.S. at 164-66. Without the ownership of such lands, Nevada lacks the ability to provide areas of settlement for its citizens. It cannot establish towns and cities. It cannot develop the sort of tax base the original thirteen states enjoy for the support of their governments and betterment of their citizens. In short, it cannot provide for its citizens what sovereigns have traditionally provided: land for settlement and the building of communities.

The only court to address the question of whether the unappropriated public lands within the states pass automatically to the states on statehood, directly was the Pollard Court. The importance of the issue is demonstrated by the following statement in Justice Catron's dissent:

> I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this court, either as it respects the amount of

> property involved, or the principles on which the present judgment proceeds--principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

Id. at 235 (J. Catron, dissenting).

What cannot be denied is that the ownership of public lands has always been an incident of sovereignty and was retained by the original thirteen States when they formed the Union. For this reason, the Equal Footing Doctrine applies to the ownership of the unappropriated public lands within Nevada and, therefore, Nevada is entitled to recognition of its ownership thereof.

### 2. The Withholding Of Public Lands From Nevada Impacts Other Areas Of Sovereignty.

#### a. Lawmaking Is An Essential Element Of Sovereignty

The most basic element of state sovereignty is a state's ability to make laws enforceable within their borders. Coyle, 221 U.S. at 564-65. To the extent that these powers are diminished, state sovereignty is as well. The United States has claimed that the State of Nevada may assert no authority on any of the public lands it claims to own in the State of Nevada. Fed. Gov. Brief, at 21. It claims the right to oust the State of Nevada and the County of Nye from any rights of sovereignty in over 87 percent of the State of Nevada and 93 percent of the County of Nye.

The effect of this is to make any law enacted by the Nevada Legislature ineffective in 87 percent of the State.

The State of Nevada, therefore, has been ousted of sovereignty in 87 percent of its land area. It can be prevented, according to the government, from enacting or enforcing any law in the 87 percent of its land area in which the federal government claims ownership. The framers clearly intended, in Article 1, Section 8, Clause 17 of the United States Constitution, that each state would have full sovereignty over all lands within its boundaries. It was provided, in that section, that the United States could purchase land from the states only "with the consent of the Legislature." This would protect state sovereignty within its borders. The Constitution leaves to the discretion of the state whether it would relinquish some sovereignty to the federal government and would retain for the state the volitional authority of all sovereign states. This concept was underscored by the Pollard Court when it indicated that federal ownership was "in trust" and for the sole purpose of executing the trusts for the new state. Pollard, 44 U.S. (3 How.) at 222.

What has happened, instead, is that Nevada has been involuntarily stripped of legislative authority, and therefore deprived of sovereignty, in over 87 percent of the land area of its state. The application of the Equal

Footing Doctrine in this instance would restore to the entire land of area of Nevada all incidents of sovereignty, including lawmaking power, in the entire state. The Equal Footing Doctrine requires that each new state be admitted on a footing equal to the original thirteen States. By withholding ownership of 87 percent of the land area of Nevada from the State, the federal government has struck at the heart of a state's most important incident of sovereignty: the making and enforcement of laws.

### 3.The Power Of Eminent Domain Is An Incident Of Sovereignty.

Eminent domain was another of the powers to which the new states succeeded. Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833); West River Bridge Co. v. Dix 47 U.S. (6 How.) 507, 532 (1848). The Supreme Court has held that power to be an inherent incident of sovereignty and the "offspring of political necessity." Bauman v. Ross, 167 U.S. 548, 574 (1897). The individual states, as political sovereigns, retain such power their having succeeded to same on independence. That power vested in the state the ability to create the instrumentalities of commerce and settlement: the building of roads and government buildings and, much later, railroad and telegraph lines. In the Supreme Court's words:

> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. Vat. Law of Nations, section 244.

Pollard, 44 U.S. (3 How.) at 223.

The unrestricted power of eminent domain rested in the original thirteen States on their formation of the union and continued after the enactment of the Constitution. This meant that those states had the power to seize any property within their borders for necessary public purposes for the creation of towns and settlements, roads and other instrumentalities of commerce and growth. This enabled the States to extend their populations, increase their tax bases and establish governmental authority over all corners of their land area. Eminent domain is an essential incident of sovereignty extending to all land in the original states, Kelo v. City of New London, save those lands over which they voluntarily relinquish sovereignty; i.e. those transferred or sold to the United States with the consent of their legislatures. The power of sovereignty rested with the states, however. The only lands over which they relinquished exclusive sovereignty were those they voluntarily relinquished.

The same is not true in the State of Nevada. In that state, federal claims to 87 percent of the land area and 93 percent of the land area of Nye County prevents those state and local governmental entities from exercising the power of eminent domain over virtually all land within their borders. This means that Nye County cannot build roads, lay water pipes, establish sewage lines, or build reservoirs for gathering water in a region that is among the most arid in the world. They cannot condemn land for the purposes of establishing towns and building roads to the few towns in Nye County. Both Nye County and the State of Nevada lack any meaningful power of eminent domain and the result is that, in addition to being deprived of the sovereign right of eminent domain, they cannot carry out other tasks of the sovereign such as providing the means of commerce, water, and health, and safety for their citizens.

The original thirteen States had the unrestricted power to condemn any land within their borders (leavened only by the Fifth Amendment). That power was an incident of their sovereignty. Ownership of the public lands within Nevada by the federal government would deny Nevada that power thereby violating the Equal Footing Doctrine. That is why it is clear that the public lands in the State of Nevada transferred to that state on Statehood just as such lands transferred to the original thirteen on statehood.

The transfer was necessary to establish full sovereignty in the state of Nevada -- to provide it with the power of eminent domain and the ability to carry out its traditional duties and powers as a sovereign state.

In like manner, Nevada lacks the power to tax the public lands claimed by the federal government. Eighty-seven percent of the land area of Nevada and 93 percent of the land area of Nye County is unavailable for taxation by reason of federal claims to the land. An essential incident of state sovereignty is the power to tax. Van Brocklin, 117 U.S. at 155. The original thirteen States had, and retained, the power to tax all lands within their borders with the exception of those on which they voluntarily surrendered that power. This essential attribute of sovereignty has also been eviscerated in the State of Nevada and Nye County where 87 percent and 93 percent of the land is unavailable for taxation by reason of federal claims on that land.

The foregoing discussion demonstrates that the withholding of public lands from the State of Nevada clearly impairs sovereignty and provides that State with a significantly lower level of sovereignty than that enjoyed by the original thirteen. The ownership of public lands is an essential incident of sovereignty. The power to make laws, exercise the power of eminent domain, and tax, are

all incidents of sovereignty that have been seriously impaired and effectively denied the State of Nevada by the federal government's refusal to recognize what admission to statehood on a truly equal footing would demand: that ownership and title of all unappropriated public lands transferred to the state of Nevada when it was admitted to the union on an equal footing with all others.

### E. The "Disclaimer Clause" Is Not Effective To Deny Nevada Ownership Of All Unappropriated Public Lands Within Its Borders

Every case bearing on equal footing decided to date, has involved the equivalent of a disclaimer clause. In Pollard, the Court, in holding that Alabama was the owner of the lands at issue in that case, decided that "...no compact that might be made between her [Alabama] and the United States could diminish or enlarge these rights." Pollard, 44 U.S. (3 How) at 229. The Court concluded:

> 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 on an equal footing with the original states, the constitution, laws, and compact to the contrary notwithstanding.

Id. at 228-9.

The position of the Pollard's Lessee Court in this instance is consistent with all other cases in this area and with basic common sense. The Supreme Court has consistently held that an unconstitutional condition cannot be vitiated by agreement. See, e.g., New York v. United States, 112 S. Ct. 2408 (1992) ("Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by `consent' of state officials.")

In Coyle, the court emphatically rejected any claim that the vote of the people in Oklahoma could bind them to the unenforceable condition placed on the admission of their state:

> But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress.

Id. at 574. The foregoing language shows why the federal government's argument here would lead to an unconstitutional result. The Court's statement that "the idea that one of the original thirteen States could be

shorn of such power by an act of Congress would not be for a moment entertained," id. at 565, demonstrates just how applicable the Equal Footing Doctrine is to the matter at hand. Congress has no power, under the Constitution, to divest state public lands from states without state assent and an attempt to do so would not be for a moment entertained. Lacking that power, Congress could not condition admission on such a divestment and even a compact will not provide such authority.

If the states' disclaimers merely clarify title to facilitate to disposal of public lands, then the acts of Congress and disclaimers by the territories "confer no new right or power upon the United States." Van Brocklin, 117 U.S. 167.

If the disclaimer clause is merely declaratory and confers no new power on the United States, as the Supreme Court determined in Van Brocklin, 117 U.S. 167,12/ we are left with the question of whether the federal government can reserve to itself land prior to statehood. This is a matter the Supreme Court has never addressed. It has never decided whether Congress may defeat a State's claim to title by a federal reservation or withdrawal of land prior

12/ Nye County believes this is the proper interpretation of Nevada's disclaimer, see discussion, supra.

to statehood. Utah Division of State Lands, 482 U.S. at 201.

The reservation of such land would have to be accomplished clearly and unambiguously to be valid. Id. at 201-2. The request for disclaimer contained in the enabling act creating Nevada falls well short of the enhanced standard. However, since ownership of such lands are clearly an incident of sovereignty and since conditioning Nevada's admission on the withdrawal of same would violate its right to be admitted on an equal footing, this court need not get to the intention of the United States and whether it was clearly and unambiguously expressed. Nevada is entitled to ownership of the public land regardless of the intention or desire of the Congress.

### F. The Equal Footing Doctrine Is Not Confined To Submerged Lands

The federal government argues that equal footing, to the extent it applies any longer to the ownership of land, applies only to "land beneath navigable waters." Fed. Gov. Brief, at 24. This ignores not only the very language of the opinions on the subject of equal footing, but the final destruction of the rationale for any such limitation of the holding.

As has been pointed out above, the language in Pollard's Lessee, Shively and Utah Division of State Lands is extremely broad and no commentator believes they are strictly confined to lands under navigable waters. See Nowak and Rotunda, supra, at 322 fn 4. It also bears pointing out that no case has limited the holding of Pollard to the "shores of and lands beneath navigable waters" as the government has asserted. The Court in Arizona v. California, 373 U.S. 546, 597 (1963) makes no such limitation. All that decision says is that Pollard only deals with the land under navigable waters and is not instructive on the nature and extent of the power of the United States to regulate navigable waters (as opposed to the land beneath those waters) under the Commerce Clause. The operative phrase is "the land." The instant case is about the land and not the regulation of navigable waters, so Pollard is perfectly applicable to the case at bar.

Any rationale for confining Pollard to land under navigable waters evaporated with Phillips Petroleum v. Mississippi, 484 U.S. 469 (1988). In that case, the Court decided that the broad concepts of equal footing extended to land under waters irrespective of whether those waters are navigable. This extension of the Equal Footing Doctrine to other lands destroys the rationale for confining equal footing to submerged lands. The rationale

that limited equal footing to land beneath navigable waters was based on the need to maintain the sovereign power to control navigation. But if equal footing applies to land under non-navigable waters, the issue becomes one of ownership as an incident of sovereignty irrespective of navigability. In other words, equal footing is applied because the ownership of the land is an incident of sovereignty and not because the control of navigation is an incident of sovereignty.

The Supreme Court's holding in Phillips Petroleum gives lie to the idea that equal footing cases are founded on a notion of navigability of water as an incident of sovereignty rather than the ownership of land being so. Furthermore, the idea that equal footing applies only to lands under navigable waters flies in the face of the very words of Pollard when the Court decided that Alabama was entitled to sovereignty and jurisdiction over "all the territory within her limits." Pollard, 44 U.S. (3 How.) at 228. It also defies the holding of Utah Division of State Lands in which the Court concluded: "When Congress reserves land for a particular purpose, however, it may not also intend to defeat a future state's title to the land. The land remains in federal control, and therefore, may still be held for the ultimate benefit of future states." Utah Div. of State Lands, 482 U.S. at 202. Finally, it

flies in the face of the uncontradicted dissent in Pollard, quoted previously, in which Justice Catron opined that the principles enunciated in Pollard were as applicable to the high lands as the lowlands and shores. Pollard at page 235. In light of this, and the holding of Phillips Petroleum, equal footing cannot be confined to submerged lands, but rather must be applied to return Nevada to the status it seeks and is constitutionally guaranteed: that of equal footing to the original thirteen states.

**VI. CONCLUSION**

Based on the foregoing, Nye County respectfully requests that this Court grant Nye County's Cross Motion for Summary Judgment on Counts I and IV and deny the federal

government's amended Motion for Partial Summary Judgment on those counts.

Respectfully submitted,

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