MEANS OF DERIVING ADDITIONAL STATE BENEFITS FROM PUBLIC LANDS

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LEGISLATIVE COMMISSION
OF THE
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Senate Concurrent Resolution No. 35—Senators Blakemore, Gibson, Dodge and Herr

FILE NUMBER 136

SENATE CONCURRENT RESOLUTION—Directing the legislative commission to study the various possible means whereby the citizens of Nevada may derive greater benefit from the public lands within the state retained by the Federal Government.

WHEREAS, The State of Nevada has a strong moral claim upon the public land within its borders retained by the Federal Government, because:

1. On October 31, 1864, the Territory of Nevada was admitted to statehood on the condition that it forever disclaimed all right and title to unappropriated public land within its boundaries;

2. From 1850 to 1894, newly admitted states received 2 sections of each township for the benefit of common schools, which in Nevada amounted to 3.9 million acres;

3. In 1880 Nevada agreed to exchange its 3.9 million acre school grant for 2 million acres of its own selection from public land in Nevada held by the Federal Government;

4. At the time the exchange was deemed necessary because of an immediate need for public school revenues and because the majority of the original federal land grant for common schools remained unsurveyed and unsold;

5. Unlike certain other states, such as New Mexico, Nevada received no land grants from the Federal Government when it occupied the status of a territory;

6. Nevada received no land grants for insane asylums, schools of mines, schools for the blind and deaf and dumb, normal schools, miners' hospitals or a governor's residence as did states such as New Mexico; and

7. Nevada thus received the least amount of land, 2,572,478 acres, and the smallest percentage of its total area, 3.9 percent, of the far west land grant states admitted after 1864, while states of comparable location and soil condition, namely, Arizona, New Mexico and Utah, received approximately 11 percent of their total area in federal land grants; and

WHEREAS, The State of Nevada has a legal claim to the public land within its borders retained by the Federal Government because:

1. In the case of the State of Alabama, a renunciation of claim to unappropriated lands similar to that contained in the ordinance adopted by the Nevada constitutional convention was held by the Supreme Court of the United States to be "void and inoperative" because it denied to Alabama "an equal footing with the original states" in *Pollard v. Hagan,* 44 U.S. (3 How.) 212 (1845);

2. The State of Texas, when admitted to the Union in 1845, retained ownership of all unappropriated land within its borders, setting a further precedent which inured to the benefit of all states admitted later "on an equal footing"; and

3. The Northwest Ordinance of 1787, adopted into the Constitution by the reference of Article VI to prior engagements of the Confederation, first proclaimed the "equal footing" doctrine, and the Treaty of Guadelupe Hidalgo by which the territory including Nevada was acquired from

Mexico, which is "the supreme law of the land" by virtue of Article VI, affirms it expressly as to the new states to be organized therein; and

WHEREAS, The exercise of broader control by the State of Nevada over the public lands within its borders would be of great public benefit because:

1. Federal holdings in the State of Nevada constitute 86.7 percent of the area of the state, and in Esmeralda, Lincoln, Mineral, Nye and White Pine counties the Federal Government owns from 97 to 99 percent of the land;

2. Federal jurisdiction over the public domain is shared among 17 federal agencies or departments which adds to problems of proper management of land and disrupts the normal relationship between a state, its residents and its property;

3. None of the federal lands in Nevada are taxable and Federal Government activities are extensive and create a tax burden for the private property owners of Nevada who must meet the needs of children of Federal Government employees, as well as provide other public services;

4. Under general land laws only 2.1 percent of federal lands in Nevada have moved from federal to private ownership; and

5. Federal administration of the retained public lands, which are vital to the livestock and mining industries of the state and essential to meet the recreational needs of its citizens, has been of uneven quality and sometimes arbitrary and capricious; and

WHEREAS, Each of these sets of facts raises issues of great legal and economic complexity which require careful and deliberate study; now, therefore, be it

Resolved by the Senate of the State of Nevada, the Assembly concurring, That the legislative commission is directed to study the several possible approaches to the problem of securing a greater degree of control by the State of Nevada over the public lands within its borders for the common benefit of its citizens, which may include:

1. Application to the Congress of the United States for an additional land grant;

2. Application to the Congress of the United States for greater participation by the state in the administration of the retained lands; and

3. Legal action by the state to vindicate its claim to all the public lands,

or any combination of these measures or of other measures to be devised; and be it further

Resolved, That the legislative commission submit its report and recommendations to the 59th session of the legislature.

REPORT OF THE LEGISLATIVE COMMISSION

To the Members of the 59th Session of the Nevada Legislature:

Attached is the report of the subcommittee appointed to study means of deriving additional state benefits from public lands pursuant to Senate Concurrent Resolution No. 35. The legislative commission offers its thanks to the members of the subcommittee, whose names appear in the introduction to their report, and to the many persons, including representatives from the local, state and federal levels of government who provided information, appeared at meetings and otherwise assisted the subcommittee in its work.

The report contains two recommended resolutions for legislative action. One would urge the attorney general to assert, in the normal course of litigation, Nevada's legal and equitable claims to the public lands. The other would create a select committee on public lands to pursue Nevada's interest in acquiring additional lands by arranging to meet with appropriate officials in Washington, D.C., following the adjournment of the 59th session of the legislature.

The report also contains comments and suggestions which are not appropriate for action by the legislature at this time.

Respectfully submitted,

Legislative Commission
Legislative Counsel Bureau
State of Nevada

Carson City, Nevada
November 22, 1976

SUMMARY OF RECOMMENDATIONS

The paragraphs below briefly summarize the recommendations of the subcommittee at the conclusion of its deliberations.

The subcommittee recommends:

1. That the legislature adopt a resolution urging the attorney general to assert, in the normal course of litigation, all possible claims the State of Nevada has to the public lands within its borders. (Appendix A, Exhibit A--BDR 90.)

2. That the legislature send a select committee of three senators and four assemblymen to Washington, D.C., with concrete proposals for increasing the percentage of land in nonfederal ownership in the State of Nevada. (Appendix A, Exhibit B--BDR 91.)

3. That the select committee consider as an item of first priority the question of whether the state should pursue, in the courts or in Congress, the possibilities for becoming the manager or trustee of the public lands without acquiring ownership.

4. That the state recommend to the Nevada congressional delegation the submission of a bill to authorize the selection by Nevada each year of a specified quantity of lands, until 100 percent of the public domain lands in Nevada have been transferred to nonfederal ownership.

5. That the select committee review the statutory provisions relating to the manner in which the State of Nevada consents to acquisition of land by the Federal Government (chapter 328 of NRS), to determine whether legislative concurrence should be required before the state's consent is effective and whether the state should attempt to bargain for the release of equivalent public domain lands as a quid pro quo.

6. That the select committee explore whether it would be worthwhile for the state to work toward federal legislation requiring state concurrence before certain activities and uses could take place on the public lands.

7. That the select committee work with other western states with a view to possible joint action on the problem of land acquisition from the Federal Government.

8. That present efforts in the direction of federal-state cooperation in land use planning for the federal lands be commended, and that continued development of procedures for this purpose be encouraged; and further, that the select committee communicate with Bureau of Land Management officials concerning the need for more effective advisory boards and public participation in decision-making in those areas where federal-state cooperation has not yet been achieved.

9. That the circulation of petitions be approved as a desirable means of expressing the sentiments of the signers on public land problems, but that action on petitions presented to the subcommittee be deferred until such time as the contents are submitted to the 59th session of the legislature.

10. That if the State of Nevada acquires additional lands from the Federal Government, either as owner or as trustee, the policy of the state be initially to sell only as much land as will increase overall tax revenues in the state sufficiently to offset the added management costs.

11. That the state land use planning agency provide assistance and coordination for counties which request such service in connection with the identification of specific lands appropriate for transfer from federal ownership or the preparation of supporting data needed to make the request.

12. That agencies of the Federal Government be asked to assure that notification of each proposed land exchange affecting the State of Nevada is provided directly to the state land use planning agency as well as to other state agencies, and that notice of the proposed exchange also be given by official publication in the newspapers of the counties affected.

Report of the Legislative Commission's Subcommittee on Means of Deriving Additional State Benefits From Public Lands

I. INTRODUCTION

Senate Concurrent Resolution No. 35, adopted by the Nevada legislature in 1975, directed the legislative commission "to study the several possible approaches to the problem of securing a greater degree of control by the State of Nevada over the public lands within its borders for the common benefit of its citizens."

The resolution suggested that the approaches might include:

1. Application to the Congress of the United States for an additional land grant;

2. Application to the Congress of the United States for greater participation by the state in the administration of the retained lands; and

3. Legal action by the state to vindicate its claim to all the public lands, or any combination of these measures or of other measures to be devised.

To carry out this assignment, the legislative commission appointed a subcommittee composed of the following legislators:

Senator Richard E. Blakemore, Chairman	Tonopah
Assemblyman Roy Young, Vice Chairman	Elko
Assemblyman Chester S. Christensen	Sparks
Assemblyman Karen W. Hayes	Las Vegas
Assemblyman Thomas J. Hickey	North Las Vegas

The subcommittee has held seven meetings, one of which was a 2-day work session. One meeting took place in Las Vegas; the others were in Carson City.

II. FEDERAL AND NONFEDERAL LANDS IN NEVADA--IS 13 PERCENT ENOUGH?

Basic Data on Nevada's Public Land Situation

The State of Nevada contains a total of 70.3 million acres, excluding water area. Of this total, approximately 60.8 million acres are owned, managed and controlled by the Federal Government. Only 9.4 million acres, or 13.4 percent, are in nonfederal ownership.[1] In fact, in several rural Nevada counties (Esmeralda, Lincoln, Mineral, Nye and White Pine), the nonfederal ownership is as low as 3 percent or lower. It is this imbalance between federal and nonfederal property ownership in the state which has been of such great concern to significant numbers of Nevada citizens in recent years and which the Nevada legislature has recognized in adopting such measures as S.C.R. 35.

In considering the various approaches detailed in the study resolution and listening to different points of view about the mixture of problems and benefits the public lands bring to the state, the subcommittee has frequently returned to the basic question, "Is 13 percent outside federal ownership enough?". In other words, does a state have the tools to govern adequately in the interests of all its citizens if 87 percent of its total land area is controlled by the Federal Government? Serious questions of federalism arise when the imbalance is so pronounced.

Principal Federal Landholders in Nevada. Most of the federally held lands in Nevada are unappropriated and unreserved, i.e., they have never left federal ownership and have never been reserved for specific federal purposes. These are commonly known as "public domain" lands, subject to management and control by the Bureau of Land Management (BLM) of the Department of the Interior. Over 48 million acres of the federal lands in Nevada are BLM controlled.

Apart from the BLM, a variety of federal landholders administer lands "reserved" for their respective federal purposes. Those holding significant amounts of land in Nevada are the

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[1] Public Land Statistics 1974, United States Department of the Interior, Bureau of Land Management, Table 7, p. 10.

U.S. Forest Service (5.1 million acres); the Department of Defense (3.1 million acres); the Fish and Wildlife Service (2.2 million acres); the Bureau of Reclamation (919,000 acres); the Energy Research and Development Administration (817,000 acres); and the National Park Service (262,000 acres).[2]

Obviously, no other single landowner, public or private, can approach the enormity of the federal stake in Nevada. And in recent years there have been virtually no transfers (dispositions) of Federal Government lands to nonfederal owners.

BLM Receipts from Public Domain Lands Located in Nevada. Perhaps because of the extent of its holdings in Nevada, the Bureau of Land Management has received a greater degree of attention during the subcommittee's study than the other landholding agencies. One of the most significant items of information requested by subcommittee members relates to the amount of money BLM takes out of Nevada every year and how much the state receives back as its share of the revenues.

Tables 1 and 2 show that approximately $5.1 million was taken in from Nevada's BLM lands in fiscal year 1975, while only $745,746 of that total was allocated back to the state.[3]

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2 Bureau of Land Management Statistics 1975, NSO Pub. 5, p. 6.
3 Bureau of Land Management Statistics 1975, NSO Pub. 5, p. 8.

Table 1

BLM Receipts from Lands in Nevada

Source	FY 1975
Mineral Leases and Permits	$1,467,391
Sale of Lands and Material:	
Timber	26,153
Land	246,976
Geothermal	1,145,434*
Grazing, Section 3	1,886,398
Grazing, Section 15	34,482
Fees and Commissions	73,495
Right-of-Ways	216,562
Rent of Land	3,553
Other	9,092
TOTALS	$5,109,536

*Includes rentals and bonus bids on competitive sales.

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Table 2

Nevada Portions of BLM Receipts from Lands in Nevada

A portion of the receipts collected are paid to the Nevada State Treasury as shown below:

Source	FY 1975
Mineral Leases	$ 550,272
Sale of Land and Materials	56,742
Grazing, Section 3*	121,491
Grazing, Section 15**	17,241
TOTALS	$ 745,746

*Section 3 refers to grazing within grazing districts.
**Section 15 refers to grazing outside established grazing districts.

The state's proportion of the receipts from public lands is governed by federal law. The state receives different percentages in different categories. Five percent of the net proceeds from sales of land and materials goes to the state as provided in Nevada's enabling act. For fiscal year 1975, 37 1/2 percent of the receipts from mineral leasing went to the state and was placed in the distributive school fund. Grazing revenues were allocated 12 1/2 percent to the state if from inside grazing districts and 50 percent to the state if from outside grazing districts. In Nevada, grazing revenues go into the county range improvement funds.

Nevada's $745,000 (of $5.1 million in total receipts) appears woefully inadequate when it is considered that these lands are within the boundaries of the state but enjoy a tax-exempt status.

Extent of State Jurisdiction on Federal Lands. When the Federal Government establishes a federal reservation within a state (for defense, national forests or other purposes), one of the considerations is the extent to which the state may continue to exercise jurisdiction on the reservation.

Varying degrees of jurisdiction may be retained in the hands of the state, as illustrated by the provisions of chapter 328 of NRS, but state jurisdiction is always subject to the condition that the state may not in any way destroy or impair the effective use of the federal reservation for its specified purpose. It has long been established, for instance, that none of the federally-owned property on a reservation may be subjected to state or local taxation or to state eminent domain.

The "exclusive" federal jurisdiction mentioned in clause 17 of section 8 of Article I of the United States Constitution (relating to the District of Columbia and forts, magazines, arsenals, dockyards and other needful buildings) has been determined to be unnecessary on many federal reservations. It is not uncommon, therefore, where exclusive federal jurisdiction is not required, for the state to reserve the right to tax private property on the reservation; the right to serve civil and criminal process on the reservation; and the entitlement of persons residing on the reservation to the civil and political rights (including suffrage) they would have if they resided elsewhere.

In some instances the state may have an even greater degree of jurisdiction, which might include full civil and criminal jurisdiction over matters arising on the reservation and the right to control all state highways located on the reservation. But always, if the land is held by a federal agency, the specter of federal supremacy is in the background. Even though the level of state jurisdiction appears to be relatively high, in practice the supremacy clause governs. This is true not only for reserved lands, but also for the unreserved public domain. For the most part (certain water questions excluded for purposes of this study), the state has not the power to act on the federal lands in any manner which the Federal Government determines is contrary to the federal interest with respect to such lands.

Early Developments Affecting Nevada Lands

In 1848 the United States acquired the area which is now the State of Nevada, under the Treaty of Guadalupe Hidalgo at the end of the Mexican War. Persons who were no longer Mexican citizens under the treaty were to be "incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights of citizens of the United States." With respect to political rights, their condition was to be "on an equality with that of the inhabitants of the other territories of the United States," and at least equally good as the condition of the inhabitants of Louisiana and the Floridas when they became territories.

The area remained unorganized territory of the United States until 1850, when Congress provided for the organization of Utah and New Mexico territories. Most of what is now Nevada was included in the Utah Territory; only the southeastern tip was part of the New Mexico Territory. Later, in 1861, the western portion of the Utah Territory became the Nevada Territory. Nevada became a state in 1864, but the last extension of the state's boundaries was not completed until 1867.

Enabling Act for Statehood. Early in 1864 the Congress of the United States passed an enabling act for the people of Nevada to form a constitution and state government. The enabling act provided that the state, when formed, "shall be admitted into the Union upon an equal footing with the original states, in all respects whatsoever."

But the enabling act also set forth certain conditions to be met. One was that the members of the constitutional convention must provide, by an ordinance to be irrevocable without the consent of Federal Government, that "the people inhabiting said territory do agree and declare that they 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."

Ordinance Adopted as Part of Constitution. The delegates to the constitutional convention, mindful of the requirements imposed by the enabling act, prepared an ordinance "irrevocable, without the consent of the United States and the people of the State of Nevada," agreeing to the disclaimer of public lands as well as to certain other conditions. The ordinance was included as part of the constitution when the constitution was submitted to a vote of the people and approved in September of 1864.

Presidential Proclamation of Statehood. On October 31, 1864, the President of the United States signed a proclamation declaring that the conditions of the enabling act had been met and that the State of Nevada was "admitted into the Union on an equal footing with the original states." By the terms of the enabling act, no further action on the part of Congress was necessary to assure Nevada's statehood.

Grants of Land to the State. Under the enabling act Congress granted the new State of Nevada sections 16 and 36 of every township, or other lands equivalent thereto, for the support of common schools. An additional 40 sections were granted for public buildings and the prison, and 5 percent of the net proceeds of subsequent sales of public lands was to be paid to the state for road and irrigation purposes.

In 1866, a 500,000-acre land grant to which the state was entitled (because of an 1841 federal statute) became available for educational purposes. A 90,000-acre grant under the 1862 land grant college act became available for the teaching of mining. Further, an additional 72 sections were granted for a university.

In 1879 the State of Nevada decided to relinquish its right to sections 16 and 36 (totaling nearly 3.9 million acres) in exchange for 2 million acres to be selected from any of the

unappropriated, nonmineral public lands within the boundaries of the state. Congress approved the exchange in 1880. Among the reasons for the exchange were the remoteness of the school sections and the likelihood of extended delays in completing the surveys which must precede selection. Another reason, however, was the attractiveness to the state of acquiring productive land in smaller quantities rather than what appeared to be worthless land in large quantities.

So, the land grants from the Federal Government to the State of Nevada between 1803 and 1974 tabulate as follows:

Total Land Grants to the State of Nevada[4]

Purpose	No. of Acres
Common schools	2,061,976
Other schools	136,080
Other institutions	12,800
Miscellaneous improvements	500,440
Other purposes	14,379
Total	2,725,666

The 2.7 million acre total appears especially meager when compared with the 5.1 million acres the Federal Government granted the railroad in Nevada. It is also below the grants to the other western states (excluding Hawaii) for the same period, none of which was below 3 million acres.

According to Nevada's division of state lands, approximately 2.6 million acres of the above-listed grants were patented to private parties. Only about 3,000 unallocated acres are held by the state at the present time. State-held lands owned for state purposes now amount to approximately 105,500 acres (exclusive of highway department holdings).

Other Western States with High Proportions of Federal Land

Nevada is not the only state containing large proportions of federally owned land. Alaska, as of June 30, 1973, was 96.7 percent owned by the Federal Government.[5] Although this is higher than Nevada's 86.6 percent, the percentage

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4 Public Land Statistics 1974, Table 4, p. 7.
5 Public Land Statistics 1974, Table 7, p. 10.

of federal ownership in Alaska will be gradually moving downward as the state makes its selections. At the time Alaska was admitted to statehood, it was granted the right to select approximately one-third of the total land acreage of the state. When the selections are completed, the proportion of federally owned land will not be nearly so high as in Nevada.

Percentages for other states (excluding the District of Columbia) having more than 20 percent federal ownership are:

State	Percentage of Federal Land
Utah	66.2
Idaho	63.7
Oregon	52.3
Wyoming	48.2
California	45.0
Arizona	43.9
Colorado	36.0
New Mexico	33.3
Montana	29.6
Washington	29.5

Such a high proportion of federal ownership is not likely to be considered desirable by any state, but Utah and Idaho (where the federal percentage exceeds 60 percent) are particularly vulnerable to problems similar to those encountered in Nevada.

Several of the western states have expressed their interest in working together in an attempt to reduce the federal proportion of lands within their respective boundaries.

Thirteen Percent in Nonfederal Ownership Is Not Enough

As was mentioned earlier, the subcommittee returned many times to the question of whether 13 percent of the state's land in nonfederal ownership is enough. Persons attending subcommittee meetings were sometimes asked to respond to this question. Some persons feel that only 100 percent in nonfederal ownership is enough. Others are opposed to the state's acquiring any additional lands at all from the Federal Government until the state is in a position to perform the necessary management functions with a high level of competence.

Taking a middle position are those who are convinced that 13 percent is not enough but are not sure what percentage to suggest as appropriate. Many in this third group have suggested the desirability of seeking out for selection and transfer those lands which it can be demonstrated will fill specific, identifiable needs within the state.

The subcommittee's view is that the imbalance in property ownership has a highly detrimental effect on the sovereign powers of the state and its subdivisions, as illustrated in such crucial areas as land use decisionmaking and state-federal jurisdictional limitations.

Wherever the land is federally owned, all the land use and land management decisions are ultimately federal decisions. Thus in Nevada, state and local authority in land use matters actually exists for only 13 percent of the entire state. When such is the case, the sovereignty of a state over its internal governance is bound to be threatened.

Furthermore, the jurisdiction allowed the state and its subdivisions on federally held lands is always subject to limitations (as noted earlier in this report) and remains ultimately a matter of federal choice. The subcommittee believes that where a state's jurisdiction is so completely limited as to 87 percent of its own land area, the state is deprived of a substantial portion of its sovereignty and some type of corrective action is called for.

Therefore, the subcommittee has concluded that, indeed, 13 percent is not enough and the state would be remiss if it did not become actively involved in attempts to improve the situation. The state should renew its efforts to increase the 13 percent--through several approaches as necessary, including applications for relatively small transfers annually over a long period of time if Congress can be convinced to consider such applications favorably.

As one means of pursuing this end, the subcommittee recommends that a select committee of Nevada legislators be appointed to meet with appropriate officials in Washington, D.C., to discuss concrete proposals for increasing the percentage of land in nonfederal ownership in the State of Nevada. The select committee would be composed of three members of the senate appointed by the majority leader and four members of the assembly appointed by the speaker. The Washington meeting would occur as soon as possible after the adjournment of the 59th session of the legislature. (Appendix A, Exhibit B--BDR 91.)

III. LEGAL ACTION TO DETERMINE NEVADA'S RIGHT TO THE PUBLIC LANDS

Senate Concurrent Resolution No. 35 mentions, as a possible approach to Nevada's public land problem, legal action by the state to vindicate its claim to all the public lands. The legal approach has been of considerable interest to the subcommittee.

Appendix B contains a Memorandum of Law prepared by the legislative counsel bureau staff for the purpose of setting forth in its best possible light the case for requiring the United States to divest itself of the public lands within the State of Nevada. The memorandum emphasizes the "trust" theory of the case because the attorney general's office offered to develop independently the "equal footing" theory. Neither of these theories excludes the other; rather, they support one another, and the counsel bureau staff's development of the "trust" theory does not mean that the staff believes it is the stronger.

Essentially, both theories of the case rest upon the interpretation of the United States Constitution and certain treaties, but as the memorandum in Appendix B shows, actual decisions of the United States Supreme Court upon the nature of Congress' authority over the unappropriated public lands outside the beds of navigable streams give the trust theory no support, and the "equal footing" theory has been applied only against Texas' offshore claims.

Therefore the legislative counsel has stated his belief that the State of Nevada has no legally enforceable claim either to acquire these public lands from the United States or to require the United States to offer them for public sale.

The subcommittee believes, however, that the State of Nevada should continue developing the theories and arguments in favor of its claim. They can be used, in whole or in part, to reinforce other arguments asserted by the state in a variety of cases involving federal-state controversies.

Consequently, the subcommittee recommends that the legislature adopt a resolution urging the attorney general to assert, in the normal course of litigation, all possible claims of the State of Nevada to the ownership, management and control of the public lands within its borders. (Appendix A, Exhibit A--BDR 90.) Asserting the claims in the normal course of litigation will provide a means of offering the arguments in court without undue expense to the state.

IV. APPLICATION FOR ADDITIONAL LAND GRANTS

Only a few years ago the State of Nevada presented to the Public Land Law Review Commission a well-documented request for a land grant of 6 million acres to be selected by the state over a period of 20 years. The Commission, however, chose to pass over that request, recommending instead that no additional land grants be made to any state. Senator Alan Bible and Congressman Walter Baring, both members of the Commission, took exception to this recommendation in the following minority statement:

> * * * The Commission's report has recommended against land grants from the Federal Government to the individual states. We do not agree with this decision. We believe Nevada's justification should have been sustained by Commission members. Nevada stands at the bottom of the 50 states in percentage terms with relation to lands granted to it by the Federal Government. It is our opinion the Federal Government should give consideration to states such as Nevada which are desperately in need of additional lands to expand the tax base and insure future growth. Therefore, we do not concur with the majority views.[6]

Despite the 1970 setback, the State of Nevada has not given up. The need for additional lands remains and the legislature, in S.C.R. 35, directed the subcommittee to consider again the possibility of applying for additional land grants.

Authority for Nevada to Make Selections Annually to Increase Proportion of Nonfederal Lands

Believing that the State of Nevada will be remiss if it does not again express in a national forum its strong support for congressional action authorizing the grant of additional Nevada lands for state selection, the subcommittee recommends that the legislature, through its select committee, request the Nevada congressional delegation to introduce and press for the passage of legislation in Congress to authorize such grants.

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[6] One-third of the Nation's Land, Report of Public Land Law Review Commission (1970), page 245.

The bill should authorize the selection by Nevada each year of a specified quantity of lands. (The annual quantity requested should be determined by the select committee after conferring with the congressional delegation and others about the feasibility of various amounts.) The annual authorization would be designed to continue until 100 percent of the unappropriated, unreserved "public domain" lands in Nevada have been transferred to nonfederal ownership. (Appendix A, Exhibit B--BDR 91.)

One of the petitions brought before the subcommittee with numerous signatures contains a request that the Federal Government transfer the ownership of all BLM lands to the respective states in which the lands are located. The subcommittee has taken note of the contents of these petitions and generally approves the circulation of petitions as a desirable means of expressing the sentiments of the signers on vital issues. The subcommittee itself, however, believes it should defer action on the petitions until such time as the contents are submitted to the 59th session of the legislature.

Identification of Land Appropriate for Transfer from Federal Ownership

The proposal for annual selections within Nevada carries with it a responsibility on the part of the state to demonstrate, both to its citizens and to interested persons in Washington, D.C., and elsewhere, that an effective mechanism is available for identifying lands which are appropriate for selection in each county.

The subcommittee anticipates that the principal responsibility for recommending lands desirable for transfer would lie with the county governments; however, the subcommittee recommends that the resources of the state land use planning agency in the state department of conservation and natural resources be readily available to counties which request assistance and coordination in connection with their identification of specific lands appropriate for transfer from federal ownership or the preparation of supporting data to justify the requests for transfer.

To the extent that Nevada is able to show that a system exists within its governmental structure for the identification and documentation of lands for which a need can be demonstrated,

it will be easier to obtain support for the proposal for a program of annual grants as the basis for selection.

Possibility of State Management of Public Lands Without State Ownership

As discussed in the Memorandum of Law (Appendix B), there is the possibility that a court might appoint the State of Nevada to serve as trustee for all the public lands within its boundaries. Likewise, the state might choose to apply to Congress for the right to manage all or some of the public lands within its boundaries.

In neither of these cases would the state become the owner of the lands, but it would almost certainly be in a better position to make decisions respecting their management and control. The state would be entitled to payment for services rendered as trustee or manager, but the distribution of public land receipts would otherwise remain unchanged. Thus the state's advantage would be primarily in its opportunity to manage and control its lands, subject to whatever restraints might be imposed by judicial order or federal law.

The subcommittee has not had the opportunity to consider adequately the advantages and disadvantages of the state's serving as trustee or manager of its public lands. If there is merit to the idea, perhaps a small-scale pilot project could be arranged with the cooperation of the BLM. Several possibilities are available.

Recognizing that further information is needed in this area, the subcommittee recommends to the legislature that its select committee consider as an item of first priority the question of whether the benefits appear promising enough that the state should pursue, in the courts or in Congress, the possibilities for becoming the manager or trustee of the public lands without acquiring ownership. (Appendix A, Exhibit B--BDR 91.)

Initial Policy of State With Respect to Lands Newly Acquired

Questions have been raised concerning what the state would do with the public lands it might acquire. Would they be sold to private buyers or held for state purposes?

Much would depend on the quantity of lands acquired, the method of acquisition and the nature of the state's interest in the lands, of course. The subcommittee recognizes the complexity of the issues which would be raised and therefore addresses only the initial stages of acquisition in its recommendation, leaving longer term goals to be developed at a later stage when there is sufficient knowledge of the situation.

The subcommittee recommends that if the state acquires additional lands from the Federal Government, either as owner or trustee, the policy of the state be initially to sell only as much land as will increase overall tax and nontax revenues in the state sufficiently to offset the added management costs.

Joint Action With Other States

Public land problems tend to be magnified in Nevada's case because of the exceptionally high percentage of federally held land, but a number of the other public land states have been becoming more and more interested in state efforts to increase nonfederal holdings within their respective borders.

The subcommittee appreciates this interest and wishes to encourage the efforts of all public land states in their attempts to effect the transfer of additional lands from the public domain. In this connection, the subcommittee recommends to the legislature that its select committee undertake to work with other western public land states with a view to possible joint action on the problem of land acquisition from the Federal Government. This effort might include the development of effective plans for carrying to Washington the case of all the interested western states in favor of a general policy permitting additional land grants and other federal dispositions in some areas of the west. (Appendix A, Exhibit B--BDR 91.)

V. GREATER STATE AND LOCAL PARTICIPATION IN POLICYMAKING FOR PUBLIC LANDS

One of the complaints heard most frequently about federal ownership of 87 percent of the land in Nevada is that decisions are made by personnel in Washington, D.C., who have no understanding of local conditions or the needs of the local people who live and attempt to do business in the areas affected. The legislature directed the subcommittee to consider what might be done to provide greater state and local participation in the policymaking process.

Federal-State Cooperation in Land Use Planning for the Public Lands

The subcommittee received statements from representatives of BLM and the Forest Service regarding their land use planning procedures, the opportunities afforded for public participation through advisory groups and other means, and the various factors which must be taken into account under federal laws and court orders.

The process does seem cumbersome, but it appears that recent awareness of the need for improved communications at the state and local levels has in fact resulted in more effective federal-state cooperation in land use planning and management of the federal lands in many parts of the state. The subcommittee commends the federal agencies for their efforts in this regard and recommends that continued development of procedures for this purpose be encouraged.

There are, however, some areas of the state where BLM, in particular, has not developed adequate mechanisms for local residents to participate effectively in planning and decisionmaking for the public lands closest to them. In these "problem" areas there appears to be a need for more effective local representation on advisory boards and more meaningful local involvement in the planning process.

The subcommittee recommends, therefore, that the legislature direct its select committee to communicate with BLM and other Department of Interior officials in Washington, D.C., as well as within the state, concerning the identification of such problem areas and whether laws and regulations should be revised to mandate that the views of local residents be given greater weight and attention than those of persons

from other areas inside and outside the state. (Appendix A, Exhibit B--BDR 91.)

Possibility of Requiring State Concurrence as Condition Precedent to Certain Uses of Public Lands

A certain amount of interest has been expressed in the possibility of working toward federal laws requiring state concurrence before the Federal Government could authorize or undertake certain activities and uses on public lands within the state. Legislation of this type could provide the state with more definite assurance of federal-state cooperation than the current planning system now offers. Greater weight would be afforded the views of the state and local participants in the process.

Although during the course of the subcommittee study there has not been much exploration of the feasibility of such requirements, the subcommittee recommends to the legislature that this be an item for its select committee to analyze with a view to determining whether it would be in the best interests of the State of Nevada to pursue the concept. One possibility would be to support congressional legislation, applicable to all federally held lands, specifying those uses and changes in use which could not be undertaken without the concurrence of the governor of the state in which the lands are located.

Federal Acquisitions, Exclusive Federal Jurisdiction and the Role of the State

Chapter 328 of the Nevada Revised Statutes includes, among other things, procedures for state consent to federal land acquisitions for "any purpose expressly stated in clause 17 of section 8 of article I of the Constitution of the United States." NRS 328.030, subsection 1, delegates to the Nevada tax commission the authority to grant such consent. The subcommittee believes that the possibility of increased legislative involvement in the consent process should be considered.

Likewise, the responsibility for negotiations over transfers of legislative jurisdiction over federal lands from or to the State of Nevada has been delegated to the Nevada tax commission (NRS 328.206 to 328.209, inclusive). This is another area in which the possibilities for greater legislative involvement should be discussed.

The subcommittee believes that greater legislative awareness of and involvement in all facets of federal-state relationships involving the public lands would be beneficial to the state and its citizens and might assist in strengthening the bargaining power of the state, particularly insofar as federal acquisitions are concerned. For example, in acquisition cases not involving exchanges, the legislature might wish to consider attempting to condition the state's consent on the release of equivalent public domain lands as a quid pro quo.

Therefore, the subcommittee recommends to the legislature that its select committee be directed to review the provisions of chapter 328 of NRS relating to federal acquisitions, federal jurisdiction and the role of the state, its agencies and subdivisions to determine whether revisions are needed, such review to include:

1. Consideration whether state consent to federal acquisitions for exclusive jurisdiction purposes, or state agreements for transfers of legislative jurisdiction, or both, should be effective only upon approval by the legislature (or the legislative commission when the legislature is not in session); and

2. Consideration whether in the future the state should, in any federal acquisition case which is not already part of an exchange agreement involving other lands within the state, attempt to condition its consent upon the Federal Government's actually disposing of equivalent public lands in the State of Nevada.

Notice of Land Exchanges Proposed by Federal Government

The subcommittee is aware that land exchanges under the Taylor Grazing Act have caused problems for certain local governments in the past because of intercounty transactions. One county may lose part of its tax base while another may have a windfall.

On the whole, however, the exchange principle has been viewed as beneficial to the state and its citizens, permitting consolidation of private holdings (as well as federal holdings) in checkerboard areas and encouraging increased protective measures for the Lake Tahoe area.

One suggestion made by the subcommittee stems from the belief that private owners, local government entities and the state as a whole should be better informed about proposed land exchanges, with sufficient time to offer comments, suggestions and alternatives. It appears that current notifications do not always reach all the affected and interested persons in time to consider and communicate their reactions to the appropriate officials.

For this reason, the subcommittee recommends that the legislature request the federal agencies involved in land exchanges affecting the State of Nevada to assure that notification of each such proposed exchange is provided directly to the state land use planning agency in the state department of conservation and natural resources, as well as to the state planning coordinator and other state agencies. Further, the subcommittee recommends that official publication of each proposed exchange be given in the newspapers of the counties affected, so that residents of the surrounding area will have an opportunity to consider the effects of the proposed exchanges.

VI. CONCLUSION

The subcommittee believes that its study has produced increased understanding and knowledge about the problems which encumber a state in which only 13 percent of the land area is nonfederally owned. Throughout the past year persons representing a variety of viewpoints have been given the opportunity to meet with the subcommittee for discussion of public land matters--both those about which there is general agreement and those involving extreme differences of opinion. The subcommittee has benefited from hearing all points of view.

As the study began, the subcommittee was aware of two bills pending in Congress, the passage of which was in considerable doubt. One concerned payments in lieu of taxes on federally owned lands. The other, commonly known as the BLM Organic Act, was a broad-based revision of the public land laws which appeared at various times throughout the year in different versions, depending upon what house or committee was working on it.

It was not considered likely (particularly in the case of the Organic Act) that the bills would pass both houses of Congress prior to adjournment. The early predictions proved wrong, however, and both bills passed and were signed by the president.

The bill for payments in lieu of taxes (Public Law 94-565) could provide considerable financial aid to counties throughout Nevada. The BLM Organic Act (Public Law 94-579) is highly complex and contains some features which may be beneficial and others which may not.

Because the passage of neither of these laws was certain as the subcommittee concluded its deliberations, their provisions were not taken into account as the recommendations in this report were drawn. It is understood, of course, that the Organic Act itself is so far reaching as to repeal or drastically revise many (if not most) of the public land laws existing at the time of this study.

This being the case, there is without question a need for the legislature to appoint the recommended select committee on public lands to follow up on items identified here and also to consider the new information which will be available next year about the effect in Nevada of Congress' most recent revisions to the public land laws and the accompanying executive department regulations.

SUMMARY--Urges attorney general to assert all claims of state to the public lands. (BDR 90)

CONCURRENT RESOLUTION--Urging the attorney general to assert all possible legal and equitable claims of the state to the public lands located within its boundaries.

WHEREAS, Only 13 percent of the land in the State of Nevada is outside federal ownership and control while every other state in the union has, or is entitled to have, 25 percent or more in that status; and

WHEREAS, Thirteen percent of the land clearly is not enough to enable state and local governments in Nevada to exercise adequate control over their internal affairs; and

WHEREAS, The imbalance in property ownership in Nevada threatens the sovereignty of the state and the social and economic interests of its citizens; and

WHEREAS, The attorney general, as the chief legal officer of the state, has a responsibility to protect and secure the interest of the state by commencing or defending court actions where necessary; and

WHEREAS, Review of the historical evidence concerning the "property clause" of the United States Constitution (Art. IV, § 3, cl. 2) leads to the conclusion that the framers of the Constitution contemplated all public lands would be disposed of and did not intend to confer upon Congress the power to retain permanently any unappropriated, unreserved public lands; and

WHEREAS, In recent years disposition of unappropriated, unreserved public lands in Nevada and other states of the West has virtually come to a standstill and influential federal officials have embraced a philosophy of federal retention which is of doubtful constitutional validity; and

WHEREAS, There is substantial documentation for an argument in court that the Federal Government holds the public lands only in the role of trustee for the ultimate purpose of disposition, and that the trustee's failure to dispose of public lands in Nevada is sufficient ground for substituting the State of Nevada as trustee with the duty to proceed with disposition, accompanied by the power to manage and control the property pending disposition; and

WHEREAS, Substantial legal arguments can also be advanced that the "equal footing" with the original states, to which Nevada is entitled pursuant to the 1864 enabling act, includes the right of the state to be free from perpetual federal ownership of unreserved public lands within its borders; that the "disclaimer" of public lands required of Nevada by the same 1864 enabling act is ineffective to the extent it purports to confer upon the United States powers not granted under the Constitution; and that there exists sufficient grounds, under the Tenth Amendment to the United States Constitution, for transferring the unreserved lands to the State of Nevada for management, control and disposition where

appropriate, on the premise that the Federal Government lacks the power to retain them permanently; and

WHEREAS, It is in the interest of the State of Nevada to pursue for evaluation in the courts of today these and all other possible legal claims of the state and its citizens relating to the ownership, management and control of the public lands within the state in order to increase the extent to which Nevadans may effectively influence the decisions which do so much to shape their lives; and

WHEREAS, All legal claims relating to the public lands can be asserted by the attorney general in the normal course of litigation without extraordinary expense; now, therefore, be it

RESOLVED BY THE OF THE STATE OF NEVADA, THE CONCURRING, That the legislature strongly urges the attorney general to assert, in the normal course of litigation, all possible legal and equitable claims of the State of Nevada and its citizens to the ownership, management and control of the public lands located within the boundaries of the state; and be it further

RESOLVED, That a copy of this resolution be prepared and transmitted forthwith by the legislative counsel to the attorney general.

SUMMARY--Creates select committee on public lands. (BDR 91)

CONCURRENT RESOLUTION--Creating a select committee on public lands to meet with appropriate members of Congress and officials of the executive branch in Washington, D.C., concerning Nevada's need for additional lands in nonfederal ownership and related matters.

WHEREAS, The legislative commission was directed by S.C.R. 35 of the 58th session of the Nevada legislature to study means of deriving additional state benefits from the public lands; and

WHEREAS, The subcommittee appointed by the legislative commission to conduct the study, after receiving testimony and other evidence from a wide variety of sources, concluded that 13 percent of the state's land area in nonfederal ownership is not enough and recommended that the state make a serious effort to increase that percentage; and

WHEREAS, The subcommittee recognized that the state would benefit from a multipronged approach which would include such actions as requests for congressional grants and negotiations with federal executive officials as well as the assertion of the state's legal and equitable claims in the courts; and

WHEREAS, The subcommittee concluded that a select committee of the Nevada legislature, assigned the task of carrying Nevada's case to Washington, would be the legislature's most effective tool during the next few months for achieving a reduction in the extreme imbalance between federal and nonfederal lands in this state; now, therefore, be it

RESOLVED BY THE OF THE STATE OF NEVADA, THE CONCURRING, That there is hereby created a select committee on public lands, composed of three members of the senate appointed by the majority leader of the senate and four members of the assembly appointed by the speaker of the assembly, for the purpose of meeting in Washington, D.C., with appropriate members of Congress and officials of the executive branch to consider Nevada's unique public land situation, the need for additional lands in nonfederal ownership and related matters; and be it further

RESOLVED, That the meeting in Washington, D.C., shall be scheduled to occur as soon as possible after the adjournment of the 59th session of the legislature; and be it further

RESOLVED, That the members of the select committee shall meet during the legislative session for the purpose of selecting a chairman and preparing for the Washington meeting, and that their study and review shall include the following items:

1. As an item of first priority, the question whether it would be advantageous for the state to become the manager or trustee for all or some of the public lands located in Nevada, even without acquiring ownership or any greater share of the proceeds from the lands, but with reimbursement for managerial expenses;

2. In pursuit of the overall objective of increasing from 13 percent the proportion of land in the State of Nevada under nonfederal ownership, consideration of specific proposals for a bill

in Congress permitting the state each year to select a specified quantity of lands from the public domain within its boundaries until all such lands are in nonfederal ownership;

3. Review of the provisions of chapter 328 of NRS relating to state consent to acquisition of land for federal purposes, including consideration whether in the future the state should attempt to condition such consent upon the Federal Government's actually disposing of equivalent public lands in the state, and also including consideration whether state consent to federal acquisitions should be effective only upon approval by the legislature (or the legislative commission if the legislature is not in session);

4. Analysis to determine whether it would be in the best interests of the State of Nevada to pursue the possibility of congressional legislation, applicable to all federally held lands, specifying those uses and changes in use which could not be undertaken without the concurrence of the governor of the state in which the lands are located;

5. The commencement of efforts to develop, along with representatives of other western states, effective plans for joint action to carry to Washington the case of all the western states in favor of federal transfer of additional lands from the public domain; and

6. The identification of areas in the state where the Bureau of Land Management has failed to develop mechanisms for local residents to participate effectively in planning and decision-making for the public lands closest to them, and the necessary

communication with B.L.M. and other Department of the Interior officials in Washington, as well as within the state, concerning whether the views of local residents ought to be entitled to greater weight and attention than those of persons from other areas within and without the State of Nevada; and be it further

RESOLVED, That the select committee is an official agency of the legislative counsel bureau and the members are entitled to receive out of the legislative fund for each day's attendance at the Washington meeting, and other meetings after adjournment of the 59th legislative session as approved by the legislative commission, $40 per day and the per diem expense allowance and travel expenses provided by law; and be it further

RESOLVED, That the select committee shall submit its report to the legislative commission for transmission to the 60th session of the legislature.

MEMORANDUM OF LAW

ON THE QUESTION WHETHER THE STATE OF NEVADA HAS ANY SUBSTANTIAL CLAIM IN EQUITY AGAINST THE UNITED STATES BASED ON THE THEORY THAT THE PUBLIC LANDS ARE HELD IN TRUST.

TABLE OF CONTENTS AND SUMMARY OF ARGUMENT

PART II. THE TRUST UNDER THE CONSTITUTION.

INTRODUCTION. EXPLANATION OF THE INTERNAL STRUCTURE OF THE MEMORANDUM.

This memorandum first explains the theoretical strength of the "trust theory" that the Federal Government has an obligation to divest itself of the public lands within the State of Nevada, briefly discusses its relation to the "equal footing" doctrine, and suggests an appropriate equitable remedy for the breach of trust. Although the subsequent examination of actual decisions of the Supreme Court upon Congressional control of the public lands shows that this remedy is not in fact available to the state as a plaintiff against the United States, the trust theory may be a valuable argument in other cases involving the public lands.

STATEMENT OF FACTS. THE FACTS INDICATE THAT THE FEDERAL GOVERNMENT HAS FAILED TO DISPOSE OF 69 PERCENT OF THE LAND AREA OF THE STATE OF NEVADA WHICH IS PUBLIC LAND HELD IN TRUST BY CONGRESS.

The Federal Government today possesses 60,788,769 acres or 87 percent of Nevada's land area. Over 48 million acres or 69 percent of this land is denominated unappropriated or "public" land and is said to be held in trust by Congress. See cases cited below. This unappropriated land is controlled by the Bureau of Land Management, and is not being held and used by the Federal Government for what has been deemed a federal purpose, such as national defense, or forest, wildlife or Indian reservations.

One of the reasons why the Federal Government possesses so much land here is that the State of Nevada was granted only 2,725,666 acres or 3.9 percent of the land area in the state for its own use. This was the smallest percentage of territory granted to any state, 40 percent smaller than the next smallest percentage of land area granted, that of Montana, which received 6.4 percent of its land area. The amount of land granted to Nevada by the Federal Government was not even half of the acreage granted to the Central Pacific Railroad in Nevada alone.

Another reason why the Federal Government possesses so much land in Nevada is that, in addition to granting so little land to the state and the railroads, it has otherwise

failed to dispose of the land by sale to private interests. Thus, only 2,452,051 acres or 2.4 percent of the land area was disposed of other than through grants to the state or the railroads. By way of contrast, the Federal Government possesses only 85.5 acres of unappropriated land in Ohio, the first public land state to be admitted to the Union, having disposed of 26,221,994.5 acres of unappropriated land. The Federal Government has likewise retained possession of only 432 acres of unappropriated land in Indiana, 408 acres in Illinois and 341 acres in Iowa. When Nevada was admitted to the Union on October 31, 1864, President Lincoln's proclamation stated that "Nevada is admitted into the Union on an equal footing with the original states." But since the Federal Government disposed of 99.9996 percent of the unappropriated land in Ohio and retained 86.514 percent of Nevada's land, it is clear that the State of Nevada has not been treated equally by the trustee, Congress.

As a consequence of the Federal Government's failure to dispose of the unappropriated land in Nevada, only 12.5 percent of the land area of the state is on the tax rolls. Four Nevada counties, which comprise almost 23 million acres or one-third of the land area in the state, have less than 2 percent of their land on the tax rolls. In addition, the absentee trustee, Congress, through the Bureau of Land Management, has asserted more and more control over water rights, predator control, wildlife, and other land use decisions which elsewhere are functions of state and local government. As a result the state is being harmed by sheep-fed coyotes, grain-fed wild horses and empire building bureaucrats. The failure to dispose of the unappropriated land has relegated Nevada to the condition of an archipelago of isolated islands of statehood in a Sargasso sea of federal sovereignty, condemned to the doldrums of perpetual economic stagnation. This condition was not contemplated or intended by the framers of the Constitution.

THE QUESTION TO BE ANSWERED. THE QUESTION IS WHETHER THE STATE OF NEVADA HAS A VALID EQUITABLE CLAIM AGAINST THE FEDERAL GOVERNMENT BECAUSE OF ITS FAILURE TO DISPOSE OF THE UNAPPROPRIATED LANDS.

THE ARGUMENT. THE CENTRAL ARGUMENT OF THIS MEMORANDUM IS THAT THE SUPREME COURT'S CONSTRUCTION OF THE "TERRITORY OR OTHER PROPERTY" CLAUSE, ART. IV, §3, CL. 2, IGNORES THE INTENT OF THE FRAMERS OF THE CONSTITUTION.

The unappropriated or public lands in the several states are held in trust by the United States with Congress as trustee. Pollard v. Hagan, 44 U.S. (3 How.) 212, 222, 11 L.Ed. 565 (1845), Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 448, 15 L.Ed. 691 (1857), Light v. U.S., 220 U.S. 523, 537 31 S.Ct. 485, 55 L.Ed. 570 (1911), U.S. v. San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 84 L.Ed. 1050 (1940). The fact that the unappropriated lands are held in trust is beyond dispute. The source of federal rights and duties with respect to this trust is Art. IV, §3, cl. 2 of the Constitution, which provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The problem with the trust doctrine is that the Supreme Court has construed away the terms of the trust to the point where the trust is legally indefinite. As a consequence, federal possession and control of unappropriated lands within the public land states is now without limitation, and is clearly unconstitutional.

The high water mark in the Supreme Court's erosion of the trust doctrine was reached in Light v. U.S., 220 U.S. 523 (1911). In this case the Federal Government was seeking an injunction to restrain the grazing of cattle on unappropriated lands without a permit. The Court in dicta defined the terms of the trust as follows:

> The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land it can do so indefinitely, Stearns v. Minnesota, 179 U.S. 243. It is true that the "United States do not and cannot hold property as a monarch may for private or personal purposes." Van Brocklin v. Tennessee, 117 U.S. 158. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, §3, Art. IV, that "Congress shall have power to dispose of

> and make all needful rules and regulations respecting the territory or the property belonging to the United States." "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property." Kansas v. Colorado, 206 U.S. 89.
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> "All the public lands of the nation are held in trust for the people of the whole country." United States v. Trinidad Coal Co., 137 U.S. 160. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Light, 220 U.S., at 536-537.

The Court says the United States does not and cannot hold property "for private or personal purposes," yet the Federal Government has the right to absolute control over "its property," which is "incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it." Thus, in one breath the Court says the lands are held by Congress in a de jure trust, while in the next they are held by the United States as de facto proprietor and sovereign. Moreover, "it is not for the courts to say how that trust shall be administered. That is for Congress to determine." This trust is unlike any other that ever existed. According to the Court, there are no terms or duties. The trustee, Congress, holds the lands indefinitely and without limitation. The trust doctrine has thus become a legal fiction, a mere pretense to justify the Federal Government's position as proprietor and sovereign over 87 percent of the land in the State of Nevada.

The State of Nevada can agree to only one point in the passage quoted from the Light case. It is that "the full scope of this paragraph [Art. IV, §3, cl. 2] has never been definitely settled." The problem with this clause of the Constitution is that it is ambiguous. The "plain meaning" rule of construction states that language which is plain and easily understood should be looked to without extrinsic aid for the meaning intended, and it is only where a constitutional provision is not clear that resort must be had to construction. 16 AM.JUR.2d Constitutional Law §58 (1964). However, where a word which would otherwise be ambiguous has two or more separate and distinct meanings or connotations, a question of construction exists and it must be determined which of the possible meanings of the terms is intended. Ibid. §75. The problem with Art. IV, §3, cl. 2 is that the term "other property" is ambiguous on its face because it is susceptible of both a broad and a narrow meaning. Thus, the basic problem with this clause is that its key terms are ambiguous, so that resort must be had to aids to construction in order to unlock the meaning of the clause.

The objective of constitutional construction is to give effect to the intent of the framers and the people adopting it. 16 AM.JUR.2d Constitutional Law §68 (1964). Two broad categories of evidence are available for the construction of a constitutional provision. Extrinsic aids to construction consist of the history of the times including the conditions and the law existing prior to, during, and subsequent to the adoption of the Constitution which reveal the intention of the framers and the understanding of the people adopting the fundamental law. Intrinsic aids consist of the internal structure of the Constitution and the conventional or dictionary meanings of the terms used in it, which reveal meaning more than intent. 2A SUTHERLAND, STATUTORY CONSTRUCTION §45.14 (4th ed. 1973).

The central argument of this memorandum is that the Supreme Court's interpretation of Art. IV, §3, cl. 2 ignores the intent of the framers of the Constitution to create a trust of the public lands and impose definite and narrow duties on Congress, the trustee of the lands. Since this argument is equitable in nature, it is not intended to preempt or conflict with any legal arguments that might be advanced.

In setting forth a construction of Art. IV, §3, cl. 2 which gives effect to the intent of the framers of the Constitution, recourse will first be had to extrinsic aids to construction to show the establishment of the trust during the period of the first Confederacy. Next, recourse will be had to intrinsic aids, the meaning of the terms at issue and the internal structure of the Constitution, to show that the terms of the trust were carried forward in Art. IV, §3, cl. 2 of the Constitution. Then extrinsic aids will be used to show that the contemporaneous construction of this clause by Congress in the period immediately following the adoption of the Constitution is consistent with the trust theory. Finally, the internal structure will be used to show that the construction advanced by the State of Nevada is the only tenable one in light of other constitutional limitations on federal power to acquire and hold real property.

PART I. THE FORMATION OF THE TRUST BEFORE THE CONSTITUTION.

THE FIRST PUBLIC LANDS WERE HELD IN A TRUST FORMED BY THE CONTINENTAL CONGRESS AND CONGRESS UNDER THE ARTICLES OF CONFEDERATION FOR THE PURPOSE OF ERECTING NEW STATES AND DISPOSING OF THE LAND BY SALE IN ORDER TO PAY OFF THE DEBTS OF THE REVOLUTIONARY WAR.

The intention of the several states and the United States to form a trust out of colonial territories for the benefit of the people and the states to be formed therefrom can be found in the early proceedings of the Continental Congress and the United States in Congress assembled under the Articles of Confederation. The trust principle was arrived at as a solution to several problems which arose during the Revolutionary War. One problem was that six of the colonies had received sea-to-sea grants from the Crown while seven had not.

Thus, Massachusetts, Connecticut, Virginia, North Carolina, South Carolina and Georgia had claims to vast territories in the west. These claims extended in theory to the Pacific Ocean, although in fact only to the Mississippi River, since the territories west of the Mississippi were possessed by France and Spain. Virginia also claimed the Northwest Territory based on its Charter of 1609. New Hampshire, Rhode Island, New York, New Jersey, Pennsylvania, Delaware and

Maryland did not have sea-to-sea grants, and were not only jealous of the states which had such claims but also feared being dominated by those potentially huge states. As a consequence of this state of affairs, Maryland refused to approve of the Articles of Confederation unless something were done to resolve the problem.

Another problem which motivated the states to form a trust was the large number of competing claims to the same territory, which was divisive at the national level at a time when the states needed to join together to pursue the war and forge a new nation. Also, any grants of individual tracts before the competing claims of the states were settled would throw a cloud over title to the land.

A third problem was that the several states and the United States needed a source of revenue to pay the mounting debts of the war.

Just a month after John Paul Jones and his Bonhomme Richard defeated the British ship Serapis, the Continental Congress took the first step in solving the problem of competing claims to the western territories. On October 30, 1779, Congress, by a vote of 8 to 3, passed the following resolution:

> Whereas the appropriation of vacant lands by the several States, during the continuance of the war, will, in the opinion of Congress, be attended with great mischiefs; therefore,
> Resolved, That it be earnestly recommended to the State of Virginia to reconsider their late act of assembly for opening their land-office; and that it be recommended to the said States, and all other States similarly circumstanced, to forbear selling or issuing warrants for unappropriated lands, or granting the same during the continuance of the present war.

This resolution was aimed at stopping the issuance of conflicting grants by states with competing claims.

The next step was to resolve the competing claims and provide for financing of the war by having the states cede their claims to the United States. New York took the lead

by providing for the cession of its western claims, such as they were, in "An act to facilitate the completion of the Articles of Confederation and perpetual Union among the United States of America," passed on March 7, 1780, just 5 days before General Sir Henry Clinton's troops captured Charleston. The purpose of this act was "* * * that a portion of the waste and uncultivated territory within the limits or claims of certain states ought to be appropriated as a common fund for the expenses of the war * * *."

The New York Act gave the New York delegates to the Continental Congress the authority to adjust the state's boundaries in the west and to cede to the United States unappropriated lands either within the boundaries of, or claimed by, the state. The final clause of the New York Act called these cessions a trust:

> Provided always * * * That the trust reposed by virtue of this act shall not be executed by the delegates of this state, unless at least three of the said delegates shall be present in Congress. (Emphasis added.)

Thus, from the outset, the word "trust" was used in referring to the unappropriated lands.

After New York passed its act providing for the cession of lands to the United States, a resolution was adopted by Congress on September 6, 1780, urging the other states with competing claims to do likewise:

> Resolved * * * that it be earnestly recommended to those states, who have claims to the western country, to pass such laws, and give their delegates in Congress such powers as may effectually remove the only obstacle to a final ratification of the Articles of Confederation * * *. (Italics in original.)

Subsequently, on October 10, 1780, just 3 days after the battle of King's Mountain, North Carolina, the Continental Congress adopted the following resolution which set forth in concrete detail the terms and conditions under which territory and unappropriated lands would be accepted, held and disposed of by Congress:

> Resolved, That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence, as the other States: that each State which shall be so formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: that the necessary and reasonable expenses which any particular State shall have incurred since the commencement of the present war, in subduing any British posts, or in maintaining forts or garrisons within and for the defence, or in acquiring any part of the territory that may be ceded or relinquished to the United States, shall be reimbursed.
>
> That the said lands shall be granted or settled at such times, and under such regulations, as shall hereafter be agreed on by the United States, in Congress assembled, or any nine or more of them.

The terms of this resolution that manifest an intention to form a trust are promises (1) to accept the lands for the common benefit of the United States and for forming new states, which indicate the two beneficiaries of the trust, and (2) to dispose of the lands, form new states and reimburse existing states for their necessary and reasonable expenses in pursuing the war, which indicate the duties to be performed by the trustee. The duty to form new states refers to the transfer of sovereignty of landed territory to new local governments, while the duty to dispose of the lands refers to the sale of title of individual tracts to settlers. Thus, from the outset, it was contemplated that the trustee, Congress, would retain nothing, neither sovereignty nor dominion, for its own benefit.

This intention by the Continental Congress to form a trust was carried forward in subsequent acts by Congress and the several states dealing with the unappropriated lands.

These terms were recited by a Virginia Act of Cession of January 2, 1781, ceding the Northwest Territory to the United States, which was passed just 2 weeks before the battle of Cowpens. On March 1, 1781, the Articles of Confederation were ratified, and later in the year on October 19, 1781, Cornwallis surrendered at Yorktown.

Additional terms imposed by the Virginia Act of Cession of January 2, 1781, were not completely acceptable to Congress, and it passed an act relative to the terms of acceptance of the Northwest Territory from Virginia on September 13, 1783, just 10 days after the signing of the Treaty of Paris which formally ended the Revolutionary War. Virginia then passed another Act of Cession on December 20, 1783, and issued a Deed of Cession on March 1, 1784, both of which recited the terms of acceptance laid down by Congress. The Act of Congress and the Act and Deed of Virginia all stated that the territory ceded to the United States was to be used for "the benefit of said states" and was subject to the following conditions:

> (1) "that the territory so ceded shall be laid out and formed into states"; (2) "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"; (3) "that all the lands within the territory so ceded * * * shall be considered as a common fund for the use and benefit of such of the United States as have become, or shall become members of the Confederation or federal alliance of the States, Virginia inclusive"; and (4) that they "shall be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatsoever."
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> 9 JOURNALS OF THE CONTINENTAL CONGRESS 47-51 (Ford & Hunt ed. 1904-37).

Thus, under the Articles of Confederation, unappropriated lands were accepted by the Confederacy in trust for the benefit of the people and for creating new states, and the land was a fund to be sold, "disposed of for that purpose, and for no other use or purpose whatsoever." The reasons for selling

the land were, first, to benefit the new states by encouraging settlement, and second, to benefit the old states by using the proceeds of sale to pay the debts of the Revolutionary War. These limitations on use, the disposal of the land and the formation of new states, indicate that the Confederacy held the ceded territories with fewer powers than a proprietary owner, that, in fact, the Confederacy was a trustee in temporary possession of legal title to the land and sovereignty over the territory, but with equitable duties to the old states, to the territories or new states to be formed, and to the people. Virginia and the Confederacy took pains to set forth in detail the terms of this trust even though the war for independence was simultaneously being waged on home ground.

There is no doubt that the relationship created by Virginia's cession was one of trust. The New York Act of March 7, 1780, discussed above, used the word "trust." Although the Resolution and Act of Congress and the Acts and Deed of Virginia did not use the term "trust," the words used are precatory words, that is, language of request, recommendation, suggestion or expectation. The test of whether an express trust is created by precatory words is whether the purpose expressed by the settlor is meant to govern the conduct of the other party. 76 AM.JUR.2d Trusts §57 (1975). It must appear that the precatory words were used in an imperative sense, to the exclusion of any option or discretion in the other party as to whether or not the expressed wish should be given effect. Ibid. Virginia and Congress both recited a term "that all the lands within the territory so ceded * * * shall be faithfully and bonafide disposed of for that purpose, and for no other use or purpose whatsoever." These are words of command, not of discretion.

Even if this precatory language is insufficient to establish with reasonable certainty an intention to form a trust, an express intention can be inferred from the circumstances, such as the nature of the transaction, the situation and relation of the parties, and the character of the property. 76 AM.JUR.2d Trusts §55. The precatory words, above, were not only stated in legislative acts but were memorialized by Virginia in a Deed. The nature of this transaction was a definite and complete present disposition of property by

delivery of a Deed, which, after the manifestation of intent, was sufficient to establish a trust.

The situation of the parties to the transaction was that of interrelated sovereign governments, and the relation between them could only be one of trust. The Confederacy could not have served in an agency relationship with the other parties. While a trustee and agent are both fiduciaries, "[t]he main ground of contrast is usually said to be the presence of 'title' in the trustee and the lack of it in the agent." 1 BOGERT, THE LAW OF TRUSTS AND TRUSTEES §15 (2d. ed. 1965). Here, title was in the Confederacy as trustee. From another point of view, the primary distinction between a trustee and an agent is the principal's right to control his agent. SEAVEY, LAW OF AGENCY §10 c (1964). There was no right to control exercisable by the Confederacy in this transaction. The only relation between the parties consistent with their being interrelated sovereigns was one of trust.

The character of the property held in trust by the Confederacy was unique in that the Confederacy did not own a foot of land in any of the original states. Patterson, The Relation of the Federal Government to the Territories and the States in Landholding, 28 TEXAS L. REV. 43, 46 (1949). Moreover, the Confederacy had no need of land for its own use.

> [T]he character of the Union at this time [under the Articles of Confederation] was such that there was no conceivable purpose for which it could use lands since it was not a government, had no officers (only committees of Congress), no functions whatever to perform except to advise the states, not one iota of coercive power, no power to legislate, to tax, or to administer. In other words, any other scheme of things than a trusteeship would have been completely inconsistent with the character of the Union * * *. Ibid., at 48.

The Confederacy's holding of land could only be of benefit to others. Thus, in addition to the precatory words of the parties, a trust can be inferred from the nature of the transaction, the situation and relation of the parties, and the character of the property.

ORDINANCES ENACTED BY CONGRESS UNDER THE ARTICLES OF CONFEDERATION CONFIRMED THE TRUST OF THE PUBLIC LANDS AND ACKNOWLEDGED THE DUTY OF THE TRUSTEE TO DISPOSE OF THE LANDS BY SALE.

After Virginia delivered its Deed of Cession on March 1, 1784, subsequent acts by the United States in Congress assembled under the Articles of Confederation indicate its contemporaneous construction of the trust and the duties imposed on the trustee. These acts also represent the state of the prior law when construing the terms of the Constitution that apply to unappropriated lands.

The first act is the "Resolution for the Government of the Western Territory" of April 23, 1784. This Resolution reiterates the purpose of the Confederacy in acquiring territory and land:

> Resolved, that so much of the territory ceded or to be ceded by individual states to the United States, as is already purchased or shall be purchased of the Indian inhabitants, and offered for sale by Congress, shall be divided into distinct states * * *.

The purpose in acquiring territory was to form new states and the purpose in acquiring land was to "offer the land for sale" to pay the debts of the Revolutionary War. The Resolution also provided for temporary and permanent governments for the territory:

> That the settlers on any territory so purchased and offered for sale, shall, either on their own petition or on the order of Congress, receive authority from them * * * to meet together, for the purpose of establishing a temporary government * * *.
>
> That when any such state shall have acquired twenty thousand free inhabitants, on giving due proof thereof to Congress, they shall receive from them authority, with appointments of time and place, to call a convention of representatives to establish a permanent constitution and government for themselves: Provided, That both the temporary and permanent governments be established on these principles as their basis:

> 1. That they shall forever remain a part of this confederacy of the United States of America.
> 2. That they shall be subject to the Articles of Confederation in all those cases in which the original state shall be so subject, and to all the acts and ordinances of the United States in Congress assembled, conformable thereto.
> 3. That they, in no case, shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona-fide purchasers.

This indicates that the territory was to be given a large degree of self-government. In fact, as Principle No. 2 of the Resolution indicates, the territories were to be subject to regulation by the Confederacy only to the extent the original states were subject to its regulation. Principle No. 2, then, suggests the scope of regulation later intended by the grant of power to Congress "to make all needful rules and regulations respecting the territory or other property * * *" in Art. IV, §3, cl. 2 of the Constitution.

Principle No. 3 grants to the Confederacy the right to "primary disposal of the soil." "Disposal" relates to the purpose of acquisition, above, that the land be "offered for sale" by Congress. "Primary" disposal refers to the right to make the first issuance of title. It asserts supremacy in issuing title, and does not detract from the duty to dispose. This Principle was to apply to both the temporary and permanent governments of the territory. It suggests the scope of the power granted to Congress "to dispose of * * * the Territory or other Property" in Art. IV, §3, cl. 2 of the Constitution.

Finally, the Resolution provided criteria for admitting new states:

> That whensoever any of the said states shall have, of free inhabitants, as many as shall then be in any one of the least numerous of the thirteen original states, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original States * * *.

> That the preceding articles shall be formed into a charter of compact * * * and shall stand as fundamental constitutions between the thirteen original States, and each of the several States now newly described, unalterable from and after the sale of any part of the territory of such State * * *.

It is clear that this compact was to be unalterable. It is not clear, however, whether the right of the Confederacy to "primary disposal of the soil" was to continue after a territory was granted statehood. The Confederacy did not own a foot of land in the original states. Patterson, cited above, at 46. It is arguable that dominion, or proprietary rights, were to pass to a new state upon admission along with sovereignty, since transfer of dominion would be necessary in order for a new state to be admitted on an "equal footing." Although this Resolution was to be unalterable, no new states were admitted to the Confederacy under its terms.

Congress subsequently adopted "An Act to provide for the government of the territory northwest of the river Ohio," the Northwest Ordinance of July 13, 1787, which contained essentially the same terms as the Resolution, above, most notably the terms respecting the admission of new states on an "equal footing" and the right of "primary disposal of the soil." The Ordinance "ordained and declared" in §14 that "whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever." Article V of §14. The word "ordain" means to enact, or make an ordinance. BLACK'S LAW DICTIONARY 1246 (4th ed. 1968). The word "declare" means to make known, manifest, or clear, and is a term customarily used in a declaration of trust. Ibid., at 496-7. The Ordinance is by its terms consistent with a declaration of trust, and acknowledges the duties of the trustee to hold the territory for the formation of new states and to admit the new states on an "equal footing."

The Northwest Ordinance also "ordained and declared" that "the legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled." Article IV of §14.

This term denies any right in the districts or new states to interfere with the issuance of titles to real property, but also acknowledges another duty of the trustee, Congress, to dispose of the soil within the territory. The term "new States" in the phrase "districts, or new States," is arguably only a synonym for "districts" and refers to the temporary government established prior to admission to the Confederacy. This would indicate an intent for the United States to dispose of the land only until statehood, the unappropriated land, or dominion, to be transferred to the state along with sovereignty upon admission to the Union. Such an interpretation would be consistent with the fact that the first three states admitted to the Union, Vermont, Kentucky and Tennessee, were admitted without any reservation of unappropriated lands by Congress whatsoever. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 286-88 (1968). The subsequent history of the United States under the Constitution indicates there was a contemporaneous construction by Congress and the executive branch that federal power to sell unappropriated lands within a new state was to persist after statehood. Thus, after the admission of Ohio, the first "public land" state, in 1803, the United States continued to sell the unappropriated lands within Ohio's borders.

Even if the United States under the Confederacy was to have the power to continue disposing of the unappropriated lands after the admission of a new state, nevertheless, it is clear that the land was to be disposed of, and that disposal meant sale. Richard Henry Lee, in notifying George Washington of the adoption of the Northwest Ordinance while the latter was presiding at the Constitutional Convention, wrote as follows: "I have the honor to inclose to you an Ordinance that we have just passed in Congress for establishing a temporary Government beyond the Ohio, as a measure preparatory to the sale of the Lands." Letter of Lee to Washington, July 15, 1787, 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 620 (E. Burnett, ed. 1921-36.) (Emphasis added.)

Earlier, on May 20, 1785, Congress had enacted "An Ordinance for Ascertaining the Mode of Disposition of Lands in the Western Territory," the Land Ordinance of 1785, which provided for the survey and sale of unappropriated lands:

> Be it ordained by the United States in Congress assembled, that the territory ceded by the individual states to the United States, which has

> been purchased of the Indian inhabitants, shall be disposed of in the following manner:
> * * *
> The surveyors, as they are respectively qualified, shall proceed to divide the said territory into townships of 6 miles square * * *.
> * * *
> As soon as 7 ranges of townships, and fractional parts of townships, in the direction from south to north, shall have been surveyed, the geographer shall transmit plats thereof to the board of treasury * * *.
> The board of treasury shall transmit a copy of the original plats * * * to the commissioners of the loan-office of the several states, who * * * shall proceed to sell the townships * * *. (Emphasis added.)

There can be no doubt that the term "dispose" in the documents of the period relating to unappropriated lands meant "sell." Dispose certainly did not mean retain. Even where the Ordinance provided "There shall be reserved for the United States out of every township the four lots, being numbered 8, 11, 26, 29, and out of every fractional part of a township, so many lots of the same numbers as shall be found thereon," this provision was qualified by the requirement that such reservation would be "for future sale." Ibid. Even where the Ordinance made special provision for the reservation of minerals, the disposal of such reservation was to be primarily by sale: "There shall be reserved * * * also one-third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of as Congress shall hereafter direct." Ibid. The reservation of mineral lands was apparently provided for to permit appraisal of such lands at a later date and avoid windfall sales of mineral lands for $1 per acre, the price provided for in the Ordinance. In any case, the ordinary nonmineral unappropriated lands were to be sold. It is clear that the duty of the trustee, Congress, to "dispose" of the nonmineral lands meant to sell them, not to retain them.

Thus, an express trust of territory and unappropriated lands was created during the period of the Continental Congress and the Confederacy. The trust can be proved both by the words of the parties and the circumstances surrounding

the transaction. The essential terms of the trust were that Congress, the trustee, was to dispose of the territory by the admission of new states on an "equal footing" with the original states, and was to dispose of the land by sale to pay the debts of the Revolutionary War. There was no intention ever expressed for Congress to retain any territory or land whatsoever for the use of the Confederacy.

The Resolutions and Ordinances of Congress comprise a contemporaneous construction of the terms of the trust and duties of the trustee. They also indicate the state of the law prior to the Constitution, and as such, they are important extrinsic aids to construction of provisions in the Constitution which apply to trust territories and lands.

PART II. THE TRUST UNDER THE CONSTITUTION.

Introduction. The Constitution manifests an intention that Congress continue to hold the unappropriated lands in trust. This intention is made in express terms in the "territory and other property" clause of Art. IV, §3, cl. 2. A trust may also be inferred, first, from the intent of the framers to create a federal system of government; second, from the express grant of power to Congress to admit new states and the implied power to acquire territory and unappropriated land (Art. IV, §3, cl. 1); third, from the limitation otherwise imposed on the Federal Government to acquire land for its own use in the "needful buildings" clause (Art. I, §8, cl. 17); and finally, from the doctrine that new states must be admitted on an "equal footing" with the original states.

THE FRAMERS OF THE CONSTITUTION INTENDED TO FORM A FEDERAL SYSTEM OF GOVERNMENT IN WHICH THE NATIONAL GOVERNMENT WOULD EXERCISE POWER OVER NATIONAL CONCERNS AND THE STATES WOULD EXERCISE POWER OVER LOCAL CONCERNS, AND THEY MANIFESTED THIS INTENTION IN THE "NEW STATES" CLAUSE AND THE "TERRITORY OR OTHER PROPERTY" CLAUSE OF ART. IV, §3 OF THE CONSTITUTION.

During the time that Congress, assembled under the Articles of Confederation, was in session at New York and enacted the Northwest Ordinance, the founding fathers were meeting in Philadelphia to frame a Constitution. The framers of the Constitution intended to distribute political power in

a federal system of government by a differentiation and division of power, such that the Federal Government would exercise power over national concerns, and the states would exercise power over local concerns.

The fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it. 16 AM.JUR.2d Constitutional Law §63 (1975). The pole star that guided the framers of the Constitution in their deliberations was political power, and how it should be distributed and limited. Alexander Hamilton, speaking in the Constitutional Convention on the question of whether the states should be represented in Congress equally or by population, explained that "It has been said that if the smaller states renounce their equality, they renounce at the same time their liberty. The truth is it is a contest for power, not for liberty." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 466 (M. Farrand ed. 1966). (Italics omitted.) The ever-present question in constitutional construction is how the framers intended to distribute and limit the scope of political power.

The intention of the framers of the Constitution was to delegate only limited powers to the Federal Government. James Madison explained in THE FEDERALIST how power was to be distributed to the Federal Government:

> In the first place it is to be remembered, that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. THE FEDERALIST NO. 14, at 86 (J. Cooke, ed. 1961).

Thus, powers were to be distributed to the Federal Government by enumeration. The doctrine of enumerated powers is fundamental to our constitutional government, and is implicit in the form and structure of the United States Constitution. The Tenth Amendment, proposed in 1789 and adopted in 1791, makes the doctrine of enumerated powers explicit:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The doctrine of enumerated powers is a quantitative limitation on the power of the Federal Government.

The framers of the Constitution also intended to separate political power among the three branches at the federal level. Madison explained in THE FEDERALIST why power was to be subject to checks and balances in a federal system:

> In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself. THE FEDERALIST NO. 51, at 350-51 (J. Cooke ed. 1961).

According to Madison, the purpose of the division of powers between the states and the Federal Government, as well as the separation of powers at the federal level, was to control government by limiting the quantity of power to be exercised by each level and branch of government. The division of powers between levels of government was not, however, to be merely quantitative; rather, the division was to be qualitative, just as the separation of powers was a qualitative separation by governmental function.

The framers of the Constitution intended to differentiate between national and local concerns in dividing and distributing power between levels of government. Madison explained in THE FEDERALIST how power was to be differentiated in the federal system:

> 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. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State. Ibid., NO. 45, at 313.

The framers of the Constitution intended to differentiate and divide power so that the Federal Government would exercise power over national concerns and the states would exercise power over local concerns. The Constitution clearly reflects a differentiation, division and distribution of power along the lines described by Madison. Catherine Drinker Bowen, in MIRACLE AT PHILADELPHIA, summarized this Constitutional system for our federal republic as "Two balanced powers: Congress and the Executive, states and central government, with the judiciary as umpire."

Thus, the power of the Federal Government was to be little exercised on internal or local objects, such as the land within the states. This intention of the framers was manifested in the Constitution by a grant to Congress of only limited power to acquire and hold real property (Art. I, §8, cl. 17), and the carrying forward of the terms of the trust established under the Articles of Confederation by grants of power to dispose of territory through statehood and other unappropriated lands through sale (Art. IV, §3, cl. 1 and 2).

THE "NEW STATES" CLAUSE, ART. IV, §3, CL. 1, CARRIES FORWARD ONE OF THE TERMS OF THE TRUST OF PUBLIC LANDS BY GRANTING CONGRESS THE POWER TO DISPOSE OF TERRITORY BY THE CREATION OF NEW STATES.

Article IV, §3, cl. 1 of the Constitution provides that "New states may be admitted by the Congress into this Union." This clause reifies the intent of the framers that the states

exercise power over local concerns, by providing for expansion of the federal system through grants of express power to admit new states into the Union and implied power to acquire territory for the purpose of encouraging settlement and creating new states. The clause relates back to the agreement in the Resolution of October 10, 1780, "that the unappropriated lands * * * be settled and formed into distinct republican states."

The mischief which this clause remedied was that the power to admit new states had not been granted to Congress under the Articles of Confederation. Madison wrote of this clause,

> The eventual establishment of new States, seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety therefore has the new system supplied the defect. THE FEDERALIST NO. 43, at 291 (J. Cooke ed. 1961).

The assumption of power Madison refers to was the passage of the "Resolution for the Government of the Western Territory" of 1784 and the Northwest Ordinance of 1787 by the Confederate Congress without an express grant of power to do so in the Articles of Confederation. The "new states" clause of the Constitution is thus a recognition of that omission.

In addition to granting Congress the power to admit new states, this clause has also been construed as a grant of power to acquire territory. In Dred Scott v. Sanford, the Supreme Court held,

> The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. 60 U.S. (19 How.) 393, 447, 15 L.Ed. 691 (1857).

The power to acquire territory is appropriately inferred from the "new states" clause because the narrow end or purpose of statehood is specified. As the Supreme Court stated in Dred Scott,

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. 60 U.S. at 446.

The narrow end or purpose of statehood is, then, a limitation on the power to acquire territory, bringing it within the intent of the framers that "internal order, improvement, and prosperity" of landed territory come under the purview of state government.

The language of this clause, that "new states may be admitted," indicates that this power of Congress is discretionary, at least as to timing of the disposal of territory through admission to statehood. This discretionary disposal of territory and sovereign power by transferring it to a new state must be differentiated from the disposal by sale of specific tracts of unappropriated land held in trust by Congress.

THE "TERRITORY OR OTHER PROPERTY" CLAUSE, ART. IV, §3, CL. 2, CARRIES FORWARD THE DUTIES OF THE TRUSTEE TO CONSERVE AND DISPOSE OF THE PUBLIC LANDS BY GRANTING CONGRESS THE POWER TO REGULATE TERRITORY AND PUBLIC LANDS AND IMPOSING THE DUTY TO DISPOSE OF THE PUBLIC LAND. WHILE THIS APPEARS TO BE A STRAINED CONSTRUCTION OF THIS CLAUSE, IT IS THE ONLY ONE WHICH IS CONSISTENT WITH THE INTENT OF THE FRAMERS OF THE CONSTITUTION.

Once territory is acquired under the "new states" clause, Article IV, §3, cl. 2 of the Constitution provides for the regulation of territory and the disposal of unappropriated lands:

> 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.

This clause is divided into two parts separated by a semicolon. The latter part of the clause dealing with prejudice to claims was a recognition by the founding fathers that some states, like Georgia, had not yet ceded the western territories they claimed to the Confederate government, as had Virginia, and that these claims were still disputed.

The first part of Art. IV, §3, cl. 2 presents a problem on its face because two powers, to dispose of and to make regulations, are joined together with two objects of those powers, territory and other property. The substance of this clause was first suggested in two separate proposals made by James Madison at the Constitutional Convention on August 18, 1787. Madison proposed that the general legislature be granted the powers "To dispose of the unappropriated lands of the United States," and "To institute temporary governments for New States arising thereon." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321 and 324 (M. Farrand ed., rev. ed. 1966). Madison's proposals were made just 5 weeks after the Northwest Ordinance was passed by Congress under the Articles of Confederation then meeting in New York. Like the "new states" clause, the immediate mischief remedied by this clause was the fact that the Land Ordinance of 1785 and the Northwest Ordinance of 1787 were enacted by Congress "without the least colour of constitutional authority." THE FEDERALIST NO. 38, at 248 (J. Cooke ed. 1961) (J. Madison); see also NO. 43, at 292 (J. Madison).

Madison's two proposals were submitted to the Committee of Detail for revision. The Committee combined and reworded the proposals, and the Committee's version was adopted by the Convention without debate on August 30, 1787. As stated in Dred Scott v. Sanford, "It was hardly possible to separate the power 'to make all needful rules and regulations' respecting the government of the territory and the disposition of the public lands." 60 U.S. (19 How.) 385, 522, 15 L.Ed. 691 (1857) (Catron, J., concurring). The construction problem includes not only the combining of two powers with the objects of these powers, but also what the powers and objects mean individually.

Territory. "Territory" is commonly defined as "a part of a country separated from the rest, and subject to a particular jurisdiction." BLACK'S LAW DICTIONARY 1642 (4th ed. 1968). Thus, in National Bank v. County of Yankton, Chief Justice Waite said, "The Territories are but political subdivisions of the outlying dominion of the United States." 101 U.S. 129, 133, 25 L.Ed. 1046 (1879). However, the Supreme Court gave a much broader meaning to "territory" in an earlier case which set an important precedent for public land law because it involved a lease of lead mines on unappropriated land: "The term 'territory,' as here used (Art. IV, §3, cl. 2), is merely descriptive of one kind of property, and is equivalent to the word 'lands.'" U.S. v. Gratiot, 39 U.S. (14 Pet.) 526, 537, 10 L.Ed. 573 (1840).

The common law and technical definitions of "territory" speak to political sovereignty or jurisdiction, whereas the Supreme Court in this overbroad construction combined property rights in tracts of land, or dominion, with rights of sovereignty. Two intrinsic aids to construction, that technical terms should be given technical meaning, and common law terms should be construed with reference to common law, should be applied here. 16 AM.JUR.2d Constitutional Law §§77-78 (1964). Nevada's position is that "territory" should be construed according to the common law to mean a part of the United States, not yet a state, and subject to the particular jurisdiction of Art. IV, §3 of the Constitution. An overbroad construction of the term "territory" is tied in with an overbroad construction of the associated term "other property."

Other property. "Other property" is a patently ambiguous term, whose meaning cannot be interpreted without reference to intrinsic and extrinsic aids to construction. Justice Story, in discussing the "territory and other property" clause, ascribed to this term an inappropriate meaning:

> Art. IV, §3, cl. 2. The power is not confined to the territory of the United States, but extends to "other property belonging to the United States;" so that it may be applied to the due regulation of all other personal and real property rightfully belonging to the United States. And so it has been constantly understood and acted upon." 2 STORY, COMMENTARIES ON THE CONSTITUTION §1325.

Intrinsic aids to construction, simple rules of logic, do not justify this broad construction, especially Story's assertion that "other property" comprehends both the "personal property" and "real property" of the United States.

First, "territory" and "other property" must be considered to be in pari materia, or pertain to the same subject matter, as the other sections and clauses of Article IV. 2A SUTHERLAND, STATUTORY CONSTRUCTION §51.03. While the doctrine of in pari materia is not of great weight in constitutional construction, it does offer some insight into the arrangement of the Constitution as a whole, and Article IV in particular, and consequently sheds light on the meaning of the term "other property."

The subject matter of Article IV, in addition to "territory and other property" (§3, cl. 2), relates to new states (§3, cl. 1), full faith and credit between states (§1), privileges and immunities accorded the citizens of states (§2, cl. 1), and the guarantee of republican government to the several states (§4). Hence, the clauses of Article IV speak to relations between states, or between a state and the Federal Government, or between a territory and the Federal Government. The doctrine of in pari materia suggests that "personal property of the United States" does not logically fit in with the subject matter of Article IV.

Second, "personal property" does not comport with the subject matter within clause 2 of section 3 of Article IV. It is beyond dispute that the second half of this clause deals with conflicting claims to territory lying west of the original states. Within the first half of the clause in which this ambiguity appears, the general term "other property" is preceded by the more specific term "territory." The doctrine of noscitur a sociis, that the meaning of a doubtful term may be known by the terms with which it is associated, suggests that the subject matter of this clause should be similar to or associated with "territory." 2A SUTHERLAND §47.16. Furthermore, where general words follow specific words in an enumeration describing a legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. This is the doctrine of ejusdem generis, meaning "of the same

class." 2A SUTHERLAND §47.17. The reasoning behind this doctrine is that if the framers intended the general term "other property" to have the full and natural meaning ascribed to it by Justice Story, they would have omitted the particular term "territory" and used instead one compendious term, such as "real and personal property," or simply "property."

The doctrines of in pari materia, noscitur a sociis and ejusdem generis are not of great weight in constitutional construction. They merely suggest that where the framers of the Constitution were thinking of a particular class of objects, their general terms may not have been intended to embrace any other than those within the class. More important are the canons of construction that in order to ascertain the meaning of a particular provision, recourse should be had to the whole Constitution, and effect should be given to every part.

Thus, the personal property of the United States can logically be found in Art. I, §8 of the Constitution which sets forth the general legislative powers of Congress. Madison had proposed that the substance of Art. IV, §3, cl. 2 be added to the general powers of Congress. The Committee of Style, however, did not place this power in Article I, which sets forth general legislative powers, but in Article IV, which sets forth intergovernmental relations.

Power over personal property is not mentioned specifically in Art. I, §8, or in any other section or clause of the Constitution, but may be found by necessary implication. For example, Art. I, §8 grants the Congress power to "establish post offices," "raise and support armies," and "provide and maintain a Navy." The personal property needed to carry out the activities of a post office, army, or navy may be implied from the express grants of power to engage in these activities. The founding fathers did not want to leave necessary implication to chance or whim, however, so they expressly provided for the power of necessary implication in Art. I, §8, cl. 18, the "necessary and proper" clause. This clause states the Congress shall have power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Constitution should be viewed in its

entirety when ascertaining the meaning of any particular provision. 16 AM.JUR.2d Constitutional Law §66 (1964). When this is done, it becomes clear that the personal property of the United States is provided for by the "necessary and proper" clause of Article I and not by the term "other property" in Article IV.

Justice Story also asserted in his COMMENTARIES that the term "other property" included the real property of the United States. But just as the "necessary and proper" clause, Art. I, §8, cl. 18, provides for personal property of the United States, so the "needful buildings" clause, Art. I, §8, cl. 17, provides for the acquisition and management of real property. This clause states that the Congress shall have power "To exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." Effect should be given to every part and every word of the Constitution. 16 AM.JUR.2d Constitutional Law §67 (1964). Since the power to acquire and manage real property is expressly provided for in Article I, it is unnecessary to seek for and find this power in Article IV by an overbroad construction of the term "other property."

After intrinsic aids to construction, simple rules of logic, are applied to the "territory and other property clause," and the Constitution is read as a whole, with effect being given to every part, it becomes clear that "other property" does not mean personal property, or real property, or both. At this juncture, an extrinsic aid, the records of the Constitutional Convention, helps to shed light on what "other property" does mean. As noted above, Madison proposed, on August 20, 1787, that the Congress be granted power "To dispose of the unappropriated lands of the United States," and "to institute temporary governments for new states arising thereon." The "new states" clause, Art. IV, §3, cl. 1, had already been proposed by John Randolph as a part of the Virginia Plan on May 29, 1787, and both the "new states" clause and the "territory and other property" clause under discussion were adopted by the Convention on August 30, 1787, so it is clear that Madison's proposals did not address the problem of new states. Rather, his phrase "new states arising thereon [i.e., arising on unappropriated lands]" was changed

by the Committee of Detail into the term "territory," and the phrase "institute temporary governments" into "make all needful rules and regulations." The term "dispose" was the same in both the proposal and the clause finally adopted.

That leaves the phrase "unappropriated lands," which was changed by the Committee of Detail into "other property." As Justice Nelson noted in Irvine v. Marshall, a territory is itself a property of the United States. 61 U.S. (20 How.) 558, 562, 15 L.Ed. 994 (1857). The adjective "other" as used in this clause means "The one of two which remains after one is taken, defined, or specified." 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 2106. In this light, other property refers to the property rights in unappropriated land which remain after sovereign rights in territory have been specified, or subtracted out of, the compendious term land. The word "other" thus reinforces by terms the simple logic of the intrinsic aids to construction that the words of Article IV pertain to the same subject matter (in pari materia), that doubtful words may be known by their associates (noscitur a sociis), and that general words embrace only objects similar in nature to those in preceding specific words (ejusdem generis). In summary, the phrase "territory or other property" speaks to sovereign rights in territory and property rights in tracts of land.

Make all needful rules and regulations. The power to regulate "territory or other property" was construed at an early time to be plenary power. In Sere and Laralde v. Pitot, a case involving the jurisdiction of the U.S. District Court in the Territory of Orleans, Chief Justice Marshall, speaking for the Court, said,

> The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares that "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. 10 U.S. (6 Cr.) 332, 336-7. 3 L.Ed. 240 (1810).

Chief Justice Marshall's method in constitutional cases was to construe federal powers as broadly as possible, and the Pitot case is no exception. In a later case, however, the Supreme Court contrasted the language of this clause with other language in the Constitution that was used to grant plenary power:

> The words "rules and regulations" are usually employed in the Constitution in speaking of some particular specified power which it means to confer on the government, and not, as we have seen, when granting general powers of legislation. As, for example, in the particular power to Congress "to make rules for the government and regulation of the land and naval forces, or the particular and specific power to regulate commerce;" "to establish an uniform rule of naturalization;" "to coin money and regulate the value thereof." And to construe the words of which we are speaking as a general and unlimited grant of sovereignty over territories which the Government might afterwards acquire, is to use them in a sense and for a purpose for which they were not used in any other part of the instrument. Dred Scott, 60 U.S. at 440.

Thus, it is clear from the language used that the framers of the Constitution did not intend to grant Congress plenary power over "territory or other property."

The scope of the power to "make all needful rules and regulations" is certainly less than absolute. In fact, when construed along with the associated power "to dispose of," and in reference to public lands, this power has been found to be identical to the management powers and duties of a trustee:

> Consequently, the power to make rules and regulations from the nature of the subject, is restricted to such administrative and Conservatory Acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. Dred Scott, 60 U.S. at 514 (Campbell, J. concurring).

This construction is in keeping with the intent of the framers of the Constitution that Congress be the trustee of the public lands, with the power to manage them and the duty to dispose of them.

Dispose of. The power "to dispose of" is ambiguous because it is susceptible of both narrow and broad meanings. It is a technical and a common law term which may be defined narrowly as "to sell"; or more broadly, "to alienate, relinquish, part with or get rid of"; or even more broadly, "to exercise finally, in any manner, one's power of control over." BLACK'S LAW DICTIONARY 557 (4th ed. 1968). The power "to dispose of" relates back to the "Resolutions for the government of the western territory" of April 23, 1784, which stated the land would be "offered for sale." From the time that the trust of public lands was established, disposal as an end or result had the narrow meaning of sale, or at least divestment.

James Madison proposed in the Constitutional Convention that Congress be granted the power "to dispose of the unappropriated lands of the United States." His letters from this period indicate his understanding of the term "dispose of." On April 23, 1787, just a month before the Constitutional Convention began, he wrote to Thomas Jefferson as follows:

> The present deliberations of Congress turn on 1. the sale of the western lands. 2. the Government of the Western settlements within the federal domain. 3. the final settlement of the Accounts between the Union and its members * * *. 9 THE PAPERS OF JAMES MADISON 399 (R. Rutland, ed. 1975).

After the Northwest Ordinance was passed by the Congress meeting in New York on July 13, 1787, and before Madison made his proposal to the Convention on August 18, 1787, Madison wrote to his father, Colonel James Madison, on July 28, 1787, as follows:

> Congress have been occupied for some time past on Western affairs. They have provided for the Government of the Country by an ordinance, of

> which a copy is herewith inclosed. They have on the anvil, at present, some projects for the most advantageous sale of the lands. 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 335 (P. Fendall ed. 1865).

On September 6, 1787, after his proposal had been adopted and before the Convention had adjourned, Madison wrote to Thomas Jefferson as follows:

> Congress have taken some measures for disposing of the public land, and have actually sold a considerable tract. Another bargain, I learn, is on foot for a further sale. Ibid., at 338.

It is clear that Madison and his contemporaries thought the term "dispose of," made in reference to the unappropriated lands, meant the end or result of "sale."

The meaning of the term "dispose" also includes a sense of methodology as well as an end or result. Thus, the title of the Land Ordinance of May 20, 1785, was "An Ordinance for Ascertaining the Mode of Disposition of Lands in the Western Territory." The phrase "mode of disposition" in the title of the ordinance reflects the fact that the issue which concerned the members of the Continental Congress was not whether the land would be sold, which was assumed, but in what units or parcels the land would be sold. In a letter from William Grayson, the chairman of the five-member Congressional committee studying the disposal of the public lands, which was sent to George Washington on April 15, 1785, Grayson explained that the southern and northern states favored different modes of disposition. The southern method was to dispose of unappropriated land through sale by "indiscriminate locations," while the northern method was through survey and sale by townships. 8 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 95 (E. Burnett ed. 1936). The northern method was adopted, so that the "mode of disposition" provided for in the land ordinance was survey and sale by townships. Thus, the power "to dispose of" included in its meaning the method of disposal as well as the narrow end or result of sale.

The Supreme Court gave an inappropriately broad meaning to the term "dispose of" in U.S. v. Gratiot, mentioned above, which involved a lease of lead mines on public lands:

> * * * the words "dispose of" cannot receive the construction contended for at the bar; that they vest in Congress only the power to sell, and not to lease such lands. The disposal must be left to the discretion of Congress. 39 U.S. at 538.

The problem with this construction is that a lease is not a disposition in either the narrow, the broader or even the broadest of the technical or common law definitions of this term; a lease is neither a sale, a divestiture nor final arrangement. Rather, a lease is a conservatory act, appropriate to a trustee, such as Congress is with respect to the public lands. As noted in the previous section, the management power of Congress as trustee of the public lands is set forth in the phrase "to make all needful rules and regulations." A lease is not and cannot be a disposition in the technical or common law sense of the word as used by the framers of the Constitution, to whom the scope of the term "to dispose of" meant a method and an end or result--survey and sale by townships.

An additional problem in the Gratiot opinion, cited above, is the court's view that "The disposal must be left to the discretion of Congress." The power "to dispose of" is a duty imposed on Congress as trustee of the public lands, and as such, it is a mandatory power. When a provision of a statute is being construed, the question of whether it is mandatory or directory depends on the intent of the legislature or the manifest meaning of the words. 2A SUTHERLAND §57.02. The form of the verb used in a statute, whether it says something "may" or "shall" or "must" be done, is the most important determinant of whether the provision is mandatory or directory. In Article IV, §3 of the Constitution, the first, or "new states" clause says that "new states may be admitted * * *." It is clear from the language used that this provision was intended to be directory or discretionary.

In construing a constitution, however, the rules distinguishing mandatory and directory statutes are rarely applied. Instead, there is a presumption that a constitutional provision is mandatory unless it appears by express terms or necessary implication that it was intended to be directory or discretionary only. 16 AM.JUR.2d Constitutional Law §90 (1964). In the "territory or other property" clause under

discussion, the language used is "The Congress shall have power to dispose of and make all needful rules and regulations * * *." The language used is not "shall dispose of" which would clearly indicate a mandatory clause, but the verb "dispose of" is, itself, a word of limitation. It does not mean "retain," as the Federal Government has done with the public lands. It connotes sale, or at least divestiture. The end or result it connotes is the termination of federal possession of the unappropriated lands within the several states.

More important, a provision in the Constitution permitting an encroachment by the Federal Government upon the exercise of a function generally belonging to the states should be strictly construed and mandatory. See 2A SUTHERLAND §57.12. Since the Federal Government did not own a foot of unappropriated land in the original 13 states or the first three new states, and disposed of 99.9996 percent of the unappropriated land it held in the first public land state, Ohio, the power "to dispose of" the unappropriated land should be viewed as an encroachment and construed as mandatory.

Most important, the mandatory nature of the term "to dispose of" can be shown by the intentions of the framers of the Constitution. James Madison, who proposed at the convention that Congress be granted the power to dispose of the unappropriated lands, indicated in THE FEDERALIST that this power to dispose would be limited in time:

> It is now no longer a point of speculation and hope that the Western territory is a mine of vast wealth to the United States, and although it is not of such a nature as to extricate them from their present distresses, or for some time to come, to yield any regular supplies for the public expences, yet must it hereafter be able under proper management both to effect a gradual discharge of the domestic debt, and to furnish for a certain period, liberal tributes to the Federal Treasury. THE FEDERALIST NO. 38, at 248 (J. Cooke ed. 1961).

As Madison stated, this power "to dispose" was to persist "for a certain period." The implication is that disposal would

continue until complete divestiture and then cease. The duration of this period of time is not definite, but such indefiniteness is not fatal to a trust. A term of duration may be inferred from the nature of a transaction and the circumstances surrounding it. The transaction was a trust relationship between interrelated sovereign governments, a permissive federal encroachment, and the circumstances surrounding it included conflicting claims to territory, conflicting grants of land made by the claimants, and unpaid war debts. Because of these circumstances and the nature of the relationship, a reasonable time may be inferred. Madison's comment in THE FEDERALIST leaves no doubt that disposal of the land was to be limited in time and that disposal was mandatory.

The Supreme Court, as late as 1845, or two generations after the Constitution was adopted, acknowledged that federal possession of unappropriated lands was only temporary. In Pollard v. Hagan, a case involving title to submerged lands in Alabama, the Court held as follows:

> Taking the legislative acts of the United States, and the States of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it 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. * * * The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new States over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease. 44 U.S. (3 How.) 212, 222-24, 11 L.Ed. 565 (1845).

The public lands were not only thought to be held in trust, but the trust itself was to cease. Hence, it may be inferred that disposition of the lands was mandatory.

The clause as a whole. Nevada's position with respect to the public lands is based on the intent of the framers of the Constitution. It is that the powers of Art. IV, §3, cl. 2 should be construed narrowly as the terms of a trust. In this view the power "to make all needful rules and regulations" provides for conservatory power in the trustee, Congress, pending disposal. The power "to dispose of" is a mandatory power of the trustee which specifies the end or result of sale, or at least divestment.

The problem with Nevada's position is that the power "to dispose of" appears at first glance, and taken in isolation, to be applicable to "territory" as well as to unappropriated land. If this is true, "dispose of" must be construed as broad rather than narrow in scope in order to encompass discretionary sovereign power to dispose of territory, as well as mandatory trust power to dispose of the public lands. The Supreme Court, in U.S. v. Gratiot, cited above, and in subsequent cases, has in fact construed "dispose of" in isolation to be broad and discretionary because it appears to encompass "territory" as well as "other property." This construction reflects the habit of the federal courts to construe federal powers as broadly as possible, but it is not a necessary consequence of the language used in this clause, nor does it reflect the intent of the framers of the Constitution. Ultimately, the problem with the "territory or other property" clause, Art. IV, §3, cl. 2, is to square what the language in isolation appears to say with what the framers intended.

The solution which gives effect to the intent of the framers of the Constitution is to read Art. IV, §3, including the "new states" clause, as a whole, and give effect to the word "or" that separates the subjects of the power in the phrase "territory or other property." "Or" is a disjunctive particle indicating that the members of the sentence are to be taken separately. 73 AM.JUR.2d Statutes §241 (1974). The manner in which the members of this clause are to be taken separately is indicated by reading clause one and clause two together. The power to dispose of territory in the general instance is provided for in clause one of Art. IV, §3 by the words "new states may be admitted." This power is clearly discretionary. Therefore, it is unnecessary to find discretionary power to dispose of territory in the second clause,

since it has been provided for in the "new states" clause. In light of this reading of the clauses together and giving effect to the disjunctive particle "or," the canon of construction reddenda singula singulis should be applied to clause two.

The canon reddenda singula singulis provides that when a sentence contains several antecedents and several consequents, they should be read distributively. "That is, the words are to be applied to the subjects to which they appear by context most properly to relate and to which they are most applicable." 2A SUTHERLAND §47.26. The purpose of this canon is to limit the effect of an expression that is obviously too far reaching to be construed literally and is contrary to the intent of the drafters of the instrument. Thus, words granting power may be limited to particular subjects and those imposing obligation applied to others. Giving effect to this canon, the power to "make all needful rules and regulations" should be applied to both "territory" and "other property," but the duty "to dispose of" should only be applied to "other property," or unappropriated land, since the discretionary power to dispose of territory has already been provided for in the preceding "new states" clause. Reading the terms of clause two distributively is consistent with Madison's proposals to the Convention to grant power "to dispose of the unappropriated lands of the United States," and "to institute temporary governments for new states arising thereon." It also comports with the intent to form a trust of the unappropriated lands, and the intent of the framers expressed in Art. I, §8, cl. 17, to limit the power of the Federal Government to acquire and hold real property for its own use.

In summary, the central argument of this legal memorandum is that the power "to dispose of" unappropriated land in Art. IV, §3, cl. 2 of the Constitution is a mandatory trust power which specifies the end or result of sale, or at least divestment.

THE REENACTMENT OF THE NORTHWEST ORDINANCE IN 1789 AND ENACTMENT OF THE LAND ACT OF 1796 ARE CONTEMPORANEOUS CONSTRUCTIONS BY CONGRESS OF THE TRUST TERMS MANIFESTED IN THE "TERRITORY OR OTHER PROPERTY" CLAUSE, AND THEY REVEAL THAT CONGRESS THOUGHT THE TERM "DISPOSE OF" MEANT SALE, OR AT LEAST DIVESTMENT, OF THE PUBLIC LANDS.

Within a short time after the Constitution became effective, Congress passed two laws under the power granted in the "territory or other property" clause. These were a reenactment of the Northwest Ordinance in 1789 and enactment of the Land Act in 1796. These Acts of Congress are contemporaneous expositions of the meaning of Art. IV, §3, cl. 2. A contemporaneous construction is accorded great weight because it is presumed that those who were the contemporaries of the makers of the Constitution had the best opportunity of informing themselves of the understanding of the framers and of the sense put upon the Constitution by the people when it was adopted. 16 AM.JUR.2d Constitutional Law §83 (1964).

Congress, in its first session under the Constitution, reenacted the Northwest Ordinance as "An Act to provide for the Government of the Territory North-west of the river Ohio." Act of August 7, 1789, 1 Stat. 50. The stated purpose of the act was as follows: "Whereas in order that the ordinance of the United States in Congress assembled, for the government of the territory north-west of the river Ohio may continue to have full effect, it is requisite that certain provisions should be made, so as to adapt the same to the present Constitution of the United States." The only adaptations necessary were, first, that communications which formerly went to the Congress should go to the President; second, the President was given the power to appoint the officers of the Territory; and finally, provision was made for succession in case of the death or removal of the Governor. This reenactment otherwise carried forward the terms of the trust, discussed above, established by the Continental Congress and by Congress under the Articles of Confederation.

The other Act of Congress which is a contemporaneous construction of the "territory or other property" clause is the Land Act of 1796. James Madison, while a member of the House of Representatives, had written to his friend Edmund Pendleton on February 13, 1791, that "The Bill for selling the Public lands, has made some progress and I hope will go through." 6 THE WRITINGS OF JAMES MADISON 44 (G. Hunt ed. 1906). Madison, who had proposed that Congress be granted the power "to dispose of the unappropriated lands of the United States" at the Constitutional Convention in 1787, indicated in this letter that he thought the term "dispose of" meant "sell."

When the Land Act was finally passed on May 18, 1796, its title was "An Act providing for the Sale of the Lands of the United States, in the territory northwest of the river Ohio, and above the mouth of the Kentucky river." 1 Stat. 464. (Emphasis added.) While this act was not a reenactment of the Land Ordinance of 1785, the essential terms of the Ordinance were carried forward, including the mode or method of disposition, and terms requiring sale of the land.

Thus, §1 of the act provided for the appointment of a Surveyor General, §2 required survey into townships and sections, and §3 stated, "* * * the said sections of six hundred and forty acres (excluding those hereby reserved) shall be offered for sale, at public vendue * * *". Section 3 of the Act provided for the following reservations: "* * * every other salt spring which may be discovered, together with the section of one mile square which includes it, and also four sections at the centre of every township, containing each one mile square, shall be reserved, for the future disposal of the United States * * *." Although four sections in each township, or 1/9 of the land, plus all salt springs, were to be reserved, they were expressly reserved for future disposal. Again, future disposal appears to have meant sale, or at least divestment, and certainly did not mean retention. Perhaps the best evidence of this is the fact that the Federal Government ultimately disposed of 99.9996 percent of the unappropriated land in Ohio.

Hence, this Act, like the reenactment of the Northwest Ordinance in 1789, carried forward the terms of the trust established by the Continental Congress and by Congress under the Articles of Confederation. These two acts, then, are contemporaneous constructions or Congressional interpretations of the power granted by the "territory or other property" clause. They help to clarify the ambiguity in the term "dispose of" by indicating it should be given the narrow meaning of sale, or at least divestment.

THE "EQUAL FOOTING" DOCTRINE HOLDS THAT ALL THE STATES SHOULD BE EQUAL IN POWER, DIGNITY AND AUTHORITY. THE FAILURE OF CONGRESS TO DISPOSE OF THE PUBLIC LANDS IT HOLDS IN TRUST DENIES TO NEVADA THIS EQUAL FOOTING IN THE UNION.

The reenactment of the Northwest Ordinance in 1789 is a contemporaneous construction by Congress of the "new states" clause, as well as the "territory or other property" clause. Article V of §14 of the Ordinance provided that new states would be admitted to the Union "on an equal footing with the original states, in all respects whatsoever." The "equal footing" requirement is not an express term of the Constitution. The Supreme Court, however, has found it to be an implied duty or limitation on the power of Congress, the trustee of "territory," when admitting a new state. In Skiriotes v. Florida, the Supreme Court held:

> The power given to Congress by §3 of Article IV of the Constitution to admit new states relates only to such states as are equal to each other "in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." Coyle v. Smith, 221 U.S. 559, 567. 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941).

The "equal footing" doctrine thus affords each new state "equal protection" under the Constitution upon admission to statehood.

The equal footing requirement is of a legal nature and provides legal grounds for Nevada to claim additional rights in the public lands. Such grounds are outside the scope of this memorandum which is exploring claims based on an equitable theory that the public lands are held in trust. The legal equal footing doctrine and the equitable trust theory are not mutually exclusive, or contradictory, however, and the legal doctrine even lends support to the trust theory. This is because the enabling act providing for the admission of every new state, including Nevada, has said the new state would be admitted on an equal footing.

The equal footing doctrine has also been important in the decision of a number of public land cases. In Pollard v. Hagan, cited above, the issue was whether the shores of and the submerged lands under navigable waters belonged to the State of Alabama or the Federal Government. Justice Douglas, speaking for the Court in U.S. v. Texas, summarized the holding of Pollard and subsequent submerged land cases as follows:

> 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. 339 U.S. 707, 716, 70 S.Ct. 918, 94 L.Ed. 1221 (1950). (Citations omitted.)

This same reasoning would appear to be applicable to the public lands, because when the Constitution became effective the new Union did not own a foot of unappropriated land in the 13 original states, the original states having reserved these lands, as well as submerged lands, to themselves. See Patterson, The Relation of the Federal Government to the Territories and the States in Landholding, 28 TEXAS L. REV. 43, 46 (1949). Furthermore, the first three new states admitted to the Union by Congress retained the unappropriated lands within their borders.

The Court in the Texas case and in other submerged land cases had anticipated the possible application of the Pollard reasoning to all public lands, and sought to identify the conditions where it would be inappropriate to separate dominion, or ownership, of unappropriated lands from sovereignty. These conditions were summarized as follows:

> Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged * * *. U.S. v. Oregon, 295 U.S. 1, 14, 85 S.Ct. 610, 79 L.Ed. 1267 (1935), cited in U.S. v. Texas, 339 U.S. at 717.

Thus, submerged unappropriated lands are considered to be incident to sovereignty, while surface unappropriated lands are not. This explanation is false, however, because dominion over surface unappropriated land was clearly incident to sovereignty in the 13 original states and first three new states. The State of Nevada's position is that dominion over surface unappropriated land is so identified with the sovereign powers

of state government that its separation could only have been intended by the framers of the Constitution "for a certain time." Federal possession of these lands beyond a reasonable period of time to allow for disposal thus denies Nevada a position of equal footing with the original states in power, dignity and authority.

In the Texas case, which involved ownership of submerged lands on the marginal sea, the Supreme Court had better reasons for holding that those particular lands were incident to federal sovereignty. The State of Texas had argued that when it was an independent Republic, it possessed dominion and sovereignty over the submerged lands on the marginal sea, and that, when it became a state, it retained possession. The Court held that the submerged lands on the marginal sea reverted to the Federal Government at statehood:

> In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States. U.S. v. Texas, 339 U.S. at 718.

The Court decided these particular unappropriated lands belonged to the United States because they involved national concerns which were committed by the framers of the Constitution to the national government. The national concerns that caused this land to be incident to federal sovereignty were described as follows:

> It must have powers of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. U.S. v. California, 332 U.S. 19, 35, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947), cited in U.S. v. Texas, 339 U.S. at 718.

Thus, the Supreme Court, as usual, was solicitous to preserve and extend federal power where national concerns and federal revenues were involved. In this instance it is clear that wars waged on or near the coast are of national concern. On the other hand, it is clear that the surface unappropriated lands involve primarily local concerns, committed by the

framers of the Constitution to the states. Furthermore, since federal land cannot be taxed by the states, disposal of the public land should be similarly mandated by the equal footing doctrine in the interest of the revenues of the public land states.

In summary, the failure of Congress to dispose of the unappropriated trust lands in Nevada denies to Nevada that power, dignity and authority which would place it on an equal footing with the original states. Thus, the equal footing doctrine is consistent with Nevada's argument that the power in Congress to "dispose of" the unappropriated lands is a mandatory power.

THE FRAMERS OF THE CONSTITUTION INTENDED THE "NEEDFUL BUILDINGS" CLAUSE, ART. I, §8, CL. 17, TO BE THE SOLE AND EXCLUSIVE SOURCE OF FEDERAL POWER TO ACQUIRE REAL PROPERTY WITHIN A STATE. THUS, IT IS REASONABLE TO INFER THAT THE POWER GRANTED TO CONGRESS TO "DISPOSE OF" THE UNAPPROPRIATED LANDS WAS INTENDED TO BE MANDATORY.

The power of the Federal Government to acquire and hold real property for its own use is granted by Art. I, §8, cl. 17 of the Constitution, which states:

> The Congress shall have Power * * * to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.

The Supreme Court, in Fort Leavenworth Railroad Co. v. Lowe, concluded that this clause was intended to provide the sole power for federal acquisition of real property in the states:

> It would seem to have been the opinion of the framers of the Constitution that, without the

> consent of the States, the new government would not be able to acquire lands within them * * *. Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the states. 114 U.S. 525, 530, 5 S.Ct. 995, 29 L. Ed. 264 (1885).

The reason why the Supreme Court reached this conclusion is revealed in the constitutional debates.

The powers contained in this clause were proposed to the convention by James Madison and Charles Pinckney on August 18, 1787, the same day that Madison proposed the powers which became the "territory or other property" clause. These proposals were first referred to the Committee of Detail and then to the Committee of Eleven. The latter Committee reported the following power to the Convention on September 5, 1787:

> To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of the Legislature become the seat of the Government of the U.S. and to exercise like authority over all places purchased for the erection of Forts, Magazines, Arsenals, Dock Yards, and other needful buildings. 2 FARRAND, at 505 and 509.

The clause at this point did not require a state's consent to the purchase of land for "needful buildings." The first part of the clause on the acquisition of the "seat of government" was unanimously adopted. The second part of the clause on the acquisition of land for "needful buildings" was opposed by Elbridge Gerry of Massachusetts, as described by Madison in his notes on the Convention:

> So much of the (4) clause as related to the seat of Government was agreed to nem: con:
> On the residue, to wit, "to exercise like authority over all places purchased for forts &c.
> Mr. Gerry contended that this power might be made use of to enslave any particular State by

> buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the Genl. Government --
>
> Mr. King thought himself the provision unnecessary, the power being already involved: but would move to insert after the word "purchased" the words "by the consent of the Legislature of the State." This would certainly make the power safe.
>
> Mr. Govr Morris 2ded. the motion, which was agreed to nem: con: as was then the residue of the clause as amended. 2 FARRAND, at 510.

It is clear from the debates that Gerry feared the Federal Government might abuse the power to purchase land. Hence, King's motion to add the requirement of state consent was directed to purchases or acquisitions of all land, not just to land over which the Federal Government wanted "exclusive legislation." It was state consent that would make the power to purchase land safe.

The Supreme Court in the Ft. Leavenworth case noted that this limitation on federal acquisition of land within the states has not been followed. The point to be emphasized, however, is that the framers of the Constitution intended this clause to be the sole and exclusive source of power for federal acquisition of land.

In summary, since the framers intended to limit federal power to acquire real property within the states by requiring state consent, it is reasonable to infer that they intended the power to "dispose of" unappropriated land to be a mandatory power. Hence, federal possession of public land within Nevada, without this state's consent, after a reasonable period of time for Congress to dispose of the land has passed, is unconstitutional.

PART III. NEVADA AND THE TRUST.

THE STATE OF NEVADA IS AN AFTERBORN BENEFICIARY AS DESCRIBED BY THE NEW STATES CLAUSE, AND THE LAND WHICH COMPRISES THE STATE OF NEVADA IS AFTER ACQUIRED PROPERTY WHICH HAS BEEN CONFIRMED TO THE TRUST BY ACTS OF THE TRUSTEE, CONGRESS.

The State of Nevada is analagous to an afterborn beneficiary. Bogert, in his treatise TRUSTS AND TRUSTEES, writes, "It is clear that provision may be made in a trust declaration or transfer for adding to the beneficiaries who are living at the time of the trust creation other persons if and when born." 2 BOGERT §153 (2d ed. 1960). The provision of the trust for adding afterborn beneficiaries is the new states clause, Art. IV, §3, cl. 1.

It is irrelevant that the United States acquired the territory, some of which later became the State of Nevada, from Mexico for $15 million under the Treaty of Guadalupe Hidalgo, 9 Stat. 922, 9 T. 791 (1848), and not from cessions by the original states. The Supreme Court, in Pollard v. Hagan, found that the territory acquired under the Louisiana Purchase was included in the trust of public lands along with the territory ceded by the original states:

> We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the Treaty with the French Republic, of the 30th of April, 1803, ceding Louisiana. 44 U.S. (3 How.) 212, 221, 11 L.Ed. 565 (1845).

The lands which comprise Nevada were acquired in the same manner as Louisiana lands, by purchase.

After acquired property, as well as afterborn beneficiaries, may be added to a trust. The forward looking nature of the powers granted in the new states clause and the territory or other property clause, Art. IV, §3, indicate this was the intention of the framers of the Constitution. Bogert, in TRUSTS AND TRUSTEES, says that after acquired property may be added to a trust, but "The settlor must perform some act after the acquisition of the property, showing his intent to have the trust attach to it." 1 BOGERT §113. If the intent of the

framers is not sufficient proof, subsequent Acts of Congress show the intent of the settlor-trustee to add the Guadalupe Hidalgo Treaty lands to the trust.

The territory which became the State of Nevada was at first a part of the Territory of Utah. In "An Act to establish a territorial government for Utah," Congress required in §6 that "* * * no law shall be passed interfering with the primary disposal of the soil * * *." Act of September 9, 1850, 2 FEDERAL AND STATE CONSTITUTIONS 1236. When the Territory of Nevada was formed out of the Territory of Utah in "An Act to organize the Territory of Nevada," the same requirement was imposed using the same language. Act of March 2, 1861, §6, 12 Stat. 209. This language relates back to a provision in §14 of the Northwest Ordinance that "The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled." The language quoted from the two territorial acts acknowledges a term in the original trust that the trustee has the power to dispose of the land, and manifests an intention by the trustee, Congress, that the trust attach to this territory. As to the noninterference provision, Nevada is not now interfering with federal disposal of the land; rather, it is interfering with federal retention.

Section 14 of "An Act to organize the Territory of Nevada" also provided that the territory should be surveyed," * * * preparatory to bringing the same into market * * *." This indicates disposal was to be primarily by sale. In the Enabling Act which prepared the way for the admission of Nevada to statehood, Congress provided in Section 10 "that 5 per centum 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 * * *." "An Act to enable the people of Nevada to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original states," March 21, 1864, 13 Stat. 30. This is a further indication that disposal was to be primarily by sale. Section 14 of the Nevada Territorial Act and sections 7 through 9 of the Enabling Act also provided for grants of land to the Territory and the State of

Nevada. This indicates that if the trust term of disposal did not always mean sale, it at least meant divestment.

Section 1 of the Enabling Act provided that Nevada "shall be admitted into the Union upon an equal footing with the original States in all respects whatsoever." This is an additional indication that Congress intended the trust of public lands to attach to the lands in the State of Nevada, since the public lands of other states had attached to the trust.

There is one provision, section 4 of the Enabling Act, which the Federal Government might argue shows an intention by Congress that the trust was not to attach to the public lands in Nevada. This provision required the people of Nevada to pass an Ordinance which states, in part,

> That the people inhabiting said Territory do agree and declare that they 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 * * *.

This Ordinance was a part of the Constitution adopted by the people of Nevada on October 31, 1864. The passage cited clearly relates back to §14 of the Northwest Ordinance and acknowledges the power of the trustee, Congress, to dispose of the lands. The phrase that required the people of Nevada to "forever disclaim all right and title to the unappropriated lands lying within said Territory" is mere surplusage.

A disclaimer such as this was never demanded of the people of the first three new states to be admitted, nor of the people of Ohio, the first public land state to be admitted. If the Federal Government were to argue that Nevada nevertheless disclaimed "all right and title" to the public lands, an equitable defense would be that the disclaimer was a condition wrongfully imposed by the trustee, Congress, and adopted by the people of Nevada under duress.

Moreover, since the mandate to Congress to dispose of the unappropriated lands is granted by the Constitution, and Nevada has a beneficial interest in such disposal, Congress lacks the power to compel Nevada to disclaim its right or interest

derived from the Constitution. In Coyle v. Oklahoma, Congress required the people of Oklahoma to adopt an irrevocable Ordinance similar to Nevada's, as a condition to statehood, containing a provision that required the people to establish the state capital at Guthrie until 1913. The Supreme Court reviewed the equal footing doctrine as applied in Pollard v. Hagan, discussed above, and 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. 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853 (1911).

That which Congress could not take away from Nevada after admission, it could not take away at admission.

If further evidence is required to show that the disclaimer is of no effect, Nevada can point to the fact that the Federal Government has acted inconsistently with the disclaimer, and considers the disclaimer to be of no legal effect. Thus, the Federal Government, despite any purported quitclaim executed by Nevada in the Ordinance of October 31, 1864, has requested and received from the state consent to the acquisition of the following trust lands under the needful buildings clause, Art. I, §8, cl. 17 of the Constitution: U.S. Forest Service Lands (328.010 of NRS); Department of Defense and Atomic Energy Commission (now ERDA) lands (28.160 of NRS); the site for Hoover Dam (328.210 of NRS); and land for numerous other federal buildings and installations. These federal requests for state consent are inconsistent with the disclaimer and show that the Federal Government, itself, thinks the disclaimer has no legal effect.

In summary, Nevada is an afterborn beneficiary of the trust, the land in Nevada is after acquired trust property, and the condition imposed by Congress on Nevada to disclaim all right and title in the trust is void as unconstitutional.

ALTERNATIVELY, A SPECIFIC TRUST WAS CREATED BY NEVADA'S DISCLAIMER AND CONGRESS' SUBSEQUENT EXERCISE OF DOMINION OVER THE PUBLIC LANDS.

Assuming the correctness of the proposition argued in Parts I and II that Congress had no power under the Constitution to retain the public lands indefinitely, what is the effect of assuming that the disclaimer above discussed was voluntary? If Congress had a constitutional duty to sell or otherwise divest itself of the public lands within a reasonable time, this disclaimer amounted to no more than a waiver of any claim to proprietary title, as distinct from governmental sovereignty, by the people speaking in advance on behalf of the state which they were authorized to form. It was a recognition of the historically established principle, dating from the admission of Ohio in 1803, that the unappropriated land in a newly formed state did not pass into the hands of the state government for disposition. As such, it was eminently reasonable, for to have asserted the contrary at so late a date would have jeopardized land titles running from the Federal Government in nearly every state from the Appalachians to the Missouri River. If it was voluntary for this purpose, however, it entailed a consequence: with the proprietary title went the duty to dispose of the lands, so that the new state would attain the "equal footing with the original states, in all respects whatever," promised in the enabling act. This amounted to a cession upon a special trust, and Congress accepted the trust (invited by the same enabling act) by its retention of proprietary title.

CONGRESS, AS TRUSTEE, HAS FAILED TO FULFILL ITS CONSTITUTIONALLY MANDATED DUTY TO DISPOSE OF THE UNAPPROPRIATED LAND IN NEVADA, AND HAS, IN FACT, ASSERTED ITS VIEW THAT "DISPOSE OF" MEANS "RETAIN." THIS FAILURE TO DISPOSE OF THE LAND IS A BREACH OF TRUST.

The failure of Congress to dispose of the unappropriated land in Nevada is most readily shown by the fact that the Federal Government possesses no unappropriated land in the 13 original states or the first three new states to be admitted; possesses only 85.5 acres of public land comprising .0004 percent of the land area of Ohio, the first public land state; but has retained possession of 87 percent of the land in

Nevada, of which 69 percent is public land. This de facto failure to dispose is paralleled by a de jure manifestation of intent not to dispose, indicated, for example, by an Act of Congress of March 2, 1889, which ended all private sales of unappropriated land, and by other subsequent Acts, discussed below.

Not only do the facts and the law indicate that Congress has not disposed of and does not intend to dispose of the unappropriated lands, but the Secretary of the Interior, Thomas S. Kleppe, has said that the Federal Government cannot dispose of the lands. The following statements by Kleppe were recorded at a recent news conference:

> Kleppe said he favored returning federal lands to the state--and the tax rolls--whenever possible. But he added hastily: "We're precluded by law from doing that."
>
> Kleppe said he was "shocked to find that the law precluded the sale of interior-administered lands to anyone when Arizona interests made a similar request shortly after he took office 9-1/2 months ago. Nevada State Journal, August 1, 1976, p. 16.

As if too much were not enough, Congress has recently gone one step beyond its failure to dispose. This year, the 94th Congress, in its closing days passed the Federal Land Policy and Management Act, or B.L.M. Organic Act, which was signed by the President on October 21, 1976, and constitutes Public Law 94-579. The "Declaration of Policy" states,

> The Congress declares that it is the policy of the United States that--the public lands be retained in Federal ownership unless as a result of the land use planning procedure provided for in this Act it is determined that disposal of a particular parcel will serve the national interest * * *. (Emphasis added.)

Thus, while Congress for a number of years has had a policy of not disposing of the unappropriated lands, in this Act it has finally admitted its policy is to retain the lands. It

is ironic that the framers of the Constitution made mandatory the power to dispose by sale or divestment, because forming states, encouraging settlement and determining land use were matters of local concern, whereas Congress now finds that disposal of the unappropriated land is a matter only of national concern.

In summary, the failure of Congress to dispose of the unappropriated lands is shown by facts, law, statements of a public official, and the bald asseveration of Congress that the power to "dispose of" means "retain." This failure to dispose of the land is a breach of trust.

PART IV. THE REMEDY.

NEVADA'S REMEDY UPON BREACH OF TRUST IS TO SUE IN EQUITY FOR REMOVAL OF THE TRUSTEE, CONGRESS, AND FOR SUBSTITUTION OF ITSELF AS TRUSTEE.

Although the trustee, Congress, is wrongfully withholding property from disposal, the appropriate remedy is not a constructive trust. Nevada has no more right of title in the land or its cash proceeds than did the State of Ohio of its land. Nevada is not entitled to a windfall of 60 million acres of land with a value in the hundreds of millions of dollars, just because the trustee has failed to dispose of it. Nevada's injury does not spring from a wrongful withholding of property by the trustee, but from a failure of duty.

The appropriate remedy where there is a failure of duty is removal of the trustee. Bogert, in TRUSTS AND TRUSTEES, writes,

> When in the course of the administration of a trust it becomes apparent that the trustee cannot with justice to the beneficiaries be allowed to continue in the exercise of his powers, he may be removed. * * * It is one of the powers [of the Chancery court] derived from the historic jurisdiction of equity to enforce the performance of trusts. 5 BOGERT §519.

Cause for removal must be shown.

> The allegations as to the grounds for removal must be specific and certain. * * * There must be sufficient particularity to give a reasonable indication of the acts or events that are said to make removal imperative. 5 BOGERT §524.

In the previous section it was shown that the trustee, Congress, has not disposed of the unappropriated land in Nevada. "The failure or refusal of a trustee to act in the affairs of the trust may furnish a basis for his displacement." 5 BOGERT §527. Congress has de facto failed to act, and should be removed.

Moreover, Congress has passed laws so that the executive branch cannot dispose of the public land. These laws are contrary to the constitutional mandate to dispose. "Disobedience of the directions of the trust instrument is usually a ground for removal." Ibid. Congress has manifested its disobedience of the constitutional mandate to dispose by declaring that "dispose" means "retain." This disobedience of a constitutionally mandated trust duty is a ground for removal.

Finally, since Congress was to possess the equitable interest of beneficial use of the land only temporarily, for a reasonable time pending disposal, its failure to dispose has resulted in an enlarged interest in the trust property accruing to itself. "Where a trustee has acquired a personal interest adverse to the trust, he is very likely to be removed." Ibid. The interest accruing to Congress is adverse to the trust because it harms Nevada, a beneficiary, by thwarting local concerns such as settlement, economic development and the addition of real property to the tax rolls. Thus, because of failure to act, disobedience of the trust, and acquisition of an interest adverse to the trust, the trustee should be removed.

In a case of failure of duty, or failure to exercise an imperative power, such as this failure of Congress to dispose of the public lands, a Court has discretion to impose other remedies than removal of the trustee. First, the Court could issue a decree to the trustee, Congress, to use the power of disposal. This would be an ineffectual remedy because the Court lacks power to enforce such a decree, short

of holding Congress in contempt of court. Second, the Court, itself, could execute the power of disposal. The problem with this remedy is that it would be too vast an undertaking for a court with limited administrative resources, and would require a court to take an active role in a governmental function typically performed by another branch of government. Where there is a failure to exercise an imperative power, the best available remedy short of a court order or court execution is removal of the trustee. 5 BOGERT §538.

On removal of a trustee, the successor will be appointed by the Court in equity. In this appointment the Court has wide discretion. 5 BOGERT §532. The State of Nevada is the ideal party to be substituted as trustee. The state is the level of government to which the framers of the Constitution committed local concerns, and the primary purposes of the trust, other than raising money, were to form states and promote their settlement and development. Nevada is in the best position to conserve and dispose of the unappropriated lands in light of local concerns. As trustee, Nevada would be required to remit the proceeds from management and disposal of the land to the U.S. Treasury, after deduction of reasonable and necessary expenses of administration. Nevada, in seeking equity, would do equity. The Court, on its part, can shape the remedy so that when the pecuniary interest of the United States is threatened, it can protest improvident management and prevent sale or disposal for less than fair value.

In summary, where there has been a failure to exercise the imperative power to dispose of the public lands, the best available remedy is to sue for removal of the trustee, Congress, and for substitution of the State of Nevada as trustee.

PART V. THE SUPREME COURT AND THE TRUST.

THE LAW OF FEDERAL LAND ACQUISITION, AS LAID DOWN BY THE SUPREME COURT, IS CONTRARY TO THE INTENT OF THE FRAMERS OF THE CONSTITUTION.

Reasonable grounds exist for construing the Constitution as imposing restrictions on real property acquisition by the Federal Government which would have the effect of limiting the Federal Government and protecting the sovereignty of the states,

but the Supreme Court has methodically and step by step permitted the exercise of more and more federal power over real property, which has concomitantly weakened the sovereignty of the states.

The expansion of federal power to acquire land has occurred in two ways: first, by narrowing or construing away the limitations imposed by the needful buildings clause, Art. I, §8, cl. 17; and second, by expanding and making discretionary the narrow and mandatory powers of the territory or other property clause, Art. IV, §3, cl. 2.

FEDERAL POWER TO ACQUIRE LAND HAS BEEN EXPANDED BY NARROWING OR CONSTRUING AWAY THE LIMITATIONS IMPOSED BY THE NEEDFUL BUILDINGS CLAUSE, ART. I, §8, CL. 17.

Because the needful buildings clause was originally the sole and exclusive means of acquiring real property, the narrowing and construing away of its restrictions was a necessary concomitant to expansion of federal power under the territory or other property clause. The narrowing of the needful buildings clause occurred in three ways: first, through acquiescence by the states to federal land purchases without consent for a governmental use; then, when the first method was challenged, a holding that the Federal Government could purchase as a mere proprietor, without exclusive jurisdiction, but could use the property without state interference, just as if it were exclusive jurisdiction property; and finally, that property could be acquired without consent by eminent domain as well as by purchase.

The first narrowing of the needful buildings clause to occur was federal acquisition of property in the states without consent. The executive branch recently conducted a study of federal land acquisition which indicates that from the inception of the Union some land for needful buildings was acquired by Congress with consent of the states, and some land was acquired without consent. 2 JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES 29-30 (USGPO, 1957). Thus, the first Congress in its first session passed a law that the United States, after the expiration of 1 year following the enactment of the act, would not defray the expenses of maintaining lighthouses, beacons, buoys and public piers unless

the respective states in which they were situated should cede them to the United States "together with the jurisdiction of the same." 1 Stat. 53, August 7, 1789. On the other hand, consent was not required for other early purchases of land authorized by Congress--for example, for fortifications and garrisons at West Point, New York, 1 Stat. 129 (1790); the erection of docks, 1 Stat. 622 (1799); the establishment of Navy hospitals, 2 Stat. 650 (1811); the exchange of one parcel of property for another for purposes of a fortification, 2 Stat. 496 (1808); and the establishment of an arsenal at Plattsburg, New York, 3 Stat. 205 (1815).

These acquisitions without state consent are a contemporaneous construction by Congress of Art. I, §8, cl. 17. This construction has been long acquiesced in, and great weight should be accorded to the Congressional practice. The Supreme Court, in Fort Leavenworth v. Lowe, cited above, acknowledged the intent of the framers of the Constitution to limit the power of the Federal Government in the needful buildings clause, but gave greater weight to this contemporaneous construction by Congress:

> It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them * * *. Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. 114 U.S. at 530-31.

As Justice Story noted in his COMMENTARIES ON THE CONSTITUTION,

> [W]hen we enter upon the analysis of the particular clauses of the Constitution, how many

> loose interpretations and plausible conjectures were hazarded at an early period, which have since silently died away, and are now retained in no living memory, as a topic either of praise or blame, of alarm or of congratulation. 1 STORY §407.

The apprehension of Elbridge Gerry of Massachusetts in the Constitutional Convention that the needful buildings clause, without the consent requirement, "might be made use of to enslave any particular State by buying up its territory," thus silently died away.

After the Civil War there was no living memory of the apprehensions and fears of the framers that had motivated them to require state consent to federal land acquisition. On the other hand, the Union was then imbued with its own self-importance. In Fort Leavenworth Railroad Co. v. Lowe, the Federal Government had acquired a military reservation other than by purchase with the consent of the State of Kansas. The Supreme Court found this acquisition to be constitutional by narrowly construing the needful buildings clause, Art. I, §8, cl. 17, to apply only when the government sought exclusive jurisdiction over real property:

> Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals. 114 U.S. at 531.

If property was acquired within a state by other than purchase with consent, it was not held with full governmental, but only proprietary, powers. Thus, the sole and exclusive means of acquiring real property within a state was construed away by finding that the government could hold real property for governmental purposes as a mere proprietor. On the other hand, the acquisition and holding of property as a mere proprietor, the Court said, would not serve to limit any needful, or governmental, use.

> Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification; that if upon them forts, arsenals, or other public buildings are erected for the uses of the General Government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Fort Leavenworth, 114 U.S. at 539.

In regard to the effective use of property by the Federal Government, acquisition as a proprietor yields the same beneficial use without interference as does acquisition as a government with exclusive legislation under Art. I, §8, cl. 17. Thus, insofar as beneficial use of property is concerned, acquisition as a proprietor or as a government is a distinction without a difference, except that the requirement of state consent to acquisition is neatly skirted.

The requirement of state consent to acquisition was also neatly skirted by the Supreme Court in holding that the Federal Government possessed the power of eminent domain. As noted previously, the needful buildings clause was the sole and exclusive federal power to acquire real property for its own use, and exercise of the power required the consent of the state. Thus, for almost 80 years after the establishment of the Union the Federal Government did not exercise any power of eminent domain. Then Congress passed an act to obtain a site for a federal building in Cincinnati which contained a provision for "the purchase at private sale or by condemnation of the ground." Act of June 10, 1872, 17 Stat. 353. In a suit which apparently conceded the federal power of eminent domain, but alleged that federal courts lacked statutory authority to hear condemnation cases, the Supreme Court noted but ignored the restriction placed on the Federal Government by the needful buildings clause:

> The powers vested by the Constitution in the general government demand for their exercise

> the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be. Kohl v. U.S., 91 U.S. 367, 371, 23 L.Ed. 449 (1876).

The Court, not finding an express grant of the power of eminent domain in the Constitution, found the power to be inherent in the concept of sovereignty:

> The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law. Vattel, ch. 20, 34; Bynk., lib. 2, 15; Kent's Com. 338-340; Cooley on Const. Lim. 584 et seq. Kohl, 91 U.S. at 371-372.

Where the Constitution was insufficient for its purposes, the Court relied on an express grant of such power by constitutional theorists and commentators. The scope of such power was apparently without limit:

> If the United States have the power, it must be complete in itself. * * * The consent of a State can never be a condition precedent to its enjoyment. Such consent is needed only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired. Kohl, 91 U.S. at 374.

The fact that such power had never been exercised by the Federal Government for almost 80 years was irrelevant:

> It is true, this power of the Federal government has not heretofore been exercised adversely; but the non-user of a power does not disprove its existence. Kohl, 91 U.S. at 373.

Thus, the consent requirement was again neatly skirted.

The several states had, of course, exercised eminent domain from the outset. As late as 1855, in fact, state eminent domain had been held superior to federal property rights. Thus, an Illinois Circuit Court held that the State of Illinois could construct public roads through the lands of the United States under its power of eminent domain, and such power would be exercised by the state subject to no power vested in the Federal Government. U.S. v. Railroad Bridge Co., 6 McLean, U.S., 517, 27 Fed. Cas. No. 16, 114 (1855). Some 40 years after the Supreme Court discovered the federal power of eminent domain in Kohl, this power of the states recognized in Railroad Bridge Co. was abolished. In Utah Light & Power Co. v. U.S., the Supreme Court held that a state could not exercise its power of eminent domain over federal lands. 243 U.S. 389, 405, 37 S.Ct. 387, 61 L.Ed. 791 (1917). Hence, where the states originally possessed the exclusive power of eminent domain, and the needful buildings clause required a state's consent to federal land acquisition, ultimately the Supreme Court turned the tables on the states, and held that the mere proprietary ownership of the United States was superior to the sovereign power of the states.

Thus, the development of the law of federal eminent domain, from no such power to ultimate superiority, parallels the development of the law of federal land acquisition, from severe restriction, requiring state consent, to virtually no restriction.

FEDERAL POWER TO ACQUIRE LAND HAS BEEN EXPANDED BY MAKING DISCRETIONARY THE NARROW AND MANDATORY POWER OF THE TERRITORY OR OTHER PROPERTY CLAUSE, ART. IV, §3, CL. 2.

The development of the law of federal land acquisition, above, is concomitant with the development of the law relating to federal land disposition under the territory or other

property clause. The narrow and mandatory powers of this clause were expanded to broad and discretionary ones, to the point where the Federal Government began reserving and withdrawing unappropriated lands for its own use. It was necessary for the consent limitation in the needful buildings clause to be construed away in order for this last and broadest expansion of the territory and other property clause, reservation and withdrawal for its own use, to be acquiesced in.

These legal developments were paralleled by similar developments in the social and political history of the United States in the last four decades of the nineteenth century, the most notable being the vastly increased importance of the Union during and after the Civil War, the rise of the conservation movement, and the emergence of the United States as a world power under Theodore Roosevelt's big stick policy.

These legal, social and political developments may be traced in the changing definition of the term "to dispose" of Art. IV, §3, cl. 2, from the narrow meaning "to sell" to the broadest possible meaning, that of "exercising finally, in any manner, one's power of control." As noted previously, the fact that the power "to dispose" meant the power "to sell" is well documented in the history of the unappropriated lands under the Articles of Confederation, during the Constitutional Convention, in the FEDERALIST PAPERS, and in the evidence of contemporaneous construction reflected in legislation enacted by Congress to survey and sell off these lands.

Although the early legislation by Congress reflected this intent to dispose by sale, Congress also enacted laws to reserve and lease mineral lands. Thus, in "An Act making provision for the disposal of the public lands situate between the United States military tract and the Connecticut reserve, and for other purposes," §5 of the act provided as follows:

> That the several lead mines in the Indian territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States. 2 Stat. 448, March 3, 1807.

When power to lease mineral lands was challenged in U.S. v. Gratiot, the Supreme Court held that the power to dispose of the lands was left to the discretion of Congress, and included the power to lease as well as to sell. 39 U.S. (14 Pet.) 526, 538, 10 L.Ed. 573 (1840).

In another controversy where the power to lease was also at issue, the attorney general construed the power "to dispose" in Art. IV, §3, cl. 2 as follows:

> The term [disposed of] was adopted from the ordinance of 1785, and comprehends every mode by which the lands and other property of the United States could be parted with by the government, whether by sale, gift, or for any limited interest. Leases of Mineral lands on Isle Royale, 4 OP. ATT'Y GEN. 480, 487 (1846).

The attorney general's opinion would have enlarged the power of Congress by permitting disposition of "any limited interest," and by gift as well as sale. As in the Gratiot case, the problem was that a lease, or conservatory act, was viewed as a disposition.

Until after the Civil War the unappropriated lands were still considered to be held in trust, and only temporarily, pending final disposition. Pollard v. Hagan, 44 U.S. at 221. A majority of the Court in Dred Scott also found the unappropriated lands to be held in trust. The plurality opinion in Dred Scott was that this power to dispose of territory in Art. IV, §3, cl. 2, was only a transitionary power relating to property possessed by the Union at its inception. Dred Scott, 60 U.S. at 442. The better view was that this clause was forward looking, not transitionary, and that disposal of the trust lands was mandatory. Dred Scott, 60 U.S. at 514 and 526.

As with the needful buildings clause, it was not until after the Civil War, until after the Union became imbued with its own self-importance, that federal power over the unappropriated lands was expanded to the detriment of state sovereignty. Thus, in Gibson v. Chouteau, the Supreme Court found that the power to dispose was plenary power and subject to no limitation:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. 80 U.S. (13 Wall.) 92, 99, 20 L.Ed. 534 (1872).

This power without limitation, and especially the power to prescribe the times of transfer, effectually undercut the trust theory of public land holding and its mandatory nature.

Subsequent to Chouteau, the attorney general opined that unappropriated lands within the states could be reserved for the benefit of Indians:

> [T]he President [has] the power to make reservations of public lands for public uses * * *. * * * A reservation from the public lands therefore for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Indian Reservations, 17 OP. ATT'Y GEN. 258, 259-61 (1882).

This reservation of lands for the benefit of Indians was not inconsistent with earlier doctrines of permissible disposition, as by gift, and was buttressed by the power of Art. I, §8, cl. 3 to regulate commerce with the Indians. However, the power of reservation was subject to expansion, to reserve lands for the use and benefit of the Federal Government as well as of the Indians.

Thus, in an Act of March 2, 1889, Congress ended all private sales of unappropriated land except for isolated tracts in Missouri. 25 Stat. 854. The ostensible purpose of this Act was to limit private acquisition to homesteaders, "actual settlers only--to bona fide tillers of the soil." GOVERNMENT LAND OFFICE REPORT at 3 (1890). This Act stopping private sales of the unappropriated lands was just a prelude to effectually permanent reservation and withdrawal of these lands for the use and benefit of the United States.

The first of these general reservation and withdrawal acts, the General Reservation Act of March 3, 1891, authorized the President to set aside unappropriated lands for forest reservations. 26 Stat. 1095. The most broad sweeping of these acts was the Withdrawal Act of June 25, 1910. In this Act, Congress granted to the President the power to withdraw any unappropriated land, ostensibly for the purpose of mineral classification, but effectually to bar settlement or private development, and such order of withdrawal was to remain in effect until revoked by the President or by act of Congress. 34 Stat. 847.

When the power to withdraw unappropriated lands was challenged, the Supreme Court held that Congress could withdraw the public lands of the United States from settlement without the consent of the state where the land was located, and further, could prohibit grazing on such land. Light v. U.S., 220 U.S. 523, 537, 32 S.Ct. 485, 55 L.Ed. 570 (1911). When delegation of this power from Congress to the President was challenged, the Supreme Court held that the withdrawal of public lands from entry had been so long exercised and recognized by Congress as to be equivalent to a grant of power. U.S. v. Midwest Oil Co., 236 U.S. 459, 472, 35 S.Ct. 309, 59 L.Ed. 673 (1915).

Thus, just as Swift had warned that "there was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid," the federal courts have ultimately held that federal power "to dispose" is the power "to reserve" for federal benefit: "The power to reserve public lands of the United States from sale or other disposition is vested in Congress." Northern Pacific Railroad Co. v. Mitchell, 208 F. 469 (D.C. Wash. 1913), error dismissed, 213 F. 1022.

That the "Property Clause, Art. IV, §3, which permits federal regulation of federal lands" permits reservation of water rights to accompany reservation of land was reaffirmed by the Supreme Court in Cappaert v. United States, ____ U.S. ____, 96 S.Ct. 2062 (1976), which originated in Nevada, and the absence of any limitation upon the power of Congress under that clause was reaffirmed in Kleppe v. New Mexico, ____ U.S. ____, 96 S. Ct. 2285 (1976), at the same term. Whether we believe that

the framers of the Constitution were toying with words in their use of the term "to dispose," saying one thing while intending another, or that the machinations of the Supreme Court and Congress have been exceeded only by the credulity of the states and the people, these cases will not be denied.

The final chapter in the saga of the appropriation, or misappropriation, of unappropriated lands as such was written by President Franklin D. Roosevelt. Pursuant to the Withdrawal Act of June 25, 1910, he issued two executive orders on November 26, 1934, and February 5, 1935, which withdrew from entry the entire 165,695,000 acres of remaining unappropriated lands.

In summary, the narrow and mandatory powers of Art. IV, §3, cl. 2 of the Constitution have been methodically expanded and made discretionary by the Supreme Court, to the point where Congress and the President can legally retain the public lands.

THE ISSUE TO BE DECIDED IN THIS CASE IS A CONSTITUTIONAL QUESTION, NOT A POLITICAL QUESTION.

The issue to be decided in this case is not a political question. The nonjusticiable nature of a politcal question is primarily a function of the separation of powers. Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). The separation of powers limitation on the courts involves a "constitutional commitment of the issue to a coordinate political department * * *." Ibid. Nevada's claims create a conflict between the federal and state levels of government, which involves the division of powers doctrine or federalism, not the separation of powers.

Nor does the mere fact that Nevada's claim involves the "political" power of the state mean that it presents a political question. "Such an objection 'is little more than a play upon words.'" Nixon v. Hernden, 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927), cited in Baker v. Carr, 369 U.S. at 209. The ultimate issue to be decided here is whether Congress has exceeded its constitutional authority. As Justice Brennan, speaking for the Court, said in Baker v. Carr,

> The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. 369 U.S. at 217.

This case presents a constitutional question, not a political question.

Nor does the mere fact that this constitutional issue has been ruled upon before mean that there should be unquestioning adherence to judicial precedent. As Justice Brandeis said in his oft cited dissenting opinion in Burnet v. Coronado Oil & Gas Co.,

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right * * *. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932). (Citations and footnotes omitted.)

Indeed, the crux of this case is that the issue is a matter of serious concern, and correction through legislation is practically impossible: it is the fundamental issue of federalism as intended by the framers of the Constitution, concerning the division of power between the Federal Government and the states. Congress will not voluntarily give up the power it has been permitted to exercise over the public lands, so there is no other remedy than an equitable court remedy.

THE WEIGHT OF CONTRARY LEGAL PRECEDENT IS A SEVERE OBSTACLE TO ANY LEGAL ACTION THAT MIGHT BE BROUGHT BY THE STATE OF NEVADA.

Legal precedent as laid down by the Supreme Court is contrary to the argument presented in this memorandum that

disposition of the public lands was intended by the framers of the Constitution to be mandatory. Thus, a petition in equity by the State of Nevada for removal of Congress from trusteeship over the public lands may be plainly unsubstantial. A federal question is unsubstantial when its unsoundness so clearly results from previous decisions of the Supreme Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy. 32 AM.JUR.2d Federal Practice and Procedure §44 (1967). The federal question must be meritorious and proffered in good faith; it cannot be merely "colorable," or plausible, but must possess "color of merit." Ibid.

On the other hand, the Supreme Court recognizes a duty to reexamine precedent that is fairly called into question. Justice Powell, concurring in Mitchell v. W. T. Grant Co., recently said,

> It is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question. And if the precedent or its rationale is of doubtful validity, then it should not stand. As Mr. Chief Justice Taney commented more than a century ago, a constitutional decision of this Court should be "always open to discussion when it is supposed to have been founded in error, [so] that [our] judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." Passenger Cases, 48 U.S. (7 How.) 283, 470, 12 L.Ed. 702 (1849). 416 U.S. 600, 627-28, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974).

Any conclusion on the color of merit of the remedy described in this memorandum must be based on whether the reasoning of Supreme Court precedent in this area has been fairly called into question.

PART VI. CONCLUSION.

LEGAL ACTION BY THE STATE OF NEVADA TO REMOVE CONGRESS FROM TRUSTEESHIP OVER THE PUBLIC LANDS IS UNLIKELY TO SUCCEED BECAUSE OF LONGSTANDING LEGAL PRECEDENT.

There is substantial evidence in the early history of the United States to conclude that the framers of the Constitution intended to form a trust of the public lands, and that disposition of the lands was mandatory. Longstanding precedents of the Supreme Court agree that the public lands are held in trust, but they are contrary in holding that the powers of the trustee are discretionary and without limitation. The pattern of precedent in the trust area is part of a larger fabric of federal law that includes land acquisition and jurisdiction, eminent domain and so forth. It is very unlikely that the Supreme Court will disturb the fabric at this late date. Hence, any legal action by the State of Nevada to remove Congress from trusteeship over the public lands is unlikely to succeed because of longstanding legal precedent.