STATE SOVEREIGNTY AS IMPAIRED BY FEDERAL OWNERSHIP OF LAND

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STATE OF NEVADA

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REPORT ON STATE SOVEREIGNTY AS IMPAIRED BY FEDERAL OWNERSHIP OF LAND

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Senate Concurrent Resolution No. 17—Committee on Natural Resources

FILE NUMBER 99

SENATE CONCURRENT RESOLUTION—Continuing the existence of the Nevada select committee on public lands.

WHEREAS, The 58th session of the Nevada legislature directed the legislative commission to study means of deriving additional state benefits from the public lands, and the 59th session of the Nevada legislature directed the creation and the 60th session continued the existence of a select committee on public lands which has been charged with:

1. Studying Nevada's unique situation with respect to public lands;
2. Considering alternatives for the management of public lands which include increasing the amounts of those lands in nonfederal ownership and management of those lands by the state;
3. Proposing state and federal legislation on public lands; and
4. Forming a regional coalition on public lands; and

WHEREAS, The select committee has accomplished some of its assigned tasks and continues to work on others, such as modifying federal policy respecting the public lands, which take time and will require continued attention during the next several years; and

WHEREAS, The select committee has been instrumental in the formation of a western coalition on public lands but is still looked to for leadership of the movement away from federal control of the public lands; now, therefore, be it

Resolved by the Senate of the State of Nevada, the Assembly concurring, That the Nevada select committee on public lands be continued through the 61st session of the Nevada legislature and for the interim period until the beginning of the 62nd session; and be it further

Resolved, That the select committee be composed of three members of the senate appointed by the majority leader of the senate and three members of the assembly appointed by the speaker of the assembly, chosen to provide for continuity of membership on the committee, and that if any vacancy should occur on the committee, the new member have experience and knowledge about public lands or be a member of an appropriate standing committee of the senate or assembly; and be it further

Resolved, That the select committee shall:

1. Actively support the efforts of the western coalition on public lands;
2. Advance knowledge and understanding in local, regional and national forums of Nevada's unique situation with respect to public lands;
3. Support Congressional legislation that will enhance state and local roles in the management of public lands and will increase the disposal of public lands; and be it further

Resolved, That the select committee is an official agency of the legislative counsel bureau whose members are entitled to receive out of the legislative fund for each day's attendance at meetings or official business of the select committee after adjournment of the 61st legislative session, if approved by the legislative commission, $80 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 62nd session of the legislature.

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REPORT OF THE NEVADA LEGISLATURE'S SELECT COMMITTEE ON PUBLIC LANDS

TO THE MEMBERS OF THE LEGISLATIVE COMMISSION, THE 62ND SESSION OF THE NEVADA LEGISLATURE, AND OTHER INTERESTED PARTIES:

This report is transmitted to the members of the Legislative Commission and the 62nd session of the Nevada legislature for their consideration and appropriate action. Senate Concurrent Resolution No. 17 of the 61st session directed the legislature's select committee on public lands to, among other things, "advance knowledge and understanding.....of Nevada's unique situation with respect to public lands."

In cooperation with Nevada's attorney general and the bureau of governmental research at the University of Nevada-Reno, the select committee encouraged the preparation of a report that would address the issue of state sovereignty as impaired by federal ownership of land. Although this report does not necessarily reflect the position of the select committee on all public lands matters, it does contain good examples of where the sovereignty of the State of Nevada has been impaired because of the extent of federal public land ownership. It is hoped that this report will not only be of assistance to the attorney general in litigation relating to public land ownership issues, but that the report will also broaden the understanding of Nevada's unique land status and encourage subsequent and complementary research efforts.

Respectfully submitted,

Select Committee on Public Lands
Legislative Counsel Bureau
State of Nevada

Carson City, Nevada
January 1982

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SELECT COMMITTEE MEMBERS

Assemblyman Karen W. Hayes, Chairman
Senator Norman D. Glaser, Vice Chairman

Senator Don W. Ashworth
Senator Richard E. Blakemore
Assemblyman Alan H. Glover
Assemblyman Dean A. Rhoads

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ACKNOWLEDGMENTS

The authors of these papers owe an especially heavy debt to many others who made these studies possible. Some contributed clues and vital information on the condition of anonymity; others must remain unnamed lest the list continue endlessly. We thank them collectively.

The papers would not have been completed without the legal and financial assistance of Attorney General Richard H. Bryan and his able staff. Larry D. Struve and Harry W. Swainston worked closely with the team from its inception and deserve the status of collaborators. Larry had a special role, initially inspiring the team effort and repeatedly urging closer attention to questions with contemporary legal significance while retaining an extraordinary appreciation for academic integrity of research.

We benefited from discussions with and access to unpublished memoranda and papers prepared by numerous legal and academic scholars. At an early stage we spent a rewarding afternoon with Rex Lee, then Dean of the Brigham Young University School of Law and now Solicitor General of the United States. Members of the team met on three occasions with Jan Stevens, Assistant Attorney General of the State of California, and his research assistants. We also shared ideas with Sally K. Fairfax, Professor of Conservation and Resource Studies, University of California, Berkeley; Harrison C. Dunning, Professor of Law, University of California, Davis; Kathy Burke, Legal Consultant; John Francis, Professor of Political Science, University of Utah; and Jeanne Nienaber, Professor of Political Science, University of Arizona. In addition, our work was facilitated by Daniel Sprague and John Thorson of the Western Office, Council of State Governments, and by Andrew Grose and Robert Erickson of the Nevada Legislative Counsel Bureau.

Finally, we would like to thank a number of individuals who assisted us directly: Mrs. Kenna Boyer of the Bureau of Governmental Research; graduate students Toni Good and Robert Lindermann; and undergraduate students John Barriage and Kathleen Marston. Their good spirits, along with their diligence, helped to make the research project enjoyable.

I. INTRODUCTORY OVERVIEW

THE QUESTION OF IMPAIRED STATE SOVEREIGNTY

by Richard Ganzel

During Spring 1981, as a number of research efforts that attempted to assess implications and ramifications of various proposals to transfer portions of the public lands to the states began to yield publications, a decision was made to form a research team at the University of Nevada, Reno (UNR). Nevada's legislature had initiated a challenge to continuing federal ownership and control of public lands two years earlier and was considering further legislation. Nevada also had undertaken a legal challenge to some aspects of federal control. An academic research effort seemed appropriate and timely.

The research team was organized under the auspices of the Bureau of Governmental Research at UNR. Richard Ganzel, Associate Professor of Political Science and formerly Assistant Director of the Bureau, agreed to head a team of Bureau Research Associates. A multidisciplinary team was recruited to help design and conduct the research that was to be undertaken. Allen R. Wilcox and Richard Siegel, Director and Assistant Director, agreed to redirect some Bureau resources toward the public lands project and also to participate in parts of the study. Other primary researchers forming the team included Phillip B. Davis, Robert E. Dickens (who has served as Assistant Project Director), John L. Dobra and George A. Uhimchuk. Students who also have worked on the project are named in the acknowledgments; their assistance was invaluable.

The research design adopted was quite broad, for the following reasons. First, public lands issues in dispute range from conflicts among user groups and between particular users and administering agencies to conflicts that involved constitutional delineation of federal and state powers. Second, early efforts that sought to assess the net benefits or losses entailed in major changes in public land ownership did not seem promising. Instead, documentation of financial and other impacts of existing ownership and management patterns seemed essential if conflicts were to be resolved in some fashion. Third, it seemed quite possible to us at the outset, based on existing knowledge, that some important instances of impairment of sovereign powers of the State of Nevada might exist. We were interested in testing that possibility. However, at that time we could only make educated guesses at which promising cases might withstand systematic scrutiny.

Consequently, we decided to look at a number of possible cases. As a first step, we decided to interview particularly knowledgeable individuals who could be persuaded to share their experiences with us. As a second step, we worked out a general agreement

among members of the team on a framework for assessing the sovereignty implications of the conflicts that were assigned to particular members of the team for investigation. Third, we developed and administered a detailed survey of informed users and managers of public lands. To contribute to dialog aimed at understanding and resolving conflicts over the public lands, we needed to be able to analyze the interplay of attitudes, particular experiences and the problems they might reveal, and our detailed case studies of possible examples of impairment of state sovereignty.

The four papers comprising this publication provide the first public release of findings. The papers have been critiqued by team members and outside reviewers. Individual papers reflect the approach of their authors. Some will undergo continued modification as research continues; others reflect completed research on the cases that they address. The team made no effort to reach a consensus on all aspects of individual papers. Rather, we believe that the distinctive approaches, read together, offer a much fuller appreciation of public lands issues that have an impact upon state sovereignty than could be achieved by any single approach.

In addition to this publication, we intend to make our continued research findings available in several forms. Several papers that analyze case studies together with our survey results are in preparation for 1982 academic conferences. A general summary of survey results and various working papers and final papers will be published by the Bureau of Governmental Research in future months and years. A second collection of papers will be published during Summer 1982. The issues studied by this team are not likely to disappear quickly. Consequently, additional research on other issues and other aspects of public lands problems will be undertaken.

Taken together, the papers document the historic route taken over two centuries of public lands decisionmaking in the United States and show how those decisions now affect the ability of Nevada to exercise powers that reside constitutionally in the states. They show that important powers of the state are significantly impaired in a context of federal ownership of almost 87 percent of the land within the state.

The first paper by Ganzel reviews the history of federal land policies within a perspective that blends relevant constitutional principles and court decisions with pluralistic principles of democratic theory. It provides a context for understanding how impairments of state sovereignty occur and the kinds of practical and judicial facts and precedents that must be balanced. It concludes with a speculative approach which would seek accommodation through a court-mandated expansion of efforts to determine

whether particular public lands should remain federal, pass to states within designated trusts, or become private.

The paper by Davis examines the issue of whether a situation of state management of wildlife can be both administratively feasible and in accordance with ecological principles when wildlife habitat is controlled by the Federal Government. He questions this feasibility in the abstract and then summarizes existing reports which have documented deterioration of habitat and existing threats to various wildlife species. Davis then provides extensive detail on ways in which federal land management practices and efforts to protect wild horses have directly impeded efforts by Nevada to manage its deer population. Since Nevada's constitutional responsibility is clear, the picture of impaired sovereignty which emerges from Davis' case study is direct and unclouded.

The paper by Dickens offers a perspective within which one can gain many insights regarding the attitudes of Nevadans and other Westerners toward the public lands. Arguing that the public lands traditionally have been regarded as common resources to be used by locals, Dickens captures some of the emotional threat implied in sharp changes in federal policy toward public lands when such lands comprise much of the territory of a state. Dickens develops this theme in his review of the initial site selection for deployment of the MX missile. That decision imposed enormous costs on Nevada; its subsequent revision has not removed the threat that at some future point "ready availability" of federal land will again shape federal siting decisions. Dickens summarizes extensive research on possible impairment of the state's capacity to protect the health and safety of citizens that might result from toxic dump sites under federal control. He identifies a possible case near Henderson, but suggests several caveats. The final two cases examined by Dickens parallel the Davis case study and reach the same conclusion. Dickens shows how federal control of the River Mountains habitat of desert bighorn sheep impairs and could jeopardize Nevada's effort to use the herd that exists in those mountains to reestablish sheep populations throughout their original habitat. Finally, Dickens shows that closing an existing road to vehicular access during the wilderness review process has imposed higher costs on Nevada as it seeks to maintain Blue Lake as a recreational fishery.

The final paper, by Dobra and Uhimchuk, presents a theoretical perspective and some suggestive evidence that challenges the practical validity of the distinction that the courts traditionally have asserted between political and economic equality of states. The authors present a model of how a "monopolistic" (federal) landowner can raise a wide variety of costs not only to private users but both directly and indirectly to state and local governments. Predicted costs are compared to selected experiences of mining ventures, isolated communities, and ranchers

dependent upon grazing rights; predicted and observed costs appear to correspond closely. These higher costs then are related directly to state sovereignty through their impact on tax revenue base, which suffers from discouragement of marginal and risky endeavors by private enterprises, and through the additional expenditures required for state and local government agencies to participate in federally-sponsored programs that might compensate for some of the costs imposed by the federal presence. Though it would be extraordinarily expensive to estimate with precision the magnitude of "net" costs resulting from the virtual monopoly of federal landownership in states such as Nevada, one conclusion is clear. The economic model presented by Dobra and Uhimchuk stands as a pointed challenge to those who would analyze the net benefits or costs of large scale land transfers in terms of agency revenues and management costs. At the same time, it calls for a more realistic legal acknowledgment of how landownership, when it approaches monopolistic proportions, nullifies distinctions between what is economic and what is political.

II. PUBLIC LANDS CONFLICT AND THE FUTURE OF FEDERALISM
by Richard Ganzel

INTRODUCTION

Although the relationship among the Federal Government, the public lands states, and users of the public lands rarely has been smooth and cordial, conflicts over the past decade have intensified. These conflicts appear to go to the core of the constitutional relationship among states and also between states and the national government. If this view is correct, these conflicts threaten the stability of the "nationally dominated system of shared power and shared functions" (Reagan and Sanzone, 1981, 157) that contemporary analysts agree is an accurate description of most aspects of the operation of American federalism today (Walker, 1981).

The depth of these conflicts makes it imperative that scholarship be devoted to the substantive aspects of issues and to a full explication of the legal and practical implications of various possible political and legal responses to current demands. To succeed, such scholarship must seek to place the contemporary demands of private, state, and national actors into a legal and historical context that exposes the merits of respective claims. Unfortunately, much contemporary scholarship falls far short of such exacting standards. It neglects the truisms that sustainable law must seek to encapsulate and hence stablize evolving expectations (Sax, 1980a) and that political and judicial decision-making in a democracy must attempt to accommodate pluralistic demands.

The requisites of an adequate treatment of contemporary public lands conflicts may be appreciated more fully by reviewing flaws in some recent analyses. One legal scholar has suggested that, because federal powers over public lands lack explicit Constitutional enumeration, two centuries of federal public lands policy can be regarded as an unconstitutional violation of reserved state powers (Brodie, 1981). Another claims that the "Sagebrush Rebellion" lacks even the slightest shred of legal merit because the constitutional question has been closed by the Court assertion that Congress can exercise power over federal property without limitations (Leshy, 1980). From one perspective, the effort of Nevada and other states to gain greater control of public lands thinly masks yet another "land grab" by private user groups who are hiding behind constitutional rhetoric (Ingram and Cortner, 1981). From the opposite perspective, it is easy to perceive the past century of federal public land legislation, which virtually has closed the public domain, as the true land grab. Such ideologically-based analyses have only limited value for democratic decision-makers.

Brodie's analysis would require overturning a long tradition of Court decisions as well as most public land legislation. No responsible court could sanction the chaos regarding long-established rights and expectations that would follow such action. Neither courts nor legislatures can act without regard to strong pressures to retain such rights and expectations. Brodie's literalist and static conception of constitutional law ignores the fact that American society has been fundamentally transformed over the past two centuries. The predominantly rural and small town enclave, hugging the Atlantic coast and leaning upon France to sustain its independence, is now an urban, industrialized world power with states stretching far into the Pacific Ocean. Constitutional principles must be capable of accommodating changed needs and expectations that accompany societal evolution.

Leshy errors in the opposite direction, resting his interpretation upon trends in Court decisionmaking rather than Constitutional principles. Certainly the Court must interpret the Constitution. Clearly, recent courts have given wide latitude to Congress in establishing public land law. But neither of these facts can sustain the view that Congressional proprietary and legislative power can be exercised without regard to other affected Constitutional principles. Nor can Leshy's "uncontextual literalism" be squared with decisions reaffirming the right of states to equal footing with other states (State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977)), or with recent efforts by the Courts to accommodate the changing circumstances and burdens of the states (most notably National League of Cities v. Usery., 426 U.S. 833 (1976), and Commonwealth Edison v. State of Montana., 615 Pacific 2nd 847 (1981)). Clearly, Leshy has generalized the application of language used by the Court far beyond its necessary or probable application.

Ingram and Cortner focus mainly on an historic image of widespread abuse by private users of public lands and secondly on the decidedly limited capacity of many state resource and land management agencies at the present time. Consequently, they suspect a conspiracy which would permit private manipulation of these weak state agencies if they should acquire responsibility for public lands from better developed federal agencies. They do not examine the extent to which federal control of the bulk of lands in western states may create a condition of extreme dependency of those states upon the Federal Government. The fact that states such as California, which have both extensive private lands and extensive state lands, have created management agencies which may be superior to those of the Federal Government is not seen as relevant. Nor do they examine impacts of federal land control within the context of trends in other aspects of federalism. If they were to do so, it would be difficult to avoid the conclusion that, if states with fiscal capacities resting upon extensive private economies have seriously overloaded service delivery capacities (Walker, 1981), the condition of states where state and private lands are mere enclaves must be much more precarious. That circumstances in such states are somewhat relieved by sharing mineral and leasing revenues and by payments from the Federal Government "in-lieu" of property taxes merely emphasizes this condition of dependency.

Those who argue that it is the Federal Government which is guilty of a land grab rarely acknowledge that private entry for mining continues to be a preeminent value in federal land management policy except for special preserves (Office of Technology Assessment, 1979). Moreover, recent federal legislation has improved rather than foreclosed the capacity of federal agencies to transfer title to lands to the states so that they may be used for a number of public purposes (Koch, 1981; List, 1981). What validity remains in the argument after such qualifications must be considered in light of frustrated expectations and impaired state roles that are analyzed in this paper and in those that accompany it (Cawley, 1981).

The challenge to federal land policy appropriately has been raised by the State of Nevada, wherein the Federal Government has retained almost 87 percent of the total land after requiring the state to renounce further land claims as a precondition for statehood (Bushnell and Driggs, 1980). Nevada's legal challenge originated as a claim that exercise of federal administrative discretion under the Desert Land Act of 1877 had effectively denied the state equality or equal footing with states having a much smaller federal land ownership presence (State of Nevada v. United States, Civ. No. R-78-077 ECR). The legal challenge has been expanded to the argument that the very existence of the overwhelming federal land ownership presence substantially impairs the capacity of the state to fulfill its constitutional obligations and places it in a position of exceptional jeopardy at the mercy of federal decision-makers.

This extension of the challenge parallels enactment by the Nevada legislature in 1979 of Assembly Bill 413, which asserts a claim to title of remaining unappropriated public lands in the state. However, the legal challenge does not entail such a wholesale transfer to the state. Instead, it raises the narrower issue of whether federal proprietary discretion over the public lands is essentially unlimited or instead must be exercised in a manner that will result in effective rather than simply formalistic legal equality among states. Consequently, if the state's challenge is upheld by the Court it is not necessary and probably is unlikely that Nevada would secure its full claims to the unappropriated lands. Similarly, if its challenge is rejected it still would be possible to pursue those claims in another suit.

Though the merits of Nevada's claims are analyzed in the remainder of this paper and in associated studies, it should be emphasized that the case raises clear and important legal issues and substantively is far from frivolous. Nevada already has experienced large withdrawals of public lands for defense installations. Controversy continues on the effects of atmospheric testing of nuclear weapons that was conducted in the state decades ago. Nevada's "worthless" lands remain attractive to others as nuclear and toxic waste storage or dumping sites. The state recently mounted an unprecedented effort challenging federal evaluations of the impact of siting the MX missile system within the state. The tentative siting decision, since reversed, had followed a Congressional vote to avoid agricultural lands (Holland and Benedict, 1981) and an executive decision to seek a "low cost" site in an unpopulated area (Dickens, 1981). Nevada and other public lands states constantly face the threat of additional withdrawals simply because the land can be regarded as available to federal decision-makers.

Associated papers analyze and document instances in which Nevada's capacity to meet Constitutional obligations has been impaired. The main purpose of this paper is to examine the nature of federal trust responsibilities toward the public lands, those arising directly from original understandings and those that have evolved over two centuries of experience. Federal responsibilities have created well-established expectations, many of them now firmly protected by a sequence of Court affirmations. A number of these expectations require regular and effective exercise of state governmental powers if they are to be met; that is, they give specific definition to the evolving content of state constitutional authority and obligation. It follows that if present federal public land laws and judicial interpretations of Congressional authority prevent Nevada from discharging those obligations, or impair its ability to discharge them, the courts must reestablish balance among the Constitutional principles involved. In the conclusion, some ways are suggested through which public trust responsibilities, defined as established expectations, could better be met once a court mandate to restore balance has been issued.

ORIGIN OF THE PUBLIC LANDS TRUST

The nature and origin of the federal responsibility is neither well known nor well understood even among those who specialize in and teach about American government. Few textbooks single out Article IV of the Constitution for attention; some even neglect to mention the enormously important role of the Federal Government as a land and resource manager. Whatever the reasons for such widespread ignorance and neglect, they can hardly include the comparative unimportance of the public lands in American society.

Since its establishment as a sovereign nation, the Federal Government has had at its disposal a truly handsome dowry of public lands. Whereas the leaders of many other nations have hesitated to embark upon ambitious programs to improve their societies because such efforts would have required burdensome taxes, American governmental leaders could draw upon their dowry, selling lands to raise revenue or offering lands to states, individuals or corporations to secure their cooperation (Patric, 1981).

The conception of the public good thereby pursued has been varied and expansive. A nation-wide system of public schools and "land grant" universities was established, dedicated to ideals of broadly equal opportunity as well as to training in technical subjects directly beneficial to the economy. Transportation projects helped to populate the western United States and to ensure the physical integration of both economy and society. Grants to states provided similar dowries so that adequate systems of authority could be created without necessitating levies of burdensome taxes upon sparse populations. During the initial century of nationhood, the main method of disposal was into private property, either directly or through the states. During the second century, much disposal has taken the form of transfer into reserves and preserves--petroleum reserves, national parks, monuments, refuges, and wilderness areas--and into nationally administered categories of lands.

The original dowry was substantially augmented on several occasions, with the result that after two centuries of concerted disposal a third of the nation remains within the public domain (including the reserves, preserves, and administrative categories). In all, the Federal Government has had at its disposal more than 1.8 billion acres of land; upon completion of transfers mandated by the Alaska National Interest Lands Conservation Act, public lands retained by the Federal Government will be reduced substantially, but will still total more than 630 million acres (Culhane estimate, 1981, 44; see also the basic histories by Hibbard, 1924, and by Gates, 1968).

Because of the size of this vital resource, and also because federal resource management policies that control resource

utilization have a substantial impact on the condition of states as well as the national economy (Office of Technology Assessment, 1979; Dana and Fairfax, 1980), it is vital to understand the origin of federal control of the public lands. In earlier centuries, federal disposition policies contributed to the harmony and national integration of a rapidly expanding nation of immigrants. Those policies also went far toward ensuring that, in contrast to many other federal experiments (Wheare, 1964), American states would be effective participants in governance of American society. The fragility of the role of states today impells a reconsideration of the bases of those substantial results.

Origin of the Federal Role

The roots of the federal public land ownership and management role lie in the experience of the original 13 states under the Articles of Confederation and in the nature of the compact that permitted ratification of the Constitution that established the federal Republic. In searching for the principles that underlie these original decisions, it is vital to recall that the framers of the institutional arrangements which would come to characterize American federalism were engaging in acts of political "invention" (Wills, 1978). That was true because, though they had studied the examples of the United Netherlands and Switzerland, no theory of federalism that would have guided them in allocating different powers among the units in the new federal system was available (Friedrich and McClosky, 1954). It also must be recalled that, in seeking continuity with English legal tradition and with its notions of individual and procedural rights, while discarding loyalty to monarchical government, it was necessary that:

> [a] new sense of legitimacy had to be created by satisfying the principle of popular sovereignty as well as the basic demand of constitutionalism: the limitation of the powers of those in public office by a set of rules unalterable by the rulers. (Adams, 1980, 21).

This effort was pursued, first, by forming state constitutions and, only secondly, by a carefully negotiated compromise Constitution for the nation.

The fundamental constitutional and philosophical issue of particular concern to this study was the question of how effective, substantive equality among states might be maintained once states had surrendered important powers to a federal Congress. Two fears lay at the base of negotiations. First, a legislature based on representation according to population might persistently ignore interests of states with small populations. Second, states that retained extensive land claims in the Western Territories thereby retained assets that might make a mockery of

formal equality. The issue, therefore, included important questions concerning the extent of federal power, the manner of representation in the federal Congress, and both the retention of equality among states and their respective retention of important powers.

Two aspects of the compromise have received dominant attention. Representative equality for states was retained in the Senate as a substantial check upon population-based representation in the House of Representatives, especially in vital matters of foreign affairs. The retention of state powers was formally reasserted--in an intentionally unenumerated fashion meant to encompass the full range of powers of existing states--in Article X of the Bill of Rights. Disposition of the question of territorial claims was incorporated into Article IV of the Constitution. We must look to that compromise decision for the principles intended to guide the federal role toward public lands and for the method through which equality among states was to be reinforced.

In approaching the significance of that compromise, it is necessary to consider a perspective that dismisses the importance of the land claims at issue. Samuel Eliot Morrison, using language currently in vogue among many activist discussants of public lands disposition and management policies, belittles the significance of land claims. Discussing delays in ratification of the Articles of Confederation, he points to ambitious "land grabbing" by speculators and venal politicians (Morrison, 1965, 277-279). The stakes involved, however, were far from trivial, forcing us to look beyond the behavior and motives of individuals at any particular moment.

Many states under their original charters had fixed boundaries. Others had claims in the Western Territories that together included 236.8 million acres. Today, these valuable lands comprise all of the states of Illinois, Indiana, Ohio, Michigan, and Tennessee, along with parts of Mississippi, Alabama, and Minnesota (Culhane, 1981, 42). Then, as now, opportunities existed or could be imagined for selling off such territories and thereby populating new reaches of states and permanently enriching their treasuries. The noted constitutional historian Andrew C. McLaughlin succinctly noted the stakes involved:

> * * *[t]his western question was a perplexing one, involving much more than merely fixing the western limits of the states. With the question of boundaries went the control of land purchases and the fixing of a land policy as well as direction and control of settlements that might be made beyond the mountains. From the beginning of colonial history, the frontier policy had been for each colony a matter of difficulty, and it was not so easy as it might now seem to cast aside traditions and at once transfer the whole--policy, hopes, plans, government, and lands--into the hands of a central authority as yet untried and indeed unformed. (quoted in Levy, 1969, 49; original, McLaughlin, 1935).

The original compromise formula that established basic principles was agreed upon on October 10, 1780; it subsequently formed the basis for the Northwest Ordinance of 1787, as well as much of Article IV of the Constitution. McLaughlin characterizes the agreement as a commitment to expansionist nation-building through the creation of new states sharing fundamental equality with those existing previously. The new states were to be created through disposition policies administered by the Confederal government (and later by the Federal Government) that encourage settlements which make possible states "which shall become members of the federal union, and have the same rights of sovereignty, freedom, and independence, as the other states" (Levy, 1969, 51).

The only additional complication facing the framers of the Constitution concerned lands that had been ceded directly to the United States by Great Britain in 1783. Once again, several states, along with private individuals and, in the eyes of some delegates, the United States, had claims to all or part of these lands. The result of these deliberations constitutes Paragraph 2 of Section 3 of Article IV of the American Constitution:

> The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

As part of an exhaustive and insightful review of the principles of public land law reflected in Constitutional and judicial decisions (Engdahl, 1976, 283-384), David E. Engdahl meticulously reconstructed the original debates surrounding Paragraph 2 (Ibid., 290-300). He notes that the first clause, replicating in essential respects the principles and language of the original compromise of 1780, elicited no serious objection. The principles were firmly established. The only question, raised by the cession of 1783, was whether they would apply to new and future territory acquired by the United States.

The framers refused to treat the cession as distinctively different from territories acquired prior to the formation of a central government (under the Articles of Confederation). Instead, they placed the cession within the single sentence encompassing the mandate of trust under which the Federal Government was entrusted with the ownership and custodianship of the public lands. The framers thereby refused to brush aside due process regarding land claims and, even more importantly, did not take the additional step of formulating a separate management mandate if through due process it should be determined that only the government of the United States had valid claim to the ceded lands. In the absence of a separate mandate, it is obvious that the mandate of the first clause of the sentence drafted by Gouvernor Morris applied

as well to lands acquired by direct cession to or acquisition by the United States. Certainly this has been the understanding upon which federal land policies have been based, and it is the only understanding consistent with the firmly established judicial tradition which holds that public trusts originating in common law pass to all new states upon the achievement of statehood (originally enunicated in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); see especially the papers by Dunning, Sax, Stevens, Johnson, and Wilkinson; U.C. Davis Law Review, 1980).

Although the nature of the federal trusteeship mandate, most notably the question of what constitutes disposition and what can fit within the scope of needful rules and regulations, has been and probably perpetually will be subject to debate, that debate conclusively must be over public lands covered by Article IV. The founding fathers, as we have recently been reminded in two superb works by Gary Wills (Wills, 1978, 1981) and the bicentennial prize-winning study of early state constitutions (Adams, 1980), were firmly committed to the retention and revitalization of tradition through its distillation into the American Constitutional framework. In this case, the principles retained are those of the compromise of 1780.

Before turning to an examination of these principles in practice, it is necessary to distinguish the public lands subject to Article IV from other federal property. Article I establishes a distinctive property category that is intended to ensure the capacity of the Federal Government to exercise its sovereign obligations in the American federal system. The general obligations of the Federal Government require land on which to locate buildings and offices. Defense obligations require space for fortifications and the training of military personnel. Under Article I, Section 8, the power of Congress and the Executive over such "enclaves" clearly is supreme, though it is not necessarily exclusive (Engdahl, 1976). Moreover, even though Section 8 describes a process of formal cessions from states of needed lands and even though, as noted previously, it can be argued that arbitrary acts siting facilities may be challengeable, it is doubtful that an assertion of federal supremacy toward a particular federal enclave on the grounds of necessity for defense could be challenged.

In contrast, for all federal property other than enclaves, there is concurrent exercise of authority by the Federal Government and the government of the state which is site to that federal property. It may be that for initial and approximate purposes of delineation we can follow the advice of the authors of a major contemporary text (Coggins and Wilkinson, 1981, 160-161): assume state supremacy, then look for federal preemption. But in difficult cases, as will be argued below, federal legislation as well as state legislation must be considered both in light of Article IV trust obligations and in terms of state powers and obligations retained under the Constitution. It is at minimum misleading to conclude

that "Congress can preempt state authority on the public lands" (Ibid., 182) without considering the Constitutional mandate to preserve the vitality of state powers and responsibilities. If the Federal Government could preempt state authority at will and at whim, that is, arbitrarily, federalism as well as equality among states would quickly be a casualty.

Origin of Diverse Expectations: Historical Experience

It is sometimes hoped that a reexamination of fundamental concepts of sovereignty will result in a clear delineation of the proper spheres of national and state authority in a federal system. Alternately, it is hoped that if one reexamined the original text (for our purposes, Article IV), guided solely by the original debates of the framers, one could derive a definitive meaning for the federal trustee function. Neither of these hopes is likely to yield what is wished, though they are valuable in understanding to what one look instead.

Those looking to classical formulations of sovereignty will quickly discover two disconcerting truths. First, the theorist who introduced the terminology of sovereignty, Jean Bodin, was concerned simultaneously with asserting the independence of civil authority from the oversight of the Roman Catholic Church and the supremacy or absolute authority of the French monarch over his subjects (Sabine and Thorson, 1973, 372-385). The second disconcerting fact is that the first of these goals--the independence and legal responsibility for internal affairs of political units--was the accepted conception of sovereignty, rather than some particular notion of the proper relationship between rulers and ruled (Passerin d'Entreves, 1967). The primary legal function of sovereignty is external, permitting stabilization of relationships among independent political units. Thus, to paraphrase the formulation of a contemporary international relations textbook, recognition of the sovereignty of a political unit merely acknowledges that a group of people dwelling with a bounded territory has organized a government which asserts and apparently possesses a capacity to act in their behalf in interactions with the citizens and governments of other units usually known as states (Ziegler, 1981, 96).

It is quite a different matter to determine what sort and extent of powers should be bestowed upon a government to command or steer the lives of citizens. And the allocation of such powers among different branches of government or among different governments is two large steps removed from the concept of sovereignty. These are vital matters, involving conceptions of what is appropriate, acceptable, or necessary. They bear in important ways on the question of whether acts of government will be deemed legitimate. But they are not synonymous with nor elements of a concept of sovereignty accepted outside the American context of constitution formation.

When one looks instead to the language of Article IV and to the underlying debates, he finds basic principles that must derive their concrete meaning from practice and in particular from the effort of legislatures and courts to reconcile law as a stabilizing concept with the practical imperative to adapt legal principles to changing circumstances. Obviously, it is impossible to know which adaptations will be successful in advance. Nor can one always see if experiments will be compatible with basic principles. Consequently, both legislative enactment and judicial decision are subject to errors resulting from such confusion. However, once laws have been enacted and held to be in accord with relevant constitutional principles, they begin to yield expectations that shape human behavior. Subsequent alterations, if they are to accord with and reinforce a rule of law, must seek to reconcile changes in direction with established expectations.

Over two centuries, a number of expectations have been built up regarding federal trust obligations toward public lands. These distinct expectations grew out of a complex set of factors, ranging from new opportunities and needs to altered judgments regarding the practical consequences of previous laws. The result is not one but several traditions of policy, frequently overlapping for substantial periods as the American frontier moved from the Appalachians to the Pacific.

During the initial century, federal policy consistently sought means of disposing of the title to public lands, transferring titles to states and directly to private property holders. It has been argued that such transfers of title were the only form of disposition (except for the minor enclaves needed to fulfill federal obligation) that was contemplated by the founding fathers (Hulse and Broadhead, 1980). Evidence necessarily is circumstantial, since no timetable for completion of disposal exists. In any case, hundreds of millions of acres of public lands exchanged hands, sometimes several times.

Legislators showed little concern for such 20th Century public land and resource goals as maximizing federal sale or lease revenues (McDonald, 1979) or obtaining market values for property transferred. Instead, "ingenious" rationales ranging from reclamation of swamp lands and encouragement of irrigation projects to creation of a nation of independent small farmers on homesteads were devised. Those who took such rationales too seriously have reacted with horror to the discrepancy between proclaimed purpose and actual results (e.g., Townley, 1981). The real intent, which permitted periodic scandals to be brushed aside despite clear evidence that land and water rights were being concentrated in large holdings, was to stimulate the expansion of a private economy. As late as 1877, Congress enacted yet another bit of special legislation, the Desert Land Act, designed to transfer arid lands.

These massive transfers firmly established the expectation of continuing transfers to private holders. That expectation helps

to explain why two otherwise problematic aspects of federal land grants to western states such as Nevada failed to generate controversy. Each of these problems was reflected in the experience of Nevada. Grants of land to new states were far from equal in number of acres transferred to each state. Secondly, and contrary to simple notions of equality, the inequality of acreage was not a reflection of approximate land values at the time of transfer. One might have expected especially arid states such as Nevada to receive large quantities of lands which at that time had low value, thereby establishing a rough par in financing such state trust obligations as public education. Instead, grants to Nevada were comparatively small (Hulse and Broadhead, 1980).

But the paucity of grants was of little concern. Nevada actually sought, successfully, to greatly reduce its dowry in favor of higher value acreage. Potentially more controversial was the requirement that western states renounce their further claims to the public lands as a precondition of statehood. But that requirement, at least for Nevada, was not controversial at the time of statehood, nor for many years afterward.

The case of Nevada illustrates the way in which actual circumstances when combined with established expectations explain this apparent anomaly. At statehood, Nevada had fewer than 7,000 residents--barely a tenth of the normal requirement to qualify for consideration (Patric, 1981, 53). Administration of an adequate land disposal system obviously was beyond the capacity of the newly-formed state. Nevertheless, Congress transferred to it public lands that were to provide an endowed revenue base for its delivery of state services, most notably a system of public education. In enacting such transfers, Congress obviously was attempting to fulfill its Constitutional mandate to promote the effective equality of newly-created states with preexisting states. At the same time, it was demonstrating its legal capacity to effectively define trust mandates for particular public lands, a role that establishes legal continuity with later Congressional delineations of quite different mandates for other public lands.

During the third quarter of the 19th Century, Congress continued massive transfers of title to prospective farmers and ranchers. Railroad companies retained very large holdings and frequently sold parcels to other private owners. In 1872, Congress formalized procedures which not only expedited and routinized title transfers for patented mining claims but also made access by mining prospectors to the public lands a preeminent value in federal public land policy. As noted previously, Congress in 1877 enacted the Desert Land Act, adapting (however imperfectly) agricultural land entry laws to the needs of arid states.

Critics have charged that these trust grants to the states frequently were frittered away. Undoubtedly, state land agents and

agencies were influenced by powerful railroad interests as well as by ranchers who quickly gained control of vital water sources (Townley, 1981). But Congress actively encouraged such "cooperation" and the General Land Office also worked closely with such groups and individuals. Neither sought to extract maximum prices for especially valuable lands. Clearly, revenues from the rapid sale of trust lands in Nevada were inadequate to fund a public school system (Patric, 1981), necessitating reliance on property and other tax revenues for most financing of those needs (Steinmann and Ganzel, 1979).

When selling such trust lands, state agents found themselves in competition with other "sellers"--railroad companies, the General Land Office, and the patenting of mining claims. It was a buyers' market, ensuring that revenues from sales would be low. But Nevada had no desire to remain in the role of seller. It preferred that the Federal Government continue that role. Consequently, in Nevada and in many other western states, it was anticipated that meager revenues from sales quickly would be substantially augmented by tax revenues made possible by a rapidly expanding private property tax base. There can be little doubt that leaders who willingly agreed to renunciation of future land claims by Nevada, and who eagerly transferred virtually the entire Nevada public land trust to private owners, did so in the full expectation that previous federal disposal policies would continue indefinitely. Based on the evidence summarized here, that expectation was reasonable, in accord with established Constitutional interpretations, and consistent with a century of federal public land policies that continued to follow the original pattern well beyond Nevada's attainment of statehood.

A second expectation that is of particular importance to western states also was firmly established during the 19th Century. Settlers in western states, whether they were rural land entrants or urban dwellers, were able to enter and use the public lands at will, even though they could not claim title to them. These lands came to be regarded as "commons," though exactly what was meant by different users who perceived their use as a matter of right varied considerably (Houghton and Nappe, 1977). For some, as Dickens has suggested (Dickens, 1981), use was utilitarian in the extractive sense that meant the "open range," the forests, the minerals, and the food supply of game and fish were available for taking, a sense similar to use of the European commons of pastures and woodlots (Hardin and Baden, 1977). For others, use was recreational; a stream or lake or wildlife habitat might be on public lands (and in Nevada many sites for such outdoor recreational opportunities are on public lands), but the resource need not be privatized (Sandler and Loehr, 1978) and was considered renewable. States faced Constitutional mandates and public pressures to conserve, manage, and augment such valued resources (Davis, 1981). A third category of such commons had distinctive legal stature, with states entrusted with an obligation to protect

streams, beaches, tidal flats and other resources from privatization and hence to retain access for all (Althaus, 1978; Stevens, 1980). As court decisions that continue to the present make clear, the protective obligation clearly has rested with the states, and sometimes results in separation of the target property from the category of public lands.

The well-established tradition of access in the West frequently has led to conflict when private landholders have sought to deny access to adjacent public lands, and this continues to be an important, recurring issue (Patric, 1981; Bureau of Governmental Research Survey, 1981). The tradition of access has generated much broader conflict when, as in the Taylor Grazing Act and more recent federal legislation, rights to access seem to be denied or effectively denied by the form of regulation imposed. Before considering the issue of access further, it is useful to review two additional expectations.

The third key expectation developed slowly, in response to accumulation of scientific knowledge and directly in response to reported scandals in the administration of federal and state land disposal programs and to reports of abuse of forests and grazing lands that remained in the public domain. Shocked by reported "rape and ruin" despoilment of the public lands, scientists organized professional societies designed to promote development and adoption of scientifically-based criteria to guide public land managers. Working cooperatively with many federal, state, and private land managers, some of whom became nationally-known advocates, they slowly succeeded in having many of these criteria incorporated into management plans for forests, grasslands, and other resources remaining in the public domain (Dana and Fairfax, 1980).

A fruitful interaction between private and public resource managers developed, partly under the auspices of the professional societies. Unquestionably, the scientific conservation management movement has vastly improved the quality of private and public land management over the past century. It has corrected glaring abuses of public lands and identified countless problems at earlier stages, thereby facilitating effective fulfillment of the federal obligation to protect and enhance the value of public lands in many practical ways.

As scientific knowledge accumulated and was applied, many federal land managers joined with private advocates in pushing for permanent federal retention of a solemn national responsibility to manage various types of public lands. They have been successful beyond expectation in having public lands "withdrawn" (closed from various kinds of entry and subject to restrictive regulations governing uses, Clayton, 1980) and designated as national forests, parks, monuments, and wildlife refuges. In recent decades, considerable controversy has surrounded management

practices and attitudes (Baden, 1980; Dana and Fairfax, 1980; Culhane, 1981; Koch, 1981), and the Constitutional basis for such withdrawals has been challenged (Brodie, 1981). Public land managers have struggled under the administrative burden of ascertaining the relative importance of competing demands for land use (Houghton and Nappe, 1977), frequently being forced to determine what in fact will be the dominant land use with little help from federal statutes that ritualistically repeat the conservationist/utilitarian slogan of management for "multiple-use, sustained yield" (Ganzel, 1977; Anderson, 1979).

Despite such difficulties, a firm expectation has been established over the period since the initial withdrawal of land to form Yellowstone National Park in 1872 that lands reserved for particular purposes will be retained in federal hands, under federal management. The key questions involve the issue of whether all existing reservations and designations will be retained or whether retention should be reconsidered for all or some of the lands administered by the U.S. Forest Service and Bureau of Land Management. The issue has not been resolved by Congress, which has simultaneously sought to expand park (and wilderness, see below) withdrawals while permitting mining entry and encouraging some disposals.

A fourth distinct expectation, which arguably overlaps with the general retention expectation summarized immediately above (Sax, 1980b), is that extraordinarily scenic and exceptional resources in the public domain (and some which must be acquired) should be retained and managed according to preservationist rather than utilitarian criteria. Though advocates of withdrawal of parks have ranged from railroad companies and prospective concessionaires to environmental purists who wish to retain national parks and wilderness areas in essentially their natural form, preservationists have in fact strongly influenced national park management and have succeeded in obtaining Congressional legislation which is in the process of creating an impressive system of wilderness areas.

Though the management values differ fundamentally, expectations three and four each involve "permanent" retention of Article IV public lands by the Federal Government. Such withdrawal and retention is not among Constitutionally enumerated federal powers (Brodie, 1981). Nevertheless, the courts consistently have been unwilling to reject such laws as being inherently inconsistent with federal powers. Instead, a line of precedents has consistently upheld the authority of the Federal Government to manage such reserves and preserves as Congress has mandated (Coggins and Wilkinson, 1981). In essence, the courts have held that Congress has the responsibility to decide the operative meaning of disposition under Article IV and consequently also the right to enact laws necessary to effectuate such dispositions (Most instructive are Camfield v. United States, 167 U.S. 518 (1897); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938); Kleppe v. New Mexico, 426 U.S. 529 (1976); and Ventura County v. Gulf

Oil Corp., Ninth Circuit, 1979, 601 F.2d 1080, summarily affirmed 100 S. Ct. 1593 (1980)).

In sum, an examination of historical experience shows that four distinct sets of expectations have evolved regarding Article IV public lands. States have an expectation that titles will be transferred in order to effectuate the equality of late-comer states with their predecessors. Those who live adjacent to public lands expect to use them, both for profit and for recreation. It is expected that lands retained as public lands will be managed according to best contemporary standards of resource conservation and utilization. Finally, it is expected that unique resources will be preserved for posterity, to be enjoyed today only in ways that are consistent with such preservation. Congress has acted in behalf of each of these expectations, and continues to recognize their validity. Moreover, the courts have upheld such Congressional authority. What has not been tested is whether Congress in such actions has plenary authority to act regardless of the impact of its actions on the Constitutional authority of other components of the federal system. Consequently, the final section of this paper analyzes the cumulative impact of Congressional actions in behalf of these four sets of expectations, giving special attention to the impact upon the sovereignty of the State of Nevada.

IMPAIRMENT AND THE DOCTRINE OF PUBLIC TRUST

Federal lands exist within states. In its capacity to exercise the prerogatives of a proprietor, as we have seen, Congressional powers are substantial. They extend to its ability to create what amounts to its own definition of a fiduciary trust regarding particular portions of the public domain, and then to decide which laws are necessary to fulfill that trust responsibility. Nevertheless, the state retains basic powers over public lands within its boundaries. In other words, federal powers exist concurrently. In addition, the exercise of federal powers is constrained by the legally sanctioned expectations described in the previous section, expectations that require that federal powers be exercised toward stated ends.

In practice, it is difficult to respond to all four established expectations simultaneously. More likely, as one expectation is emphasized in a particular period of time, some expectations are neglected. During the 19th Century, critics contend, title transfers and user access were emphasized to the neglect of proper custodianship or husbandry of public lands and without regard to possibly unique resources being lost to posterity. In recent decades, other critics charge, management and preservation have been emphasized to the neglect of individual user groups and of the obligation to ensure equality among states.

The papers by Davis, Dickens, and Dobra and Uhimchuk in most respects affirm and document not only neglect of important obligations but also the ways in which such neglect has impaired or threatens to impair the capacity of Nevada to exercise important powers. Wildlife management is rendered difficult in principle and federal wild horse protection is shown to be directly competitive with the efforts of the state to maintain deer populations for the recreational desires of its population. The state's desire to rebuild its desert bighorn sheep population is shown to be severely impacted by federal control of the crucial habitat of the "stock" herd and by failure to effectively police off-road-vehicle entrants. Defense siting decisions are shown to utilize the very existence of massive federal land holdings, as reflected in low population and low cost of land "acquisition," as a rationale which nominates Nevada as a favored site. Restriction of isolated urban communities to enclaves and retention of much property in federal rather than private hands despite use for such purposes as grazing are shown to exact very high transactional costs, and to foreclose, delay, or reduce the profitability of various private endeavors that might generate substantial revenue for state and local governments.

These impairments are individually serious. Cumulatively, they create an exceedingly fragile and precarious situation for governmental units in the state. If taxes are raised, private activities whose profitability has been reduced by federal practices may be put in jeopardy. Planning that might facilitate private activity, public and private investments that might increase profitability of private activity, and consequently funds to undertake high priority public investments are all victims of this vicious circle. To be sure, states are not guaranteed economic equality; in practice, however, Nevada is guaranteed inequality and dependence upon the Federal Government.

In a recent article, Wilkinson has suggested that the fundamental doctrine of state public trust responsibilities arising from the common law trust--that is, to protect the quality of a common resource and to prevent its privatization at the expense of the general public--become the underlying doctrine bringing coherence to the rationale supporting federal powers on public lands (Wilkinson, 1980). The idea is not without merit, and certainly is consistent with the views of writers such as Sax who argue that the national parks and wilderness areas must be protected from uses that endanger their essential quality (Sax, 1980b).

But if the notion of public trust responsibility is to encompass the four distinctive expectations described in this paper, and hence to protect as well the underlying bases which allow states to exist as equals, substantial refinement of the notion and some surgery are required. What should be the purpose of a particular parcel? If a trust is essential or desirable, who should be entrusted with the mandate?

If the primary value of a particular isolated mountain range is to support a state responsibility, shouldn't that land be transferred to the state under a trust mandate to retain its quality for that purpose? If a lake for decades has served as a prime recreation site for nearby residents, shouldn't it be assigned that function and entrusted to the state for protection and improvement of those recreational traits, rather than cut off from those users and made more expensive for the state to manage by placing it in a national wilderness designation? More provocatively, if the "highest use" for certain lands is a utilitarian use such as grazing, is there a meaningful extension of the logic of public trusts that requires such land to be under federal or even under state management?

Any serious effort to extend the sweep of public trust doctrine from its relatively constricted historic meaning to solidify the foundations of responsible management and preservation expectations must make room for these questions, which represent a few dimensions of the access and equal footing through creation of private property titles expectations that also retain validity. The nature of such an effort is not difficult to envisage. At this time, active interest groups and Congress together are attempting to answer the question of whether various units of public lands are to be designated as national wilderness or not. One could mandate trust transfers to states. Then, if one answered two questions negatively--non-wilderness and non-state trust--one could determine if the best form of management for a parcel was public or private. Such a step seems to have been contemplated in the last major study of public lands (One Third of the Nation's Land, 1970). With the intermediate step of considering the relationship between effective exercise of state powers and the ownership or control of particularly crucial lands, as well as the minimal needs of a state for a tax base under its control, a truly accommodating inventory review process might be accomplished.

Such a process could be initiated by Congress. But it is unlikely that any administration could effectively mediate the divergent interests and values that must be accommodated without a court mandate to do so. The painful process of accommodation undertaken in the wake of court mandated integration of schools provides an apt analogy. Impairment of state powers must, it seems, achieve legal acknowledgment by the courts before a true accommodation will be undertaken.

So long as the direction of federal public land policy continues to be understood merely as reflecting preferences and pressures, rather than Constitutional imperatives, policy debate will remain inflamed and initiatives will lack broad legitimacy. Court recognition of state claims will not eliminate conflict, nor quiet emotions. Hopefully, however, it will change the terms of discourse sufficiently that the trend toward polarization of opinions regarding public lands will be reversed and a movement toward accommodation can begin.

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III. IMPACTS OF FEDERAL LAND OWNERSHIP AND MANAGEMENT ON NEVADA'S ABILITY TO MANAGE WILDLIFE

by Phillip B. Davis

INTRODUCTION

The State of Nevada has the primary authority for management of over 50 kinds of mammals, 50 varieties of fishes, 50 reptiles and amphibians and 250 species of birds. Wildlife management and the associated prescribing of hunting, fishing and trapping regulations is uniquely challenging in Nevada due to the preponderance of federal land ownership.

Federal holdings in the State of Nevada constitute 86.7 percent of the state's land area. These federal lands are administered by some 17 different federal agencies or departments. For the purpose of analysis this paper will focus on the impacts of ownership and management of those lands administered by the Bureau of Land Management (BLM) (68.4 percent of the state's land area).

A conceptual framework is presented which contains the components necessary to develop and implement successful wildlife management policies and practices. Once this framework is stated, it is then possible to identify impacts of the preponderance of federal land ownership and management on the state's ability to carry out its wildlife management responsibilities.

CONCEPTUAL FRAMEWORK

A conceptual framework is a structure which aids in tying together different related and interrelated ideas for examination from different perspectives. The perspective taken here will focus on whether Nevada's ability to develop and implement wildlife management programs is impaired by existing federal ownership and management patterns.

Three major components are necessary for wildlife management practices and policies to operate successfully: first, any proposed action must be biologically sound over time; second, managerial practices must be consistent with the existing body of law; finally, success of proposed policies can only be achieved if the management practices are administratively workable.

Biological Practicability

To be effective, wildlife policies and programs must address the basic needs of wildlife. Habitat provides these needs, which include the proper quantity and quality of food, shelter, and water distributed throughout time and space. The continued existence of wildlife populations in Nevada depends upon the maintenance of the life support systems provided by their habitats.

Therefore, if the state is to meet its wildlife management objectives, an approach must be adopted which recognizes that land use decisions which alter habitat ultimately affect wildlife populations. Land management decisions, with respect to resources other than wildlife, are not independent from wildlife values. Agencies responsible for land use decisions which result in an alteration of existing habitats and the nature of resultant habitats often determine the range of biologically practical wildlife alternatives. An example of such a decision is site location for an access road. This decision results in the loss of forage and cover production for the duration of the road's existence and an effective elimination of that land area as wildlife habitat.

Several ecological principles to which land managers must adhere insure compatibility between proposed resource decisions and wildlife values. The first of these is to protect critical environments and habitats. Wildlife populations cannot exist without adequate habitat.

A second principle is to adopt a long-term carrying capacity approach to management. This requires study of habitat to determine if adequate resources are available to maintain wildlife populations. A population will tend to increase or decrease in response to the availability of food, water and shelter over time. If one habitat is replaced by another due to either natural or artificial causes, the carrying capacity of that habitat for a particular composition of species is altered, while a new carrying capacity of the resultant environment is created for a new composition of species.

The third ecological principle is to prevent irreversible changes in the environment. Man is capable of altering habitats, rendering them uninhabitable by wildlife. Avoiding such actions requires a prior understanding of the ramifications of a proposed action.

Since wildlife's very existence is dependent upon habitat, the decision-makers responsible for what and how lands will be utilized are ultimately wildlife managers. Leopold (1933) states this succinctly in that only the landowner can effectively manage wildlife. Thus, it is possible to have landowners making decisions of more consequence to wildlife than those entities that have the legal wildlife management responsibilities. This situation exists in Nevada and is discussed in more detail below.

The production, maintenance, harvest, manipulation, or preservation of wildlife populations is achieved as a result of controlling man's impacts on habitats. Landowners under the present legal system, have the decisionmaking power to determine how habitats present on their lands are to be utilized. Therefore, a closer examination of the relationship between wildlife law and land ownership is necessary to determine how, within existing law, biologically practical management programs can be developed and implemented.

Legal Feasibility

Under the laws of the State of Nevada the Nevada state board of wildlife commissioners is responsible for establishing policies and adopting regulations necessary to the preservation, protection, management, and restoration of wildlife and its habitat (NRS A 1969, 1347; 1971, 1381). Wildlife comprise part of the resources belonging to the people of the state and include any wild animal, wild bird, fish, reptile or amphibian found naturally in a wild state, whether indigenous to Nevada or not and whether raised in captivity or not (NRS 1969, 1350).

Within the limits of what BLM will permit as the appropriate level of usage for wildlife on public lands, the actual implementation of wildlife programs is carried out cooperatively by BLM and the individual state (Environmental Law Institute, 1977). The Nevada department of wildlife is authorized under section 501.351, Nevada Revised Statutes, to enter into cooperative or reciprocal agreements with the Federal Government or any agency thereof for the purpose of implementing wildlife policy. A memorandum of understanding between the Nevada department of wildlife and BLM is currently in effect. This agreement recognizes the state as having primary authority for management of resident fish and wildlife species and the prescribing of hunting, fishing and trapping regulations on BLM lands. This cooperative approach between the state and BLM allocates "species management" responsibilities to the state and "habitat management" responsibilities to BLM.

A simplistic view of wildlife allows for a separation of habitat management activities on one end of the spectrum and species management on the other. An example of species management would be the number of deer harvested. Allocation of deer winter range would be considered habitat management. However, due to the ecological interrelationships between deer and their forage requirements, the number of deer left after harvest will determine what level of impact occurs on the range. The reverse is also true in that quantity and quality of habitat will directly affect the condition and number of deer.

Separation of species and habitat management, although legally possible, is not biologically feasible or administratively workable. For effective wildlife management to occur, consideration by resource decision-makers of how habitat and the associated species will be impacted must be determined simultaneously. Land management decisions directly effect habitats and ultimately those wildlife species dependent upon them. Consequently, the administrative arrangement between the Nevada department of wildlife and BLM requires highly efficient communication, coordination and cooperative working relationships. This is almost impossible even under ideal conditions and with total support from all parties involved.

Administratively Workable

Administration of wildlife management programs and policies requires two basic components: a purpose and cooperative action. Successful administration, therefore, is the achievement of common goals (purpose) through cooperative group efforts. If common goals are to be accomplished, planning, organizing, staffing, directing, coordination, controlling and budgeting activities need to be set in motion to meet stated objectives.

Nevada's department of wildlife has management responsibilities for both habitat and species management on lands owned by the state. However, to be effective in managing wildlife species that are mobile and dependent upon adjacent or intermingled public lands, cooperative administration is required to meet stated objectives.

It is this need for cooperation that is addressed in the memorandum of understanding between the Nevada department of wildlife and BLM. Although the administration process is intangible, it is easy to determine if it is working well. One need simply look at the stated objectives to establish whether they have been or are being met.

Interviews with personnel from both Nevada department of wildlife and BLM revealed that the separation of species and habitat responsibilities results in an administrative structure which prohibits the full achievement of common goals. In addition, the two agencies do not always have common goals, and in such cases land management decisions within the power of the landowner prevail. Applicable here is Leopold's observation (1933) of the landowners' ultimate management of wildlife through control of habitat.

IMPACT OF BLM'S POLICIES ON NEVADA'S RESPONSIBILITIES ON PUBLIC LANDS

While the federal presence has been expanding with increased federal legislation regarding wildlife, the constitutional basis that support such legislation have been subject to dispute (Lund, 1980). The various federal powers that have sustained congressional wildlife legislation are those of spending, treaty, commerce and property. Among the issues generating the most conflict is that of ownership of wildlife. In an early court decision (Geer v. Connecticut, 161 U.S. 519) it was determined that the state had the power, as representative for its citizens, who "owned" in common all wild animals in the state, to control the "ownership" of wildlife.

The Court in Geer expressed the view derived from Roman law that wild fish and game located within the territorial limits of a state are the common property of its citizens, and that the

state, as a kind of trustee, may exercise this "ownership" for the benefits of its citizens (161 U.S., 529).

A recent decision [Hughes v. Oklahoma 441 U.S. 321 (1979)] reversed Geer v. Connecticut, ruling that states do not "own" wildlife as a proprietor. Rather, the state in its sovereign capacity as the representative for the benefit of all its people in common may protect and conserve wild animal life within their borders.

Is this sovereign capacity in the State of Nevada impaired due to the preponderance of federal land ownership and management within its borders? If agreement can be reached that wildlife management policies and practices must be biologically practical, legally feasible, and administratively workable, then the answer is "yes."

Existing federal ownership patterns and management policies have frustrated the state's ability to carry out its wildlife management responsibilities on both state and federal lands. Historically, BLM has given wildlife a very low priority in the administration of its land (Swanson, 1978).

A report to Congress prepared by the Comptroller General of the United States (1977) concluded:

> "The nations's public rangelands have been deteriorating for years and, for the most part, are not improving. These vast lands need to be protected through better management by the Bureau of Land Management.
>
> Deterioration can be attributed principally to poorly managed grazing by livestock--horses, cattle, sheep, and goats. Livestock have been permitted to graze on public rangelands year after year without adequate regard to the detrimental effect on range vegetation.
>
> Efforts to protect the wildlife habitat and watershed of the rangelands also are lagging. Although the Bureau is generally aware of many current problems and their causes, it has not acted effectively to solve or significantly minimize them."

These conclusions, when related to the aforementioned conceptual framework, support the contention that BLM has failed to achieve any of the three components necessary to produce successful wildlife management programs. The Nevada department of wildlife is faced with deteriorating rangelands which, for the most part, are not improving, and federal managerial practices which have not been administratively effective in producing results consistent with existing state wildlife law.

Similar conclusions were found in a Department of Interior Range Condition Report (1975) and were summarized in the following manner:

> Public rangelands will continue to deteriorate; projections indicate that in 25 years productive capability could decrease by as much as 25 percent--a decline that could be reflected in the possible loss of grazing privileges resulting in local economic disruption. Other losses will be suffered in terms of erosion, water quality deterioration, downstream flooding, loss of wildlife and recreational values and a decline in the basic productive capability.

An additional specific conclusion on wildlife habitat was that the general trend under current management is for wildlife habitat to continue in a general decline.

In yet another report prepared by BLM's Washington office, the effects of livestock grazing on wildlife (1975) were evaluated and similar conclusions were reached. For biologically practical wildlife programs to be implemented, it is necessary to protect critical habitats, adopt a long-term carrying capacity approach, and prevent irreversible changes in the environment. This report documents that on BLM lands in Nevada livestock grazing is adversely affecting critical habitats; that as a result of livestock forage allocations made during range adjudication, the long-term carrying capacity of wildlife is reduced; and that due to lack of action, one of the last remaining pure populations of endangered Lahontan Cutthroat trout could be lost.

As a result of the land use decisions of BLM, Nevada's department of wildlife has clearly been impaired in effectively carrying out its wildlife "species management" responsibilities. Therefore, the opportunity to assemble biologically practical, legally feasible, and administratively workable wildlife policies and practices on BLM lands in Nevada has rarely occurred.

IMPACT OF BLM'S POLICIES ON NEVADA'S RESPONSIBILITIES ON STATE AND PRIVATE LANDS

The focus here will be on the ability of the state to carry out management responsibilities concerning impacts of BLM policies encountered on state and private lands where the state's sovereignty is unquestioned. When examining problems encountered by the Nevada department of wildlife on state and private lands the total land area being considered is greatly reduced. This, in and of itself, poses the problem of a limited number of habitats available for management. Possible programs to be implemented are therefore limited where control of both habitat and species management is required for biological practicability and administrative feasibility. Programs of species introduction are a case in point. Thus, the very range of available wildlife management alternatives is limited due to the preponderance of federal land ownership.

The greatest impact BLM policies have on wildlife species found on state and private lands is the alteration and degradation of wildlife habitat. Populations of wildlife range over broad areas during an annual cycle, with little regard for ownership boundaries. Although this total area may be quite large, often certain critical areas or components of the habitat control the population of the species. In a typical deer herd, for example, only 5 percent of the total habitat meets critical requirements for winter range (Department of Interior 1975). Loss of half the winter range would only show a two and one-half percent change in total habitat. However, the impact on the deer herd would be disastrous with an ensuing loss of up to 50 percent. This type of analysis reveals the significance of critical habitat for wildlife that utilizes public lands for a portion of the annual cycle.

Wild Horse Management

Wild horses and their management have been the focus of tremendous state, regional, and national attention over the last 20 years. This interest culminated with the passage of the Wild Free-Roaming Horse and Burro Act of 1971 (Public Law 92-195). BLM's management policies relating to wild horses can serve as an example of how land resource management decisions on public land affect habitat and, ultimately, wildlife on state and private lands.

Although scientific and management information is lacking, the wild horse literature is expanding (Zarn, 1977). Heather Thomas, in her recent book entitled The Wild Horse Controversy (1979), has portrayed the broad picture of the wild horse issue from its beginnings, with all the complications, until today.

The examination here will include a statement of what the stated BLM wild horse policies are in Nevada, whether these policies are being achieved, and impacts of such policies on state and private lands. Under the legislative provisions of the Wild Free-Roaming Horse and Burro Act of 1971, as amended by Section 404 of the Federal Land Policy and Management Act of 1976 (Public Law 94-579) and Section 14 of the Public Rangelands Improvement Act of 1978 (Public Law 95-306), the overall wild horse management objectives are identified. Four of these objectives which have implications for wildlife on state and private lands are:

(1) To maintain in a thriving ecological condition the basic soil, water, and vegetation resources that comprise the rangeland ecosystem.

(2) To ensure viable populations of healthy free-roaming wild horses in equilibrium with their habitat and other resource values under the principles of multiple use.

(3) To control wild horse populations and prevent the deterioration of the range by removing excess wild horses from public lands.

(4) To arrange for the removal of wild free-roaming horses that stray from public lands to privately owned lands.

Thriving Ecological Condition

The impacts of excess wild horses on the ecological condition of soil, water, and vegetative resources that comprise the rangeland ecosystem are the same whether it occurs on private or public lands. Since the passage of the Wild Free-Roaming Horse and Burro Act of 1971 over a dozen lawsuits have been initiated, originating from wild horse and burro protection organizations, livestock groups and state and local entities. Information obtained for these suits has revealed that increasing populations of wild horses on the public lands have resulted in the deterioration of range ecosystems.

Affidavits by Curt Becklund, Gene Nodine, Hamuel Rowley, Wayne Cook and Floyd Kinsinger were obtained in the American Horse Protection Association, Inc., vs. Frizzell (Civil LV 75-143, RDF). All confirmed that as a result of excess numbers of wild horses in Stone Cabin Valley, Nevada, the vegetation showed destructive characteristics of deterioration which remove protective cover from the soil, leading to water runoff, erosion, and sedimentation. Also, contained within their statements is detailed documentation of the ecological characteristics which were being adversely affected by wild horses. The consensus was that the lands in question were not being maintained in thriving ecological condition.

Protecting Multiple Use Values

Glen Griffith, former director of the Nevada department of fish and game, made four major points in an affidavit (American Horse Protection Association, Inc., v. Andrus, Civil Action No. 78-606) concerning the impact on wildlife values under the principles of multiple use. First, the other animals, both wild and domestic, who must live in concert with the wild horse, are being adversely affected at an ever increasing rate; second, in the Gold Butte and Silver Peak areas there has been a significant diminution of range capabilities which is directly and deleteriously influencing the desert bighorn populations; third, indirect competitiveness with horses is creating an adverse influence on the welfare of mule deer; and, fourth, spring meadows are being overutilized by horses during the growing period, causing an adverse influence on the meadow and, ultimately, sage grouse populations.

These adverse impacts on wildlife habitat, wildlife, vegetation and soils also result in decreasing the capability of the range

to provide multiple use values. Forage requirements being produced are inadequate to meet livestock active and regular nonuse licenses, recreation opportunities are being reduced and watershed quality is declining.

Removal of Excess Horses on Public Lands

Although legislation requires the removal of excess wild horses to control populations levels and prevent the deterioration of the range, such management actions to date have been inadequate. According to BLM estimates, in 1971 there were 6,782 wild horses on public lands in Nevada. In 1974 the population was reported to have reached 20,300 (Department of Interior) and in 1979 the population was listed at 33,220 (Public Land Statistics). These numbers have been the subject of controversy, but there is a general agreement among all interested parties that wild horse numbers in the state have been and are increasing at a rapid rate. Under current management efforts, populations cannot be controlled by removal of excess animals, and numbers will continue to increase, causing serious problems on public lands and adjacent private lands. For this reason the State of Nevada initiated a lawsuit in 1979 (Civil No. R-79-185) claiming that the large populations of wild horses in Nevada pose a threat to their habitat, wildlife and other range values.

Nevada has asked the court to require BLM to conduct a timely and uninterrupted removal of wild horses until the population is reduced to 1971 levels. This suit has not been resolved, but the decision may parallel a recent ruling in Wyoming (Mountain States Legal Foundation v. Andrus, C. 79-275K). In that case the federal court found that the wild horse populations had dramatically increased and that the excess demand on grazing lands had prevented the maintenance of the ecological balance of the range. Therefore, it was ordered that the Rock Springs District office should remove all excess horses from the district.

In the same decision it was also ordered that all wild horses be removed from the checkboard grazing lands in the district. This decision is significant in that it recognizes the responsibility of BLM to remove excess horses not only from public lands but from private lands as well.

Removal of Wild Horses From Private Lands

Judge Thompson's ruling in the case of the American Horse Protection Association v. Andrus (Civil No. 78-105BRT) contains some interesting points regarding wild horses on private lands in Nevada. Two of the areas in question, Paradise-Denio and the East Range southwest of Winnemucca, were in checkboard ownership with 35 and 27 percent, respectively, in private ownership. Based on this ownership it was ruled that all horses were to be removed. According to Judge Thompson, this was appropriate

because the owners of the private lands had requested their removal, as is their right by law. Title 16 U.S.C. 1334 provides:

> If wild free-roaming horses stray from the public lands onto privately owned land, the owners of such land may inform the nearest federal marshal or agent of the Secretary, who shall arrange to have the animals removed.

The only practical way this can be done in checkboard ownership is to remove all the horses.

With these decisions, the courts have recognized that wild horses remaining on private lands, after proper notification has been received by an agent of the Secretary, are in excess to those permitted by law. The management of wild horses in Nevada has resulted in increasing numbers of wild horses both on public and private lands. These wild horses have been the focus of both state and private requests to have excess animals removed. Due to lack of adequate response from BLM, these requests are now in litigation. (State of Nevada v. Andrus Civil No. R-79-185, Fallini v. Andrus Civil No. 79-223). In May 1981, Judge Thompson held a hearing in C-Punch Corporation v. Andrus (Civil No. R-80-266), at which time he instructed the C-Punch counsel to prepare and submit a formal order that will require BLM to reduce wild horse numbers on private lands described in the complaint before October 1981.

Attainment of Objectives

The stated objectives identified which have implications for wildlife on state and private lands have not and are not being met in Nevada. Maintenance of thriving ecological condition of range ecosystems, protection of other multiple use values, removal of excess animals on public and private lands must be achieved if the Nevada department of wildlife is not to be impaired in the execution of its wildlife management responsibilities.

Management of the wild horse was presented here as only one example of how management programs implemented by BLM can affect available wildlife management options on both state and private lands. Land use decisions ultimately affect wildlife. Landowners are responsible for making such decisions. In the State of Nevada, with its preponderance of federal land ownership, the future of wildlife lies in the decisions and management policies made by the Federal Government regarding land use.

For instance, in Nevada approximately 98 percent of the lands utilized by bighorn sheep are on public lands (McGuivey, 1978). Sheep habitat controlled by private owners and the state comprise the remainder. BLM has administrative responsibility for the

greatest amount of bighorn sheep habitat in the state. The future of bighorn sheep, then, is going to be determined by BLM policies. If the current trend of increasing wild horse numbers and decreasing sheep numbers is coupled with ever-increasing demands for additional development and recreational uses, the distribution of bighorn sheep in Nevada may be greatly reduced.

SUMMARY AND CONCLUSIONS

The State of Nevada has the primary authority for management of resident fish and wildlife species. A conceptual framework was presented which contains the components necessary to develop and implement successful wildlife management policies. Within this framework, examination of existing land ownership patterns and management practices of BLM in Nevada identified several problems.

Separation of species and habitat management, although legally possible, is not biologically feasible or administratively workable. The current administrative arrangement between the Nevada department of wildlife and BLM necessitates such efficient communication, coordination, and cooperative working relationships as to make the successful achievement of wildlife management programs almost impossible, even under ideal conditions.

Review of the literature, coupled with information obtained during interviews with state and BLM personnel, revealed that as a result of land use decisions made by BLM, Nevada's department of wildlife has been impaired in efficiently executing its wildlife "species management" responsibilities in an effective manner. Therefore, the assemblage of biologically practical, legally feasible and administratively workable wildlife policies and practices on BLM lands in Nevada has rarely occurred.

To illustrate how BLM's policies can impact state and private lands, the management of wild horses in Nevada was analyzed. Objectives which have implications for wildlife on state and private lands were identified. The inability of BLM to meet any of these objectives and the court's legal reactions were then discussed. As a result of this review it was determined that Nevada's ability to carry out its wildlife responsibilities was rendered less effective.

Has Nevada's ability to develop and implement wildlife programs been impaired by existing federal ownership and management patterns? If agreement can be reached that wildlife policies and practices must be biologically practical, legally feasible and administratively workable, then the answer is "yes." Existing federal ownership patterns and management policies have frustrated the state's ability on private, state and federal lands to carry out its wildlife management responsibilities.

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IV. STATEHOOD, SOVEREIGNTY, AND THE SAGEBRUSH REBELLION

by Robert E. Dickens

Public Lands and Political Culture: An Introduction

The question put forth at the outset of this research involved the degree to which, if any, the capability of the State of Nevada to promote public health, safety, and welfare has been impaired by the preponderance of federal landownership within the state's boundaries. The approach adopted herein involves a search for cases that exemplify such an impairment and to evaluate the extent to which that impairment exists and debilitates state actions.

It is frequently pointed out that Nevada is comprised of nearly 87 percent federal land and 13 percent in other categories, either state or private, all of which makes up a complex patchwork of land uses and tenure (Lutsey and Nichols, 1972). Another way of looking at these proportions is to indicate that although Nevada is the seventh largest state geographically, that portion of the land within its borders which does not belong to the Federal Government, and may therefore be regarded as constituting the "whole" of the state, makes Nevada the tenth smallest state in the Union. In other words, the State of Nevada has never constituted more than 13 percent of the area that commonly goes by that name.

The history of public land policy in Nevada has been characterized by cycles of satisfaction and controversy (Downs, 1972). Reclamation projects exemplify the former, while passage of Assembly Bill 413 (the so-called Sagebrush Rebellion bill) during the 1979 Nevada legislature is indicative of the latter. That action of the 1979 legislature symbolized a high point in state-based opposition to what one scholar calls the "nationalization" of public land policy (Culhane, 1978). Traditional users of public land resources within the state responded by opposing the victory of the environmental movement in establishing and integrating environmental standards within current acts of Congress regarding the disposition, as distinguished from disposal, of public lands. Such an action was taken in the 1976 Federal Land Policy Management Act (FLPMA) (P.L. 94-579). Nothing so much as the Federal Government's declared intention to retain the majority of land within Nevada and other public land states may be said to have set in motion the wheels of political opposition.

When it passed A.B. 413, Nevada began a long process of examining its relationship with the Federal Government, indeed, the relationship of one state to the union. Since this was done by legislative authority, it also marked a point of departure in a long-standing pattern of consent and cooperation between public land agencies and users. Many scholars suggest this relationship is the model of clientelism and praise it for its stablility, uniqueness, and democratic values (McConnell, 1966; Culhane, 1981, Lowi, 1969; Fenno, 1973).

What had brought about this turn in opinion and events was the violation of the way of political life in such a clientelistic relationship. The rules of the game within this "subgovernmental arena" which constitutes the site of authoritative, national public land decisionmaking had been permanently changed. The declarations of FLPMA represented the views of a national environmental constituency, at the expense of the more regional, state-based constituency (Schattschneider, 1960; Fenno, 1973). The price of nationalization had been exacted against the expectations of continuation of policies that allocated public land resources to users traditionally a part of the rural economy of the state--ranchers, farmers, miners, and the support industries associated with them.

These expectations exist as a result of the federal preponderance of landownership. The political culture associated with public lands in Nevada entailed the notion, more utilitarian than environmental, that resources contained on those lands would be available to a variety of uses. Moreover, one is obligated to use those resources. To do otherwise is to waste them. This expectation is not unlike the view of the "commons" which is deeply entwined in the American tradition of land use and view of nature (Hardin, 1977; Nash, 1973). The widely shared perception was that it was the duty of the Federal Government to provide a governmentally-managed resource base from which the citizens of the state could derive sustenance. One could characterize this as a dependent relationship whereby the Federal Government took action to reduce economic uncertainty, conserve the natural resource base, and generate wealth for citizens and the nation. When the beneficiaries of that relationship shifted from the state to the national level, local consent was withdrawn.

To be sure, Nevada's view of the commons is more utilitarian than preservationist (Nash, 1973). What it lacks in purity, it makes up in firmness of conviction. One such conviction is that it is the trust obligation of the Federal Government to continue the process through which public land resources are devolved from public to private ownership. Retention of lands in federal ownership for other than defense interests violated a fiduciary relationship between the national government and citizens of the state.

The counter viewpoint, that held by national conservation and environmental interests, is that public land resources are to be managed for the long-run betterment of the nation as a whole. The values added by the national perspective run somewhat against the grain of the values indigenous to the political culture of the state. As an example, the most frequently mentioned, and vehemently opposed, national values are those served by the Wild Horse and Free-Roaming Burro Act of 1971 (P.L. 92-195). Animals "protected" by national legislation surpass in numbers the foreseeable carrying capacity of grazing resources, given cattle and

wildlife as competitors. Another example, one most frequently misunderstood, involves the wilderness study process under FLPMA. What is little understood here is that of 14.1 million acres inventoried, 3.3 million are under study for potential inclusion in the National Wilderness Preservation System. A little over 100,000 acres are being appealed. Congress will be the decision-making arena wherein state interests will have a say in the final designation process. The wilderness study process example is instructive insofar as it seems to symbolize, in its preservationism, the retention policy of FLPMA. Hence, the national value of wilderness preservation is perceived at the state level as a declaration that 14 million acres would be withdrawn from the "commons" and what is worse would not be available for anything but "backpacking."

Regardless of the fact that mineral, oil, and gas location and development can be accomplished under the discretionary authority of Secretary of the Interior, it was widely believed by interviewees that wilderness designation was a waste of public land. This is perhaps due to the rationale, largely aesthetic and philosophical, underlying wilderness preservation.

Aside from the myths and facts associated with the wilderness debate, the view that public land in Nevada is perceived as a commons is augmented by interview data suggesting opposition to a change in the status quo, particularly if such a change means withdrawal of access to public lands as a result of the privatization of all or part of the public domain. The prime example was pointed out by a former cattleman turned miner. From his point of view, desert land entries and mineral location promise to bisect and destroy the continuity of the vast cattle driveways that lace their way through central and northeastern parts of the state (Lutsey and Nichols, 1972). This was surprising insofar as one would expect quite the opposite reaction from a knowledgeable individual engaged in ranching and mining activities. Apparently, what has been discovered in field interviews is a sentiment of satisfaction that certain economic interests enjoy what amounts to a transportation subsidy in the form of access to rights-of-way in grazing areas. Without this governmental support, which is characteristic of agency-client relationships in public land management agencies, the individual stockman would necessarily incur some direct cost for transporting animals to major transportation points (Culhane, 1981). It is significant that stock driveways are viewed as a common resource from which users can draw, particularly as to the single use of moving cattle and sheep.

Impairment: Real and Potential

The issue presented by this research project is whether the State of Nevada's capacity to serve its citizens' health and welfare has been impaired by the preponderance of federal landownership.

Has Nevada lost its capability to meet citizen needs as a result of the changing of the "rules of the game" in the passage of FLPMA and other federal actions? The cases selected and developed in the following seek to answer this question in terms of intergovernmental relations. By looking at cases that range from toxic dumps through wildlife to MX, we will come to an evaluation of the scope of the impairment.

Henderson and Toxic Dumps

The approach used in this segment of the research was intended to yield cases of abandoned toxic dump sites within the State of Nevada, located on public land, and in important ways outside the jurisdiction of the state due either to a break in the chain of liability, that is, inability to discover culpable parties against whom mitigative action could be taken, or to lack of action by federal land managment agencies. Hypothetically, one might expect such an occurrence in conjunction with the extensive mining activities that characterize the economy of the State of Nevada. In addition, the National Directory of Toxic and Chemical Dumps was examined to identify any sites that might fit the criteria of being abandoned and located on public land. At the outset, then, we looked for abandoned mine and mill sites. Interview data strongly indicated that such sites were likely to contain only very low levels of toxic materials. Operating sites that use toxic materials in ore processing, for example, produce only small amounts of materials, so little that neither federal nor state officials consider toxics associated with large-scale operations to present a significant regulatory problem. Interview findings also suggested that the only regulatory problems associated with mining and toxic wastes involved the small, "mom and pop" weekend operations scattered about the state. No interviewee was able to identify a particular site, and the researchers' judgment was that the focal point of inquiry should be adjusted accordingly.

Field surveys and interviews were conducted in the area around the toxic dumps at the Basic Management Industries (BMI) complex in Henderson. Interview findings suggested that an abandoned dump site exists on sections 28 and 29 of the Henderson quadrangle. The land is part of the original Bureau of Reclamation withdrawal from the construction phase of Boulder Dam. The National Directory of Toxic Dumps suggested the location of a site on public land that had been in use since 1942 by undisclosed parties. Interviews with knowledgeable individuals suggested that the site had been burning beneath the ground for at least seven years. Field investigation indicated a substantial number of fumaroles and charred material in the location, which is characterized by collapsing soil and has a history of noxious odors. Bureau of Reclamation records indicate that during a proposed construction project of a pipeline through the area, surveys were taken and auger pits dug in the vicinity. The record of Auger Pit 134

indicates that the machinery was stopped at about nine feet (others in the area achieved depths up to 20 feet with no difficulty) by a 55-gallon drum and offensive odors. When asked why such a site would be burning, one interviewee with a long history of working for the state indicated that "BMI probably dumped bad batches of napalm there during World War II."

This case is complicated by several factors. First, at this time we have discovered no evidence establishing whether toxic materials are actually buried there. Second, the surface area of this dump site has been used as a municipal and construction material dump by the City of Henderson via a lease agreement from the Bureau of Land Management, which has land management responsibilities for the site. Although the Bureau of Reclamation has what one might refer to as a first option or right of refusal on the use to which the land is put, BLM nonetheless manages the area. Toxic materials, if they do in fact exist at the site, are buried beneath the levels used for municipal solid waste. Third, the area in question should be surveyed to determine the extent of the site. Fourth, the Clark County Comprehensive Planning Department and a variety of citizen groups are interested in putting the entire Las Vegas Wash area to use as a wetlands parks, the Henderson dump sites in the vicinity notwithstanding. Fifth, and most important, any action taken with regard to this site is likely to be viewed in light of the state's regulatory activities vis-a-vis the entire Henderson complex. One could, for example argue that the existence of the site in question serves to frustrate the state's regulatory efforts in the BMI area that is private land.

Alternatively, one could argue that the site in question is insignificant compared to the larger public health problem associated with the waste management practices conducted within the private sector at the BMI complex. On this point, the relatively recent spill of 30,000 gallons of benzene from the Stauffer Chemical plant suggests what critics might call a slow and impotent response from the state--the spill was unreported for a year and abatement remains under study while the benzene migrates from private toward public land at the rate of 750 feet per year.

If the point of looking at toxic waste issues is to demonstrate that, because of landownership patterns, Nevada is prevented from pursuing the best interests of the state's public health and safety, then it follows that a bona fide effort should be underway in those spheres of jurisdiction where Nevada is not impeded by the presence of federal landownership. Finally, should the state so construe this case, it would have authority to deal with this problem through its groundwater authority, particularly since the entire Las Vegas Valley has been a designated groundwater basin.

Off-Road Vehicles and Bighorn Sheep

The River Mountains are located east of Henderson, north of Boulder City, west of Lake Mead, and south of the Las Vegas Wash. Despite being bounded on all sides by urban and recreational development, the River Mountains contain the State of Nevada's largest population of desert bighorn sheep (Leslie and Douglas, 1979; McQuivey, 1978). The unique relationship between humans and wildlife demonstrated by the River Mountains illustrates a clash of federal and state powers. It is well established that while the Federal Government manages a public land habitat upon which both wildlife and domesticated animals depend, the state has responsibility for managing, protecting, and enhancing wildlife resources (Hughes v. Oklahoma, 441 U.S. 321 (1979)). The case presented here is distinguishable from Kleppe v. New Mexico (426 U.S. 529) (1976) insofar as the wildlife resource at issue in this instance does not involve a species protected by federal legislation such as the Wild Horse and Burro Act, which was challenged in Kleppe. Rather, this case fits the analytical framework outlined earlier, particularly since Nevada's wildlife management program depends on this resource, and the Federal Government manages the habitat that supports the resource.

The River Mountains are contained within the Lake Mead National Recreation Area managed by the National Park Service, abutted by Bureau of Land Management lands contiguous to the western boundary of the National Recreation Area (NRA), and near some areas of Bureau of Reclamation withdrawals, as mentioned in the toxic dump discussion. Hence, the entire habitat of the River Mountain bighorn sheep herd is managed by the Federal Government.

Land use pressures exerted on the area in question are substantial, owing particularly to the desert environment of Nevada, the large population in the Las Vegas Valley, and the unnatural water resource of Lake Mead, which constitutes a recreation economy valued at approximately $80 million per year. Of special interest in this case, however, is the impact of off-road vehicles on the River Mountain habitat. Interview data indicate that from the Henderson side of the range, off-road vehicle use is substantial.

A better appreciation of the problems associated with this case can be had by considering the behavior of the bighorn sheep in the River Mountains. Since the isolation of the herd in the particular area and the development of human-made, permanent water sources, the animals have demonstrated a clear dependence on humans, particularly during the dry months of late summer and early fall. Susceptible to water stress, the bighorn sheep will tolerate the substantial presence of people in order to secure a dependable source of water, even if it is a sewage lagoon near a National Park Service residence. In short, the desert bighorns have become habituated to the presence of humans and their works. Although this dependence brings a typically elusive species into

easy view and close proximity, it also denotes a vulnerability imposed by the high rates of visitation and attendant patterns of land use within the National Recreation Area and the less strictly regulated public lands on the western boundary of the National Recreation Area. That vulnerability has been substantiated by instances of poaching from the River Mountain herd and the intrusion of off-road vehicles (ORV), particularly motorcycles in the western reaches of the habitat. Motorcycles are particularly important in this case because of their noise level and ability to use terrain unreachable by four-wheeled vehicles, and by the riders' capacity to chase individual sheep leaving precipitous terrain on their way to water. The intrusion of off-road vehicles tends to limit the habitat of the species, but less so than the availability of water. The susceptibility of the species to stress induced by water shortage or harrassment serves only to heighten the vulnerability of the River Mountain herd.

From the state's point of view, much is at stake regarding the conservation of this wildlife resource. Interview data as well as popular press coverage indicate that Nevada's fish and game authority has established a program whereby the River Mountain herd will be used as a "bank" from which a certain number of sheep will be taken each year in order to reestablish the animals in their former habitat, which was essentially statewide. Nevada has established a beneficial relationship with private wildlife conservation groups interested in donating financially to this program.

The conflict between sovereign authorities in this case, then, is constituted of federal management of the habitat of River Mountain bighorn sheep. Where the rub comes is in the federal agencies' inability to restrict and enforce regulations concerning off-road vehicle use. To be sure, such use is regulated, particularly within the National Recreation Area. Nonetheless, ORV use is considered a management problem within the NRA. The problem within the NRA revolves around visitors trying to gain shoreline access to Lake Mead and leaving marked roads to do so. Hence, the ORV problem as it affects the bighorn sheep is, from a management viewpoint, restricted to BLM lands from which access to sheep habitat is gained from the western watershed of the River Mountains. The critical factors here are both the dependence and the vulnerability of the wildlife resource juxtaposed with the state's program to reestablish sheep in their former habitat. This habitat was reduced to mere enclaves of elusive individuals by the encroachment of humans and their domesticated sheep and cattle, which competed for forage and brought bacterial diseases to which existing sheep populations had no immunity. Hunting and predation within shrinking suitable habitat are also cited as factors.

The vulnerability of the bighorn is further indicated by interview data suggesting that the immune system of the species, when

stressed, suffers a depression that weakens the animal's natural resistance to flora, which the animal hosts throughout its life, only to succumb to disease the animal can no longer fight. Other species within the state are susceptible to the same processes. What makes the River Mountain bighorn a unique case is their precarious location vis-a-vis the activities of humans and the crucial role this specific enclave is expected to play in Nevada's plan to restore sheep to their former habitat.

The irony of this case is that to prosecute the interests of the state in maintaining the River Mountain herd as the population base from which species restoration is achieved statewide, one is constrained to face the political difficulty of challenging the citizens more desirous of maintaining ORV use than conserving or preserving the habitat of sheep.

Wilderness, Wildlife, and Sagebrush

One of the most contentious issues associated with the reaction to federal land management has been the series of wilderness reviews undertaken as a result of FLPMA. Some have raised questions associated with the ability of Nevada to see to its sovereign obligations, yet most do not fit the clear framework of equally legitimate governmental duties. One area that fits the suggested framework concerns wildlife (see Davis paper). Interviews were conducted to discern whether there had been any intergovernmental conflict surrounding wildlife and fisheries management within wilderness study areas. Since the wilderness review process is currently under way and no formal designations have been made by Congress, emphasis has been solely on areas under study by BLM.

After reviewing documents dealing with the entire wilderness review process, five study areas were identified, which had significant fisheries within them. Of these, the Blue Lake Wilderness Study Area constituted a point of significant federal-state conflict regarding the maintenance of fisheries within the area.

Interview data suggested that Blue Lake, a natural lake, had been a prime fishing site in northwestern Nevada. Access was by road, both for the taking and stocking of fish. Indeed, Blue Lake is navigable with a history of fishermen hauling boats and rafts to the area. When declared a Wilderness Study Area, access by motor vehicle and use by boats was denied. Apparently gates were locked. The impact of this decision, made by BLM personnel at the district level, was to severely limit the numbers of fish that could be stocked in Blue Lake and to force the State of Nevada's department of fish and game to adopt a more costly and less efficient mode of delivering fish to the lake, namely, by nonmotorized means. Hence, maintenance of fisheries in Blue Lake had to be done either by horseback or on foot.

It should be pointed out that although this case fits the analytic criteria established at the outset of this paper, the problem identified is one of fisheries management, perhaps more than intergovernmental impairment. It has been suggested in interviews that with appropriate intergovernmental cooperation, fisheries can be maintained in this Wilderness Study Area by means of airborne (helicopter) planting, albeit more costly in dollars per numbers of fish released.

Missiles and Sovereignty

Initially, the study team felt that deployment of the MX system in the State of Nevada would constitute the most severe and unpredictable form of impairment on the sovereignty of the state. The original deployment area involved unappropriated public lands in Nevada and Utah. Such lands have their national constitutional base in Article IV of the Constitution of the United States and therefore, permit certain legitimately sovereign roles for the state.

The State of Nevada has a series of legitimate concerns stemming from its sovereign duties to protect the public health and safety in those areas and towns contiguous to the deployment area. The actual impacts during the construction phase of the project are not precisely known, but substantial concerns have been expressed regarding the social impacts of deployment. One report produced by the Nevada state division of investigation and narcotics points to the inability of local law enforcement agencies to deal with the amount and scope of criminal activities that are immutably associated with boomtowns. Although the report has been viewed as extremely controversial, particularly in regard to comments suggesting mob and gang activity within labor unions, it nonetheless validly points to the public safety problems associated with boomtown developments elsewhere in the West--regardless of whether the purpose of such developments involves energy development, mineral extraction, or deployment of a nuclear weapons system.

The choice of Nevada and Utah as a site for the deployment of the MX is one complicated by strategic defense policy, arms limitations treaties and negotiations, and the domestic political necessity during the Carter Administration to soothe hawks and conservatives on the question of verifiability of treaty compliance.

One exceptionally knowledgeable interviewee suggested that Nevada and Utah were selected for deployment as a result of a high level meeting during the Carter Administration during which an assessment of political attitudes and Congressional voting records on defense issues was presented. Before the decision to base the MX in Nevada, the state and its citizens consistently supported the national government on strategic defense policy. Indeed, Nevada willingly accepted atmospheric and underground

nuclear testing, displaying dissent only with respect to recently discovered long-term health effects of above-ground tests. Continuation of such support was assumed.

With respect to MX, the question facing the research team was twofold: Why was Nevada selected and what impact would siting have upon the capability of the state to perform its typical functions? In a 1979 draft document titled "MX Siting Area Decision Paper" it is stated, in terms of security, preservation of uncertain missile location, explosive safety, Strategic Arms Limitations Treaty (SALT) considerations, and strategic operations, that Nevada is the most desirable location. What is of peculiar interest is how this conclusion was achieved. "The fact that Nevada (Utah) has the lowest rural population density, the lowest degree of private landownership, and the least internetting of highways and railroads of any (considered site) makes it the most suitable MX deployment region" (from page 5). It is further stated that Nevada is desirable because of low land acquisition cost, lowest agricultural losses due to land competition, and less than 5 percent private landownership. On criteria of particular interest to the state, however, deployment in Nevada is less desirable. One year unreimbursed costs to local governments are the highest of any candidate site. This is also true of the projected increment in demand for water over 20 years of operation. Total demand for electricity is the highest projected of any proposed location. Archaeological impacts are also expected to be high.

The siting decision seems to have been based on factors important to the national government, depending on broadly defined, low cost criteria. On factors of higher interest to the public welfare of the State of Nevada, however, just the opposite is true. To matters of interest to the state such as costs to local governments, demands on scarce water resources, demand on energy resources, and archaeologic resources, the broadly defined cost criteria are quite high. It is significant then that siting of MX in Nevada has been accomplished on criteria of great interest and low cost to the national government. One could argue that impairment of sovereignty exists in the imposition of high cost factors on the various functions of Nevada's state and local governments. When the scope of the MX deployment area became known, a surprising reaction ensued. Although not a shock to knowledgeable Nevadans, national policymakers found the opposition to deployment of the MX within the state to be well beyond what had been anticipated. Having underestimated the political culture of the state and its attendant desire to maintain a rural society with traditional forms of public land use, the Federal Government, particularly the Department of Defense, was unprepared to deal with intense opposition.

Some potential areas of sovereign conflict have been delineated with respect to MX. One involves the social impacts associated with the boomtown cycles characteristic of massive, analogous

construction projects such as the Alaska pipeline, coal strip-mines in Wyoming, and energy development in Colorado. One that is unique to MX, particularly if sited near the Nevada test site, is the potential disturbance of radioactive fallout from previous atmospheric tests. One interviewee, commenting on radioactive wastes, indicated that the entire Nellis and Nevada Test sites are the "dirtiest spots" in the state. Construction activities may release radioactive materials, which constitute a danger to citizens living outside Article I lands. One must therefore, also consider as a spillover effect the public health impacts from increased construction activity near communities surrounding the construction and deployment areas.

Conclusion

When the Nevada State Legislature passed A.B. 413, it acted on the assumption that such a declaration would encourage the Federal Government to divest itself of public lands slated for retention. This action came as a regional response to the nationalization of public land policy (Culhane, 1978). With this declaration was some sentiment that unappropriated federal lands should and would be transferred to state management and disposition, if not outright disposal.

Anticipation that public lands would again become available for appropriation grew and, indeed, was significantly augmented by the presidential election of 1980 and subsequent executive appointments. Interviews conducted during the Reno conference of the Council of State Governments in 1981 indicated that such sentiments and anticipations continue to exist not only in the Nevada delegation, but in other western states as well. When asked about the failure of Secretary Watt to appear before the conference, some individuals agreed that a good political opportunity had been missed. Irritation at not eliciting a positive response from the Watt Administration was apparently widespread. One insightful observer indicated that the western states' expectation of playing a significant role in the devolution of unappropriated public lands was grossly misplaced. What has changed is that public land policy emanates from the center of this political system (Culhane, 1978). Yet absent from this policymaking and implementing system is a clear, substantive commitment from Reagan and Watt to share power regarding public land policy with state legislatures. Indeed, at the recent National Governors' Conference, one governor requested that states be allowed veto power on development decisions pursued by the Department of the Interior. In what can be construed only as a resurrection of Calhoun's pre-Civil War notion of the concurrent majority--settled by the supremacy of the Union as a result of northern victory--western states have requested the denationalization of public land policy. The Reagan-Watt Administration has rejected this notion. From a political standpoint, it hardly seems reasonable that a western

President and Secretary of the Interior would in this fashion divorce themselves from constituents. Commenting on this, one interviewee suggested that the national government does not intend to permit a substantial state role in adjustments made to existing public land policy. Rather, it is felt that a cohesiveness to that policy can and will be maintained by the national government. Therefore, while the states of the West support moves to devolve unappropriated lands, the national government seeks to place itself in the role of broker, putting unappropriated public lands to forms of use felt to be desirable in Washington, though not consented to by affected states. It should be no surprise that the state would be bypassed, the nationalization of public land policy being complete (Culhane, 1978, 1981).

The foregoing cases each suggest that some impairment of the state's capacity to carry out its governmental responsibilities exists as a result of the preponderance of federal landownership. The remaining question at the close of this research is whether that impairment amounts to an unconstitutional denial of attributes typically accorded states within the Union. While this is ultimately a matter of constitutional law and decision by the Supreme Court, an evaluation can be put forth.

The cases documented above fit the criteria established for impairment at the outset of this research. One has evaporated due to a Presidential decision not to deploy MX within Nevada, although the fact that an impairment did exist makes MX a case worthy of recognition. The issue of toxic dumps on public lands is one marked by its narrowness in comparison to toxic waste generation and disposal on private lands nearby. The wilderness issue is likewise marked by narrowness. It is not the stuff of which constitutional law is made, rather it constitutes the fabric of typical administrative accommodations. The question of managing ORV use vis-a-vis desert bighorn, however, represents a case most illustrative of impairment and frustration of state goals due to federal land and resource ownership (Engdahl, 1976). As Kleppe and Hughes suggest, the question of wildlife management has been treated by recent Supreme Court opinions, particularly because constitutional law has yet to reconcile conflicting federal and state roles.

It has been asserted that Nevada can do a better job of managing public lands than the Federal Government. Given shifts in taxation policy, budget and income limitations, and a general unwillingness to expand the scope of governmental activities, caution would seem advisable in the acceptance of managerial responsibility for public lands by the state. In order to address this concern, the forthcoming legislative session might consider creating a commission on public lands to study the implications of an adjustment in the status quo with a view toward detailing options and opportunities should Nevada be successful in promoting divestiture.

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V. SOME ECONOMICS OF SAGEBRUSH AND SOVEREIGNTY

by John L. Dobra and George A. Uhimchuk

A. THE POLITICAL ECONOMY OF THE "SAGEBRUSH REBELLION": SCOPE AND METHOD

The "Sagebrush Rebellion" (SR) refers to a legal and political controversy over ownership of western lands held by the United States Government and managed by the Bureau of Land Management (BLM). Nationally, the land area involved is approximately 400 million acres, or about one-sixth of the total land area of the U.S.[1] These lands make up over half of the total land holdings of the national government, some 770 million acres, or one-third of the national land area.

Since 93 percent of the total land holdings of the national government are in the 12 western states containing and west of the Rocky Mountains,[2] the SR is primarily a regional issue. However, the "rebellion" was formally begun in 1979 in Nevada with the passage of A.B. 413 by the state legislature. In Nevada the U.S. Government owns a total of 60.7 million acres, or 87 percent of the state's land area. Briefly, A.B. 413 claims title for the state of 49 million acres, or 68.4 percent of the state's area that is managed by the BLM.[3] The bill also establishes an agency to assume the functions of the BLM in managing these "state" lands.

The amounts of land involved across the region and within Nevada have led opponents of the SR to call it the biggest land grab in history with some justification. Controversy over the SR has elicited sharp responses from a large number of constituencies. Miners, ranchers, outdoor recreationists, environmentalists, and public officials at all levels of government have personal interests tied to the land and its use. Understanding these alternative perspectives on the SR is essential to understanding what is at stake beyond some 400 million acres of western real estate.

As a matter of necessity, however, the discussion here cannot explore all, or even very many of these issues and perspectives in the detail they deserve. Generally, the issues examined here are concerned with the social efficiency implications of property rights and regulatory arrangements in these BLM managed lands. More precisely, the analysis focuses on the State of Nevada and the ways that the existing property rights and regulatory arrangements in these lands have influenced political and economic competition for the benefits that may be derived from the control of the land.

Our interest in this fairly narrow set of issues has been prompted by discussions of the legal theories of the SR and federal property law by authors such as Anderson,[4] Brodie,[5] Clayton,[6] and Engdahl.[7]

These authors have suggested that a potentially fruitful line of legal argument for the State of Nevada and other western states is that the extensiveness of U.S. Government land holdings in these states diminishes their capacities to exercise sovereign prerogatives and fulfill obligations to their citizens. The nature of these legal arguments are examined briefly below.

These legal theories are of interest from our perspective for two reasons. First, to this point scholarly investigations of the SR have been largely confined to legal discussions. John Baden's discussion of "property rights, cowboys, and bureaucrats," is the most notable exception in this regard.[8] These legal theories are of additional interest because they outline the relevent doctrines of law and federal theory that are operative in the western states' legal cases. However, while these discussions have outlined the relevent legal doctrines, they have been unable to link political philosophy, historical precedent, and constitutional doctrines to relevent empirical evidence on the impacts of national government land ownership. Without such linkages and analyses of potential impairments of state sovereignty due to U.S. Government land holding, arguments on either side of the SR appear to be moot.

As economists interested in the areas of public choice, and law and economics, we take the position that property rights and the nature of legal rules concerning the use of property directly affect the allocation and distribution of scarce resources. Our interests and objectives lie in exploring the links between U.S. Government policies affecting the land and the sovereignty of the State of Nevada. The political sovereignty issues raised by these economic analyses ultimately reduce to a matter of the limitations of local governments' abilities to exercise traditionally local sovereign prerogatives. Hence, much of our concern is with local public decisions such as where to locate public facilities such as parks, schools, garbage dumps, airports, and so on. Also of interest are the problems facing local governments in controlling and planning residential and commercial development.

The shift in national population to the West has presented local governments throughout the region with the need to coordinate orderly population growth and economic development. Nevada's relatively high rates of growth in the past decade has created similar needs for increased local expenditures for public capital and services. Hence, not only does the issue of local sovereignty relate to the larger legal question at hand, but it is a significant local issue.

These types of potential impairments of local sovereignty are of further interest because of their ability to satisfy a number of criteria. First, by focusing on the activities of local governments we examine a traditionally and constitutionally secure

domain of state authority. Not only may the long arm of Congressional commerce powers be avoided by this focus, but we may also distinguish cases of exclusive local sovereignty and cases that Coggins and Wilkinson describe as "concurrent" and "partial" local sovereignty.[9]

Another criterion satisfied by the focus on local public choice and sovereignty concerns the real resource costs imposed on communities as a consequence of extensive national land ownership. These issues are discussed in detail in section B below but, in general, "dead-weight" losses and "transactions costs" imposed on communities constitute real damages to the quality and/or level of public services that local governments may provide.

The discussion in section B uses traditional economic analysis to investigate the way that land ownership patterns and regulations lead to these social inefficiencies. The application of these principles to the legal controversy of the SR in section C integrates the political, legal, and economic aspects of the argument on local sovereignty using the analytics of the literature on "law and economics." Scholars that have contributed to this literature, such as Coase, Posner, Buchanan, Tullock, Manne, and others[10] have been generally concerned with the ways that the law is used to promote efficiency in a broad sense.

From this perspective, the concept of sovereignty itself has efficiency implications so long as sovereignty is contingent on the consent of the governed. Hence, the private and public economic consequences of the existing property rights and regulatory arrangements in western lands can be linked to comparable implications of sovereignty itself. At a theoretical level this link is provided by Ostrom's discussion of the efficiency gains implicit in the federalist system of "multiple sovereigns."[11] At a practical level, this link is evident in the direct and indirect, and generally unintended consequences of extensive national government land ownership and regulation on the exercise of local sovereignty.

Evidence that extensive national government land ownership has been the source of social inefficiency, and has fostered the wasting of private and public resources, can therefore, be linked to Constitutionally relevent issues. Specifically, the discriminatory aspects of Congressional policy respecting public lands, because of its extensiveness in Nevada and other public lands states, vis-a-vis eastern states, provides a basis for an appeal to the "equal footing" doctrine.

This appeal, however, cannot be adequately represented by the lines of reasoning and argument employed in the discussions of title to riverbeds, nor in historical discussions of land cessions that are, for the most part, the substance of the "equal

footing" doctrine. Rather, this appeal rests on the notion of political equality among states, and the contention that ownership and regulation of land by the national government constitutes a de facto impairment of sovereignty when it is extensive. Hence, the line of argument derived from the analysis of the efficiency implications of national government land ownership and regulation is closely related to federal doctrines to intergovernmental relations, immunities, and sovereignty, that are not well reflected in the narrow discussion of "equal footing."

This latter line of legal reasoning is found in the series of decisions and opinions of the Court concerning inter-governmental relations. From the decision in McCulloch v. Maryland[12] through Helvering v. Gerhardt[13] and, most recently, National League of Cities v. Usery[14] the Court has dealt with the problems of maintaining the "multiple sovereigns" aspects of the federal system. These rulings provide a test and a distinction useful in examining the circumstances of "public lands" states.

First, the rulings in Gerhardt and Usery create a distinction between actions of a sovereign that are directed towards individuals, such as personal income taxation, and actions that are directed towards states, such as Congressional regulation of wages paid by state and local governments. The ruling in Gerhardt corresponds to the first case, where the Court ruled that the immunity of the sovereign does not extend to its employees. The ruling in Usery corresponds to the latter case, where the national government may not extend its regulation of wages to state and local governmental employees.

Secondly, Hughes' Gerhardt opinion suggests that whatever inefficiencies may be implicit in the existing property rights and regulatory arrangements in western lands may be acceptable if these inefficiencies are "* * *a necessary incident to the coexistence of the two* * *sovereigns." Additionally, such de facto regulation and taxation of the local or national sovereign by the other may be acceptable so long as the burden is one that the "Constitution presupposes."

The property rights and regulatory arrangements in question, where the national government holds one-third of the national land area and substantially larger proportions in specific states, can hardly be considered to be an arrangement presupposed by the Constitutional authors. Furthermore, these property rights and regulatory arrangements can hardly be viewed as necessary to the "coexistence" of the multiple sovereigns. Indeed, the opposite; the elimination of these arrangements is more likely to assure the coexistence of the multiple sovereigns.

In taking this focus and attempting to draw a link between property rights and regulation of western lands and local sovereignty, we have, to some extent, assumed the roles of both advocate and

critic. Advocacy and criticism, however, are implicit in a method of analysis that evaluates the merits and deficiencies of alternative property rights and regulatory arrangements. "As political economists we examine public choices; * * *make institutional predictions* * * (and) analyze alternative political-social-economic structures."[15]

For this reason the methods and conclusions here should not be confused with advocacy of either the Constitutionality or, in a normative sense, the desirability of Nevada's A.B. 413. Our findings can be summarized as indicating that there are theoretical, empirical, and Constitutional bases for the claim of impairment of local sovereignty as a consequence of extensive land ownership by the national sovereign. Yet to the extent that Nevada's A.B. 413 would simply transfer ownership of BLM lands to a comparable agency of the state, the analysis suggests that there may be little or no net benefit, financial or other, from this transfer. Only to the extent that the state government is likely to dispose of lands more quickly than the national government (in order to meet the costs of managing the land) would the literal enforcement of A.B. 413 generate more clearly defined property rights and greater local sovereignty.

B. FEDERAL LAND LAW, SOCIAL EFFICIENCY, AND THE POLITICAL ECONOMY OF THE SAGEBRUSH REBELLION

The Evolution of Property Rights in Public Lands

The traditional treatment of western rangelands as a "commons" and their "privatization" has not only provided a source of frontier folklore, it also provides an historical laboratory for observing the creation and protection of property rights. Hill and Anderson,[16] for example, cite the activities of cattlemen associations, and technical innovations such as barbed wire fencing, as devices used by settlers to establish and enforce their property rights in the land.

The lands that are the concern of the SR range from the least productive desert lands to lands of marginal productivity that could not be profitably entered under the terms of Congressional homestead acts. In many cases, however, the proximity of "public" lands to private lands that could be profitably obtained led to the deterioration of the range from over-grazing. This system of unconstrained public access and use of western lands also sparked occasional range wars and controversy that ultimately led to the Taylor Grazing Act of 1934, in the midst of the economic and ecological calamities of the "dustbowl." Through the grazing lease program, Congress succeeded in establishing a system of property rights under which only access to the land remained a public property right. This was a step closer to a private property rights system and, therefore, was an improvement over the previous treatment of the land as "public domain."

Hardin's seminal treatment of the "tragedy of the commons,"[17] and others that have followed, indicate that the problem with unconstrained public access and use of the land is that this property rights system provides no incentives for maintaining the productive, or exchange value, of the resource. Costs of resting or improving the range are borne entirely by private individuals who either reduce the size of their herds or invest in improvements. Conservation and improvement of the range do not occur under a regime of public property rights in the land because the benefits of these actions are likely to accrue primarily to other users of the range. The prospective investor or conservator of the public resource cannot "internalize" the spillover of investing or conserving. For example, reductions in herd size by one user will induce other users to increase their herds, and the investor cannot exclude competing users from benefiting from improvements on the range.

From this perspective, the enactment of the grazing lease program administered by the BLM represented a clarification of property rights in the land which increased social welfare by increasing the long run productivity of these publicly owned assets. This altered property rights system constituted an improvement over the previous treatment of the land as public domain because it simulated a system of private property rights to the extent that it allowed lessees of land to exclude unauthorized competing users.

Beyond these successes in U.S. Government land management policy, limitations in other areas have drawn criticism from interest groups and policy analysts and have elicited legislative remedies from Congress. In the first case, analysts who have examined the social efficiency implications of the existing property rights arrangements in western land have sharply criticized bureaucratic management. Baden's examples of BLM's practices of "rest-rotation" and "pinion pine - juniper chaining," which he suggests have a zero, and perhaps negative rate of return on public investment, are suggestive of a general problem encountered in bureaucratic management.[18] In this case, bureaucratic management of the land represents a system of property rights which does not induce responsible decision makers to maximize the productive, or exchange value of the lands.

On the other hand, it must be acknowledged that agencies of the U.S. Government like the Department of Agriculture and its U.S. Forest Service, deserve considerable credit for their contributions to forestry and agriculture. Further, environmental legislation, and the influence of environmental concerns in public land and resource legislation under the leadership of Congress, not to mention the influence of environmental lobbies, have begun to deal in a meaningful way with the problems of the "commons." Among these legislative attempts to deal with the property rights

dilemma of the "commons," are the Federal Land Policy and Management Act of 1976 (FLPMA) and the Wild Free-Roaming Horses and Burros Act of 1971, both of which are of interest to Nevada and at issue in the SR.

Some Economic Implications of Property Rights in Public Lands

The most recent effort of Congress to modify its management policies, FLPMA, does not deal with the fundamental problem generated by public property rights and bureaucratic land management. Moreover, FLPMA has been viewed with some apprehension in the West because in it Congress has announced the intent of holding an unspecified amount of current U.S. Government land in perpetuity. In addition, it has elaborated an expanded regulatory role for the BLM.

It should first be noted that the intent of Congress to hold certain lands in perpetuity is really only a change in the policy of disposal that the U.S. Government pursued in the 19th Century. The policy of Congress in the past has clearly been one of selective disposal and retention, however, and the effect of FLPMA will be to perpetuate this effective policy. Hence, beyond dispelling the understanding that all these lands are held in trust for eventual disposal, this aspect of the policy in FLPMA is merely a continuation of policies of the past.

The second aspect of FLPMA noted above, the expanded role of the BLM, is likely to have more significant consequences. These consequences flow from BLM's administrative discretion over the use of the land and the procedures that must be followed to obtain use rights. The administrative discretion generates uncertainty, and requirements to comply with administrative procedures to use or acquire title to land impose a transactions cost on private individuals and governmental agencies seeking to acquire rights to use the land. Applicants for lands under existing regulations recognize these transactions costs and bear them in the same manner that purchasers of residential properties recognize and pay commissions, fees, and taxes required to execute a transaction.

Transactions costs are significant from an economic point of view because their existence tends to foreclose possibilities for mutually beneficial exchanges. Hence, transactions costs impose a dead-weight, or non-recoupable loss on society in the form of lost opportunities to pursue some privately or socially productive activity. In the same manner that an increase in taxes, fees, and commissions may drive prospective buyers out of markets for goods and services, transactions costs in the public sector also serve to raise the costs of, or tax, the reallocation of scarce resources into more highly valued uses which occurs in these markets.

As noted, applicants for land under existing regulations recognize the transactions costs involved in their decisions to submit

applications. By its power to regulate the terms of applications, Congress and the BLM may raise or lower costs of application with the same effects of raising or lowering a tax or use fee. Like the effects of a tax, the costs associated with the application process may generate a "dead-weight-loss" by precluding applications for uses which would be profitable without the transactions costs. That is to say, the transactions costs drive the marginal buyers and applicants out of the market.

These effects of regulation can be illustrated with the standard analytics of supply and demand, and the aid of Figures 1 and 2. As with the price of any exchangeable private property right, the price of land in any community is determined by the interaction of the forces of supply and demand. For illustrative purposes we may assume that the demand curve for land of a given quality in terms of site value, or productivity, is downward sloping as shown in Figure 1.

Growth in the community or increased speculative interest in the land will shift the demand curve to the right. The demand for land in Nevada has been subject to pressures from growth and considerable speculative pressure due to the prospective siting of the MX missile system in the state. In addition, with its dependence on mining activity, which is subject to "boom" and "bust" cycles, speculative pressures on land prices have been compounded in Nevada. These three factors, the prospective siting of the MX missile in Nevada, a recent "boom" in mining activity, and the bureaucratic regulation of land acquisition, have combined to generate substantial locational rents in affected local areas. More generally, however, market distortions in the form of BLM generated rents are most likely encountered when BLM lands have private uses that are more productive, in market terms, than the uses made of the land by the BLM.

The supply side of the market for land in Nevada and other areas where the BLM's land holdings are substantial, presents an unusual case in economic analysis. The typical case, where all land is privately held, or held by a government in perpetuity, is illustrated by Figure 1. The supply curve for land in the Figure S, represents both the long run and short run supply of land. Line S in Figure 1 is perfectly vertical because more land cannot be obtained. Hence, in the figure, the land available on the market, Q_O, would sell for a price dependent solely on the demand for land of a given productivity and location.

In Nevada and other public lands states the supply curve shown in Figure 1 only represents the short run supply. The situation in these states is unique because in the long run the supply of land is relatively elastic. Contrary to popular wisdom, more land can be "produced" in that it can be made available for exchange on the market by the BLM's ability to release its holdings.

The elasticity of the long run supply of land is dependent upon administrative policies of the BLM. More precisely, the shape of the supply curve depends upon the price at which BLM is willing to release land plus transactions costs associated with acquiring it. For example, suppose the national government were willing to release all its land at a fixed price of P_o shown in Figure 1. Also suppose that no transaction costs were imposed. Under these assumptions, the supply of land could be represented by the kinked line, S', in Figure 2, which runs through points a, d, and up S'. That is, the long run supply curve under these assumptions would be a perpendicular to the short run supply, S, at P_o, extending out to another vertical line above point Q_t on the horizontal axis which represents the sum of BLM and existing private holdings.

In the event of growth in the demand for land which could be represented by the shift in the demand curve in Figure 2 from D_o to D_1, the "no administrative transactions costs" assumption would yield an intersection of supply and demand that brings an additional quantity of land $(Q_1 - Q_o)$ into private holdings. Further growth in demand under these assumptions would bring additional land into private ownership until the quantity Q_t is reached. Without some mechanism for releasing land, of course, these shifts in demand would simply generate higher prices for a fixed quantity of land.

The introduction of transactions costs in this model is accomplished by adding the transactions costs associated with acquiring a marginal acre, T, with the per acre price. Hence, with a new supply curve, S' + T, the equilibrium quantity of land acquired would be reduced to Q_2 in Figure 2, and the extent of this reduction would depend entirely upon the magnitude of the transactions costs. The elasticity of supply, S' + T, indicates the degree of responsiveness of BLM administrative procedures to changes in the value of its land holdings.[19] The administrative regulation of the elasticity of the supply of land by the imposition of applications processes and delays in decisionmaking results in the restriction of the number of applicants as shown in the graph, and generates a dead-weight welfare loss represented by the shaded area on the figure.[20]

The "dead-weight" loss, as noted, reflects lost opportunities for socially productive uses of the land. The welfare loss triangle represents the net value marginal entrants on the land expected to be able to produce on the land or, the discounted value of an expected income stream from the land. The marginal entrants are presumably willing to expend real resources to acquire the land, and subsequent to the foreclosure of opportunity to undertake this expenditure, the prospective land entrant must pursue some other opportunity, an opportunity that we presume has a lower value to the entrant. (Otherwise, the second prospect would have been the opportunity pursued.)

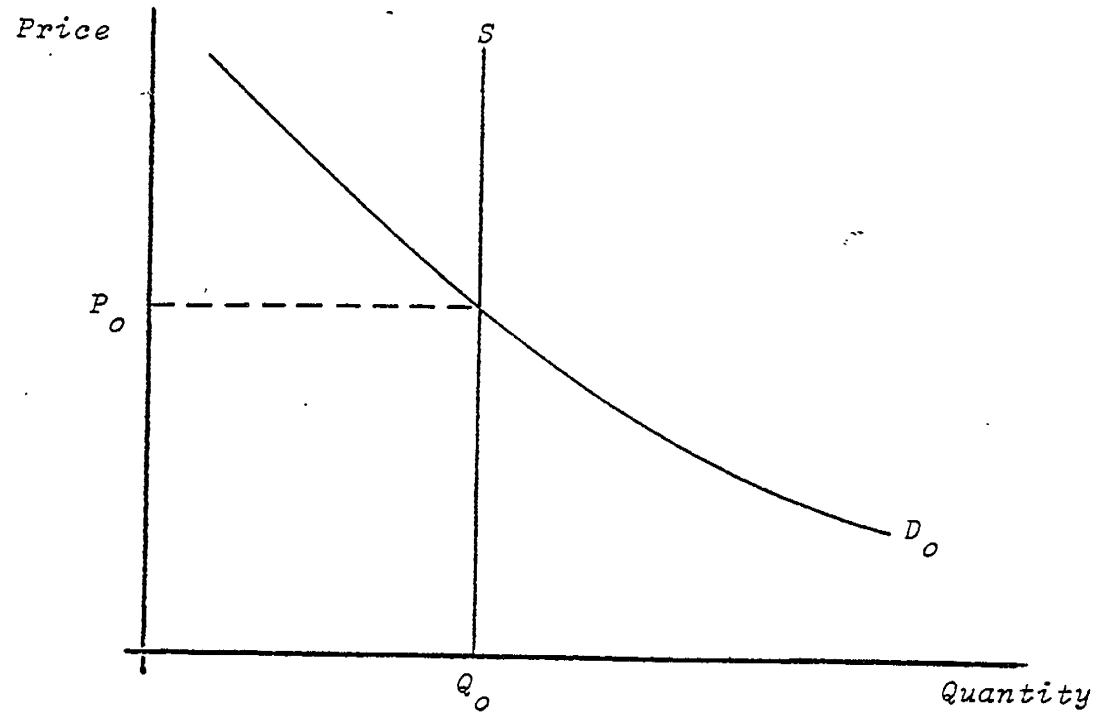

FIGURE 1

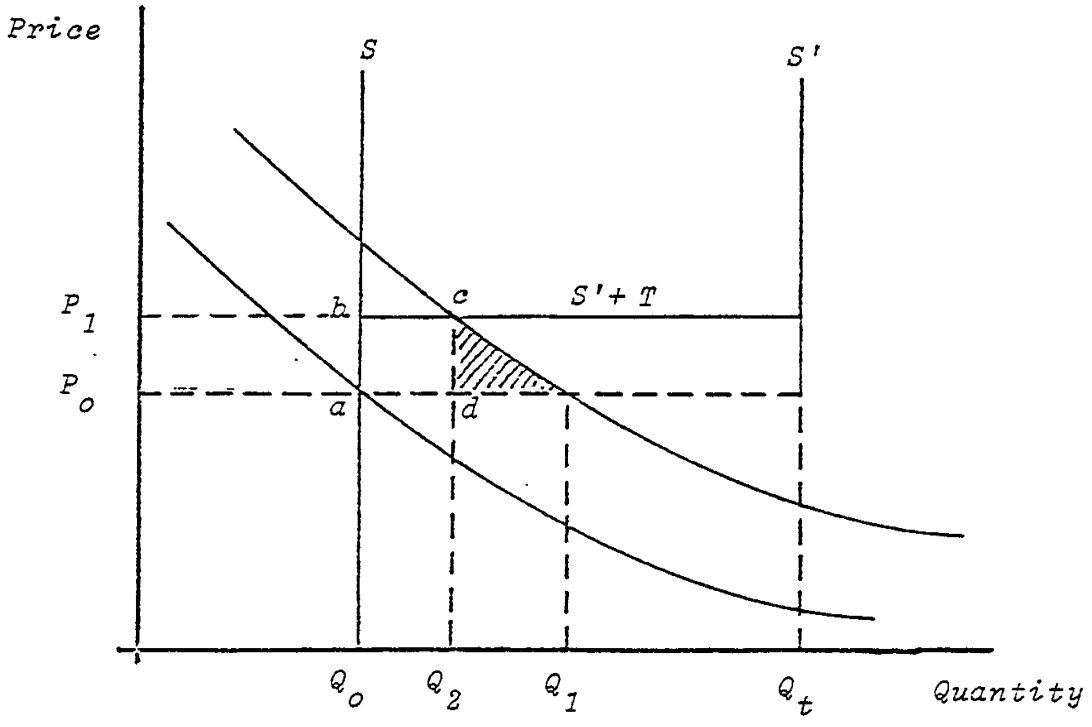

FIGURE 2

At best, the prospective entrant may subsequently discover a better opportunity, but more probably not. And, to rely on this possibility to achieve social efficiency makes questionable assumptions about the intelligence of individuals and the nature of their search for opportunities. In any event, these individuals must incur a real loss since even if subsequent opportunities are just as good, i.e., there is no welfare loss triangle, individuals must expend resources to find these other opportunities. Resources expended for these purposes are the transactions costs noted above. In Figure 2, these costs are represented by the rectangle "abcd." At best, these resources must be considered as a "cost of compliance," a cost that is over and above the funds budgeted through the national government for the management of the lands. On the other hand, to the extent that these costs would be avoided under an alternative property rights arrangement, the resources should be regarded as wasted.

One additional area in Figure 2 that is relevent to the discussion is the rectangle "P_oP_1ba". This area represents rents generated by administrative transactions costs that accrue to owners of the initial stock of private land, Q_o. It is important to recall that these rents are primarily locational, and are most associated with problems of "land-locked" communities and the control of residential and commercial development. These rents are of interest for a number of reasons. First, because rents associated with transactions costs, like speculative rents, become incorporated into the costs of doing business in a given area, the rents become a burden on local citizens, businesses, and governments.

A second reason for concern with the rents generated by these property rights and regulatory arrangements become dissipated into costs through "rent-seeking" behavior. Such behavior is characterized by negative-sum outcomes for those involved along lines similar to the "tragedy of the commons."[21]

Finally, a third reason for concern with the rent generating characteristics of public land management concerns their distributional implications. That is, because different buyers in the market have differential abilities to comply with administrative procedures and to bear risks associated with delays, certain buyers will be harmed relatively less than other, more marginal buyers. Those most likely to be "priced out of the market" by administrative compliance costs are the smaller mining and ranching interests, as well as local governments which do not have a sufficient tax base to support the necessary administrative staff.

The conclusions of our discussion of the supply of and demand for land in Nevada are that land prices are subject to significant distortions resulting from a combination of factors: The BLM's retention and disposal decisions on the supply side, and on the

demand side, speculative pressure caused by mining activity and potential MX missile deployment in Nevada. As a consequence of these factors it is impossible to isolate the effects of BLM's influence on the supply side of the market. However, several examples can illustrate the combined effects of these factors on land prices.

Our field investigation in July 1981 revealed that in Eureka County, Nevada, which has mining activity and is a potential MX missile deployment area, residential properties selling for between $4,500 and $7,500 in 1978 were being listed for sale at prices between $55,000 and $80,000. Investigations of price levels for residential land in other rural areas disclosed cases of building sites selling for $12,000 to $20,000 per acre, prices which would be expected in suburban Washington, D.C., but not in suburban Ely, Nevada. Admittedly, much speculative pressure is due to the prospective siting of the MX missile in Nevada. However, this too may be viewed as a consequence of extensive national government land ownership in Nevada.[22]

Evidence gathered on the Nevada experience with land speculation, suggests that these premiums or rents are substantial, and may amount to many times the value of the land. Hence, it is fairly clear that one consequence of the current system of property rights in western lands has been to generate significant distortions in local land prices. Further, the affects of FLPMA have simply been to generate greater uncertainty, and hence even greater rents, or premiums, on all lands restricting socially beneficial uses of the land even further.

Another reason for local concern with existing land policies is the nature of the BLM land in Nevada (and other Great Basin and Rocky Mountain states). As noted above, unappropriated lands were not entered under various Acts of Congress because their productivity did not justify homesteading. Moreover, the treatment of these lands as public domain in the late 19th and early 20th Centuries virtually precluded profitable entry on the land.[23] In economic terms, these lands are marginally productive and are brought into, or taken out of production with fluctuations in the market price of its output. Hence, the U.S. Government's regulatory powers wield substantial influence over the region's marginally profitable economic bases in ranching, agriculture, and mining through its discretion over regulatory transactions costs.

The Nevada Experience: The Private Sectors

The State of Nevada ranks 7th in terms of land area with approximately 70.7 million acres. At the same time, it ranks 46th in terms of population with a 1981 population of approximately 825,000.[24] Principal economic activities in Nevada are gaming and tourism, centered in the two major metropolitan areas, Las Vegas

in the south, and the Reno-Sparks-Carson City areas in the northwestern part of the state. Gaming and tourism contribute to local incomes and the tax base throughout the State but mining and ranching activities are dominant outside the two metropolitan areas mentioned.

As a consequence of 60.8 million acres of U.S. Government property in Nevada, 49 million of which are managed by the BLM, private sector activity is very dependent upon bureaucratic channels for land acquisition rather than traditional market exchanges. It should be noted that this is in contrast to the situation east of the Rocky Mountains.

Since the BLM dominates the market in terms of "market share" as the single largest landholder, it has significant power to affect the price of land. This power exists in the BLM's administrative powers over the retention and disposal of lands, and it is an influence on the price of land in addition to the capitalization of transactions costs into the price of land as discussed above. Clearly, by a comparison of market shares, the State of Nevada has no such power. The state owns 105,500 acres, or fourteen one-hundredths of 1 percent of the state's land area.[25]

An examination of the impacts of the BLM's monopoly power in local land markets is extremely important in the framework of the legal theory of the SR. On the one hand these impacts take the form of affecting the profitability of activities on the land and, hence, concern private rights of an economic character. The specific effects examined below are impacts on mining activity and impacts on ranching activity. These impacts are of interest here because the economic value of the land and the profitability of activities on the land effectively limit the tax powers of the sovereign. Consistent with the distinction posed above concerning actions of one sovereign directed at individuals vis-a-vis actions directed at states, the limitations of state sovereignty implicit in the effects of national land policies on mining and ranching profitability fall into the former category. Hence, these are indirect effects on the sovereign but, direct or not, their effects may be substantial.

These "indirect" effects are also of interest to the extent that local governments operate in local markets and are influenced by local market conditions; such effects come to bear "directly" on the local sovereign. These effects of national policy on local governments, along with the other effects of national government policy on local governments are discussed below.

Mining and U.S. Government Landownership

The center of attention, particularly with respect to U.S. Government landholdings, lies in the rural central and eastern parts of Nevada. The major urban areas of the state have either

developed on private land, as in the case of the Reno-Sparks-Carson City metropolitan area; or, as in the case of Las Vegas, a "land-locked" community, the community has had sufficient funds for urban planning and land acquisition. These urban communities have largely been exempt from the difficulties in local government finance associated with extensive U.S. Government landholdings. This has primarily been the result of the state's adoption of gaming as the major sector in the economy and tax base as opposed to the traditional tax bases of local governments. Although gaming is present in the rural areas of the state, it does not provide an adequate tax base for local governments in these areas, consequently these communities must depend upon the traditional tax base for local governments, viz., the land and activities on it.

It should be noted that private lands in communities which began as mining centers were originally patented as mining claims, e.g., in Austin, Eureka, Ely, Goldfield, and Tonopah. As a consequence, and in contrast to communities where ranching and agriculture have been the traditional economic bases of the community, land for community development is scarce. Hence, "land-locked" communities and associated problems are most likely encountered in mining areas.

By tradition, prospectors and miners have had virtually unencumbered access to public lands for the purpose of developing mineral resources.[26] It would then appear that mining and prospecting activities are not adversely effected by the extensiveness of U.S. Government landholdings. However, it must be recognized that mining and prospecting are dependent upon service industries and a labor force which are generally located in nearby towns and communities. The mining town, comprised of private land and state/local government land, provides the necessary support in terms of inventories of capital equipment, service to maintain capital stock, housing for the labor force, retail sales, medical facilities, police protection, education, and so on. All of these services supplied within the towns act to lower the costs associated with the development of mineral resources by lowering the transportation costs of providing supportive services to mining operations. As the extent and intensity of mining grows in a particular region, it is expected that the size of the supportive community must necessarily grow also. This growth in the community would occur to a minimum scale determined by the size of the labor force that is attracted to the area.

A mining operation or business must be treated as a consumer when considering the inputs that the firm uses in its day-to-day operations. If land rents on existing private lands are driven up, as illustrated above, then the costs of doing business in the area increase. Hence, a link exists between the decisions made by BLM and the costs incurred by mining operations. This linkage

works through land rents reflected in the prices of goods and services in the community.

Ranching and Extensive U.S. Government Landownership

The effects of extensive national government landownership on the ranching industry of Nevada are considerably more varied in nature than the impacts on mining. This is accounted for by the extensive dealings between members of the ranching industry with agents of the U.S. Government, from the Departments of Agriculture and Interior. In the latter case, the ranching industry has a tenant relationship with the national government, and, hence, the policies of the landlord have substantial potential to help or harm the tenants.

In this regard, it must be acknowledged that the industry and the state, in general, have been subsidized by the national government. These subsidies are evident in the grazing lease fee determination that adjusts fees according to the costs of production, for example. They are also evident in payments in lieu of taxes received by county governments and the pass through of grazing lease revenues to the state.[27]

These characteristics of the relationship between the industry, the state, and the national government notwithstanding, an examination of the property aspects of this relationship reveals problems generated under the existing property rights and regulatory arrangements in rangelands. The association of ranching interests with issues in the SR has clearly not involved controversy over their subsidization by the national government, however. Rather controversy has been focused in areas where the industry has had poorly defined, or only informally acknowledged rights to the use of the land. Specifically, field investigations conducted in July 1981, revealed a number of specific issues of this sort arising from U.S. Government policy that are of concern to ranchers. These issues include problems generated by noncontiguous landholdings, the "wild" horse and burro issue, and prospects of alternative property rights arrangements under the provisions of Nevada's A.B. 413.

Inefficiencies of Noncontiguous Land Ownership Patterns

Under this heading there are two sub-issues of concern to ranchers. The first deals with public stock driveways. Early U.S. Government land grants to railroads created areas known as "checkerboard" lands where BLM and private land parcels alternate.[28] Moreover, in other regions many ranchers own non-contiguous parcels separated by BLM lands. In order to use their own lands and lands leased from the BLM, ranchers have become dependent upon common access stock driveways which are strips of land that ranchers use to move their stock from one grazing area to another. The alternative is to truck the animals between grazing areas, a much more expensive procedure. Ranchers complain that new land

entries pending under existing acts will close off these driveways. This action would undoubtedly raise ranchers' costs and reduce the profitability of the industry.

The stock driveway issue is somewhat typical of these cases where poorly defined property rights in resources generate social costs. In this case, the market value of these common access privileges, along with access to grazing allotments discussed below, have generated rents. Consequently, their existence has generated spontaneous market responses and various political, legal, economic, and social actions to acquire the rents and to protect them from being acquired. Social costs are generated in the case of the ranching industry in the form of private energies and resources being used to comply with costs imposed by regulation. Further, to the extent that public ownership fails to create a system of incentives to induce investment and improvement of the land, investment opportunities are foregone.

These consequences may be viewed as a result of the differential treatment accorded access to common property resources in the market and by Congress. While access to common property resources are clearly a privilege that the industry enjoys, one regulatory objective noted by Ganzel[29] has been to make access "privileges" quasi-permanent as a means of creating proper incentives for maintaining the resources. Hence, the intent of regulators was to induce the industry to incorporate access to the common property resources into their expectations and production plans.

Whether this has been an explicit regulatory objective or not, it has had the coincidental effect in the market of generating locational rents that have accrued to properties situated to be able to take advantage of the stock driveways and BLM grazing lands. Ranchers that purchased such properties have, consequently, paid these locational rents when acquiring them. These rents reflect the expected increased profitability of employing the common property resources along with privately owned resources. From the market's perspective it is immaterial whether access to the common property resource is a "right" or a "privilege" so long as the policy and behavior of the government is to make the resources available on a routine basis.

There is clearly a sense in which the industry has paid for its access "privileges," and in the same manner that rents paid in mining communities became capitalized into the costs of doing business these locational rents have become incorporated into the ranchers' costs. Hence, the threat of entry on stock driveways, and the reduction of grazing allotments from the wild horse and burro issue below, not only reduce the profitability of ranching but also threatens to revoke a privilege that the industry has been led to rely upon by the past policies and actions of the government.

The second sub-issue related to noncontiguous landholdings is the problems encountered by ranchers in their attempts to control weeds and pests on their lands. This issue provides a classic case of external diseconomies. That is, it is a case in which one set of property owners, ranchers, are directly harmed by the activities of another landholder, the U.S. Government. Actually, in this case it is the lack of action of the BLM that is detrimental to neighboring proprietors.

In their efforts to control weeds and pests on their own lands ranchers, acting alone or through special service districts,[30] incur the costs of spraying their lands. By controlling these pests on their own lands they also control these pests on BLM lands. In economic terms, ranchers generate an external benefit on BLM lands. Ranchers' complaints in this matter are two-fold. First, the BLM does not contribute to the costs of pest control and, hence, the BLM "free-rides" at the expense of the ranchers. Second, the BLM makes no efforts at pest control on their lands. Consequently, pests thrive on BLM lands and quickly return to the private lands after the spraying operations which, of course, raises the costs and reduces the profitability of ranching operations on private land. Like the suburban land owner who complains that weeds in his neighbors' yards spread to his, the ranchers complain that the BLM is a bad neighbor.

The "Wild" Horse and Burro Issue

The "wild" horse and burro problem is the second land use issue of concern to ranchers. The system that evolved on the open range in the West was that those individuals in the regions where the horses and burros roamed maintained the herds. In addition to having a market value, the horses presented the residents of the area and horse-lovers throughout the nation with aesthetic pleasure. These non-pecuniary benefits are undoubtedly related to the passage of legislation protecting the animals.

There are also indications that a large proportion of the free-roaming horses on the range in Nevada were, in fact, the branded private property of ranchers that were allowed to "free-ride" on public domain. Putting the issue of trespass aside for the moment, private property rights in these horses meant that the herds were benefited by usual livestock management and breeding practices. Further, the herds were limited to an acceptable size determined by the ability of the land to support the nutritional needs of the horses and competing livestock. Because the local residents could monitor the herds at a relatively low cost and because they possessed the necessary skills in the management of livestock, the "wild" horses were efficiently managed. Truly "wild" horses, of course, were not private property so that this fraction of the horses on the range did not enjoy these benefits.

The Wild Free-Roaming Horses and Burros Act of 1971 drastically altered this management scheme by empowering the BLM to manage

these animals. In the opinion of many local residents and experts the results have been disastrous.[31] Horse herds have over-populated the range to the detriment of cattle, wildlife, and the horses themselves. Incidents of starvation and disfigurement due to lack of food and water among the horses have become more common as the horse herds have grown, and the horses' long run prospects are indeed bleak. Thus an apparent act of compassion has unintentionally become one of condemnation.

This is a case in which a decentralized system of management was abandoned for a centralized system. Although the decentralized system did not work well in the sense that branded private property was allowed to "free-ride" on public domain, the fact that property rights were private assured that those horses on the range would be adequately cared for. Moreover, the trespassing of private herds naturally limited the sizes of herds that were truly wild. Protecting "wild" horses by converting them into public property has clearly worsened the situation. The horses are still "free-riding" off the land, but now in greater numbers. Further, since they are now public property no individuals are willing to incur the private costs to maintain and protect them, and we have adopted a bureaucractic management system which so far has proven to be a poor substitute for private management.

These cases shed light on the nature of ranchers' concerns and illustrate the consequences of the existing property rights and regulatory arrangements in western lands. In the cases noted above, ill-defined, perhaps misunderstood, and often unenforceable rights to access to common property resources have led to controversy such as the SR. The ranching industry's interests in the cases above have clearly been in access to the land that they have been led to rely on. Controversy such as the SR and the objectives delineated in Nevada's A.B. 413, however, can do little more than call attention to the problems faced by the industry.

The prospect of regulation by the state has a number of potential pitfalls for the ranching industry but they are apparently worth risking in light of the uncertainty generated by recent changes in Congressional policies and regulations. In light of this uncertainty, ranchers may favor the SR even though they may have little hope of ever obtaining title. On the basis of their alternative expectation of state control and management similar to the current BLM arrangement, ranchers may feel that state control will offer them greater political input into land policies. This line of reasoning leads to a scenario that SR critics have elaborated. That is, ranching interests in the state legislature may enable current users of BLM lands to enjoy most of the benefits of title to the land without the necessity of paying for it. The validity of this scenario clearly depends upon the degree that legislative influence may be substituted for the purchase of the land.

From the perspective taken here, state management of the type assumed before will offer little, if any, advantage over the current policies. Indeed, the literatures on property rights and rent-seeking are unambiguous on the point that social welfare will be increased by making the land available to profit-seeking individuals rather than rent-seeking speculators, politicians and bureaucrats.[32] This analytical perspective also suggests that the current property rights arrangements, specifically the grazing lease program and Congressional legislation protecting wild horses and regulating land use, encourage rent-seeking behavior by special interests of this sort.

However one regards the motivations of various interests groups, it should be recalled that their actions are strongly influenced by the political institutions and policies. Ranching interests' attempts to remediate the effects of national government policies through their state government are arguably both privately necessary and politically proper actions in a federal system.

Impacts of Extensive U.S. Government Landownership on Local Governments

As noted the effects of extensive national government landholdings in Nevada and similarly situated areas are not limited to the private sector. In examining the private sector effects we have seen the basis for claims of "indirect" impacts of national government land ownership on local sovereignty. Below these effects are examined further but, consistent with the distinction between actions of a sovereign directed against individual vis-a-vis other sovereigns, the focus is on the "direct" effects of existing property rights and regulatory arrangements in the land. In the latter case, the focus is on the way that extensive national government regulation of land use and disposal inhibit the exercise of traditional sovereign powers.

Within this framework, the sum of "direct" and "indirect" impacts of national regulation of local affairs can be further divided by their effects on local governments' abilities to generate revenue and its ability to exercise its local mandates. The focus below is first directed to the revenue side of the communities fiscal accounts, then to the provision of public goods and services, and then to local policymaking powers.

The power to tax is one of the inherent sovereign powers noted above. This power is delegated by the state government to local governments through either the state constitution or through legislative actions. The Nevada constitution, article 8, section 8, implicitly requires the legislature to delegate this power to local governments and it explicitly mandates that this taxing power shall be limited.[33] Historically, the property tax has been the most important source of revenues for local governments. The second most important source of revenues for local governments

(aside from user fees) is inter-governmental transfers, and primarily U.S. Government grants.[34] Atkinson et al. have indicated that there has been a continual decline in local governments' reliance on property taxes and an increasing reliance on these inter-governmental transfers.[35] This trend has continued with the recent revision of Nevada tax codes rolling back property tax limits and increasing state sales tax receipts. The latter indicates that local governments will become even more dependent upon inter-governmental transfers and, therefore, are likely to suffer a loss in local autonomy.

Another explanation for the extensive dependence of local governments on national government revenues is applicable nationally. That is, increasing U.S. Government taxes and distribution of these revenues through revenue sharing and block-grant programs have simultaneously limited states' abilities and needs to generate revenues locally. However, extensive U.S. Government land ownership in Nevada, and subsequent removal of these lands from the tax base, intensifies these problems. As compensation for this situation local governments receive "payments-in-lieu-of-taxes" which are based upon acreage and population. Accordingly, in fiscal year 1979 the BLM paid a total of $5.5 million to Nevada counties in lieu of property taxes on BLM lands.[36] In contrast, the total ad valorem tax collections in Nevada were $176.4 million in the same year.[37]

Recalling that the BLM controls some 49 million acres in Nevada, it follows that local governments receive about 11 cents per acre. In contrast, the average payment per acre for private property in the state was $17.72. This, of course, includes revenues from the taxation of improvements on the land. The average payment for agricultural land, which would be more comparable to BLM's better holdings appears to lie in the range of $1 to $3 per acre.[38]

It is clear that the in-lieu-of-tax payments received by local governments in Nevada are substantially below the tax revenues generated when the land is privately held. However, quality differences in the land must be considered in interpreting these figures. In some cases, such as when BLM lands are alkali flats, qualitative differences are extreme and such comparisons are worthless. On the other hand, in cases where the differences between BLM and adjacent private lands are generated by private investment, such comparisons are quite meaningful.

In light of this uncertainty generated by the quality of BLM lands vis-a-vis private lands, the question of whether local government revenues would be greater than payments-in-lieu-of-taxes currently received remains a question. However, under the property rights arrangement proposed by Nevada's A.B. 413 there would be no alleviation of this problem since the state enjoys a similar immunity from taxation by local governments. Hence, short of some kind of state transfer to local governments, e.g.,

a pass-through of leasing revenues from state" grazing lands, A.B. 413 has relatively little to offer to local governments.

The prospect mentioned earlier, that the costs of state management may accelerate the privatization of the commons and thereby increase local governments' tax base, however, may be viewed as one possible advantage to local governments. And, similar to the interests of the mining and ranching industries, bringing the regulation of the land to the state level may be viewed as advantageous by local governments.

As uncertain as these prospects may be for these interest groups, resources used in the promotion of the SR indicate a willingness by these groups to incur costs in order to avoid the rent-transferring consequences of uncertain national policy. This, of course, is illustrative of the social costs of rent-seeking behavior. It is further illustrative of the degree of dependence of the local private and public sectors on the policy decisions of the national government. This dependence is clearly a "direct" impact on the local public sector since it must rely on the beneficence of Congress and the state government rather than the traditional tax base of local governments. Under the current system, in-lieu-of-tax payments are determined by the U.S. Congress rather than the Nevada constitution, the Nevada legislature, or by local authorities. The state has little input into the determination of the availability of these payments, let alone their level.

An additional way that Congressional policies serve to limit the tax powers of local governments comes from the extensive regulation of land-use by the national government. The ability of any type of tax to generate revenues is dependent upon the base of the tax, its rate structure, and the tax rate. The base of the tax is the object on which the tax is levied or, in the context of the discussion of local tax power above, the land. The rate structure refers to rate classes or categories based on some parameter of the tax base. Unimproved, improved, residential, commercial, and agricultural designations of land status or use are common parameters for structuring the tax. In other words, the rate structure establishes the degree to which a government can tax discriminate by charging different rates for different land categories.

The United States Government is capable of influencing the use of a particular parcel of land not only through the policies of the BLM but also through environmental laws, OSHA regulations, wilderness area designation, or any other legislation that either excluded particular activities altogether or increases the cost of these activities. Consequently the ability of the United States Government to regulate activities on land also affects the rate structure of the property tax system in Nevada.

In addition to the effects on the property tax, the degree to which the United States Government affects the profitability of mining also has adverse effects on Nevada local government's only alternative to the property tax, the net proceeds tax which is a tax on the output of mines. Revenue collections from the net proceeds tax suffer in proportion to the extent that mining activity is discouraged by high land rents in mining communities.

A final comment concerning the revenue side of the state's fiscal accounts deals with deficit financing. Although there are no indications at the present that Nevada governmental units are currently experiencing any difficulty in selling bonds, this is a potential source of future problems for localities. The backing for revenue bonds shrink as tax bases and the net proceeds tax are reduced. If this were to occur it is reasonable to expect that investors would lose confidence in rural Nevada's communities ability to pay on these debt instruments and consequently sales will decline.

Impacts on Local Governments' Provision of Productive and Protective Services

On the expenditure side of local governments' fiscal operations, the effects of extensive national government landownership in Nevada are equally clear and probably constitute the most obvious violations of local sovereignty along the lines discussed in the context of the discussion of legal theories of the SR. To the extent that local governments are land users and attempt to regulate the activities of other users, local governments must pay the rents on land, they must bear the transactions costs of dealing with the BLM in addition to normal operating costs, and they must bear the dead-weight losses just like any other consumer.

An examination of the Nevada constitution reveals that certain services are mandated, and those require expenditures of tax revenues. Protective services are mandated in articles 4, 6, and 12, while productive services are mandated by articles 11, and 13. To the extent that performance of these protective and productive services depends upon expenditures for manpower, for goods, for services, and for land, local governments must compete in the market.

From an analytical perspective, the impacts of the BLM in the market for land and the distortions of all prices discussed above are identical to the effects of a tax. That is, the transactions costs imposed in the market for land have the same impacts on the allocation of resources that a tax on land transactions would have. Hence, like the power to tax, the power to impose transactions costs is a power to destroy.

The destructive nature of these transactions costs is particularly evident in the cases of local governments in sparsely

populated areas. In these cases, maintaining staffs of competent local planners and administrators in order to be able to comply with administrative procedures is extremely costly on a per capita basis, particularly when one of the counties in question has a total population of less than 1,000, and a number of the others have populations under 10,000.[39]

In addition to the high costs of complying with regulations of the national government concerning the land, these regulations impose dead-weight losses on local governments just like other land users. The counties are required to pay the market price of the land as determined by the BLM. This price, of course, is the presently distorted market price, and this further burdens local governments by forcing them to pay BLM generated rents. This practice can only contribute to the further distortion of market prices.

Quantitative evidence on the magnitude of rents and price distortions, unfortunately, is scarce and is difficult to evaluate when available. For example, an estimate of the dollar value of transactions costs, land rents, and dead-weight losses cannot be made with any reasonable degree of confidence because of the large number of intervening variables such as site values, land productivity, proximity to mining activity, and potential MX missile deployment areas.

With this lack of quantitative information we must rely on the behavior of individuals to indicate the existence and the magnitude of these damages. In this regard, the case of "leap-frog" development in "land-locked" communities is illustrative of the way in which U.S. Government landownership impairs traditional sovereign rights to regulate purely local affairs and provide public services.

"Land-locked" communities are unable to expand on contiguous private land and are therefore forced to seek BLM land through an application process in order to expand. The alternative, in most cases, is to develop non-contiguous private land in the vicinity to relieve the pressure on rents and public services in the community. Despite its lower site value because of its distance to the community, the non-contiguous lands are worthwhile developing from an entrepreneur's perspective because of the high rents paid on private land. An additional consequence of the rent is that commercial and residential users of the land will willingly incur the higher costs associated with using these non-contiguous parcels to avoid paying the rent.

Again, mechanisms exist under BLM regulations for the transfer of contiguous lands to the private sector. The question then, is why do these individuals willingly incur higher transportation costs and the higher costs of developing and providing public services to these non-contiguous developments? The answer that

their behavior reveals is that acquiring the superior, contiguous parcels from the BLM is not a costless activity. Indeed, the costs of complying with the regulations and, from our observations, uncertainty over prospective administrative delays, impose prohibitively high costs on the development of many BLM lands.

In areas developing via this process of "leap-froging" from one island of private land to another, local governments have a mandate to develop land use plans as in other communities. However, in the face of limited alternatives for private developers, population growth, commercial development, and subsequent high rents, local officials find it difficult to limit local alternatives further in the interests of long run urban planning goals. Consequently, it is not surprising that such areas are characterized by the near total lack of such planning guidelines, and by minimal compliance with these mandates.

It should be noted that such minimal compliance does not indicate disapproval of the goals of urban planning or a disregard for the amenities of orderly growth. It is quite possible that local governments find themselves in a situation where pursuing these worthy long run objectives precludes short run options for development that are highly valuable given pressures on the community from growth and rents. Hence, in spite of mandates and a genuine desire to achieve the objectives of planning, local governments find their options so severely limited that pursuing these objectives interferes with more urgent and basic local government functions.

Another case in which concerns over violation of local sovereignty are raised, but in a slightly different context, involves an application by the Nye County, Nevada school district for a small parcel of land where it wanted to put a football field in Tonopah, a "land-locked," "boom-town." The application was pending for over a decade. Fortunately, the full dead-weight loss of this delay, which would have consisted of the school district's inability to provide facilities and services which are part of its traditional function in communities, was not incurred. The school district simply entered and "squatted" on the land. While this approach has been successfully used in some cases, it is risky in that it subjects the school district to potential costs from litigation, as well as costs of finding and developing an alternative site. Further, instances such as this illustrate the way in which the exercise of traditional sovereign powers of local authorities is not only impaired, but is in direct conflict with the policies and regulations of the U.S. Government.

C. PROPERTY RIGHTS, LEGAL EFFICIENCY, AND "INSTITUTIONAL" FAILURE

Distortions of public and private choice similar to the above have been examined previously under the rubric of "market failure." Examples of "leap-frog" development, pollution and destruction of common property resources, and so forth, are generally attributed

to failures of the marketplace to force relevent decision makers to consider the full costs and impacts of their actions. As in these textbook cases of "market failure" the impacts of extensive national government land ownership noted above are characterized by a lack of appropriate property rights arrangements and/or relatively high costs of acquiring and enforcing these rights.

The cases of "institutional failure" examined above are really only distinct from these cases of "market failure" in that the dominant actor is the U.S. Government, acting as proprietor and policymaker with respect to western lands. Hence, they are a matter of public policy concern just as cases of "market failure." Inasmuch as these inefficiencies are a consequence of national government policies and impact on the exercise of local sovereignty, however, it is argued that the property rights and regulatory arrangements in western lands become a Constitutional concern.

As noted at the outset, these Constitutional concerns take two specific forms: concerns over "equal footing" and intergovernmental immunities. In the remaining discussion below, our objective is to relate the discussion of social efficiency in section B above to these Constitutional issues. In this effort we do not take the position that social efficiency considerations are the sole object of these legal institutions, only that these issues have, in some instances, been raised expressly by Constitutional doctrines and, in other cases, have been discovered in these doctrines after the fact. Investigations of constitutional issues and substantive rules of law along the lines pioneered by Buchanan and Tullock,[40] Posner,[41] Ostrom,[42] Rawls,[43] Nozick,[44] and numerous others, provide the methodological under-pinnings of such an analysis.

We may begin with the notion of sovereignty itself which, as noted above, has general efficiency implications concerning the consent of the governed and fundamental properties of the "rule of law." Derived from a "contract theory of the state," sovereignty involves an agreement among individuals to establish the "rule of law" embodied in the state. The choice of a particular set of Constitutional rules implies, ex post, that no other alternative could obtain a greater degree of consent. Hence, consent is not only the basis of sovereignty, but when it is unanimous it is indicative of achieving efficient results.

Consent is both desirable and rational from the individual's perspective as a consequence of private benefits generated by the "rule of law" established under the Constitution. By "rule of law" we refer to Dicey's classical exposition where the concept is defined as:

> * * *the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.[45]

Beyond avoiding the arbitrary use of the state's powers as a goal in itself, the "rule of law" has additional economic implications that run parallel to the discussion of the ways that the existing property rights and regulatory arrangements in western lands have affected the ranching and mining industries above. The "rule of law" provides a set of fixed and pre-announced rules that bind the government and

> * * *make it possible to foresee with fair certainty how the authorities will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[46]

Consequently, the rule of law is also "* * *a kind of instrument of production, helping people predict the behavior of those with whom they must collaborate."[47]

This latter function of formal rules regarding allowable actions towards persons and their property, and their incorporation into production plans and expectations of market participants provided the framework and substance of the discussion of the economic impacts of extensive national land ownership above. Our earlier discussion of the existing property rights and regulatory arrangements in western lands, therefore, bears directly on the way that these arrangements have succeeded or failed in accomplishing this fundamental objective of formal legal rules.

One of the most significant ways that the social efficiency concerns relate to constitutional issues, however, rests in the relationship between the state and national governments in public land states. Ostrom's discussion of federalist views on the necessary and proper relationship between the national government and the states in his Political Theory of the Compound Republic provides a useful perspective for addressing this issue further.[48]

The "compound republic," "multiple sovereigns," or system of "concurrent regimes" are all descriptions derived from the Federalist Papers and used by Ostrom to describe the "federal principle."[49] The state and national governments, in Madison's words, are * * *but different agents and trustees of the people, constituted with different powers and designed for different purposes."[50]

With this division and specialization of sovereignty, however, it is imperative that each sovereign should have general competence within the scope of its jurisdiction. Ostrom summarizes Hamilton and Madisons' views on the appropriate relationship between the states and the national governments noting that "[t]heir object was to maintain the essential legal and political independence of the states and of the federal government so that each might govern in its sphere without being usurped by the prerogatives of the other."[51] This result was achieved through the enumeration of the powers of the national government that are supreme in relation

to the powers of the states, while leaving state authority supreme and plenary in areas beyond the scope of national jurisdiction.

As noted at the outset, the focus on the impacts of U.S. Government landownership on local governments was selected to explore these areas beyond the scope of the national government's authority. Hence, we assume such areas exist in spite of the Court's opinion in Kleppe v. New Mexico that Congressional authority over public lands is "without limit"[52] under Justice Marshall's strict interpretation of Article IV. In this strict interpretation, however, Article IV seems to provide little justification for authority to conduct policies obstructing the state's sovereign authority under the Tenth Amendment. So long as the effects of these policies towards public lands pursued by Congress are not limited to the lands, but spill over in substantial ways to burden the states, the discretion of Congress is either limited by, or apparently over-rides the Tenth Amendment. The latter, of course, would not be a "strict" interpretation of Congressional power under Article IV.

The impacts of extensive national land ownership in public land states suggests that its sovereign prerogatives have been usurped by the Congressional policies and plenary Congressional power respecting public lands. These usurpations have taken two general forms above. The first of these relates to the dependence of local authority on the administrative discretion of the national government created by the existing property rights arrangements in public lands. The second consequence of these property rights arrangements that tends to usurp local authority concerns the limitation of local options. That is, while local authorities do have options and administrative mechanisms to appeal to for relief, the effects of extensive national land ownership tend to limit these options.

One case in point noted above concerned the dependence of local governments on the administrative policies and discretion of agents of the national government rather than traditional market mechanisms or their own powers of eminent domain. The magnitude of this reliance is reflected in a report to the Secretary of Interior, James Watt, from Governor Robert List of Nevada in April 1981, on "Federally Owned Land Transfers Necessary to Meet Community and State Needs."[53] This report provides a description of over one million acres of land, an area comparable to the State of Delaware, that had either already been requested or was designated as under consideration for future request by the state and local governments. Approximately one-third of these lands had already been requested at the time of the report.

The way that this arrangement burdens local governments and frustrates local decision makers by limiting local options and creating a dependence upon the national government can be illustrated by numerous cases cited in the List report. Three cases that

parallel the discussion above include development problems in and around the community of Laughlin, Nevada, flood control, dust pollution, and other problems in the City of Henderson resulting from BLM procedures, and a dispute involving the City of Sparks, Nevada, over land in a recreation area.

In each of these cases and many others, local authority has been pre-empted entirely or substantially limited. In the Laughlin example, the report states that as a result of the area's location at the southern tip of the state and recreational opportunities, the community is "experiencing volitile development pressures* * * Development in the Laughlin area is basically confined to those private holdings already in existence, at least for the near future."[54] The report also notes that:

> "[T]hree owners control over 95% of all plannned residential development area. Sale or transfer or federal lands in the immediate Laughlin vicinty would create a better supply and demand balance with which to lever the start of residential development, avoiding fractured development which would occur under existing ownership patterns. The Division of Water and Power Resources and the Bureau of Land Management control most developable land in Laughlin."[55] (Clark Co., p. 2)

In the case of the City of Henderson, a similar pre-emption of local authority resulting from landownership patterns is noted in the report. In this case:

> Recent sales of federally owned five-acre parcels to private citizens has resulted in poor flood control protection, increased dust pollution from unpaved streets, and a street grid system which is costly to construct and maintain. Acquisition of these lands (requested) by the City would enable planning and development of essential public facilities and subdivisions at a lower cost to taxpayers.[56]

Hence, the issues of the usurpation of traditionally local sovereign prerogatives derived from extensive U.S. Government landownership and limitless Congressional powers respecting public lands are of concern to state and local authorities as well as a burden on the communities involved.

In this discussion of the usurpation of local authority Congressional interference in local affairs there are several essential qualities in common the cases cited at the outset, Gerhardt and Usery.[57] In particular, in each of these cases the actions of the sovereign are distinguished on the basis of whether they impact on individuals or other sovereigns. A fundamental dissimilarity between the case of public lands and the cases of inter-governmental taxation and regulation cited, however, concerns the inability of Congress or the Court to selectively immune local governments from the effects of extensive landownership by the national sovereign.

This dissimilarity, of course, makes remediation of the problems associated with these property rights arrangement slightly more difficult.

The remediation offered by the SR, as we have noted above, is arguable at best. Yet, whatever drawbacks proposals such as Nevada's A.B. 413 may have they do serve to publicize, and open to question the social, political, and economic consequences of property rights and regulatory arrangements in the land. Whether remediation of these problems can be achieved without some kind of radical reassignment of rights is a difficult issue for future consideration.

As long as the status quo is maintained, however, Nevada and similarly situated public lands states will continue to bear the costs and other burdens described above. Earlier it was noted that Nevada is the seventh largest state in terms of land area. The foregoing discussion suggests that this description is somewhat misleading. When viewed in terms of private land that the state has the power to regulate on an "equal footing" with states on the eastern side of the Rocky Mountains, Nevada is a state about half the size of Maine or South Carolina, or two-thirds the size of West Virginia. From this perspective, Nevada is more accurately described as the tenth smallest state rather than the seventh largest.

It is readily acknowledged that size is not the issue. The concurrent regimes have been designed, in part, to negate the impacts of geographical size in its grant of equal political sovereignty. The issue is clearly one of whether the national government's property rights in western lands and Congressional authority to make policies respecting these lands have thwarted more fundamental Constitutional objectives.

However this question may be answered or disposed of in the future, we emphasize that property rights and regulatory arrangements create a behavioral setting which needs to be analyzed in detail. Through this kind of analysis we may avoid some of the problems examined above.

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19 The shape of S'+T is irrelevent to the point so long as T>0. The lump sum type transaction cost illustrated on the figure would tend to lend support to the redistributional effects of BLM policies noted below.

20 The theoretical nature of "dead-weight" welfare losses from misallocations of resources have been examined by Arnold C. Harberger, "Monopoly and Resource Allocation," American Economic Review, 44 (May 1954): pp. 77-87; Gordon Tullock, "The Welfare Costs of Tariffs, Monopolies, and Theft," Western Economic Journal, 5, No. 3 (June 1967), pp. 224-32; and Anne O. Krueger, "The Political Economy of the Rent-Seeking Society," American Economic Review, 64, No. 3 (June 1974), pp. 291-303.

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22 The fact that 96 percent of the land used for the Air Force's "shell game" basing mode for the MX missile, if sited in Nevada and Utah, has been a major budgetary selling point for the system. The implication of such rhetoric is that because the land is public property, there is no cost involved in land acquisition. This notion, of course, is purely illusionary. "There is no such thing as a 'free lunch.'" Allocating land for the nuclear "shell game" has an opportunity cost of other uses of the land foregone. From the perspective of the relevant bureaucratic decision makers, however, such rhetoric indicated that these costs are not reflected in the Air Force's budget. Hence, we have another instance where public property rights lead bureaucratic decision makers to ignore relevant information on public sector decisions.

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57 Supra at notes 13 and 14, respectively.