Can the Federal Government Legally Own Public Land in the West?

By Paul E. Larsen, Esq.

At the heart of legitimate policy debates about who should own and manage public lands in Nevada and other western states — the federal government, states, or local communities — are the legal parameters for public land set forth in the US Constitution. Supporters of transferring lands currently owned and managed by the federal government to state or local control, such as US Senator Mike Lee or Director of the Bureau of Land Management William Pendley, often cite the Constitution to argue that the federal government either does not or should not own any such western land.

A recurrent legal argument against federal ownership of public land is that the "Enclave Clause" of the US Constitution prohibits federal ownership of land except by consent of the states. For example, in a television interview in 2016, advocate against federal ownership of public land, Ammon Bundy, stated "the federal government does not have authority to come down into the states and to control its land and resources. That is for the people to do, and that is clearly stated in Article 1, (Section) 8, (Clause) 17 of the Constitution." Bryce Gray, "*No, federal lands are not in the Constitution,*" High Country News (Feb. 4, 2016). Senator Lee of Utah is also well known for advocating this theory.

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That quoted constitutional article, known to both learned and armchair legal scholars as the "Enclave Clause," grants the federal government the power:

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

The Enclave Clause is a broad grant of power to the federal government, authorizing it "to exercise Legislation in all Cases whatsoever." The second half of the

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clause uses the word "consent" only to define the lands to which these broad powers apply, meaning the clause applies to lands obtained with the consent of the states for use as "Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." *See Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 530, 539 (1885). On such transferred land, the U.S. has the power of "exclusive legislation," just as it does in Washington, D.C. While a state might reserve the right to enforce some criminal or civil laws on the transferred property, the clause does not provide an affirmative grant of state power. *Id*. at 532-34. *See also* Doug Kendall, *"Strange Brew: Mike Lee and the "Enclave Clause""* Constitutional Accountability Center (10th installment, August 2, 2010).

It should be noted that because the Enclave Clause only concerns state transfers of land to the U.S. government for a limited number of purposes, it does not apply to the vast majority of federally owned lands in Nevada. After all, Nevada could not "consent" to federal control over these lands because they were property of the U.S. government *before* Nevada's statehood: when Nevada became a state in 1865, the state's constitution contained an express clause recognizing prior and continuing federal ownership of those public lands. This provision of the Nevada Constitution has been reviewed by numerous courts, such as litigation brought by Nevada ranchers and Nye County, and has been universally deemed valid and binding. *See* Larsen, "*Public Lands argument not rooted in fact*," Las Vegas Review Journal (March 26, 2016).

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Given that the clear language of the Enclave Clause is only directed at the power to exercise "exclusive leg-

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islation" within an enclave, it is unclear how sagebrush scholars interpret the clause to mean the federal government cannot or should not own or control public land. Perhaps they interpret the phrase regarding consent of state legislatures to imply the federal government may only own or manage public land if a state "consents." However, the US Supreme Court has consistently interpreted the Enclave Clause ***not*** as curtailing federal control of public land, but ***protecting*** it. Gray, *supra*.

The "No Federal Ownership" construction, some argue, misinterprets the explicit "exercise exclusive legislation" language of the Enclave Clause, and also overlooks the Constitution's Property Clause, which courts have ruled undermines the argument that the federal government cannot own property within a state unless the state consents. The Property Clause, outlined in Article 4, Section 3, Clause 2, states:

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

When Congress passes legislation respecting federal lands, "the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976); *see* U.S. Const., Art. VI, cl. 2. *See also* Kendall, *supra*. When the federal government has title to lands within a state, the state may not "affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal." *James v. Dravo Contracting Co.*, 302 U.S. 134, 141 (1937) (emphasis added) (quoting *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930)). Federal application of the Property Clause has been consistently supported in a chain of legal precedent that extends back to 1840. "In an unbroken line of cases, the Supreme Court has upheld federal management of public federal lands under the Property Clause," says Michael Blumm, a law professor at Oregon's Lewis and Clark College who specializes in public lands. Gray, *supra*.

One of the strongest advocates of the Enclave Clause is Mike Lee, the US Senator from Utah whose impressive legal credentials lend credibility to the otherwise questionable theory. According to Senator Lee, the clause gives Utah power over all federal lands within the state's borders. Kendall, *supra*. Senator Lee's theory was even incorporated into state law by the Utah legislature. However, the state's legislative general counsel explained the clear defects in the theory, advising that "the state has no standing as sovereign to … assert any other state law that is contrary to federal law on land or property that the federal government holds under the Property Clause." Kendall, *supra*.

There may be legitimate policy reasons for transferring ownership and/or control over federally owned public land to state or local (even private) ownership. Indeed, a great deal of land in Nevada has been transferred from federal to local or private ownership to facilitate construction of public infrastructure (such as transfers under the Recreational and Public Purposes Act) or for land needed to accommodate housing for a growing population (such as transfers under the Southern Nevada Public Land Management Act). However, the arguments that the public land cannot even be owned by the federal government lack merit. Rather, questions of public policy, and whether those policies should result in transfer of public land for private or other uses, are the more compelling considerations in the debate. **C**