Executive Summary
The Mining Law: The Extent of Federal Authority Over Public Domain

Because of a dangerous, imminent protective reflex by Mineral Estate Grantees in the county responding to an unjust loss of property rights and livelihood without adequate remedy, in relief of the same, we met in February with Josephine County sheriff Gil Gilbertson. From that meeting we have been asked by sheriff Gilbertson to prepare the foundation of the mining law as regards federal agency Authority specific to Mining Property, Roads and Trails, and how agency activity relates to lawful agency authority. Currently, public land management agents purport their authority is omnipotent and omnipresent. The sheriff posed to us the important first question. In the context of regulating public domain or as it affects Locateable mineral deposit property, and ingress and egress generally, highways, What is the extent of federal agency authority? The paragraph below serves to answer that question:

Where both the Forest Service and the BLM are required to adhere the congressional public land management man date of the Federal Land Management Policy Act, FLPMA, which expressly states at 43 USC 1732 (b), that, ". . . ***no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress"*** any assertion of federal authority by agency, such as the BLM or the Forest Service, impairing, obstructing or closing access against, or managing the surface of Locatable mineral deposit property on public domain in-holding the public land, or otherwise interfering in any way is committed contrary to the laws of the United States of America, a breach of fiduciary duty, and an intentional and negligent trust tort.

For the widening audience, we would like to recap the most very important disclosures made during the February meeting with the Sheriff supporting the answer above. The distinction between "public land" and "public domain". The distinction between just "any mining claim" and those "mineral deposit" claims. And lastly, the distinction between the uncommon minerals disposed of by the grants culminating in act of 1872, and the common mineral materials variety sold or leased under separate statutes. These distinctions must be made to properly apprehend mining law and to avoid confusion.

The distinction between "public land" and "public domain"

Any interpretation of mining law requires that it be read "*para materia*", interpreted all together. The definition given to distinguish the difference between "public land" and "public domain", citing the Congressional Record of October 2000, page 1885-1866, states, "2. The true nature of ''public lands.'' ''Public Lands'' are ''lands open to sale or other dispositions under general laws, lands to which no claim or rights of others have attached.'' "The United States Supreme Court has stated: It is well settled that all land to which any claim or rights of others has attached does not fall within the designation of public lands.'' In additional support we add from the same record, "The courts have repeatedly held that when a lawful possession of the public lands has been taken, these lands are no longer available to the public and are therefore no longer public lands. Possession of the mineral estate in public lands could be lawfully taken under the mining acts. Where valid mining claims exist, that land is no longer public land." The "public land" that is disposed by claims under the act of 1872 is public domain as stated in that Act, reference "USC 30 § 26. Locators' rights of possession and enjoyment: The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain. . ."

The "public land" has many potential uses, until disposed. The FLPMA, conveniently recognizes two general Uses, "Specific Use" and "Special Use". A valuable mineral deposit location is a specific use on public domain, not a special use of "public land" such as is regulated by 43 CFR 3809. Reference the Act of May 10, 1872, amending the Act of 1870 and the 1866 mining law clause 1, after "granting" or 30 USC 22, locatable minerals are not mining claims on "public land" but mineral deposits, 30 USC 22, on public domain, 30 USC 26.

30 USC § 22. Lands open to purchase by citizens
Except as otherwise provided, **all valuable mineral deposits** in lands belonging to the United States, both surveyed and unsurveyed, **shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase**, by citizens of the United States and those who have declared their intention to become such, *under regulations prescribed by law*, **and** *according to the local customs or rules of miners* in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. -R.S. Sec. 2319 **derived from act May 10, 1872,** ch. 152, Sec. 1, 17 Stat. 91.

USC 30 § 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, **situated on the public domain,** their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they *comply with the laws of the United States,* and with State, territorial, ***and*** *local regulations* not in conflict with the laws of the United States *governing their possessory title*, **shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations**,

-R.S. § 2322 derived from act May 10, 1872, ch. 152, § 3, 17 Stat. 91.

The mechanics of what happens to the "public land" once found to be mineral in character is expressly evidenced in the Organic Act of 1897, that "*any public lands embraced within the limits of any forest reservation which. . . .*" "*...shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain.*" By private settlement under various land disposal laws of the United States, such as the Mining Law of 1872, "public land" is restored to the public domain. The federal agencies have management authority only over " public land", not privately settled public domain. The act of location, restores the land to public domain and the minin g law provides the locator of such segregation "**shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations**,
-R.S. ℣ 2322 derived from act May 10, 1872, ch. 152, ℣ 3, 17 Stat. 91."

Federal mining claims are "private property"
Freese v. United States, 639 F.2d 754, 757, 226 Ct.Cl. 252 cert. denied, 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 10 3 (1981); Oil Shale Corp. v. Morton, 370 F. Supp. 108, 124 (D.Colo. 1973).

"but so long as he complies with the provisions of the mining laws **his possessory right, for all practical purposes of ownership, is as good as though secured by patent.**"
Wilbur v. U.S. ex rel. Krushnic, 1930, 50 S.Ct. 103, 280 U.S. 306, 74 L.Ed. 445.

In complete concurrence, the Congressional Record of October 23, 2000, states, "*Federal rules and regulations cannot extinguish property which derives from state law*". State law acknowledges at "ORS **517.080 Mining claims as realty.** ***All mining claims, whether quartz or placer, are real estate****. The owner of the possessory right thereto has a legal estate therein within the meaning of ORS 105.005*".

Mineral deposit claims and the property thereon and livelihood therefrom may not be tampered with, or denied protection of government which property and livelihood shall not suffer impairment or interference. Setting the required boundaries of a mining claim literally sets a boundary describing land separate and distinct from agency authority placing the claim under the exclusive authority and jurisdiction of the locator. And this interest is stated, as case law and Forest Service Manual details, at: FSM 2813 - RIGHTS AND OBLIGATIONS OF CLAIMANTS; 2813.1 - Rights of Claimants

By location and entry, ***in compliance with the 1872 act****,* ***a claimant acquires certain rights against other citizens and against the United States*** (FSM 2811).

By clear and identical language, Congress has stated in the Organic Act of June 4, 1897, the Eastern Forests (Week's) Act of 1911, and the Taylor Grazing Act of 1934, that there was no intention to retain federal jurisdiction over private interests within national forests. The courts have consistently upheld the ruling in *Kansas* v. *Colorado* since 1907.

The rights the locator maintains exclusive possession even against the government, including all agencies, must be preserved, “saved”, in every land disposal act subsequent to the original granting act of 1866, including the FLPMA. Those rights include that the locator of a valuable mineral deposit, “**shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.**” The courts declared possessory title in 1864 before the grant itself. This grant is exclusive conveying permanent, title, *as good as patent*, such that the title shall not be affected by the paramount or trust title of the United Stated, referencing 30 USC 53, that *“No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession”.* The existence of valid existing rights by relation back of the granting act of July 26, 1866 disposing the uncommon mineral estate held in trust are required to be “saved” in subsequent acts as a “specific use” of the public domain to the Locator. This mineral estate is treated like any other granted property, the contract of which a grantor in this case Congress, or by agency, treated as a mere proprietor may not breach.

It must be noted, referring to the italicized emphasis in both Section 22 and 26 above, that the former referencing “*regulations prescribed*” and the latter the “*the laws of the United States...”“**and** local regulations”* are only those laws and regulations relevant and *“governing their possessory title”.* This was a miner's law for miners. The only “regulation authority” retained by the federal government, was that oversight authority in dutifully disposing the soil pursuant to the various grants, to avoid such things as fraudulent public land entry, not to regulate the uses thereby those disposal acts.

Despite current Agency rhetoric to the contrary, and fraudulently so, the FLPMA contains many savings provision eliminating agency authority over uncommon mineral deposits and other rights, such as ingress and egress, and water, or obligations, such as livelihood. Those are as found referencing the:

*Short Title Of 1988 Amendment “Federal Land Policy and Management Act of 1976'." **SAVINGS PROVISION** Section 701 of Pub. L. 94-579 provided that: "(a) **Nothing in this Act**, or in any amendment made by this Act [see Short Title note above], **shall be construed as terminating any** valid lease, permit, patent, right-of-way, or **other land use right or authorization existing** on the date of approval of this Act [Oct. 21, 1976” “"(f) **Nothing in this Act shall be deemed to repeal any existing law by implication.** "(g) **Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or** - "(1) **as affecting in any way any law governing appropriation** or use of, or Federal right to, water on public lands; "(2) **as expanding or diminishing Federal or State jurisdiction**, responsibility, interests, or rights in water resources development or control; ” “"(h) **All actions by the Secretary concerned under this Act shall be subject to valid existing rights.** ”*

Amplifying with particularity upon the previous list of withheld authorities under the FLPMA, 43 USC 1732, as found in annotation, the “**Section Referred To In Other Sections**” following Section 22 printed above, constraining agency authority further, consistent with the previously mentioned Savings Provisions of which all enforcement provisions such as 43 USC 1733 are subject, we find:

§ 1732. Management of use, occupancy, and development of public lands

(a) **Multiple use and sustained yield requirements applicable; exception**

“. . . . **except** that where a tract of such public land has been dedicated to **specific uses according to any other provisions of law it shall be managed in accordance with such law.**

(b) **Easements, permits, etc., for utilization through habitation, cultivation, and development of small trade or manufacturing concerns; applicable statutory requirements**

“In managing the public lands, **the Secretary shall, subject to** this Act and **other applicable law and under such terms and conditions as are consistent with such law . . .**”

". . . . **no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress."**

(c) **Revocation or suspension provision in instrument authorizing use, occupancy or development; viola tion of provision; procedure applicable**

". . . . **Provided further, That, where** other applicable law contains specific provisions for suspension, revoc ation, or cancellation of a permit, license, or **other authorization to use, occupy, or develop the public lands, the specific provisions of such law shall prevail**."

This clearly evidences no section of the FLPMA can amend or impair the rights of locators under the 1872 mining law. This is so even for Forest Service authority where, for example, purportedly criminal, citations issue under 36 CFR 261, implement 16 USC 551 the authority of which was 16 USC 471, repealed by FLPMA, redirected by 43 USC 1740, now authorizing 16 USC 1609, "Multiple Use", subject to FLPMA mandate 43 USC 1732 (b) stating that no section of the FLPMA and, therefore, no Forest Service authority may impair or amend locator's rights under the act of 1872. There is no federal agency authority in this context regarding Locateable deposits. Imposing authority is a trust breach.

The distinction between "mining claims" generally, and "mineral deposits" specifically.

In contradistinction to the possessory rights under the 1872 act for uncommon, such as gold, mineral deposit grant disposal, Common Mineral Materials, such as sand and gravel, were only first disposed of in 1947, and today as amended in 1955, the oft and erroneously relied "Surface Resources Act", are under the FLPMA and of continuing disposal or mineral management oversight and regulation by lease or sale contract. In other words, until 1947, unlike the granted uncommon minerals since 1864, common mineral materials were not available for disposal. Paying particular attention to the difference and distinction between "mining claims" generally under agency managed surface rights, and "mineral deposits" with exclusively or privately possessed surface rights, specifically reference:

30 § 612. Unpatented **mining claims**

(a) Prospecting, mining or processing operations

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations in the United States to use of the surface and surface resources

Rights under **any mining claim** hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof **(except mineral deposits subject to location under the mining laws of the United States).**

Please note above, **any mining claim** not a valuable **mineral deposit** is likely a US owned mineral subject to surface servitude, treated as a split or severed estate, unlike the Locator of a valuable deposit who shall have exclusive or private possesssion and enjoyment, including the entire surface within the limits of the claim. Unlike Common entries, a locator by the act of 1872 enjoys a complete land estate.

Federal agencies are required to recognize the private "*as good as though secured by patent*" property rights and non-discretionary nature of locatable mining as being distinct from United States, U.S., owned mineral operations of leaseable or saleable contract of agency discretion.

The distinction between uncommon minerals disposed by grant and common mineral materials.

It must be remembered here that under the laws of the United States regarding mineral deposits, 30 USC 26, the locator of any valuable mineral deposit "**shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations**", and why the FLPMA or the 1947 Common Materials Act or its amending act of 1955, 30 USC 612, can not impair or interfere at all with such locator's right or property or obligations, such as livelihood. In other words, as long a mineral deposit locator holds pursuant to the act of 1872, any surface management authority delegated to the agencies shall not interfere nor impair a locator's rights under the 1872 act.

This exception for the UNCOMMON mineral deposits disposed of by the Acts culminating in the Act of May 10, 1872 represents that Congress keenly understood the need by cause of it's grantor obligation and Trustee relationship, that paramount title, to "save" or protect, in relation back honoring Congress' reciprocal obligation in the granting enactment, rights of the future locators of valid unpatented mineral deposit locations. Congress does this by placing a preservation clause in every subsequent property disposal legislation such as found at 30 USC Section 612 (b) "Any mining claim" "*(**except mineral deposits** subject to location under the mining laws of the United States)*". Another preserving exception is stated in Section 612 (c): "*Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of building or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, . . .*" Certainly this shows too, placing buildings on exclusively possessed in-holdings is a lawful use contrary to what the agencies currently, unlawfully, enforce. Any act by any federal agency causing any interference to the granted uncommon mineral deposits or rights appurtenant the locator is to come in to conflict with the laws of the United States.

"**Such an interest may be asserted against the United States as well as against third parties**" (see Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); Gwillim v. Donnellan, 115 U.S. 45, 50 (1885)) "and may not be taken from the claimant by the United States without due compensation." See United States v. North American Transportation & Trading Co., 253 U.S. 330 (1920); cf. Best v. Humboldt Placer Mining Co., supra.

Moreover, it must be noted, at the time of the grant enactment for compliance with laws and regulations, i.e., 30 USC 22, "*under regulations prescribed by law*" and customs of the mining districts there were, other than the General Land Office, no agencies existing such that might today represent that the phrases "*under regulations prescribed by law*" "***and** local regulations*" provided for current agency management authority. Even so, any interference would still be contrary to the Federal Land Management Policy Act of 1976, FLPMA, prohibiting agency interference, impairment, or amendment to the rights of a mineral deposit Locator. The phrase in 30 USC 26 "so long as they *comply with the laws of the United States,* and with State, territorial, ***and** local regulations* not in conflict with the laws of the United States *governing their possessory title"*, shows any regulation could only be in regards of how a locator acquired or maintained possessory title or as recognized by the courts since 1864. Any suggestion that the FLPMA did amend the 1872 act would be a fraudulent representation. To suggest to would constitute an intentional tort in breach of the trust expressly established by the Act of 1866. The FLPMA, as a matter of law, shall save, preserve, this granted or "Locateable" mineral estate, appurtenant or contemporaneous rights, or obligations when appropriated.

Federal Authority Under Law In Contrast of Agency Current Practice.

Given that the Federal Land Management Policy Act of 1976 is the sole congressional act delegating and dictating to any federal agency how and to what extent federal trustees manage the public land held in Government trust, it can not be conceived and there is no other Act of Congress found describing any agency possession of "public land" or " public domain". The federal agencies have no actual title.

As a matter of law, even Congress is merely trustee of the public land trust. Therefore, subject to delegated authorization, any and all authority, or the lack thereof, will be found in this act. Because of Congress' trust obligation s there are certain authorities which, and because of Agency, must be withheld from all agencies to avoid a breach of trust of disposed lands. Federal agency has no power to interfere with disposed public domain. Savings provision s mandate the FLPMA can not be used or extended in such a way as to encroach in any way upon any disposed properties or rights. The only remaining authority is managing what of the "public land" is yet to be disposed, as the Constitution requires.

In trying to remove any and all continuing confusion the mining law seems to create, it was observed at the February meeting that a further confusion was how is it that a bunch of "dumb miners" could write the mining law with such highly educated language use as to render it so confusing? In historical fact, eliminating confusion was why miners threw attorneys out of their camps and courts. What, then, might there be in the language of the act which could cause anyone confusion? To break through this conundrum, the inquiry was made, from the Mining Law act, What about the phrase in the grant expressing that the locator "**shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations**" is so confounding as to render any one reading that part dumb-struck? And coupled with the knowledge that the singular delegation of authority to the federal agencies states that "***no provision of this section or any other section of this Act [FLPMA] shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress and egress*"**, What is left to be understood causing confusion regarding whether a federal agency or State may interfere with a granted property? What about "exclusive possession" "of all the surface" is confusing?

Where, by Act of Congress, federal agency authority is withheld, by what authority does a "public land" management agent lawfully act to interfere or impair rights of a locators exclusively possessing public domain under the Act of 1872? The answer is, as previously shown, there is no lawful authority.

Sections 8 and 9 of the 1866 Act are the seminal U.S. law defining the rights of ownership.

We were asked by the sheriff to explain highways law. Section 8 of the act of July 26, 1866, commonly known as R.S. 2477 right-of ways, grants the establishment of ''highways'' across "public land": "*And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.*" The term "highways" as used in the 1866 Act refers to any road or trail used for travel. The right-of-ways created by this act were an absolute donation for the establishment of travel ways over unappropriated land and by whatever means recognized in law or under local rules and customs. The RS 2477 right-of-way grant is a property right. Therefore, it enjoys the same constitutional and legal protections as any other property. Lawfully, when the grant was made, the federal government's interest in the land underlying the right-of-way became the "subservient estate" and the interest of the right-of-way grantee became the "dominant estate". That means that the government can not interfere with the grantee's exercise of the right of travel as will be seen herein at *Gibson* v. *Chouteau,* 13 Wall. 92 (1872).

The Section 8 grant also conveyed a bundle of associated rights. These include the right to maintain the road and even to upgrade the road. The private yet common possession of the highways can be seen through a famous case of a county asserting rights to a highway, or as stated in the Congressional Record of 2000, "*the individual owners whose mines, ranches and other property are accessed by the road may have a compensable property right in the road. Federal rules and regulations cannot extinguish property which derives from state law. For the USFS to implement regulations under the Endangered Species Act, Clean Water Act or any other federal authority, which would divest citizens of their property is to trigger claims for compensation by the affected citizens. For the USFS to institute criminal action against Elko County for exercising its lawful jurisdiction over the road and the land adjacent to the Road is a usurpation of power upon which the US Supreme Court has long since conclusively ruled*". This is applicable also to the BLM.

To perfect the grant of the United States through Section 8 of the Act of July 26, 1866 to construct highways, Oregon enacted a law in 1901 accepting the grant of the highways, such that, ways existing without interference or protest for 10 years are public roads; Understanding the term "highway" meant a way of any character for the purpose of travel whether by any mode and need, whether designated trail, road, or way, or otherwise, the right to travel of which can not be extinguished by regulation:

This evidences that every constructed way that has existed in Oregon is declared in law a property right which all agencies are without authority to question. Moreover, Oregon statute requires that any change to those ways must be done by application to the county court. Reference SB 208 of 1901 Oregon Law, attached. See also ORS 368.00 1 Definitions, 368.021 County authority over trails, 368.056 Permit for gate construction on public road, 368.131 Right of way over United States public lands. The county governing body may by resolution accept the grant of right s of way for the construction of public roads over public lands of the United States. **This section does not invalidate the acceptance of such grant by general public use and enjoyment.** [Formerly 368.555]. That last sentence evidences the perpetual nature of the land donation dedication and right of the public to use the highway for travel as a matter of right. ORS "**801.305 "Highway."** (*1) "Highway" means every public way, road, street, thoroughfare and place, including bridges, viaducts and other structures within the boundaries of this state, open, used or intended for use of the general public for vehicles or vehicular traffic as a matter of right.*"

Every way in Oregon created by authority of the grant of 1866 is a free and open ingress and egress possessed commonly by the public not the State, or the County, or the United States. The county may accept the obligation of maintenance. Any gate constructed on a public road requires county permission according to the purpose for which the road was constructed. There is no enforcement authority over mere use of the highways which are owned in common by the people. And no road may be altered or vacated without county court oversight, literally, alteration only by a delegated act of Congress.

Section 9 Water and Rights.

Water is no less granted or protected than the other granted properties of the land, minerals, highways, or other public domain. Constitutionally valid law "*forbids legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in transfer of the title after the initiation for its acquisition.*" Oregon law complied with this requirement in 1899 acknowledging Congressionally granted rights to water to the people, in pertinent part:

H.B. 362; ***Be it enacted by the legislative assembly of the state of Oregon :***

Section 1. That **the use of water** in the lakes and running streams of the state of Oregon for the purpose of **developing the mineral resources** of the state and to furnish electrical power for all purposes **is declared to be a public and beneficial use is hereby granted**.

Section 2. **All persons**, companies and corporations **having title or possessory right to any mineral or other land**, **shall be entitled to the use and enjoyments of the water** of any lake or running stream within the state for mining resources of the state or to furnish electrical power for any purposes; and such waters may be made available to the full extent of the capacity thereof **without regard to the deterioration in quality or diminution of quantity**, so that such use of the same does not materially affect the rights of prior appropriations.

Section 24. Inasmuch as this state contains large tracts of mineral lands which cannot be successfully work ed or the mineral extracted therefrom without the use of water, and the **working of said mining properties will largely increase the wealth of this state** ;

Approved February 18, 1899.

Federal jurisdiction in the States

The one remaining topic asked of us by sheriff Gilbertson was to discuss current agency activity as it relates to legitimate agency authority. As contrasted from what the authority management agencies purport is omnipotent and omnipresent, it will be found that federal agents acting outside of their lawful authority are not immune from state prosecution for abuses against property holders in-holding public land. From the **Jurisdiction Over Federal Areas Within The States,** Report of the Interdepartmental Committee For The Study Of Jurisdiction Over Federal Areas Within The States, Part II, June 1957, Page 252, "We mean by this statement to say that Federal officers who are discharging their duties in a State and who are engaged as this appellee was engaged in superintending the internal government and management of a Federal institution, under the direction of its board of managers and with the approval of Congress, are not subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority." Page 253, "The government is but claiming that its own officers, when discharging duties under Federal authority pursuant to and by virtue of valid Federal laws, are not subject to arrest or other liability under the laws of the State in which their duties are performed." [7] "In addition to these source s of constitutional power of the Federal Government, which have consequent limitations on State authority, article IV, section 3, clause 2 [8], of the Constitution, vests in Congress certain authority with respect to any federally owned land which it alone may exercise without interference from any source."

[7] In the case In re Turner, 119 Fed. 231 (C.C.S.D. Iowa, 1902), it was held that an injunction could not issue to prevent a Federal officer from carrying out his official duties.
[8] This clause reads:
"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 any particular State."
The clause does not give the United States jurisdiction over its property within the United States, **such as public lands, in the legislative jurisdiction sense** of art. I, sec. 8, cl. 17. *Op. Sol., Dept. of Agriculture*, No. 10906-10910 (May 6, 1924); *Pollard v. Hagan*, 3 How. 212 (1845).

Page 274, *Gibson* v. *Chouteau,* 13 Wall. 92 (1872) "The same principle which forbids any State legislation interferin g with the power of Congress to dispose of the public property of the United States, also forbids legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in transfer of the title after the initiation for its acquisition."

USC 30 § 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 **so long as they *comply with the laws of the United States*,** and with State, territorial, ***and*** *local regulations* not in conflict with the laws of the United States ***governing their possessory title***, **shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations**,

-R.S. ⁋ 2322 derived from act May 10, 1872, ch. 152, ⁋ 3, 17 Stat. 91.

To summarize: Federal officers acting without the approval of Congress and outside the internal management of government are subject to the jurisdiction of the State. There is no question here that federal agents acting pursuant to invalid laws or contrary to the laws of the United States are subject to arrest or other liability. Injunction will issue. The Report identifies Congress the Principle trustee and further indicating its principle authority can not be interfered with, including its delegated agent. This appears to be acknowledgment of the Trustee status of the Federal government in holding as proprietor of the public lands for disposal to the people accepting a land disposal offer. To dispose land is to divest the federal government of authority and jurisdiction in it. As a matter of law, agencies of Government and its employees are without authority to interfere with lawful disposed uses, or livelihood on "public domain" and may be subject to the penal or other liability for acts contrary to law or the mineral grant.

Prepared March 3, 2011. Commissioned to:

Dave McAllister,
President of S.W.O.M.A.

Ron Gibson,
Vice-President, S.W.O.M.A.

Hal Anthony,
research and mining law consultant.

Supporting Documents

AN ACT [H. B. 208]

To declare certain thoroughfares to be county roads; declaring how roads of public easement may be established, altered, or vacated; and to amend section 4062 of the Code, as prepared and annotated by William Lair Hill.

Be it enacted by the Legislative Assembly of the State of Oregon:

Seciton 1. All roads or thoroughfares not heretofore legally established within the State of Oregon that may have heretofore been used, or may hereafter be used, for a period of ten (10) consecutive years or more by the general public for the purpose of travel, without interference or protest, are hereby declared to be county roads.

Section 2. That section 4062 of the code, as prepared and annotated by William Lair Hill, be amended to read as follows:

§ 4062. All applications for laying out, altering, or locating county roads shall be by petition to the county court of the proper county, signed by at least twelve householders of the county residing in the vicinity where said road is to be laid out, altered, or located, which petition shall specify the place of beginning, the intermediate points, if any, and the place of termination of said road; *provided*, that whenever one or more persons owning all the deeded land over which it is desired to establish a county road shall present to the county court a good and sufficient deed, properly executed, forever dedicating to the use of the public a strip of land to be used

as a public road, said county court may, if it deems proper, accept such dedicated road as a county road, or road of public easement, and thereafter such road shall be subject to the same provisions as apply to other county roads or roads of public easement.

Section 2. No road of public easement shall be altered or vacated except by the county court in the manner now provided by law; and no county shall be bound to work, or improve, or keep in repair such road of public easement.

Approved February 28, 1901.

reimbursement policies. Mr. Hassan writes that the ''current system has proven to be untenable. . . .'' It is the pricing practices of companies like his that have made it untenable.

Pharmacia's behavior overcharges taxpayers—particularly patients—and endangers the public health by influencing the practice of medicine. It is for all of these reasons that I have called on the FDA to conduct a full investigation into such drug company behavior.

The letter from Pharmacia follows:

PHARMACIA CORPORATION,
Peapack, NJ, October 16, 2000.

Re: Your Letter of October 3, 2000
Hon. FORTNEY PETE STARK,
Cannon House Office Building, House of Representatives, Washington, DC.

DEAR REPRESENTATIVE STARK: I am the President, Chief Executive Officer, and a member of the Board of Directors of Pharmacia Corporation (''Pharmacia''). For your information, Pharmacia was created earlier this year upon the merger of Pharmacia & Upjohn, Inc., and Monsanto Company.

In my capacity as Chief Executive Officer of Pharmacia, I write to acknowledge receipt of your letter of October 3, 2000, addressed to Pharmacia & Upjohn, Inc., and to address preliminarily the issues that you raise regarding the reporting and publishing of certain price data for several prescription medications sold by Pharmacia.

Initially, I want to provide you with my personal assurance that Pharmacia takes the issues raised in your letter very seriously. For your information, Pharmacia has actively provided information regarding our pricing practices to a number of investigative bodies. Also, the Company is committed to continuing to work with the appropriate authorities until any differences that may exist in the understanding of this matter are resolved.

As to the particulars of your letter, you should know that Pharmacia is continuing to investigate the allegations made in your letter, as well as those that have been reported recently in various news media regarding the pharmaceutical industry's practices in the area of reimbursement.

As you know, Medicare and Medicaid reimbursement policies are considerably complex. Indeed, in correspondence from the administrator of the Health Care Financing Authority (''HCFA''), it was publicly noted in a letter addressed to the Honorable Tom Bliley, Chairman, Commerce Committee, U.S. House of Representatives, that HCFA has been ''actively working to address drug payment issues, both legislatively and through administrative actions, for many years.'' In fact, Ms. DeParle, the HCFA Administrator, notes that her Agency tried several alternative approaches in the early 1990's but that none were adopted. In fact, in 1997, the Administration proposed to pay physicians and suppliers their so-called ''acquisition costs'' for drugs, but the proposal was not adopted. Instead, the Balanced Budget Act of 1997 reduced Medicare payments for covered drugs from 100% to 95% of the average wholesale price or ''AWP''.

From my perspective, it is the designing of a system to replace the current system that to date has proven to be difficult. Indeed, the current system has proven to be untenable and we would welcome the opportunity of working with you, Congress, HCFA, and any other interested regulatory agencies and stakeholders to develop reimbursement guidelines that are simple, transparent, and representative of the current market conditions.

Finally, I want you to know that—in accordance with your request—I will share your letter and this response with the members of Pharmacia's Public Issues and Social Responsibility Committee of the Board of Directors. In addition, Pharmacia will continue to participate constructively in the public dialogue with regard to whether changes will be made in this arena either legislatively or through administrative action.

Sincerely,

FRED HASSAN.

HONORING MRS. CLEOTILDE CASTRO GOULD

HON. ROBERT A. UNDERWOOD

OF GUAM

IN THE HOUSE OF REPRESENTATIVES

Monday, October 23, 2000

Mr. UNDERWOOD. Mr. Speaker, From a pool of very worthy candidates, the Guam Humanities Council elected to bestow the 2000 Humanities Award for Lifetime Contribution upon Mrs. Cleotilde Castro Gould, a retired educator and well-known local storyteller. This very distinguished award honors the contributions of individuals who, over the years, have worked towards the promotion and advancement of local culture and traditions. To Mrs. Gould, the conferral of this honor is both timely and well deserved.

Mrs. Gould is primarily known as an educator and as a specialist on Chamorro language and culture. In 1974, she played a key role in the formation of the Guam Department of Education's Chamorro language and Culture program. She served as the program's director until her recent retirement. Her many talents include that of singing, songwriting and creative writing. She is a talented singer of Kantan Chamorrita (Chamorro Songs) and has written several songs made popular by local island performer, Johnny Sablan. In the 1980's, she obtained funding to document the Kantan Chamorrita song form. The result was a video record of the ancient call-and-response impromptu song form which is practiced today by few remaining artists.

However, her claim to fame is that of being a storyteller. Her great talent in conveying ancient Chamorro legends to the younger generation has placed great demand on her skills throughout the island's many schools. Mrs. Gould has represented the island as a storyteller in a Pacific islands tour sponsored by the Consortium of Pacific Arts and Cultures and she employed the same talent in 1988 as part of the Guam delegation to the Pacific Festival of Arts in Australia. In addition, Mrs. Gould is also the writer and creator of the Juan Malimanga comic strip. A daily feature in the Pacific Daily News, Guam's daily newspaper, the strip and its characters embody the Chamorro perspective and our local tendency to use humor in order to get points across or to express criticism in a witty and nonconfrontational manner. Mrs. Gould is one of my best friends and favorite colleagues in education. She represents the best in that indomitable Chamorro spirit.

Through her song lyrics, the Comical situations she has concocted, and the lessons brought forth by her storytelling, Mrs. Gould has touched a generation of children, young adults and students. Her exceptional ability to communicate with people form a wide range of age and educational backgrounds has enabled her to pass on the values and standards of our elders to the younger generation. Her life has been dedicated towards the preservation of our island's culture and traditions. For this she rightfully deserves commendation.

Also worthy of note are several distinguished island residents, who, in their own ways, have made contributions to our island. Dirk Ballendorf, a professor of History and Micronesian Studies, through his scholarly work and research, has provided the academic community a wide body of material on the history and culture of our island and our region. Professor Lawrence Cunningham, the author of the first Chamorro history book, has been largely instrumental in the inclusion of Guam History in the secondary school curriculum and the participation of island students in local and national Mock Trial debate competitions. Professor Marjorie Driver's translation of documents pertaining to the Spanish presence in the Mariana Islands has generated enthusiasm among the local community and brought about a desire to get reacquainted with their heritage and traditions. The Reverend Dr. Thomas H. Hilt, the founder of the Evangelical Christian Academy, has fostered the development of a generation of students and donated his time and efforts providing assistance and counsel to troubled kids. Local banker, Jesus Leon Guerrero, founder of the first locally chartered full service bank on Guam, the Bank of Guam, has made great contributions towards the economic, political, and social transformation of Guam. Newspaperman Joe Murphy has written a daily newspaper column for the last thirty years and has provoked our thoughts and encouraged us to get involved in our island's affairs and concerns. The director of the Guam Chapter of the American Red Cross, Josephine Palomo, in addition to her invaluable assistance during disaster related situations, has established a program which encourages involvement among the island's senior citizens in social and healthful activities. Professor Robert F. Rogers, through his scholarly work and provision of guidance and advise to political science majors in the University of Guam, has fostered the development of policy and leadership within our region. Finally, former Senator Cynthia Torres, one of the first women to be elected to the Guam Legislature, has made great contributions towards the advancement of women and vulnerable members in our island society.

On behalf of the people of Guam, I commend and congratulate these wonderful people for their contributions. Their passion and dedication has gone a long way towards the development of a new generation who, like them, will dedicate their lives and their work towards the humanities. To each and everyone of these individuals, I offer my heartfelt gratitude. Si Yu'os Ma'ase'.

CHAIRMAN'S FINAL REPORT CONCERNING THE NOVEMBER 13 SUBCOMMITTEE ON FORESTS AND FOREST HEALTH HEARING IN ELKO, NEVADA

HON. JIM GIBBONS

OF NEVADA

IN THE HOUSE OF REPRESENTATIVES

Monday, October 23, 2000

Mr. GIBBONS. Mr. Speaker, last year on November 13th, the Subcommittee on Forests

and Forest Health held a hearing in Elko, Nevada to study the events surrounding the closure of the South Canyon Road by the Forest Service. After a thunderstorm washed out parts of the road in the Spring of 1995, the agency prohibited the community of Jarbidge from repairing it—going so far as to initiate criminal action against the county. At this hearing, we learned that it wasn't just parts of the road that washed away in that storm but also the Federal Government's failure to use common sense. The South Canyon Road has been used by local residents since the late 1800s—to now keep the citizens of Elko County from maintaining and using what is clearly theirs is a violation of the statute commonly referred to as RS 2477. This is an issue of national significance, demonstrating ongoing attempts by the Federal Government, particularly under this Administration, to usurp the legal rights of States and Counties. So for this reason, the subcommittee has done extensive research into the fundamental questions concerning the South Canyon Road, specifically: who has ownership of the road and who has jurisdiction over the road? Subcommittee Chairman CHENOWETH-HAGE has compiled her research into this, her final report on the November 13th hearing. I would now respectfully ask that it be submitted into the RECORD of this 106th Congress.

CHAIRMAN'S FINAL REPORT—HEARING ON THE JARBIDGE ROAD, ELKO COUNTY, NEVADA, SUBCOMMITTEE ON FORESTS AND FOREST HEALTH

PREFACE

By invitation of Congressman Jim Gibbons of Nevada, the Subcommittee on Forests and Forest Health held an oversight hearing in Elko Nevada on November 13, 1999, on a dispute between Elko County and the United States Forest Service (USFS). The County of Elko claimed ownership of a road known as the Jarbidge South Canyon Road by virtue of their assertion of rights under a statute commonly referred to as RS 2477. The USFS asserted they do not recognize the county's ownership rights and claimed jurisdiction over the road under the Treaty of Guadalupe Hidalgo, the proclamation creating the Humboldt National Forest, the Wilderness Act, the Federal Land Policy and Management Act (FLPMA), the Endangered Species Act, and the Clean Water Act. This issue came to a head when the USFS directed its contractor to destroy approximately a one-fourth mile section of the Road, thus preventing its use by parties claiming private rights of use which could be accessed only by the Road. Also, access to the Jarbidge Wilderness Area was closed off by the action of the USFS.

Chairman Chenoweth-Hage submits this final report to members based on the testimony given and records available to the Subcommittee. Representatives of the USFS failed to defend their position from a legal standpoint, submitting no legal analysis that justified their position. Instead, they simply ''ruled'' that they did not recognize the validity of the County's assertion to the road.

The investment of time in the historic perspective leading up to the County's assertion was fruitful, yielding numerous clearly worded acts of Congress, backed up in a plethora of case law. I have attempted to bring that historic perspective to this report, because the Congressional and legal background cannot be ignored if we are to view the western lands issues in the framework Congress and the courts have intended.

I therefore submit my final report on the hearing on the Jarbidge Road.

Summary: The Basic Questions of Ownership and Jurisdiction

The dispute over the Jarbidge South Canyon Road (Road) between Elko County, Nevada and the United States Forest Service (USFS) involves two basic questions:

1. Who has ownership of the road?
2. Who has jurisdiction over the road?

Ownership is defined as control of property rights.

Jurisdiction is defined as the right to exercise civil and criminal process.

The United States argues that when the Humboldt National Forest was created in 1909, the road in question became part of the Humboldt National Forest. The United States argues that the Humboldt National Forest is public land owned by the United States and the USFS, as agent for the United States, has both ownership and jurisdiction. The United States has responded to the RS 2477 issue (Section 8, Act of July 26, 1866) by arguing that no RS 2477 road which was established in a national forest after the creation of the national forests, was valid, and all roads within the national forest fall under USFS jurisdiction after passage of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA).

Evidence was presented by Elko County in an effort to establish proof of ownership of the Jarbidge South Canyon Road. This evidence includes documents and oral testimony, showing that the road was established in the late 1800s on what had been a pre-existing Indian trail used by the native Shoshone for an unknown period of time prior to any white settlement in the area.

Elko County claims jurisdiction over the Jarbidge South Canyon Road by virtue of evidence that the road was created to serve the private property interests of the settlers in the area. Elko County cites various private right claims to water, minerals, and grazing which the road was constructed to serve.

The crucial factor in determining which argument is correct is to determine whether the federal land upon which the Road exists is ''public land'' subject to federal ownership and jurisdiction or whether the federal land upon which the Road exists is encumbered with private property rights over which the state of Nevada and private citizens exercise ownership and jurisdiction.

In any dispute of this kind, it is essential to review, not only prior history, but also the public policy of the United States as expressed in acts of Congress and relevant court decisions.

I. Breaking Down the Principles of Ownership

A. The law prior to Nevada Statehood.

1. The Mexican cession and ''Kearney's Code.''

Nevada became a state on October 30, 1864. Prior to that time the area in question was part of the territory of Nevada. The territory of Nevada had been created out of the western portion of the territory of Utah. Utah Territory has been a portion of the Mexican cession resulting from the Mexican War of 1845–46. U.S. Brigadier General of the Army of the West, Stephen Watts Kearney, instituted an interim rule, commonly referred to as ''Kearney's Code,'' over the ceded area pending formal treaty arrangement between the U.S. and Mexico. The Mexican cession was formalized two years later with the Treaty of Guadalupe Hildago, February 2, 1848.

Mexico recognized title of the peaceful/Pueblo (or ''civilized'') Indians (either tribally or as individuals) to the lands actually occupied or possessed by them, unless abandoned or extinguished by legal process (i.e. treaty agreements). The Mexican policy of inducing Indians to give up their wandering ''nomadic, uncivilized'' life in favor of a settled ''pastoral, civilized'' life, was continued by Congress after the 1846 session and was the very basis of the government's Indian allotment and reservation policy. Mexico and Spain retained the mineral estate under both private grants and public lands as a sovereign asset obtainable only by express language in the grant or under the provisions of the Mining Ordinance.

2. The acquisition by the U.S.

When the area was ceded to the U.S., the U.S. acquired all ownership rights in the lands which had been previously held by the Mexican government. This included the mineral estate and the then unappropriated surface rights. Indian title, where it existed, remained with the respective Indian tribes. All other private property existing at the time of the cession, was also recognized and protected. Kearney's Code also recognized all existing Mexican property law and continued, in force, the laws ''concerning water courses, stock marks and brands, horses, enclosures, commons and arbitrations'', except where such laws would be repugnant to the Constitution of the United States. The Supreme Court of the United States, has upheld the validity of Kearney's Code, stating that Congress alone could have repealed it, and this it has never done.

In 1846, the area where the Jarbidge South Canyon Road presently exists was acquired by the United States. The United States, like Mexico, retained the mineral estate, while the surface estate was open to settlement. Settlement of the surface estate continued under United States jurisdiction in much the same way it had proceeded under Mexican jurisdiction. Towns, cities and communities grew up around agricultural and mining areas.

3. The characteristics of the land and custom of settlement under Mexican law.

The Mexican cession, which is today the southwestern portion of the United States, consisted primarily of arid lands, interspersed with rugged mountain ranges. These mountain ranges were the primary source of water supply for the arid region. The water courses were part of the surface estate. Control or development of the land by settlers for either agricultural uses or mining depended on control of the water courses.

The most expansive (and most common) method of settlement under the Mexican ''colonization'' law was for the individual settler to establish a cattle and horse (ganado de mejor) or sheep and goat (ganado de menor) farm, known as a ''rancho'' or ranch. These ranches were large, eleven square leagues or ''sitos'' (approximately one-hundred square miles). The individual settler (under local authorization) would acquire a portion of irrigable crop land and an additional allotment of nearby seasonal/arid (temporal or agostadero) land and mountainous land containing water sources (canadas or abrevaderos) as a ''cattle range'' or ''range for pasturage.'' Four years of actual possession gave the ranchero a vested property right that could be sold (even before final federal confirmation or approval of the survey map (diseno). Control of livestock ranges depended on lawful control of the various springs, seeps and other water sources for livestock pasturage and watering purposes. Arbitration of disputes over water rights and range boundaries (rodeo or ''round-up'' boundaries) were adjudicated by local authorities (jueces del campo or ''judges of the plains'').

4. Mexican customs of settlement were maintained under U.S. rule.

This same settlement pattern of appropriate servitudes or rights (servidumbres) for pasturage adjacent to water courses, continued after the area was ceded to the United

States in 1846, One of the first acts of the California legislature after the Mexican cession was to re-enact, as state law, the previous Mexican ''jueces del campo'' or ''rodeo'' laws governing the acquisition and adjudication of range (or pasturage) rights on the lands within the state.

The new settlers on lands in the Mexican cession after 1846, were not trespassers on the lands of the U.S., since Kearney's Code had continued in effect all the previous laws pertaining to water courses, livestock, enclosures and commons (stock ranges). Under Mexican law, water rights, possessory pasturage rights, and right-of-ways were easement rights. Mexican land law was based on a split-estate system (surface/mineral titles and easements) which the United States Courts were unfamiliar with and for which no federal equivalent law existed. Problems in sorting agricultural (rancho) titles/rights from mining titles/rights quickly became apparent when the courts began the adjudication of Spanish and Mexican land claims. Congress (like Spain and Mexico) had previously followed a policy of retaining mineral lands and valuable mines as a national asset.

5. Congress further defines and codifies settlement customs through the Act of 1866 with the establishment of mineral and surface estate rights.

There was no law passed by Congress to define the settlement process for the western mineral lands until Congress addressed this problem by a series of acts beginning in the 1860's. Key among the split-estate mining/settlement laws was the Act of July 26, 1866. Congress established a lawful procedure whereby the mineral estate of the United States could pass into the possession of private miners. Private mining operations could then turn the dormant resource wealth of these lands into active resource wealth for the benefit of a growing nation.

The 1866 Act also dealt with the surface estate of the mineral lands. The act clearly recognized local law and custom and decisions of the court, which had been operating relative to these lands and extended these existing laws and customs into the future. The 1866 Act created a general right-of-way for settlers to cross these lands at will. It also allowed for the establishment of easements.

At this point, it is important to note the definitions of these key terms:

A right-of-way is defined as the right to cross the lands of another.

An easement is defined as the rights to use the lands of another.

Sections 8 and 9 of the 1866 Act are the seminal U.S. law defining the rights of ownership in the Jarbidge South Canyon Road. Section 8, which was later codified as Revised Statute 2477, deals with the establishment of ''highways'' across the land. The term highways as used in the 1866 Act refers to any road or trail used for travel. The right-of-way portion of this act was an absolute grant for the establishment of general crossing routes over these lands at any point and by whatever means was recognized under local rules and customs.

Section 9 of the Act of July 26, 1866, ''acknowledged and confirmed'' the right-of-way for the construction of ditches, canals, pipelines, reservoirs and other water conveyance/storage easements. Section 9 also guaranteed that water rights and associated rights of ''possession'' for the purpose of mining and agriculture (farming or stock grazing) would be maintained and protected.

B. The Law After Nevada Statehood.

1. The states adopt Mexican settlement customs, as affirmed by Kearney's Code and 1866 Act.

Once settlers in an area had exercised the general right-of-way provisions of the 1866 Act to establish permanent roads or trails, those roads or trails then, by operation of law, became easements (which is the right to use the lands of another). The general right-of-way provisions of the 1866 Act gave Congressional sanction and approval to the authorization of Kearney's Code respecting water courses, livestock enclosures and commons, and local arbitration respecting possessory rights. All of the states and territories, west of the 98th meridian ultimately adopted water right-of-way related range/trail property laws similar to the former Mexican laws in California, New Mexico, and Arizona. These range rights were ''property'' recognized by the Supreme Court.

2. The Supreme Court upholds states' adoption of settlement customs and attached range rights.

In Omaechevarria v. Idaho, it was held that all Western states had adopted range law similar to Idaho's, that those laws were a valid exercise of the state's constitutional police power and did not infringe on the government's underlying property interest. Grazers took possession and control of certain range areas primarily by gaining lawful control of water courses. The water courses were under the jurisdiction of State and Territorial government by authority of Kearney's Code and the 1866 Act. The general right-of-way provision of the 1866 Act became an easement for grazing, the bounds of the easement being determined by the exterior boundaries of the area the grazier could effectively possess and control.

3. Only the states possess the authority to define property.

As a general proposition, the United States, as opposed to the several states, is not possessed of a residual authority enabling it to define property in the first instance. The United States has performed the role of agent over lands which are lawfully owned by the union of states, or the United States. Individual States in the southwest, established laws deriving from local custom and court decisions (common law) for determining property rights. These were the local laws, customs, and decisions of the court affirmed by Congress in the Act of July 26, 1866. The Act extended this principle to all the western states and conferred a license on settlers to develop property rights in both the mineral estates and surface estate of the mineral lands of the United States.

C. Congress Affirmation of Local Laws and Customs Regarding Ownership.

1. Congress has passed numerous Acts recognizing surface and mineral estate rights.

The argument of the United States claiming ownership of the Jarbidge South Canyon Road raises a perplexing question. To arrive at the conclusion that the United States Forest Service owns the Road based on the Mexican cession to the United States in 1846, is to ignore local law, custom, court decisions, and the Congressional Act that confirmed those local laws, customs, and court decisions in 1866. The United States in its reach to claim all title to the lands in question must ignore the subsequent acts of Congress which are predicated on the Act of July 26, 1866 as well as voluminous case law which have consistently upheld the acts of Congress in the disposal of the surface estate and/or mineral estate into private hands. The acts and their relevant case law include, but are not limited to:

1. The Mining Act of 1872, confirming lawful procedure for citizens to acquire property rights in the mineral estate of federal lands;

2. The Act of August 30, 1890, which confirmed private rights and settlement then existing on the surface estate of federal lands;

3. The General Land Law Revision Act of March 3, 1891, which further confirmed existing private rights (settlement) on the land;

4. The Act for Surveying Public Lands of June 4, 1897, also known as the Forest Reserve Organic Act which excluded all lands within Forest Reserves more valuable for agriculture and mining and guaranteed rights to access, the right to construct roads and improvements, the right to acquire water rights under state law, and continued state jurisdiction over all persons and property within forest reserves.

2. The courts insist that these laws must be read on pari materia (all together).

The courts have stated repeatedly that laws relating to the same subject (such as land disposal laws) must be read in pari materia (all together). In other words, FLPMA or any other land disposal act cannot be read as if it stands alone. It must be read together with all its parts and with every other prior land disposal act of Congress if the true intent of the act is to be known.

3. Each of these Acts contain ''savings'' clauses protecting existing right, including FLPMA.

All acts of Congress, relating to land disposal contain a savings clause protecting prior existing rights. FLPMA contains a savings clause protecting prior existing property rights. There is an obvious reason for this. Any land disposal law passed by Congress without a savings clause would amount to a ''taking'' of private property without compensation. This could trigger litigation against the United States and monetary liability on the part of the U.S.

II. Determining the Ownership of Jarbidge South Canyon Road

A. Executive order creating Humboldt National Forest, Where the Road Resides, and relevant Congressional acts contain a savings clause protecting Preexisting rights.

The Presidential Executive Order which created the Humboldt National Forest contained a savings clause, protecting all existing rights and excluding all land more valuable for agriculture and mining. The Road was in existence long before there was a Humboldt National Forest. The Road was a prior existing right, having been confirmed by the Act of 1866 and related subsequent acts of Congress as well as court decisions. The Road was never a part of the Humboldt National Forest, and could not be made a part of the Humboldt National Forest without triggering the Fifth Amendment of the Constitution of the United States dealing with ''takings'' and ''compensation.''

The Wilderness Act which created the Jarbidge Wilderness Area also contained a savings clause protecting prior existing rights.

B. The United States makes errant arguments claiming ownership of the Road.

1. The U.S. argument regarding ''public lands'' resulting from Mexican cession logically fails on its face.

The U.S. argues that the Mexican cession of 1846, ratified in the Treaty of Guadalupe Hidalgo in 1848, conveyed the Road and the land of the Road crosses to the United States, which some 150 years later remain ''public land'' unencumbered by private rights. If this argument is valid, the myriad other roads, highways, towns, cities, ranches, farms, mines and other private property which did not exist in the southwest in 1846 but which exists today also remain the sole property of the United States. One cannot logically reach the first conclusion without accepting the later.

2. The true nature of ''public lands.''

''Public Lands'' are ''lands open to sale or other dispositions under general laws, lands to which no claim or rights of others have attached.'' The United States Supreme Court has stated: ''It is well settled that all land to which any claim or rights of others has attached does not fall within the designation

of public lands.'' FLPMA defines ''public lands'' to mean ''any land and interest in land owned by the United States within the several states and administered by the Secretary of the Interior through the Bureau of Land Management.'' The mineral estate of lands within the exterior boundaries of National Forests are administered by the Secretary of the Interior through the Bureau of Land Management.

The mineral estate in the Humbolt National Forest where no claims or rights have attached is ''public land'' according to FLPMA. The mineral estate in these lands is still open to disposition under the mining laws of the United States. Private agricultural and patented mineral lands, as well as surface estate rights in grazing allotments or subsurface rights in unpatented mining claims are not public lands within the definition set forth in FLPMA.

The Road is bounded on both sides by mining claims and lawfully adjudicated grazing allotments. This fact is clear from the testimony and the evidence presented to the Subcommittee. The record shows that mining, grazing rights and water rights as well as general access right-of-ways were established on these lands in the late 1800's and preceded the establishment of the Humboldt National Forest and the Jarbidge Wilderness Area by many years. No evidence has been submitted to the record showing any lawful extinguishment of these rights which would effect a return of the area in question to ''public land'' status, giving rise to a trespass against the United States.

3. The United States errantly cites FLPMA as extinguishing RS 2477 rights.

The United States has also argued that no RS 2477 road could be created in a national forest after the date of creation of the national forest. They cite FLPMA as authority for this argument. This does, however, ignore the fact that FLPMA applies to all federal lands. FLPMA itself confirms all prior existing roads, whose origins predate October 21, 1976.

The United States claims that FLPMA allows the USFS to permit right-of-ways, and thus gives them the right to exercise control over existing roads in the national forest. However, FLPMA was amended in 1985 to clarify that the USFS has no authority to impose regulations on prior existing roads that would diminish the scope and extent of the original grant. Any regulatory control of an existing RS 2477 road diminishes the scope and extent of an existing right. The regulatory control of right-of-ways cited by the United States only applies to right-of-ways created after October 21, 1976.

Nothing in the law allows the USFS to usurp control over right-of-ways, existing prior to October 21, 1976, or to change the definition of a road which had existed prior to 1976. Congress clarified this issue in Section 198 of the Department of Interior Appropriations Bill for 1996: ''No final rule or regulation of any agency of the federal government pertaining to the recognition, management, or validity of a right-of-way, pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by an act of Congress subsequent to the date of enactment of this act.''

III. Establishing Jurisdiction

A. Determining whether State or Federal Government has jurisdiction is key.

The USFS has threatened arrest and criminal prosecution of various individuals in the road dispute. The USFS has threatened litigation against Elko County for Elko County's attempt to defend against a ''taking'' of its property and jurisdiction. The United States and its agency, the USFS claims to have jurisdiction over the matter involved in this dispute. Jurisdiction differs from ownership, in that ownership is the control of property rights and usually vests in individuals and corporate entities, while jurisdiction is the right to exercise civil and criminal process, a right which usually vests in government. The question in this dispute is: does the United States have jurisdiction? Or does Elko County as a subdivision of the state of Nevada have jurisdiction?

B. The establishment of jurisdiction depends on proper use of the term ''Public Lands.''

The United States makes its claim to jurisdiction on the premise that the national forests are public lands subject to the jurisdiction of the United States. The term ''public lands'' has a lawful definition. When used in a dispute over lawful rights, the lawful definition of ''public lands'' must be used. In recent years, this term has been widely misused by the government to encompass all lands for which the federal government has a management responsibility. In reality, the lawful definition of ''public lands'' are ''lands available to the public for purchase and/or settlement.'' The courts have repeatedly held that when a lawful possession of the public lands has been taken, these lands are no longer available to the public and are therefore no longer public lands.

Possession of the mineral estate in public lands could be lawfully taken under the mining acts. Where valid mining claims exist, that land is no longer public land. Possession of the surface estate could be lawfully taken under various pre-emption and homestead acts of Congress. Possession and settlement of the surface estate for grazing areas on the mineral lands of the United States derived from the general right-of-way provisions of the Act of July 26, 1866 and was confirmed by the Act of August 30, 1890. Congress revised the land laws to conform to the intent of the Act of August 30, 1890 with the passage of the General Land Law Revision Act of March 3, 1891.

1. Congress has withdrawn the lands from the public domain through various Acts.

Congress provided for the withdrawal of lands from the public domain as forest reserves in Section 24 of the Act of March 3, 1891. The intent of Congress as expressed in the 1891 and 1897 Acts was to protect timber stands (from exploitation by large, rapacious timber and mining corporations) in order to provide a continued supply of wood for settlers and by so doing improving watershed yields to provide a continuous water supply for appropriation by settlers. These Acts also contained numerous survey and administrative provisions providing for the identification and adjudication of prior existing private property rights within the exterior boundaries of the reserves. When the forest reserves were withdrawn from the public lands, the lands within the reserves were only available to the public for purchase or settlement after the date of the withdrawal if they were more valuable for agricultural (stock grazing) or mining purposes, and if they were not already occupied by prior possession.

2. The adjudicatory process.

The adjudication applied to rights established, whether for homesteads, roads, ditches, or range easements, prior to their withdrawal as forest reserves. Adjudication of the prior rights on the forest reserves resulted in lawful recognition of rights to lands within the exterior boundaries of the forest reserves (later renamed as national forests after 1907). For example, homesteads in fee simple, absolute title, and water right and right-of-way related surface estate rights in the form of grazing allotments were some of the lawful rights recognized. Homesteads, grazing allotments, and mining claims ceased being public lands upon their adjudication by property authority.

On national forest/reserves being established for a split-estate purpose of providing timber for settlers (and enhancing water yield), miners and ranchers could only cut or clear timber for fuel, fences, buildings and developments related to the mining or agricultural use of the claims or allotments.

D. The proper adjudication of the Humboldt National Forest belongs to the State.

1. Grazing allotments cover the entire forest.

The Humboldt National Forest was adjudicated prior to 1920. The grazing allotments were identified and confirmed as a private property right to the surface state of the forest reserves. These grazing allotments cover the entire Humboldt National Forest, including the area traversed by the Road. The Road traverses the lawfully adjudicated Jarbidge Canyon allotment.

2. The Supreme Court has confirmed state jurisdiction.

On May 19, 1907, the U.S. Supreme Court held in the case of *Kansas* v. *Colorado* that the United States was only an ordinary proprietor within the state of Colorado and subject to all the sovereign laws of the state of Colorado. The court ruled that forest reserves were not federal enclaves subject to the doctrine of exclusive legislative jurisdiction of the United States. Local peace officers were to exercise civil and criminal process over these lands. Forest Service rangers were not law enforcement officers unless designated as such by state authority. The USFS had no general grant of law enforcement authority within a sovereign State. The court has also held that a right-of-way and related improvements (as well as vehicles on the right-of-way) within a federal reservation were private interests separate from the government's title to the underlying land and that the United States had no legislative (civil or criminal) jurisdiction without an express cession from the state.

The Court has held that when the United States disposes of any interest in federal lands that there is an automatic relinquishment of federal jurisdiction over that property. By clear and identical language, Congress has stated in the Organic Act of June 4, 1897, the Eastern Forests (Week's) Act of 1911, and the Taylor Grazing Act of 1934, that there was no intention to retain federal jurisdiction over private interests within national forests. The courts have consistently upheld the ruling in *Kansas* v. *Colorado* since 1907. Even standing timber within a national forest (once sold under a timber contract) ceases to be federal property subject to federal jurisdiction.

CONCLUSION

As laid out in this report and in the hearing record, un-rebutted evidence presented in the Road dispute clearly demonstrates that the United States and its agent, the US Forest Service, have no claim to ownership of the Road. Control of property rights to the road clearly vests in the state of Nevada and Elko County on behalf of the public who created the road under the general right-of-way provisions of the Act of 1866. Even if Elko County disclaimed any interest in the road, the individual owners whose mines, ranches and other property are accessed by the road may have a compensable property right in the road.

Futher, the state of Nevada and its subdivision (Elko County) have lawfully exercised jurisdiction over the Road. This jurisdiction would appear to include the right to maintain the road under the laws of the state of Nevada.

Federal rules and regulations cannot extinguish property which derives from state law.

For the USFS to implement regulations under the Endangered Species Act, Clean Water Act or any other federal authority, which would divest citizens of their property is to trigger claims for compensation by the affected citizens. For the USFS to institute criminal action against Elko County for exercising its lawful jurisdiction over the road and the land adjacent to the Road is a usurpation of power upon which the US Supreme Court has long since conclusively ruled.

SENATE COMMITTEE MEETINGS

Title IV of Senate Resolution 4, agreed to by the Senate on February 4, 1977, calls for establishment of a system for a computerized schedule of all meetings and hearings of Senate committees, subcommittees, joint committees, and committees of conference. This title requires all such committees to notify the Office of the Senate Daily Digest—designated by the Rules committee—of the time, place, and purpose of the meetings, when scheduled, and any cancellations or changes in the meetings as they occur.

As an additional procedure along with the computerization of this information, the Office of the Senate Daily Digest will prepare this information for printing in the Extensions of Remarks section of the CONGRESSIONAL RECORD on Monday and Wednesday of each week.

Meetings scheduled for Tuesday, October 24, 2000 may be found in the Daily Digest of today's RECORD.

MEETINGS SCHEDULED

OCTOBER 25

9 a.m.
Armed Services
To resume hearings on issues related to the attack on the U.S.S. *Cole;* to be followed by a closed hearing (SH–219).
SH–216

10 a.m.
Foreign Relations
European Affairs Subcommittee
Near Eastern and South Asian Affairs Subcommittee
To hold joint hearings to examine the Gore and Chernomyrdin diplomacy; to be followed by a closed hearing.
SD–419