

Federal Jurisdiction within a State

The ultimate goal of this document is to identify true jurisdictional authority of the Federal Government, examine how the powers of individual States are usurped by federal agencies, and examine how the health, safety, and welfare of the citizens within the State are undermined: as well as, provide a positive and equitable solution.

Soon after declaring independence from the British Crown, the original Colonies established themselves as sovereign and separate nations. In fact, so independent were they it caused an unforeseen rift between the states in terms of interstate activity and commerce. In an attempt to link the several states, the **Articles of Confederation** of November 17, 1777, emerged.

“Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.”¹

It became abundantly clear a more cohesive and functional link between the states needed to be developed. The First Constitutional Congress of 1787, eleven years after the Declaration of Independence convened; from which emerged a legal contract between the states and the people, called the **“United States Constitution”**.

The U.S. Constitution delegates, describes and limits the powers of each of the three branches of government; they are Legislative, Executive, and Judicial.

“All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”²

The subsequent sections of Article I and paragraphs grant enumerated responsibilities to the central government. The Framers intended that those were the only powers ceded to the central government but a condition of ratification for many states was a “Bill of Rights,” which became the first ten amendments.

The 10th **Amendment** of the **Bill of Rights** reaffirmed that any power not **explicitly granted** to the central government was **explicitly withheld** from the central government.

“The powers not delegated to the United States by the Constitution not prohibited by it to the States, are reserved to the States respectively, or the people.”³

¹ Article 2, Articles of Confederation

² United States Constitution Article 1 § 1

³ 10th Amendment, Bill of Rights

The principal purpose was not the distribution of power between the central government and the states but rather a reservation to the States, or people of all powers not explicitly granted.

POWER OVER LAND

The Constitution explicitly identifies geographic concerns as well as imposing limits on Congress' authority and jurisdiction; *"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".*⁴

*"The Court established a principle that federal jurisdiction extends only over the areas wherein it possesses the power of **exclusive** legislation, and this is a principle incorporated into all subsequent decisions regarding the extent of federal jurisdiction. To hold otherwise would destroy the purpose, intent and meaning of the entire U.S. Constitution".*⁵

The State of Oregon consented to the federal government the acquisition of land for federal buildings and granted exclusive jurisdiction for needful public buildings ⁶; the same applied to Fort Stevens ⁷, and Oregon City canal ⁸. However, the State only granted concurrent jurisdiction over land acquired for national forests. ⁹ *"The State of Oregon retains a concurrent jurisdiction with the United States in and over lands so acquired; So that civil processes in all cases, and such criminal processes as may issue under the authority of this state against any person charged with the commission of any crime without or within such jurisdiction, may be executed thereon in like manner as if this consent had not been granted."*¹⁰

Concurrent jurisdiction does not reference perceived federal police powers but rather the state's ability to file the case in either state or federal court.

⁴ United States Constitution, Article 1 § 8 c.17

⁵ United States v. Bevens 16 U.S. (3Wheat.) 366 (1818)

⁶ Oregon Revised Statute 272.030

⁷ Oregon Revised Statute 272.033

⁸ Oregon Revised Statute 272.036

⁹ Oregon Revised Statute 272.040 (2)

¹⁰ Oregon Revised Statute

In a dispute over federal jurisdiction of title to real property, the court held; *“We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new States were formed,”*.

“Because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, with the limits of a State or elsewhere, except in the cases in which it is expressly granted,”

*“Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law,”*¹¹

The Constitution further grants Congress with the power, *“To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”*¹²

Nowhere in these Articles is Congress granted a **GENERAL** legislative power. Accordingly, the **10th Amendment** reserved those powers to the States. This Article does not delegate a new and independent specific power but rather a provision for making effective the powers theretofore mentioned.

MISSION CREEP

A term often used in military circles called “mission creep” seems to be a repetitive phenomenon that occurs within most organizations as well as governments, throughout history. Over the many years, our system of government seemingly has fallen victim to this dilemma.

This methodology is often engaged to usurp limiting or prohibitive factors or to fill voids where deemed necessary; as seen with the advent of, and continued efforts by the United States Forest Service, Bureau of Land Management, Environmental Protection Agency, Department of Environmental Quality, Fish and Game, and many other federal regulatory organizations.

According to enumerated powers of Congress expressed in Article 1, and subsequent paragraphs, the only exceptions enabling Congress’ power over an individual State is often referred to as the **Interstate Commerce Clause**, which states: *“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”*¹³ In careful reading of the paragraphs contained in Article 1, the only

¹¹ Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845)

¹² United States Constitution, Article 1 § 8 c.18

¹³ United States Constitution, Article 1 § 8 c.3

other exception is the federal governments' authority to coin money, declare war, raise revenue, and certain felonies such as counterfeiting, piracy, espionage.

The largest volume of violations to the Constitution is under color of the **Commerce Clause**. In many cases, the issues assume the form of a recommendation, guideline, or federal regulation of which the States are often forced into compliance through threatening a loss of federal funding.

The **United States Department of Agriculture** and **Department of Interior**, specifically the **United States Forest Service** and **Bureau of Land Management** identifies their source of authority to: *"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."*¹⁴

Their claims of authority, however, do prejudice the claims and powers of individual states.

The 10th Amendment, which was seemingly adopted with a precognitive insight that our central government would eventually overstep their authority; by disclosing the widespread fear that the central government might, under pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination, the Constitutional framers intended that no such assumption should ever find justification; and if in the future, it were determined such additional powers seemed necessary - only **the people should grant them**, in the proper manner prescribe for amending those acts.

The second claim of federal jurisdiction purportedly emanates from an interpretation describing their power as "**without limitation**" referencing the Supremacy Clause. (see *Kleppe v. New Mexico*)¹⁵

A study conducted (1956-1957) referred to as the Eisenhower Document examined the federal authority within a State. It was determined local law enforcement overlooked duties within the lands held in trust by the federal government and the federal agencies were not engaged in such actions. What emerged from this study were four levels of jurisdiction. They are (1) **exclusive**, (2) **concurrent**, (3) **partial**, and (4) **proprietary**. Most lands fit into the proprietary level of jurisdiction, unless specifically stated otherwise.

The United States Constitution was signed September 17, 1787; this document stood on its' own for well over 100 years; with a clear understanding of content and meaning. The public lands (out West) were considered by many as the "problem lands". Accordingly, these lands were for "**disposal**" and open for purchase. The reason for selling these lands was to repay the National debt incurred by the Civil War. Moreover, to open the lands for expansion, exploration, occupancy, and production by settlers.

When the actual shift in paradigm occurred is open for debate, but many of these "public lands" held in trust seemingly became more desirable to retain, rather than for "**disposal**". Whenever that actually started,

¹⁴ U.S. Constitution, Article IV § 3 c.2 (AKA Property Clause)

¹⁵ *Kleppe v. New Mexico*, 426 U.S. 529, 542-543 (1976)

newly formed federal regulatory agencies worked their way into existence, each taking an increasingly expanding role (enter “mission creep”).

Instead of reading the Constitution in the matter of which it was designed – “**pari materia**” (all together), it becomes easier to distort or usurp the original meaning of the U.S. Constitution. *“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, Federal Land Plan Management Act (FLPMA) or any other land disposal act cannot be read as if it stands alone....”*¹⁶ Thereby, allowing these federal regulatory entities to come up with their own agenda driven rules, which not surprisingly often benefits the special interest groups’ agendas.

Examples of the continuation of “mission creep” are demonstrated in illegal road closures of Revised Statutes 2477 (RS2477) roads, which only meet the qualifications of consideration for Wild Lands designation if they are 5,000 acres, or more, and “**roadless**”. These road and trail closures by “decommissioning” or destruction have been occurring for years.

In 1964, the U.S.G.S. redefined categories of roads to meet with their new agenda...road closures for qualifying as Wild Lands.

The Bureau of Land Management under the U.S. Department of Interior issued a letter dated June 1, 2011 from Mr. Salazar (Secretary of Interior) stating the BLM will not designate any lands a Wild Lands; but directs Deputy David Hays to develop management of public lands with Wilderness characteristics and to solicit members of Congress, state and local officials, tribes and federal land managers to identify BLM lands that may be appropriate candidates for Congressional protection under the Wilderness Act.

The USFS recently sent out a communication dated July 15, 2011 titled **Federal Register publication of Final Proposed Rules 262,261 and 212**; purportedly to clarify and expand their authority.

*“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.”*¹⁷

It is no wonder everyone is confused with various federal entities writing their own rules and regulations, which serve only to confuse the public and often contradict each other. These many federal agencies often fail to follow their own rules and regulations; examples being mining laws, clean water, timber harvest, grazing, travel management acts such as FLPMA, and so on. This manner of business has turned into a 900-pound gorilla and needs to be addressed at the highest levels.

¹⁶ Congressional Record, October 23, 2000 E1883, Hon. Jim Gibbons of Nevada in the House of Representatives.

¹⁷ Congressional Record, October 23, 2000 E1884, Hon Jim Gibbons of Nevada in the House of Representatives.

POLICE POWERS

Getting back to the original issue of the federal government bodies engaging in “**police powers**” within the States – one of the more important cases, *“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.”*¹⁸

Road closures, for example, are critical to our public health welfare, and safety. As the chief law enforcement authority, saddled with those responsibilities, I must assert my lawful authority to use any road deemed essential in this regard to conduct law enforcement operations including crime prevention, crime response, fire suppression, emergency medical response, assistance to federal agents, search and rescue operations, drug cartel and illicit drug eradication, and related operations. The closure of roads and harassment by federal agents upon miners has prompted my actions.

LEGAL FOUNDATION FOR POLICE POWER

Recently, there has been a movement by the Supreme Courts in rendering decisions relative to the clear meaning and intent of our Constitution. A recent Court reviewed many of the clear attempts on the part of Congress to usurp authority it did not have. The Court stated *“But law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else....’The authority and only authority is the State, and if that be so, the voice adopted by the State as its’ own (whether it be of its Legislature or of its Supreme Court) should utter the last word.’ Thus the doctrine of Swift v. Tyson is, as Mr. Justice Holmes said, “an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.’ In disapproving that doctrine, we do not hold [304 U.S. 64, 80] unconstitutional section of 34 of the Federal Judiciary Act of 1789 or any other act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.”*

In a concurring opinion, Justice Thomas stated; *“the exchanges during the ratification campaign reveal the relatively limited reach of the Commerce Clause and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce)*

¹⁸ Congressional Record, October 23, 2000 E1886, Hon Jim Gibbons of Nevada in the House of Representatives.

would remain outside the reach of the Federal Government. Such affairs would continue to be under the exclusive control of the States.”

“We have said that Congress may regulate not only ‘Commerce...among the several states,’ U.S. Const., Art. I, 8, cl.3, but also anything that has a ‘substantial effect’ on such commerce. This test, if taken to its logical extreme, would give congress a “police power’ over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly applied the substantial effects test for the past 60 years, we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a “**police power**”; our cases are quite clear that there are real limits to federal power...Indeed, on the crucial point, the majority and Justice Breyer agree in principle: the Federal Government has nothing approaching a police power.”

“The Constitution mandates this uncertainty by withholding from Congress a plenary “**police power**” that would authorize enactment of every type of legislation.”¹⁹

In another case, the Court claimed the federal government had no jurisdiction over crimes committed within the 50 States.²⁰

“In the United States of America, there are two separate and distinct jurisdictions, such being the jurisdiction of the states within their own state boundaries, and the other being federal jurisdiction (central government), which is limited to the District of Columbia, the U.S. territories, and federal enclaves within the states, under Article 1, Section 8, Clause 17.” “The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction... Congress has power to exercise exclusive jurisdiction over this district, and 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.”²¹

“Special provision is made in the Constitution for the cession of jurisdiction from the States over places where the federal government shall establish forts or other military works. And it is only in these places, or in the territories of the United States, where it can exercise a general jurisdiction.”²²

¹⁹ United States v. Lopez, 115 S.Ct. 1624 (1995)

²⁰ United States v. Morrison, 169 F.3d 820 (1999)

²¹ United States v. Bevans, 16 (3 Wheat.) 336 (1818)

²² New Orleans v. United States, 35 U.S. (10 Pet.) 662, 737 (1836)

USES OF PUBLIC LAND

There seems to be more and more regulations coming forth that violate property rights and grants to the people by our Constitution; such as, the *“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.”*²³

*“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 with the designation of public lands.” ‘FLPMA defines “public lands” to mean “any land and interest in land owned by the United States with the several states and administered by the Secretary of the Interior through the Bureau of Land Management.”*²⁴

*“Public land” that is disposed by claims under the act of 1872 is “**Public Domain**”. “The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, were 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.”*²⁵

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 mining 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”*²⁶

²³ Congressional Record October 23, 2000 E1885 Hon. Jim Gibbons of Nevada in the House of Representatives

²⁴ Congressional Record October 23, 2000 E1885-E1886 Jim Gibbons of Nevada

²⁵ 30 USC § 26

²⁶ R.S. § 2332 derived from act May 10, 1872 ch. 152, § 3, 17 Stat. 91

Federal mining claims are “private property”²⁷

*“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.”*²⁸

*“All mining claims, whether quartz or placer, are real estate. The owner of the possessory right thereto has a legal estate therein with the meaning of ORS 105.005”*²⁹

Setting the required boundaries of a mining claim literally sets a boundary describing land separate and distinct from agency authority placing the land under the exclusive authority and jurisdiction of the locator. This interest is also stated as case law and Forest Service Manual details.³⁰

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.

No section of the FLPMA and, therefore, no Forest Service authority may impair or amend locator’s rights under the act of 1872.³¹ *Further 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”*

One final point, *“where rights secured by the constitution are involved, there can be no legislation or rule-making that would abrogate them”*³²

²⁷ *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 103 (1981); *Oil Shale Corp. v. Morton*, 370 F. Supp. 108, 124 (D.Colo. 1973)

²⁸ *Wilbur v. U.S. ex rel. Krushnic*, 1930, 50 S.Ct. 103, 280 U.S. 306, 74 L.Ed. 445

²⁹ Oregon Revised Statute 517.080 Mining claims as realty.

³⁰ Forest Service Manual 2813 – rights and obligations of claimants

³¹ 43 USC 1732 (b)

³² *Miranda v. Arizona*, 384 U.S. 436 p. 491

CONCLUSION

In summation, the Supreme Court has declared the federal government has no authority or jurisdiction over individuals or issues not involving interstate commerce or issues not involving federal territory. Neither Congress, nor the President, can pass laws that govern life or activities within the boundaries of the several States. "Police" powers are **not explicitly granted** to the central (federal) government and thereby fall within the purview of the 10th Amendment Clause of the Bill of Rights.

The points addressed in this document are not all that require redress, but rather presented to identify violations and disjointed (often overbearing) management of our public lands. The lack of federal **Coordination** and the inaccurate scientific studies to mention two, must also be addressed, as the federal agencies seem to blatantly ignore.

At the beginning of this document, reference was made proposing a possible solution. To that end, I would begin with a point made in the Congressional Record referred to several times from Hon. Jim Gibbons of Nevada, to wit:

*"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."*³³

Put police enforcement back where it belongs, within the several States, or political subdivisions. In these tough economic times, it would put our citizens back to work; by sub-contracting to local authorities for Law Enforcement services it would most certainly provide a cost savings benefit to the federal government; and places the protection of our forests and natural resources with those having a real stake in the safety, health, and welfare of the community they serve.

It is my hope; this letter will serve as a starting point of discussion.

Respectfully,

Gil Gilbertson, Sheriff

Josephine County, Oregon

³³ Congressional Record October 23, 2000 E1886 Hon. Jim Gibbons of Nevada in the House of Representatives, and U.S. Supreme Court May 19, 1907 Kansas v. Colorado