

1 **MOT**
2 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP**
3 CHRISTOPHER W. MIXSON, ESQ.
4 Nevada Bar No. 10685
5 3556 E. Russell Road, Second Floor
6 Las Vegas, Nevada 89120
7 (702) 341-5200/Fax: (702) 341-5300
8 cmixson@wrslawyers.com

9 **CENTER FOR BIOLOGICAL DIVERSITY**
10 JUSTIN AUGUSTINE, ESQ. (*Pro Hac Vice*)
11 California Bar No. 235561
12 1212 Broadway, Suite 800
13 Oakland, CA 94612
14 503-910-9214
15 jaugustine@biologicaldiversity.org

16 *Attorneys for Defendant-Intervenor*
17 *Center for Biological Diversity*

18 **EIGHTH JUDICIAL DISTRICT COURT**

19 **IN AND FOR CLARK COUNTY, STATE OF NEVADA**

20 CLIVEN BUNDY, an Individual,

21 Plaintiff,

22 vs.

23 STATE OF NEVADA, *ex rel*, and CLARK
24 COUNTY, a Subdivision of the State of
25 Nevada; DOES I-X; and ROE
26 CORPORATIONS XI-XX,

27 Defendants,

28 CENTER FOR BIOLOGICAL DIVERSITY,

Defendant-Intervenor,

Case No. A-18-779718-C

Dept. No.: XXIV

**MOTION OF CENTER FOR
BIOLOGICAL DIVERSITY FOR
JUDGMENT ON THE PLEADINGS**

Defendant-Intervenor the Center for Biological Diversity (the “Center”), by and through its attorneys, moves for judgment on the pleadings pursuant to Nev. R. Civ. P. 12. At base, Plaintiff/Petitioner Cliven Bundy (“Bundy”) seeks to re-litigate settled law because he wishes to continue illegal livestock grazing on federal public lands. Bundy’s wrongful effort was rejected in 1998, and many times since then, and should be rejected once more by this Court.

Judgment should be entered against Bundy as to all matters raised in his Complaint pursuant to Rules 12(c) and 12(h)(2) because the Complaint fails to state any claim upon which

1 relief can be granted. Under Rule 12(c), “any party may move for judgment on the pleadings,” and
2 under Rule 12(h)(2), the “defense of failure to state a claim upon which relief can be granted . . .
3 may be made . . . by motion for judgment on the pleadings” *See also Duff v. Lewis*, 114 Nev.
4 564, 568 (1998) (“It is well established that a motion under NRCP 12(c) is designed to provide a
5 means of disposing of cases when material facts are not in dispute and a judgment on the merits can
6 be achieved by focusing on the content of the pleadings.” (internal citations and quotations
7 omitted)); *Clark Cnty. Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395 (2007) (“NRCP
8 12(h)(2) permits raising the NRCP 12(b)(5) defense of failure to state a claim upon which relief can
9 be granted at the pleading stage, by a motion for judgment on the pleadings, or at trial on the
10 merits.”); *Mulder v. Nev.*, Case No. CF-1509016 Dept. No. 2, 2016 Nev. Dist. LEXIS 2952, *3 (7th
11 Jud. Dist. Nov. 7, 2016) (“NRCP 12(h)(2) includes a ‘defense of failure to state a claim upon which
12 relief can be granted.’ Thus, a defendant never waives any defense of failure to state a claim upon
13 which relief can be granted”)

14 Specifically, the Complaint’s first and third causes of action are both barred by the doctrine
15 of issue preclusion because they are identical to issues previously unsuccessfully litigated by
16 Bundy in prior actions. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1052 (2008) (“The
17 doctrine provides that any issue that was actually and necessarily litigated in one action will be
18 estopped from being relitigated in a subsequent suit.”) (quoting *U. of Nev. v. Tarkanian*, 110 Nev.
19 581, 599, 879 P.2d 1180, 1191 (1994)). Bundy has an exceptionally long history of unsuccessful
20 attempts to gain control of federal public land through litigation that asserted the same stale and
21 fringe legal theories he presents in the first and third causes of action in the Complaint. *See U.S. v.*
22 *Bundy*, Case No. CV-S-98-531, 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 3, 1998) (“*Bundy I*”),
23 *affirmed* 178 F.3d 1301 (9th Cir. 1999) (attached hereto as Exhibit 1); *U.S. v. Bundy*, Case No.
24 2:12-cv-0804, 2013 U.S. Dist. LEXIS 95294 (D. Nev. July 9, 2013) (“*Bundy II*”) (attached hereto
25 as Exhibit 2); *see also U.S. v. Bundy*, Case No. 2:16-cv-00046, 2016 U.S. Dist. LEXIS 182437 (D.
26 Nev. Dec. 20, 2016) (“*Bundy III*,” Magistrate Report and Recommendation) (attached hereto as
27 Exhibit 3), *dismissed on other grounds*, 2018 U.S. Dist. LEXIS 18998 (D. Nev. Jan. 8, 2018).

28 Additionally, Bundy’s second cause of action fails to state a claim because it seeks to

1 compel enforcement of Nevada statutes previously found by a court to be invalid. *See U.S. v. Nye*
2 *County*, 920 F. Supp. 1108, 1114 (D. Nev. 1996) (“[W]hile Nevada has statutorily claimed
3 [ownership of] the [federal] public lands..., it now concedes that this claim is constitutionally
4 untenable. While this concession is tantamount to a consent to judgment, the court also concludes
5 that the statutory claim is unsupported, unconstitutional, and fails as a matter of law.”). Moreover,
6 Bundy’s second cause of action is grounded in the same false premise as his first and third causes
7 of action.

8 This motion is based on the following Memorandum of Points and Authorities, the papers
9 and exhibits on file, and any oral argument this Court sees fit to allow at hearing on this matter.

10 DATED this 24th day of January, 2019.

11

CENTER FOR BIOLOGICAL DIVERSITY

12

13 By: /s/ Justin Augustine
JUSTIN AUGUSTINE, ESQ. (Pro Hac Vice)
14 California Bar No. 235561
1212 Broadway, Suite 800
15 Oakland, CA 94612
503-910-9214
16 jaugustine@biologicaldiversity.org

17

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP
18 CHRISTOPHER W. MIXSON, ESQ.
19 Nevada Bar No. 10685
3556 E. Russell Road, Second Floor
20 Las Vegas, Nevada 89120
21 (702) 341-5200/Fax: (702) 341-5300

18

19

20

21

22

Attorneys for Defendant-Intervenor
Center for Biological Diversity

23

24

25

26

27

28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Bundy grazes cattle on the federal public lands at issue in this case, and has been doing so
4 illegally for decades. For two decades now as well, Bundy has raised legal claims like the one he
5 brings in the Complaint in this case in a misguided attempt to convert federal public lands that lie
6 within the borders of Nevada into State land, and thereby undo his long-standing violations of
7 federal law. Bundy’s legal arguments have been soundly rejected every time he has brought them.
8 In 1998, 2013, and 2017, the United States District Court for the District of Nevada rejected
9 Bundy’s legal theories, time and again explaining that the federal public lands in Nevada are indeed
10 the property of the United States. *See Bundy I; Bundy II; Bundy III; see also U.S. v. Gardner*, 107
11 F.3d 1314 (9th Cir. 1997). Undeterred by those rulings, Bundy, in this case, again asks a Court to
12 declare the federal public lands within Nevada as State lands. Because Bundy’s current lawsuit
13 does nothing more than rehash already rejected arguments, it should be dismissed with prejudice.

14 Specifically, Bundy’s first and third causes of action have already been litigated in federal
15 court, and the doctrine of issue preclusion bars him from asserting them again here. *See Five Star*
16 *Capital* at 1055. Further, Bundy’s attempt in his second cause of action to manufacture a new
17 claim must fail as well because the statutes he seeks to have the state of Nevada enforce were long
18 ago ruled invalid. *U.S. v. Nye County*, 920 F. Supp. at 1114. Consequently, pursuant to Rule 12(c)
19 and 12(h)(2), Bundy’s entire Complaint should be dismissed for failure to state a claim upon which
20 relief can be granted.

21 **II. BACKGROUND**

22 Bundy’s Complaint is the latest in a long line of cases to which he is a party against the
23 government. Bundy grazes livestock on approximately 160 acres of privately owned land, and
24 also, albeit illegally, upon approximately 300,000 acres of federal public land that is owned by the
25 People of the United States and managed by the federal Bureau of Land Management. Bundy
26 believes the federal government has no authority on these public lands and has scoffed at every
27 attempt by the federal government to hold him accountable for the costs and impacts of his illegal
28 grazing on federal public lands. Many times, Bundy has claimed in legal proceedings that the

1 federal public lands within the boundaries of Nevada do not belong to the People of the United
2 States, and instead belong to the State of Nevada. Each time, as discussed below, the courts have
3 rejected Bundy’s assertions, citing either to previous cases to which Bundy himself was a party, or
4 to cases that already raised and resolved the same issues.

5 **A. Bundy I**

6 In 1998, the United States filed a Complaint seeking to prevent Bundy’s ongoing illegal
7 grazing of livestock on property owned by the United States. *Bundy I*, Exh. 1 at *1. Bundy
8 attempted to dismiss the government’s case, arguing that “the federal government cannot have
9 authority over lands ‘inside an admitted state.’” *Id.* at *12–13. The United States District Court for
10 the District of Nevada dismissed Bundy’s assertions and ruled that “federal lands located within
11 states are federal territories under federal jurisdiction,” and the “Bunkerville Allotment where
12 Bundy is grazing his livestock falls within the definition of ‘public lands’ administered by the
13 Secretary of the Interior through the BLM.” *Id.* at *13. The Court further explained that “[a]n
14 examination of the history of the lands in question further establishes federal ownership. . . . The
15 public lands in Nevada are the property of the United States because the United States has held title
16 to those public lands since 1848, when Mexico ceded the land to the United States.” *Id.* at *13–14.
17 The Court, in reaching its decision, cited to *United States v. Gardner*, 107 F.3d 1314 (9th Cir.
18 1997), discussed further below. *Id.* at *13–14.

19 **B. Bundy II**

20 In 2012, the United States again filed a complaint against Bundy in order to prevent
21 Bundy’s ongoing unlawful grazing of livestock on federal land. *Bundy II*, Exh. 2 at *1. Despite
22 having lost on the same issue in 1998, Bundy attempted to oppose the government’s case “on the
23 ground that this court lacks jurisdiction because the United States does not own the public lands in
24 question.” *Id.* at *4. The federal district court easily rejected Bundy’s argument, explaining:

25 As this court previously ruled in [*Bundy I*], the public lands in Nevada are the
26 property of the United States because the United States has held title to those public
27 lands since 1848, when Mexico ceded the land to the United States. Moreover,
28 Bundy is incorrect in claiming that the Disclaimer Clause of the Nevada
Constitution carries no legal force, that the Property Clause of the United States
Constitution applies only to federal lands outside the borders of states, that the
United States’ exercise of ownership over federal lands violates the Equal Footing

1 Doctrine, that the United States is basing its authority to sanction Bundy for his
2 unauthorized use of federal lands on the Endangered Species Act as opposed to
trespass, and that Nevada’s “Open Range” statute excuses Bundy’s trespass.

3 *Bundy II*, Exh. 2 at *4–5 (internal citations and quotations omitted).

4 **C. *Bundy III***

5 Most recently, in *Bundy III*, the United States District Court for the District of Nevada
6 reviewed and cited many of the above-discussed cases to come to the correct conclusion that
7 Bundy’s public lands arguments lacked any merit. Exh. 3.

8 In *Bundy III*, Bundy sought to dismiss a criminal indictment against him on the ground that
9 the federal district court lacked subject matter jurisdiction because the federal government does not
10 have any ownership interest in land within the State of Nevada, and that the federal public land is
11 instead “owned by the people of Nevada.” Exh. 3 at *8–9. Magistrate Judge Leen rejected
12 Bundy’s public lands arguments (*id.*), and her rejection was accepted in Chief Judge Navarro’s
13 subsequent adoption of Magistrate Judge Leen’s Report and Recommendation. *Bundy III*, Order
14 Accepting and Adopting Report and Recommendation, 2017 U.S. Dist. LEXIS 7525, at *1 (D.
15 Nev. Jan. 18, 2017) (attached hereto as Exhibit 4). In addition, Judge Navarro denied a Motion to
16 Reconsider brought by Bundy’s son Ryan Bundy, noting once again that “the land in question
17 belongs to the United States” *Bundy III*, Order Denying Motion to Reconsider, 2017 U.S.
18 Dist. LEXIS 152896, at *4 (Sep. 20, 2017) (attached hereto as Exhibit 5).

19 In his effort to dismiss the criminal indictment, Bundy asserted that the “Nevada State
20 Legislature has never consented to let the federal government own 85% of public land within
21 Nevada’s boundaries,” and that “the Nevada State Legislature . . . has expressly repudiated federal
22 ownership in a series of statutes declaring state ownership, control, and jurisdiction over all ‘public
23 lands’ within Nevada.” *Bundy III*, Exh. 3 at *10. Bundy further claimed that “even if the federal
24 government originally owned the land, the federal government only owned the land conditionally
25 as a matter of contract and title passed to the State of Nevada when that condition expired.” *Id.* at
26 *11.

27 Magistrate Judge Leen’s Report and Recommendation overwhelmingly rejected Bundy’s
28 arguments, explaining that “[f]or more than two decades, Mr. Bundy has argued that the federal

1 government does not have an ownership interest in any land in Nevada,” and that “this argument
2 has been soundly and consistently rejected by every court to consider the issue.” *Bundy III*, Exh. 3
3 at *23. Magistrate Judge Leen further explained that the court was “bound by, and required to
4 apply, controlling Supreme Court and Ninth Circuit precedent.” *Id.*

5 In ruling against Bundy, Magistrate Judge Leen cited to *U.S. v. Gardner*, 107 F.3d 1314
6 (9th Cir. 1997), which she explained “definitively resolved the question of ownership regarding the
7 federal public lands within Nevada.” *Bundy III*, Exh. 3 at *24. Magistrate Judge Leen bluntly
8 stated that “the courts have rejected [Bundy’s] arguments concerning federal ownership of lands
9 within Nevada,” *id.* at *26, and noted the following:

10 When Nevada was admitted to the Union in 1864, the United States retained
11 ownership of federal public lands within the state. Thus, the United States lawfully
12 owns and administers the federal public lands in Nevada. Nevada permanently
13 disclaimed all right and title to lands upon statehood. The United States’ ownership
14 of federal public lands does not violate equal protection or the privileges and
15 immunities of Nevada citizens. The equal footing doctrine and/or the equal
16 sovereignty doctrine do not give Nevada superior title to all lands within its
17 boundaries. The court is required to apply *Gardner’s* holdings, which remain
18 binding precedent. Three different federal district judges in this district so held in
19 *Bundy I* and *Bundy II*.

20 *Id.* at *26–27 (citing *Gardner*, 107 F.3d at 1318–19; *U.S. v. Medenbach*, 116 F.3d 487 (9th Cir.
21 1997) (unpublished); *Nye Cty.*, 920 F. Supp. at 1114–17; *Bundy I*; *Bundy II*).

22 In addition, Magistrate Judge Leen pointed out “that the State of Nevada has agreed with
23 judicial interpretations regarding federal public lands within its borders.” *Id.* at *27. For example,
24 “[i]n *Nye County*, county officials argued that the United States did not own public lands within
25 Nevada *Nye County’s* position, similar to Cliven Bundy’s, was based on Nevada statutes
26 NRS 321.596–321.599, which declared ownership of and control and jurisdiction over all ‘public
27 lands’ within Nevada.” *Id.* The State of Nevada nonetheless “conceded that its statutory claim to
28 public lands within the state was ‘legally untenable,’” and, moreover, the *Nye County* Court
“concluded that Nevada’s statutory claim was unconstitutional and failed as a matter of law.” *Id.*
Magistrate Judge Leen thus found that the “*Nye County* decision clearly demonstrates the State of
Nevada’s legal position on this issue: the United States holds title to federal public lands in
Nevada.” *Bundy III*, Exh. 3 at *28–29. Moreover, “[t]he State of Nevada reaffirmed this position

1 in *Gardner*, filing an amicus brief . . . supporting the United States’ position.” *Id.* at *29. In short,
2 “Mr. Bundy’s position on the ownership and management of federal public lands in Nevada is not
3 only contrary to binding federal case law but it is also at odds with the State of Nevada’s position.”
4 *Id.*

5 In *Bundy III*, Bundy also presented an additional argument, not raised (and thus not
6 addressed) in *Gardner*, “that even if the federal government was at one point the absolute owner of
7 the land at issue, it transferred the lands to the State of Nevada on May 5, 1866, without reserving
8 to itself any public lands in the state.” *Id.* at *12. Magistrate Judge Leen disposed of Bundy’s
9 1866 Act claim as well. *Id.* at *29–35. Specifically, she found that the “plain language of the 1866
10 Act does not transfer title of the 1866 Land to the State of Nevada—it merely added the land to the
11 state boundaries.” *Id.* at *32. Magistrate Judge Leen concluded: “Bundy’s . . . personal
12 interpretations of the Constitution or subsequent congressional actions, including the 1866 Act, are
13 simply not supported by controlling law.” *Id.* at *35.

14 In her order approving and adopting Magistrate Judge Leen’s findings, Judge Navarro
15 wholeheartedly “agree[d] with the analysis and findings of Judge Leen. . . .” *Bundy III*, Exh. 4 at
16 *6. Judge Navarro further elaborated that “the Gardners and [Bundy] *are actually making the same*
17 *argument*, as both assert that ‘the unappropriated lands in the state of Nevada [are] not territory or
18 other property belonging to the United States,’” and then “agree[d] with Judge Leen that *Gardner*
19 dictates that the unappropriated public lands in Nevada are the property of the United States.” *Id.*
20 at *7–8 (emphasis added).¹

21 **D. U.S. v. Gardner**

22 Although Bundy was not a party to *Gardner*, and therefore the case is not itself controlling
23 with respect to issue preclusion, it is important as background because it (1) addresses the same
24 issues that Bundy raises, and (2) is oft cited to by cases that Bundy is a party to. Like Bundy, the
25 Gardners argued that grazing their livestock “without a permit does not constitute trespass because

26 ¹ *Bundy III* was ultimately dismissed on other grounds: *Bundy III*, 2018 U.S. Dist. LEXIS 18998
27 (D. Nev. Jan. 8, 2018).

1 the federal government does not have title to the land on which the grazing took place.” *Gardner*,
2 107 F.3d at 1317. “After Nevada became a state, Gardners argue, all of the public lands within the
3 state boundaries reverted to the state of Nevada.” *Id.*

4 The Ninth Circuit unequivocally rejected this argument, explaining that “Courts in the
5 United States have uniformly found that title to the land first passed to the United States through
6 the Treaty [of Guadalupe Hidalgo in 1848].” *Id.* (citing *U.S. v. California*, 436 U.S. 32, 34 n.3
7 (1978) (under the Treaty, “all nongranted lands previously held by the Government of Mexico
8 passed into the federal public domain”); *Cappaert v. U.S.*, 426 U.S. 128, 131 (1976) (limestone
9 cavern located in Nevada is “situated on land owned by the United States since the Treaty of
10 Guadalupe Hidalgo in 1848”).

11 The *Gardner* Court further explained that the Gardners’ reliance “on a case dealing with
12 land acquired by the United States from the thirteen original states” was inapposite because “that
13 decision was based on the terms of the cessions of the land from Virginia and Georgia to the United
14 States,” whereas “[b]efore becoming a state . . . Nevada had no independent claim to sovereignty,
15 unlike the original thirteen states.” *Id.* at 1317–18. “Thus, as the United States has held title to the
16 unappropriated public lands in Nevada since Mexico ceded the land to the United States in 1848,
17 the land is the property of the United States.” *Id.*

18 The *Gardner* Court addressed an Equal Footing Doctrine argument as well. “[T]he
19 Supreme Court held that [under the Equal Footing Doctrine] the shores of and land beneath
20 navigable waters were reserved to the states, and were not granted by the Constitution to the federal
21 government.” *Id.* at 1318 (citing *Pollard’s Lessee v. Hagan*, 44 U.S. 212 (1845)). “However, the
22 Supreme Court has declined to extend the Equal Footing Doctrine to lands other than those
23 underneath navigable waters or waters affected by the ebb and flow of the tides.” *Id.* at 1319.
24 Moreover, “the purpose of the Equal Footing Doctrine is not to eradicate all diversity among states
25 but rather to establish equality among the states with regards to political standing and sovereignty.”
26 *Id.* “Therefore, the Equal Footing Doctrine would not operate, as Gardners argue, to give Nevada
27 title to the public lands within its boundaries.” *Id.*

28

1 **E. The Instant Case**

2 Bundy brings three causes of action, all of which revolve around his long-standing, and oft-
3 rejected, argument that Nevada, not the United States, owns the lands in question. For example, in
4 his first cause of action, Bundy asserts that he “is entitled to declaratory judgment that the lands
5 upon which he and his family have conducted its ranching . . . is property belonging to the People
6 of Nevada and its subdivision, Clark County” Bundy Complaint at 10. In his second cause of
7 action, Mr. Bundy asserts that he is “entitled to declaratory judgment that pursuant to the mandate
8 of the 1983 Nevada Constitution and N.R.S. §§ 321.596 - 321.599 the government of Nevada and
9 its subdivision, Clark County, is obligated to and owes to the Petitioner the duty to defend the
10 interests of the 1983 Nevada Constitution and the statutes of Nevada N.R.S. §§ 321.596 - 321.599
11 in claiming the public lands within the State as the property of Nevada and its subdivision, Clark
12 County.” Bundy Complaint at 12. The third cause of action asserts that “Nevada has a superior
13 claim to title and actual ownership of all of the public lands within Nevada and its subdivision,
14 Clark County,” and that Mr. Bundy “is entitled to an order quieting title to Nevada and its
15 subdivision, Clark County” Bundy Complaint at 13. In short, as he has done for decades,
16 Bundy seeks to make what are federal lands into state lands.

17 **III. LEGAL ARGUMENT**

18 **A. Bundy’s First and Third Claims are Prohibited Under the “Issue Preclusion”**
19 **Doctrine**

20 A plaintiff cannot litigate and lose in one court, and then re-litigate the same issues in
21 another court because he does not like the first outcome. Specifically, the Nevada Supreme Court
22 has ruled that “the following factors are necessary for application of issue preclusion: (1) the issue
23 decided in the prior litigation must be identical to the issue presented in the current action; (2) the
24 initial ruling must have been on the merits and have become final; (3) the party against whom the
25 judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4)
26 the issue was actually and necessarily litigated. *Five Star Capital*, 124 Nev. at 1055. As discussed
27 below, Bundy’s first and third causes of action in his August 20, 2018, Complaint meet each of the
28 issue preclusion factors, and therefore, the Court should dismiss them both.

1 The first cause of action presents issues that are identical to prior litigation because Bundy
2 once again asserts that the federal public lands within the boundaries of the State of Nevada do not
3 belong to the United States and instead are “property belonging to the People of Nevada and its
4 subdivision, Clark County” Bundy Complaint at 10. That issue was actually and necessarily
5 put to rest in *Gardner*, which formed the basis for denial of Bundy’s identical claims in *Bundy I*,
6 and then again in *Bundy II*, and then yet again in the order denying Bundy’s motion to dismiss the
7 criminal indictment against him in *Bundy III*.

8 In *Bundy I*, in 1998, Bundy asked the federal district court to address the issue of federal
9 control over public lands in Nevada. There, the court explicitly determined that the “Bunkerville
10 Allotment where Bundy is grazing his livestock falls within the definition of ‘public lands’
11 administered by the Secretary of the Interior through the BLM.” *Bundy I*, Exh. 1 at *13. That
12 court also explicitly determined that “[a]n examination of the history of the lands in question
13 further establishes federal ownership. [***] The public lands in Nevada are the property of the
14 United States because the United States has held title to those public lands since 1848, when
15 Mexico ceded the land to the United States.” *Id.* at *13–14.

16 Likewise, in 2012, in *Bundy II*, the federal district court rejected Bundy’s essentially
17 identical argument, noting that “[as this court previously ruled in *Bundy I*], the public lands in
18 Nevada are the property of the United States” Exh. 2 at *4–5 (internal citations and
19 quotations omitted).

20 Finally, in *Bundy III*, Bundy yet again asserted that the federal public lands at issue are
21 “owned by the people of Nevada.” *Bundy III*, Exh. 3 at *8–9. Magistrate Judge Leen’s Report and
22 Recommendation made abundantly clear that Bundy’s arguments on this issue lacked any merit:
23 “For more than two decades, Mr. Bundy has argued that the federal government does not have an
24 ownership interest in any land in Nevada, [but] this argument has been soundly and consistently
25 rejected by every court to consider the issue.” *Id.* at *23. Magistrate Judge Leen also poignantly
26 noted that “Mr. Bundy’s position on the ownership and management of federal public lands in
27 Nevada is not only contrary to binding federal case law but it is also at odds with the State of
28 Nevada’s position.” *Id.* at *29.

1 In *Bundy III*, Bundy also argued “that even if the federal government was at one point the
2 absolute owner of the land at issue, it transferred the lands to the State of Nevada on May 5, 1866,
3 without reserving to itself any public lands in the state.” Exh. 3 at *12. This argument appears in
4 Bundy’s Complaint in this case as well. Bundy Complaint at paragraph 12. Magistrate Judge Leen
5 rejected this position, bluntly explaining that “Bundy’s . . . personal interpretations of the
6 Constitution or subsequent congressional actions, including the 1866 Act, are simply not supported
7 by controlling law.” *Bundy III*, Exh. 3 at *35. In her order approving and adopting Magistrate
8 Judge Leen’s findings, Judge Navarro “agree[d] with the analysis and findings of Judge Leen. . . .”
9 *Bundy III*, Exh. 4 at *6.

10 Bundy’s repeatedly failed attempts to claim that the land in question belongs to the State of
11 Nevada and its subdivision, Clark County, have been finally resolved multiple times against
12 Bundy. Additionally, Bundy was not only a party to those cases, he was the party bringing the
13 motions that were decided by the Courts against him. Hence, Bundy’s first cause of action here
14 should be dismissed on the ground that it is precluded under the doctrine of issue preclusion.

15 The third cause of action also presents issues that are identical to the prior litigation for the
16 reasons just discussed. That is because the third cause of action is really no different than the first
17 cause of action with respect to the issues it raises. While the third cause of action seeks “quiet
18 title,” it nonetheless relies on the same legal argument that the federal public lands within the
19 boundaries of the State of Nevada do not belong to the United States and instead belong to the State
20 of Nevada. As stated in Mr. Bundy’s Complaint, the third cause of action asserts that “Nevada has
21 a superior claim to title and actual ownership of all of the public lands within Nevada and its
22 subdivision, Clark County. . . .” Bundy Complaint at 13. Thus, because *Bundy I*, *Bundy II*, and
23 *Bundy III* already disposed of the issue of who has superior title to the lands in question in this
24 case, the third cause also meets the “issue preclusion” factors.

25 Accordingly, the first and third claims asserted in Bundy’s Complaint are barred and must
26 be dismissed as a matter of law.

27 ///

28 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. Plaintiff’s Second Cause of Action Fails to State a Claim Because The Nevada Statutes Relied Upon Are Invalid

In his second cause of action, Bundy asserts that “the government of Nevada and its subdivision, Clark County, is obligated to and owes to the Petitioner the duty to defend the interests of the 1983 Nevada Constitution and the statutes of Nevada N.R.S. §§ 321.596 - 321.599 in claiming the public lands within the State as the property of Nevada and its subdivision, Clark County.” Bundy Complaint at 12. Mr. Bundy fails to state a claim upon which relief can be granted, however, because NRS 321.596–599 are invalid and preempted by federal law, and moreover, as already discussed above, Nevada has no authority to claim ownership of all of the lands within the external boundaries of the State of Nevada (as delineated by the 1983 Nevada Constitutional amendment), and has acknowledged that the United States owns the federal public lands at issue in this case.

These arguments were all disposed of previously in *U.S. v. Nye County*, where the federal district court specifically ruled on the validity of NRS 321.596–599, concluding that “the statutory claim is unsupported, unconstitutional, and fails as a matter of law.” 920 F. Supp. at 1114. Because NRS 321.596–599 have been deemed unconstitutional and untenable, Bundy cannot compel this Court to enforce them as against the State of Nevada or Clark County. Moreover, it is notable that the State of Nevada itself has previously repudiated these statutes—as discussed in *Nye County*, “while Nevada has statutorily claimed the public lands within Nye County, it now concedes that this claim is constitutionally untenable.” *Id.*

In light of this reality, it is untenable for Bundy to seek an order compelling the State of Nevada to now enforce these statutes on his behalf and for his benefit. Rather, this Court should dismiss Bundy’s second cause of action because it cannot grant the relief he seeks.

///
///
///
///
///

1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendant-Intervenor the Center for Biological Diversity
3 respectfully requests that the Court dismiss Plaintiff’s Complaint in its entirety with prejudice
4 and/or enter judgment against Plaintiff as to each and every claim asserted in his Complaint.

5 DATED this 24th day of January, 2019.

6 **CENTER FOR BIOLOGICAL DIVERSITY**

7 By: /s/ Justin Augustine
8 JUSTIN AUGUSTINE, ESQ. (Pro Hac Vice)
9 California Bar No. 235561
10 1212 Broadway, Suite 800
11 Oakland, CA 94612
12 503-910-9214
13 jaugustine@biologicaldiversity.org

14 **WOLF, RIFKIN, SHAPIRO,**
15 **SCHULMAN & RABKIN, LLP**
16 CHRISTOPHER W. MIXSON, ESQ.
17 Nevada Bar No. 10685
18 3556 E. Russell Road, Second Floor
19 Las Vegas, Nevada 89120
20 (702) 341-5200/Fax: (702) 341-5300

21 *Attorneys for Defendant-Intervenor*
22 *Center for Biological Diversity*

23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2019, a true and correct copy of **MOTION OF CENTER FOR BIOLOGICAL DIVERSITY FOR JUDGMENT ON THE PLEADINGS** was served by electronically filing with the Clerk of the Court using the Odyssey Electronic Filing and Service system and serving all parties with an email address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

By: /s/ Christie Rehfeld
Christie Rehfeld, An employee of Wolf, Rifkin,
Shapiro, Schulman and Rabkin LLP

EXHIBIT “1”

EXHIBIT “1”

United States v. Bundy

United States District Court for the District of Nevada

November 3, 1998, Decided; November 4, 1998, Entered and Served

CV-S-98-531-JBR (RJJ)

Reporter

1998 U.S. Dist. LEXIS 23835 *

UNITED STATES OF AMERICA, Plaintiff, v. CLIVEN BUNDY, Defendant.

Subsequent History: Affirmed by United States v. Bundy, 178 F.3d 1301, 1999 U.S. App. LEXIS 19489 (9th Cir. Nev., May 14, 1999)

Related proceeding at, Summary judgment granted by, Motion denied by, As moot, Injunction granted at United States v. Bundy, 2013 U.S. Dist. LEXIS 95294 (D. Nev., July 9, 2013)

Motion granted by, Injunction granted at United States v. Bundy, 2013 U.S. Dist. LEXIS 197007 (D. Nev., Oct. 8, 2013)

Related proceeding at United States v. Bundy, 2016 U.S. Dist. LEXIS 35352 (D. Nev., Mar. 18, 2016)

Related proceeding at Freedom Watch v. BLM, 2016 U.S. Dist. LEXIS 148659 (D.D.C., Oct. 27, 2016)

Related proceeding at Freedom Watch v. BLM, 2017 U.S. Dist. LEXIS 73458 (D.D.C., May 15, 2017)

Counsel: [*1] For United States of America, Plaintiff: Blaine T Welsh, Nadia Janjua Ahmed, LEAD ATTORNEYS, U.S. Attorney's Office, Las Vegas, NV; Stephen R Terrell, Terry M. Petrie, United States Department of Justice, Washington, DC.

Cliven Bundy, Defendant, Pro se, Bunkerville, NV.

Judges: JOHNNIE B. RAWLINSON, United States District Judge.

Opinion by: JOHNNIE B. RAWLINSON

Opinion

ORDER

This matter comes before the Court on Defendant Cliven Bundy's ("Bundy") Motion to Dismiss (#4), Plaintiffs Motion for Summary Judgment (#11), and on Bundy's Motion to Strike Motion for Summary Judgment (#14). Oppositions and Replies were filed for all motions.

I. BACKGROUND

The United States filed a Complaint (#1) on March 27, 1998 for injunctive relief to prevent Bundy's alleged unauthorized and unlawful grazing of livestock on property owned by the United States and administered by the Secretary of the Interior, Bureau of Land Management ("BLM"), and for trespass damages.

Beginning about 1954, Bundy or his father or both have grazed livestock on public lands owned by the United States and administered by the BLM. For several years, Bundy or his father applied to the BLM to use the

Bunkerville Allotment ("Allotment") for livestock grazing and paid [*2] the BLM for the use of the Allotment. Beginning in March 1993, Bundy refused to pay the grazing bills or apply for use of the Allotment.

From 1973 or before until 1993, the BLM issued to Bundy's father and Bundy, as his father's representative, ephemeral grazing permits to graze livestock on the Allotment. Regions classed as ephemeral do not consistently produce forage, but periodically provide annual vegetation suitable for livestock grazing. 33 FED. REG. 18245. Before grazing on an ephemeral range, a person must submit an application to the BLM. The BLM will determine if adequate forage is available and that the use is consistent with all of the terms and conditions of the permit.

The last grazing fees paid by Bundy to the BLM was for the period of December 1, 1992 to February 28, 1993. See Exhibit 7 to #11, Mot. Summ. Jud. The last grazing application was for the same period. See Exhibit 8 to #11. The government contends Bundy did not have authorization to graze livestock on the Allotment after February 28, 1993.

On February 26, 1993, Bundy sent an Administrative Notice of Intent to the BLM, which stated his intent to graze cattle "pursuant to my vested grazing rights." See Exhibit [*3] 10 to #11. Bundy sent several more Administrative Notice[s] of Intent in the months that followed. On June 16, 1993, the BLM sent Bundy a letter informing him that his application had not been received to graze livestock for the June 15, 1993 to August 31, 1993 period. The BLM included another application for Bundy to fill out and return. See Exhibit 12 to #11. Bundy responded to the BLM letter with another Administrative Notice and Intent, stating, among other things, that the BLM has produced no documents showing it had jurisdiction over the public lands. See Exhibit 13 to #11. The BLM began trespass detection efforts at the end of June 1993.

On July 13, 1993, the BLM sent Bundy a Trespass Notice and Order to Remove and gave him ten days to respond. As requested by Bundy, the BLM informed Bundy in a July 27, 1993 letter that it would extend the response time to 30 days. On August 19, 1993, Bundy sent another Administrative Notice and Intent, stating the BLM lacked proof that it had jurisdiction. See Exhibit 16 to #11.

On January 24, 1994, the BLM delivered a Proposed Decision Order to Remove and Demand for Payment to Bundy by placing it on the dashboard of Bundy's vehicle while he [*4] was in the vehicle. BLM officials allege that Bundy became agitated, walked out of his truck and accused the BLM of harassing him. He then returned to his truck, threw the decision out of the window and drove away. One of Bundy's sons then picked up the decision, tore it into pieces and threw it on the ground.

On February 17, 1994, the BLM issued a final decision canceling Bundy's ephemeral range grazing permit. On March 3, 1994, Bundy sent a check for \$1,961.47 to Clark County for grazing fees. The BLM calculated that this amount is equal to the amount Bundy would pay to graze 85 cattle on the Allotment for a 12-month period if the fees were paid to the BLM in advance. Clark County returned the check to Bundy since it did not have jurisdiction over the Allotment.

In March and April of 1994, the BLM sent letters to Bundy requesting that he pay past due bills for grazing fees. Bundy responded by sending more administrative notices. In December 1994, Bundy or his agents served a Constructive Notice on a contractor hired by the BLM to gather wild horses and burros. In August 1995, the BLM sent Bundy another Trespass Notice and Order to Remove. Bundy responded by sending a Constructive Notice [*5] and Order to Stop, in which he again questioned the United States' authority to manage the Allotment. See Exhibit 28 to #11.

In September 1997, the BLM tried to set up a meeting with Bundy to resolve the trespasses, but Bundy declined to meet with the BLM.

The government contends it could have impounded Bundy's livestock, but it took no action because any action could have resulted in physical confrontation. Since the trespass detection efforts began in late June of 1993, the BLM has kept a record of observed livestock grazing on the Allotment.

On April 17, 1998, Bundy, a pro se defendant, filed his Answer and Motion to Dismiss (#4). Bundy alleged that this Court lacks jurisdiction to hear the case. On July 22, 1998, the United States filed a Motion for Summary Judgment (#11) requesting injunctive relief and damages.

II. DISCUSSION

A. Subject Matter Jurisdiction

Bundy appears to argue in his Motion to Dismiss (#4) that the Complaint (#1) should be dismissed because this Court lacks jurisdiction since Article IV of the Constitution cannot be imposed upon him. Bundy claims that he is a citizen of Nevada and not a citizen of a territory of the United States, and he also quotes religious texts. [*6] Bundy also brings in the Property Clause, the Commerce Clause and International Treaty laws. None of these statutes, laws or other citations is relevant to the jurisdictional issue.

Bundy is correct that federal courts have limited jurisdiction. However, this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1345. Section 1331 provides that: "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *Duncan v. Stuetzle*, 76 F.3d 1480, 1485 (9th Cir. 1996). Section 1345 provides that: "the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States ..." 28 U.S.C. § 1345; *United States v. State of Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987).

This Court thus has subject matter jurisdiction under 28 U.S.C. § 1345 because this civil suit was commenced by the United States.

Federal laws regulating and managing federal public lands are involved in this case where the government alleges Bundy is grazing livestock on federal lands without authority and without paying the required fees. Congress enacted the Taylor Grazing Act [*7] ("TGA"), 48 Stat. 1269, as amended, 43 U.S.C. § 315(f), in 1934 to regulate and preserve the federal lands. *Public Lands Council v. Babbitt*, 154 F.3d 1160, 1998 WL 559362, at *1 (10th Cir. 1998). Recognizing that the TGA had not adequately protected the federal lands, Congress in 1976 enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701-1785. 154 F.3d 1160, *Id.* at *2. The FLPMA provides that "the Attorney General may institute a civil action in any United States district court for an injunction or other appropriate order to prevent any person from utilizing public lands in violation of regulations issued by the Secretary under this Act." 43 U.S.C. § 1733(b). This Court therefore has jurisdiction under the FLPMA.

In his Reply (#7), Bundy explains this action started in 1992 when he received a "Full Force and Effect Decision Bunkerville Allotment" from the BLM. Reply (#7), p. 5. The letter to which Bundy refers is in fact dated January 28, 1993. Bundy claims this "decision concerning the Desert Tortoise, if fully implemented, would lead to the end of ranching in Clark County," and his ranching days would be over. Reply (#7), p. 5. The decision from the BLM does not inform [*8] Bundy he can no longer graze livestock due to the protection of the Desert Tortoise, but instead reminds Bundy that his grazing permit would end at the end of the next month, February 1993, and the new permit application was attached to the decision. The decision informed Bundy the BLM would issue him a new ten-year federal grazing permit for the Bunkerville Allotment. Mot. Dism. (#4), Exh. E. The terms and conditions for the new federal grazing permit allowed for livestock grazing with some restrictions to be determined by the BLM. For example, if tortoises were found to be active in the early spring in a specific area, then grazing would not be allowed until the amount of spring ephemeral forage had grown to a sufficient amount.

Bundy alleges the BLM does not have "Constitutional authority" to make the full force and effect decision. The Property Clause of the United States Constitution gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *United States v. Gardner* ("*Gardner II*"), 107 F.3d 1314, 1318 (9th Cir. 1997); U.S. CONST. art. IV, § 3, cl.2. This Congressional power over [*9] the public lands is without limitations. *Gardner II*, 107 F.3d at 1318. Congress enacted the FLPMA, which instructs the Secretary of the Interior to manage through the BLM the public lands under the principles of

multiple use and sustained yield. 43 U.S.C. § 1732(a). "Multiple use" requires managing the public lands and their resources so that they "best meet the present and future needs of the American people," and taking into account the long-term needs of future generations for renewable and nonrenewable resources, including recreation, timber, wildlife and fish and scientific values. 43 U.S.C. § 1702(c). "Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h).

The FLPMA provides the Secretary of the Interior with the authority to regulate grazing and issue grazing permits that require permittees to adhere to the terms and conditions of such permits. *Id.* § 1752(a). The Allotment is administered by the Secretary of the Interior through the BLM, thus the BLM had authority to issue the full force and effect decision. [*10] The Allotment where Bundy and his father before him have been grazing livestock is classed as an ephemeral region, which does not consistently produce forage. The BLM has authority under the FLPMA to place restrictions on grazing when the forage declines to a level that would defeat the goals of multiple use and sustained yield.

B. Summary Judgment

Summary judgment may be granted when, viewed in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Intel Corp. v. Hartford Acc. and Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991), "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment shall be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Summary judgment [*11] shall not be granted if a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. *Matsushita*, 475 U.S. at 588-87; Fed. R. Civ. P. 56(e). The nonmoving party may not rest upon the mere allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 256; Fed. R. Civ. P. 56(e). The evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor. *Anderson*, 477 U.S. at 255; Fed. R. Civ. P. 56(e).

Bundy argues in his Opposition to Motion for Summary Judgment (#14) that the Court should strike the government's Motion for Summary Judgment (#11) because his Motion to Dismiss (#4) has not been ruled upon and thus the government's motion is "premature and unnecessary." [*12] Bundy's argument is unpersuasive. The plaintiff may move for summary judgment at any time more than twenty days after the commencement of the action. Fed. R. Civ. P. 56(a); *G & G Fire Sprinklers, Inc. v. Bradshaw*, 156 F.3d 893, 1998 WL 596442, at *9 (9th Cir. 1998). The government filed the Complaint (#1) on March 27, 1998, and it filed its Motion for Summary Judgment (#11) on July 22, 1998, almost four months later.

Bundy argues since this Court does not have jurisdiction, it must deny the Motion for Summary Judgment (#11). Bundy's argument fails again. Bundy's citation of *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), does not help his case. The Supreme Court in *Steel* stated: "Without jurisdiction the court cannot proceed at all in any cause." *Id.* at 1012. The *Steel* Court frowned upon "hypothetical jurisdiction" where courts assume jurisdiction for the purpose of deciding the merits of cases. *Id.* However, this Court is not assuming jurisdiction where none exist; this Court has federal question jurisdiction and the United States is a party. Therefore, Bundy's jurisdictional argument must fail.

C. Federal Lands

Bundy argues the federal [*13] government cannot have authority over lands "inside an admitted state." See Motion to Dismiss (#4), p. 10. That argument must fail because federal lands located within states are federal territories under federal jurisdiction. The FLPMA provides:

The term "public lands" means 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, without regard to how the United States acquired ownership, except —

- (1) lands located on the Outer Continental Shelf; and
- (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

43 U.S.C. § 1702(e). The Bunkerville Allotment where Bundy is grazing his livestock falls within the definition of "public lands" administered by the Secretary of the Interior through the BLM.

An examination of the history of the lands in question further establishes federal ownership. On May 13, 1846, the United States declared war on Mexico. The Treaty of Guadalupe Hidalgo ("Treaty"), 9 Stat. 922 (1848), which ended the war, was signed by the United States Congress on February 2, 1848 and ratified by the Mexican Congress on May 25, 1848.

In the Treaty, Mexico ceded [*14] land to the United States, including land that is now Nevada. *Gardner II*, 107 F.3d at 1317. Where Mexico before the Treaty included land that is now California, Nevada, Arizona, New Mexico, Colorado, Texas and Utah, the Treaty drew the new boundary line starting at the Gulf of Mexico, opposite the mouth of the Rio Grande, following the river until the southern boundary of New Mexico, then westward until it touches the first branch of the River Gila River, then westward until it empties into the Colorado River, then to the Pacific Ocean. 9 Stat. 922, 926, Article V; see also *Encyclopedia Britannica, Micropedia*, 15th ed., vol. 5 at 528. The public lands in Nevada are the property of the United States because the United States has held title to those public lands since 1848, when Mexico ceded the land to the United States. *Gardner II*, 107 F.3d at 1318.

Summary judgment shall be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Bundy has failed to make such a showing. He has set forth no specific facts showing a [*15] genuine factual issue for trial. See *Matsushita*, 475 U.S. at 588-87; Fed. R. Civ. P. 56(e). Although courts construe liberally pleadings of pro se litigants such as Bundy in their favor, pro se litigants are still bound by the rules of procedure. *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). As the nonmoving party, Bundy may not rest upon the mere allegations or denials of his pleadings, but he must produce specific facts, by affidavit or other evidentiary materials, showing there is a genuine issue for trial. See *Anderson*, 477 U.S. at 256; Fed. R. Civ. P. 56(e). Bundy has produced no specific facts, but instead has argued that this Court has no jurisdiction. Bundy's failure to produce specific facts showing a genuine issue for trial gives the Court sufficient grounds to grant the Motion for Summary Judgment (#11).

D. Injunctive Relief

Injunctive relief is appropriate when the moving party shows irreparable injury will result and remedies at law are inadequate. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). The moving party must show actual success on the merits and the balance of equities favors injunctive relief. *Id.* As [*16] stated above, the United States owns the Allotment where Bundy is grazing his livestock. Bundy is therefore trespassing upon United States property. Trespass is defined as entering the real property of another without the owner's permission or invitation. *United States v. Gardner* ("*Gardner I*"), 903 F. Supp. 1394, 1402 (D. Nev. 1995) (citing RESTATEMENT SECOND OF TORTS, §§ 158-59). The Restatement of Torts provides that:

One is subject to liability to another for trespass... if he intentionally

- (a) enters land in the possession of the other, or causes a thing ... to do so, or
- (b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

RESTATEMENT SECOND OF TORTS, §§ 158-59. Grazing on federal public lands without a permit is a grazing trespass. *Holland Livestock Ranch v. United States*, 655 F.2d 1002, 1005 (9th Cir. 1981).

Gardner I had facts similar to this case, where the defendants grazed livestock without authority. A permanent injunction was entered against the defendants; they were ordered to remove the livestock, and pay the owed grazing fees. *Gardner I*, 903 F. Supp. at 1403. As in *Gardner I*, the United States prevails in this case on the [*17] merits since Bundy is trespassing. The other component of the test requiring a showing of irreparable injury and inadequate remedies at law has also been met by the United States. Bundy has been grazing his livestock on the Allotment without a permit since March 1993, and he has informed the BLM in several "administrative notices" that he intends to graze cattle "pursuant to my vested grazing rights." See Exhibit 10 to #11. Despite numerous trespass notices and demands for payment from the BLM, Bundy has grazed livestock on the Allotment. Irreparable harm is established in cases of continuing trespasses. See, e.g., *Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 892 (1st Cir. 1988)(a continuing trespass on real property can properly be enjoined); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989)(defendants' stated intent to continue illegal actions showed harm was of a continuing nature and permanent injunction properly issued).

Section 4140.1 of the Code of Federal Regulations prohibits unauthorized grazing of livestock on public lands. 43 C.F.R. § 4140.1(b)(1)(i) (1998). Any person who violates the grazing regulations as set forth under 43 C.F.R. § 4140.1(b) [*18] is subject to civil and criminal penalties. 43 C.F.R. §§ 4140.1(b), 4170.1, 4170.2. The regulations provide that the settlement for repeated willful violations is three times the value of the forage consumed by the livestock as determined by the average monthly rate per AUM (animal unit month) ¹. 43 C.F.R. § 4150.3. The BLM is also authorized to impound and dispose of the unauthorized livestock after written notice of intent to impound. 43 C.F.R. §§ 4150.2, 4150.4, 4150.4-1, 4150.4-2; see also *Klump v. United States*, 38 Fed. Cl. 243 (1997)(government had not violated takings clause in impounding cattle as sanction for unauthorized grazing on federal lands). The government alleges that the BLM has not impounded Bundy's livestock due to its anticipation the action could result in physical confrontation. See Mot. Summ. Jud., #11, pp. 11-12. For over five years, Bundy has been trespassing on public lands and his livestock have consumed forage. The government has shown commendable restraint in allowing this trespass to continue for so long without impounding Bundy's livestock.

III. CONCLUSION

This [*19] Court has subject matter jurisdiction under 28 U.S.C. §§1331 and 1345. The United States owns the Allotment where Bundy is grazing livestock without authority. Since Bundy is in trespass on public lands,

IT IS ORDERED that Defendant's Motion to Dismiss (#4) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment (#11) is GRANTED as to the permanent injunction.

IT IS FURTHER ORDERED that Bundy is permanently enjoined from grazing his livestock within the Bunkerville Allotment and shall remove his livestock from this allotment on or before November 30, 1998.

IT IS FURTHER ORDERED that Plaintiff United States shall be entitled to trespass damages from Bundy in the amount of \$200.00 per day per head for any livestock belonging to Bundy remaining on the Bunkerville Allotment after November 30, 1998.

IT IS FURTHER ORDERED that Defendant's Motion to Strike Motion for Summary Judgment (#14) is DENIED.

The Clerk shall enter judgment accordingly.

¹ An animal unit month is the amount of forage necessary for the sustenance of one cow for one month.

DATED this 3rd day of November, 1998.

/s/ Johnnie B. Rawlinson

JOHNNIE B. RAWLINSON

United States District Judge

End of Document

EXHIBIT “2”

EXHIBIT “2”

United States v. Bundy

United States District Court for the District of Nevada

July 9, 2013, Decided; July 9, 2013, Filed

Case No. 2:12-cv-0804-LDG-GWF

Reporter

2013 U.S. Dist. LEXIS 95294 *; 2013 WL 3463610

UNITED STATES OF AMERICA, Plaintiff, v. CLIVEN BUNDY, Defendant.

Subsequent History: Motion denied by United States v. Bundy, 2017 U.S. App. LEXIS 26909 (9th Cir. Nev., Dec. 27, 2017)

Prior History: United States v. Bundy, 1998 U.S. Dist. LEXIS 23835 (D. Nev., Nov. 3, 1998)

Counsel: [*1] For United States of America, Plaintiff: Stephen R Terrell, United States Department of Justice, Washington, DC; Terry M. Petrie, U.S. Department of Justice, Denver, CO; Nadia Janjua Ahmed, U.S. Attorney's Office, Las Vegas, NV.

Cliven Bundy, Defendant, Pro se, Bunkerville, NV.

Judges: Lloyd D. George, United States District Judge.

Opinion by: Lloyd D. George

Opinion

This matter comes before the court on the plaintiff United States' Motion for Summary Judgment (#18, Opposition #28, Reply #30) and defendant Cliven Bundy's Motion to Dismiss (#28, Opposition #30).

I. BACKGROUND

The United States filed a complaint on May 14, 2012, for injunctive relief to prevent Bundy's alleged unauthorized and unlawful grazing of livestock on property owned by the United States and administered by the Secretary of the Interior, Bureau of Land Management and National Park Service, and for trespass damages.

In an order dated November 3, 1998, this court permanently enjoined Bundy from grazing his livestock within a different area, the Bunkerville Allotment, and ordered Bundy to remove his livestock from the Allotment before November 30, 1998. *U.S. v. Bundy*, No. CV-S-98-531-JBR (RJJ), 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 4, 1998). The court also ordered that the [*2] United States was entitled to trespass damages from Bundy for livestock left on the Bunkerville Allotment after such date.

In its complaint, the United States alleges that, not only has Bundy failed to comply with the court's orders that he remove his cattle from the Bunkerville Allotment and pay the financial penalties, but that Bundy's cattle have moved beyond the boundaries of the Bunkerville Allotment and are now trespassing on a broad swath of additional federal land (the "New Trespass Lands"), including public lands within the Gold Butte area that are administered by the BLM, and National Park System land within the Overton Arm and Gold Butte areas of the Lake Mead National Recreation Area. The United States seeks an order enjoining Bundy's unauthorized grazing on the New Trespass Lands.

II. SUMMARY JUDGMENT

Summary judgment may be granted when, viewed in the light most favorable to the non-moving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Intel Corp. v. Hartford Acc. And Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991), "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show [*3] that there is not genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Summary judgment should not be granted if a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the non-moving party to set forth specific facts demonstrating a genuine factual issue for trial. *Matsushita*, 475 U.S. at 588-87; Fed. R. Civ. P. 56(e). The non-moving party may not rest upon the mere allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. *Anderson*, 477 U.S. at 256; Fed. R. Civ. P. 56(e). [*4] The evidence of the non-moving party is to be believed, and all justifiable inferences are to be drawn in the non-moving party's favor. *Anderson*, 477 U.S. at 255; Fed. R. Civ. P. 56(e).

Bundy principally opposes the United States' motion for summary judgment on the ground that this court lacks jurisdiction because the United States does not own the public lands in question. As this court previously ruled in *United States v. Bundy*, Case No. CV-S-98-531-JBR (RJJ), 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 4, 1998), "the public lands in Nevada are the property of the United States because the United States has held title to those public lands since 1848, when Mexico ceded the land to the United States." 1998 U.S. Dist. LEXIS 23835 at *14 (citing *United States v. Gardner*, 107 F.3d 1314, 1318 (9th Cir. 1997)). Moreover, Bundy is incorrect in claiming that the Disclaimer Clause of the Nevada Constitution carries no legal force, see *Gardner*, 107 F.3d at 1320; that the Property Clause of the United States Constitution applies only to federal lands outside the borders of states, see *id.* at 1320; that the United States' exercise of ownership over federal lands violates the Equal Footing Doctrine, see *id.* at 1319; that the United States is [*5] basing its authority to sanction Bundy for his unauthorized use of federal lands on the Endangered Species Act as opposed to trespass, see Compl. at ¶¶ 1,3, 26-39; and that Nevada's "Open Range" statute excuses Bundy's trespass. See e.g., *Gardner*, 107 F.3d at 1320 (under Supremacy Clause state statute in conflict with federal law requiring permit to graze would be trumped).

Nor is there a legitimate dispute that Bundy has grazed his cattle on the New Trespass Lands without federal authorization. The United States has submitted Bundy's deposition excerpts indicating that Bundy has grazed livestock on the New Trespass Lands and further evidence of the trespass of Bundy's cattle in those areas. Notwithstanding Bundy's contentions that the observed cattle bearing his brand may not in fact be his own, such a denial does not controvert Nevada law regarding prima facie evidence of ownership of branded cattle. In sum, in this most recent effort to oppose the United States' legal process, Bundy has produced no valid law or specific facts raising a genuine issue of fact regarding federal ownership or management of public lands in Nevada, or that his cattle have not trespassed on the New Trespass [*6] Lands.

III. INJUNCTIVE RELIEF

The United States has established irreparable harm not only through the continuing nature of Bundy's trespass, *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 12, 19 S. Ct. 77, 43 L. Ed. 341 (1898); *Newfound Mgmt. Corp. v. Lewis*, 131 F.3d 108, 115, 37 V.I. 612 (3rd Cir. 1997), but because Bundy's cattle have caused and continue to cause damage to natural and cultural resources and pose a threat to public safety. The United States has also demonstrated that the equities and the public interest strongly favor an injunction. The public interest is best served by having the federal lands managed without the presence of trespassing cattle on lands that are closed to grazing. The public interest is also best served by removal of trespassing cattle that cause harm to natural and cultural resources or pose a threat to the health and safety of members of the public who use the federal lands for recreation. The court finds that the public interest is negatively affected by Bundy's continuing trespass.

Moreover, the United States is entitled to injunctive relief as a matter of law once trespass on federal lands is proven. See *United States v. Nogueira*, 403 F.2d 816, 825 (9th Cir. 1968). The same result [*7] followed in *Gardner* where this court held that the United States was entitled to injunctive relief to prevent a continuing trespass. 107 F.3d at 1317. Finally, the public interest is served by the enforcement of Congress' mandate for management of the public rangelands, and by having federal laws and regulations applied to all citizens equally.

IV. CONCLUSION

IT IS HEREBY ORDERED that the United States' Motion for Summary Judgment (#18) is GRANTED.

IT IS FURTHER ORDERED that defendant Cliven Bundy's Motion to Dismiss (#28) is DENIED as moot.

IT IS FURTHER ORDERED that Bundy is permanently enjoined from trespassing on the New Trespass Lands.

IT IS FURTHER ORDERED that the United States is entitled to protect the New Trespass Lands against this trespass, and all future trespasses by Bundy.

IT IS FURTHER ORDERED that Bundy shall remove his livestock from the New Trespass Lands within 45 days of the date hereof, and that the United States is entitled to seize and remove to impound any of Bundy's cattle that remain in trespass after 45 days of the date hereof.

IT IS FURTHER ORDERED that the United States is entitled to seize and remove to impound any of Bundy's cattle for any future trespasses, [*8] provided the United States has provided notice to Bundy under the governing regulations of the United States Department of the Interior.

DATED this 9th day of July, 2013.

/s/ Lloyd D. George

Lloyd D. George

United States District Judge

End of Document

EXHIBIT “3”

EXHIBIT “3”

United States v. Bundy

United States District Court for the District of Nevada

December 20, 2016, Decided; December 20, 2016, Filed

Case No. 2:16-cr-00046-GMN-PAL

Reporter

2016 U.S. Dist. LEXIS 182437 *

UNITED STATES OF AMERICA, Plaintiff, v. CLIVEN D. BUNDY, Defendant.

Subsequent History: Adopted by, Motion denied by United States v. Bundy, 2017 U.S. Dist. LEXIS 7525 (D. Nev., Jan. 18, 2017)

Prior History: United States v. Bundy, 2016 U.S. Dist. LEXIS 35352 (D. Nev., Mar. 18, 2016)

Counsel: [*1] For Cliven D. Bundy, also known as Cliven Bundy, Defendant: Joel F. Hansen, LEAD ATTORNEY, Cooper Levenson, P.A., Las Vegas, NV; Bret O Whipple, Bret Whipple, Law Office of, Las Vegas, NV.

Ryan C. Bundy, Defendant, Pro se, Pahrump, NV.

For Ryan C. Bundy, Defendant: Angela H. Dows, LEAD ATTORNEY, Premier Legal Group, Las Vegas, NV.

For Ammon E. Bundy, Defendant: Daniel Hill, LEAD ATTORNEY, Wolf, Rifkin, Shapiro & Schulman, Las Vegas, NV.

For Ryan W. Payne, Defendant: Brenda Weksler, Shari L. Kaufman, William C. Carrico, LEAD ATTORNEYS, Federal Public Defender, Las Vegas, NV; Ryan Norwood, LEAD ATTORNEY, Federal Public Defenders, Las Vegas, NV; Cristen Thayer, Cullen Macbeth, Las Vegas, NV.

For Peter T. Santilli, Jr., true name, Peter T. Santilli, Defendant: Chris T Rasmussen, LEAD ATTORNEY, Rasmussen & Kang LLC., Las Vegas, NV.

For Melvin D. Bundy, Defendant: Lucas Gaffney, LEAD ATTORNEY, Oronoz, Ericsson & Gaffney LLC, Las Vegas, NV.

For David H. Bundy, Defendant: Cal J. Potter, III, LEAD ATTORNEY, Potter Law Offices, Las Vegas, NV.

For Brian D. Cavalier, Defendant: Mace J Yampolsky, LEAD ATTORNEY, Mace Yampolsky, LTD, Las Vegas, NV.

For Blaine Cooper, Defendant: Dennis Matthew Lay, LEAD ATTORNEY, [*2] Nguyen & Lay, Las Vegas, NV.

For Gerald A. Delemus, Defendant: Dustin R. Marcello, LEAD ATTORNEY, Osvaldo E. Fumo, Chtd, Las Vegas, NV.

For Eric J. Parker, Defendant: Jess R. Marchese, LEAD ATTORNEY, Law Office of Jess R. Marchese, Las Vegas, NV.

For O. Scott Drexler, Defendant: Todd M Leventhal, LEAD ATTORNEY, Leventhal and Associates, Las Vegas, NV.

For Richard R. Lovelien, Defendant: Shawn R Perez, LEAD ATTORNEY, Law Office Of Shawn R. Perez, Las Vegas, NV.

For Steven A. Stewart, Defendant: Richard E Tanasi, LEAD ATTORNEY, Las Vegas, NV.

Todd C. Engel, Defendant, Pro se, Pahrump, NV.

For Todd C. Engel, Defendant: John G George, LEAD ATTORNEY, John George, Las Vegas, NV.

For Gregory P. Burluson, Defendant: Terrence M Jackson, LEAD ATTORNEY, Law Office of Terrence M. Jackson, Las Vegas, NV.

For Joseph D. O'Shaughnessy, Defendant: Andrea Lee Luem, LEAD ATTORNEY, Law Offices of Andrea L Luem, Las Vegas, NV.

For Micah L. McGuire, Defendant: Chris Arabia, LEAD ATTORNEY, Las Vegas, NV.

For Jason D. Woods, Defendant: Kristine M Kuzemka, LEAD ATTORNEY, Kuzemka Law Group, Las Vegas, NV.

For Russell M. Aoki, Interested Party: Russell M Aoki, LEAD ATTORNEY, Aoki Law PLLC, Seattle, WA.

For Las Vegas Review-Journal, [*3] Battle Born Media, Associated Press, Intervenor: Alina M Shell, Margaret A McLetchie, LEAD ATTORNEYS, McLetchie Shell LLC, Las Vegas, NV.

For USA, Plaintiff: Erin M Creegan, LEAD ATTORNEY, United States Attorney District of Nevada, Las Vegas, NV; Nadia Janjua Ahmed, Roger W. Wenthe, Steven W. Myhre, LEAD ATTORNEYS, U.S. Attorney's Office, Las Vegas, NV; Nicholas D Dickinson, LEAD ATTORNEY, US Attorneys Office, Las Vegas, NV.

Judges: PEGGY A. LEEN, UNITED STATES MAGISTRATE JUDGE.

Opinion by: PEGGY A. LEEN

Opinion

ORDER - AND - REPORT OF FINDINGS AND RECOMMENDATION

(Mot. Dismiss - ECF No. 892)

Before the court is Defendant Cliven D. Bundy's ("Cliven Bundy") Motion to Dismiss Indictment for Lack of Subject Matter Jurisdiction and Under Rule 12(b)(5) for Failure to State an Offense (ECF No. 892), which was referred to the undersigned for a Report of Findings of Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4 of the Local Rules of Practice. On December 9, 2016, the court held a hearing on this Motion. Present was counsel for Cliven Bundy, Brett Whipple, and counsel for the government, Steven Myhre, Nicholas Dickinson, Nadia Ahmed, and Erin Creegan. The court has considered the Motion, Defendants Steven Stewart, Ryan Payne, Melvin Bundy, and [*4] Ammon Bundy's Motions for Joinder (ECF Nos. 915, 980, 1095, 1117), the Government's Response (ECF No. 985), Cliven Bundy's Reply (ECF No. 1035), and the arguments of counsel at the hearing.

BACKGROUND

I. THE INDICTMENT

Defendant Cliven Bundy and 18 co-defendants are charged with 16 counts in a Superseding Indictment (ECF No. 27) returned March 2, 2016. The superseding indictment arises out of a series of events related to a Bureau of Land Management ("BLM") impoundment of Cliven Bundy's cattle following a two-decade-long battle with the federal government. Beginning in 1993, Cliven Bundy continued to graze cattle on land commonly referred to as the "Bunkerville Allotment" without paying required grazing fees or obtaining required permits. The United States initiated civil litigation against Cliven Bundy in 1998 in the United States District Court for the District of Nevada. See *United States v. Bundy*, No. 2:98-cv-0531-JBR-RJJ ("*Bundy I*"), 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 3, 1998), Order (No. 19) (granting motion for summary judgment). The court found that Cliven Bundy had engaged in unauthorized and unlawful grazing of his livestock on property owned by the United States and administered by the Department of the Interior through [*5] the BLM. *Id.* The court permanently enjoined Cliven Bundy from grazing his livestock on the Bunkerville Allotment, ordered him to remove them, and authorized the BLM to impound any unauthorized cattle. *Id.* The Court of Appeals for the Ninth Circuit affirmed the district court's decision. *United States v. Bundy*, 178 F.3d 1301 (9th Cir. 1999).

Bundy did not remove his cattle or comply with the court's order and injunction. The United States went back to court. Subsequent orders were entered in 2013 by different judges in this district issuing a new injunction permanently enjoining Bundy from trespassing on additional federal lands administered by the National Park Service ("NPS") in the Lake Mead National Recreation Area,¹ ordering Bundy to remove his cattle, and explicitly authorizing the United States to seize, remove, and impound any of Bundy's cattle for future trespasses, provided that written notice was given to Bundy, and modifying and enforcing the 1998 permanent injunction from *Bundy I* addressing the Bunkerville Allotment. *United States v. Bundy*, No. 2013 U.S. Dist. LEXIS 197007, 2:98-cv-0531-LRH-VCF (D. Nev. Oct. 9, 2013), Order (ECF No. 56) (granting motion to enforce injunction); *United States v. Bundy*, 2:12-cv-0804-LDG-GWF ("*Bundy II*"), 2013 U.S. Dist. LEXIS 95294, 2013 WL 3463610 (D. Nev. July 9, 2013), Order (ECF No. 35) [*6] (granting motion for summary judgment and permanently enjoining trespass).

On February 17, 2014, the BLM entered into a contract with a civilian contractor in Utah to round up and gather Bundy's trespass cattle. BLM developed an impoundment plan to establish a base of operations on public lands near Bunkerville, Nevada, about 7 miles from the Bundy ranch in an area commonly referred to as the Toquop Wash. On March 20, 2014, BLM also entered into a contract with an auctioneer in Utah who was to sell impounded cattle at a public sale. Bundy was formally notified that impoundment operations would take place on March 14, 2014. The following day, Bundy allegedly threatened to interfere with the impoundment operation by stating publicly that he was "ready to do battle" with the BLM, and would "do whatever it takes" to protect "his property." The superseding indictment alleges that after being notified that BLM intended to impound his cattle, Bundy began to threaten to interfere with the impoundment operation, and made public statements he intended to organize people to come to Nevada in a "range war" with BLM and would do whatever it took to protect his cattle and property.

The superseding [*7] indictment alleges that, beginning in March 2014, the 19 defendants charged in this case planned, organized, conspired, led and/or participated as followers and gunmen in a massive armed assault against federal law enforcement officers to threaten, intimidate, and extort the officers into abandoning approximately 400 head of cattle owned by Cliven Bundy. The removal and impoundment operation began on April 5, 2014. On April 12, 2014, defendants and hundreds of recruited "followers" executed a plan to recover the cattle by force, threats, and intimidation. Defendants and their followers demanded that officers leave and abandon the cattle and threatened to use force if the officers did not do so. The superseding indictment alleges armed gunmen took sniper positions behind concrete barriers and aimed their assault rifles at the officers. Defendants and their followers outnumbered the officers by more than 4 to 1, and the potential firefight posed a threat to the lives of the officers, as well as unarmed bystanders which included children. Thus, the officers were forced to leave and abandon the impounded cattle.

After the April 12, 2014 confrontation with federal officers, the superseding [*8] indictment alleges that the leaders and organizers of the conspiracy organized armed security patrols and check points in and around Cliven Bundy's Bunkerville ranch to deter and prevent any future law enforcement actions against Bundy or his co-conspirators, and to protect Bundy's cattle from future law enforcement actions.

II. THE PARTIES' POSITIONS

A. Cliven Bundy's Motion to Dismiss

In the current motion, Cliven Bundy seeks to dismiss the superseding indictment against him arguing the court lacks subject matter jurisdiction because the federal government does not have any ownership interest in land within the State of Nevada. The motion argues that any activity of federal agents during the time period described within the indictment was illegal and consists of an aggressive trespass into lands owned by the people of Nevada. Certain counts of the superseding indictment require proof that Mr. Bundy interfered with lawful duties of federal agents.

¹ By 2012, Bundy's cattle had multiplied and he also began grazing his cattle on land administered by the NPS in the Lake Mead National Recreation Area without obtaining grazing permits or paying grazing fees.

These counts are precluded as a matter of law and must be dismissed for failure to state a claim. Specifically, the court should dismiss Counts 1D, 1E, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 because all of these counts involve proof [*9] that federal officers were engaged in lawful duties. The motion traces the history of the feudal land system dating back to the Norman conquest of 1066. It also cites statements of our founding fathers concerning the goals of the American Revolution which included abolishing the system of feudal land ownership and tenancy.

The motion argues that historically, the states allowed for federal and centralized allotment and disposition of western lands so that the federal government could parcel out land to new settlers and use the money to pay off debt. This system of centralized distribution of western lands was intended to be temporary. However, the United States Congress has held almost all of Nevada's lands either out of use entirely, or acting as a quasi-feudal landlord, and allowed heavily regulated and managed uses of local land while extracting fees from local producers. Bundy maintains Congress has, in this manner, allotted Nevada to itself in perpetuity and is now Nevada's largest landlord and "the functional lord of Nevada, its citizens, and its local politics."

The court should dismiss the superseding indictment as a matter of law for failure to state a claim under Rule 12(b) because it [*10] is a motion capable of determination before trial and involves a question of law rather than fact. The motion argues that the indictment must be dismissed because federal agents involved in this prosecution were engaged in unlawful acts, trespassing upon state and local property, and the chattel of Mr. Bundy. The motion contends that the United States federal government has never lawfully owned land in Nevada. The Nevada State Legislature has never consented to let the federal government own 85% of public land within Nevada's boundaries. Although the Territorial Legislature did consent, this does not bind the Nevada State Legislature which has expressly repudiated federal ownership in a series of statutes declaring state ownership, control, and jurisdiction over all "public lands" within Nevada.

Bundy argues that although the federal government claims it acquired the land from the nation of Mexico following the Mexican-American War pursuant to the Treaty of Guadalupe Hildago, it is incorrect. The treaty as a whole merely defined the boundary between two nations and established rules of diplomatic relations and international relations between them. It explicitly reserved the rights in [*11] the land to the inhabitants to be "inviolably respected." It promised the inhabitants that they would, at the proper time, be admitted as a state and able to enjoy all rights of citizens of the United States. This indicates Congress was never the absolute owner of the lands at issue and never had plenary power.

Alternatively, Bundy argues that even if the federal government originally owned the land, the federal government only owned the land conditionally as a matter of contract and title passed to the State of Nevada when that condition expired. He maintains that the conditional ownership of Nevada public lands by the federal government terminated as soon as the federal government violated the condition upon their ownership interest. Specifically, the federal government violated the condition of their ownership as soon as they demonstrated intent to permanently retain public lands. With this breach of compact, title to all of the public lands reverted to the State of Nevada and citizens of the state who were occupying and using those lands. Bundy is aware that the Ninth Circuit has rejected this argument in *United States v. Gardner*, 107 F.3d 1314, 1317-18 (9th Cir. 1997). However, he argues that *Gardner* was wrongly decided.

The motion argues, in [*12] the alternative, that even if the federal government was at one point the absolute owner of the land at issue, it transferred the lands to the State of Nevada on May 5, 1866, without reserving to itself any public lands in the state. This occurred when Congress enacted "An Act Concerning the Boundaries of the State of Nevada." Bundy claims that in this Act, Congress absolutely disposed of the lands of Southern Nevada to the State of Nevada permanently and without reservation, in line with historical practice. Elsewhere in the Act, Congress imposed a condition that Nevada agree not to interfere with the possessory rights to mining claims in the Pahranaagat and other districts in the State of Nevada. This shows Congress intended to dispose of the land and give up its plenary power over the lands in the Act.

The motion also makes arguments that the United States' absolute ownership of the land is unconstitutional and violates the equal footing doctrine, the equal sovereignty doctrine, is contrary to the fundamental principles of

justice within a federation of states, violates the equal protection and the privileges and immunities of the citizens of Nevada.

The motion concludes that the superseding [*13] indictment alleges that Cliven Bundy conspired to interfere with, threaten and assault federal agents in the course of their allegedly lawful duties upon the Bundy ranch. However, as the federal government does not have any ownership interest in the Bundy ranch, the court is deprived of subject matter jurisdiction. The court should dismiss those counts that include as an element proof that Bundy interfered with lawful duties of federal agents.

B. The Government's Response

The government opposes the motion arguing it should be denied as frivolous. The charging language of the superseding indictment contains the elements of the offenses charged and fairly informs Bundy of the charges against him enabling him to plead an acquittal or conviction to bar future prosecution. It is therefore sufficient under Rule 12. Bundy's arguments that the court lacks subject matter jurisdiction are false. However, the government maintains that ownership of the lands is irrelevant to the court's subject jurisdiction over the offense conduct charged in this case. Federal district courts have exclusive original jurisdiction over "all offenses against the laws of the United States under 18 U.S.C. § 3231. All of the counts in the [*14] superseding indictment involve offenses against the laws of the United States, and the court therefore has subject matter jurisdiction regardless of whether the offenses were committed on federal land, state land, or Bundy's land.

Bundy's claims that the court lacks jurisdiction because, according to him, court orders being enforced by BLM officers were unlawful because the State of Nevada owns public lands also lack merit. The Supreme Court has determined that the United States Constitution vests the federal government with power to own and regulate public lands. The Supreme Court has held that Congress has near "complete power" under the Property Clause of the Constitution over public land. This court has repeatedly found that the land where the BLM was conducting impoundment operations was owned by the United States and not the State of Nevada. While Bundy may disagree with the court's findings, they were affirmed by the Ninth Circuit on appeal. His disagreement with the court's findings does not deprive the court of subject matter jurisdiction over the offenses charged, or make the BLM's actions unlawful or unconstitutional. The government cites *United States v. Willfong*, 274 F.3d 1297, 1300-01 (9th Cir. 2001), for the proposition that a federal law enforcement officer is engaged [*15] in his duties when on the job, even if executing an order that could later be found invalid.

The political question of whether the federal government can or should own land is irrelevant to whether the indictment properly alleges Bundy committed the offenses charged. The superseding indictment need only track the language of the statute comprising the offenses charged to comport with Rule 12. Additionally, Bundy's political views provide no defense to any of these offenses at trial.

C. Cliven Bundy's Reply

Bundy's reply reiterates argument that the charges against him are beyond the jurisdiction of this court and are barred on their face as a matter of law. The reply accuses the United States of failing to address the arguments raised in the motion. The government's opposition primarily relies on orders of this court in the collateral civil cases of *Bundy I* and *Bundy II*, and a catchall reference to the Supreme Court's interpretation of the Property Clause. However, the motion to dismiss addressed *Bundy I* and *Bundy II* and distinguished the Ninth Circuit's holding in *Gardner* and related Supreme Court cases. The United States fails entirely to address the arguments based on the Congressional Act of May 5, 1866. [*16]

Bundy disputes the United States' position that the legality or illegality of the federal activity described in the indictment is irrelevant. The United States must still prove that the actions of federal agents alleged in the superseding indictment were lawful. Bundy argues that the Ninth Circuit's holding in *Willfong* is contrary to fundamental principles of justice and the character of the American form of government. He argues that the

American Revolution was an act of treason and a violation of law by the colonists. The United States is effectively arguing that people must, as a matter of law, submit to unlawful orders, or else be called a criminal which is alien and foreign to our shared history. The offenses charged in the superseding indictment require proof of lawful official duties and lawful justice and are not satisfied by any type of good faith belief by the agents involved. Any other result "would be tantamount to a declaration that the United States is itself not subject to its laws, and that its people are subject not only to the laws of the United States, but the un-laws of the United States." Mr. Bundy is exercising his right to challenge the application of any such [*17] case law and is preserving those objections to higher courts if necessary.

DISCUSSION

I. APPLICABLE LEGAL STANDARD

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure,² a "party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Rule 12(b)(3) specifies the motions which must be made before trial. Among them is a motion to dismiss for failure to state an offense. Fed. R. Crim. P. 12(b)(3)(A)(v). A pretrial motion to dismiss a criminal case is appropriate when it involves questions of law rather than fact. *United States v. Schulman*, 817 F.2d 1355, 1358 (9th Cir. 1987).

In ruling on a pretrial motion to dismiss, "the district court is bound by the four corners of the indictment." *United States v. Lyle*, 742 F.3d 434, 436 (9th Cir. 2014); *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002) ("On a motion to dismiss an indictment for failure to state an offense the court must accept the truth of the allegations in the indictment in analyzing whether a cognizable offense has been charged."). The court should not consider evidence that does not appear on the face of the indictment. *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996)). Thus, a defendant is not entitled to a pre-trial evidentiary hearing to obtain a preview of the government's evidence and an opportunity to cross-examine its witnesses. *Id.* at 669 ("A motion to dismiss the indictment cannot be used as a device for a summary trial of the evidence.").

In determining whether [*18] a cognizable offense has been charged, the court does not consider whether the government can *prove* its case, only whether accepting the facts as alleged in the indictment as true, a crime has been alleged. *United States v. Milovanovic*, 678 F.3d 713, 717 (9th Cir. 2012). Rule 12 motions cannot be used to determine "general issues of guilt or innocence," which "helps ensure that the respective provinces of the judge and jury are respected." *Boren*, 278 F.3d at 914 (citation omitted). A defendant may not challenge a facially-sufficient indictment on the ground that the allegations are not supported by adequate evidence. *Jensen*, 93 F.3d at 669 (citation omitted). However, the court may dismiss an indictment if "it fails to recite an essential element of the charged offense." *United States v. Ezeta*, 752 F.3d 1182, 1184 (9th Cir. 2014) (citing *United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005)).

II. ANALYSIS AND DECISION

A. The Land Described in the Motion

The Motion creates some confusion in defining the term "Bundy Ranch" as "land within the borders of the State of Nevada that is allegedly owned in fee simple by the Federal Government and controlled by the same with plenary power under Article IV of the United States Constitution." Mot. at 2:7-11. The Motion further states that 85% of Nevada's land is held by the federal government. Mot. at 5. Based on these statements, one could infer that Mr. Bundy asserts that 85% of Nevada is the "Bundy Ranch." The [*19] court doubts this is his claim as, the Motion

²All references to a "Rule" or the "Rules" in this Order refer to the Federal Rules of Criminal Procedure.

also states that the land where the "Bundy Ranch" sits and where he grazed cattle was included in an 1866 congressional land grant to the State of Nevada. Mot. at 22. The Superseding Indictment (ECF No. 27) alleges only that Cliven Bundy is "the operator of a ranch referred to as 'Bundy Ranch'" and his "ranching operations included grazing cattle on federal public land." *Id.* at 6, ¶ 9. This Order does not address or decide the boundaries of the Bundy Ranch.

B. Judicial Review

Article III of the United States Constitution outlines the powers of the judicial branch of the federal government. In the seminal decision, *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803), Chief Justice John Marshall explained that Article III established a "judicial department" with the "province and duty . . . to say what the law is" in particular cases and controversies. In addition, *Marbury* established another fundamental function of Article III judicial power is "the duty to maintain the supremacy of federal law and, above all, the Constitution." *Crater v. Galaza*, 508 F.3d 1261, 1265 (9th Cir. 2007) (citation omitted).³ Over the past two centuries, many Supreme Court decisions have "unequivocally reaffirmed" *Marbury's* holding establishing the power of judicial review. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). The Framers crafted Article III [*20] to give the federal judiciary "the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 217-19, 115 S. Ct. 1447, 131 L. Ed. 2d 328 (1995) (citation omitted). Accordingly, "[t]he federal judiciary has the ultimate authority to interpret the Constitution." *Crater*, 508 F.3d at 1267; see also *City of Boerne v. Flores*, 521 U.S. 507, 524, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) ("the power to interpret the Constitution" is entrusted to the judiciary).

The American system of federal government is "one of enumerated powers," meaning that the Constitution lists, or enumerates, the federal government's powers, "rather than granting general authority to perform all the conceivable functions of government." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2577, 183 L. Ed. 2d 450 (2012) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819)). The Constitution authorizes Congress to "make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers, such as the power to tax and spend or to provide for the defense and general welfare. See U.S. Const. art. I, § 8. Exercising the power of judicial review, the Supreme Court has consistently interpreted Article I "to give Congress great latitude in exercising its powers: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, [*21] but consist with the letter and spirit of the constitution, are constitutional.'" *Nat'l Fed'n*, 132 S. Ct. at 2579 (quoting *McCulloch*, 4 Wheat. at 421).

Almost two centuries ago, Chief Justice Marshall observed that the question regarding the extent of the powers the Constitution actually granted to the federal government "is perpetually arising, and will probably continue to arise, as long as our system shall exist." *McCulloch*, 4 Wheat. at 405. If there is a principle in the Constitution "more sacred than another, it is that which separates the legislative, executive and judicial powers." *Myers v. United States*, 272 U.S. 52, 116, 47 S. Ct. 21, 71 L. Ed. 160 (1926) (citation omitted). Thus, the courts may invalidate "an Act of Congress only if 'the lack of constitutional authority to pass the act in question is clearly demonstrated.'" *Nat'l Fed'n*, 132 S. Ct. at 2579 (quoting *United States v. Harris*, 106 U.S. 629, 635, 1 S. Ct. 601, 27 L. Ed. 290, 4 Ky. L. Rptr. 739 (1883)).

Federal courts "have developed a panoply of tools to guide them in the interpretive process, among them inferring rules from text or structure, reasoning from analogy, and applying rules from precedent." *Crater*, 508 F.3d at 1265 (citation omitted). "One tool in the judicial toolbox" is *stare decisis*, *id.*, which is a Latin term meaning to "to stand by

³ Pursuant to the Supremacy Clause, federal law preempts any state law that conflicts with federal law. See U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

things decided." Black's Law Dictionary (10th ed. 2014). Stare decisis is the "doctrine of precedent, under which a court must follow earlier judicial decisions when the same [*22] points arise again in litigation," *id.*, and it "bears particular Article III significance":

The central importance of stare decisis to the Article III 'judicial power' is well-founded; as the Supreme Court has explained, stare decisis is 'the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion,' a process that 'permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.'"

Crater, 508 F.3d at 1265-66 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265-66, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986)). Based on stare decisis, federal district courts "are bound by earlier published decisions" of the Supreme Court and the circuit court of appeals in which their district sits. See *Oregon Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 782 (9th Cir. 2008). Federal judges "may not respectfully (or disrespectfully) disagree" with their colleagues on their "own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court." *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). "Binding authority must be followed unless and until overruled by a body competent to do so." *Id.* Judges in this district must follow both [*23] Supreme Court and Ninth Circuit precedent.

C. Bundy's Constitutional Arguments are Foreclosed by Prior Judicial Opinions

For more than two decades, Mr. Bundy has argued that the federal government does not have an ownership interest in any land in Nevada. However, this argument has been soundly and consistently rejected by every court to consider the issue. The court appreciates that Mr. Bundy is raising arguments that have been previously raised and rejected, believing prior cases were wrongly decided, so that he may preserve the issues for later appeal if necessary. However, this court is bound by, and required to apply, controlling Supreme Court and Ninth Circuit precedent.

Following the Mexican American War, the United States and Mexico signed the Treaty of Guadalupe Hidalgo (the "Treaty") in 1848. *United States v. Gardner*, 107 F.3d 1314, 1317 (9th Cir. 1997); *United States v. Nye Cty., Nev.*, 920 F. Supp. 1108, 1110 (D. Nev. 1996). Pursuant to this Treaty, Mexico ceded lands to the United States, including the land comprising present day Nevada. *Id.*; see also *Sparrow v. Strong*, 70 U.S. 97, 104, 18 L. Ed. 49 (1865) ("The Territory, of which Nevada is part, was acquired by treaty.").⁴ As the Ninth Circuit explained in *Gardner*, Supreme Court precedent "uniformly found that title to the land first passed to the United States through the Treaty." 107 F.3d at 1317 (citing *United States v. California*, 436 U.S. 32, 34 n.3, 98 S. Ct. 1662, 56 L. Ed. 2d 94 (1978) (stating that [*24] the Treaty "obligated the United States to respect private property rights derived from Mexican land grants, all nongranted lands previously held by the Government of Mexico passed into the federal public domain"); *Cappaert v. United States*, 426 U.S. 128, 131, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976) (stating that a limestone cavern in Nevada is "situated on land owned by the United States since the Treaty of Guadalupe Hidalgo in 1848")). *Gardner* recognized that "the federal government was the initial owner of the land from which the state of Nevada was later carved" and definitively resolved the question of ownership regarding the federal public lands within Nevada. 107 F.3d at 1318.

On March 21, 1864, Congress enacted the Nevada Enabling Act, chp. 36, 13 Stat. 30,⁵ "authorizing a convention to draft a state constitution for ratification by the residents of the Nevada Territory." *Nye Cty.*, 920 F. Supp. at 1110. "As a condition of statehood, the Nevada Enabling Act required that the convention adopt an ordinance agreeing and declaring that Nevada would 'forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States'." *Id.* In

⁴The word "cede" is a verb meaning, "1. To surrender or relinquish. 2. To assign or grant." Black's Law Dictionary (10th ed. 2014).

⁵The Nevada Enabling Act is available online through the state legislature's website at leg.state.nv.us/Division/Research/Library/Documents/HistDocs/1864Act (last visited Dec. 19, 2016).

July 1864, the convention adopted the Nevada State Constitution and complied with [*25] Congress' directive in the Nevada Enabling Act by adopting an ordinance disclaiming all right and title to unappropriated public lands. *Id.* On October 31, 1864, Nevada was admitted to the Union. *Id.* The United States has therefore held title to Nevada's federal public lands since before Nevada achieved statehood. *Gardner*, 107 F.3d at 1318 (finding that the United States has held title to such lands since the Treaty in 1848: "the land is the property of the United States").

Article IV of the Constitution states: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States" U.S. Const. art. IV, - 3, cl. 2. In case after case, the Supreme Court has recognized the expansiveness of this power, finding that the Constitution entrusted Congress with the "power over the public land" and this power "is without limitations." See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S. Ct. 2285, 49 L. Ed. 2d 34 (1976).⁶ In addition, Congress may deal with public lands "precisely as an ordinary individual may deal with his farming property. It may sell or withhold them from sale." *Light v. United States*, 220 U.S. 523, 536, 31 S. Ct. 485, 55 L. Ed. 570 (1911) (internal quotation marks and citation omitted). Congress, through federal agencies, may also set rules and regulations for grazing livestock on federal public lands. [*26] See *Pub. Lands Council v. Babbitt*, 529 U.S. 728, 120 S. Ct. 1815, 146 L. Ed. 2d 753 (2000) (noting in a unanimous opinion that grazing is a privilege, not a right); *Omaechevarria v. Idaho*, 246 U.S. 343, 352, 38 S. Ct. 323, 62 L. Ed. 763 (1918); *Buford v. Houtz*, 133 U.S. 320, 326, 10 S. Ct. 305, 33 L. Ed. 618 (1890).

Although Cliven Bundy strongly disagrees, the courts have rejected his arguments concerning federal ownership of lands within Nevada. The United States may own land, and Congress may sell, withhold, regulate, and manage public lands. The Treaty passed title from Mexico to the United States for the land that includes more than 80% of present-day Nevada. When Nevada was admitted to the Union in 1864, the United States retained ownership of federal public lands within the state. Thus, the United States lawfully owns and administers the federal public lands in Nevada. Nevada permanently disclaimed all right and title to lands upon statehood. The United States' ownership of federal public lands does not violate equal protection or the privileges and immunities of Nevada citizens. The equal footing doctrine and/or the equal sovereignty doctrine do not give Nevada superior title to all lands within its boundaries. See, e.g., *Gardner*, 107 F.3d at 1318-19; *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1997) (unpublished); *Nye Cty.*, 920 F. Supp. at 1114-17.⁷ The court is required to apply *Gardner's* holdings, which remain binding precedent. Three different federal district judges in this district so held [*27] in *Bundy I* and *Bundy II*. See *Bundy I*, 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 3, 1998), *aff'd* by 178 F.3d 1301 (9th Cir. 1999); Oct. 9, 2013

⁶ See also *Alabama v. Texas*, 347 U.S. 272, 273, 74 S. Ct. 481, 98 L. Ed. 689 (1954); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21, 73 S. Ct. 85, 97 L. Ed. 15 (1952); *United States v. San Francisco*, 310 U.S. 16, 29, 60 S. Ct. 749, 84 L. Ed. 1050 (1940); *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99, 20 L. Ed. 534 (1871); *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537, 10 L. Ed. 573 (1840); *United States v. Estate of Hage*, 810 F.3d 712, 716 (9th Cir.), *cert. denied*, 137 S. Ct. 332, 196 L. Ed. 2d 260 (2016); *McFarland v. Kempthorne*, 545 F.3d 1106, 1112 (9th Cir. 2008) ("The Property Clause gives Congress plenary power to regulate the use of federal land.").

⁷ The equal footing doctrine was designed to create parity regarding each state's political rights and sovereignty. See, e.g., *Stearns v. Minnesota*, 179 U.S. 223, 245, 21 S. Ct. 73, 45 L. Ed. 162 (1900); see also *Puerto Rico v. Sanchez Valle*, ___ U.S. ___, 136 S. Ct. 1863, 1871 n.4, 195 L. Ed. 2d 179 (2016); *United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal.*, 683 F.3d 1030, 1035 (9th Cir. 2012) (discussing the doctrine's history). The doctrine confirms that each state shares "those attributes essential to its equality in dignity and power with other states." *Coyle v. Oklahoma*, 221 U.S. 559, 568, 31 S. Ct. 688, 55 L. Ed. 853 (1911); however, it does not address other important attributes such as economic status, which varies greatly due to factors such as "[a]rea, location, geology, and latitude." *United States v. Texas*, 339 U.S. 707, 716, 70 S. Ct. 918, 94 L. Ed. 1221 (1950). Although political rights and sovereignty are seemingly broad concepts, the doctrine has limited application: to ensure that "each State takes title to the beds of all navigable waters in that State, as did the original thirteen States that formed the Union." *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990) (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988) ("[T]he States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide."); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 228-29, 11 L. Ed. 565 (1845)). The Supreme Court has expressly held that the equal footing doctrine negates "any implied, special limitation of any of the paramount powers of the United States in favor of a State." *Texas*, 339 U.S. at 717. This includes Congress' exercise of its power under the Property Clause. *Watkins*, 914 F.2d at 1555.

Order (ECF No. 56); *Bundy II*, 2013 U.S. Dist. LEXIS 95294, 2013 WL 3463610 (D. Nev. July 9, 2013), Order (ECF No. 35). Mr. Bundy's contentions that federal officers were acting unlawfully by enforcing federal court orders to remove trespass cattle as alleged in the superseding indictment lack support in binding case law.

Additionally, the court notes that the State of Nevada has agreed with judicial interpretations regarding federal public lands within its borders. In *Nye County*, county officials argued that the United States did not own public lands within Nevada and was entirely without jurisdiction to regulate Nevada's public lands. 920 F. Supp. 1108 (D. Nev. 1996), *appeal dismissed*, 133 F.3d 930 (9th Cir. 1997). The United States joined the State of Nevada in the action and sought a declaration stating that the United States owned and had authority to manage the federal public lands in Nye County. *Id.* at 1112. Nye County's position, similar to Cliven Bundy's, was based on Nevada statutes NRS 321.596-321.599, which declared ownership of and control and jurisdiction over all "public lands" within Nevada.⁸ The Nevada legislature enacted these statutes in 1979, as a direct response to Congress' enactment of the Federal Land Policy and Management Act of 1976 [*28] ("FLPMA"), 43 U.S.C. - 1701, which "formally ended the policy of transferring federal lands to private ownership and adopted a policy of retention of these lands by the federal government." *Nye Cty.*, 920 F. Supp. at 1110. The FLPMA authorized the BLM to administer public lands that were not under the direction of other federal agencies. *Id.*

The State of Nevada conceded that its statutory claim to public lands within the state was "legally untenable." *Id.* at 1113. The court found this concession was essentially "a consent to judgment" but also concluded that Nevada's statutory claim was unconstitutional and failed as a matter of law. *Id.* at 1114. Furthermore, the State did "not dispute that, prior to statehood, the United States held title to the public lands within the territory that was to become Nevada." *Id.* Despite the broad language of NRS 321.596-321.599, the court found that "title did not pass to Nevada, but remains with the United States." *Id.* The court explicitly recognized that "the United States owns and has the power and authority to manage and administer the unappropriated public lands and National Forest System lands within Nye County, Nevada." *Id.* at 1120.

The *Nye County* decision clearly demonstrates the State of Nevada's legal position on this issue: [*29] the United States holds title to federal public lands in Nevada. The State of Nevada reaffirmed this position in *Gardner*, filing an amicus brief along with the states of New Mexico, Alaska, Maine, Montana, Oregon, and Vermont, supporting the United States' position. 107 F.3d at 1317 n.1. Mr. Bundy's position on the ownership and management of federal public lands in Nevada is not only contrary to binding federal case law but it is also at odds with the State of Nevada's position.

D. The 1866 Act Did Not Transfer Federal Public Lands to the State of Nevada

The Motion asserts that the land at issue in this case was not incorporated into the State of Nevada until after May 5, 1866, the date when Congress approved "An Act Concerning the Boundaries of the State of Nevada" (the "1866 Act"). The 1866 Act states:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, as provided for and consented to in the constitution of the State of Nevada, all that territory and tract of land adjoining the present eastern boundary of the State of Nevada, and lying between the thirty-seventh and the forty-second degrees of north latitude and west of the thirty-seventh [*30] degree of longitude west of Washington, is hereby added to and made a part of the State of Nevada.*

Sec. 2. And be it further enacted, That there is hereby added to and made a part of the State of Nevada all that extent of territory lying within the following boundaries, to wit: Commencing on the thirty-seventh degree of north latitude, at the thirty-seventh degree of longitude west from Washington; and running thence south on

⁸ Notably, NRS 321.5963 defined the term "public lands" to exclude, among other things, land located in congressionally authorized national parks and monuments, national forests, wildlife refuges, lands acquired by the consent of the legislature, and lands controlled by the Department of Defense, Department of Energy, or Bureau of Reclamation.

said degree of longitude to the middle of the river Colorado of the West; thence down the middle of said river to the eastern boundary of the State of California; thence northwesterly along said boundary of California to the thirty-seventh degree of north latitude; and thence east along said degree of latitude to the point of beginning: *Provided*, That the territory mentioned in this section shall not become a part of the State of Nevada until said State shall, through its legislature, consent thereto: *And provided further*, That all possessory rights acquired by citizens of the United States to mining claims, discovered, located, and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the [*31] Territory incorporated by the provisions of this act into the State of Nevada shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in Title in fee not the mining States and Territories.

Ch. 73, 14 Stat. 43 (1866). The first section of the 1866 Act attached an additional portion of the Utah Territory along Nevada's eastern border, and did so automatically because the drafters of the Nevada Constitution anticipated the addition. See Dean Heller, Nevada Secretary of State, *Political History of Nevada* 112 (Renee Parker & Steve George, eds., 11th ed. 2006).⁹ The second section added the northwestern portion of the Arizona Territory to Nevada's southern border. *Id.* at 114. This addition, however, required the Nevada legislature to pass a resolution accepting the addition, which occurred in early 1867. *Id.* The court will jointly refer to the land described in both sections of the 1866 Act as the "1866 Land" and individually as the "Utah addition" and "Arizona addition."

The Motion presents the novel argument that the 1866 Act transferred title to the 1866 Land to the State of [*32] Nevada because the transfer was conditioned on the state legislature's acceptance of the new land and a prohibition on interfering with certain possessory mining rights. Under this theory, the United States has no claim to the 1866 Land because the Congress absolutely and permanently disposed of such land pursuant to its expansive authority under the Property Clause. This result is purportedly apparent from the plain meaning of the text in the 1866 Act. Additionally, Mr. Bundy asserts that the prohibition on interference with possessory mining rights would be meaningless unless Congress intended to dispose of the 1866 Land to the State of Nevada in the 1866 Act. Mr. Bundy provides no legal authority for this interpretation, only argument, and his reasoning does not withstand scrutiny.

The plain language of the 1866 Act does not transfer title of the 1866 Land to the State of Nevada—it merely added the land to the state boundaries. Section 2 of the Nevada Enabling Act provided the initial boundaries of the new state:

Boundaries of state. *And be it further enacted*, That the said state of Nevada shall consist of all the territory included within the following boundaries, to wit: Commencing at a point formed by [*33] the intersection of the thirty-eighth degree of longitude west from Washington with the thirty-seventh degree of north latitude; thence due west along said thirty-seventh degree of north latitude to the eastern boundary line of the state of California; thence in a northwesterly direction along the said eastern boundary line of the state of California to the forty-third degree of longitude west from Washington; thence north along said forty-third degree of west longitude and said eastern boundary line of the state of California to the forty-second degree of north latitude; thence due east along the said forty-second degree of north latitude to a point formed by its intersection with the aforesaid thirty-eighth degree of longitude west from Washington; thence due south down said thirty-eighth degree of west longitude to the place of beginning.

Chp. 36, 13 Stat. 30, - 2 (1864). Other sections provided specific land grants to the state for support of common schools, erecting public buildings, and erecting a state prison. *Id.* -- 7-9. For example, Section 7 of the Nevada Enabling Act states:

Grant of public lands for support of common schools. *And be it further enacted*, That sections numbers sixteen and thirty-six, [*34] in every township, and where such sections have been sold or otherwise disposed

⁹*Political History of Nevada* is available online through the Nevada State Archives website at nsla.nv.gov/Archives/PoliticalHistoryOfNevada2006 (last visited Dec. 19, 2016).

of by any act of congress, other lands equivalent thereto in legal subdivisions of not less than one quarter-section, and as contiguous as may be, shall be, and are hereby, granted to said state for the support of common schools.

Id. - 7 (underlined emphasis added). If Congress intended the Act to grant public land to the State of Nevada, it would have expressly said so, just as it did in Sections 7, 8, and 9 of the Nevada Enabling Act. Instead, the 1866 Act uses language very similar to Section 2 of the Nevada Enabling Act, which merely established the state's boundaries. *United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007) ("[C]ourts generally interpret similar language in different statutes in a like manner when the two statutes address a similar subject matter.") (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S. Ct. 1542, 95 L. Ed. 2d 55 (1987); *Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973)). Thus, it is clear that Congress did not grant or otherwise dispose of the 1866 Land in the 1866 Act. The inclusion of language requiring acceptance of the Arizona addition and the possessory rights of certain mining claims does not demonstrate a federal land grant or alter Congress' clear but limited intent to expand Nevada's boundaries. Historical records indicate that legislative approval was required for the [*35] Arizona addition because it was not anticipated in the state constitution, unlike the Utah addition. See *Political History of Nevada* at 112-14. Thus, the condition of acceptance for the Arizona addition does not show that Congress granted title to the 1866 Land to the State of Nevada.

As explained, the State of Nevada has expressly disclaimed ownership or management of federal public lands within the state. Mr. Bundy's his personal interpretations of the Constitution or subsequent congressional actions, including the 1866 Act, are simply not supported by controlling law. His arguments are foreclosed by decisions of the United States Supreme Court, the ultimate authority on constitutional interpretation, and the Ninth Circuit.

E. 18 U.S.C. Section 3231

Finally, the government correctly points out that the crimes charged in the superseding indictment are all offenses against the laws of the United States. 18 U.S.C. - 3231 provides in relevant part: "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." Under this statute, Congress gave this court subject matter jurisdiction over the crimes charged in the superseding indictment.

For [*36] the reasons explained, the court will recommend denial of Mr. Bundy's Motion to Dismiss based on arguments the court lacks subject matter jurisdiction.

Accordingly,

IT IS ORDERED that Defendants Steven Stewart, Ryan Payne, Mel Bundy, and Ammon Bundy's Motions for Joinder (ECF Nos. 915, 980, 1095, 1117) are **GRANTED**.

IT IS FURTHER RECOMMENDED that Cliven Bundy's Motion to Dismiss (ECF No. 892) be **DENIED**.

DATED this 20th day of December, 2016.

/s/ Peggy A. Leen

PEGGY A. LEEN

UNITED STATES MAGISTRATE JUDGE

EXHIBIT “4”

EXHIBIT “4”

United States v. Bundy

United States District Court for the District of Nevada

January 18, 2017, Decided; January 18, 2017, Filed

Case No.: 2:16-cr-46-GMN-PAL

Reporter

2017 U.S. Dist. LEXIS 7525 *; 2017 WL 238472

UNITED STATES OF AMERICA, Plaintiff, vs. CLIVEN D. BUNDY, Defendant.

Subsequent History: Reconsideration denied by United States v. Bundy, 2017 U.S. Dist. LEXIS 152896 (D. Nev., Sept. 20, 2017)

Prior History: United States v. Bundy, 2016 U.S. Dist. LEXIS 182437 (D. Nev., Dec. 20, 2016)

Counsel: [*1] For Cliven D. Bundy, also known as Cliven Bundy, Defendant: Joel F. Hansen, LEAD ATTORNEY, Cooper Levenson, P.A., Las Vegas, NV; Bret O Whipple, Bret Whipple, Law Office of, Las Vegas, NV.

Ryan C. Bundy, Defendant, Pro se, Pahrump, NV.

For Ryan C. Bundy, Defendant: Angela H. Dows, LEAD ATTORNEY, Premier Legal Group, Las Vegas, NV.

For Ammon E. Bundy, Defendant: Daniel Hill, LEAD ATTORNEY, Wolf, Rifkin, Shapiro & Schulman, Las Vegas, NV.

For Ryan W. Payne, Defendant: Brenda Weksler, Shari L. Kaufman, William C. Carrico, LEAD ATTORNEYS, Federal Public Defender, Las Vegas, NV; Ryan Norwood, LEAD ATTORNEY, Federal Public Defenders, Las Vegas, NV; Cristen Thayer, Cullen Macbeth, Las Vegas, NV.

For Peter T. Santilli, Jr., true name, Peter T. Santilli, Defendant: Chris T Rasmussen, LEAD ATTORNEY, Rasmussen & Kang LLC., Las Vegas, NV.

For Melvin D. Bundy, Defendant: Lucas Gaffney, LEAD ATTORNEY, Oronoz, Ericsson & Gaffney LLC, Las Vegas, NV.

For David H. Bundy, Defendant: Cal J. Potter, III, LEAD ATTORNEY, Potter Law Offices, Las Vegas, NV.

For Brian D. Cavalier, Defendant: Mace J Yampolsky, LEAD ATTORNEY, Mace Yampolsky, LTD, Las Vegas, NV.

For Blaine Cooper, Defendant: Dennis Matthew Lay, LEAD ATTORNEY, [*2] Nguyen & Lay, Las Vegas, NV.

For Gerald A. Delemus, Defendant: Dustin R. Marcello, LEAD ATTORNEY, Osvaldo E. Fumo, Chtd, Las Vegas, NV.

For Eric J. Parker, Defendant: Jess R. Marchese, LEAD ATTORNEY, Law Office of Jess R. Marchese, Las Vegas, NV.

For O. Scott Drexler, Defendant: Todd M Leventhal, LEAD ATTORNEY, Leventhal and Associates, Las Vegas, NV.

For Richard R. Lovelien, Defendant: Shawn R Perez, LEAD ATTORNEY, Law Office Of Shawn R. Perez, Las Vegas, NV.

For Steven A. Stewart, Defendant: Richard E Tanasi, LEAD ATTORNEY, Las Vegas, NV.

Todd C. Engel, Defendant, Pro se, Pahrump, NV.

For Todd C. Engel, Defendant: John G George, LEAD ATTORNEY, John George, Las Vegas, NV.

For Gregory P. Burluson, Defendant: Terrence M Jackson, LEAD ATTORNEY, Law Office of Terrence M. Jackson, Las Vegas, NV.

For Joseph D. O'Shaughnessy, Defendant: Andrea Lee Luem, LEAD ATTORNEY, Law Offices of Andrea L Luem, Las Vegas, NV.

For Micah L. McGuire, Defendant: Chris Arabia, LEAD ATTORNEY, Las Vegas, NV.

For Jason D. Woods, Defendant: Kristine M Kuzemka, LEAD ATTORNEY, Kuzemka Law Group, Las Vegas, NV.

For Russell M. Aoki, Interested Party: Russell M Aoki, LEAD ATTORNEY, Aoki Law PLLC, Seattle, WA.

For Las Vegas Review-Journal, [*3] Battle Born Media, Associated Press, Intervenor: Alina M Shell, Margaret A McLetchie, LEAD ATTORNEYS, McLetchie Shell LLC, Las Vegas, NV.

For USA, Plaintiff: Erin M Creegan, LEAD ATTORNEY, United States Attorney District of Nevada, Las Vegas, NV; Nadia Janjua Ahmed, Roger W. Wenthe, Steven W. Myhre, LEAD ATTORNEYS, U.S. Attorney's Office, Las Vegas, NV; Nicholas D Dickinson, LEAD ATTORNEY, US Attorneys Office, Las Vegas, NV.

Judges: Gloria M. Navarro, Chief United States District Judge.

Opinion by: Gloria M. Navarro

Opinion

ORDER

Pending before the Court is the Report and Recommendation (ECF No. 1173) entered by Magistrate Judge Peggy A. Leen on December 20, 2016, denying Defendant Cliven D. Bundy's ("Defendant's") Motion to Dismiss (ECF No. 892). Defendant timely filed his Objection (ECF No. 1226), to which the Government filed a Response (ECF No. 1323).¹

I. BACKGROUND

On March 2, 2016, a federal grand jury sitting in the District of Nevada returned a Superseding Indictment charging Defendant and eighteen other co-defendants with sixteen counts related to a confrontation occurring on April 12, 2014, with Bureau of Land Management ("BLM") Officers in Bunkerville, Nevada. (ECF No. 27).

As detailed thoroughly in Judge [*4] Leen's Report and Recommendation, Defendant has been involved in civil litigation with the federal government for the past two decades. (R. & R. 1:27-2:21, ECF No. 1173). Specifically, the Court previously found, and the Ninth Circuit affirmed, that Defendant engaged in unauthorized and unlawful grazing of his cattle on property owned by the United States. (See Order, *United States v. Bundy*, Case No. 2:98-cv-0531-JBR-RJJ, 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 3, 1998), ECF No. 19), *aff'd* by 178 F.3d 1301 (9th Cir. 1999).

¹On January 5, 2017, Defendants Ryan W. Payne and Ammon E. Bundy each filed Motions for Joinder (ECF Nos. 1235, 1238) to Defendant's Objection (ECF No. 1226). Additionally, on January 9, 2017, Defendants Steven A. Stewart and Richard R. Lovelien each filed Motions for Joinder (ECF Nos. 1258, 1260) to Defendant's Objection (ECF No. 1226). Pursuant to District of Nevada Local Rule IB 3-2(a), any objections to a magistrate judge's report and recommendation must be filed within 14 days of service. None of these Motions for Joinder were filed within the 14-day deadline to be considered as objections to Judge Leen's Report and Recommendation. Accordingly, the Court denies these Motions for Joinder (ECF Nos. 1235, 1238, 1258, 1260) as untimely.

In his Motion to Dismiss, Defendant seeks to dismiss his case because "the Federal Government does not have any ownership interest in the Bundy Ranch,² depriving this court of jurisdiction over the subject matter of the dispute." (Mot. to Dismiss 2:11-14, ECF No. 892). Further, Defendant asserts that because the Federal Government does not own the land in question, "any activity of Federal Agents on [the land in question] during the time period described within the indictments was illegal, unlawful, and was an aggressive trespass onto lands owned by the people of Nevada." (*Id.* 2:14-19). As such, because Counts 1(d), 1(e), 1(f), 2, and 4-15 all require proof that federal officers were engaged in lawful duties, these Counts should be dismissed for failure [*5] to state a claim.³ (*Id.* 2:23-3:11). In her Report and Recommendation, Judge Leen rejected these arguments and recommended denial of the Motion. (R. & R. 11:24-12:2, 18:14-26).

II. LEGAL STANDARD

A party may file specific written objections to the findings and recommendations of a United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B); D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a *de novo* determination of those portions of the Report to which objections are made. *Id.* The Court may accept, reject, or modify, in whole or in part, the findings or recommendations of the Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

III. DISCUSSION

Defendant asserts several objections to Judge Leen's Report and Recommendation denying his Motion to Dismiss. (Obj., ECF No. 1226). Defendant argues that Judge Leen "erred in finding that the land-ownership question is foreclosed by existing law on the subject." (*Id.* 4:10-12). Specifically, Defendant contends that "while these courts have several times expressed the conclusion that the Federal Government absolutely owns all of these lands, that these expressions could not even be categorized as findings of law, but rather [*6] were restatements of the unexamined self-serving assumptions of a party to the dispute (the Federal Government)." (*Id.* 3:24-4:1). Defendant's related objections, including Judge Leen's alleged error in finding that 18 U.S.C. § 3231 conveys jurisdiction, stem from Defendant's general premise that "the land is not owned by the United States." (*See id.* 11:11 - 26). Defendant also asserts that Judge Leen erred by "implying that the unilateral stipulation of a former attorney general of Nevada in a collateral case acts as a concession in future cases." (*Id.* 4:13-14). As such, these objections do not present new or rebuttal legal arguments, but rather request that this Court reject Judge Leen's determinations.

Having reviewed the record in this case *de novo*, the Court agrees with the analysis and findings of Judge Leen in her Report and Recommendation (ECF No. 1173) denying the Motion to Dismiss and incorporates them by reference in this order. The Court agrees that Defendant's arguments against the federal government's land ownership in Nevada are foreclosed by binding precedent. As explained by Judge Leen: "For more than two decades, [Defendant] has argued that the federal government does not have an ownership [*7] interest in any land

² As Judge Leen noted in her Report and Recommendation, "Bundy Ranch" is not a clearly defined term. (*See* R. & R. 9:8-19, ECF No. 1173). This term does not refer to the land actually owned by Defendant, but rather, as used by Defendant, "Bundy Ranch" includes "land within the borders of the State of Nevada that is allegedly owned in fee simple by the Federal Government and controlled by the same with plenary power under Article IV of the United States Constitution." (*Id.* (citing Mot. to Dismiss 2:7-11)). As such, the Court will refer to this area as "the land in question."

³ Defendant cites "Rule 12(b)(5)" as the basis for "dismissal as a matter of law for failure to state actionable claims." (*Id.* 13:22-24). This citation likely refers to the Federal Rules of Civil Procedure; however, in the Federal Rules of Criminal Procedure, such a basis is found under Rule 12(b)(3)(B)(v): "The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits: . . . a defect in the indictment or information, including: . . . failure to state an offense."

in Nevada. However, this argument has been soundly and consistently rejected by every court to consider the issue." (R. & R. 11:25-27).

As in his original motion, Defendant's Objection attempts to distinguish *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997).⁴ He argues that "Gardner apparently did not argue that the Federal Government obtained less-than absolute title to land in question through the treaty with Mexico, whereas [Defendant] specifically argued that the treaty never conferred such absolute ownership." (Obj. 6:15-18). However, the Gardners and Defendant are actually making the same argument, as both assert that "the unappropriated lands in the state of Nevada . . . [are] not territory or other property belonging to the United States." *Gardner*, 107 F.3d at 1317. In *Gardner*, the Ninth Circuit analyzed the 1848 Treaty of Guadalupe Hidalgo in conjunction with the question of the "United States' title to federal land in Nevada" to find that the "unappropriated public lands in Nevada" have been "the property of the United States" since 1848. *Id.* at 1317-18. Indeed, the *Gardner* Court explained that "under the Property Clause, the United States can administer its federal lands any way it chooses . . . [and] the federal government was the initial owner of the [*8] land from which the state of Nevada was later carved." *Id.* at 1318. Thus, the Court agrees with Judge Leen that *Gardner* dictates that the unappropriated public lands in Nevada are the property of the United States.

As Judge Leen explained, this conclusion is further supported by the Court's prior determinations in Defendant's civil cases. (R. & R. 14:4-10). In the first Order granting Summary Judgment to the United States in *United States v. Bundy*, the Court cited *Gardner* for this same proposition: "The public lands in Nevada are the property of the United States because the United States has held title to those public lands since 1848, when Mexico ceded the land to the United States." (Order, *United States v. Bundy*, Case No. 2:98-cv-0531-JBR-RJJ, 1998 U.S. Dist. LEXIS 23835, at *14 (D. Nev. Nov. 3, 1998), ECF No. 19), *aff'd* by 178 F.3d 1301 (9th Cir. 1999). Therein, the Court rejected Defendant's argument that "the federal government cannot have authority over lands 'inside an admitted state,'" *id.* at *12-13, and found that the Court had jurisdiction over the case.

Additionally, Judge Leen found that the Court had subject matter jurisdiction over the crimes charged in the Superseding Indictment under 18 U.S.C. § 3231, which gives the United States district courts "original jurisdiction . . . of all offenses [*9] against the laws of the United States." 18 U.S.C. § 3231. Defendant's objection contends that merely conveying jurisdiction is not sufficient. Specifically, he asserts that the Superseding Indictment "failed to state actionable claims" because "there must be at minimum a theoretical possibility of proving an offense to keep the defendant in court for trial." (Obj. 11:15-19). Defendant's underlying premise as to why the crimes fail as a matter of law, however, remains that "the land is not owned by the United States." (*Id.* 11:19-27). Because the Court finds that the land in question is owned by the United States, this objection necessarily fails.⁵

Accordingly, Defendant's Objection (ECF No. 1226) is overruled. The Court accepts and adopts Judge Leen's Report and Recommendation (ECF No. 1173) to the extent that it is not inconsistent with this opinion and denies Defendant's Motion to Dismiss (ECF No. 892).

IV. CONCLUSION

IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 1173) is **ACCEPTED and ADOPTED in full**.

IT IS FURTHER ORDERED that Defendant's Motion to Dismiss (ECF No. 892) is **DENIED**.

⁴In Defendant's Motion to Dismiss, he stated: "Defendant is aware that a similar argument was raised in [*Gardner*] wherein it was rejected by the Ninth Circuit. Defendant argues both that *Gardner* was wrongly decided and that it is distinguishable from the argument raised here." (Mot. to Dismiss 19:22-20:2).

⁵Additionally, because the Court otherwise finds that the federal government owns the land in question, giving this Court subject matter jurisdiction, the Court need not address Defendant's objection regarding the effect of the attorney general's stipulation in *United States v. Nye Cty.*, 920 F. Supp. 1108, 1110 (D. Nev. 1996).

IT IS FURTHER ORDERED that the Motions for Joinder (ECF Nos. 1235, 1238, 1258, 1260) are **DENIED**.

DATED this [*10] 18 day of January, 2017.

/s/ Gloria M. Navarro

Gloria M. Navarro, Chief Judge

United States District Court

End of Document

EXHIBIT “5”

EXHIBIT “5”

United States v. Bundy

United States District Court for the District of Nevada

September 20, 2017, Decided; September 20, 2017, Filed

Case No.: 2:16-cr-46-GMN-PAL

Reporter

2017 U.S. Dist. LEXIS 152896 *

UNITED STATES OF AMERICA, Plaintiff, vs. RYAN C. BUNDY, Defendant.

Prior History: United States v. Bundy, 2017 U.S. Dist. LEXIS 7525 (D. Nev., Jan. 18, 2017)

Counsel: [*1] For Gregory P. Bureson, Defendant: Terrence M Jackson, LEAD ATTORNEY, Law Office of Terrence M. Jackson, Las Vegas, NV.

For Russell M. Aoki, Interested Party: Russell M Aoki, LEAD ATTORNEY, Aoki Law PLLC, Seattle, WA.

For Las Vegas Review-Journal, Battle Born Media, Associated Press, Intervenors: Alina M Shell, Margaret A McLetchie, LEAD ATTORNEYS, McLetchie Shell LLC, Las Vegas, NV.

For USA, Plaintiff: Erin M Creegan, LEAD ATTORNEY, United States Attorney District of Nevada, Las Vegas, NV; Nadia Janjua Ahmed, Roger W. Wenthe, Steven W. Myhre, LEAD ATTORNEYS, U.S. Attorney's Office, Las Vegas, NV; Nicholas D Dickinson, LEAD ATTORNEY, US Attorneys Office, Las Vegas, NV; Peter S. Levitt, U.S. Attorney, Las Vegas, NV.

Judges: Gloria M. Navarro, Chief United States District Judge.

Opinion by: Gloria M. Navarro

Opinion

ORDER

Pending before the Court is pro se Defendant Ryan C. Bundy's ("Defendant's") Challenge to Jurisdiction (ECF No. 1536), which the Court construes as a Motion to Reconsider the Court's prior Order (ECF No. 1353)¹ regarding jurisdiction.² The Government filed a Response (ECF No. 1570), and Defendant filed two Replies (ECF Nos. 1651, 1652).³

¹ Defendant refers to this Order in a footnote on page 11 of his filing.

² This Motion is signed by pro se co-defendant Todd Engel, along with co-defendants Ammon Bundy, Ryan W. Payne, Cliven Bundy, and Pete Santilli. (Mot. Reconsider at 25, ECF No. 1536). To the extent that these co-defendants are seeking to jointly file Defendant's motion, the Court grants the request by Engel, but denies the request by the other four parties who are all represented by counsel. Parties who are represented by counsel "may not personally file a document with the court; [rather,] all filings must thereafter be made by the attorney." (D. Nev. LR IA 11-6).

³ Defendant is only entitled to one reply. The first reply is the only one signed by Defendant. Accordingly, the Court will consider Defendant's first reply (ECF No. 1651) as the operative reply and will instruct the Clerk of Court to strike Defendant's second reply (ECF No. 1652).

On March 2, 2016, a federal grand jury sitting in the District of Nevada [*2] returned a Superseding Indictment charging Defendant and eighteen other co-defendants with sixteen counts related to a confrontation occurring on April 12, 2014, with Bureau of Land Management ("BLM") Officers in Bunkerville, Nevada. (ECF No. 27).

On October 17, 2016, co-defendant Cliven Bundy ("C. Bundy")⁴ filed a Motion to Dismiss asserting that the federal government does not own the land in question, "any activity of Federal Agents on [the land in question] during the time period described within the indictments was illegal, unlawful, and was an aggressive trespass onto lands owned by the people of Nevada." (Mot. to Dismiss 2:14-19, ECF No. 892). After full briefing and a hearing, Magistrate Judge Peggy A. Leen filed a Report and Recommendation rejecting Defendant's arguments and recommending denial of the motion. (R. & R. 11:24-12:2, 18:14-26, ECF No. 1173). C. Bundy objected to the Report and Recommendation (Obj., ECF No. 1226), and the Court performed a *de novo* review of C. Bundy's Motion to Dismiss before accepting and adopting Judge Leen's Report and Recommendation in full. (Order, ECF No. 1353). The Court, like Judge Leen, found that C. Bundy's arguments were foreclosed by [*3] case law, including C. Bundy's prior related civil cases, and the Court had jurisdiction over the land in question because it is owned by the federal government. (*Id.* 3:25-5:17).

In the instant motion, Defendant challenges the Court's jurisdiction once again. He asserts that the prior Order "fail[s] to mention . . . that the fourth paragraph of Section 4 of the Nevada Enabling Act . . . presents the clear intention of Congress to reserve right and title, i.e. ownership, of the unappropriated [sic] public lands." (Mot. Reconsider at 11, ECF No. 1536). The Court understands this assertion, along with the rest of Defendant's motion, to argue that contrary to the Court's prior Order, the land is not property of the United States. (*See also id.* at 8) ("it cannot be proved by the explicit language of the Constitution for the United States, that property within a State of the union may be possessed by the federal government").

"[A] motion for reconsideration should not be granted, absent highly unusual circumstances." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (citation omitted). Reconsideration is appropriate where: (1) the court is presented with newly discovered evidence, (2) the court committed clear error or the initial decision was manifestly unjust, [*4] or (3) if there is an intervening change in controlling law. *School Dist. No. 1J, Multnomah Cnty v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

The Court has reviewed the prior Order and the arguments presented by Defendant in his motion and has not found any reason to overturn this Court's previous Order. The Court finds neither clear error nor manifest injustice in the reasoning of its previous Order. Additionally, Defendant cites no newly discovered evidence or intervening change in controlling law. As then-District Judge Johnnie B. Rawlinson originally determined in C. Bundy's civil case in 1998, which was affirmed by the Ninth Circuit, the land in question belongs to the United States, and federal courts have proper jurisdiction to adjudicate this case. (*See Order, United States v. Bundy*, Case No. 2:98-cv-0531-JBR-RJJ, 1998 U.S. Dist. LEXIS 23835 (D. Nev. Nov. 3, 1998), ECF No. 19, *aff'd* by 178 F.3d 1301 (9th Cir. 1999)). Therefore, the Court denies Defendant's Motion to Reconsider.

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Reconsider (ECF No. 1536) is **DENIED**.

IT IS FURTHER ORDERED that the Clerk of Court shall strike the document currently filed as Defendant's second reply (ECF No. 1652).

DATED this 20 day of September, 2017.

/s/ Gloria M. Navarro

Gloria M. Navarro, Chief Judge

⁴C. Bundy is Defendant's father.

United States District Court

End of Document