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Showdown on the Range

"Domestic terrorists." That is how U.S. Senate Majority Leader Harry Reid referred to the hundreds of supporters who had come to Bunkerville, Nevada, to stand with the besieged ranch family of Cliven and Carol Bundy against the federal Bureau of Land Management (BLM).

While most critics of the Bundys and their supporters have veered short of the verbal excesses of Nevada's senior senator, they have nonetheless showered the 67-year-old rancher and his adherents with venom and ridicule. "Welfare rancher," "deadbeat," "crackpot," "redneck teabagger," "fools," "fanatics," "wackos" — those are some of the more printable epithets. Elias Isquith at Salon.com delivers the typical "liberal" analysis, describing Bundy as "wingnut rancher" and his allies as "anti-government extremists." Over at the Huffington Post, college student Brian Jecunas was given column space to pontificate that Bundy is a "dangerous knave" and a "selfish radical." "Hopefully," Jecunas wrote, "Bundy and his followers will end up where criminals belong — a cramped prison cell."

Presumably, Harry Reid and others of his ilk would have been satisfied had the standoff gone beyond arrests and incarceration, ending with Cliven Bundy and the hundreds of ranchers, cowboys, cowgirls, clerks, truck drivers, Boy Scouts, grandmas, moms, dads, and children — the "domestic terrorists" — mowed down by the federal army of agents from the BLM and other agencies.

Most Americans, however, are likely struggling with a great deal of ambivalence about the whole episode — and the larger issues that frame it. The video images of 200 heavily armed federal myrmidons pointing weapons at civilians, using a taser against one of Bundy's adult sons, throwing Bundy's sister Margaret (a 57-year-old mother of 11 and a recovering cancer victim) to the ground as she was taking photographs, and siccing dogs on protesters — these and other images and reports have outraged viewers, confirming the charges of Cliven Bundy that the federal police state has spiraled out of control and is busily building tyranny.

But the Obama administration and its helpmates in the establishment media have been successful to a large degree in spinning what was becoming a PR nightmare into a narrative more favorable to their game. It is a deceptive narrative that depends on half-truths, lies, and a great deal of ignorance on the

part of most Americans about legal doctrines and private property rights on the "public lands" of the Western states. It also depends on a great deal of ignorance (on the part of the public and public officials) concerning a long history of gross abuses — including criminal actions — by federal officials charged with overseeing the "public lands."

The Obama/BLM public relations offensive has relentlessly drummed a message of alleged facts aimed at convincing the American public that Cliven Bundy: a) is a deadbeat tenant who refuses to pay his rent; b) is more than $1 million in arrears in fees and fines; c) has enjoyed the full benefit of due process in our courts and the leniency of the BLM for more than 20 years; d) is an environmental criminal whose cattle are threatening the "endangered" desert tortoise; and e) holds dangerous, "anti-government" crackpot ideas about "states rights" and federal authority.

Seen in the light of these alleged "facts," the BLM actions, while heavy-handed, seem, well, more reasonable. The fedgov propaganda offensive against Cliven Bundy has worked, to a large extent, with most of the major media uncritically adopting the BLM talking points as their own narrative. Even many of the right-leaning commentators who initially supported Bundy — Fox News reporter and legal analyst Megyn Kelly, MSNBC's Joe Scarborough, Glenn Beck, and Tucker Carlson, for instance — have backed off, or even reversed themselves and adopted a more critical position, regurgitating many of the BLM talking points.

In what follows, we will be unpacking and examining these talking points, and bringing in many relevant facts that have been almost completely ignored, underreported, or misrepresented.

"Deadbeat" "Freeloader"

Travis Kavulla, writing for the neoconservative *National Review*, typifies many who have bought the Obama/BLM talking points that are aimed at twisting and contorting the fedgov action against Bundy into a *defense* of property rights. Kavulla denounces Bundy as "an unapologetic freeloader" and blasts the fedgov "landlords" for being so lenient. "What kind of landowner lets a tenant stay on his property for two decades without paying?" he asks.

Kavulla offers what he supposes is an open-and-shut, slam-dunk argument:

Bundy is extracting a valuable use from land that does not belong to him, and is refusing to pay the owner (i.e., the American taxpayer) for that use. He is a squatter, a right-wing version of the dreadlocked freegan who sets up living quarters in an abandoned building in Brooklyn. If everyone did as Bundy does, the concept of property rights would be diminished.

Testing Bundy's claim is simple. If he has a right to do what he is doing on public land to which he does not have title, then so should you and I. What would happen if a hundred other people each put a hundred head of cattle on the same property? The grass would run out; every animal would, eventually, starve.

But Kavulla and the many others who argue similarly are showing a woeful ignorance of long established Western property law recognized in state and federal statutes and court decisions. Bundy may be wrong in some important particulars and some of his political/legal theories may not be completely sound, but the "crazy rancher" is undoubtedly closer to the mark than the critics who are sneering and rolling their eyes.

First of all, the federal government is not "the landowner" of the "public lands" and Cliven Bundy is not a "tenant" or "freeloader." The massive "public lands" in the Western states are comprised of what is known as the "split estate," wherein ownership is split between surface rights (water, grazing, timber, wildlife) and subsurface rights (minerals, oil, gas) divided among multiple owners: federal government, state governments, private individuals, and corporations. The federal government owns the subsurface rights, but as our related article "Feds vs. the West" shows, even that is a questionable point that is being seriously challenged by state legislatures and members of Congress. State governments own the wildlife. Timber and mining companies own forest and mineral rights, and ranchers own forage and water rights.

Cliven Bundy, like thousands of other ranchers, *owns* range rights that were bought and paid for and/or inherited. Land-use law in the arid Western states falls under the Prior Appropriation Water Doctrine, under which the person who acquires title to the water has a right to acquire the use of as much land as is necessary to put the water to beneficial use. In the desert West, where rainfall is minimal and sporadic, large tracts of land are necessary to raise cattle and other livestock. The Prior Appropriation doctrine allows for a system that enables productive use of the surface land that produces food for consumers, jobs, and taxes, as well as wildlife habitat improvement and wildfire prevention. In addition to the 160 acres that the Bundys own as fee simple property, they also own the water and forage rights to 150,000 acres of "public lands."

In an interview with The New American in 2006, shortly before his death, Nevada rancher/author/scholar Wayne Hage explained what he called the "public lands myth" this way:

The term "public lands" has been erroneously applied to these lands. I say erroneously because the United States Supreme Court held in *Bardon v. Northern Pacific Railway Company* that "lands to which rights and claims of another attach do not fall within the classification of public lands." Rights and claims of ranchers to water rights and grazing easements (range rights) cover virtually all these lands. According to the U.S. Supreme Court, the ranchers' grazing allotments cannot be public lands.

Bardon v. Northern Pacific Railway Company, he noted, has been cited 133 times by other courts and has never been overturned in whole or in part. Why, then, we asked, are ranchers required to have a grazing "permit" if they already own the water and forage on these lands? Hage explained:

The truth is that a rancher is not required to have a grazing permit. The grazing permit should more accurately be called a grazing management permit. It is a cooperative permit whereby the rancher permits the U.S. Forest Service or Bureau of Land Management to manage his private range rights in return for the rancher being permitted to participate in the range improvement fund for capital expenditures. When the federal agency cancels a grazing permit, as they did in my case, they cancelled my ability to participate in the range improvement fund, but they also cancelled any authority to manage my private range and water rights.

Hage was not merely spouting some crackpot theory he'd dreamed up. As we have reported many times here in The New American over the years, he was vindicated in federal court — repeatedly. The Hage family valiantly fought the enormous federal bureaucracy (BLM, U.S. Forest Service, National Park Service) for three decades, barely staving off bankruptcy time and again — and are still fighting them. The Hages repeatedly prevailed in court and were awarded millions of dollars in damages, but the federal government has never paid up; the federal "servants" just keep dragging things out, stalling,

appealing — and bringing new harassment.

"Out of every dollar of the grazing fee I pay to the BLM, 12-and-a-half cents is supposed to go to BLM for administration and 87-and-a-half cents is supposed to go for 'range management' and 'range improvement," Bundy explained to The New American. "That's in the contract, its in the law. But they stopped doing any improvements and were using the money *against* me." "They constantly changed definitions of everything and issued new regulations based on the so-called science of their own 'scientists,'" he says. "They come up with new definitions of 'drought,' 'pressure,' 'ephemeral feed,' 'degradation,' 'stress,' — a thousand excuses to harass you." So, he "fired" them as his managers, which was his right, says Bundy. Problem is, he doesn't have the deep pockets to hire batteries of lawyers to match the high-powered legal guns employed by the federal government and the Big Green enviro lobby.

Where's the "Rule of Law"?

So, before one succumbs to the facile arguments of the BLM and its champions in the media, consider that this is the same agency (along with the USFS) that Chief Judge Robert C. Jones of the Federal District Court of Nevada last year ruled had been engaged in a decades-long criminal "conspiracy" against the Wayne Hage family. Among other things, Judge Jones accused the federal bureaucrats of racketeering under the federal RICO (Racketeer Influenced and Corruption Organizations) statute, and accused them as well of extortion, mail fraud, and fraud, in an effort "to kill the business of Mr. Hage." In fact, the government's actions were so malicious and "abhorrent," said the judge, as to "shock the conscience of the Court."

Judge Jones said he found that "the government and the agents of the government in that locale, sometime in the '70s and '80s, entered into a conspiracy, a literal, intentional conspiracy, to deprive the Hages of not only their permit grazing rights, for whatever reason, but also to deprive them of their vested property rights under the takings clause, and I find that that's a sufficient basis to hold that there is irreparable harm if I don't … restrain the government from continuing in that conduct."

Judge Jones granted an injunction against the agencies and referred area BLM and Forest Service managers to the Justice Department for prosecution. Of course, Sen. Harry Reid rushed to demand that Attorney General Eric Holder prosecute these fedgov criminals who had been harassing and criminally violating the rights of his constituents be prosecuted, right? Nevadans who know Reid laugh at the thought; Holder and Reid are too busy persecuting the ranchers who are the victims of the BLM criminals Judge Jones condemned!

As we have reported in our online stories, Cliven Bundy is the "Last Rancher Standing" in Clark County; a short time ago there were more than 50 ranches like his. A very important component of the "conspiracy" that Judge Jones fingered in his blistering ruling against the federal government involves the collusion and cooperation between the federal agencies and so-called environmentalist organizations, which planned decades ago to drive all the ranchers off the "public lands" by 1993. Thus their slogan at the time: "Cattle Free by '93."

Part of that plan was revealed at a "Public Interest Law Conference" held in March 1991 at the University of Oregon School of Law in Eugene, Oregon. A key presenter at the conference was Roy Elicker, counsel for the National Wildlife Federation, who explained that ranchers could be driven off

the range by gradually driving them out of business with costly fees and regulations. Elicker noted that "if they got to go out and move that cow around six times, by the time they're done, they've lost their shirt."

"You can win a lot more victories," said Elicker, "by making him pay for what he does out there and by making it so expensive in his operation and making all these changes for him to continue to run the cattle on the public lands, he goes broke."

One of the tactics that Elicker's "green" colleagues and the federal bureaucrats have used with great effect in this campaign to exterminate the ranchers is the Endangered Species Act. Currently, in the Bundy case the critter *du jour* is the "threatened" desert tortoise (*Gopherus agassizii*). However, unfortunately for the BLM, the U.S. Fish & Wildlife Service, and their militant NGO activist allies, their own bad timing has exposed the fraudulent nature of their claimed concern for the supposedly threatened reptile. Last year the federal bureaucrats "euthanized" hundreds of the tortoises, claiming that due to a budget shortfall of around $1 million, they didn't have sufficient funds to continue running a Nevada care and research reserve for the creatures. This, after having put many ranchers out of business. Nevertheless, the same bureaucrats found ways to come up with the funds to launch the paramilitary raid against the Bundys, which by various estimates may have ended up costing several million dollars — so far.

There are many additional reasons to doubt the Obama administration's claim that the welfare of the desert tortoise is at the heart of the move against Bundy. The rancher now has only around 500 head of cattle running on 150,000 acres. Do the math; that's around one cow per 300 acres. Not exactly high density. Probably not a high probability of turtle/cattle congestion, collision, or conflict. After all, the two critters have co-existed for centuries on the same range. But wait! According to the BLM, Bundy's cattle have wandered onto the surrounding BLM land. If that is true, then the density is even sparser than one cow per 300 acres. The Gold Butte area where the Bundy ranch is situated encompasses more than 600,000 acres that once included many ranches. Bundy's is the last. That means the density is less than one cow per 1,200 acres. So, the *Gopherus agassizii* now has, virtually, a monopoly on a considerable real estate empire; with Bundy gone the monopoly will be complete — for the fegov agencies and enviro NGOs that claim to be conservators for the charming reptile.

Rogue Agencies, "Lawless" Feds

Important question: Were the Obama administration and BLM officials breaking the law when they sent an army of around 200 heavily armed "troops" (with snipers, helicopters, heavy equipment, and armored vehicles) to the Bundy ranch on April 5, allegedly to uphold the "rule of law"? Rep. Steve Stockman (R-Texas) thinks so. He says the feds acted in a "lawless manner," disregarding both federal law and the U.S. Constitution. On April 15, Rep. Stockman sent a letter to President Barack Obama, Department of the Interior Secretary Sally Jewell, and BLM Director Neil Kornze, condemning the BLM "paramilitary raid."

"Because of this standoff," he wrote, "I have looked into BLM's authority to conduct such paramilitary raids against American citizens, and it appears that BLM is acting in a lawless manner in Nevada."

"As the federal government possesses only limited, enumerated powers," noted Rep. Stockman, "and does not have the right to assume preemptory police powers, that role being reserved to the States,

many federal laws require the federal government to seek assistance from local law enforcement whenever the use of force may become necessary."

He then cited 43 U.S.C. Section 1733, which defines the law-enforcement authority over BLM lands vested by Congress in the Secretary of the Interior. Subsection (c) of that statute provides as follows:

When the Secretary determines that assistance is necessary in enforcing Federal laws and regulations relating to the public lands or their resources he shall offer a contract to appropriate local officials having law enforcement authority within their respective jurisdictions with the view of achieving maximum feasible reliance upon local law enforcement officials in enforcing such laws and regulations.

Stockman noted that in the matter of the Bundy conflict, "the relevant local law enforcement officials appear to be the Sheriff of Clark County, Nevada, Douglas C. Gillespie."

"Indeed," said Stockman, "the exact type of crisis that the federal government has provoked at the Bundy ranch is the very type of incident that Congress knew could be avoided by relying on local law enforcement officials."

"I call on the Administration to bring the BLM into compliance with 43 U.S.C. section 1733," Stockman concluded. "Until this possible violation of federal law can be more fully investigated, and the statute requiring reliance on local law enforcement followed in both letter and spirit, the federal government must not only stand down, but remove all federal personnel from anywhere near the Bundy ranch."

Washington State Representative Matt Shea, who was at the Bundy Ranch during the tense standoff on April 12, told The New American he agrees completely with Rep. Stockman. "A sniper rifle is not due process," Rep. Shea said, in a pithy comment that has been picked up and echoed by many. Shea, who commanded infantry and cavalry units as a U.S. Army officer during combat tours of Bosnia and Iraq, says the sight of federal agents ready to shoot American citizens over "trespassing cattle" and alleged back taxes was "absolutely appalling" to him. "That is completely contrary to the way our legal system, our constitutional system is supposed to operate, and seriously violates the oath taken by each of us in uniform and public office," the legislator/lawyer/military veteran said.

Fox News' senior judicial analyst Judge Andrew Napolitano explained, in an interview with Dana Loesch of TheBlaze, that the federal government had an alternative to "brute force" and the potential for fatalities that come with it. He noted that Bundy has argued he wouldn't pay the federal grazing fee because the land on which he was grazing his cattle belonged to the state, not the federal government.

"A federal court decided that it belonged to the federal government, and that position was upheld on appeal," Judge Napolitano said. "Now, that is a decision that *never should have been made* by a federal court, for two reasons. The federal government should never be in a position in which it is deciding on the extent of its own power…. And secondly, when you have a dispute over real estate, there's a universal principle of law *everywhere* in the United States of America … that real estate disputes are resolved by state courts."

Nevertheless, Napolitano noted, the federal government won and the decision was upheld. "At that point the federal government could've won," Napolitano observed. "But instead of docketing the judgment, instead of taking that piece of paper and filing it in the courthouse and waiting for Mr. Bundy to pass the property on to someone else … it decided to use brute force to enforce its judgment, and that's when the entire dynamic turned around." The BLM, he said, which is "supposed to be a bunch of

bureaucrats" preserving land for the "future enjoyment of all Americans" quickly became "a group of thugs dressed in military uniform with loaded M16s pointed at a rancher and his family."

The federal paramilitary raid opened additional serious legal issues that must be addressed. The court order obtained by the BLM authorized the agency to "seize and remove" the Bundy cattle, but did not authorize the killing of any cattle, nor did it permit the BLM to rip up Bundy's water lines, or destroy water tanks, pumps, and corrals. When we interviewed Cliven Bundy by telephone on April 21, he was still unsure as to the total damage that had been done and what the total financial costs would be. To replace the waterlines, tanks, and pumps could easily reach $100,000, he figured. Two of his bulls had been killed, one shot multiple times. One calf and six cows were buried in a mass grave. The bulls have a market value of about $5,000 apiece, he said, while the cows would fetch about $2,200 per head. One of his biggest concerns was the many young calves that are without mothers, either because the cows had been killed, run off, or so traumatized that they had abandoned their calves. "We're bottle feeding 27 calves now," he told this reporter. "One of the youngest, that we named Liberty, was still wet from just being born. They picked a terrible time to do this raid, because it's right during calving, when the mothers and the babies are most vulnerable."

Other cattle were injured. "Some of them were dragged (by vehicle or by horse)," he said, "over rough, rocky ground, rubbing the hide off them, hurting their hooves and legs, and they've been chased by helicopter and vehicles — that puts a lot of stress on the whole herd." As a result, many of them lose weight, get sick, and are too upset to nurse their young. All of these BLM actions that were not authorized by the court order would be considered criminal acts if committed by anyone else, Bundy notes, and the federal agents must be held to the same standard if the "rule of law" is to have any meaning.

The particulars in the Bundy case may end up showing that the rancher is in the wrong on some points. But what we know thus far is that the BLM is a rogue agency with a history of malicious abuse, and in this matter they have resorted to lawless means and nearly used deadly force to collect an alleged debt and enforce dubious regulations.

Photo at top: Josh Warburton, The Independent (southern Utah) | suindependent.com

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