Written by **Joe Wolverton, II, J.D.** on April 13, 2014

Bundy's Case: Feds Do Not Own the Land Where His Cattle Graze

The standoff in the Nevada desert seems to have cooled a little by the federal government's decision to return over 100 head of cattle to rancher Cliven Bundy.

A deal was reportedly struck between Bundy and the Bureau of Land Management (BLM) requiring that the federal agency release Bundy's livestock that was reportedly seized because of the rancher's refusal to pay fees to the federal government for grazing his cattle on land that he has preemptive rights to, and that, he insists, is the property of the sovereign state of Nevada.

According to a story in the *Las Vegas Review-Journal*, "the BLM decided to halt the roundup, fearing for the safety of its agents and the public."

In a statement released Saturday and quoted by the newspaper, recently confirmed BLM Director Neil Kornze, a former senior adviser to Senator Harry Reid, said, "Based on information about conditions on the ground, and in consultation with law enforcement, we have made a decision to conclude the cattle gather because of our serious concern about the safety of employees and members of the public."

The newspaper also reports that Bundy was pleased with the agreement. He reportedly spoke to supporters gathered near his home in Bunkerville, Nevada, telling them, "Good morning America! Good morning world! Isn't it a beautiful day in Bunkerville?"

The *Review-Journal* story seems to suggest that the federal government stood down because of citizen militia forming and threatening to forcibly free Bundy's cattle. But this does not mean that the federal government has conceded. It is more likely that the feds will do as they have done in so many other cases, and try to use the federal courts to do what armed BLM agents were ordered not to do.

Perhaps in the legal assault it is likely to launch on Bundy's rights, the federal government will be forced to retreat there, too, as it was last year in the case of another Nevada rancher, E. Wayne Hage, where a federal judge ruled in favor of the rancher's property rights and against the BLM's attempted abuses of power.

Anti-Federalist Foresight

Such usurpations and wholesale efforts to reduce to rubble the concept of state sovereignty were not unknown to our Founding Fathers. And so it is not surprising that many, including this author, have quoted *The Federalist Papers* in support of state sovereignty, and in support of Cliven Bundy's position that it was the federal government and not his cattle that trespassed on the land where his cattle grazed. In fact, Bundy argues, the public land in question does not belong to the federal government but to the sovereign state of Nevada. I will write a bit more about this in a minute. First, regarding the

federal government's efforts to annihilate state sovereignty, the group of Founding Fathers known as Anti-Federalists seemed to see clearly into the future — though it is important to keep in mind that these efforts have been helped along by changes to the Constitution such as the direct election of U.S. senators (making the senators no longer beholden to the state legislatures) as well as the growth of extra-constitutional government.

On June 5, 1788, Patrick Henry rose for the third time and addressed the body of 168 delegates gathered in the Richmond Theatre in Richmond, Virginia to debate ratification of the newly proposed Constitution. In all, Henry delivered 24 discourses blasting away at what he called the most "objectionable parts" of the Constitution.

Remarkably, on that hot June afternoon, the target of Henry's unparalleled oratory assault was the very scenario — citizens arming to defend against federal seizure of land located within state territory — that is the crux of the Bundy versus BLM showdown.

To read Henry's powerful speech is to appreciate his remarkable foresight:

> Oh, sir! we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone; and you have no longer an aristocratical, no longer a democratical spirit. Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who had no power at all? You read of a riot act in a country which is called one of the freest in the world, where a few neighbors can not assemble without the risk of being shot by a hired soldiery, the engines of despotism. We may see such an act in America.
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> A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? The clause before you gives a power of direct taxation, unbounded and unlimited — an exclusive power of legislation, in all cases whatsoever, for ten miles square, and over all places purchased for the erection of forts, magazines, arsenals, dockyards, etc. What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies; their garrisons will naturally be the strongest places in the country. Your militia is given up to Congress also, in another part of this plan; they will therefore act as they think proper; all power will be in their own possession. You can not force them to receive their punishment: of what service would militia be to you, when, most probably, you will not have a single musket in the State? For, as arms are to be provided by Congress, they may or may not furnish them.

Old and New on Equal Footing

Finally, there is the constitutional issue of whether states, in forming the Constitution, gave the federal government power to own land.

In the decision handed down by the Supreme Court in the case of *Escanaba Co. v. City of Chicago*, 107 U.S. 678, 689 (1883), an important constitutionally based concept known as the "equal footing doctrine" was described as "Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Basically, this principle requires that any state added to the union do so on equal footing with the 13 original states. As reported by the legal website Justia, "Since the admission of Tennessee in 1796, Congress has included in each State's act of admission a clause providing that the State enters the

Union 'on an equal footing with the original States in all respects whatever.'"

An issue very similar to that in Cliven Bundy's situation was at the heart of a Supreme Court case of *Pollard's Lessee v. Hagan*, decided in 1845. Justia provides a short, helpful summary of the events:

> *Pollard's Lessee* involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands.
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> Rather than an issue of mere land ownership, the Court saw the question as one concerning sovereignty and jurisdiction of the States. Inasmuch as the original States retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new States would bring those States into the Union on less than an equal footing with the original States.
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> This, the Court would not permit.
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> "**Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law,** to the same extent that Georgia possessed it, before she ceded it to the United States.
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> To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding….
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> **[T]o Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights."** [Emphasis added.]

So, regardless of the BLM's — and by extension, the Obama administration's — insistence that Nevada's land was ceded to the federal government when Nevada became a state in 1864, the Constitution, common law, and relevant Supreme Court rulings have found otherwise.

The bottom line, then, is that Nevada owns the land where Cliven Bundy's cattle fed, and Bundy — who has preemptive rights for his cattle to feed there — has faithfully and fully paid that landlord the rent he owed it.

(Please read this author's previous analysis of a similar federal land grab in Utah.)

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