



Written by [Joe Wolverton, II, J.D.](#) on May 20, 2014

Fed Government Maintains Control of Creek in Otero County, New Mexico

A meeting between county officials and ranchers has failed to result in an agreement, leaving federal officers in charge of state land and leaving thirsty cattle locked out of watering holes.

Last Friday, commissioners of Otero County, New Mexico, met with representatives of the U.S. Forest Service in the office of U.S. Attorney Damon Martinez, hoping to hash out some sort of settlement of the standoff that has left cattle dying of thirst on the drought-stricken southern New Mexico range.



As *The New American* reported, the federal Forest Service fenced off a 23-acre section of land, preventing a rancher's cattle from getting to a watering hole located on the tract.

Early last week, the county commission voted unanimously (with one commissioner absent) to empower the sheriff to open a gate, making a way for the cattle, some 200 in number, to get to the water. "We are reacting to the infringement of the U.S. Forest Service on the water rights of our land-allotment owners," Otero County Commissioner Tommie Herrell told Reuters. "People have been grazing there since 1956," he added.

Herrell reported that the meeting held on Friday was useless and that nothing was resolved. "We thought with us coming up here and taking our time — we could get something resolved," Herrell said, as reported in the *Alamogordo News*. "We're very disappointed."

After leaving the futile confab, the Otero County Commission issued a statement summing up how disgruntled they were with the federal government:

Ultimately the members from the county were frustrated and disappointed by the inability of the USFS [U.S. Forest Service] to work cooperatively in any meaningful way. And, while the county contingent respectfully discussed that the U.S. was violating the law in their current actions, the federal government was unwavering in their belief that they lacked the authority to stop violating the law and open the gates.

Otero County attorney Blair Dunn reports that U.S. Attorney Martinez claimed at the meeting that neither his office nor the local Forest Service office had the authority to open the gates and give the cattle access to the water. "For the past 15 years they've been opening the gates and the fences have been down or up," Dunn said, as recounted by the *Alamogordo News*. "They've always allowed people in and out of the water. Then all of a sudden now they don't have the authority to do that anymore."

Dunn doesn't buy the feds' story. "It's inconceivable that the Forest Service doesn't have the authority to open a gate on a fence that they just built," he said.

Given the fact that this area of the state has been suffering under extreme drought conditions for over a



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year, ranchers in Otero County are particularly angry at the government's ham-fisted attempt to exercise control over the site of the spring, effectively killing their cattle. "The winds are blowing; we're in a drought. Sacramento Mountains are dry. So whatever water source these animals can find, they have to be able to get to it," county commissioner Susan Flores told television station KVIA news earlier this month.

The *Alamogordo News* summed up Dunn's direct and accurate assessment of the scope of the federal government's iron-fisted attempt to hold ranchers and their stock hostage and to disdainfully disregard sincere efforts by the county to make the case for relief:

Dunn said the U.S. Attorney seemed more concerned with the safety and welfare of U.S. Forest Service employees instead of finding a solution.

He said Martinez was concerned citizens might retaliate against the Forest Service.

"[Martinez] was worried people would take the law in their own hands by opening a gate and that it would put the Forest Service in a position where they have to confront somebody and try to keep them from doing something," Dunn said. "So really the point of the meeting wasn't really to reach any short-term solution to get people into their water. It really became them asking the county officials and the sheriff to do what they can to keep people calm and to just get everybody to quiet down."

Herrell said Martinez might have been concerned the issue would ignite into a situation similar to the Cliven Bundy confrontation that occurred in Nevada recently.

Dunn said he felt the U.S. Attorney had overlooked the real flaws in the case that was made on behalf of the Forest Service keeping the gates closed.

"So there are two things that were overlooked. One, they are OK with violating the law when it comes to taking over someone else's property but they're not OK with violating the law to let that person back into their property. Which is an astounding concept."

Dunn said another aspect that was overlooked was the fact that the Forest Service was breaking the law.

"They do not have a right to that water," he said. "That is an illegal diversion of water on their part."

Attorney Dunn is to be commended for his understanding of the Constitution, federalism, and the protection of fundamental liberties at the heart of this latest attempt by the Obama administration to send, as Thomas Jefferson [complained of in the Declaration of Independence](#), "swarms of Officers to harass our people, and eat out their substance."

There is no argument that swarms of federal agents are harassing our people, preventing them making a living, and invading the sovereign territory of Western states, in open and hostile defiance of the Constitution, the rule of law, principles of federalism, and Supreme Court rulings.

As this reporter wrote in [an earlier article](#), in the decision handed down by the Supreme Court in the case of *Esanaba Co. v. City of Chicago*, 107 U.S. 678, 689 (1883), the concept of constitutional interpretation known as the "equal footing doctrine" was established. It declares that the "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 joining the union do so on equal footing with the 13



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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.’”

The question of whether the federal government could legally and constitutionally assert ownership over lands located within the boundaries of a state was the central issue in the Supreme Court case of *Pollard’s Lessee v. Hagan*, decided in 1845.

In what sounds substantially similar to the cases in Otero County, New Mexico, and Bunkerville, Nevada, the issue in *Pollard’s Lessee* was whether the federal government could seize unoccupied “public” lands within the borders of the sovereign state of Alabama. The Alabama state constitution contained — as does the current Nevada state constitution — provisions declaring both the federal government’s right to exercise control over these lands and the state’s “equal footing” with the original 13 states.

Regarding the ownership question as secondary, the Supreme Court focused on the issue of state sovereignty and the jurisdiction of the federal government over land within a state. This is a critical consideration, as there is no doubt that the 13 original states retained unchallenged sovereignty over all the lands within their recognized boundaries, including land underneath navigable waters.

Accepting this as the state of the law, the Supreme Court specifically held that there is no constitutional or legal justification for the federal government’s assertion of ownership or control over lands in Alabama or any state, noting particularly how it never attempted to do so in the 13 states that formed the union.

The court held:

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.

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....

To 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.]

The battle to preserve the sovereignty of states is not over in Otero County. As the *Alamogordo News* reports:

District 3 Commissioner Ronny Rardin said the issue was far from over and ultimately it is incumbent upon the commission, the sheriff and the citizens of the county to stand up for their Constitutional rights.

“I think it is important for the residents of Otero County to understand that their county officials are doing everything they can to try to help the people, keep their private property rights and resolve this issue,” Dunn said. “They are going to continue to do everything they lawfully can to make it happen.”

The New American will continue to follow this story and support the efforts of citizens to push back against the “swarms of officers sent to harass our people and eat out their substance.”



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