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Speaker John Hambrick
Assembly Chambers

Dear Speaker Hambrick:

You have asked to be informed when we have identified constitutional problems with a particular bill during the drafting process. This letter is to notify you that, based on the authorities and analysis provided in this letter, it is the opinion of this office that Assembly Bill No. 408 (A.B. 408) presents such constitutional problems. A.B. 408 amends the provisions of chapter 321 of NRS governing public lands in a manner which restricts the Federal Government from managing and controlling public lands in this State in accordance with federal laws and regulations. For the reasons set forth below, it is the opinion of this office that, if enacted into law in its current form, the bill would be found unconstitutional.

A.B. 408 amends the provisions of chapter 321 of NRS governing public lands by adding several new sections to that chapter concerning the appropriation and use of public lands in Nevada that are currently managed and controlled by the Federal Government. For the purposes of those sections, the provisions of section 2 of A.B. 408 define the term "public lands" to mean:

> [A]ll lands within the exterior boundaries of the State of Nevada except lands:
> 1. To which title is held by any private person or entity;
> 2. To which title is held by the State of Nevada, any of its local governments or the Nevada System of Higher Education;
> 3. To which title has been acquired by the Federal Government pursuant to section 3 of [A.B. 408]; or
> 4. Which are held in trust for Indian purposes or are Indian reservations.

This definition is broader than the current definition of "public lands" set forth in NRS 321.5963 in that the definition set forth in section 2 of A.B. 408 would additionally include all lands which are located within congressionally authorized parks, monuments,

national forests and national wildlife refuges and all lands which are controlled by the United States Department of Defense, Department of Energy and Bureau of Reclamation.

Section 3 of A.B. 408 prohibits the Federal Government from owing any land within the borders of the State of Nevada unless: (1) the Federal Government provides consideration to Nevada; (2) the Nevada Legislature cedes jurisdiction over the land pursuant to statute; (3) the Federal Government uses the land for purposes authorized by the Enclave Clause; and (4) the Federal Government records the deed to the land with the county recorder in the county in which the land is located. Section 3 also prohibits the Federal Government from enforcing any federal law or regulation in this State except on land that has been acquired in that manner and for those purposes. Additionally, section 3 prohibits the Federal Government from owning rights to use land or water, posting signs on any land or disposing of, leasing, issuing permits for the use of, collecting fees relating to, prohibiting or restricting the use of or entering into any contract relating to land or water within the borders of Nevada for any purpose. Section 3 also provides that until equivalent measures are enacted by the State of Nevada, the rights and privileges of the people of Nevada under the National Forest Reserve Transfer Act, the General Mining Laws, the Homestead Act, the Taylor Grazing Act, the Desert Land Act, the Carey Act and the Public Rangelands Improvement Act and all rights-of-ways and easements held by persons, must be preserved under administration by the State of Nevada.

Section 4 of A.B. 408 requires the State Land Registrar to adopt regulations establishing the conditions under which a person may appropriate the right to use public lands for grazing, logging, mineral development or any other beneficial use, and requires those regulations to: (1) provide for the appropriation of grazing, logging, mineral development or other beneficial use rights on public lands; (2) establish procedures by which claims to those rights may be registered with the State Land Registrar; (3) provide for the appropriation of grazing rights on public lands to a person who owns stock-watering rights on those public lands; (4) require the owner of grazing, logging, mineral development or other beneficial use rights for public lands to submit once every 5 years proof that the owner is using the lands for an appropriate beneficial use; (5) prohibit the sale or lease of grazing, logging, mineral development or other beneficial use rights on public lands unless the holder of those rights provides proof that he or she has used the land for which the rights are held to beneficial use for 4 consecutive years; (6) authorize another person to claim a right to use public lands for grazing, logging, mineral development or any other beneficial use if the holder of those rights fails to use those rights for a beneficial use; (7) require a person to publish notice for 120 consecutive days if he or she wishes to appropriate and register grazing, logging, mineral development or other beneficial use rights on public lands; (8) provide for the appropriation and registration of a grazing, logging, mineral development or other beneficial use right if a protest is not filed; and (9) prohibit the Federal Government and any governmental entity

from outside this State from registering grazing, logging, mineral development or other beneficial use rights on public lands.

Section 5 of A.B. 408 requires the State Land Registrar to publish several notices concerning the availability of rights to use public lands for logging, grazing, mineral development or any other beneficial use.

Section 6 of A.B. 408 sets forth the manner in which a person may protest the availability of the right to use public land for logging, grazing, mineral development or any other beneficial use. Section 6 also specifies the manner in which an aggrieved person may appeal a decision of the State Land Registrar concerning a protest. Additionally, section 6 authorizes the Attorney General to enforce and seek appropriate judicial relief concerning the provisions of A.B. 408.

Section 7 of A.B. 408 specifies that, if the right to use public land for logging, grazing, mineral development or any other beneficial use is not appropriated and registered, the right becomes the common property of the citizens of this State and requires the State Land Registrar to hold annual auctions for permits to use public lands for those purposes.

Section 8 of A.B. 408 requires the Board of County Commissioners of each county to impose a tax on profits earned from the beneficial use of public lands in accordance with A.B. 408.

In determining the constitutionality of the bill, it is important to consider that the principal source of federal power to regulate and manage the public lands is set forth in the Property Clause of the United States Constitution, which provides, in relevant part, that "[t]he 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. It has long been held that the power of the Federal Government over the public lands entrusted to Congress pursuant to this clause is without limitation, Kleppe v. New Mexico, 96 S. Ct. 2285, 2291 (1976), and the exercise of that power may not be curtailed by state legislation. Denee v. Ankeny, 38 S. Ct. 226, 227 (1918); Itcaina v. Marble, 56 Nev. 420, 433 (1936). When Congress exercises its exclusive right to control and dispose of the public lands of the United States, neither a state nor any state agency has any power to interfere. United States v. Montgomery, 155 F. Supp. 633, 635 (D. Mont. 1957). The United States Supreme Court and various federal courts have expanded these holdings to the extent that the power over federally owned public land entrusted to Congress by the Property Clause of the United States Constitution is substantially without limitation. *See* California Coastal Comm'n v. Granite Rock Co., 107 S. Ct. 1419, 1425 (1987); Nevada v. United States, 512 F. Supp. 166, 171 (D. Nev. 1981) The basic import of these holdings is that Congress may adopt any regulations concerning public lands so long as the regulations do not violate some specific provision of the United States Constitution.

The provisions of clause 17 of section 8 of article I of the United States Constitution, commonly referred to as the "Enclave Clause", provide another source of federal authority to regulate and manage lands belonging to the United States. Those provisions state, in relevant part, that "[t]he Congress shall have Power To . . . exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." U.S. Const. art. I, § 8, cl. 17. Pursuant to those provisions, the Federal Government may acquire land within a state by purchasing the land with the consent of the legislature of the state in which the land is located. The phrase "exclusive [l]egislation" used in those provisions has been construed to mean exclusive jurisdiction. Thus, where the Federal Government acquires land in accordance with those provisions, the Federal Government retains exclusive jurisdiction over that land and state laws generally do not apply within the area so acquired. Surplus Trading Co. v. Cook, 50 S. Ct. 455, 457 (1930) (holding that personal property belonging to a defendant located on a federal military installation in Arkansas was not subject to the laws of Arkansas taxing personal property in that state).

Despite the expansive reading by the courts of the power of Congress over public lands pursuant to the Property Clause and the Enclave Clause, the states are allowed, to a limited extent, to regulate areas in the federal public domain. States may enact quarantine rules and measures to prevent breaches of the peace, or prescribe other reasonable police regulations so long as the regulations are not arbitrary or inconsistent with applicable congressional enactments. *See* McKelvey v. United States, 43 S. Ct. 132, 135 (1922); In re Calvo, 50 Nev. 125, 135 (1927); Hagood v. Heckers, 513 P.2d 208 213 (1973); 43 Op. Att'y Gen. (1931). The United States does not in every case acquire exclusive jurisdiction when it receives title to lands located within a state. Acquisition by the United States of title to lands within the boundaries of a state is not sufficient in itself to exclude the state from exercising any legislative authority, including its taxing and police power, in relation to property and activities of individuals and corporations within the state. It must appear that the state, by consent or cession, has transferred to the United States that residuum of jurisdiction which it would otherwise be free to exercise before exclusive jurisdiction is acquired by the United States. State v. Cline, 322 P.2d 208, 213 (Okla. 1958). However, where Congress acts under the Property Clause by providing rules and regulations for public land, any state law which conflicts with federal law is superseded and must recede. *See* Bilderback v. United States, 558 F. Supp. 903 (D. Or. 1982); United States v. Brown, 431 F. Supp. 56, 63 (D. Minn. 1976); Ansolabehere v. Laborde, 73 Nev. 93, 107 (1957). Consent or cession of jurisdiction of a state is not required when Congress acts pursuant to its plenary authority to regulate public lands. United States v. Bohn, 622 F.3d 1129, 1134 (9th Cir. 2010); Nevada v. Watkins, 914 F.2d 1545, 1552 (9th Cir. 1990). Therefore, even though the State of Nevada may have a limited amount of concurrent jurisdiction over federal public lands under its taxing and police power, any state laws passed which conflict with existing federal laws are superseded under the Supremacy Clause of the United States Constitution.

Various persons and groups who criticize the authority of the Federal Government to manage and control lands in Nevada have often based their criticism in part upon the theory that the United States may not acquire title to land within a state unless the land was purchased with the consent of the legislature of the state in accordance with the provisions of the Enclave Clause. Because most federal public lands in Nevada were never acquired in this manner, those persons and groups argue that the Federal Government has unconstitutionally acquired title to the public lands in Nevada and therefore any federal law pertaining to the public lands has no effect. This argument has been rejected by the courts. The United States Supreme Court has long recognized that the United States, at the discretion of Congress, may acquire and hold real property in any state, whenever such property is needed for the use of the government in the execution of any of its powers, whether for arsenals, fortifications, light-houses, custom-houses, barracks or hospitals, or for any other of the many public purposes for which such property is used. Van Brocklin v. Tennessee, 6 S. Ct. 670, 672 (1886). Although the mode in which the United States may acquire property is not prescribed by the Constitution, In re Will of Fox, 52 N.Y. 530 (N.Y. 1873), aff'd, 94 U.S. 315 (1877), Courts have held that the provisions of the Enclave Clause are not restrictive of the power of the United States to acquire lands for other governmental purposes and functions, United States v. Vogler, 859 F.2d 638, 641 (9th Cir. 1988), and those large areas of public lands used for forests, parks, ranges, wildlife sanctuaries, flood control and other such purposes are not covered by the Enclave Clause. Collins v. Yosemite Park & Curry Co., 58 S. Ct. 1009, 1014 (1938). Courts have also held that exclusive jurisdiction over land located within the boundary of a state may be obtained by: (1) excepting the land from the jurisdiction of the state upon admission of the state into the union; (2) cessation of jurisdiction from the state to the Federal Government; and (3) pursuant to The Enclave Clause. State v. Cline, 322 P.2d 208, 212 (Okla. 1958); Richardson v. Turner, 401 P.2d 443, 444 (Utah 1965). Based upon these authorities, it is clear that the United States may acquire property located within a state by means and for purposes other than those provided for in Article I, Section 8 Clause 17 of the Constitution. This clause simply establishes the exclusive jurisdiction of the United States over property which is acquired in the manner provided in the Enclave Clause. This clause does not dictate the only method by which the United States may gain title to property located within a state.

Based upon these authorities, it clear that Congressional power to prescribe rules and regulations concerning public lands entrusted to Congress is firmly entrenched, and ample authority exists upon which to invalidate state laws which conflict with federal laws concerning the management and control of federal public lands.

In addition to the general authority of the Federal Government to regulate and manage the public lands discussed above, several courts have specifically ruled on the issue of whether the Federal Government owns the public lands in Nevada, and at least one court has held that Nevada's current statutory claim of ownership to the

unappropriated public lands in this State set forth in NRS 321.596 to 321.599, inclusive, is unconstitutional and fails as a matter of law.

Before discussing the holdings in those cases, it may be helpful to provide a brief discussion concerning the provisions of NRS 321.596 to 321.599, inclusive, which set forth the statutory claim of ownership of the State of Nevada to certain public lands located within this State. Specifically, the provisions of NRS 321.5973 state that "[s]ubject to existing rights, all public lands in Nevada and all minerals not previously appropriated are the property of the State of Nevada and subject to its jurisdiction and control." The provisions of NRS 321.5963 define the term "public lands" to mean:

> [A]ll lands within the exterior boundaries of the State of Nevada except lands:
>
> (a) To which title is held by any private person or entity;
>
> (b) To which title is held by the State of Nevada, any of its local governments or the Nevada System of Higher Education;
>
> (c) Which are located within congressionally authorized national parks, monuments, national forests or wildlife refuges or which are lands acquired by purchase consented to by the Legislature;
>
> (d) Which are controlled by the United States Department of Defense, Department of Energy or Bureau of Reclamation; or
>
> (e) Which are held in trust for Indian purposes or are Indian reservations.

The provisions of NRS 321.597 require the Division of State Lands of the State Department of Conservation and Natural Resources to "hold the public lands of the State in trust for the benefit of the people of the State."

In United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996), the defendant Nye County, through its Board of County Commissioners, adopted a resolution claiming that the State of Nevada owned the public lands to which the provisions of NRS 321.596 to 321.599, inclusive, apply, and that the United States lacked the authority to manage those public lands within the boundaries of Nye County. The Board of County Commissioners also adopted a resolution declaring that certain roads, highways and other rights-of-way located on or crossing over those public lands were public roads of Nye County and were the property of Nye County. After those resolutions were adopted, a member of the Board of County Commissioners used a bulldozer owned by Nye County to reopen a road located within the Toiyabe National Forest which had been closed by the United States Forest Service. Id. at 1111. In response, the United States filed a civil complaint against Nye County in which it sought a declaratory judgment indicating that the United States owns and has the authority to manage the disputed public lands in Nye County and that the resolutions adopted by Nye County were preempted under federal law. Id. at 1110. In granting summary judgment in favor of the United States, the United States District Court for the District of Nevada stated that Nevada's statutory claim of ownership of the unappropriated public lands of the United States is "unsupported, unconstitutional, and fails as a matter of law." Id. at 1114. The Court further held 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.

Similarly, in United States v. Gardner, 107 F.3d 1314 (9th Cir. 1997), the defendants appealed the granting of an injunction and the imposition of a fee against the defendants for engaging in unauthorized grazing upon lands managed by the United States Forest Service. In affirming the injunction and the imposition of the fee, the United States Court of Appeals for the Ninth Circuit rejected the assertion made by the defendants that they were not required to obtain a grazing permit or pay fees for grazing on public lands managed by the United States Forest Service because those lands do not belong to the United States. The Court firmly rejected that argument and held that the United States is not required to hold, in trust for the establishment of future states, any public lands it acquires within the boundaries of this State and that the United States has authority under the Property Clause to "administer its federal lands any way it chooses." Id. at 1318. The Court further held that the Equal Footing Doctrine does not "operate . . . to give Nevada title to the public lands within its boundaries." Id. at 1319.

It is important to note that the holdings in Nye County and Gardner comport with the holding in the early case of Vansickle v. Haines, 7 Nev. 249 (1872) (overruled on other grounds in Jones v. Adams, 19 Nev. 78, 88 (1885)), wherein the Nevada Supreme Court stated that the United States has "absolute and perfect" title to the unappropriated public lands in Nevada. Vansickle, 7 Nev. at 260. In support of its conclusion, the Court stated that the:

> United States is the unqualified proprietor of all public land to which the Indian title has been extinguished. Certainly there is none other who has any right to, or claim upon it, which in any way qualifies the right of the federal government. *Although it has sometimes been suggested that the unoccupied lands belonged to the several states in which they may be located, the suggestion has never received the serious sanction of statesmen, or the courts of the country.*

Id. at 261 (emphasis added).

Based upon the holdings in these cases, it appears well-settled that the United States has been judicially declared to be the owner of the unappropriated public lands in this State and, as such, has the authority to manage and control those public lands. Furthermore, it also appears well-settled that Nevada's current statutory claim of ownership over those public lands set forth in NRS 321.596 to 321.599, inclusive, is unconstitutional and fails as a matter of law.

Based upon the authorities discussed above concerning the authority of the Federal Government to manage and control federal public lands in this State, the provisions of A.B 408, if enacted, will directly conflict with that authority. The Federal Government currently exercises significant regulatory authority over the federal public lands in this State in accordance with numerous provisions of federal law, including, without limitation, the General Mining Laws of 1872, 30 U.S.C. §§ 21 et seq., the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315 et seq., the Desert Land Act of 1877, 43 U.S.C. §§ 321 et seq., the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq., and the Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901. Specifically, Congress has declared that "[a]ll valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase." 30 U.S.C. §22. Congress has also declared, that "it is the policy of the United States that . . . the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in [the Federal Land Policy and Management] Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. §1701. Additionally, as to the National Park System, it is stated that the purpose of the System is to "conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life . . . for the enjoyment of future generations." 54 U.S.C. § 100101. Those provisions are a clear indication of the intent of Congress to retain management and control of the public lands in this State. In direct conflict with those provisions, A.B. 408 will, if enacted, confer upon the State of Nevada, through the State Land Registrar, the authority to regulate and appropriate the right to use those public lands for grazing, logging, mineral development or any other beneficial use. Specifically, section 4 of A.B. 408 requires the State Land Registrar to "adopt regulations establishing conditions under which a person may appropriate the right to use public lands for grazing, logging, mineral development or any other beneficial use and the procedures for appropriating such rights." The provisions of subsection 9 of section 4 of A.B. 408 specifically prohibit the "Federal Government and any governmental entity from outside this State from registering grazing, logging, mineral development or other beneficial use rights on public lands." All of these provisions would, if enacted, directly conflict with the authority of the Federal Government to manage and control the federal public lands in this State.

In addition to the issue concerning the enactment of laws by the State of Nevada which directly conflict with federal laws and regulations, the Supreme Court of the United States has held that state laws which are hostile to federal interests concerning public lands or which interfere with or otherwise handicap the efforts of federal agencies to carry out a national purpose are invalid. *See* North Dakota v. United States, 103 S. Ct. 1095, 1105 (1983); United States v. Little Lake Misere Land Co., 93 S. Ct. 2389, 2399 (1973); James Stewart & Co. v. Sardrakula, 60 S. Ct. 431, 436 (1940). This concept was borrowed by the court from the area of labor relations, stating that "incompatible doctrines of local law must give way to principles of federal labor law." UAW v. Hoosier Cardinal Corp., 86 S. Ct. 1107, 1111 (1966). Other federal courts have reiterated and

relied upon these holdings to invalidate various state laws when those state laws have been applied to federal interests. *See* Central Pines Land Co. v. United States, 274 F.3d 881, 890 (5th Cir. 2001) (stating that the application of state laws may in some instances so strongly conflict with federal interests that those laws may be rejected without further analysis); LaFargue v. United States, 4 F. Supp. 2d. 593 (E.D. La. 1998) (holding that a law of the State of Louisiana which prohibited the Federal Government from selling certain pipeline rights-of-way separately from a related gas facility was inconsistent with and therefore inapplicable to federal interests in carrying out the Energy Policy and Conservation Act, 42 U.S.C. §§ 6201 et seq.); Sierra Club v. Marsh, 692 F. Supp. 1210, 1214 (S.D. Cal. 1988) (holding that a city ordinance which prohibited the transfer of certain land to the Federal Government in its attempt to carry out the provisions of the Endangered Species Act, 42 U.S.C. §§ 4321 et seq., was hostile to federal interests and therefore inapplicable to the transaction). At least one state court has held that state legislation which is "manifestly hostile" to the exercise of rights granted by a federal statute cannot stand. Fullerton v. Lamm, 163 P.2d 941, 945 (Or. 1945). The thrust of the holdings in these cases is that if a state enacts a state law which, either on its face or in its effect, is hostile to federal interests or impermissibly interferes or strongly conflicts with or handicaps the efforts of any agency of the Federal Government in carrying out federal laws having a national purpose, the state law may be struck down.

Finally, this office is in agreement with the concurring opinion of Justice Rehnquist in United States v. Little Lake Misere Land Co., *supra,* in which he stated that the "doctrine of intergovernmental immunity enunciated in McCulloch v. Maryland, however it may have evolved since that decision, requires at least that the United States be immune from discriminatory treatment by a State which in some manner interferes with the execution of federal laws." Little Lake Misere Land Co.,93 S. Ct. at 608 (citation omitted). This prohibition against discriminatory treatment has been reiterated to a certain extent by the Ninth Circuit in Clifton v. Cox, 549 F.2d 722 (9th Cir. 1977), wherein the Court stated that "[o]ne of the basic tenets in the application of the Supremacy Clause is that the states have no power to determine the extent of federal authority. To rule otherwise would allow a state to punish the exercise of federal authority under the guise of questioning the right of federal officials to act." Id., at 730 (footnote omitted). The Nevada Supreme Court has made similar statements in State v. Morros, 104 Nev. 709 (1988), wherein the Court held that, as to the issue of the application of state water law to the Federal Government, the United States is to be "treated as a person . . . it is not to be feared, given preferential treatment and certainly not discriminated against." Id., at 717. The provisions of section 2 of A.B. 408 define the term "public lands" to include only certain public lands that are currently managed and controlled by the Federal Government under federal laws and regulations. The provisions of subsection 2 of section 3 of A.B. 408 state that the "Federal Government shall not own rights to use land or water, post signs on any land or dispose of, lease, issue permits for use of, collect fees relating to, prohibit or restrict the use of or enter into any contract relating to land or water within the borders of this State for any purpose." The provisions of section 4 of A.B. 408 require the State Land Registrar, as to the federal public lands to

which A.B. 408 applies, to adopt regulations "for grazing, logging, mineral development or any other beneficial use and the procedures for appropriating such rights." As written, A.B. 408 clearly singles out the Federal Government for discriminatory treatment and seeks to exercise ownership and control over public lands to which the State of Nevada would otherwise have no legitimate claim of ownership or control. As such, the provisions of A.B. 408 are certainly hostile to federal interests concerning federal public lands and would handicap and interfere with the efforts of federal agencies to carry out federal laws enacted for a national purpose.

In conclusion, it is the opinion of this office that the provisions of A.B. 408, if enacted, would be constitutionally invalid. The authority of the United States to acquire and control the public lands located in this State is extensive, and ample bases exist upon which a court could invalidate any state laws which are in direct conflict with existing federal laws concerning those public lands or which are hostile to or interfere with the exercise of federal authority over public lands. The provisions of A.B. 408 propose to confer broad authority upon the State Land Registrar concerning the appropriation and management of grazing, logging, mineral development and other beneficial use rights on public lands currently controlled by the United States, and therefore are in direct conflict with and would be superseded by those federal laws. Additionally, the provisions of A.B. 408 which attempt to prohibit the Federal Government from owning land in this State and prohibit the Federal Government from registering grazing, logging, mineral development or other beneficial use rights on those public lands would be held to be manifestly hostile to federal interests and discriminatory towards the Federal Government in carrying out policies of national concern. As such, it is the opinion of this office that under the current precedent, the provisions of A.B. 408, if challenged, would be held unconstitutional.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,

Brenda J. Erdoes
Legislative Counsel