

# **Federal Ownership of Land in Oregon and Other States West of the Mississippi**

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This analysis responds to the request of the Legal Counsel of the Association of Oregon Counties that I share my opinion about the validity of legal arguments made by Ms. Kris Anne Hall<sup>1</sup> concerning the ownership and control of property by the federal government in Harney County, Oregon (namely Malheur Wildlife Refuge). My opinion is based on several decades of experience as a natural resources lawyer who litigated these and related issues, and more recently as a legal scholar who has studied and published on such matters.<sup>2</sup> I have taught natural resources law, including public land law, in Oregon at Willamette University College of Law for the past 26 years. I have also taught Water Law, Federal Constitutional Law, Administrative Law, and State and Local Government Law.

Ms. Hall takes the position that the federal government is prohibited by the United States Constitution from owning land within states, other than federal enclaves created with the consent of the states. Ms. Hall adamantly argues that the Enclave Clause itself limits the United States to owning enclave property.<sup>3</sup> She also argues that the Property Clause powers only apply to Territories, and that the US holds such property in trust until the Territories become states, at which time the US can no longer own property except pursuant to the Enclave Clause.<sup>4</sup> Ms. Hall asserts that “the Equal Footing doctrine” supports her argument.

Ms. Hall primarily relies on an approach to Constitutional interpretation called “textualism.” She maintains that the Constitution can be understood simply by reading the text, without any detailed knowledge of the history and context of its formulation and without taking into account how the Constitution has been authoritatively interpreted by federal courts over the past two centuries. This is a most simplistic approach to constitutional interpretation, seldom relied upon by the United States Supreme Court or constitutional scholars. The most conservative approach to reading the Constitution, advocated by some Supreme Court justices and constitutional scholars, is “original meaning” or “original intent.” This approach to interpretation allows us to consider the history and context surrounding the adoption of various constitutional provisions in order to discern the Founders “original intent” in adopting the text’s language or the “original meaning” of the text.

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<sup>1</sup> Ms. Hall, of course, scarcely qualifies as a constitutional scholar. I am uncertain what she is suggesting by calling herself a constitutional lawyer. To the best of my knowledge, she does not currently belong to the Florida bar, the state in which she resides, and Florida does not recognize constitutional law as an area of specialization.

<sup>2</sup> I am offering my scholarly opinion for the benefit of the public and for purposes of public debate. I am not being compensated for this analysis or for sharing my opinion. I do not currently practice law in Oregon or elsewhere; my opinion should not be regarded as legal advice to a client.

<sup>3</sup> United States Constitution, Article I, Section 8, clause 17.

<sup>4</sup> US Constitution, Art. IV, S. 3, cl. 2.

My analysis begins by examining Ms. Hall’s arguments using with her textual approach. I will then examine those arguments using other interpretative aids, such as the history and structure of the Constitution. Finally, I will review those arguments in light of the federal constitutional law decisions made by federal courts over the course of more than 175 years.

### **Reading the Constitutional text alone**

Beginning with the most obvious fallacy in her argument, Ms. Hall limits the Property Clause power of the United States to “Territories” and suggests that power disappears once “Territories” become states. Ms. Hall conveniently ignores the actual text of the Property Clause. The portion of the Property Clause Ms. Hall is citing actually reads:

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.<sup>5</sup>

The very words of the Property Clause give Congress power to control all federal property, whether it is a Territory, an Enclave, or other property.<sup>6</sup> They also give Congress power to “dispose of” all federal property, which implies complete federal ownership of the property because only owners of property have the right to dispose of it.

In reading the phrase “or other Property” entirely out of the Constitution, Ms. Hall apparently is relying on her first assertion that the Enclave Clause itself bars the federal government from owning property other than property provided for in the Enclave Clause. So I’ll address that assertion next.

Again, Ms. Hall misreads the constitutional text she cites. The Enclave Clause actually grants Congress power:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority 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.<sup>7</sup>

On a textual level, the Enclave Clause in no way addresses the power of the federal government to own property. Instead, it simply provides that for certain federal property (federal lands purchased by the consent of the states for various needful purposes for which Congress has accepted legislative jurisdiction), only the federal government has legislative authority. On such property, state law has no force at all and only federal law applies.<sup>8</sup>

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<sup>5</sup> US Constitution, Art. IV, S. 3, cl. 2.

<sup>6</sup> Note that the word “Territory” was construed by the U.S. Supreme Court in 1840 to mean “land;” thus, the Property Clause power was construed from the beginning to apply to all federal land, not just territory held prior to statehood. *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840).

<sup>7</sup> US Constitution, Art. I, S. 8, cl. 17.

<sup>8</sup> Federal courts have read the Enclave Clause to allow the federal government to exercise less than exclusive legislative power over enclaves – areas where both the federal government and the state have full police powers as well as areas where the federal government and state agree on how to divide police powers. Malheur Wildlife Refuge, however, is not held pursuant to the Enclave Clause. It is land owned in a proprietorial capacity under the Property Clause. As such, the State of Oregon has full regulatory or police power over the Refuge. In addition to the ordinary powers of a land owner, the federal government also exercises its

Ms. Hall deviates even further from the constitutional text when she refers to the Equal Footing doctrine. The Equal Footing doctrine refers to a judicially created doctrine that when new states are admitted to the union, they and their citizens are entitled to enjoy equal legal rights in terms of sovereignty, independence and freedom. Unfortunately for Ms. Hall, the Constitution makes absolutely no reference whatsoever to admitting states on an equal footing.

Ms. Hall simply misreads the text of the Constitution apparently to serve her own political, and perhaps business, purposes.

## **Understanding the Constitution in terms of History and Structure**

### **History of Western Land Claims and Rights of States Formed from those Lands**

At the time the thirteen colonies won their independence, some newly independent states were “landed” in the sense that they had claims to lands west of existing colonial settlements. Other states were called “landless” because they had fixed western boundaries and had no claim to western lands. Remember, until the 1800s, when people spoke of “the West,” they meant lands between the Appalachian Mountains and the Mississippi River.

The Articles of Confederation signed by the states after the Revolutionary War did not address western land claims. However, after the Confederation was formed, the national government had to deal with two pressing issues: how to pay the \$80 million war debt and how to handle the political conflict between the landed and landless states because sales of western lands would make the landed states disproportionately rich and more heavily populated. The national government decided that the way to pay the debt and avoid conflict between landed and landless states was to persuade the landed states to cede their western land claims to the national government. The national government would then sell the western lands and ultimately admit new western states. The landed states agreed, ceding their western land claims to the national government. The national Congress then passed the Ordinance of 1785 to provide a process for settling western lands by selling those lands for \$1/acre. It also enacted the Northwest Ordinance of 1787, creating a single Northwest Territory for western lands north of the Ohio River and east of the Mississippi. So, the original 13 states gave up both land and sovereignty over their western land claims to the national government, with the understanding that those lands would eventually become new states.

In the NW Ordinance, the national government decided that newly formed states within the Northwest Territory should be on “an equal footing” with the original 13 states in terms of independence and sovereignty, but did not equate that with transfer of land to the states.<sup>9</sup> Even though that statute provided equal footing for states such as Illinois

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sovereign powers under the Constitution. Where state law conflicts with federal law with respect to the Refuge, federal law necessarily preempts state law under the Supremacy Clause. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

<sup>9</sup> Far from depriving the federal government of the right to own property after statehood, the NW Ordinance provided for continued federal primacy with federal lands:

The Legislatures of those districts, or new States, shall never interfere with the primary disposal of the Soil by the United States in Congress Assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers.

and Indiana, note that adoption of an equal footing notion was a political decision reached by the national government and embodied in a federal statute.

When the Constitution was adopted, the Founders chose not to resolve western land claim issues or to provide equal footing for newly admitted states. Instead, they chose to allow the national government to make the political choices necessary to resolve those issues and empower Congress to address them by statute. Actually, in the Constitutional Convention, an equal footing amendment to the constitutional provision on admitting new states was considered and rejected.<sup>10</sup>

Given this history of the adoption of the Constitution, there is no basis for reading the Constitution to provide for ownership of federal lands to pass to states upon admission. There is no basis for reading it to give states the right to control an equal amount of lands within their boundaries and requiring the federal government to cede federal lands to achieve that outcome. There is no basis for reading it to suddenly abandon federal supremacy over management of lands owned by the federal government. The Founders in both the Articles of Confederation and the Constitution regarded those matters as political issues to be resolved by federal legislation.

Congress indeed resolved that issue in the Federal Land Policy and Management Act, which has governed the public lands since 1976.<sup>11</sup> Congress determined that, after disposing of roughly 1.3 billion acres of land in the western United States for free or at bargain basement prices, federal policy should be to retain the remaining federal land in federal ownership for the common benefit of all Americans.

### **The Constitutional Structure**

As a general matter, the Founders regarded the Articles of Confederation as flawed because the national government had been given insufficient powers to function. The Constitution was adopted to specify and generally strengthen the powers of the national government. It is inconsistent with the Constitution's overall purposes and structure to read the Property Clause and the Enclave Clause to weaken power of the national government to own land and regulate that land when it lies within admitted states. Instead, those provisions empower the national government to own and control land so that government can fulfill its functions and achieve the purposes for which the nation was founded: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."<sup>12</sup>

### **Understanding the Constitution using the United State Supreme Court Decisions interpreting its Provisions**

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<sup>10</sup> The report of the Committee on Detail contained a provision that new states were to be admitted "on the same terms with the original States." Delegate Morris of Pennsylvania moved to strike that requirement, joined by delegates from North Carolina and New Hampshire. Morris's motion was adopted by a 9-2 vote. 2 Convention Records at 454.

<sup>11</sup> 43 USC 1701(a), 1713.

<sup>12</sup> United States Constitution, Preamble.

Ms. Hall briefly suggests that the United States Supreme Court's interpretations of the United States Constitution are not authoritative and that state interpretations should be preferred. That suggestion is outright error. The United States Constitution is federal law and interpretation of federal law is done authoritatively by the United States Supreme Court. State courts only authoritatively interpret state law and when state law conflicts with federal law, the Supremacy Clause of the Constitution provides that federal law trumps state law.

### **The Limited Holding of *Pollard's Lessee v. Hagan***

Due to ancient doctrines about sovereign ownership and control of water for navigation and other purposes, the law about water, tidelands, and submerged lands beneath navigable waters differs from the law about other land. Under those ancient doctrines, the sovereign owned tidelands and the lands submerged beneath waters used by the public for navigation and other purposes; the sovereign held those lands and waters in trust for the benefit of the public.<sup>13</sup>

When a question arose about whether the newly admitted state of Alabama owned the tidelands or instead those lands remained in federal ownership, the United States Supreme Court reasoned in *Pollard's Lessee v. Hagan*<sup>14</sup> that because the original 13 states owned their tidelands, Alabama also owned its tidelands. The Court could not rely on the Constitution, which did not address that question, nor on the equal footing language in the NW Ordinance because that statute did not cover the western lands south of the Ohio river that had been ceded by Virginia, North Carolina, South Carolina, and Georgia. Instead, the Court reasoned that by virtue of the understanding of the states of Virginia and Georgia in ceding their western lands to the federal government, the State of Alabama should have the same right to tidelands as the original 13 states as an incident of its sovereignty. The Court did not suggest that the Constitution included an equal footing doctrine, but instead relied upon the state and foreign cessions that created the territory from which Alabama was formed. From those cessions, the Court inferred that Alabama, the state created by the cessions, received tidelands as an incident of sovereignty. And the Court used the language of "equal footing" to describe the equal sovereign position of the state of Alabama.

*Pollard* simply does not support Ms. Hall's position that the federal government cannot constitutionally own dry land or land beneath non-navigable waters within admitted states. *Pollard* is not based on the US Constitution and the decision never addressed the question of federal ownership of dry lands<sup>15</sup> or lands beneath non-navigable waters. The Court in *Pollard* indeed actually recognized the power of the federal government to continue owning land in Alabama after statehood.<sup>16</sup>

The United States Supreme Court has specifically addressed the extent of state and federal ownership of land in what we would regard as western states, the states west of the Mississippi. Indeed, it has addressed that question in the specific case of *Malheur*

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<sup>13</sup>*Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Public ownership of water, tidelands, and submerged lands, which are held in trust for public use, dates from at least the Roman Empire.

<sup>14</sup>*Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

<sup>15</sup>*Scott v. Lattig*, 227 U.S. 229, 224 (1913).

<sup>16</sup>*Pollard*, 44 U.S. at 223.

Wildlife Refuge. In *United States v. Oregon*,<sup>17</sup> the Court quieted title in favor of the United States against the State of Oregon with respect to lands beneath several non-navigable lakes and adjoining dry lands within the refuge.<sup>18</sup> Not only has Ms. Hall's position that the federal government cannot constitutionally own the land on which Malheur Wildlife Refuge is located has been directly contradicted by the U.S. Supreme Court, the decree in *United States v. Oregon* quieting title effectively prevents the question of federal and state ownership from being litigated again due to *res judicata*.

The Ninth Circuit, whose decisions are controlling authority on federal questions in Oregon, has also addressed whether federal ownership of land within states West of the Mississippi is subject to *Pollard*. Noting that the lands west of the Mississippi were obtained by purchase or treaties with foreign nations, not by cessions of states, the Ninth Circuit held that *Pollard* does not apply to federal land ownership in states west of the Mississippi.<sup>19</sup>

The Supreme Court in other cases has limited the holding of *Pollard* and the equal footing doctrine. As the Congressional Research Service observed:

Some have argued that [the language about temporary federal ownership in *Pollard*] language combined with the "equal footing doctrine" — that new states come into the Union on an equal footing with older states — means that the federal government may only hold lands temporarily. However, other Supreme Court cases negate this argument. The equal footing doctrine does not mean that physical or economic differences among states are precluded and the doctrine only transfers title of tidelands and submerged lands beneath navigable waterways to the states. It is accepted law that the federal government may own and hold property as Congress directs. Whether some or all of the remaining federal lands should be retained or be disposed to the states, or whether to acquire additional federal lands, appears to be a *policy* question that Congress, of course, may answer as it chooses [citing *United States v. Texas*, 339 U.S. 707, 716

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<sup>17</sup> *United States v. Oregon*, 295 U.S. 1 (1935). The U.S. Supreme Court in *US v. Oregon* noted "upon the admission of a State to the Union, the title of the United States to lands underlying navigable waters within the States passes to it, as incident to the transfer to the State of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. But if the waters are not navigable in fact, the title of the United States to land underlying them remains unaffected by the creation of the new State. See [United States v. Utah, supra, 75](#); [Oklahoma v. Texas, supra, 583, 591](#)." 295 U.S. 1, 14.

<sup>18</sup> A limited exception to the Court's ruling that the United States retained its ownership interest in the Malheur Wildlife Refuge lands concerned school lands and indemnity lands that had been separately conveyed to Oregon by the United States.

<sup>19</sup> *United States v. Gardner*, 107 F.3d 1314 (9th Cir. 1997). In *United States v. Gardner*, the U.S. Forest Service assessed an unauthorized grazing fee against a Nevada rancher who illegally grazed cattle on National Forest land. When the rancher refused to pay the fee, the United States sued the rancher. The federal District Court issued an injunction prohibiting the rancher from grazing cattle on National Forest land and ordered the rancher to pay the fee. On appeal, the rancher claimed that the State of Nevada owned the land, not the federal government, relying on *Pollard* and the equal footing doctrine. The Ninth Circuit rejected the rancher's claims and affirmed the district court's judgment.

(1950), *reh'g denied*, 340 U.S. 907 (1950) and *United States v. California*, 332 U.S. 19, 29-39 (1947)].<sup>20</sup>

## **The Power of the Federal Government to Own and Control Lands in the western United States**

The unmistakable legal reality is that a series of solid, indisputable U.S. Supreme Court cases establishes that the federal government is constitutionally empowered to own land, control that land through federal statutes and regulations as it sees fit, and dispose of that land if it chooses to “without limitation.”<sup>21</sup> The management of federal land in the West is a political matter to be decided by Congress. Ms. Hall’s position to the contrary is utterly without legal basis. It is little more than the wishful thinking of someone who seeks to radically revise reality and constitutional law, with little appreciation of the possible consequences of their actions.<sup>22</sup>

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<sup>20</sup> Congressional Research Service Report RL30126: *Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Retention; and Current Acquisition and Disposal Authorities*, authored by Ross W. Gorte and Pamela Baldwin (April 7, 1999). [digital.library.unt.edu/ark:/67531/metacrs1009/m1/1/high\\_res\\_d/RL30126\\_1999Apr07.html](http://digital.library.unt.edu/ark:/67531/metacrs1009/m1/1/high_res_d/RL30126_1999Apr07.html)

<sup>21</sup>*United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). In *Gratiot*, the Supreme Court upheld a federal lease for a lead smelter issued before Illinois became a state. The Court noted that “[Illinois] surely cannot claim a right to the public lands within her limits. It has been the policy of the government, at all times in disposing of the public lands, to reserve the mines for the use of the United States.” 39 U.S. at 538. The Court stated:

[T]he Constitution of the United States (article four, section three) provides, “That 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.” The term territory, as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation...

Thus, even within states covered by the NW ordinance such as Illinois, the United States could still reserve lands to be held in federal ownership.

The U.S. Supreme Court’s holding in *Gratiot* that the Property Clause grants the federal government virtually unlimited power over its property has often been echoed by the Supreme Court over subsequent decades and by now subsequent centuries. See, e.g., *Gibson v. Chouteau*, 80 U.S. 92, 99 (1872) (upholding claim to land by a federal patent holder against a competing claim reliant on state law); *Light v. United States*, 220 U.S. 523, 536-537 (1911) (United States entitled to grazing on federal lands by Colorado rancher because the power conferred by the Property Clause which includes the right to “sell or withhold [public lands] from sale... the United States can prohibit absolutely or fix terms on which its property can be used. As it can withhold or reserve the land it can do so indefinitely.”); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917) (the Enclave Clause does not require cession of state jurisdiction over federal lands and the United States retains authority under the Property Clause); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 336 (1936) (where the United States holds title to a hydroelectric dam, rights to the water passing through the dam, and all features incident to power generation, the electricity produced “constitutes property belonging to the United States,” and the Property Clause does not constrain Congress’s power to determine the terms of property dispossession); *United States v. City of San Francisco*, 310 U.S. 16, 29 (1940) (“[t]he power over the public land... entrusted to Congress [by the Property Clause] is without limitations.”); *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

The only Supreme Court case that has squarely adopted a narrow view of the federal government’s power under the Property Clause is the infamous 1857 Dred Scott case, in which the Supreme Court determined that the federal government could not regulate slavery in the Missouri Compromise. That case, of course, was overruled long ago.

<sup>22</sup>If the U.S. Supreme Court were to ever adopt the radical revision of constitutional law that Ms. Hall advocates, such a decision would cause chaos in the whole western United States. For example, most private owners of property within those states would no longer hold valid title to their land, unless their land had been patented by the United States prior to statehood. Their land, instead, would revert to the state. If the state chose to do so, it might seek to patent the land without cost back to the current private property owners. However, the state might well be unable to do so; arguably, the state would be bound by the public trust doctrine to either retain the land in state ownership or to charge fair market value for lands sold back to its current owners. In addition, all

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mineral claims made on what were previously federal lands, whether mining claims or oil & gas leases, would also be invalid if the claim were made or lease were issued after statehood; instead, the mineral estate would have reverted to the state upon admission. Thus, such an imprudent and unwarranted decision would cast doubt on the validity of the vast majority of western land titles and the attendant litigation would throw property law in western states into utter disarray for decades.