

The West Against Itself...

Again

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dé·jà vu

noun

1. a feeling of having already experienced the present situation

Objectives

- **Background:** Several western states re-engaging in fights with federal government over ownership of federal lands
 - **Utah Example:** Act requiring the U.S. to extinguish title to public lands and transfer title to Utah
- **Context:** To place these initiatives in their historical, constitutional, legal, and political setting
- **My position:**
 - Grateful for our federal lands legacy—a legacy that is not to be taken for granted.

Several western states are re-engaging in fights with the federal government over the ownership of federal lands and resources. The strategies for doing so run the gamut from state laws and resolutions calling for state ownership or control of federal lands to commencing studies for the purpose of doing so.

Getting most of the attention right now is the State of Utah’s “Transfer of Public Lands Act,” which among other things establishes a deadline for the federal government to “extinguish title” to the public lands and transfer these lands to the State of Utah.

My plan: to place these initiatives coming from Western state legislatures in their proper historical, legal, and political context.

My biases and perspectives: I will admit from the outset that I am not some unbiased observer of this debate. Our public lands are profoundly important to me and I am very grateful for this legacy.

But my hope is that even if some of you disagree with me regarding the value of public land—that we can at least try to agree about what we disagree about. I’m hoping to provide some history and context so that we can at least have an informed debate.

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**TRANSFER OF PUBLIC LANDS ACT AND RELATED
STUDY**

2012 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ken Ivory

Senate Sponsor: Wayne L. Niederhauser

LONG TITLE

General Description:

This bill addresses issues related to public lands, including the transfer of title to public lands to the state and requiring the Constitutional Defense Council to study or draft proposed legislation on certain issues related to public lands.

Highlighted Provisions:

This bill:

- ▶ enacts the Transfer of Public Lands Act;
- ▶ defines terms;
- ▶ requires the United States to extinguish title to public lands and transfer title to those public lands to the state on or before December 31, 2014;

These slides give you an idea of what some states are doing, such as in Utah, Idaho, and Montana.

LEGISLATURE OF THE STATE OF IDAHO
Sixty-second Legislature First Regular Session - 2013

IN THE HOUSE OF REPRESENTATIVES
HOUSE CONCURRENT RESOLUTION NO. 21
BY STATE AFFAIRS COMMITTEE

A CONCURRENT RESOLUTION
STATING FINDINGS OF THE LEGISLATURE AND AUTHORIZING THE LEGISLATIVE COUNCIL
TO APPOINT A COMMITTEE TO UNDERTAKE AND COMPLETE A STUDY OF THE PROCESS
OF THE STATE ACQUIRING TITLE TO AND CONTROL OF PUBLIC LANDS CONTROLLED
BY THE FEDERAL GOVERNMENT IN THE STATE OF IDAHO.

For more information on Idaho's approach:

<http://www.legislature.idaho.gov/sessioninfo/2013/interim/lands.htm>

63rd Legislature

SJ0015



A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY EVALUATING THE MANAGEMENT OF CERTAIN FEDERAL LANDS, ASSESSING RISKS, AND IDENTIFYING SOLUTIONS.

Montana's approach is different. For more information see:

<http://leg.mt.gov/css/Committees/interim/2013-2014/EQC/Committee-Topics/committee-topics.asp>



Disposal and Taxation of Public Lands Act

NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of {insert state} demands that the Federal Government immediately dispose of the public lands within [state]'s borders directly to the state of [state].

BE IT FURTHER RESOLVED that the Legislature calls for the creation of a [state] Public Lands Commission to review and manage multiple use of the public lands and to determine, through a public process, the extent to which public land may be sold.

There are some similarities here—and this could be due to the role played by ALEC—which is a controversial group of state legislators and corporations—in providing model legislation.

Example: Ken Ivory, of the American Lands Council, and sponsor of Utah's transfer bill, is ALEC's State Chair for Utah.

Some History

The Western position on federal subsidies and federal land use restrictions: It shakes down to a western platform:

“Get Out and Give Us More Money.”

Bernard DeVoto, “The West Against Itself” (1947)

In some respects, there is nothing really new here. The title of my talk, for example, has been used by several people in the past in analyzing similar efforts among the western states.

The historian Bernard DeVoto, one of the most astute observers of western public land politics, wrote about similar efforts by western states more than fifty years ago in a classic essay entitled “The West Against Itself.” It was 1947, and DeVoto critiqued the West’s curious position of being so antagonistic to any regulations or conservation safeguards used by the federal government while simultaneously taking so much money and subsidies from it. It shakes down to a western platform said DeVoto: “get out and give us more money.”

(DeVoto traced the multiple strategies used by what he called the “landgrabbers” who challenged the notion of federal land ownership and control. “There are many ways to skin a cat,” and he detailed how the skinning knife would be used on the U.S. Forest Service (USFS) as an example: “The idea was to bring it into disrepute, undermine public confidence in it by every imaginable kind of accusation and propaganda, cut down its authority, and get out of its hands the power to regulate” such things as grazing on federal lands. Bernard DeVoto, *The Western Paradox: A Conservation Reader* (Douglas Brinkley & Patricia Nelson Limerick, eds.) (2001), pp. 114-115.). This sounds familiar.

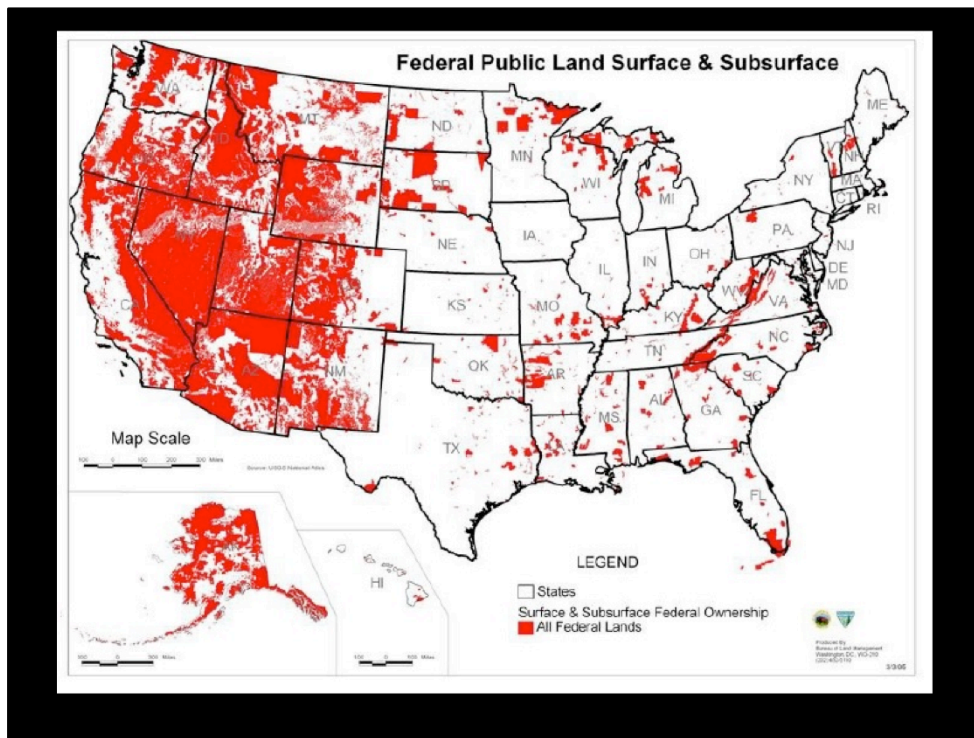
“It has been my experience that a Legislature can seldom be induced by considerations from outside to take action against the opposition of interests dominant in the State.”

Gifford Pinchot, on the need for federal, as opposed to state, control of forest lands—the need to manage federal lands for the **National interest** (1920)

Being from the School of Forestry, it is also my duty to quote scripture from Gifford Pinchot—the brains, political brawn and heart of the USFS—who believed so strongly in Federal lands being managed in the *National Interest*.

Forever the progressive, Pinchot battled multiple interests, including leaders within the USFS, that he believed were jeopardizing the national interest by becoming too cozy and deferential to the states and the commodity interests that he believed controlled them.

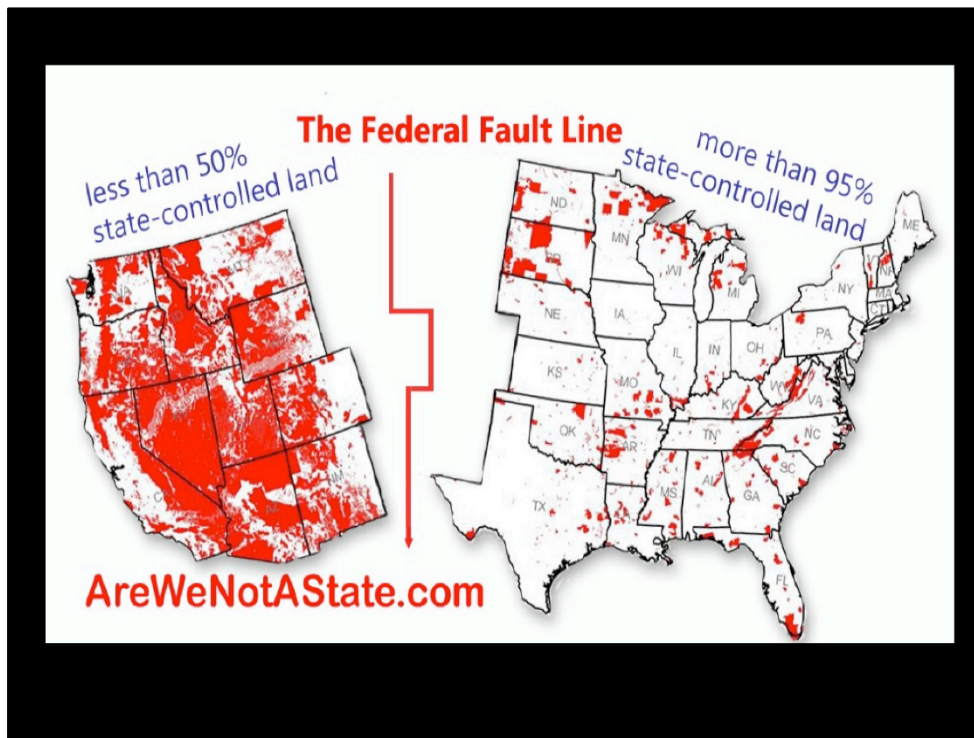
(Said Pinchot, “It has been my experience that a Legislature can seldom be induced by considerations from outside to take action against the opposition of interests dominant in the State” [and] “[j]ust as the waterpower monopolists and grazing interests formerly clamored for State control, well-knowing they could themselves control the States, so now the lumbermen will be found almost without exception against Federal and for State control, and for the same reason.” Gifford Pinchot, “National or State Control of Forest Devastation,” *Journal of Forestry* (Feb. 1920), 107-108.)



Map from the American Lands Council, available at <http://www.americanlandscouncil.org/>

This is the visual that is used by the American Lands Council in telling its story. It is a map showing the amount of land, both surface and subsurface, owned and managed by the federal government.

Roughly 28% of the U.S. is federal land, and most of that land is located in the Western States.



Map from the American Lands Council, available at <http://www.americanlandscouncil.org/>

As you know, federal lands are very much a western thing—and those challenging federal land ownership argue that this distinction between west and non-west puts Western states at various disadvantages.

Questions

1. Do you want the West to look like the East?
2. Why another rebellion?
3. How did the federal government—the **public**—come to own so much land and resources in the West?
4. How to respond? Moving Forward

I would like to structure my talk around some basic questions. The first is the most simple yet powerful of the bunch—and one that deserves to be asked more often.

What's Driving This New Rebellion?

- Desires to utilize more resources (oil & gas) without federal planning, permitting, analytical requirements
 - Assumption: more control, less hassle at state level



What is driving this new rebellion in parts of the West?

To begin, there are some interests that simply wish to utilize more resources on federal lands, especially oil and gas, without so much of the planning, analysis, and permitting required by federal law.

Photo credit: <http://ecoflight.org/>

What GAO Found

In its October 2010 report, GAO noted that oil shale development presents the following opportunities for the United States:

- **Increasing domestic oil production.** Tapping the vast amounts of oil locked within U.S. oil shale formations could go a long way toward satisfying the nation's future oil demands. Oil shale deposits in the Green River Formation are estimated to contain up to 3 trillion barrels of oil, half of which may be recoverable, which is about equal to the entire world's proven oil reserves.

oil shale development. As noted earlier, the federal government is in a unique position to influence the development of oil shale because 72 percent of the oil shale within the Green River Formation lies beneath federal lands managed by BLM. In addition to its leasing of these lands,

United States Government Accountability Office	
GAO	Testimony Before the Subcommittee on Energy and Environment, Committee on Science, Space, and Technology, House of Representatives
GAO-10-204 Oil Shale Development in the West October 2010	UNCONVENTIONAL OIL AND GAS PRODUCTION Opportunities and Challenges of Oil Shale Development
	Statement of Aron K. Mitchell, Director Natural Resources and Environment

This, for example, is a GAO report emphasized by the American Lands Council—giving a sense of just how much oil and gas could still be developed in parts of the West—and how the federal government will shape this development—unless that land is transferred or sold.

What's Driving This New Rebellion?

- **Budgets/Sequester** & uncertainty regarding the future of federal transfer (**PILT/SRS**) payments to states
 - 2.9 Billion: Federal land payments to states in 2012
 - The federal lands—schools connection
 - SRS: Decoupled county payments from timber receipts—extended transition payments
 - PILT: designed to compensate counties with non-taxable federal land

Money is also at the heart of matters, with several states and western political representatives concerned about declines and possible stoppages of federal land payments traditionally shared with the states (i.e., PILT/SRS payments). Sequestration and declining budgets have a way of escalating conflict amongst those fighting for smaller pieces of the pie.

The most common framing of the issue is to tell the story of underfunded schools in Western states. The argument goes that Western states are struggling to fund public education simply because of the amount of federal land in Western states (notwithstanding PILT/SRS payments). Federal lands are not taxable property, so the argument is that Western states are at an inherent disadvantage in funding schools.

The problem is that funding for public education is a much more complicated issue than this (e.g., property tax issues, taxes and per pupil expenditures, why some federal land states fund schools better than others, etc.).

“If the national interest dictates that lands should be retained in Federal ownership, it is the obligation of the United States to make certain that the burden of that policy is spread among all the people of the United States and is not borne only by those states and governments in whose area the lands are located.”

“The Federal Government, as a landowner, must pay its way. Whatever the costs, fairness and equity demand that such payments be made.”

One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission (Washington, D.C.: 1970), p. 236-237.

Keep in mind, moreover, that the federal government, since 1976/1977, has provided the states with assistance in this regard, as part of the Payment in Lieu of Taxes (PILT) Program, which is designed to lessen the burdens associated with the tax immunity of federal lands.

I wish to point out here that finding a long term solution to the PILT-SRS issue is very important—and that there has long been a recognition that the national public has some responsibility in this regard.

What's Driving This New Rebellion?

- **Ideology:** skepticism and hostility towards the idea of federal land



Slide from: <http://www.americanlandscouncil.org/>

Also at play is ideology: a core belief that there is something inherently wrong with the idea of federal lands. And by federal, I mean *America's public land*. Our land. But for others, the whole notion of public lands—or public anything for that matter—is suspect as socialism.

What's Driving This New Rebellion?

- Non-ideological, widespread frustration with status quo on USFS lands
 - Fire



But there are also less obvious reasons for all the frustration and some of it goes beyond ideology. My research focused on national forest management in recent years shows there to be a widespread sense of frustration with the status quo. There are multiple sources of frustration, from a deeply problematic and fire-dominated agency budget to all sorts of criticisms pertaining to the agency's management of such things as fire, planning, and restoration. See e.g., Nie, M. "Place-Based National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations," *Environmental Law Reporter* 41 (2011): 10,229-10,246.

- Widespread frustration: but a lot of “place-based” collaborative initiatives going on throughout the West



The interesting thing here is that there is an apparent divide between the new Rebels and coalitions working on federal land issues. On the one side, we have these extreme bills seeking the transfer of federal lands. But on the other side are dozens of collaborative initiatives that are actually trying to solve several intractable issues on federal lands—actually doing the hard work—getting serious and getting into the details.

I am in no way suggesting that collaboration is the best alternative here—instead, I’m just pointing out that there is a difference between solving problems on federal lands and using federal lands as political theatre and as a wedge issue.

Extreme Political Polarization

- Between the parties in Congress
- Outside of Congress
- Current federal lands legislation in Congress
- Sagebrush bills & resolutions in Western state legislatures

Also important to consider in this context is the extreme political polarization that now characterizes the U.S. Congress and the politics and partisanship outside of the Nation's Capitol.

The political science literature on this topic is remarkable: it consistently shows a drastic separation and pulling apart of the parties. Furthermore, this hyper-polarization goes beyond Congress to include those most active and engaged in politics.

We are currently seeing this polarization of the parties as it relates to federal lands management, with the Republican-controlled House of Representatives moving dozens of bills that would fundamentally re-write federal lands law.

I believe that Sagebrush-like laws and resolutions are another manifestation of this polarized political context.

(In reviewing the social science literature focused on the extreme partisan polarization that now characterizes American democracy, one comprehensive account concludes that “[w]e have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century.” Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIFORNIA L. REV. 273 (2011)).

Why so much federal land in the West?



What I'd like to do now is quickly discuss how the federal government—the public—came to own so much land and resources in the West. I do so because the history of federal land ownership is so much more complicated and less convenient than opponents of federal lands make it out to be.

(Also keep in mind that each system of federal lands—like the National Forests managed by the USFS or “public lands” managed by the BLM—have different histories and starting points).

The Four Eras of Federal Lands

and the small print

- **Acquisition of lands**
 - ~1781—1802
 - Via purchase & treaties
 - (& why these treaties are still so significant)
- **Disposition of lands**
 - ~1776—1891
 - ~1.3 billion acres
 - Via squares given to states, railroads, settlers, etc.
- **Retention**
 - 1872 Yellowstone
 - 1906 Antiquities Act
 - Forest reserves Act 1891
 - FLPMA (stay tuned)
- **Management**
 - ☺☹

History explains this crazy quilt and this is the standard yet oversimplified way in which federal land ownership is so often taught and explained.

Four relatively distinct periods, the first beginning with the federal government acquiring of lands from foreign nations and via treaties signed with Native Nations. Interestingly, these Treaties are not discussed much by the new Rebels. Another inconvenient part of history I suppose. But they are extremely important because so many of these agreements precede the creation of federal land agencies and several of these treaties reserve various use rights on federal lands, such as hunting and fishing rights. Such rights cannot be abrogated by the states.

Acquisition soon gives way to the federal government's disposal of lands in the name of western settlement. To simplify, some 1.3 billion acres were disposed by the federal government to the states as trust lands, to the railroads in checkerboard fashion, and to settlers and homesteaders as a way to encourage western settlement.

But then, an important shift happens, ideas about the land, conservation, and the public interest change—and so does the law. The evidence surrounds us. To our east, Congress establishes Yellowstone in 1872—which signifies a fundamental shift in federal lands and conservation thinking. The President is given the ability to designate National Monuments under the Antiquities Act. And what would become the National Forests are first reserved by the Executive branch and later placed in a system designed by Congress. These are a few examples of retention of federal lands.

1872

Mixed Messages

As you would expect, even this history is way too neat and tidy. Consider, for example, the year 1872: this is the year that Congress establishes Yellowstone—and also the year it passes the hardrock mining law which would eventually lead to the disposal of roughly 3.5 million acres of patented mining claims.

My point: Congress has changed its mind in the past and sent some mixed messages regarding federal lands. But that was a long time ago.

Lands Were Disposed

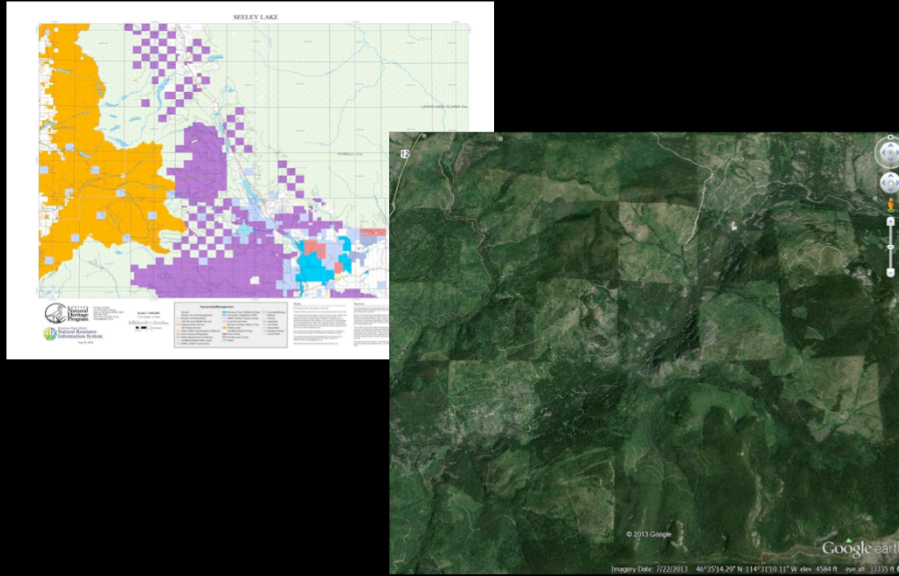
Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall

Renunciation of public lands.

Furthermore, several western state enabling laws state that the admitted states “forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof.”

For analysis of this language, see Wyoming’s Office of the Attorney General (memorandum discussing Wyoming’s legal perspective on the Utah Transfer of Public Lands Act), available at <http://trib.com/ag-memo-on-taking-back-federal-lands/pdf>.

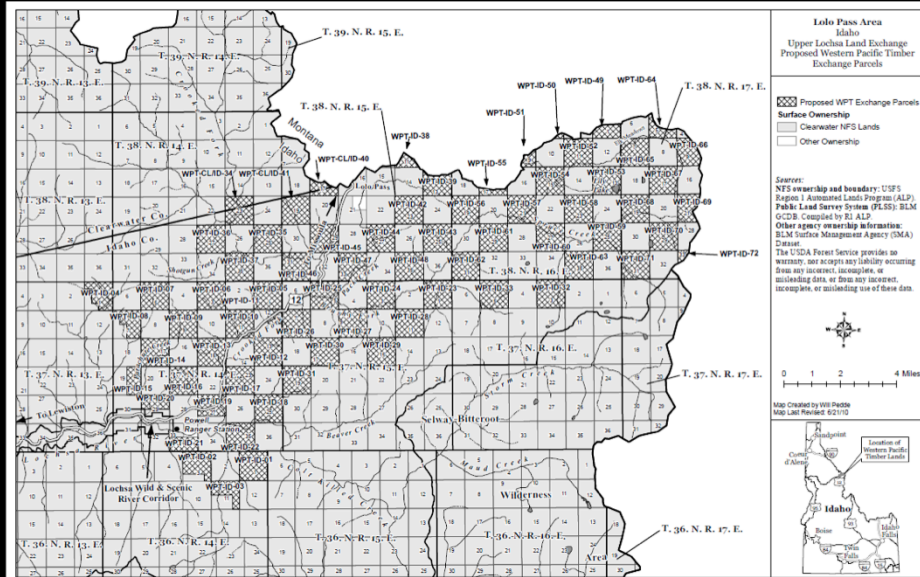
Lands Were Disposed



Again, lands were disposed—such as these checkerboarded sections up the Seeley-Swan and along Highway 12.



And along Fish Creek.



You get the point.

Lands Were Disposed

~1.3 Billion Acres disposed to states, railroads, settlers and other interests.

The U.S. Constitution's Property Clause

“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...” (Art IV, Sec. 3)

Moving to the legal context, here is the U.S. Constitution's Property Clause. This is really the basis of federal land ownership and management—to be considered along with the Constitution's Supremacy Clause and Interstate Commerce provision.

So what does this Clause mean? It essentially gives Congress proprietary and sovereign powers over its property and the power to delegate decisions regarding federal lands to executive agencies. The Supreme Court has repeatedly observed that this power over federal land is “without limitations.”

The Supreme Court's View

Congress's proprietary and sovereign powers over federal lands is "without limitations."

"And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."

Kleppe v. New Mexico (1976)

The dispositive case is *Kleppe v. New Mexico* (1976) where the Supreme Court explains in no uncertain terms the "complete power" that Congress has over federal lands; "And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause."

What is interesting to note here is that the new Sagebrush Rebels are essentially asking for an absurd level of judicial activism in overturning decades of precedent on this matter.

The Property Clause, in a nutshell, puts Congress in the driver's seat. It has the power to dispose of or retain federal lands and to make the laws governing them. It is Congress—not state legislatures—that will determine the fate of federal lands in the West.

Federal Land Policy Management Act (FLPMA 1976)

“The Congress declares 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 this Act, it is determined that disposal of a particular parcel will serve the national interest.”

A most important turning point in this story is passage of FLPMA in 1976—this serves as the Organic Act for the BLM.

After a prolonged public lands study and national debate, Congress made the important decision that “the public lands be retained in federal ownership.”

The Sagebrush Rebellion

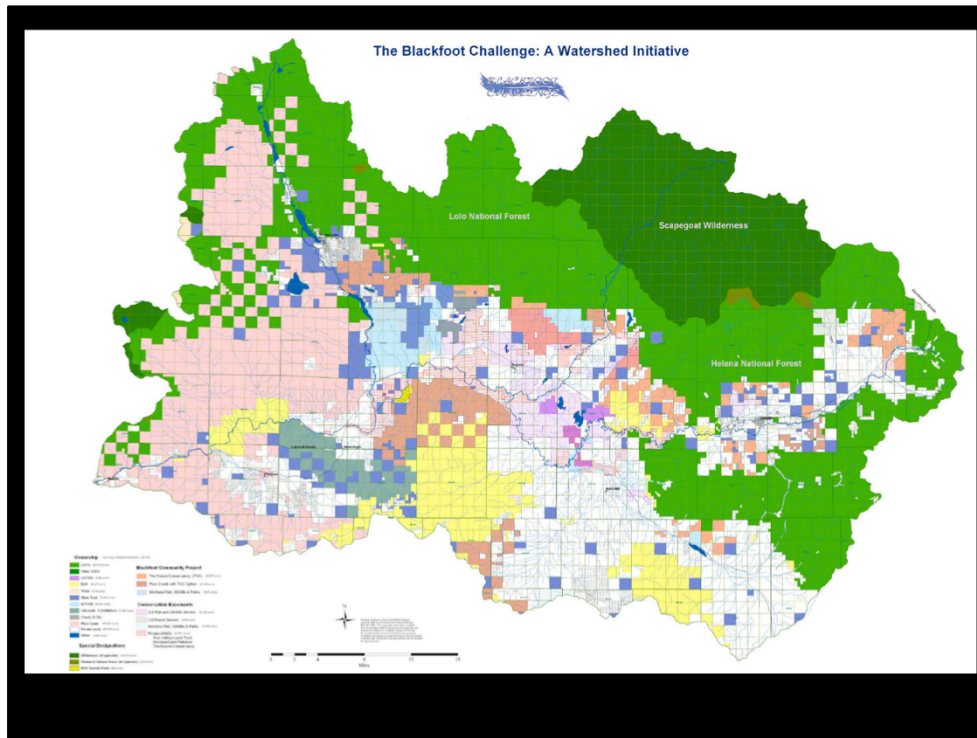
- Challenging federal land ownership
- 1976 (FLPMA & *Kleppe*)
- Unsuccessful litigation
- Politics, theatre, symbolism & wedges
- Is this another Sagebrush Rebellion?



1976 was a watershed year for federal lands management with laws and judicial decisions serving as catalysts for the “Sagebrush Rebellion.”

Among other tactics, the sagebrush rebels questioned the constitutionality of federal land ownership. One of their central assertions was based on the equal footing doctrine of the Constitution (Article IV, §3) which requires states to be admitted to the union on an equal footing with others. One of the arguments, then, was that an equal footing amongst the states becomes impossible given the amount of federal land in the West. But the courts disposed of this claim and others, making clear that the equal footing doctrine “applies to political rights and sovereignty, not to economic or physical characteristics of the states.” See *United States v. Gardner*, 903 F. Supp. 1394, 1400 (D. Nev. 1995). See also *United States v. Nye County*, 920 F. Supp. 1108 (D. Nev. 1996). Furthermore, many of the states that were challenging federal land ownership, and continue to do so, disclaimed of all rights and title to federal lands within their territories in their state enabling laws.

The recent spate of resolutions and studies coming from western states will end their journey in the same Cul-de sac as the sagebrush rebellion. And like the rebellion before it, the ultimate impact of today’s protests will be more symbolic than substantive in nature. Symbolism has its political virtues, but governing and managing federal land is different than using the issue as a political wedge. Resurrecting arguments from the sagebrush rebellion makes for great political theater but such efforts will not take us very far in solving the most pressing issues in federal lands management.

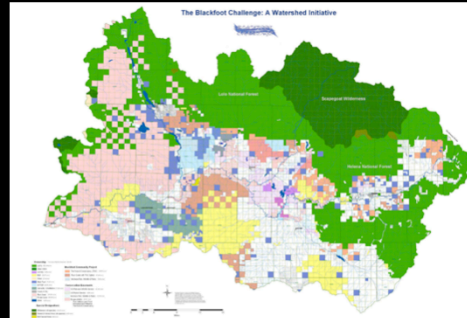


So the answer is yes, this is another rebellion—and it is unfortunate and frustrating. Why? Consider again, this map of the Blackfoot and similar sorts of mixed ownership landscapes found throughout the West. The conservation issues of the future will require actions transcending political jurisdictions. Resurrecting arguments from decades ago over land ownership and control will not help us solve issues pertaining to fire, water, fish and wildlife, restoration, and so many others that require the constructive engagement of federal *and* state governments.

The Blackfoot Challenge, which includes federal-state-and private partners, is exemplary in its achievements conserving the Blackfoot watershed and its communities. It shows, as do other initiatives in the West, that there is an alternative to conflict and acrimony between federal and state governments in the management of federal lands and resources.

Moving Forward

- The conservation issues of the future require actions transcending political jurisdictions
- The need to ~~ignore~~ engage
- Multiple opportunities for constructive federal-state cooperation
- An opportunity to explain why federal lands are more important today than ever before



What is the most appropriate response to the latest rebellion?

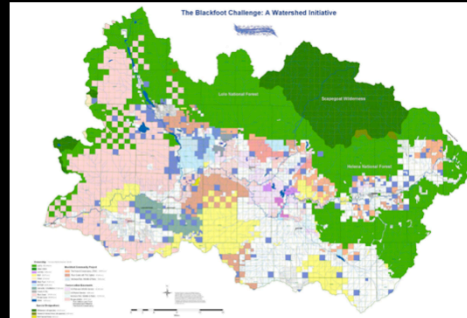
One option is to mostly ignore it. Refuse to give it the attention it wants. Instead of wasting time rehashing stale arguments and far-fetched legal claims, this option means letting the new Rebels sing to their own choirs. After all, to fully engage in this debate once again comes with some costs: time spent correcting the tortured logic of the new sagebrush rebellion means less time for solving real problems facing our federal lands and resources. To re-engage means playing defense, instead of offense.

But the strategy of tactical ignoring, I fear, comes with real risks as well. I am concerned that without an active opposition, some people will start to believe what is being sold by the new Sagebrush Rebellion. Our federal lands legacy cannot be taken for granted. There have always been voices wanting to privatize federal lands or to transfer lands to the states. Some of our nation's conservation icons kept a very careful watch on those interests wanting to cash in or sell out the federal estate. There is a similar need to do so today.

This is a cause that should unite all sorts of different users of the federal lands, users that are often in conflict with one another. It is one thing to disagree about how our federal lands legacy should be managed—that is the messy, democratic, public part of public lands management. But cashing in or selling out the federal lands legacy is something altogether different.

Moving Forward

- The conservation issues of the future require actions transcending political jurisdictions
- The need to ~~ignore~~ engage
- Multiple opportunities for constructive federal-state cooperation
- An opportunity to explain why federal lands are more important today than ever before



What is the most appropriate response to the latest Western rebellion?

As Aldo Leopold once asked, “Of what avail are forty freedoms without a blank space on the map?”

The transboundary and interstate nature of so many natural resource issues justify strong federal action in federal lands and resources law. But the states also have an important role to play, partly because some actions on federal lands may spill over to adjacent state, tribal and/or private lands. This is one reason why the field is characterized by what is called “cooperative federalism.” There are multiple ways that states and local governments can work constructively with federal land agencies.

There is a silver lining in all this commotion. First, it presents an opportunity to discuss with the public how federal lands have become only more significant since the first forest reserves were established and the public rangelands were retained by Congress in 1976. As more private lands gets developed—with so many forests lost to development, rangelands subdivided, etc.—the values of federal land become only more significant. (for private land development figures see slide #41).

The new rebels have very badly misread how much Westerners love their federal lands. They will always disagree about how they should be managed—more wilderness, more access, more timber, more whatever. But those federal lands make the West the West. And I, for one, don’t want the West looking like somewhere else.

- The U.S. population is expected to increase by more than 120 million people over the next 50 years (Alig et al. 2003).
- Between 1982 and 2001, 34 million acres of open space were developed (the size of Illinois), approximately 4 acres per minute or 6,000 acres per day (USFS 2007a).
- From 1990 to 2000, experts estimate that 60% of all new housing units in the United States were built in the WUI, and by 2000, about 38% of housing units overall were located in the WUI (GAO 2007).
- Between 1982 and 1997, over 10 million acres of forest lands were converted to houses, buildings, lawns, and pavement, with another 26 million acres projected to be developed by 2030. All together (1982–2030), the total loss of forests will be close to the size of Georgia (USFS 2007a).
- Total forest area is projected to decrease by roughly 23 million acres by 2050 (Alig et al. 2003).
- Forty-four million acres of private forests could see sizable increases in housing density by 2030 (USFS 2007a).
- As much as 12–15 million acres of industrial timberland in the United States could be transferred out of industry ownership by 2011 (Block and Sample 2001).
- From 1982 to 1997, 3.2 million acres of rangeland were converted to developed land (NRCS 1997). Another study focused on the Rocky Mountain West estimates that 25 million acres of “strategic ranch lands” are at risk of residential development by 2020 (American Farmland Trust 2007).