Order Code RL34267

CRS Report for Congress

Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention

December 3, 2007

Kristina Alexander
Legislative Attorney
American Law Division

Ross W. Gorte
Specialist in Natural Resources Policy
Resources, Science, and Industry Division

Prepared for Members and
Committees of Congress

Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention

Summary

Federal land ownership began when the original 13 states ceded their "western" lands (between the Appalachian Mountains and the Mississippi River) to the central government between 1781 and 1802. Substantial land acquisition in North America via treaties and purchases began with the Louisiana Purchase in 1803 and culminated with the purchase of Alaska in 1867. In total, the federal government acquired 1.8 billion acres in North America.

The U.S. Constitution addresses the relationship of the federal government to lands. Article IV, § 3, Clause 2 — the Property Clause — gives Congress authority over federal property generally, and the Supreme Court has described Congress's power to legislate under this Clause as "without limitation." The *equal footing doctrine* (based on language within Article IV, § 3, Clause 1), and found in state enabling acts, provides new states with equality to the original states in terms of constitutional rights, but has not been used successfully to force the divestment of federal lands. The policy question of whether to acquire more, or to dispose of any or all, federal lands is left to Congress to decide.

The initial federal policy generally was to transfer ownership of many federal lands to private and state ownership. Congress enacted many laws granting lands and authorizing or directing sales or transfers, ultimately disposing of 1.275 billion acres. However, from the earliest times, Congress also provided for reserving lands for federal purposes, and over time has reserved or withdrawn areas for such entities as national parks, national forests, and wildlife refuges.

The Taylor Grazing Act of 1934 was enacted to remedy the deterioration of the range on the remaining public lands. This was the first direct authority for federal management of these lands, and implicitly began the shift toward ending disposals and retaining lands in federal ownership. In 1976, Congress formally declared that national policy was generally to retain the remaining lands in federal ownership in the Federal Land Policy and Management Act.

The "Sagebrush Rebellion" was a collection of unsuccessful state and local efforts, beginning in 1978, to assert title to federal lands or force their divestiture. It also included efforts by the Reagan Administration and in Congress to divest of many federal lands, which also proved unsuccessful.

Legislation on federal land disposal continues to be considered. Bills for the wholesale disposal have not been introduced in more than a decade, but legislation has been introduced to limit federal land ownership or acquisition, to expand disposal authorities (at least in some areas), to sell lands to pay for other activities, and to accelerate currently authorized land sales. Because the extent of federal lands and the authority to acquire and dispose of federal lands are an enduring policy question, Congress faces continued consideration of federal lands legislation.

Contents

List of Tables

Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal and Retention[1]

The federal government has retained about a third of the 1.8 billion acres it acquired in North America. These lands are heavily concentrated in 12 western states (including Alaska but not Hawaii), where, in total, the federal government owns more than half of the land (ranging from 30% in Montana to 84% in Nevada).[2] Many western citizens and Members of Congress continue to express concerns about what they feel is excessive federal influence over their lives and economies, and assert that the federal government should divest itself of many of these lands. Others support the policy of retaining these lands in federal ownership. This report describes practices and authority for federal land ownership and retention. It presents background on disposal, withdrawal, and retention policies. The report concludes with a summary of the "Sagebrush Rebellion" (efforts to force divestiture of the federal lands) and issues for Congress on disposing or retaining federal lands.

Federal Land Acquisition

Federal land ownership began when the original 13 states ceded title to more than 40% of their "western" lands (237 million acres between the Appalachian Mountains and the Mississippi River) to the central government between 1781 and 1802. Federal land acquisition from foreign countries began with the Louisiana Purchase (530 million acres) in 1803 and continued via treaties with Great Britain and Spain (76 million acres) in 1817 and 1819, respectively. Other substantial acquisitions (620 million acres), via purchases and treaties, occurred between 1846 and 1853. The last major North American land acquisition by the U.S. federal government was the purchase of Alaska (378 million acres) in 1867.

At its inception, the federal government did not own land in the original states of the Union. Rather, ownership of lands between the Appalachian Mountains and the Mississippi River was ceded by the original states, and additional states were formed from those lands.[3] West of the Mississippi River (except Texas), lands were

---

[1] This report updates and revises CRS Report RL30126, *Federal Land Ownership: Constitutional Authority; the History of Acquisition, Disposal, and Detention; and Current Acquisition and Disposal Authorities*, by Ross W. Gorte and Pamela Baldwin.

[2] U.S. General Services Administration, Office of Governmentwide Policy, *Federal Real Property Profile, As of September 30, 2004*, Table 16, pp. 18-19. Hereinafter referred to as GSA, *Federal Real Property Profile*.

[3] Kentucky and Tennessee were created directly from lands ceded by the original states, (continued...)

primarily acquired by the U.S. federal government from foreign governments, as was Florida (which was acquired from Spain). The means by which the federal government came to own its lands can affect which laws govern the lands' management. The *public domain* lands, primarily those obtained from a foreign sovereign, typically are governed by different laws than are lands *acquired* from states or individuals.

Constitutional Basis for Federal Land Ownership: The Property Clause

The U.S. Constitution addresses the relationship of the federal government to lands. The Property Clause, Article IV, § 3, Clause 2, gives Congress authority over the lands, territories, or other property of the United States. It 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.

This provision provides broad authority for Congress to govern the lands acquired by the federal government as it sees fit, and to exercise exclusive authority to decide on whether or not to dispose of those lands. The U.S. Supreme Court has described this power as "without limitation," stating that:

> while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause.... And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.[4]

One authoritative commentary noted that:

> No appropriation of public lands may be made for any purpose except by authority of Congress.... Congress may limit the disposition of the public domain to a manner consistent with its views of public policy.... It [the Property Clause] empowers Congress to act as both proprietor and legislature over the public domain; Congress has complete power to make those "needful rules" which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the [Property] clause, its legislation overrides conflicting state laws. Absent action by Congress, however, states may in some instances exercise some jurisdiction over activities on federal lands.[5]

---

[3] (...continued)
without intervening federal ownership.

[4] Kleppe v. New Mexico, 426 U.S. 529, 542-543 (1976).

[5] CRS, "Article IV, Section 3, Clause 2 Analysis," *United States Constitution: Analysis and Interpretation*, footnotes omitted, at [http://www.crs.gov/products/conan/Article04/topic_

Thus, it is accepted law that the federal government may own and hold property as Congress directs.[6] Issues such as whether some or all of the remaining federal lands should be retained or divested, how to dispose of lands, or whether to acquire additional federal lands, appear to be *policy* questions for Congress.

The Equal Footing Doctrine. The *equal footing doctrine* is based on Article IV, § 3, Clause 1 of the Constitution. That clause addresses how new states will be admitted.[7] The doctrine means that "equality of constitutional right and power is the condition of all States of the Union, old and new."[8] It does not mean that physical or economic situations among states must be the same.[9] The term comes from state enabling acts that included the phrase that the state was admitted "into the Union on an equal Footing with the original States."[10] The U.S. Supreme Court has clarified what those rights are.

In the context of land, the equal footing doctrine has been held to mean that states have the authority over the beds of navigable waterways. Some have argued that the *equal footing doctrine* prohibits permanent federal land ownership. This is contrary to the plain wording of the Constitution. The doctrine and some language within the U.S. Supreme Court case of *Pollard's Lessee v. Hagan*[11] have been combined to provide an argument that the federal government held the lands ceded by the original states only temporarily pending their disposal. However, this theory has been rejected by other Supreme Court cases. Furthermore, in *Pollard's Lessee v. Hagan*, the Supreme Court ruled on the narrow issue of federal ownership of submerged lands beneath navigable waterways, finding those lands belonged to the state under the equal footing doctrine because the original states had kept ownership of the shores of navigable waters and the soils under them.[12]

---

[5] (...continued)
S3_C2_1_2.html].

[6] See United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); Camfield v. United States, 167 U.S. 518 (1897); Kleppe v. New Mexico, 426 U.S. 529 (1976); and Nevada v. United States, 512 F. Supp. 166 (D. Nev. 1981), *aff'd on other grounds*, 699 F. 2d 486 (9th Cir. 1983).

[7] The clause reads: "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."

[8] Escanaba v. City of Chicago, 107 U.S. 678, 689 (1883).

[9] United States v. Texas, 339 U.S. 707, 716 (1950), *reh'g denied*, 340 U.S. 907 (1950).

[10] See, e.g., Nevada Enabling Act, 13 Stat. 30 (1863-1864).

[11] 44 U.S. (3 How.) 21 (1845).

[12] See CRS, "Article IV, Section 3, Clause 1 Analysis," *United States Constitution: Analysis and Interpretation*, footnotes omitted, at [http://www.crs.gov/products/conan/Article04/topic_S3_C1_1_2.html]. The contrary position was premised on dicta (extraneous discussion on which the court did not rely for its decision) from the case indicating that the federal government held the lands ceded by the original states only temporarily pending their disposal.

Federal Land Disposal

The initial policy of the federal government generally was to transfer ownership of many of the federal lands to private and state hands — to pay Revolutionary War soldiers, to finance the new government, and later to encourage the development of infrastructure and the settlement of the territories. In October 1780, even before the Articles of Confederation were ratified, the Continental Congress adopted a general policy for administering any lands transferred to the federal government:

> The lands were to be "disposed of for the common benefit of the United States," were to be "settled and formed into distinct republican States, which shall become members of the Federal Union, and shall have the same rights of sovereignty, freedom and independence, as the other States...." The lands were to "be granted and settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled."[13]

The need for revenues to pay off the national debt was a driving force in the debate over land disposal systems.[14] The Continental Congress balanced the need for revenue with other needs (e.g., compensating veterans and providing for public schools) in enacting the Land Ordinance of May 20, 1785, to address the lands in the Ohio Territory (north of the Ohio River and west of Pennsylvania). After extensive debates, the Continental Congress essentially followed an approach for land disposal that included several provisions that were used in most federal land disposal legislation over the next 50 years, including prior rectangular survey before disposal; public auction of the surveyed lands; a minimum price; and at least one section ($1/36^{th}$) of every 6-mile square township "for the maintenance of public schools within the said township."[15]

Questions about the governance of these lands (including potential statehood) were resolved by the Continental Congress in the Northwest Ordinance of 1787, and at nearly the same time and in nearly the same manner, by the Constitutional Convention drafting the new U.S. Constitution. The decision was to have initial administration by a federally appointed governor, followed by shared authority between an appointed governor and a representative assembly, culminating in statehood on an equal footing with the original states.

The Constitutional Convention also addressed concerns about statehood for the western lands. Robert Morris (PA) expressed apprehensions about the impact on the developed East by western congressional representation by unschooled

---

[13] Worthington C. Ford, et al. (eds.), *Journals of the Continental Congress*, vol. 18: 915. Quoted in Paul W. Gates, *History of Public Land Law Development, Written for the Public Land Law Review Commission* (Washington, DC: U.S. GPO, November 1968). Hereinafter referred to as Gates, *History of Public Land Law Development*.

[14] Gates, *History of Public Land Law Development*, pp. 59-71.

[15] These provisions were subsequently enacted in various statutes following ratification of the Constitution, beginning with the Land Act of 1796 (Act of May 18, 1796, ch. 29; 1 Stat. 464) and the Ohio Enabling Act (Act of April 30, 1802, ch. 40; 2 Stat. 173). See also subsequent state enabling acts.

frontiersmen.[16] This concern was addressed in Article IV, § 3, cl. 1, which requires the consent of both Congress and the legislatures of the existing states from which a new state is created. Charles Carroll (MD) noted the concern of small states that the consent provision, together with the existing state claims to the "western" lands (i.e., the Ohio Territory), could prevent eventual statehood for those lands, because the state claiming the land could deny its consent.[17] This was then addressed by requiring the original states to cede title to those western lands to the central government.

The new federal government took various actions regarding lands, including settling conflicting claims, granting lands to veterans for military service and other purposes, and selling the remaining lands under various programs. The first land offices to resolve land claims and sales were established by Congress in Ohio in 1800,[18] and the General Land Office was established in 1812 to administer the disposal of federal lands.

Congress enacted numerous laws to grant, sell, or otherwise transfer federal lands into private ownership, including the Homestead Act of 1862 and the General Mining Law of 1872.[19] Grants to railroads in the 1870s gave them incentives to create much of the nation's transportation system. Nearly 816 million acres of the public domain lands were transferred to private ownership between 1781 and 2006.[20] Most (97%) occurred before 1940; homestead entries, for example, peaked in 1910 at 18.3 million acres, but dropped below 200,000 acres annually after 1935,[21] because the best agricultural lands were already taken.

The federal government also granted 328 million acres to the states.[22] The single largest state grant was in 1958.[23] Under the Alaska Statehood Act, the State of Alaska could select up to 103.35 million acres (under certain constraints). Also, the Alaska Native Claims Settlement Act[24] authorized various regional and village native corporations to select 40 million acres of federal land (within the constraints identified in the act). Through 2006, 93.1 million acres have been transferred to the State of Alaska, while 37.7 million acres have been transferred to native

---

[16] Gates, *History of Public Land Law Development*, pp. 73-74.

[17] Gates, *History of Public Land Law Development*, p. 74.

[18] Act of May 10, 1800, ch. 55; 2 Stat. 73.

[19] Respectively: Act of May 20, 1862, ch. 75; 12 Stat. 392; and Act of May 10, 1872, ch. 152; 17 Stat. 91.

[20] U.S. Dept. of the Interior, Bureau of Land Management, *Public Land Statistics, 2006*, v. 191, BLM/BC/ST-07/001+1165 (Washington, DC: U.S. GPO, April 2007), Table 1-2.

[21] U.S. Dept. of Commerce, Bureau of Census, *Historical Statistics of the United States, Colonial Times to 1970*, H.Doc. 93-78 (Washington, DC: U.S. GPO, 1976), pp. 428-429.

[22] *Public Land Statistics, 2006*, Table 1-2.

[23] Act of July 7, 1958, P.L. 85-508; 72 Stat. 339.

[24] Act of December 18, 1971, P.L. 92-203; 85 Stat. 690.

corporations.[25] In total, the federal government has disposed of 1.275 billion acres of the 1.841 billion acres it acquired from state cessions, foreign treaties, and land purchases.[26]

Federal Land Withdrawals

Although early federal policy generally was to dispose of many of the lands it had acquired, increasingly over time, Congress withdrew lands — removed them from disposal under some or all of the disposal laws — or reserved lands — withdrew them for a particular national purpose. For example, the Land Ordinance of 1785 reserved section 16 of every township to maintain public schools.[27] The Act of 1796 made permanent many of the provisions of the Land Ordinance of 1785, and provided that "instead of reserving scattered sections for future disposal by Congress, the four central sections [of each township] were to be retained."[28] In 1798, Congress authorized and funded military reservations for building fortifications, at the discretion of the President.[29]

Early withdrawals were primarily to retain lands for future disposals or for Indian trading posts, for military and mineral reservations, or for other public purposes.[30] The establishment of Yellowstone National Park in 1872[31] led the way to preserving certain lands for recreation and for the future, with other national parks designated later.[32] This eventually led to the National Park Organic Act[33] and to the National Park System. In 1891, the President was authorized to protect other federal lands by proclaiming forest reserves;[34] this eventually led to the creation of the National Forest System. In 1903, President Theodore Roosevelt began the practice of withdrawing federal lands to protect wildlife habitats, which led to the National Wildlife Refuge System. Today, the National Park Service, the U.S. Forest Service, and the U.S. Fish and Wildlife Service manage the lands to preserve parks, conserve

---

[25] *Public Land Statistics, 2006*, Table 1-2.

[26] *Public Land Statistics, 2006*, Tables 1-1 and 1-2.

[27] Gates, *History of Public Land Law Development*, p. 65.

[28] Gates, *History of Public Land Law Development*, p. 125.

[29] Act of May 3, 1798, ch. 37; 1 Stat. 554.

[30] For examples, see, respectively: Act of April 18, 1796, ch. 13; 1 Stat. 452; Act of May 3, 1798, ch. 37; 1 Stat. 554; Act of March 26, 1804, ch. 35; 2 Stat. 277; and Act of March 3, 1807, ch. 34; 2 Stat. 437. Discussed in Charles F. Wheatley, Jr., and Robert L. McCarty, *Study of Withdrawals and Reservations of Public Domain Lands — Volume I, Part 1, Summary*, prepared for the Public Land Law Review Commission (Washington, DC: September 1969), pp. 55-60.

[31] Act of March 1, 1872, ch. 24; 17 Stat. 32.

[32] Two other National Park System units had been reserved earlier — Hot Springs (AR) in 1832, and Yosemite (CA) in 1864 — but were not designated as national parks until after the establishment of Yellowstone (in 1921 and 1890, respectively).

[33] Act of August 25, 1916, ch. 408; 39 Stat. 535.

[34] Act of March 3, 1891, ch. 561; 26 Stat. 1103.

forests, and protect wildlife and wildlife habitat, respectively. These three agencies manage 360 million acres, about 55% of all federal lands. (See **Table 1**, below.) Additional, though more modest, withdrawals have been made for military reservations and for other federal purposes.

Federal Land Retention

As noted earlier, the General Land Office was established as part of the Treasury Department in 1812 to oversee the disposal of the public lands through land sales, homesteading, grants to railroads and to states, and other means.[35] The Office's Division of Forestry was responsible for the forest reserves beginning with their establishment in 1891, but in 1905 this division was transferred and merged into the Department of Agriculture's Bureau of Forestry to form the new U.S. Forest Service.[36] The General Land Office remained in the business of principally overseeing the disposal of many of the remaining federal lands and maintaining federal title records and documents.

The U.S. Grazing Service was created in 1934 to administer many of the public lands for livestock grazing under the authority of the Taylor Grazing Act of 1934.[37] Although the act referred to managing those lands, "pending their disposal," the act implicitly began the shift in federal law toward ending disposals and retaining lands in federal ownership. This act was intended to remedy the deterioration of the remaining public lands apparently due to overgrazing and the drought and depression of the 1920s and 1930s. It was the first direct authority for federal management of lands which previously were freely available for transient grazing, and reflected the significant decline in homestead entries. In part because of controversies over its management efforts, the Grazing Service was terminated in 1946 by merging it with the General Land Office to form the Bureau of Land Management (BLM).[38]

The debate over federal retention of the remaining public lands endured for decades. The shift toward explicit federal policy to retain these lands continued with two laws enacted in 1964. One created the Public Land Law Review Commission (PLLRC) to review existing public land laws and regulations, and to examine the policies and practices of the federal agencies which administered the federal lands. The 1970 PLLRC report contained 137 specific legal and policy recommendations for improving federal land management.[39] The first recommendation was that the existing federal lands should generally be retained in federal ownership:

> We, therefore, recommend that: The policy of large-scale disposal of public lands reflected by the majority of statutes in force today be revised and that

---

[35] Gates, *History of Public Land Law Development*, pp. 127-128. The General Land Office was moved to the Department of the Interior when it was created in 1849.

[36] Act of February 1, 1905, ch. 288; 33 Stat. 628.

[37] Act of June 28, 1934, ch. 865; 48 Stat. 1269.

[38] Executive Reorganization No. 3 of June 6, 1946.

[39] *One Third of the Nation's Land: A Report to the President and to the Congress by the Public Land Law Review Commission* (Washington, DC: U.S. GPO, June 1970), p. 1.

> future disposal should be only those lands that will achieve maximum benefit for the general public in non-Federal ownership, while retaining in Federal ownership those whose values must be preserved so that they may be used and enjoyed by all Americans.

The other 1964 law, the Classification and Multiple Use Act, directed BLM to classify lands for retention or for disposal and to manage the lands for multiple purposes, pending the PLLRC recommendations. By 1970, when the PLLRC report was released, BLM had classified more than 90% of the remaining unreserved public domain lands for retention. This reflected the decline in federal land disposal to nearly zero in the 1960s.

The future of the public lands, including the issue of retention or disposal, was debated in three Congresses following the release of the PLLRC report. Finally, enactment of the Federal Land Policy and Management Act of 1976 (FLPMA) formally ended the previous disposal policy, expressly declaring that the national policy generally was to retain the remaining lands in federal ownership.[40] Section 102(a) of FLPMA states: "The Congress declares that it is the policy of the United States that — (1) 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."

FLPMA also amended many previous management authorities and public land and resource laws and repealed most land disposal laws. Section 702 repealed the many statutes and sections authorizing homesteading, although the effective date of the repeal was delayed for 10 years in Alaska. Section 703 similarly repealed (and delayed the effective date in Alaska) most other statutes authorizing land sales or transfers. FLPMA did authorize the sale of some specific tracts of public lands "at a price not less than their fair market value" under conditions specified in the act.

BLM currently manages 258 million acres of land — 39.5% of all federal land and 11.4% of all land in the United States. A third of BLM lands, 83.5 million acres, are in Alaska. The remainder is substantially concentrated in 11 western states, and accounts for significant amounts of land in most of those states. BLM also manages 387,721 acres in states east of the Rocky Mountains, with 70% of those lands in South Dakota. BLM lands are administered for the sustained yield of multiple uses (including recreation, livestock grazing, timber harvesting, watershed protection, and wildlife and fish habitat management), although users typically want higher outputs than BLM provides, while environmental groups typically want more protection (and lower outputs).

---

[40] Act of October 21, 1976, P.L. 94-579; 90 Stat. 2743, codified at 43 U.S.C. §§ 1701 et seq. Section 103(e) of FLPMA also defines *public lands* as "any land or interest in land owned by the United States ... and administered by ... the Bureau of Land Management, without regard to how the United States acquired ownership, except" for the Outer Continental Shelf and lands held in trust for Native Americans. This reflects BLM administration of not only the remaining public domain lands, but also many lands acquired under various authorities, such as the Bankhead-Jones Farm Tenant Act (Act of July 22, 1937, ch. 517; 50 Stat. 522).

Table 1, below, summarizes the current federal lands reserved for, or otherwise retained or acquired by, the four major federal management agencies.

Table 1. Federal Lands, by State or Region and by Agency
(in millions of acres)

	Alaska	11 Western States [a]	Other [b]	Total
USDA Forest Service	21.97	141.80	29.02	192.79
National Park Service	51.09	20.13	6.92	78.13
Fish and Wildlife Service	76.61	6.32	7.55	90.47
Bureau of Land Management	83.54	174.35	0.39	258.28
Other Federal[c]	19.29	10.85	5.25	35.38
Federal Total	252.50	353.33	47.47	653.30
Nonfederal Total	112.99	399.62	1,105.44	1,618.04
Percent Federal	69.1%	46.9%	3.1%	28.8%

Sources:

U.S. Dept. of Agriculture, Forest Service, *Land Areas of the National Forest System, as of Sept. 30, 2007*, at [http://www.fs.fed.us/land/staff/lar/2007/TABLE_4.htm].

U.S. Dept. of the Interior, National Park Service, *National Park Service Listing of Acreage as of 9/30/07*, at [http://www2.nature.nps.gov/stats/acrebypark07fy.pdf]. Includes only NPS lands with fee simple NPS ownership.

U.S. Dept. of the Interior, Fish and Wildlife Service, *Annual Report of Lands Under Control of the U.S. Fish & Wildlife Service, as of September 30, 2006*, pp. 10-11. Includes only federal lands with FWS primary jurisdiction.

U.S. Dept. of the Interior, Bureau of Land Management, *Public Land Statistics, 2006*, at [http://www.blm.gov/wo/st/en/res/Direct_Links_to_Publications/ann_rpt_and_pls/2006_pls_index.html], Table 1-4.

GSA, *Federal Real Property Profile*, Table 16, pp. 18-19.

a. Includes Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming.

b. Includes the other 38 states, the District of Columbia, Puerto Rico, Virgin Islands, Guam, and other insular lands.

c. CRS calculations. Equals the difference between the federal total, from GSA, and the sum of lands administered by the four federal land management agencies.

The "Sagebrush Rebellion"

At various times, efforts have been made to turn over remaining unreserved public domain lands to the states. Until 1976, many westerners retained the hope that the substantial federal presence might be reduced through additional federal land transfers to private or state ownership. However, FLPMA repealed most of the authorities for such ownership transfers and established an official policy of retaining the remaining lands. Thus, these western interests faced a future with a substantial and permanent federal presence — as much as 84% of the land in Nevada, 69% in

Alaska, 57% in Utah, 53% in Oregon and 50% in Idaho.[41] The "Sagebrush Rebellion" was largely a reaction to these facts.

The Sagebrush Rebellion was a collection of efforts to force the federal government to divest itself of federal lands. These efforts took the form of state and local legislation, court challenges, federal administrative changes, and efforts at federal legislation. The target was usually BLM lands, but sometimes included national forests. These efforts failed for a number of reasons. A fundamental obstacle was that Nevada, and other states, agreed as a condition of statehood to disclaim forever "all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States."[42] This language was part of the enabling act creating the states and was incorporated into their constitutions; therefore the state laws asserting title to those federal lands appeared to contravene their own constitutions.[43] At any rate, the state laws were not enforced.[44] The rebellion was more effective as a political movement than a legislative one.[45]

State and Local Efforts. In 1979, Nevada enacted a state law asserting state title, and management and disposal authority over public (BLM) lands within Nevada's boundaries.[46] Similar state laws asserting state authority over public lands were passed in Arizona, Hawaii, Idaho, New Mexico, North Dakota, Utah, and Wyoming.[47] Other attempts to enact similar state laws were less successful. Legislation in California, Colorado, and South Dakota was vetoed, although a weaker version of the California bill was passed that did not require the governor's

---

[41] GSA, *Federal Real Property Profile*.

[42] John D. Leshy, "Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands," *University of California Davis Law Review*, v. 14 (1980-1981): p. 325. See Nevada Enabling Act, 13 Stat. 30, § 4 (1863-1864).

[43] Richard M. Mollison and Richard W. Eddy, Jr., "The Sagebrush Rebellion: A Simplistic Response to the Complex Problems of Federal Land Management," *Harvard Journal on Legislation*, v. 19 (Winter 1982): p. 121.

[44] Jessica Owley Lippmann, "The Emergence of Enacted Conservation Easements," *Nebraska Law Review*, v. 84 (2006): p. 1057.

[45] For a discussion on the economic factors surrounding the Sagebrush Rebellion, see Bruce Babbitt, "Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion," *Environmental Law*, v. 12 (1982).

[46] Nev. Rev. Stat. §§ 321.596 - 321.599. "Public lands" excluded lands in congressionally authorized national parks and monuments, national forests, wildlife refuges, lands acquired by the consent of the legislature, lands controlled by the Department of Defense and the Department of Energy and Indian lands. See Richard D. Clayton, "The Sagebrush Rebellion: Who Should Control the Public Lands?" *Utah Law Review*, no. 3 (1980): pp.505, 512-515.

[47] John D. Leshy, Unraveling the Sagebrush Rebellion: Law, Politics, and Federal Lands, *University of California Davis Law Review*, v. 14 (1980): pp.317-355.

signature.[48] A Washington State measure contingent on an amendment to the state's constitution failed.

In 1978, the State of Nevada began its court challenge of the constitutionality of the federal land retention policy in § 102(a) of FLPMA. Nevada argued that the federal government could only lawfully hold public lands in a temporary trust pending eventual disposal, and that retention of the lands violated the equal footing doctrine. The federal District Court for the District of Nevada dismissed the case for failure to identify a claim upon which relief could be granted.[49] The court found that any limitations on holding lands ceded by the original states did not apply to western lands acquired after the Constitution went into effect, and that the equal footing doctrine did not mean that the newer western states were entitled to the public lands. The court noted that the equal footing doctrine applied only to political and sovereignty rights, and not to economic or geographic equality, and that the Constitution reserved to Congress the authority to decide which federal lands to sell or to keep.

On the symbolic date of July 4, 1993, Nye County (NV) took action on federal lands, using a bulldozer to open closed roads, based on the assertion that Nevada held title to the lands. The United States filed suit seeking a declaratory judgment that it owned and had authority to manage the disputed lands within Nye County and that the county resolution regarding roads and right of way was invalid. The United States prevailed in federal court.[50]

County governments in several states also have asserted local authority over federal lands and attempted to specify management of those lands. Catron County (NM) was a vanguard in asserting local control over federal property.[51] Its ordinance was repealed a year later, however. Local laws that impose direct management requirements on the lands or require local approvals for land use changes almost certainly are preempted under the Supremacy Clause (Article VI, Clause 2) of the U.S. Constitution if they conflict with federal laws, regulations, or purposes.[52]

---

[48] See 1980 Cal. Stats. 831 (1980); Colo. S.B. 170 (1981); S. Dakota S.B. 131 (1981).

[49] Nevada State Board of Agriculture v. United States, 512 F. Supp. 166, 167 (D. Nev. 1981), *aff'd on other grounds*, 699 F.2d 486 (9th Cir 1983).

[50] United States v. Nye County, 920 F. Supp. 1108 (D. Nev. 1996). Nye County made broader assertions than the state itself had made in the statutes referred to previously, in that Nye County denied federal authority over national forests and other reserves as well. Although the court discussed the equal footing doctrine, it was not central to the holding.

[51] Catron County Ordinance No. 004-91 (May 21, 1991), directing county management activities for local federal lands. Repealed by Catron Co. Ordinance No. 003-92 (October 6, 1992).

[52] Boundary Backpackers v. Boundary County, 913 P. 2d 1141, 128 Id. 371 (Id. 1996). The Supreme Court of Idaho found that Congress had preempted portions of the Boundary County ordinance that purported to exert considerable controls over federal lands, and that the other portions of the local ordinance were not severable. See also Opinion No. 94-01, Attorney General of New Mexico.

Private entities have also challenged federal land ownership. In one case, the plaintiffs asserted that they did not need a permit to graze livestock in a national forest because the State of Nevada owned the lands.[53] Both the lower and appellate courts again rejected the arguments that Nevada was entitled to the lands under the equal footing doctrine, or that the federal government had any obligation to turn lands over to states.

Administrative Efforts. President Reagan attempted to address the issue administratively in the early 1980s. That Administration's concept of reducing federal influence in the West slowly changed from transferring the lands free of charge to selling the lands at fair market value. Several factors stimulated this shift, including pressure from Congress and the rising federal deficit. Eventually, President Reagan issued an Executive Order establishing the Property Review Board to review federal real property for potential disposal.[54] It was not clear how this initiative related to existing laws such as FLPMA that provide statutory criteria for reviewing lands for disposal and contain an express policy of retention. The "Asset Management" program eventually stalled, however, because the Administration sought clear congressional authorization for land disposal before it would identify which lands might be disposed of, and Congress refused to consider legislation to authorize such disposal until the Administration had identified which lands might be disposed of.[55]

Congressional Efforts. The history of the foregoing state, local, and administrative efforts made it clear that reducing federal land ownership would require an act of Congress. Bills were introduced in the 95th, 96th, and 97th Congresses (1977-1982) to change the retention policy in FLPMA. In general, these bills would have authorized transferring the unreserved lands to the states upon application if the state had a land management agency with a multiple-use mandate. However, none of these bills was reported by a committee or considered on the floor.

Efforts to legislate a reduction in federal land ownership were revived in 1994 with the election of Republican majorities in the House and the Senate, and the vision of shifting federal control toward the states was embodied in the House Republican "Contract with America." Organizations supporting this vision, such as the Cato Institute, have advocated extensive disposal of federal lands through privatization and/or transfer to state ownership or management. Several bills were circulated or introduced in the 104th Congress for the wholesale transfer of BLM lands or for the transfer of ownership or management of specific federal units (e.g., specific wildlife

---

[53] United States v. Gardner, 903 F. Supp. 1394 (D. Nev. 1995), *aff'd*, 103 F.3d 1314 (9th Cir. 1997), *cert. denied* 118 S. Ct. 264. Note that this assertion of title to national forest lands was not made by the state, but rather by the ranchers.

[54] Executive Order 12348 of February 25, 1982, "Federal Real Property," 47 *Fed. Reg.* 8547 (March 1, 1982).

[55] U.S. General Accounting Office (now Government Accountability Office), *Forest Service's Program To Identify Unneeded Land For Potential Sale Is Stalled*, GAO/RCED-85-16 (Washington, DC: November 6, 1984).

refuges or National Park System units in one state).[56] Hearings were held on some of the bills, but none was reported by a committee or considered on the floor.

General legislation to dispose of federal land saw less congressional attention in the 105th Congress. One bill — S. 1254, the Federal Lands Management Adjustment Act — would have authorized management of the Forest Service or BLM lands in a state for renewable 10-year terms by the state or a qualified non-profit organization, but with legislative authorization required for each management transfer. No hearings were held on the bill.

No bills to promote broad divestiture of the federal lands have been introduced since the 105th Congress. Numerous bills have been introduced in most Congresses to transfer individual or groups of parcels, for instance to local governments for public purposes. Several bills and amendments have been offered to prohibit or restrict federal land acquisition in states with 50% or more federal land ownership. The Federal Lands Improvement Act was introduced in the 106th, 107th, and 108th Congresses to accelerate BLM sales of lands identified for disposal under § 203 of FLPMA; no hearings were held on these bills. In the 109th Congress, two bills, the Action Plan for Public Lands and Education Act of 2005 (H.R. 3463/S. 2569), would have allowed western states to select from the "unappropriated federal lands" (as defined in the bill) up to 5% of the federal land acreage in the state, which could then be leased or sold to generate state funds for education; no hearings were held on the bills.

Issues for Congress

Concerns persist among many western citizens and Members of Congress about the extent of federal landholdings and the effect of those lands — and of federal decision-making about the management of those lands — on their lives and economies. Legislation addressing the issue continues to be offered, although in recent years, the bills have not been for wholesale disposal. Rather, the bills tend to be more limited — capping federal land acquisition or ownership; expanding disposal authorities, typically in limited areas; or otherwise accelerating currently-authorized disposals.

The agencies have numerous authorities for acquiring and disposing of federal lands. Nonetheless, numerous bills are introduced and considered in each Congress on specific acquisitions, disposals, and exchanges, often because of the limitations in or difficulties with the existing authorities. Other initiatives have been offered to sell federal lands to pay for other programs; the Bush Administration has twice proposed land sales to fund a county compensation program.[57]

As noted earlier, decisions about the extent of federal landholdings and about acquiring and disposing of federal lands are policy choices for Congress. Such

---

[56] See CRS Report 96-919 ENR, *Federal Land Disposal: Legislative Initiatives in the 104th Congress*, by Ross W. Gorte (archived, available from the author).

[57] See CRS Report RL33822, *The Secure Rural Schools and Community Self-Determination Act of 2000: Forest Service Payments to Counties*, by Ross W. Gorte.

choices are combined with interests in reducing federal presence in the West and with possible sales of federal assets (i.e, lands) to pay for programs (often including federal land acquisition). Thus, Congress is likely to continue to consider legislation that would alter federal land ownership.