

- 1901. Bureau of Plant Industry was created**, encompassing activities of former Div. of Botany, and Div. of Agrostology. The BPI published illustrated reports of range surveys throughout the range states and on the grasslands of the Alaska coast. (Griffiths, Davy, Bentley, Piper).
- 1903. Santa Rita Range Reserve established** by the Bureau of Plant Industry (So. Ariz.). The oldest Exp. Range.
- 1905. U.S. Forest Service created.**
1910. Office of Grazing Studies born; J.T. Jardine, Head.
1911. Range surveys by field parties started on National Forests.
1912. Jornada Range Reserve established (So. N. Mex.).
1915. Responsibility for range research *outside* the National Forests was transferred from the Bureau of Plant Industry to the USFS.
- 1927. Act authorized Sec. of Interior to establish grazing districts on unreserved public lands in Alaska (only) with leases permitted to run up to 20 years.**

- 1930. Forestry Branch of Bureau of Indian Affairs given responsibility for handling grazing on rangelands of Indian Reservations.**
- 1933. Soil Erosion Service established** in U.S. Dept. Interior.
- 1934. Taylor Grazing Act authorized** Sec. of Interior to establish grazing districts on the unreserved public domain within the coterminous United States.
- 1935. Soil Conservation Service established** in the USDA (from SES of Interior Dept.); providing for first direct professional assistance to private ranch owners in planning for grazing management and rangeland conservation.
- 1946. General Land Office & Grazing Service** of the Interior Dept. consolidated to form **Bureau of Land Management**. The BLM now administers grazing on Grazing Districts (see 1927 & 1934).
- 1948. American Society of Range Management**—now Society for Range Management—was organized; with continuous publication of the *Journal of Range Management* to the present.

# State Takeover of Federal Lands — “The Sagebrush Rebellion”



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## Introduction

On July 1, 1979, Assembly Bill 413 as passed by the Legislature and signed by the Governor of Nevada became effective. By its terms, all of the unreserved, nonappropriated federal lands contained within the federal public domain in the State of Nevada came under the control of that state's government. Properly, this particular piece of legislation has been the subject of great notoriety and intense discussion, both during its consideration by the Legislature and after its ultimate passage. AB 413 and the efforts both to pass and implement it have become focal points in a major controversy over who has the right to own and control the unappropriated public domain—federal or state government. This debate has been nicknamed by both the participants and the media as “The Sagebrush Rebellion.” Aside from Nevada, the States of Oklahoma, California, Utah, Alaska, Oregon, Wyoming, New Mexico and Arizona have, in some form or

another, become involved in the Sagebrush Rebellion controversy. Accordingly, we felt it appropriate to prepare a summary document to review the history of the “Rebellion” to date. This material has been organized in three separate parts. The first portion will articulate the various reasons leading to the origin of the “Sagebrush Rebellion”. The second portion traces the history of the Rebellion chronologically in Nevada and other states. Third, this document discusses and analyzes the various legal theories associated with the mechanics for potential state takeover of federal public domain lands.

## I. The Causes for the Rebellion

As the Office of the Idaho Attorney General researched the various questions and problems associated with the Sagebrush Rebellion, it seemed necessary and appropriate for us to identify, articulate, and classify the various causes underlying the Sagebrush Rebellion. Obviously, several of the wide range and variety of practices employed by the federal government in the management of the Federal public lands have caused varying degrees of frustration among the users of those lands. A complete and detailed listing of instances of such frustrations would be exceptionally lengthy and is not properly subject to treatment here. Rather, those fact patterns can be grouped into broad general categories. Thus organized they present a conceptualization of the underlying roots of the Rebellion. There are eight types of problems:

(1) *The extent of federal ownership of public lands in the Western States:* Perhaps the most significant broad category of frustration is resultant from the overpervasive scheme of federal land ownership in the Western states. The widespread federal land ownership in the west has tremendous economic, social and political impact not only in the use of those particular lands, but also in the use of other land contiguous to that federally owned. A listing of the 11 continental western states plus Alaska and the total percentage of federally owned lands within the boundaries of those states shows the extent of this ownership: Washington—29%, Montana—30%, New Mexico—34%, Colorado—36%,

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*Editor's Note:* This article is based on excerpts taken from a document prepared by the authors on the Sagebrush Rebellion for the 1980 session of the Idaho Legislature.

Arizona—43%, California—45%, Wyoming—48%, Oregon—53%, Idaho—64%, Utah—66%, Nevada—87%, and Alaska—96%.

These particular figures should be contrasted with a number of other states that have significantly lower percentages of federally owned land within their borders: Texas—2%, New York—1%, and Maine—0%.

Not one state east of the Mississippi River has greater than nine percent of its total land mass in federal ownership.

(2). *Recent and significant changes in federal land management policies:* Throughout the entire history of our country's existence, prior to the 1960's and 1970's the federal government has maintained a general policy of controlled disposition of western lands. From the point in time that the original 13 colonies ceded their western land claims to the federal government, it has been the policy of the United States Government to relinquish the lands contained within the public domain in various ways. A number of specific acts were prominent under this theory of disposal. The Desert Land Entry Act, Federal Mining Act and the Carey Act are three significant pieces of federal legislation by which unreserved, unappropriated public lands within the federal public domain were transferred from public to private ownership.

Starting with the administration of President Theodore Roosevelt, the federal government commenced the practice of selecting and isolating unique public domain lands for specific and particularized purposes, such as the creation of a national forest, or a national park. However, unless removed for such a special federal purpose the bulk of the unreserved, unappropriated public domain has remained under the jurisdiction of what was originally the General Land Office, now evolved into the Federal Bureau of Land Management. In 1976, Congress passed legislation that serves as the "organic act" for the Bureau of Land Management. The enactment is known as the Federal Land Policy and Management Act of 1976. There, *for the first time*, Congress specifically designated that even portions of the non-special purpose, unappropriated federal public domain could, and would, be retained by the federal government. Starting at that point, the federal government changed roles from that of a disposer of public lands into private hands to one of being an almost absolute retainer of vast tracts of western lands.

(3). *Failure by federal officials to heed statutorily mandated requirements of cooperation with the public:* A significant number of federal land management statutes and accompanying administrative regulatory rules mandate that members of the public are to be given the opportunity for significant input into the decision making process on federal lands. In addition, those same statutes and rules require that such input be considered and utilized in the decision making process. It is our belief that the failure of federal officials to heed the statutorily mandated requirement of genuine cooperation with the public and the resultant public frustrations forms one of the underlying roots of discontent that has led to the Sagebrush Rebellion.

(4). *Studies, delays, moratoriums and proposed changes in operating procedures threaten the users of the public domain:* By mandate of both statute and the U.S. courts, federal land managers in recent years have been required to initiate and complete a significant number of environmental and other studies on various portions of the federal public domain. In addition, as a part of this entire study process, delays, moratoriums, and ultimately, proposed changes in

land management practices have severely, if not fatally, threatened a significant number of uses of the federal domain lands.

(5.) *Short deadlines and abrupt notices by the federal government in the land management decision making process.* Often short deadlines and insufficient notices have severely curtailed the ability of state and local governments and private interests to participate in a meaningful way in hearings or other proceedings.

(6.) Proposed changes in land management practices on federal public domain lands often impacts or restricts access to private or state lands intermingled with or contiguous to the federal property.

(7.) *Perceived management inefficiencies by the federal government:* A great many Westerners have expressed discontent over what are perceived to be management inefficiencies on the part of the federal land managers. Even as to lands managed to produce income, the revenues produced on those federal properties are often greatly exceeded by the costs. The local-district-regional-Washington chain of command builds in numerous inefficiencies, and makes flexible, practical management often impossible for even the best intentioned of federal land managers.

(8.) *Promises made, promises broken:* This general category of discontent proceeds from specific statutory or administrative "promises" made to the various citizens or states of the West that, for one reason or another, have never been honored by the federal government. The number of instances that could be detailed is extensive.

## II. A Brief History of the Rebellion

As of December 31, 1979, several states, largely by legislative action have maneuvered in and around the "Sagebrush Rebellion":

1. *Nevada.* The 1977 Session of the Nevada Legislature created a select committee on public lands and authorized it to urge Congress to consider Nevada's public land situation and need for additional lands of nonfederal ownership. When it became obvious that Congress would not respond, the 1979 Legislature in Nevada approved AB 413 asserting state control of public lands appropriating a \$250,000.00 fund for the administration of the Act. Under the terms of AB 413, all unreserved and unappropriated lands currently in the public domain but under federal ownership were to revert to state control. The following were excepted: the lands of the Department of Defense, Department of Energy and Bureau of Reclamation, all Indian reservations and all national parks and forests specifically authorized by Congressional action. Further, all lands reverting to the control of the state became subject to the supervision of the state land board which would, by statute, be required to manage the lands under a multiple use concept. Legally, the Nevada claim to the public lands was designed to encourage a lawsuit to test two legal principles known as the Equal Footing Doctrine and the Trustee Doctrine. These particular theories will be discussed later.

2. *California.* The Legislature of the State of California approved a public land measure of its own in 1979, only to have it vetoed by the governor.

3. *Oregon.* The State of Oregon considered legislation similar to that of Nevada, but failed to take any action.

4. *Oklahoma.* Effective May 9, 1979, legislation in the State of Oklahoma required that any further purchase or acquisition of private or state lands by the federal government could

only be done with the majority consent of both houses of legislature. The only statutorily enumerated exception to this requirement was the acquisition by the federal government of lands pursuant to the provisions of Art. I, S 8, of the U.S. Constitution, which in relevant part states that Congress shall have exclusive jurisdiction over lands obtained "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

5. *The West in General.* At the time of this writing, (October 1980) the legislatures of Utah, Arizona and Wyoming have enacted legislation (similar to that of Nevada's) asserting state control over the unappropriated, unreserved public domain lands of their states.

6. *The U.S. Congress.* It should also be noted that, at the federal level, Congress is considering legislation that will allow the transfer of federal public domain lands to the respective states.

### III. Legal Theories Underpinning the Sagebrush Rebellion

#### A. Equal Footing Theory

The Equal Footing Doctrine asserts that states west of the Rocky Mountains have been denied the same treatment as the eastern states, where federal lands were either turned over to state or private ownership during the past century, or never acquired at all. The legal cornerstone of the argument is found in the United States Supreme Court case of *Pollards Lessee v. Hagan*, handed down by the Court in 1945. It was in that decision that the Court ruled that each and every state received absolute title to the beds of all navigable waterways within its boundaries at the time that it became a member of the Union.

The theory itself is not founded in any particular language of the U.S. Constitution. Rather, it is a theory created by U.S. Supreme Court interpretations of the Constitution, and by the various admission bills the Congress passed when states joined the Union.

In its simplest form, the argument the State of Nevada will have to make in seeking to control the unappropriated federal domain within its borders through a bill similar to AB 413, is that the Equal Footing Doctrine is broad enough to treat the unappropriated public lands identically with that soil underlying navigable waterways. However, a state seeking an extension of the Equal Footing Doctrine is faced with a substantial burden of persuasion. Overall, it must show that local dominion over the unappropriated public lands is a necessary adjunct to its own governmental sovereignty if it is to be truly equal in constitutional right and power with the

original states.

#### B. The Public Trustee Doctrine

This doctrine states that the federal government holds the unappropriated public lands in trust pending their disposal. That policy has been properly carried out in the past. So, the argument goes, because the federal government no longer divests itself of those lands, it is guilty of a breach of trust. The Nevada Attorney General's Office, in a research paper prepared for the legislature on the question of the Sagebrush Rebellion, states, "The power of Congress to admit new States to the Union does not carry with it the authority to maintain colonies or territories in perpetuity. The retention under federal dominion of vast areas of public lands within the boundaries of a State by Congress is an exercise of a power after statehood which is denied by the constitution before statehood." It is argued that such retention would be in direct conflict with the U.S. Constitution's Property Clause, Art. IV, S 3, which provides the authority for Congress to exercise control only over certain limited lands necessary for the carrying out of constitutionally mandated federal activities, such as the construction of military bases.

Obviously, both of the above legal theories have yet to be tested in the courts. In addition, other legal impediments remain in making the above theories viable.

The admission bills resolutions by Congress of various states contain certain disclaimers to unappropriated lands. The Idaho Admissions Bill is illustrative. Section 21 of the bill in relevant part states: "The State of Idaho shall not be entitled to any further or other grants of lands for any purpose than is expressly provided in this article." The other lands expressly provided for in the act were sections of endowment lands given to the state for the purpose of providing funds for the schools, universities and other institutions of the state. In addition, Art. XXI, S 19 of the Idaho Constitution presently contains disclaimer language to the same effect.

Other problems remain with any lawsuit brought against the federal government pursuant to the above theories. The first and foremost impediment is the Legal Doctrine of Sovereign Immunity which basically provides that any suit against the United States is prohibited without an express consent to such a suit by the government. Thus, unless Congress has specifically consented statutorily to a particular kind of suit, or waives sovereign immunity in some form or fashion, it may be that no action by a state or an individual can be brought against the federal government.



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