THE LEGAL MERIT OF THE SAGEBRUSH REBELLION

On June 4, 1979, Nevada enacted a law declaiming most of the public land within its borders property of the state, and authorizing the Nevada Attorney General to initiate legal action against the United States government in pursuit of this claim. There has yet to be legal action, but the matters of law have been made clear.

The legal and political relationship between the U.S. government and the individual states has always been complex and controversial. The Sagebrush Rebellion is controversial, but its legal issue is fairly simple. Two principles of law are involved--the equal footing dectrine and the power of Congress under the property clause of the U.S. Constitution.

EQUAL FOOTING DOCTRINE

The legal claims of sagebrush rebellion backers spring from an established legal premise--that all states be admitted to the Union on an "equal footing" with other states. The principle was first expressed in 1796, when Congress admitted Tennessee as "one of the United States of America on an equal footing with the original States in all respects whatever." Nearly identical language has been used since for each new state.

The sagebrush rebels interpret the equal footing doctrine quite literally, applying it to a state's landed status as well as political status. In its law, Nevada asserts it was denied equal footing when it entered the Union in 1864, because the federal government retained title to the unappropriated public land within its borders (unappropriated public lands were all U. S. government lands without a specific legal claim or mandate

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attached to them). Nevada contends that the equal footing doctrine applies to property rights. This is Justice Douglas, speaking for the Supreme Court on that issue in 1950:

> The 'equal footing' clause has long been held to refer to political rights and to sovereignty.... It does not, of course, include economic stature, or standing. There has never been equality among the states in that area. Some States when they entered the Union had within their boundaries tracts of land belonging to theFederal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders.... Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty. 1

The Idaho Admission Bill, after consecutive sections granting Idaho specific school, university, and college lands, says in Section 12:

> The state of Idaho shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. 2

And Article 21, Section 19 of the Idaho Constitution states:

> And the people of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof... and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States.

Nevada's Statehood Act contains nearly identical language.

The Supreme Court has ruled these agreements between the nation and new states do not violate the equal footing doctrine:

> It has often been said that a State admitted into the Union enters therein full equality with all the others, and such equality may forbid any agreement or compact

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1. United States v. Texas, 339 U.S. 707, 716 (1950) (emphasis added).

2. Idaho Admission Bill, 26 Stat. L. 215, ch. 656.

> limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of states, but only of the power of a state to deal with the nation...in reference to such property. 3

The Court summed up: "/T/he provision of the enabling act and the state constitution... secure to the United states full control of the disposition of the public lands within the limits of the State."[4]

Pollard's Lessee v. Hagan

Nevada's argument for extending the equal footing doctrine to property is based on one legal case. Section 2(2) of Nevada's 1979 law states:

> The state of Nevada has a legal claim to the public land retained by the Federal Government within Nevada's borders because:
> (a) in the case of the state of Alabama, a renunciation of any claim to unappropriated lands similar to that contained in the ordinance adopted by the Nevada constitutional convention was held by the Supreme Court of the United States to be "void and inoperative" because it denied to Alabama "an equal footing with the original states" in Pollard v. Hagan, 44 U.S. (3 Hon.) 212 (1845). 5

The Alabama case cited is Nevada's legal linchpin. Nevada's Attorney General's Office terms the case "chiefly responsible... for the legal basis for equaltiy in respect to landholding.[6]

The specific issue in Pollard's v. Hagan was whether the United States or Alabama owned the shores and beds of navigable rivers in the state. The Supreme Court held that beds of navigable rivers passed to state ownership at the time of statehood, under the equal footing doctrine. The reason, as the Court said later,

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3. Stearns v. Minnesota, 179 U.S. 223, 244-45 (1900) (emphasis added).
4. Ibid.
5. Chapter 633, Statutes of Nevada.
6. "Equal Footing Doctrine and its Application by Congress and the Courts", Office of the Attorney General, Carson City, Nevada,

is that control of the beds of navigable rivers is "identified with the sovereign power of government."[7] As Justice Douglas said, states are guaranteed equal footing as regards sovereignty. Idaho and all other states own the beds of navigable rivers within their borders.

Nevada seeks to extend that rule to cover all lands held by the United States. The Supreme Court has always limited it to apply only to beds of navigable rivers. The Court has held, for instance, that adjacent seabeds do not pass to state ownership upon statehood.[8] Extending the Pollard rule to public lands would go far beyond the seabed claim the Court has already refused. There seems to be no evidence anywhere in U.S. public land law supporting an extension of the rule.

THE PROPERTY CLAUSE

Article IV, Section 3, clause 2 of the U.S. Constitution reads:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the the Territory or other Property belonging to the United States.

In a 1976 case, the Supreme Court held that Congress' power under the property clause is "without limitation."[9] A long, consistent line of Supreme Court decisions underly and affirm that recent one.[10]

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7. United States v. Oregon, 295 U.S. 1, 14 (1835).

8. United States v. California, 332 U.S. 19 (1947).

9. Kleppe v. New Mexico, 426 U.S. 529, 539 (1976); quoting United States v. San Francisco, 310 U.S. 16, 29 (1940).

10. Sinclair v. United States, 279 U.S. 263, 297 (1929); Utah

In a decision which found that the equal footing doctrine did indeed restrict certain of Congress' powers over a state, the Court nevertheless affirmed Congress' power over the "care and disposition of the public lands or reservations therein."[11] In a slightly earlier decision, the Court held that a federal reservation of water within a territory for use by an Indian tribe was not invalidated or altered when the territory was admitted to the Union as a state on an "equal footing" with other states.[12]

In all of these cases, the Court has either not questioned or expressly affirmed federal ownership and control of the public lands. These Court decisions have in turn formed the basis of U.S. public land law. To accept Nevada's claim that federal ownership is not valid, the Court would have to completely reverse its unbroken past acceptance of federal ownership, and it would have to overturn virtually the entire body of U.S. public land law. Hundreds of laws enacted by Congress over the last 200 years would have to be declared unconstitutional.

Conclusion

Nevada's legal hopes are summarized thus by the Office of its Attorney General:

> Perhaps the strongest reason Nevada's legal efforts would be successful is that the contest in such a case would be head to head confrontation between the two constitutional concepts, the equal footing clause on the one hand and the Property Clause on the other."[13]

Power and Light v. United States, 243 U.S. 389, 405 (1917); United States v. Gratiot, 14 Pet. 526, 537-38 (1840); Canfield v. United States, 167 U.S. 518, 525-26 (1897); Right v. United States, 220 U.S. 523, 537, (1911).

11. Coyle v. Oklahoma, 221 U.S. 559 at 574 (1911).

12. Winters v. United States, 207 U.S. 564, 577, (1908).

13. "Equal Footing Doctrine...", op. cit.

There is no equal footing clause in the Constitution. The Supreme Court has never applied the equal footing doctrine to the public lands, and indeed has expressly refused to do so. And Congress' ownership and power over the public lands has been expressly affirmed by the Supreme Court and Congress in case after case and law after law over the last 150 years. Nevada's legal claim to the public lands can be politely labelled wishful thinking. When Secretary of the Interior Andrus challenged Nevada to press their claim in court in 1979, he knew he held the winning hand. Nevada's silence on court action indicates that they know which hand they hold.

(I am indebted to John Leshy, an associate solicitor with the Department of the Interior, for his help in preparing this legal analysis.)

CAN IDAHO AFFORD THE SAGEBRUSH REBELLION?

What would be the economic impact on Idaho if Bureau of Land Management lands were transferred to state ownership? This is a basic question for backers of the Sagebrush Rebellion. The times are difficult and uncertain for Idaho's public finances, both state and local. Inflation, rising real costs of basics like fuel and materials, the 1% property tax limitation and its implementation fallout, diminishing federal funds, and other factors are combining to limit public revenues and increase public expenses.

The state of Idaho now owns and manages just over 2.5 million acres. Transfer of BLM lands would raise that figure to almost 14.5 million acres. Managing 12 million new acres is a major undertaking, to say the least. Can Idaho afford it? It doesn't make sense for Idaho to even contemplate the undertaking without some solid assurance that it is economically feasible.

The numbers below provide a starting point for an economic impact analysis of a land transfer. They show the revenues produced and expenses incurred by BLM in managing their Idaho lands in Fiscal Year 1977 (the latest year for which all data was readily available). The numbers are not meant as a detailed economic analysis. The Idaho Conservation League doesn't have the resources for that job. We believe the responsibility for doing that job rests with those who support a land transfer.

Total Direct Revenues and Expenses on Bureau of Land Management Acreage in Idaho--Fiscal Year 1977

Item	Amount
REVENUES	
Minerals	$2,736,240
Timber	1,780,837
Sale of Land	107,260
Grazing	1,748,806
Other Sources	182,692
Total Revenues	$6,555,835
EXPENSES	
Receipt Shares	$1,682,522
In Lieu Payments	7,214,759
Fire Prevention	1,080,000
Schools	320,292
Insect Control	48,590
Highways	726,000
Subtotal	$11,072,163
Operation and Maintenance	10,614,786
Total Expenses*	$21,686,949

*The figures above do not include BLM's net worth in real property (buildings, machinery, equipment). BLM estimates that net worth at $7 million. Idaho would either have to buy or replace this property, if it assumed ownership of BLM lands.

REVENUE ITEMS

Minerals--In 1977, the BLM received $2,736,240 from mineral leases, oil and gas leases, permits, and bonuses on 2,762,751 acres of public land.

Timber--BLM realized $1,780,837 from timber sales in Idaho.

Sale of Land--BLM received $107,260 from land sales in 1977.

Grazing--In 1977, the BLM leased 972,739 AUM's (an animal unit month is the amount of forage necessary to feed one cow or its equivalent for one month) for cattle; 162,198 AUM's for sheep; and 6026 AUM's for horses. The total was 1,140,963 AUM's. Receipts totalled $1,748,806 at $1.81 per AUM.

Other Sources--BLM received $182,692 from rent, rights of way, and other miscellaneous sources.

EXPENSE ITEMS

Receipt Shares--BLM returns a certain percentage of its income from various sources to the state. The percentages are:

Leasable Minerals	50%
Sale of Timber	5%
Grazing Leases	50%
Grazing Permits & Licenses	12.5%

These receipts paid to Idaho by BLM totalled $1,686,522 in 1977.

In Lieu Payments--These payments are made to counties to compensate them for non-taxable federal property within their jurisdiction. These In Lieu tax payments for BLM land totalled $7,214,759 in 1977.

Fire Prevention--This is the total amount spent by BLM on fire pre-suppression, fire control, and rehabilitation. In 1977 it was $1,080,000.

Schools--The U.S. Government makes payments to local school districts for the children of federal employees. The amount is $434 per child. BLM had 492 employees; using 1.5 school age children per employee, the total is $320,292.

Insect Control--BLM spent $48,590 in 1977 to control grasshoppers and other insects on its land.

Highways--The U.S. Government helps pay for highway construction in Idaho in many ways. One small part of their contribution is determined by the amount of federal land in the state. In 1977, Idaho's 12 million acres of BLM land enabled it to receive approximately $726,000 for highway construction.

Subtotal--A subtotal is given here to show the amount which Idaho state and local governments either receive directly as a result of BLM's land ownership in Idaho, or which BLM spends for necessary public services like fire and insect control. The amount is $11,072,163.

Operation and Maintenance--This $10,614,949 figure is BLM's total Idaho budget for Fiscal Year 1977, minus fire and insect control costs. Salaries to employees is the biggest single item in this figure.

The figures demonstrate that the Bureau of Land Management, at the most uncomplicated economic level, operated at a $15 million deficit in Idaho in 1977. The state, of course, couldn't bear such a deficit. Revenues would have to markedly increased, and expenses drastically reduced, for Idaho to afford the Sagebrush Rebellion.

How do Sagebrush Rebellion backers propose to eliminate the deficit? Revenues can be increased by raising lease, permit, and sale fees for mining, grazing, and timber, or imposing new fees on recreation. Revenues can also be increased by selling the land. Which method do sagebrush rebels propose, and at what level? Expenses can be cut by reducing program and personnel. Again, backers must say with some precision what they propose to cut and by how much.

It will not be easy. Even if the state by some magic were to both acquire the BLM lands and not add one penny to its present budget (that is, simply liquidate BLM's entire operation and maintenance budget), there would still remain a $4.5 million deficit. That deficit could not be further cut on the expense side without reducing the amount of revenue Idaho state and local governments now receive.

The numbers above lead to a simple conclusion: Idaho can't afford the Sagebrush Rebellion, unless_____. Sagebrush rebellion backers, please fill in the blank. The last thing Idaho needs at this time is a major economic liability. The state should waste no more time on the issue of state ownership of BLM lands until backers of the transfer can demonstrate economic feasibility. A good first step would be to offer specific proposals for eliminating the present deficit at which the lands are managed. Such proposals would have the added benefit of showing more plainly what transfer backers believe should happen to the lands after they are acquired.