Original Intent

Blatant constitutional abuse of the West would shock the Founders who never intended that there should be large federal ownership. By Michael S. Coffman, Ph.D.

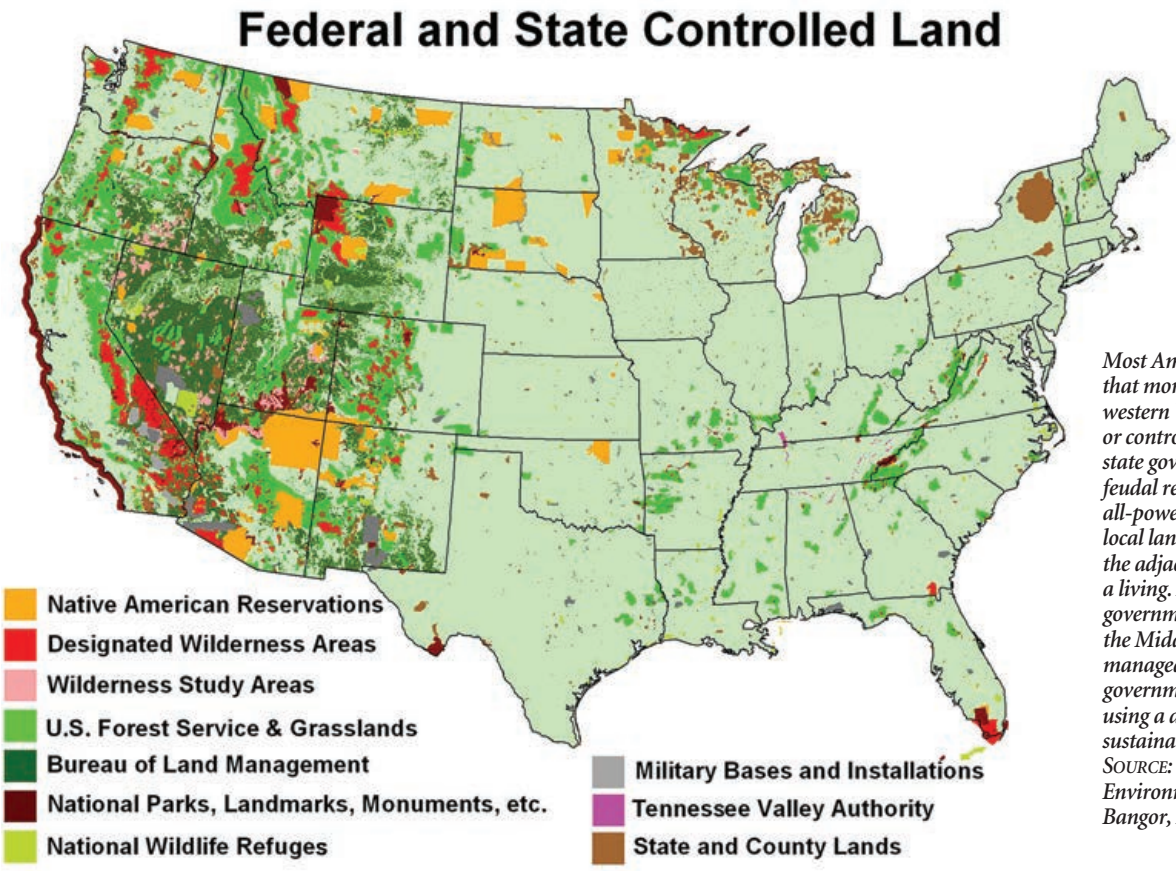
RECENT YEARS HAVE SEEN INCREASING TENSION BETWEEN AN ARMY OF FEDERAL ZEALOTS AND RANCHERS AND RURAL RESIDENTS IN THE WEST. THE MEDIA, EVEN CONSERVATIVE MEDIA, REINFORCE THE PREMISE THAT THESE LANDOWNERS ARE BREAKING THE LAW. THAT IS RAW PROPAGANDA. WE ARE LIVING IN DANGEROUS TIMES. IF ALLOWED TO CONTINUE, THE SAME STRATEGY THAT IS BEING USED TO DESTROY WESTERN LANDOWNERS WILL BE USED TO DESTROY OTHER PRODUCING AMERICANS WITH EPA'S NEW, OVERREACHING CLEAN WATER, ENERGY AND POLLUTION PROGRAMS.

Most Americans who live east of the Rocky Mountains, or those who live in large urban/suburban areas in the West, are surprised to learn that the federal government "owns" or controls over 30 percent of the land area in the United States. Most of that land is in the western states where over 50 percent of each state is federal "public land." Rural residents who make their living from federal lands are finding that Washington is enacting regulations that seem more intent on bankrupting them than helping them. An uninformed and/or propagandized population in the East is complicit by default.

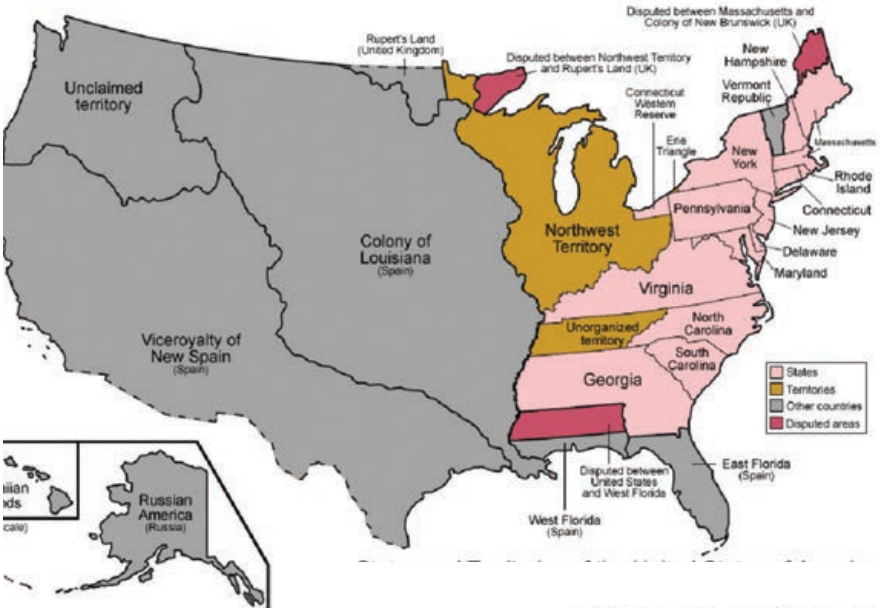
The strategy employs a time-tested tool made famous by Nazi propagandist Joseph Goebbels: "If you tell a lie big enough and keep repeating it, people will eventually come to believe it." President Obama uses it all the time with Islamic extremism, immigration, gun control, and global warming, to name four examples.

With global warming, Obama keeps repeating the lie that 95 percent of all climate scientists believe mankind is causing global warming, that coastlines are flooding, that we are experiencing more extreme weather events, and many more. Obama's 2014 "National Climate Assessment" regurgitates one lie after another, which is faithfully reported by the liberal press. (See "Hot Air," *RANGE*, Fall 2014.) There is no empirical evidence that man is causing global warming; there is a mountain of evidence that it is the result of natural cycles. Yet, most believers today will ignore the hard evidence and will emphatically regurgitate the lie.

In the same way, the only way citizens can understand the magnitude of the abuse of western ranchers and rural citizens is by reviewing the legal trail that led to the abuse we see today. Like the lies about global warming, most of the actions taken by the EPA are justified by repeatedly claiming it is necessary to "protect" the environment. Most people would be shocked to find out how corrupt our federal agencies have been for the past 120 years and what they are doing now. Today federal agencies are targeting every private landowner, manufacturer and power company in America to gain control over everything—exactly opposite from



Most Americans have no idea that more than 50 percent of the western United States is "owned" or controlled by the federal or state governments. This creates a feudal relationship between an all-powerful government and the local landowners who must use the adjacent federal land to make a living. As with the feudal governments in Europe during the Middle Ages, the land is managed for the benefit of the government, not landowners, using a dangerous ideology called sustainable development. SOURCE: *Produced by Environmental Perspectives Inc., Bangor, Maine*



Map of the states and territories of the United States as it was from August 1780 to 1790. On Aug. 7, 1789, the Northwest Territory was organized. On May 26, 1790, the Territory South of the Ohio River was organized. SOURCE: Made by Golbez. Used under the GNU Free Documentation License

the intentions of our Founding Fathers.

By examining how the "elite" created federal lands in the West, the reader will begin to see parallels in what is happening today that affects every American's fundamental rights.

In the 2012 Winter issue of *RANGE*, "Our Federal Landlord," along with several other articles, provided an overview of this history. Some material is replicated in this article to maintain consistency. Nevertheless, to understand the corruption and out-and-out attack on not only rural citizens of the West but on every property owner in the United States, an understanding of the perversion of constitutional law is needed. This may be boring for some, but unless the history is understood, numerous false assumptions and conclusions will be made. Even conservative media and bloggers have been sucked into *the big lie*. They have already done far more harm than good in their analyses.

As with almost everything else that has been twisted from original intent, the Founders never intended that there should be large federal land ownership. When they wrote the U.S. Constitution, feudalism and manorialism still existed in France. Our Founders were eyewitnesses to the brutal treatment of the peasants under such a system. In 1783, Thomas Jefferson even went so far as to insist that all federal land should be sold quickly, and "shall never after, in any case, revert to the United States."

To ensure that the federal government never amassed large landholdings, our Founders allowed only three forms of federal landownership and jurisdiction in Article I, Section 8 of the U.S. Constitution: "To establish Post Offices and post Roads"; "To exercise exclusive Legislation...over such District [of Columbia] (not to exceed ten Miles square)"; "and to exercise like Authority over all Places *purchased by the Consent of the Legislature of the State*...for the Erection of Forts, Magazines, Arsenals, Dock Yards, and other needful buildings." (Italics added)

Add to this the 10th Amendment to the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Nowhere in the Constitution is the federal government delegated police powers at the local level. Therefore, according to the 10th Amendment, police powers belong to state and local governments. Period.

With these constitutional constraints, how did the federal government wind up with more than 50 percent of the land in every state west of the Rocky Mountains? Why not in the East as well? Most importantly, what does it have to do with western ranches, indeed all property owners in the United States?

Everything.

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Every state that entered the Union from a U.S. territory was to be on an equal footing with the original colonies. This Equal Footing Doctrine was formalized for the entire United States with the passage of the Northwest Ordinance in 1787: "Whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States in all respects whatever, and shall be at liberty to form a permanent constitution and State government."

The Homestead Act of 1862 gave 160 acres to those who successfully filed a Homestead claim. It led to the Homestead Land Rush and tens of thousands of Americans staked claims to the land. The image at right is an original photo of 50,000 potential homesteaders vying for 12,000 homestead parcels on two million acres in Oklahoma. SOURCE: Oklahoma Historical Society

Map of Texas annexation and land ceded by Mexico in the Treaty of Guadalupe Hidalgo in 1848. The treaty gave much of what is now Arizona, New Mexico, Colorado, and all of Utah, Nevada and California to the United States, along with very specific language protecting the private property rights of its existing landowners. Texas won its independence from Mexico in 1836 and was annexed by the United States in 1845. SOURCE: Wikipedia

Before that happened, however, legislation required the federal government to sell citizens the land to pay down the Revolutionary War debt by stipulating that new states "in no case, shall interfere with the primary disposal of the soil by the United States in Congress assembled."

This also extended "the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory: to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States."

Notice that it was passed as a basic human right, not to be altered by any future legislation. Along with the principles laid down in the Magna Carta and English Law (check "Magna Carta," *RANGE*, Summer 2015), the Northwest Ordinance provided the basis for the Bill of Rights (the first 10 amendments). These fundamental rights were woven into the U.S. Constitution that same year and into the Bill of Rights in 1791. Yet, the Equal Footing provision was totally ignored in the creation of states west of the Rocky Mountains. Today, the Bill of Rights is under fierce attack by progressives on both sides of the aisle and the Obama administration.

There is absolutely no constitutional basis for "federal landownership" on the scale of that found in the West. In fact, there is no record of any deed for this land in the General Land Office. The Bureau of Land Management justifies its vast landholdings by claiming: "By Article IV, Section 3, Clause 2 of the Constitution, Congress was empowered 'to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.'" But wait. Doesn't the language of the Northwest Ordinance trump this, stating, "to provide also for the establishment of States, and permanent government therein, and for their admission to a share in the federal councils on an equal footing with the original States"?

Article IV, Section 3, Clause 2 of the Constitution specifically is for territories only. Once these territories became states, this article became moot. It no longer applied. So how are federal agencies able to use this clause when it seemingly has no legal basis? The answer is long and torturous, but has a direct bearing on the hostilities in the West.

Homestead families living in sod homes on the Plains endured hardships almost beyond belief in today's culture. Most of these homesteads failed, and the homesteaders sold their 160 acres for pennies on the dollar to speculators. While tragic for the failed farmers, the consolidation of land created what would become the world's breadbasket. SOURCE: Nebraska Historical Society

Early Evolution of Land Law

Although it was fraught with controversy and power plays, all future states east of the Rocky Mountains did enter the Union over the next 100 years on more or less equal footing. The federal government for the most part did not retain large blocks of land. The most notable things that happened during that period were the Preemption Acts of 1830 and 1841, the Homestead Act of 1862, and the Civil Rights Act of 1866.

The Preemption Act of 1830 allowed squatters on federal land preemption rights to buy the land very cheaply. The Preemption Act of 1841 limited the purchase to 160 acres and provided the basis for settling the Kansas and Nebraska territories. The highly popular Homestead Act of 1862 created a land rush by requiring the federal government to deed 160 acres of free land to homesteaders west of the Mississippi. The Civil Rights Act of 1866 not only brought equality to blacks and other minorities, it also gave preemptive rights to water and minerals to ranchers and miners actively grazing or mining on federal land.

The mid-1800s created chaos in western policy as first the tension, and then the Civil War resulted in turbulent allegiances and politics. The Mexican War also occurred during the mid-1800s and was ended with the Treaty of Guadalupe Hidalgo in 1848. Part of the settlement in the treaty required Mexico to cede all its territory to the United States from New Mexico to Colorado and westward to the Pacific. Most importantly, Article VIII of the treaty clearly stated: "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the

United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever."

The word "Mexicans" in Article VIII also included Americans. The conditions of the treaty stipulated, without exception, that the United States honor any and all property rights granted to the residents of the newly created U.S. territory. This included all types of property rights, especially water and grazing. By this time, much of it was already settled, including timber rights in the forested area.

Growing a crop to harvest was very problematic. If the rancher's 160 acres contained a perennial stream, the owner could perhaps irrigate, if he was able to afford the equipment. Few could. Because life was so hard, a majority of homesteads fell to speculators who bought the land at steeply discounted prices.

The Enlarged Homestead Act of 1909 increased the acreage of the homestead to 320 acres. This gave most homesteads east of the Rocky Mountains sufficient acreage for marginal dry-land farming. If the 320-acre homestead had water, a small herd of livestock could even be raised. The 1916 Stock-Raising Homestead Act increased the acreage once again to 640 acres for ranching purposes. With these three acts, most of the land east of the Rockies was quickly settled by homesteaders and very little land remained as public domain. However, the three acts still did not provide sufficient acreage for arid homesteading west of the Rockies, so most land remained in the public domain.

Ranchers owning homesteads west of the Rockies had another problem. Not only did they need water for their livestock, but the parched land would not support much forage for grazing. They required thousands of acres to graze a herd large enough to sustain a family in even marginal comfort. The answer was the Preemptive Rights of Appropriation, where the rancher used his or her homestead as a base and grazed his cattle on public land called open range (without fences). They could use, but not own, this public land. The open range led to bitter range wars when one homesteader/owner's livestock grazing encroached upon another, especially when both claimed the only water available.

Water was extremely precious, perhaps more so than gold. Ranchers built ditches, dug water tanks, and enlarged seeps. Often these were on public lands where the cattle and sheep were grazed. The more water that could be developed, the more livestock that could be grazed—limited only by the forage produced.

Lack of water and forage required thousands of acres of land to support a family in the dry land west of the Rocky Mountains. SOURCE: Photo by Tana on highdesertranchwife.com.

The use of water on public land evolved into a property right that was codified by Congress as a "preexisting right of possession" by the Civil Rights Act of 1866. This started what is known as the "split estate," in which one owner—the federal government in this case—claims the land, and another owner—the homesteader—owns the mineral, grazing and/or water rights. The act gave mineral rights to those miners actively mining public lands and water rights to ranchers actively grazing public lands. All other mineral and water rights remained with the federal government. These water and mineral rights were strengthened by the Act of 1870 and especially by the Desert Land Act of 1877.

This admittedly abbreviated and simplified history glosses over the messiness and even lawlessness of the process. In retrospect, the preemption and homestead laws didn't really work as intended. Most of the homesteads failed and unscrupulous speculators greatly profited by their demise. Yet, some homesteaders did succeed.

Fortunately for the world, land east of the Rocky Mountains has very little federal land today because of federal policy and constitutional restrictions based on the Equal Footing Doctrine of the Northwest Ordinance. What happened to radically change well-established constitutional law? Two new unconstitutional laws in the late 1800s radically changed public land west of the Rockies by ignoring the requirements of the Equal Footing Doctrine and Treaty of Guadalupe Hidalgo, thereby keeping it in the hands of an abusive federal government.

Unknown to the general population, law schools were introducing concepts in the mid-1800s whereby court cases were decided based on previous court decisions, not on the Constitution. This is called case law and it became the rage of U.S. law schools when Christopher Langdell, dean of Harvard Law School, promoted it the last half of the 1800s. It was accepted by most law schools by 1890.

By using case law, all an unscrupulous lawyer had to do was force innocent-sounding language into a court decision so that he could use it to force future decisions that violated the U.S. Constitution in some way. That is what happened in the Forest Reserve and General Revision Acts of 1891. Suddenly, the requirements of the Equal Footing Doctrine and the Treaty of Guadalupe Hidalgo were trumped by earlier court decisions. That change was destined to become a disaster for people who have to make a living from that land. ■

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