Undoing Unconstitutional Land Grabs

Utah's quest for its own land. By Henry Lamb

Why does the federal government own 49 percent of the land in 12 western states, and only 8 percent of the land in eastern states? This question has been asked by every generation for more than a century, but no one can produce a satisfactory answer. That's because there is no satisfactory answer. And there is no legitimate reason why the federal government should own any land other than the land that is authorized by the Enclave Clause (Article 1, Section 8, Clause 17) of the U.S. Constitution. The so-called Property Clause (Article 4, Section 3) authorizes the federal government to dispose of land within its territories; it does not authorize the federal government to preserve land—and the resources it contains—in perpetuity.

The state of Utah is trying, once again, to get the federal government out of the land-holding business. Utah state representative, Christopher Herrod, has sponsored legislation authorizing the state to exercise its eminent-domain power—against the federal government. The Utah Legislature is not just whistling Dixie; it also appropriated $3 million to take the case to the Supreme Court. Utah is willing to pay the federal government fair market value for certain lands that the legislature believes will produce badly needed revenue for state coffers.

This is a unique approach to an old problem. Few people believe the state will be successful. Even the legislature's own research staff concluded that "there is a high probability that a court would hold that the federal government is the sovereign of public lands." But they could be wrong. In 1987, the Utah Division of State Lands challenged the federal government's decision to claim the land—and resources—under Utah Lake, a navigable waterway. The court held that, "Title to Utah Lake's bed passed to Utah under the equal footing doctrine upon Utah's admission to the Union (482 U.S. 193 Utah Division of State Lands v. United States Pp. 200-209)."

All the western states and Utah entered the Union under the equal footing doctrine. The idea of equal footing for new states originates with the 1784 "Report of Government for the Western Territory." The western territory described in this report was the land which became Ohio, Indiana, Illinois, Michigan, and Wisconsin. The report established that when states from this territory were admitted to the Union, it would be "on an equal footing with the original states in all respects whatever."

The Northwest Ordinance of 1787 established another important principle: the withholding of certain unclaimed lands for disposal by the federal government. The Northwest Ordinance authorized the federal government to retain unappropriated lands to be sold as a way to get money to pay the debt incurred by the Revolutionary War. It is significant that the federal government owns only 5.2 percent of the five states carved from this territory, and most of this land is held by the federal government consistent with the Enclave Clause, not the Property Clause, of the U.S. Constitution.

All the states admitted to the Union after the Northwest Ordinance entered on an "equal footing with the original states in all respects whatever"—that is until 1850, when California entered the Union.

California's admission was at the center of the debate about slavery. The Treaty of Guadalupe Hidalgo, which ended the war with Mexico, was signed in 1848. Rep. David Wilmot, a Pennsylvania Democrat, attached the Wilmot Proviso to a $2 million appropriations bill that required all the territory acquired through the treaty to be designated as slave-free.

California was a part of that territory, and Southern congressmen wanted it to be a slave state. Two separate attempts to admit California failed before President Millard Fillmore worked out the Compromise of 1850, which allowed California to be admitted as a free state. The retention of federal land was of little concern at the time.

The Compromise of 1850 was actually a group of bills that included two very important historic events. On Sept. 9, 1850, one bill allowed California to be admitted into the Union; another bill created the Utah Territory—which included all of what is now Utah, about one-third of what is now Colorado, almost all of Nevada, and a small portion of

southwest Wyoming. Brigham Young was named governor of this new territory.

It went largely unnoticed at the time, but as a condition of statehood, Californians were required to forever disclaim any interest in or title to the land that had not already been appropriated (45 percent). California quickly accepted the terms and became the first state that was a half-state/half-federal entity.

The people who lived in the states affected by the Treaty of Guadalupe Hidalgo were guaranteed that it would retain their property and all property rights. Perhaps the most important property right conveyed by this treaty was the right to water. Under the doctrine of prior appropriation, both the water and all the adjacent land required to put the water to beneficial use remained under the exclusive control of the owner.

Virtually all the western states that joined

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the Union after 1850 were required, as a condition of statehood, to disclaim all interest in and title to the land still held by the federal government, while at the same time agreeing that the state was being admitted on an "equal footing." Utah's Enabling Act says: "the proposed State of Utah shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original States, from and after the date of said proclamation (Section 4)."

It continues: "the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof (Section 3)." The federal government saw the unappropriated land only as a valuable resource that could be converted into nontax revenue. In fact, the Utah Enabling Act grants four sections in every township to the new state to support schools (Section 6). The act also stipulates that 5 percent of the revenue generated from the sale of federal lands would go to the state to create a permanent fund, "the interest of which will be expended in support of the common schools (Section 9)."

The fact is that neither Utah nor the other 11 western states were actually admitted to the Union on an equal footing with the original states. This fact alone should be ample reason for the Supreme Court to rule that federal ownership of nearly half the 12 western states is unconstitutional. This is not a new argument, however. It has been argued in the courts repeatedly and, so far, the federal government has won. However, an honest reading of the Constitution reveals that the founders intended the federal government to own only the land authorized by the Enclave Clause. The Property Clause is necessary only to authorize the disposition and regulation of territories acquired by conquest, treaty, or purchase. Political influence, rather than constitutional intent, has governed federal land in western states.

Utah's bold new approach is an attempt to solve the problem of federal encroachment into what should be state property, but it also puts the sovereign power of a state on a collision course with the sovereign power of the federal government. If the federal government was created by the states, does it not follow that the federal government's power should be inferior to the power of its creator...the states? The counterargument quickly arises that the Civil War settled this question in favor of the federal government. To which arises the response that just because the federal government won doesn't mean that it is right.

If the state of Utah has the power of eminent domain, why should that power stop at the property of the federal government? If the state of Utah needs certain land for a public purpose, it could take that land, with just compensation, from any other owner. What possible reason could there be to nullify this state power, simply because the land is owned by the federal government? Whether argued publicly or not, the reason Utah will be viciously attacked is to prevent a run on the bank—so to speak. If Utah were to prevail, every western state with federal land would follow.

If today's members of Congress truly believe that the Constitution has greater authority than their collective opinions, and if they truly want to make public policy that serves all people equally, then Congress will do well to take a serious look at eliminating the disparity of federal land ownership by disposing of all its land held under the Property Clause. Although this land was originally retained for its cash value, it is now held by the federal government because environmentalists have convinced the majority in Washington that the world will come to a cataclysmic end if this land ever falls under the control of private owners.

This idea is, of course, nonsense, but it is deeply engrained in the Washington bureaucracy, especially in the community of nongovernmental organizations (NGOs) that draw their lifeblood from those bureaucracies and from lawsuits filed against anyone who fails to wipe his or her feet before treading on what the feds consider to be their private domain.

Imagine: Were the federal government to return this land to the states, it could immediately close the Department of Interior, with its 67,000 employees. States' budget problems could be solved immediately from the disposition of lands, or from the sale or lease of resources. This would let the people in the state make the important land-use decisions that affect them, rather than have those decisions made by eastern politicians and NGOs.

There is no legitimate reason for the federal government to own half the land in 12 western states. Utah's novel approach to regaining use of some small portion of this land will be monitored all the way to the Supreme Court. The real solution, however, lies not with the courts; it lies with the Congress of the United States, charged with the responsibility of managing federal lands, and sworn to protect and defend the U.S. Constitution. Until the nation elects a majority of statesmen to Congress (and a president to the White House) who actually do respect the Constitution and the free market it requires, people in the western states will continue to be deprived of half the land that should rightfully be theirs. And the nation will continue to be deprived of the prosperity it offers. ■

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See page 75 for more information on Henry.