Written by **Joe Wolverton, II, J.D.** on May 4, 2015

Utah Congressmen Form Federal Land Group to Return Control to States

On April 28, U.S. Representatives Chris Stewart (R-Utah) and Rob Bishop (R-Utah) launched the Federal Land Action Group, a congressional team that will "develop a legislative framework for transferring public lands to local ownership and control."

The group, chaired by Representative Stewart, will build on the work started by Utah and other states in recent years to take back land from federal control. "The federal government has been a lousy landlord for western states and we simply think the states can do it better," Stewart said. "If we want healthier forests, better access to public lands, more consistent funding for public education and more reliable energy development, it makes sense to have local control."

Representative Bishop, chairman of the House Natural Resources Committee, said,

> This group will explore legal and historical background in order to determine the best congressional action needed to return these lands back to the rightful owners.
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> We have assembled a strong team of lawmakers, and I look forward to formulating a plan that reminds the federal government it should leave the job of land management to those who know best.

The Federal Land Action Group will hold a series of forums with experts on public lands policy, with the goal of introducing transfer legislation.

Other members of the group include Representatives Mark Amodei (R-Nev.), Diane Black (R-Tenn.), Jeff Duncan (R-S.C.), Cresent Hardy (R-Nev.), and Cynthia Lummis (R-Wyo.).

If it's "legal and historical background" that Stewart and his congressional colleagues want to explore, then *The New American* offers the following roadmap to the relevant constitutional and case law considerations.

First, there is the constitutional issue of whether states, in forming the Constitution, gave the federal government power to own land.

In the decision handed down by the Supreme Court in the case of *Escanaba Co. v. City of Chicago*, 107 U.S. 678, 689 (1883), an important constitutionally based concept known as the "equal footing doctrine" was described as "Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Basically, this principle requires that any state added to the union do so on equal footing with the 13 original states. As reported by the legal website Justia, "Since the admission of Tennessee in 1796, Congress has included in each State's act of admission a clause providing that the State enters the Union 'on an equal footing with the original States in all respects whatever.'"

An issue very similar to that of Cliven Bundy's situation in Nevada (see here for recent news on that case) was at the heart of a Supreme Court case of *Pollard's Lessee v. Hagan*, decided in 1845. Justia provides a short, helpful summary of the events:

> *Pollard's Lessee* involved conflicting claims by the United States and Alabama of ownership of certain partially inundated lands on the shore of the Gulf of Mexico in Alabama. The enabling act for Alabama had contained both a declaration of equal footing and a reservation to the United States of these lands.
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> Rather than an issue of mere land ownership, the Court saw the question as one concerning sovereignty and jurisdiction of the States. Inasmuch as the original States retained sovereignty and jurisdiction over the navigable waters and the soil beneath them within their boundaries, retention by the United States of either title to or jurisdiction over common lands in the new States would bring those States into the Union on less than an equal footing with the original States.

This, the court would not permit.

> *Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law*, to the same extent that Georgia possessed it, before she ceded it to the United States.
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> To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding….
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> *To Alabama belong the navigable waters and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights*. [Emphasis added.]

So, regardless of the Obama administration's insistence that Western lands were ceded to the federal government when those territories became states at the end of the 19th century, the Constitution, common law, and relevant Supreme Court rulings have found otherwise.

Finally, with regard to the power of all states to exercise sovereignty over the territory within their borders, history is illustrative.

First, regarding the federal government's efforts to annihilate state sovereignty, the group of Founding Fathers known as Anti-Federalists seemed to see clearly into the future — though it is important to keep in mind that these efforts have been helped along by changes to the Constitution such as the direct election of U.S. senators (making the senators no longer beholden to the state legislatures) as well as the growth of extra-constitutional government.

On June 5, 1788, Patrick Henry rose for the third time and addressed the body of 168 delegates gathered in the Richmond Theatre in Richmond, Virginia, to debate ratification of the newly proposed Constitution. In all, Henry delivered 24 discourses blasting away at what he called the most "objectionable parts" of the Constitution.

Remarkably, on that hot June afternoon, the target of Henry's unparalleled oratory assault was the very

scenario — citizens defending themselves against federal seizure of land located within state territory — that is the crux of the showdown between the Western states and the federal government that prompted the creation of Representative Stewart's Federal Land Action Group.

To read Henry's powerful speech is to appreciate his remarkable foresight:

> Oh, sir! we should have fine times, indeed, if, to punish tyrants, it were only sufficient to assemble the people! Your arms, wherewith you could defend yourselves, are gone; and you have no longer an aristocratical, no longer a democratical spirit. Did you ever read of any revolution in a nation, brought about by the punishment of those in power, inflicted by those who had no power at all? You read of a riot act in a country which is called one of the freest in the world, where a few neighbors can not assemble without the risk of being shot by a hired soldiery, the engines of despotism. We may see such an act in America.
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> A standing army we shall have, also, to execute the execrable commands of tyranny; and how are you to punish them? Will you order them to be punished? Who shall obey these orders? Will your mace-bearer be a match for a disciplined regiment? In what situation are we to be? The clause before you gives a power of direct taxation, unbounded and unlimited — an exclusive power of legislation, in all cases whatsoever, for ten miles square, and over all places purchased for the erection of forts, magazines, arsenals, dockyards, etc. What resistance could be made? The attempt would be madness. You will find all the strength of this country in the hands of your enemies; their garrisons will naturally be the strongest places in the country. Your militia is given up to Congress also, in another part of this plan; they will therefore act as they think proper; all power will be in their own possession. You can not force them to receive their punishment: of what service would militia be to you, when, most probably, you will not have a single musket in the State? For, as arms are to be provided by Congress, they may or may not furnish them.

Regardless of the soundness of the preceding analysis of history and constitutional law, there is little doubt that a federal government consumed with and committed to a consolidation of all power will fight to maintain control of the Western states (and all states) as it has done with other recent legislative expressions of state sovereignty.

Challenges filed by the Obama administration against state laws in the areas of immigration and healthcare, reveal that Washington considers the states nothing more than administrative subordinates whose continued existence is tolerated only so long as they faithfully facilitate the execution of the millions of mandates of the multitude of federal programs.