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Is Privatization of Western Lands the Answer to the Face-Off with the Feds?

It appears that the Oregon standoff may soon come to an end after the killing of one of the leaders and the arrest of others, including Ammon Bundy, who has called for the remaining holdouts to leave the wildlife refuge. But regardless of what happens regarding this tragic episode, there is no doubt that the controversial continuation of federal control of western land is still unsettled and will likely lead to future face-offs.

In a *New York Times* commentary titled "Give States Control Over Public Land Out West," Robert H. Nelson wrote: "The federal government owns almost half the land in the American West — even California is some 46 percent federal land."

Nelson explains that in the beginning of the federal policy, "the theory was that it would be managed more efficiently, and by the best experts."

He admits, however, that, "We now know otherwise: The dysfunction that characterizes so much of the federal government today extends to the public land agencies like the U.S. Forest Service and the Bureau of Land Management."

As a solution to the sloppy management, Nelson recommends that the federal bureaucracy "transfer 'ordinary' public lands (about 70 percent of the federal total) to the western states." By 'ordinary" Nelson means that land which is used for "livestock grazing, timber harvesting and trails and campgrounds." National parks, under his proposal, would remain under the care of the federal government.

The problems of federal mismanagement, Nelson believes, would be solved by state governments who he argues would "operate with much greater flexibility and attention to local circumstances."

While that is true in many western states, there are some of them that would make such a transfer by simply taking millions of acres out of the federal bureaucratic frying pan and putting them into the fire of similarly destructive and dysfunctional state-run agencies.

The only safe option would be to privatize the ownership of all land currently controlled by the federal and state governments, freeing them up for use by the people of the United States who would undoubtedly manage these massive tracts with greater efficiency and to the good of thousands of families.

Writing in the Independent Institute's blog called The Beacon, Lawrence J. McQuillan promotes the constitutional concept of private ownership, as well:

> The best approach is to privatize all federal public land, with the exception of land ownership authorized by the U.S. Constitution for such things as military forts and ports. Private land

> ownership best accommodates competing interests such as ranching, farming, hunting, fishing, conservation, and residential and commercial use. Private ownership provides the correct incentives for wise stewardship of land, striking a proper balance between multiple uses. Government ownership, in contrast, often locks land into less valuable uses.
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> If you doubt that private land ownership can work for parks, visit the High Lonesome Ranch in De Beque, Colorado, essentially a 300-square-mile private "national" park. Private land trusts have worked well in California. There are more than 150 land trusts in California managing more than 2.5 million acres, an area larger than the size of California's state park system of 1.6 million acres. Land trusts raise money voluntarily through foundation support and private individuals.

Nelson disagrees with proposals for privatization of "public" land.

"Privatization of the public lands is not the answer. It would face strong opposition even from most of the westerners now unhappy about the excessive federal presence," he claims.

In an earlier article published by *The New American* I offered the following roadmap to the relevant constitutional and case law regarding the federal government's lack of constitutional authority to own land inside a sovereign state:

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

Consider also the ruling in the 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.

> 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.]

Nelson closes his *New York Times* opinion piece by insisting that "the public land status quo is no longer acceptable." To constitutionalists, the concept of federally-owned "public" land (with a few constitutionally permitted exceptions as listed above) is no longer acceptable, either.

Moreover, the question isn't simply one of management, it's one of sovereignty and constitutional fidelity. As the president emeritus of The John Birch Society (the parent company of *The New American*), John F. McManus wrote in a recent article, "There are many increasingly irate citizens whose main issue isn't grazing on federally owned lands or wisely setting a fire to protect property. Their issue is control and ownership of land, one of the fundamental rights enjoyed by a free people."