

Montana Legislature's Joint Resolution No. 15 on the Study of Public Land Management in Montana

Montana State Legislature
Montana Environmental Quality Council
Helena, MT, Sept. 11, 2013

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Abbreviated Statement

I wish to thank the Montana Environmental Quality Council for its invitation to be here. I was asked to place the joint resolution in its relevant historical, constitutional, and statutory context and to briefly review issues pertaining to the relationship of federal and state governments in the management of federal lands and resources. I have provided the Council my full written and referenced testimony so I will keep my remarks brief. I hope doing so will provide more time for any questions or comments by the group.

I will start by recognizing that several western states have recently decided to re-engage in fights with the federal government over the management of federal lands and resources. The strategies for doing so run the gamut from state laws and resolutions calling for state ownership or control of federal lands to commencing studies for the purpose of doing so. I believe that Montana's Joint Resolution could be viewed in this regional political context, but that it has the potential of offering a more constructive path forward.

There is nothing really new about this recent escalation of rhetoric coming from the West. It is an old theme and I make reference in my testimony to those, such as the historian Bernard DeVoto and Forest Service Chief Gifford Pinchot, who chronicled all the ways the states and various economic interests tried to gain control of federal lands and resources. It was DeVoto, for example, who critiqued the West's curious position of being so antagonistic to any regulations or conservation safeguards used by the federal government while simultaneously taking so much money and subsidy from it. It shakes down to a western platform said DeVoto: "get out and give us more money."

There are also several similarities between the recent actions of western states with the "Sagebrush Rebellion," which began in earnest in the late 1970s. There were several factors that catalyzed the

rebellion, from the implementation of relatively new environmental laws to passage of the Federal Land Policy and Management Act of 1976. FLPMA, as it's called, begins with Congress declaring that "the public lands be retained in Federal ownership." This law was a major turning point in the history of federal land management.

As I discuss in my testimony, the sagebrush rebels challenged the constitutionality of federal land ownership. But their litigation was not successful, from a legal standpoint at least. The courts have been consistent in their reading of the U.S. Constitution's Property Clause which gives Congress proprietary and sovereign powers over its property and the power to delegate decisions regarding federal lands to executive agencies. The Supreme Court has repeatedly observed that this power over federal land is "without limitations." The same powerful words were used in the Court's 1976 *Kleppe* Decision—which was another motivating factor for the Sagebrush Rebels. This Constitutional power is a significant one and it extends to the authority of the federal government to manage wildlife on federal lands, if it chooses to do so, and the Clause could also be used to impact how state and private lands that are adjacent to federal lands are managed.

The U.S. Constitution's Property Clause, along with other powers based on interstate commerce and federal preemption provides the federal government a strong basis of control over federal lands and resources. There is also a significant federal responsibility to the Tribes, as several Native Nations have retained various use rights on federal lands, as negotiated pursuant to the Constitution's Treaty Clause.

There is also a strong case for federal law in this field. Several issues facing federal land agencies go beyond state boundaries, authorities, and capabilities. Consider, for example, the multi-state run of salmon or bull trout, the management of endangered species, the downstream impacts related to mining and energy development, and the boundary-spanning watersheds of the West. The transboundary and interstate nature of issues like these justify strong federal action in federal lands and resources law.

Clear is that federal powers over federal lands are substantial. But the states can also play an important role. Bear in mind that some actions on federal lands may spill over to adjacent state, tribal and/or private lands. Take, for example, a run of fire from federal to state lands or from one private checkerboard section to a federal one. The collective efforts required to protect a municipality's water supply provides further illustration. This is one reason why federal land law is

often characterized as “cooperative federalism” and why laws include limited language pertaining to “coordination” and “cooperation” in federal planning processes with the states. Furthermore, federal lands can be subject to both federal *and* state environmental regulations.

The BLM and USFS have considerable discretion in giving meaning to these statutory provisions, as neither FLPMA or the National Forest Management Act define “coordination.” The provisions are limited insofar as they pertain to state engagement in forest and rangeland *planning* processes. In no way does such language mean that federal decisions must be consistent with the plans and desires of state and local governments. There is no veto authority by the states. Instead, the provisions simply provide opportunities for coordination. Even if they so wished, federal agencies could not, without explicit congressional action, cede or delegate its decision making powers over federal lands management to state and local governments.

It is my professional opinion that the recent spate of resolutions and studies coming from western states will end their journey in the same Cul-de sac as the sagebrush rebellion. And like the rebellion before it, the ultimate impact of today’s protests will be more symbolic than substantive in nature. Symbolism has its political virtues, but governing and managing federal land is different than using the issue as a political wedge. Resurrecting arguments from the sagebrush rebellion makes for great political theater but such efforts will not take us very far in solving the most pressing issues in federal land management.

It is my hope that Montana’s approach will differ from what is being done in other western states that will probably conclude their studies with predetermined conclusions. If Montana is going to invest time and resources in such an endeavor it should advance the Resolution by asking a set of more refined questions that can help Montanans and their representatives truly understand the significance of federal lands in the state.

If the Report does nothing than present one-sided answers to one-sided questions it will be of limited value and discounted quickly by those viewing it as politics and nothing else. If, however, the study is serious, inclusive, and done in rigorous fashion it could provide decision makers and the public useful information. I have provided in my written testimony examples of how such questions could be framed. Once those questions are answered, the study could then proceed by asking

questions that pertain to how federal and state governments could work more constructively with one another in advancing collective goals and objectives. That, in my opinion, is a study worth undertaking.

Why? Because the conservation issues of the future will require actions transcending political jurisdictions. Resurrecting arguments from decades ago over land ownership and control will not help us solve issues pertaining to fire, water, fish and wildlife, the recovery of endangered species, restoration, and so many others that require the constructive engagement of federal *and* state governments.

Thankfully, there are efforts going on throughout the western states that are dealing with complex issues facing federal lands. Montana provides multiple examples of federal-state cooperation and problem-solving. I see evidence on my drive from Missoula to Helena. The Blackfoot Challenge, which includes federal-state-and private partners, is exemplary in its achievements conserving the Blackfoot watershed and its communities. I also drove by forest lands that were once scheduled to be developed into real estate by Plum Creek but eventually transferred into public ownership using federal and state resources and intergovernmental cooperation. These examples and others demonstrate that there is an alternative to conflict and acrimony between federal and state governments in the management of federal lands and resources.

Thank you for the opportunity to share my perspective on this Resolution.